JOURNAL OF LAW

TSU FACULTY OF LAW

№2, 2022

CONTENTS

Zhiron Khujadze
Hans Kelsen's Basic Norm: Transition from the Transcendental-Logical Condition to a Fiction

Guliko Pheradze
The Right of all People to Self-determination at the Beginning of the 20th Century, Following the Example of the Committee for the Liberation of Georgia

Mikheil Bichia
Defining the Legal Nature of Shared Rights Annotation

Ekaterine Kardava
Summing of Worker's Working Times with different Employers by an Employee – as an Infringement of Freedom of Parallel Employment and Illegal Processing of Personal Data

Ketevan Kvinikadze
The Operation of the So-called "Doctrine of Notice" in the Law of Bona Fide Acquisition of Immovable Property (Comparative analysis of Georgian, German and English law)

Giorgi Meladze
Property-related Obligations of Spouses

Ia Ujmajuridze
Matter of Authenticity of Electronically Agreed Penalty as Similar in Writing

Shalva Kipshidze
Recognition of the Right, as a Ground to Acquire Property Rights of the Illegally Occupied Plots of Land

Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№2, 2022

უნივერსიტეტის
გამომცემლობა

UDC(უაკ) 34(051.2)
ს-216

Published by the decision of Ivane Javakhishvili Tbilisi State University Publishing Board

P-ISSN 2233-3746
E-ISSN 2720-782X

Table of Contents

Zhiron Khujadze

Hans Kelsen's Basic Norm: Transition from the Transcendental-Logical Condition to a Fiction.. 5

Guliko Pheradze

The Right of all People to Self-determination at the Beginning of the 20th Century, Following the Example of the Committee for the Liberation of Georgia 18

Mikheil Bichia

Defining the Legal Nature of Shared Rights 37

Ekaterine Kardava

Summing of Worker's Working Times with different Employers by an Employee – as an Infringement of Freedom of Parallel Employment and Illegal Processing of Personal Data..... 54

Ketevan Kvinikadze

The Operation of the So-called "Doctrine of Notice" in the Law of Bona Fide Acquisition of Immovable Property (Comparative analysis of Georgian, German and English law) 64

Giorgi Meladze

Property-related Obligations of Spouses 77

Ia Ujmajuridze

Matter of Authenticity of Electronically Agreed Penalty as Similar in Writing 90

Shalva Kipshidze

Recognition of the Right, as a Ground to Acquire Property Rights of the Illegally Occupied Plots of Land 100

Nana Chigladze

Municipal Elections: Peculiarities and Challenges in Georgia 114

Irakli Kakhidze

Challenges of Implementing the "Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority" in Georgia 128

Saba Elizbarashvili

Resignation of a Member of Parliament – The Disputed Essence of the 5th Paragraph of the 39th Article of the Constitution of Georgia and a Practice Leading to its Unconstitutional Interpretation..... 146

Beka Zegardeli

The Historical and Legal Role of Georgia in 1917-1918 for the Unity of the Caucasus 160

Maia Kopaleishvili

Constitutional Guarantees of Protection against Unjustified Dismissal of Officials with an Important Public Legal Function in a Democratic Society 171

Khatuna Loria

Assurance of an Administrative Body – the Basis of Legal Reliance..... 185

Meri Agapishvili

The Issue about the Provision for Damage Inflicted by Preventive Security Measures upon Adjudicating the Dispute over Legality of Enabling Individual Administrative-legal Acts 203

Lali Papiashvili

Problematic Aspects of Criminal Adjudication in Cases of Sexual Violence against Minors..... 217

Elguja Tavberidze

Legal Regulations and Practical Features of a Person's Arrest with a Court Ruling..... 236

Lela Nozadze

The Court Practice of Imposing Fine towards Juvenile and Litigated Issue of Its Enforcement 254

Tamar Sadradze

Inappropriateness of Prohibiting Appealing an Arrest Warrant..... 266

Nino Begalishvili

State Immunity from Execution under the "United Nations Convention on the Jurisdictional Immunities of States and their Property" (UN Convention) in the Process of Execution of Arbitral Awards against States..... 279

Elza Chachanidze

Protection of Human Dignity in Case of Insult Committed by Action in Ancient Georgian Law.. 293

Zhiron Khujadze*

Hans Kelsen's Basic Norm: Transition from the Transcendental-Logical Condition to a Fiction

Hans Kelsen's legal philosophy plays a significant role in shaping modern legal thinking. The defining, primary concept of his legal theory is the basic norm, which was represented as a transcendental-logical condition until 1960, and then, in the last years of his work, as a fiction. The article is dedicated to the study of the mentioned change, in particular, to the discovery of the influences of Cohen's and Vaihinger's philosophical doctrines in the formation of the contents of the basic norm and their criticism. The paper will also discuss the possibility of solving the problem that we come against when separating the pure theory of law from natural law and legal positivist traditions.

Keywords: *Kelsen, the basic norm, the jurisprudential antinomy, the transcendental method, fictionalism.*

1. Introduction

Hans Kelsen is considered as one of the most important legal theorists of the 20th century. In 1934 Roscoe Pound wrote that Kelsen was the leading jurist of the time,[1] and H.L.A. Hart called him the most stimulating author on analytical jurisprudence.[2] He was an advisor to the last Emperor of Austria-Hungary, a founding father of the 1920 Austrian Constitution, and held the position of a member of the Austrian Constitutional Court, which he had to leave for political reasons. In his article published in 2003, "Hans Kelsen and the Logic of Legal Systems", Michael Green points to a non-exhaustive survey he has conducted, according to which the non-English literature written on Kelsen in the last 20 years includes at least 75 books, but in some geographical areas of the world, such as Latin America and Italy, his influence is so significant that legal philosophy is considered as the "dialogue with Kelsen". As for the English-speaking world, after decades of neglect, interest in his works has reached the highest level.[3]

Kelsen proceeded steadily and deliberately to develop and perfect the Pure Theory of Law that he had begun in the early 1910s. In the last years of his career, in the 1960s, he made two radical changes with reference to the theory. First, he rejected the idea, which he insisted on throughout his whole life, that contradictory norms could not be simultaneously valid.[4] Second, he changed his attitude towards the founding concept, the basic norm, which in his Kantian or neo-Kantian phase

---

* PhD student of Ivane Javakhishvili Tbilisi State University, Faculty of Law, Research Fellow at Tinatin Tsereteli Institute of State and Law, Assistant at Legal Methods Department, TSU Faculty of Law.

1 *Pound R.,* Law and the Science of Law in Recent Theories, The Yale Law Journal, Vol. 43, № 4, 1934, 532.

2 *Hart H.L.A.,* Kelsen Visited, in: Essays in Jurisprudence and Philosophy, Oxford, 1983, 308.

3 *Green M.S.,* Hans Kelsen and the Logic of Legal Systems, Alabama Law Review, Vol. 54, № 2, 2003, 365.

4 See: *Kelsen H.,* General Theory of Norms, *Hartney M. (trans.),* Oxford, 1991, 213-214.

considered a transcendental category to explain law's normativity and its systematic-hierarchical unity, and since the 1960s, after the second edition of the "Pure Theory of Law", he is no longer satisfied with the definition of the basic norm as the result of an act of thinking rather than the act of will, and displays it as a fiction.[5]

This article will try to find out what was the reason for the formation of the concept which lasted for half a century and its subsequent change. However, before moving on to the discussion of the aforesaid, it is necessary to analyse the Pure Theory of Law as a systematic activity different from positive-law and natural-law theories. Although, according to the "general view", Kelsen is considered as a legal positivist, as Stanley Paulson, a prominent Kelsen scholar points out in his 1992 article, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," the theory's normativist dimension is what distinguishes it from reductive or naturalistic aspirations that are typical for scholars considered in the legal positivist camp.[6]

The main part of the article includes three directions. First off, as the jurisprudential antinomy will be overcome, the characteristics of separation of the Pure Theory of Law from the prevailing classical theories will be established. In the second part will be discussed Kelsen's neo-Kantian, in particular, Herman Cohen's influence, which determines the establishment of the ideas and categories necessary for the existence of legal science, in which the basic norm will appear as a presupposed condition of lawmaking. And the main topic of discussion of the third part is Kelsen's "changed heart", during which the basic norm will be vested with the content of Hans Vaihinger's fiction.

2. Antinomy in Jurisprudence: Departure from the Traditional Theories

On the first page of the second edition of the "Pure Theory of Law" Kelsen tries to clearly define the methodological basis of the theory he developed, to establish it as a general theory of law and not as an interpretation of specific national or international legal norms, with the main goal to free the science of law from alien parts and to reject and criticise the historical experience which caused the bonding of "foreign" elements in it:

"Yet, a glance upon the traditional science of law as it developed during the nineteenth and twentieth centuries clearly shows how far removed it is from the postulate of purity; uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. This adulteration is understandable, because the latter disciplines deal with subject matters that are closely connected with law. The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism)

5 See: *Duxbury N.,* Kelsen's Endgame, The Cambridge Law Journal, Vol. 67, № 1, 2008, 51-61.

6 *Paulson S.L.,* The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, Oxford Journal of Legal Studies, Vol. 12, № 3, 1992, 312. Kelsen overcomes the "jurisprudential antinomy" by distancing himself from the traditional legal theories, which is Paulson's interpretation and not explicitly expressed by Kelsen himself, although we will see later that this interpretation is convincing.

which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter."[7]

Kelsen thought that the "purity" of the theory should be secured in two directions. First, it had to be separated from the sociological point of view, which used methods established in the sciences operating on the principle of causality to evaluate law and represented it as a part of nature. Second, it had to be separated from the natural-law theory, which took legal theory out of the space of positive legal norms and brought it into an ethico-political dimension.[8]

Against the natural-law doctrine (its objectivity), Kelsen criticises Plato and declares his concept of justice as irrational. The answer to the question, what is justice, must presuppose "the good", which is intuitively given and formed as inner knowledge that is only to the chosen ones and, insomuch, is an inexpressible (inconceivable in rational concepts) secret. Therefore, it is an expression of mysticism.[9] In law the absolute value designated by the word "ought" only means that "you ought to do what you ought to do" and not that "you ought to do good and avoid evil." Justice, as an absolute value, lies as much outside of positive law as Plato's world of ideas lies outside of natural reality or the transcendent thing-in-itself lies outside of its actual manifestation. The metaphysical dualism between law and justice is similar to the mentioned ontological dualisms. Just as it is impossible to understand rationally based on experience the Platonic idea or the thing-in-itself, so it is impossible to say what justice is.[10] Herewith, the Pure Theory of Law takes an anti-ideological position as it deals with cognition, while the basis of ideology is the will.[11]

Kelsen also criticises the reduction of law to the fact, noting that "The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: the norm is an *ought,* but the act of will is an *is*."[12]

The initiation of the jurisprudential antinomy pertains to the fact that there are two legal traditions (respectively, the "morality thesis" and the "separability thesis" – the name of the latter is derived from and even reminds us of Hart's famous essay "Positivism and the Separation of Law and Morals"[13]), which excludes the third, and furthermore, both traditions cannot withstand criticism separately.[14] It is an "echo" of Kant's mathematical antinomies which the German philosopher talks about in "Critique of Pure Reason"; Kant introduces mutually conflicting arguments, in the form of

---

7 *Kelsen H.,* Pure Theory of Law, *Knight M. (trans.),* Berkley and Los Angeles, 1967, 1.

8 *Paulson S.L.,* The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, Oxford Journal of Legal Studies, Vol. 12, № 3, 1992, 313. See: *Kelsen*, Hauptprobleme.

9 *Kelsen H.,* Platonic Justice, International Journal of Ethics, Vol. 48, № 3, 1938, 396-400.

10 *Kelsen H.,* Introduction to the Problems of Legal Theory, *Paulson B.L. & S.L. (trans.),* Oxford, 1992, 16-17. Kelsen links the "rise" of natural law theory to the period of the police state of absolute monarchies, and positive law to the 19th century, when the liberal bourgeoisie agenda swept Europe, accompanied by the progress in the empirical natural sciences and the breakdown of the metaphysical understanding of religious ideologies and philosophy. See: ibid, 21.

11 Ibid, 19.

12 *Kelsen H.,* Pure Theory of Law, *Knight M. (trans.),* Berkley and Los Angeles, 1967, 5.

13 *Hart H.L.A.,* Positivism and the Separation of Law and Morals, Harvard Law Review, Vol. 71, № 4, 1958, 593-629.

14 *Paulson S.L.,* The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, Oxford Journal of Legal Studies, Vol. 12, № 3, 1992, 313-314, 318-319.

thesis and antithesis, for example, the temporal beginning and spatial closure of the world is opposed by the antithesis of spatio-temporal infinity, and their synthesis, the concept of totality, cannot be given/apprehended. Kant calls the unifying thought of theses dogmatism, and antitheses – empiricism, and sees the only way to remove the contradiction in the revelation of falsity of both. Dogmatic rationalism and skeptical empiricism can be overcome in the form of transcendental idealism, which states that the objects of experience are never given in themselves. For instance, both propositions that the world is infinite in magnitude and that the world is finite in magnitude, present the world as the thing-in-itself, that must be dismissed because the world can only be represented in relation to the consciousness. It is a mistake to assume absolutely unconditioned empirically. The world is not a whole existing in itself; It is an appearance and appearances do not exist without our representations.[15]

Despite that the traditional theories consider the approach between law and morality as the primary difference and turn this issue into theses, Kelsen realised that there is another perspective that represents the relation between law and fact, so there are not two but four theses. Positive law emphasizes on the inseparability of fact and law, which is a reductive thesis, while natural law highlights the separation of fact and law, and therefore, it represents an antithesis.[16]

As we received four theses, it is possible to "pair" them in this way. The morality thesis (inseparability of morality and law) and the normativity thesis (separation of law and fact) are constituents of natural law, and the separability thesis (separation of morality and law) and reductive thesis (inseparability of law and fact) are constituents of empirical-positive law. The contradiction can be overcome if from each tradition non-contradictory theses are selected. Kelsen should still be considered as a legal positivist, because he defends the main idea of separation of law and morality, although he "teams up" with it not the reductive approach of reducing law to facts, but the normative thesis.

As social science differs from natural science, it must have a principle other than causality. Natural sciences describe phenomena in terms of cause and effect, for instance, metal expands when heated, while heating is the cause and expansion is the effect. Society, as an object of science, represents a normative order of human behavior and it must be based on some principle (in Kelsen's opinion, this principle does not as yet have its own name in science), which Kelsen calls the principle of "normative imputation", which just as causality connects a cause to an effect, also provides the possibility of connecting two elements, that sounds as: "If x, then the coercive act y ought to be executed" (it shares the feature of "causality" as of a Kantian category). The legal norm becomes the legal proposition, which expresses the initial, basic form of positive laws. The legislator establishes a connection between two material facts, for instance, between crime and punishment, "imputates", or if you would like, "ascribes" them to each other. It differs from the causal relation since the unity formed by this normative connection and its demand may not be fulfilled. It should be noted that a person will be "charged", "imputated" legal responsibility only if we combine the principle of "imputation" with

---

15 *Kant I.,* Critique of Pure Reason, *Papuashvili Sh. (trans.), Tevzadze G. (ed.),* Tbilisi, 1979, A426-438/B454-466, A462-567/B490-595 (in Georgian).

16 *Paulson S.L.,* The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, Oxford Journal of Legal Studies, Vol. 12, № 3, 1992, 319.

the concept of "responsibility", because, for instance, a person who cannot realise the actual nature of his actions due to his mental illness, cannot be punished, so towards him a legal condition cannot be attached to a legal consequence.[17]

Let's discuss a specific example: if a person does not pay his debt, a civil execution ought to be directed into his posessions. There is a legal condition (non-payment of the debt, which is a material fact) and a legal consequence (implementation of a civil execution); civil delict and civil execution. Unlike a causal relation that says: "When A is, *is* (will be) B", a legal proposition (which describes a legal norm) says: "When A is, B *ought* to be".

Accordingly, in order to distinguish his theory from the ideas of the empirical-positivist philosophical school, Kelsen contemplates the legal norm as a scheme of interpretation of acts of will. The external fact, whose objective meaning can be a legal or illegal act, represents natural phenomenon determined by causality that occurs in time and space and is perceived by the senses, although it, as a part of nature, is not an object of legal cognition: "What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation."[18] And contrary to the philosophy of natural law, the legal norm is a social technique, which, based on the principle of responsibility, connects the legal condition to the legal consequence in the legal proposition, and as the legal consequence determines the sanction citizens want to avoid. Legal *ought* represents a relative (and unlike morality, not an imperative) a priori category for understanding empirical legal data.

3. Cohen, Kelsen and the Transcendental Method

The legal system consists of norms and higher norms determine the possibility of creating lower norms, granting authority to the state organs (which also includes specific people) to enact the rules regulating behavior. Why does the subjective meaning of the command of a gangster, the act of his will to turn over to him a certain amount of money, unlike the same kind of command of an income tax official, not become a norm interpreted as an objectively valid? The answer is simple, because in the second case the act is authorized by the valid norm. So, the legal system is hierarchical. A search for the chain of authorization leads to the historically first constitution, which stands at the top, and just as God has no "higher" authority, so its "higher" founding document can't be found. The question arises, why or how should we accept the objective meaning of the Constitution as a legally valid document? It is impossible to refer to a "super-constitution", because it simply does not exist, but we can presuppose some ought statement which commands obedience to the historically first constitution. However, won't it be an endless chain? As William Buckland, professor at the University of Cambridge observed, does not the supposition of a super-norm require the supposition of another still superior norm, and so on *ad infinitum*? Just as the earth was believed supported by elephants and tortoises.[19]

---

17 *Kelsen H.,* Pure Theory of Law, *Knight M. (trans.),* Berkley and Los Angeles, 1967, 75-81.
18 Ibid, 3-4.
19 *Buckland W.W.,* Some Reflections on Jurisprudence, Cambridge, 1945, 21.

For the basis of the theory Kelsen develops the concept of the basic norm, which in principle remains unchanged during the quarter of a century, that is the time between the first and the second editions of the "Pure Theory of Law". In the 1934 edition, he states that the basic norm is simply the expression of the necessary assumption for the positivistic understanding of legal data, and it is valid not as a legal norm, but as a presupposed condition of lawmaking.[20] In the 1960 edition, he states that since historically legal authority higher than the creator of the first constitution, and consequently, an act of his will don't exist, the basic norm cannot be posited norm, but only the norm presuppposed by the juristic mind, that is the meaning of an act of thinking, not an act of will. It is a precondition for an effective coercive order to be interpreted as a system of objectively valid legal norms.[21] The question of the validity of the basic norm cannot be raised, because it is a condition of system's validity. To illustrate this, Kelsen provides following example:

"A father orders his child to go to school. The child answers: Why? The reply may be: Because the father so ordered and the child ought to obey the father. If the child continues to ask: Why ought I to obey my father, the answer may be: Because God has commanded "Obey Your Parents", and one ought to obey the commands of God. If the child now asks why one ought to obey the commands of God, that is, if the child questions the validity of this norm, then the answer is that this question cannot be asked, that the norm cannot be questioned – the reason for the validity of the norm must not be sought: the norm has to be presupposed."[22]

Kelsen establishes the epistemological basis for the theory of law developed by him on the transcendental method used by neo-Kantian Herman Cohen, a method which is focused on the discovery of non-empirical necessary conditions for the cognition of any knowledge. It is true that Kant did not use the term "transcendental method", although he uses the term "transcendental deduction", which is a method of discovering the universal conditions of objective empirical knowledge.[23]

In "Critique of Pure Reason" Kant speaks about the representation through which the object can be known. The relation between the object and the representation can be of two kinds: when the object alone makes the representation possible or conversely, when the representation alone makes the object possible. The first relation is only empirical, and the second is divided into two forms, the first is intuition, through which an object is given to us in the form of an appearance, and the second is concept, through which an object is thought. What makes possible objects to be intuited lies in the mind as a formal condition of sensibility,[24] and "concepts of objects in general lie at the ground of all experiental cognition as *a priori* conditions".[25]

---

20 *Kelsen H.,* Introduction to the Problems of Legal Theory, *Paulson B.L. & S.L. (trans.),* Oxford, 1992, 58.

21 *Kelsen H.,* Pure Theory of Law, *Knight M. (trans.),* Berkley and Los Angeles, 1967, 204.

22 Ibid, 196-197.

23 *Heidemann C.,* Hans Kelsen and the Transcendental Method, The Northern Ireland Legal Quarterly, Vol. 55, № 4, 2004, 358. See: *Kant I.,* Critique of Pure Reason, *Papuashvili Sh. (trans.), Tevzadze G. (ed.),* Tbilisi, 1979, §13-27 (in Georgian).

24 *Kant I.,* Critique of Pure Reason, *Papuashvili Sh. (trans.), Tevzadze G. (ed.),* Tbilisi, 1979, B125/A93 (in Georgian).

25 Ibid, B126.

Kant puts an accent on the "comprehension of the manifold of representations", which can be given in an intuition, that is merely sensible, yet the combination of the manifold can never come to us through the senses. Since the person who says "I think" is capable of combining manifold of representations in one consciousness, "this self-consciousness", one could argue, is not derived from experience, but is a condition of that experience. Kant calls it the "transcendental unity of self-consciousness", or in order to distinguish it from the empirical one – "pure apperception".[26] He calls categories those concepts that "prescribe laws *a priori* to appearances, thus to the nature as the sum total of all appearances".[27]

Speaking about the basic norm as a "transcendental-logical" concept, Kelsen mentions Kant, who asks : how is it possible without a metaphysical hypotheses to interpret the facts perceived by the senses, in the laws of nature given by the natural sciences? The Pure Theory of Law asks the same kind of question: how is it possible without a meta-legal "authority", such as God or nature, to interpret the subjective meaning of certain facts as objectively valid (describable as legal propositions) legal norms? The epistemological answer of The Pure Theory of Law is the basic norm, which interprets the subjective meaning of the acts of human beings, here an act of will of the founders of the constitution, as their objective, i.e. legal meaning.[28] The science of law, i.e. cognition of the law, like every cognition, creates its object to the degree that it comprehends the object as a meaningful whole. Just as the chaos of sensual perceptions turns into an ordered unified system, i.e. "nature", as a result of its cognition by the natural science, so the multitude of general and individual legal norms "becomes" a legal order by the science of law.[29]

However, as mentioned above, Kelsen does not use Kant's "transcendental deduction", but the neo-Kantian Cohen's "transcendental method".[30] Cohen begins with the science in which the object is given, and not with the transcendental unity of self-awareness that "I think" must accompany all our ideas, and probes the question: which presuppositions are responsible for the certainty of the scientific fact.[31]

In the second edition of the "Main Problems in the Theory of Public Law", published in 1923, Kelsen denotes that the neo-Kantian theory first caught his attention in 1912, when he discovered

---

26 Ibid, B130-B135.

27 Ibid, B164.

28 *Kelsen H.,* Pure Theory of Law, *Knight M. (trans.),* Berkley and Los Angeles, 1967, 202. The legal proposition (*Rechts-Satz*) differs from the legal norm (*Rechts-Norm*). The first is a component of the science of law, it is a statement about an object of cognition, that is law-describing, true or false, and the legal norm is either valid or not. The "ought" used in the former is descriptive and in the latter – prescriptive. See: Ibid, 71-72.

29 Ibid, 72.

30 It is worth mentioning that Kant himself was aware of the difference between these two methods. In the "Prolegomena" he distinguishes between synthetic (progressive) and analytic (regressive) methods. See: *Kant I.,* Prolegomena to any Future Metaphysics with Selections from the Critique of Pure Reason, *Hatfield G. (trans.),* Cambridge, 2004, 4:275.

31 *Heidemann C.,* Hans Kelsen and the Transcendental Method, The Northern Ireland Legal Quarterly, Vol. 55, № 4, 2004, 359. See Citation: *Cohen H.,* Das Prinzip der Infinitesimal-Methode und seine Geschichte, *Flach W. (ed.),* Frankfurt/M., 1980, 47-48.

certain similarities between his and Cohen's works.[32] Kelsen accepts the "factum of legal science", defines the pure science of law as a theory that must discover the conditions which make this "factum" possible. He indicates that, although it is impossible to prove the existence of the law as one proves the existence of natural material facts and the natural laws, however, the possibility or the necessity of a normative theory of law is proven by the existence of legal science, which is known as dogmatic jurisprudence. If there is a religion, there must be dogmatic theology, which cannot be replaced by the sociology of religion, and similarly, if there is a law, there must be a normative legal theory.[33]

For Cohen, the theories of mathematical natural science are paradigms of experience, and the fundamental concepts and laws established in them are a priori laws that enable experience's possibility. Philosophy takes this knowledge, that is, the fact of mathematical natural science, as its starting-point. It is true that theories, i.e. facts can change over time, but the philosopher must take the "best" theory of the day and apply to it a transcendental, namely purely logical (a priori) method of cognition. For instance, in the construction of the object of mathematics, Cohen uses the *Infinitesimal Method*, which precedes any sensibly given object and allows the determination of entity; Mathematical reality is the infinitesimal and is the necessary precondition of every experiment or entity.[34]

For Kelsen, the science of law is a fact, that includes several theses: 1. The Pure Science is a theory of institutionalized legal science. 2. It is necessary to separate "is" from "ought". It is not possible to deduce a normative sentence from an empirical sentence 3. A norm is an ought 4. The validity of a norm means its objectivity 5. The object of legal cognition is only positive norms 6. There is no necessary connection between the validity of a norm and its content 7. The legal system forms a hierarchical structure of norms. The validity of lower norms is determined by higher norms. 8. At the top of the hierarchy of norms is the basic norm presupposed in our thinking, which is the basis for the validity of the highest positive norms of the by and large effective coercive order.[35]

Cohen's style of transcendental method is conveyed in this way: (1) Sentences that are accepted as true according to the application of (best) methods established in sciences are true (2) the truth of these sentences entails a (3) therefore, necessarily a. And Kelsenian style is as follows: (1) those normative legal propositions that are considered true according to the use of established methods in institutionalized legal science, are true (2) the possibility of their truth includes the principle of normative imputation (or the hierarchical structure of validity of norms, or the uniqueness of legal system, or the general effectiveness...) (3) Therefore, they are presupposed. It is certain that we did not mention the basic norm and legal ought as the most important preconditions, although component (2) is their denotation by "other" expression. For example, the principle of normative imputation stands in the place of legal ought, and the basic norm implies the validity of norms, hierarchy, effectiveness and

---

32 Ibid, 361. See Citation: Hans Kelsen, Hauptprobleme der Staatsrechtslehre (2nd ed., Tubingen 1923), YVII.

33 *Kelsen H.,* Introduction to the Problems of Legal Theory, *Paulson B.L. & S.L. (trans.),* Oxford, 1992, 34-35.

34 See: *Tevzadze G*., The Cognition Theory of German Neo-Kantianism, Tbilisi, 1963, 65, 69, 122-123 (in Georgian).

35 *Heidemann C.,* Hans Kelsen and the Transcendental Method, The Northern Ireland Legal Quarterly, Vol. 55, № 4, 2004, 361-362.

autonomy of legal system. With the same success we could have said that ... includes the presupposition of the basic norm that citizens ought to obey the prescriptions of the historically first constitution.[36]

For example, if we take the sentences "legally theft ought to be punished" or "if someone steals, he ought to be imprisoned" and accept their truth value, then the next step in reasoning should be to discover the conditions that establish the objectivity of these sentences. Is theft connected to imprisonment as heating is connected to expansion? Obviously not. Therefore, the principle of normative imputation is needed. Why should we accept the subjective meaning of the norm that theft ought to be punished as its objective meaning? We can respond that it must be valid by a higher norm, so, it is necessary to accept the hierarchical structure of validity of norms as a precondition, therefore, it is necessary to consider the basic norm as well.

Again, the question arises as to what answer can be given to the sceptic who denies the existence of a science of law? The existence of a legal norm cannot be proven as chemical substance's, but the science of law is an age-old fact. However, as Heidemann mentions citing Kelsen, in any society law and legal procedures are part of an existing social practice (and this is a fact). And the factual procedures that can be classified as "legal" can thus be defined only if one shares the perspective of the science of law, that is, if one accepts the meaning-contents of the utterances whose purpose is to determine the law as valid norms. If the sceptic denies the existence of legal norms and, for instance, the truth value of the proposition that "legally theft ought to be punished", he must also deny law as a social fact, which is a challenging job.[37]

4. Later Kelsen: the Basic Norm as a Fiction

In the second edition of the "Pure Theory of Law", i.e. after 1960, Kelsen changes his attitude towards the basic norm as a transcendental-logical condition through which the science of law describes law as an objectively valid order and designates it as a fiction. It is interesting, what could have caused such a radical change? Should we see it as a collapse, and should we agree with John Finnis, who says that Kelsen correctly recognized the failure of his legal philosophy, could not explain, or even coherently describe law's validity, because he excluded from the theory law's purposefulness and the requirements of practical reasonableness.[38]

In 1964, Kelsen publishes a short esaay on the function of a constitution, and although, at the beginning he repeats the attitude of the previous years towards the basic norm, at one point he notes that it is correct to validly object the meaning of an act of thinking as a norm, as there is an essential correlation between "ought" and "willing", and this objection can only be overcome, if along with the basic norm presupposed in our thinking, there is also assumed an "imaginary authority" whose

---

[36] Ibid, 368-370, 373-376. See: *Paulson S.L.,* The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, Oxford Journal of Legal Studies, Vol. 12, № 3, 1992, 324-330.

[37] *Heidemann C.,* Hans Kelsen and the Transcendental Method, The Northern Ireland Legal Quarterly, Vol. 55, № 4, 2004, 370-371.

[38] *Finnis J.,* The Priority of Persons, Oxford Essays in Jurisprudence, 4th Series, *Horden J. (ed.),* Oxford, 2000, 6.

(fictional) act of will has the basic norm as its meaning. Therefore, it must be a genuine fiction (and not a semi-fiction), which not only contradicts reality, but also containing contradiction within itself. It is contrary to reality, insofar as such a norm as the meaning of an actual act of will does not exist, and it is self-contradictory, since it represents the authorisation of a supreme moral or legal authority, so it has to issue from an authority that is superior to it, and the "higher than the supreme" authority is simply a product of imagination.[39]

How can "highest" be derived from "still higher"? And for this "still higher" will it be necessary to bring in "higher than it"? As Robert Alexy points out, in this case, the "highest authority" is not the "highest authority". To such an extent, a further basic norm would have to be invented to empower the "fictitious authority" to create the basic norm, and so endlessly.[40]

Kelsen's "change of heart" should have sparked from an interest in Hans Vaihinger's fictionalism, according to which fictions – false concepts and ideas are used as if they were true, with the help of which right results are obtained. Vaihinger says that what is commonly called reality, which surrounds human in its diversity, is the world of our own imaginative representations. He distinguishes between fiction and hypothesis[41] and as the goal of the latter names the reflection of reality, while fiction looks sceptically at the discovery of reality and its laws independent of thinking and aims at inventing useful methods. We know in advance that fiction not only does not exist, but also that its logical consideration is contradictory. For instance, assuming an atom or infinitely small. Language expresses this with the word "as if" (*Als ob*). Therefore, the basis of the assumption, which we know in advance to be contrary to logic, is only its expediency, that is, the practical result it ensures. Thinking utilizes fiction only because it makes adaptation to environment easier. For example, the Romans developed legal fictions and the word fiction (*fictio*) first appears with them.[42]

---

39 *Kelsen H.,* The Function of a Constitution, *Stewart I. (trans.), Tur R., Twining W.* (*eds.*), Essays on Kelsen, Oxford, 1986, 116-117.

40 *Alexy R.,* The Argument from Injustice : A Reply to Legal Positivism, *Paulson B.L. & S.L. (trans.),* Oxford, 2002, 111.

41 Kelsen in the work "General Theory of Norms", published posthumously in an unfinished manner, notes that the basic norm is not a hypothesis, but a fiction. See: *Kelsen H.,* General Theory of Norms, *Hartney M. (trans.),* Oxford, 1991, 256. In 1933, Kelsen mentions Mach's principle of economy of thought and Vaihinger's fictionalism, although he rejects both and focuses on Cohen's Method of Hypothesis. See: *Kelsen H.,* The Pure Theory of Law. "Labandism" and Neo-Kantianism. A Letter to Renato Traves., *Paulson S.L., Litschewski B. (trans.), Paulson S.L., Litschewski B. (eds*.), Normativity and Norms. Critical Perspectives on Kelsenian Topics, Oxford, 1998, 173.

42 Speaking of juridic fictions, Kelsen criticises Vaihinger and points out that nearly all the examples he uses are false. Of the three possible activities – legislative, judicial and scientific, only the latter, the legal science can produce a fiction. A legislative act cannot contradict reality; Positing a norm is the result of an act of will, not a process of thought aimed at cognition. And the application of law, when in the absence of law it is assumed "as if" it were covered by a statute, lacks the element of expediency, insofar as correct conclusion is not reached ("correctness" means legality, not utility). An example of a fiction used by legal science is the concept of the legal subject or the legal person, which is a way of personification or hypostatisation applied by legal theory to the complex of norms, that simplifies the understanding of norms. See: *Kelsen H.,* On the Theory of Juridic Fictions. With Special Consideration of Vaihinger's Philosophy of the As-If, *Kletzer C. (trans.), Del Mar M., Twining W. (eds.),* Legal Fictions in Theory and Practice,

The method of using fiction is as follows: when thinking tries to cognize the reality, it means that the subject is not satisfied with the given situation and wants to change it, although the given reality does not show a tendency to change. Therefore, thinking goes the other way, consciously allowing something that cannot exist in reality and thereby introducing dissonance (since traditional logical forms only give relations in constancy), that is, thinking is given a contradictory reality that it must overcome.[43]

Fiction forms four main characteristics, which are: deviation from the reality, removal of fiction in the research result, the awareness of the fictivity and the expediency, however, according to Vaihinger, for juridic fictions, because law is a human artifact and legal fictions do not describe natural phenomena or natural laws, the criterion for canceling, "correcting" the fiction in the research result is unnecessary, which Kelsen does not agree in relation to the legal science.[44]

The critical opinion, often expressed in literature, that the basic norm is inapplicable as a fiction because it implies an endless chain of legitimation, should not be shared for the simple reason that the assumption of this logical contradiction, what is thus conceived, gives it a fictional character. It is a preliminarily cognized internal contradiction and not a "correct" construction corresponding to the legal reality which completes the hierarchy of legitimation at the level of the constitution.

According to Kelsen, reality should not be diminished only in the form of "natural or empirical" reality, and it should also include, in general, the object of knowledge, which in relation to the legal science, since its object of knowledge is law, means legal reality. Accordingly, deviating from reality means deviating from legal reality, i.e. contradiction with the legal order: "The juridic fiction can only involve a fictitious *legal* claim, and not a fictitious *actual* claim."[45]

Vaihinger distinguishes between theoretical and practical value and recognizes only the possibility of practical application of thinking. Kelsen, since he considers as fictions only the fictions of the science of law, for the legal science should consider expedient precisely a result which is having a "practical value" for the theory, not for the practice, as a mean of "explaining" law's normativity and validity. If his aim were to "explain" the practice of law (the vision from the viewpoint of the sociology of law), then Hart's remark regarding the basic norm, if a constitution specifies sources of law that are part of "living reality" in the sense that the courts and state bodies "identify" the law based on it, then the constitution is accepted and actually exists, therefore, consideration of a further norm (basic norm) is an needless reduplication, is legitimate.[46]

The question arises, is the basic norm as a fiction, used by Kelsen more for theoretical rather than practical utility? The legal science describes the law whose validity must be explained, however,

---

Switzerland, 2015, 3-22. See: *Vaihinger H.,* The Philosophy of "As if", 2nd ed., *Ogden C.K. (trans.),* London, 1935, 33-35.

43 See: *Vaihinger H.,* The Philosophy of "As if", 2nd ed., *Ogden C.K. (trans.),* London, 1935, 85-100. See also: *Tevzadze G.,* The Cognition Theory of German Neo-Kantianism, Tbilisi, 1963, 287-310 (in Georgian).

44 *Kelsen H.,* On the Theory of Juridic Fictions. With Special Consideration of Vaihinger's Philosophy of the As-If, *Kletzer C. (trans.), Del Mar M., Twining W. (eds.),* Legal Fictions in Theory and Practice, Switzerland, 2015, 6. See citation: Vaihinger, H. *Die Philosophie des Als-ob*. 2nd ed., Berlin : Reuther & reichard. 197.

45 Ibid, 13.

46 *Hart H.L.A.,* The Concept of Law, 2nd ed., Oxford, 1994, 293.

the question of why this or that norm is valid, first of all, must consider lawyer's "practical" perspective, who will not really point up the basic norm as a fictitious member.

5. Conclusion

Transcendental-logical condition or fiction? In principle, in both cases the content of the basic norm is the same, that citizens ought to behave as determined by the historically first constitution. It is true that in both the basic norm is an epistemological mean for the science of law to cognize its object, but if the first denotes a true condition for obtaining a true result, the second is a false condition that leads to a practical result.

Representing the legal science as a "pure science" obviously leads to the need for the Humean radical separation of is and ought or to the need to lock the normative reality into itself. Therefore, Kelsen's criticism should, first of all, be derived from the law itself, i.e. should be determined not the insufficiences of the philosophical theories that he uses to explain the validity of law, but their incongruity with the coercive order that is called law.

If with Cohen scientific fact is a mathematical natural science, with Kelsen it is a science of law and there is an immense difference between them. For instance, in a triangle, the sum of the lengths of any two sides is greater than the length of the third side, or if one body exerts a certain force on another, then the second body will exert the same force of equal magnitude and opposite direction back on the first, and this is always the case, it is impossible to "see" anything else, and the legal science, which states that "Legally, theft is punishable", describes the legal norm, which can be appraised from different perspectives, both from the legal or anarchist's point of view, who will only see power relations in the law. The assessment of coercive order as the law is the result of normative interpretation, which is one of the possible interpretations (and not the only one).

As for Vaihinger, he finally established the fictitiousness of all thinking and stopped at the unknowability of the real world. With Kelsen, to define legal reality is problematic, because legal reality only becomes as such on the premise of the basic norm, so how can the basic norm be in contradiction with the reality it constitutes? Legal reality is not built by the senses, but it is construed by human being, and before assuming the basic norm, we only have subjective meanings.

Bibliography:

1. *Tevzadze G.,* The Cognition Theory of German Neo-Kantianism, Tbilisi, 1963, 65, 69, 122-123, 287-310 (in Georgian).
2. *Kant I.,* Critique of Pure Reason, *Papuashvili Sh. (trans.), Tevzadze G. (ed.),* Tbilisi, 1979, §13-27, A426-438/B454-466, A462-567/B490 -595 (in Georgian).
3. *Alexy R.,* The Argument from Injustice: A Reply to Legal Positivism, *Paulson B.L. & S.L. (trans.),* Oxford, 2002, 111.
4. *Buckland W.W.,* Some Reflections on Jurisprudence, Cambridge, 1945, 21.
5. *Duxbury N.,* Kelsen's Endgame, The Cambridge Law Journal, Vol. 67, № 1, 2008, 51-61.
6. *Finnis J.,* The Priority of Persons, Oxford Essays in Jurisprudence, 4th Series, *Horden J. (ed.),* Oxford, 2000, 6.

7. *Green M.S.,* Hans Kelsen and the Logic of Legal Systems, Alabama Law Review, Vol. 54, № 2, 2003, 365.
8. *Hart H.L.A.,* Kelsen Visited, in: Essays in Jurisprudence and Philosophy, Oxford, 1983, 308.
9. *Hart H.L.A.,* The Concept of Law, 2nd ed., Oxford, 1994, 293.
10. *Heidemann C.,* Hans Kelsen and the Transcendental Method, The Northern Ireland Legal Quarterly, Vol. 55, № 4, 2004, 358, 361, 368-371, 373-376.
11. *Kant I.,* Prolegomena to any Future Metaphysics with Selections from the Critique of Pure Reason, *Hatfield G. (trans.),* Cambridge, 2004, 4:275.
12. *Kelsen H.,* General Theory of Norms, *Hartney M. (trans.),* Oxford, 1991, 213-214, 256.
13. *Kelsen H.,* Introduction to the Problems of Legal Theory, *Paulson B.L. & S.L. (trans.),* Oxford, 1992, 16-17, 34-35, 58.
14. *Kelsen H.,* On the Theory of Juridic Fictions. With Special Consideration of Vaihinger's Philosophy of the As-if, *Kletzer C. (trans.), Del Mar M., Twining W. (eds.),* Legal Fictions in Theory and Practice, Switzerland, 2015, 3-22.
15. *Kelsen H.,* Platonic Justice, International Journal of Ethics, Vol. 48, № 3, 1938, 396-400.
16. *Kelsen H.,* Pure Theory of Law, *Knight M. (trans.),* Berkley and Los Angeles, 1967, 3-5, 71-72, 75-81, 196-197, 202, 204.
17. *Kelsen H.,* Pure Theory of Law. "Labandism" and Neo-Kantianism. A Letter to Renato Traves., *Paulson S.L., Litschewski B. (trans.), Paulson S.L., Litschewski B.* (*eds.*), Normativity and Norms. Critical Perspectives on Kelsenian Themes, Oxford, 1998, 173.
18. *Kelsen H.,* The Function of a Constitution, *Stewart I. (trans.), Tur R., Twining W. (eds.),* Essays on Kelsen, Oxford, 1986, 116-117.
19. *Paulson S.L.,* The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, Oxford Journal of Legal Studies, Vol. 12, № 3, 1992, 312-314, 318-319, 324-330.
20. *Pound R.,* Law and the Science of Law in Recent Theories, The Yale Law Journal, Vol. 43, № 4, 1934, 532.
21. *Vaihinger H.,* The Philosophy of "As if", 2nd ed., *Ogden C.K. (trans.),* London, 1935, 33-35, 85-100.

Guliko Pheradze*

The Right of all People to Self-determination at the Beginning of the 20th Century, Following the Example of the Committee for the Liberation of Georgia

This paper presents the essence of the right of all people to self-determination, the stages of its development, historical-legal analysis, its evolution – from individualist to collectivist doctrine, nature of the right to internal and external self-determination is explained. Furthermore, the letter illustrates the vision of the President of the United States of America, Woodrow Wilson, regarding the right of all people to self-determination based on "Wilson's Fourteen Points" and his legal analysis. The theoretical and practical aspects of the struggle for independence of the Georgian people based on the right of nation to self-determination are discussed directly in the work of the members of the Georgian National Committee.

Keywords: *the right of nation to self-determination, people, Georgian National Committee, Wilson's Fourteen Points, self-government, people's sovereignty, political sovereignty, rights of oppressed nations, restoration of independence, state, government formation.*

I. Introduction

The right of all people to self-determination is a fundamental issue that was arisen in the legal space at the crossroads of the eras of imperialism and nationalism. It can be noted, that in the 20th century "no phrase has had such a great political resonance as the right of all people to self-determination" and at the same time, "no concept is as vague as it".[1] However, the fact is that this did not prevent it from becoming a favorite slogan of almost all kinds of movements around the world and, at the same time, taking a key place in all prominent documents of international law since the forties of the 19th century.[2] The right of all people to self-determination became the main slogan for the members of the Georgian National Committee, the leading political organization of the Georgian national liberation movement operating in Europe during the First World War (1914-1918).[3]

---

* PhD student, Ivane Javakhishvili Tbilisi State University, Faculty of Law; Research Associate, Tinatin Tsereteli Institute of State and Law; Invited lecturer, Tbilisi State University and Georgian-American University.

1 *Weitz E. D.,* Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right, The American Historical Review, Vol. 120, № 2, April 2015, 462.

2 *Summers J. J.,* The Right of Self-Determination and Nationalism in International Law, International Journal on Minority and Group Rights, Vol. 12, № 4, 2005, 325.

3 In 1910, an organization named "Free Georgia Group" was founded in Geneva. At first, the idea of founding the union came to Petre Surguladze, an exile from Georgia, who contacted Nestor Maghalashvili, also exiled from Georgia, brothers Leo and Giorgi Kereselidze, and jointly formed the "Free Georgia

Before discussing the political-legal views of fighter-patriots who fought to restore state independence, at the very beginning of the paper, the essence of the right of all people to self-determination and the phases of its development are discussed, the nature of the right to internal and external self-determination, its evolution from individualist to collectivist doctrine is determined and based on the well-known so-called "Wilson's Fourteen Points", the vision of Thomas Woodrow Wilson, the President of the United States of America in 1913-1921, is demonstrated regarding this issue.

The next chapter of the paper is devoted to the theoretical and practical aspects of the struggle for independence of the members of the liberation committee based on the right of all people to self-determination. The memorandum of September 24, 1914 created by Mikhako Tsereteli and Giorgi Machabeli and the additional report card related to it – "On the Liberation of Georgia and the Caucasus and the Necessity of Their Obtaining a Neutral Status", general telegram of the "League of Oppressed Nations of Russia" to President Woodrow Wilson (1916) and Mikhako Tsereteli's Speech at the Third Conference of the League of Nations (1916) are discussed.

In the next, concluding chapter of the paper, attention is focused on the sad reality that centuries after the introduction of the right of all people to self-determination into the legal circulation, the matter of implementing this fundamental right in life remains relevant. The difficulties faced by progressive-minded humanity in avoiding the facts of oppression of small nations by a large state are presented.

II. Historical Evolution of the Right of Nation to Self-determination

2.1. The Right to Internal and External Self-determination

The modern interpretation of the self-determination of all people, as presumed in international law, implies the right of peoples to freely determine their political status and to be able to freely

Group". Such figures as Mikhako Tsereteli, Varlam Cherkezishvili, Geronti Kikodze, Aleksandre Shanshiashvili, Davit Vachnadze, Shalva Karumidze, Revaz Gabashvili, Shalva Amirejibi, Spyridon Kedia, Lado Garsevanishvili, Nikoloz Naskyashvili, Vladimer Mdzinarashvili and others connected their career with the activities of the group created for the independence of Georgia. The main goal of the people united around the group was the liberation of Georgia from Russia and the creation of the Democratic Republic of Georgia. After several years of work, in the fall of 1914, the "Georgian Freedom Group" created the "Committee for the Liberation of Georgia" in the city of Geneva, whose head was Petre Surguladze. The "Committee for the Liberation of Georgia" included the category of Georgian figures for whom the national interests of Georgia and the return of independence to the country were the most important. It will not be surprising if we note that the majority of the members of the committee were composed of the later created National Democratic Party. Accordingly, it can be said that the group of national democrats working without a party was united under the name of the committee at that specific stage of political activity – Petre Surguladze, Davit Vachnadze, Revaz Gabashvili, Spiridon Kedia, Meliton Kartsivadze and others. We should not lose sight of those persons who, although they did not later represent the National Democratic Party, but based on their own national interests, were enrolled in the ranks of the committee members and fought with common efforts to liberate Georgia from Russian oppression – Mikhako Tsereteli, Varlam Cherkezishvili, Giorgi Machabeli and others, see Citation*: Janelidze O.,* Essays from the history of the National Democratic Party of Georgia, 2002, "Science", Tbilisi, 219-227 (in Georgian).

pursue economic, social and cultural development.[4] Accordingly, it establishes the possibility for people to free themselves from foreign, colonial and racist domination.

The right itself includes the right to external and internal self-determination. In particular, the right to external self-determination is expressed in determining the international status of people, according to which each nation has the right to form an independent state or to integrate and be in a federal union with another state. The right to internal self-determination of the nation is reflected in the ability of the people to freely choose their own political, economic and social system. Considering the above, it is clear that the right to internal self-determination of the nation cannot be exercised in the conditions when the people are under the control of the colonizer. While the nation does not dare to oppose the ruler. The right can be used by people, as an entity that already has statehood, that requires other states not to interfere or influence their choices. The people themselves should be given the opportunity to freely define their own political, economic and social systems.[5] Thus, it can be said that the right of a nation to external self-determination is a broader concept. Moreover, to some extent it includes the right to internal self-determination. The latter, in turn, represents the next level of legal security for the restored state.

From the second half of the twentieth century to the end of the century, the content of the right to self-determination became even clearer. The conventions and declarations of that time considered and still consider each nation as a subject of the right to self-determination of nations, which can "freely determine its own political status and freely pursue its own economic, social or cultural development policy".[6]

Undoubtedly, the outstanding Georgian political emigrant, Warlam Tcherkezishvili (1846-1925),[7] had in mind such a solution to the issue, when he reminded his young compatriots at the Geneva Conference in 1904 of the rights of the Georgian nation recognized by international law: "We have the right to talk to the Russian government as free states talk to each other… We can declare war on Russia by virtue of European international law. Right now, right here, we can form a committee for

---

4 *Summers J. J.,* The Right of Self-Determination and Nationalism in International Law, International Journal on Minority and Group Rights, Vol. 12, № 4, 2005, 325.

5 *Senese S.,* External and Internal Self-Determination, Human Rights & Peoples' Rights: Views from North & South, Vol. 16, № 1 (35), Spring 1989, 19, <https://www.jstor.org/stable/29766439> [21.08.22].

6 *Summers J. J.,* The Right of Self-Determination and Nationalism in International Law, International Journal on Minority and Group Rights, Vol. 12, № 4, 2005, 325, იხ. ციტირება: the International Covenant on Economic, Social and Cultural Rights, 16 Dec 1966, General Assembly resolution 2200A (XXI), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> [21.08.2022]; Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, General Assembly resolution 1514, (XV), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Independence.aspx>, [21.08.2022]; International Covenant on Civil and Political Rights, 16 December 1966, General Assembly resolution 2200A (XXI), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [21.08.2022]; Helsinki Final Act, 14 ILM, 1975, <https://www.osce.org/files/f/ documents/5/c/39501.pdf> [22.08.2022.]; Vienna Declaration and Programme of Action, 25 June 1993, the World Conference on Human Rights in Vienna, <https://www.ohchr.org/en/instruments-mechanisms/ instruments/vienna-declaration-and-programme-action> [21.08.2022].

7 Warlam Tcherkezishvili had close cooperation with the members of the Committee for the Liberation of Georgia, despite the fact that he was in favor of the defeat of the German Empire in the First World War.

the independent governance of Georgians. . . Do you see what rights we have? . . Why should we surrender our rights without a fight? The Europeans will never deceive us in their day by fighting for the protection of these rights. They will say that we are fighting the one who invaded our country by force. People should not abandon their rights. We should acquire new rights and not give up the old ones or leave them to someone else".[8]

2.2. The Way from the Individualistic Nature of the Right to the Collectivist Doctrine

As it has already been noted, the formation of the right of all people to self-determination, its perception and seizure did not happen in one day. All this was preceded by a rather long preparatory period. Moreover, it can be said that society's attitude towards its essence continues to change even today. The development of the individualistic right to self-determination into a collectivist doctrine during the last centuries, namely from the middle of the 18th century to the First World War is a clear confirmation of the above mentioned.[9] It should also be emphasized that the role of historical and political events was of equal importance in this process.

It is in the 19th-20th centuries that a new concept of nationalism and statehood, different from the previous ones, was formed, the formation of which was greatly influenced by the destruction of nationalism, imperialism and the "ruins" that humanity has survived from them to this day. The new concept combined the ideals of freedom and democracy with the common goal of the people to achieve independence. We believe this is what the great French philosopher Jean-Jacques Rousseau (1712-1778) meant when he linked people and political sovereignty through the ideals of nationality and freedom. For the French educator, the nation was the confirmation of the uniqueness of a particular people. That is, what we call today the right of foreign self-determination of nations.[10]

The consideration of people and political sovereignty in relation to each other led to the origin of the principle of people's sovereignty[11], in which society represents the source of independence, freedom and law – the people as the founder and creator of the state and its law. As we can see, in this case people are recognized not only as subjects of law and subordinates to it, but they are the main and only legal owner of this sovereignty.[12]

The French Revolution and its consequences undoubtedly played an immense role in the origin of the right of all people to self-determination and in its development as a concept. The event of universal significance, thanks to which "the divine powers of kings were replaced by the divine rights of men."[13] The fact that at the end of the 18th century, the principle of nationalism complemented the principle of democracy and laid the foundation for the vision according to which, after "the people" become sovereign, they have the right, and in fact it is their most fundamental natural right, to

---

8 Protocols from the first Conference of Georgian Revolutionaries, Paris, 1905, 179 (in Georgian).

9 *Weitz E. D*., Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right, The American Historical Review, Vol. 120, № 2, April, 2015, 463.

10 *Senese S.,* External and Internal Self-Determination, Human Rights & Peoples' Rights: Views from North & South, Vol. 16, № 1 (35), Spring 1989, 21-22, <https://www.jstor.org/stable/29766439> [21.08.22].

11 Ibid., 21.

12 Ibid.

13 *Cobban A*., National Self-Determination, Chicago, 1944, 6.

establish themselves an independent state must be considered in connection with the revolution. The very term "people" is expressive of the natural union called the nation.[14]

Regarding the right of all people to self-determination, the views of German educators are extremely interesting. It is with the name of Immanuel Kant (1724-1802), one of the founders of German classical philosophy, German idealism, that the origin and establishment of the term ("Selbstbestimmung") denoting the right itself in the German language is connected. It was later shared by the greatest figures of the German classical age: Goethe, Schiller, and many other outstanding thinkers of their generation, by the German philosophers who discussed freedom as a process of individual self-determination.[15]

Among them, one of the outstanding ones is a graduate of the University of Jena, later a professor of the same university since 1794, Johann Gottlieb Fichte (1762-1814). A person who was an active defender of the right to self-determination from the initial stage of establishment of this principle. In particular, according to Kant's thinking, the desire of every rational person was to establish general rules for himself, and this was the beginning of freedom or autonomy for him.[16] According to Fichte's thinking, the realization of the right of self-determination by an individual led to the involvement of the world in this process, because human self-government and the development of the world is a dynamic and never-ending process.[17] As the German philosopher considered, a person's right to self-determination and the use of this right affects the world and, in turn, leaves a similar right to him and the world. Therefore, it is no doubt the opinion that the Kantian doctrine on the freedom of the individual and the views of other German educators in connection with it, prepared an important theoretical basis so that in the first half of the nineteenth century, "the right of individual self-determination was transformed into the right of self-determination of nations".[18]

Obviously, political processes developed in Europe at the beginning of the 19th century contributed significantly to such a development of events. Let's mention the fact of the occupation of German lands by Napoleon Bonaparte. It is undeniable, that this event largely led to the fact that the universal "I" was replaced by the "German nation"[19] in Fichte's works, and instead of the individual's right to self-determination, the addressee of this right was presented in the form of the German nation – the people themselves. An individual, Fichte wrote, is never alone, he is able to realize his right to self-determination only with "others". According to the deep conviction of the German philosopher, at this time the unity of individuals behaves as one. People are inseparably connected to each other and

---

14 *Randle R.,* From National Self-Determination to National Self-Development, Journal of the History of Ideas, Vol. 31, No 1, Jan.-Mar., 1970, 51.

15 *Weitz E. D*., Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right, The American Historical Review, Vol. 120, № 2, April, 2015,469-472.

16 *Randle R.,* From National Self-Determination to National Self-Development, Journal of the History of Ideas, Vol. 31, No 1, Jan.-Mar., 1970, 51-52.

17 *Weitz E. D*., Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right, The American Historical Review, Vol. 120, № 2, April, 2015,474.

18 *Randle R.,* From National Self-Determination to National Self-Development, Journal of the History of Ideas, Vol. 31, No 1, Jan.-Mar., 1970, 62.

19 *Weitz E. D*., Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right, The American Historical Review, Vol. 120, No 2, April, 2015,477.

become a common subject of the right to self-determination.[20] That is, as rightly pointed out by R.Rendle, a supposed association of people forms a particular type of society known as a nation and exercises the right to form an independent state through a government of its own choosing.[21] Accordingly, the principle of people's sovereignty and the right of nations to self-determination can be noted to complement each other with their own stages of development.

We would like to draw the attention to the fact that the collectivist concept of the right to self-determination and along with all this the spread of nationalist ideal, in the conditions of the liberation struggle of the small nations conquered by the empires, acquired special importance. For the sake of visibility, we can recall the demonstrations of the people of Eastern Europe in the beginning of the nineteenth century, and from 1848, the people of Central and Southern Europe in the Habsburg Empire,[22] uprisings caused by the desire to preserve identity in the huge Russian empire, turned into a prison for people. Among them in Georgia, where from the abolition of the Kingdom of Kartli-Kakheti, from 1801, in order to save the identity and restore statehood, throughout the century, until 1918, the Georgian people led an irreconcilable battle against Tsarist autocracy.

The creation of the Committee for the Liberation of Georgia by Georgian patriots in Geneva in the fall of 1914 can be considered as one of the final stages of this battle. The formation of such a national political organization, the main task of which was the liberation of Georgia from the Russian Empire. Unfortunately, despite the great merits to the Georgian nation, today the public knows little about this committee and its members in general: Petre Surguladze, Mikhako Tsereteli, Giorgi Machabeli, brothers Giorgi and Leo Kereselidze, Meliton Kartsivadze and their comrades, many great patriots. This is when each of them was ready to sacrifice their lives on the altar of their motherland without any hesitation.[23]

Therefore, it is not surprising that when discussing the right of all people to self-determination, we chose the extremely interesting epistolary legacy of the members of the Committee for the Liberation of Georgia and the rich practical experience of the struggle for independence. The reality that the members of the committee encountered and the road to the set goal was really challenging. For a whole century, the Georgian nation was deprived of the opportunity to form a national government, taking into consideration its own interests and wills. That is, the most important thing, which is recognized as the right of nations to self-determination: "the possibility of self-expression of the society considered as a nation", to exist and conduct the activities of its own state independently from other states and empires.[24] In such circumstances, when the nation is deprived of the possibility of independent action, the right to self-determination includes within itself the right to revolution – the

---

20 Ibid, 478.

21 *Randle R.,* From National Self-Determination to National Self-Development, Journal of the History of Ideas, Vol. 31, No 1, Jan.-Mar., 1970, 49.

22 Ibid, 62.

23 A clear confirmation of this is the fact that during the years of the First World War, members of the committee were on a German submarine many times secretly in Georgia to contact the political parties operating here and to supply weapons to the national liberation movement.

24 Ibid, 50.

right of the national community to rebel against the regime that governs it.[25] In relation to Georgia, this is the use of that right, which Warlam Tcherkezishvili called upon his compatriots in 1904, and which the members of the Georgian National Committee were able to exemplify in 1914-1918.[26]

2.3. Wilsonian Right of All People to Self-determination

2.3.1. "Wilson's Fourteen Points"

As for the issue of self-determination of all people as a universal slogan of an important right arising as a result of nationalist ideals. "Wilson's 14 provisions" laid the foundation to those fundamental changes on the world political map, which were initiated by the creation of independent states and on which the world still stands nowadays. It should be noted, that this phenomenon is primarily related to the political and diplomatic events that took place during the First World War.

On January 8, 1918, when the President of the United States of America, Thomas Woodrow Wilson (1913-1921), presented this post-war peace plan to Congress, his main goal was to create an international environment in which self-governing institutions and independent entities could freely strengthen their positions and develop.[27] At the same time, it should be emphasized that the inclusion of the most important paragraph 5 in the fourteen-point agreement in that form as it is known to the public was the merit of President Wilson personally, and not a general decision.[28] Therefore, it is legitimate to believe that it was the President of the United States of America, Woodrow Wilson, who had a significant influence on the definition of the essence of the right to self-determination, and in fact Wilson was the first to help present the issue of self-determination in the form of a theory.[29]

In his address to the Congress, the President emphasized that: the world should become safe and suitable for life, especially for peace-loving nations, who, like them, wanted to exist, arrange their own lives and state institutions. It was crucial for them to make sure that "justice and fair treatment will definitely oppose violence and aggression. The nations of the world are united around this interest and it is crystal clear that if justice is not served to others, it will not be served to anyone. That the program of the world peace is a common program of humanity".[30]

It is accurate that Wilson does not provide a broad definition of the right to self-determination in this document, however, the attitude that national interests must be taken into account in political

---

25 Ibid.

26 It should be noted that after the declaration of independence by Georgia, the Committee for the Liberation of Georgia considered its own mission accomplished and announced self-liquidation in June 1918. see Citation: O. Janelidze, "Essays from the history of the National Democratic Party of Georgia", Tb., 2002, 255-256 (in Georgian).

27 *Throntveit T.,* The Fable of the Fourteen Points: Woodrow Wilson and National Self-Determination, Diplomatic History, Vol. 35, No 3, June, 2011, 463.

28 Ibid, 469.

29 *Nawaz M.K.,* The Meaning and Range of the Principle of Self-Determination, Duke Law Journal, Vol. 1965, № 1, Winter, 1965, 83.

30 President Woodrow Wilson's 14 Points, January 8, 1918, <https://www.archives.gov/milestone-documents/president-woodrow-wilsons-14-points> [21.08.2022].

processes is clearly presented in his thinking.[31] Moreover, it can be noted that the fifth point of the fourteen-point plan is dedicated to the post-war attitudes and legal status of the European colonies. In which the President's aspiration is clearly presented, to promote the development of self-government in various forms and methods.[32]

In the fifth paragraph of the peace plan, President Wilson explicitly called on the states to make a "free, open and completely impartial settlement of all colonial claims..." and "to give the interests of the population equal meaning with the interests of the governments".[33] In putting the subject like this, it was obviously meant to ensure the right of self-determination[34] of all people conquered by empires, Which, obviously, was a great challenge for the imperial states of that time and their agenda.[35]

Therefore, it should not be surprising that these courageous calls of the president, outlined in the fourteen-point peace plan, did not have a uniform response. One part of politicians and diplomats did not share Wilson's plan as a new opportunity to establish peace in the world. For instance, the famous American diplomat and journalist, William Bullitt (1891-1967), considered the self-determination of nations, as it was given in the fifth paragraph of the agreement, not to be a salvation for the oppressed peoples of the world, but the beginning of new oppression, subjugation and division.[36]

American senator George Norris (1861-1944), British historian and diplomat Edward Curry (1892-1982) and others made similar or even more far-reaching conclusions.[37] However, despite such a mixed attitude towards the Wilsonian right to self-determination, one thing is clear, the initiative of the American president, and in particular the fifth paragraph of the agreement, was understood by the "growing nations" of Eastern Europe as an absolute right to self-determination of nations.[38] They granted less importance to, for example, later statements by President Wilson and his adviser, Colonel Edward Mundell House[39] (1858-1938), that the operation of Article Five was primarily aimed at Germany, which had been declared defeated in the First World War, rather than Britain, which had won that war, or, in relation to the French colonies. The world's progressive-minded society

---

31 *Nawaz M.K.,* The Meaning and Range of the Principle of Self-Determination, Duke Law Journal, Vol. 1965, № 1, Winter, 1965, 83.

32 *Throntveit T.,* The Fable of the Fourteen Points: Woodrow Wilson and National Self-Determination, Diplomatic History, Vol. 35, No 3, June, 2011, 469.

33 President Woodrow Wilson's 14 Points, Point V, January 8, 1918, <https://www.archives.gov/milestone-documents/president-woodrow-wilsons-14-points> [21.08.2022].

34 It is significant that the term "self-determination" does not appear in the agreement. However, in terms of content, it is meant. Which was later confirmed by the use of the term itself in the agreement in subsequent submissions to Congress, see Citation: *Weitz E. D.,* Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right, The American Historical Review, Vol. 120, № 2, April, 2015, 487.

35 *Throntveit T.,* The Fable of the Fourteen Points: Woodrow Wilson and National Self-Determination, Diplomatic History, Vol. 35, No 3, June, 2011, 469.

36 Ibid, 445.

37 Ibid.

38 *Randle R.,* From National Self-Determination to National Self-Development, Journal of the History of Ideas, Vol. 31, No 1, Jan.-Mar., 1970, 63.

39 Edward Mendel House (1858-1938), American diplomat, advisor to President Woodrow Wilson.

understood the fifth article as a call to consider and recognize the right to self-determination of all European nations.[40]

2.3.2. "People" as the Beneficiary of the Right and the Question of Their Identification

The analysis on the discussed issue will not be complete if due attention is not paid to the legal meaning of the term "people", which has acquired a different meaning since the beginning of the 19th century. Moreover, the active lobbying of the right of all people to self-determination by President Wilson and the active involvement of this right in the political processes resulting from the First World War caused additional difficulties. Especially, in relation to the identification of those peoples who should have enjoyed the right to self-determination.[41] Accordingly, it was put on the agenda to give a legal definition to the term "people", which was not implemented at the legislative level. The different interpretations given to this term by scientists and politicians have created additional difficulties instead of clarity.[42]

It is clear that it will not be possible to fully reflect these views in one scientific paper, however, we share the opinion that, considering the principle of self-determination, when discussing the subject with this right, it is necessary to take into account the ethnic, religious, linguistic, historical or other identity-determining indicators of the population living in a specific area.[43] Accordingly, the use of the term "people" also applies to the population of a state, colony, or group of individuals bound together by a common language, ethnicity, or race, whether or not they constitute the entire population of the state or colony.[44] The "people" united under each of these specific components (if they exist cumulatively) should be given the legitimate right, based on the external dimension of self-determination, to determine their own international status.

Here we will note that the reasoning shared by us regarding the meaning of the term "people" is in agreement with the articles of the Charter signed by the United Nations Organization on June 26, 1945 (entered into force on October 24, 1945) after the Second World War. In this international legal document, the term "people" is already officially used in connection with the right of all people to self-determination. In particular, in Article 1(2) of the Charter, which defines the purpose and mission of the United Nations, it is mentioned that one of its main goals is to "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[45] Article 55 of the same charter stipulates that the organization will help to create conditions of stability

---

40 *Randle R.,* From National Self-Determination to National Self-Development, Journal of the History of Ideas, Vol. 31, No 1, Jan.-Mar., 1970, 63.

41 *Whelan A.,* Wilsonian Self-determination and the Versailles Settlement, The International and Comparative Law Quarterly, Vol. 43, № 1, Jan., 1994, 101.

42 *Quane H*., The United Nations and the Evolving Right to Self-determination, The International and Comparative Law Quarterly, Vol. 47, № 3, Jul., 1998, 537.

43 *Whelan A.,* Wilsonian Self-determination and the Versailles Settlement, The International and Comparative Law Quarterly, Vol. 43, № 1, Jan., 1994, 107.

44 *Quane H*., The United Nations and the Evolving Right to Self-determination, The International and Comparative Law Quarterly, Vol. 47, № 3, Jul., 1998, 537.

45 United Nations Charter, 1945, Chapter I, Article 1(2), <https://www.un.org/en/about-us/un-charter/chapter-1> [21.08.2022].

and prosperity, which are necessary for peaceful and friendly relations between nations, which will be based on respect for the principle of equality of each nation and people.[46]

It is significant that despite the use of the term "people" by the United Nations in the articles of the Charter and even if that this most important international legal document officially calls on the subjects of international law to respect the equal rights of "peoples" and the principle of self-determination, the emphasis was not placed on the legal content of the term itself. However, based on the general context of the normative act, it is clear that the legislator has in mind those groups of individuals who are connected to each other by a common language, religion and ethnic origin.[47]

2.3.3. A Double Standard in the Practice of the Right of Nation to Self-determination

As for the issue of practical application of the right of nations to self-determination in political processes. The analysis of the historical facts of the use of the right of self-determination of all people in world politics, we keep in mind in relation to the discussed issue, for example, the members of the Tripartite Union during the First World War, the decisions made by Lenin in 1917,[48] and Hitler in the 1930s clearly prove that the great states, their leaders often disregarded the right of nations to self-determination as a moral principle, and even less considered it as an impartial, imperative rule that should be applied equally to all specific cases. Instead, as the analysis of the same practice shows, this right was often used for propaganda purposes, to gain supporters against a common enemy or to strengthen one's own positions.[49] In the same way, international practice is rich in the facts of double standard guidance by states in relation to the right of nations to self-determination.

For example, in 1916, the French, later the British and the Americans supported the right to self-determination of the Czechs and Poles,[50] while Italy's constituent regions did not accept the offer of a plebiscite in return for Italy entering the war on the side of the Entente;[51] Just as the national minorities within Czechoslovakia were denied the right to self-determination;[52] Moreover, for obvious reasons (bearing in mind the British alliance), Ireland's request for a plebiscite was not even

---

46 Ibid, hapter IX, Article 55, <https://www.un.org/en/about-us/un-charter/chapter-9> [21.08.2022].

47 *Quane H*., The United Nations and the Evolving Right to Self-determination, The International and Comparative Law Quarterly, Vol. 47, № 3, Jul., 1998, 539-540.

48 It means the issue of realization of the right of national self-determination of all small nations within the Russian Empire by Lenin before the October Revolution. However, after the revolution, it only recognized the independence of the Finns and Poles, arguing that despite the universality of the right to self-determination, it is not always appropriate for small nations to exercise this right. As the reason for the difference between the theoretical approach and practical actions, he discussed the issue of transition from bourgeois nationalism to socialism, see Quote: *Diesing P.,* National Self-Determination and U.S. Foreign Policy, Ethics – An International Journal of Social, Political, and Legal Philosophy, Vol. 77, № 2, Jan., 1967, 86-88; *Boersner D.,* The Bolsheviks and the National and Colonial Question, Geneva: Droz, 1957, 62-63; *Lenin V.,* The Right of Nations to Self-determination, New York: International Publishers, 1951, 24.

49 *Diesing P.,* National Self-Determination and U.S. Foreign Policy, Ethics – An International Journal of Social, Political, and Legal Philosophy, Vol. 77, № 2, Jan., 1967, 86.

50 *Ibid, see Citation: Masaryk T.,* The Making of a State, New York: Stokes, 1927, 96, 287, 500.

51 *Ibid, see Citation: Wambaugh S.,* Plebiscities since the World War, Washington, D.C.: Cernegie Endowment, 1933, 23.

52 *Ibid, see Citation: Masaryk T.,* The Making of a State, New York: Stokes, 1927, pp. 429-33.

considered by President Wilson;[53] In the same context should be evaluated the fact that the letters sent by the "Committee of Oppressed Peoples" to President Woodrow Wilson were left undiscussed and without any response, letters in which the issue of supporting the nations oppressed by the Russian Empire, including Georgia, based on the right of nation to self-determination, was raised[54] and others.

However, despite all of the above and despite the different standard of application of the right of nations to self-determination, which is primarily explained by the political and diplomatic intentions of the states themselves, it is crystal clear that the right to self-determination occupied a central place in Woodrow Wilson's political philosophy.[55] Moreover, it became a determining factor not only for American, but also for international politics in general.[56] This applies not only to the Peace Conference of 1919, but also to the events that developed after it.[57] The slogan of self-determination, built on the basis of Wilson's Anglo-American political traditions and nourished by the ideas of John Locke and John Stuart Mill, gave self-determination a different direction than before, and laid the foundation for the spread of this right throughout the world. The right, in which Wilson himself first of all considered, the possibility of civilized people to unite, to create a democratic polity.[58]

It is no coincidence that attention is focused on the word unity this time, since President Wilson's consideration of the factor of people's unification and population's involvement in the process of struggle for self-determination is not only related to the fourteen-point plan. The leader of the American Democrats has repeatedly emphasized the importance of the population's involvement in this vitally important process for any nation, even before the creation of the peace plan. According to his definition: Self-government is not a mere form of legal institution that can be acquired when the need arises... but rather, its possession is associated with long-term discipline, and it "gives the people self-possession, self-mastery, a habit of order and peace, and a respect for law that must not be violated, even when they become law makers themselves."[59]

---

53 *Ibid, see Citation: Cobban A.,* National self-determination, New York: Oxford University Press, 1944, 22.

54 *L. Bakradze, "*German-Georgian relations during the First World War" – activities of the Georgian National Committee, 1814-1918, Tbilisi, 2010, 117-119 (in Georgian).

55 *Nawaz M.K.,* The Meaning and Range of the Principle of Self-Determination, Duke Law Journal, Vol. 1965, № 1, Winter, 1965, 84.

56 The reasoning developed by President Wilson regarding the right of oppressed peoples and self-determination largely led to the definition of three closely related conditions after World War I, according to which: 1. Statehood should be granted to identifiable peoples; 2. The fate of the disputed territories was to be decided through a plebiscite; 3. And those ethnic groups that were small in number or scattered, disintegrated and did not meet the previous two requirements, should benefit from the special protection of the minority regimes, whose supervisory function would be combined with the newly founded Council of the League of Nations, see Citation: *Whelan A.,* Wilsonian Self-determination and the Versailles Settlement, The International and Comparative Law Quarterly, Vol. 43, № 1, Jan., 1994, 100-101.

57 *Whelan A.,* Wilsonian Self-determination and the Versailles Settlement, The International and Comparative Law Quarterly, Vol. 43, № 1, Jan., 1994, 100.

58 *Weitz E. D*., Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right, The American Historical Review, Vol. 120, № 2, April, 2015,485.

59 *Woodrow W.,* Constitutional Government in the United States, New York, The Columbia University Press, 1908, 52.

III. The National Committee on the Georgian People's Right to Self-determination

On the example of the Georgian nation as a subject of international law, it should be noted that from the first day of the loss of independence, under the leadership of the best sons of the nation, the society expressed a firm and unwavering position to restore the Bagration's royal dynasty and state independence. Accordingly, the processes dictated by nationalist ideals and the unwavering desire to preserve the identity of the nation have been marked in the history of Georgian state and political thought since 1801, which is in full compliance with the vision that "self-government is not something that can be given to any people, because it is a form of character",[60] which the nation must generate and manifest itself.

It is also worth mentioning that Wilson's vision regarding the right of nations to self-determination was not limited to the formal marking and establishment of territorial or ethnic boundaries, but his belief included the issue of practical political ethics, that each person should have had a voice in the government, under whose rule he lived and politically mature communities had to control the state institutions that were involved in shaping their lives.[61] Moreover, this right should have been enjoyed by the Georgian society, which was not only a politically mature community, but also one of the oldest subjects with statehood in Europe before 1801 year. Accordingly, the Georgian people, by virtue of the right to self-determination, had the legitimate right to demand the recognition of state sovereignty and to form state institutions according to their own opinion.

As already stated, the historical evolution of the principle of self-determination showed that the right of the individual to lead his own life according to his own interests and choices was transformed into a collective right of the people and it was applied in the context of decolonization, which entered a decisive phase during the First World War.[62]

Parallel to the development of nationalist ideals in the world, the national interests and requirements of the Georgian national liberation movement and the Georgian society in general were developing and being clarified. A concrete manifestation of this is the activity of the Committee for the Liberation of Georgia to ensure the right of the Georgian people to self-determination. It should be noted that the materials kept in the political archive of the German National Library, the State University of Jena, and the German Ministry of Foreign Affairs helped us immensely to get to know the life and creative heritage of the members of the committee, as well as the Georgian political emigration in general. In particular, the letters, books and brochures[63] published by the members of the

---

60 Ibid, 53.

61 *Throntveit T.,* The Fable of the Fourteen Points: Woodrow Wilson and National Self-Determination, Diplomatic History, Vol. 35, No 3, June, 2011, 455.

62 *Nawaz M.K.,* The Meaning and Range of the Principle of Self-Determination, Duke Law Journal, Vol. 1965, № 1, Winter, 1965, 100.

63 In this direction, it is worth noting the support of the German government ("Nachrichtenburo" founded by the German state in the spring of 1915, the so-called "Nachrichtenstelle Office"), through which a number of propaganda works were published by the members of the committee. For example, in 1915, Mikhako Tsereteli's book titled "Georgia and the World War" was published in Germany, specifically in Zurich, and in August 1917, Mikhako Tsereteli's "Georgia's Rights", Konstantine Gamsakhurdia's "Caucasus in the World War" and others were published in Berlin.

committee in the press of different countries, as well as the words spoken at the gatherings and conferences about the sovereign state of Georgia. Also, materials depicting personal and official correspondence between the members of the Liberation Committee and international partners, primarily representatives of the German Empire, regarding the restoration of Georgia's independence.

It is known that part of the strategy of the German Empire to defeat the enemy in the First World War was the rebellion of its neighboring countries and colonies against the metropolises.[64] First of all, it is in this context that the mutually beneficial cooperation of the officials of the German Empire with Georgia, in particular with the National Committee, is presented. Obviously, this time it will not be possible to fully present the documents reflecting the rather intense relationship that has been going on for years, however, depending on the research goals, it is undoubtedly important to focus on a few of them.

a) Memorandum of September 24, 1914 and additional report card of September 27 "On the Need for the Liberation of Georgia and the Caucasus and Their Acquisition of Neutral Status".

First of all, let's consider the memorandum and additional report card prepared by the committee members for the German Foreign Ministry.[65] The memorandum of September 24, 1924, was created by Mikhako Tsereteli and Giorgi Machabli and was intended to be sent to Otto Gunther von Wesendonck, Secretary of the Legation of the Ministry of Foreign Affairs of the German Empire and Secretary of the Middle East Affairs of the Political Department. The name of the memorandum, "On the need for the liberation of Georgia and the Caucasus and their acquisition of a neutral status", defined the intention of the committee members to return independence to the Georgian people based on the right of self-determination of nations, in which they hoped for the help of the German government.

At the beginning of the memorandum, it is explained that the current war and the world political situation should be used to restore "the political rights of the Georgian people, which were trampled down by the Russian authorities".[66] The members of the Committee focused on the "Georgian people as the beneficiary of the right of nations to self-determination and presented the criteria, which had already explained above, were needed to identify "people". In particular, the appeal states: "The Georgian nation does not consist of conspirators or traitors. It also does not represent any unorganized mass, but a united nation that has existed for twenty-three centuries, which continues to exist

---

64 *Bakradze L.,* "German-Georgian relations during the First World War" – activities of the Georgian National Committee, 1814-1918, Tbilisi, 2010, 31 (in Georgian).

65 *Mamulia G*., Astamadze G., "Committee for the Liberation of Georgia 1914-1918 – documents and materials", volume, 2019, 83-90 (in Georgian); see Quote: Politisches Archiv des Auswärtigen Amts (PA AA), Akten Betrefend den Krieg 1914, 'Unternehmungen und Aufwiegelungen gegen unsere Feinde im Kaukasus'. R 21008. 24.09,1914 (B1.65-70) / PAAA, R 21008, 27.09.1914.; < https://politisches-archiv.diplo.de/invenio/main.xhtml > [21.08.2022.].

66 Ibid: 83, PA AA, R 21008. 24.09, 1914., < https://politisches-archiv.diplo.de/invenio/main.xhtml > [21.08.2022.].

independently, despite its own bitter fate. Under Georgia it is meant a large part of Transcaucasia, along with the cities Tiflis, Kutaisi, Batumi and Poti'.[67]

In addition to the territorial component, the appeal focused on the centuries-old existence, history and the common religion of the Georgian people as a nation: 'Georgians belong to the number of ancient nations in the world[68]… about 2,500,000 Georgian live in Georgia, most of whom, since 326, belong to the Greek-Orthodox religion... from ancient times, Georgians were known as a brave and freedom-loving people who waged endless wars against their neighbors who wanted to conquer their rich country. The 12th century AD represented a Golden Era for us, an era of development of higher culture, science and literature. The treasure of this literature that has reached our time has excited many scientists and researchers'.[69]

Mikhako Tsereteli and Giorgi Machabeli named the Alliance of Agreement of 1783 as the main legal document that gave full legitimacy to the Georgian peoples demand for independence and briefly reviewed the period before the agreement was signed and the current political situation. In the text of memorandum, it is emphasized that an international agreement was concluded between Erekle II and Russian Empress Catherine II, according to which Georgia became a protectorate of Russia, however on the condition that it would maintain its political freedom and complete independence in matters of internal management. The mentioned agreement which had an international character, was included in the Book of the Collection of Laws of the Russian Empire. This Book can be found in Volume XXI. The Russian Emperor, who had officially sworn to forever uphold the terms of this treaty, soon broke his word and divided Georgian into four Russian provinces. As a result of this, the independent kingdom was abolished, despite our protests and soon the well-known policy of Russification made its appearance'.[70]

After drawing attention to the worst consequences brought to the Georgian people by the Russian forced rule, the memorandum emphasizes on the importance of the help of Germany and its allied countries, not only for the Georgian and other European peoples, but also for the German people themselves.[71]

As for the supplementary report card of September 27, 1914, attached to the memorandum of September 24, 1914, like the main text of the memorandum, it once again emphasizes the will of the

---

67 Ibid.

68 For example, the memorandum states: 'the legend about the journey of the Argonauts to Kolkheti, i.e. to modern Western Georgia – which according to the members of the committee, should be considered, along with others, as evidence of the ancient history of our people', See: Ibid, 84, PA AA, R 21008. 24.09,1914., < https://politisches-archiv.diplo.de/invenio/main.xhtml > [21.08.2022.]

69 Ibid.

70 Ibid.

71 According to the memorandum, the neutralization of the Caucasus: '1. Disarm dangerous neighbor of Turkey; 2. Liberates Persia from Russian guardianship; 3. Creates a credible guarantee of lasting peace in the Middle East; 4. It opens a wide field of action for trade and business connections of Europe and especially Germany, whose influence can irreversibly spread over the entire Caucasus and Central Asia'; Ibid: 86, See: PA AA, R 21008. 24.09,1914., < https://politisches-archiv.diplo.de/invenio/main.xhtml > [21.08.2022.].

Georgian people to achieve political independence in order to end the 'political oppression and economic exploitation' by the Russian Empire for over a century.[72]

At the same time, in the additional card, the presence of criteria related to 'the people' in general is presented once again and in more detail in relation to 'Georgian people'. It is emphasized that 'the Kingdom of Georgia existed as an independent state for 23 centuries, until 1801, and was only temporarily under the protectorate of the Persians und Turks. It has bounded territory with firm borders and is inhabited by two and a half million Georgians'. . . Besides, the attention is focused on the fact that the kingdom of Georgia restoring its independence should include all its all provinces (Abkhazia, Samegrelo, Svaneti, Imereti,Guria, Tao-Klarjeti, Samtskhe, Javakheti, Kartli, Kakheti, Pshavi, Khevsureti, Tusheti and Saingilo), which are mostly inhabited by Georgian People'.[73]

The Georgian National Committee considered it necessary to draw attention to the common language of the Georgian people as one of the most important criteria for identifying the people. It is significant that while discussing the issue of language, they did not forget to focused on the old Georgian dialects, so that the Russian government would not use this issue to oppose people groups. In the provinces included in the territory of Georgia, as we read in the additional card, 'people use the old Georgian dialect, as, for example, in Samegrelo and Svaneti, which, in fact, should be considered as provincialisms (like the literary German language and the lower-Saxon dialect. The Russian government and politicians tried to create a policy of division between these provinces under the pretext that they were not Georgian, but their efforts turned out to be futile. Besides using their own dialect, the entire population of Samegrelo, Svaneti and other provinces also speaks the pure Georgian language and fourth against the aforementioned Russian defamation. This language remains the church and the literary language of all Georgian tribes from the beginning of our history to the present day.[74]

b) Collective telegram of the "Nations League Oppressed by Russia" to President Woodrow Wilson

We should pay attention to the fact from the history of the liberation fight of the Georgian people when "Oppressed Nations of Russia" sent the telegram to President Woodrow Wilson in May 1916 based on the right of self-determination. Through this message, the nations oppressed by Russia reported their difficult situation to the President of the United States of America and asked for help. It is meaningful that the violated rights of Georgian people, the issue of the struggle for its independence were presented extensively in the telegram. And the Georgian National Committee had a great contribution to this.

That document is also significant because the members of the Georgian National Committee justified the Georgian people's demand on restoring independence with the right of nations to self-

[72] Ibid: 88, See: PA AA, R 21008. 27.09,1914., <https://politisches-archiv.diplo.de/invenio/main.xhtml> [21.08.2022.].

[73] Ibid, See: PA AA, R 21008. 27.09,1914., <https://politisches-archiv.diplo.de/invenio/main.xhtml> [21.08.2022.].

[74] Ibid, See: PA AA, R 21008. 27.09,1914., <https://politisches-archiv.diplo.de/invenio/main.xhtml> [21.08.2022.].

determination. In particular, in the address to President Wilson, the centuries-old history of Georgia and the deplorable consequences for the Georgian statehood as a result of the violation of the alliance agreement of 1783 are once again fully described.[75] Unfortunately, as we have already mentioned, the appeal of the "Nations League Oppressed by Russia" to President Woodrow Wilson did not have any tangible results.[76] After the victory in the First World War, given the political plans of the Entente states and the spirit of the Versailles treaty, this is not strange. However, the very fact that at the beginning of the 20th century, the members of the Georgian National Committee, with all the legal levers at their disposal, including Fourteen Points Peace Plan initiated by President Wilson in international law, fought for the restoration of Georgia's independence based on the right of nations to self-determination, speaks volumes. It is another clear proof of determination and high legal culture of Georgian politicians working in the international arena at the beginning of the 20th century.

c) Speech delivered by Mikhako Tsereteli at the Third Conference of the Union of Nations (1916)

While working on this topic, my attention attracted to the speech delivered by Mikhako Tserteli, a member of the Georgian National Committee, at the Third Conference of the Union of Nations Held on June 27-29, 1916.[77] The Georgian delegate made a report on the first day and clearly presented the need to separate Georgia from Russia and restore its independence, which actually determined the future course of the conference.[78] As we learn from the materials found about the conference, the "anti-Russian spirit" reached its culmination during the discussion about Georgia. "Mikhako Tsereteli was allowed to speak as much as he considered necessary. All his words were greeted with admiration and applause" as though "he was settling scores with the Russian Empire".[79] After such a speech, it is not surprising that "among the Eastern Nations, the Georgian Tsereteli had the greatest success with his well-grounded explanation. He was able to convince the session not only of the indisputable right of the Georgians to be independent, but also of the unprecedented cruelty how Russia treated the conquered nations".[80]

IV. Conclusion

Although the Kantian definition of the right of nations to self-determination described in the letter, or you prefer, the highly interesting historical process of transforming the same 'right of

---

75 *Bakradze L.,* German-Georgian Relations during the First World War' – Activities of the Georgian National Committee 1814-1918, Tbilisi, 2010, 117-119; See: 'Qartuli Gazeti', N6, 15 June, 1916 (in Georgian).

76 *Bakradze L.,* German-Georgian Relations during the First World War' – Activities of the Georgian National Committee 1814-1918, Tbilisi, 2010, 119. See: 'Qartuli Gazeti', N12, 16.09.1916 (in Georgian).

77 *Tsereteli M.,* The Rights of Georgian Nation, 'Qartuli Gazeti', 1916, N16, 17, 18 (in Georgian).

78 *Bakradze L.,* German-Georgian Relations during the First World War' – Activities of the Georgian National Committee 1814-1918, Tbilisi, 2010, 128 (in Georgian).

79 Ibid, 129.

80 Ibid 130-131, See: "Von der dritten Nationalitätenkonferenz", Korrespondenzblatt der N.O., Nr. 13, 13 Juli, 1916..

individual self-determination into the right on nations to self-determination' is centuries away and political map has 'changed color' many times during this period, the right of peoples to self-determination remains one of the most pressing issues of the international law. As for its viability, the right of nations to self-determination is presented in the letter as a combination of features characteristic of both international law and the doctrine of nationalism. International law is oriented and based on the state, and nations and people are the basis of nationalism. For both the state is the common fundamental component. The main goal of every nation or people fighting for independence. Accordingly, the paper shares the opinion that the right of nations to self-determination includes both nationalist ideas in the context of the protection of the right of nations, as well as positive international law, as it is a product of international law itself.[81]

In the long process of defining the essence of the right of nation to self-determination and especially, presenting it in the form of a theory, the contribution of the 28th president of the United States of America, Woodrow Wilson, is undoubtedly outstanding.[82] It can be said with certainty the peace plan presented by him to the Congress contributed to increase in the relevance of the issue of self-determination and had a positive effect on the process of struggle for self-governance and independence of the peoples living in the colonial territories. Among them, the Georgian people who were deprived of their independence by the Russian Empire and at the turn of the 19th-20th centuries, the right of nations to self-determination was considered as the best legal lever for the protection of their rights.

As it is presented in the paper, determination of new criteria of the self-determination played the greatest role in directing these extremely interesting political processes in the right direction for the Georgian State. In particular, taking into account, the ethnic, religious, linguistic, historical or other identity-determining indicators of the population living in a specific territory.[83] Based on these criteria, the members of the Georgian political organization created in the fall of 1914 in Geneva, Georgian National Committee, showed an amazing ability to feel political realism, they managed to bring the pain of the Georgian nation to the world's progressive-minded society. They convinced the partner states that the Georgian people, who were not only a politically mature community, but also presented one of the oldest subjects with statehood in Europe before 1801, had the right to legitimately demand the recognition of state sovereignty and the formation of state institutions according to their own opinion within the framework of the right of nations to self-determination.

On the international arena, they also managed to present clearly one of the most important signs which gives people possibility to live in any part of the world and to enjoy the right of nations to self-determination. In particular, the Committee members were focusing on the centuries-old history, culture, language and ethnic origin of the Georgian people. In addition to the above, they focused on the Alliance Agreement of 1783, which obviously gave the Georgian people's demand for

---

81 *Summers J. J.,* The Right of Self-Determination and Nationalism in International Law, International Journal on Minority and Group Rights, Vol. 12, № 4, 2005, 328.

82 *Nawaz M.K.,* The Meaning and Range of the Principle of Self-Determination, Duke Law Journal, Vol. 1965, № 1, Winter, 1965, 83.

83 *Whelan A.,* Wilsonian Self-determination and the Versailles Settlement, The International and Comparative Law Quarterly, Vol. 43, № 1, Jan., 1994, 107.

independence even more legitimacy. As a result, at the beginning of the 20th century, Georgia, this time as a democratic republic, returned to the world political map and gave other oppressed nations an excellent example of realizing the right of nations to self-determination in life.

Bibliography:

1. *Bakradze L.,* German-Georgian relations during the First World War – activities of the Georgian National Committee, 1814-1918, Pegasi, Tb., 2010, 31, 117, 118, 119, 128 (in Georgian).
2. *Boersner D.,* The Bolsheviks and the National and Colonial Question, Geneva: Droz, 1957, 62, 63.
3. *Cobban A.,* 'National Self-Determination', published by the University of Chicago Press, Chicago, 1944, 6, 22.
4. Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, General Assembly resolution 1514, (XV), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Independence.aspx>, [21.08.2022];
5. *Diesing P.,* National Self-Determination and U.S. Foreign Policy, published by the University of Chicago Press, Ethics – An International Journal of Social, Political, and Legal Philosophy, Vol. 77, № 2, Jan., 1967, 86, 87, 88;
6. Georgian newspaper, N6, June 15, 1916.
7. Georgian newspaper, N12, September 16, 1916.
8. Helsinki Final Act, 14 ILM, 1975, < https://www.osce.org/files/f/documents/5/c/39501.pdf > [22.08.2022.];
9. International Covenant on Civil and Political Rights, 16 December 1966, General Assembly resolution 2200A (XXI), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights > [21.08.2022];
10. *Janelidze O.,* Essays from the history of the National Democratic Party of Georgia, vol., Science, 2002, 219, 220, 221, 222, 223, 224, 225, 226, 227, 255, 256 (in Georgian).
11. *Lenin V.,* The Right of Nations to Self-determination, New York: International Publishers, 1951, 24.
12. *Mamulia G., Astamadze G.,* Committee for the Liberation of Georgia 1914-1918 – documents and materials, National Library Publishing House, Tb., 2019, 83, 84, 85, 86, 87, 88, 89, 90 (in Georgian).
13. *Masaryk T.,* 'The Making of a State', New York: Stokes, 1927, 96, 287, 429, 430, 431, 432, 433, 500.
14. *Nawaz M.K.,* 'The Meaning and Range of the Principle of Self-Determination', Duke Law Journal, Vol. 1965, № 1, Winter, 1965, 83, 84, 100.
15. Protocols from the first Conference of Georgian Revolutionaries, Paris, 1905, 179 (in Georgian).
16. President Woodrow Wilson's 14 Points, January 8, 1918, <https://www.archives.gov/milestone-documents/president-woodrow-wilsons-14-points> [21.08.2022].
17. Politisches Archiv des Auswärtigen Amts (PA AA), Akten Betrefend den Krieg 1914, 'Unternehmungen und Aufwiegelungen gegen unsere Feinde im Kaukasus'. R 21008. 24.09,1914 (B1.65-70) / PAAA, R 21008, 27.09.1912.; <https://politisches-archiv.diplo.de/invenio/main.xhtml> [21.08.2022].
18. *Quane H.,* 'The United Nations and the Evolving Right to Self-determination', Published by Cambridge University Press, The International and Comparative Law Quarterly, Vol. 47, № 3, Jul., 1998, 537, 539, 540.

19. *Randle R.,* 'From National Self-Determination to National Self-Development', published by 'University of Pennsylvania Press, Journal of the History of Ideas, Vol. 31, No 1, Jan.-Mar., 1970, 49, 51, 52, 62, 63.
20. *Senese S.,* 'External and Internal Self-Determination', Social Justice ,Vol. 16, № 1 (35), Human Rights & Peoples' Rights: Views From North & South, Vol. 16, № 1 (35), Spring 1989, 19, 21, 22, <https://www.jstor.org/stable/29766439 > [21.08.2022].
21. *Summers J. J.,* 'The Right of Self-Determination and Nationalism in International Law', Published by Brill, International Journal on Minority and Group Rights, Vol. 12, № 4, 2005, 325, 328.
22. *Tsereteli M.,* The Rights of the Georgian Nation, Georgian newspaper, 1916, N16, 17, 18.
23. The International Covenant on Economic, Social and Cultural Rights, 16 Dec 1966, General Assembly resolution 2200A (XXI), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights > [21.08.2022];
24. *Throntveit T.,* The Fable of the Fourteen Points: Woodrow Wilson and National Self-Determination', published by Oxford University Press, Diplomatic History, Vol. 35, No 3, June, 2011, 445, 455, 463, 469.
25. United Nations Charter, 1945, < https://www.un.org/en/about-us/un-charter > [21.08.2022].
26. Vienna Declaration and Programme of Action, 25 June 1993, the World Conference on Human Rights in Vienna, <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action > [21.08.2022].
27. Von der dritten Nationalitätenkonferenz, Korrespondenzblatt der N.O., Nr. 13, 13 Juli, 1916.
28. *Wambaugh S.,* 'Plebiscities since the World War', Washington, D.C.: Cernegie Endowment, 1933, 23.
29. *Weitz E. D.,* 'Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right', Published by Oxford University Press, The American Historical Review, Vol. 120, № 2, April, 2015, 462, 463, 469, 470, 471, 472, 474, 477, 478, 485, 487.
30. *Whelan A.,* Wilsonian Self-determination and the Versailles Settlement, The International and Comparative Law Quarterly, Published by Cambridge University Press, Vol. 43, №1, Jan., 100, 101, 107.
31. Woodrow W., Constitutional Government in the United States, New York, The Columbia University Press, 1908, 52, 53.

Mikheil Bichia*

Defining the Legal Nature of Shared Rights

The current article is dedicated to defining the legal nature of shared rights, which has twofold importance, scientific accuracy, and practicality.

The roots of shared rights are in common property, which is part of property law. Therefore, logically, shared rights contain some elements of property law. In particular, the relationship of owners of shared rights with third parties is an external and property law-connected. This relationship has an absolute character. In addition, the internal fiduciary relationship between parties, which is related to the origins of the obligation law of shared rights, is also noteworthy.

The existence of shared rights in the obligation law is caused by the internal, relational, and personal nature of the existing relationship, by the non-injury of the interests of the other parties in the use of the shared rights by one party. The legal content of the rights and obligations of the parties is expressed in the powers of using, managing, and disposing of the shared object, taking into account the interests of other parties, also in the power of canceling the shared right, etc.

Shared rights have a merged legal nature: the internal relations of the shareholders are relative, and the relationships of the owners of shared rights with third parties are absolute. Accordingly, the specifics of this relationship depend on whether it concerns the internal rights and obligations of the shareholders or the interests of the co-sharers with third parties. The above-mentioned determines which field of civil law norms will be applicable concerning the mentioned relationship – property or obligation law.

Keywords: *Common property, Shared right, relative, obligational right, internal relationship of shareholders, mixed relationship*

1. Introduction

What is the legal nature of shared rights, and where is the place of this institution in the civil law system? This question is a crucial issue to which there is no uniform approach in the legal literature. In this regard, there are no monographic studies in the Georgian language, although there are several noteworthy foreign studies on the basic principles of shared rights.[1] It is quite clear that it is impossible to discuss every single aspect of shared rights in this article. However, within this article,

* Doctor of Law, Visiting Lecturer of Ivane Javakhishvili Tbilisi State University Faculty of Law, Professor of European University (Tbilisi).

1 *Schnorr R.*, Die Gemeinschaft nach Bruchteilen (§§ 741-758 BGB), Tübingen, 2004; *Staudinger von. J.*, *Langhein G.-H.*, Kommentar zum BGB, Berlin, 2008; *Filatova U.B.,* Institute of common property law in the countries of the Romano-Germanic legal family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015 and others.

some of the problematic issues will be highlighted, based on which there will be defined the legal character of the shared rights.

In this matter, the relationship between common property and shared rights should be determined. Whether shared rights should be in the property law or obligation law?[2] Accordingly, this research aims to determine the legal nature of the shared right. Research also seeks to identify the specifics of the implementation of the rights and duties of the shareholders. Since rights and duties in this relationship determine the content of the legal relationship.

What is the importance of defining the legal nature of shared rights? It will specify which will be applied to the shared rights property law or obligation law principles and signs. The issue is determining the nature of the relationship between the participants and the legal consequences of the infringement. It will answer the question: what are the specifics of shared rights and the scope of realization of the shared rights by participants?

Accordingly, the presented article tries to determine the legal nature of shared rights in which the author use normative-dogmatic, synthesis, and analysis or comparative methods, which are both from the point of view of educational-methodical and scientific accuracy.

2. Connection of Common Property with Shared Rights

The property is owned by people of two or more in case of common property. Each individual is the co-owner of the property. There is only one specific norm of shared property in property law (CCG art. 173), whereas, the other legal relations are directed in different chapters of Georgian Civil Code or other special legislation. The shared property may be derived on the grounds of legislation or agreement (CCG art. 173-1). The shared property is divided into co-owned and share property.[3]

As for shared property, unlike joint property, shares themselves are defined here. Therefore, common shared property rights differs from the common joint property rights.[4]

Shared property relates to separate objects such as things, claims, and rights. Each co-owner has not actual share (like shared obligation) but an ideal share in the property.[5] In shared rights, each participant has the right to an ideal share in property, which is expressed as a share in the common right. Above-mentioned determines both the scope of the implementation of legal rights and obligations between the participants, as well as the content of the legal responsibility of the participants in relations with third parties.[6]

As for the shared property, unlike the co-owned property, shares themselves are not defined here. Therefore, the co-owner of the property lacks the ability to dispose of shares of property, unlike

---

2 See *Bichia M*., Several Aspects of Establishing the Ontological Nature of Shared rights (Analysis of Theory and Practice), In: Proceedings of the XVIII International Scientific and Practical Conference "Social and Economic Aspects of Education in Modern Society", Warsaw, October 28, 2019, 54.

3 See *Zoidze B.,* Georgian Property Law, 2nd ed., Tbilisi, 2003, 102 (in Georgian).

4 Civil law, In 4 volumes, Vol. II, Property law, Inheritance law, Exclusive rights, Personal non-property rights, TexTbilisiook, Ed. *Sukhanova E. A*., 3rd edition, M., 2006, 120 (in Russian).

5 See *Fikentscher W., Heinemann A*., Schuldrecht, 10. Auflage, Berlin, 2006, 372.

6 *Staudinger von. J.*, *Langhein G.-H.*, Kommentar zum BGB, Berlin, 2008, § 741 (Rn. 59, 256), § 742 (Rn. 1).

the participant of shared property.[7] In common shared property share applies not only to individual objects or rights but also to the property as a whole, which is separated from the common property. The content of the property separated from the common property may be a separate object as an exception, for example, a plot of land for a house. In addition, with co-owned property each owner's right extends to the entire property. In shared property, the owner's share in the property is ideal. And in co-ownership, share can be determined if the property is divided. However, before the division, it is considered that the shares of all the participants are equal.[8] For example, according to the Civil code of Georgia article 1159, if otherwise is not defined by mutual agreement of the spouses, they shall have equal rights to the spousal property. According to the first paragraph of the same article, any property acquired by the spouses during their marriage shall be treated as their joint property (spousal property). Possession, use, and disposal of this property depend on the mutual agreement of the spouses. Therefore, co-ownership, in which the owners have ownership rights to undivided shares of property, differs from shared ownership. Difference is caused the object of co-ownership is property, but the object of shared ownership is only a separate right.[9]

Moreover, following article 953 of the Civil Code of Georgia, a shared unit differs from a co-owned unit in that it is a property unit. Joint activity (partnership) acts against third parties based on common rights. Co-owned property is regulated by the norms governing shared rights. However, co-shared unity is considered as the unit connected to the property. Co-owned unity is considered legal unity and transforms the co-owned unity into a union of property. A characteristic of most co-ownership is that the co-owners cannot independently dispose of the shared object or their share.[10]

Common co-owned ownership[11] is a union of persons whose members cannot be changed, and the members represent a single whole (unit) in external relations. A partnership is an association around the property (not around persons). As each co-owner has powers in common rights, the co-sharer has both his vote and his sphere by disposing of his share. The purpose of shared ownership is not to take into account the opinion of each co-owner separately, but to create conditions for co-owners to use the shared object as efficiently as possible. The judgment of the majority is necessary for the effective management and use of the common property. Common shared ownership does not depend on the change of members and is created around the property, therefore the change of co-owners is allowed.[12]

---

7 *Filatova U.B.,* Institute of Common Property Law in the Countries of the Romano-Germanic Legal Family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 334 (in Russian).

8 See *Zoidze B.*, Georgian Property Law, 2. Ed., Tbilisi, 2003, 102 (in Georgian).

9 *Fikentscher W*., *Heinemann A.*, Schuldrecht, 10. Auflage, Berlin, 2006, 665.

10 *Baur F., Stürner R*., Sachenrecht, 18. Auflage, München, 2009, § 3 Rn. 25 and hereinafter; *Filatova U.B.,* Institute of common property law in the countries of the Romano-Germanic legal family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 329-330 (in Russian).

11 Common joint ownership is a shared co-ownership right.

12 See *Filatova U.B.,* Institute of Common Property Law in the Countries of the Romano-Germanic Legal Family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 388 (in Russian).

According to the opinion in the legal literature, it is not suitable to have shared rights in the circle of statutory obligations. In this regard, shared rights are considered an institution of property law, because they are related to the rights and obligations of two or more co-owners of real estate.[13] Therefore, it is required to define why common ownership provided by the property law is placed in the obligatory law in the form of shared rights.[14] Sharing this point of view would allow us to explain the norms that existed before the amendment (Articles 210-232) of the Civil Code of Georgia "ON HOMEOWNERS' ASSOCIATIONS" (Articles 210-232), which are currently regulated by a separate law. Most likely, these norms also created a problem of systematization since the provisions included in the property law could not be logically connected with the co-ownership rights in the obligation law – legal obligations.

The common property itself implies a collision of two aspects: on the one hand, unity, in which being in means subordination to the rules developed by this unity, and on the other hand, the right of ownership, as complete domination over the thing, absolute property rights.[15]

3. Concept of Shared Rights and Prerequisites for Usage

The legislator started the section of legal obligations in the Civil Code with the chapter regulating shared rights, which includes provisions from Article 953 to Article 968. A share right is a right owned by more than one person. If several persons are jointly entitled to a right, then the rules of shared rights shall apply unless the law provides to the contrary (Art. 953).[16]

In common shared ownership, there is a common right, which is considered as togetherness of rights (shares) of several persons on a shared object. Each co-owner has a share in the common right, which in its content is not equal to the right of common property or private property. Common property does not match the shared co-ownership right. I.e., to exercise common powers, it is not sufficient to have only a share, but it is necessary to unite everyone's share. Such possession, use and disposal of an item is one of the forms of manifestation of common ownership, namely the separation of a share. In Germany, Austria, Switzerland, and France, common ownership generally establishes itself by changing the function and disposing of the item. The co-ownership right creates opportunities that belong to the individual sphere of the co-owner. This includes some possibilities as follows: disposal of shares, the use of a part of the thing in proportion to the share or its use for a certain time. The disposal of the share in the right is not considered only the individual sphere of the co-owner, since any disposal affects the interests of other co-owners.[17]

---

13 *Willems H.*, Comparative Analysis of Georgian and Dutch Obligatory Law, in the book: The Law of Obligations, ed. Kviralashvili Kh., Tbilisi, 2006, 97 (in Georgian).

14 *Fikentscher W., Heinemann A*., Schuldrecht, 10. Auflage, Berlin, 2006, 665.

15 *Filatova U.B.,* Institute of common property law in the countries of the Romano-Germanic legal family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 385 (in Russian).

16 See *Klunzinger E*., Grundzüge des Gesellschaftsrechts, 16. Auflage, München, 2012, 17; *Klein-Blenkers Fr.*, Rechtsformen der Unternehmen, Köln, 2009, 184.

17 See *Filatova U.B.*, Institute of Common Property Law in the Countries of the Romano-Germanic Legal Family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 142 (in Russian).

Hence, for the rights to be considered shared, the following requirements must be met: 1) Civil rights; 2) several persons; 3) these persons should have this right; 4) The law should not allow the possibility of using another rule of regulation of the given relationship.[18]

- Shared rights include the civil right, i.e., the ability of a person recognized by civil law to demand the debtor to perform an action or to refrain from it, as well as to perform an action with the help of the court to defend his interests.[19] Along with this right, there is the duty of another person (shareholder), which is actually aimed at the exercise of the right. Hence, there is a correlation between right and duty; a right has meaning only when there is a corresponding duty, a right without a duty loses its legal character.[20] In addition, shared rights can be found in family relations (Common property of spouses), inheritance relations, etc. Therefore, the scope and meaning of shared rights are wide.[21]
- The relationship based on common ownership is characterized by the plurality of persons having ownership rights to a specific object. Both individuals and legal entities can be the owners of shared rights.[22] Therefore, it is not allowable to have a shared right with only one person, because this will lead to the termination of the shared right.[23] Accordingly, in the case of shared rights, the right to a share must be owned by several persons, otherwise, the existence of shared rights is excluded.
- Moreover, for the existence of shared rights, it is required to establish a legal connection between the civil rights and these persons, precisely, the right must belong to the person (co-owners).
- The applicability of the institution of shared rights requires the exemption of any other contractual or statutory basis. If such a rule exists, then this special rule will apply to this relationship (Agency without Specific Authorisation) (Civil Code of Georgia, Art.953)

For example, **when performing other's affairs without an authorization, the initiator has neither the duty nor the authority to perform the affairs**. However, in the case of **shared rights, the participants have authority over the common object**. Therefore, it is not considered that he was performing the affairs of others. Moreover, provisions of performing others' affairs without authorization are still not applicable if the individual conducts a transaction for another person in the belief that it is his/her own (Civil Code of Georgia, Art.975). In this case, the possibility of using the provisions (Civil Code of Georgia, 969-974) of performing other people's affairs without authorization is excluded.[24]

The second paragraph of Article 956 of the Civil Code gives the co-sharer the right to take measures necessary for maintaining the object even without the consent of other part shareholders. This provision provides the right to manage other people's affairs in the same way as one's own. The shareholder, who uses his authority recognized in the second paragraph of Article 956 of the Civil

---

18 See *Bichia M.*, Legal obligational law, 2nd ed., Tbilisi, 2018, 58 (in Georgian).

19 *Alexandrov N. G.*, Legality and legal relations in Soviet society, M., 1955, 108-109 (in Russian).

20 See *Surghuladze I.,* Government and law, Translator: *Gamkhrelidze O.,* Tbilisi, 2002, 110 (in Georgian).

21 See *Bichia M.*, Legal Obligational Relations, Tbilisi, 2016, 44 (in Georgian).

22 Civil law, In 4 volumes, Vol. II, Property law, Inheritance law, Exclusive rights, Personal non-property rights, Textbook, Ed. *Sukhanova E.A.,* 3rd ed., M., 2006, 117 (in Russian).

23 *Schmidt K.,* in: Müko-BGB, 7. Auflage, München, 2017, § 741, Rn. 8.

24 Decision № As-649-610-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia, dated October 4, 2011.

Code, genuinely only exercises his right in the form of a property right. The excess of authority by the co-shareer is considered not as an infringement, but as an intervention in the authority of other shareholders. This shareholder is similar to a third person, who intervenes in the rights of the sharer and is similar to the performer of someone else's affairs within the meaning of Article 969 of the Civil Code. However, the shared right differs from the agency of other people's affairs without authorization in that the sharer protects the shared object while exercising his right.[25] Accordingly, when a person has the right to interfere in another's affairs, the provisions of agency other's affairs without authorization is not applicable to this relationship, since there is no authority to do other's affairs when performing other's affairs without assignment.

In addition, if one of the shareholders of the shared right suffers certain necessary expenses directly for the storage of the object, the other participants will be enriched, and there is also a causal connection between the enrichment of the other participants and the result (damage) caused by the expenses incurred by one of the participants. However, unjust enrichment has a subsidized character, i.e. it retreats to another rule for the relationship. If there is no contractual or other legal basis for compensation of incurred expenses, and the relationship between the parties has arisen on the basis of the rules on shared rights, the case should be resolved within the framework of co-ownership rights.[26]

Accordingly, the content of the relationship based on shared rights includes all the property and obligatory rights and obligations that may belong to several persons on one property. The inseparability of an item can give rise to both shared rights and shared duties.[27] Co-heirs shall reduce the inheritance or the inherited objects following the common right of the heirs to the shares related to the conditionally inherited objects or their division quota at the time of the personal contribution of the heir to the association of persons. For example, when inheritances are defective, their value will automatically decrease for all co-heirs.[28]

4. Specific features of shared rights in the obligation law

4.1. The ground of origin

The rights and obligations of the shareholders of share rights derive from the law, and the relations between them are regulated by the law[29], which exists without the consent of the co-owners.[30]

---

25 See *Schnorr R.*, Die Gemeinschaft nach Bruchteilen (§§ 741-758 BGB), Tübingen, 2004, 228-229, 232.

26 See Decision № As-649-610-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia, dated October 4, 2011.

27 See *Shotadze T.*, Comparative Analysis of Common property and Rights in Common According to the Civil Code of Georgia, Journal of Law, № 2, 2009, 20 (in Georgian).

28 *Eberl-Borges Chr*., Die Erbauseinandersetzung, Tübingen, 2000, 455.

29 See *Akhvlediani Z.,* Obligation law, 2nd Tbilisi, 1999, 251-252 (in Georgian); *Kübler F., Assmann H.-D.,* Gesellschaftsrecht, Die privatrechtlichen, Ordnungsstrukuren und Regelungsprobleme von Verbänden und Unternehmen, 6. Aufage, Lehr- und Handbuch, Heidelberg, München, Landsberg, Berlin, 2006, 1, 29.

30 *Kirkpatrick Me J., Stuhler E., Francois H., Cosciani C., Fantozzi A., Gloden Joseph Me, Van der Heyde M.,* Steuervorschriften für die überbetriebliche Zusammenarbeit oder Fusion landwirtschaftlicher Betriebe, II. BR Deutschland, 84, Februar, 1972, 6.

Often, owners of shared rights do not have any document reflecting the agreement, except for the document of origin of the right (extract, inheritance certificate). Such shared property relations should be regulated by law. In addition, the property may be jointly owned by several persons under the right of rent or lease, which implies the existence of a contract, which excludes legal obligation. However, when it comes to issues not regulated by the agreement, priority is again given to legal regulations. Therefore, the same relationship is regulated by different institutions.[31]

4.2. Relative Nature of the Relationship

Firstly, Article 954 of the Civil Code institutes the possibility of defining special regulations and considers their priority over general norms. According to the mentioned provision, it is possible to deviate from the established rule by the superiority of special norms, which indicates the dispositional nature of this provision.[32] The correspondent of the mentioned provision in the German Civil Code (GCC) is Article 742, according to which, in case of doubt, the presumption applies that the shareholder have an equal share. However, it is not suitable to distribute shares equally, and deviation from the established rule of equality is allowed if there is an agreement between the shareholders, a special rule, or special circumstances. In this case, the special rule of interpretation of the law takes precedence over the general rule.[33] For example, when several persons create an invention, the proportion of share is determined in proportion to the co-inventor's contribution to its inventions, unless the parties have agreed otherwise. Article 742 of the GCC is used when the contribution cannot be determined.[34]

The use and administration of the shared object and the cancellation of the right belong to an obligation law relationship since it is based on mutually agreed action by the shareholders.[35] The content of the right to the fruit is a confirmation of this. Authority stipulated in Art.955 of the Civil Code does not have a nature of property law, since each part owner shall be entitled to the portion of the fruit proportionate to his/her share. In this case, the circle of persons of the relationship (creditor and debtor) is specified. Therefore, the right of the shareholders to the fruit has a relative nature. In addition, when using the shared object, the shareholder must take into consideration the interests of other shareholders. So as not to interfere with others' right. This provision also outlines the relative nature of the relationship between the shareholders.[36]

Shareholders right to use share extends to the entire common object. However, according to Art.955 of the Civil Code paragraph 2 each part shareholder may use the thing held in common in

---

31 See *Shotadze T.,* Comparative Analysis of Common property and Shared Rights According to the Civil Code of Georgia, Journal of Law, № 2, 2009, 19-20 (in Georgian).

32 *Staudinger von J., Proff v.*, BGB, 2015, § 741, Rn. 6

33 *Schmidt K*., in: Müko-BGB, 6. Auflage, München, 2013, § 742, Rn. 1, 3.

34 BGH GRUR 1979, 540 (LS 2, 541) – Biedermeiermanschetten; *Schmidt K.* in: Müko-BGB, 6. Auflage, München, 2013, § 742, Rn. 4.

35 *Staudinger von J.*, Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen, München, 2007, 350.

36 On the essence of the relative relationship, see *Bratus S. N., Ioffe O. S.*, Civil law, M., 1967, 41 (in Russian).

such a way as not to impair the use by the rest of the shareholders.[37] This refers to the actual (and not legally permissible) usage. If the shareholders of street A has used the street for himself, sharer B cannot rely on the fact that theoretically he should have had the opportunity to use this street to justify his compensation claim. The independent use of the mentioned object is due to the privileged position of owner A. Thus, the use of shared rights should be in line with the interests of shareholders. Anyone can have the full (unlimited) right to use the property as long as it does not interfere with the use of other shareholders. This is specified in the first paragraph of Article 170 of the Civil Code. To the extent that the rights of the co-owner are related to the relationship of the co-owners with other co-owners, the right to use the shared object becomes relative. The parties should jointly (agreed) settle the use of the territory or the use of a shared object for a certain time. However, the problem of managing a shared property arises only when both parties require the use of the country house at the same time. Thus, if one of the two co-owners does not have an interest in using the shared country house, the other can live here at any time and as long as he is allowed to do so.[38]

The management of shared objects is also noteworthy. The power of management is an active and purposeful action. It provides to protect and maintain the object, taking into account the interests of all co-owners to preserve, improve, and profit from the object. In the legal regulation of shared property management, the corporate nature of co-owners relationships can be seen to some extent.[39] In addition, the fulfillment of shared request, forgiveness of debt and postponement of common debt belong to the scope of joint management of the shared object, which, according to the first part of Article 956 of the Civil Code, is the responsibility of the owners of shares.[40] However, each shareholder (co-owner) can take measures necessary for the storage of the object without the consent of other shareholders (the second part of Article 956 of the Civil Code).

Article 956 of the Civil Code regulates not only the right of the co-owner but also the duty, if necessary, to act for the interests of other shareholders and to maintain the shared object, taking into account the functional purpose.[41] Accordingly, the purpose of Article 956 of the Civil Code is to regulate the rights and duties of the co-owner, if necessary, to act independently in the interests of other shareholders to preserve the shared object, according to its value.

Thus, the norms on the management of shared objects (Articles 956 and 957 of the Civil Code) have an obligatory law character.[42]

---

37 *Staudingers von J.*. Kommentar zum BGB mit Einführungsgesetz und Nebengesetzen, Neubearbeitung von *Engel N., Langhein G-H., Mayer J.*, Berlin, 2008, § 743, Rn. 34.

38 *Schnorr R.*, Die Gemeinschaft nach Bruchteilen (§§ 741-758 BGB), Tübingen, 2004, 177-178.

39 *Filatova U.B.*, Institute of common property law in the countries of the Romano-Germanic Legal Family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 204-205, 211 (in Russian).

40 *Kroppholler I.*, German Civil Code – Educational Commentary, revised by F. Jacob and M. Von Hinden, 13th edition, translators: *Darjania T., Chechelashvili Z.*, Tbilisi, 2014, 301-302 (in Georgian).

41 Ruling № As-600-2019 of the Civil Affairs Chamber of the Supreme Court of Georgia dated November 14, 2019 (in Georgian).

42 See *Schnorr R.,* Die Gemeinschaft nach Bruchteilen (§§ 741-758 BGB), Tübingen, 2004, 8.

Taking into account the right of pre-emptive rights in the case of shared rights is also relative. By agreement of the parties, it can be established that the other shareholders have the right of pre-emptive rights during the sale of the share (second sentence of Article 959 of the Civil Code).[43]

According to Article 967 of the Civil Code, if upon cancellation of shared right, the thing held in common is allocated to one of the part shareholders, then each of the remaining part owners shall be liable, pro rata to his/her share, in the same manner as a seller is liable for a legal or material defect in a thing. For a benefit to be attributed to a person, legal obligatory (and not by property law) "transfer" (it means reaching an agreement – M.B.) is enough. Accordingly, the "allocation" established by Article 967 of the Civil Code of Georgia exists when the benefit legitimately passes to the recipient. In addition, when distributing equal shares, distribution can be made by drawing lots among shareholders (Article 963 of CCG). Therefore, if the object is subject to division according to the rules of the law or in accordance with the intent of the testator, the obligation legal order will arise in the first place, before the property good is transferred according to the rules. [44]

4.3. Internal Relations

The common interest of the sharers is not limited to the possession of shared objects. It creates a special legal relationship between the sharers, which is reflected in Article 955 of the Civil Code. Here, the relationship arising from the specific internal shared ownership is understood: since the external relationship, in the sense of Article 953 of the Civil Code, does not mean the authority over the shared ownership. In this case, the plurality of persons determines the internal relations arising from co-ownership with the help of this unity. Therefore, the person who conferred the right to possess of a shared object trusts other persons who can transfer ownership of the property based on a fiduciary relationship. It turns out that an independent owner owns a common object partly for himself and partly for another.[45]

Only the unit of shares constitutes a full right, which is why all acts of disposal must be carried out by agreed decision.[46]

In addition, the first part of Article 955 of the Civil Code should be considered as an obligation law provision that establishes the internal relations of the participants, such as the distribution of the fruits of a shared object. The content of this provision should be the requirement considered in obligation law. If, according to the second part of Article 955 of the Civil Code, a co-sharer can use the shared object without the prior consent (permission) of the other co-sharer, the provisions of Article 955 of the Civil Code should prohibit him from taking the fruit without the consent of the other

---

43 See Decision № As-646-607-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia dated June 30, 2011 (in Georgian).

44 *Eberl-Borges C.,* Die Erbauseinandersetzung, Tübingen, 2000, 435-436.

45 *Schmidt K*., Das Gemeinschaftskonto: Rechtsgemeinschaft am Rechtsverhältnis – Eine rechtsdogmatische Skizze zu den §§ 421, 427, 428, 432, 705 und 741 BGB, In: "Festschrift für Walther Hadding zum 70. Geburtstag", herausgegeben von *Häuser F., Hammen H., Heinrichs J., Steinbeck A., Siebel U. R., Welter R.,* Berlin, 2004, 1097.

46 See *Filatova U.B.*, Institute of common property law in the countries of the Romano-Germanic legal family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 388 (in Russian).

co-sharers. Accordingly, under Articles 956 and 957 of the Civil Code, the acceptance of the fruit is always in the scope of subject management.[47]

Shared nature and common management of shared property is explained by the fact that in the sense of the first part of Article 170 of the Civil Code, the second part of Article 956 of the Civil Code bases collective powers on the principles of common ownership. According to the second part of Article 956 of the Civil Code, the co-owner has the right to use the object in the same way as an independent owner only under the conditions that he does not harm the benefits of other co-owners. If the right of another co-owner is violated, then the right to joint use is blocked. The second part of Article 956 of the Civil Code, on the implementation of necessary measures, applies to the maintenance of the subject. The above applies the individual right of a person, and not the right that an individual co-sharer uses for the unity of co-sharers. Thus, the right established in the second part of Article 956 of the Civil Code differs from the authority to carry out other people's affairs without the existing assignment in the sense of Article 969 of the Civil Code.[48]

Simultaneously, each sharer can use the shared object in a way that does not harm the benefit of the other co-sharers (the second part of Article 955 of the Civil Code). Shared rights in this form stipulate the general rule of prohibition of the abuse of the right, which prohibits usage the right only to harm a third party.[49] The main thing is that when the second part of Article 955 of the Civil Code defines the internal relationship of the co-owners, which includes the modified right of use of the owner established by the first part of Article 170 of the Civil Code, the decision can be made only in agreement with the other co-sharers. A sharer who transfers the object of use to a third party for lease is equal to the owner, who can independently use his right. This may concern the leasing of the object to a third party.[50]

Internal relations between co-owners are not absolute but relative. For the realization of the right by the co-owners, the formation and expression of their common, unified will require reaching an agreement directly between the co-owners regarding these or other issues, for example, on the use and disposal of common property. Thus, during such an agreement, obligatory legal relationships arise between co-owners.[51]

4.4. Personal Nature

Obligatory law regulates relations between persons regarding “personal” rights arising from contract, tort, unjust enrichment, or other basis established by law. It is possible that a personal right is challenged only against a certain person, and only a specific person can file a claim. The “personal” nature of the right is also expressed in the fact that the right cannot be realized without the person (debtor), and between the right and the thing stands the debtor's autonomous will, action, on which the

47 *Schnorr R.*, Die Gemeinschaft nach Bruchteilen (§§ 741-758 BGB), Tübingen, 2004, 204

48 See *Schnorr R.,* Die Gemeinschaft nach Bruchteilen (§§ 741-758 BGB), Tübingen, 2004, 224-225

49 On the misuse of the right, see *Chanturia L.*, General part of civil law, Tbilisi, 2011, 108-110 (in Georgian).

50 *Schnorr R.,* Die Gemeinschaft nach Bruchteilen (§§ 741-758 BGB), Tübingen, 2004, 175.

51 Civil law in 4 volumes, Vol. II, Property law, Inheritance law, Exclusive rights, Personal Non-property Rights, Textbook, ed. *Sukhanova E. A.*, 3rd ed., M., 2006, 119 (in Russian).

existence of the right directly depends.[52] Even in co-ownership rights, the internal relationship of the shareholders has a personal character. In the case of common shared ownership, it refers to the unity of persons (and not around the property).[53] In this unit, a personal legal relationship arises in which it looks like a legal entity. Based on this, according to some opinions, the governing norms of the union are applicable in this situation.[54]

The "personal" character of the right is reflected in the powers of ownership, use, and disposal of joint property of the spouses, the exercise of rights which is based on mutual agreement (Article 1159 of the Civil Code). The use of co-ownership by a co-owner includes the pledging of the common property in an agreement with other co-owners or encumbrance in favor of his interests (the second part of Article 173 of the Civil Code). For example, if a person takes a loan from the bank and uses a jointly owned car as collateral, the mortgagors of the property will become co-owners.[55]

According to Article 1159 of the Civil Code of Georgia, spouses have equal rights to jointly-owned property. Spouses should own, use and dispose of such property by mutual agreement. According to Articles 50 and 1160 of the Civil Code, the confirmation of the other spouse is needed to dispose of the property. According to the first part of Article 1160 of the same code, when disposing of the common property of the spouses, a mutual agreement of the spouse is required, regardless of which spouse disposes of the said property. In the absence of such an agreement, if one of the spouses disposes of the common property, such disposal will be considered against the law (Article 54 of the Civil Code). In addition, according to the second part of Article 1160 no transaction made by one of the spouses in connection with the administration of the matrimonial property may be declared void upon request of the other spouse on the ground that: a) he/she had no knowledge of the transaction; b) he/she disagreed with the transaction. Accordingly, when the interest of the co-owner spouse conflicts with the interests of the bona fide acquirer of co-owned property, the law considers the bona fide acquirer more worthy of protection, because the presumption is that spouses agreed to the will expressed by the other. The basis of this legal presumption is the family attitude of the spouses, directly the status of wife and husband. In addition, when one of the spouses disposes the common property, this action implies that the other spouse will have the same rights and obligations.[56]

---

52 *Todua M.,* Some features of the application of the norms regulating the obligation law relations according to the Civil Code of Georgia, in the book: "Obligatory Law", ed. *Khvralashvili Kh.*, Tbilisi, 2006, 8 (in Georgian).

53 *Filatova U.B*., Institute of common property law in the countries of the Romano-Germanic legal family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 388 (in Russian).

54 *Staudinger von J.*, Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen, München, 2007, § 741 ff. Rz. 24.

55 See *Zoidze B.*, Georgian property law, 2. Ed., Tbilisi, 2003, 103-104 (in Georgian).

56 See *Bichia M.,* Characteristics of the Regime of Spouses' Material Relationship according to the Practice of Georgian Courts, Journal "Justice and Law", № 1, 2019, 89-90 (in Georgian).

4.5. Request Performance

The fate of the infringed right (or the dispute) depends on whether this right is property or obligatory. The interests of the authorized person **in property relations can be satisfied at the expense of the beneficial character of item, but in obligatory legal relations** – through the implementation of actions determined by the debtor. The point is that the actions of the participants in obligatory and property legal relations are regulated in different ways.[57]

In contrast to the property relationship in the **obligation-legal relationship, the debtor performs an active action** and brings material benefit to the authorized person. Property legal relations are realized by the action of the authorized person himself. His legal interest will be fully satisfied if no one opposes his behavior. [58] For example, according to Article 960 of the Civil Code, each co-sharer is responsible for the expenses related to the shared object in proportion to the other co-sharer. According to Article 965 of the Civil Code, **the co-sharers are joint debtors, and if one of the co-sharer fully covers the costs of property maintenance, he has the right to claim a proportional part of the expenses.** This right, in turn, has a relative nature.

4.6. Interconnection of Co-sharers' Interests

It is also significant that the interest of one participant is tied to the interests of other participants. The interdependence of the interests of the participants can be explained with the help of the use of the shared object, management, cancelation of the shared right, and other aspects.

Usually, when another co-owner is damaged during the use of the shared object defined in the second part of Article 955 of the Civil Code, the liability arises only under Article 992 of the Civil Code. Here arises the anti-infringement (preventive) function. **The co-owner must use the shared object that it does not harm the other co-sharer, since he does not have the right of ownership over this object**, but only the right of legal use with the obligation legal relationship. Therefore, if the co-owner arbitrarily treats the object as the owner general liability arises according to Article 992 of the Civil Code.[59]

The legislator has linked the rules of decision-making on the management and use of the common object to the interdependence of the interests of the co-sharers. The point is that the co-sharers jointly participate in the management of the shared object taking into account the proportionality of the shares. According to the first part of Article 957 of the Civil Code, the decision on the running and use of the features of the shared object is made by the majority of votes, which is determined according to the shares. The vote of the co-sharers is determined in proportion to the

---

57 *Todua M.*, Some Features of the Application of the Norms Regulating the Obligation Law Relations according to the Civil Code of Georgia, in the book: "Obligatory Law", ed. *Khviralashvili Kh.,* Tbilisi, 2006, 8 (in Georgian).

58 See *Kobakhidze A.,* Civil Law, I, General Part, Chapter, 2001, 102-103 (in Georgian).

59 See *Schnorr R.*, Die Gemeinschaft nach Bruchteilen (§§ 741-758 BGB), Tübingen, 2004, 185-187.

shares. For instance, when the car is owned by more than one person, they can govern the days of use of the car for each co-sharer, or other rules for its use.[60]

If the co-sharers do not agree on the management and use of the shared object, **each co-sharer has the right to demand the use of shared objects within the rational consideration of other co-sharers interests. In addition, this use should not lead to a reduction in co-sharers right to use the shared object;** The share of the co-sharers can be reduced only with his consent (parts two and three of Article 957 of the Civil Code).

Therefore, co-owners enjoy the shared property equally, unless there is a different agreement between the co-sharers. The legislation does not recognize the restriction of the use of the property without proper justification. In a specific case, objective circumstance does not exist that would give the defendant the right to use the property in common ownership, not as a co-owner, but individually, only for his interests.[61]

According to court practice use of a shared object may limit the legal interest of other co-owners of this object to enjoy the common property (Part 2 of Article 955 of the Civil Code). Therefore, the freedom to use the thing is limited. The reason is the existence of other co-owners and consideration of their interests.[62] The contractual burden of the owned thing for the benefit of another person should not destroy the right of ownership (Articles 170 and 961 of the Civil Code). In addition, the agreement of parties concerning the method of using real estate (land) does not cancel or change the regime of acquiring ownership rights to real estate. For determining the ownership rights of the parties, preference is given to the record of the public register.[63]

As for the cancellation of the share right, it also has obligatory legal content[64] because it is related to the interests of the co-sharers.

According to court practice, *cancellation of the shared right by division of item causes co-ownership to be transferred to the regime of individual ownership. It is not allowed to divide the shared object that the legal regime of individual ownership applies to one part, and the regime of common ownership applies to the other part*.[65]

Sharer can protect the ownership by canceling the share right. According to the definition of the Supreme Court of Georgia, by law, the shared right belongs to the category of legal obligations. The rights and duties of the co-sharers are derived from the law, and, therefore, the relationships between them are also regulated by the law. The only restriction for the exercise of this right is that the right of

---

60 See Decision № As-547-517-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia dated June 16, 2011 (in Georgian).

61 Decision № As-1169-1098-2012 of the Civil Affairs Chamber of the Supreme Court of Georgia of November 8, 2012 (in Georgian).

62 Decision № As-336-321-2015 of the Civil Affairs Chamber of the Supreme Court of Georgia dated June 24, 2016 (in Georgian).

63 Decision № As-496-472-2013 of the Civil Affairs Chamber of the Supreme Court of Georgia dated January 9, 2014 (in Georgian).

64 *Staudinger von J.*, Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen, München, 2007, 350.

65 Ruling № As-41-41-2016 of the Civil Affairs Chamber of the Supreme Court of Georgia of July 4, 2016 (in Georgian).

the co-sharer to cancel the ***shared property must not affect the destructively of the other co-sharer's property rights****. Therefore, according to Article 963 of the Civil Code,* ***cancellation of the shared right by division in kind is allowed, only if the shared object is divided (1) into uniform parts and (2) this is done without reducing the value****. It is not allowed to cancel the share right if the property rights of all participants are not in line with their ideal share. The separation of the ideal share of only one co-owner in such a way that only his interests (the state before the division of the shared object) are protected does not justify the cancellation of the shared right by division in kind in the context of Article 963 of the Civil Code, when the* ***condition (value) of the ideal share of other co-owners is not preserved****.*[66] *Both cases imply that the object separated in kind should not lose the purpose it had before the separation. This object should not be deprived of the function that it performed for the owner. Equal shares will be distributed among the co-sharers by voting.*[67]

According to the dominant theory in Germany, the authority derived from ***the share is a property legal relation one, and the unity of the shareholders creates an obligation-legal relationship****. Thus,* ***the share is in the field of commercial law, and the unity is an obligation-legal relationship.*** *Within the framework of this unity, the powers to use the shared object, established by Part 2 of Article 955 of the Civil Code, and the powers to cancel the shared right reflected in Article 963 of the Civil Code have a obligation-legal nature.*[68]

Therefore, ***the external relationship, in which the co-owners appear as one whole, is an absolute property relationship, while the internal relationship between the co-owners*** *has an obligation-legal character. Ultimately, the relationship arising from fractional ownership (ie, fractional shared rights) in common property is an absolute-relative relationship. This proves the ambiguity of fractional property. Therefore, it is considered a mixed legal relationship.*[69] *The concept of relativity of property powers and requirements within the framework of shared rights is not new.* ***It is traced to Englander, according to which the right to share is a constituent part of the share of the particular shareholders. Therefore, shared right includes "quasi-absolute", "limited absolute" or "relatively property" authority****.*[70]

Thus, the dualistic approach to the legal nature of shared rights is due to the non-uniform attitude to the main essence of ownership, namely, the fact that it is manifested in property and obligation-legal relations. Shared rights reflect the obligation-legal aspects of ownership that arise on the basis of the law.

---

66 Decision № AS-1977-2018 of March 22, 2019 of the Civil Affairs Chamber of the Supreme Court of Georgia (in Georgian).

67 Decision № As-332-309-2010 of the Civil Affairs Chamber of the Supreme Court of Georgia dated October 28, 2010 (in Georgian).

68 *Larenz K.,* Lehrbuch des Schuldrechts II, 13. Aufl. München, 1994, 375; *Schnorr R.*, Die Gemeinschaft nach Bruchteilen (§§ 741-758 BGB), Tübingen, 2004, 7; Filatova U.B., Institute of common property law in the countries of the Romano-Germanic legal family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 143 (in Russian).

69 *Filatova U. B.*, Institute of common property law in the countries of the Romano-Germanic legal family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 387-388 (in Russian).

70 *Engländer K*., Die regelmäßige Rechtsgemeinschaft, Teil 1., Grundlegung II Anhang, Berlin, 1914, 209.

5. Conclusion

According to the study, it is difficult to determine the legal nature of shared rights. Since it concerns, on the **one hand, the external relationship arising from the share, and on the other hand, the internal fiduciary relationship between the shareholders, which is relative**.[71]

In the beginning, it is important **to note that the origins of shared rights derive from common property, which belongs to property law.** Accordingly, it is natural that the shared right contains certain elements of the property law, although in the obligation law it changes in content and acquires other signs. This, in turn, conditions the spread of the signs of obligatory law relationship concerning the obligation arising from shared rights. Also, the scope of shared rights is wide and is not limited to property or obligatory law relations; It can be found in any civil law relationship.

It was determined that the internal fiduciary relations between the **shareholders are regulated by the norms on shared rights, which are relational and personal in nature**. In this relationship, the request is fulfilled by the active action of the debtor, **and the actions of the co-sharer are binded by the interests of other co-sharers**. Considering these signs, the legislator placed co-ownership rights in the private part of the obligation law – in the statutory obligations part. In addition, the legal basis of the obligation law relations of shared rights is reflected in the mutually agreed management and disposal of the shared object, in not allowing the share of the sharer to be reduced, in the use of the shared object without harming the benefits of other participants, in-kind cancellation of shared right into uniform parts of the object and by dividing it without reducing the value. Violation of these rules generates specific legal consequences and is associated with neglecting the interests of co-sharers.

The study made it clear that if the protection of the interests of the co-sharers is defined directly, this internal relationship has an obligation-legal character, and in the relationship of the participants with third parties, the case concerns an absolute (property) legal relationship. Therefore, whether there is an internal relationship between the co-sharers or an external relationship between the co-sharers with third parties, the specifics of this relationship can be easily established. This helps to identify which field of civil law provisions is applicable – norms of property or obligation law.

Bibliography:

1. Civil Code of Georgia, 26/06/1997 (in Georgian).
2. *Akhvlediani Z.*, Obligatory Law, second edition, Tbilisi, 1999, 251-252 (in Georgian).
3. *Bichia M.*, Legal Obligational Relations, Tbilisi, 2016, 44 (in Georgian).
4. *Bichia M.*, Legal Obligational Relations, 2nd ed., Tbilisi, 2018, 58 (in Georgian).
5. *Bichia M.*, Characteristics of the regime of spouses' material relationship according to the Practice of Georgian courts, Journal "Justice and Law", № 1, 2019, 89-90 (in Georgian).

[71] See *Bichia M.,* Several Aspects of Establishing the Ontological Nature of Shared Rights (Analysis of Theory and Practice), Proceedings of the XVIII International Scientific and Practical Conference "Social and Economic Aspects of Education in Modern Society", Warsaw, October 28, 2019, 54-57.

6. *Willems H.*, Comparative Analysis of Georgian and Dutch Obligatory Law, in the book "Obligatory Law", ed. Khvralashvili Kh., Tbilisi, 2006, 97 (in Georgian).
7. Zoidze B., Georgian Property Law, second edition, volume, 2003, 102, 103-104. (in Georgian).
8. *Todua M.*, Some peculiarities of the application of the norms regulating the obligatory relations according to the Civil Code of Georgia, in the book: "Obligatory Law", ed. Khvralashvili Kh., Tbilisi, 2006, 7-8 (in Georgian).
9. *Kobakhidze A.*, Civil law, I, General Part, chapter, 2001, 102-103 (in Georgian).
10. *Kropholler I.*, The German Civil Code – Educational Commentary, edited by F. Jacob and M. Von Hinden, 13th edition, translators: Darjania T., Chechelashvili Z., Tbilisi, 2014, 301-302 (in Georgian).
11. *Surguladze I.*, Government and Law, translator: Gamkrelidze O., Tbilisi, 2002, 110 (in Georgian).
12. *Shotadze T.*, Comparative Analysis of the Norms Governing Common Ownership and Shared Rights according to the Civil Code of Georgia, Law Journal, № 2, 2009, 19-20 (in Georgian).
13. *Chanturia L.*, General part of civil law, Tbilisi, 2011, 108-110 (in Georgian).
14. Ruling № As-600-2019 of the Civil Affairs Chamber of the Supreme Court of Georgia dated November 14, 2019 (in Georgian).
15. Decision № AS-1977-2018 of March 22, 2019 of the Civil Affairs Chamber of the Supreme Court of Georgia (in Georgian).
16. Decision № As-41-41-2016 of the Civil Affairs Chamber of the Supreme Court of Georgia of July 4, 2016 (in Georgian).
17. Decision № As-336-321-2015 of the Civil Affairs Chamber of the Supreme Court of Georgia of June 24, 2016 (in Georgian).
18. Decision № As-496-472-2013 of the Civil Affairs Chamber of the Supreme Court of Georgia dated January 9, 2014 (in Georgian).
19. Decision № As-1169-1098-2012 of the Civil Affairs Chamber of the Supreme Court of Georgia of November 8, 2012 (in Georgian).
20. Decision № As-881-924-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia dated November 15, 2011 (in Georgian).
21. Decision № As-649-610-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia dated October 4, 2011 (in Georgian).
22. Decision № As-646-607-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia of June 30, 2011 (in Georgian).
23. Decision № AS-547-517-2011 of June 16, 2011 of the Civil Affairs Chamber of the Supreme Court of Georgia (in Georgian).
24. Decision № As-332-309-2010 of the Civil Affairs Chamber of the Supreme Court of Georgia dated October 28, 2010 (in Georgian).
25. BGB, Ausfertigungsdatum: 18.08.1896, zuletzt geändert durch Art. 2 G v. 21.12.2021 I 5252.
26. *Bichia M.*, Several Aspects of Establishing the Ontological Nature of Shared rights (Analysis of Theory and Practice), In: Proceedings of the XVIII International Scientific and Practical Conference "Social and Economic Aspects of Education in Modern Society", Warsaw, October 28, 2019, 54-57.
27. *Baur F., Stürner R.*, Sachenrecht, 18. Auflage, München, 2009, § 3 Rn. 25 ff.
28. *Engländer K.*, Die regelmäßige Rechtsgemeinschaft, Teil 1., Grundlegung II Anhang, 1914, 209.
29. *Eberl-Borges Chr*., Die Erbauseinandersetzung, Tübingen, 2000, 435-436, 455.
30. *Fikentscher W., Heinemann A.*, Schuldrecht, 10. Auflage, Berlin, 2006, 365, 372.

31. *Kirkpatrick Me J., Stuhler E., Francois H., Cosciani C., Fantozzi A., Gloden Me Joseph, Van der Heyde M.*, Steuervorschriften für die überbetriebliche Zusammenarbeit oder Fusion landwirtschaftlicher Betriebe, II. BR Deutschland, 84, Februar, 1972, 6.
32. *Klein-Blenkers Fr.*, Rechtsformen der Unternehmen, Köln, 2009, 184.
33. *Klunzinger E.*, Grundzüge des Gesellschaftsrechts, 16. überarbeitete und erweiterte Auflage, München, 2012, 17.
34. *Kübler F., Assmann H.-D.*, Gesellschaftsrecht, Die privatrechtlichen, Ordnungsstrukuren und Regelungsprobleme von Verbänden und Unternehmen, 6.Auflage, Lehr- und Handbuch, Heidelberg, München, Landsberg, Berlin, 2006, 1, 29.
35. *Larenz K.*, Lehrbuch des Schuldrechts II, 13. Aufl. München, 1994, 375.
36. *Schmidt K.*, Das Gemeinschaftskonto: Rechtsgemeinschaft am Rechtsverhältnis – Eine rechtsdogmatische Skizze zu den §§ 421, 427, 428, 432, 705 und 741 BGB, In: "Festschrift für Walther Hadding zum 70. Geburtstag", herausgegeben von Häuser F., Hammen H., Heinrichs J., Steinbeck A., Siebel U. R., Welter R., Berlin, 2004, 1097.
37. *Schmidt K.* in: Müko-BGB, 7. Auflage, 2017, § 741, Rn. 8.
38. *Schmidt K.* in: Müko-BGB, 6. Auflage, München, 2013, § 742, Rn. 1, 3, 4.
39. *Schnorr R.*, Die Gemeinschaft nach Bruchteilen (§§ 741-758 BGB), Tübingen, 2004, 8, 175, 177-178, 185-187, 224-225, 228-229, 232.
40. *Staudinger von J.*, Proff v., BGB, 2015, § 741, Rn. 6.
41. *Staudinger von J.*, Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen, München, 2007, 350, § 741 ff. Rz. 24.
42. *Staudingers von J.*, Kommentar zum BGB mit Einführungsgesetz und Nebengesetzen, Neubearbeitung von Engel N., Langhein G-H., Mayer J., Berlin, 2008, § 743, Rn. 34.
43. *Staudinger von. J.*, *Langhein G.-H.,* Kommentar zum BGB, Berlin, 2008, § 741, Rn. 59, 256, § 742, Rn. 1.
44. BGH GRUR 1979, 540 (LS 2, 541) – Biedermeiermanschetten.
45. *Alexandrov N. G.*, Legality and legal relations in Soviet society, M., 1955, 108-109 (in Russian).
46. *Bratus S. N., Ioffe O. S.*, Civil Law, M., 1967, 41 (in Russian).
47. Civil law, In 4 volumes, Vol. II, Property law, Inheritance law, Exclusive rights, Personal non-property rights, Textbook, Ed. *Sukhanova E. A.*, 3rd edition, M., 2006, 117, 119-120 (in Russian).
48. *Filatova U.B.,* Institute of Common Property Law in the Countries of the Romano-Germanic Legal Family (Germany, Austria, Switzerland, France and Russia: Comparative Legal Research), M., 2015, 142-143, 211, 329-330, 334, 385, 387-388 (in Russian).

Ekaterine Kardava*

Summing of Worker's Working Times with different Employers by an Employee – as an Infringement of Freedom of Parallel Employment and Illegal Processing of Personal Data

In the modern labor market, parallel employment of a person in different businesses is an opportunity to mitigate the economic dependence on only one employer and manage own welfare life. In 2019, the EU Labor Directive 2019/1125 on Transparent and Predictable Working Conditions, legally strengthened the freedom of an employee to work with different employers in case of will. Restriction of this freedom is allowed only in reasonable and precisely defined cases.

The article explains the legal norm of the Labor Code of Georgia regulating parallel employment. Some wrong Georgian practices between competitors (employers) are criticized. In order to use the norm in a uniform and good sense, in order to understand the real purpose of parallel labor freedom, the models of European legal regulations, the provisions of 2019/1125 directive, and various laws/norms of Georgia are synchronized and analysed.

Keywords: *Parallel Employment, Labour, Competition, EU, Directive, Labour Code of Georgia.*

1. Introduction

Millions of employees in the European Union (hereinafter – the EU) are bound by a contractual provision – not to work with another employer (non-compete clauses). Employees are fully dependent on sole employer. This form of exploitation has been paid attention by the European Commission and the issue has become subject to special regulation by Directive 2019/1125.[1] Employees, in case of they wish, should have the opportunity to work more, find other jobs, improve their welfare, receive other income/remuneration than from only one employer. The results of the study show that only a small number of people in Europe (zero-hour/on-demand contract workers) are able to work in parallel, because of the fact that they are bound by excessively restrictive/prohibitive contractual conditions.[2]

* Doctor of Law, Associated (Affiliated) Professor of the Caucasus University, Professor of the Gori State Teaching University, Visiting Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law.

1 *Georgiou D.,* The New EU Directive on Transparent and Predictable Working Conditions in the Context of New Forms of Employment, European Journal of Industrial Relations, <https://journals.sagepub.com/doi/full/10. 1177/09596801211043717> [14.11.2022].

2 Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union, European Commission, 21/12/2017, 70, 204-205, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0478&from=EN> [14.11.2022].

According to Directive 2019/1125 on Transparent and Predictable Working Conditions[3], parallel employment[4] cannot be prohibited. Limitation of parallel work with another employer is allowed only in reasonably exceptional and foreseeable cases.

The Labor Code of Georgia (hereinafter – Labour Code) regulates the aspects of parallel work. But there is no consensus on the uniform interpretation of norms. In order to make a healthy and proper use of norms and avoid excessively restrictive practices, it is important to study two legal aspects:

1. When (by what criteria) the freedom of parallel work will be restricted?
2. Is it permissible for an employer to combine the working hours of the employee with other/different employers?

In order to research the above-mentioned issues (and answer the questions), the article reviews the relevant provisions of the EU Directive 2019/1125, the legal regulation models of some EU member states, and the legal norms of Georgia.

Via using methods of description, formal-legal, analysis and synchronization, by this article, the author offers such an interpretation of Labour Code norms, which will serve the development of the theory and practice of Georgian labor law, will not worsen the work conditions of employees (the weak part of the contract) and, at the same time, will protect the employer's economic interests in the field of competition.

2. EU Labour Law and European National Legal Regulations on Parallel Employment

According to the Annex XXX of the Association Agreement[5] Georgia should meet the obligation of transposition of the EU directive 91/533 into national legislation. Currently, this directive is annulled[6] and based on the Dynamic Approximation principle[7], Georgia is obliged to approximate the new 2019/1125 directive on Transparent and Predictable Working Conditions.[8] According to article 9 of the directive:

---

3 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/ PDF/?uri=CELEX:32019L1152&from=EN> [14.11.2022].

4 In some sources/literature it is named as Second Job.

5 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 27.06.2014, <https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02)> [14.11.2022].

6 *Kardava E.,* Interpretation of the Trial Labou in Georgian Case Law and EU Directive 2019/1125, Case Law Analysis, № 1, Caucasus University, 2021, 30 (in Georgian).

7 See, article 418 of the Association Agreement and its interpretation in the following sources: *Kardava E.,* Georgian Labour Law Reform in terms of Requirements of European Integration and Association Agreement, dissertation, Tbilisi State University, 2018, 21-36, <http://press.tsu.ge/ data/image_db_innova/Eka%20Kardava.pdf> [14.11.2022] (in Georgian); *Kardava E.,* Legal Approximation – Guidline Principles, the Parliament of Georgia, association "European Time", Fridriech Ebert Stiftung, 2017, <https://web-api.parliament.ge/storage/files/shares/sascavlo-centri/resursi/booklet-legal-approximation-26-11-17.pdf> [14.11.2022] (in Georgian).

8 Directive (EU) 2019/1152 Of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1152&from=EN> [14.11.2022].

1. Member States shall ensure that an employer neither prohibits a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so.
2. Member States may lay down conditions for the use of incompatibility restrictions by employers, on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests.

The EU adopted a new directive in 2019. Annulled Directive 91/533/EEC has been repealed with effect from 1 August 2022. So, from this date, the new directive's provisions are applicable. During this period, EU member states had the obligation to transpose the directive into national law. In 2027, the European Commission will prepare a first report and examine the impact of the new norms on micro, small and medium-sized enterprises and, where necessary, propose further legislative amendments.

The explanatory note of the 2019/1125 directive mentions that the modern labor market is characterized by non-standard/atypical labor relations, where more transparency and information are necessary. This also applies to parallel employment.[9]

Based on new directive, Employment Protection Act of **Sweden** was amended in 2022, according to which:[10]

- *The employer is not allowed to prohibit the employee to work with another employer during the employment period.*
- *However, a restriction is allowed if, 1. Working with another employer damages the performance of duties; 2. The other employer is a competitor of the employer and this causes harm to the employer; or 3. The employer is harmed in other ways.*
- *An employer must not put an employee at a disadvantage on the grounds that she/he works for another employer.*

According to the Employment Contracts Act of **Estonia** (which was amended in 2022 as well)[11]:

- *An employer may not prohibit an employee from working for another employer, unless the parties have concluded an agreement on a restraint of trade clause.*
- *Under an agreement on a restraint of trade clause an employee assumes the obligation not to work for the employer's competitor or not to engage in the same economic or professional activity as the employer.*
- *An agreement on a restraint of trade clause may be entered into if it is necessary for protecting the employer's special economic interest, in maintenance of confidentiality of which the employer has a legitimate interest, especially if the employment relationship*

[9] Explanatory Memorandum for the Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, European Commission, 2021, 5.

[10] Article 6i, Lag (1982:80) om anställningsskydd (Employment Protection Act of Sweden), consolidated, 2022.

[11] Article 23, 24, Employment Contracts Act of Republic of Estonia, Consolidated version of 2022, <https://www.riigiteataja.ee/en/eli/ee/520062016003/consolide/current> [14.11.2022].

allows an employee to become acquainted with the employer's clients or access the employer's production and business secret, and the use of this knowledge may harm the employer considerably.

- *A restraint of trade clause must be delimited reasonably and recognisably for the employee in terms of space, time and objects.*
- *An agreement entered into in breach of the requirements provided in this section is void.*

According to the **Lithuania** Labour Code:[12]

- *The parties to an employment contract may agree that for a certain period of time, the employee will not perform certain job activities under an employment contract with another employer and will also not engage in independent commercial or industrial activities related to the functions of the job if these activities are in direct competition with the activities of the employer. This agreement may be concluded during the period of validity of the employment contract and/or after the employment contract has expired.*
- *Non-compete agreements may only be concluded with employees who have special knowledge or skills which can be applied at an enterprise, institution or organisation that is in competition with the employer, or in starting individual activities, thus harming the employer.*
- *A non-compete agreement must define the work or professional activities prohibited for the employee, the amount of non-compete compensation due to the employee, the non-compete territory, and the period of validity of the non-compete agreement.*

According to the **Bulgaria** Labour Code**:**[13][14]

- *An employee may, outside of working hours, enter into another employment contract with another employer, unless it is limited by an individual employment contract.*
- *Prohibition from working for another employer may be agreed upon only to protect trade confidentiality and/or avoid conflicts of interest.*

As EU member states faced new obligations from 2019, most of them have not yet completed the process of approximation with the new directive.[15] However, the examples presented above are enough to assess **the main features of the formation of the new European practice:**

1. Parallel work with another employer is recognized as a fundamental value and freedom. This, as such (with this content), is directly and obviously declared in both – the directive and the national norms. Only then, in logical continuity, admissibility clauses (on working with another employer) are followed by prohibitive/restrictive clauses.

---

12 Article 38, Republic of Lithuania, Law on the Approval, Entry into Force and Implementation of the Labour Code, 14 September 2016, xii-2603.

13 Articles 111-112, Labour Code of Republic of Bulgaria, Labour Code**,** Prom. SG. 26/1 Apr 1986, prom. SG. 27/4 Apr 1986.

14 Changes to Labour Code, Legal News, KPMG, <https://home.kpmg/bg/en/home/insights/2022/08/legal-news--changes-to-the-labour-code.html> [14.11.2022].

15 Current Status of the Implementation of EU Directive 2019/1152 by Member States, 17.08.2022, <https://cms.law/en/int/publication/current-status-of-the-implementation-of-eu-directive-2019-1152-by-member-states> [14.11.2022].

2. Cases of restriction of parallel work are limited. The member states of the EU approach the issue in different ways, but they are united by the principle – clearly and foreseeably define the scope of the restriction. The purpose of the restriction is not general prohibitIon of working with a competitor (in broad sense), but rather to prohibit the employee from working with a competitor that is harmful or threatens the protection of trade/industrial confidential information.
3. The restriction cannot be permanent and for everyone and in all fields of work. It is limited to specific employees (who have access to employer/industry specific information and therefore possess the skills and knowledge necessary to perform competitively), to a specific time and geographic area. The prohibition applies only in the field where protection is required by the special economic interest of the employer (mainly, where the production process and competition is based on commercial confidential information).
4. Employees, subject to restrictions, enjoy special trust from employers, and restrictions are balanced by contractual guarantees (including compensation/payment).

The regulation of parallel work and the contractual terms on competition protection are controversial in the modern world and still remain debatable. However, practice is developing in the direction that a balance should be achieved between the interests of employers and employees; restrictions are allowed, but the scope of restrictions of employees and compensation aspects are getting more transparent and precise.[16]

3. Parallel Employment Regulation in Georgia

Article 16(5) of the Labour Code regulates:

- *An employee's right to be employed for more than one full-time or part-time job may be restricted by an employment agreement if the person who is to be substituted is the employer's competitor.*[17]

The content of the above-mentioned article implies that the employee's freedom of labor is protected – to choose a contragent and enter into an employment contract with several employers at full and part-time jobs, except in cases when the employer is a competitor of the employer. However, compared to Directive 2019/1125 and the legal practices of EU countries, a) in Georgian law it is not directly and primarily declared a fundamental standard that parallel work cannot be prohibited and the employer cannot put the employee in a disadvantageous position due to working elsewhere; b) The scope/objectives of restriction of parallel work with the competitor are not detailed.

The wording and structure of the content of the Georgian norm is such that:

1. The top line/main accent has been shifted to the fact of allowing the restriction;
2. It is unlimited and does not make it transparent with which employee, in which field or in what volume the restriction is effective/applicable;

---

16 *Farrell C.,* Non-compete Clauses – Are they still Appropriate?, 27.07.2021, <https://parissmith.co.uk/blog/non-compete-clauses/> [14.11.2022].

17 Organic Law of Georgia "Labour Code of Georgia", 75, 27/12/2010.

3. It does not create the balancing statutory guarantees for the protection of the employee.

Despite the problematic/imperfect formulation of the norm and the failure to consider the new European standard, it is a positive case because of the fact that establishes the freedom of parallel work. Now, the main thing is that the purpose of the norm should not be diminished by the non-uniform interpretation and formation of subjective practices.

The goodness/merit of the norm can be undermined by such aspects as the employer's abuse of power and gaining such influence over the employee to start the request of information on labor relations with other employers and the summarize all working hours. This practice is especially used in the educational field in Georgia.

Labor contracts are binding instrument of private relations (under the regulation of Obligation Law as well). Labour contracts integrate only the individual will of two parties. The terms are agreed only between them (employer and employee). According to the Labor Code, the only employer is responsible for labor management (organizational regulation of labor). This is evidenced not only by theory, doctrine and common practice, but also by the fact that in case of violation of the requirements of the Labor Code, the responsibility rests with the employer; labor inspection monitoring is directed to only within the enterprise – how the employer performs labour standards established by law. Thus, the employer's liability is limited to the power which it has over the employees under own industry/enterprise/organization.

Consequently, the employer is entitled to seek and process only the information that is necessary for accountability and performance of established/agreed functions/terms by the employee. This, as well, includes the working time that is spent only within the framework of the employer's disposal. The employer has no right to invade the personal life/space of the employee, break the balance and start unjustified "chasing" – where and why the employee is doing after finishing the working day or performing the duties. [18] **Labor policy – checking the working conditions of employees under any circumstances – is only the prerogative of the government, not the private employer.**

It is a wrong opinion/approach – as if the employer, when requesting the information about the employee's working time with another employer, is taking care of the prevention of fatigue and the health of the employee. The care must be proven by several factors and actions: a) at least reduce the working time or functional load of the employee within the framework of own organization, labor management and individual labour contract; b) spend expenses for determining the state of health of employee and in case of a problem – spend money for his/her treatment; or c) increase the salary in order to compensate and relief the employee's work and conditions issued by working with different and many employers. In fact, no employer takes responsibility for the employee's work with another employer (even in case of overtired)!!! **There is only the request and process of information, without achieving beneficial results.**

Georgia experiences such a practice in the field of education[19]: an employer requests from the employee a certificate of only parallel working in another educational institution, not a certificate of

[18] Constitution of Georgia, articles 15(1), 26(1), 24.08.1995.

[19] Authorisation and Acreditation Practities, University Practices in Georgia.

work with any other employers. Such a situation is even more illogical than the above-described false concern/care about the employee's health. The example of Georgia clearly and publicly proves that advocates, judges, politicians, civil servants, persons employed in banking and other commercial sectors work in educational institutions as well. Despite of this fact, the educational institute (employer) is not interested in how many hours employees work with any other employers except educational bodies. Such an approach, based on which the employees are separated, is the unequal treatment without rational and objective justification. Consequently, the comparators (identical employees) are put at a disadvantage compared to the other employees (for example, a lecturer who works at 3 universities is at a disadvantage compared to a lecturer who holds a public position or works at bank sector). The legal standard related to equal treatment is violated. [20] This practice cannot be justified even by protecting the interests of the competitor, because it is not legally forbidden for a person to work in different educational institutions as a lecturer.[21] It is also necessary to take into account the legal nuance that the Labor Code is an organic law of Georgia which has a dominant power over other legislative acts (laws and by-laws) and has the monopolized nature of regulation labor and labour-related issues throughout the territory of Georgia. Even a special law cannot regulate a different approach, which will worsen the conditions of employees and which will promote unjustified restrictions – unjustified competition.

The employment contract and terms of employment relationship in the private sector are personal information of the employee. Thus, when an employer requests certificates from an employee about the work with another employers, it also violates the personal data protection legislation. [22] The

---

[20] Articles of Labour Code – 2.3, 4.1, etc.

[21] In the EU, the regulation of education policy remains within the competence of the member states. Thus, education regulating legislation is characterized by a national (and not common European) nature. However, European countries have long been trying to establish the European Higher Education Area/EHEA (<http://www.ehea.info/page-how-does-the-bologna-process-work> [14.11.2022]) and make the freedom of movement of education between countries more flexible. For this purpose, agreement on three main and fundamental aspects has already been reached (1. three-level education; 2. recognition of qualifications; 3. implementation of a quality assurance system (<https://education.ec.europa.eu/education-levels/higher-education/inclusive -and-connected-higher-education/bologna-process> [14.11.2022]). The Bologna process is very important as the governments of European countries try to jointly overcome the contradictions and problems that arise in the common space of higher education. Other countries also participate in the Bologna process. Thus, the Bologna process is an instrument for forum for dialogue with neighboring states in the field of higher education reform (especially the Eastern Partnership countries, Western Balkan countries, Turkey, etc.) The Association Agreement also testifies the fact that the field of education does not fall under the exclusive competencies of the EU: Education policy is presented under Title VI, Chapter 16, Annex XXXII of the Association Agreement. Here: 1. It is defined that Georgia is obliged to approximate with non-mandatory legislation of the EU (recommendations). An exception is Decision 2241/2004/EC of the European Parliament and of the Council of 15 December 2004 on a single Community framework for the transparency of qualifications and competences (Europass). 2. mandatory time-frame is defined for the implementation of obligations. In contrast to the aforementioned and in contrast to the field of education, in the field of labor law, Georgia has the obligation to approximate the EU mandatory and binding legislative acts (directives).

[22] Article 1 and others, Georgian Law on Personal Data Protection, 16.01.2012.

employer is abusing his power by forcing the employee to provide personal information. The result of such action can be a negative impact on the employee's freedom of labour, forcing him/her to leave parallel work, worsening the employees' conditions, etc.

The above-mentioned Georgian practice is extremely negative, it is used against the employee with an unjustified and demolishing imbalance. it should not be admissible for employer to restrict the employee's parallel work for various negative motives: manipulation by summarizing all working times with all employers, false care, unnecessary and ineffective processing of personal data, worsen of the employee's work-life balance and conditions, evil demonstration of the employer's power to force the employee to obey. All such actions and practices does not serve development, progress, protection of rights, positive outcomes for employees, and it is morally degrading, it does not carry the purpose of protecting the weak part, it is illegal.

4. Conclusion

The article touched the provisions of the EU Directive 2019/1125 regarding the freedom of parallel work of the employee, the latest legislative innovations of the EU countries regarding the issue, the model of legal regulation of Georgia and some vicious and negative Georgian practices.

The following conclusions were drawn: Georgian legal norm (article 16(5) of the labour code) requires legislative modification taking into account the EU standard or, within the framework of the current wording of the norm, it is essential ennoblement and improvement of practice **taking into account the following cumulative criteria:**

1. The employer may not prohibit the parallel work of the employee with another employer.
2. Limitation of parallel work is allowed in reasonable exceptional cases. Restriction cannot be unlimited. The restriction should not apply to all competitors in a broad sense. The restriction must be justified only by protecting the employer's special economic interests, where it may result in harm or breach of confidentiality.
3. Limitation of parallel work should not be permanent, should not apply to all employees, should not be used in all fields (especially in the field where there are no commercial and confidential information). The restriction must be balanced by offering guarantees to the employee, including compensation/payment.

It should not be allowed the development of such negative practices and such interpretation of legal norms as a result of which **the employer:**

1. Requests and collects information about the employee's working hours with other employers under the pretext of false care or competition. (Such a policy of the employer is not intended for the welfare of the employee or for improvement his/her situation. In fact, the employer neither cares about the health of the employee, nor pays for the summed working hours; the employer neither increases the salary in exchange for reducing work in other businesses, nor increases expenses for other needs of the employee, etc.).
2. Intrudes into the personal life of the employee, gains complete control over him/her (what and where he/she does), forces him/her to share such personal information that is not related to the individual employment contract, performance of duties and accountability

before the employer. This breaks the balance between the parties, which is used aiming to gain excessive influence over the employee, and thus the legal requirements are also violated.

3. Treats employees unequally based on place of employment, selects certain employees in order to request from them the certificates about parallel work and working hours, puts them at a disadvantage in comparison with other identical employees, and thus violates legal standards of equal treatment.

Labor policy – to study/evaluate the working conditions of employees in any workplace – is only the prerogative of the state/government and not of the private employer. If necessary, the labor inspection will investigate the situation of a specific employee. The power of the private employer is limited to the labor management of his own business/institution and the individual labor contract.

Bibliography:

1. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 27/06/2014.
2. Constitution of Georgia, 24/08/1995.
3. Organic Law of Georgia "Labour Code of Georgia", 27/12/2010.
4. Georgian Law "On Personal Data Protection", 16/01/2012.
5. Directive (EU) 2019/1152 Of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union.
6. Commission Staff Working Document, Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union, European Commission, 21.12.2017, 70, 204-205.
7. Employment Protection Act of Sweden, 2022.
8. Employment Contracts Act of Republic of Estonia, 2022.
9. Explanatory Memorandum for the Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, European Commission, 2021.
10. Labour Code of Republic of Bulgaria, 1986.
11. Republic of Lithuania, Law on the Approval, Entry into Force and Implementation of the Labour Code, 2016.
12. Changes to Labour Code, Legal News, KPMG, <https://home.kpmg/bg/en/home/insights/2022/08/legal-news--changes-to-the-labour-code.html> [14.11.2022].
13. Current Status of the Implementation of EU Directive 2019/1152 by Member States, 17/08/2022, <https://cms.law/en/int/publication/current-status-of-the-implementation-of-eu-directive-2019-1152-by-member-states> [14.11.2022].
14. *Farrell C.,* Non-compete Clauses – Are They still Appropriate?, 27/07/2021, <https://parissmith.co.uk/blog/non-compete-clauses/> [14.11.2022].
15. *Georgiou D.,* The New EU Directive on Transparent and Predictable Working Conditions in the Context of New Forms of Employment, European Journal of Industrial Relations, <https://journals.sagepub.com/doi/full/10.1177/09596801211043717> [14.11.2022].
16. *Kardava E.,* Interpretation of the Trial Labou in Georgian Case Law and EU Directive 2019/1125, Case Law Analysis, № 1, 2021, 30 (in Georgian).

17. *Kardava E.,* Georgian Labour Law Reform in terms of Requirements of European Integration and Association Agreement, Dissertation, Tbilisi State University, 2018 (in Georgian).
18. *Kardava E.,* Legal Approximation – Guidline Principles, the Parliament of Georgia, association "European Time", Fridriech Ebert Stiftung, 2017 (in Georgian).
19. <http://www.ehea.info/page-how-does-the-bologna-process-work> [14.11.2022].
20. <https://education.ec.europa.eu/education-levels/higher-education/inclusive-and-connected-higher-education/bologna-process> [14.11.2022].

Ketevan Kvinikadze*

The Operation of the So-called "Doctrine of Notice" in the Law of Bona Fide Acquisition of Immovable Property (Comparative analysis of Georgian, German and English law)

The same legal problem, as a rule, is regulated differently in different jurisdictions, but nevertheless, it is still possible to find a common point of contact in a number of issues, which comparative legal analysis helps us to determine what kind of regulation may be the most suitable for national law. One of these issues is the problem of "notice" in the law of bona fide acquisition of real estate, which is discussed in the present article on the example of three countries. Although these countries differ even in terms of the understanding of the right of ownership itself (meaning the difference with respect to English law), "notice" is crucial in all three of them as part of the assessment of the bona fide acquisition of a right to immovable property. Thus, a comparative study of the "notice" component provides an opportunity to draw valuable conclusions.

Keywords: *Immovable property, unauthorized alienator, purchaser in good faith, Actusal knowledge, possible notice.*

1. Introduction

The problem related to bona fide purchase of real estate is a subject of special regulation in all jurisdictions. The whole complexity of the issue lies in the fact that not two basic rights collide with each other, at which point the question of determining the superior one arises, but there is one basic right – the right to property – and two conflicting interests. Confidence in the authenticity of the right is based, first of all, on the good faith of the participants of the turnover, and only then on the artificial institutions created by the state. [1]

There are quite frequent cases when the buyer acquires the immovable thing based on the trust of the public registry from a registered unauthorized person, at which time he does not know that the alienator is not actually the owner of the thing. At such times, the question arises as to which of them should have priority protection in relation to the right of ownership – the purchaser of the thing or its real owner? For such cases, all legal systems have their own solutions – some give priority to the interests of the bona fide acquirer, which is explained by the argument of the stability of civil turnover, and others – to the real owner, which is justified by the old Latin maxim – "nemo plus iuris transferre potest quam ipse habet" (No one can give more rights than he himself has).

In terms of the circumstances excluding the bona fide acquisition of immovable property, each legal order sets different conditions, however, in any of them, the notice of the alienator's non-

* PhD Student, Invited Lecturer at Ivane Javakhishvili Tbilisi State University, Faculty of Law.

1 *Zoidze B*., Reliability of the Public Register and Bona Fide Acquisition of Real Estate in Georgian law, Journal of Comparative Law, #12/2021, 128 (in Georgian).

ownership excludes the bona fides of the purchaser and, accordingly, the acquisition of the ownership right. From this point of view, the comparative-legal research of the component of "notice" is interesting to the extent that its scope is different in legal systems – for example, German law includes only actual notice in "notice", while in Georgian law "notice" is extended by the obligation of "possible notice". As for English law, here notice is divided into three aspects, one of which fully corresponds to the "possible notice" standard in Georgian law. Based on this, I think it should be interesting and valuable to study one of the central issues of the institution of bona fide acquisition of immovable property on the examples of countries with a continental and common law system such as Germany and England, especially when the topic under discussion allows for the possibility of drawing certain conclusions by comparing it with Georgian law.

2. Purchase of Real Estate from Unauthorized Alienator

The institution of bona fide purchase of a thing, i.e. purchase from an unauthorized alienator, is characteristic of all legal systems, although the normative regulation of this institution is different. If the purchase is made from a non-owner, a conflict arises: The law considers the acquirer as the owner despite the defect in the right of the alienator, thus the real owner will be harmed by the transaction made behind his back if he refuses to the acquirer in the origination of the right to the acquired, which will already harm the acquirer.[2]

The approach of Georgian and German law in regulating the institution of bona fide acquisition of immovable property is similar, although it would be more correct to say that it was conceived in the same way. The approach of the general courts[3] and the decision of the Constitutional Court[4] made certain changes in the Georgian regulation of the purchase of immovable property from an unauthorized alienator, which is mainly related to the problem of "notice".

Both Article 312 (2) of the Civil Code of Georgia (hereinafter – SC) and Paragraph 892 of the German Civil Code (hereinafter – BGB) exclude the bona fide purchase of immovable property when a complaint is filed against the entry in the public register or the buyer knows that the alienator is not the owner. A registered complaint excludes the presumption of truthfulness and completeness of the public register and in this way hinders the possibility of a bona fide purchase,[5] that is, by registering a

---

2 *Prütting H.,* Sachenrecht, 34.Aufl., C.H. Beck München 2010, 50.

3 See Ruling of the Supreme Court of Georgia dated June 17, 2015 #AS-491-465-2015; Ruling of the Supreme Court of Georgia dated April 8, 2015 #AS-675-642-2014; Decision #2b/298-18 of the Tbilisi Court of Appeal of April 15, 2019; Ruling of the Supreme Court of Georgia dated December 25, 2007 #AS-524-869-07; Ruling of the Supreme Court of Georgia dated December 15, 2017 #AS-595-554-2017; Ruling of the Supreme Court of Georgia dated August 1, 2012 #AS-567-535-2012; Decision #AS-394-373-2013 of the Supreme Court of Georgia dated May 20, 2014.

4 See Decision #3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 on the case "Georgian citizen Nodar Dvali vs. Parliament of Georgia", <https://www.constcourt.ge/ka/judicial-acts?legal=1005> [25.08.2022].

5 *Chiuzi T.*, Analysis of the decision of the Constitutional Court of Georgia – "Nodar Dvali v. Parliament of Georgia" – analysis from the perspective of German law, Journal of Comparative Law, #1/2019, 3 (in Georgian).

complaint due to incorrect data in the land register, an obstacle is created for a bona fide purchase.[6] According to §892 of the BGB, the buyer's notice of the complaint is unimportant, because the latter, through registration in the public register, is necessarily reflected in the extract of the public register, which is why information about its existence is available to third parties.[7] Paragraph 892 of the BGB does not establish any additional condition to exclude the presumption, including the obligation of notice of the acquirer. A registered protest destroys the public trust in the public registry, even when the acquirer knows nothing about it.[8] The complaint provided for in Article 312 (2) of the Civil Code, despite its similar purpose, due to the lack of appropriate legislative regulation, is not effective in practice, which implies that it will not be included in the extract of the public register, thus it would acquire the force of universal validity. Because of this, the function of a registered complaint is taken over by the complaint and notice about it (Article 185 of the Civil Code), in which case publicity is achieved through personal information, and to protect the item from a bona fide purchase, as a rule, a claim security measure is applied, which, unlike a complaint, makes it impossible to make dispositional deals related to the item until the dispute is over.

Due to the not-so-perfect registration system and incomplete legislative regulation, the standard of "possible notice" appeared in Georgian law in relation to real estate, which calls for any potential acquirer to act within the framework of reasonable prudence. This had a direct impact on the content of the "notice" component, which is why it is now freely possible to say that Georgian law regulates the institution of bona fide acquisition of immovable property by the "possible notice" standard. This standard is also used in English law, where it is recognized as one of the aspects of notice that excludes the possibility of bona fide acquisition of an interest in unregistered land.

Despite the fact that Georgian law has created a peculiar model of the institution of bona fide acquisition of immovable property (it is possible to see similarities with all legal systems),[9] it remains committed to the principle of preferential protection of the interests of a bona fide participant in civil turnover, which means that, like German law, preference is given to the bona fide purchaser, and the right to claim damages from an unfair alienator is the claim of the real owner of the property. Unlike

---

6 *Wilhelm J.,* Sachenrecht, 6.Aufl., De Gruyter 2019, 2019, 364, Rn.599.

7 See *Sirdadze L.,* Complaint filed against the Entry of the Public Registry, Journal of Comparative Law, #1/2020, 11 (in Georgian).

8 *Kropholler I.,* German Civil Code, Educational Commentary, 13th revised edition, *Darjania T., Chechelashvili Z., (trans.), Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, 681, field 8 (in Georgian).

9 In terms of normative regulation, Article 312 (2) of the Civil Code repeats §892 of the BGB, however, in the "possible notice" part, it shows similarities with the Napoleonic Code (Italy, Spain), Scandinavia (Finland, Sweden, Norway), Eastern Europe (Poland) and common law system countries, as well as Austria, which is a country with a German legal system, however, it should be noted that the similarity with other legal system countries is not a result of reception, but a result of a correct consideration of a specific approach to the same problem. See *Pradi A.,* Transfer of Immoveable Property in Europe, From Contract to Registration, (ed.) *Pradi A.,* Universita degli Studi di Trento, 2012, 160-161, *Santisteban M.S.,* Transfer of Immoveable Property in Europe, From Contract to Registration, (ed.) *Pradi A.,* Universita degli Studi di Trento, 2012, 196-197, *Niemi M.I.,* Transfer of Immoveable Property in Europe, From Contract to Registration, (ed.) *Pradi A.,* Universita degli Studi di Trento, 2012, 86-89.

some countries, the Georgian Public Registry has been relieved of all responsibilities regarding the obligation to compensate for damages.[10]

3. "Notice" as an Exclusionary Circumstance for Bona Fide Acquisition

3.1. "Actual Notice"

According to Georgian and German law, actual notice is an exclusionary condition for bona fide acquisition of immovable property. In articles 185 and 312 (2) of the Civil Code, "notice" is expressed by the words: "the buyer knew", and in paragraph 892 of the Civil Code, "notice" is expressed by the wording – "known to the buyer". Therefore, if the acquirer knows that the transferor, who is registered as the owner, is not the real owner of the property, he cannot acquire the right of ownership based on the contract concluded with him, because actual notice excludes the possibility of a bona fide acquisition.

German law takes a strict approach to the assessment of "notice", in particular, "notice" includes only certain, confirmed notice about the non-ownership of the registered person and excludes the possibility of presuming any doubt or assumption in "notice".[11] Even the possession of specific information, which is related to the unauthorized person registered as the owner, cannot prevent a bona fide purchase, if this information is obtained from an unreliable source or is tender.[12] Even ignorance due to gross negligence does not constitute bad faith.[13] In contrast, according to the so-called "prudence protection standard" developed by the Georgian general courts, a bona fide acquisition will always be hindered if the acquirer does not use the opportunity to verify the information received by the transferor regarding the ownership and dispel doubts.[14] This is considered gross negligence of the buyer, which deprives him of the opportunity to keep the acquired with reference to bona fide.

It is worth noting the assessment related to the circumstances leading to the incorrect registered data. Under German law, there is no bad faith when the buyer is aware of the facts from which the wrongful act arises.[15] This assessment is not shared by the Georgian judicial practice, which develops reasoning regarding the fact that "notice of the inaccuracy of the record means notice of the

---

10 Include Swedish Land Book, 18:1 – 18:4, according to which both the real owner and the acquirer, if the relevant prerequisites are met, are guaranteed the right to compensation against the state for the loss of the right.

11 See *Ring G., Griziwotz H., Keukenschrijver A.,* BGB Kommentar, Sachenrecht, Band 3, 3. Aufl., Baden-Baden 2013, 225, Rn.57, *Wilhelm J.,* Sachenrecht, 6.Aufl., De Gruyter 2019, 2019, 435, Rn.725, *Soergel H.T., Stürner R.,* BGB Sachenrecht 1, Band 14, 13. Aufl., Kohlhammer, 2002, §892, 196, Rn.4.

12 See *Rusiashvili G.,* Analysis of judicial practice in case #AS-189-182-2013, January 16, 2014, 11-2/2020, Journal of Comparative Law #2/2020, 88-89 (in Georgian).

13 *Kropholler I.,* German Civil Code, educational commentary, 13th revised ed*., Darjania T., Chechelashvili Z., (trans.), Chachanidze E., Darjania T., Totladze L. (ed.),* Tbilisi, 2014, 681, field 11 (in Georgian); *Wilhelm J.,* Sachenrecht, 6.Aufl., De Gruyter 2019, 2019, 435, Rn.725; *Soergel H.T., Stürner R.,* BGB Sachenrecht 1, Band 14, 13. Aufl., Kohlhammer, 2002, §892, 204, Rn.4.

14 For judicial practice, see Decisions referred to in footnote 3.

15 *Soergel H.T., Stürner R.,* BGB Sachenrecht 1, Band 14, 13. Aufl., Kohlhammer, 2002, §892, 196, Rn. 4.

circumstances due to which the record is inaccurate".[16] In this matter, it is difficult to share the opinion of the German author, because if a person knows the facts that lead to the incorrectness of the registered data, then it turns out that he knows about the incorrectness, which directly leads to dishonesty, which excludes a bona fide purchase. Thus, when the buyer knows the facts from which the irregularity derives, it should be assumed that he knows about the irregularity itself, which these facts lead to.

The presumption of legality of the public register ceases to apply when the person has actual notice of the inaccuracy of the record.[17] Actual notice refers to the case when the buyer knows for sure that the person registered in the public register is not the real owner of the real estate. In addition, the buyer is not obliged to know who the real owner of the property is;[18] it is enough to know that the legal status declared in the register is inconsistent with the real situation. Paragraphs §§892-893 of the BGB also talk about the notice of wrongdoing, and not about the notice of the actual legal situation.[19] Article 312 (2) of the Civil Code shares a similar assessment of "notice", although only at the legislative level, because in practice, the assessment of "notice" in relation to real estate does not actually occur independently of the obligation of "possible notice", the reason for this is to establish a standard of "possible notice" with respect to bona fide real estate acquisition disputes.

3.2. The Scope of "Notice" in Georgian Law

3.2.1. "Knew or Could Have Known" Standard

According to the literal interpretation of Articles 185 and 312 of the Civil Code, the true owner of the real estate must prove that the purchaser knew about the alienator's non-ownership, which means that he must prove to the purchaser the notice of this fact, and not that he could have known it. Therefore, the acquirer is unfairly charged with notice, not the obligation of notice.[20]

According to the established judicial practice, certain corrections have been included in the scope of "notice", in particular, it is expanded with cases of "possible notice". The latter refers to the standard of behavior to be performed by the buyer within the framework of reasonable prudence, which reliably confirms that the buyer has insured all possible risks before purchasing the item.[21]

---

16 See Decision #AS-189-182-2013 of the Supreme Court of Georgia of January 16, 2014.

17 *Müller K., Gruber P. U.,* Sachenrecht, Verlag Franz Vahlen München 2016, 546, Rn.2795; *Ring G., Griziwotz H., Keukenschrijver A.,* BGB Kommentar, Sachenrecht, Band 3, 3.Aufl., Baden-Baden 2013, 225, Rn.57.

18 *Ring G., Griziwotz H., Keukenschrijver A.,* BGB Kommentar, Sachenrecht, Band 3, 3.Aufl., Baden-Baden 2013, 225, Rn.57.

19 *Müller K., Gruber P. U.,* Sachenrecht, Verlag Franz Vahlen München 2016, 547, Rn. 2803.

20 *Zoidze B.,* Reliability of the Public Register and Bona Fide Acquisition of Real Estate in Georgian law, Journal of Comparative Law, #12/2021, 132 (in Georgian).

21 For judicial practice, see #AS-1279-2019 of the Supreme Court of Georgia dated March 2, 2020; Decision #AS-1198-2019 of the Supreme Court of Georgia of June 25, 2021; Ruling of the Supreme Court of Georgia dated October 23, 2020 #AS-562-2020; Ruling of the Supreme Court of Georgia dated October 29, 2020 #AS-700-2020; Ruling of the Supreme Court of Georgia dated March 11, 2021 #AS-1387-2020; Decision #AS-394-373-2013 of the Supreme Court of Georgia dated May 20, 2014.

Acting within the framework of reasonable prudence is a given to be evaluated and it is determined taking into account the peculiarities of each specific case. For example, is it possible for a buyer to be considered in good faith when he buys a next-door apartment where family members of the real owner of the house still live?[22] For the buyer, inspecting the item for damage before purchasing it (even for the apartment next door), does not follow from Articles 185 or 312 (2) of the Criminal Code. Therefore, failure to carry out such an inspection according to the same articles does not cause dishonesty on the part of the acquirer, although the obligation to act within the scope of so-called reasonable prudence is established for the acquirer in accordance with the general norm-principle of bona fide, which implies the duty to perform such actions on his part, that with minimal effort and financial losses, makes it possible to investigate the legal status related to the real estate before purchasing it. Although such an obligation for the acquirer is not established by law, I think it should be justified in cases where there are certain circumstances that create reasonable doubts about the validity of the right. Although the public registry provides the buyer with information regarding the ownership right, but if there are suspicious circumstances, the verification of which requires minimal effort, they cannot be ignored and a decision cannot be made only on the basis of the public register sheet. Such a rigid approach does not correspond to a reasonable balancing of interests, when one party benefits from the presumption of legality of the registry, while the other is harmed by such a presumption. However, if the buyer has taken all measures to dispel these doubts, but later the right still becomes disputed, this cannot be the basis for recognizing him as in bad faith. At such a time he should keep the purchase. Ultimately, this approach avoids encouraging blatant indifference when the acquirer fails to take basic due diligence measures.[23]

Case law research has shown that in some cases the use of the standard of "possible notice" may lead to an unjustified limitation of the interests of a bona fide purchaser.[24] This mainly happens in disputes where the contract is concluded between close persons or relatives. The court considers such connections to be suspicious circumstances, which it sometimes associates with dishonesty of the

---

22 An example is taken from judicial practice, where the cassation court returned the case to the appellate court for reconsideration on the grounds that it did not fully assess the issue that the buyer could not have known about the dispute related to the right of ownership of the next-door neighbor's apartment. see Ruling #AS-1026-1219-08 of the Supreme Court of Georgia of July 3, 2009. see also, *Zarandia T.,* Bona fide purchase of immovable property from an unauthorized alienator in Georgian judicial practice, 65. *Nachkibia A.,* Definitions of civil legal norms in the practice of the Supreme Court (2000-2013), Tbilisi, 2014, 84 (in Georgian); see Also, *Zarandia T.,* Industrial Law, Tbilisi, 2016, 297-303 (in Georgian).

23 See Decision #3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 in the case "Citizen of Georgia Nodar Dvali vs. Parliament of Georgia", II, 35, <https://www.constcourt.ge/ka/judicial-acts?legal=1005> [25.08.2022].

24 See for example, the ruling of the Supreme Court of Georgia dated February 17, 2011 #Ac-888-836-2010, where the appellate court considered that due to the fact of proximity, the buyer should have been aware of the ongoing dispute over the property. The court of cassation highlighted the issue of wrong distribution of the burden of proof by the court of appeal and noted that the case file did not establish the buyer's knowledge of the dispute related to the plots of land, the court of appeal relied only on the plaintiff's position, although it is quite possible that the intermediary who was interested in the alienation of the land hid from the buyer the fact of the dispute and this opinion has the same right to exist as the opposite opinion.

buyer, although such a decision should not be valid in all cases. The presence of kinship or other close connection may only make it easier to prove the acquirer's dishonesty, therefore, based only on the fact of kinship or other close relationship, when there are no other suspicious circumstances, it will not be appropriate to make a decision against the acquirer.

3.2.2. The "Origin" of the Obligation of "Possible notice"

No court decision has clarified where the "possible notice" standard for real estate came from. It is necessary to determine the above to the extent that the "origin" of the standard in relation to a real estate is clarified, so that the appropriateness of its use can be correctly assessed. Georgian judicial practice emphasizes that "notice" means only notice and not "possible notice", which makes us think that the reasoning of Georgian courts regarding "possible notice" is not the result of a broad interpretation of "notice", in which "possible notice" would also be presumed. Rather, it is the result of an interpretation of the general principle of bona fide, which is more related to behavior than to cognitive condition. From this point of view, it can be said that a kind of contradiction was created between the general norm-principle of bona fide (Article 8 of the Civil Code) and the obligation of bona fide established by Articles 185 and 312 (2) of the Civil Code.

3.3. The So-called "Doctrine of Notice" in English Law

3.3.1. In General

In English law, not only the manner of acquiring property is different, but also the perception of the right to property itself. In England, there is no absolute ownership of land, but only rights of ownership ("estates"). In England, individuals own rights to lands, not the lands themselves.[25] Such rights are called "interests", which are treated as property rights. Thus, when people say they own land, what they really mean is that they have title (interest, right) to the land.[26] In this sense, the English understanding of ownership is relative rather than absolute, as the only title to land can be possession.[27]

In England, there is a concept of "Proprietary Right", which is not identical[28] to the right of ownership. Property right is one type of property right. For example, a home owned by someone can be rented out as well as encumbered to secure the bank's claim. In such a case, the owner, the tenant and the bank have ownership rights to the house.[29]

There are two types of land in England – registered and unregistered; therefore, the standard of protection for those who acquire them is also different. The purpose of the so-called "Doctrine of

---

25 *Dixon M.,* Modern Land Law, 6th edition, Routledge-Cavendish 2009, 6.

26 Ibid, 7.

27 *Caldwell L.K.,* Rights of Ownership or Rights of Use? – The Need for a New Conceptual Basis for Land Use Policy, 15 Wm. & Mary L. Rev., (1974), 760.

28 When we say that a person has the right of ownership to land, apartment, it means that he has the right of long-term ownership.

29 *Stevens J., Pearce R.,* Land Law, 5th Edition, Sweet & Maxwell Ltd, 2013, 4, Rn. 1.03.

Notice" developed in English law is to determine the priority of interests in land that is not governed by the Real Estate Act 1925[30] (i.e. unregistered land), thus this rule applies only to unregistered land. towards. Within the framework of the so-called "doctrine of notice", three types of notice are distinguished, one of which is equivalent to the "knew or could have known" standard in Georgian law. Under the so-called "doctrine of cognizance," a bona fide purchaser of real property who acquires the property for consideration is given priority over any owner of an interest in the land who has not registered his interest, unless the acquirer does not know and cannot know of the existence of such interest(s).

3.3.2. Types of Notice

3.3.2.1. Actual Notice

"Actual notice" is one of the types of notice under English law, which implies the purchaser's certain notice of the existence of an interest in the land. This kind of notice does not include the cases of notice of hearsay, it refers only to the notice on which any rational person would act. It is immaterial from whom, when or how the purchaser acquired the "notice", all that is decisive is that at the time of acquisition of the interest he had notice of the previously established interest in the land.[31] According to the opposite opinion, unclear and vague messages received from strangers or statements from persons who are not interested in a particular real estate should not be considered notice of the purchaser.[32]

Although at first glance it is easy to recognize cases of "Actual Notice", in practice it is still associated with certain difficulties, due to the fact that it is often difficult to separate it from cases of "possible notice". In one of the cases, the judge explained: "Not using the opportunity to receive "notice" equals 'notice' itself."[33] It is not necessary to have direct evidence of the purchaser's knowledge of the existence of the *Deed*[34], but any evidence capable of showing facts and circumstances which any person would suspect may be presented to the jury as evidence of "actual notice."[35] Therefore, despite the fact that the mentioned type of notice should include only the cases of actual notice in its content, it often includes such content of notice, which is closer to another type of notice.

3.3.2.2. Possible Notice

Constructive notice with its content implies the obligation of "possible notice", that is, notice that the buyer would have received within the scope of reasonable investigation. We are dealing with

---

30 Law of Property Act 1925, <https://www.legislation.gov.uk/ukpga/Geo5/15-16/20/contents> [25.08.2022].
31 *Long J.R.,* Notice in Equity, Harvard Law Review, Dec., 1920, Vol. 34, № 2 (Dec., 1920), 142.
32 Ibid, 143.
33 Ibid, 147.
34 Document confirming the title by which the right is transferred.
35 *Long J.R.,* Notice in Equity, Harvard Law Review, Dec., 1920, Vol. 34, № 2 (Dec., 1920), 149.

this type of notice when there is gross negligence[36] or deliberate refraining[37] from conducting the relevant investigation. Constructive notice corresponds to the so-called standard of "observance of norms of prudence" recognized in Georgian law and implies such "notice" that any average prudent person should have, if it were not for the indifference on his part. In the case of constructive notice, there is a presumption that the person might have known a specific fact, as if he really knows it.[38] This type of knowledge is a manifestation of the principle – Caveat Emptor – "let the buyer beware".

Regarding the problem of bona fide acquisition, one of the most famous cases in English law is the case of Hodgson and Marx.[39] The plot of the case was as follows: Mrs. Hodgson was an 83-year-old widow who lived in her apartment[40] with a tenant. She transferred this apartment to the tenant, who was registered as the owner, although the transferor wanted to continue living in the apartment, just to have it registered in the name of the tenant. In 1964, the tenant sold the house to a third party – the buyer. Before the purchase, the buyer visited the house and met Mrs. Hodgson, although he did not know who she was. Ms. Hodgson filed a lawsuit claiming that her interest in the flat should be binding on the buyer and that the buyer should not be buying the flat free of that interest. The legal basis for the claim was 70 (1) sub-section "c"[41] of the Land Registration Act 1925, on the basis of which the claimant argued that she was the beneficial owner of the flat and, moreover, there was nothing to show that she had abandoned or in any way renounced his interest in the flat. The Court of Appeal overturned the lower court's decision and explained that a prospective buyer should investigate all persons he encounters in the apartment being purchased and, if possible, obtain a written response for evidentiary purposes, and it is important that the buyer does this before registration. The judge's test of "present and apparent" possession[42] was met in this case because Mrs. Hodgson was still living in his flat. Also, the court explained that the fact of clear ownership should be evaluated from the buyer's point of view.[43] Criticism of the decision is based on the rationale of what significance registration can

---

36 In the case Hudson v. Viney [1921] 1 Ch98, the court explained regarding gross negligence that gross negligence does not mean mere carelessness, it means carelessness of a "gross nature" that indicates an indifference to foreseeable risks.

37 Deliberate abstinence was explained by the court in John v. Smith ((1841) 1 Hare 60), <https://vlex.co.uk/vid/jones-v-smith-807013737> [25.08.2022].

38 This type of knowledge is established in such cases as: Hunt v Luke [1902] 1 Ch 428; Williams & Glins Bank v Boland [1981] AC 487; Counce v Counce, [1969] 1 WLR 286; Lloyds Bank v Carrick, [1996] 1 WLR 783; *Kingsnorth Finance v Tizard* [1986] 1 WLR 783.

39 *Hodgson v Marks* [1971] EWCA Civ 8 (12 March 1971) ხელმისაწვდომია: <https://www.bailii.org/ew/cases/EWCA/Civ/1971/8.html> [25.08.2022]. For a critical analysis, see *Maudsley R.H.,* Bona Fide Purchase of Registered Land, The Modern Law Review, Vol. 36, № 1, 1973, 25-41.

40 He had *free simple* (the same Freehold) right to the apartment, which means that he had indefinite and unlimited ownership rights over the land.

41 Land Registration Act 1925, 1925, <https://www.legislation.gov.uk/ukpga/Geo5/15-16/21/contents> [25.08.2022].

42 Jurisprudence distinguishes between possession, which is a fact, and possession, which is based on a title right. From the terminological point of view, the first type of ownership is expressed by the term "possession", and the second – "occupation".

43 In the case of Hunt and Luke (*Hunt v. Luck* [1902] 1 CH 428) the court explained that actual possession must be apparent to the purchaser.

have when the buyer is still required to carry out such an investigation. The lower court's reasoning was based on the argument that the purchaser had no so-called undisputedly presumed notice of Mrs. Hodgson's interest in the flat.

It is also worth noting the case of Miles and Langley,[44] where the court explained the following: "If I enter into a contract of sale with someone who does not own the land himself, but who owns it as a lessee, this is an unquestionable case that provides me with information that there is a lessee of the land, which according to the case of Daniels and Davison,[45] I am under an obligation to investigate the tenant's information and verify the title he holds to the land." Also in the case of Jones and Smith,[46] the court explained: "If a person acquires real property which is not in the actual possession of the transferor but of another person, he becomes attached to all the interests vested in that land." A similar definition is found in the case of Hunt and Luke,[47] where the court explained that if the buyer or mortgagee has notice that the seller does not own the property, he has an obligation to find out who is in actual possession of the property and find out what rights he has over the land, and if he does not fulfill this obligation, then he will become the bearer of all the burdens related to the land, which his actual owner has on this land.

3.3.2.3. Notice when Acting through a Representative

Imputed notice is used in cases where the buyer acts through a representative. At such time he is presumed to know all that his representative ought to know (section 199 of the Real Property Act 1925, (1)(ii)(b)). This is based on the Latin principle: qui facit per alium facit per se – "He who acts through another acts himself."[48]

The question of bona fide of the buyer, when he acts through a representative, is also interesting for Georgian and German law. According to §166 paragraph I of the BGB, if the buyer acts through a representative, the notice of the representative and not of the represented is taken into account.[49] If the represented person knows that the alienator is not authorized, and the representative does not know this, then it would be correct that the represented (acquirer) could not obtain the right of ownership of the property. A contrary assumption would be in contradiction with the institution of bona fide acquisition of real estate, which, in case of actual notice, excludes the possibility of bona fide acquisition. Merely because the acquisition is made through another person, it should not give

---

44 *Miles v. Langley* (1831) 2 R. & My., 626, 628, <https://vlex.co.uk/vid/miles-v-langley-802706321> [25.08.2022].

45 *Daniels v. Davison* (1089) 16 Ves. 249; (1811) 17 Ves. 433, <https://vlex.co.uk/vid/daniels-v-davison-805880469> [25.08.2022].

46 *Jones v. Smith* (1841) 1 Hare 60, ხელმისაწვდომია: <https://vlex.co.uk/vid/jones-v-smith-807013737> [25.08.2022].

47 *Hunt v. Luck* [1902] 1 Ch. 428**, See** *Maudsley R.H.,* Bona Fide Purchase of Registered Land, The Modern Law Review, Vol. 36, № 1, 1973, 33.

48 See in detail *Long J.R.,* Notice in Equity, Harvard Law Review, Dec., 1920, Vol. 34, № 2 (Dec., 1920), 137-160.

49 *Ring G., Griziwotz H., Keukenschrijver A.,* BGB Kommentar, Sachenrecht, Band 3, 3.Aufl., Baden-Baden 2013, 226, Rn. 63.

ownership to a person who could not have acquired ownership, if he purchased the item personally and not through a representative. Such a case is similar to an intermediary execution in criminal law, when an intermediary executor tries to avoid responsibility by committing a crime at the hands of a blameless person. Thus, in the case where the representative does not have notice, but the represented does, bona fide acquisition should be excluded. Assuming the opposite, the result would be that the buyer through the agent (representative) would always manage to bypass "notice".[50] It should be assumed that the agent and the principal (that is, the buyer and his representative) are one and the same person; in this sense the agent is the alter ego of the principal.[51] The possibility of bona fide acquisition should be excluded even when the representative has notice and the represented does not. In such a case, the notice of the representative should be disclosed to the represented person and bona fide acquisition should be excluded.

4. Conclusion

As the presented research has shown, the "notice" component in the law of bona fide acquisition of real estate of the reviewed countries is interpreted with different content. Georgian law, which was created on the basis of German law, shows more similarities with English law in terms of practical action, in the part of interpretation of "notice". According to the SC and BGB, the presumption of infallibility and completeness of the public register is excluded by actual notice, in addition, Georgian law provides for the case of "possible notice" in addition to "notice", which is the result of the transfer of the general principle of bona fide in the law of bona fide acquisition of real estate and its interpretation. Unlike English law, notice is not divided into types in either Georgian or German law. Although Georgian law allows the possibility of using "possible notice" in relation to immovable things, however, unlike Constructive notice, it is not formed in a separate form and is used next to "notice" and together with the words: "knew or could have known". In a number of cases, the mentioned standard provides a reasonable balancing of interests. Imputed notice is a familiar problem for Georgian and German law. Although neither the SC nor the BGB provides for a special provision for the exclusion of bona fide acquisition when acting through an unscrupulous representative, however, it would be a correct solution if the representative's knowledge is imputed to the represented person. The same rule should apply in the opposite case, when the representative is bona fide and the represented is not. In this way, the dangers of obtaining ownership rights to real estate in good faith through the artificial involvement of a representative will be avoided. In one case, when an unscrupulous acquirer tries to obtain a right through a bona fide representative, and in the second case, when an unscrupulous representative does it in order to obtain ownership rights for the buyer.

Bibliography:

1. Civil Code of Georgia, Department of Parliament, 31, 24/07/1997.
2. Law of Property Act 1925.

[50] *Long J.R.,* Notice in Equity, Harvard Law Review, Dec., 1920, Vol. 34, № 2 (Dec., 1920), 158.
[51] Ibid. In English law, there are virtually no conflicting decisions regarding a given type of notice.

3. Land Registration Act 1925.
4. Land Code of Sweden, 1970.
5. *Caldwell L.K.,* Rights of Ownership or Rights of Use? – The Need for a New Conceptual Basis for Land Use Policy, 15 Wm. & Mary L. Rev., (1974), 760.
6. *Chiusi T.,* Analysis of the decision of the Constitutional Court of Georgia – "Nodar Dvali v. Parliament of Georgia" – analysis from the perspective of German law, Journal of Comparative Law, #1/2019, 3 (in Georgian).
7. *Dixon M.,* Modern Land Law, 6th edition, Routledge-Cavendish 2009, 6.
8. *Kropholler I.,* German Civil Code, educational commentary, 13th revised edition, *Darjania T., Chechelashvili Z., (trans.), Chachanidze E., Darjania T., Totladze L. (eds.),* Tbilisi, 681, Rn. 8, 11 (in Georgian).
9. *Long J.R.,* Notice in Equity, Harvard Law Review, Dec., 1920, Vol. 34, № 2 (Dec., 1920), 142, 149, 158, 137-160.
10. *Maudsley R.H.,* Bona Fide Purchase of Registered Land, The Modern Law Review, Vol. 36, № 1, 1973, 25-41.
11. *Müller K., Gruber P. U.,* Sachenrecht, Verlag Franz Vahlen München 2016, 546, Rn. 2795, 547, Rn.2803.
12. *Nachkbia A.,* Definitions of civil legal norms in the practice of the Supreme Court (2000-2013), Tbilisi, 2014, 84 (in Georgian).
13. *Niemi M.I.,* Transfer of Immoveable Property in Europe, From Contract to Registration, (ed.) *Pradi A.,* Universita degli Studi di Trento, 2012, 86-89.
14. *Pradi A.,* Transfer of Immoveable Property in Europe, From Contract to Registration, (ed.) *Pradi A.,* Universita degli Studi di Trento, 2012, 160-161.
15. *Pierre B*., Classification of Property and Conceptions of Ownership in Civil and Common Law. Revue générale de droit, (1997) 28 R.G.D.
16. *Prütting H.,* Sachenrecht, 34.Aufl., C.H. Beck München 2010, 50.
17. *Ring G., Griziwotz H., Keukenschrijver A.,* BGB Kommentar, Sachenrecht, Band 3, 3.Aufl., Baden-Baden 2013, 225, Rn.57, 226, Rn. 63.
18. *Rusiashvili G.,* Analysis of Judicial Practice in Case #AS-189-182-2013, January 16, 2014, 11-2/2020, Journal of Comparative Law #2/2020, 88-89 (in Georgian).
19. *Santisteban M.S.,* Transfer of Immoveable Property in Europe, From Contract to Registration, (ed.) *Pradi A.,* Universita degli Studi di Trento, 2012, 196-197.
20. *Sirdadze L.,* Complaint Filed against the Public Registry Entry, Journal of Comparative Law, #1/2020, 11.
21. *Soergel H.T., Stürner R.,* BGB Sachenrecht 1, Band 14, 13. Aufl., Kohlhammer, 2002, 225, Rn.57, 226, Rn. 63.
22. *Stevens J., Pearce R.,* Land Law, 5th Edition, Sweet & Maxwell Ltd, 2013, 4.
23. *Wilhelm J.,* Sachenrecht, 6.Aufl., De Gruyter 2019, 225, Rn.57, 226, Rn. 63
24. *Zarandia T.,* Good Faith (Bona Fide) purchase of real estate from an unauthorized alienator in Georgian judicial practice, 2014, 65 (in Georgian)
25. *Zarandia T.,* Commercial Law, Tbilisi, 2016, 297-303 (in Georgian).
26. *Zoidze B.,* Reliability of the Public Register and Bona Fide Acquisition of Real Estate in Georgian Law, Journal of Comparative Law, #12/2021, 128, 132 (in Georgian).

27. Ruling #AS-1387-2020 of the Supreme Court of Georgia dated March 11, 2021.
28. Ruling #AS-1198-2019 of the Supreme Court of Georgia dated June 25, 2021.
29. Ruling #AS-1279-2019 of the Supreme Court of Georgia dated March 2, 2020.
30. Ruling #AS-700-2020 of the Supreme Court of Georgia dated October 29, 2020.
31. Ruling #AS-562-2020 of the Supreme Court of Georgia dated October 23, 2020.
32. Ruling #2b/298-18 of the Tbilisi Court of Appeal of April 15, 2019.
33. Ruling #3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 on the case "Georgian citizen Nodar Dvali vs. Parliament of Georgia".
34. Ruling of the Supreme Court of Georgia of December 15, 2017 #AS-595-554-2017.
35. Ruling #AS-675-642-2014 of the Supreme Court of Georgia dated April 8, 2015.
36. Ruling of the Supreme Court of Georgia dated June 17, 2015 #AS-491-465-2015.
37. Ruling #AS-189-182-2013 of the Supreme Court of Georgia of January 16, 2014.
38. Ruling #AS-394-373-2013 of the Supreme Court of Georgia dated May 20, 2014.
39. Ruling #AS-567-535-2012 of the Supreme Court of Georgia dated August 1, 2012.
40. Ruling of the Supreme Court of Georgia dated February 17, 2011 #AS-888-836-2010.
41. Ruling #AS-1026-1219-08 of the Supreme Court of Georgia of July 3, 2009.
42. Ruling #AS-524-869-07 of the Supreme Court of Georgia of December 25, 2007.
43. Hudston v. Viney [1921] 1 Ch98.
44. Hunt v. Luck [1902] 1 Ch. 428.
45. Hodgson v Marks [1971] EWCA Civ 8 (12 March 1971).
46. Jones v. Smith (1841) 1 Hare 60.
47. Miles v. Langley (1831) 2 R. & My., 626, 628.
48. Daniels v. Davison (1089) 16 Ves. 249; (1811) 17 Ves. 433.
49. <https://www.constcourt.ge/ka/judicial-acts?legal=1005> [25.08.2022].
50. <https://www.bailii.org/ew/cases/EWCA/Civ/1971/8.html> [25.08.2022].
51. <https://vlex.co.uk/vid/jones-v-smith-807013737> [25.08.2022].
52. <https://vlex.co.uk/vid/daniels-v-davison-805880469> [25.08.2022].
53. <https://vlex.co.uk/vid/miles-v-langley-802706321> [25.08.2022].
54. < https://www.legislation.gov.uk/ukpga/Geo5/15-16/21/contents> [25.08.2022].
55. <https://www.legislation.gov.uk/ukpga/Geo5/15-16/20/contents [25.08.2022].

Giorgi Meladze*

Property-related Obligations of Spouses

Property obligations of spouses is one of the fundamental issues of family law, which is characterized by a number of features. The purpose of this article is to define/distinguish the spheres of common and separate obligations of spouses, which in turn affects the scope of their property responsibility. It is worth noting the interest of the creditor towards the fulfillment of the obligation of debtor spouse/spouses – without taking it into consideration, the examination of the property obligations of spouses and conducting respective legal reasoning will not be justified,. It should be emphasized that in general, the property obligations of spouses also include the legal duty of mutual maintenance of spouses established by the Civil Code of Georgia and its regulatory norms, however, the purpose of this article is to separately examine the obligations of spouses not in the context of the alimony relationship, but in the context of the property regime.

Keywords: *Separation of Common and Individual obligations of Spouses, The Interest of the Creditor vs. Common Interest of the Family, Criterion of Covering Family Needs, The Rule of Fulfilling the Individual Debt, The Rule of Dividing the Common Debts.*

1. Introduction

Family law is a complex, multifaceted sphere encompassing all aspects of legal intervention in both the private and domestic areas of individuals who are related by blood or by certain union.[1] In the modern world, the subject of interest towards the family law is mainly conditioned by social and economic aspects of family members, including, by financial consequences following the marriage termination or others.[2] One of the most important issues in legal relations of spouses is related to the property obligations arising from their relations with the third parties (creditors). This property-related obligations are regulated by articles 1169-1170 of the Civil Code of Georgia (hereinafter, CCG). In consideration of the Georgian family law where joint and personal properties of spouses are differentiated, this very dichotomy is the basis of similar separation of property obligations of spouses.[3] Respectively, the definition of the Supreme Court of Georgia, pursuant to which, in order to define what is the joint debt of spouses for family law purposes, the articles 1169-1170 shall be defined systemically, jointly with articles 1158 (Matrimonial property), 1160 (Administration of matrimonial property by mutual agreement) and 1161 (Separate property of spouses) therein, shall be

* PhD student, invited Lecturer at Ivane Javakhishvili Tbilisi State University, Faculty of Law.

1 *Bryan A.*, A Straightforward Guide to Family Law, London, 2015, 10.

2 *Boele-Woelki K.*, Common Core and Better Law in European Family Law, Antwerp-Oxford, 2005, 5.

3 *Shengelia R., Shengelia E.,* Family Law, Tbilisi, 2011, 168 (in Georgian).

shared.[4] Regardless of this, the above-referred articles require correct definition, firstly in consideration of the legal constructions that are not currently recognized by Georgian family law. In the process of fulfilling the obligations of the spouses to the creditors and, therefore, determining the obligation, the correct opinion must be envisaged, according to which, as in other joint property regimes, the spouses do not have a separate share in the property, which they may dispose independently.[5] Apart from the aforementioned, before discussing the issues foreseen under this thesis, it is critical to briefly describe the legal systems of modern jurisdictions that regulate the matrimonial property relations and peculiarities of which are considered to regulate the sphere of matrimonial property obligations.

Modern European jurisdictions, according to one of the classifications, recognize four major systems of regulating the marital property relations:[6] 1. Universal Regime of Marital Property – at the moment, Holland is the only EU state that maintained this regime. A number of efforts to change and modernize the regime failed, however, some steps may still be made to this direction in future. In universal regime of marital property, absolutely all properties for the moment of marriage become the joint properties of spouses, including the property received via gift or inheritance during the marriage. 2. Legal Regime of Marital Property–the most wide-spread legal model in Europe also known under the name of "joint acquisition". According to this very regime, the joint and individual properties of spouses are separated from each other. This regime is spread in the majority of states with Roman jurisdiction as well as in Middle and East Europe states. Georgian family law chose legal model of marital property (legal regime of joint property) as a legal regime. 3. Deferred Marital Property Regime – this legal system is common to Scandinavian countries. According to this method, there is no joint marital property concept, during marriage each spouse owns alone all his or her property, irrespective of whether the property is marital property or individual property. However, in case of divorce all properties (excluding the gift or inherited properties) become the co-ownership properties of spouses. 4. Legal Compensation Regime – common to countries with German law jurisdiction. Regardless of the marriage, the spouses maintain their individual assets separately. However, unlike the Scandinavian regime, joint property of spouses (marital property) does not arise even in case of the divorce. Instead, during the divorce, the law foresees potential claims of spouses for financial compensation.

This work aims to identify the correct definition of the articles 1169-1170 of the Civil Code of Georgia on the basis of comparative analysis of national and foreign regulations, their scope of operation and importance in legal relations of spouses.

2. Separation of Property-related Obligations of Spouses

Paragraph 2 of the Article 1170 of Civil Code of Georgia, despite the inaccurate title of the article, offers the criterion as to how to separate individual and joint debts of spouses. In particular,

---

4 Decision № AS-1334-1254-2017 of 18 May 2018 of the Chamber for Civil Cases of Supreme Court of Georgia.

5 *Rusiashvili G.,* Matrimonial Property Relations, Comparative law magazine 10/2020, 10 (in Georgian).

6 *Scherpe J. M.,* The Financial Consequences of Divorce in a European Perspective, Cambridge, 2016, 4-10.

this criterion is taking the debt for the joint interests of the family, which essentially repeats the definition of the concept of "family needs" (family maintenance) used in Article 1160 of Civil Code.[7] The latter distinguishes the administered transactions authenticity of which does not require the approval of a non-disposing spouse and the transactions, the authenticity of which requires such approval.[8] According to the homogeneous Georgian judicial case law, in case of a debt taken by one of the spouses, the joint and several liability of the other spouse for such a liability is not presumed only on the basis of determining the origin of the debt taken during the marriage. Consequently, the debtor spouse bears a responsibility towards the creditor until this debt is recognized as a joint debt and the burden of proof (article 102 of Civil Procedure Code of Georgia) regarding opposite circumstances lies on the person who appeals the debt was used for family maintenance.[9] Moreover, with regard to the definition of this assessment concept, Georgian judicial case law has currently made some steps and in certain cases, the circumstances belonging to the category of joint interest of the family were specified.[10]

From the point of view of legal regulation, it should be noted that the Civil Code of Georgia does not offer any kind of list of examples what should be deemed as an individual and/or a joint debt. In contrast to the above, we can look at Belgian Civil Code, where the Articles 1406 and 1407 provide an exhaustive list of individual obligations of spouses.[11] Therefore, in Belgian law there is a presumption in favor of marital property, according to which, the obligations not listed in the above-mentioned articles are considered as joint obligations of spouses and also, it is not uncommon for the Belgian law to use the category of joint interests of the family as a ground to identify the purposes of obligations undertaken by one of the spouses, which is foreseen in the article 1408.[12] Current form of separation of matrimonial obligations in the Georgian family law is mostly common to post-Soviet countries too. For instance, we can have a look at Kazakh family legislation according to which, giving education to a joint child belongs to the category of joint obligations and on the opposite to this,

---

7 *Rusiashvili G., Kavshbaia N., Batiashvili Z.,* Comments on Civil Code of Georgia*,* Book VII, Tbilisi, 2021, 88 (in Georgian).

8 *Meladze G.,* The Rule of Disposal of the Matrimonial Property*,* Journal of Law № 1, Tbilisi, 2021, 67 (in Georgian).

9 Decision № AS-516-489-2015 of 17 June 2015 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-1029-964-2012 of 23 July 2012 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-1334-1254-2017 of 18 May 2018 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-1646-2018 of 22 March 2019 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-315-300-2016 of 17 June 2016 of the Chamber for Civil Cases of Supreme Court of Georgia.

10 Decision № 3K/519-01 of 29 June 2001 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-981-922-2012 of 24 September 2012 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-516-489-2015 of 17 June 2015 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-372-356-2016 of 3 January 2017 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № 3k/990-01 of 16 January 2002 of the Chamber for Civil Cases of Supreme Court of Georgia.

11 *Verbeke A.,* Marital Property Planning in a Belgian Nutshell, Based on a Lecture at the Annual Conference of the International Academy of Estate and Trust Law (2005), New Mexico, 2006, 5.

12 Ibid, 6.

any obligations arising from health treatment by one of the spouses shall be covered from the individual property of this spouse.[13] Similarly, pursuant to the article 45(2) of the Family Code of Russian Federation, joint debt includes the debts taken jointly by spouses (directly meaning – joint) as well as the debt taken by one of the spouses, if in the case of the latter, the Court rules that the debts were used for family maintenance.[14] Accordingly, payment must be made from the joint property of the spouses, and where the said property turns insufficient to satisfy the claim of the creditor, and then each spouse is liable jointly and severally with their individual property.[15]

Family law of British Columbia, one of the Canadian provinces shall also be mentioned. In particular, Canada belongs to the binary system state, where two systems of law are effective – Continental Europe (public law) and Anglo-American (private law, including family law).[16] Respectively, in the this province of Canada, the family law area is regulated by Continental-European Law system and its main regulatory instrument – Family Law Act.

Pursuant to the Chapter 86 of this Act, family debt includes all financial obligations incurred by one or both spouses during the period beginning when the relationship between the spouses begins and ending when the spouses separated, including the debt taken by one of the spouses after the date of separation, if incurred for the purpose of maintaining family property, for example, to fulfill the joint tax obligations.[17]

According to this definition, the debt taken by one of the spouses before the marriage or actual cohabitation shall be deemed as his/her individual debt. Article 81 therein provides the presumption by which the spouses are both responsible for family debt, regardless of their respective use or contribution (who used it).[18]

European Commission of Family Law (hereinafter – Commission)[19] has developed a set of family law principles to regulate the marital property relations. One of the major goals of the Commission work was to define a common core for comparing the current national family laws of different states under European jurisdiction that overall had to be the best model for regulating different legal issues. For this very purpose, the Commission, as a result of analysis and processing of family law regulations of its 26 states, has developed 58 principles with the best regulatory functions for matrimonial property relations.

In scientific literature, there are some sources that are oriented on the afore-mentioned principles of the Commission and also, the comparative analysis of current regulation in national laws. One of the sources was a work dedicated to the comparative analysis of Spanish family law and Commission principles. In particular, in the context of separation of matrimonial property obligations,

---

13 *Baideldinova Dalpane M.,* Matrimonial Property and Its Contractual Regulation in Kazakhstan, The International Survey of Family Law, London, 2011, 249.

14 *Вишнякова А.В.*, Комментарий к Семейному Кодексу Российской Федерации, Москва, 2011, 33.

15 *Власова М.В.*, Постатейный Комментарий к Семейному Кодексу Российской Федерации, Москва, 2013, 151.

16 <www.oas.org> [15.01.2022].

17 *Chiu H., Ostrow M.,* JP Boyd on Family Law, Resolving Family Law Disputes in British Columbia, Wikibook, 2019, 463.

18 Ibid.

19 See <www.ceflonline.net> [19.01.2022] for history and goals of the Commission.

if Spanish law is applied, the latter distinguishes the cases where both spouses acted together (or one of the spouses by the consent of the other) from the cases where one of the spouses acted separately.[20] According to this analysis, Spanish family law separates the joint responsibility of spouses (object of responsibility – joint property) from the individual responsibility of spouses (responsibility object – individual property). Civil Code of Spain does not offer any list of individual obligations as provided in the Commission principles (4:41) but its meaning is explained by negative formulation (i.e. what does not belong to the joint property is a subject of individual property). Individual obligations shall be covered from the individual property of the debtor spouse (including, his/her income and profit) and also, such obligations may be fulfilled from the debtor spouse's share in the joint property.[21] In this part, Georgian and Spanish regulation coincide with each other. As for the order of repayment of individual obligations in view of matrimonial property masses – pursuant to the Commission principles as well as to the Spanish law (article 1371 of Civil Code of Spain), it is stated that each spouse's personal debts are his or her sole responsibility and can only be settled out of their individual property.[22] Where said individual property is insufficient, creditors make a claim for the debtor spouse's share of the joint property. Respectively, non-debtor spouse's individual property as well as the share in joint property shall be inviolable.[23]

3. Rule of Repayment of One of the Spouse's Debt

After separating the joint and individual obligations of spouses, it is important to define the rule of fulfillment of such distinguished obligations. In particular, the rule of payment of the individual obligation of one of the spouses is foreseen in the first paragraph of the article 1170 "Procedure for the payment of the debt of one of the spouses", according to which, the payment of the debt of one of the spouses may be recovered from his or her property and/or from his or her share in the matrimonial property which s/he would have received if the property had been divided. Considering the fact that common property is a joint and not share-based co-ownership, where each spouse cannot have a share separately even in theory, it is necessary to interpret this provision correctly (like it was mentioned many times, Georgian homogenous judicial case law is developed in wrong direction). In Georgian legal literature, there is a correct opinion that repayment of the spouse's personal debt is made not only from the abstract share in joint property but also from the claim related to division of joint assets (article 1164 of Civil Code of Georgia) and receipt of the specific share.[24] In order to imagine the full procedure correctly, how the creditor's due claim shall be realized against the debtor spouse (for the repayment of personal debt), we offer you the detailed scheme formed in paragraphs:

---

20 *Redondo P.Q.*, Spanish Matrimonial Property Regimes and CEFL Principles regarding Property Relations between Spouses, European Journal of Law Reform, Vol.17, Joint Edition, 2015, 338.

21 Ibid.

22 Ibid.

23 *Shengelia R., Shengelia E.,* Family Law, Tbilisi, 2011, 170 (in Georgian).

24 *Rusiashvili G., Kavshbaia N., Batiashvili Z.,* Comments on Civil Code of Georgia*,* Book VII, Tbilisi, 2021, 133 (in Georgian).

- An agreement was made between one of the spouses and the creditor, by which the spouse undertook responsibility to fulfill a certain obligation;
- The debtor spouse has violated this obligation;
- The creditor decided to hold the debtor spouse liable and since the obligation was incurred by one of the spouses, the Article 1170 of the Civil Code of Georgia shall be applied. The creditor filed a lawsuit against this spouse, winning the dispute, however, the spouse still fails to fulfill the obligation;
- First of all, the creditor should try to satisfy the claim from the individual property of the debtor spouse, i.e. first his / her personal property should be determined and the assets corresponding to the value of the creditor's claim should be seized on this property (for the purposes of family law);
- Where such property does not exist or it is not sufficient to satisfy the creditor's claim, the Article 1170 (2) of Civil Code of Georgia shall be applied; according to this paragraph, the payment must be made from the marital joint property, provided that what was received from the obligation will be used for the joint interests of the family.
- At this stage, the creditor must apply to the court to claim the repayment from the debtor spouse's share in the matrimonial joint property, which the latter would receive if the property was divided. Respectively, this record shall be interpreted as an opportunity to seize a joint property claim or a claim under Article 1164 of the Civil Code of Georgia. In this case, Chapter X (Enforcement of Claims (Articles 55-60) of the Law of Georgia on Enforcement Proceedings shall be applied.
- In resolving the issue of seizure, the court must identify that what was received by one of the spouses as an obligation was used for the common good of the whole family;
- If the court finds that it has not been used for the above-mentioned purposes, the claim must not be satisfied and the creditor's claim cannot ultimately be realized too;
- If the court finds that it was used for this purpose, then the claim shall be satisfied and the claim of debtor spouse for division of the joint property must be seized;
- After all these, the debtor spouse can still voluntarily fulfill the obligation, which may become the ground for lifting the seizure;
- If the debtor spouse still fails to fulfill such an obligation, then the creditor will proceed with enforcement procedure of the claim;
- In particular, the creditor, instead of the debtor spouse, will demand the division of the joint property;
- From the moment of realization of the claim for division of the joint property, the latter ceases to exist and consequently this particular seizure will not exist, i.e. the property will be divided. However, the right of the creditor to the obligation-legal claim will remain in force as it has not yet been fulfilled at this stage;
- In such case, the Court may divide the joint property equally or may divert from equal division rule upon evaluation of different circumstances foreseen in the law (e.g. provisions of the article 1168)

- Once determining both the shares and the specific items assigned to these shares between the spouses, only then the creditor will be able to choose from the relevant items belonging to the debtor spouse's share and the property of the value of his claim and seize the said asset. Therefore, other items actually belonging to the defined share will remain in the ownership of the debtor spouse, with the right of disposal.
- At this stage, the debtor spouse should be able to fulfill his / her obligation to save himself / herself from sale of specific items;
- If s/he still does not fulfill this obligation, then these items will be sold at auction, the proceeds will be used to satisfy the creditor's claim and any amount that may exceed the value of the claim will be returned to the debtor spouse.

Article 1412 of the Civil Code of France offers an arrangement that is different from the scheme described above and from the possibility of seizing the debtor's claim for divorce by the creditor. According to this article, in case of repayment of one of the spouse's personal debt from joint property, the latter has an obligation to reimburse the other.[25] This norm does not consider the possibility of division of the joint property and repayment of the creditor's claim from the separated property. Opposite to this, pursuant to articles 233 and 234 of Swiss Civil Code, the obligation that was taken for the common interest of the family shall be repaid from the matrimonial property, while the obligation taken by one of the spouses for personal interests shall be covered exclusively from the personal property of the latter and from his/her share in the joint property; this case may consider sale of joint property too (article 189 of Civil Code of Switzerland).[26] In particular, according to the given article, when the debtor spouse is under the regime of marital property and the creditor demands from him/her to fulfill the individual (personal) obligation and his/her share in the joint property is under seizure, National Bureau of Enforcement has a right to demand division of the joint property via the Court.[27] Georgian family law shall also foresee this approach by adopting similar regulation at the legislative level in order to equip the creditor with relevant rights for claim (seizure of joint property, division and forced realization of the debtor spouse's share).

In the context of fulfillment of individual obligation by one of the spouses, it shall be considered how to resolve the issue related to fulfillment of obligation of this spouse incurred before marriage. Provision of the article 1161 (a) of the Civil Code of Georgia concerns only the establishment of the individual property regime for the property that belonged to each spouse before they entered into marriage; however, it does not define anything regarding the fulfillment of individual obligation of each spouse incurred in the same period.

According to *William de Funiak*, one of the leading scholars on matrimonial property issues, the basic principle of matrimonial property system is to fulfill only the obligations incurred during the marriage.[28] A different approach to the above is directly contrary to the basic principles of the matrimonial property system. The main issue that needs to be resolved in this case is the following: in

---

25 *Izquierdo A.O., Rodriguez A.M.O., Izquierdo A.M.O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 334.

26 Ibid, 841.

27 <www.fedlex.admin.ch> [22.01.2022].

28 The Antenuptial Obligation and Arizona Community Property Law, Law and Social Order, 1970, 614.

the context of one of the spouses fulfilling a pre-marital obligation, which should be given the priority – the best interests of the family or the interests of the creditor. Joint property system gives preference to the family welfare/interests and for this very choice, it is deemed inadmissible to repay the pre-marital personal debt from the matrimonial property.[29] In this respect, it is interesting to look at the case Kaizer against James at Court of Appeals of Louisiana State (USA) as of 1963.[30] According to the factual circumstances of the case, the couple intended to marry; the bride rented an apartment before marriage for a period of one year. The landlord signed an agreement under one condition, the tenant had to marry her fiancé, future husband (presumably, the landlord wanted to secure the rent by a reliable property). In three months after Rent Agreement, the couple got married and the husband moved to the wife's rented apartment where the latter lived from the day of rent agreement. The rent fee was paid from the joint revenues of spouses, from May until the month when the Agreement terminated. The landlord filed a lawsuit to the court claiming the reimbursement of three months' rent for June, July and August. It was unequivocally established in the case that the rent was intended to benefit the common property interests of the spouses; nevertheless the court denied the possibility of reimbursing the rent from the matrimonial property. This decision was justified by the argument that the obligation, fulfillment of which was claimed in the lawsuit, related to the debt taken by one of the spouses before marriage and therefore, it had to be considered as an individual obligation (even though, apartment was rented for the joint property interest of spouses and the rent fee was also paid from the joint property). This case has become a case law and the presumption made by the Court in this case has been used in other disputes many times.[31] According to this presumption, in cases where the wife concludes contracts during the marriage, it shall be assumed that the relation is established between her and the co-ownership, i.e. the agent and the principal. Respectively, it is assumed that whilst concluding the contract she acts not for her personal interests but for the joint interest of her family. On its side, this presumption affects the distribution of burden of evidence between the dispute parties. In particular, if it is applied, the non-debtor spouse,[32] the defendant against the creditor must prove the opposite, i.e. the debt was taken for the interests of the family and not for personal purposes of the debtor spouse.

Regardless of the above-mentioned decisions that led to the development of Louisiana judicial practice completely different court judgments can also be found in the USA, for example – the case

---

29 Ibid, 614.

30 *Keyser v. James*, 153 So. 2d 97 – La: Court of Appeals, 1st Circuit 1963, www.scholar.google.com [29.05.2022].

31 For Example, *American National Bank of Beaumont v. Rathburn*, 264 So. 2d 360 – La: Court. of Appeals, Third Circuit 1972, <www.casetext.com> [29.05.2022]; *Commercial Credit Plan, Incorporated v. Perry*, 186 So. 2d 900 – La: Court. of Appeals, First Circuit 1966, <www.casetext.com> [29.05.2022].

32 ***Note:*** In the present case, it should be noted that the legal status of spouses in relation to property interests was not always equal. In particular, the husband held more privileged position than the wife, which was expressed in the term – "head and master of community." Respectively, the creditors normally filed a lawsuit regarding the joint property of spouses against the husband and normally, the wife never participated in such disputes, regardless of her actions.

Weinberg vs. Weinberg.[33] Traditionally, in California, it was believed that joint property could be subject to the responsibility for pre-marital individual obligations of the spouses. In this case too, defining the policy of the family law was considered as a priority issue – whose interest was more important, the family's interest or the creditor's interest. The Judge Traynor in his decision contends that protection of the property interests of the husband's creditors, related to the pre-marital obligations, outweighs the interest of protecting the family revenues. Therefore, such creditors shall have access to the spouses' property to satisfy the due claims. It is also interesting that this judgment was made in the context of realization of the alimony claim of the ex-wife of the husband (from first marriage).

Current arrangement of the Georgian family law does not consider the repayment of pre-marital debts first of all because there is no legal basis at the legislative level. Theoretically, two types of pre-marital obligations may be separated (no matter which spouse undertook to repay the obligation): 1. The obligation taken by one of the spouses clearly for personal interest and 2. Fulfillment of the obligation that was undertaken by one of the spouses for personal interests before the marriage, but this obligation was intended for joint property interest of the future family. In both cases, pursuant to the Georgian family law system, the repayment of these obligations shall not be allowed from joint property of spouses. It is clear that pre-marital property is an individual property of spouses (article 1161 (a) of Civil Code of Georgia), respectively, the pre-marital obligation shall similarly be the individual/personal obligation of the debtor spouse, otherwise, we will receive the situation where consideration of pre-marital individual property as a matrimonial property will not be accepted while the fulfillment of pre-marital obligation will be allowed from the joint property (marital property) of spouses which clearly contradicts the Georgian family law policy – the choice of the legislator made in favor of maintaining the family unity.

It is noteworthy that alimony obligations incurring from the first marriage should not be allowed to be paid from the spouses' joint property too, as the latter does belong to the individual obligation of the spouse. Therefore, for the fulfillment of such obligation, the individual property of the debtor spouse shall be used first, and in its absence or insufficient volume, the matrimonial property shall become subject to division – firstly, the debtor spouse's share shall be determined for the ultimate satisfaction of the creditor from the property of the value of this share.

In the case of criminally derived property, the responsible is the specific joint property item or items that were purchased through criminal offense.[34] This is regulated by Article 1170 (3) of the Criminal Code of Georgia. According to the definition of the Court of Cassation, this norm allows to recover compensation for the damage caused by one of the spouses from the joint property of spouses only if the court judgment determines that the property was purchased with funds received as a result of the criminal offense.[35] Accordingly, the precondition for the application of this norm is that there is

---

33 *Traynor Roger J.*, Weinberg v. Weinberg 67 Cal.2d, University of California, UC Hastings Scholarship Repository, 1967, 557.

34 *Rusiashvili R., Kavshbaia N., Batiashvili Z.,* Comments on Civil Code of Georgia*,* Book VII, Tbilisi, 2021, 134 (in Georgian).

35 Decision № AS-569-540-2015 of 1 July 2016 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № 2b/6774-14 of 17 February 2016 of the Chamber for Civil Cases of Tbilisi Court of Appeals.

an effective judgment of conviction in place that establishes the property was purchased by one of the spouses as a result of the use of funds received through the criminal offense.

4. Rule for Division of Joint Debts of Spouses

The rule for the division of joint debts of spouses is stipulated in the article 1169 of Civil Code of Georgia. First of all, it must be noted that according to the Georgian judicial case law, the spouse's claim for division of the joint debt is considered as an action for declaration, which is not a shared position.[36] According to the correct opinion expressed in the Georgian legal literature, this lawsuit is not an action for declaration but rather a transferred claim, because here, the spouse does not actually ask for the existence / absence of a certain obligation, s/he just demands division of certain obligations.[37] Respectively, in this case, the existence of obligation does not raise any doubts.[38] Apart from the afore-mentioned, Georgian judicial case law does not have any judgments in the context of article 1169 of CCG that would be ground for changing the content of this article.[39] Thus, the outcome of division of joint debt is expressed in the fact that the pre-division obligation had to be performed jointly and after division, we would receive individual responsibility of spouses.

Taking into account the aforementioned, it is unclear how the division of the joint debt affects the interest of spouses' creditor. In particular, after division of the total debt, the creditor will be allowed to hold liable each spouse for failure to fulfill the obligation only within the scope of defined shares. Hence, the question whether division of the total debt of spouses requires the consent of the creditor or not, shall be resolved. At the legislative level, there are no preconditions defined for the division of joint debt. The only precondition that can be identified after logical interpretation of the article 1169 of CCG is the identification of individual share of each spouse in the joint property, proportionally to which, the joint debt shall be divided later. The current law does not mandatorily require the creditor's consent. Therefore, in the absence of definition, the creditor's interest in fulfillment of the obligation is jeopardized, because in certain cases, the joint fulfillment may ensure more guarantee for the realization of claim than an individual responsibility for the failure to fulfill the obligation. In the Georgian legal literature a correct opinion can be found, according to which, for the division of debt, the creditor's consent is required and if such does not exist, the debt can be divided only through the court.[40] In such case, for the purposes of division of the debt, the legal ground for requesting the creditor's consent lies in the article 204 of the Civil Code of Georgia, because this article regulates not the division of the debt between some people, but the assumption of the debt by the third person. Where the creditor does not agree to divide the debt, each spouse shall be authorized

---

36 Decision № 2b/6774-14 of 17 February 2016 of the Chamber for Civil Cases of Tbilisi Court of Appeals.

37 *Rusiashvili G., Kavshbaia N., Batiashvili Z.,* Comments on Civil Code of Georgia, Book VII, Tbilisi, 2021, 128 (in Georgian).

38 On the Types and Separation of Lawsuits in Civil Procedural Law, see *Kurdadze Sh., Khunashvili N*., Civil Procedure Law of Georgia, Tbilisi, 2012, 304 (in Georgian).

39 Decision № AS-605-579-2016 of 17 February 2017 of the Chamber for Civil Cases of Supreme Court of Georgia.

40 *Rusiashvili G., Kavshbaia N., Batiashvili Z.,* Comments on Civil Code of Georgia, Book VII, Tbilisi, 2021, 129 (in Georgian).

to refer to the court with such claim. The court, whilst discussing and making the decision on the claim, shall definitely consider the creditor's interest in the obligation.

Moreover, the legal fate of undividual, joint debts of spouses shall also be considered. First of all, the joint debt shall be divided into two categories: 1. Divisible and 2. Indivisible obligations. Since both belong to the joint debt, they shall be fulfilled by spouses jointly and depending how the joint debt division issue is qualified, different outcomes will arrive: 1. In case of the divisible obligation, this obligation will be divided in the process of division of joint property according to the article 1169 of CCG and after the division, the joint obligation will turn into the individual obligations. 2. In case of indivisible obligation, since it cannot be divided during the division of joint property, the decision shall be made when to perform such obligation. Considering the fact that joint obligation of spouses is normally performed jointly, first this obligation shall be fulfilled and then the joint property shall be divided.[41] Otherwise, there is a risk that the spouse, by rule of regress, may not be able to recover from the other spouse half of the value of his/her performance pursuant to the article 473 of CCG. Interestingly, if the monetary assets, the spouses hold in joint property, are not sufficient to cover the joint indivisible debts, the items included in the joint property shall be sold and the rule for division of joint property shall be applied, as regulated by articles 963/964 of CCG.[42] Respectively, these articles may be applied by the similar rule of the law, on the basis of the first paragraph of the article 5 of CCG.

5. Conclusion

Georgian family law is based on joint property regime which is the most common regime in European countries. Respectively, for analyzing its peculiarities, the experience of such countries shall be studied. Moreover, Georgian family law has a great resemblance to the laws of Post-Soviet states and respectively, the legal arrangement of these states is one of the main subjects of this study. Special attention shall be paid to the set of principles elaborated by EU Commission. These principles regulate the matrimonial property relations and studying them will allow us identify the best European practice, which may be established in the Georgian family law.

As it has been identified, separation of property-related obligations shall be based on the purpose of taking the debt, which shall be defined by the court judgment. It must be mentioned that division of joint property by the creditor is a complete novelty for the Georgian family law. The scheme provided in this work describes this novelty in much detail. In this respect, the arrangement of Swiss law may be shared, although the approach of the French family law is also interesting, not speaking of the judicial case law of US states. Considering that court judgments of various US states completely differ from each other, we believe that pre-marital obligation is the individual obligation of the spouse who undertook to perform this obligation.

With regard to the rule of division of joint debts of spouses, first of all, it shall be divided in the process of division of joint property, because only after the spouse's share in joint property is

41 Ibid.
42 Ibid, 130.

identified, the joint obligation can be divided proportionally. In case of indivisible obligations, firstly, this obligation shall be performed and then the joint property of spouses shall be divided in consideration of the risks that the sale of regressive claim of the performing spouse shall not be jeopardized.

Bibliography:

1. Civil Code of Georgia, Legislative Herald of Georgia, Parliamentary Gazette, 24/08/1995.
2. *Bryan D.*, A Straightforward Guide to Family Law, London, 2015, 10.
3. *Boele-Woelki K.*, Common Core and Better Law in European Family Law, Antwerp-Oxford, 2005, 5.
4. *Chiu H., Ostrow M.,* JP Boyd on Family Law, Resolving Family Law Disputes in British Columbia, Wikibook, 2019, 463.
5. *Dalpane M.,* Matrimonial Property and Its Contractual Regulation in Kazakhstan, The International Survey of Family Law, London, 2011, 249.
6. *Izquierdo A.O., Rodriguez A.M.O., Izquierdo A.M.O.,* Matrimonial Property Regimes Throughout the World, Madrid, 2018, 334, 841.
7. *Kurdadze Sh.*, *Khunashvili N.*, Civil Procedure Law of Georgia, Tbilisi, 2012, 304 (in Georgian).
8. *Meladze G.*, Rules for Disposal of Spouses' Property, Law Magazine № 1, Tbilisi, 2021, 67 (in Georgian).
9. *Rusiashvili G.*, Matrimonial Property Relations, Comparative Law Magazine 10/2020, 10 (in Georgian).
10. *Rusiashvili G., Kavshbaia N., Batiashvili Z.,* Comments on the Civil Code, Book VII, Tbilisi, 2021, 88,128,129,133,134 (in Georgian).
11. *Redondo P. Q.*, Spanish Matrimonial Property Regimes and CEFL Principlesregarding Property Relations between Spouses, European Journal of Law Reform, Vol.17, Joint Edition, 2015, 338.
12. *Shengelia R.*, *Shengelia E.*, Family law, Tbilisi, 2011, 168, 170 (in Georgian).
13. *Scherpe J. M.,* The Financial Consequences of Divorce in a European Perspective, Cambridge, 2016, 4-10.
14. *Traynor Roger J.*, Weinberg v. Weinberg 67 Cal.2d, University of California, UC Hastings Scholarship Repository, 1967, 557.
15. The Antenuptial Obligation and Arizona Community Property Law, Law and Social Order, 1970, 614.
16. *Verbeke A.,* Marital Property Planning in a Belgian Nutshell, Based on a Lecture at the Annual Conference of the International Academy of Estate and Trust Law (2005), New Mexico, 2006, 5, 6.
17. *Вишнякова А.В.*, Комментарий к Семейному Кодексу Российской Федерации, Москва, 2011, 33 (in Russian).
18. *Власова М.В.*, Постатейный Комментарий к Семейному Кодексу Российской Федерации, Москва, 2013, 151 (in Russian).
19. Decision № AS-1646-2018 of 22 March, 2019 of Supreme Court of Georgia.
20. Decision № AS-1334-1254-2017 of 18 May, 2018 of Supreme Court of Georgia.
21. Decision № AS-605-579-2016 of 17 February, 2017 of Supreme Court of Georgia.
22. Decision № AS-372-356-2016 of 3 January, 2017 of Supreme Court of Georgia.

23. Decision № AS-569-540-2015 of 1 July, 2016 of Supreme Court of Georgia.
24. Decision № AS-315-300-2016 of 17 June, 2016 of Supreme Court of Georgia.
25. Decision № 2b/6774-14 of 17 February, 2016 of Tbilisi Court of Appeals.
26. Decision № AS-516-489-2015 of 17 June, 2015 of Supreme Court of Georgia.
27. Decision № AS-981-922-2012 of 24 September, 2012 of Supreme Court of Georgia.
28. Decision № AS-1029-964-2012 of 23 July, 2012 of Supreme Court of Georgia.
29. Decision № 3k/990-01 of 16 January, 2002 of Supreme Court of Georgia.
30. Decision № 3K/519-01 of 29 June, 2001 of Supreme Court of Georgia.
31. <www.scholar.google.com> [29.05.2022].
32. <www.casetext.com> [29.05.2022].
33. <www.oas.org> [29.05.2022].
34. <www.ceflonline.net> [29.05.2022].
35. <www.fedlex.admin.ch> [29.05.2022].

Ia Ujmajuridze*

Matter of Authenticity of Electronically Agreed Penalty as Similar in Writing

The modern world is increasingly consuming the Internet in everyday life. Through the Internet, people, among others, enter into consumer contracts. This circumstance gave rise to the need to adapt the relations to the legal norms, if necessary – to introduce new legislation. In the footsteps of the development of the Internet, an electronic form of contract was created, which was similar to a simple written form of contract. In this circumstance there arises a legal question – whether the electronically agreed legal category is equal to written one. The purpose of this article is, among others, to answer this question.

Keywords: *Electronic form of the contract, Written form of the contract, Penalty.*

1. Introduction

The modern rapidly evolving society of human beings is increasingly using the Internet in their daily activities. Internet contracting is especially common in the trade. E-commerce should be considered as a modern form of civil law, especially in the recent pandemic situation when businesses other than food traders were closed but courier services were not restricted.[1] Merchants were actively involved in online marketing and through websites or social networking customers were offered goods with increased intensity, sometimes, in addition to free courier services for the buyer.

The pandemic presented to both the supplier and the consumer the advantages of using electronic means in their relationship with the consumer, and highlighted the usefulness of this form for both parties.

* PhD student of Ivane Javakhishvili Tbilisi State Univercity, Chief Consult at the office of the Chamber of Civil Cases in Tbilisi City Court, Assistant to a Judge, Head of Secondary Structural Unit.

1 By the 5864-ss, March 21, 2020 Resolution of the Parliament of Georgia was approved the Edict № 1 of the President of Georgia March 21, 2020 on the Declaration of the State of Emergency throughout the Whole Territory of Georgia (Legislative Herald of Georgia, website, 21/03/2020). By the № 181 Ordinance, 23 March 2020 of the Government of Georgia (Legislative Herald of Georgia, website, 23/03/2020, void, 23/05/2020) 'in connection with the Declaration of a State of Emergency throughout the Whole Territory of Georgia', On the basis of Decree № 1 of 21 March 2020 of the President of Georgia, 'Measures to be Implemented in connection with the Prevention of the Spread of the Novel Coronavirus (COVID-19) in Georgia' was approved. According to Article 7 of the Resolution of the Government of Georgia, the supply/sale of all goods/products has been suspended for a state of emergency, except for food and some other goods. The activities of restaurants, public catering facilities, ... / food establishments in organizations were allowed only with on-site delivery or delivery of the product by transport (...) ... .

The large-scale development of technology has created the need to innovate and adopt new legislative norms.[2] The process of changes has started by the Georgian legislator and is progressing according to the European path. However, given the fact that, as a result of the universality of the Internet, the protection of consumer rights is easily accessible, it can be said that the Georgian online market, due to the lack of detailed legal regulations, has not suffered a setback. It should be noted that the EU has increasingly harmonized consumer protection legislation, which includes regulations on distance trade, unfair terms and consumer credit.[3] In particular, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights[4], amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. Given that directives do not have direct effect, Member States [as well as Georgia] are obliged to ensure their implementation in national law.[5]

Under Article 127 of an international "Association Agreement between the EU and the European Union on Atomic Energy and its member states, on the one hand, and Georgia, on the other hand," (Association Agreement)[6] both parties recognize that e-commerce increases trade opportunities in many sectors; the Parties agree to promote the development of e-commerce between them, in particular co-operation in matters arising from e-commerce. …

The purpose of the article is to highlight the role that modern technology offers to consumers for greater flexibility of legal relationship, raise the question of whether it is necessary to impose a penalty as of securing a claim in a written form, whether there is a need to fill a legislative gap. Therefore, looking for an answer to the question, can it be considered that a contract concluded through the website is equal to a written contract? And when you agree to the terms of the agreement posted on the Website, which contains provisions on the possibility of accruing a penalty, whether or not it is agreed upon in compliance with the mandatory form of the penalty.

2. The Nature of the Penalty as a Means of Securing the Obligation to Secure the Claim

In order to protect the interests of the creditor, the Civil Code of Georgia provides the possibility of using various means to ensure the fulfillment of the contractual obligation. There are substantive and contractual means of securing the obligation[7/8]. It seems that the classic form of means of securing a claim by the Civil Code of Georgia is considered to be substantive means, so non-material means, which, as mentioned, are also called contractuals, are referred to by the Civil Code of Georgia as additional means of securing a claim.

---

2 *Pachuashvili N.,* Contracts concluded by electronic means, grounds for their invalidity, termination, rejection and legal consequences, thesis, Tbilisi, 2019, 8 (in Georgian).

3 *Cortés P.*, Online Dispute Resolution for Consumers in the European Union, 2010, 6-7 http://hdl.handle.net/10419/181972 [10.03.2022].

4 See <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011L0083> [10.03.2 022].

5 *Lakerbaia Th.,* European standard for informed consumers, Journal of Law, #1, 2015, 145 (in Georgian).

6 Legislative Herald of Georgia, website, 11/09/2014.

7 *Akhvlediani Z.,* Obligation Law, Tbilisi, 1999, 76 (in Georgian).

8 *Tchanturia L.,* Credit Security Law, Tbilisi, 2012, 15 (in Georgian).

Thus, the contractual legal remedies for securing a claim are: a penalty, an earnest, a debtor's guarantee, which is characterized by accessory, and a non-accessory bank guarantee[9], which in practice is used to secure contracts concluded through relatively high cost and by announcing an electronic tender on budget management.[10]

The penalty will be imposed in case of breach of obligation and it is usually a common means of securing a monetary claim.[11] According to the will of the legislator, a necessary precondition for the imposition of a fine is the observance of the written form of the penalty agreement and the breach of the obligation for which the penalty was used.

As mentioned, the penalty is of an accessory nature,[12] which means that the obligation to pay the penalty does not exist without the existence of a basic contractual obligation. The invalidity of the besic obligation will also result in the invalidity of the additional obligation, while the invalidity of the collateral agreement will not invalidate the underlying obligation.[13]

The agreement on the fine requires the expression of mutual will. Unilateral confession does not really reflect the will expressed in the fine and, consequently, does not give rise to the right to claim it.[14]

The specificity of the penalty as one of the means of securing the claim is that the possibility of imposing it must be provided in the contract.

The occurrence of the obligation to pay a penalty is related to the breach of a contractual obligation, therefore, a necessary condition for the application of a penalty is a breach of the obligation. "A penalty is a produced obligation, therefore, the right to claim it is possible only after the violation of the basic obligation."[15/16] If the breach of the obligation is not established by the authorized person, there is no basis for imposing a penalty.

3. The Form of the Penalty

3.1. Written Form according to the Legislation of Georgia, in General

According to Article 418(2) of the Civil Code of Georgia,[17] the agreement on the penalty requires a written form.

---

9 *Lipartia N.,* Bank Guarantee, Modern Theory and Practice, Tbilisi, 2020, 75 (in Georgian).

10 See Order № 12 of 14 June 2017 of Chairman of the State Procurement Agency On Approval of the Rules for Conducting Electronic Tenders, Legislative Herald of Georgia, website, 15/06/2017.

11 *Tchanturia L.,* Credit Security Law, Tbilisi, 2012, 16 (in Georgian).

12 *Meskhishvili K.,* Topical Issues of Private Law, Theory and Case Law, Vol. I, Tbilisi, 2020, 89 (in Georgian).

13 *Akhvlediani Z.,* Obligation Law, Tbilisi, 1999, 76 (in Georgian).

14 *Meskhishvili K.,* Topical Issues of Private Law, Theory and Case Law, Vol. I, Tbilisi, 2020, 91 (in Georgian).

15 Decision on the case № as-335-2021 of the Civil Cases Chamber of the Supreme Court of Georgia of June 25, 2021, § 30.

16 Decision on the case № as-1482-2018 of the Civil Cases Chamber of the Supreme Court of Georgia of May 8, 2020, § 38.

17 Gazzete of Parliament of Georgia, 31, 24/07/1997.

It should be noted that a written form is required regardless of the form of the main obligation.[18]

According to the Civil Code of Georgia, a transaction may be concluded orally or in writing (Article 68(1)). Pursuant to Article 319(1) of the Civil Code of Georgia, freedom of contract is defined in several aspects. These are: freedom to determine the content of the contract, freedom to choose a contractor, freedom to choose the form of the contract, freedom to choose the type of contract and freedom to enter into a contract.[19] However, the principle of freedom of form derives only indirectly from the wording of Article 68.[20] The existence of a form of contract (transaction) is a common manifestation of interference with the freedom of private autonomy. For example, the need for a written form. It arises from a separate contractual relationship. In the event that such an obligation is not provided by law, the parties may, at their discretion, choose the type of form. For example, the electronic form, which is a subspecies of the written form.[21] The imposition of a mandatory written form of the penalty agreement is an exception, which proves the non-absoluteness of the principle of freedom of contract.

If there is a mandatory form for the contract, then the application (offer) for the contract and the acceptance of it needs to follow the established form.[22] It should be noted that the parties may agree on a fine, both under the main contract and, independently of it, by an additional contract. The latter must be in writing even if the main contract is oral. However, the binding form of the transaction may be determined by the parties themselves when the law itself does not prescribe any binding form for the transaction..[23]

Particular importance is attached to how the written document itself is constructed, since the purpose of the binding form is reflected in it.[24] In the case of a written form, the expression of will directed to the origin of the transaction must be expressed in alphabetical letters.[25] According to Article 69(3) of the Civil Code of Georgia, in the presence of a written form of the transaction, the signature of the parties to the transaction is sufficient. Signature means signing a document specially prepared for the transaction. In case of a unilateral transaction, the signature of one person is sufficient, and in case of a bilateral or multilateral transaction – the signature of two or more persons is required.[26]

Thus, a written contract is a document containing a text composed of letters with the signatures of the party or parties.

It's interesting – which type of a contract an electronic text contract should be considered? Is it a kind of written form, or something new that is not considered as a written form? In the recent past, it

---

18 *Akhvlediani Z.,* Obligation Law, Tbilisi, 1999, 79 (in Georgian).

19 *Jorbenadze S.,* Freedom of Contract In Civil Law, Tbilisi, 2017, 103 (in Georgian).

20 Comments on Civil Code, Book I, General Provisions of Civile Code, *Tchanturia L. (ed.),* Tbilisi, 2017, 368, field 1 (in Georgian).

21 *Jorbenadze S.,* Freedom of Contract In Civil Law, Tbilisi, 2017, 131 (in Georgian).

22 Comments on Civil Code, Book I, General Provisions of Civile Code, *Tchanturia L. (ed.),* Tbilisi, 2017, 388, field 4 (in Georgian).

23 Ibid, 390, field 8.

24 Ibid, 390, field 8.

25 Ibid, 391, field 9.

26 *Tchanturia L.,* General Part of Covil Law, Manual, Tbilisi, 2011, 340 (in Georgian).

was indicated in Georgia that an electronic contract does not traditionally belong to any form of a transaction.[27]

3.2. Written Forms of Contracts in European Legislation

In the process of drafting the unified European Purchase Law, formed in early 2006 by the "Correction and Unification Team" Draft Common Frame of Reference (DCFR)[28] was established. DCFR is a comprehensive set of central areas of private law, intended to be used in relation to transnational disputes; its goal was to use it in connection with transnational disputes. The DCFR is also a draft of the Comprehensive Code of Inheritance Law for EU countries or the so-called "Basic Law". Although the team working on the DCFR project mainly wanted to present the academic nature of the paper, this practice could not be implemented and the DCFR still became part of the political process in the future.[29] The DCFR-related text layers were originally released in May 2011, while the revised version was released in August 2011. Finally, this was the basis for the development of the Common European Procurement Law, issued in October 2011[30]. Although the European Commission launched the European Procurement Law in 2015, renowned German law researcher Reinhard Zimmermann believes that "it is in the hands of science to do everything possible to set and give us the key directions for future development."[31]

According to Article I.1:106, – "Draft Common Frame of Reference" – A reference to a person's signature includes a reference to that person's handwritten signature, electronic signature or advanced electronic signature.[32]

According to Article 126(1) of the German Civil Code, if a written form is prescribed by law, then the document must be signed by the compiler himself or his notarized initials must be made on it. According to Article 126(3), the written form may be changed electronically, unless otherwise provided by law.[33]

Pursuant to Article 13(1) of Amendments to the Swiss Civil Code of 30 March 1911 (Part Five: Obligatory Law) a contract for which a written form is required by law must be signed by all parties to the contract who will be obliged.

Article 14(1) of the same law stipulates that the signature must be done by hand. According to paragraph 2bis of the same article, a handwritten signature is equated with an authentic electronic

---

27 *Benashvili K.,* E-Commerce – The Challenge of Modernity in Private Law, Private Law Review, № 2, 2019, 90 (in Georgian).

28 *Zimmermann R.*, The Textual Layers of European Contract Law, *Katamadze N. and Ustiashvil G. (translators) Gegenava D. (ed.*), Sulkhan-Saba Orbeliani University, 2019, ii (author's foreword), 29 (in Georgian).

29 Ibid, 32.

30 Ibid, 36.

31 Ibid, ii (author's foreword).

32 Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Articles and Comments, Prepared by the Study Group on a European Civil Code and the Research Group on the Existing EC Private Law (Acquis Group), 56, <https://bit.ly/3KC1nzM> [10.03.2022].

33 *Kroppholler I.,* Civil Code of Germany, Study Comment, *Darjania Th., Tchetchelashvili Z. (translators*), *Chachanidze E., Darjania Th., Thothladze L. (ed.),* 13th ed., Tbilisi, 2014, 53 (in Georgian).

signature associated with an authentic time stamp within the meaning of the Federal Law on Electronic Signature of March 18, 2016. A different legal or contractual settlement of this issue is allowed.[34]

According to Article 6: 227a of Title 6: 227a of the Civil Code of the Netherlands, "Contracts Concluded by Electronic Means of Communication": If the contract is concluded through electronic means of communication and: a. The contract is and remains available to the parties; b. The authenticity of the contract is sufficiently guaranteed;c. The moment of concluding the contract can be determined by sufficient credibility, and d. The parties can be identified with sufficient certainty.[35]

To summarize, it should be noted that European legislation recognizes the written form of a contract and equates the written form with the textual form without signature, given the circumstances in which it is possible to determine the identity of the parties to the treaty and the will expressed by them.

It should also be noted that the Law of Georgia on Electronic Documents and Electronic Trust Services is in force in Georgia.[36]

According to this law, electronic signature is a set of electronic data that is attached to or logically linked with an electronic document and is used for signing the electronic document. According to the article 3.1. of the same law, a qualified electronic signature shall have the same legal effect as a handwritten signature.

It should be noted that this law offers the possibility of concluding a contract remotely, as well as the possibility of convincing in the real will of the party, which contributes to the simplification and rapidity of the relationship.

In the financial market, along with banks, other non-bank lending institutions have recently increased significantly, not to mention the individuals who issue the interest-bearing loans, including those secured by real estate. The proliferation of consumer loans, which are characterized by high interest rate accruals, has necessitated the introduction of certain rules by the regulator. Accordingly, by the order of the President of the National Bank of Georgia № 151/04 of December 23, 2016, the rule of protection of consumers' rights while providing services by financial organizations was approved, attached, along with the principle of calculating the effective interest rate of a loan.[37]

The purpose of the rule was to promote the financial stability and transparency of the financial sector, as well as to increase public confidence in the financial sector, maximize the protection of consumer interests and transparency of information about financial products on the market. Which, in turn, should significantly contribute to the active use of new financial products by the consumer, as well as to reducing the various risks associated with them.

---

34 Swiss Civil Code (As of 1 January 2017), *Tchetchelashvili Z. (translator*), Tbilisi, 2018, 264-265, <https://www.notary.ge/res/docs/gare/Swiss_Civil_%20Code.pdf> [10.03.2022] (in Georgian).

35 Civil Code of the Netherlands (As of 1 January 2019), *Tchetchelashvili Z. (translator*), Tbilisi, 2021, 520, <https://www.notary.ge/res/docs/gare/Dutch_Civil_%20Code.pdf> [10.03.2022] (in Georgian).

36 Legislative Herald of Georgia, website,10/05/2017.

37 Order № 151/04 of 23 December 2016 of Chairman of the Georgian National Bank, Legislative Herald of Georgia, website, 28/12/2016.

Under the rule, the financial organization is obliged to conclude the contract – regardless of whether the contract is made remotely (online) or materially (at a branch of a financial institution), also in the process of offering a product, inform the customer of the significant risks associated with the desired product. Such a risk may be, for example, the risk of an increase in the amount payable on a loan, which may arise if the customer has income in GEL, borrows in foreign currency, and the GEL depreciates against foreign currency. Also, the risks associated with non-payment of the loan (for example, the imposition of a penalty, the seizure of current accounts, the possible sale to repay a loan owned by real estate or movable property owned by him).

Pursuant to Article 5 of this Rule, the financial institution is obliged to make a contract for specific financial products, which must have a mandatory title – "Significant terms of the contract" and must contain information in a font size easily accessible to users, but not less than 12. The rule also stipulates that an agreement on specific financial products, both in material and electronic form, must include, among other provisions, an agreement on possible fines (Rule 6.3 (h)).

Thus, the rule echoes the reality that a loan agreement can be concluded remotely and makes it permissible to agree remotely on the terms of the financial product, including secure electronic channels. In such a case, prior to the entry into force of the Agreement, the financial institution shall ensure that the user receives and discloses the information provided by it in accordance with this Rule, as well as agrees to the terms and conditions offered. After confirmation of the user's consent, the agreed terms enter into force (Article 3.8 of the Rule).

4. Judicial Practice

It should be noted that among the civil cases reviewed by the Common Courts of Georgia, the cases arising from the loan (bank credit) dispute under the category of liability, under the agreement, are distinguished by the obvious dominance in terms of number. According to the statistics of cases reviewed by the Supreme Court of Georgia, published by the Supreme Court of Georgia, during 2020[38] Of the 116,310 civil disputes under consideration, the apparent majority were legal liabilities – 92,677, of which 65,350 were disputes arising out of the loan agreement, while, for example, there were only 2 disputes over tourism services and 4 over disputes over transport expeditions.[39].

Nevertheless, the case law of Georgia is not distinguished by the abundance of court decisions on contracts concluded in electronic form. The practice of the Supreme Court of Georgia so far contains only scanty definitions of e-contracts. This may also be due to the fact that no legal irregularities were allowed by the courts of lower instance in resolving the relevant cases or no substantiated cassation claim was filed.

In the case N as-898-848-2015 of the Civil Cases Chamber of the Supreme Court of Georgia of March 9, 2016 (§ 57), the Cassation Chamber did not share the Cassator's view that with the offer made electronically by the applicant for sale and its acceptance by the potential buyer, the purchase agreement between the parties is considered concluded. This finding of the Court of Cassation cannot

[38] Modern data is not published at the time of writing this Artilce (Author's note).

[39] Statistics of the Common Court Cases of Georgia is available at the website <https://www.supremecourt.ge/statistics/2020/> [10.03.2022].

be considered logical, given its following definition: "59. ... In modern practice, the so-called Concluding electronic contracts. The parties enter into contracts on a daily basis through various e-commerce channels. An agreement entered into in this form shall be deemed to be an agreement equal to an agreement entered into in simple written form."[40] It seems that the Court of Cassation justifies its conclusion with this reasoning: "the Chamber of Cassation considers that in the absence of the use of electronic signatures, the electronic auction system fails to provide any possibility of identifying the person wishing to alienate and the potential buyer during the auction process, which precludes the performance of certain actions by an unauthorized person. This is the reason for the need to conclude an additional agreement between the parties." However, it should be noted that the use of an electronic signature would not have been sufficient if the signatures had not been verified, given the complex written protection requirement for concluding a real estate transaction. Accordingly, the Court of Cassation should have pointed out that even with the use of an electronic signature, a transaction in respect of an immovable property would not be genuine, as the parties' will was not certified by a notary or an authorized person of the registering authority.

The explanations set out in the decision of the European Court of Justice may have an indirect but recommendatory effect on the case law of Georgia. On the case *Home Credit Slovakia, a.s. v Klára Bíróová,* N C-42/15, by the Judgement of November 9, 2016[41] the Court ruled that when a credit agreement does not include all the information required under Article 10(2) of the directive [2008/48/EC of the European Parliament and of the Counci l of 23 April 2008][42], the agreement is to be deemed interest-free and free of charges.

5. Conclusion

In conclusion it should be noted that modern European legislation considers it permissible and equates the written form of a contract with the electronic text form.

Certain norms of the current legislation of Georgia (the Law of Georgia on Electronic Documents and Electronic Trust Services, the order by the President of the National Bank of Georgia № 151/04 of December 23, 2016) also declares an electronic form permissible in relation to a separate financial agreement. Therefore, it should be noted that Georgian legislation has not lagged behind the modern European trend and it can be said that the electronic text form is a form of written contract. In view of these circumstances, it would be appropriate if the relevant amendments were made to the Civil Code of Georgia and, in particular, the written form of the contract is interpreted not only as a text form with the signatures of the party(s), but also as a form agreed via electronic channel with formally agreed provision on penalty, even if the parties do not put an electronic signature on the relevant text form. All the more so given that Georgia has committed itself to promoting e-commerce within the framework of the Association Agreement. The penalty agreement, which is used to secure

[40] Decision on the case № as-898-848-2015 of the Civil Cases Chamber of the Supreme Court of Georgia of 9 March, 2016.

[41] Judgement of the ECJ on *Home Credit Slovakia, a.s. v Klára Bíróová),* № C-42/15, 09.06.2016 <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-42/15> [10.03.2022].

[42] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0048 [10.03.2022].

monetary claims, is an accompanying issue for such activities. Possible changes should concern Article 69.1 and Article 418.2 of the Civil Code of Georgia.

Bibliography:

1. Georgia International Agreement "Association Agreement, on the one hand, the European Union and the European Atomic Energy Community and their member states and, on the other hand, Georgia" Legislative Herald of Georgia, website 11/09/2014.
2. Civil Code of Georgia, Gazzete of Parliament of Georgia, 31, 24/07/1997.
3. Civil Code of the Netherlands (As of 1 January 2019), Tchetchelashvili Z. (translator), Tbilisi, 2021, 520, <https://www.notary.ge/res/docs/gare/Dutch_Civil_%20Code.pdf> [10.03.2022] (in Georgian).
4. Law of Georgia on Electronic Documents and Electronic Trust Services is in force in Georgia Legislative Herald of Georgia, website, 10/05/2017 (in Georgian).
5. Swiss Civil Code (As of 1 January 2017), *Tchetchelashvili Z.* (translator), Tbilisi, 2018, 264-265, <https://www.notary.ge/res/docs/gare/Swiss_Civil_%20Code.pdf> [10.03.2022].
6. 5864-ss, March 21, 2020 Resolution of the Parliament of Georgia on approval of the Edict № 1 of the President of Georgia March 21, 2020, Legislative Herald of Georgia, website, 21/03/2020.
7. Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Articles and Comments, Prepared by the Study Group on a European Civil Code and the Research Group on the Existing EC Private Law (Acquis Group), <https://bit.ly/3KC1nzM> [10.03.2022].
8. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011L0083> [10.03.2022].
9. 2008/48/EC of the European Parliament and of the Council of 23 April 2008, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0048> [10.03.2022].
10. The № 181 Ordinance, 23 March 2020 of the Government of Georgia, Legislative Herald of Georgia, website, 23/03/2020, void, 23/05/2020.
11. *Akhvlediani Z.,* Obligation Law, Tbilisi, 1999, 76, 79 (in Georgian).
12. *Benashvili K.,* E-Commerce – The Challenge of Modernity in Private Law, Private Law Review, № 2, 2019, 90 (In Georgian).
13. *Cortés P.,* Online Dispute Resolution for Consumers in the European Union, 2010, 6-7 <http://hdl.handle.net/10419/181972> [10.03.2022].
14. *Jorbenadze S.,* Freedom of Contract In Civil Law, Tbilisi, 2017, 103, 131 (in Georgian).
15. *Kroppholler I.,* Civil Code of Germany, Study Comment*, Darjania Th., Tchetchelashvili Z. (translators), Chachanidze E., Darjania Th., Thothladze L. (ed.),* 13th ed., Tbilisi, 2014, 53 (in Georgian).
16. *Lakerbaia Th.,* European standard for informed consumers, Journal of Law, #1, 2015, 145 (in Georgian).
17. *Lipartia N.,* Bank Guarantee, Modern Theory and Practice, Tbilisi, 2020, 75 (in Georgian).
18. *Meskhishvili K.,* Topical Issues of Private Law, Theory and Case Law, Vol. I, Tbilisi, 2020, 89, 91 (in Georgian).

19. *Pachuashvili N.,* Contracts Concluded by Electronic Means, Grounds for their Invalidity, Termination, Rejection and Legal Consequences, Thesis, Tbilisi, 2019, 8 (in Georgian).
20. *Tchanturia L. (ed.),* Comments on Civil Code, Book I, General Provisions of Civil Code, Tbilisi, 2017, 368, field 1, 388, field 4, 390, field 8, 391, field 9 (in Georgian).
21. *Tchanturia L.,* Credit Security Law, Tbilisi, 2012, 15-16 (in Georgian).
22. *Tchanturia L.,* General Part of Civil Law, a manual, Tbilisi, 2011, 340 (in Georgian).
23. *Zimmermann R.,* The Textual Layers of European Contract Law, Katamadze N. and Ustiashvil G. (translators) Gegenava D. (ed.), Sulkhan-Saba Orbeliani University, 2019, 29 (in Georgian).
24. Order № 151/04 of 23 December 2016 of Chairman of the Georgian National Bank, Legislative Herald of Georgia, website, 28/12/2016.
25. Order № 12 of 14 June 2017 of Chairman of the State Procurement Agency On Approval of the Rules for Conducting Electronic Tenders, Legislative Herald of Georgia, website, 15/06/2017.
26. Decision on the case № as-335-2021 of the Civil Cases Chamber of the Supreme Court of Georgia of June 25, 2021.
27. Decision on the case № as-1482-2018 of the Civil Cases Chamber of the Supreme Court of Georgia of May 8, 2020.
28. Decision on the case № as-898-848-2015 of the Civil Cases Chamber of the Supreme Court of Georgia of 9 March, 2016.
29. Judgement of the ECJ on Home Credit Slovakia, a.s. v Klára Bíróová), № C-42/15, 09.06.2016, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-42/15> [10.03.2022].
30. <https://www.supremecourt.ge/statistical2020/> [10.03.2022].

Shalva Kipshidze*

Recognition of the Right, as a Ground to Acquire Property Rights of the Illegally Occupied Plots of Land

The constitution of Georgia, article 19, stipulates the universal right to ownership, acquisition, alienation, and inheritance of property. The right to own property is a pillar to the modern democratic society development, on which it is based economic freedom and stable civil turnover. According to the established practice of the Constitutional Court of Georgia, "The constitutional-legal guarantee of property rights includes the obligation to create a legal base that ensures the practical realization of the right to own property and makes it possible to accumulate property through the purchase of the property."[1]

According to Georgian law, one type of property acquisition is the recognition of property rights to illegally occupied plots of land in the absence of a document certifying the lawful possession (use) of land.

The purpose of this article is to discuss the recognition of the right as a basis for acquiring ownership to illegally occupied plots of land. To do this, logical analysis is used along with the presentation of the issue's informational and cognitive aspects and discussion of the judicial practice.

Keywords: *property, illegally occupied plots of land, privatization, recognition, state property, commission for recognition.*

1. Introduction

After the fall of the Soviet Union, in the transition from the socialist farming system to modern market relations in Georgia, privatization – the transfer of state property to private ownership – was considered a central direction of economic reforms.[2] Accordingly, the state land reform began, As a result, agricultural land used by individuals during the Soviet period was transferred to Georgian citizens.[3]

---

* PHD student of Ivane Javakhishvili Tbilisi State University; academic assistant of the faculty of law at Sulkhan-Saba Orbeliani University; invited lecturer of the faculty of law at Ivane Javakhishvili Tbilisi State University; invited trainer of the legal direction at LEPL Training Center of the justice of Georgia. Research Associate at the Davit Batonishvili Institute of Law, Leading Specialist at LEPL National Agency of State Property, Ministry of Economy and Sustainable Development of Georgia.

1 A judgment of the Constitutional Court of Georgia on the case "Khatuna Tsotseria v. the Parliament of Georgia" December 29, 2020. no2/3/1337. II.1.

2 *Kipshidze Sh.,* Privatization as a fundamental element of public management, Journal Orbeliani, № 4, 2021, 103 (in Georgian).

3 The post-Soviet countries have a similar history, from which the experience of Germany, the Czech Republic, and Poland in the process of privatization is worth noting, in these countries the privatization

During the distribution of lands, the reform was flawed, a part of the population was not given an acceptance and delivery certificate or any other certificate of title, while a part of the population illegally occupied plots of land. Therefore, the legislator made it possible to obtain the property rights to illegally occupied plots of land in a simplified manner. For this purpose the parliament of Georgia adopted the law in 2007: the Law of Georgia "On Recognition of Property Rights of the Plots of Land Possessed (Used) by Natural Persons and Legal Entities under Private Law ("The law on recognition of property rights"). The law mentioned above, defined the status of illegally occupied plots of land and established the rules and procedures for obtaining ownership rights over them.

It should be highlighted, that the recognition of property rights to illegally occupied plots of land is characteristic of Georgian reality and is unfamiliar to the law of European Nations.

Accordingly, due to the uniqueness of the subject, primarily Georgian practice is discussed, however, the experiences of other countries are also represented.

Analyzing the recognition of property rights[4] and assessing present practice is a current issue. The above is confirmed by the large number of applications of interested persons in the property rights recognition commissions and the multitude of lawsuits, which especially increases the relevance of the research.

The present article will discuss the legislative acts of Georgia in terms of the recognition of property rights, as well as the assessment standards for the recognition of property rights in the process of administrative proceedings and the implementation of justice, and in conclusion, appropriate recommendations will be given.

2. Property Right as a Right protected by the Constitution

According to the first section of Article 19 of the Constitution of Georgia the right to own property is "recognized and inviolable". "Property is recognized and inviolable" means that legitimate property is protected. At the same time such property is trustworthy. The trust factor is an important aspect of the concept of ownership. As it is said, it establishes and legitimizes property".[5] Property rights are the most extensive rights to control an object among the rights in the legal order.[6]

According to the definition of the Constitutional Court of Georgia "Property rights are a natural right, without which the existence of a democratic society is impossible. This stimulates individuals' private economic initiatives, which contributes to the development of economic relations, free entrepreneurship, a market economy, and normal, stable civil turnover. Meanwhile, the institution of private property is central to the proper functioning of a market economy; as such, it is one of the most

reform was implemented with an accelerated and organic privatization strategy. See: *Sack D.,* Vom Staat zum Markt, Privatisierung aus politikwissenschaftlicher Perspektive, 2019, 4-5.

4 Property rights are the source of the well-being of the democratic and social state. See: *Arsenault C.,* Property Rights for World's Poor Could Unlock Trillions in „Dead Capital": Economist, Thomson Reuters Foundation, 2016, 14.

5 *Zoidze B., Constitutional Control and Order of Values in Georgia, Tbilisi, 2007, 96 (in Georgian).*

6 *Schwab/Prütting*, Sachenrecht, 32. Aufl., 2005, Rdnr. 306.

important prerequisites not only for economic competition among owners but also for a democratic state and public order."[7]

The Plenum of the Constitutional Court of Georgia in the case "A citizen of Denmark Heike *Kronqvist* v. The Parliament of Georgia,' " pointed out that "The right to purchase property implies the ability of a person to become the owner. A person's desire to acquire property is a normal social behavior characteristic of him/her. This aspiration is a kind of manifestation of personal freedom. The constitutional right to acquire property establishes a negative obligation on the state to not obstruct a person from acquiring property, and based on this, he/she can ensure his/her well-being. Property is the foundation for the independence and development of a person. A person's aspiration to create his own property for his own independence and well-being undoubtedly deserves respect from the state and it should be expressed in such legal regulations for the acquisition of property that ensure, on the one hand, the unhindered realization of the property rights and on the other hand, effective civil turnover.[8]

Land is the most important economic asset for the state.[9] The recognition of property rights of the plots of land possessed (used) by natural persons and legal entities serves to encourage private ownership, "To promote the development of the land market and to bring the usage of land into the legal order".[10]

3. Legal Grounds for Recognition of Property Rights

3.1. Definition of the Illegally Occupied Plots of Land

The law of Georgia on recognition of property rights regulates the grounds, terms, and conditions, as well as the authorities that represent the state in the process of recognizing property rights to illegally occupied plots of land.[11]

According to the first article of the abovementioned law, the purpose of the law shall be, by recognizing the property rights ("recognition of property rights"), to use state-owned land resources in lawful possession (use), as well as state-owned land illegally occupied by natural persons, legal entities under private law, or any other organizational structures provided by law, and to facilitate land market development. The law distinguishes between two types of land: lawfully possessed (used) plots of land and illegally occupied plots of land. The purpose of the present article is to discuss the issue of the recognition of property rights to illegally occupied plots of land, therefore, we will discuss the latter.

---

7 A judgment of the Constitutional Court of Georgia on the case "Citizens of Georgia- David Jimsheleisvili, Tariel Gvetadze and Neli Dalalashvili v. The Parliament of Georgia" July 2, 2007, № 1/2/384, II. 5.

8 A judgment of the Constitutional Court of Georgia on the case "A citizen of Denmark Heike *Kronqvist* v. The Parliament of Georgia," June 26, 2012. № 3/1/512. II. 37-38.

9 *Dixon M.,* Modern Land Law, 7th Ed., Routledge, 2010, 31.

10 A judgment of the Constitutional Court of Georgia on the case "GP. Grisha Asordia v. The Parliament of Georgia" December 27, 2013. № 2/3/522,553. II.18.

11 The Law of Georgia on Recognition of Property Rights of the Plots of Land Possessed (Used) by Natural Persons and Legal Entities under Private Law, 11/07/2007.

While determining the purpose of the law on recognition, the factual and legal realities should be taken into account as they existed at the time of its adoption. By adopting the abovementioned law, the legislator encouraged private initiative and stimulated the utilization/usage of existing land resources and for this purpose, the state established a regime with certain benefits on state property, in particular, in case of privatization of the plots of land.[12]

According to the explanatory note to the aforementioned law: "the arbitrarily occupation of plots of land, which represents an important part of the state-owned land resources, on the one hand impedes the utilization of the fund of state-owned land and the development of the land market; on the other hand, besides citizens using state-owned plots of land, registration of the right to these lands was associated with a number of difficulties, and the current situation caused a hindrance to the growth of the revenue part of the state's budget because the inability to identify the property rights on these lands at the National Agency of Public Registry excluded the possibility of making them an object of taxation. Along with the aforementioned actions, the state aimed to use land funds to promote the development of the land market and to bring illegally occupied lands into the legal order.[13]

According to Article 2 of Paragraph "c" of the Law on Recognition of Property rights: "illegally occupied plots of land are illegally occupied state-owned agricultural or non-agricultural plots of land with a residential house (built, under construction or destroyed) or a non-residential building (built, under construction or destroyed) built upon it before entry into force of this Law, (July 11, 2007) as well as illegally occupied plots of land (with or without fixed structures built upon them) adjacent to a plot of land owned or lawfully possessed by an interested natural person, and its size should not exceed 1.25 hectares in the bar and in the highland settlement should not exceed 5 hectares, as defined in the law "On the Development of High Mountainous Regions," and that plot of land at the moment of requesting recognition of the property rights should not be disposed of by the state."

3.2. Plot of Land Subject to the Recognition of the Property Rights

As previously stated, According to Paragraph "c" of Article 2 of the law on recognition of property rights, a state-owned agricultural or non-agricultural plot of land shall be the subject to the recognition of property rights. As a result, we must determine whether only land registered in the name of the state at the LEPL – National Agency of Public Registry (the Public Registry) is an object of recognition, or whether land registered in the name of the municipality is also an object of recognition.

The analysis of court practice[14] reveals that the commissions for the recognition of property rights ("the Recognition Commission") and the courts have different approaches to the issue of the

---

12 A judgment of the Constitutional Court of Georgia on the case " 'GP. Grisha Asordia v. The Parliament of Georgia" December 27, 2013. II. 17.

13 The explanatory note to the draft law of Georgia "on Recognition of Property Rights of the Plots of Land Possessed (Used) by Natural Persons and Legal Entities under Private Law by the Local Self-government" <https://info.parliament.ge/ file/1/BillReviewContent/119949> [31.08.2022].

14 See, Chamber of Administrative Cases of Tbilisi Court of Appeals judgements: Case № . 3ბ/1434-16 dated February 16, 2016. Case № . 3ბ/1937-18 dated October 11, 2018. And Case № . 3ბ/2644-19 dated

recognition of plots of land registered under the ownership of the municipality, and they refuse to recognize the property rights of the interested person.

Issues related to the governance, disposal, and transfer of state property are regulated by the Law of Georgia "On State Property"[15], according to Article 2 of this law "State property is movable and immovable things and intangible assets owned by the state". This Law does not apply to the cases determined by the Law of Georgia on the Recognition of Property Rights of the Plots of Land. That is the reason of ambiguity during the dispute resolution.

The municipal property is legally regulated by the Organic Law: "Local Self-Government Code". According to this document the property of the municipality includes: the property assigned to a municipality by law, the property transferred by the State to the ownership of a municipality; the property that has been created, acquired or registered by a municipality according to the legislation of Georgia.[16] Accordingly, it is necessary to evaluate whether the legislator allowed the possibility of recognition of municipal property on illegally occupied land by adopting the law on recognition of property rights.

In 1992, the Cabinet of Ministers of the Republic of Georgia adopted decree N48 "On Reform of Agricultural Land in the Republic of Georgia" on the bases of which began the mass transfer of plots of land to private ownership. The homestead, garden, and country land, which were during the Soviet Union period registered in the form established by law, were transferred to the private ownership of the citizens of Georgia free of charge.[17]

It should be noted that all countries of the post-Soviet system have gone through the land reform. The process of privatization in East Germany is special and unique.[18] After the reunification of Germany was created a special body responsible for privatization under the Federal Ministry of Finance. The assignment of the mentioned body was the integration of the East German economy into the West German economy, the creation of the appropriate legal framework, and effective

December 4, 2019. In the aforementioned judgements, the Court of Appeal refers to the relevant articles of the Local Self-Government Code and the Constitution of Georgia, according to which the power of the government and self-governing units are separated. A self-governing unit has the power to make a decision about all those issues that according to law are not under the authority of the government or an autonomous republic, and decision-making on these issues is not excluded from the authority of the self-governing unit by law. The state-owned lands are separated from the local self-government bodies and from the lands owned by the Ministry of Economy and it is incorrect to grant the self-governing units general authority to recognize property rights to the state-owned lands. Hence, according to the Court of Appeals, the recognition commission has the right to recognize property rights as a delegated authority by the legislator, which additionally confirms that only state-owned plots of land can be the subject of the recognition and not municipality-owned plots of land. Otherwise, it would violate the principles of delegated and own authority, as well as the completeness and exclusivity of own authority, and, of course, the principles of separation of central and local government – the principles of decentralization and subsidiarity. The recognition commission's refusals to recognize property rights contain similar reasoning.

15 The Law of Georgia "On State Property", the Parliament of Georgia, 21/07/2010.

16 The Organic Law, "Local Self-Government Code", article 106, 05/02/2014.

17 "On Reform of Agricultural Land in the Republic of Georgia" the decree adopted by the Cabinet of Ministers of the Republic of Georgia, N48, 18/01/1992 (Expiration Date 26/06/1997, № 786)

18 *Kloepfer M.,* Verträge als Instrumente der Privatisierung, Liberalisierung und Regulierung in der Wasserwirtschaft, 2009, 31.

management of the privatization process.[19] In 1992, a state-federal body, the Property Management and Conversion Corporation, was established, which still carries out the privatization of agricultural lands and forestry areas.[20] Germany, in contrast to Georgia, applied a strategy of accelerated privatization, which meant privatization with social responsibility and oriented towards the market economy,[21] As a result, the state determined which property was private property and which asset could participate in economic turnover.[22]

In Georgia, The first legislative act that defined property rights is the Law of the Republic of Georgia "On Property Rights" adopted in 1993. In accordance with Article 3 of the named law, "Subjects (owners) of property rights in the Republic of Georgia are citizens of Georgia, stateless persons, legal entities and the state." In addition, Article 12 of the same law determined: "State property includes the property of the Republic of Georgia and its autonomous republics' and local administrative-territorial units' (municipal) that are owned, used and disposed of the bodies authorized by the owner in accordance with the applicable legislation.[23] Thus, it is clear that arbitrary occupation and use of lands by Georgian citizens began in the period when there was no separated property of the state, the autonomous republic, and local self-government, and the land was owned only by the state.

The experience of the Czech Republic is interesting, where state/municipal property was privatized by issuing vouchers/transferring ownership to the voucher holder. All adult citizens of the country received a voucher that could not be bought or sold. Their owners could own state property, including shares in state-owned enterprises. This kind of privatization contributed to the formation of a class of private owners and the prevention of arbitrary occupation of state-owned lands.[24]

It should be noted, that before the adoption of the law on the recognition of property rights, the transfer of ownership rights was carried out by the relevant bodies (the State, local self-government bodies, the Ministry of Economic Development of Georgia, the National Agency of Public Registry and its territorial bodies). Also, transferring the plot of land from the state ownership to the ownership of the local self-government body did not exclude the possibility of declaring the used (illegally occupied) land as the private property of individuals or legal entities under private law.[25]

The Supreme Court of Georgia in a case explained in detail that "before the implementation of the law on the recognition of property rights, a person had possessed state-owned land. Mentioning the land as a state-owned does not mean that the land must necessarily be owned only by the state at the

---

19 *Kornai J.,* Making the Transition to Private Ownership, F&D, 2000, 12-13.

20 *Christoph Rieger H.,* Die Privatisierung der Staatsunternehmen: Das Disinvestment-Desaster, 2001, 19.

21 It meant the balanced development of rural territories in close cooperation with federal and local institutions, the reform covered a very short period of time , the 1990-1994 years and as a result of the reform state property transferred into private ownership swiftly. *Himmelmann G.,* Politische Bestimmungsmerkmale der Privatisierungsdiskussion in der Bundesrepublik Deutschland. In Privatisierung und die Zukunft der öffentlichen Wirtschaft, Baden-Baden: Nomos,1988, 107–176.

22 *Merkel W.,* Verstaatlichung, Privatisierung und Sozialdemokratie: ein westeuropäischer Vergleich, 1992, 252.

23 The Law of the Republic of Georgia "On Property Rights", Parliamentary Gazette, 15/07/1993.

24 *Kloepfer M.,* Verträge als Instrumente der Privatisierung, Liberalisierung und Regulierung in der Wasserwirtschaft, 2009, 42.

25 The law of Georgia "On declaration of the non-agricultural land possessed (used) by Natural Persons and Legal Entities under Private Law as a private ownership" article 1 and 3. (Expiration date 11/07/2007)

time the application is considered. Transferring property from state to local ownership did not preclude recognition of property rights because privatization and transfer into private ownership had not occurred." [26]In the mentioned case, the Court of Cassation determined unequivocally that illegally occupied land, can be municipal property too, based on reviewing the status of state property, its importance and the historical development of the legal framework related to the recognition of the right, by giving a perfect definition of the concept of state property. Therefore, the Court of Cassation considered that the recognition of property rights to such land is absolutely permissible. In the aforementioned case, it was explained that "municipal property is not a variety of state property, however, it represents an independent variety of public property. It is in the best interests of the population to have their property rights to the illegally occupied plot of land recognized. The realization of this right does not confirm the limitation of the property rights of the local self-government."[27]

Despite mentioned definition made by the Supreme Court, in some cases, recognition commissions and courts refuse to register property rights of municipal-owned land.

In conclusion, we can say that the plot of land registered under the state or municipal property, is subject to the recognition of property rights, if it is not disposed of as of July 11, 2007.

3.3. Existence of Building as a Basis for Recognition of Property Right

According to paragraph "c" of Article 2 of the Law on Recognition of Property Rights, illegally occupied state-owned agricultural or non-agricultural plot of land with a residential house (built, under construction or destroyed) or a non-residential building (built, under construction or destroyed) is subject to recognition.

The legislator distinguishes between the residential house and non-residential building, as well constructed and destroyed building. Therefore, in the process of evaluating a building, it is essential to determine its purpose. According to Article 2(f) of the Law on Recognition of property rights, a building is a structural system constructed of building materials and other wares which is firmly fixed to the ground, creates a covered space, and is enclosed by walls, columns and/or other enclosing structures, (including wooden structures), except for a temporary building; Accordingly, the building can exist not only in the form of a metal structure but also can be built with wooden material. However, according to Article 3, sub-paragraph "H" of the Law of Georgia on "Spatial Planning, Architecture, and Construction Code of Georgia", a building is defined as a structural system constructed of building materials and other wares which are firmly fixed to the ground.[28]

In spite of the existing records, confirming the existence of the building is the most common problem in the practice of the court. Especially, if there is a destroyed building on the plot of land or a building built with a wooden structure. In the recognition commission, to recognize property rights,

---

[26] A judgment of the Administrative Affairs Chamber of the Supreme Court of Georgia on the case № ბს-504-501, dated October 28, 2019, (ვ-17).

[27] Ibid.

[28] The term "building" has a double meaning: it has an important legal nature for the construction order and the law on the planning of construction. See. Turava P., Kalichava K., Construction Law, Tbilisi, 2020,177.

the burden of proof to confirm the statute of limitations of the building located on the plot of land, is on the interested person. The statute of limitations can be determined by an orthophoto (aerial photography) or an expert opinion, that will confirm the fact of the existence of a building-structure (built, under construction, or destroyed) on the plot of land before the entry into force of the law on recognition of property rights.[29]

According to the definition of the court of cassation, the legislator gave decisive importance to the location of the building, the appearance, and the condition of the building built on the applicant's plot of land. Accordingly, on the one hand, the applicant must prove ownership of the plot of land as well as the location of the building.[30] Because if the state building is located on the plot of land, a natural person could not have a legal claim on such land. Hence, while considering the building as an object of the state, the decisive importance should be given not to the fact of registration of the property rights in the name of the state, but by whom is the building built and for what purpose, because if the building is built under the order of the state, with the state's funds or by third parties, with the reservation of transfer to the state, we should consider such buildings as objects owned by the state."[31]

In one of the cases, the property rights recognition commission refused to recognize the property rights of the interested person. It was explained to the applicant that due to the lack of buildings and their purpose, it represented a temporary building.[32] The court of the first instance uphold the decision made by the commission[33] but the appellate court revised the decision of the lower instance and explained that the commission should have taken into account the testimony of the witnesses, the expert's opinion, which confirmed the statute of limitations of the building, also the fact

---

29 See, "On the Procedure for recognition of property rights of the plots of land possessed(used) by natural persons and legal entities under private law and an Approval of the Form of property Rights Certificate" the decree № 376, The Government of Georgia, dated July 28, 2016, article 2, paragraph 1, sub-paragraph "e" and the law on recognition, paragraphs 5^{1} and article $3^{1.}$

30 A judgment of the Administrative Affairs Chamber of the Supreme Court of Georgia on the case № ბს-1015(კ-19), dated March 18, 2021.

31 Ibid.

32 In another case, the citizen had submitted an expert opinion to recognition commission which stated that the residential house was made of wood construction. The building was installed on wood beam under which a concrete base construction was made…the house was valid to live. The recognition commission do not take into consideration an expert's opinion and defined that a temporary building (made of wood) was placed on the plot of land, and that is the ground to reject the application. The Court pointed out that temporary building is made of construction elements, an *assemblable/disassemblable* or/and mobile system, which is connected to the ground by non-monolithic fastenings, in this case the building is placed on wood beam under which a concrete base construction was made. Accordingly, the mentioned should be considered as a building. See. A judgment of the Administrative Cases Panel of Tbilisi City Court, case No № 3/7960-17, dated December 26, 2017. It should be noted that mentioned decision remained in force by the decision of Tbilisi Court of Appeals, case № № 3ბ/478-18 dated May 24, 2018. And of the Supreme Court of Georgia, case № ბს-1382(კ-18) dated February 7, 2019.

33 A judgment of the Administrative Cases Panel of Tbilisi City Court, case № 3/6919-16. dated February 23, 2017.

that the building was used for a living. Accordingly, the court decided to satisfy the applicant's request.[34]

4. Bodies Authorized to Recognize Property Rights

4.1. Property Rights Recognition Commission for an Illegally Occupied Plot of Land

The Law on Recognition of property rights and the decree № 376 of July 28, 2016, of the government of Georgia "On the procedure for recognition of property rights of the plots of land possessed (used) by natural persons and legal entities under private law and an approval of the form of property rights certificate" determines the bodies authorized to recognize property rights to illegally occupied lands and their authority.

The commission for the recognition of property rights to illegally occupied plots of land, which is part of the executive body of the relevant municipality (Tbilisi – the Mayor of Tbilisi Municipality), has been authorized to recognize property rights to illegally occupied plots of land, but in areas of systematic registration the public registry has the authority. In addition, the Government of Georgia can determine the authority of another body to recognize the right of ownership of the resort areas, mountain-ski centers, and areas with the recreational status of the Black Sea Coast defined by the relevant decree of the Government of Georgia.[35]

The authority to recognize property rights is delegated to a municipality for acquiring property rights of state, and the Ministry of Economy and Sustainable Development of Georgia supervises the process of implementation.[36]

The recognition commission is a collegial administrative body and its legal basis for establishment and activity is determined by the rules on recognition of property rights to plots of land possessed (used) by natural persons and legal entities approved by the relevant decree of the Government of Georgia.

The recognition commission is established by an individual administrative legal act, order of the mayor of the relevant municipality. The commission consists of officials of the Municipality's city hall. Members of the municipality's local assembly, can also be appointed as members of the commission (with their consent), but that number should not exceed half of the members of the commission. A representative of LEPL National Agency of State Property may also be appointed as a member of the commission, with the consent of the same agency. In the work of the commission, with the right of deliberative vote, competent experts/specialists with relevant knowledge may be invited,

---

34 A judgment of the Administrative Affairs Chamber of Tbilisi Court of Appeals, case № № 3/1839-18.dated December 26, 2018.

35 The Law of Georgia "on Recognition of Property Rights of the Plots of Land Possessed (Used) by Natural Persons and Legal Entities under Private Law", 11/07/2007, article 4.

36 Ibid. article 4, paragraph 1^2, state property shall be managed by the Ministry of Economic, according to the Law of Georgia "on State Property", article 2.

as well as representatives of various public institutions. The number of commission members should be odd, but not less than 5 and more than 11.[37]

The members of the commission for the recognition of the property rights to illegally occupied plots of land shall not be remunerated for serving on the commission. This restriction shall not apply to members of the commission existing under the Mayor of Tbilisi Municipality for recognition of the property rights to illegally occupied plots of land. The activity of these members may be financed from the funds allocated for exercising the delegated powers in the amount and according to the procedure determined by the municipal assembly of Tbilisi.[38]

The recognition commission is authorized to consider and decide on the issue of recognition of property rights within the territory of the relevant self-governing unit.[39] The commission is independent and accountable to the Mayor of the relevant municipality, however this does not mean that the Mayor has the authority to check the legality or appropriateness of the commission's decision. No one has the right to influence and/or interfere in the commission's activities while it makes a decision. If the fact of using the plot of land is stated and the interested person meets the requirements of the law, the commission shall issue a certificate of the property rights and an approved cadastral surveying/measurement plan, which in addition to other cadastral data, should indicate the borders and the area of the plot of land of recognized property and any building located on it, and these are the grounds to register the property rights in the Public Registry[40]. The Commission's decision can be appealed directly to the court within 1 month of its announcement.

4.2. LEPL – National Agency of Public Registry's Authority to Recognize Property Rights of the Plots of Land

In 2016, the Parliament of Georgia adopted the Law of Georgia, On the Improvement of Cadastral Data and the Procedure for Systematic and Sporadic Registration of Rights to Plots of Land within the Framework of the State Project" and one of the primary goal is sporadic registration[41] of rights to plots of land in the entire territory of the country and in case of the systematic registration[42]

---

37 On the Procedure for recognition of property rights of the plots of land possessed(used) by natural persons and legal entities under private law and an Approval of the Form of property Rights Certificate" the decree № 376, The Government of Georgia, dated July 28, 2016, articles 5-6.

38 The Law of Georgia "on Recognition of Property Rights of the Parcels of Land Possessed (Used) by Natural Persons and Legal Entities under Private Law", 11/07/2007, article 4, paragraph 3.

39 Proceedings are carried out in accordance with formal administrative proceedings defined in Chapter VIII of the General Administrative Code of Georgia. See in detail: the Law on Recognition article 11-12 and Order № 487 of the Minister of Justice of Georgia dated December 31, 2019, article 31.

40 Ibid, article 18.

41 Sporadic registration- registration, throughout the country, of titles to plots of land and of changes to registered data on the basis of an application and registration documents submitted by an interested person. See, The Law of Georgia "On the Improvement of Cadastral Data and the Procedure for Systematic and Sporadic Registration of Rights to Plots of Land within the Framework of the State Project", article 3.

42 Ibid., Systematic registration-within the framework of the Pilot Project, or a project of extreme state and public importance, registration, on a proactive basis, of titles to plots of land and of changes in the registered data.

(Systematic Registration) systematic performance of cadastral works on plots of land and the registration of title.

In 2021, with the amendments implemented in the abovementioned law and the law on recognition of property rights, within the framework of systematic registration, the National Agency of Public Registry was defined as the body authorized to recognize the property rights to the illegally occupied lands located in the geographical area (areas) determined by the order of the Minister of Justice of Georgia.

order № 798 of December 31, 2021, of the Minister of Justice on Determining Systematic Registration Geographic Area for Purposes of the Law of Georgia on Improvement of Cadastral Data and Procedure for Systematic and Sporadic Registration of Rights to Plots of Land defined that in all municipalities of Georgia, the Public Registry will make a decision on the recognition of property rights to illegally occupied lands, according to the procedure provided by the instruction on "About the Public Registry" approved by the order of the Minister of Justice of Georgia, except for self-governing cities (Tbilisi, Kutaisi, Poti, Batumi, Rustavi). However, recognition of property rights is still ensured by the recognition commissions in self-governing cities.

In addition, it should be noted that the systematic registration should be completed by January 1, 2025. After the completion of systematic registration, the recognition of property rights to the illegally occupied plots of land located in the relevant geographical area will continue, as usual, by the recognition commissions in the manner established by the legislation of Georgia.[43]

In the geographic area of systematic registration, within the framework of sporadic registration, the Public Registry is obliged to determine whether there is a document confirming the property rights or lawful possession (usage) of the plot of land or part of it. If it is ascertained that there is no document establishing the right to register an object and the interested person expresses his/her consent, the agency will consider the issue of recognition of the property rights. The interested person may obtain recognition of ownership rights to the illegally occupied plot of land if he or she was of legal age on September 20, 2007. [44] [45]

If the object of registration does not meet the requirements established by the legislation, the agency decides to deny the registration.[46]

after making the decision of the public registry to deny registration, suspend, or terminate the registration process officially available, and in the case of publication of the decision within 30

---

[43] "On the Improvement of Cadastral Data and the Procedure for Systematic and Sporadic Registration of Rights to Plots of Land within the Framework of the State Project", For the purposes of the law of Georgia, on determining the geographic areas of systematic registration" Order № 798, of the Minister of Justice of Georgia dated December 31, 2021. Article 2.

[44] Edict № 525 of the President of Georgia "On the Procedure for recognition of property rights of the parcels of land possessed(used) by natural persons and legal entities under private law and an Approval of the Form of property Rights Certificate" dated September 20, 2007.

[45] On approval of the instruction "On Public Registry", Order № 487 of the Minister of Justice of Georgia dated December 31, 2019. Articles 31 and 37^5.

[46] Since the National Agency of Public Registry's authority to recognize property rights came into force on January 1, 2022, and the Public Registry's decisions have not been the subject of evaluation by the Court's practice, I will not discuss this in detail at this stage.

calendar days after publication, may be appealed first at the National Agency of Public Registry and only afterward in court. [47]

5. Conclusion

Within the scope of this research, recognition of the right was discussed as a basis for the acquisition of property rights over the illegally occupied plot of land.

In conclusion, it can be said, that property rights are "closely connected with human dignity and freedom, they are the economic basis of human existence and activity".[48]

Since the legislation allowed for the possibility of recognizing property rights, there should be appropriate legal guarantees for the realization of the said right. First of all, it is desirable to amend the law on recognition of property rights and give a clear definition of the concept of an illegally occupied plot of land, which decreases the denials of the recognition commissions to satisfy the application, and, in this regard, reduces disputes in court.

Also, it is necessary to specify what kinds of buildings [49] can be subject to recognition to exclude the possibility of arbitrary decision-making by the recognition commissions.

Likewise, in any other disputes, the court's interpretations have paramount importance. Based on the aforesaid, judges should give a broad definition to the problematic issues of legislation, which will contribute to the establishment of a uniform practice and raise the quality of dispute resolution.

Bibliography:

1. Constitution of Georgia, 24/08/1995.
2. Organic law of Georgia "Local self-government code" 05/02/2014.
3. Law of Georgia on Recognition of Property Rights of the Plots of Land Possessed (Used) by Natural Persons and Legal Entities under Private Law, 11/07/2007.
4. Law of Georgia "on State Property" the Parliament of Georgia, 21/07/2010
5. Law of the Republic of Georgia "On Property Rights", Parliamentary Gazette of Georgia, 15/07/1993.
6. The law of Georgia "On declaration of the non-agricultural land possessed (used) by Natural Persons and Legal Entities under Private Law as a private ownership" 1663, 28/10/1998, (Expiration Date 11/07/2007)
7. The law of Georgia "On the Public Registry", 820, 19/12/2008.
8. The decree "On Reform of Agricultural Land in the Republic of Georgia" adopted by the Cabinet of Ministers of the Republic of Georgia, N48, 18/01/1992 (Expiration Date 26/06/1997, № 786)
9. "On the Procedure for recognition of property rights of the plots of land possessed(used) by natural persons and legal entities under private law and an Approval of the Form of property Rights Certificate" the decree № 376, The Government of Georgia, dated July 28, 2016.

47 See. The law of Georgia "On the Public Registry", 820, 19/12/2008, article 29.

48 *Kublashvili K.,* Basic human rights and freedoms, Tbilisi, 2022, 247. See: *Goo Sh.,* Sourcebook on Land Law, 3rd ed., Cavendish Publishing, 2002, 42.

49 In this case, it is meant the general criteria, based on judicial practice, it is possible to further specify the definition of the term "building."

10. "On the Improvement of Cadastral Data and the Procedure for Systematic and Sporadic Registration of Rights to Plots of Land within the Framework of the State Project", For the purposes of the law of Georgia, on determining the geographic areas of systematic registration" Order of the Minister of Justice of Georgia dated December 31, 2021 № 798.
11. Order № 487 of the Minister of Justice of Georgia on approval of the instruction "On Public Registry, dated December 31, 2019.
12. The explanatory note to the draft law of Georgia "on Recognition of Property Rights of the Parcels of Land Possessed (Used) by Natural Persons and Legal Entities under Private Law by the Local Self-government", <https://info.parliament.ge/file/1/BillReviewContent/119949> [31.08.2022].
13. *Christoph Rieger H.,* Die Privatisierung der Staatsunternehmen: Das Disinvestment-Desaster, 2001, 19.
14. *Dixon M.,* Modern Land Law, 7th Ed., Routledge, 2010, 31.
15. *Goo SH.,* Sourcebook on Land Law, 3rd Ed., Cavendish Publishing, 2002, 42.
16. *Himmelmann G.,* Politische Bestimmungsmerkmale der Privatisierungsdiskussion in der Bundesrepublik Deutschland. In Privatisierung und die Zukunft der öffentlichen Wirtschaft, Baden-Baden: Nomos,1988, 107–176.
17. *Kipshidze Sh.,* Privatization as a fundamental element of public management, journal, "Orbeliani", № 4, 2021, 103 (in Georgian).
18. *Kloepfer M.,* Verträge als Instrumente der Privatisierung, Liberalisierung und Regulierung in der Wasserwirtschaft, 2009, 31, 42.
19. *Kornai J.,* Making the Transition to Private Ownership, F&D, 2000, 12-13.
20. *Kublashvili K.,* Basic human rights and freedoms, Tbilisi, 2020, 247 (in Georgian).
21. *Turava P., Kalichava K.,* Construction Law, Tbilisi, 2020, 177 (in Georgian).
22. *Merkel W.,* Verstaatlichung, Privatisierung und Sozialdemokratie: ein westeuropäischer Vergleich, 1992, 252
23. *Sack D.,* Vom Staat zum Markt, Privatisierung aus politikwissenschaftlicher Perspektive, 2019, 4-5.
24. *Schwab/Prütting*, Sachenrecht, 32. Aufl., 2005, Rdnr. 306.
25. *Zoidze B.,* Constitutional control and order of values in Georgia, Tbilisi, 207, 96 (in Georgian).
26. A judgment of the Constitutional Court of Georgia on the case "Citizens of Georgia- David Jimsheleisvili, Tariel Gvetadze and Neli Dalalashvili v. The Parliament of Georgia" July 2, 2007, № 1/2/384, II. 5.
27. A judgment of the Constitutional Court of Georgia on the case "A citizen of Denmark Heike *Kronqvist* v. The Parliament of Georgia," June 26, 2012. № 3/1/512. II. 37-38.
28. A judgment of the Constitutional Court of Georgia on the case "GP. Grisha Asordia v. The Parliament of Georgia" December 27, 2013, II.17-18.
29. A judgment of the Constitutional Court of Georgia on the case "Khatuna Tsotseria v. the Parliament of Georgia" December 29, 2020. no2/3/1337. II.1.
30. A judgment of the Administrative Affairs Chamber of the Supreme Court of Georgia on the case № ბს- 1015(კ-19), dated March 18, 2021.
31. The Supreme Court of Georgia, case № ბს-1382(კ-18) dated February 7, 2019.
32. A judgment of the Administrative Affairs Chamber of Tbilisi Court of Appeals, case № 3ბ/2644-19, dated December 4, 2019.

33. A judgment of the Administrative Affairs Chamber of Tbilisi Court of Appeals, case № 3/1839-18. dated December 26, 2018.
34. A judgment of the Administrative Affairs Chamber of Tbilisi Court of Appeals, case № 3ბ/1937-18. Dated October 11, 2018.
35. A judgment of the Administrative Affairs Chamber of Tbilisi Court of Appeals, case № 3ბ/478-18, dated May 24, 2018.
36. A judgment of the Administrative Affairs Chamber of Tbilisi Court of Appeals, case № 3ბ/1434-16. Dated February 16, 2016.
37. A judgment of the Administrative Cases Panel of Tbilisi City Court, case № 3/7960-17, dated December 26, 2017.
38. A judgment of the Administrative Cases Panel of Tbilisi City Court, case № 3/6919-16, dated February 23, 2017.

Nana Chigladze*

Municipal Elections: Peculiarities and Challenges in Georgia

After the restoration of independence, in the 90s, along with other vital issues of state importance, the process of bringing municipal democracy closer to the Georgian reality began actively. A number of factors prevented perfecting the local management system in Georgia, therefore, it is still in the process of reforming. The most important component, which enables municipal bodies to function in accordance with modern international standards and is a guarantee of effective self-government, is the rule of their formation.

Electiveness, that is, the possibility of people's participation in the creation and activities of municipal bodies, is a visible expression of the exercise of the right of local self-government. It is noteworthy that the municipal elections, in their essence, are characterized by a number of peculiarities and sharply differ from the elections of the central governmental institutions. Accordingly, national states, including Georgia, try to create legislation that is adapted to the political and social reality of their own country and reflects traditions and legislation which will provide the realization of real content of local self-government and the possibility of involvement of the population of the municipal unit. In the relevant electoral legislation, substantial changes were made more than once, which had a positive impact, mainly, on the result of the October 2, 2021 local self-government elections. Additionally, municipal electoral legislation and practice still face challenges, on which answers depends the future of Georgia as a democratic and legal state largely.

Keywords: *Elections, local self-government, representative body of the municipality, executive body of the municipality, self-governing unit, election system.*

1. Introduction

The existence of a modern democratic society is unimaginable without a successful local self-government. It, as "a constituent part of public authorities, plays a vital role in the country's political system"[1] and is considered to be the measuring tool for its development.

Protection and strengthening of local self-government in various European countries is an important contribution to the construction of Europe which will be based on the principles of democracy and decentralization of government.[2] It is recognized that local self-government institutions are the closest structures to the population and express the interest of the people. "Their

* Doctor of Law, Professor, Ivane Javakhishvili Tbilisi State University Faculty of Law.

1 Decision of the Constitutional Court of Georgia on the case of Georgian citizen Kakha Kukava v. Parliament of Georgia, № 3/3/600, May 17, 2017, dissenting opinion of the member of the Constitutional Court of Georgia, Maya Kopaleishvili, 23.

2 European Charter of Local Self-Government, 1985 October 15, Preamble.

institutional strengthening and protection is an irreplaceable contribution to the development of democracy."[3]Municipal governance is aimed at ensuring peaceful coexistence of people in territorial units and solving issues of local importance in solidarity.

2. The Importance of "Election" at the Self-government Level

Obviously, direct participation in the exercising of government, including at the local level, is very effective. The principle of Elections was already considered as a main factor for determining the content of Self-government by Ilia Chavchavadze. He believed that "local officials should have been elected by the community of local residents, who were responsible to the same community."[4] Even during the First Republic, the electability of local bodies, as a condition for stuffing municipal representative bodies, was relevant. It was considered that "The nation, built on universal elections, is the solid foundation of democracy"[5] and therefore "Local institutions should have been elected by the people and trusted by them."[6] *Constant and continuous connection with the people, with their voters, getting as close to them as possible and connecting people around the community in all of the community's and state's affairs should have been the primary goal of this community.*[7] In such conditions, officials would depend on their people and instead of lording over them, they would become their real servants*. ,,In this way, self-control of the people in the entire state would have been implemented."*[8] *In that era, everything was done to promote the need for people's involvement in the local government election process.*

Local bodies of the government and the real accessibility of them by citizens is the fundamental of a democratic state.[9] The statement of the European Charter that "local self-government means the right and ability of local government bodies to organize and manage an important part of public affairs within the framework of the law under their responsibility and in accordance with the interests of the local population"[10] obviously indicates the ability of the population to ensure the legitimacy of municipal bodies.

As the constitutional court of Georgia explains "for the reason of deciding the issues of local importance, the government that is close to its citizens can be primarily achieved by receiving

---

3 Decision of the Constitutional Court of Georgia on the case of Georgian citizen Giorgi Ugulava against the Parliament of Georgia, № 3/2/574, May 23, 2014, 11.

4 *Chavchavadze I*., Publicist Letters, Volume IV, Life and Law, Letter Four, Tbilisi, 1987 (in Georgian).

5 "Unity" magazine, № 158, 25. 07. 1918, (in Georgian).

6 *Arsenidze R*., Democratic Republic, Chronicles of Georgian Constitutionalism, Zviad Kordzadze Publishing House, 2016, 61 (in Georgian).

7 *Ghlonti V.,* The meaning of the commune – on the destination, "Eroba" newspaper, the Union of Nations, № 11 – 12, 1920, 22 (in Georgian).

8 *Arsenidze R.,* Democratic Republic, Chronicles of Georgian Constitutionalism, Zviad Kordzadze Publishing House, 2016, 62 (in Georgian).

9 Decision of the Constitutional Court of Georgia on the case of Georgian citizen Giorgi Ugulava against the Parliament of Georgia, № 3/2/574, May 23, 2014, 10.

10 European Charter on Local Self-Government, Article 3 – 1. Strasbourg, 15.X.1985.

legitimacy directly from the people."[11] The main form of involvement of the population in the governance of a municipality is the periodic election of their own representatives by secret ballot on the basis of direct, universal, and equal electoral rights.[12] The level of the citizens' involvement and the society's responsibility in deciding issues of local importance increase even more, when they participate in the formation of local self-government bodies through elections.[13] Electability, as the mechanism for the formation of local self-government, is the best way for the people to exercise the municipal government themselves.

It is obvious, that the election of local self-government bodies, especially, the representative institutions, ensures the high-quality responsibility of the population of the municipal unit, which, on the one hand, is manifested in the process of making a choice by the voter, and on the other hand, in the process of effectively implementing the obtained mandate.

2.1. The European Charter of Local Self-Government and the principle of electability

It is noteworthy, that the European Charter of self-government indicates the exercise of the right to self-government by "councils or assemblies composed of members elected by secret ballot on the basis of direct and equal voting'[14] and adds there that "there may be executive bodies responsible to them."'[15] That is, the document regulating the European standard of self-governance establishes legitimacy obligatorily only through the elections of representative bodies and does not require the same in relation to executive bodies. Additionally, usually, it is considered that the creation of an effective model of local self-government bodies is connected to the electability of its executive and representative bodies.[16] For this reason, within the framework of the democratic world, many countries extended electability, as the factor of high legitimacy of government, to the process of government formation.

2.2. The Logic of Direct Election of the Mayor

As we have mentioned, "The European Charter of Local Self-Government" establishes the principle of electability only in the case of municipal representative bodies, while the rule of formation of executive bodies remains within the discretion of national states.

---

11 Decision of the Constitutional Court of Georgia on the case of Georgian citizen *Giorgi Ugulava v. Parliament of Georgia*, .№ 3/2/574, May 23, 2014, 13.

12 *Losaberidze D., Kandelaki K., Abuladze M., Konjaria O*., Local self-government, Green Caucasus, 2016, 126 (in Georgian).

13 Decision of the Constitutional Court of Georgia on the case of Georgian citizen *Kakha Kukava* vs. Parliament of Georgia, № 3/3/600, May 17, 2017; The dissenting opinion of the member of the Constitutional Court of Georgia, *Maya Kopaleishvili*, 23.

5 European Charter on Local Self-Government, Article 3 – 2. Strasbourg, 15.X.1985.

15 Ibid.

16 Decision of the Constitutional Court of Georgia on the case of Georgian citizen *Kakha Kukava* vs. Parliament of Georgia, № 3/3/600, May 17, 2017; The dissenting opinion of the member of the Constitutional Court of Georgia, *Maya Kopaleishvili*, 23.

In the process of government formation, there are different forms of people's participation, and bodies created based on them in compliance with the law are obviously legitimate. It is decisive, that the manner of holding office in the executive bodies of local self-government should comply with constitutional principles. The Constitution of Georgia requires that the legislator should take into account the guarantees of the institutional independence of the municipal bodies when determining the manner of holding the office of the executive bodies of the local self-government, in order not to violate the fundamental principles of democracy, popular sovereignty and separation of powers. It is necessary to guarantee the independence of executive bodies of local self-government from the central government and the people's participation in this process.[17] Georgian legislators considered that holding office through elections represents an irreplaceable mechanism of democratic governance[18] and in order to ensure people's participation, established the direct and universal elections of mayors in the process of formation of municipal executive bodies. The establishment of mayor elections by the lawmaker is related to the important constitutional status of these bodies and serves to ensure the representation of the people.[19] In the case of direct elections, people directly participate in the process of forming self-government executive bodies, which contributes to the implementation of popular sovereignty at the local level.[20] Therefore, despite different opinions, direct elections are one of the best ways to form local self-government executive bodies.

2.3. Obligation of the State and Legitimacy of Elections

The obligation of the state to create "fertile soil" for municipal bodies to express the true will of the population of the self-governing unit is worth mentioning separately. According to the definition of the Constitutional Court of Georgia, the state is obliged to ensure the right of the population to create local self-government bodies independently, without the interference of state bodies or officials, and to elect appropriate leaders.[21] This function is assigned to them by the democratic state. "It is the demand of democracy that the will of the people should not be ignored, the mandate given by them should not be defeated."[22] Within the framework of the constitution, the positive obligation of the state to form self-governing electoral bodies, whose legitimacy will be ensured in the elections held at a

---

17 The decision of the Constitutional Court of Georgia on the case – Citizens of Georgia – *Salome Qinqladze, Nino Kvetenadze, Nino Odisharia, Dachi Janelidze, Tamar Khitarishvili, and Salome Sebiskveradze* against the Parliament of Georgia, № 3/2/588, April 14, 2016, II-28.

18 The decision of the Constitutional Court of Georgia on the case of *Kakha Kukava*, a citizen of Georgia, against the Parliament of Georgia, № 3/3/600, May 17, 2017, II – 10.

19 The decision of the Constitutional Court of Georgia on the case – Citizens of Georgia – *Salome Qinqladze, Nino Kvetenadze, Nino Odisharia, Dachi Janelidze, Tamar Khitarishvili, and Salome Sebiskveradze* against the Parliament of Georgia, № 3/2/588, April 14, 2016, 29.

20 Ibid, 39.

21 Decision of the Constitutional Court of Georgia on the case of Citizens of Georgia – Uta Lipartia, Giorgi Khmelidze, Eliso Janashia and Gocha Ghadua against the Parliament of Georgia, № 1/2/213,243, February 16, 2005, 12.

22 Decision of the Constitutional Court of Georgia on the case of Georgian citizen *Giorgi Ugulava v. Parliament of Georgia*, .№ 3/2/574, May 23, 2014, 13.

certain period of time, is determined. Within the framework of the constitution, the positive obligation of the state to form self-governing electoral bodies, whose legitimacy will be ensured in the elections held with a certain periodicity of time, is determined.

3. Peculiarity of Local Self-government Body Elections

When it comes to the election of local self-government bodies, it is interesting to understand the peculiarities that accompany the specified process, including and mainly in the Georgian reality. Elections at the local self-government level are essentially different from national elections.

3.1. Candidate to be Elected and Challenges of Municipal Elections

First of all, it should be emphasized that municipal elections are not "party elections". In the process of self-government, a decisive role is assigned to individuals who enjoy a high rating among the population. Traditionally, people place authority figures above party functionaries. Voter trusts them because of his/her own experience and not because the candidate was selected in the central structures of the parties, in a relatively less transparent process of internal party democracy.[23] Even the conflict arising in self-governmental bodies is usually personified. Individuals and interpersonal relationships are of special importance in removing and neutralizing contradictions.[24] Such participation is a part of the realization of the right of local self-government.

While discussing the peculiarities of municipal elections, the close relationship between the local voter and the candidate for election is noteworthy. The population knows better the representatives, who were elected in self-governing bodies. Additionally, the emotional connection is more intensive between voters and elected representatives. For the voter, the member of the self-governing body is not associated with any party, but with his "own" representative. Voters expect self-government activities to focus on solving local problems and not on following instructions from party structures.[25] Therefore, it is especially important to include candidates with personal authority in the self-governing unit.

It should be mentioned here that the freedom of mandate holders from external factors in the process of executing self-governance is very important. The representatives elected by the people do not only exercise their rights, but first of all, they are the people's mandate holders, they act on their behalf, and they must use their official authority for the interests of their voters.[26] Legitimization of

---

[23] *Khubua G.,* "Parliamentization" of local self-government: risks and challenges, elections and democracy, election journal № 7, 2021, 41 (in Georgian).

[24] *Holtkamp L., Bathge T., Friedhoff C.,* Kommunale Parteien und Wahlergemeinschaften in Ost und Westdeutschland. In: Zeitschrift fur Vergleichende Politikwissenschaft, 2015, 9, 1-18, see citation: *Khubua G.,* "Parliamentization" of local self-government: risks and challenges, elections and democracy, election journal № 7, 2021, 41 (in Georgian).

[25] *Khubua G.,* "Parliamentization" of local self-government: risks and challenges, elections and democracy, election journal № 7, 2021, 42 (in Georgian).

[26] Decision of the Constitutional Court of Georgia on the case of Georgian citizen Giorgi Ugulava v. Parliament of Georgia, .№ 3/2/574, May 23, 2014, 13.

municipal government itself requires more independence to guarantee the trouble-free exercise of the power delegated by the voters.

3.2. "Big Politics" and "Local Interest"

It is important that in the process of local self-government elections, especially when conducting the election campaign, the theme of the municipal unit should prevail and not be dominated by "big politics".[27] During the election period, the general political environment with polarized rhetoric leaves less space for problems of local importance. There is a risk that the national issues in the election campaigns and the topic of the possible impact of the election results on the politics of Georgia will overshadow the local needs that are provided by the mandate of mayors and local assemblies.[28] Therefore, local self-government should strive to solve issues of thematic, local importance. Politics centered on party conflict and competition is not a task of self-government. Population expects solving the local issues from local, communal politicians and not to be active in "Big politics". The threat of "parliamentization" of self-government is also recognized in municipal scientific literature.[29] In the process of local elections, it is important that excessive focus on national issues and the influence of national politics do not overshadow issues of local importance.[30] This is a recognized serious problem, including for the last municipal elections in Georgia.

The dangers of political polarization, which appear in the process of local elections, are worth mentioning separately. Transferring the party political conflict from the central level to the local level will strengthen the belief among the population that the local self-government is a part of the central government structures and not an independent entity. The partisan antagonism characteristic of national politics limits voters' ability to self-identify with the local government[31], which ultimately has a sharp negative impact on the development of local democracy.

Obviously, the threat created by party polarization at the local level has its own "creator". The entire political spectrum is responsible for public skepticism because, in such cases, public needs are sacrificed to party interests. During Elections Parties' unhealthy competition gives rise to serious problem. Protracted political crisis in the pre-election period has a negative impact on its results. Risks

---

27 *Khubua G.,* "Parliamentization" of local self-government: risks and challenges, elections and democracy, election journal № 7, 2021, 40 (in Georgian)

28 See Long-Term Small-Scale Election Evaluation Mission, Georgia 2021 Local Government Elections, Election Evaluation Report, National Democratic Institute, (NDI), September 1 – November 5, 2021, 7 (in Georgian).

29 *Holtmann E., Rademacher CH., Reiser M.,* Kommunalpolitik. Eine Einfuhrung, 2017, 42 ff., see citation: *Khubua G.,* "Parliamentization" of local self-government: risks and challenges, elections and democracy, election journal № 7, 2021, 44 (in Georgian).

30 <https//www. Osce.org/files/f/documents/d/9/499477_2.pdf> [17.11.2022].

31 See *Khubua G.,* "Parliamentization" of local self-government: risks and challenges, elections and democracy, election journal № 7, 2021, 40 (in Georgian).

are created by the feeling that narrow political interests are prioritized.[32] It is clear that local self-government cannot be politically "sterile"[33], however, it is necessary to show good faith efforts, overcome political divisions and internal political reflection in order to ensure high public trust towards democratic political processes before the next election cycle.[34] The manifestation of such a will is necessary in order not to endanger the effective realization of the right to local self-government, which is a necessary condition for the existence of a democratic society.

4. Constitutional Guarantees of Municipal Elections

In general, establishing norms regulating individual institutions, powers or processes at the level of the fundamental law is, to a large extent, a guarantee of their full realization. As the Constitutional Court of Georgia explains, unhindered exercise of the official powers of elected officials in the local self-governing unit, issues of their independence and inviolability, within the framework of the order established by the constitution, require qualitatively different protection of the institutional guarantees provided for in the constitution of local self-government, and, moreover, most importantly, for the realization of the principles of democracy, popular sovereignty and separation of powers, because the protection of the interests of the voters and the protection of the authorities delegated by them from unreasonable restrictions are of an important value.[35] The challenges faced by the local public authority, as the closest authority to the citizen, obliges the state government to create maximum constitutional guarantees at the level of self-government for the purpose of strengthening the involvement of citizens in governance,[36] in order to effectively realize the right to local self-government.

When it comes to the constitutional guarantees of local self-government, of course, the principles related to the formation of municipal bodies are primarily considered. Obviously, "qualitatively different" protection is possible by the fundamental law. Within the specified definitions, the court made a loud statement regarding the importance of the constitutional guarantees of elections of local self-government bodies.

The current Constitution of Georgia regulates the essential principles related to local self-government elections. According to the fundamental law, "every citizen of Georgia has the right to participate in the referendum, in the elections of the state, autonomous republic, and local self-

---

32 See Long-Term Small-Scale Election Evaluation Mission, Georgia 2021 Local Government Elections, Election Evaluation Report, National Democratic Institute, September 1 – November 5, 2021, 5 (in Georgian).

33 *Khubua G.,* "Parliamentization" of local self-government: risks and challenges, elections and democracy, election journal № 7, 2021, 43 (in Georgian).

34 See Long-Term Small-Scale Election Evaluation Mission, Georgia 2021 Local Government Elections, Election Evaluation Report, National Democratic Institute, (NDI) September 1 – November 5, 2021, 2.

35 See Decision of the Constitutional Court of Georgia on the case of Georgian citizen *Giorgi Ugulava* v. Parliament of Georgia, № 3/2/574, May 23, 2014, 17.

36 See Decision of the Constitutional Court of Georgia on the case of Georgian citizen *Kakha Kukava* vs. Parliament of Georgia, № 3/3/600, May 17, 2017, The dissenting opinion of the member of the Constitutional Court of Georgia, Maya Kopaleishvili, 23.

government bodies."[37] It is obvious that the constitution distinguishes the right to participate in the elections of the state government and in the elections of self-government bodies. By the way, during the constitutional reform of 2009-2010, when it was decided to regulate the catalog of norms regulating local self-government with a separate chapter in the fundamental law, there was an opinion that the principles regulating election should have been included in its concept. According to the interpretation by the Venice Commission[38], which was agreed by the German expert Ralf Brinktrin, "living in the territory of the self-governing unit" should have been replaced by a more specific criterion, where the active and passive electoral rights of citizens in relation to elections would have been defined.[39] An attempt to include a similar text in the text of the Constitution was unsuccessful.

As mentioned above, The European Charter of Local Self-Government, the document that establishes the relevant European standard, does not require the contracting parties to elect executive bodies. The constitution clearly states that „the representative body shall be elected on the basis of universal, equal and direct suffrage, by secret ballot".[40] The same guarantees are not established by the constitution for executive bodies of local self-government. The Georgian Fundamental Law does not define the electoral principles of municipal executive bodies and does not require their mandatory election. Despite this, according to the current legislation, universal and direct elections of executive bodies are recognized in Georgian reality and, accordingly, in practice.

Issues related to the elections of local self-government bodies are formulated in detail in the organic law of Georgia – Election Code of Georgia. It discusses the entire infrastructural system of local self-government and establishes the construction of the electoral system.[41] More specifically, It regulates the issues related to the election of representative and executive bodies of the municipality.[42] Before the local government elections of October 2, 2021, the reform of the electoral legislation, mainly in the part of the elections of municipal bodies, ensured the correction of a number of identified shortcomings and the revision of a large part of the norms that were facing modern challenges.

5. Challenges before and after the Municipal Elections of October 2, 2021

In Georgia, after the restoration of independence, on October 2, 2021, the last, eighth election of municipal bodies was held, which created an interesting history and left an important mark in Georgian electoral law.

Preparations for the elections actively began in the spring. As mentioned, the changes made by the Parliament of Georgia in the Election Code in June 2021 were important. The changes were prompted in general by a fairly high degree of mistrust of election results over the years. The changes

37 Constitution of Georgia, 24/08/1995. Article 24-1.

38 Venice Commission, conclusions no. 543/2009, (2010)008, paragraph 22.

39 See Comments on the constitutional reform of Georgia: the plan to incorporate Chapter 7^1 on local self-government and other aspects of territorial reform, Chronicles of the Constitution of Georgia, *Demetrashvili A.,* 2009-2010 Constitutional Reform in Georgia, 2012, 326 (in Georgian).

40 Constitution of Georgia, 24. 08. 1995. Article 74-1.

41 *Melkadze O.*, Georgian municipalism, "Universal" publishing house, 2009, 110 (in Georgian).

42 Organic Law of Georgia Election Code of Georgia, Article – 1. 27. 11. 2011 (in Georgian).

were based on the agreement – The future path for Georgia – reached on April 19, 2021, between the governing party and the parliamentary opposition, which was mediated by the President of the European Council, Charles Michel.[43] This agreement, among other important issues, contained the commitment to carry out electoral reform.

5.1. Necessity and Result of changing the Electoral System

The main problem, which existed for years in relation to the electoral legislation of local self-government, was related to the electoral system. Georgian municipal elections were held at different times with different electoral systems: in 1991 – with a single transferable vote system, in 1998 – with a fully proportional system in some of the assemblies, in some with only a multi-mandate majoritarian (bloc) system, in 2002 only with a multi-mandate majoritarian system. The Tbilisi City Assembly was elected in 1998 and 2002 with a fully proportional electoral system.

It should be noted that the city assemblies elected by the mentioned systems were distinguished by multi-partyism, and, in many cases, by the dominance of opposition parties in the city councils, including Tbilisi. Since 2006, similar to the Parliament of Georgia, the hybrid proportional-majoritarian system of the elections of the assemblies has been established and the picture has changed radically, which was manifested in the absolute dominance of the ruling political parties in the assemblies in all subsequent elections.[44] Therefore, unfortunately, since 2006, when the mixed system of elections of the city assemblies had been established, the one-party rule has emerged in the representative bodies.

The past twenty years have proven that the central government elections had a decisive influence on the results of the municipal elections. Generally, the political power that controlled the Georgian parliament and government at the central level won the local self-government elections. At the same time, the chances of non-governmental political parties to gain and maintain certain positions at least at the local level were decreasing year by year.[45] Experts consider several factors as system causes of the negative reality.

Firstly, a large number of members elected by the majoritarian system in the composition of the assemblies, and the election by the relative majority of participants by a relative majority of participants worked in favor of the ruling party. Secondly, the 4% election threshold when electing a part of the composition of the assemblies by the proportional system led to the representation of a small number of parties in the city assemblies, with the complete dominance of the ruling party and the so-called „large number of lost votes". Hence, the ruling party had a qualified majority in almost all assemblies. This created a significant problem in terms of the democratic management of

---

43 *Khmaladze V.,* New electoral system for local self-government elections on October 2, 2021 – better representation in the search for democracy?, Elections and Democracy, election journal № 6, 2021, 7 (in Georgian).

44 *Kandelaki K*., History of elections of local self-government bodies, elections and democracy, election journal № 5, 7, (in Georgian).

45 *Losaberidze D.,* Report on Politics, Local Self-Government in Georgia, 1991-2014, International Center for Civic Culture, 2015, 15 (in Georgian).

municipalities.[46] It is important that "in some cases, there was a very big difference between the sizes of the majoritarian constituencies." Also, the number of members to be elected by majority rule was unreasonably high during the distribution of mandates of many municipalities."[47] Thus, the system has been creating a problem of converting voters' votes into mandates with a high level of disproportionality.[48] There is no doubt that the hybrid electoral system, even at the level of local self-government, could not ensure the real reflection of the voters' will in the local representative bodies.

According to the opinion of some experts, apart from the fact that the current electoral system could/can not protect the proportion of the political views of the voters in the city assemblies, its shortcoming is also manifested in the fact that it cannot sufficiently ensure the representation of the social groups of the society.[49] Also, in their opinion, the shortcoming of the majoritarian electoral system causes not only the problem of the representation of ethnic, religious, and other minorities but also a serious gender imbalance in the city councils while the proportional system allows for setting quotas and incentives for women's representation in party lists to be regulated by legislation,[50] which can be considered as an additional problem of the electoral system. Over the years, the parallel hybrid election system has rightly deserved the criticism of local and international organizations, which was mainly due to the violation of the principles of equality of vote weight and proportionality.

Based on the agreement of April 19, 2021, the balance of mandates to be distributed by proportional and majoritarian rule was determined in the composition of municipal representative bodies. In particular, it was agreed that the mandates to be distributed by the proportional and majoritarian election systems in the city councils would have been distributed in five big cities in a ratio of 4:1, in all other self-governing units in a ratio of 2:1.

The change in the proportion of members of the assembly to be elected by the proportional and majoritarian system in self-governing cities and communities led to an increase in the number of members of the assembly elected by the proportional list from 970 to 1404, and a decrease in the number of members elected by the majoritarian system from 1088 to 664. The threshold for majority candidates was set at 40 percent, that is, a two-round system was actually established.[51] An important component of the electoral system – the electoral threshold – was also agreed upon. 3% in all self-governmental units and 2.5% in Tbilisi were determined for the elections under the proportional system. Such a rule is clearly better than the previous rule, as it potentially increases the number of

---

46 *Khmaladze V.,* New electoral system for local self-government elections on October 2, 2021 – better representation in the search for democracy?, Elections and Democracy, election journal № 6, 2021, 8 (in Georgian).

47 *Aleksidze T.*, Equal right of the electoral vote and an equal weight of electoral vote – international standards and local practice, Elections and Democracy, Journal № 6, 2021, 36 (in Georgian).

48 See "Amendments to the Election Code: Assessment and Recommendations", International Society for Fair Elections and Democracy, Transparency International – Georgia, 2021.

49 *Losaberidze D., Kandelaki K., Abuladze M., Konjaria O.,* Local self-government, Green Caucasus, 2016, 130 (in Georgian).

50 Ibid.

51 Long-Term Small-Scale Election Evaluation Mission, Georgia 2021 Local Government Elections, Election Evaluation Report, National Democratic Institute, (NDI) September 1 – November 5, 2021, 6, (in Georgian).

parties represented in the city councils, reduces the number of so-called "lost" votes, and the negative effect characteristic of a majoritarian electoral system,[52] which, undoubtedly, should be considered as positive news.

It should be emphasized that a number of demands of non-governmental organizations and political parties to improve reality were shared to some extent. The change of the electoral system and, accordingly, the reformed part of the Election Code of Georgia, except for the "Michel Agreement", was supported by the Venice Commission and the Office of Democratic Institutions and Human Rights of the OSCE. Nevertheless, the question of revising the electoral system is not settled, and the desire to reform, in general, continues to move toward more proportional representation.

5.2. Election Infrastructure – Electoral Constituencies

In order to ensure the equal weight of voters' votes, the legislator, within the framework of the reform carried out before the local self-government elections, based the division into local majoritarian constituencies on the number of voters in the self-governing unit.

In the opinion of local and international experts, despite a number of positive changes that have improved the electoral legislation and environment, the measures of local self-government assemblies still need to be reconsidered. They believe that it is necessary to establish clear criteria on the basis of which the number of members of the Assembly will be determined in each municipality.[53] Generally, In the process of determining the size and borders of local self-government majoritarian constituencies, it is important to reasonably balance the principles of the relative equality of the size of constituencies and consideration of various geographical, as well as social-cultural features. At the same time, it is important to exclude the threat of electoral manipulation when determining the borders of the constituencies.[54] In the joint opinion of the Venice Commission and the OSCE/ODIHR on the draft amendments to the Election Code of Georgia, it is emphasized that despite a number of recommendations[55] of similar content issued in the past, this gap is still present before the local self-government elections on October 2, 2021. A recommendation is made here that in the next period, the state, with the involvement of all interested parties, should make efforts for an unhurried, thoughtful reform of the electoral legislation, which will be based on a broad public consensus and will contribute to the stabilization of the country's electoral legislation.[56] It seems that the issue of division into electoral districts does not lose its urgency at any stage of the electoral legislation reform.

---

52 *Khmaladze V.*, New electoral system for local self-government elections on October 2, 2021 – better representation in the search for democracy?, Elections and Democracy, election journal № 6, 2021, 11 (in Georgian).

53 CDL-PL (2021) 015, (30.04.2021).

54 "Amendments to the Election Code: Assessment and Recommendations", International Society for Fair Elections and Democracy, Transparency International – Georgia, 2021.

55 Venice Commission – ODIHR Joint Opinion on the Draft Election Code of Georgia, CDL-AD(2011)043, &20.

56 *Aleksidze T.,* Equal right of the electoral vote and an equal weight of electoral vote – international standards and local practice, Elections and Democracy, Journal № 6, 2021, 37 (in Georgian).

5.3. Gender Balance in Party Lists

The problem, which is known as gender equality, has been associated with Georgian constitutionalism for a long time. Within the framework of the electoral law, it is manifested in the minority of women in the composition of representative bodies, including at the local level. The gradual changes in the election code, including the introduction of recommendation quotas, did not bring results.

As a result of the constitutional reform of 2017-2018, the text of the fundamental law included: "The state provides equal rights and opportunities for men and women. The state takes special measures to ensure the essential equality of men and women and to eliminate inequality."[57] The mentioned provision eliminated the problem of the constitutionality of mandatory gender quotas to some extent, and, in a way, created the basis for their establishment as a temporary measure. The gender quota used in the 2020 parliamentary elections has yielded certain results and laid the foundation for ensuring a fair gender balance in representative bodies at the level of local self-government.

In the final provisions of the electoral legislation[58], the temporary rule for submission of party lists for the general elections of the municipality to be held until 2028 was established. According to the mentioned norm, for the elections of the general bodies of the municipality to be held until 2028, the party is obliged to determine the procedure for creating the party list in such a way that at least one of every three candidates is a representative of a different gender. The Constitutional Court of Georgia has invalidated the normative content of the mentioned provision, which states that for the general elections of the municipal bodies to be held until 2028, at least one person must be a man in each third of the electoral list.[59] If a political party submits a party list to the eligible District Election Commission without following the established gender balance, and it does not eliminate the defect according to the established rules, the party list will not be registered, therefore it will not be able to participate in the elections. The legislator did not limit himself to the establishment of the principle of the gender balance of the party list and spread the same trend in the "rule of succession".

The mandatory gender quota, which stipulates the nomination of at least one woman for every three candidates on the party list, has had a significant impact on increasing women's representation. Women made up 42.5 percent of the proportional candidates – 8,767 out of 20,624 candidates. More than 30 percent of the candidates elected by the proportional system are women, which is a significant

[57] Constitution of Georgia, Article 11-3, 24.08.1995.
[58] Organic Law of Georgia Election Code of Georgia, Article – 203. 27. 12. 2011.
[59] Ruling of the Constitutional Court of Georgia of October 21, 2021 № 3/2/1647, 25.10.2021.

increase compared to the results of 2017.[60] It should be emphasized that mandatory quota is a temporary measure, and after achieving the appropriate result, its necessity will no longer exist.

6. Conclusion

It is worth noting that in the preliminary findings and conclusions[61] of the OSCE Office of Democratic Institutions and Human Rights in the assessment of the 2021 local government elections[62], there are interesting and thought-provoking references regarding the local government elections. Together with the problems expressed by the Georgian political elite and civil society, they face the legislator with another decision.

Participation in municipal electorate elections contributes to increasing the civic self-awareness of the population of the self-governing unit and encouraging the culture of democratic participation. Accordingly, perfecting the legislation related to elections of local self-government bodies and organizing effective implementation in practice is today still the first positive obligation and high-quality responsibility of the Georgian state.

Bibliography:

1. The Constitution of Georgia, 24/08/1995.
2. European Charter of Local Self-Government, 15/10/1985.
3. Organic Law of Georgia, Election Code of Georgia 27/12/2011.
4. *Aleksidze T.,* Equal right of the electoral vote and an equal weight of electoral vote – international standards and local practice, Elections and Democracy, Journal № 6, 2021, 36, 37 (in Georgian).
5. *Arsenidze R.,* Democratic Republic, Chronicles of Georgian Constitutionalism, Zviad Kordzadze Publishing House, 2016, 61 (in Georgian).
6. *Chavchavadze I.,* Publicist Letters, Volume IV, Life and Law, Letter Four, Tbilisi, 1987, 324 (in Georgian).
7. *Ghlonti V.,* The Meaning of the Commune – on the Destination, "Eroba" newspaper, the the Union of Nations, № 11 – 12, 1920, 22 (in Georgian).
8. *Kandelaki K.,* History of Elections of Local Self-government Bodies, Elections and Democracy, Election Journal, № 5, 2021, 7 (in Georgian).
9. *Khmaladze V.,* New electoral system for the local self-government elections of October 2, 2021 – better representation in the search for democracy?, Elections and Democracy, Election Journal № 6, 2021, 7-8, 11 (in Georgian).

[60] Long-Term Small-Scale Election Evaluation Mission, Georgia 2021 Local Government Elections, Election Evaluation Report, National Democratic Institute, (NDI) September 1 – November 5, 2021, 15 (in Georgian).

[61] International Election Observation Mission Georgia – Elections of municipal bodies, second round, October 30, 2021, (in Georgian) <https://www.osce.org/files/f/documents/a/a/498306.pdf> [14.06.2022].

[62] Election observation mission of the OSCE Office for Democratic Institutions and Human Rights, local elections in Assembly, 2 October 2021 (in Georgian) <https://www.osce.org/files/f/documents/d/9/499477_2.pdf> [14.06.2022].

10. *Khubua G.,* "Parliamentization" of local self-government: risks and challenges, elections and democracy, election journal № 7, 2021, 40-44 (in Georgian).
11. *Losaberidze D., Kandelaki K., Abuladze M., Konjaria O.,* Local self-government, Green Caucasus, 2016, 126, 130 (in Georgian).
12. *Losaberidze D.,* Report on Politics, Local Self-Government in Georgia, 1991-2014, International Center for Civic Culture, 2015, 15 (in Georgian).
13. *Melkadze O.,* Georgian Municipalism, Tbilisi, 2009, 110 (in Georgian).
14. Election observation mission of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), local elections in Assembly, 2 October 2021 (in Georgian).
15. "Amendments to the Election Code: Assessment and Recommendations", International Society for Fair Elections and Democracy, Transparency International – Georgia, 2021.
16. Decision of the Constitutional Court of Georgia on the case of Georgian citizen Kakha Kukava vs. Parliament of Georgia, № 3/3/600, May 17, 2017.
17. International Election Observation Mission Georgia – Elections of municipal bodies, second round, October 30, 2021 (in Georgian).
18. Long-Term Small-Scale Election Evaluation Mission, Georgia 2021 Local Government Elections, Election Evaluation Report, National Democratic Institute, (NDI) September 1 – November 5, 2021, 2, 5-7, 11 (in Georgian).
19. Report on the October 2, 2021 elections of the representative body of the municipality – the assembly and the mayor of the self-governing city/self-governing community, (August 2 – November 13), CESKO, December 2021.
20. "Unity" magazine, № 158, 25. 07. 1918.
21. Venice Commission – ODIHR Joint Opinion on the Draft Election Code of Georgia, CDL-AD(2011)043.
22. Decision of the Constitutional Court of Georgia on the case of Georgian citizen Giorgi Ugulava against the Parliament of Georgia, № 3/2/574, May 23, 2014.
23. Decision of the Constitutional Court of Georgia on the case of Citizens of Georgia – Uta Lipartia, Giorgi Khmelidze, Eliso Janashia and Gocha Ghadua against the Parliament of Georgia, № 1/2/213,243, February 16, 2005.
24. Decision of the Constitutional Court of Georgia on the case of "Citizens of Georgia – Salome Qinqladze, Nino Kvetenadze, Nino Odisharia, Dachi Janelidze, Tamar Khitarishvili and Salome Sebiskveradze vs the Parliament of Georgia", № 3/2/588, April 14, 2016.

Irakli Kakhidze*

Challenges of Implementing the "Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority" in Georgia

Democracy implies not only the existence of elected representatives, but also the existence of active and politically engaged citizens. People's participation in the exercise of government is the basic essence, ground and purpose of democracy.

The present article analyzes the environment and practice of citizens' participation in the implementation of local self-government in Georgia. The article talks about the challenges in Georgia in the mentioned field, their causes and ways to solve them.

Keywords: *Local Self-government, Citizens' Participation, Additional Protocol to the Charter.*

1. Introduction

On May 29, 2019, the Parliament of Georgia ratified the additional protocol (hereinafter – the additional protocol) of the "European Charter of Local Self-Government" on "the right to participate in the affairs of a local authority".

Approximately 3 years have passed since the ratification of the Additional Protocol. The purpose of the article is to analyze the implementation of the obligations provided for in the Additional Protocol in Georgia. The main attention in the article is given to the assessment of the state of implementation of Article 2 of the Additional Protocol, which defines the list of measures and conditions for the implementation of the right of citizens to participate in the exercise of local self-government.

The evaluations presented in the article are based on the analysis of Georgian legislation and the results of three studies conducted with the author's participation.[1] The findings of the mentioned scientific studies are developed on the basis of the desk research methodology and also the information obtained through interviews with political officials of municipalities, heads of structural units of the City Hall, regional non-governmental organizations and representatives of the population. The legal acts and practices of approximately 20 municipalities of Georgia have been analyzed within the framework of the studies.

---

* Doctor of Law, Associate Professor of the Ivane Javakhishvili Tbilisi State University.

1 See *Kakhidze I., Toklikishvili G., Chanturia S., Kadagidze M.*, Survey of Citizens' Participation in the Implementation of Local Self-government, CTC, 2020 (in Georgian); *Kakhidze I.*, Project – Development of a Concept for Introducing a Feedback Mechanism at the Level of Local Self-government and Improving the Practice of Administrative Complaints, CTC, 2021 (in Georgian); *Kakhidze I.*, Project – Development of Feedback Management Manual at the Local Self-government Level, CTC, 2022 (in Georgian); *Kakhidze I.*, Project on the Development of the Supporting Procedural Manual for Administrative Complaints Review in Municipalities, CTC, 2022, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).

The article also uses the results of the evaluation of the "Local Self-Government Index" (hereinafter – the index). The index is a tool for assessment of the proactive publication of public information, e-governance and citizen participation in Georgian municipalities. The assessment is conducted every two years and municipalities are ranked on its basis.[2]

The first part of the article answers the question why citizens' participation in the exercise of local self-government is important, the second part – describes the standards of the additional protocol on the participation of citizens in the exercise of local self-government and analyzes the compliance of the Georgian legislation and practice of municipalities with Article 2 of the protocol. The last part of the paper summarizes the results of the analysis carried out.

2. Why the Citizens' Participation is Important?

The Committee of Ministers of the Council of Europe in its recommendation "on Citizen Participation in Local Public Life" notes: citizen participation is "the heart of the idea of democracy". Citizens who are committed to democratic values, aware of their civic obligations and engaged in political activity are the "lifeblood" for any democratic system.[3]

"In keeping with the principle of subsidiarity, local authorities have, and must assume, a leading role in promoting the participation of citizens, and that their commitment is critical to the success of any local democratic participation policy."[4]

The following arguments can be presented to the question on why citizens' participation is important?:

a) Ensuring "Viable Democracy"

"Democracy is a political system the direct control over which is held by a subject with sovereign power, the people."[5] Representative democracy is the simplest and therefore actively used form of popular sovereignty. Nevertheless, the effectiveness of representative democracy has its limits. Representative democracy is facing significant challenges in the modern world, which is manifested in the decrease of trust in the existing political system, the decrease in the electoral activity of citizens and distancing from politics. These trends are not alien to local democracy either.[6]

Participatory democracy, which manifests itself in the direct participation of citizens in deciding public affairs, has a complementary function to representative democracy.[7] Participatory democracy

---

2 See Local Self-Government Index, <www.lsgindex.org> [22.08.2022].

3 Council of Europe, Committee of Ministers, Recommendation CM/Rec(2018)4 to Member States on the Participation of Citizens in Local Public Life, 21 March 2018, <https://rm.coe.int/16807954c3> [22.08.2022].

4 Ibid.

5 *Lutz D.,* Principles of Constitutional Design, New York, 2006, 97.

6 Congress of Local and Regional Democracy, Rapporteur: Karl-Heinz Lambertz, Beyond Elections: The Use of Deliberative Methods in European Municipalities and Regions, Report CG(2022)42-12, 23 March 2022, <https://www.coe.int> [22.08.2022].

7 Ibid.

gives citizens not only the right to choose government bodies, but also a real opportunity to participate in the public decision-making process and influence it.[8]

Based on this, during the last few decades, there is a clear tendency to use "non-electoral forms" to ensure the strengthening of citizens' participation in political processes. Today, it is not disputed that the functioning of the developed mechanisms of citizens' participation is an important indicator of the existence of a "healthy democracy".[9]

Participation of citizens in solving public affairs increases a person's sense of belonging to a specific country, region, city or village and develops the desire to share responsibility for its destiny and the will to take active action.[10]

b) Ensuring the Legitimacy and Effectiveness of Public Policy

The effectiveness of public authorities decreases when its decisions do not have the support and trust of citizens. Public authorities may make decisions in full compliance with the legislation, spend significant financial resources, time and effort, but the reform implemented by them may fail.

The implementation of successful public reform is related not only to qualified decisions, but also to achieving a positive change in public behavior. Changing behavior requires convincing members of society to change their behavior. For example, wear a seat belt, not to cross the street at a red light, collect plastic waste separately, etc.

Citizens' participation in the public decision-making process creates trust towards the decision, which means sharing responsibility. Thus, citizens' participation ensures high legitimacy of decisions, government accountability and public policy efficiency.[11]

c) Improving the Quality of Public Services

Another important argument in support of citizens' participation is related to the improvement of the quality of public services.[12] In the theory of public administration, the quality of public service is associated with meeting and exceeding the needs and expectations of users, which is ultimately evaluated by the satisfaction of users.[13]

The user of public service and the evaluator of its quality are those natural and legal persons that use public service.

---

8 See *Kakhidze I.*, Basic Principles of the Constitution of Georgia, Constitutional Law of Georgia, *Gonashvili V., Tevdorashvili G., Kakhiani G, Kakhidze I., Kverenchkhiladze G., Chigladze N.*, Tbilisi, 2020, 26-27 (in Georgian).

9 Congress of Local and Regional Democracy, Rapporteur: Karl-Heinz Lambertz, Beyond Elections: The Use of Deliberative Methods in European Municipalities and Regions, Report CG(2022)42-12, 23 March 2022, <https://www.coe.int> [22.08.2022].

10 See Council of Europe, Committee of Ministers, Recommendation CM/Rec (2009)2 to Member States on the Evaluation, Auditing and Monitoring of Participation and Participation Policies at Local and Regional Level, 11 March 2009, <https://www.coe.int> [22.08.2022].

11 Ibid.

12 Ibid.

13 See *Goetsch D., Davis S.*, Quality Management for Organizational Excellence: Introduction to Total Quality, Seventh Edition, New York, 2014, 1-19.

Thus, knowing what consumers want and how to meet or exceed their expectations is a necessary condition for providing quality public services. One of the main tools for obtaining the aforementioned knowledge is the active use of forms of citizens' participation in the process of making public decisions.

3. "Standards" of Citizens' Participation Determined by the Additional Protocol

The "European Charter of Local Self-Government" from 1985 (hereinafter – the Charter) mentioned the issue of citizens' participation in the implementation of local self-government only indirectly. This Charter approach was revised in 2009 when the Council of Europe developed an additional protocol.

Article 2 of the additional protocol explains the right to participate in the affairs of the local authority as follows: "The right to participate in the affairs of a local authority denotes the right to seek to determine or to influence the exercise of a local authority's powers and responsibilities."[14]

In addition, the protocol clearly establishes the direct obligation of the signatory states to "... secure to everyone within their jurisdiction the right to participate in the affairs of a local authority."[15] In addition, the additional protocol indicates the need to determine the means of exercising the right to participate by law. "The law should facilitate the implementation of the said right by means of appropriate instruments."[16] The additional protocol assigns the responsibility of ensuring the practical implementation of the right to participation to the central government.

It should be noted that the additional protocol uses the term – "every person" and not a citizen, which includes both stateless persons and foreign citizens who legally reside in a particular municipality. Thus, in addition to the charter, the protocol develops the approach that within the framework of the law and according to the established procedure, all persons may have the right to participate in the resolution of issues within the authority of the local government. However, it should be taken into account that the mentioned approach is not an unconditional and imperative requirement. According to the additional protocol, "Without unfairly discriminating against any person or group, the law may provide particular measures for different circumstances or categories of persons."[17] This norm requires the maximum inclusiveness of citizen participation forms and regulations, however, at the same time, it does not exclude the existence of a different approach, which It is determined by objective circumstances. In particular, the additional protocol considers it permissible that only the citizens of the country benefited from some opportunities for citizens' participation. "In accordance with the constitutional and/or international obligations of the party, the law may, in particular, provide

[14] Article 1, Paragraph 2, Council of Europe, Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority, Utrecht, 16/11/2009, <https://rm.coe.int/168008482a> [22.08.2022].

[15] Ibid. Article 1, Paragraph 1.

[16] Ibid. Article 1, Paragraph 3.

[17] Ibid.

for measures specifically limited to voters."[18] For example, the right to participate in a local referendum may be considered here.

Article 2 of the additional protocol defines the general standards for the realization of the right to participate in local government affairs. "The right to participate in the affairs of a local authority denotes the right to seek to determine or to influence the exercise of a local authority's powers and responsibilities."[19] The mentioned norm requires not only legislative strengthening of the right to participate, but also its effective enforcement.

In accordance with the Additional Protocol to the Charter, the signatory states must take the following measures to ensure the effective implementation of the right to participate:

Firstly, local government should be empowered to initiate, strengthen and promote the real use of the right to participate in the activities of local government.[20]

Secondly, procedures must be established that may include consultation mechanisms, referendums and petitions for participation in local government activities, and in the case of local self-governments with a large population or a large area, mechanisms must be developed to ensure participation as close as possible to them territorially.[21]

Thirdly, the procedures that ensure the availability of official documents of the local government should be strengthened.[22]

Fourth, it is necessary to implement measures that strengthen the possibility of participation of social groups traditionally excluded from public processes for objective reasons.[23]

Fifth, mechanisms and procedures should be developed that ensure response to complaints and suggestions of the population regarding the functioning of local government and the provision of local public services.[24]

Finally, the use of information and communication technologies should be encouraged to strengthen and actively exercise the right to participate.[25]

It should be noted that the Additional Protocol generally does not define mandatory provisions that are subject to direct enforcement. It establishes guiding principles; the protection guarantees and enforcement measures of which must be provided by the signatory states themselves. This approach significantly reduces the degree of imperativeness of the Additional Protocol and leaves the signatory states with a wide discretion of enforcement.[26]

---

18 Ibid.

19 Ibid. Article 2, Paragraph 1.

20 Article 2, Paragraph 2.I, a, Council of Europe, Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority, Utrecht, 16/11/2009, <https://rm.coe.int/168008482a> [22.08.2022].

21 Ibid, Article 2, Paragraph 2.II, a.

22 Ibid, Article 2, Paragraph 2.II, b.

23 Ibid, Article 2, Paragraph 2.II, c.

24 Ibid, Article 2, Paragraph 2.II, d.

25 Ibid, Article 2, Paragraph 2.III.

26 *Boggero G.,* Constitutional Principles of Local Self-Government in Europe, Brill, Leiden, 2017, 133.

The following subsections of the article present an analysis of the compliance of the Georgian legislation and its enforcement practices with the six requirements of the additional protocol listed above.

4. Analysis of Compliance of Georgian Normative Acts and Practices of Municipalities with the Requirements of the Additional Protocol

4.1. Equipping Local Government with the Power

The Charter requires the signatory states to equip local self-government with appropriate powers to ensure the effective implementation of the right of citizens to participate. Equipping local self-government with power means defining the titles by law and giving wide discretion for their execution.

Georgia fulfills the requirement of the Additional Protocol by taking into account the relevant provisions in the Organic Law of Georgia – Local Self-Government Code (hereinafter – the Code). A separate 4th Chapter in the Code is devoted to the regulation of citizens' participation issues.

The Code defines 5 forms of citizens' participation in the process of exercise of local self-government: the general meeting of the settlement; petition; Civilian Advisory Council; participation in the sessions of the municipality assembly and the commission of the municipality assembly; Listening to the reports on the work done by the mayor of the municipality and the member of the municipal assembly.

In addition, according to the Code, municipalities are equipped with the discretionary authority to determine additional forms of citizen participation and to allocate funds from the municipality's budget to support the development of citizen participation mechanisms.[27]

In accordance with the code, "municipality bodies and officials of municipality bodies are obliged to ensure the participation of citizens in the exercise of local self-government, to create organizational and material-technical conditions for the reception of citizens, meetings with citizens, activities of municipal bodies, including meetings of collegial public institutions, citizen participation and decision-making for the transparency of the process."[28]

4.2. Development of Appropriate Procedures and Mechanisms to Ensure Participation

The list of forms of participation specified in the additional protocol – consultation mechanism, petition and referendum – is only an exemplary list of forms of participation. The additional protocol does not provide for the imperative obligation to consider the mentioned forms within the national legislation.

---

[27] Based on the volume of the issue, the main attention in the article is given to the forms of participation – mechanisms defined by the Code.

[28] Paragraph 1 of Article 85, Organic Law of Georgia "Local Self-Government Code", Legislative Herald of Georgia, 1958-II, 19/02/2014.

It should be taken into account that compliance with the Additional Protocol cannot be confirmed only by formal recognition of participation mechanisms by law. According to the additional protocol, the forms defined by the law should ensure the actual exercise of the right of citizens to participate.[29]

Effectiveness of the forms of citizens' participation determined by the Code requires an assessment of the practice of their use, which is analyzed below.

a) General Meeting of the Settlement

By the additional protocol, the signatory states are obliged to develop such forms of participation that ensure maximum territorial inclusiveness. In particular, residents of settlements far away from the administrative center of the municipality should not have to go to the administrative center to exercise their right to participate.

Georgia has one of the largest municipalities in Europe in terms of territory and population. Thus, the existence of territorially accessible forms of participation with the population is a significant challenge. The code ensures formal compliance with the requirement of the additional protocol by determining the general meeting of the settlement.

The general meeting of the settlement is a form of citizens' participation in the self-organization of the population and the exercise of local self-government, the purpose of which is to ensure the involvement of voters registered in the settlement in solving important issues for their own settlement and municipality.

The Code sets quite a high requirement for convening a general meeting of the settlement, in particular, convening a general meeting requires the support of 5% of the registered voters in the settlement, and the presence of 20% of the voters for the convened meeting to be eligible.

In addition, the Code regulates in detail practically all issues related to convening and to the activities of the general meeting of the settlement. Due to the excessive legislative regulation of the activities of the general assembly, it resembles an inflexible bureaucratic mechanism and becomes difficult for the population to use. The analysis of the practice of municipalities indicates that the mentioned regulations are an important hindering factor for the functioning of general meetings.[30]

Such an approach limits the municipality's ability to adapt the mechanism to local conditions, which does not correspond to the requirement of the additional protocol to ensure the effective use of the right of citizen participation.

Thus, an important part of the norms governing the convening of meetings and issues of activity should be removed from the code and their regulation defined as the discretionary authority of municipalities.

---

[29] Article 2, Paragraph 1, Council of Europe, Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority, Utrecht, 16/11/2009, <https://rm.coe.int/168008482a> [22.08.2022].

[30] See *Kakhidze I., Toklikishvili G*., *Chanturia S., Kadagidze M.*, Research on Citizens' Participation in the Implementation of Local Self-government, CTC, 2020, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian); *N. Luhtvadze*, Evaluation of Existing Mechanisms of Citizens' Involvement in the Implementation of Local Self-Government in Georgia, Tbilisi, 2017, 20-21, 32-33 (in Georgian).

b) Petition

The Code envisages the right of voters to apply to the municipality assembly in the form of a petition. In the case of a petition, the Code defines relatively flexible regulations. In particular, the municipality is equipped with the authority to determine the minimum number of voters' signatures necessary for submitting a petition, which leaves possibility to adapt to local conditions.

The Code gives the municipalities the authority to define the procedure for submitting the petition in electronic form, which corresponds to the requirement of the additional protocol on the use of information technologies for the active use of the right to participate.[31]

The possibility of submitting a petition in electronic form has been established in 25 municipalities.[32] Some municipalities have reduced the minimum number of voter support required for a petition to 1%. For example, it is 0.5% in Batumi, Zugdidi and Ozurgeti municipalities. In Lagodekhi, at least 10 voters can submit a petition.

It is worth noting that in municipalities where there is a possibility of electronic petition submission and the minimum number of voters determined to submit a petition is reduced, the rate of petitioning is relatively high. In such municipalities, a higher quality and thematic variety of prepared petitions are also recorded.[33]

Thus, the analysis of the practice of municipalities indicates the need to expand the good practice of e-petition and reduction of the number of signatures required for petition submission.

c) Mayor's Civil Advisory Council

The mayor's civil advisory council is the mayor's deliberative body. The composition of the council is determined by representatives of businesses, non-governmental organizations and the population, with a total of not less than 10 members.

In accordance with the code, the mayor of the municipality is obliged to submit the budget project for municipality, spatial planning documents of the municipality, proposals on the names of geographical objects of the municipality, as well as drafts of other important administrative-legal acts, along with infrastructural and social projects, to the Civil Advisory Council for consideration.

According to the recommendation of the Congress of Local and Regional Authorities of the Council of Europe, the signatory states of the Charter should develop participation mechanisms, which are characterized by a high degree of involvement and allow dialogue – deliberation between citizens and authorities.[34]

---

31 See Article 2, Paragraph 2.III, Council of Europe, Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority, Utrecht, 16/11/2009, <https://rm.coe.int/168008482a> [22.08.2022].

32 See Local Self-Government Index, <www.lsgindex.org> [22.08.2022].

33 See *Kakhidze I., Toklikishvili G., Chanturia S., Kadagidze M*., Research on Citizens' Participation in the Implementation of Local Self-government, CTC, 2020, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).

34 Congress of Local and Regional Democracy, Rapporteur: Karl-Heinz Lambertz, Beyond Elections: The Use of Deliberative Methods in European Municipalities and Regions, Report CG(2022)42-12, 23 March 2022, <https://www.coe.int> [22.08.2022].

Unlike consultation, the purpose of dialogue is not only to understand the opinion of citizens. The level of dialogue of the citizen participation implies mutual activity. Dialogue is based on the idea of regular exchange of views and inclusiveness of different interests in public policy and consensus-based political decisions. It serves the purpose of joint preparation of decisions, and not only of understanding the opinion of community representatives.

The Citizen Advisory Council is not based on the idea of ensuring dialogue and is only a consultative form of citizen participation. The leading role in the activities of the Council is assigned to the public authorities.

Accordingly, it is recommended to define such powers by the statute of the Council, which will take into account the joint preparation of initiatives in addition to consultation on certain issues. For example, the Council may have the authority to draft legal acts, develop programs.

However, in most municipalities, the determination of the composition of the council is within the full discretionary authority of the mayor, there are frequent cases when a significant part of the composition of the council is staffed by civil servants of the city hall, which limits the form of participation of the council and reduces trust in it.

The procedure of formation of the council provides a higher degree of transparency and reliability when the representatives of the public are involved in the selection of the members of the council and the composition of the council is also composed mainly of their representatives.

For example, in Batumi, unions of entrepreneurial legal entities and non-governmental organizations have been granted the exclusive right to nominate candidates for council membership, based on the mayor's written appeal. In the case of Tsageri and Gori, the initiative group of the municipality's population (at least 20 citizens in Tsageri, 30 in Gori) and entrepreneurial and non-entrepreneurial legal entities have the right to nominate a candidate for council membership.[35]

d) Attending Meetings of the Local Assembly and Commission of the Local Assembly, Initiating an Extraordinary Meeting of the Assembly

Sessions of the municipality Assembly (Sakrebulo) and assembly commission are public. Any person has the right to attend the meetings without prior notice or permission. In addition, persons attending the public sessions of the Municipality Assembly and the Commission of the Municipality Assembly have the right to ask questions, make clarifications and statements, and submit information without prior permission, with the approval of the chairman of the session.

For the effective realization of the mentioned right, it is important to correctly define the "consent" of the chairperson of the session in practice, which is defined by the Code. The requirement of consent does not imply an unfettered discretion of the chairperson to refuse the person to express his opinion. The consent of the chairman of the Assembly in the Code should be interpreted as the authority to maintain order and order of speakers at the meeting, which derives from the responsibility of the Chairman of the Assembly as the leader of the meeting. Thus, it is appropriate to have a clearer reference to the scope of the authority of the chairman of the Sakrebulo in the Code.

---

[35] See *Kakhidze I., Toklikishvili G., Chanturia S., Kadagidze M*., Research on Citizens' Participation in the Implementation of Local Self-government, CTC, 2020, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).

The same can be said about the procedure provided by the rules of municipal assemblies, which determines the necessity of prior application (notification) to the assembly office in case a citizen wishes to express his/her opinion at the meeting. The mentioned record should only have the function of smooth operation of the assembly meetings and protection of organizational order. In practice, such an entry in the rules of procedure should not be interpreted as permission to speak at the meeting. According to the Code, a citizen is entitled to attend the session of the City Assembly without prior permission and to ask questions.

Nevertheless, in some municipalities, the mentioned norms of the code and rules of procedure are interpreted incorrectly.[36]

Another opportunity to participate in the sessions of the Sakrebulo is the procedure of convening an extraordinary session of the Sakrebulo at the request of at least 1% of the voters. The mentioned norm does not allow the municipality to reduce the minimum number of supporting voters, although it can increase it, which contains the danger of excessive restriction of the right to participate. For example, convening a session of the City Assembly in Batumi needs the support of at least 3% of the voters.

Thus, it is reasonable for the Code to determine only the maximum number of supporting voters and to leave the possibility to the municipality to determine the minimum number of voters necessary for convening a meeting of the Sakrebulo itself, in accordance with local conditions.

e) Accountability towards the Voter

The mayor of the municipality and the member of the municipal assembly are obliged, at least once a year, but no later than November 1, to organize public meetings with the voters and submit a report on the work done, as well as answer questions during the review of the report.

A study of the practices of municipalities indicates that reporting is the weakest mechanism among the existing forms of participation. There are frequent cases when the presentation of the report is attended by the employees of the municipality, from whom the critical comments and questions are less expected in general.[37]

Based on the results of the 2021 index assessment, the mayor's report submission in the form of a meeting with the voters took place in less than 1/3 of the municipalities, and the submission of report of the members of the Sakrebulo – in 9 municipalities, while there is only one municipality where all the members of the Sakrebulo submitted their report.[38]

In spite of the above, examples of good practice are recorded in some municipalities. In particular, in some municipalities, the obligation to proactively publish information on the date, place and time of the submission of the mayor's and city council member's report in advance, as well as the text of the report. The report form has also been approved.[39] Such an approach creates a unique opportunity of informed engagement for the voter.

---

36 Ibid.

37 Ibid.

38 See Local Self-Government Index, <www.lsgindex.org> [22.08.2022].

39 See *Kakhidze I., Toklikishvili G., Chanturia S., Kadagidze M*., Research on Citizens' Participation in the Implementation of Local Self-government, CTC, 2020, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).

In order to ensure the effective involvement of citizens in the process of submitting the report, it is also recommended that voters be given the opportunity to submit questions on issues of interest to them in advance, to which the public official will answer directly during the presentation of the report.

4.3. Availability of Official Documentation

Access to information is the minimum condition for citizens' participation.

According to the Code, along with fulfilling the obligations established by the "General Administrative Code of Georgia" regarding the provision of access to public information, the municipal bodies are obliged to publish important public information related to the activities of the municipality.[40]

The index provides valuable information on the practice of access to public information and proactive use in municipalities. According to the results of the 2021 index assessment, the average rate of proactive publication of public information in municipalities is only 27% on a 100% scale. It should be noted that only 32 municipalities improved the rate of proactive publication of public information compared to the 2019 assessment. Regression was observed in 30 municipalities. The worst practice is recorded in relation to the administrative expenses of the municipality (8%) and non-publication of the information on the legal entities based with shared participation or under the management of the municipalities (12%).[41]

The mentioned data, despite the legal compliance with the requirements of the Additional Protocol, indicates clear challenges of its implementation in practice.

4.4. Ensuring Inclusiveness of Citizens' Participation

The Additional Protocol requires the signatory states to take special measures to develop the possibility of participation of those groups of population that are often excluded from the process or are less involved. For example, persons with disabilities (hereinafter – PWD), young people, ethnic minorities, stateless persons and citizens of foreign countries, women, etc.

The consultative and deliberative bodies of the mayor and the assembly represent the main instrument for the involvement of vulnerable social groups in the municipality's activities in the municipalities of Georgia.

The Code defines two regulations to ensure the increase of women's participation in the local self-government activities. In one case, it provides for the obligation to ensure equal participation of men and women in the activities of the general meeting of the settlement, and in the other case, it determines the gender quota for the composition of the Mayor's Civil Advisory Council, in particular,

---

40 See Paragraph 3 of Article 85[1], Organic Law of Georgia "Local Self-Government Code", Legislative Gazette of Georgia, 1958-II, 19/02/2014.

41 See *Tushurashvili G., Kakhidze I., Kighuradze K., Naskydashvili T., Toklikishvili G., Turashvili T.*, Local Self-government Index: Main Findings and Recommendations, Tbilisi, 2021, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).

the number of representatives of one gender in the composition of the Mayor's Civil Advisory Council should not be less than 1/3. In case of failure of the said request, the Council loses its authority.

The analysis of the practice of municipalities indicates that local policies on vulnerable social groups are mainly focused on strengthening the civic activism and involvement of PWD and women, and less on other groups, for example, ethnic and religious minorities, IDPs, and youth. There are also rare cases of good practice, for example, in Bolnisi Municipality, the Mayor's Civil Advisory Council provides for a quota of representatives of ethnic minorities.[42]

In conclusion, it can be said that Georgia's degree of compliance with the requirements of paragraph 2.II of Article 2 of the Additional Protocol is weak. The final responsibility for the complete fulfillment of the obligation stipulated by the additional protocol rests with the state government. Accordingly, it is necessary to create legal regulations and develop mechanisms of state financial incentives of the municipality to ensure support for the involvement of vulnerable social groups in the activities of local self-government.

4.5. Effective Response to the Complaints and Proposals of Population Regarding the Provision of Public Services

The Additional Protocol obliges the signatory states to develop mechanisms to ensure an effective response to citizens' complaints and suggestions regarding the functioning of local authorities and the provision of local public services.[43]

Within the citizens' complaints and suggestions, the Additional Protocol refers to the statements of citizens presented in the form prescribed by law, including administrative complaints, as well as informal messages incoming into the municipality. For example, a citizen's message left on the social network address of the municipality or the message left on the hotline regarding the query to arrange a park in the neighborhood or a complaint requesting the repair of damaged outdoor lighting. In the theory of public management, the term "feedback from citizens" is used to denote this type of communication with citizens.[44]

In the process of modern public administration, complaints and other forms of feedback from citizens are perceived as an opportunity to "really listen" to the customer and turn the received information into knowledge that ensures the improvement of service quality.[45] Public authorities should have an answer to the question of what consumers want. The answer to this question gives an indication of what, how and why should be done in order for the user to be satisfied with the public service.

---

42 See *Kakhidze I., Toklikishvili G., Chanturia S., Kadagidze M*., Research on Citizens' Participation in the Implementation of Local Self-government, CTC, 2020, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).

43 Article 2, Paragraph 2.II, d, Council of Europe, Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority, Utrecht, 16/11/2009, <https://rm.coe.int/168008482a> [22.08.2022].

44 European Union, Quality of Public Administration a Toolbox for Practitioners, Luxemburg, 2017, 10.

45 Ibid, 2-21.

Hence, the above-mentioned requirement of the additional protocol should be understood as a requirement for the existence of guarantees for the protection of human rights, as well as the need to develop effective mechanisms for self-control and improvement of the quality of public services.

Existence of the mentioned goals radically changes the policy of the public authorities in relation to administrative complaints. Complaints are an important source of information for local authorities to identify problems and their causes in the provision of public services. Thus, the local government should perceive the complaint not as a problem, but as an opportunity to improve the quality of service. This approach automatically eliminates the "traditional policy" of "zero complaint" and replaces it with an accessible complaint policy.

The development of other feedback mechanisms should focus on the task of improving service quality. Its purpose should be to avoid formal procedures, including administrative appeals and court disputes, and to meet customer requirements as quickly and efficiently as possible.

Below is an analysis of the extent to which the legal and practical environment in municipalities is compatible with the implementation of the mentioned goals.

a) Administrative Appeals

The analysis of the practice of Georgian municipalities shows that the municipalities focus only on the observance of the principle of legality when dealing with an administrative complaint, the administrative complaint is considered in a narrow legal sense, and it is not perceived as a potential tool for improving municipal services.[46]

The information received from the municipalities indicates that in about 20% of the municipalities, no administrative complaints are recorded at all during the year. This practice is explained by the following reasons:[47]

First, organizational culture. Making all decisions in a centralized form by the mayor of the municipality is a kind of "tradition" of local management. Acts of the mayor can only be appealed in court.

Second, legal restrictions on the delegation of authority. Most of the sectoral laws[48] regulating the powers of local self-government define the authority to issue individual administrative-legal acts in the provision of public services (for example: issuing permits for construction, outdoor advertising and regular passenger transportation) as the direct responsibility of the mayor and do not refer to the possibility of delegation of authority, which limits their appeal to a higher administrative body.

Third, municipal service delivery practices. The provision of municipal services is rarely carried out directly by the municipality's mayor's office. The provision of a significant part of municipal services is provided by legal entities established by the municipality, or the provision of services is carried out on the basis of state procurement. The mentioned approach is part of the good practice of

---

46 *Kakhidze I*., Project – Development of a Concept for Introducing a Feedback Mechanism at the Level of Local Self-government and Improving the Practice of Administrative Complaints, CTC, 2021, <www.tvitmartveloba.ge> [22.08.2022].

47 Ibid.

48 For example: the Law of Georgia on Licenses and Permits, the Law of Georgia on Windshield (Land Protection) Strip, the Code of Spatial Planning, Architectural and Construction Activities of Georgia.

modern public management, although the administrative legislation of Georgia does not consider the mayor of the municipality as the superior body for appealing administrative-legal acts of legal entities of the municipality. Accordingly, the list of issues that can be appealed to the mayor of the municipality in an administrative manner is objectively reduced.

Not having the opportunity to appeal in an administrative manner, on the one hand, deprives the user of the opportunity to protect his rights through a simple, fast and cheap administrative appeal mechanism and avoid court disputes, and on the other hand, it does not give the mayor of the municipality the right to review the issue once again and correct the mistakes made by the employees of the municipality. At the same time, the possibility of using administrative complaints as a mechanism for service quality improvement is limited.

The solution to the mentioned challenge requires the expansion of the legal possibilities for the delegation of the mayor's authority. For this purpose, changes should be made in the sectoral legislation of Georgia and "executive body of the municipality and the person authorized by it" should be defined as the issuing entity of the individual administrative-legal acts of the municipality hall. It should be noted that such practice already exists in some laws.

In addition, based on the legislative amendments, a legal opportunity should be created to appeal the decision made by the municipality's NNLEs in the process of exercising public authority to the municipality's mayor's office in an administrative manner. For example, a similar practice already exists in relation to administrative fines.[49]

b) Other Mechanisms of the Feedback from Citizens

Development of informal means of feedback is especially important to ensure service quality. When using the aforementioned mechanisms, the municipality is less limited by the "frameworks" of the legislation, which allows more flexibility. For example, social networks, hotline, relevant electronic platforms.

The development of effective feedback mechanisms is possible only in the presence of a systematic approach and sustainable procedures, which are determined by the legal acts of the municipality.

Usually, a citizen initiates communication with the municipality when a problem arises. A citizen should be able to easily contact the municipality (for example, on the municipality's Facebook page, website, hotline, etc.) and solve the problem. It should not always be necessary to initiate bureaucratic administrative proceedings.

For example, if a message left on the municipality's social media address is about damaged outdoor lighting, the person responsible for feedback in the municipality must ensure that the entity responsible for solving the problem is informed and the citizen is provided with an explanation.

The analysis of the practice of municipalities indicates that the response to informal feedback depends only on the personal activity of the employees and it takes the form of spontaneous response to individual cases. Informal feedback management is not based on a procedure regulated by legal

[49] See Parts 3 and 4 of Article 2093, Code of Administrative Offenses of Georgia, Departments of the Supreme Council of the SSR of Georgia, Annex 12, 31/12/1984.

acts. Effective feedback mechanisms in municipalities are not perceived as a means of improving the quality of services, and the received information is not processed, analyzed and used for the purpose of improving the quality of services.[50]

Municipalities have not approved customer communication standards, which define the rules of behavior of employees when communicating with citizens. For example, the form of greeting and farewell, the manner of behavior of the employee during an offensive address, when answering a question on a social network or hotline, etc. The citizen should be informed about the possibility and procedure of submitting a claim in case of inappropriate treatment by the employee.[51]

Therefore, there is a need to develop a quality-oriented system of informal feedback services in municipalities and legal regulation of relevant procedures.

As a summary, it should be noted that the legal and practical environment for managing administrative complaints and other feedback mechanisms in the municipalities of Georgia is significantly below the requirement of the additional protocol.

4.6. Use of Information and Communication Technologies

The additional protocol determines the obligation to use information and communication technologies for the active realization of the right of citizens to participate.[52] In Georgia, the mentioned issue is mainly within the discretionary authority of municipalities.

Examples of good practice in the use of information technology to promote citizen participation are recorded in municipalities. In particular, some of the municipalities have introduced mechanisms for electronic participation in the meetings of the representative bodies of the municipality, which allows not only to follow the meetings, but also provides the opportunity to ask questions and give feedback.

For example, in Ozurgeti municipality, since 2015, the practice of live broadcasting of assembly meetings has been in effect. Its promotion is facilitated by the SMS service, through which citizens become subscribers to the news of the City Assembly and receive notifications about the scheduled meeting. Citizens have the opportunity to follow the current sessions of the City Assembly, including asking questions in live mode.[53]

Any citizen can watch the session through the website of the Batumi Municipality Council. Citizens also have the opportunity to ask questions and express their opinion.[54]

---

50 *Kakhidze I*., Project – Development of Feedback Management Manual at the Local Self-government Level, CTC, 2022, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).

51 Ibid.

52 Article 2, Paragraph 2.III, Council of Europe, Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority, Utrecht, 16/11/2009, <https://rm.coe.int/168008482a> [22.08.2022].

53 See *Kakhidze I., Toklikishvili G., Chanturia S., Kadagidze M*., Research on Citizens' Participation in the Implementation of Local Self-government, CTC, 2020, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).

54 Ibid.

It should be noted here that the procedure of electronic participation in the sessions of the City Assembly is not regulated by normative acts in any municipality. The absence of formalized mechanisms and legal obligations raises questions about the sustainability of the mechanism and leaves the City Assembly with wide discretion in its selective use.

Despite the existence of examples of good practice, it is important to further expand the mechanisms of electronic participation, for example, to extend it to the procedure of submitting the reports of the mayor or the member of the city assembly.

Municipalities also use electronic means to provide administrative complaints and the delivery of some municipal services, such as building permits.

Citizens can apply to the municipality and receive services through the official e-mail address of the municipality or using the portals www.my.gov.ge and www.ms.gov.ge.

Despite the above, very few people use the possibility of electronic services in the municipalities of Georgia, which is explained by insufficient awareness of the population and limited access to relevant electronic technologies.[55]

Thus, Georgia mostly fulfills the requirements of the additional protocol, however, it is necessary to increase the intensity of practical use of electronic technologies by the population, which can be achieved through an information campaign and the implementation of relevant municipal programs.

5. Conclusion

The fulfillment of the obligations of the additional protocol requires the central government to determine the procedures for ensuring citizen participation by law and to develop a policy supporting citizen participation, which ensures the practical realization of the right to participate.

Important steps have been taken in recent years to ensure citizens' participation in the implementation of local self-government in Georgia. In 2015, the regulation of issue of the citizen participation by the Code gave a good impetus to the development of citizen participation mechanisms in municipalities and the introduction of new forms. However, despite the mentioned positive changes, significant challenges remain in the direction of the practical implementation of the right to participate.

Municipal authorities have little understanding of the positive value of citizens' participation, therefore, sometimes it is perceived as an artificial "democratic addition" to the governance process rather than an effective management tool. Moreover, in addition to municipal authorities, the local population does not clearly see the need for citizens' participation, there is not enough trust in the process of citizens' participation, and the level of civic activity is low. Forms of citizen participation sometimes exist only because they are required by law.[56]

---

55 *Kakhidze I*., Project – Development of a Concept for Introducing a Feedback Mechanism at the Level of Local Self-government and Improving the Practice of Administrative Complaints, CTC, 2021, <www.tvitmartveloba.ge> [22.08.2022].

56 Ibid.

Trust towards citizen participation cannot increase and civil initiative will not develop if the population does not have faith that their activism brings real results. This conclusion coincides with the position of the Monitoring Committee of the Congress of Local and Regional Authorities of the Council of Europe in the 2018 report on Georgia.[57]

Bibliography:

1. European Union, Quality of Public Administration a Toolbox for Practitioners, Luxemburg, 2017, 10.
2. Council of Europe, Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority, Utrecht, 16/11/2009, <https://rm.coe.int/168008482a> [22.08.2022].
3. Council of Europe, Explanatory Report to the Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority, Utrecht, 16/11/2009, <https://rm.coe.int/16800d3838> [22.08.2022].
4. Council of Europe, Committee of Ministers, Recommendation CM/Rec(2018)4 to Member States on the Participation of Citizens in Local Public Life, 21 March 2018, <https://rm.coe.int/16807954c3> [22.08.2022].
5. Council of Europe, Committee of Ministers, Recommendation CM/Rec(2009)2 to Member States on the Evaluation, Auditing and Monitoring of Participation and Participation Policies at Local and Regional Level, 11 March 2009, <https://www.coe.int> [22.08.2022].
6. Congress of Local and Regional Democracy, Rapporteur: Karl-Heinz Lambertz, Beyond Elections: The Use of Deliberative Methods in European Municipalities and Regions, Report CG(2022)42-12, 23 March 2022, <https://www.coe.int> [22.08.2022].
7. Congress of Local and Regional Authorities, Monitoring Committee, Local and Regional Democracy in Georgia, CG35(2018)18, 7 November 2018, <https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016808e551a> [22.08.2022].
8. Organic Law of Georgia "Local Self-Government Code", Legislative Herald of Georgia, 1958-IIs, 19/02/2014.
9. General Administrative Code of Georgia, Legislative Herald of Georgia, 32(39), 15/07/1999.
10. Code of Administrative Offenses of Georgia, Departments of the Supreme Council of the SSR of Georgia, Annex 12, 31/12/1984.
11. *Boggero G.,* Constitutional Principles of Local Self-Government in Europe, Brill, Leiden, 2017, 133.
12. *Goetsch D., Davis S.,* Quality Management for Organizational Excellence: Introduction to Total Quality, 7th ed., New York, 2014, 1-19.
13. *Kakhidze I., Toklikishvili G., Chanturia S., Kadagidze M.,* Research on Citizens' Participation in the Implementation of Local Self-government, CTC, 2020, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).
14. *Kakhidze I.,* Project – Development of a Concept for Introducing a Feedback Mechanism at the Level of Local Self-government and Improving the Practice of Administrative Complaints, CTC, 2021, <www.tvitmmartveloba.ge> [22.08.2022] (in Georgian).

[57] Congress of Local and Regional Authorities, Monitoring Committee, Local and Regional Democracy in Georgia, CG35(2018)18, 7 November 2018.

15. *Kakhidze I.,* Project – Development of Feedback Management Manual at the Local Self-Government Level, CTC, 2022, <www.tvitmmartveloba.ge> [22.08.2022] (in Georgian).
16. *Kakhidze I.,* Project on the Development of the Supporting Procedural Manual for Administrative Complaints Review in Municipalities, CTC, 2022, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).
17. *Kakhidze I.,* Basic Principles of the Constitution of Georgia, Constitutional Law of Georgia, *Gonashvili V., Tevdorashvili G., Kakhiani G, Kakhidze I., Kverenchkhiladze G., Chigladze N.,* Tbilisi, 2020, 26-27 (in Georgian).
18. *Lutz D.,* Principles of Constitutional Design, New York, 2006, 97.
19. Local Self-Government Index, <www.lsgindex.org> [22.08.2022].
20. *Tvaltvadze N.,* Evaluation of the Existing Mechanisms of Citizens' Involvement in the Implementation of Local Self-government in Georgia, Tbilisi, 2017, 20-21, 32-33 (in Georgian).
21. *Tushurashvili G., Kakhidze I., Kighuradze K., Naskydashvili T., Toklikishvili G., Turashvili T.,* Local Self-government Index: Main Findings and Recommendations, Tbilisi, 2021, <www.tvitmartveloba.ge> [22.08.2022] (in Georgian).

Saba Elizbarashvili*

Resignation of a Member of Parliament – The Disputed Essence of the 5th Paragraph of the 39th Article of the Constitution of Georgia and a Practice Leading to its Unconstitutional Interpretation

The Constitution of Georgia stipulates that the mandate of a member of the Parliament will be terminated before the expiration of the term if he/she submits a personal application for terminating his/her powers to Parliament. Based on this norm, in December 2020, 54 opposition MPs applied to the Parliament with the request to terminate their parliamentary powers. They initiated "boycotting" the Parliament of the tenth convocation and tried to express their political protest by refusing the authority of a member of the Parliament. In response to this, the Parliament of Georgia did not satisfy the request of 51 members of the Parliament to terminate their powers before the expiration of the term. This decision of the parliamentary majority is based on a new interpretation of the constitutional norm, which has become the subject of controversy.

This article discusses the controversial content of Article 39, Clause 5 of the Constitution of Georgia and presents an analysis of its interpretation. Based on the methods of interpretation of the norm, the shortcomings of the interpretation proposed by the Parliament have been checked and the corresponding shortcomings have been identified. In the context of the decision made by the Parliament, a discussion is presented on the relationship between the interpretation and construction of the constitutional norm. In addition, the article discusses the relationship between the termination of the powers of the member of the parliament and the free mandate of the decision-making deputies.

***Keywords**: Constitution, termination of powers of the Member of Parliament, interpretation of the constitutional norm, free mandate.*

1. Introduction

Parliament is the highest representative body of the country, effective action of which is one of the main determinants of the democratic development of the state. Its role in the state government system is special. It is, as the source of power of the people,[1] the central body of representation,[2] where the public will and its interests are reflected[3] in the planning and implementation of state policy,

* Master of Law, Ivane Javakhishvili Tbilisi State University, Strategic Litigation Lawyer at Tolerance and Diversity Institute (TDI).

1 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism (1999), publishing house "Sezani", edited by T. Ninidze, 2003, 62 (in Georgian).

2 *Laundy P.,* Parliaments in the Modern World, Dartmouth, 1989, 11.

3 *Demetrashvili A., Kobakhidze I.,* Constitutional Law, Tbilisi, 2011, 210 (in Georgian).

and in which the gathered representatives are united by the goal of seeking a common public interest,[4] that is manifested in the confrontation of opinions surrounding public problems of great or small importance.[5] This tendency of the parliament is expressed not only in its institutional form, but also in the activities carried out,[6] within the framework of which the members of the parliament are equipped with certain rights, obligations[7] and freedom[8] – to follow their personal inner beliefs.[9] However, naturally, the people retain the ability to take back the power transferred to someone else,[10] which is manifested in its authority – to change the parliament, which has failed to live up to its hope and trust.[11]

The rights and obligations of MPs under the idea of representation itself are perceived differently in different parliamentary systems.[12] In this regard, along with many other components of the activity of a member of the parliament, it is interesting where the limit of his/her authority is in the process of using the parliamentary mandate given to him/her by the people.

According to James Madison, the representatives of the people are distinguished by having been preferred by their fellow-citizens. Therefore, Madison suggests, we should think that they will also be distinguished by their qualities, which will show us that they will sincerely and meticulously fulfill the duty assigned to them.[13] Among many other manifestations, this may mean taking such an unpopular step on the part of the deputy, such as resignation for one reason or another (including expressing political protest).[14] Therefore, it is interesting whether he/she has/should have the right to request early termination of his authority, and if he/she has/should have it, then in what form and within what scope can this will be expressed? Also, it should be assessed whether the Parliament, as a collegial body, is authorized to reject a member of Parliament's personal application for terminating his/her powers.

The issue acquired a special relevance in the process of activity of the Parliament of the 10th convocation of Georgia. In general, the Constitution of Georgia explicitly stipulates that the mandate of a member of the Parliament will be terminated before the term if he/she applies to the Parliament

---

4 *Sajó A., Uitz R.,* The Constitution of Freedom: An Introduction to Legal Constitutionalism, Oxford University Press, 2017, 221.

5 *Mill J. S.,* Considerations on Representative Government [1861], Prometheus Books, 1991, 118.

6 *Rai S.M., Johnson R.E.,* Democracy in Practice: Ceremony and Ritual in Parliament, Palgrave Macmillan, 2014, 21.

7 E.g., see *O'Donnell G.,* Delegative Democracy (1994), from Politics and Democracy, ed. *Nabakhteveli E.,* Intellect Publishing House, Tbilisi, 2020, 263 (in Georgian).

8 E.g., see *Eremadze K.,* Fundamental Rights for Freedom, Tbilisi, 2020, 8 (in Georgian).

9 *Jones P., Berrington H.,* Party, Parliament and Personality: Essays Presented to Hugh Berrington, London, Routledge, 1995, 135.

10 *Locke J.,* Two Treatises of Government, *Laslett P. (ed.),* Cambridge University Press, 1999, 366-367, (§149).

11 *Linn S., Sobolewski F.,* The German Bundestag: Functions and Procedures: Organisation and Working Methods: the Legislation of the Federation, NDV, 2015, 12.

12 *Iliec C.,* Analytical Perspectives on Parliamentary and Extra-parliamentary Discourses, Journal of Pragmatics 42, no.4, 2010, 879-884, 880.

13 *Madison J.,* Federalist Letters – #57 (with Alexander Hamilton), to the People of the State of New York, February 19, 1788 (in Georgian).

14 *Burke E.,* The Writings and Speeches of Edmund Burke, Vol. 3, *Langford P., Todd W.B.(eds.),* Oxford University Press, 1996, 63.

with a personal statement about the termination of the mandate.[15] Based on this norm, following the 2020 parliamentary elections, in December of the same year, 54 opposition MPs applied to the Parliament with a request to terminate their parliamentary powers. They announced a "boycott"[16] to the Parliament of the tenth convocation and tried to express their political protest by refusing the authority of a member of the Parliament. In response to this, on February 2 of 2021, the Parliament of Georgia rejected the request of 51 members of the Parliament for the early termination of their powers.[17] It is significant that in the history of the existence of the parliament of Georgia, it made such a decision for the first time. It is also worth noting that this decision of the Parliament was appealed by several deputies to the Constitutional Court,[18] where the substantive review session was held on June 10-11 of 2021,[19] although it is not yet known what decision the court will make.

The difference between opinions is caused by the scope of the parliament's authority in the process of termination of the powers of the deputy – according to the parliamentary majority, the constitution gives the parliament not only a formal but also an active role and entrusts the issue of termination of the powers of the member of the parliament to the decision of the representative body. According to the opposite position, the role of the parliament in the process of termination of authority is limited to the formal confirmation of the deputy's statement.

Despite the differences in political opinions, the aforementioned decision of the Parliament should be considered as the result of a wrong interpretation of the constitutional norm, since it contradicts with the explicitly expressed will of the text of the constitution and does not derive from the unified spirit of the norm. The purpose of this article is to analyze in detail the content of the discussed norm of the Constitution and, based on the analysis of the practice or theory of constitutional law, to determine what flaws the controversial definition presented by the Parliament contains and what threats it may pose to the future activities of the Parliament.

2. Legislation Regulating the Issue and the Georgian Experience of Early Termination of the Mandate of a Member of Parliament based on a Personal Statement

The Constitution of Georgia and the Rules of Procedure of the Parliament of Georgia regulate the status of a member of the Parliament, the scope of his powers, the grounds for recognizing and early termination of powers, procedures and other related issues.

One of the important issues regulated by the Constitution of Georgia and the Regulations of the Parliament of Georgia is the recognition and early termination of the powers of a member of the Parliament. According to the Constitution, "the issue of recognition or early termination of the powers of a member of the Parliament is decided by the Parliament. … the authority of a member of the

---

15 Constitution of Georgia, Article 39, paragraph 5, 24/08/1995.

16 See <https://1tv.ge/news/parlamenti-51-opozicioneristvis-sadeputato-uflebamosilebis-shewyvetaze-mimdinare-kvirashi-imsjelebs/> [14.09.2022].

17 E.g., see Resolution #153-IVმს-Xმპ of February 2, 2021 of the Parliament of Georgia.

18 Constitutional complaint N1565 and N1569 of February 10 and 16, 2021.

19 See <https://bit.ly/3IAYWNM> [14.09.2022].

Parliament will be terminated before the expiration of the term, if he/she a) applies to the Parliament with a personal statement about the termination of the authority".[20]

According to the rule established by the Rules of procedure of the Parliament of Georgia, a written statement on the removal of authority by a member of the Parliament shall be submitted to the Chairman of the Parliament, who will immediately forward it to the Committee on Procedural Issues and Rules of the Parliament. In turn, the committee determines the validity of the submitted application, the circumstances that formed the basis of the application, and prepares a relevant report no earlier than 8 and no later than 15 days[21] and submits it to the Bureau of the Parliament. The purpose of this record is for the Legislature to determine whether the personal statement made by the Member of Parliament is truly a free expression of his/her will, or the result of coercion, before taking a decision on the early termination of its member's powers..[22]

On January 28 of 2021, the Committee on Procedural Issues and Rules of the Parliament of Georgia, based on the written statements of the members of the Parliament, discussed the issue of early termination of the powers of the 51 MPs at the committee meeting. In accordance with the paragraph 3 of article 6 of the Rules of procedure of the Parliament of Georgia, the committee established the validity of the statements submitted by the MPs on the termination of their powers, based on which, the committee considered that the powers of the MPs should have been terminated before the expiration of the term.[23] It is worth noting that the mentioned decision was adopted by the committee unanimously,[24] thus it confirmed the authenticity of the will expressed by the MPs to terminate their powers and their compliance with the rules defined by the regulations. However, it can be said that the Parliament did not share the committee's conclusion, as it did not approve the request of the MPs to terminate their powers.

Special attention should be paid to the fact that in the history of Georgian parliamentarism, this was the first time when the parliament did not approve the request of its members to terminate their mandate before the expiration of the term. It should be noted that the Parliament of the same convocation approved the application and terminated the mandate of 4 members of the Parliament,[25] whose request for termination of mandate was based on the same factual circumstances as of other 51 deputies. The mentioned circumstance gives rise to the assumption that such an interpretation of the constitutional norm may lay the foundation for the practice of making decisions based on narrow party interests and subjective perceptions regarding the recognition/termination of the authority of individual MPs by the parliamentary majority, which will cause significant damage to the goal of

---

20 Constitution of Georgia, Article 39, paragraph 5.

21 Constitution of Georgia, Article 39, paragraph 3.

22 *Khetsuriani J.,* The Authority of the Constitutional Court of Georgia on the issues of constitutionality of recognition or early termination of the powers of a member of the Parliament, Justice and Law, #3(42)14, 2014, 19 (in Georgian).

23 E.g., see Conclusion of the Procedural Issues and Rules Committee of the Parliament of Georgia dated January 28, 2021 N-2-882/21.

24 Minutes of the meeting of the Procedural Issues and Rules Committee of the Parliament of Georgia on January 28, 2021 N13.

25 Resolutions of the Parliament of Georgia of January 4, 2021 N53-IIრს-Xმპ; N54-IIრს-Xმპ; N55-IIრს-Xმპ and Resolution of May 25, 2021 N487-IVმს-Xმპ

establishing a healthy parliamentary environment. Democracy does not mean that the position of the majority always appears as a "winning" position. It is important to achieve a balance that creates the basis for equal and fair treatment of the minority and avoids the danger of abuse of the dominant position of the majority.[26] It is necessary that the legislation regulating the activity of the Parliament, as well as the normative content obtained as a result of the interpretation of this legislation, should not act as a weapon directed against the opposition in the hands of the parliamentary majority,[27] but should serve the purpose of implementing democratic principles.

3. Definition of the Disputed Norm of the Constitution of Georgia

The analysis of the Georgian legislation reveals that the decision of the Parliament of February 2 of 2021, regarding the refusal of the statements of 51 deputies of the Parliament, was not based on a specific formal legislative basis, which would be explicitly expressed in the Constitution of Georgia or the Rules of Procedure of the Parliament, but on the flawed interpretation of the entries in the aforementioned acts. In such case, it is important to analyze how correctly the definition of the norm was made and how it corresponded to the recognized methods of interpretation.

Constitution is a living organism, which, in order to adapt to modern challenges, may require clarification and revision from time to time, and at that time it is important to choose the right method of interpretation of the norm.[28] In general, "grammatical", "logical", "historical" and "systematic" ways of interpreting the norm are distinguished.[29] In the constitutional context, interpretation is an action that primarily aims to determine the linguistic meaning of the provisions of the constitution.[30] However, one thing is clear that "in every interpretation of the law, the problem of legitimacy arises".[31] Therefore, it is important, when interpreting the norms of the Constitution, that the interpreter does not go beyond the goals and scope of regulation of a specific norm of the Constitution itself. In addition, it is necessary to support the interpretation of legal norms with appropriate legal argumentation, which will make the process reasonable and understandable, both directly to the addressee of the decision and to society as a whole.

According to the formalist approach of interpretation, which implies a literal interpretation of the text, "the Constitution clearly defines who should do what",[32] in other words, the Constitution precisely prescribes the basic framework of the powers of state bodies, which limits the activities of

---

26 *Gorzelik and Others v. Poland [GC]*, Application no. 44158/98, Judgment of 17 February, 2004, para. 90, <http://hudoc.echr.coe.int/eng?i=001-61637> [14.09.2022].

27 *Karácsony and others v. Hungary* [GC], Application nos. 42461/13 and 44357/13, Judgment of 17 May 2016, para. 147, <http://hudoc.echr.coe.int/fre?i=001-162831> [14.09.2022].

28 *Redish M.H., Arnould M.B.,* Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative, 64 Fla. L. Rev. 2012, 1486.

29 *Zippelius R.,* Juristische Methodenlehre (10th Revised ed.), München, 2006, 53 (in Georgian).

30 *Solum L.B.,* The Interpretation-Construction Distinction, Georgetown Law Faculty Publications and Other Works, 95-118, 2010, 101.

31 *Zippelius R.,* Juristische Methodenlehre (10th Revised Edition), München, 2006, 88 (in Georgian).

32 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism (1999), Publishing House "Sezani", edited by *T. Ninidze, Maisuradze M. (trans.),* 2003, 95-96 (in Georgian).

each of them. Thus, it is of particular importance to correctly define the constitutional scope of authority of a particular institution.

In this regard, the opinion of Hamilton is particularly interesting, who believed that it is not permissible to assume the following: as if the constitution provides for the people's representatives to replace the will of the people with their own will. ... If incompatible contradictions appear, of course, supreme obligation and legality must prevail. In other words, we should consider the constitution prevailing over the law, and we should put the will of the people above the will of the people's representatives.[33] Thus, according to Hamilton, what is determined by the constitution – that is, the supreme law expressing the will of the people, is decisive, and no one, including the representatives elected by the people, has the right to change its content by interpreting the text of the constitution.

3.1. Controversial Content of Paragraph 5 of Article 39 of the Constitution

Sometimes it happens that the content of individual words and phrases used in the text of the Constitution is vague, unclear, contradictory, insufficiently clear[34] and allows for more than one linguistic interpretation. However, even from such a vague text, it is always possible to draw an objective conclusion if the context in which this particular word/phrase is placed is properly analyzed.[35]

Constitutions of many states clearly and directly define the procedure for making the final decision on the termination of the powers of the deputy by the parliament. For example, the Swedish constitution mandates that a member of the Riksdag does not have the right to resign without the consent of the Riksdag.[36] The decision on the issue is entrusted to the authority of the parliament in Turkey as well.[37] We see a similar approach in the cases of Ukraine[38] and Belarus.[39] However, as mentioned above, paragraph 5 of article 39 of the Constitution of Georgia, as it appeared during the activity of the Parliament of the 10th convocation, may cause some confusion and differences of opinion. In such case, it is important to choose the alternative definition of the norm, which is supported by the strongest argumentation.

In general, when interpreting a norm, one of the main goals of the interpreter is to understand the objectified content of the norm, that is, the content that a standard reasonable person would read

---

33 *Hamilton A.,* Federalist Letters – #78, to the People of the State of New York, May 28, 1788 (in Georgian).

34 *Goldsworthy J.,* Interpreting Constitutions: A Comparative Study, Oxford University Press, 2006, 1.

35 *Solum L. B.,* The Interpretation-Construction Distinction, Georgetown Law Faculty Publications and Other Works, 95-118, 2010, 102.

36 The Constitution of Sweden, article 11, https://www.constituteproject.org/constitution/Sweden_2012?lang=en> [14.09.2022].

37 The Constitution of Turkey, article 84, <https://www.constituteproject.org/constitution/Turkey_2017?lang=en> [14.09.2022].

38 The Constitution of Ukraine, article 81, <https://www.constituteproject.org/constitution/Ukraine_2016?lang=en> [14.09.2022]

39 *Chmyha A.,* The Legal Grounds of Emergence and Termination of Mandates of Members of Parliaments in Belarus and Poland: a Comparative Analysis, Biaostockie Studia Prawnicze vol. 24, #4, 2019, 143-152, 149.

from the text of the law.[40] Therefore, when interpreting the norm, the aim should be to search for the meanings of the words that most closely correspond to the ideas prevailing in the society about the specific norm.[41] In addition, according to the practice established by the Constitutional Court, "it is impossible to fully resolve the constitutionality of the disputed issue, if the court does not read/interpret the norms of the Constitution in connection with each other".[42] Therefore, it is necessary to evaluate in details the entire structure of paragraph 5 of Article 39.

3.1.1. The Identical Rule Established for Recognition and Early Termination of Powers of a Member of Parliament

First of all, attention should be drawn to the fact that the first sentence of paragraph 5 of Article 39 concerns not only the issue of early termination of the mandate of a member of the Parliament, but also the issue of recognition of his/her mandate. Thus, the will of the legislator is read that the words "the issue is decided by the Parliament" should apply equally to one and the other issue, and accordingly, it should have the same force of action both for the recognition of the powers of the MP and for its early termination.

Based on the above, if we follow the approach proposed by the parliament for the definition of the norm in question, it turns out that being beyond and evading the rules provided by the constitution and the law, the parliament will be authorized, based on certain arguments,[43] to consider and make a positive or negative decision not only to terminate the powers of a member of the parliament, but also on the issue of recognition of the authority, which will directly contradict with the spirit of the constitution and the essence of the mandate of the deputy.

It should be noted that the exercise of power should not go beyond the scope established by the text of the Constitution.[44] This is the essence of the textual method of interpretation – the law must be read in the way it is written.[45] In the case under consideration, the will of the legislator is observed – both in the process of making a decision regarding the recognition of the authority of a member of the parliament and its early termination, the role of the parliament was defined by a formal function, which should be expressed in its unconditional confirmation by the parliament in the event of determining the compliance of the statement of the member of the parliament with the formal-procedural conditions defined by the law.

---

40 *Scalia A., Wood G., Tribe L., Glendon M., Dworkin R.,* A Matter of Interpretation: Federal Courts and the Law, *Gutmann A. (ed.),* Princeton, New Jersey: Princeton University Press, 1997, 17.

41 *Zippelius R.,* Juristische Methodenlehre (10th Revised Edition), Verlag C.H. Beck München, 2006, 28.

42 Decision N3/1/659 of the Constitutional Court of Georgia dated February 15, 2017 on the case – Georgian citizen Omar Zorbenadze against the Parliament of Georgia, II-20.

43 Among them, political expediency.

44 *Pakte P., Melen-Sukramaniani F.,* Constitutional Law, 28th edition (as of July 2009), Tbilisi, 2012, 49 (in Georgian).

45 *Scalia A., Wood G., Tribe L., Glendon M., Dworkin R.,* A Matter of Interpretation: Federal Courts and the Law, *Gutmann A. (ed.),* Princeton, New Jersey: Princeton University Press, 1997, 23.

3.1.2. "The powers of a member of parliament will be terminated before the expiration of the term, if..."

Sentence 3 of paragraph 5 of article 39 of the Constitution is formulated as follows: "The powers of a Member of Parliament shall be terminated early if he/she: ... [submits a personal application for terminating his/her powers to Parliament]". As already mentioned, the vagueness of the norms of the constitution is usually clarified by their interpretation, which is based on the use of the words and phrases in the text of the constitutional provision to be evaluated with the generally recognized content.[46] According to this approach, the considered provision and the phrase "shall be terminated" used in its text are read in such a way that the powers of the member of the parliament must be terminated and that it should be enough for the member of the parliament to submit an appropriate application. When defining the mentioned issue, the legislator uses an imperative tone, thereby emphasizing his/her will – in case of the existence of the grounds listed in Article 39(5), the powers of the member of the Parliament will be terminated. In addition, the Constitution does not say anything about the grounds or conditions that would grant the Parliament the power to review the deputy's application and, based on political or other motivations, to disapprove it. As already mentioned, the only condition established by the Rules of Procedure of the Parliament is to determine the validity of the will expressed by the MP by the Committee on Procedural Issues and Rules.

Thus, it is more likely that if the creators of the Constitution were motivated by the will and purpose of granting certain freedom of action to the Parliament, then the Constitution would have used an alternative set of words instead of the imperative term "shall be terminated", such as, for example, "may be terminated", which would leave the parliament with a wide discretion.

3.1.3. Relation of other grounds for termination of powers to the rule of termination of powers by personal application

It is also noteworthy that in relation to the other grounds[47] for the termination of the powers of a member of the Parliament prescribed by the Constitution, the Rules of Procedure of the Parliament provide for a procedure similar to the one established for the termination of the powers by personal application. It is related to the preparation of the relevant conclusion by the Committee on Procedural Issues and Rules of the Parliament and passing it to Bureau, and afterwards to the plenary session for voting.[48] Therefore, allowing the possibility of the parliament refusing to approve the personal application of the deputy regarding the termination of the powers itself creates the danger of the spread of a similar possibility with respect to other grounds for the termination of the powers. In other words, such a definition of the norm includes giving the Parliament the opportunity, for personal, political or any other reason, not to terminate the powers of a member of the Parliament who engages in entrepreneurial activity, who the court found guilty, or even a member of the Parliament who has died,

---

46 *Solum, L. B., The Interpretation-Construction Distinction*, Georgetown Law Faculty Publications and Other Works, 95-118, 2010, 102.

47 The Constitution of Georgia, Article 39, sub-paragraphs "b-t" of paragraph 5.

48 Paragraphs 4-12 of Article 6 of the Rules of Procedure of the Parliament of Georgia.

etc. Such an approach will endanger the reputation and authority of the Parliament, which will ultimately affect the legitimacy of its decisions.

In the conditions, when the Georgian legislation applies equally to all the grounds for early termination of the mandate, there is a danger that the political expediency of such decision will be defined as the motive for refusing to terminate the mandate for a member of the Parliament on one or another basis,[49] which is unequivocally unacceptable, since the criterion of political expediency does not have a normative basis, it is extremely vague in nature and entirely dependent on the subjective perception of the decision maker. Therefore, the potential danger caused by allowing the possibility of the parliament to refuse to approve the application for the termination of the mandate may turn out to be much more harmful than just neglecting the interest of the individual MP who wants to terminate the mandate.

3.2. The Decision of the Parliament from 2 February 2021 and a New Way of Interpreting Article 39(5) of the Constitution

Contrary to the reasoning developed above, the Parliament of the 10th convocation of Georgia, by the decision of February 2, 2021, did not terminate the powers of 51 members of the Parliament, despite the fact that all of them had submitted the relevant application, and the Committee on Procedural Issues and Rules had issued a positive conclusion on each of them, that As a proof that the will expressed in the statements really belonged to their authors and that all the conditions stipulated by the law for early termination of their powers were in place.

In relation to the issue of the termination of the powers of a deputy, the approach of the Constitutional Court is interesting, according to which, "the effective functioning of democracy itself requires that there must be a mechanism for early termination of the powers of a representative of the people, which should be used only when there is an appropriate basis... That is why paragraph 5 of article 39 of the Constitution of Georgia exclusively and exhaustively lists the grounds, the existence of which leads to the early termination of the powers of a member of the parliament and minimizes the scope of discretion of this decision-making body.[50]

In general, "the Constitution, by the very fact of its existence, with its formal meaning, opposes arbitrariness by defining a legal state, where only that which is in accordance with the rules established by the Constitution is allowed".[51] However, despite the fact that neither the Constitution nor the Rules of Procedure of the Parliament does not include any indication of consideration of the application of the MP on the termination of the powers and even refusing to satisfy it, in the discussed case, the Parliament, in fact, arbitrarily, without the existence of the necessary normative basis for this, expanded the scope of discretion and "introduced" into the parliamentary life such an authority as refusing a request to terminate the powers for a deputy. Accordingly, by interpreting the provisions of

---

[49] As it happened during the decision of the Parliament of Georgia on February 2, 2021.

[50] Decision № 3/2/1473 of the Constitutional Court of Georgia dated September 25, 2020 on the case – Nikanor Melia vs. Parliament of Georgia, II-7.

[51] *Pakte P., Melen-Sukramaniani F.,* Constitutional Law, 28th edition (as of July 2009), Tbilisi, 2012, 93 (in Georgian).

the Constitution on this scale, the Parliament went beyond the scope provided by the text of the Constitution and invaded the space of its construction.

The doctrine of law separates the interpretation of the norm and its construction. The difference between them is the quality and intensity of the intervention of the entity explaining the provision and the definition itself.[52] As it was said in the reasoning developed above, the interpretation of the provision includes the definition within its existing linguistic framework[53],[54] and if there is such a scale of the ambiguity of the norm, which is referred to in the law literature as "irreducible ambiguity", then the methods of interpretation to clarify such a provision will be useless and it will be necessary to construct it,[55] which, on the other hand, goes beyond the scope of determining the linguistic content of norms and is expressed in determining its foundation.[56]

If there is a constitutional dilemma about which the text of the constitution is silent, in such case, the mechanism of construction may prove to be a useful mean for filling the gap in the legislation.[57] In other words, in the case of Article 39(5) of the Constitution of Georgia, behavior aimed at determining the linguistic content of its existing text should be considered as an attempt to interpret the norm, and all attempts to read the content from the provision in question, which is fed by general and abstract constitutional principles (which might even be contradictory to the opinion explicitly expressed in the norm), it should be considered as a construction of the said norm. The analysis of the provision discussed within the scope of the article reveals that the words and terms presented in it, both autonomously and systematically (in relation to each other), allow the interpretation of the norm and do not require the Parliament to "fill the void" in the norm through construction, as long as the existence of such a void is not even apparent at all.

3.3. Refusal to Terminate the Powers, as a Possible Result of Realization of the Free Mandate of Individual Members of the Parliament

An opinion can be expressed with regard to this issue, that the members of the parliament being present at the plenary session, who do not support the issue of terminating the powers of the deputy based on his/her personal statement, act within the framework of a free mandate and personally make a decision about what they will support and what they will not. On one hand, it is true that "every individual governs his own destiny",[58] and the free mandate includes the right of the deputy to act in

---

52 See e.g. *Redish M. H., Arnould M. B.,* Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative, 64 Fla. L. Rev. 2012, 1489.

53 *Barnett R.E.,* Interpretation and Construction, Georgetown Public Law and Legal Theory Research Paper 34 Harv. J.L. & Pub. Pol'y – 65-72, 2011, 66.

54 Which in itself may include, among others, the definition of the norm by a grammatical, historical, systematic or teleological method.

55 *Solum L. B.,* The Interpretation-Construction Distinction, Georgetown Law Faculty Publications and Other Works, 95-118, 2010, 102.

56 Ibid, 104-105.

57 Ibid, 107.

58 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism (1999), publishing house "Sezani", edited by T. Ninidze, Trans. *Maisuradze M.,* 2003, 137 (in Georgian).

accordance with his beliefs[59] and frees him from the legal obligation to follow the instructions of the voter[60] or the political party[61] presenting him. However, it is interesting, based on the logic of the constitution, whether there is a certain category of issues, the acceptance of which should be considered as a constitutional obligation, not as a choice of MP.

For example, paragraph 5 of article 39 of the Constitution, along with the termination of the mandate, also regulates the issue of recognition of the mandate of the newly elected deputy, which, in fact, establishes the same rule as in the case of termination. Article 6 of the Parliament's Rules of Procedure shows a similar approach. There is no doubt that in case of determining the procedural relevance of the issue, the powers of the candidate for membership of the Parliament must be necessarily recognized.

Although, formally, the "resolution" of the issue is entrusted to the members being present at the plenary session of the Parliament, it can be said that in case of preliminary determination of the candidate's formal compliance with the status of a member of the Parliament, there is no constitutional mechanism for refusing to recognize his authority. It turns out that there is a sort of directive of the constitution to the members of the parliament – to support the resolution on the recognition of the authority of the member of the parliament.[62]

In the case of a different interpretation of the mentioned norm, the parliamentary majority would have the right, for example, to evaluate the issue of political expediency of recognizing the authority of a member of the parliament, and based on personal subjective views, decide whether or not to recognize the powers of a deputy. Such an approach would contradict the principles of the Constitution and its general essence.

Therefore, it will not be an exaggeration if we say that the Constitution entails certain regulations, the implementation of which can be considered not as the authority of the Parliament, but as a kind of informal obligation. The issue of making decision by the Parliament regarding recognition and termination of powers of MPs should be considered as one of such obligations. And in the case when the members of the parliament refuse to support the issue of recognition/early termination of the authority of the deputy, referring to the free mandate, the case needs to be considered by the Constitutional Court,[63] which will have to cancel the formally correct, but actually unconstitutional, resolution adopted by the parliament.

---

59 Venice Commission, Opinion on the Amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017), [CDL-AD(2017)026], 33, <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)026-e> [14.09.2022].

60 *Van Der Hulst M.,* The parliamentary mandate: A global comparative study, Studies on comparative parliamentary law, Inter-Parliamentary Union, Geneva, 2000, 9, <http://archive.ipu.org/pdf/publications/mandate_e.pdf> [14.09.2022].

61 *Linn S., Sobolewski F.,* The German Bundestag: Functions and procedures: Organisation and working methods: the legislation of the federation, NDV, 2015, 11-12, <https://www.btg-bestellservice.de/pdf/80080000.pdf> [14.09.2022].

62 In this regard, the case considered by the US Supreme Court – Powell v. McCormack, 395 U.S. 486 (1969). <https://supreme.justia.com/cases/federal/us/395/486/> [14.09.2022].

63 Paragraph 5 of Article 39 of the Constitution allows for this possibility – "... this decision of the Parliament can be appealed in the Constitutional Court".

Conclusion

In conclusion, it should be noted that such an interpretation of the norm is not allowed, which "obviously contradicts the legislator's decision about the purpose and expediency of the norm, because with such an interpretation, the user of the law would change the legislative decision with his own political opinion."[64] As it appeared from the reasoning developed above, in relation to the issue under consideration, the Constitution unconditionally establishes the rule of early termination of the powers of a member of the Parliament based on a personal statement. Thus, according to the current legislation in Georgia, "resignation" can really be considered an absolute right of a member of the parliament, which he/she should be able to use at any time and on any basis, regardless of whether the MP's behavior is founded on personal or political motives.

As for the decision made by the Parliament on February 2 of 2021 and justification of the new interpretation of paragraph 5 of article 39 of the Constitution: it can be said unequivocally that the definition proposed by the Parliament does not meet the standards of interpretation of the constitutional norm, since the authority of the Parliament cannot be read from the text of the provision – not to approve the personal application of the MP submitted for early termination of the term of office. In the process of applying the provision in question, the Parliament went beyond the scope of the interpretation of the norm and invaded the space of its construction, when there was no necessity. Such approach roughly violates the recognized standards of interpretation of the constitutional norm.

It should also be noted that, in general, in the practice of world constitutionalism, we may encounter cases when, by rejecting the statement of a member of the parliament on termination of powers, the parliament aims to prevent possible manipulation of the quorum by specific deputies,[65] or to prevent the deputy from evading disciplinary responsibility.[66] However, according to the recommendation of the Venice Commission,[67] the parliamentary opposition should not be restricted from the reasonable use of such tactics, which even prolong or complicate the political processes, although they are allowed by the procedural rules of the parliament. According to the Constitution of Georgia, termination of authority by personal statement belongs to the number of "permitted" measures of this category.

It is important to emphasize that if the constitutional majority of the members of the parliament considers a specific entry of the text of the constitution to be "outdated" or faulty, it is obliged to express its will through the procedure of revision of the constitution, and not by abstractly assigning the political content desired by a simple parliamentary majority to the basic law. Such an approach would lose the essence of the constitution as the supreme document expressing the will of the people

---

64 *Zippelius R.,* Juristische Methodenlehre (10th Revised Edition), Verlag C.H. Beck München, 2006, 75.

65 *Chafetz J.,* Leaving the House: The Constitutional Status of Resignation from the House of Representatives, Duke Law Journal, vol. 58, no. 2, 2008, 226.

66 *Strøm K., Mueller W.C., Bergman T.,* Delegation and Accountability in Parliamentary Democracies, Oxford University Press, 2005, 354.

67 Venice Commission, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019), [CDL-AD(2019)015-e], 25.

and would make it a subject of manipulation by the holders of political power, which is totally unacceptable.

Bibliography:

1. Constitution of Georgia, 24/08/1995.
2. Constitution of Sweden, 1974 (rev. 2012).
3. Constitution of Ukraine, 1996 (rev. 2016).
   Constitution of Türkiye, 1982 (rev. 2017).
4. Rules of Procedure of the Parliament of Georgia, 06.12.2018.
5. Resolution #153-IVმს-Xმპ of the Parliament of Georgia from February 2, 2021.
6. Resolution of the Parliament of Georgia of January 4, 2021 #53-IIრს-Xმპ;
7. Resolution of the Parliament of Georgia of January 4, 2021 #54-IIრს-Xმპ;
8. Resolution of the Parliament of Georgia of January 4, 2021, #55-IIრს-Xმპ
9. Resolution of the Parliament of Georgia, May 25, 2021 N487-IVმს-Xმპ.
10. Conclusion of the Procedural Issues and Rules Committee of the Parliament of Georgia dated January 28, 2021 #-2-882/21.
11. Minutes of the Meeting of the Procedural Issues and Rules Committee of the Parliament of Georgia on January 28, 2021 #13.
12. *Barnett R.E.*, Interpretation and Construction, Georgetown Public Law and Legal Theory Research Paper, 34 Harv. J.L. & Pub. Pol'y, 65-72, 2011, 66.
13. *Burke E.*, The Writings and Speeches of Edmund Burke, Vol. 3, eds. *P. Langford and W. B. Todd,* Oxford University Press, 1996, 63.
14. *Chafetz J.*, Leaving the House: The Constitutional Status of Resignation from the House of Representatives, Duke Law Journal, Vol. 58, no. 2, 2008, 226.
15. *Chmyha A.*, The Legal Grounds of Emergence and Termination of Mandates of Members of Parliaments in Belarus and Poland: a Comparative Analysis, Biaostockie Studia Prawnicze, Vol. 24, #4, 143-152, 2019, 149.
16. *Demetrashvili A., Kobakhidze I.,* Constitutional Law, Tbilisi, 2011, 210 (in Georgian).
17. *Eremadze K.*, Fundamental Rights for Freedom, Tbilisi, 2020, 8 (in Georgian).
18. *Goldsworthy J.,* Interpreting Constitutions: A Comparative Study, Oxford University Press, 2006, 102.
19. *Hamilton A., Madison J., Jay J.*, The Federalist Papers (1788), *Rossister C. (ed.),* Signet Classics, 2003, letters #57 and #78.
20. *Iliec C.*, Analytical Perspectives on Parliamentary and Extra-parliamentary Discourses, Journal of Pragmatics 42, no. 4, 2010, *Jones P., Berrington H.,* Party, Parliament and Personality: Essays Presented to Hugh Berrington, London, Routledge, 879-884, 1995, 880.
21. *Khetsuriani J.,* The Authority of the Constitutional Court of Georgia on the Issues of Constitutionality of Recognition or Early Termination of the Powers of a Member of the Parliament, Justice and Law, #3 (42)14, 2014, 19 (in Georgian).
22. *Laundy P.*, Parliaments in the Modern World, Dartmouth, 1989, 11.
23. *Linn S., Sobolewski F.*, The German Bundestag: Functions and Procedures: Organisation and Working Methods: the Legislation of the Federation, NDV, 2015, 11-12;

24. *Locke J.*, Two Treatises of Government, ed. *P. Laslett (ed.),* Cambridge University Press, 1999, 366-367.
25. *Mill J. S.,* Considerations on Representative Government [1861], Prometheus Books, 1991, 118.
26. *O'Donnell G.,* Delegative Democracy (1994), from Politics and Democracy, ed. *Nabakhteveli E.,* Intellect Publishing House, Tbilisi, 2020, 263 (in Georgian);
27. *Pakte P., Melen-Sukramaniani F.,* Constitutional Law, 28th edition (as of July 2009), Tbilisi, 2012, 49, 93 (in Georgian).
28. *Rai S.M., Johnson, R.E.*, Democracy in practice: Ceremony and Ritual in Parliament, Palgrave Macmillan, 2014, 21.
29. *Redish M. H., Arnould M. B.,* Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative, 64 Fla. L. Rev. 2012, 1486, 1489.
30. *Sajó A., Uitz, R.,* The Constitution of Freedom: An Introduction to Legal Constitutionalism, Oxford University Press. 2017, 221.
31. *Sajó A.,* Limiting Government: An Introduction to Constitutionalism (1999), publishing house "Sezani", *T. Ninidze (ed.),* Trans. *M. Maisuradze,* 2003, 62, 95-96, 137 (in Georgian).
32. *Scalia A., Wood G., Tribe L., Glendon M., Dworkin R.*, A Matter of Interpretation: Federal Courts and the Law, *Gutmann A. (ed.)*, Princeton, New Jersey: Princeton University Press, 1997, 17, 23.
33. *Solum L. B.*, The Interpretation-Construction Distinction, Georgetown Law Faculty Publications and Other Works, 95-118, 2010, 101-102.
34. *Strøm K., Mueller W.C., Bergman T.,* Delegation and Accountability in Parliamentary Democracies, Oxford University Press, 2005, 354.
35. *Van Der Hulst M.*, The Parliamentary Mandate: A Global Comparative Study, Studies on Comparative Parliamentary Law, Inter-Parliamentary Union, Geneva, 2000, 9.
36. *Venice Commission*, Opinion on the Amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017);
37. *Venice Commission*, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019), 25.
38. *Zippelius R.,* Juristische Methodenlehre (10th Revised Edition), München, 2006, 28, 53, 75, 88 (in Georgian).
39. Constitutional complaint #1565 and #1569 of February 10 and 16, 2021.
40. Decision #3/1/659 of the Constitutional Court of Georgia dated February 15, 2017 on the case – Georgian citizen Omar Zorbenadze against the Parliament of Georgia, II-20.
41. Decision № 3/2/1473 of the Constitutional Court of Georgia dated September 25, 2020 on the case – Nikanor Melia vs. Parliament of Georgia, II-7.
42. Karácsony and others v. Hungary [GC], European Court of Human Rights, Application nos. 42461/13 and 44357/13, Judgment of 17 May 2016.
43. Gorzelik and Others v. Poland [GC], European Court of Human Rights, Application no. 44158/98, Judgment of 17 February, 2004.
44. Powell v. McCormack, 395 U.S. 486, U.S Supreme Court, 1969.

Beka Zegardeli*

The Historical and Legal Role of Georgia in 1917-1918 for the Unity of the Caucasus

The article is devoted to the issue of the unity of the Caucasus region in 1917-1918. The article discusses and analyzes the historical and legal foundations of formation and dissolution of the Transcaucasian Democratic Federal Republic.

It presents problems and challenges that existed in the period under discussion both in Georgia and in Transcaucasia as a whole. The article portrays the unity of the Caucasus region and its relationship with Europe, as well as the possibilities of its constitutional regulation.

In the end, the article outlines the importance of the state of Georgia and the historical and legal role of Georgian people in management and leadership of issues of the Caucasus region.

Keywords: *Transcaucasia, Unity, Independence, Commissariat, Seim.*

1. Introduction

Caucasus region is an established term. According to the general geographical definition, the Caucasus is a mountainous region between the shores of the Black and Caspian seas. However, this simple geographical definition requires clarification.[1]

For example, if we try to define the region taking into account the history and demographic factors of the last centuries, the northern border will naturally pass on the northern slopes of the Caucasus range or on its bordering plains, which separate the living area of the small indigenous peoples of the North Caucasus from the northern lands inhabited by Russians.

According to the political terminology of the end of the XX century, the border coincides with the boundary of the autonomies of the North Caucasus with the Krasnodar and Stavropol districts, where Russia itself begins.

To the west, the bordering area is the region where the territories populated on one hand by Turkish and on the other hand by Georgian and Armenian populations meet.

The southern border is more difficult to define because, demographically, both banks of the Araks River (which is the political border) are inhabited by Azerbaijani Turks.

According to modern political map, the Caucasus region includes three states – Armenia, Azerbaijan and Georgia – and part of a fourth state, as far as north Caucasus (Adyghe, Karachay-Cherkessia, Kabardino-Balkaria, North Ossetia, Ingushetia, Chechnya and Dagestan) is part of the Russian Federation. However, the subject to be discussed directly concerns the conjunction of the

* PhD student of Ivane Javakhishvili Tbilisi State University, Faculty of Law.

1 National Library of the Parliament of Georgia, Encyclopedic Definition, <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=5&t=18705> [19.11.2022] (in Georgian).

interests of Georgia, Azerbaijan and Armenia, their independence from Russia and the importance of strengthening the region from this point of view.

It should be noted that for centuries, the territories of the present Tskhinvali region/former South Ossetia Autonomous District were constantly included in the United Kingdom of Georgia, the Kingdom of Kartli or Kartl-Kakheti, and later, under the Tsarist Russia, it represented the "Ossetian Okrug" (Ossetian district) created in Shida Kartli.

Tskhinvali region, with its historical name – Samachablo, has always been part of the Georgian state and united military-administrative unit. Ever since the formation of the Kartli kingdom (the end of the 4th century BC), Shida Kartli has been the central fief of the country. Georgians have lived here since ancient times, and the territory of Samachablo was an integral part of the Georgian cultural space, as evidenced by Georgian[2] and foreign[3] historical sources and many art pieces found in the region.[4]

Besides, the territory of Abkhazia was part of the Kingdom of Kolkheti from time immemorial. It is confirmed by historical sources that in this area as early as in the 1st millennium BC., Kartvelian tribes lived together with tribes of unknown ethnicity. During the tsarism period, the Sukhumi district was created, which was part of the Kutaisi province.

It must be noted that among the Georgian principalities, Abkhazia fought for the longest time against the settlement of Russia in Georgia and in Abkhazia itself. An example of this is the numerous uprisings of Georgian and Abkhazian people against the Russian Empire. This is what led to the fact that Russia succeeded in abolishing Abkhazia principality among the Georgian kingdoms – principalities.[5]

Accordingly, the issues discussed in the article in relation to Georgia obviously refer to both of its undivided territories, Abkhazia and Tskhinvali region/former South Ossetian Autonomous District,[6] which are currently occupied by the Russian Federation.

The Caucasus region was often discoursed in the context of geopolitical interests, and achieving unified spirit of the Caucasus was often a challenge.

Historically, united Georgia has always tried to contribute to the unity and strengthening of the Caucasus.

The role of Georgia in maintaining the unity of the Caucasus after the withdrawal from Russia in 1917-1918 should be highlighted. Accordingly, the methodology of the discussed issue is based on the historical analysis of this period.

---

2 Leonti Mroveli (XI century), Juansher (XI century), "Deed of Protection" (654), Vakhushti Batonishvili (XVIII century) and others.

3 Armenian anonymous author (VII century), Flavius Arrian (86-160), Procopius of Caesarea (507-562), Lev Isauriel (716-741), Nicholas the Mystic (925) and others.

4 The so-called Tskhinvali treasure from 7th century BC, which is identical to the treasure found in Western Georgia), Georgian toponymy and epigraphic inscriptions on temples (Nikozi (V-XVIII centuries), Armazi (864), Kanchaeti Kaben (IX century), Tircholi (IX century), Byeti (IX s.), Eredvi (906), Dodoti's Nine Kara (10th century), Kvaisi Cross Church (10th century), Kasagina (10th century), Sokhta (10th-11th centuries), Ikorta (1172) and others.

5 Georgia, Encyclopedia Vol. I, Tbilisi, 2007, 250 (in Georgian).

6 Law of Georgia "On Occupied Territories".

Although this process did not last long, the fundamentals of its creation and existence are important. It is possible to analyze them in a new manner from today's perspective.

First of all, historical and factual circumstances should be reviewed from this point of view.

2. Historical Situation

The First World War, which started in 1914, was unsuccessful for the Russian Empire. It is true that it defeated the Ottomans on the Caucasus front, but it suffered heavy defeat on the main front – against Germany. This was followed by the February Revolution of 1917 and the overthrowing of the king. Since the fall of 1917, after the Bolsheviks seized power, Russia has been in the midst of a civil war.[7]

The process of actual separation of Transcaucasia from Russia has begun. On November 7 of 1917, the Bolsheviks overthrew the Provisional Government in Russia and proclaimed the Russian Soviet Socialist Republic.

On November 14 of 1917, the Transcaucasian Commissariat was established, which did not obey the Bolshevik government, but was waiting for the convocation of the Founding Assembly of Russia.

On January 5 of 1918, the Founding Assembly of Russia gathered, where the Bolsheviks were in the minority and the Founding Assembly was dissolved the very next day.[8]

In response, on February 10 of 1918, the Transcaucasian Seim bearing legislative functions was established in the South Caucasus. It comprised delegates from the South Caucasus elected to the founding assembly of Russia.[9]

In January-February of 1918, the Russian army abandoned the Caucasian front. The Transcaucasian government tried to stop the Ottoman military units through negotiations.

It should be noted that, considering the mentioned context, Georgia is trying to get closer to European countries. The presence of Georgian representation in powerful European countries, which also covered Scandinavian countries, was of crucial importance for Georgia's interests. Ivane Javakhishvili's visits to Stockholm also testify to this. Also conducting negotiations with the German Embassy.[10]

On March 14 of 1918, a peace conference was held in Trabzon between the Transcaucasian delegation and the Ottoman Empire.

The Transcaucasian Seim delegation, under the leadership of Akaki Chkhenkeli, tried to preserve the pre-World War I borders, while Ottomans saved the terms of the Brest Treaty[11] signed by

---

7 *Inasaridze K.,* Little "Golden Age", Democratic Republic of Georgia, 1918-1921, Radio Documentation, Munich, 1984 (in Georgian).

8 Newspaper "Ertoba", February 7, 1918, № 30 (in Georgian).

9 *Silagadze A.,* Restoration of Georgia's State Independence (1917-1918), Tb., 2000, 64 (in Georgian).

10 National Archives of Georgia, Historical Central Archives, Fund 17, Census 1, File № 8036 (in Georgian).

11 Truce Treaty of Brest, March 3, 1918, Brest-Litovsk, Article IV.

the Russian Bolshevik government on March 3 of 1918, and demanded the transfer of Kars, Ardagan and Batumi districts.[12] In addition, it may have tried to conquer the entire Caucasus.

Turkish sources of the time also confirm that the head of the Transcaucasian Seim delegation considered the terms of the Brest Treaty in relation to the above-mentioned districts to be harmful to the interests of both Georgia and Transcaucasia as a whole, did not recognize them and he officially stated this.[13]

In March and April of 1918, the Ottoman army occupied Kars District, a large part of Yerevan Governorate, Batumi District, Ozurgeti and Akhaltsikhe-Akhalkalaki districts.

On April 22 of 1918, the Transcaucasian Seim declared the independence of the Transcaucasian Democratic Federal Republic.[14]

On May 11 of 1918, peace negotiations were resumed in Batumi. Ottomans were no longer satisfied with the terms of the Brest Treaty and demanded submission of all territories occupied by them.

Azerbaijanis refused to fight against the Ottomans. Germany, the main ally of Ottomans, did not like the prospect of Ottoman domination in the Caucasus and was ready to support Georgia.

On May 25 of 1918, the chairman of the Transcaucasian delegation, Akaki Chkhenkeli, informed the National Council of Georgia that it would be possible to stop the Ottoman expansion by declaring Georgia's independence.[15]

The political parties of Georgia, Azerbaijan and Armenia involved in the Transcaucasian Seim had a long discussion and finally on May 26 of 1918, they jointly decided to declare the self-liquidation of the Seim.

The given situation turned out to be difficult, since part of the territory of Georgia was occupied by the Ottomans, and in Tbilisi they did not rule out that the Turks wanted to conquer the whole Georgia. Also, by this time, the Turks occupied a large part of Armenia, and Azerbaijan refused to fight against the Ottomans.

By declaring independence, Georgia was given the opportunity to act at its own discretion and even try to use help from Germany.

On the evening of May 26 of 1918, in the same hall of the former palace of the vicegerent of the Caucasus, where the dissolution of the Transcaucasian Federal Republic was announced, an extended session of the National Council of Georgia was held, which declared Georgia's independence.

Noe Zhordania opened the session. In his speech, he noted that “the new state of Georgia, which will be established today, will not be directed against any people, any state. Its goal is to protect itself from today's historical crises”.[16]

---

12 *Bayur Y. H.,* History of Turkish Revolution, Vol. III, Part IV, Ankara, 1983, 173-178.

13 *Hazırlayan Y., Tosun H. (eds.),* International Symposium on the Relations of Ottoman Empire – Azerbaijan Duting the World War I and Islamic Army of the Caucasus, Papers, Ankara, 2021, 224, 407.

14 *Khundadze M.,* Seim of Transcaucasia, New Trace, Tb., 1918, 2-3 (in Georgian).

15 Akaki Chkhenkeli's Secret Letter, May 22, 1918, Batumi, National Council of Georgia № 866, May 25 (in Georgian).

16 *Zhordania N.,* My Past, Tbilisi, 1990 (in Georgian).

After the introductory speech, participants of the session looked through the Act of Independence of Georgia and approved it. Georgia's independence was declared on May 26 of 1918. More people were in favor of the principle of "centralization" within the country.[17]

The Act of Independence of Georgia – Declaration of Independence is obviously not an ordinary event in the history of the country. The Act of Independence of Georgia consists of two parts: it begins with an introduction, in which the historical situation of the announcement of independence is briefly presented; It is followed by the main part, in which the basic principles and values are formulated, on which the newly created state is based.

The Act of Independence of May 26 of 1918 begins with a description of how Georgia became part of the Russian Empire and why independence was restored:[18]

"For many centuries, Georgia existed as an independent and free state. At the end of the 18th century, Georgia, being pressured by the enemy on all sides, voluntarily joined Russia on the condition that Russia was obliged to protect Georgia from the enemy. The course of the Great Russian Revolution created such an internal arrangement in Russia that the entire war front completely crumbled and the Russian army left Transcaucasia. As a result of remaining dependent on own force, Georgia and Transcaucasia mobilized to manage their own affairs and created appropriate bodies, but due to the influence of external influence, one connecting link of Transcaucasia was wrecked and the political integrity of Transcaucasia also collapsed. The current state of the Georgian nation definitely requires Georgia to create its own state organization, save itself from being conquered by an external force and build a solid foundation for independent development."

It seems that the Act of Independence of May 26 of 1918 does not accuse Russia of violating Georgia's independence, and it is noted that Georgia joined Russia "in its own free will" under the condition of "protection from external enemies". This is what the official historiography of Tsarist Russia claimed, but it does not correspond to historical truth.[19] Why was nothing said before about Russia's conquest of Georgia and Russia's aggressive policy towards Georgia? This can be explained by two main reasons. Russia had left the South Caucasus, and at that moment Georgia was no longer threatened by Russia; Also, Georgia was forced to "create its own state organization" to protect itself.

It should be emphasized here that the entry in the Act of Independence of Georgia of May 26 of 1918 directly states – "Georgia and Transcaucasia with it set themselves the management and ownership of their own affairs and created appropriate bodies." This entry points to the possibility of jointly managing Georgia and Transcaucasia at the same time, which gives grounds for assuming that the Georgian government at that time considered it possible to declare Georgia's independence and, at the same time, continue to promote the unity of the Caucasus. However, we directly read that the problem of achieving this was created by external forces. In particular, "under the influence of an external force, one connecting link of the Transcaucasia was broken and the political integrity of the Transcaucasia was also disintegrated."

---

17 *Avalishvili Z.,* Georgia's Independence in the International Politics of 1918-21, 1990, 17 (in Georgian).

18 The Act of Independence of Georgia of May 26, 1918.

19 *Matsaberidze M.,* Political System of Georgia, 2019, 109-116 (in Georgian).

It should be noted that later on, the Act of Independence was also attached to the 1921 Constitution of Georgia with relevant notes, by which a unitary democratic republic was actually formed in Georgia, at the same time, the principle of unitarism was compatible with the principle of wide local self-government and allowing autonomous governance for some distant areas (Abkhazia, Batumi area, Saingilo). Special importance was attached to the local self-government in establishing a true democratic system.

At the same time, it should also be said that the considered legal acts, in the desire to "save Georgia from conquest", "to establish good-neighborly attitude with all members of international relations", if we leave aside the historical situation and context at that time, from an international point of view, they meant European orientation.

In the end, Georgia and Transcaucasia in general could escape from Russian domination only in case of a favorable situation, that is, in the conditions of a significant military defeat of the Russian Empire or in the conditions of major internal political disturbances in the Russian Empire itself, when Russia could no longer, or would no longer be able to, maintain its domination in this region.

3. Georgia's Efforts for the Unity of the Caucasus

Together with the pursuit for independence, efforts of Georgia in terms of the unity of the Caucasus in that period become obvious, and that needs to be discussed and analyzed in more details.

After the victory of the October Revolution of 1917, the powers of the regional body appointed by the Provisional Government of Russia – Ozakom – were terminated in the Caucasus.

At this time, Georgia starts working for the independence of Transcaucasia. It should be noted that Noe Zhordania had the support of all social classes at the given moment, but he had to act in such a way that the construction of the state would not be similar to the construction of the workers' state, which would threaten other classes, such as the peasantry or the bourgeoisie.

In November of 1917, a national congress was convened in the Opera House, where representatives of Georgian political parties and public organizations gathered. Noe Zhordania read the report – "Present moment and the political situation of the Georgian nation". In the report, Zhordania supported the independence of Georgia and the Transcaucasian Federation. The congress elected the National Council of Georgia, with Zhordania as its chairman. The council had to prepare the basis for the state organization of the Georgian nation. It should be noted that Zhordania later became a member of the Seim as well.

In this situation, with the efforts of the Georgians, before the Soviet government spread its power in Transcaucasia, the political forces of Transcaucasia created a regional government body – Transcaucasia Commissariat, which started functioning on November 15 of 1917.[20] Transcaucasian Commissariat performed the function of executive power.[21]

---

[20] *Surguladze A.,* Georgian Soviet Encyclopedia, Vol. 1, 1975 (in Georgian).

[21] *Athanelishvili T., Astamadze G., Bakhtadze M., Gafrindashvili L., Gegia M., Guntsadze M., Vadachkoria Sh., Iremadze I., Kupatadze B.,. Lezhava Z., Liluashvili M., Lomidze G., Otarashvili K., Samushia J., Saralidze L., Silakadze D., Kantaria B., Kartvelishvili M., Kifiani N., Shamilishvili M.,. Shvelidze D.,*

The Transcaucasian Commissariat, as a Transcaucasian regional governmental body, was established in Tbilisi by Georgian Social Democrats (Mensheviks) and Socialist-Revolutionaries (SRs), Armenian Dashnaks and Azerbaijani Musavats. The commissariat was chaired by Yevgeni Gegechkori, and the minister of justice was Shalva Aleksi-Meskhishvili (commissioner).[22]

On February 10 (23) of 1918, the Transcaucasian Commissariat summoned a representative government body of the Transcaucasian countries, namely the Transcaucasian Seim. It was the body with the highest legislative powers in Transcaucasia.

The word "Seim" comes from the Polish word and means parliament.[23] The body of legislative power (lower house), which controls the activities of the Council of Ministers, still operates in the Republic of Poland under the name of the Seim.[24] It should be noted that Noe Zhornadia, whose name is associated with the declaration of the independence of the Transcaucasian Republic and subsequently the independence of Georgia, studied at the University of Warsaw in 1891-1892.[25] Some researchers believe that the naming of the highest legislative body of Transcaucasia – "Seim" was related to Noe Zhordania's work in Warsaw and his initiatives.[26]

The Seim was invited to legalize the independence of Transcaucasia. It consisted of members of the founding assembly of whole Russia, elected from Transcaucasia. Nikoloz (Karlo) Chkheidze was elected as the chairman of the Seim.[27] The Seim was announced as a tool for coordinating the agreement of the nations of the region.[28]

By the invitation of the Seim, the Transcaucasian Commissariat emphasized the separation of this region from Russia, although independence was not officially declared yet.

Three factions were formed in the Seim: the Muslim faction (Musavates and non-partisans) – 50; Social Democrats (Mensheviks) – 32 members and Dashnak faction – 27;[29]

At the session of the Transcaucasian Seim on April 22 of 1918, the independence of the Transcaucasian Democratic Federal Republic was already announced, and at the same session, the government cabinet headed by Akaki Chkhenkeli was formed. With this, it declared the complete independence of this "country", and the Seim informed about that foreign countries.[30] Chkhenkeli was both the Chairman of the government and, at the same time, the Minister of foreign affairs. Noe Ramishvili was appointed as the Minister of Internal Affairs. It should be noted that one of the

---

Chkhaidze N., Tsitsishvili M., Tsereteli M., Chanturidze S., Chumburidze D., Javakhishvili E., Javakhishvili N., Janelidze O., Democratic Republic of Georgia (1918-1921), Encyclopedia, Tb., 2018, 22 (in Georgian).

22 Newspaper "Ertoba", № 105, 1919 (in Georgian).

23 Dictionary of Foreign Words, National Library of the Parliament of Georgia, <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=3&t=36125> [19.11.2022] (in Georgian).

24 Konstytucja RP, Art. 95, <https://www.prezydent.pl/prawo/konstytucja-rp/iv-sejm-i-senat> [19.11.2022].

25 Georgians Abroad, Biography and Work of Noe Zhrdania, National Library of the Parliament of Georgia, <http://www.nplg.gov.ge/emigrants/ka/00000379/> [19.11.2022].

26 International Conference of Historians of the Polish-Georgian Commission and Exhibition in the National Archives, 100th Anniversary of the Transcaucasian Republic and the Seym, February, 2018.

27 Department of Civil Education of the National Library of the Parliament of Georgia.

28 *Kazemzade F.,* Battle for Transcaucasia 1917-1921, Tb., 2016.

29 "Horizont", Tbilisi, 1917 (in Georgian).

30 *Janelidze O.,* Essays on the History of the Democratic Republic of Georgia, Vol., 2018, 25-26 (in Georgian).

ministers in the government chaired by Chkhenkeli was Azerbaijani F.H. Khoiski, who subsequently became the chairman of the executive body of the independent Republic of Azerbaijan,[31] and also Armenian H. Kajaznuni held the position of minister, who after the declaration of independence of the Republic of Armenia, was also nominated to the post of Prime Minister.[32]

From the legal point of view, it should be noted that the Seim was able to adopt a number of legislative acts, one of which is still valid today.[33] In particular, this is a law that provided for a significant change in the calendar. In particular, after April 17, instead of April 18, the calendar moved to May 1, which was connected with the transition from the Julian calendar to the Gregorian calendar.

On March 3 of 1918, Russia signed the Treaty of Brest with Germany and its allies, which provided for the transfer of Batumi, Kars and Artaan districts to Turkey. In fact, the Ottoman government forced Moscow to cede territories in the Caucasus, although the Transcaucasian Commissariat refused to do so.[34] Turkey demanded the districts transferred by peace. Transcaucasia rejected these non-agreed demands and tried to resolve the situation diplomatically.

In March 1918, active negotiations between Transcaucasia and Turkey began in the city of Trabzon, but these negotiations were not successful, since the Turkish army started hostilities anyway, and by April they had already occupied Batumi, Ozurgeti, and Meskheti. It was possible to stop the Turkish troops only on the river Cholok.

On April 22 of 1918, the Transcaucasian Seim assembled to resolve the situation. At the meeting, it was decided that in case of the official declaration of independence of Transcaucasia, it would be possible to avoid Turkish aggression. They envisioned a broad and politically united region as (geo)politically, developmentally and ideologically more viable.[35]

Therefore, on April 22 of 1918, the creation of an independent state – Transcaucasian Democratic Federal Republic was announced. The Seim decided to continue peace negotiations with Turkey under the leadership of Akaki Chkhenkeli.

4. Conclusion

It is difficult to say whether it would be possible to maintain the unity of Transcaucasia along with the independence of Georgia and what would be its legal or constitutional regulation. For example, even in such a way that Georgia, as an independent republic, would continue to conduct foreign relations on behalf of the united Caucasus and establish peace in the region, without interfering in the internal affairs of other independent states included in it.

However, it becomes clear that due to the situation created in Russia since 1917, Georgia has faced a historical situation, when along with the independence of Georgia, it is also trying to achieve

---

31 <http://www.milliarxiv.gov.az/az/axc-yaradilmasi-ve-onon-beynelxalq-alemde> [19.11.2022].

32 <http://www.academhistory.am/images/Patmabanasirakan_handes/2018-3/2018-1.pdf> [19.11.2022].

33 Законь – Днейвь Закавказье Календар Стиля, Закавказская Демократическая Федеративная Республика, 1918.

34 *Noack D. X.,* Vor 100 Jahren marschierte die Rote Armee in Georgien ein, Ausgabe vom 20/02/2021, 15.

35 *Briscua.,* Karl University, Prague, Report – "Democratic Federal Republic of Transcaucasia", 15/07/2018.

independence and unity of the Caucasus from Russia. For this purpose, relevant bodies are created and a number of legal acts are elaborated.

We can assume that the leadership of this process by Georgia would not be easy and also not accidental. What could have been the contributing factors?

It can be concluded that one was the slowing down of Russia's interests in the Caucasus and the reduction of future threats from this country, the second was Georgia's initiative for its independence from Russia, for stopping common aggression and for European development, and third – the presence of political figures and personalities in Georgia who would be acceptable to lead this for the process in the name of the united Caucasus, and it would be acceptable for the Caucasian countries to protect their united interests. It is possible to highlight the individual circumstances more clearly, namely:

When it comes to the weakness or strength of big countries, it is probably possible to discuss the frequency and intensity of geopolitical interests, which are always relative to the similar interests of any other country or group of countries. As one becomes stronger, it becomes possible to slow down the other. It is possible to assume that when there are high mutual interests, for example, between Georgia and Europe, it indicates the strength of these interests, which generally makes difficult goals achievable. For example, it is known how a few years ago Georgia achieved great success with Europe in the field of visa liberalization and visa-free travel.

Georgia is a multi-ethnic country and is characterized by a high degree of tolerance, which is its advantage, and this created an opportunity for the presence of such public and political figures in the country, who had the ability, for example, in the Caucasus region, to try to unite certain interests, even for a short time, and become the head of the aforementioned. For example, even as Nikoloz Chkheidze, Akaki Chkhenkeli and others were in the period in question.

Initiative and thinking about a better future are key elements for success. In the discussed historical conditions, it can be seen that Georgia's aspiration to stop aggression on its own, to build the country and to get even closer to Europe, was a role model for other Transcaucasian countries at a certain initial stage. The creation and formation of the Transcaucasian Commissariat and the Seim in Tbilisi, and most importantly the declaration of independence of the Transcaucasian Democratic Federal Republic, can be considered as an example of this.

If these issues are evaluated from today's perspective, it can be seen that although the existence of any form of the above-described unified republic of the Caucasus is irrelevant both from a political and a legal point of view, it is clear that in the Caucasus region, Georgia has the most aspirations and achievements in terms of integration with Europe, and at the same time, it can be assumed , that in case of the necessary readiness, Georgia may manage to contribute to the reconciliation of other countries of Transcaucasia and to bring them closer to Europe under its own leadership.

Bibliography:

1. Constitution of Georgia, 1921.
2. The Act of Independence of Georgia, 1918.
3. Truce Treaty of Brest, 1918.
4. Law of Georgia “On Occupied Territories”, 2008.

5. Newspaper “Horizon”, 1917 (in Georgian).
6. Newspaper “Ertoba”, № 30, 1918 (in Georgian).
7. Newspaper “Ertoba”, № 105, 1919 (in Georgian).
8. Akaki Chkhenkeli's Secret Letter, May 22, 1918, Batumi, National Council of Georgia № 866, May 25 (in Georgian).
9. *Athanelishvili T., Astamadze G., Bakhtadze M., Gafrindashvili L., Gegia M., Guntsadze M., Vadachkoria Sh., Iremadze I., Kupatadze B.,. Lezhava Z., Liluashvili M., Lomidze G., Otarashvili K., Samushia J., Saralidze L., Silakadze D., Kantaria B., Kartvelishvili M., Kifiani N., Shamilishvili M.,. Shvelidze D., Chkhaidze N., Tsitsishvili M., Tsereteli M., Chanturidze S., Chumburidze D., Javakhishvili E., Javakhishvili N., Janelidze O.,* Democratic Republic of Georgia (1918-1921), Encyclopedia, Tb., 2018, 22 (in Georgian).
10. *Avalishvili Z.,* Georgia's Independence in the International Politics of 1918-1921, 1990, 17 (in Georgian).
11. *Bayur Y. H.,* History of Turkish Revolution, Vol. III, Part IV, Ankara, 1983, 173-178.
12. *Briscua.,* Karl University, Prague, Report – “Democratic Federal Republic of Transcaucasia”, 2018.
13. Dictionary of Foreign Words, National Library of the Parliament of Georgia, <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=3&t=36125> [19.11.2022] (in Georgian).
14. Georgia, Encyclopedia Vol. I, Tbilisi, 2007, 250 (in Georgian).
15. Georgians Abroad, Biography and Work of Noe Zhrdania, National Library of the Parliament of Georgia, <http://www.nplg.gov.ge/emigrants/ka/00000379/> [19.11.2022] (in Georgian).
16. *Hazırlayan Y., Tosun H. (eds.),* International Symposium on the Relations of Ottoman Empire – Azerbaijan Duting the World War I and Islamic Army of the Caucasus, International Symposium Papers, Ankara, 2021, 224, 407.
17. *Inasaridze K.,* Little “Golden Age”, Democratic Republic of Georgia, 1918-1921, Radio Documentation, Munich, 1984 (in Georgian).
18. *Janelidze O.,* Essays on the History of the Democratic Republic of Georgia, 2018, 25-26 (in Georgian).
19. *Kazemzade F.,* Battle for Transcaucasia 1917-1921, Tb., 2016.
20. *Khundadze M.,* Seim of Transcaucasia, New Trace, Tb., 1918, 2-3 (in Georgian).
21. *Matsaberidze M.,* Political System of Georgia, 2019, 109-116 (in Georgian).
22. National Archives of Georgia, Historical Central Archives, Fund 17, Census 1, File № 8036 (in Georgian).
23. National Library of the Parliament of Georgia, Encyclopedic Definition, <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=5&t=18705> [19.11.2022] (in Georgian).
24. *Noack D. X.,* Vor 100 Jahren marschierte die Rote Armee in Georgien ein, Ausgabe vom 20/02/2021, 15.
25. *Silagadze A.,* Restoration of Georgia's State Independence (1917-1918), Tb., 2000, 64 (in Georgian).
26. *Surguladze A.,* Georgian Soviet Encyclopedia, Vol. 1, 1975 (in Georgian).
27. *Zhordania N.,* My Past, Tbilisi, 1990 (in Georgian).

28. Законь – Дней вь Закавказье Календар Стиля, Закавказская Демократическая Федеративная Республика, 1918.
29. Konstytucja RP, <https://www.prezydent.pl/prawo/konstytucja-rp/iv-sejm-i-senat> [19.11.2022].
30. <https://archive.gov.ge/> [19.11.2022].
31. <http://www.milliarxiv.gov.az/az/axc-yaradilmasi-ve-onon-beynelxalq-alemde> [19.11.2022].
32. <http://www.academhistory.am/images/Patmabanasirakan_handes/2018-3/2018-1.pdf> [19.11.2022].

Maia Kopaleishvili*

Constitutional Guarantees of Protection against Unjustified Dismissal of Officials with an Important Public Legal Function in a Democratic Society

In a democratic society, the activities of officials with a special public legal function, elected by the legislative body for a specific term, should be stable. It is true that a number of such officials do not have constitutional status, but nevertheless, their dismissal from office should not be done without justification, in violation of the constitutional guarantees of protection of rights. By appointing a person to a position for a fixed term, the legislator equips the person in this position with guarantees of independence. Personal and institutional independence is required for impartial decision-making and is therefore a prerequisite for impartiality. When limiting the official powers of such persons, the legislator is obliged to justify the valuable public (legitimate) interest that led to the need to limit the right.

Reforming public institutions is a discretionary authority of the government, however, the legal norm should provide for the possibility for such officials to continue their term of office as the head of any newly created service. Termination of the term of office would be justified if the goal of institutional reform was to perform fundamentally different functions. In addition, premature termination of authority undoubtedly causes a "stinging effect" not only for the dismissed person, but also for other public officials. The disputed legal norm has discouraged them because they do not have the sense of stability to exercise their public office without interruption.

Keywords: *an official holding a public legal function, the position of a state inspector, creation of guarantees of independence for persons elected for a specified term, constitutional guarantee of protection of official status, the issue of compliance with the constitution of termination of authority, protection of the balance of proportionality between public and individual interests.*

1. Introduction

This article touches upon the constitutional guarantees of protection of the rights of the officials who are elected by the Parliament of Georgia for a term determined by the Parliament, and who carry out the public legal function important for the democratic society, and whose status is not determined by the Constitution. According to the practice of the Constitutional Court of Georgia, "the Constitution creates special guarantees with respect to a number of positions... In this case, the functional load of officials and their importance in a democratic society comes to the fore." The constitution allows that they may have to make decisions that are not desirable for various interested parties. Accordingly,

* Doctor of Law, Professor, Ivane Javakhishvili Tbilisi State University Faculty of Law, Former Judge of the Constitutional Court of Georgia.

ensuring that they exercise their powers properly requires special guarantees of protection from any interested parties... Unhindered exercise of these functions is an unconditional requirement of democracy, so as not to endanger the value system of governance. Accordingly, when assessing the constitutionality of the regulations established in relation to these types of positions, the emphasis is usually shifted to what effect the restriction has on the person's exercise of his official powers."[1]

By the Law of Georgia "on Amendments to the Law of Georgia "on the State Inspector Service", on December 30 of 2021, the Parliament of Georgia abolished the State Inspector Service and, on its basis, created the Personal Data Protection Service and the Special Investigation Service with the same functions.[2] This led to the premature termination of the authority of the State Inspector elected by the Parliament for a period of 6 years (2019-2025). According to the first paragraph of Article 27[1] of the Law of Georgia "On the State Inspector Service": "From March 1, 2022, the State Inspector Service and the position of the State Inspector shall be abolished. As of March 1, 2022, the state inspector shall be dismissed from his/her position ...". [3]According to the named norm, from March 1 of 2022, the official authority of the state inspector was terminated. The Parliament of Georgia did not give the state inspector the opportunity to continue his/her official powers in the remaining term (until July 3, 2025).[4]

It should be noted that reforming this or that field, increasing its effectiveness is a legitimate goal of the government, and the state government enjoys wide discretion/wide scope of state opinion in the field of reforms. At the same time, the reform should not be a spontaneous decision, should not disproportionately restrict human rights. It should lead to public trust, for which it needs to be preceded by the involvement of interested parties, discussions, study of existing problems, sharing of possible legislative projects, etc.

Taking into account Article 4, paragraph 2, Sentence 2 of the Constitution of Georgia,[5] the Georgian Parliament/Legislator is limited by human rights and freedoms, as applicable law, when exercising discretionary powers. "This document gives basic rights to the binding power of the government, protects a person from the arbitrariness of the government. In the absence of such an approach, the rights and freedoms provided for by the constitution would have only a declaratory weight, ... a person would be deprived of the means of constitutional and legal protection, and the state would be given immense opportunities for arbitrary action and ignoring basic rights...".[6]

---

1 Decision № 3/1/1298,1313 of the Constitutional Court of Georgia dated April 23, 2021 in the case "Tamaz Mechiauri vs. Parliament of Georgia", II-10.

2 See Law of Georgia "On State Inspector Service" on Amendments to the Law of Georgia, № 1312-VIIRS-XMP, 30/12/2021. By the same law, the Law of Georgia "On the State Inspector Service" was renamed and renamed to the Law of Georgia "On the Special Investigation Service".

3 Ibid, Article 27[1].

4 The state inspector – Londa Toloraya appealed to the Constitutional Court of Georgia about the constitutionality of his dismissal and requested to suspend the validity of the disputed norm until a decision is made. The Constitutional Court did not suspend the contested norm. see Minutes of the Constitutional Court of Georgia № 1/1/1673 of February 28, 2022 in the case "Londa Toloraya v. Parliament of Georgia", III-3.

5 Constitution of Georgia, 24/08/1995.

6 Decision № 2/2-389 of the Constitutional Court of Georgia dated October 26, 2007 in the case "Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia", II-5.

It should be taken into account that the legislator is obliged not to violate the principles, system of values, and human rights established by the Constitution of Georgia when establishing the rules of conduct. The Parliament of Georgia should take into account that the interest of the majority cannot always prevail, in the presence of a conflict between interests, it is important to maintain a balance between public and private interests. A person's rights can be restricted to the extent necessary in a democratic society. According to paragraph 3 of Article 34 of the Constitution of Georgia, "restriction of basic human rights must correspond to the importance of the legitimate goal it serves to achieve."[7]

2. Official Status of the State Inspector Determined by the Legislation

The position of state inspector is not stipulated in the constitution. Nevertheless, taking into account the special public legal functions granted to the State Inspector by the legislation and according to the rule of appointment to the position of State Inspector, the position of State Inspector, from the point of view of constitutional-legal protection, was equal to the positions provided for by the Constitution of Georgia. The aforementioned gave rise to the legislator's obligation to protect the 6-year term of being in an elective position and to give the state inspector the opportunity guaranteed by the constitution to continue his activities during the remaining term of office.

Such solution of the issue is not alien to the legislator. This is clearly confirmed by Article 27 of the Law of Georgia "On the State Inspector Service",[8] according to which, when the position of the Personal Data Protection Inspector was abolished, the State Inspector and the State Inspector's Service were considered the successors of the Personal Data Protection Service and the Personal Data Protection Inspector. The personal data protection inspector elected by the Parliament of Georgia at the time of the implementation of the Law of Georgia "On the Service of the State Inspector" acquired the authority of the state inspector before the expiration of the authority of the personal data protection inspector. It was a constitutional, fair resolution unlike the present case before us. The Parliament of Georgia established different regulations in two identical cases, which shows the inconsistent approach of the Parliament's actions.

The State Inspector Service/State Inspector was created on the basis of the law and the legislator assigned important public legal functions to it. In addition, the State Inspector's Office represented the successor of the Personal Data Protection Inspector. Article 2 of the Law of Georgia "On the State Inspector Service" indicated that the State Inspector Service is an independent body. As an independent state body, it was not part of the legislative and executive branches. The State Inspector performed public legal functions important for the effective functioning of a democratic and legal state, which today are distributed between two new independent services created on the basis of the State Inspector's Service. Its activities were carried out in three directions: control of the legality of personal data processing, control of covert investigative actions and activities carried out in the central bank of identifying data of electronic communication (within this function, the service was authorized to stop the covert monitoring and recording of telephone communication), the representative, officer

7 See Article 34 of the Constitution of Georgia.

8 See Law of Georgia "On State Inspector Service", 21/07/2018.

or equivalent of a law enforcement body Impartial and effective investigation of crimes committed by a person (including the investigation of facts of torture, inhuman and degrading treatment). From the point of view of carrying out the function of impartial and effective investigation of a crime committed by a law enforcement agency representative, official or a person equal to it, the State Inspector Service was considered a qualified and independent mechanism that acted independently from law enforcement agencies (police, prosecutor's office) as an impartial representative of society.

It is important to create guarantees of independence for persons elected for a specified term. According to the case law of the Strasbourg Court, "independence" refers to the necessary personal and institutional independence required for impartial decision-making and is therefore a prerequisite for impartiality.[9]

Article 11 of the Law of Georgia "On the State Inspector Service" defined the same guarantees of independence of the State Inspector Service as are provided by the Constitution for elected officials (for example, Public Defender, Auditor General). According to the named article, the State Inspector Service is independent in exercising its powers and is not subject to any body or official. Any influence on the state inspector, the employee of the state inspector's service and the investigator or illegal interference in their activities is prohibited and punishable by law. In order to ensure the independence of the state service, the state is obliged to create appropriate conditions for its activity. The state inspector has the right not to testify in relation to the authority provided by the law because of the fact that was revealed to him as a state inspector. This right is preserved even after the termination of the authority of the state inspector. The protection of guarantees of the State Inspector's inviolability was ensured by the Parliament of Georgia. In particular, without the consent of the Parliament of Georgia, it was not allowed to prosecute him, arrest or arrest him, search his apartment, car, workplace or personal in connection with a case related to his official activities. An exception is the case of witnessing a crime, which should be immediately reported to the Parliament of Georgia. If the Parliament of Georgia did not give its consent, the arrested or imprisoned state inspector should be released immediately. If the Parliament of Georgia gives its consent to the arrest or detention of the State Inspector, his authority would be suspended by the resolution of the Parliament of Georgia until the resolution on the termination of criminal prosecution is issued or the court judgment enters into legal force. Financial guarantees were also provided for by the current legislation. The activities of the State Inspector Service were financed from the state budget of Georgia. Appropriations necessary for the activities of the State Inspector Service were determined by a separate code of the State Budget of Georgia.

The necessity of applying the standard of constitutional protection to the person in the position of the state inspector is indicated by the rule of establishment of the position of the state inspector. According to Article 6 of the Law of Georgia "On the State Inspector Service", the candidature of the State Inspector was selected by an independent commission, presented to the Prime Minister, and the Prime Minister to the Parliament of Georgia. The State Inspector was elected by the Parliament of Georgia. According to paragraph 7 of the same norm, the term of office of the state inspector was determined for 6 years. Termination of the term of office of the state inspector was provided only in

[9] *Case of Grzeda V. Poland*, Application no. 43572/18, § 308, 15 March 2022.

the case directly provided by the law, which was specified in Article 9 of the Law of Georgia "On the State Inspector Service". This provision did not provide for termination of authority due to reorganization or other mechanical intervention, such as division.

3. Constitutional Guarantees of Protection of the Official Status of the Official

By appointing an official with an important public legal function to a position for a fixed term, the legislator equips the person in this position with guarantees of independence. Accordingly, according to the practice of the Constitutional Court, the limitation of the official powers of such persons should be evaluated in the context of the constitutional guarantee: "regardless of whether the specific term of a person's activity in a state position is directly determined by the Constitution of Georgia, in case of termination of the authority before the term, the legislator must justify the public interest, which leads to the necessity of limiting the right. The limitation of the term of authority in the case under consideration ... should be evaluated in the context of the constitutional guarantee of independence ... special status and guarantees of protection ... serve to protect independence ... therefore, ... the limitation of the right to carry out activities will be evaluated using strict constitutional standards."[10]

The analysis of legal norms and factual circumstances provides a sufficient basis for an objective evaluator to determine the standard of legal evaluation of early termination of authority for the state inspector. The special content of the powers granted to the state inspector by legislation, the manner of his appointment and the purpose of this position in a democratic society indicate that the state inspector should enjoy a high constitutional standard of protection.

3.1. The Second Sentence of the First Paragraph of Article 25 of the Constitution of Georgia

According to Article 25, paragraph 1, sentence 2 of the Constitution of Georgia, "the terms of public service are determined by law." "The Constitutional Court of Georgia has repeatedly explained that public service is professional activity in state and local self-government bodies, in institutions established for the purpose of implementing other public functions."[11] The state inspector, as already mentioned, performed functions of special importance. The named functions, by their nature, are of a public legal nature and, accordingly, the office of the state inspector was a public office, and the position of the state inspector was a public office in the sense of Article 25 of the Constitution of Georgia.

According to the clarification of the Constitutional Court of Georgia, the named provision of the Constitution includes "guarantees of the smooth exercise of this official authority and protection

[10] Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia", II-29, 30.

[11] Decision № 3/1/1298,1313 of the Constitutional Court of Georgia dated April 23, 2021 in the case "Tamaz Mechiauri vs. Parliament of Georgia", II-5.

against unjustified dismissal".[12] The Constitution of Georgia strives to "protect the public servant from unjustified interference in his activities, so that he can properly fulfill the duties assigned to him by the Constitution and the law."[13]

The 2nd sentence of the first paragraph of Article 25 of the Constitution of Georgia "refers to the constitutional guarantees related to the position of a person employed in the public service – he will not be dismissed without justification, he will be protected from any external interference".[14] According to the explanation of the Constitutional Court of Georgia, the named provision of the Constitution protects the right to perform activities in the state service and "includes various legal components of the smooth implementation of activities in the state service, including the guarantee of protection against unjustified dismissal."[15]

Within the scope of Article 25, paragraph 1, sentence 2, the law that defines the conditions of public service must comply with constitutional standards. According to the definition of the Constitutional Court of Georgia, the principle of the rule of law "makes the action of the state authorities, including the legislative authorities, within strict constitutional and legal frameworks".[16] The constitutional-legal limitation of the legislative power implies that any legislative act must comply with the requirements of the Constitution, both in terms of formal-legal aspect and material-legal content. In this case, the law, which allows the termination of the official powers of the state inspector and officials with a similar status, should comply with the formal and material content of the requirements of the second sentence of the first paragraph of Article 25 of the Constitution of Georgia.

3.2. The Issue of Constitutionality of Early Termination of Authority

Whether the early termination of the authority is consistent with the Constitution, it is necessary to evaluate the conformity of the norm establishing the termination of the State Inspector's authority with the Constitution.

According to the established practice of the Constitutional Court of Georgia: "The disputed norm must comply with the principles of proportionality and determination, which are directly related to the principle of the rule of law. It is the principle of proportionality that determines the material dimensions for the legislator when limiting the basic rights. If a norm does not conform to these principles, it allows for arbitrariness. The arbitrariness of the state in the field of human freedom automatically means the violation of human dignity as the highest principle of the constitutional order,

---

12 Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia", II-1.

13 Ibid, II-7.

14 Decision 3/2/574 of the Constitutional Court of Georgia dated May 23, 2014 on the case "Georgia Citizen Giorgi Ugulava vs. Parliament of Georgia", II-19.

15 Decision № 3/2/717 of the Constitutional Court of Georgia of April 7, 2017 on the case "Citizens of Georgia, Moonusa Kevlishvili, Nazi Dotiashvili and Marina Gloveli against the Parliament of Georgia", II-13, 14.

16 Decision № 2/2-389 of the Constitutional Court of Georgia dated October 26, 2007 in the case "Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia", II-18.

the rule of law and other constitutional principles, and the unconstitutional violation of the basic human right".[17]

"The requirement of the principle of proportionality is that the legal regulation limiting the right should represent a useful and necessary means of achieving a valuable public (legitimate) goal. At the same time, the intensity of the restriction of the right should be proportional to the public goal to be achieved, it should be commensurate with it. It is not allowed to achieve a legitimate goal at the expense of excessive restriction of human rights".[18] In addition, "the more the government interferes with human freedom, the higher the requirements for justifying the interference."[19]

The Constitutional Court pointed out about maintaining the balance of proportionality between conflicting constitutional interests: "... the difficulty of the conflict of values... lies in the fact that legal interests are in conflict with each other... The only way out of this dilemma in a democratic society is to achieve a fair balance. While the conflict of interests is inevitable, there is a need to harmonize and balance them fairly."[20] The Constitutional Court of Georgia always indicates that the state should be able to fairly balance conflicting interests – private and public interests. The degree of democracy is revealed in this. In a democratic society, the implementation/achievement of public interests cannot be justified at the expense of encroaching on private interests. "In a legal state, it is legitimate to expect that the relationship between private and public interests will be fair."[21]

According to the explanatory note[22] of the draft law of Georgia,[23] legitimate interests can be united around one main legitimate interest – that is, the division of the State Inspector Service into two independent services, because the creation of two independent services provides a more effective institutional arrangement. It will facilitate the control of the legal processing of personal data during the implementation of investigations and covert investigative actions, as well as expand the scope of investigation.

The named legitimate interest represents an important public interest, but it is opposed by the interest of protecting the state inspector from early dismissal. The balance between them must be assessed by the test of proportionality.

It should be noted that in order to assess the specialness of the legitimate interest of the state inspector, it is necessary to take into account what important functions the state inspector's office

---

17 Decision № 2/1/415 of the Constitutional Court of Georgia dated April 6, 2009 on the case "Defender of the People's Republic of Georgia against the Parliament of Georgia", II-13.

18 Decision № 3/1/512 of the Constitutional Court of June 26, 2012 on the case "Danish citizen Heike Kronqvist vs. Parliament of Georgia", II-65.

19 Decision № 1/2/384 of the Constitutional Court of July 2, 2007 on the case "Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili against the Parliament of Georgia", II-19.

20 Decision № 1/1/477 of the Constitutional Court of December 22, 2011 on the case "Public Defender of Georgia against the Parliament of Georgia", II-45.

21 Decision № 1/2/384 of the Constitutional Court of July 2, 2007 on the case "Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili against the Parliament of Georgia", II-19.

22 See Explanatory note on the draft law of Georgia "On the State Inspector Service" regarding the amendment to the law of Georgia, https://info.parliament.ge/file/1/BillReviewContent/289992?fbclid=IwAR1QIETXdeDBqFXYyFCx8p4UqneE_M-arLQZSfKv660blKyBoFspjXEKcz8> [14.09.2022].

23 Ibid, 3.

performed as an independent body and what was the procedure for the election of the state inspector and the term of office. As already mentioned, the independence of the State Inspector Service from the executive and legislative authorities was determined by the current legislation. This service, as mentioned above, performed three important functions. Taking into account the modern standards of the implementation of public legal functions, the authority to implement the named functions is the competence of independent bodies, which, on the one hand, indicates the special importance of these bodies in a democratic and legal state and, on the other hand, helps to increase the credibility of these bodies.

The independence of the state inspector was indicated by the manner of holding office and the guarantees of his inviolability established by law during the exercise of authority. Public involvement was high in the selection process of the state inspector. He was selected by a commission specially created for these purposes. Political parties, representatives of the Public Defender and non-governmental organizations participated in the interview process in the Parliament. Naturally, the state inspector had the constitutional expectation of being in this position for a period of 6 years (until July 3, 2025). However, his legitimate expectations were violated contrary to the constitution and he was terminated after less than three years of his election.

According to the practice of the Constitutional Court of Georgia, "being appointed to a state position for a definite or indefinite period gives a citizen a legitimate expectation that he will carry out activities in this position during the term of office – for a definite period or – for life." Accordingly, the limitation of the right to carry out activities within the term defined by the law is permissible only in the presence of significant public interest, in such a way that the legitimate expectations of state officials are not unjustifiably and unjustifiably limited and their trust in the existing legislation is not shaken. The Constitution of Georgia requires that the state office, taking into account its specificity and diversity, should represent a stable and independent structural unit, through which it will be possible to carry out the functions assigned by the law and the constitution without hindrance.[24]

With broad public participation, for a person appointed to a position for a fixed term, early termination of authority leads to a decrease in trust in state institutions, a gross interference in human rights. Therefore, it should only be done for clearly expressed and very important legitimate purposes. The named public and private/individual interests are significant legitimate interests. Thus, it is important to determine to what extent the constitutional balance between the legitimate public interest provided for by the contested norms and the private/individual legitimate interest is preserved.

According to the precedent law of Strasbourg, the institutional reform of a public institution, if it serves to increase the efficiency of the functioning of these services, can be considered a legitimate goal, but the legislative authority cannot use the reform of public institutions to justify such a measure – the early termination of the mandate of a person elected for a certain period.[25]

---

[24] Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia", II-33-34.

[25] *Case of Baka v. Hungary,* Application no. 20261/12, § 155-156, 23 June 2016.

The Constitutional Court notes that "premature termination of the authority of an official, in this case, the state inspector, elected with a guaranteed term, represents an interference with the right to smoothly carry out activities in the public service, which must meet the general requirements of constitutionality".[26]

According to the established practice of the Constitutional Court of Georgia, the existence of an important legitimate goal does not mean that interference with the right is justified. For the proportionality of the restriction, it is also necessary to satisfy the requirement of usefulness. On the other hand, when discussing the effectiveness of the measure, "the Constitutional Court must determine to what extent there is a logical connection between the legitimate goal named by the Parliament of Georgia and the form of restriction of the right established by the disputed norms – to what extent the disputed norms provide the opportunity to achieve the named legitimate goal."[27] The Parliament of Georgia indicates that by establishing two independent services instead of the State Inspector Service, a more effective institutional regulation of the control of the legal processing of personal data during the implementation of investigations and covert investigative actions will be achieved, as well as the investigative jurisdiction will be expanded and conflict of interest will be prevented during performance of functions.

The controversial norms established two independent services, and the public legal functions of the State Inspector Service were distributed between them. Institutional reform of state bodies/public institutions in order to strengthen them and increase their effectiveness belongs to the scope of the broad view of the state, therefore, the implementation of the named measure is a justified legitimate goal of the state and it really ensures the effective implementation of the public legal functions provided for them by the law by the newly created services.

It should be taken into account that the justification of the legitimacy of the named public interests/goals will not be useful in relation to the first paragraph of Article 27^1 of the Law of Georgia "On the Service of the State Inspector". Based on the disputed norm, the state inspector's official authority was terminated early. The clarification card does not separately indicate the legitimate goals of early dismissal, why the Parliament did not use the legislative practice established by it to allow the state inspector to continue his activities during the remaining term of office, about which it is mentioned above.

The disputed legislative arrangement did not take into account the possibility for the state inspector to continue his authority as the head of any newly created service for the remaining term. Accordingly, the disputed norm establishes a different rule from the legislative practice of the Parliament.

Termination of the term of office is justified if the goal of institutional reform is to implement fundamentally different functions. In one of the cases, the Strasbourg Court noted: "Based on the reasons given by the government to justify the contested measure, it does not appear that the changes

---

[26] Decision № 1/9/1673,1681 of the Constitutional Court of Georgia of November 17, 2022 on the case: "Londa Toloraya and the Public Defender of Georgia against the Parliament of Georgia", II-33.

[27] Decision № 3/3/600 of the Constitutional Court of Georgia dated May 17, 2017 on the case "Citizen of Georgia Kakha Kukava vs. Parliament of Georgia", II-48.

made in ... functions or ... tasks were of such a fundamental nature that they could or should have caused the applicant's mandate to be prematurely terminated." ..Furthermore, if the applicant was considered competent to carry out both functions at the time of his election, the fact that one of them was subsequently removed should not in principle affect his fitness to continue to carry out the other function ...As for the ... changes, they do not It seems to be of such a fundamental nature."[28] Thus, the regulation established by the first paragraph of Article 27[1] of the Law of Georgia "On the Service of the State Inspector" does not represent a useful means of achieving the legitimate goal named by the Parliament.

According to the definition of the Constitutional Court of Georgia, "any measure restricting a person's right should represent a necessary, least restrictive means of achieving a legitimate goal. Therefore, in each specific case, the state must justify that there is no possibility of achieving the legitimate goal by using other, less restrictive measures.[29] The court stated almost the same thing in another case: "A restrictive measure must be a necessary (least restrictive) means of restriction in addition to its effectiveness."[30] In the case under consideration, it should be established whether the Parliament of Georgia could ensure the institutional reformation of the independent body for the state inspector elected for a period of 6 years without terminating the authority before the term.

In the explanatory note, the Parliament indicates the importance of establishing two independent services, the need for institutional reform, and the interest in increasing the efficiency of public legal functions. However, it does not explain why the state inspector could not exercise these interests without prematurely terminating his mandate. It should be noted that the powers granted by the legislation to the newly established two independent services/heads of the service do not qualitatively differ from the powers granted to the State Inspectorate/State Inspector by the legislation. The newly created services did not add any new public legal function that is not related to the activity performed by the state inspector. The public legal functions of the State Inspector Service/State Inspector were distributed between the two newly created independent services. In addition, there were no question marks regarding the independence, competence, qualifications and professionalism of the state inspector. Therefore, there is no argument to prove that the state inspector would not be able to fully lead any newly created service during the remaining term of office.

Based on all of the above, the regulation provided for by the disputed norm – early dismissal of the state inspector is not a measure caused by extreme necessity. The legitimate goal of the institutional arrangement of the public service – the establishment of two independent services did not exclude the possibility that the state inspector would continue to lead one of the newly created services during the remaining term of office. The Parliament of Georgia had all the legislative levers to regulate that the position of the head of any newly created service was considered as a substitute for the state inspector and established the following legislative reservation: at the moment of the entry into

---

28 Case of Baka v. Hungary, Application no. 20261/12, § 155-156, 23 June 2016.

29 Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia", II-44.

30 Decision № 3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 in the case "Citizen of Georgia Nodar Dvali vs. Parliament of Georgia", II-26.

force of the disputed norm (by March 1, 2022), the state inspector elected by the Parliament of Georgia, who was in office, acquired any specific newly created Authority of the head of the service before the expiration of the authority of the state inspector. Thus, for the state inspector, early termination of the authority is not an extremely necessary means of achieving the goal. Therefore, legitimate objectives could be achieved using other, less restrictive measures.

According to the case law of the Court of Strasbourg, when reforming public institutions, there are clearly some alternative measures that can be taken that respect the general rule of the Constitution.[31]

In order for the restriction provided by the contested norm to be considered in accordance with the Constitution of Georgia, along with the component of necessity, it must meet proportionality in a narrow sense. The requirement of the mentioned component is that "when limiting the right, the legislator establishes a fair balance between the limited and protected interests".[32] The Constitutional Court of Georgia has repeatedly explained that "the principle of proportionality also requires that proportionality in a narrow sense be preserved. It is necessary for the state to establish a fair balance when developing a right-limiting measure in such a way that the protected good and the interest in its protection exceed the interest in the protection of the limited right.[33]

The reformation dictated by the best interests of public service and public institutions is in the interests of a democratic and legal state. At the same time, it should be noted that reforming state institutions is not a sufficient basis for early dismissal of an official elected by the Parliament of Georgia for a certain period based on transparent legal norms and legal process. It is necessary to have an increased public interest corresponding to the requirements of the Constitution. The Constitutional Court points out that the termination of the powers of such officials can be "justified only in the presence of significant public interest, while the early termination of the powers of the said officials is a necessary, effective and less restrictive means of achieving the relevant legitimate goal. Otherwise, it may take on a permanent, irreversible character, which will not only make the appointment of persons in office for a certain period of time meaningless, but also question the institutional independence of these bodies."[34]

As we can see, there are no special circumstances that would justify limiting the right of the person protected by Article 25 of the Constitution of Georgia – the state inspector. However, as the Strasbourg Court points out, the premature termination of authority undoubtedly causes a "stinging effect" not only for the dismissed person, but also for other public officials.[35] The disputed legal norm has discouraged them because they do not have the sense of stability to exercise their public office without interruption.

---

31 Case of Grzeda V. Poland, Application no. 43572/18, §279, 15 March 2022.

32 Decision № 3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 in the case "Citizen of Georgia Nodar Dvali vs. Parliament of Georgia", II-43.

33 Decision № 3/1/752 of the Constitutional Court of Georgia of December 14, 2018, in the case "Green Alternative Party" against the Parliament of Georgia, II-28.

34 Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia", II-53.

35 *Case of Baka v. Hungary,* Application no. 20261/12, § 173, 23 June 2016.

Taking into account all the above, the disputed norm violated the guarantees of the state inspector's unhindered performance of activities in the state service protected by the second sentence of the first paragraph of Article 25 of the Constitution of Georgia, including the protection against unjustified dismissal, because it does not establish a reasonable balance between the state inspector's rights and public interests. between.

Accordingly, the normative content of the first paragraph of Article 27[1] of the Law of Georgia "On the State Inspector Service", which does not provide for the continuation of the authority of the state inspector elected by the Parliament of Georgia for the remaining period of 6 years in the position of the head of any newly created independent body, contradicts the first paragraph of Article 25 of the Constitution of Georgia. requirements of the second sentence and is unconstitutional.

4. Conclusion

The Constitutional Court, while recognizing the normative content of the disputed norm as unconstitutional[36], used such wording that raised questions as to how effectively the decision will be enforced. According to the resolution part of the decision, "normative content that provides for the dismissal of the state inspector ... without offering an equivalent position or without giving fair compensation" is unconstitutional. It should be noted that the court recognized as unconstitutional not that the disputed norm did not provide for the possibility of the state inspector continuing his authority as the head of any newly created service in the remaining term of office, but indicated at the offer of „equivalent position" with the alternative of receiving compensation. Aforementioned leaves the decision practically unenforceable in the part of the offer of the position.

It should be taken into account that the court threatened the enforcement of the decision even when it did not suspend the operation of the disputed norm.[37] By the time of the decision, the new heads of both newly created services have already been appointed to their positions.

In this regard, it is also interesting to consider the authority of the Constitutional Court of Georgia envisaged by the law,[38] according to which the norm known as unconstitutional in relation to the issues of the second chapter of the Constitution of Georgia is invalid from the moment the decision is published on the court's website, not from the moment this norm is adopted/entered into force.[39] In addition, it should be noted that the Parliament of Georgia enjoys wide discretion to ensure the restoration of violated human rights and freedoms.

It is interesting to evaluate the practice of the Strasbourg Court on the subject of enforcement of court decisions. The court notes that in the context of the enforcement of decisions, the decision in which the court establishes a violation of the right imposes a legal obligation on the respondent party

---

36 See Decision № 1/9/1673,1681 of the Constitutional Court of Georgia dated November 17, 2022 in the case: "Londa Toloraya and the Public Defender of Georgia against the Parliament of Georgia", III-1.

37 See Minutes of the Constitutional Court of Georgia № 1/1/1673 of February 28, 2022 in the case "Londa Toloraya v. Parliament of Georgia", III-3.

38 See Organic Law of Georgia "On the Constitutional Court of Georgia", Article 19, Clause 1, Sub-Clause "e", Article 23, Clause 1, 31/01/1996.

39 *Kopaleishvili M.,* for the issue of invalidating a legal act, Law Journal, № 2, 2016, 170-179 (in Georgian).

to reparate (correct) the consequences of the violation in such a way as to restore as much as possible the legal situation existing before the violation was committed. It should also be taken into account that sometimes the national legislation does not provide for the possibility of reparation of the violated results in relation to specific cases. In such a case, the applicable legislation should allow the aggrieved person to be awarded such satisfaction as the court deems appropriate. In the absence of fair reparation, the state remains obligated to ensure human rights and freedoms in accordance with the court's decision.[40]

At the same time, the practice of the Strasbourg Court is interesting, according to which "the judicial system in a democratic society ... is regulated by a law originating from the Parliament. Also, in countries where laws are codified, the judicial system cannot depend on the discretion of the judiciary, although this does not mean that the courts do not have some freedom to interpret national legislation."[41] A controversial example of this kind of interpretation by the Constitutional Court is the recognition as unconstitutional of the normative content of the above mentioned disputed norm by the decision of November 17, 2022 N1/9/1673,1681, which envisages dismissal from office "without offering a equivalent position or without providing fair compensation".

With the mentioned record in the decision, the court, in fact, reduced the constitutional guarantees of unhindered exercise of official authority and protection against unjustified dismissal of persons holding an important public legal function to the point of compensation and thereby harmed not only the practice of the court before this decision, but also the effective protection of human rights.

Bibliography:

1. Constitution of Georgia, 24/08/1995.
2. Law of Georgia "On State Inspector Service", 07/21/2018.
3. Organic Law of Georgia "On the Constitutional Court of Georgia", 31/01/1996.
4. *Kopaleishvili M.,* on the issue of invalidating a legal act, "Law Journal", № 2, 2016, 170-179 (in Georgian).
5. Minutes of the Constitutional Court of Georgia № 1/1/1673 of February 28, 2022 in the case "Londa Toloraya v. Parliament of Georgia", III-3.
6. Decision № 1/9/1673,1681 of the Constitutional Court of Georgia of November 17, 2022 on the case: "*Londa Toloraya and the Public Defender of Georgia against the Parliament of Georgia",* II-33, III-1.
7. Decision № 3/1/1298,1313 of the Constitutional Court of Georgia dated April 23, 2021 in the case "Tamaz Mechiauri vs. Parliament of Georgia", II-5, 10.
8. Decision № 3/1/752 of the Constitutional Court of Georgia dated December 14, 2018 in the case "Green Alternative" against the Parliament of Georgia, II-28.
9. Decision № 3/2/717 of the Constitutional Court of Georgia dated April 7, 2017 in the case "Citizens of Georgia Moonusa Kevlishvili, Nazi Dotiashvili and Marina Gloveli against the Parliament of Georgia", II-13, 14.
10. Decision № 3/3/600 of the Constitutional Court of Georgia dated May 17, 2017 on the case "Citizen of Georgia Kakha Kukava vs. Parliament of Georgia", II-48.

40 *Oleksandr Volkov v. Ukraine,* no. 21722/11, § 193-195, ECHR 2013.

41 *Case of Oleksandr Volkov v. Ukraine,* no. 21722/11, § 150, ECHR 2013.

11. Decision № 3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 on the case "Georgian citizen Nodar Dvali vs. Parliament of Georgia", II-26, 43.
12. Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia", II-1, 7, 29 , 30, 33-44, 53.
13. Decision № 3/2/574 of the Constitutional Court of Georgia dated May 23, 2014 on the case "Georgia Citizen Giorgi Ugulava vs. Parliament of Georgia", II-19.
14. Decision № 3/1/512 of the Constitutional Court of Georgia dated June 26, 2012 in the case "Danish citizen Heike Kronqvist vs. Parliament of Georgia", II-65.
15. Decision № 1/1/477 of the Constitutional Court of December 22, 2011 in the case "Public Defender of Georgia vs. Parliament of Georgia", II-45.
16. Decision № 2/1/415 of the Constitutional Court of Georgia dated April 6, 2009 in the case "Defender of the People's Republic of Georgia against the Parliament of Georgia", II-13.
17. Decision № 1/2/384 of the Constitutional Court of July 2, 2007 on the case "Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili against the Parliament of Georgia", II-19.
18. Decision № 2/2-389 of the Constitutional Court of Georgia dated October 26, 2007 on the case "Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia", II-18.
19. Decision № 2/2-389 of the Constitutional Court of Georgia dated October 26, 2007 on the case "Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia", II-5.
20. Case of Baka v. Hungary, Application no. 20261/12, §150, 155-156,173, 23 June 2016.
21. Case of Grzeda v. Poland, Application no. 43572/18, §279, 308, 15 March 2022.
22. Case of Oleksandr Volkov v. Ukraine, no. 21722/11, §150, ECHR 2013.

Khatuna Loria*

Assurance of an Administrative Body – the Basis of Legal Reliance

The exercise of public authority of an administrative body can lead to limitation/deterioration of a person's right. This issue is particularly painful when there is a pre-announced will by the administrative body regarding the desired legal result. Administrative legislation protects the legitimate expectations of the interested party. The article discusses legal reliance, the basis of which can be the assurance of an administrative body.

Keywords: *assurance of an administrative body, legal reliance*

1. Introduction

There is an opinion in the legal literature that "administrative law best expresses the character of the state and the people."[1] I consider it as a correct assessment. Due to the fact that contemporary administrative law deviates from the scope that was characteristic of years ago (police like, repressive) and is getting closer to individuals, not only as a ruler, but as a "partner" of society."[2] This is even more unusual for Georgia, which had no legal heritage before the adoption of the General Administrative Code. From January 1, 2000,[3] with the entry into force of the General Administrative Code of Georgia (hereinafter referred to as the GACG) and the Administrative Procedure Code of Georgia (hereinafter referred to as the APCG), a new life began for both citizens and administrative bodies. The law offered us many innovations, especially in the conditions when there was no trace of such a relationship in our legal memory.

Obviously, if there was a choice, an individual would not allow the state to interfere with his rights, but since the state and society cannot be managed without interference, it is necessary to organize it in such a way that both parties feel supported and treated with dignity as much as possible.

We do not have a definition of legal reliance in GACG. It presupposes a firm belief in the performance of a certain action.[4] According to Article 10 of the Administrative Procedure Law of Latvia,[5] legal reliance means the belief of the interested party that the action of an administrative body is legal.

---

* Doctor of Law, TSU, Faculty of Law, Associate Professor.

1 *Nolte G.,* General Principles of German and European Administrative Law – A Comparison in Historical Perspective, The Modern Law Review, 1994, 212 cited from Schemer, 'Der EinfluB des franzosischen Venvaltungsrechts auf die deutsche Rechtsentwicklung' (1963) 16 Die dffentliche Verwalrung, 714.

2 *Khubua G., Kalichava K. (eds.),* Handbook of Administrative Science, Tbilisi, 2018, 185-186 (in Georgian).

3 General Administrative Code of Georgia, SSM, 32(39), 15/07/1999, Issued June 25, 1999. Administrative Procedure Code of Georgia, SSM, 39(46), 06/08/1999, Issued 23 July, 1999.

4 *Turava P.,* Principle of Legal Reliance (comparative legal analysis), Review of Georgian Law, 2007, #2-3, 218 (in Georgian).

5 Сборник законодательных актов по административным процедурам, GIZ, BMZ, 2013, 255.

Trust is related to the creation of an advance expectation, the ability to predict the outcome, however "trust is also considered risky as it affects the expectations of others, it cannot be predicted with certainty."[6] Despite this, it is generally recognized that a modern democratic state cannot exist without public trust. Trust, the continuity of state institutions and the reliability of the legal system form the basis for the development of human freedom.[7] "In the modern era, trust, constitution and democracy are inextricably linked."[8]

The activity of the administrative body, which is related to the exercise of public authority, must, of course, be legal. This is announced both by the Constitution[9] and by the relevant articles of GACG. According to GACG,[10] administrative acts and activities, which exceed the powers authorized by law, shall have no legal force and must be declared null and void. As for determining the fact of exceeding the authority, it follows the decision made or the action taken, so its determination can be related either to the self-initiative of the administrative body, which is often connected to the use of discretionary authority, or to the filing of a complaint/lawsuit.What are the legal consequences for a person who has received or expects to receive any benefit based on such an illegal act? The existence of the institution of legal reliance is related to this exact issue.

The first data on legal trust are related to the decision of the highest administrative court of Prussia.[11] However, there are also opinions that legitimate expectation (as it is referred to in common law countries) finds its roots in English law. The origin of the legitimate expectation was connected to the existence of the procedural (hearing) right and its provision. It served to grant procedural rights to a fair hearing.[12] In general, the influence of the German administrative law's separate doctrine on the legal systems of other European countries, as well as on the common law system, is so great that it has been compared to a "Trojan horse" by which common law countries are harassed by German administrative law.[13]

2. Purpose of Legal Reliance

According to the definition of the Constitutional Court of Georgia, the principle of legal reliance serves to strengthen citizens' trust in the applicable law. [14] The doctrine of the legal reliance is based on the idea of fairness.[15] That is why, it can stand above the law. In a society, where there is a high

6 *Ulrike K.*, Wissenschaft und Gesellschaft, erhältnis – Auswirkungen – Einbindung, Ein Bericht im Auftrag des Rates für Forschung und Technologieentwicklung, Wien, 2008, 25.

7 *Pezzer* H.-J. (Hrsg.), Vertrauensschutz im Steuerrecht, 2004, 271.

8 *Schaal G.S.,* Vertrauen, Verfassung und Demokratie, Wiesbaden 2004, 189.

9 See Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995, Art.4, Art.18.

10 General Administrative Code of Georgia, Art.5.

11 *Turava P.,* Principle of legal reliance (comparative legal analysis), Review of Georgian Law, 2007, #2-3, 216 (in Georgian).

12 *Stott D., Felix A.*, Principles of administrative law, London, 1997, 69.

13 *Nolte G.,* General Principles of German and European Administrative Law – A Comparison in Historical Perspective, The Modern Law Review, 1994, 191.

14 Decision of the Constitutional Court of Georgia of December 27, 2013 on the case "Joint liability company Grisha Ashoredia" vs. Parliament of Georgia", № 2/3/522,553 II-42.

15 *Stott D., Felix A.*, Principles of Administrative Law, London, 1997, 70.

degree of trust, reliance in its content is balanced by the principle of "give and take". [16] The legal reliance provides a kind of compromise and concession between the state and the individual.[17]

The General Administrative Code of Georgia connects the legal reliance to the assurance of the administrative body (Art. 9), declaration of administrative act as null and void (Art. 60^1) and declaring the administrative-legal act invalid (Art. 61). The aim is, of course, to protect the right of an interested party while maintaining the authority and trust of the administrative bodies.

The institution of legal reliance is related to the institution of annulment of an administrative act.[18] According to the General Administrative Code of Georgia (Art. 60^1), an act shall be null and void at the initiative of an administrative body, at the request of an interested party – on the basis of a complaint (higher administrative body) or a lawsuit (court). The legal basis for declaring the act null and void is its illegal nature.

The legislation does not establish a time limit for the possibility of revoking the act issued to the administrative body, which is related to the purpose of protecting the public interest.

If the complaint of the interested person serves the interest of protecting his right, the administrative body acts on the basis of public goals, and this explains its unlimited opportunity to change or revoke the administrative act issued by it. It should also be noted that the implementation of an administrative act and its binding force apply not only to the addressee of the act, but also to the administrative body itself, despite this, this "legal force is not absolute[19] and the administrative body has the ability to revoke its own decisions on its own initiative. At the same time, the administrative body is limited by the fundamental principle of general administrative law, the principle of legal reliance, when revoking the adopted beneficial decisions and making new decisions.[20]

It should be noted that the right to file a complaint is the right of a person to defend a violated or contested right with the help of an administrative body. Based on the functions of the complaint, it not only serves to protect the right (which is the primary task of this institution), but also "forces" the administrative bodies to revise the appealed decision. It turns out that the person himself should be actively involved in order to ensure the protection of his own right and the protection of legality in general. To some extent, the oblique lever of "control" of the legality of the activities of administrative bodies depends on the activity of individuals. If I do not complain, the violation may become "forgivable" to the administrative body, which to some extent means "mitigating" the responsibility of the administrative body. This kind of an approach is incompatible with the functions of "good governance" and "good administration". Moreover, legislation right away imposes on the administrative body the obligation to comply with the law, defining such requirements within the framework of the principles. If we derive from the basic principles of GACG, the spirit of which is

---

16 *Oliver W. L., Klink V. B.,* Gesellschaftliche Voraussetzungen freiheitlicher Ordnung, Zeitschrift für Politische Theorie, Jahrgang 8, Heft 2/2017, 219.

17 *Pezzer H.-J.* (Hrsg.), Vertrauensschutz im Steuerrecht, 2004, 181-183.

18 *Turava P.,* Principle of legal reliance (comparative legal analysis), Review of Georgian Law, 2007, #2-3, 212 (in Georgian).

19 Ibid, 214.

20 Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of January 24, 2008, case #BS-117-110(K-07).

that administrative bodies should strictly follow the law and should exercise their powers in accordance with the requirements of the law, it can be assumed that the product of their activity (in this case, an administrative act) should be legal. It is from these reservations that the presumption of legality of acts is derived. Despite this, we cannot rule out violations of the law, examples of which are not so rare in practice.

It is crystal clear, that the purpose of annulment is to protect the principle of legality, there should be no illegal act, therefore, if the administrative act is against the law, it should be annulled (declared null and void). This is where a kind of dilemma arises, which can be related to the conflict of interests: the interest of protecting validity and the interest of protecting the person who has received some benefit or expects to receive such a benefit based on the beneficial administrative act. "Legal reliance can even go beyond the scope of lawful conduct."[21]

3. The Influence of Good Faith on the Principle of Legal Trust

Who bears the burden of responsibility in case of illegality of the act?

If we rely on the relevant norms of the GACG, it turns out that it is the responsibility of the administrative body to comply with the law, it is the one conducting the administrative proceedings and is therefore obliged to investigate all the circumstances significant to the case. At first glance, an impression is created that the administrative body should not be influenced by external factors and it should not be misled by the interested party. However, this is not exactly the case. To some extent, a kind of burden of responsibility also falls on the interested person, the law requires him to act in good faith. As for the definition of good faith itself, its definition is not given in GACG, although there are separate assessments regarding it both in scientific literature and in judicial practice.[22]

In one of the cases, the Supreme Court of Georgia notes, "that the participants of the legal relationship are obliged to exercise their rights and duties in good faith. The obligation to act in good faith is based on the general assumption of good faith in law. The principle of good faith basically means that the contracting party takes into consideration the interests of the other party.[23] The Supreme Court of Georgia explains, that "the good faith of the tax payer implies a person's subjective attitude towards the action he has committed. A person believes that his action is legal, not unlawful."[24] It is obvious that a number of circumstances should be taken into consideration when assessing good faith, especially in the conditions when the court does not right away consider a certain violation by the interested person to be illegal , this is confirmed by the assessment of the Supreme

---

21 *Elliot M.,* Unlawful representations, Legitimate Expectations and Estoppel in Public Law, Judicial Review, 2003, 73-74.

22 Recommendations developed as a result of regular meetings of judges in the Supreme Court of Georgia in the field of civil and administrative law and uniform practice of the Supreme Court of Georgia on civil law issues, Tbilisi, 2011, 72, <https://www.supremecourt.ge/files/upload-file/pdf/rekomenda-samoqadmin.pdf>[10.09.22].

23 Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of April 2, 2020, case № BS-570(K-19).

24 Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of May 17, 2022, case № BS-531(K-20).

Court of Georgia, which states that "a person acts in the so-called in the conditions of an excusable mistake, so, he did not know and could not have known that he was committing a prohibited act (offense). In case of a forgivable mistake, a person thinks that there is no norm that prohibits his action. Therefore, he has no consciousness of committing the offense. If the mistake is not excusable (for example, it was acted out of reckless misconduct or negligence), the person cannot be exempted from tax liability."[25] It should also be noted that the verification of a person's good faith is mainly performed by the court, since the existence or non-existence of the legal reliance becomes the subject of a legal dispute. As noted in the literature, "the legislator is free within the framework of the normative language, while the court represents the true spoken language of the law."[26] It is the court that examines and evaluates the circumstances, which must indicate whether there is an overriding interest in the protection of a person based on a legal reliance. Despite this, there is an opinion in the literature that good faith is less relevant in administrative-legal relations, since it depends on mutual will, and administrative-legal relations are characterized by a subordinate character, a characteristic feature of subordinate relations is the possibility of unilateral intervention in the legal sphere of another participant.[27] Therefore, in some cases, they consider it excessive to appeal to it in public-legal relations.

In the scientific literature, there is a viewpoint that the basis of legitimate expectation (legal reliance) can go beyond the purely normative content and derive from the existing order of the state, from the established practice of behavior, [28]which in turn does not deviate from the regulations established by law. Such an opinion is conditioned by the belief in establishing a sense of equal treatment and justice. [29]Administrative bodies, which are obliged to exercise their authority in accordance with the requirements of the law, must create trust and expectations in society not only through concrete-individual decisions, but also through their behavior.

The responsibility of the interested party regarding the presence or absence of the assurance and legal reliance is established by Article 9, paragraph "c" of the GACG. In this case, an unlawful act of a party is implied, although the exact definition of this action is not specified. We must consider such an action, which goes beyond the scope of not only good faith, but also legality in some cases. e.g. Submission of incorrect information (intentionally), coercion, threats, bribery[30]... Recent cases can become the basis for starting a criminal prosecution against a person if signs of crime have been identified. However, this already goes beyond the scope of administrative-legal relations.

Georgian legislation protects only a party acting in good faith with legal reliance, the Supreme Court of Georgia states the same in its evaluations.[31]

---

25 Ibid.

26 *Zoidze B.,* Constitutional control and order of values in Georgia, Tbilisi, 2007, 46 (in Georgian).

27 *Pautsch A., Hoffmann L. (Hrsg).,* Verwaltungsverfahrensgesetz, Kommentar, 2., neu bearbeitete Auflage, 2021, 65.

28 *Stott D., Felix A*, Principles of administrative law, London, 1997, 68.

29 Ibid, 69-71.

30 In the legislation of other countries, the same list is specified as exclusionary circumstances for legal reliance. For example, Germany, Estonia, etc. Georgian judicial practice also focuses on these circumstances to determine the good faith of the interested person.

31 Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of February 3, 2015, case № BS-428-423(2k-14).

Article 9 of GACG stipulates that no legal reliance in the assurance of an administrative body may exist if:

"a) it is based on the unlawful assurance of the administrative body;

b) a person can no longer meet the determined requirements because of amendment of the respective normative act;

c) it is based on an unlawful act of an interested party."

We can connect the mentioned circumstances to the legal reliance not only to the assurance, but also to the issued beneficial administrative acts.

The first and second paragraphs of the above-mentioned conditions are beyond the capabilities of the interested party. In the first case ("a") we are dealing with the incorrect use of the authority of the administrative body, and in the second case ("b") with a normatively changed circumstance, which changes the possibility in the content of the assurance and worsens the person's situation due to the changed circumstances, since he is deprived of the opportunity to receive the legal result that he expected from the assurance of the administrative body, based on the normatively changed situation.

Similarly, the issue of the absence (exclusion) of legal reliance is considered under the German legislation. In particular, paragraph 42 of the Administrative Procedure Act of Germany (VwVfG) states: "There is no legal reliance if the party:

1. obtained the administrative act by false pretenses, threat or bribery;
2. obtained the administrative act by giving information which was substantially incorrect or incomplete;
3. was aware of the illegality of the administrative act or was unaware thereof due to gross negligence.[32]

It can be seen from this list that the named circumstances are completely related to the good faith of the interested party and the legality of his action.

In all three cases, the indicated activity originates from the interested party and is not related to the administrative body. In contrast to the German legislation, in Article 9 of the GACG, the circumstances resulting from the actions of both the administrative body and the interested party are integrated into the exclusionary conditions of legal reliance.

Under Estonian law[33], a legal trust cannot protect a person in the following cases:

1. the deadline for submitting an appeal to the administrative court for revoking the administrative act has not yet passed, as well as during the review of the appeal for revoking the administrative act;
2. the possibility of annulment is provided for in the law or the possibility is left for this purpose in an administrative act;
3. the person has not fulfilled the additional obligation related to the administrative act;
4. the person has not used the money or thing transferred on the basis of an administrative act for the intended purpose;

---

[32] Verwaltungsverfahrensgesetz (VwVfG), §48,<https://www.gesetze-im-internet.de/vwvfg/> [10.09.22].

[33] Administrative Procedure Act, Estonia, (HMS), Art.67,<https://www.riigiteataja.ee/akt/123022011008> [10.09.22].

5. the person was aware of the illegality of the administrative act or was not aware of it due to his own fault;
6. the administrative act is based on incorrect or incomplete data submitted by the given person or as a result of unlawfully influencing the administrative body by fraud or threat or in any other way.

The submission of incorrect data does not exclude the consideration of trust, if the provision of incorrect or incomplete data was caused by the administrative body and the person did not know and could not have known about the illegality of the administrative act.

In contrast to GACG, Estonian law explicitly mentions the lack of legal reliance in the time limit for appeal of the beneficial act or during the period of consideration of the appeal. In our legislation we do not have an express reservation on this basis of absence of legal trust, although it can be presumed from the legislation.

As GACG notes, legal reliance is excluded if it is based on an illegal assurance by an administrative body. This once again emphasizes the fact that legal trust in this case is also considered within the framework of the protection of the principle of legality. In the present case, the expectation is for the future, unlike in the case of annulment of the act, where the person tries to preserve the present result. In the case of an assurance, this result has not yet occurred and the person expects it. The justification of the expectation on the part of the administrative body is related to its authority and trust in the institutions in general.

The assurance and the occurrence of the desired legal result are related to each other to the extent that the promise itself creates an obligation for the administrative body to fulfill it.

Within the scope of legal trust review, many opinions can be found in the scientific literature. One thing is crystal clear, in any case, it is connected with the administrative body primarily for the purpose of protecting the individual. "The primary function of an administrative law should be to control the excess of state power",[34] more precisely, to subordinate it to the idea of the rule of law and justice. In connection with this issue, the theory of "red and green light" was formed in science. The 'red light' theory supports a powerful judiciary within the control of the executive power."[35] This theory emphasizes the rights of individuals and the law, as a brake on government actions.[36] On the contrary, the "green light" theory welcomes the so-called "administrative state." [37]If the "red light" theory prioritizes the courts, the "green light" theory favors a lawful and accountable administration.

4. The Criteria of Assurance Legality

GACG mentions the assurance of the administrative body only in Article 9, we do not find any mention of it in other norms. In addition to the existence of a promise, GACG considers its compliance with the law to be an important circumstance. Thus, the basis for fulfilling the obligation

[34] *Harlow C., Rawlings R.*, Law and Administration, Cambridge University Press, 2009, 6.
[35] *Harlow C., Rawlings R.*, Law and Administration, 2nd edn. (London, 1997), chs.1–2; M. Loughlin, Public Law and Political Theory (Oxford, 1992), 23.
[36] *Harlow C., Rawlings R.*, Law and Administration, Cambridge University Press, 2009, 6.
[37] Ibid, 31.

is not the promise of the administrative body in general, but its legal assurance. Only a legal assurance assumes the existence of a legal reliance. "In determining the legality of a promise, decisive importance is given to the objective side of the issue, that is, whether the assurance is against the law, and not whether the promiser or the interested party knew about the illegality of this promise."[38] Therefore, it is very important to clarify the issue of whether the assurance is in full compliance with the law, the existence of impeding circumstances under Article 9 of the GACG should be excluded.

As for the form of the assurance, it turns out that the law imposes more requirements on it, since it imperatively establishes its written form, while regarding the individual administrative act, it provides for the possibility of oral issuance as well.[39] Here it should also be mentioned that despite the existence of an oral form of an individual administrative act, more preference and reliability is directed towards the written form of the act.

Regarding the circumstances excluding trust in Article 9 of the GACG, the law does not impose a cumulative requirement, which means that if at least one of the listed conditions is present, trust towards the promise is already excluded.

Based on the abovementioned, in order to have legal reliance towards the assurance given by the administrative body, it is necessary to have the following composition:[40]

- The assurance must be issued by an authorized administrative body;
- The assurance must be written;
- The promise must be lawful;
- The good faith of the interested party should be evident.

5. The Problem of Determining the Legal Form of the Assurance of the Administrative Body

Article 9 of the CACG does not specify whether the assurance of an administrative body constitutes an individual administrative-legal act. The assurance of an administrative body has the following features: it is issued by the administrative body, based on an administrative legislation, has an addressee to whom it is addressed, has binding force for the administrative body issuing the assurance. In addition, according to the same Article, "the procedures determined by law for appealing individual administrative acts shall apply to assurance made by an administrative body." Therefore, there is a reason to consider the promise as an individual administrative act. This opinion is supported by the fact that the assurance (if it is not fulfilled or is fulfilled improperly) can become the subject of a dispute both in the higher administrative body and in the court. The nature of binding force for performance is peculiar to the assurance. If the binding force for the performance of administrative acts is directed to its addressees, in the case of an assurance, as mentioned, this obligation is directed to the administrative body issuing the promise, which implies its obligation to ensure the occurrence of

[38] Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of September 10, 2008, case NBS-942-903(K-07).

[39] General Administrative Code of Georgia, Art.51.

[40] *Vachadze M., Todria I., Turava P., Tskepladze N.,* Commentary on the Administrative Procedure Code of Georgia, Tbilisi 2005, 200-201 (in Georgian).

the result described by the promise. There is no unequivocal viewpoint about the determination of the assurance as a form of activity[41] of an administrative body. In scientific circles, there is a different opinion regarding this issue. We find the opinion according to which the assurance of an administrative body is an administrative real act according to the legal form of the activity,[42] although there is a different opinion that considers the assurance as an individual administrative act, based on the fact that the will of an administrative body is declared in it and the intention of an administrative body is also read.[43]

If we look at the court practice, there are few assessments regarding the determination of the legal form of the assurance of the administrative body. Despite this, there are separate judgments where the court equates the assurance with the beneficial administrative act, although it does not discuss its constituent elements.[44]

In one of the cases, the Supreme Court of Georgia points out that "administrative act is considered to be all those documents issued or confirmed by the administrative body, which may have legal consequences. In addition, the corresponding result should be established not through the issuance of any other administrative act, but directly through this act – without the issuance of another act."[45] This is where the main key issue lies in the ambiguity of the legal form of the promise. An assurance does not create a desired legal result for an individual, but it is a preliminary basis for a beneficial individual act to be issued in the future. The assurance of the administrative body does not have a regulatory function,[46] accordingly, it does not meet the fourth element of the individual administrative act provided for by GACG, which, due to the need for the cumulative existence of the signs of the individual administrative act, excludes its consideration as an act creating a legal result, it only has the function of creating a precondition for bringing a future result.

It is accurate that the assurance does not directly produce the legal result that the interested party expects, although it has a mandatory character to be fulfilled, not for the interested person, but for the administrative body issuing the assurance. By making an assurance, the administrative body falls within the limits of self-obligation and is limited in the possibility of settling the matter in a different way.

The assurance of the administrative body is the basis of expectation, where it is clear to the interested party what rights will be granted and what benefits will be received. Accordingly, the

---

41 *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Handbook of General Administrative Law, Tbilisi, 2005, 124 (in Georgian).

42 *Uriadmkofeli K.,* The principle of legal reliance in administrative law, doctoral dissertation, Georgian-American University, 2015, 44, 124, <https://www.gau.edu.ge/storage/app/media/GAU%20Research%20Books%20and%20Documents/Kakhaber%20Uriadmkopeli%20PhD%20Thesis-2016.pdf>

43 *Pilving L.,* Haldusakti siduvus. Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalikõiguslikel lubadel. Dissertatsioon. Dissertation defended at the University of Tartu. 2006, 22.

44 Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of June 6, 2013, case NBS-699-685(K-12).

45 Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of March 17, 2010, case NBS-939-899(K-09).

46 In this regard, see 12. *Turava P., Tskepladze N.,* Handbook of General Administrative Law, Tbilisi, 2013, 176.

assurance is much more predictable for an interested party than, in general, the content of the individual administrative act that is issued after the end of the administrative proceedings. The administrative body is not obliged to in advance create a solid guarantee to the interested party regarding the content of the administrative act to be issued, except for the case when there is an assurance made in accordance with the law.

6. Stability and Retroactive Effect

One of the directions of good public administration, i.e. good governance, involves active communication with society and people,[47] and communication is ineffective beyond goodwill and trust. Therefore, it is an important capital for the administration itself to gain public trust, which is related to its moral character. Therefore, it is very important for the administrative body to become a reliable partner, the basis of which is the guarantee that "what was said will be fulfilled." Legal assurance creates a mood "which requires a duty on the part of an administrative body to act fairly by following the promised procedure, based on the principle of good governance."[48]

One of the "dangers" and impeding circumstances is the normatively changed situation, which deprives the administrative body of the opportunity to issue beneficial administrative act bringing the promised result. In the state a kind of instrument of legal stability is considered to be a limitation of legal reliance and the restriction of the retroactive effect of the normative act,[49] which gives an opportunity to preserve the existing good.

The legal arrangement of the relationship should precede the events in time, and not the other way around. The retroactive effect of a normative act can become a challenge to the principle of stability. Despite this, it is crystal clear that state institutions cannot be limited in carrying out certain changes. Legislative changes are considered as a kind of "threat" to the assurance of the administrative body and, in general, to the stable legal environment in the state. The Constitutional Court of Georgia offers an interesting assessment, the decision reads: "The trust of the addressees of the law cannot be shaken by unjustified and frequent changes of the rights granted by the law...essentially undefined and uncalculated, unreliable legal development creates a feeling of uncertainty, which hinders the personal development of a person. Legal security is an important prerequisite for an individual's personal freedom."[50] To some extent, the future plans of the activities of the administrative bodies should be predictable. "Governmental intervention must be as predictable as possible,"[51] so when making a promise, an administrative body must be bound by a reasonable prediction of future behavior. Such an attitude will deepen public trust and authority towards state institutions.

Legal reliance "insures" against changes, although we must also remember that no one can prohibit the state and the administration from changing the established rules. It is in this chain of

---

47 *Izoria L.,* Modern State, Modern Administration, 2009, 116-119 (in Georgian).

48 *Hawke N., Parpworth N.,* Introduction to Administrative Law, 1996, 165.

49 *Stott D., Felix A*., Principles of administrative law, London, 1997, 275-276.

50 Decision of the Constitutional Court of Georgia of December 27, 2013 on the case "Joint liability company Grisha Ashoredia" vs. Parliament of Georgia", № 2/3/522,553 II-42.

51 *Schwabe I.,* Decisions of the Federal Constitutional Court of Germany, 2011, 320 (in Georgian).

changes that the interest of a specific person or group of persons is represented as one of the links. The state, just like the society, strives for a better future. Accordingly, acceptance of the future is achieved by a certain legal regulation, which does not exclude the painful consequences of the changes. Here lies the risk of conflict of interest.

Retroactive effect is equivalent to a change of condition that follows a pre-existing promise. It is true that an assurance does not in itself lead to the occurrence of a legal result, however, it creates a solid expectation of the occurrence of a foreknown result. It would be desirable, based on the goal of proportional protection of public and private interests, for the legislation to show more support for the interested party and instead of the completely exclusionary reservation of trust in Article 9 of GACG, to propose the absence of trust unless the basis of changed circumstances harms the public or a third party's legally protected interest. By doing so, it would be closer to the content of Article 60^{1}, paragraph 4 of the GACG.

7. Proportional Limitation Test

Protection of human rights has an important place in a legal state. Interfering with protected rights, limiting the rights of an individual is permissible to protect a more important and valuable good. One of the indicators of the permissibility of interfering with human rights is the assessment of the existence of "best necessity".[52] "Geeignetheit" (appropriateness) and "Erforderlichkeit" (necessity, need) are also considered as a measure of proportionality in Germany.[53]

When determining proportionality, "the greater the degree of non-satisfaction or damage to one principle, the greater the importance of satisfying the other should be".[54] Regarding the competition of the principle of legal reliance and legality in administrative law, it should first be noted that it is the principle of legality that gives rise to legal trust. I suppose the rule of law creates the possibility of stability, equality and predictability.

We recognize that often the interests of the individual must give way to the greater public good, of which he can become the addressee, however, "the individual sphere of the citizen cannot be limited to a greater extent than is necessary",[55] the limitation must be proportional to the result and the goal.

GACG does not directly determine the priority of interests, it does not even explicitly indicate the priority of public interest when making a specific decision. Despite this, the law is clearly on the side of public interest, which is not at all strange and not alien to the legislation of other countries.

---

52 *Wong G.*, Towards the Nutcracker Principle: Reconsidering the Objections toProportionality. Public Law, 2000, 95-103.

53 *Nolte G.,* General Principles of German and European Administrative Law – A Comparison in Historical Perspective, The Modern Law Review, 1994, 193.

54 *Kumm M.*, The Idea of Socratic Contestation and theRight to Justification: The Point of Rights-Based Proportionality Review, "Law & Ethics of Human Right", NYU Law School, 2010, 149.

55 *Burduli I., Gotsiridze E., Zoidze B. and others,* Commentary on the Constitution of Georgia, Chapter Two, Tbilisi, 2013, 24 (in Georgian).

The presence of the threat of harming the public interest determines the peculiarities of a number of actions. Legislation determines priorities in the hierarchy of interest protection, following certain criteria, "it is not enough that the interference with the right serves a legitimate purpose. But proportionality must also be preserved."[56] In the decision "Megadat.com v. Moldova", the European Court of Human Rights notes that "the failure of national state authorities to balance the private and public interests involved in the case is likely to be used against the respondent state."[57]

As for the conflict of interests, which is characteristic of the administrative-legal relationship, the law focuses on the principle of proportionality when making a decision. The latter implies measurability. The importance of this principle is especially great in the conditions of "good governance", where the state and the administration are considered not as a ruler and only a sovereign, but as a reliable support, a partner.[58]

The years have changed the approach towards administrative law, administrative law is not only related to the possibility of carrying out repressive measures, it has become even closer to individuals and their interests. According to the opinion expressed in the literature, "the state has the ability to intervene in one or another area of the life of individuals based on the authority granted by law, although the same individuals can in some cases resist such intervention and restrain it. Crossing this line is exactly the biggest puzzle of administrative law."[59] Any restriction is justified in order to protect a more valuable legitimate interest. "Any measure restricting a person's right must be the least restrictive means necessary to achieve a legitimate goal.[60]

Protection of proportionality implies such a balancing of interests, where each side makes concessions. This is the need for the coexistence of public and private interest in the decision-making process and their reasonable protection. Of course, this principle is actualized when using the discretionary powers of the administrative body. Discretion is considered as a kind of "moderate threat" in relation to the principle of legal reliance, since we see "danger," which is associated with a legally limited, but still somewhat free possibility of action, where there is often a risk of an outcome that may be undesirable for the interested party. The issue is aggravated by the fact that checking the appropriateness of such a decision often goes beyond the possibility of court. The court respects the discretionary power of an administrative body and in many cases leaves it to itself to determine the legitimate purpose of making such a decision. The court requires from the administrative body a

---

56 Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of May 21, 2020, case NBS-268(K-19).

57 Megadat.com SRL v. Moldova, № 21151/04, §74, 08.04.2008,- Quoted from the decision of the Court of Cassation, case NBS-268(K-19)

58 *Khubua G., Kalichava K. (eds.),* Handbook of Administrative Science, Tbilisi, 2018, 185-186 (in Georgian).

59 *Rawlings H.,* Law and Administration, , Cambridge University Press, 2009, 17.

60 2014 decision of the Constitutional Court of Georgia on the case of Georgian citizens – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia, #1/2/569, 11.04.2014.

complete justification of the decision. The court does not check the expediency of the decision made by the administrative body, but its legality and justification.[61]

When evaluating the legality and expediency of a decision made within the scope of discretionary powers, it is important to determine whether the administrative body has investigated all relevant circumstances before issuing the act, so the court verifies the correctness of the factual circumstances.

8. Judicial and Legal Reliance Principle

The actualization of the issue of legal reliance means that the issue refers to the cancellation of a beneficial individual administrative act, or the dispute is related to the existence of an assurance of an administrative body and, accordingly, the request to issue an individual administrative act or perform an action. This issue, as a subject of dispute, is often assessed and decided by the court. In modern governance there is an attempt to interpret the various requirements as liberally as possible in favor of the individual.[62] Even the procedural norms with which the legislation is saturated, in many cases serve to protect the interests of the individual.[63]

As the current reality demonstrates, "regarding legal reliance, it should be noted that in many cases it becomes a matter for consideration by the court, and the intensity of its protection in relation to administrative bodies, beyond the dispute, is rarely found."[64] Such a view of the issue confirms the opinion in the legal literature that courts are better positioned in the area of rights protection compared to administrative bodies.[65] That is why, in many cases, the issue of existence or non-existence of legal trust will be decided by the court within the framework of the dispute. It is also noted in the scientific literature that "the court has to step from time to time into the space owned by the executive branch in order to verify whether the decisions made are in accordance with the law and whether the administrative bodies respond to the standards of fairness that the legislator must have intended."[66]

As mentioned above, the presence or absence of legal reliance is sometimes subject to judicial review. The plaintiff's claim may relate to the issuance of an act based on legal trust, the performance of an action, or the maintenance of the existence of a beneficial act. The court checks whether there is place for the existence of the legal reliance of the plaintiff. "The court has full jurisdiction to resolve the dispute, however, taking into account the specificity of the field, the degree of regulation of the discretionary field of the administrative body, the density and intensity of judicial control differs, therefore, the control of the court in these conditions must be appropriate and proportionate, depending

---

61 Uniform practice of the Supreme Court of Georgia on administrative cases, (II half of 2014 – 2015), Supreme Court of Georgia, Tbilisi, 2017, 19, <https://www.supremecourt.ge/files/upload-file/pdf/ertgvarovani-praktika-administraciuli.pdf> [17.11.2022].

62 *Hawke N., Parpworth N.,* Introduction to Administrative Law, 1996, 132.

63 Ibid, 131.

64 *Pezzer H.-J. (Hrsg.),* Vertrauensschutz im Steuerrecht, 2004, 257-258.

65 *Kumm M.,* The Idea of Socratic Contestation and theRight to Justification: The Point ofRights-Based Proportionality Review, "Law & Ethics of Human Right", NYU Law School, 2010, 142.

66 *Rawlings H.*, Law and Administration, 2009, 13.

on the importance of the object to be protected, a stricter test for discretion is not excluded to be used."[67]

Unlike the court, when submitting an administrative complaint, the administrative body reviewing the complaint is itself authorized to use discretionary powers, which gives the administrative body a wider opportunity to discuss the appropriateness of the decision. "Judicial control of decisions made within discretionary authority is limited by the constitutional principle of separation of powers, the court cannot turn into a higher administrative body and cannot exercise discretionary authority itself. The peculiarity of judicial review of discretionary power is that the court does not make a final decision and thus does not interfere with the discretion of an administrative body."[68] Accordingly, the court often uses the 4th paragraph of Article 32 of the APCG on the basis of which it declares an individual administrative act as null and void and instructs the administrative body to issue a new act after investigating and evaluating the circumstances.

Unlike Georgia, the German Code of Administrative Procedure[69] separately considers the possibility of judicial control of the decision made on the basis of discretionary powers. Article 114 of the German Administrative Procedure Code includes the possibility of checking the legality of an administrative act, refusal or action taken by an administrative body within the scope of discretionary powers.

9. Legal Reliance and Third Party Legitimate Interests

The rule of law implies the compliance of public power with the law[70] – this phrase accurately conveys the main obligation of administrative bodies to limit and fall within the limits established by law. If it were not for the violation of the law, the illegal beneficial act would not exist. Accordingly, the administrative body would not face a kind of conundrum due to the principle of legality and protection of the essential good of the individual. Therefore, not only the goal of protecting the individual should be sought in this principle, but also the "retraction" of the state due to its own mistake. As Prof. Besarion Zoidze notes, [71]"Constitutions are based on human rights, not human rights on constitutions." Obviously, we have to believe in the state authorities and we have to trust them. Trust in this case can be imagined in a broad sense, which implies benevolence and the belief that the state acts within the framework of law and justice, therefore, the existing trust in it is conditioned by a caring attitude. And on the other hand, trust is directed towards a specific legal act, a promise, and creates a reasonable expectation of the occurrence of a specified result or its maintenance.

---

67 Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of February 13, 2013, case NBS-448-443(K-12)

68 Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of March 7, 2019, case NBS-797 (K-18).

69 Verwaltungsgerichtsordnung, (VwGO), § 114, <https://www.gesetze-im-internet.de/vwgo/> [17.11.2022].

70 Rainer Arnold, The Role of the Rule of Law in the development of constitutional law, Journal of Constitutional Law Review, #8, 2015,21.

71 *Zoidze B.,* The Principle of Preserving the Essence of the Basic Right, Review of Constitutional Law, #6, 2012, 140 (in Georgian).

The public interest or the legally protected interest of a third party is considered to be the main obstacle to legal reliance. "A right granted by law has a superior force, which means that it is worthy of preferential protection compared to a legal reliance, if the issue is related to the protection of a third party or the public interest."[72] If the goal of balanced limitation of the parties' interest, proportional protection of their interest is important when determining proportionality, protection of the legal right of the third party becomes preferable. That is why, if the beneficial administrative act at the same time limits the rights of the third party, the interest of protecting the third party will outweigh the legal reliance. Obviously, the addressee of the beneficial administrative act will enjoy the right to receive compensation.

"Where the public interest does not prevail and the requirements of the law are clearer, the interests of individuals are more protected."[73] If we talk about the conflict between legal reliance and the rule of law, we must also mention that the rule of law does not exclude the possibility of obtaining a foreseeable and predictable result, moreover, legal trust itself is tied to the principle of legality, as long as administrative bodies are not authorized to perform any action beyond the requirements of the law, i.e. presumably, any of their actions, any of their decisions is considered legal. It is this assumption that sets up this kind of "maintenance" and "expectation of solid guarantee", with the principle of "I deserve, I own."

The Supreme Court of Georgia makes an interesting assessment, where it is stated that "citizen's trust in the action of the governing body should be evaluated more significantly than the interest protected by the administrative body."[74]

10. Conclusion

As the European Court of Human Rights points out, the behavior of authorities (administrative bodies) creates certain expectations in an individual.[75] The administrative body must take into consideration the expectations created in the society at the basis of its activities and assurances.

A formal approach to the issue is insufficient. It is important to use a measure of reasonableness. Thus, both the administrative body and the court, when evaluating the issue in each specific case, should use the measure of determining reasonableness in order to correctly calculate the harm or risks that may inevitably occur when deciding based on the conflict of interests. Public interest, at first glance, feeding the function of "lifeline" for the administrative body, will not always be an argument.

The basis of legal reliance is, of course, the obligation of the administrative body to act lawfully. Which indicates that any action taken by it is in accordance with the law. An administrative

---

72 J. Mertens de Wilmars, The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed-Economy Systems, 1983, 15-16.

73 *Hawke N., Parpworth N.,* Introduction to Administrative Law, 1996, 130.

74 Uniform practice of the Supreme Court of Georgia on administrative cases, (II half of 2014 – 2015), Supreme Court of Georgia, Tbilisi, 2017, 19 <https://www.supremecourt.ge/files/upload-file/pdf/ertgvarovani-praktika-administraciuli.pdf> [17.11.2022].

75 Case 289/81 Mavrides v. European Parliament [1983], E.C.R. 1731, paragraph 21

body must not go beyond the established legal framework, therefore, what emanates from it, including the promise, gives us a legitimate basis to trust and accept as inevitable.

The basis of expectation is not a person's subjective state of mind and irrational ideas, but existing legislation and even established practice. Thus, it is important to think about how honest the attitude is towards an individual for whom the government, administrative body or official, represents an authority, gets disappointed by them and becomes a victim of a false assurance. This destroys the moral image of administrative bodies in front of the public.

The vacillation of administrative bodies within the framework of regulating relations, their future-oriented behavior to the detriment of a person's interests should not hang like a sword of Damocles. It is important to maintain legal stability. All the more so when the administrative bodies are not limited in time to review and change (even revoke) their decisions. "Public interest" should not turn into a whale that can swallow all the good things that can counterbalance it. Stability is an important value for the rule of law. It provides an opportunity to predict the future of people, which in turn gives them the opportunity to plan their lives and where it becomes necessary to interact with the administrative body, participate in public-legal relations, to anticipate certain outcomes beforehand.

Bibliography:

1. Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995.
2. Administrative Procedure Code of Georgia, SSM, 39(46), 06/08/1999.
3. Administrative Procedure Act, Estonia, (HMS), https://www.riigiteataja.ee/akt/123022011008
4. General Administrative Code of Georgia, SSM, 32(39), 15/07/1999.
5. Verwaltungsverfahrensgesetz (VwVfG), https://www.gesetze-im-internet.de/vwvfg/ [10.09.22].
6. Verwaltungsgerichtsordnung, (VwGO), https://www.gesetze-im-internet.de/vwgo/ [10.09.22]
7. Сборник законодательных актов по административным процедурам, GIZ, BMZ, 2013, 255.
8. *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Handbook of General Administrative Law, Tbilisi, 2005, 124 (in Georgian).
9. *Arnold R.,* The Role of the Rule of Law in the development of constitutional law, Journal of Constitutional Law Review, #8, 2015, 21 (in Georgian).
10. *Burduli I., Gotsiridze E., Zoidze B.* and others*,* Commentary on the Constitution of Georgia, Chapter Two, Tbilisi, 2013, 24 (in Georgian).
11. *Elliot M.,* Unlawful representations, Legitimate Expectations and Estoppel in Public Law, Judicial Review, 2003, 73-74.
12. *Harlow C., Rawlings R.,* Law and Administration, 2nd edn. (London, 1997), chs.1–2; M. Loughlin, Public Law and Political Theory, Oxford, 1992, 23.
13. *Hawke N., Parpworth N*., Introduction to Administrative Law, 1996, 130-132, 165.
14. *Izoria L.,* Modern state, modern administration, Tbilisi, 2009, 116-119 (in Georgian).
15. *Khubua G., Kalichava K. (eds.),* Handbook of Administrative Science, Tbilisi, 2018, 185-186 (in Georgian).
16. *Kozeluh U.*, Wissenschaft und Gesellschaft, erhältnis – Auswirkungen – Einbindung , Ein Bericht im Auftrag des Rates für Forschung und Technologieentwicklung, Wien, 2008, 25.

17. *Kumm M.,* The Idea of Socratic Contestation and theRight to Justification: The Point ofRights-Based Proportionality Review, "Law & Ethics of Human Right", NYU Law School, 2010, 142, 149.
18. *Lembcke O.W., van Klink B.,* Gesellschaftliche Voraussetzungen freiheitlicher Ordnung, Zeitschrift für Politische Theorie, Jahrgang 8, Heft 2/2017, 219.
19. *Nolte G.,* General Principles of German and European Administrative Law – A Comparison in Historical Perspective, The Modern Law Review, 1994,191, 193, 714.
20. *Pezzer H.-J. (Hrsg.),* Vertrauensschutz im Steuerrecht, 2004,181-183, 257-258.
21. *Pautsch A., Hoffmann L. (Hrsg).,* Verwaltungsverfahrensgesetz, Kommentar, 2., neu bearbeitete Auflage, 2021, 65.
22. *Pilving L*., Haldusakti siduvus. Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalikõiguslikel lubadel, 2006, 22.
23. *Rawlings R., Harlow C*., Law and Administration, Cambridge University Press, 2009, 6, 13, 17.
24. *Schaal G.S.*, Vertrauen, Verfassung und Demokratie, Wiesbaden 2004, 189.
25. *Schwabe I.,* Decisions of the Federal Constitutional Court of Germany, 2011, 320 (in Georgian).
26. *Stott D., Felix A*, Principles of administrative law, London, 1997, 69-71, 275-276.
27. *Turava P.,* Principle of legal reliance (comparative legal analysis), Review of Georgian Law, 2007, #2-3, 212, 214, 216, 218 (in Georgian).
28. *Turava P., Tskepladze N.,* Handbook of General Administrative Law, Tbilisi, 2013, 176 (in Georgian).
29. *Uriadmkofeli K.,* The principle of legal reliance in administrative law, doctoral dissertation, Georgian-American University, 2015, 44, 124, <https://www.gau.edu.ge/storage/app/media/GAU%20Research%20Books%20and%20Documents/Kakhaber%20Uriadmkopeli%20PhD%20Thesis-2016.pdf> [10.09.22].
30. *Vachadze M., Todria I., Turava P., Tskepladze N.,* Commentary on the Administrative Procedure Code of Georgia, Tbilisi 2005, 200-201 (in Georgian).
31. *Wilmars J.M.,* The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed-Economy Systems, 1983, 15-16.
32. *Wong G.,* Towards the Nutcracker Principle: Reconsidering the Objections toProportionality, Public Law, 2000, 95-103.
33. *Zoidze B.,* The principle of preserving the essence of the basic right, Review of Constitutional Law, #6, 2012, 140 (in Georgian).
34. *Zoidze B.,* Constitutional control and order of values in Georgia, Tbilisi, 2007, 46 (in Georgian).
35. 2014 decision of the Constitutional Court of Georgia on the case of Georgian citizens – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia, #1/2/569, 11.04.2014.
36. Decision of the Constitutional Court of Georgia of December 27, 2013 on the case "Joint liability company Grisha Ashoredia" vs. Parliament of Georgia", № 2/3/522,553 II-42.
37. Uniform practice of the Supreme Court of Georgia on administrative cases, (II half of 2014 – 2015), Supreme Court of Georgia, Tbilisi, 2017, 19 https://www.supremecourt.ge/files/upload-file/pdf/ertgvarovani-praktika-administraciuli.pdf [10.09.22].
38. Recommendations developed as a result of regular meetings of judges in the Supreme Court of Georgia in the field of civil and administrative law and uniform practice of the Supreme Court of Georgia on civil law issues, Tbilisi, 2011, 72, https://www.supremecourt.ge/files/upload-file/pdf/rekomenda-samoqadmin.pdf [10.09.22].

39. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of May 17, 2022, case № BS-531(K-20).
40. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of November 25, 2021, case #BS-131(K-19).
41. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of May 21, 2020, case NBS-268(K-19).
42. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of April 2, 2020, case № BS-570(K-19).
43. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of March 7, 2019, case NBS-797 (K-18).
44. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of February 3, 2015, case NBS-428-423(2k-14).
45. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of February 13, 2013, case NBS-448-443(k-12)
46. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of June 6, 2013, case NBS-699-685(K-12).
47. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of March 17, 2010, case NBS-939-899(K-09).
48. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of September 10, 2008, case NBS-942-903(K-07).
49. Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of January 24, 2008, case NBS-117-110(K-07).
50. Megadat.com SRL v. Moldova, № 21151/04, §74, 08.04.2008.
51. Case 289/81 Mavrides v. European Parliament [1983], E.C.R. 1731, paragraph 21.

Meri Agapishvili*

The Issue about the Provision for Damage Inflicted by Preventive Security Measures upon Adjudicating the Dispute over Legality of Enabling Individual Administrative-legal Acts

The Constitutional Court of Georgia considers the constitutional submission of Tbilisi Court of Appeals requesting to establish the constitutionality of inadmissibility of the reversal of provision upon applying the preventive security measures in the administrative process.

The idea of admitting the reversal of provisional measures in the administrative proceedings of civil procedure standards aims at the maintenance of balance between the private interests of participants in the administrative process. However, it is impossible to speak about the methods and prospects of its implementation without the joint understanding of the enabling individual administrative-legal act as the essence of examining the result of conflict of interests, the legitimacy of state administration, the principle of legal trust and the major function of administrative justice at the stage of preventive security.

The goal of this paper is to present certain viewpoints on the problematic aspects of admissibility of the reversal of civil security in administrative proceedings and their solutions pursuant to the principle of their legal trust.

Keywords: *provisional measures, preventive security, damage, conflict of private interests, legal trust.*

1. 1ntroduction

Upon the constitutional submission[1] of Tbilisi Court of Appeals of April 07, 2021, with respect to the 1st part of Article 19 and the 1st part of Article 31 of the Constitution of Georgia the Constitutional Court was requested to establish the constitutionality of the normative content of the 3rd part of Article 29 (only upon applying "e" sub-paragraph of the 2nd part of article 29, in the section of enabling act) and Article 31 (only upon the conflict of interests of subjects of private law) of the Administrative Procedures Code of Georgia, pursuant to which the provision of security envisaged by Civil Procedure Code and/or the rule on the compensation of damage caused by the provisional measures are not applied upon using the above-mentioned norms.

The constitutional submission was made about the legality of construction permit within the adjudication of administrative dispute, in which under the 3rd part of Article 29[2] of the Administrative

---

* Master of International Law at Faculty of Law at TSU, General Practice Attorney, The Member of Commercial and Competition Law Committee of Georgian Bar Association.

1 Constitutional submission of Tbilisi Court of Appeals of 30.03.21, <https://constcourt.ge/ka/judicial-acts?legal=11044> [12.01.2022].

2 Under the 3rd part of Article 29 of the Administrative Procedure Code of Georgia, at the request of a party the court may suspend the validity of the individual administrative-legal act or of its part, if the

Procedure Code of Georgia the first instance of administrative court of Georgia suspended the construction permit as the validity of individual administrative-legal act[3] envisaged by "e" subparagraph of the 2nd part of Article 29 of the same Code. The third person entitled to the permit of suspended construction requested to impose the provision for compensatory damage caused by the suspension of construction permit upon the plaintiff.

It is ambiguous, how the administrative courts should resolve the issue about the provision of compensatory damages laid down in "e" sub-paragraph of the 2nd part of Article 29 of the Code of Administrative Procedures upon adjudicating the dispute on the legality of enabling act, when the right to preventive security measures is exercised in the sphere of conflict of two various private interests with respect to the individual administrative-legal act. The legality of individual administrative-legal acts including construction permits are frequently made the subject of judicial disputes. The interests of persons entitled to the permit, among them that of real-estate developers, are in conflict with the interests of natural persons (health, safety, environmental, etc.) and cause the resistance of population living in building site. Obviously, the satisfaction of many -thousand demands with the suspension of administrative-legal basis of large-scale investment projects will cause the restriction[4] of access to legal remedies for the protection of potential victims' rights with "wealth effect", that is in contradiction with the essence of Constitutional State and the principle of rule of law. On the other hand, the addressees of suspended construction permit turn to the property right, the components of adversarial fair trial and the equality of parties which have effect in case of civil legal "reversal of provision".

The Supreme Court of Georgia, except for some exceptions, deems it inadmissible[5] to take the security measures for civil legal claims in administrative proceedings and accordingly, to apply its reversal mechanism envisaged by Article 199 of Civil Procedure Code. The court of cassation has not extended its position related to the inadmissibility of administrative procedural analogue of providing the security for damage caused by a particular provisional measure. Neither the direct legislative regulation exists concerning this issue.

Occasioned by the mentioned, the common courts are certainly faced with the issue about changing the established practice and reality, which are created by the insufficiency of regulatory laws, by way of constitutional submission. The position, which is reflected in the constitutional

---

substantiated suspicion about legality of the individual administrative-legal act exists or if its urgent enforcement substantially prejudices the party or makes it impossible to protect its legal right or interest.

3 The justification of security from suspensive effect by the private interest of the addressee of enabling act is enshrined only in "e" sub-paragraph of the 2nd part of Article 29 of the Code of Administrative Procedures. Hence, upon applying the preventive measures, prescribed by the 3rd part of Article 29 of protection of rights, towards it the conflict of private interests between the plaintiff and addressee of the act will be arisen.

4 It is hard to imagine, that the statistical (average) citizen, the foundation of whose house may be demolished due to the construction of a building in the neighborhood, will be able to deposit many thousands of money which is demanded by the builder in the form of compensation of damage caused by the suspension of construction permit. In this case, if not maintaining the preventive remedy for protection of the right, there is no point in filing a revocable or confessional lawsuit in court.

5 Judgment of 09 January, 2019 on the case № bs-1562(us-18) of the Chamber of administrative cases of the Supreme Court of Georgia<http://prg.supremecourt.ge> [12.01.2022] (in Georgian).

submission of Tbilisi Court of Appeals and suggests that the divergent degree of protection of private interests in various proceedings breaches the constitutionally protected right to property and fair trial as well as the adversarial component of the right to fair trial enshrined in Article 6 of European Convention on Human Rights, is definitely worth sharing. However, the main thing is, that in order to balance the mentioned private interests, to what extent the introduction of civil procedural standard into the administrative proceedings and the imposition of damages caused by the suspension of enabling individual administrative- legal act upon the party prejudiced by this act will be justified, that practically, would deprive the latter of the opportunity for protection of the right in court. Upon considering the administrative dispute on declaring the individual administrative-legal act as null or void, it is impossible to pass the judgment on the issue of admissibility of the reversal of preventive security measures without determining the liable person for the damages, when the validity of the appealed enabling administrative- legal act is suspended by the court on grounds of the substantiated suspicion of its legality or the threat of significant damage to the plaintiff's right or interest. The necessity for the development of reasoning exactly in this direction became the source of inspiration for this paper.

The participants of administrative justice have been in agreement about the necessity for reforms and independent development of Administrative Procedures Law of Georgia for a long time. The outcomes of discussions about constitutional submission, in the sphere of preventive security measures, will apparently be the step forward on the way of this development. In the paper, for our part, we will try to focus our attention on several problematic aspects of administrative procedural analogy with the reversal of provisional measures and seek for their solutions.

By the example of construction permit, only within the revocable and confessional claims, we will refer to the issue about the compensation of damages caused by the suspension of enabling act enshrined in "e" sub-paragraph of 2nd part of Article 29e of the Code of Administrative Procedures. As concerns the temporary judgment regulated by Article 31, in contrast to article 29, it is applied when the active regulation of individual administrative- legal act does not exist. Accordingly, considering the circumstances of the case, a larger spectrum of conflicts of rights and interests may stand trial, where the prevelance of private interests is also admissible and may be deemed to be the analogue with civil legal security measures[6].

The considerable part of the paper is dedicated to defining the essence of individual administrative- legal act (by the example of construction permit) as a consequence of conflict of interests (2), which leads to understanding the significance of the emerge of third persons' interests to be protected by the institute of so called "reversal of provision" from the principles of legal trust in the administrative process (3). We will review the legal reality existing today in terms of abolishing the

[6] The case, when preventive security measure envisaged by Article 31 of the Code of Administrative Procedures is applied within the revocable or confessional claims, for instance, in the dispute about the legality of the decision of National Agency of Public Register, the demand for abolition of alienation/encumbrance of real estate, occasioned by its consequences, has the effect of suspension of the decision on the registration and the same regulation shall apply thereto as the suspension of the validity of the act.

reversal of revocable/ confessional administrative claims (1). In addition, we will refer to the analogous legislative regulations in France and Germany (4).

2. The Essence of Suspending the Validity of Appealed Enabling Individual Administrative-legal Act as a Prohibition of the Reversal of Provisional Measures

In the administrative process, within the revocable (the claim on declaring the annulment or invalidation of the administrative-legal act envisaged by Article 22 of the Code of Administrative Procedures) and confessional (the action for acknowledgement of the absence of an act, envisaged by Article 25 of the Code of Administrative Procedures) claims, the preventive remedy of the right protection is regulated by Article 29 of the Code of Administrative Procedures. Under the 3rd part of the mentioned Article the court is entitled to suspend the validity of the individual administrative-legal act, to which the suspensive effect of a claim is not applied pursuant to the 2nd part of the same Article. In accordance with the "e" subparagraph of the 2nd part of Article 29 the enabling individual administrative-legal act is secured from the suspensive effect of a claim, that implies that the priority of interest of the addressee of enabling act – the third party is recognized by the rule on administrative procedure with regard to the preventive protection of a plaintiff's right. This starting priority is related to the goal[7] of procedural implementation of subjective public-legal right of the third parties entitled exactly to the individual administrative-legal act. The protection of the addressee of enabling act may be violated as an exception upon the existence of preconditions for applying the 3rd part of Article 29 of the Code of Administrative Procedures if: 1. the substantiated suspicion for the legality of individual administrative legal act exists or 2. its urgent execution significantly prejudice the party or makes it impossible to protect his legal right or interest.

The guarantee of compensatory damage caused by the provisional measures regulated by the Code of Civil Procedures is not applied in administrative proceedings. Due to the absence of legislative regulation on this issue, the administrative courts are guided by the judgement of the Supreme Court of January 09, 2019, under which carrying out the provision of security enshrined in Articles 57 and 199 of the Code of Civil Procedures of Georgia in administrative proceedings is inadmissible, except for the cases when the provisional measures stipulated by the Code of Civil Procedures is in force, the application of which in administrative proceedings are admitted only in the exceptional cases by the Supreme Court.

The separation of the preliminary remedies for the protection of rights according to administrative and civil proceedings and the establishment of the priority of their application ensure the smooth management of administrative process, as the remedy for the enforcement of the right to fair trial. The 3rd part of Article 29 and Article 31 of the Code of Administrative Procedures create the proper opportunity for protection of the right for all the types of claims and the maintenance of their autonomy represents the perfect precondition for the legality of the process of preliminary protection of the right. However, it is quite another thing, when the matter of fact concerns the provision of

[7] *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P. (Ed.)*, Administrative Procedural Law Guide, Tbilisi, 2008, 232 (in Georgian).

compensatory damages inflicted by the preventive security measures in administrative proceedings. The position about the inadmissibility of applying the provision for damages caused by security measures in administrative proceedings, which is reflected in the ruling of the Supreme Court from January 09, 2019, does not include the sufficient substantiation in respect to the rights of the third person participating in the administrative process, that leads to certain ambiguities upon reviewing the demands for the application of reversal of provision in courts of lower instances. Especially, if taking into account that the participation of the interests of a plaintiff and addressee of enabling act in the dispute on legality of enabling act at the stage of preventive protection creates the kind of illusion about the conflict of rights, when the administrative court has to review the issue related to the application of reversal of provision on the basis of conflict of private interests, and the liability of the creator of dispute – the administrative body issuing the disputed act stays at a distance from the trial.

The large scale of using the Code of Civil Procedures in administrative proceedings often leads the divergence between these procedural orders down to the degree of inquisition and the attention is not focused on its primary source – the fundamental distinctive mark of administrative justice that is expressed in the control of legitimacy of public administration. The inquisitive nature of administrative process is derived from the function of having control over the public legitimacy. This function is performed at the stage of resolving the issue about taking the preventive security measures as well as in the whole administrative process. The discussion on the issue about the admissibility of reversal of provisional measures in the administrative process must be held taking into account the basic context of exactly judicial control over the legitimacy of public administration.

The institute of provisional measures is the substantive dimension of the right to fair trial, through which the objective of implementing the results of court hearing on the maintenance of violated right and its restoration is achieved. As it is noted in a number of judgments, including those enacted against Georgia, of European Court of Human Rights, the right to fair trial would not be authentic without the enforceability of court ruling[8]. In civil process the objective of enforceability of court ruling is related to the goal of ensuring the stability of civil circulation, and in the administrative process the primary aim is to eradicate the illegal governing activities that will not be limited only to the conflict of interests of natural persons. Thus, in the dispute about the legality of administrative act, the attribution of private legal logics to the preventive protection of right, which is occasioned only by the horizontal conflict of interests, will clear it from the autonomous content of administrative justice and transform it into the identical tool of civil provisional measures, which will create the reality incompatible with the basic function of administrative justice.

Upon rendering the decision on the application of civil legal provisional measures the court relies on the entirely hypothetic supposition, whereas upon reviewing the suspension of disputable individual administrative-legal act by the administrative court the incomplete, but still, preventive inspection of its legality is employed. In the literature, the standard of "substantiated suspicion" to be used upon reviewing the mediation about the suspension of application of individual administrative-legal act, with high probability, is associated with the assumption prescribed in the 3rd part of Article

[8] Judgment of 27 September, 2005 of European Court of Human Rights on the case Iza LTD and Makrakhidze v Georgia, §42 (in Georgian).

29 of the Code of Administrative Procedures about the existence of circumstances, which represents the basis for the request to employ the preventive security measures[9]; In this case, the prospect of claims may be inspected more thoroughly than in the civil process, where the implementation of provisional measures is based on the simple assumption of claim satisfaction, however, this action of court must not be transformed into the substantive investigation for the justification of a claim[10].

Pursuant to the content laid down in the 3rd part of Article 29 of the Code of Administrative Procedures, at the plaintiff's request the appealed individual administrative legal act undergoes the test on preventive security and the case about the suspension of its validity shall be resolved according to the test results. In particular, 1. in the part referring to the existence of substantiated suspicion on its legality or 2. in the part referring to the infliction of damage to the legal right or interest of a party. Occasioned by the content of the aforesaid norm, in the administration process the initial goal of preventive measure of the protection of right is the exclusion of validity of illegal regulatory act, and the confirmation of the preconditions reflected in it can be deemed as a preventive judicial control over the legitimacy of public administration, due to which in the administrative proceedings the measure for suspension of validity of the appealed act pursuant to the 3rd part of Article 29 cannot be identified with the civil procedural provisional measure having even the similar protective effect.

In the administrative dispute about legality of the enabling individual administrative- legal act the Constitutional Court shall render the decision on the issue about the application of civil procedural standard for the reversal of provision with the motivation of protecting both adversarial private interests upon suspending the enabling act envisaged by "e" subparagraph of the 2nd part of Article 29 ("the suspension of which will considerably prejudice another party's right and interest"). However, in order to exclude the attribution of regulation opposing the principle of superficial and administrative-legal safety to this issue, it is necessary to understand the essence of participation of public and private interests, as a genetic compiler, in the issuance of the enabling individual-legal act- in this case a construction permit, not to say anything about the threat of restricting the access to the right to fair trial with wealthy effect against the potential third persons (future plaintiffs) prejudiced by the enabling act, as it will be practically impossible for them to place the amount of compensation for damages inflicted by the suspension of large construction projects on deposit and to defend themselves from the potential irreversible damage in the process of considering the claim.

3. The Individual Administrative-legal Act as the Consequence of Conflict of Interests (by the Example of Construction Permit)

The construction permit, like other individual administrative-legal acts, can cause the complex conflict of interests. The demands for its abolition, as a rule, for the part of administrative body are based on the potential violation of enterprise- legal function of a construction permit. The lawsuit is

[9] *Abuseridze G.,* The preventive security measures in administrative law, Jour. "Justice and law", #2(62)'19, 2019, 5-19, <https://www.supremecourt.ge/files/upload-file/pdf/martlmsajuleba-da-kanoni-2019w-n2.pdf> (in Georgian).

[10] *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P. (ed.),* Administrative Procedural Law Guide, Tbilisi, 2008, 390 (in Georgian).

filed for the negligence in the legally protected public interest on the part of the administrative body by the party, which implies the protection of its private interest. Accordingly, the court also has to inspect the issue about the legality of developing the public interests to be protected within the framework of implementation of spatial planning and the public-legal entitlement to the urban planning made by the administrative body via the private interest.

The construction permit is the result of implementing the complex proceedings that implies the counterweight and balance between all the salient public and private interests[11]." Otherwise, this process can be called the subjectivism of interests, which is the phenomenon characteristic of the flexible model of the modern, legal, social state. "From the contextual viewpoint, the public interest encompasses the private interest as well: it either facilitates the realization of the private interest or comes into conflict over it[12]. It is true, that the diffusion between public and private interests remains the significant sign of forming public administration, but the interactive processes between them make this limit more dynamically interpretable." The particular factual combination of public goods has assumed the pluralistic and procedural nature. The Constitution of a democratic state refuses to provide the specific definition of content of public interest, public goods and makes it subordinated to the dynamics of development of pluralistic society[13]." The public interests participating in the process of issuance of construction permit is stipulated by the 2nd part of Article 2 of Georgian Code of Spatial Planning, Architectural and Construction Activities, including:

"b) Creating the decent environment for the life and activities of a human, the protection of human health, environment, natural resources and cultural heritage in the process of spatial planning, urban planning and construction;

g) Ensuring the effective participation of the society in the process of spatial planning and urban planning;

z) Ensuring the safe urban construction for human's health and life, establishing the best practice of building activities and raising the quality of construction;"

The public interests reflected in the above mentioned objectives combine the private interests, which the residents of building area may have in relation to the construction. The enterprise – legal function of the construction permit implies the balance between the private interest of a seeker for the permit and subjectivized public interests (which in this case represents the private interests of population, neighbors as well) resulted from the administrative proceedings as well as the establishment of such a determination that will exclude the occurrence of well-grounded conflict

---

11 The 2nd part of Article 9 of the Spatial Planning, Architectural and Construction Code of Georgia, The legislative Herald of Georgia, 3213-rs, 13/08/2018 <https://matsne.gov.ge/document/view/4276845?publication=10> [01.11.2022] (in Georgian).

12 *Kalichava K.*, The subject of administrative science, in the collection: Administrative science guide, *Khubua G. Kalichava K. (eds.),* The Institute of Administrative Sciences, TSU, 2018, Ch. II. 69, <http://lawlibrary.info/ge/books/2018giz-ge-administraciuli_mecnierebis_saxelmdzgvanelo.pdf> [01.11.2022] (in Georgian).

13 *Izoria L.,* Modern State- Modern Administration, Publishing house "Siesta", Tbilisi, 2009, 139, <https://www.tsu.ge/data/file_db/faculty-law-public/L[1].Izoria-Tanamedrove%20saxelmwifo.pdf>[11.01.2022] (in Georgian).

between the legal interest/right of various persons towards the construction. This can be achieved by practical implementation of the objectives prescribed by the Code. And the failure in accomplishment of these objectives, in its turn, gives rise to disputes pertaining to the legality of construction permits. Hence, the dispute over the construction permit may be initiated by the conflict of interests between natural persons, but the source of conflict always represents the failure in implementation of that public interest on the part of administrative body, which implies the absolute conflict of adversarial interests and the provision of legality of choice in behalf of any of the interests. "The decisions rendered by public administrative bodies shall ensure the regulation of conflict of interest existing in the society and follow the course of the daily life of the country determined by the political power of a state[14]." In the process of the issuance of construction permit the regulation of conflict of interests may be frequently hindered by the fact, that the obligation to ensure the participation of the person concerned with the permit proceedings, which is the key factor for raising the legality of this proceeding, is neglected[15].

In the Doctrine of Administrative Law, the significance of realizing the content of principles for the implementation of public administration is recognized in administrative proceedings as in the function. "The principles of administrative proceedings are the ideas, which must be shared by all the administrative bodies and official persons in the process of implementation of management, their content expressed in various norms shall be complied with and followed by them. Since the principles of administrative law represents the guidelines, which the whole process of management should be saturated with, they shall apply not only to the activities performed within the administrative proceedings in the administrative body, but their content shall be reflected in the implementation of all the management activities which are performed within the activities of public administration…"[16]

Occasioned by the aforesaid, based on the substantive enterprise – legal function, the individual enabling acts (including construction permit) are entitled to the presumption of achieving the agreement and balance between the public and private interests, which is one of the manifestations of legality of the act and the salient aspect of functioning the rule of law, which, in its turn, represents the consequence of unwavering defense of principles for implementing the public administration. "Principle of proportionality, principle of equality before law, principle of legality, principle of impartiality in judgment, principle of transparency (openness), principle of legal trust – these are the guidelines without which the public administration, as the crucial function of a state, is impossible to implement. Based on the above mentioned, whichever form the performance of the function – public administration may take, the compliance with these principles is essential and unconditional for any person performing the function."[17]

---

14 *Turava P.,* General Administrative Law, Publishing house "World of Lawyers", Tbilisi, 2016, 44 (in Georgian).

15 *Churghulia D*., Construction Permit Administrative Proceedings as a Mechanism for Implementing Construction Safety, Journal of Law, (2), 180-201, <https://doi.org/10.48614/jlaw.2.2020.180-201> [18.01.2022] (in Georgian).

16 *Turava P., Pirtskhalashvili A., Kardava E.,* Administrative Proceedings in Public Service, Tbilisi, 2020, 40 (in Georgian).

17 Ibid, 41 (in Georgian).

The above mentioned presumption is violated by making the legality of administrative-legal act disputable, that leads to the imposition of burden of proof for the legality of an appealed act upon the administrative body[18]. The degree of violation of presumption is increasing, when the court at the stage of preventive protection considers, that some foundations for the suspension of validity of the appealed act prescribed by Article 29.3 exists[19].

Hence, pursuant to the presumed legality of management in the Constitutional State and the combination of the 3rd part of Article 29 and the 2nd part of Article 17 of the Code of Administrative Procedures, through applying the systemic-teleological method and under the conditions of providing the definition through the unified and genetic principles[20], it is inadmissible to worsen the situation of the plaintiff by imposing thereto the provision for compensatory damages prejudiced as a result of violating the presumption of legality of the appealed act within the application of preventive security measures of rights, and to leave the administrative body issuing the act beyond the limits of liability.

The seeker for the construction permit involved in the process of obtaining the act, which has public legal functions, is subordinated to the relevant legal regulation at the stage of administrative as well as legal proceedings, which implies, that in case of failure of reaching the compromise between his/her interests and those of his neighbors and having regard with the possible negative results, the person holding the permit agrees to "replace" the authority issuing the permit by himself in both internal and external control during inspecting the legality of the permit and apply the outcomes to himself. And upon issuing the permit the administrative body, for its part, assumes liability to meet not only the essential but the preventive standards of its legality established by the 3rd part of Article 29 of the Code of Administrative Procedures as well.

Based on this, upon hearing the case of even preventive procedural measures of the suspension of validity of administrative-legal act, the grounds for the application of private-legal procedural logic to the subject of dispute must not be considered to be only the conflict of interests of natural persons by the court. By our example, the adversarial private interests of construction permit are those interests which under the construction applicable law are protected by the public objectives of the state both at the stage of administrative and legal proceedings. Besides, in contrast to the civil trial, at the stage of preventive protection of the right, the administrative court preventively inspects the suspicion of legality of the appealed act and the degree of the breach of right, which implies the summary examination of legal situation[21]. The confirmation of any grounds (the substantiated suspicion about legality or substantive prejudice to the plaintiff's interest or right) for the suspension of construction permit appealed in court implies that the administrative body issuing the construction permit could not

---

18 The 2nd part of Article 17 of The Administrative Procedures Code of Georgia, The Legislative Herald of Georgia, <https://matsne.gov.ge/ka/document/view/16492?publication=84> [11.01.2022] (in Georgian).

19 According to the enforcement theory the presumption of legality violated by suspensive effect is expressed in the validity of an act and not in the suspension of authenticity

20 On the principles of definition of a norm see the Resolution of 09 July, 2020 on the case № bs – 10 (k-20) of Chamber of Administrative Cases of Supreme Court of Georgia, <http://prg.supremecourt.ge/Default.aspx> [11.01.2022] (in Georgian).

21 *Kopaleishvili., Skhirtlade N., Kardava E., Turava P. (eds.),* Administrative Procedural Law Guide, Publishing house "World of Lawyers", Tbilisi, 2008, 390 (in Georgian).

provide the act to overcome the preventive examination stage of legality (among them the performance of function of conflict of interests). The potential damage inflicted to the third person entitled to the suspension of validity of such an enabling act will be caused not by the plaintiff's request to suspend the act, but by the negligence of enterprise – legal function of the appealed act and the standard of preventive legality on the part of administrative body. The suspension of validity of the act is the procedural – legal consequence only of this failure. Occasioned by this, except for the case when the abuse of rights by the plaintiff is proved[22], the person entitled to the construction permit should seek for the way of providing the potential compensatory damage caused by the suspension of the permit, first of all, in the sphere of protection of legal trust towards the permit and, accordingly, of the liability of administrative body issuing the act.

4. The Legal Defense Trust of an Addressee of the Suspended Enabling Administrative-legal Act and the Liability of Administrative Body Issuing the Act

The issue about the existence of legal defense, as a rule, is not adjudicated in courts within the dispute about the legality of individual administrative-legal act. The aforesaid may become the subject of judicial investigation in case of issuing the request for the compensation of damage on the part of the addressee prejudiced by recognizing the annulment/invalidation of the enabling act. However, the well-grounded solution of the issue about the provision of damage inflicted by the suspension of individual administrative-legal act is impossible to be made without entailing the issue about legal trust.

As mentioned above, in the revocable and confessional administrative dispute the case of compensation for damage inflicted by the preventive security measures of the right – the suspension of validity of the act must be subordinated to administrative-legal foundations and not be redirected in the private legal procedural space to the plaintiffs prejudiced by the constructions. However, it should be highlighted, that the existence of the right of addressee of the act to self-defense is beyond any doubt. The main point is, that in contrast to the civil process, in the administrative process the subjective public-legal right of the addressee of the enabling act is based not on the adversarial principle of the process or equality of parties, but it is occasioned by the principle of legal trust of the addressee towards the suspended administrative act, that is implemented by the liability of the body issuing the act on the provision for damage caused by any fault related to the legality of the act.

Under these circumstances, the legal trust is revealed as the integral hypostasis of legal security, which, it is true, represents the subjective dimension of legal security, but it is tightly linked to and occasioned by the stability of management in the constitutional state as well as the presumption of legality (objective legal security) and in case of delaying the validity of the act the legal trust ensures the protection of interests of its addressee.

According to the literal definition of the 5th and 6th parts of Article 60^1 of the General Administrative Code, the scopes of legal defense trust applies only to the abolition of enabling

[22] In such a case, the plaintiff's demand for the damages is possible by general foundations.

administrative-legal act and is expressed in the obligation for compensation of damage on the part of administrative body. Neither enterprise – legal, nor direct procedural regulations pertaining to the damage inflicted by the suspension of the effect of enabling act possessing the power of legal trust can be encountered.

If we follow the admission of logic of reversal of provision in the administrative process, one of the ways of exercising the right of the addressee of enabling act may be the integration of legal trust in solving the issue about the application of preventive security measure, when the provision for damage caused by suspension of the act is imposed on the administrative body issuing this act, which necessitates the relevant amendments to be made to the Code of Administrative Procedures. However, thenceforth this way seems unpromising due to conflicting with the public interests of functioning of its administrative bodies.

The second alternative way of the right protection may be the employment of remedy for the protection of rights envisaged by the 6th part of Article 60^1 of General Administrative Code by the addressee of the suspended act as well as the request of administrative body for the compensation of damage caused by the suspension of its enabling act, when the issue related to the definition[23] of *Praeter legem* of the 6th part of Article 60^1 will be laid before the Administrative Court – in particular, whether the legal defense trust applies to the right to compensation of damage caused by the suspension of the validity of the act. In this case, the alternative of legislative change is deemed to be the opportunity for development of judicial law.

In order to be aware of the scopes of liability of an administrative body, the interest is evinced in the fact, that Georgian legislation considers only the wrongdoing of the addressee as the circumstance excluding the legal trust towards the enabling act. However, it is noteworthy, to what extent the 5th part of 60^1 of General Administrative Code allows to provide the broader definition of the "addressee's wrongdoing" based on the type of addressee's activities and economic status. This particularly concerns large construction developers, who obtain the construction permits within their usual activities and they are imposed the duty of prudence, good faith, compliance with requirements, among them, in relation to the third persons as well. Hence, it is expedient to determine the sphere of legal defense trust in the dispute on the compensation of damage inflicted by the disapproval of the legal trust act considering the role of prudent economic operator[24] like the practice of Court of Justice of European Union.

---

[23] When defining « Praeter legem (Lat. "outside the law") it is true, that the definition of the norm neither corresponds to nor matches the literal meaning of the law, but it does not contradict it either. At this time, the law is somehow "silent" about the problem, which necessitates the legal solution, but the judge has to update the content of the norm and adapt it to the changed social relationships. *Khubua G.,* Definition Contra Legem, Jour, Methods of Law, № 2, Prince David Institute for Law, 2018, 1-20. <https://www.sabauni.edu.ge/library/samarTlis-meTodebi.-%e2%84%962.-1600250691.pdf> [11.01.2022] (in Georgian).

[24] Arrêt du 30 novembre 2017, Red Bull / EUIPO – Optimum Mark (Combinaison des couleurs bleue et argent) (T-101/15 et T-102/15) (cf. points 125-127) <https://eurlex.europa.eu/legalcontent/FR/TXT/?uri=CELEX:62015TJ0101> [11.01.2022].

5. Preventive Security in the Administrative Process of France and Germany

In the dispute about the abrogation of administrative-legal act the mechanism for suspension of the act is applied more or less differently in the legal order of the leading and interesting for Georgian reality countries of Continental law, such as France and German.

The Code of Administrative Law of the Republic of France[25] considers the application of suspensive effect to the appealed administrative-legal act by the rule of court to be admissible, if it is required by urgent interest of the right protection and, at the same time, the legality of the act is attached the considerable suspicion. As we see, the preconditions for the application of preventive security measures of the right are similar in French and Georgian administrative process, however, there is the significant difference between them – in contrast to the 3rd part of Article 29 of the Code of Administrative Procedures of Georgia, in French Code the two preconditions for suspending the act is administered in the cumulative form. In order to render a decision about suspension of the act, French judge requires the necessity of urgent protection of the right in line with the substantiated suspicion about its legality.

As regards the German regulation, the general regulation for the application of provisional measures in the administrative process is prescribed in Article 123 of the Law of Federal Republic of Germany on "The Administrative Judicial Order"[26], and the suspension of the act is regulated by Articles 80 and 80a of the same law. The precondition for the employment of security measure is only the existence of substantive threat to the implementation of a plaintiff's right.

It is interesting, that Georgian Code of Administrative Procedures considers the analogous norms of regulations of both countries, however, it still diverges from each of them. In particular, in contrast to German order, according to Georgian Administrative Law, apart from the threat of eradication of the right, the substantiated suspicion about the legality of the act is also accepted to be the precondition for suspension of the act, whereas in contrast to French regulation, one out of these two existing conditions suffices to suspend the act. This position provides the Georgian administrative judge with comparatively freer space in the process of preventive protection of the right in contrast to his/her French or German colleagues.

The mechanism for the compensation of damage caused by the suspensive measure of the act is not considered in the form of reversal of provision in French administrative process[27]. As regards the German administrative process, the reversal of provision is generally accepted here, however, it is explicitly excluded within the scopes of considering the claims pertaining to the legality of administrative acts as enshrined in Article 123(5) of Law of Federal Republic of Germany on the "Administrative Judicial Order"

---

[25] The Code of Administrative Law of the Republic of France, Article L. 521 <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070933/> [11.01.2022].

[26] Law of Federal Republic of Germany on the "Administrative Judicial Order" <http://www.gesetze-im-internet.de/englisch_vwgo/ > [11.01.2022].

[27] Under Article L. 600-7 of the Code of Urbanization of the Republic of France, the claims on the abuse of crime are used as the means of defense from damage, through which the addressee of construction permit may apply to court and demand for compensation upon existing the proper foundations.

As we see, the rule of reversal of preventive security measures in the disputes related to the legality of administrative-legal acts is not accepted in either of two European countries having the various traditions of administrative justice, and the grounds thereof should be found in the essence and fundamental function of the administrative justice, which presents the administrative process as a tool of control of the legality of management activities in the mentioned countries and the employment of all the administrative procedural means are subordinated to the primary interest of achieving this goal.

6. Conclusion

The preventive measures of protecting the right represents the salient mechanism for realization of the right to fair trial, which should be implemented through proper attention, understanding its essence and functions as well as through the in-depth determination of its legal foundations. Due to the substantive divergence between the administrative and civil provisional measures, their interaction and the introduction of civil legal logic in the dispute about the legality of administrative-legal acts at the stage of preventive security will fundamentally violate the essence of administrative procedural order and the principle of fair trial. The necessity of such separation can be seen by the example of European countries having the rich tradition of administrative process.

On the other hand, the rights of the addresses of enabling individual administrative-legal acts, which are suspended in the administrative process, must not be left without protection and the foundations of their provision should be based not on the horizontal conflict of interests, but on the legal trust of the addresses towards the suspended enabling act as the public management measure. Utilizing this approach enables the maintenance of the means of compensation of the damage caused by the suspended act both at the stage of preventive protection of the right upon introducing the liability of administrative body and in case of filing a separate lawsuit demanding for the damages against the body issuing the act.

The progress of regulation of remedies of preventive protection of rights in the administrative proceedings will be significantly depended on the resolution adopted as a consequence of reviewing the constitutional submission of the Court of Appeals of Tbilisi. The solution of the issue raised by the constitutional submission of Tbilisi Court of Appeals, in any case, will more clarify the process of preventive protection, that will be the prerequisite for elimination of the delay in functioning and proceedings of administrative courts. Having regard to the significance of topic and the expectation of its future activation, the goal of this paper is to make contribution to the development of reasoning. In this work we tried to present the key points, the consideration of which is deemed necessary for reviewing the admission of the reversal of provision in administrative process. We hope, that the debates on the mentioned topic will become more active and comprehensive that will definitely foster the development of Administrative Procedural law.

Bibliography:

1. Constitution of Georgia, 31-33, 24/08/1995.
2. The General Administrative Code of Georgia, 32(39), 15/07/1999.
3. The Administrative Procedures Code of Georgia, 39(46), 06/08/1999.

4. The Civil Procedure Code of Georgia, 47-48, 31/12/1997.
5. The Code of Administrative Law of the Republic of France, <https://www. legifrance.gouv.fr/codes/id/LEGITEXT000006070933/> [11.01.2022].
6. Law of Federal Republic of Germany on the "Administrative Judicial Order", 19/03/1991, <http://www.gesetze-im-internet.de/englisch_vwgo/> [11.01.2022].
7. Arrêt du 30 novembre 2017, Red Bull / EUIPO – Optimum Mark (Combinaison des couleurs bleue et argent) (T-101/15 et T-102/15).
8. Spatial Planning, Architectural and Construction Code of Georgia, 3213-რს, 20/07/2018.
9. *Abuseridze G.,* The preventive security measures in administrative law, Justice and law Journal, #2(62)'19, 2019, 5-19 (in Georgian).
10. *Izoria L.*, Modern state- modern administration, Publishing house "Siesta" Tbilisi, 2009, 139, <https://www.tsu.ge/data/file_db/faculty-law-public/L[1].Izoria-Tanamedrove%20saxel mwifo.pdf> [11.01.2022] (in Georgian).
11. *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P. (ed.),* Administrative Procedural Law Guide, Tbilisi, 2008, 232, 390 (in Georgian).
12. *Turava P.,* General Administrative Law, publishing house "World of Lawyers", Tbilisi, 2016, 44 (in Georgian).
13. *Turava P., Pirtskhalashvili A., Kardava E.,* Administrative Proceedings in Public Service, Tbilisi, 2020, 40 (in Georgian).
14. *Kalichava K.,* The subject of administrative science, in the collection: Administrative science guide, *Khubua G., Kalichava K. (eds.),* The Institute of Administrative Sciences, TSU, 2018, 69 <http://lawlibrary.info/ge/books/2018giz-ge-administraciuli_ mecnierebis_saxelmdzgvanelo.pdf> [01.11.2022] (in Georgian).
15. *Khubua G.,* Definition Contra Legem, Prince David Institute for Law, Journal "Methods of Law, #2, 2018, 1-20 <https://www.sabauni.edu.ge/library/samarTlis-meTodebi.-%e2%84%962.-1600250691.pdf> [11.01.2022] (in Georgian).
16. *Churghulia D.,* for Construction Permit Administrative Proceedings as a Mechanism for Implementing Construction Safety, "Journal of Law, #2, 2020, 180-<https://doi.org/10.48614/jlaw.2.2020.180-201> [18.01.2022], (in Georgian).
17. Resolution of 09 July, 2020 on the case № bs – 10 (k-20), Chamber of administrative cases of Supreme Court of Georgia (in Georgian).
18. Judgment of 09 January, 2019 on the case № bs-1562 (us-18) of Chamber of administrative Cases of Supreme Court of Georgia (in Georgian).
19. Judgment of 13 June, 2017 on the case № bs-312 (k-18), Chamber of administrative Cases of Supreme Court of Georgia (in Georgian).
20. Judgment of 27 September, 2005 on the case Iza LTD and Makrakhidze v Georgia, European Court of Human Rights (in Georgian).

Lali Papiashvili*

Problematic Aspects of Criminal Adjudication in Cases of Sexual Violence against Minors

Although sexual violence and coercion against minors are formally punishable in all modern societies, special attention is paid to the protection of minors, victim support, the rights of juvenile witnesses/victims in criminal proceedings, strict action against perpetrators and strengthening international cooperation to this end. However, combating it still poses considerable difficulties due to the latent nature of the crime and the paucity of incriminating evidence.

The article reviews positive obligations of the State with regard to the crime of the mentioned category in the context of criminal legal proceedings, significance of the testimonies of minor victims/witnesses and issues related to the assessment of testimonies, interrelation of the rights of minor victims/witnesses and right of accused/defendant to a fair trial.

Keywords: *testimony of minor witnesses/victims, their rights, sexual violence.*

1. Introduction

Sexual abuse on juveniles can take different forms (e.g. touching, incest, molestation, rape, etc.), take place at different times and in different venues (at home, in educational and medical institutions, foster and care facilities, in church, in cyberspace, etc.); for a variety of reasons (including socio-economic and/or gender, racial or social discrimination, migration, lack of education, traditions, etc.);[1] by a wide range of people (family members and relatives of the victim, legal representatives, people caring for the child, social workers and any person),[2] but usually – privately and without eyewitnesses, and therefore it's latent character creates additional difficulties in obtaining incriminating evidence.

Despite the increase in the number of institutions and structures involved in combating violence against minors and cross-border cooperation, conviction rates still do not reflect the real situation, partly due to the difficulties in obtaining the evidence necessary for conviction in the aforementioned category of offences[3] and partly due to the refusal of victims to cooperate with law enforcement authorities.

---

* Professor of Ivane Javakhishvili Tbilisi State University Faculty of Law, Judge of the Supreme Court of Georgia.

1 See Stockholm Declaration and Agenda for Action, World Congress against Commercial Sexual Exploitation, 1996, par. 6.

2 UN CRC, General Comment №13, The Right of the Child to Freedom from all Forms of Violence, CRC/C/GC/13, 18/04/2011.

3 *Marchese C. L.,* Child Victims of Sexual Abuse: Balancing a Child's Trauma Against the Defendant's Confrontation Rights – Coy v. Iowa, 6 J. Contemp. Health L. & Pol'y, 411, 1990.

2. Positive Obligation of the State

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Violence[4] (hereinafter – the Lanzarote Convention), the UN Convention on the Rights of the Child[5] (hereinafter – the UN Convention), Directive N0 2011/93/EU "on the Prevention of Sexual Abuse and Sexual Exploitation of Children and Child Pornography" (hereinafter – 2011/93/EU Directive)[6], the "European Convention for the Protection of Human Rights and Fundamental Freedoms" (hereinafter – the European Convention) and the case law of the European Court of Human Rights (hereinafter – the ECHR[7], as well as other international legal instruments[8] taken together, they impose negative and positive obligations on Member States to protect minors from violence.

Despite the plethora of international legal instruments in the field of protection of minors from sexual violence and exploitation, European law is mainly based on the UN Convention, which obliges Member States to ensure: the primacy of the best interests of the juvenile in all decisions concerning the minor (Article 3(1)); protection of minors from all forms of violence, including sexual violence and exploitation (Articles 19 and 34). General Comment № 13[9] sets out measures to protect minors from violence, explains Article 19 of the Convention and the concept of sexual abuse and exploitation of juveniles, and General Comment № 5[10] identifies legislative measures and policies to be implemented by Member States at national level. At the same time, the importance of the Lanzarote Convention lies in it's multidisciplinary approach, in the obligation to harmonise national legislation with the provisions of the Convention (which facilitates international cooperation in this field) and in the collection and unification of standards established by international law in this field.

According to the case law of the ECHR, Member States are responsible for the protection of minors placed in special institutions,[11] as well as obligation to protect juveniles from private individuals[12] – family members, and for these reasons to establish both the effective criminal law provisions and the effectiveness of their enforcement – investigation and prosecution,[13] punishment of

4 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS 201, Lanzarote, 25/10/2007.

5 UN Convention on the Rights of the Child, Gen. Assembly Res. 44/25, 20/11/1989.

6 Directive 2011/93/EU, "Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography", and replacing Council Framework Decision 2004/68/JHA, 13/12/2011

7 X. and Others v. Bulgaria, №22457/16 [GC], [2021], ECHR, 179, 192; Demir and Baykara v. Turkey [GC], №34503/97, [2008], ECHR, 69, 74; Streletz, Kessler and Krenz v. Germany [GC], №34044/96 and 2 others, [2001], ECHR, 90; Al Adsani v. the United Kingdom [GC], №35763/97, [2001], ECHR, 55.

8 Resolution 1307(2002), Sexual Exploitation of Children: Zero Tolerance, 27/09/2002; Rec (2001)16, Protection of Children Against Sexual Exploitation, 31/10/2001; Directive 2012/29/EU of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, 25/10/2012, OJ 2012 L 315/55; UN Guidelines on Justice in Matters Involving Child Victims or Witnesses of Crime, ECOSOC, 22/07/2005, E/RES/2005/20; European Social Charter, ETS №035.

9 UN CRC, General Comment №13 (2011).

10 UN CRC, General Comment №5, CRC/GC/2003/5, 27/11/2003.

11 Nencheva and Others v Bulgaria, №48609/06, [2013], ECHR.

12 O'Keeffee v Ireland, [GC], №35810/09, [2014], ECHR; M.C.v Bulgaria, №39272/98, [2003], ECHR.

13 R.B. v. Estonia, №22597/16, [2021], ECHR, 79.

offenders,[14] compensation for minor victims and mandatory reporting mechanisms for cases.[15] Implementation of the so-called 4P approach (Prevention, Protection, Prosecution and Punishment of perpetrators). However, this is a means obligation and not a final obligation, because there is no absolute right to prosecute or convict a particular person if the impossibility of holding the perpetrator criminally responsible is not related to the culpable failure of responsible bodies to fulfil their obligations.[16]

Major part of decisions of the European Court on cases of sexual violence against minors[17] refer to the fulfilment of a positive obligation by the State.[18] Although the extent of positive liability depends on the foreseeability of the threat,[19] in all cases this means giving priority to the best interests of the minor,[20] appropriate consideration of the minor's vulnerability and needs. [21]This includes: establishing a legal framework for physical and psychological integrity; safe and accessible reporting mechanisms at every stage of the process; appropriate, minor- and gender-sensitive and timely response to reports of sexual violence and exploitation;[22] taking operational measures to protect those at risk; protecting the minor and inviolability of their private life, providing support services,[23] the effective investigation of reports of violence regardless of the victim's cooperation with investigating authorities;[24] implementation of criminal justice response mechanisms taking into account the special vulnerability and best interests of the minor victim/witness,[25] application of child-friendly and protective measures,[26] including consideration of the individual needs and opinions of the minor,[27] minimisation of the number of interrogations/interviews of minors; the irrelevance of the victimogenic

---

14 CRC, 2013b, 52-52; CRC 2014b, 43-44.

15 CRC, 2001a, 52; CRC 2015b, 235a.

16 A.B. C v Latvia, №30808/11, [2016], ECHR, 149; X. and Others v Bulgaria, Ibid, 183, 186, 210; A and B v Croatia, №7144/15, [2019], ECHR, 110, 129; M.P. and Others v Bulgaria, №22457/08, [2011], ECHR, 111; Z. v. Bulgaria, №39257/17, [2020], ECHR, 65.

17 O'Keeffe v. Ireland, №35810/09,[2014], ECHR; A and B v. Croatia, 106; Blokhin v. Russia, [GC], №47152/06, [2016], ECHR, 138; Neulinger and Shuruk v. Switzerland, [GC], №41615/07, [2009], ECHR, 134; Scozzari and Giunta v. Italy, [GC], №39221/98 and №41963/98, [2000], ECHR, 169.

18 E. and Others v. the United Kingdom, №33218/96, [2002], ECHR; E.S. and Others v. Slovakia, №8227/04, [2009], ECHR; O'Keeffe v. Ireland.

19 *Lursmanashvili L.* (transl.), Handbook of the European Law of Child Rights, Tbilisi, 2020, 87, (in Georgian); eg. O'Keeffee v Ireland.

20 See M.G.C. v. Romania, № 61495/11, [2016], ECHR, 56-57; Rulings of the Chamber of Criminal Affairs of the Supreme Court of Georgia: № 640AP-20, 1/03/2021; № 856 AP-20, 9/03/2021.

21 See A and B v. Croatia, Ibid 111; M.M.B. v. Slovakia, №6318/17, [2019], ECHR, 61.

22 Council of Europe, 2012; UN Committee on the Rights of the Child, 2019, art. 8.1.a; Concluding Observation: Czech Republich (2003). para 62b.

23 See UN Committee on the Rights of the Child, 2019, art. 8.1.

24 S.M. v. Croatia, 314; Y. v. Bulgaria, 93; S.Z. v. Bulgaria, №29263/12, [2015], ECHR, 50; M. and Others v. Italy and Bulgaria, №40020/03, [2012], ECHR, 104; G.U. v. Turkey, №16143/10, [2016], ECHR, 73.

25 R.B. v. Estonia, § 87; A and B v. Croatia, §121.

26 Judgment of the Chamber of Criminal Affairs of the Supreme Court of Georgia on case № 297AP-21, 8/10/2021; eg Lanzarote Convention, Article 30 and its Explanatory Report. R. B. v. Estonia, 99; G.U. v. Turkey, 73.

27 See ECOSOC, Resolution 2005/20 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Resolution 2005/20, 22/07/2005, par. 9.

behaviour and previous sexual life of minor to the assessment of the truthfulness of his or her testimony; the irrelevance of the minor's age to the assessment of the reliability of a minor witness/victim's testimony when his or her developmental level provides the opportunity to determine the truthfulness of the testimony; the right to be heard; perception of the juvenile as a full-fledged witness, taking into account his or her individual abilities and needs, in order to facilitate communication with the body conducting the proceedings, both during the investigation and during the trial;[28] providing information regarding child rights, judicial proceeding, support services, appeal mechanisms,[29] on the right to compensation;[30] conduct of investigations and prosecution regardless of the existence of a complaint by the victim (even if claim is withdrawn) in the language and form comprehensible for child upon first contact with minor victim and his/her legal/procedural representative taking into account gender/cultural/religious aspects; identifying a minor as a victim, regardless whether the alleged perpetrator is identified and prosecuted, or readiness and capacity of the victim to provide information to the investigating body about crime committed against him/her and/or giving incriminating testimony in cour,[31] "regardless of the victim's role in the crime or in the prosecution of the alleged perpetrator(s)";[32] *the* inadmissibility of attaching decisive importance to the question of the presence of traces of physical damage for the confirmation of violence; swift, efficient,[33] commitment to an objective, comprehensive and complete investigation – using all appropriate means to obtain evidence,[34] to identify and, if necessary, to punish the persons responsible.[35]

It is unacceptable to limit investigations only to responding to the victim's requests and the implementation of investigative/procedural measures be depend on the victim's initiative,[36] on the victim's position or level of involvement (hence, the victim's position – in terms of reconciliation with the accused / conviction and lack of a claim – is irrelevant for the purposes of prosecution under the Criminal Procedure Code of Georgia and is not an obstacle to prosecution, however the victim's active participation in the investigation must be ensured to the extent necessary to protect his/her legitimate interests.[37]

Investigation of sexual violence against minors is difficult mainly due to the age of the victim, as it is usually quite difficult to obtain a legally significant statement from a frightened minor – due to

---

28 Ibid, par. 19.
29 Ibid, par. 19
30 Conducting measures for physical, psychological and social rehabilitation and reintegration of child victims – including providing shelter, legal assistance and information, access to education; UN Committee on the Rights of the Child, 2019, Article 8.5, 9.3.
31 UNICEF Guidelines on the Protection of Child Victims of Trafficking, New York, 2006, 14.
32 ECOSOC, UN Guidelines on Justice in Matters Involving Child Victims or Witnesses of Crime, 22/07/2005, E/RES/2005/20, par. 9a.
33 See Söderman v. Sweden, №5786/08, [2013], ECHR, 82-83; R.B. v. Estonia, იქვე, 79; X. and Others v Bulgaria, [GC], 213.
34 See S.Z. v Bulgaria, 44; V.B. v Belgium, №61030/08 [2017], ECHR, 56.
35 R.B. v. Estonia, 80.
36 X. and Others v Bulgaria, 213.
37 Ibid, 189.

the private nature of the crime (in most cases the crime takes place in a private space and very rarely are there eyewitnesses to the crime), the stereotypes established in society or lack of information, minors often do not realise the criminal nature of the acts committed against them until long after the crime – under the influence of independent factors.[38] In most cases – the minor involved is "ashamed to talk about this subject; he/she is afraid because the perpetrator threatens him/her with physical consequences"[39] or due to a psychological influence (assures that the mentioned behaviour is normal and the victim is obliged to believe him, blackmailes minor by giving personal data to his/her relatives) or dependence on the offender, victim's lack of awareness of the antisocial/criminal nature of the act, the authority of the perpetrator and/or the feeling of gratitude towards him, shame and other reasons) and in most cases it takes a long time to realise the criminal nature of the act committed against him/her.

Although according to the Article 71, Part 5^1 of the Criminal Code of Georgia, the limitation period does not apply to the acts provided by Articles 137-141 and 253-255^2 of the Code committed in respect of minors (in accordance with the requirements of Article 33 of the Lanzarote Convention) and for victims of violence there is the possibility of reporting sexual offences committed against them during childhood even after they have reached the age of majority – the possibility of convicting the perpetrator decreases due to the length of time between the commission of the offence and the start of the investigation, the latent nature of the offence, the lack of witnesses and destruction of evidence.[40] There are four major challenges in dealing with cases of sexual violence against minors: Identifying the victim; Protecting the victim; Listening to the victim and believing the information he or she gives; Supporting the victim.[41]

3. Rights of a Minor Witness/Victim

For the protection of the best interests and rights of minor victims and minor witnesses and their protection against secondary and re-victimisation[42] the Juvenile Justice Code[43] (hereinafter JJC) provides, inter alia, for free legal assistance for minor victims/witnesses to crimes against sexual freedom and inviolability; obligatory presence of the minor's legal representative and participation of the minor's lawyer in the procedural acts conducted with the involvement of the minor and questioning of the minor[44] obligation of the body conducting the proceedings to ensure the participation of a

---

38 See Judgment of the Supreme Court of Georgia of June 28, 2022 in case № 433AP-22. The victim reported about the action taken against him approximately 1 year after the incident, after the meetings held at the school within the framework of the awareness raising campaign on the issues of violence against minors.

39 M.G.C. v. Romania.

40 Judgment of the Supreme Court of Georgia on case № 433AP-22, ibid. It turned out to be impossible to conduct an investigative experiment due to the repairs carried out in the apartment and the replacement of the partitions of the rooms indicated in the testimony of the victim.

41 See *Field N., Katz C.,* The Experiences and Perceptions of Sexually Abused Children as Participants in the Legal Process: Key Conclusions from a Scoping Literature Review, Trauma, Violence and Abuse, 2022.

42 15 and 16 of Article 3 of the Juvenile Justice Code.

43 Juvenile Justice Code, Departments of the Parliament of Georgia, 3708-II, 12/06/2015.

44 See Parts 15 and 16 of Article 3 of the Juvenile Justice Code.

psychologist and the witness and victim coordinator[45]in the proceedings, taking into account the best interests of the minor; at all stages of the proceedings provide minors (regardless of their status) with information in a form appropriate to their development; if necessary – the use of the services of an interpreter free of charge; the right to be accompanied by a legal/procedural representative (including the obligation to remove a legal representative), consular assistance;[46] proceedings by a person specialised in juvenile justice;[47] the involvement of a social worker and a psychologist etc..

However, the JJ Code does not establish the principle of immutability of persons. Moreover, although it specifies the purpose of the psychologist's involvement,[48]it does not clearly distinguish between the functions and role of the psychologist and the social worker; it does not determine the form of their involvement and their rights and obligations. Therefore, it is important that the court clearly defines the role of the psychologist, his/her rights and duties and the form of his/her involvement and takes into account his/her comments/recommendations; provides minor witness/victim with the help of the same social worker/psychologist at all stages of the proceedings.

As the juvenile finds the trial the most difficult examination, especially when facing the accused,[49] alike international acts, Articles 24 and 52 of the JJC in order to prevent re-victimisation and secondary victimisation of minors, establish, on the one hand, procedural safeguards for the questioning and interrogation of minors and the use of protective measures, including – remote questioning of the victim during a court session without the victim being physically present in the courtroom,[50] using devices altering minor's image/sound; interrogation of minor under the conditions of removal of the defendant from the courtroom; interrogation and video recording of the interrogation with the participation of the accused's lawyer behind an opaque screen or before the court session; audio-video recording of the questioning/interrogation of minors in cases of sexual violence and showing this recording in the court session instead of re-interrogating the minor[51] and accepting these recordings as admissible evidence;[52] However, there is no provision for submitting the testimony in written form to the competent officer.

---

45 For the coordinator's rights, see JJC Article 23, Section 7-71. Meanwhile, on the one hand, Article 29 connects the issue of the coordinator's participation in the court session to the desire of the minor witness/victim, and parts 4-5 of Article 23 to the involvement of the coordinator – the decision of the prosecutor/investigator, which is made based on the interests of the minor witness/victim. Regardless of wish – therefore, the minor witness/victim and his legal representative have the right to refuse to cooperate with the coordinator, but cannot request his removal (and not avoidance) from the criminal case (JJC, Art.23, para 6; CPC Article 52, paras 8-9).

46 Part 2 of Article 15 of the Juvenile Justice Code.

47 Ibid. Articles 17-21.

48 Ibid. 1 para of Article 23.

49 See S.N. v. Sweden, №34209/96, [2002], ECHR.

50 See UN CRC, General comment № 13 (2011), Ibid, 54-56; Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 17.11.2010, Council of Europe, 2011; ECOSOC Resolution 2005/20 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

51 Para 3, Article 52 of the Juvenile Justice Code.

52 X. and Others v Bulgaria, 214.

3.1. The Right to be Heard by the Court

Although the JJC (Article 10, Par. 1) grants a person in conflict with the law the right to be heard, this right is not explicitly stated for a minor victim. According to the Committee on the Rights of the Child, a child can form an opinion at a young age, even if he or she cannot express it verbally.[53] According to General Comment № 12, minor victims and witnesses should be given the opportunity to freely express their opinions and views during the court proceedings.[54] To this end, they should be provided with the explanation of the rights and guarantees provided by the legislation, the role and importance of the minor victim/witness, the process of questioning the minor (methods, course) and other issues important to the criminal process. An incomplete/incorrect interpretation of rights may render major incriminating evidence inadmissible and jeopardise the fulfilment of the state's positive obligation.[55]

The right to be heard enshrined in the Convention and the definition of the rights of minors refer to the practical implementation of support mechanisms in the participation of minors in investigations and judicial proceedings – including the involvement of relevant professionals (e.g. psychologists), coordinators, representatives,[56] the appropriateness of the time and place of the hearing, the method of questioning with the best interests of the minor in mind, communicating with the minor in a simple manner and in a language the juvenile uses and understands; taking into account the individual characteristics of the minor (including limited abilities) that may affect the minor's ability to perceive or communicate,[57] availability of effective protection measures, remedies and redress mechanisms.[58]

At the same time, the right to be heard includes not only the right of the minor to provide information, but also the possibility for the juvenile to choose the manner in which he or she testifies[59] . In the case of sexual violence, this means the choice of the right by the minor victim, including the form of expression – directly or through an intermediary.[60]

In the adversarial proceedings where the parties decide what evidence and arguments will be presented to the court and what will be the major question for discussion – the main task of the judge is to provide the parties with such an opportunity,[61]according to the CPC, participation of the victim in criminal proceedings depends upon: 1. Request/ motion of the defence/prosecution side to question the

53 UN CRC, General Comment №12 (2009): the Right of the Child to be Heard, CRC/C/GC/12, 20/07/2009, 20.

54 Ibid, 62-64.

55 See, for example, R.B. v. Estonia, 83. A procedural error in the interrogation of a minor victim and later the court's "rigid" application of procedural law in assessing the admissibility of said evidence resulted in an acquittal; see Also G.U. v. Turkey, 73.

56 ECOSOC/RES/2005, Article 21.

57 Directive №2012/29/EU, Article 3(2).

58 See UN CRC, General Comment №12 (2009): the Right of the Child to be Heard, CRC/C/GC/12, 1/07/2009, 63-64.

59 ECOSOC/RES/2005/20, Article 21 (b).

60 E.g., Lanzarote Convention, Article 31 (1c).

61 See Decision of the Constitutional Court of Georgia of September 29, 2015 № 3/1/608,609 on the constitutional submission of the Supreme Court of Georgia, II-15.

victim; 2. use of the right enshrined by the article 57 of the CPC to give a testimony concerning the damage he/she has incurred as a result of the crime or submit, in writing, that information to the court.

The "quality" of the victim's participation in the criminal proceedings depends largely on the parties, because under procedural law the victim does not have the right to obtain evidence (e.g. interviewing the victim, carrying out investigative/procedural activities with his/her participation – taking samples, conducting investigative experiments, scientific examination, seizure or withdrawal of computer data of a minor victim or the computer equipment belonging to him/her), the right to present important information for the criminal proceedings and to request its use as evidence.

Although the CPC grants the victim the right to provide the court with information on the damage suffered, at his or her own discretion, regardless of the parties' opinion on the necessity of questioning the victim in court and filing a motion to that effect, the question arises as to the scope of the information provided to the court in exercising this right and the possibility of using it to justify the judgment. In particular, Article 57 of the CPC clearly delimits the scope of issues on which the victim has the possibility to address the court directly and provide information regardless of the will of the parties. In particular, subsection "d" of the first part of Article 57 links the use of the aforementioned right only to the damage suffered and not to other circumstances that are important for the case, as well as does not define possibility of introducing evidence to the court by the victim even in such case where the mentioned information corresponds to criteria of relevance and authenticity.

4. Rights of the Minor Witness/Victim v. the Right of the Accused to a Fair Trial

Although the legislation provides, on the one hand, for the victim's right to refuse to testify and, on the other hand, for the State's obligation to ensure justice regardless of the victim's degree of involvement and desire to participate in the proceedings, particular importance is attached to the victim's testimony, as this category of offences is not usually characterised by an abundance of witnesses/evidence. Information and evidence provided by a minor should not be considered less reliable or ineffective because of his or her age;[62] Similarly, the simplified rules that procedural law provides for the testimony of a minor (including, for example, the absence of the obligation to take an oath or equivalent statement; procedural measures adapted to the juvenile) should not in themselves diminish the evidentiary weight of the juvenile's testimony. [63]

At the same time, objective and subjective circumstances should be taken into account when assessing the victim's testimony in order to eliminate the risk of victim manipulation of the justice system and unjustified conviction of the person, as well as the risk of secondary and re-victimisation of the victim.

"Sexual offences involve considerable difficulties for the victim, especially if he or she is to be confronted accused against his or her will.[64] It is therefore necessary to ensure that juvenile victims

[62] See Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 30-31, 64-74; For example, the decision of the Criminal Chamber of the Supreme Court of Georgia on March 2, 2022 in case № 925AP-21 (testimony of the 5-year-old victim).

[63] Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 70.

[64] S.N. v Sweden, 47.

testify in the most comfortable environment possible, taking into account their age, maturity, level of perception and communication difficulties, so that they can testify during the trial in the most appropriate and relevant conditions.[65] This includes the victim's right to testify under condition of removal of accused from the courtroom; use of audio-visual recordings of a minor's testimony[66] as evidence, to be questioned in court without being present in the courtroom – through using communication technologies.

At the same time, the implementation of measures to protect minor victims must not prejudice the right of the accused to an effective defence[67] and therefore to a fair trial,[68] which in cases in the said category is primarily related to the possibility of questioning witnesses.[69] The European Court takes into account the nature and gravity of the offence, the social stigma attached to the conviction of a person in the said category of offences[70] and the consequences of a conviction. [71] Therefore, it is not permissible to grant minors such rights, which violate the conventional rights of the accused. [72]At the same time, in view of the difficulties involved in the investigation and the vulnerability of the victims, the European Court sets a somewhat lower procedural standard[73] (in connection with the questioning of minor victims and witnesses), however, applies strict approach to cases when defendant lack an opportunity to challenge the testimony of the minor victim or to cross-examine the victim at all.[74] But even in this case, the fairness of the proceedings as a whole is assessed, not just the existence of the opportunity to question the victim – there is no absolute need for the defence to question the victim if the defence had the opportunity to challenge the legality and/or truthfulness of part of the

---

65 Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 64.

66 See, Lanzarote Convention, Article 35 (2).

67 Kovac v Croatia, №503/05, [2007], ECHR.

68 See C-105/03, Maria Pupino[2005] ECR I-5285, 53, 59; C-507/10, X., [2011], ECR

69 W.S. v. Poland, №21508/02, [2007], ECHR – Non-interrogation of the victim by the prosecutor during the entire proceedings is a violation; A.S. v. Finland, № 40156/07, [2010], ECHR – the main and only incriminating evidence of the guilty verdict was the video recording of the victim's testimony; Ruban and Others v. Spain (dec.), № 41640/04, [2005], ECHR – National courts were given more flexibility in granting the defense the opportunity to cross-examine the victim in sex crime cases.

70 For example, see Šubinski v. Slovenia, № 19611/04, [2007], ECHR; Sánchez Cárdenas v. Norway, № 12148/03, [2007], ECHR – Social stigmatization violated the right under Article 8 of the Convention; B.B. v. France, № 5335/06, [2009], ECHR – Database entry of sex offenders does not violate Article 8; Gardel v. France, № 16428/05, [2009], ECHR – Detention of convicted sex offenders is a "preventive measure" and not a punishment.

71 Similar to the Lanzarote Convention, the Law of Georgia "On Combating Crimes Against Sexual Freedom and Inviolability" (Departments of the Parliament of Georgia, 57-II, 17/03/2020) provides for: mandatory/possibility of deprivation of a wide range of rights along with the basic punishment (Article 3); to store the personal data (conviction, dactyloscopy and other identifying data) of the convicted person in the register of persons convicted and deprived of their rights for committing crimes against sexual freedom and inviolability (Article 8); Criminal liability for non-compliance with imposed restrictions (deprivation of rights) by the convict (paragraph 3 of Article 5).

72 Jendrowiak v Germany, №30060/04, 14/04/2011, ECtHR, 37.

73 The absence of the opportunity to directly interrogate the victim does not violate the right to sentencing guaranteed by Article 6. e.g. Magnusson v. Sweden, № 53972/00, [2003], ECHR; S.N. v. Sweden.

74 See P.S. v Germany, №33900/96, [2001], ECHR; R.B. v. Estonia, 95.

incriminating evidence.[75] However, the use of video recordings of the interrogation of minors requires special care and attention.[76] The right to a fair trial is violated when a minor witness/victim is questioned in court without the participation of the defence side, the accused/defence side did not have the opportunity to rebut this testimony at any stage of the proceedings, the court merely pointed out at the trial that the victim was questioned before the judge and the said victim's testimony became the sole and main basis of the conviction.

4.1. Sufficiency of the Evidence for a Conviction

The Georgian Criminal Procedure Code provides for the same standard of proof for a guilty verdict regardless of the category and nature of the offence and stipulates that a guilty verdict may only be based on a set of consistent, clear and convincing evidence, proving a person's guilt beyond reasonable doubt (para.2, Article 13 and para 3, Article 82 of the CPC), that the guilty verdict must be based only on unequivocal evidence, and that any doubts that cannot be proved in accordance with the law must be decided in favour of the accused (convicted person). [77]

Since "*the accused may not be charged with a crime until it is proven by sufficient and convincing evidence that every element of the crime was present in his or her act "*[78] according to the CPC the guilty verdict may not be based on circumstantial / indirect evidence and only one direct evidence (the victim's testimony). When assessing the sufficiency of evidence to support a guilty verdict, the court takes into account the diversity of sources of information, as a factual plurality of evidence derived from the same main source does not constitute a legal plurality of evidence.[79] Although procedural law does not prescribe how much evidence is required for a conviction, according to the well-established case law, at least two direct incriminating evidence is necessary for conviction.[80] This does not include hearsay, as the use of hearsay to support a conviction is only permissible in exceptional cases under the conditions of clear legal regulation and adequate

---

75 Vanhatalo v Finland, №22692/93, [1995], ECHR.

76 See S.N. v Sweden. The main and practically the only direct incriminating evidence of the conviction was the testimony of the minor victim published at the trial. The minor was interrogated twice by an investigator with appropriate qualifications and experience, and video recording of the first interrogation was carried out, and audio recording of the second interrogation (the lawyer of the accused was not present at the second interrogation). The first and second instance courts examined the videotape of the first interrogation in its entirety, and the second interrogation tape was examined in the district court. The victim was not questioned directly at the court session, but the defense had the opportunity to challenge the victim's testimony, which is why the proceedings as a whole complied with the requirements of a fair trial.

77 See the Judgment of the Criminal Chamber of the Supreme Court of Georgia dated July 21, 2022 in case № 575AP-22.

78 Decision № 1/1/548 of the Constitutional Court of Georgia dated January 22, 2015 "Georgian citizen Zurab Mikadze against the Parliament of Georgia", II-41-43.

79 For example, the victim's testimony and the victim's own investigative experiment or restraining order represent information obtained from a single source.

80 Verdicts of the Criminal Chamber of the Supreme Court of Georgia № 251AP-16, 26/07/2016 and № 453AP-15, 9/02/2016.

constitutional guarantees, and not as a general rule set out in the the Criminal Procedure Code[81]. Accordingly, each and every evidence in a criminal case must be evaluated in terms of both its' connection to the subject of proof, as well as to the source of the information, and only the part of the testimony that is direct may be used for conviction, regardless of whether the testimony, as a whole, is direct or circumstantial.[82] When evaluating the testimony of medical personnel/doctors, experts, psychologists, the court shall take into account both the standard set out in Article 82 of the CPC and their connection with the source of information, and shall use only the part of the testimony in which the aforementioned persons state what they themselves saw/examined/heard (in person) to justify a guilty verdict.

Under the above-mentioned conditions and the latent nature of sexual violence, in many cases the absence of obvious, visible or measurable traces (e.g. crimes foreseen by the Articles 140-141 of the Criminal Code of Georgia), the testimony of a minor victim/witness is often of crucial importance. The use of the victim's and witness's testimony in criminal proceedings is associated with several problematic issues: assessment of the truthfulness of the victim's testimony and the possibility of using it for a conviction; change of the testimony; refusal to testify and the sufficiency of other evidence in the case to support a guilty verdict.

4.2. Evaluation of the Testimony of a Minor Witness/Victim

When evaluating the testimony of a minor victim, the court takes into account, on the one hand, the special vulnerability of juvenile victims of offences against sexual freedom and integrity[83] and psychological factors[84], characteristics that explain the victim's hesitation, both in giving information about the violent act and in describing the facts of the case[85] and, on the other hand, the circumstance, that testimonies of witnesses, and even more so of victims, always contain a component of subjectivism, which, taking into account age and individual abilities and/or attitudes, may have a different impact on the witness's ability to objectively perceive, remember and pass on information important to the case, as well as – being related to subjective circumstances (e.g. fear of telling the truth), protection of another person, bias towards the victim/accussed, influence/impact on minors (e.g. persuasion, the importance of relatives' opinion for the child, fear of parents, etc.). Therefore, the court examines the nature of the relationship between the minor victim/witness and the defendant/accussed, the influence of the minor's relatives (family members) on the minor, and the motives that may lead the minor to testify or refuse to testify, how correctly the minor perceives or reproduces the circumstances related to the offence and to what extent he or she was able to perceive the criminal nature of the offence committed[86], the consistency of the content of the statements of the minor

---

81 Decision № 1/1/548 of the Constitutional Court of Georgia dated January 22, 2015 "Georgian citizen Zurab Mikadze against the Parliament of Georgia", II-37-52.

82 See Verdict № 97AP-20, 14/07/2020 and Verdict № 575AP-22, 21/07/2022 of the Chamber of Criminal Affairs of the Supreme Court of Georgia.

83 Z v. Bulgaria, 69.

84 M. and C. v. Romania, №29032/04, [2011], ECHR, 115-117, 119.

85 C.A.S. and C.S. v. Romania, №26692/05, [2012], ECHR, §81; M.C. v. Bulgaria, 183.

86 Judgment № 356AP-21 of the Criminal Chamber of the Supreme Court of Georgia dated August 31, 2021.

victim/witness, – how uniformly they present the same circumstances that are crucial to the case – including the information given by them at the stages of the investigation and trial (e.g. time of the offence, location, parties involved and the actions they took),[87] The comprehensiveness and consistency of the account given at the different stages of the proceedings (investigation and court), – as well as when communicating with family members, relatives, social workers and psychologists. [88] Therefore, when assessing the truthfulness of a minor's testimony, in addition to checking the content of the testimony in accordance with the evidence in the case and the existence of a biased attitude of the minor, the conclusion of the forensic psychological examination and the testimony of the expert should be taken into account, including the correlation of the juvenile's thinking and attention, the level of depression and anxiety during the examination, coefficient of reliability of the victim, expert's definition of the main factors causing the minor's character change,[89] on mental development and the adequacy of the information provided (level of detailing and lexical aspects) for his age, the ability to store in memory and then reproduce what he has seen, the persuasiveness of the non-verbal expression (e.g. the way of speaking, non-inertia, the feeling of embarrassment when it comes to certain details).[90]

In assessing the reliability and truthfulness of the testimony, both the concluding and the descriptive-motivational parts of scientific examination report, the methodology used, the extent and completeness of the examined information and the difficulties encountered in the process of examination are relevant.

For example, when evaluating the testimony of a 9-year-old victim, the court took into account that the victim described all the details convincingly and logically, although he had emotional moments during the testimony, could not be fully coherent and focused on the details of a different kind, described the sexual acts against him completely and clearly, every episode, answered the questions with convincing accuracy, there was no room for his interpretation of the facts, which would be unbelievable for a child his age at his developmental level;[91] the testimony of his friend – a minor witness – about the mental-motional state of the victim during the crime.

There is a violation of the requirements of the European Convention if the court changes the qualification of the complaint or pronounces an acquittal just because the evidence presented does not prove that the applicant did not consent to sexual intercourse; there are no traces of violence on the applicant's body. The question of the presence of traces of injury should not be given too much importance because, on the one hand, a criminal offence can also be committed without physical violence – by psychologically influencing the victim (e.g. threats, conviction of the habitual nature of

---

87 See Decisions of the Chamber of Criminal Affairs of the Supreme Court of Georgia: № 550AP-21, 21/12/2020 and № 459AP-21, 2/11/2021.

88 Ruling № 459AP-21 of the Criminal Chamber of the Supreme Court of Georgia.

89 See For example, the ruling of the Criminal Chamber of the Supreme Court of Georgia of October 3, 2022 № 685AP-22.

90 See M.M.B. v. Slovakia, 70; Rulings of the Criminal Chamber of the Supreme Court of Georgia № 513AP-21 and № 356AP-21. The conviction was also based on the testimony of a minor; Verdict № 854AP-20.

91 See Judgment of November 2, 2022 of the Criminal Chamber of the Supreme Court of Georgia on case № 459AP-21 and judgment on case № 856AP-20.

the act, persuasion); on the other hand, the absence of traces of injury at the opening of the case can be caused by the victim's late notification of the criminal offence.[92]

The victim's behaviour before and after the offence should also be carefully examined. For example, it is not permissible to justify an acquittal by referring to the provocative behaviour of the victim and the victim's repeated visits to the same place after the commission of the offence.[93]

4.3. Forensic-psychological Expert Opinion to Determine the Truthfulness of Witness Statements

When using the expert opinion of a forensic psychological examination, it is important to ensure the infallibility of the expert opinion – the exclusion of manipulation of the expert by the minor and/or errors in the examination report. The infallibility of the expert report is problematic, on the one hand, if there are two contradictory conclusions in the criminal case and, on the other hand, in connection with the methods of investigation used. Therefore, in determining the probative value of the conclusion, the reliability of the method used and the completeness of the research, the significance of the research material, the experience of the expert and the agreement between the conclusions of the expert and the psychologist should be taken into account,[94] as well as to what extent are the circumstances, mentioned in the conclusion, confirmed by other evidence in the criminal case (e.g. changes in behaviour after the accident, the history of the victim's treatment in the psychosocial and medical rehabilitation centre and the testimony of his attending physician), etc.

If there are several forensic psychological conclusions in a criminal case, each of which points to a different result, these conclusions cannot be mutually exclusive if a similar/same guiding methodology was used in both psychological examinations, but the examinations were conducted under substantially different conditions, the experts and the subject differed in terms of the scope and quality of the information obtained during the clinical interview. For example, if in the first case the process of interviewing the victim was uninformative for answering the questions posed to the expert (the victim did not talk to the expert and left the questions unanswered, hence it could not be managed

---

92 For example, the ruling of the Criminal Chamber of the Supreme Court of Georgia on case № 433AP-22 of June 28, 2022. The victim reported the crime against him under Article 137 of the Civil Code of Georgia 1 year after the incident.

93 For example, in the case of M.G.C. v. In Romania (cited above), the national court changed the qualification of the act – finding the accused guilty of sexual intercourse with a minor but not of rape. In establishing the acquittal verdict in the case of rape, the court indicated that the victim did not tell her parents about the violence and after the crime she went to the place where the crime (rape) was committed – to the neighbor's house – to play. The court did not take into account the victim's age and the expert opinion, according to which the victim had post-traumatic stress; Due to his youth, he could not understand the consequences of his actions; Age and vulnerability have conditioned his attitude towards violence. The European Court found a violation of Articles 3 and 8 of the Convention, since the national court's approach violated the positive obligation of the state to effectively use the criminal justice system to punish all forms of sexual violence and rape against children. The court explained that the approach of the national courts – not sharing the position of the victim when the victim was unable to provide evidence of physical violence in the case of rape charges – the standard of proof does not correspond to the factual circumstances related to the rape victims and indicates the ineffectiveness of the appeal.

94 See Establishment of the Criminal Chamber of the Supreme Court of Georgia in case № 685AP-22.

to gather objective data through expertise and assess psycho-emotional condition of the victim in relation to the emerged situation, the victim was emotional, unreliable, confused and inconsistent before the end of examination),[95]whereas in the second case – the investigation material was sufficient to draw a categorical conclusion.

4.4. Alteration of Testimony and Refusal to Testify by a Minor

The CPC provides for public prosecution for all categories of offences, the initiation and termination of which is not dependent on the victim's wishes (continues even if the victim reconciles with the defendant and changes the statement in favour of the defendant). When the minor victim/witness changes the statement in favour of the defendant/ accussed or refuses to testify, it may result in an acquittal unless other direct incriminating evidence is found in the criminal case to support a conviction. In particular, if:

1. a minor victim/witness cooperates with the investigating authority during the investigation phase, but refuses to testify in court[96] – in such a case, the main problem is the possibility to use the expert's opinion and to reach a guilty verdict based on it.

According to the Principle of *in dubio pro reo*, when the only and/or main incriminating evidence is the conclusion of the psychological examination and the minor witness/victim refuses to testify in court, the use of the expert opinion to support a guilty verdict is not allowed because the expert opinion is based on the information given by the minor to the expert and the truthfulness of it can't be verified as the defence did not have the opportunity to challenge the reliability of the information given by the minor victim/witness at the investigation stage.

In order to prevent secondary and re-victimisation and to protect the most important potentially incriminating evidence, it is important (in cases in the above mentioned category) to ensure from the very beginning the interrogation of the minor, the audio and video recording of the interrogation and the examination of the said recording during the court hearing.

2. in some cases the position of the minor is contradictory – the minor changes his position several times with regard to both the fact of the crime and the subject who committed the crime, pointing to different objective/subjective circumstances as the reason for the change of position.[97] In such cases, it is questionable whether the testimony meets the standard of reliability.

A minor's refusal to testify at the hearing in court or to substantially deny or change the statements he or she made at the investigation stage is not a reason for the court to uphold the statement made at the investigation stage, even if the credibility of the original statement is confirmed by part of the evidence collected in the criminal case, because according to the Article 3 of the CPC

---

95 Judgment of the Criminal Chamber of the Supreme Court of Georgia N 683ap-22, October 3, 2022

96 Refusal can be caused by a feeling of shame, dependence on the abuser, bullying by the abuser of the victim/her family members, the desire of the victim's parents to avoid the negative attitude and stigma of society, etc. see Guide for Parliamentarians, Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse (Lanzarote Convention), Parliamentary Assembly of the Council of Europe, 2013, 15.

97 See Decision of the Criminal Chamber of the Supreme Court of Georgia dated November 16, 2021 on case № 467AP-21.

testimony of a witness is information on the circumstances of a criminal case provided by a witness *to a court*.

At a court hearing the publication of substantially different statements of the same witnesses, made during investigation, only serves impeachment of the witness.

The court assesses how coherent the statements made at the different stages of the proceedings (during questioning and interrogation) are in relation to the main issue, how important changes are in relation to the main issue of the evidence and the reasons for the changes, and how well the statements made are consistent with the statements made by other witnesses in the criminal case.

Thus, the minor's refusal to testify or changing his testimony in favour of conviction in the absence of other direct incriminating evidence results in acquittal under the principle of "in dubio pro reo", as the Georgian Criminal Procedure Code does not provide for the possibility of establishing a guilty verdict only on the basis of indirect evidence (regardless of its number), including – on the basis of the victim's deviant behaviour, changed mood (locked in his mind, suicidal, etc.) or other circumstantial evidence. At the same time, it becomes problematic to use the result of the forensic psychological examination as the main direct incriminating evidence for the purposes of sentencing.

5. Conclusion

To prevent re-victimisation and secondary victimisation of minors, to reduce the threats of influence to change or refuse a minor's testimony and to preserve the probative value of a minor's testimony for the purposes of the administration of justice, procedural legislation, including Article 52 of the JJC, should preferably provide that the minor victims and witnesses, in cases of sexual violence against minors, should not be interrogated by the investigating authority and should be questioned before a magistrate not only in the cases prescribed by para 1 Art. 52, but in each and every case when minor witness/victim express willingness to cooperate with the investigation and give testimony (therefore a new subparagraph should be added to the part 1 Art 114 of the CPC stating: "e) juvenile witness/victim in the case of a crime under Chapter XXII of the Criminal Code of Georgia").

The study of the case law confirms that when minors are cross-examined in court, the defence uses aggressive tactics which, together with the excitement of being questioned in court, make an additional stressful environment for minors, regardless of whether the minor attends the hearing from a distance or is present in the courtroom. In some cases, this is not followed by an appropriate response from the court, and psychologists' comments often refer to a request to rephrase the questions/take a break. It is therefore important to proactively involve the court in the interrogation process to prevent a hostile environment for minors; pinpoint audio-video interrogation with the purpose to investigate recording at the court hearing and consider possibility of re-interrogation of the minor only in case of necessity to additionally clear up or specify questions having essential significance for the case.

Taking into account the specifics of the mentioned category of cases, the possibility of using hearsay as an exception, based on a thorough examination of the admissibility of the testimony and the necessity of its use by the court in accordance with the standard set by the Constitutional Court of

Georgia – on the basis of clearly defined and detailed procedural standards, respecting appropriate procedural safeguards – is increasingly discussed.

Given the limited rights granted to the victim by the procedural legislation, it is important to consider the minor's right to be heard and have his or her views taken into account not only for persons in conflict with the law but also for the minor victim (the minor victim's right to compensation is directly related to the nature of the judgment).

Bibliography:

1. Juvenile Justice Code, 12/06/2015.
2. Criminal Procedure Code of Georgia, 09/10/2009.
3. Law of Georgia "On Combating Crimes Against Sexual Freedom and Inviolability", 17/03/2020.
4. Convention on the Rights of the Child, 20/22/1989.
5. Council of Europe Convention "On the Protection of Children from Sexual Exploitation and Sexual Violence", 25/10/2007.
6. Council of Europe Convention "On the prevention and suppression of violence against women and domestic violence", 11/05/2011.
7. European Social Charter, 03/05/1996.
8. *Lursmanashvili L. (trans.),* Handbook of the European Law of Child Rights, Tbilisi, 2020, 87 (in Georgian).
9. *Pataraia B., Bakhtadze U., Areshidze E., Gagievi M., Khatiashvili G., Tsirekidze I.,* Commentary on crimes against sexual freedom and inviolability, Tbilisi, 2020, 42-43 (in Georgian).
10. Special report on the implementation of justice on crimes of sexual abuse and sexual exploitation of children, Public Defender of Georgia, Tbilisi, 2021, 25-27, 77.
11. Protection of procedural rights of minor defendants, witnesses and victims in the field of criminal justice, Public Defender of Georgia, 2020, 72.
12. International and European legislative framework related to children in conflict with the law, 54-55 <http://phf.org.ge/uploads/publications/5c861293048a1.pdf> [21.11.2022].
13. Violence against children in Georgia, 2013, 13, 36.
14. Decision № 1/1/548 of the Constitutional Court of Georgia dated January 22, 2015 in the case "Georgian citizen Zurab Mikadze against the Parliament of Georgia".
15. Decision № 3/1/608,609 of the Constitutional Court of Georgia dated September 29, 2015 on the constitutional submission of the Supreme Court of Georgia.
16. Decision of the Criminal Chamber of the Supreme Court of Georgia dated November 2, 2022 on case № 459AP-21.
17. Judgment of the Criminal Chamber of the Supreme Court of Georgia dated October 3, 2022 on case № 685AP-22.
18. Judgment of the Criminal Chamber of the Supreme Court of Georgia dated October 3, 2022 on case № 683AP-22.
19. Judgement of the Criminal Chamber of the Supreme Court of Georgia of July 21, 2022 on case № 575AP-22.
20. Judgment of the Criminal Chamber of the Supreme Court of Georgia dated June 28, 2022 on case № 433AP-22.

21. Judgment of the Criminal Chamber of the Supreme Court of Georgia dated March 2, 2022 on case № 925AP-21.
22. Judgment of the Criminal Chamber of the Supreme Court of Georgia of December 21, 2020 on case № 550AP-21.
23. Decision of the Criminal Chamber of the Supreme Court of Georgia dated November 29, 2021 in case № 513AP-21.
24. Judgment of the Criminal Law Chamber of the Supreme Court of Georgia of November 2, 2021 on case № 459AP-21.
25. Judgment of the Criminal Chamber of the Supreme Court of Georgia dated October 8, 2021 on case № 297AP-21.
26. Judgment of the Criminal Chamber of the Supreme Court of Georgia on August 31, 2021 in case № 356AP-21.
27. Ruling of the Criminal Chamber of the Supreme Court of Georgia of July 21, 2022 on case № 575AP-22.
28. Judgment of the Criminal Law Chamber of the Supreme Court of Georgia of July 13, 2021 on case № 854AP-20.
29. Judgment of the Criminal Chamber of the Supreme Court of Georgia of March 9, 2021 on case № 856AP-20.
30. Judgment of the Criminal Chamber of the Supreme Court of Georgia dated March 1, 2021 on case № 640AP-20.
31. Judgment of the Criminal Chamber of the Supreme Court of Georgia of July 14, 2020 on case № 97AP-20.
32. Judgment of the Criminal Chamber of the Supreme Court of Georgia of July 26, 2016 on case № 251AP-16.
33. Verdict of the Criminal Chamber of the Supreme Court of Georgia dated February 9, 2016 on case № 453AP-15.
34. EU Strategy for a More Effective Fight against Child Sexual Abuse, 24/07/2020.
35. UN Protocol on the Provision of Assist to Victims of Sexual Exploitation and Abuse, 12/12/2019.
36. Directive 2012/29/EU of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, 25/10/2012, OJ 2012 L 315/55.
37. Directive 2011/93/EU, "Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography", and replacing Council Framework Decision 2004/68/JHA, 13/12/2011.
38. Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, Council of Europe, 17/11/2010.
39. ECOSOC, UN Guidelines on Justice in Matters Involving Child Victims or Witnesses of Crime, 22/07/2005, E/RES/2005/20.
40. Recommendation Rec (2001)16, of the Committee of Ministers on the Protection of Children Against Sexual Exploitation, Council of Europe, 31/10/2001.
41. UN CRC, General Comment №13 (2011), The Right of the Child to Freedom from all Forms of Violence, 18.04.2011, CRC/C/GC/13, 18/04/2011.
42. UN CRC, General Comment №12 (2009): the Right of the Child to be Heard, CRC/C/GC/12, 20/07/2009, 20.

43. UN CRC, General Comment №5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27/11/2003.
44. UNICEF Guidelines on the Protection of Child Victims of Trafficking, New York, 2006.
45. UN GA/12050, Resolution 1307 (2002), Sexual exploitation of children: Zero Tolerance, 13/09/2002.
46. Declaration and Agenda for Action, World Congress Against Commercial Sexual Exploitation, 1996.
47. Child Sexual Abuse and Child Pornography in the Court's Case-law, Research Report, Council of Europe, 2011.
48. *Greijer S., Doerk J.,* Terminology Guidelines for the protection of Children from Sexual Exploitation and sexual Abuse, Luxemburg, 2016, 18, 24, 78.
49. *Marchese C. L.,* Child Victims of Sexual Abuse: Balancing a Child's Trauma Against the Defendant's Confrontation Rights – Coy v. Iowa, 6 J. Contemp. Health L. & Pol'y 411, 1990, 411, <https://scholarship.law.edu/jchlp/vol6/iss1/23> [22.11.2022].
50. *Field N., Katz C.,* The Experiences and Perceptions of Sexually Abused Children as Participants in the Legal Process: Key Conclusions From a Scoping Literature Review, Trauma, Violenca and Abuse, 2022.
51. *Pavlovic Z., Paunovic N.,* Protection of Children from Sexual Abuse and Exploitation in International, European and National Framework, in: Human Rights Protection, The Right to Human Dignity, Yearbook, Novi Sad, 2020, 319.
52. R.B. v. Estonia, №22597/16, [2021], ECHR.
53. X. and Others v. Bulgaria, №22457/16 [GC], [2021], ECHR.
54. Z. v. Bulgaria, №39257/17, [2020], ECHR.
55. A and B v Croatia, №7144/15, [2019], ECHR, 110,129.
56. M.M.B. v. Slovakia, №6318/17, [2019], ECHR.
57. V.B. v Belgium, №61030/08, [2017], ECHR.
58. A.B. C v Latvia, №30808/11, [2016], ECHR.
59. Blokhin v. Russia, [GC], №47152/06, [2016], ECHR.
60. M.G.C. v. Romania, №61495/11, [2016], ECHR.
61. G.U. v. Turkey, №16143/10, [2016], ECHR.
62. S.Z. v. Bulgaria, №29263/12, [2015], ECHR.
63. O'Keeffee v. Ireland, [GC], №35810/09, [2014], ECHR.
64. Nencheva and Others v. Bulgaria, №48609/06, [2013], ECHR.
65. Söderman v. Sweden, №5786/08, [2013], ECHR.
66. C.A.S. and C.S. v. Romania, №26692/05, [2012], ECHR.
67. M. and Others v. Italy and Bulgaria, №40020/03, [2012], ECHR.
68. M. and C. v. Romania, №29032/04, [2011], ECHR.
69. M.P. and Others v. Bulgaria, №22457/08, [2011], ECHR.
70. Jendrowiak v. Germany, №30060/04, [2011], ECHR.
71. A.S. v. Finland, №40156/07, [2010], ECHR.
72. B.B. v. France, №5335/06, [2009], ECHR.
73. Neulinger and Shuruk v. Switzerland, [GC], №41615/07, [2009], ECHR.
74. Gardel v. France, №16428/05, [2009], ECHR.
75. E.S. and Others v. Slovakia, №8227/04, [2009], ECHR.
76. Demir and Baykara v. Turkey [GC], №34503/97, [2008], ECHR.

77. Kovac v. Croatia, №503/05, [2007], ECHR.
78. Šubinski v. Slovenia, №19611/04, [2007], ECHR.
79. Sanchez Cardenas v. Norway, №12148/03, [2007], ECHR.
80. Ruban and Others v. Spain (dec.), №41640/04,[2005], ECHR.
81. Magnusson v. Sweden, №53972/00, [2003], ECHR.
82. M.C. v. Bulgaria, №39272/98, [2003], ECHR.
83. E. and Others v. the United Kingdom, №33218/96, [2002], ECHR.
84. Al Adsani v. the United Kingdom [GC], №35763/97, [2001], ECHR.
85. S.N. v. Sweden, №34209/96, [2002], ECHR.
86. P.S. v. Germany, №33900/96, [2001], ECHR.
87. Streletz, Kessler and Krenz v. Germany [GC], №34044/96 and 2 others, [2001], ECHR.
88. Scozzari and Giunta v. Italy, [GC], №39221/98 and №41963/98, [2000], ECHR.
89. Vanhatalo v. Finland, №22692/93, [1995], ECHR.
90. W.S. v. Poland, №21508/02, [2007], ECHR.
91. C-507/10, X., [2011], ECR.
92. C-105/03, Maria Pupino, [2005] ECR I-5285, 53, 59.

Elguja Tavberidze*

Legal Regulations and Practical Features of a Person's Arrest with a Court Ruling

This article looks at the one of the most important institutes of criminal procedure law. Protecting the right to liberty is a major positive responsibility of any democratic state. The freedom of the person is inviolable. Consequently, the restriction of this right and the interference of the state in it is possible only in rare, exceptional cases, provided that the normative rules established by the imperative must be observed unconditionally.

The article is based on the analysis of scientific literature, legislation and investigative / judicial practice. It reviews the key provisions of lawful arrest and the challenges involved. The purpose of the study is to identify gaps in legislative and investigative / judicial practice related to the arrest of a person based on a judge's ruling and to develop the necessary recommendations for their elimination.

Keywords: *Arrest, Lawful Arrest, Judge's Ruling, Probable cause.*

1. Introduction

The study of an arrest as a procedural coercive measure is so relevant that it is directly related to one of the most important and fundamental values of a person – his freedom. In view of the above circumstances, the study of lawful arrest is important, as it is necessary to determine the completeness of the current legislation with the mechanisms of protection of rights, how it is interpreted on a theoretical level and what coherent or contradictory aspects are revealed in terms of practical application of the norm.

Arrest of a person with or without a court ruling serves to promote the proper administration of justice, which is reflected in the prevention or suppression of specific threats. However, on the other hand, the arrest of the person itself is associated with the risks of arbitrary restriction of the rights of the arrested person. In view of the above, the special legal nature of the arrest as a procedural coercive measure underscores its urgency and importance.

Arrest of a person on the basis of a judge's ruling is one of the tangible legal levers for an effective fight against crime. However, at the same time, the prosecution has an obligation to strictly enforce a number of legal rules in order not to unduly and unjustly restrict human rights. Accordingly, the provisions of the current legislation should be regulated in such a way as to exclude the risks of arbitrary interference with the person's liberty and, at the same time, impose unconditional obligations on the state servant. Moreover, the linear and lawful development of investigative practices is directly related to the protection or violation of human rights.

* Ivane Javakhishvili Tbilisi State University, Faculty of Law, PhD student in Law, Invited lecturer.

In view of the above circumstances, it is necessary to identify problems at both the normative and practical levels, to seek appropriate ways to resolve them, to improve the current legislation and to apply the lawful arrest legally correct in practice.

2. Probable Cause as a Necessary Evidential Standard

Under criminal procedure law, arrest can be both lawful and unlawful, which means that a person can be arrested both on the basis of a judge's ruling and, in case of urgent necessity, without the permission of the court.[1]

The main essence of an arrest of the person on the basis of a court ruling is that before the person is arrested, the objective observer, the judge, examines the factual and formal grounds for the arrest and makes a decision to restrict a person's right to liberty only if they exist properly.[2]

The first and third parts of Article 171 of the Code of Criminal Procedure (hereinafter – the Criminal Procedure Code) directly indicate the circumstance that it does not matter whether there is lawful arrest or unlawful arrest, in both cases, there must be a probable cause[3] that the person committed a crime, i.e., any action provided for in the Private Part of the Criminal Procedure Code.

Accordingly, a probable cause is a necessary evidential standard both in the arrest of a person with a judge's ruling and without it.

The standard of probable cause should establish both the fact that a person has committed a crime and the circumstances under which the person will flee or will not appear before a court, destroys information important to the case, or will commit a new crime. The absence of one of these preconditions precludes the possibility of applying the arrest and makes it illegal.[4]

According to Article 3 (11) of the Criminal Procedure Code, law enforcement body in relation to a particular criminal case must have a totality of facts or information that raises the suspicion in so-called the third eye, in the objective observer that this particular person may have committed this crime. This ground can be established by a variety of pieces of evidence, including a record of identification for a victim / witness, a record of inspection, a record of search/seizure[5] and other evidence in the case that indicates a person has allegedly committed a crime.

Although the evidentiary standard of a probable cause is less rigid than other standards of evidence, the prosecutor is still empowered, when establishing such a standard, to file a motion with a court for the arrest of a person. Also, a person authorized to arrest is allowed to arrest a person without the permission of a court, in the presence of this standard. In both cases there is a justification to the extent that both types of arrest will inevitably pass judicial review and it is the latter who will have the final say on the legality of the arrest.

---

1 *Gutsenko K.F., Golovko L.V., Filimonov B.A.,* Criminal Procedure of Western States, translation from Russian, *Gogshelidze R. (ed.),* Tbilisi, 2007, 281-285.

2 *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Process, Tbilisi, 2015, 83 (in Georgian).

3 *Anderson J.F., Thompson B.,* American Criminal Procedures, Durham, North Carolina, 2007, 178.

4 *Papiashvili L. (ed.),* Collective of Authors, Georgian Criminal Procedure Law Private Part, Tbilisi, 2017, 209 (in Georgian).

5 Ibid.

The standard of probable cause provides admissibility for a person in case of reasonable suspicion of restriction of liberty and excludes arbitrariness, is an important part of protection against arbitrary restriction of person's liberty.[6]

First of all, the judges reviewing the motion for arrest check (should have checked) the factual basis for the application of the arrest in accordance with the standard of probable cause provided for by the criminal proceedings.[7] Typically, in practice, more problems arise in setting the standard of a probable cause, not in relation to the alleged commission of a crime, but in the substantiation of other threats that must precede the arrest of a person.

There are cases when prosecutors justify these threats by saying only that "there is a probable cause of a specific person fleeing and / or other threats", but in fact their motion does not say anything else about the possible realization of these threats and / or does not substantiate those to a degree that actually gives us a standard of probable cause. Nevertheless, in most cases, the courts do not shy away from granting such motions.

It is interesting to consider one of the criminal cases from practice. In the framework of the mentioned case, on May 8, 2018, the prosecutor filed with the Tbilisi City court a motion and requested the arrest of D.S. According to the standard of probable cause, in the motion was initially established by the prosecutor that D.S may have committed an offense under Article 182, Part 2, Subparagraphs "d" and Part 3, Subparagraphs "B" of the Criminal Code of Georgia, and then he was transferred to substantiate the expected threats. In the mentioned motion, the prosecutor explains that the above crime without alternative exceed 7-11 years of imprisonment , which is why there was a probable cause that after the indictment was filed, in order to avoid the expected harsh sentence, a foreign national D.S with connections abroad, would flee from the investigation and the court. Also, a few words substantiated the fact that D.S. might have influenced both the interviewees already interviewed in the case and the witnesses to be interviewed in the future, as evidenced by his various contacts with individuals, thereby actually destroying information relevant to the case. No other substantiated evidence of the actual existence of the threats can be found in the mentioned motion.[8]

It should be noted that the above-mentioned motion of the prosecutor was satisfied by the Tbilisi City Court's ruling.[9] According to the judge's mentioned ruling, there were both formal (procedural) and factual (evidential) grounds for the arrest of D.S. According to the court, the information in the case and the totality of the materials presented gave legal grounds that D.S might have committed the crime provided for by Article 182 (2) (D) and 182 (3) (b) of the Criminal Code of Georgia. The Court also points out that he agrees with the Prosecutor in the position that once D.S. becomes aware of that he may be charged in the said case, he may flee; there is also a probable cause that he will destroy information relevant to the case and affect witnesses. It was on these grounds that the court ruled that the arrest of D.S. should have been carried out on the basis of a judge's ruling. Any

---

6 *United Nations*, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, New York, Geneva, 2003, 174.

7 *Mchedlidze N.,* Standards of Application of the European Convention on Human Rights by Common Courts of Georgia, Tbilisi, 2017, 51 (in Georgian).

8 Criminal Case № 092310819001, Motion for Arrest 8/05/2018.

9 Ruling № 6137 of the Tbilisi City Court 8/05/2018.

other justification or position as to why the court granted prosecutor's motion is not read in the mentioned ruling.[10]

Following this, on May 10, 2018, based on a court ruling, D.S. was arrested according to the report of the accused person. On May 11, 2018, the prosecutor have already appealed to the court with the request for applying the measure of restraint[11] and requested that detention be applied against the accused D.S. The application of the mentioned measure of restraint was substantiated on the same grounds as discussed above about the motion to arrest. In this case, too, the prosecutor indicated that the ground for applying the detention was to prevent the accused from hiding and interfering with the rendering of justice/the collection of evidence.[12]

Interestingly, according to the decision of the Tbilisi City Court[13], the above-mentioned motion of the prosecutor to apply detention was not satisfied and the accused was selected on bail in the amount of 50,000 GEL.

According to the judge's mentioned ruling, with the standard of probable cause established only that D.S. might have committed the act charged against him, although the reality of the other threats had not been substantiated by the prosecutor. According to the court, the only fear of impending punishment cannot be the sole ground for using detention against the accused person. Although severe punishment is a relevant factor in assessing the risk of hiding, this threat cannot be assessed in the abstract. The court pointed out that D.S. was twice interviewed as a witness in this case, as well as the dispute was resolved through a civil procedure against him, and nevertheless, he had never left the territory of Georgia. In addition, he had a wife and children in Georgia, had a permanent place of residence, engaged in an entrepreneurial activity, which reduced the risk of hiding from him.

In addition, the court considered that there may have been some risks and dangers in putting pressure on witnesses by the accused person, but not to the standard that the most severe form of restraint – detention is provided for.[14]

In view of all the above, taking into account the above position of the judge, with the standard of probable cause could not establish the existence of fleeing of D.S. or other relevant threats. Consequently, this could not be substantiated with the required standard nor could in the motion for arrest, which could have led to the rejection of the mentioned motion. Nevertheless, it should be noted that the judges reviewing the motion for arrest, in most cases, do not enter into an in-depth discussion in the context of substantiating the threats and for this they give place to the judges reviewing the motion for the application of a measure of restraint, as was in the above-mentioned criminal case. Therefore, in the context of human rights protection, despite the fact that the maximum term of detention is 72 hours, it is advisable, that arrest warrants should not be issued superficially, without verifying and / or establishing the reality of the threats by the standard of probable cause.

A similar approach is being developed by the European Court of Human Rights and its established practice. Even short-term deprivation of liberty is considered to be the most severe form of

---

10 Ibid.

11 Criminal Case № 092310819001, Motion for the Application of a Measure of Restraint 11/05/2018.

12 Ibid.

13 Ruling № 10a / 2221 of the Tbilisi City Court 12/05/2018.

14 Ibid.

restriction of the right of a person (accused)[15], the justification of which is considered by the European Court of Human Rights under Article 5 (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms.[16] According to the European Court of Human Rights, although a probable cause that a person has committed a crime is a necessary condition for restricting his or her liberty, this alone is not enough and at the same time, there must be tangible circumstances that justify such interference by the state.[17]

3. Necessity of Imprisonment as a Sentence

According to the first part of Article 171 of the Criminal Procedure Code of Georgia, If there is probable cause that a person has committed a crime for which the law provides imprisonment,…upon motion of the prosecutor, the court, according to the place of investigation, shall deliver a ruling for the arrest of the person without an oral hearing.[18] This rule refers to the lawful arrest, based on a judge's ruling, in which case it is necessary to have a probable cause against the person for the crime for which the law (CC) should provide for imprisonment.

It should be noted that the necessity of imprisonment as a sentence applies only to the lawful arrest based on a judge's ruling and not to cases of urgent necessity. A verbal explanation of the law makes it possible to make this conclusion. Article 171 of the Criminal Procedure Code explicitly states that a prosecutor should not file a motion in court and, consequently, a court should not rule on the arrest of a person against whom there is a probable cause that he has committed a crime which does not provide for imprisonment.

It should not be disputed that a person may be arrested in such a case without a judge's ruling, in a state of urgent necessity, due to the following circumstances: Article 171 of the Criminal Procedure Code is based on the grounds for arrest and should be guided by this norm when it comes to arrest. According to the 3rd part of the mentioned norm, a person may be arrested without a court ruling only if there is a probable cause that the person has committed a crime and the risk that he/she may flee, not appear before the court, destroy information that is important to the case, or commit a new crime cannot be prevented by an alternative measure that is proportional to the circumstances of the alleged crime and to personal characteristics of the accused. Therefore, it is clear, that first part of Article 171 of the Criminal Procedure Code refers to the lawful arrest of a person, while the second and third parts of the said article are entirely devoted to the unlawful arrest of a person in case of urgent necessity.

If the legislator had willed that the arrest of a person in both lawful and unlawful cases required a mandatory sentence of imprisonment, then he would have formulated Article 171 (3) of the Criminal Procedure Code as follows: If there is probable cause that a person has committed a crime for which the law provides imprisonment, or the person will flee, … Accordingly, the legislature directly

---

15 *Trexeli Sh.,* Human Rights in Criminal Procedure, Constitutional Court of Georgia, Tbilisi, 2009, 452 (in Georgian).

16 Kosenko v. Russia, [2020], ECtHR, 15669/13, 76140/13, 45.

17 Idalov v. Russia, [2012], ECtHR, 5826/03, 140; I. E. v. Moldova, [2020], EctHR, 45422/13, 73.

18 *Tumanishvili G.,* Criminal Process, General Part Review, Tbilisi, 2014 (in Georgian).

referred to the necessity of imprisonment as a sentence, as it does in the first part of the norm under consideration.

This reasoning also has a practical justification, in particular, when a person authorized to arrest, for example, a person keeping public order, sees that a particular person is committing a crime, hence the urgent necessity to prevent the said action immediately.[19] The only way to achieve this goal is to arrest a person. It is clear that no one is obliged to know orally the sentences for each crime separately, but it is enough to know that this particular action is provided by the Criminal Code of Georgia. Accordingly, in such a case, the arrest of a person should be declared illegal on the grounds that the actions of the said person in this particular case were provided for in the Criminal Code of Georgia, although it did not provide for imprisonment.

A similar position is taken by the authors of the comments on the Criminal Procedure Code: "The action taken by the arrested person, which was the basis for his arrest, must contain signs of a crime under the Criminal Code, that carry imprisonment (Refers only to an arrest made on the basis of the permission of the court).[20]

Accordingly, it should be concluded that the necessity of imprisonment as a sentence applies only to lawful detention and is not related to the restriction of a person's liberty in case of urgent necessity.

4. Existence of the Risk of Hiding Person

In order to detain a person, it is necessary to have both factual and formal grounds cumulatively. The factual basis refers to the evidences that there is a probable cause in relation to a particular person according to which that person has committed a crime for which the law provides imprisonment, while the formal basis refers to the procedural grounds provided for by article 171. Both a factual and a formal basis must be established by a standard of probable cause. Preventing the risk of hiding serves to promote the proper administration of justice. In case of hiding a person will be actually prevented from administering adequate and instant justice in the case, even in the future enforcement of a judgment.

The danger of a person hiding can be indicated by a number of circumstances: he does not have a permanent place of residence, has active connections with people living abroad, frequent border crossings are observed, etc. For fear of punishment and expected judgment, the European Court of Human Rights even considers the use of detention in a number of judgments to be permissible,[21] explaining that the severity of the crime and the fear of severe punishment, combined with other circumstances, are a relevant element in assessing risk of hiding.[22]

Italian law also provides for the possibility of arresting a person on appeal for a threat of hiding. If there are sufficient grounds that a person convicted of a serious crime may be hiding, the public

---

19 *Kamisar Y., Lafave W.R., Israel J.H., King N.J.,* Basic Criminal Procedure, Cases, Comments and Questions, Eleventh Edition, Thomson West, 2005, 4.

20 *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 502 (in Georgian).

21 Mkhitaryan v. Russia, [2013], ECtHR, 46108/11.

22 Aleksandr Makarov v. Russia, [2009], ECtHR, 15217/07.

prosecutor may detain him or her, regardless of whether the person has been caught in action while or immediately after committing a crime.[23]

In terms of justifying the threat of absconding in relation to the fear of expected punishment, the practice in Georgian judicial law is heterogeneous. According to the explanation of the court in the ruling of the Tbilisi City Court of May 8, 2018, after DS becomes aware that he may be charged in the case, he may hide for fear of the expected punishment.[24]

According to the ruling of the Tbilisi City Court of June 30, 2017, "the circumstance that the action committed by K.G. (The first part of Article 1261 of the Criminal Code), provides, among other alternative sentences, a sentence of imprisonment. This is a relevant factor in assessing the danger of hiding".[25]

According to the ruling of the Tbilisi City Court of February 4, 2017, in order to avoid the expected punishment and civil liability (the total amount of damages is 13,783 GEL), K.B. may avoid the investigation. The expected severe punishment is in itself a relevant factor in assessing the danger of hiding.[26]

In view of all the above, it should be noted that judges of Tbilisi City Court often point to the dangers of fleeing in their rulings for fear of expected punishment, but the judgment of 4 February 2017 also states that, "However, at the same time, the court clarifies that the only indication of the expected severe sentence is not sufficient to arrest a person, and notes that in this particular case there may be a fear of the expected sentence, given its severity, and the court is convinced that K.B. may also continue criminal activities.[27]

Consequently, taking into account these circumstances, it is also clear that the only fear of an expected punishment should not be considered sufficient to justify the danger of absconding and, consequently, to satisfy a motion for the arrest of a person. It is also necessary that there be other circumstances that either indicate a greater risk of absconding (for example, frequent border crossings) or a direct indication of other legal threats (committing a new crime, destroying information important to the case). Although severe punishment is a relevant factor in assessing the risk of hiding, this threat cannot be assessed in the abstract. The risk of absconding can be reasonably determined by reference to factors when a person has previously attempted to flee from the country for a lawful punishment and / or there are specific signs of a plan of hiding.[28]

According to one of the rulings of the Tbilisi City Court, "Fear of passing possible judgment of conviction and punishment may become the driving motive for him to hide and not appear before the court. This assumption is also supported by the fact that at present it is not possible to determine his (the detainee's) whereabouts, and it is clear from the records of the announcement of the apartment that B. D. has no permanent place of residence, no contact with his parents, no control over his

---

23 *Vingart K.* (ed.), Criminal Procedure Systems in EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 260.

24 Ruling № 6137 of the Tbilisi City Court 8/05/2018.

25 Ruling № 6209-17 of the Tbilisi City Court 30/06/2017.

26 Ruling № 1044 of the Tbilisi City Court 4/02/2017.

27 Ibid.

28 Ruling № 10a / 2221 of the Tbilisi City Court 12/05/2018.

movement and behavior.[29] Consequently, in addition to the fear of expected severe punishment, other indicators were identified – a lack of control over the place of residence and movement – which together constituted the danger of hiding.

In view of all the above, when talking about the threat of hiding by prosecutors, it is expedient and necessary to justify the mentioned threat by referring to specific, actually existing circumstances and not in an abstract / stereotyped way. Accordingly, the danger of a person hiding must be assessed in a similar way by the court.

4.1. Danger of not Appearing Before the Court

One of the formal grounds under Article 171 of the Criminal Procedure Code is that a person will not appear before the court. Accordingly, if there is a danger of not appearing before the court, it must be established by the standard of probable cause, after which, once the factual basis has been established, the court will have the opportunity to issue a ruling on the arrest of a particular person.

Although the law (Article 171 (1) of the Criminal Procedure Code) specifically mentions a person hiding and not appearing before the court, it is clear that these two grounds are closely related. At the investigation stage, the investigator, the prosecutor has no idea whether a particular person will appear in court in the future, even because at the investigation stage the person may not need to appear in court for a sufficient period of time. The mentioned subjects (investigator, prosecutor) discuss depending on whether the person is announced by summoning them to the investigative body or to the prosecutor. Consequently, appearing in court is also directly related to appearing in an investigative body or in the prosecutor's office. This is related to the dangers of hiding a person. Not appearing in court, as well as in investigative bodies, impedes the proper administration of justice, which is why the prevention of both threats is precisely in line with the goals of effective justice.

Indeed, in practice, there are cases when prosecutors simultaneously indicate the danger of both hiding and non-appearance before the court to justify the threats. Although the above-mentioned grounds are listed alternatively under the above-mentioned article, from a practical point of view, it is difficult to imagine that there is no danger of absconding and there is only the danger of not appearing before the court. However, in case of justification of the threat of hiding, the danger of not appearing before the court will be automatically substantiated. The prosecutor's motion[30] emphasizes the fact that a person who must be arrested will hide from both the investigation and the court because of the fear of expected punishment, which will prevent the proper administration of justice.

Also, according to the prosecutor's motion for arrest of the prosecutor of Gldani-Nadzaladevi District Prosecutor's Office on June 29, 2017,[31] the prosecutor could not serve questionnaires to K.G. because he was not in the apartment rented by his family. At the same time, it was impossible to connect with him through his mobile phone. Therefore upon instructions of the prosecutor, since the whereabouts of K.G. were related to a number of difficulties, it emphasized the fact that K.G. was hidden from the investigation and avoided appearing in the investigative body.

---

29 Ruling № 19341 of the Tbilisi City Court 19/10/2021.

30 Criminal Case № 007290918005, Motion for Arrest 15/02/2019.

31 Criminal Case № 001150617003, Motion for Arrest 29/06/2017.

Consequently, if a person hides from the investigation and avoids appearing in the investigative body, there is a danger that he will not appear before the court either. Due to the above, the danger of both hiding and non-appearance before the court is substantiated at the same time. A similar reasoning is developed in the judge's ruling of person's arrest based on the mentioned motion, who considered the above-mentioned threats to be real.[32]

In addition to the above, according to the prosecutor's motion for arrest on February 3, 2017,[33] in order to avoid the expected punishment and civil liability (the total amount is 13,783 GEL), K.B. is hiding and will not appear before the court. It was on the basis of these circumstances that the court ruled that K.B. might have avoided the investigation.[34]

In view of all the above, it is clear that the dangers of hiding and non-appearance before the court are very closely related to each other, and if the threat of hiding is actually determined by the standard of probable cause, the danger of non-appearance in court will be also substantiated.

4.2. Destroying Information Important to the Case

One of the formal grounds for arresting a person is also the risk of destroying information important to the case. Accordingly, the prosecutor must establish that there is a probable cause that a particular person has destroyed information / evidence important to the case.

Important information for the case includes any information related to the factual circumstances of the criminal case, as well as an item, a document, substance or any other object containing this information.[35]

The risk of destroying evidence can be manifested in the destruction of documents, or in exerting pressure on accomplices or witnesses.[36]

As far as destruction is concerned, evidence can be destroyed either by the physical destruction of evidence (for example, burning a document; breaking / throwing evidence, blowing it up…), as well as by substantially altering its features by erasing traces of it – for example, by replacing a firearm, clearing traces of weapons, processing the place of commission of a crime to remove traces there, setting fire to the crime scene to clear traces, and so on.[37]

The risk of destroying information important to the case is indicated by the kinship or other close ties between the accused / potential accused and the victim / witness. Indeed, according to the Tbilisi City Court ruling for arrest,[38] "given that the people examined as a witnesses in the case are the spouse of the person who may be arrested, they have a close relationship with key witnesses, it provides a basis for the probable cause that there is a risk of destroying information important to the case".[39]

---

32 Ruling № 6209-17 of the Tbilisi City Court 30/06/2017.
33 Criminal Case № 092130916001, Motion for Arrest 3/02/2017.
34 Ruling № 1044 of the Tbilisi City Court 4/02/2017.
35 See, Article 3 (23) of the Criminal Procedure Code.
36 *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 597 (in Georgian).
37 Ibid, 597-598.
38 Ruling № 6209-17 of the Tbilisi City Court 30/06/2017.
39 Ibid.

It should be noted that the risk, which may lead to changes in the testimony of witnesses, should be the basis for the release of the accused and / or his refusal to be released.[40] The need for this is reinforced by the current procedure code, according to which, in order for the information entered into the record of the interview to become evidence, it is necessary to confirm the information provided by the person examined as a witness in court.[41]

Also, fear of revenge may not infrequently be enough for intimidated witnesses to refuse to participate in criminal proceedings altogether. The safety of witnesses who have already testified against the applicant is accountable. See also the desire of other Witnesses to testify in the future.[42]

In addition to the above, one of the rulings for arrest of the Tbilisi City Court[43] also contains the following entry: "Besides, the people being questioned in the case, the witnesses, are related to K.B.,[44] which is why he may influence the witnesses to get the testimony he wants.[45] Consequently, not only kinship, but even just acquaintance with a person can become an appropriate indicator for determining the reality of a risk based on the destruction of information important to the case.

If the case file reveals that the accused has personal ties to witnesses or can be bribed or otherwise influenced, there is a real risk of interfering with the administration of justice.[46]

It should be noted that in order to prevent undue influence on witnesses, the possibility of arresting a person is also provided for in Danish law. In particular, the arrest of a person by the police is permissible if there is a probable cause that the person has committed a crime and the restriction of his or her liberty is necessary to prevent him / her from coming into contact with other persons.[47]

It indicates the lack of danger of destruction of evidence when, based on the case file, the accused was aware of the investigation conducted by the investigative body against him, however, he did not interfere with the investigation and cooperated with him (indicated the identity of the weapon, object of crime, accomplices, etc…).[48] The above-mentioned reasoning is also developed by the judge of the Tbilisi City Court in his ruling of 12 May 2018,[49] in particular, "for the accused, who became aware that a criminal case was under investigation, he did not influence any of the witnesses".[50] Accordingly, the judge considered that in this particular case there was no danger of the defendant destroying the evidence, in any case, the said threat could not be substantiated by the relevant evidential standard by the prosecutor.

In view of all the above circumstances, it should be noted that the prevention of the risk of destruction of information important to the case is one of the important circumstances for preventing

---

40 Letellier v. France, [1991], ECtHR, 12369/86, 39.
41 See, Article 3 (24) of the Criminal Procedure Code.
42 Sopin v. Russia, [2012], ECtHR, 57319/10, 44.
43 Ruling № 1044 of the Tbilisi City Court 4/02/2017.
44 K.B. – person, who may be arrested.
45 Ruling № 1044 of the Tbilisi City Court 4/02/2017.
46 Mikiashvili v. Georgia, [2012], ECtHR, 18996/06, 102.
47 *Vingart K. (ed.),* Criminal Procedure Systems in EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 79.
48 *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 598 (in Georgian).
49 Ruling № 10a / 2221 of the Tbilisi City Court 12/05/2018.
50 Ibid.

the impediment to the proper administration of justice in the future. In domestic crime cases, for example, the risk in question may be excessive, but in other cases, irrelevant. Therefore, it is expedient and necessary to substantiate this risk in each specific case, based on facts actually existing in nature and not with reference to abstract dangers.

4.3. Risk of the Possible Committing a New Crime

An analysis of investigative and case law reveals that one of the most important, tangible, and often cited formal grounds is the emphasis on the threat of a possible committing a new crime. If there is a standard of probable cause in the commission of a crime against a person, it is unequivocal that the prosecution is tempted to substantiate the motion for the arrest of a person by assessing the wrongdoing already committed and to highlight the risk of continuing criminal activity in the future. However, it is self-evident that only the crime committed, no matter how serious it is, isolated by the permissible standard, it does not indicate the risks in question.[51]

According to the definition of the Constitutional Court of Georgia, "an action that is antisocial in nature and which, in all probability, may pose a real threat at the moment of such an action, potentially endanger the health of others or public order, may be subject to restriction / regulation. At the same time, it is clear that the state's response to anti-social action should be tightened only according to the severity, quality and scale of the threats posed by the action".[52] Accordingly, the prosecutor and the judge must assess, including the nature of the action and whether there is / is a real threat of recurrence.[53]

According to the European Court of Human Rights, the burden to prove the charges shall lie with the prosecution in relation to the motion for arrest / detention. It is the prosecution that must prove the existence of the circumstances that justify the application of the arrest / detention. It is also responsible for checking all the circumstances proving the existence of public interests or against it.[54]

In any case, a person should remain at liberty during the proceedings against him / her, unless the state can provide "appropriate and sufficient" reasons to justify the application of the arrest / detention.[55] Evidence of a new crime must be derived from the accused's past life, personality traits, and facts in the case.[56]

It should be emphasized that both the decision for the arrest a person and the choice of a specific type of restraint depend not on the number of preconditions (threat of hiding, committing a new crime, destruction of evidence), but on the intensity and significance of each of these threats.[57] The risk of

---

51 Bykov v. Russia, [2009], ECtHR, 4378/02, 64.

52 Ruling № 1/8/696 of the Constitutional Court of Georgia 13/07/2017 "Citizen of Georgia Lasha Bakhutashvili v. Parliament of Georgia", II-12, see. Citation 27.Ruling № 1/4/592 of the Constitutional Court of Georgia 24/10/2015 "Citizen of Georgia Beka Tsikarishvili v. Parliament of Georgia, II-75.

53 Criminal Case № 001230521008 , Motion for Arrest 19/10/2021.

54 Ilijkov v. Bulgaria, [2001], ECtHR, 33977/96, 84.

55 Wemhoff v. Germany, [1968], ECtHR, 2122/64, 18.

56 Clooth v. Belgium, [1991], ECtHR, 12718/87.

57 Ruling № 10a/4502-21 of the Tbilisi City Court 18/10/2021.

committing a new crime helps the court to correctly recognize a person's restriction of liberty / being in detention.[58]

All of the above is based on the conclusion that when discussing a possible risk of the committing a new crime, the prosecution and the court should not only consider the gravity or violent nature of the action,[59] but also the abstract and stereotyped reasoning in order to avoid In order to avoid unjustified arrests, violation of Article 5 of the European Convention for the Protection of Human Rights and Freedoms and, consequently, the responsibility of the state at the international level.

4.4. Consideration of the Issue of Requesting Consent From a Foreign State in Accordance with Article 16(4) of the Law of Georgia on International Cooperation in Criminal Matters

According to the Law of Georgia "on Amendments to the Criminal Procedure Code of Georgia"[60] of July 20, 2018, Article 171 of the Criminal Procedure Code of Georgia was amended for the first time since the entry into force of the current version, which referred to the first and second parts of this article.

In particular, one formal ground was added to the first part "or if the issue of requesting consent from a foreign state in accordance with Article 16(4) of the Law of Georgia on International Cooperation in Criminal Matters is under consideration".[61]

According to Article 16(2) of the Law of Georgia "on International Cooperation in Criminal Matters", a person extradited to Georgia may not be prosecuted for or convicted of any other crime committed by him/her before the extradition, other than the crime for which he/she has been extradited to Georgia. Consequently, we cannot initiate criminal proceedings against a person and we cannot sentence him for a crime he has committed in the past, the law allows this only for the crime for which the person was extradited to Georgia. However, there is exception to this rule, in particular, in order to prosecute such a person, the Ministry of Justice must first withdraw the consent from the foreign state carrying out the extradition. At the same time, according to international treaties and agreements of legal force for Georgia, it is obligatory to attach to the motion for consent an original or certified copy of the court decision and ruling (in case of a convicted person), or an arrest warrant or other warrant of the same force (in the case of an accused person). In the second case (in respect of a person who has not been convicted yet), in accordance with the current legislation of Georgia, the requested document is (1) a court ruling imposing detention on a person as a measure of restraint and (2) a court ruling on detention.[62]

---

58 Matznetter v. Austria, [1969], ECtHR, 2178/64.

59 *Mchedlidze N.,* Standards of Application of the European Convention on Human Rights by Common Courts of Georgia, Tbilisi, 2017, 71 (in Georgian).

60 See Explanatory Card on the Draft Law of Georgia "on Amendments to the Criminal Procedure Code of Georgia".

61 See, Article 171 (1) of the Criminal Procedure Code.

62 See, Explanatory Card on the Draft Law of Georgia "on Amendments to the Criminal Procedure Code of Georgia".

The second extreme is the fact that, according to the current version of the Criminal Procedure Code, a court cannot consider the issue of applying a measure of restraint unless a criminal prosecution has been initiated against him. First proceeding of the accused before the court, where the application of the measure of restraint against the person is considered, is the next stage in the initiation of criminal proceedings. Based on the above, only the court decision on the arrest of a person remains a legal lever. Accordingly, in its essence, an "arrest warrant or other warrant of the same force" under Georgian law may be only a court order on the arrest of a person, which must be accompanied by a motion to be sent to a foreign state requesting consent to prosecute an extradited person for a crime committed prior to extradition.[63]

This was the reason for the change in the first part of Article 171 of the Criminal Procedure Code. This, in turn, will enable the competent Georgian authorities to withdraw the consent from a foreign state in accordance with the rules established by law, in order to enable the extradition to be prosecuted for a crime for which it has not been extradited to Georgia before.[64]

5. Form and Procedure for Rendering a Ruling

If there are both factual (evidential) and formal (procedural) grounds for the arrest of a person, in such a case, the prosecutor, depending on the place of investigation, should apply to the court with a motion to issue a decision on the arrest of the person. It is interesting how this is carried out in the Georgian investigative practice. For example, if the investigation is conducted by the First Department of the Isani-Samgori Division of the Tbilisi Police Department, then the said Division is headed by the Isani-Samgori District Prosecutor's Office of Tbilisi.[65] Therefore, if at the stage of the investigation of a given criminal case, there is a probable cause against a specific person, both in the commission of a crime punishable by imprisonment and on any of the grounds listed in the law, then the specific prosecutor of the Isani-Samgori District Prosecutor's Office of Tbilisi, who is leading the case to the investigator of the criminal case, submits a motion for arrest of the person. After that, the given motion and the materials of the criminal case are usually submitted to the Tbilisi City Court by the investigator of the case. Accordingly, the Court Chancellery will receive the motion and the case file, after which the motion will be referred to one of the judges of the Tbilisi City Court, who will consider the motion without an oral hearing and makes a decision on grant the motion and arrest the person and / or on refuse to grant the motion (to arrest the person).

In a single motion for arrest, the prosecutor may request the arrest of more than one person, and the court ruling will be rendered to all persons together. But, both in the ruling and in the motion, the grounds and necessity of using the arrest in respect of each person must be independently substantiated.[66]

---

63 See, Explanatory Card on the Draft Law of Georgia "on Amendments to the Criminal Procedure Code of Georgia".

64 Ibid.

65 Human Rights Training and Monitoring Center (EMC), Georgian Law Firms Association (SIFA), Investigation System Analysis, Tbilisi, 2018, 22 (in Georgian).

66 *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 503 (in Georgian).

At the same time, a judge's decision to arrest a person will obviously not be issued for life. In the motion, the prosecutor must indicate the approximate period of the arrest, which must be determined individually in each case, but must not exceed 30 days (maximum period for the enforcement of the judgement). If the judgement is not / cannot enforced and the person is not/cannot arrested within the time period specified in the judgment, after the expiration of the judgement, the prosecutor may re-apply to the court with a motion for arrest the same person, but must indicate the reasons why the judgement could not be enforced in a timely manner.[67]

The hearing without an oral hearing of the motion is valid insofar as it facilitates the speedy administration of justice. In the current situation, when the Georgian judicial system is overloaded, the oral hearing of these types of motions would put the judiciary in an even more difficult situation. Apart from the above, as a rule, a motion for arrest is filed at the stage of the criminal case, when the criminal prosecution against the person has not started yet, therefore, there is no other party in the case – the defence. It is therefore quite reasonable to consider the said motion without an oral hearing.

After receiving a judge's decision on arrest of a person, law enforcement body must ensure the planning of the arrest procedure, which requires the analysis of a number of circumstances. The main actors in the development of the arrest plan are the investigator and the heads of the relevant department, who must first determine the place and time of the arrest. It is necessary for this to take into account the person to be detained and the expected situation at the place of custody. Also, it is necessary to be identified the person conducting the arrest and personal search (if it is necessary) and the need to summon other persons involved in the arrest (interpreter, attorney). In addition, at the time of arrest, the relevant persons must be equipped with the necessary equipment (investigative and other procedural protocols, technical means, handcuffs, if necessary – firearms, seals, packages, etc.), which, if appropriate, also must be determined by the investigator or / and his immediate supervisor.[68] The thorough implementation of all the above-mentioned issues together ensures the successful implementation of the process of arrest, as well as the unwavering protection of human rights and freedoms.

The decision made by the judge on the arrest of the person may not be appealed. With regard to the institution of appeal in this case, it should be noted that this issue is not so urgent as, in general, the period of the arrest is very short – procedural law requires from law enforcement bodies to make a specific decision within about 72 hours, i.e. The person must be sentenced to a measure of restraint, or must be released. Consequently, it does not matter how much a person will have the right to appeal in this case, especially since he then has all the guarantees to receive the compensation that he received as a result of the illegal arrest.[69] It should also be noted that under German law, if an arrest warrant is issued by an official other than a judge, a prosecutor or a police officer, the mentioned decision can be appealed in court.[70]

---

67 Ibid, 503-504.

68 *Jankarashvili M., Merabishvili N., Naghebashvili D., Dzneladze R., Ratchvelishvili G.,* Investigative Methodology Manual, Tbilisi, 2017, 292-293 (in Georgian).

69 *Melkadze Z.,* Criminal Procedure Code of Georgia, Tbilisi, 2012, 190 (in Georgian).

70 *Vingart K. (ed.),* Criminal Procedure Systems in EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 164.

In addition to receiving compensation, even though the person has no right to appeal, the lawfulness of his or her arrest is discussed by the judge hearing the first proceeding of the accused before the court. Accordingly, the court has the right to consider the arrest of a person illegal in the event of a substantive procedural violation. This applies to both lawful and unlawful arrest, although it is less likely that a person will be arrested illegally on the basis of a judge's ruling, unless there has been a direct violation by the arresting person during the process of the arrest. Obviously, in such a case, the preconditions, grounds, etc. of the arrest are not checked. But the legality of the process of arrest must be checked directly – the proportionality / use of force, the definition of rights, etc. As for urgent necessity, this requires more judicial control, even with regard to the grounds for arrest. Indeed, in the judgment of the Tbilisi City Court of 9 February 2015,[71] we read: "the court finds that there is a substantial violation of the requirement of Article 171 of the Criminal Procedure Code of Georgia, in particular, the arrest of a person without a court ruling, when there was no need for arrest in case of urgent necessity, which is the basis for release from detention".[72]

In addition, although a person may not appeal the ruling for his/her arrest, he has the opportunity to appeal the ruling for the application of a measure of restraint in the investigation panel of a Court of Appeal. He can also appeal the lawfulness of his arrest with the same complaint and this will already be discussed by the investigative panel of the Court of Appeal. Indeed, according to the ruling of the Investigative Panel of the Tbilisi Court of Appeal of 22 January 2015,[73] "Only the fact that the arrest was made 24 hours after the creation the grounds for arrest in case urgent necessity will not become a ground for declaring the arrest illegal and satisfying the complaint. The court finds that there were no substantive procedural irregularities permissible in the arrest and indictment process".[74]

The practice of the Supreme Court of Georgia is also interesting. There are cases when the cassation point out the illegality of the arrest in their cassation appeal and then the Supreme Court discusses the correctness of the decisions made by the previous instances. Indeed, according to the decision of the Supreme Court of Georgia of 26 October 2017 on the admissibility of the cassation appeal,[75] "The Chamber of Cassation notes that the decision of the Judge of the Investigative and the preliminary hearing of the Tbilisi City Court of September 21, 2016 on the arrest of a person discusses in detail the circumstances, why the court considered it appropriate to arrest M.K., namely: there was a combination of facts and information which gave rise to the presumption that M.K. committed a crime; While being at the police department, he deceived the investigator and left the building of the investigative body, after which his whereabouts were unknown and he himself did not voluntarily report to the police; There was speculation that he would still commit a new crime as he had been convicted of a crime of a similar nature, which indicates his personality as prone to violence. Due to all the above, the court considered it appropriate to issue a ruling for arrest of M.K. In view of the above, the Supreme Court considered the decision on arrest a person to be legally justified and correct, which ruled that "the judge's decision of 21 September 2016 was lawful and well-founded, as there

71 Ruling № 10a / 536 of the Tbilisi City Court 9/02/2015.
72 Ibid.
73 Ruling № 1c-63 of the Investigative Panel of the Tbilisi Court of Appeal 22/01/2015.
74 Ibid.
75 Ruling № 289 ap-17 of the Supreme Court of Georgia 26/10/2017.

were sufficient grounds for arrest other than a reasonable suspicion of a crime, which were fully taken into account and assessed by the court".[76] In view of all the above, even the Supreme Court discusses and enters into the context of the legality of arrest in the context of legal reasoning.

Notwithstanding all the above, the prosecution should be able to appeal a ruling of a judge refusing to arrest. There is a danger that the judge will refuse to arrest the person without solid legal justification, which is why such a ruling should allow to go to a higher instance. At the same time, refusing to arrest a person may cause significant problems for the investigation of a particular criminal case and / or cause irreparable damage, which will ultimately lead to ineffective justice. In view of the above, it is advisable to determine at the legal level the right of the prosecution to appeal a judge's refusal to arrest a person.

6. Conclusion

Restriction of a person's liberty based on a court ruling, as well as unlawful arrest and related provisions or approaches, are actively discussed / debated in theory and disputed / controversial in practice.

The present study is an attempt to improve the mechanisms of protection of rights at the legislative level, as well as investigative and case law, in order to promote the unwavering protection of the rights of individuals and to prevent cases of the arbitrary arrest.

The exceptional nature of the detention and its "Ultima Ratio" nature should not have only a written character, but should be effectively implemented in practice.

State institutions must be able to strike a so-called "golden balance" between the interests of investigation and public safety on the one hand, and the protection of the rights of particular individuals on the other.

Due to the theoretical issues or practical solutions discussed in the article, there is a problem both in terms of protection of rights and in terms of heterogeneous case law.

Therefore, the identification of shortcomings in the study and the proposed solutions should ensure the effective protection of the rights of the individual – the main actor in determining the constitutional order, as well as the development of law and the establishment of a uniform investigative / judicial practice.

Bibliography:

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, 16/11/1999.
2. Law of Georgia "On Amendments to the Criminal Procedure Code of Georgia", № 3157, 20/07/2018.
3. Criminal Code of Georgia, 41(48), 13/08/1999.
4. Criminal Procedure Code of Georgia, 31, 03/11/2009.
5. Explanatory Card on the Draft Law of Georgia "on Amendments to the Criminal Procedure Code of Georgia", 2018, <https://info.parliament.ge/file/1/BillReviewContent/181659?> [22.01.2022].

[76] Ibid.

6. Human Rights Training and Monitoring Center (EMC), Georgian Law Firms Association (SIFA), Investigation System Analysis, Tbilisi, 2018, 22 (in Georgian) (in Georgian).
7. *Anderson J.F.,* Thompson B., American Criminal Procedures, Durham, North Carolina, 2007, 178.
8. *Gutsenko K.F., Golovko L.V., Filimonov B.A.,* Criminal Procedure of Western States, translation from Russian, *Gogshelidze R. (ed.),* Tbilisi, 2007, 281-285 (in Georgian).
9. *Jankarashvili M., Merabishvili N., Naghebashvili D., Dzneladze R., Ratchvelishvili G.,* Investigative Methodology Manual, Tbilisi, 2017, 292-293 (in Georgian).
10. *Kamisar Y.,* Lafave W.R., Israel J.H., King N.J., Basic Criminal Procedure, Cases, Comments and Questions, 11th, Thomson West, 2005, 4.
11. *Mchedlidze N.*, Standards of Application of the European Convention on Human Rights by Common Courts of Georgia, Tbilisi, 2017, 51, 71 (in Georgian).
12. *Melkadze Z.,* Criminal Procedure Code of Georgia, Tbilisi, 2012, 190 (in Georgian).
13. *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Process, Tbilisi, 2015, 83 (in Georgian).
14. *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 502-503, 597-598 (in Georgian).
15. *Papiashvili L. (ed.),* Collective of Authors, Georgian Criminal Procedure Law Private Part, Tbilisi, 2017, 209 (in Georgian).
16. *Tumanishvili G.,* Criminal Process, General Part Review, Tbilisi, 2014, 43 (in Georgian).
17. *Trexeli Sh.,* Human Rights in Criminal Procedure, Constitutional Court of Georgia, Tbilisi, 2009, 452 (in Georgian).
18. *Vingart K. (ed.),* Criminal Procedure Systems in EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 79, 164, 260 (in Georgian).
19. Ruling № 10a/4502-21 of the Tbilisi City Court 18/10/2021.
20. Ruling № 19341 of the Tbilisi City Court 19/10/2021.
21. Ruling № 6137 of the Tbilisi City Court 8/05/2018.
22. Ruling № 10a / 2221 of the Tbilisi City Court 12/05/2018.
23. Ruling № 1044 of the Tbilisi City Court 4/02/2017.
24. Ruling № 6209-17 of the Tbilisi City Court 30/06/2017.
25. Ruling № 10a / 536 of the Tbilisi City Court 9/02/2015.
26. Ruling № 1c-63 of the Investigative Panel of the Tbilisi Court of Appeal 22/01/2015.
27. Ruling № 289 ap-17 of the Supreme Court of Georgia 26/10/2017.
28. Ruling № 1/8/696 of the Constitutional Court of Georgia 13/07/2017 "Citizen of Georgia Lasha Bakhutashvili v. Parliament of Georgia", II-12.
29. Ruling № 1/4/592 of the Constitutional Court of Georgia 24/10/2015 "Citizen of Georgia Beka Tsikarishvili v. Parliament of Georgia, II-75.
30. Criminal Case № 001230521008 , Motion for Arrest 19/10/2021.
31. Criminal Case № 007290918005, Motion for Arrest 15/02/2019.
32. Criminal Case № 092310819001, Motion for Arrest 8/05/2018).
33. Criminal Case № 092310819001, Motion for the Application of a Measure of Restraint 11/05/2018.
34. Criminal Case № 092130916001, Motion for Arrest 3/02/2017.
35. Criminal Case № 001150617003, Motion for Arrest 29/06/2017.

36. United Nations, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, New York, Geneva, 2003, 174.
37. Kosenko v. Russia, [2020], ECtHR, 15669/13, 76140/13.
38. Idalov v. Russia, [2012], ECtHR, 5826/03.
39. I. E. v. Moldova, [2020], EctHR, 45422/13.
40. Mkhitaryan v. Russia, [2013], ECtHR, 46108/11.
41. Sopin v. Russia, [2012], ECtHR, 57319/10.
42. Mikiashvili v. Georgia, [2012], ECtHR, 18996/06.
43. Aleksandr Makarov v. Russia, [2009], ECtHR, 15217/07.
44. Bykov v. Russia, [2009], ECtHR, 4378/02.
45. Ilijkov v. Bulgaria, [2001], ECtHR, 33977/96.
46. Clooth v. Belgium, [1991], ECtHR, 12718/87.
47. Letellier v. France, [1991], ECtHR, 12369/86.
48. Matznetter v. Austria, [1969], ECtHR, 2178/64.
49. Wemhoff v. Germany, [1968], ECtHR, 2122/64.

Lela Nozadze*

The Court Practice of Imposing Fine towards Juvenile and Litigated Issue of Its Enforcement

Research and generalization of the court practice should shape those non-custodial punishments, which in reality will perform the main aim of the Juvenile Justice Code – protection of the best interests of child, their faces not to remain only as "unchanged monument carved into the stone".

Keywords: *Juvenile Justice, Punishment, Fine, Court Practice.*

1. Introduction

Liberalization of the policy of the criminal justice, the important part of which is reform of Juvenile Justice, according to the international standards created the foundation to the Juvenile Justice Code.

Juvenile Justice Code (afterwards – JJC), granted the priority to the protection of the best interests of the person who is in conflict with the law, as a principle there was set priority of use of most light means and alternative measures.

According to the explanation of United Nations (UN) Committee on the Rights of the Child, special psychological and physical condition of underage minor, emotional and educational needs (*per se)* confirms less quality of its guiltiness and demands from the underage minors different approach. It means, that such kind of traditional aim of criminal justice, as it is, restoration of justice, repression/punishment should replaced by aims of rehabilitation and restorative justice, which finally serves to the aim of security of the society.

In the articles 5.1 and 17.1(a) of the minimal standard rules (Pekin rules)[1] realization of juvenile justice there is underlined that, considering the best interests of child measure should be not only proportional to only gravity and circumstances of law violation, as well as, in case of use of the punishment it is obligatory to defend principle of proportionality.

By defending these demands, legislative changes experienced not only Juvenile Justice Code (JJC), as well as rule of their appointment and it touched also Juvenile Justice Code (JJC) 68th article. In particular, the court can appoint this punishment, only in case if underage minor has independent income from legal activity.

The adopted law improved the problem which was existing during the years, which was connected to the rule of appointment of the fine as punitive measure towards underage minor and principle of individualization of the punishment recognized in the criminal law.[2]

---

* PhD Student at Ivane Javakhishvili Tbilisi State University, Judge of Tbilisi City Court Criminal Cases Board.

1 International Standards in Juvenile Justice Sphere, United Nations Children's Fund, 2011, 35-42, Adopted According to the UN Resolution 40/33 dated 29 November 1985 (in Georgian).

2 *Shalikashvili M., Mikanadze G*., Juvenile Justice (Manual), Tbilisi, Freiburg, Strasbourg, 2016, 129 (in Georgian).

The subject of the research of the current article is court practice of imposing of the fine towards underage minor as punishment. In spite of the fact that, their statistical indicator in comparison to previous years in significantly decreased,[3] in certain cases court approaches on the use of this punishment is coming into controversy with ordinance of Juvenile Justice Code (JJC) 68th article and their main part is connected to the cases that ended with the plea agreement, which during the period of enforcement, according of the error of the law, can occur problem of changing the fine with other punishment.

2. Legislative Regulations of Use of the Fine Towards Underage Minor According to the Criminal Code of Georgia, Short Prehistory

Adopted on 22 July 1999 in Criminal Code of Georgia (afterwards – CCG), the seperate door was given to criminal responsibility of underage minor and in the same door, according to 16th chapter together with other issues there was determined punishment of underage minors.

According to 83th article of Criminal Code of Georgia (edition of July 22, 1999), imposing of the fine as a punitive measure towards underage minor was possible only in case if he/she did have independent salary or property. So, enforcement of the punishment imposed towards underage minor can be directed towards salary from one side, which was income based on the legal labor activity, and from another side on the property, which underage minor might have received based on will, heritage or as gift and so forth.[4]

By change of 29 December 2006, from Criminal Code of Georgia 83th article there was removed existing record[5] of appointment of fine as punitive measure and legislator worsening condition for that equaled underage minor to adult, because imposition of the fine was taking place according to legislative rule, which was considered in case of adult.

According to the same change, on 42th article there was added the 5^{1}th part of with the following context, in case if convicted was underage minor and insolvent, the court was imposing the payment of imposed fine to the parent, guardian or custodian.

The most high indicator of the use of appointed penalties, based on the common courts statistics, is declared exactly in this period. In particular, in 2009 the fine is used – on 102 underage minor; in 2010 – on 171 underage minor, in 2011 – on 70 underage minor.[6]

The change made in the law was many times criticized in the legal literature, that by adopting it there was violated universally recognized personal responsibility principle and the most important for underage minor, the aim of resocialization of punishment remained not achieved.[7]

---

3 See <https://www.supremecourt.ge/files/upload-file/pdf/2020-weli-wigni-sisxli.pdf> [25.08.2022].

4 *Tkesheliadze G., Natchkebia G.,* General Part of Criminal Justice, Collective of Authors, Tbilisi, 2004, 352 (in Georgian).

5 83th Article to be Developed According the Following Edition: "Article 83. Fine "Minimal Amount of the Fine Appointed for Underage Minor is Five Daily Compensation and Maximal – Two Hundred Daily Compensation. While Collection of the Punishment the Amount Shouldn't be More than Four Hundred Daily Compensation." About the Making of the Changes and Additions in Criminal Code of Georgia, 29/12/2006, <https://www.matsne.gov.ge/ka/document/view/22468?publication=0> [01.08.2022].

6 <https://www.supremecourt.ge/files/upload-file/pdf/2020-weli-wigni-sisxli.pdf> [27.08.2022].

"Getting introduced to the court practice showed that, the judge while use of 5^1th part of 42th article of Criminal Code of Georgia doesn't clarify that issue, how insolvent underage minor's parent, guardian or custodian is and does it mean that deciding this issue in such way will bring family of underage minor is extreme social situation, which in its turn, will support one to commit of the new crime and making innocent persons as victims.[8]

On the disputed norm the Constitutional Court of Georgia explained that, imposition of the fine on parent (guardian, custodian) which was imposed on the underage minor, at the same time was not equal to imposition of criminal liability on the parent (guardian, custodian).[9]

Professor O. Gamkrelidze dedicated article to the same decision and marked – 5^1th part of 42th article of Criminal Code of Georgia was opening the way to the use of the court unfair punishment.[10] The punishment should touch personally only that person, who committed crime and can't be extended on that person, who didn't deserve it.[11]

Together with adopting of Juvenile Justice Code, there was removed disputed norm of appointing of the fine,[12] which was importantly influenced by not only the criticism expressed by the well-educated law specialists, but also, by guidelines of existing legislative reform in the frame of justice code of underage minors.[13]

3. Juvenile Justice Code (JJC) 68th Article, Fine

Fine, is first non-custodial punishment measure in Juvenile Justice Code (JJC) system, which can be imposed to the underage minor only in the case, if he/she has independent income from legal activity. While appointing the fine towards underage minor, minimal amount determined according to the Criminal Code of Georgia becomes half. Fine towards underage minor can be appointed also as additional punishment.

---

7 *Lekveishvili M.*, Individualization of the Punishment, as Important Principle of Imposition of the Punishment, Tendencies of Liberalization of the Legislation of the Criminal Justice in Georgia, Tbilisi, 2016, 277 (in Georgian).

8 *Shakikashvili M., Mikanadze G.,* Juvenile Justice (Manual), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 130-131 (in Georgian).

9 The Decision № 3/2/416 of Constitutional Court of Georgia dated 11 July 2011 (in Georgian).

10 *Gamkrelidze O.,* Punishment Fair and Punishment Unfair, "The Life and the Law", № 1, 2016, 5-6 (in Georgian).

11 *Gamkrelidze O.,* Problems of Criminal Justice, Tome III, Tbilisi, 2013, 46 (in Georgian).

12 The Law of Georgia About Making Changes in the Criminal Code of Georgia, 3714-IIს12/06/2015.

13 "Many States Impose Fine to the Parents in that Case, When Child has No Possibility to Pay. This Practice Generally is Discussed as Unsuitable with the Best Interests of Child, Because with that the Parent can Feel Less Desire for Active Partnership in the Process of Social Reintegration of Child." *Hamilton K.,* Guideline References of The Legislative Reform of Juvenile Justice, ("Unicef"), Tbilisi, 2011, 109-110. On The Same Issue in the Juvenile Literature They Consider That, When it Comes To The Committed Crime by the Underage Minors, Fine and Deprivation of the Liberty Should Be Used as the Last Measure, Because has Repeated Character (Relapse) and Doesn't Serve to Resocialization–Rehabilitation of Underage Minor. See *Junger-Tas J., Decker S.,* International Handbook of Juvenile, New York, 2006, 263; *Feierman J., Naomi G., Emily H., Jaymes F.,* The High Cost of Fines and Fees in the Juvenile Justice System, Juvenile Law Center, Philadelphia, 2016, 18.

So, the 1st part of 68th article of Juvenile Justice Code (JJC) determines the basics of the appointing of the fine, and 2nd part of the same article defines minimal limit of the punishment to appoint, which considering 42th article of Criminal Code of Georgia is 1000 GEL, and if sanction of the Criminal Code considers as punishment deprivation of the liberty till three tears term, minimal amount of the fine is 250 GEL.

There should be said that, in spite of existing draft of law,[14] while making changes in the Juvenile Code, as well as in the Criminal Code of Georgia, there was not considered proposals of determining of the upper limit of the fine.

In the professional circles there is expressed opinion that, while appointing of the fine determining their amount can contain threat from the judges to show willfulness[15] and the problem is connected not only to the upper limit of the fine, but also, is spread on that case, if it will be appointed as additional punishment as well, because according to the Criminal Code of Georgia is not clarified in which case and together with which punishments it can be used.

The punishment, as negative reaction of the state on the guilty action, should be normatively determined by the legislator, and in case of violation of criminal norm determined sanction should be able to be predictable for the addressee.[16] The principle of determinism of the norm comes from the legal state principle given in the constitution, it has connection to the 5th section of the 42nd article of the constitution and is part of the sphere protected by this right.[17] The legislator is obliged, to maximally clearly determine to the judge the frames, in which he/she should act[18] and to give possibility to correctly use it.[19] At the same time, addressee of the norm should be able to clearly understand its content, he/she to act according to the demand of the norm and what is main issue to leave sense of legal security.[20]

Accordingly, the state should provide that, proposed legislation, (the part of which is punitive system) to be in compliance to the convention of children's right, as well as with universally recognized principles and standards of international law.[21]

General basics of appointing of the punishment towards underage minor is based on two main regulations, best interests of underage minor and individual approach.

The best interest of underage minor is guideline principle of Juvenile Justice Code and means security, well-being, protection of health, education, development, resocialization-rehabilitation of the underage minor.

---

14 The Project of The Law of Georgia – "The Criminal Code Of Georgia" About Making of The Changes-30/06/2014.

15 *Tskitishvili T.,* Report on The Conference: "Criminal Justice Sanctions And Imposition Of The Punishment" – 12-13 May 2017, Tbilisi, German-Georgian Criminal Justice Journal, 84.

16 *Schwabe*, Decisions of Federal Constitutional Court of Germany, *Chachanidze E. (trans.), Kublashvili K., Ninidze T., Loladze B., Eremadze K. (eds.),* 2011, 370-371 (in Georgian).

17 The Decision № 2/2/516,542 Dates 14 May 2013 of The Constitutional Court of Georgia (in Georgian).

18 The Decision № 1/2/384 Dates 2 July 2007 of The Constitutional Court of Georgia (in Georgian).

19 The Decision № 1/3/407 Dated 26 December 2007 of the Constitutional Court of Georgia (in Georgian).

20 *Izoria L.,* Comment of the Constitution of Georgia, Second Chapter Citizenship of Georgia, The Main Rights and Freedoms of Human, Tbilisi, 2013, 26 (in Georgian).

21 *Ivanidze M.,* Juvenile and Its Best Interests, Analysis of Legislation of Juveniles and Court Practice, *Todua N., Ivanidze M. (eds.),* Tbilisi, 2017, 11 (in Georgian).

The best interest of underage minor, which should be defined in each individual case, demands from the person who manages the process, that on every stage of law proceedings, while making any kind of decision towards underage minor to show special attention and to consider such kind of individual characteristics, as they are: age, level of development, life and upbringing conditions, education, health condition, family situation and other circumstances, which is giving possibility to determine characteristics and his/her needs.[22]

Preparation of individual report,[23] towards the person who is in conflict with the law, is made through social worker of Probation National Agency.

Considering the individual characteristics, which are obligatory while appointing of the punishment, is kind of guideline, underage minor to be imposed that type and extent of the punishment, which will be fit to his/her best interests, because according to 50th article of the model law about Juvenile Justice, the aim of the punishment imposed towards underage minor is rehabilitation of the person and his/her reintegration into the society.[24]

As there was mentioned above, use of the fine as type of the punishment is conditional and its appointment is possible only in that case, if person who is in conflict with the law has independent income from legal activity.

For considering the labor as legal activity of the underage minor, is necessary to get introduced to existing international standards of juvenile labor, the most part of which is ratified by the Parliament of Georgia and their main principles are expressed in Labour Law Code.

According to the international standards, different content have terms "economic activity of children" and "labor of children". The labor of children is term with negative meaning and expresses such kind of activity of children, which is undesirable and needs eradication. When economic activity of children, is possible, in some cases to be encouraged. In particular, economic activity, which doesn't make negative influence on their health and personal development, can contain such kind activity, as they are – helping parents at home and in family business, which doesn't damage physical health and development of child;

Such kind of type of activity, often measure of child's personal development, producing additional natural abilities, to receive experience and earning "pocket money".[25]

Concerning the employment of underage minor according to the law there are determined the restrictions and it is connected, as to the age, as well as type of the job. The existing aims protection of underage minors in that point of view, that labor/physical load not to influence negatively on their

---

22 Explanatory Note on the Project of the Law of Georgia "On Juvenile Justice Code".

23 Common Order № 132/№ 95/№ 23, Dated 15 March 2016 of the Minister of Justice of Georgia, Minister of Internal Affairs of Georgia and the Minister of Penitentiary and Probation of Georgia, Determination of Methodology, Rule and Standard of Preparation of the Individual Assessment Report № 1 Appendix (in Georgian).

24 Model Law About Justice of Juvenile Who Are in Conflict with Law, United Nations Office on Drugs and Crime (UNODC), 2013.

25 Special Report of the Public Defender, Tbilisi, <https://www.unicef.org/georgia/media/6006/file/PDO%20report-Child%20Labour.pdf> [01.08.2022] (in Georgian).

health, growing-development and also, in parallel to the employment to have enough time to receive education.[26]

According to 10th article of the code of laws of labor of Georgia, labor capability of natural person arises since 16 years old age. Before 16 years age labor capability of underage minor arises by consent of his/her legal representative or guardian/custodian organ, if labor relations are not against interests of underage minor, doesn't cause damage to his/her moral, physical and mental development and doesn't restrict his/her obligatory right and possibility to receive primary and basic education. Consent of legal representative or guardian/custodian organ remains into the power also towards subsequent labor relations of similar character.

The labor agreement can be conducted with underage minor who is till 14 years old only on the activity which are in the sphere of sports, art and culture, also for the performance of the work connected to advertising. There is prohibited conducting labor agreement which is connected to the work linked with gambling business, night entertainment facilities, which is connected to manufacturing of erotic and pornographic production, transportation and realization of pharmaceutic and toxic substances. Also it is prohibited conducting labor agreement with underage minor for the performance of works lined to harmful and dangerous work.

The service of labor inspection has right, to conduct state supervision and monitoring to the companies that employ persons under 18 years old, if the age of the employee is in coincidence with the standards determined by the law and are working conditions contain increased risk.[27] Violation of the demands indicated above causes liability according to 170[1]th article of the Administrative Offences Code of Georgia.

Considering the existing regulations, indicator of legal employment is low, which directly proportionally expressed on the percentage indicator of appointing fine towards underage minor as punitive measure.

Professor M. Shalikashvili considers that, on the background of high unemployment in the country, when for adult persons is tough to find long term job, it is impossible to demand from underage minor, he/she to have independent income, based on which he/she will pay fine. In case of such kind of demand it is possible not to be able to use fine as type of the punishment.[28] At the same time he explains that, as source of independent income of underage minor can be considered pocket money given by the parents, because under independent income mentioned in the first part of 68th article of Juvenile Justice Code is not meant only particular sum earned from particular independent work/job realized by underage minor.[29]

It is interesting what kind of approaches the court has concerning the same issue?

---

26 Ibid.

27 Order № 01-126/N of the Minister of IDPS From the Occupied Territories, Labor, Health and Social Protection of Georgia, 30/11/2020.

28 *Shalikashvili M., Mikanadze G.*, Juvenile Justice (Guideline), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 131 (in Georgian).

29 Ibid.

Tbilisi City Court, in the verdict[30] dated September 5, 2019, 31 as bases to use fine towards underage minor indicated that, he/she did have personal cash savings from the money which was given by the parents.

The same should be said on the verdict of Tbilisi City Court dated 30 May 2019,[31] where the judge as legal basis to use fine indicated that, underage minor did have independent income from the financial assistance of the refugee.

In spite of the scarce decisions there can be said that, common approaches have theoreticians and practicing lawyers. Existing record of 68th article of Juvenile Justice Code, indifferent from 83th article of Criminal Code of Georgia (which as prerequisite of appointing of the punishment together with the property, was discussing only independent income received from the salary), is giving possibility to appoint the fine in those cases also, when an underage minor has received income from economic activity, which is not in accordance with demands determined by the Juvenile Justice Code, as well as by international standards.

4. The Court Practice (2017-2022) of Using Towards Underage Minor Fine

According to the verdict of Tbilisi City Court,[32] (the plea agreement was approved on the stage of essential discussion of the case) the underage minor as type of the punishment according to 1st part of 181th article of Criminal Code of Georgia was imposed fine in amount of 1000 GEL. In the decision the court explained that, while appointing of the punishment considered by plea agreement took into consideration individual characteristics of the person who is in conflict with the law, as well as prerequisite of using of the fine, that he/she had independent income from legal activity, was working as operator in one of the parks.

According to the verdict of Tbilisi City Court,[33] (the plea agreement was approved on the first session of representation of accused person) underage minor according to 2nd part of 260th article of Criminal Code of Georgia as punishment was imposed fine in amount of 3000 GEL.

The court decision in the part of justification of the punishment doesn't contain information if underage minor had independent income source from legal activity. According to Juvenile Justice Code 27th article 4th part "b" subsection and 1st part of 75th article, while appointing of the punishment it is obligatory the judge to consider individual assessment report and the law doesn't consider exception while approval of the plea agreement.

In spite of appointed punishment, which is more light than sanction of the same article – deprivation of the freedom with 5 years term (active edition of 2015), form and the size of the punishment imposed towards underage minor is against to the ordinance of 68th article of Juvenile Justice Code, also, general principles of Juvenile Justice, that size of the punishment used towards underage minor who is in conflict with law, should be proportionate to the action committed and should be in coincidence with his/her age, educational, social and other kind of needs.

30 Verdict of Tbilisi City Court dated 5 September 2019, Case № 1/3955-19 (in Georgian).
31 Verdict of Tbilisi City Court dated 30 May 2019, Case № /1328-19 (in Georgian).
32 Verdict of Tbilisi City Court dated 24 April, 2017, Case № 1/104-17 (in Georgian).
33 Verdict of Tbilisi City Court dated 20 October 2017, Case № 1/4365 -17 (in Georgian).

We meet the same problems in the verdict[34] of Tbilici City Court, according to which on the first representation session of accused person there was approved plea agreement and underage minor as form of the punishment according to 376th article of Criminal Code of Georgia was imposed fine in amount of 1000 (one thousand) GEL. In the given case the court decision doesn't contain information if underage minor did have independent income.

On the stage of essential discussion of the case there was approved plea agreement and according to the verdict[35] of Tbilisi City Court during commitment of the crime underage minor based on Criminal Code of Georgia 19th, 344th article 2nd part "a" subsection as type of the punishment was imposed fine in amount of 1000 GEL by using Juvenile Justice Core 68th article and Criminal Code of Georgia 55th article.

The court indicated in the decision that, while appointing of the punishment took into the consideration the fact that, accused person did have personal cash savings in amount of 500 US Dollars.

According to the verdict[36] of Tbilisi City Court (the plea agreement was appoved on the session of first representation of accused person), underage minor based on Criminal Code of Georgia 177th article 3rd part "a" subsection as type of the punishment was defined fine in amount ot 500 GEL.

According Criminal Code of Georgia 59th article 4th part, the punishment appointed by last verdict absorbed, equal punishment appointed by Zugdidi Regional Court dated 23 September 2019 and finally, underage minor as punishment was imposed fine in amount of 500 GEL.

In spite of the fact that, based on the plea agreement towards underage minor there was used more light punishment, than it was considered by 177th article 3rd part "a" subsection, there didn't exist legal basics of appointment of the fine and the doubt about existence of independent income, is backed up previous non enforced decision on the same punishment.

According to the verdict[37] of Tbilisi City Court (the plea agreement was approved on the first representation session of accused person), during commitment of the crime underage minor according to Criminal Code of Georgia 126th article 1^1 part "b" section as type of the punishment was imposed fine in amount of 1000 GEL.

From the verdict there is clarified while appointing type and size of the punishment what judge decision was based on and did underage minor have independent income or not. In spite of the fact that, before making of the verdict the person in conflict with the law became of the full legal age, he committed crime during the period of being underage minor and the court was obliged to be guided by ordinance of Juvenile Justice Code 2nd part 2nd article. In particular, towards that person, who during commitment crime was underage minor and after he/she became of the full legal age, there is being used material-legal norms of Juvenile Justice Code and norms of Criminal Procedure Code of Georgia.

Also, for the crime considered according to Criminal Code of Georgia 126th article 1^1th part "b" subsection there is defined deprivation of the liberty till 2 years and in this case minimal amount of the fine instead of 1000 GEL is 250 GEL.

---

34 Verdict of Tbilisi City Court dated 04 December 2018, Case № 1/5369 -18 (in Georgian).
35 Ibid.
36 Verdict of Tbilisi City Court dated 11 November 2019, Case № 1/5355 -19 (in Georgian).
37 Verdict of Tbilisi City Court dated 11 June 2021, Case № 1/2600 -21 (in Georgian).

According to the verdict[38] of Tbilisi City Court (the plea agreement was approved on the first session of representation of accused person), underage minor based on Criminal Code of Georgia 177th article first part as type of the punishment was imposed fine in amount of 1000 GEL.

In the given case there are not clarified recommendations issued from the verdict by individual assessment report and if underage minor did have independent income, which is necessary prerequisite of appointment of the fine.

Accordingly, there is violated ordinance not only of Juvenile Justice Code 68th article 1st part, but as well as ordinance of 2nd part of the same article, because amount of the fine to be appointed towards underage minor considering sanction of Criminal Code of Georgia 177th article first part is 250 GEL.

According to the verdict[39] of Tbilisi City Court dated 19 April 2022, underage minor as type of the punishment based on Criminal Code of Georgia 126th article 1^1 th part "b" subsection was imposed fine in amount of 500 (five hundred) GEL. He/she him/herself according to the 2nd part of Juvenile Justice Code 68th article 2nd part was made it half imposed punishment and finally was determined the fine in amount of 250 GEL.

The court while appointing of the punishment indicated that, considered characteristics indicated in individual assessment report and the fact that, person who is in conflict with law, who was employed in the private sector, did have source of independent income and existing information was confirmed with bank extract.

If we will summarize above discussed decisions we will see that, problem of appointing the fine is connected to the plea agreement approved on the first representation court session and while their approval, by the court doesn't take place clarifying the fact if underage minor has or not independent income. The same should be said on the size of the used punishment, which comes into the controversy with Juvenile Justice Code 68th article 2nd part, as well as with demands of Juvenile Justice Code.

Many researches were dedicated to the use of the plea agreement in Georgia, where there is discussed practical, as well as legislative errors of this institute.[40] they consider that, Georgian model of the plea agreement formally grants the court discretion to confirm or neglect the motion of the plea agreement conducted by the prosecutor and not to be able to essentially participate in the determination of the conditions of the plea agreement.[41]

---

38 Verdict of Tbilisi City Court dated 18 February 2022, Case № 1/675 -22 (in Georgian).

39 Verdict of Tbilisi City Court dated 19 April 2022, Case № 1/3161-21 (in Georgian).

40 The Research Prepared by the Working Group of the Coalition for Independent and Transparent Justice, which is Connected to the Use of the Plea Agreement in Georgia and Underlines that, "In Most Cases the Plea Agreement is Conducted with the Aim of Implementation of Fast Justice and Personal Characteristics of the Convicted Person, Among them Family Condition, Previous Convictions, Age, Education, Considering of which is Necessary while Determining the Punishment, which is Possible to Represent Basics of Decrease of the Size of the Punishment is Neglected", (in Georgian). <http://coalition.ge/files/coalition_criminal_law_wg_research_geo_9th_forum..pdf> [01.09.2022].

41 *Gvenetadze N.*, The Plea Agreement of Georgia Legislative Analysis, in Symposium Collected Articles: Criminal Justice Science in the Process of Common European Development, Tbilisi, 2013, 232 (in Georgian).

The active legislation can't create firm guarantees for the fact that, defense party to be able to implement effective protection of the interests of accused person.[42] True interest of the underage minor who is in conflict with the law is incompatible with institute of the plea agreement while implementation of the underage minor's justice.[43]

There should be noted that, Juvenile Justice Code 27th article 4th part b) section is applies also on the punishment to be appointed while plea agreement and defending this demand is granted the special importance while using fine towards underage minor, because not considering the individual assessment report towards person who is on conflict with the law, which also contains information about labor activity of underage minor, is possible to give rise to the problems of dispel of previous convictions, as well as its changing with other punishment.

5. Disputed Issue of Enforcement of the Fine according to Juvenile Justice Code (77th Article 6th Part)

According to the 2nd article of "b" section of the law of Georgia About Enforcement Proceedings, the basics of the beginning of enforcement proceedings is guilty verdict of the court that came into the legal power on the criminal case about imposition of the fine as punishment or/and deprivation of the property.

According to the same law, executor is obliged based on the enforcement paper issued by the court not later than 5 days from the beginning of the enforcement proceedings, to inform to the debtor that, in case of not performance of the demand voluntarily which contains 7 days term, the person will be subject to enforcement.

Based on the order № 234 dated 28 December 2009 of the Minister of Justice of Georgia there is approved rule of the proceedings of the debtor's registry, according to which, towards those natural persons who missed the term defined by the law for voluntary enforcement of the payment of money, based on the information provided by the executor takes place their registration in debtor's registry.

In different from the rule of enforcement of non-custodial punishments and 8th article of the law of Georgia about probation, which together with Juvenile Justice Code 77th article 3rd and 5th parts is obligation of the Probation Bureau, to address with the submission to the court about change of non-custodial punishments with other punishment, based on the law of Georgia About Enforcement Proceedings, Enforcement Bureau doesn't have such kind of authority[44] and record of Juvenile Justice Code 77th article 6th part – "Enforcement National Bureau is authorized in case of avoiding the payment of the fine by underage minor based on the submission to address to the court, and in 2 weeks

---

42 Using of the Plea Agreement in Georgia (in Georgian).

43 *Shalikashvili M., Mikanadze G*., Juvenile Justice (Guideline), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 77 (in Georgian).

44 Active Edition of the Law of Georgia "About Enforcement Proceedings" Doesn't Consider Authorization of Enforcement National Bureau to Apply to the Court with the Demand to Change Non-Custodial Punishment – Fine with Other Punishment Appointed Based on the Verdict, Letter № 64046, 31/08/2022 of Ministry of Justice of Georgia to Enforcement National Bureau (in Georgian).

term after filing of the submission the court issues the decision about leaving the fine without change or its alteration," has the formal character.

The best interest of underage minor, which is basics of the principles of Juvenile Justice Code, is expressed in the rule of dispelling of the previous convictions.

According to Juvenile Justice Code 12th article 1st part, previous convictions of underage minor is considered as dispelled upon serving the punishment, but while suspended sentence – upon expiry of probationary period.

Humanistic approach of the legislator about immediate dispelling of the previous convictions serves to the rehabilitation of underage minor, aim of resocialization and supports his/her harmonic development.

In spite of existing relief, if underage minor avoided payment of the money that was imposed as fine and as such there can be considered that case also when while making of the plea agreement with the aim to receive more light punishment agreed on the conditions, towards him/her enforcement bureau can't enter the court with the submission about changing of the fine with other punishment, because doesn't have such kind of authority and according to the error of the law underage minor stays as convicted person, which will make influence against his/her interest, while defining of criminal justice liability and crime qualification, also while appointing of the punishment.

Considering the mentioned above there occurs need that, the law of Georgia "About Enforcement Proceedings" to come into the compliance with Juvenile Justice Code 77th article 6th part.

6. Conclusion

Research of the underage minor court practice gives possibility of identification and assessment of legislative and practical errors, how material-legal and procedure norms used towards underage minor in the law proceedings are in compliance with the demands determined according to Juvenile Justice Code, as well as, international standards.

Bibliography:

1. The Constitution of Georgia, 24/08/1995.
2. The Law of Georgia "Code of Administrative Law Violations of Georgia", 15/12/1984.
3. The Law of Georgia "About Enforcement Proceedings", 16/04/1999.
4. The Law of Georgia "Criminal Code of Georgia", 22/07/1999.
5. The Law of Georgia "About Crime Prevention, Non-custodial Sentence Enforcement and Probation", 19/06/2007.
6. The Law of Georgia "Juvenile Justice Code", 12/06/2015.
7. The Order of the Minister of Labor, Health and Social Protection of IDPs from the Occupied Territories of Georgia № 01-126/N, 30/11/2020.
8. United Nations Minimal Standard Rules for the Realization of Juvenile Justice (Pekin Rules), 1985.
9. Model Law on Lustice for Juveniles in Conflict with the Law, United Nations Bureau of Fight against Drugs and Crime, 2013.
10. *Feierman J., Naomi G., Emily H., Jaymes F.,* The High Cost of Fines and Fees in the Juvenile Justice System, Juvenile Law Center, Philadelphia, 2016, 18.

11. *Gamkrelidze O.,* Punishment Fair and Punishment Unfair, Journal. "Life and Law", № 1(22), 2016, 5-6 (in Georgian).
12. *Gamkrelidze O.,* The Problems of Criminal Law, 3rd Vol., Tbilisi, 2013, 46 (in Georgian).
13. *Gvenetadze N.,* Plea Agreement in Georgia Analysis of Legislation, Symposium Collection, 2013, 232 (in Georgian).
14. *Hamilton K.,* Guidelines for Juvenile Justice Law Reform, 2011, 109-110.
15. *Ivanidze M.,* A Underage Minor and His Best Interests, in the book: Analysis of Juvenile Legislation and Court Practice, *Todua N., Ivanidze M. (eds.),* 2017, 11 (in Georgian).
16. *Izoria L.,* Comment of the Constitution of Georgia, chapter two, Citizenship of Georgia. The basic human rights and freedoms, 2013, 26 (in Georgian).
17. *Junger-Tas J., Decker S.,* International Handbook of Juvenile, New York, 2006, 263.
18. Lekveishvili M., Individualization of Punishment as an Important Principle of Punishment Imposition, in the Book: Tendencies of Liberalization of Legislation of Criminal Law in Georgia, 2016, 277 (in Georgian).
19. *Schwabe Jur.,* The Decisions of the Federal Constitutional Court of Germany, *Chachanidze E. (trans.), Kublashvili K., Ninidze T., Loladze B., Eremadze K (eds.),* Tbilisi, 2011, 370-371.
20. *Shalikashvili M., Mikanadze G.,* Juvenile Justice (manual), 2nd ed., Tbilisi, Freiburg, Strasbourg, 2016, 77, 129-131 (In Georgian).
21. *Tkesheliadze G., Natchkbia G.,* General Part of Criminal Law, 2004, 352 (in Georgian).
22. *Tskitishvili T.,* Report on the Conference: Criminal Law Sanctions and Imposition of the Punishment, May 12-13, 2017, Tbilisi, Georgia, "German-Georgian Criminal Law Journal", № 3, 2017, 84 (in Georgian).
23. Special Report of the Public Defender of Georgia: Children's labor in the conditions of the new corona virus pandemic and beyond that, Tbilisi, 2021 (in Georgian).
24. Report of the Working Group on Criminal Law for Independent and Transparent Justice, Using of Plea Agreement in Georgia, (in Georgian) <http://coalition.ge/files/coalition_criminal_law_wg_research_geo_9th_forum..pdf> [01.09.2022].
25. The Letter of Appeal of the Ministry of Justice of Georgia to the National Enforcement Bureau, № 64046, 31/08/2022.
26. Decision № 2/2/516,542 of the Constitutional Court of Georgia dated May 14, 2013.
27. Decision № 3/2/416 of the Constitutional Court of Georgia dated July 11, 2011.
28. Decision № 1/2/384 of the Constitutional Court of Georgia dated July 2, 2007.
29. Decision № 1/3/407 of the Constitutional Court of Georgia dated December 26, 2007.
30. The verdict of the Tbilisi City Court of April 19, 2022 on case № 1/3161-21.
31. Tbilisi City Court verdict dated February 18, 2022 on case № 1/675-22.
32. The verdict of the Tbilisi City Court of June 11, 2021 on case № 1/2600-21.
33. The verdict of the Tbilisi City Court of September 5, 2019 on case № 1/3955-19.
34. The verdict of the Tbilisi City Court of May 30, 2019 on case № 1328-19.
35. The verdict of the Tbilisi City Court of September 5, 2019 on case № 1/3955-19.
36. The verdict of the Tbilisi City Court of November 11, 2019 on case № 1/5355-19.
37. The verdict of the Tbilisi City Court of December 4, 2018 on case № 1/5369-18.
38. The verdict of the Tbilisi City Court of April 24, 2017 on case № 1/104-17.
39. The verdict of the Tbilisi City Court of October 20, 2017 on case № 1/4365-17.

Tamar Sadradze*

Inappropriateness of Prohibiting Appealing an Arrest Warrant

According to Paragraph One of Article 13 of the Constitution of Georgia, human freedom shall be protected. The XVIII Chapter of the Criminal Procedure Code of Georgia specifies the grounds for criminal prosecution, detention and recognition as an accused.

The present article deals with some problems related to a person's detention by a court decision. It discusses the following issues: the concept and essence of detention, the gaps associated with arrest warrants, in particular the lack of legal grounds for specifying the term of execution of an arrest warrant, lack of control over the execution of an arrest warrant, the constitutional claim filed by my colleagues and me related to the prohibition of appealing an arrest warrant and resultant legal problems.

The article also explores the court practice regarding a person's detention by a court decision, which demonstrates and illustrates the problems related to detention practices. Examples of some foreign jurisdictions for appeals of warrant orders that have chosen the principles of equality and adversariality of the parties as their primary guiding principle are also discussed.

The article describes the effective legal norm, reviews the judicial practice, gives conclusions and essential recommendations to improve the issue of legislative control.

Keywords: *detention, arrest warrant, appeal.*

1. Introduction

The goal of this article is to study an important and complex procedure regulated by the Criminal Procedure Code of Georgia, such as detention as a type of compulsory measure. The interest in this issue stems from the fact that the effective legal control does not allow a person to appeal an issued arrest warrant what creates a number of issues.

Based on reasonable assumption standard established by the court in its arrest warrant implying that there was a risk that the accused would flee, not appear before the court, destroy information relevant to the case or commit a new crime, the court, at the initial appearance of the accused in court, refers to the facts established in its arrest warrant as the grounds to apply the preventive measure and no longer examines these circumstances during the application of the preventive measure. According to Article 170(1) of the Criminal Procedure Code of Georgia, "Arrest is a short-term restriction of a person's freedom", while paragraph two of the same Article states: "A person shall be considered arrested from the moment when his/her freedom of movement is restricted. From the time of arrest, a person shall be recognized as an accused". The XVIII Chapter of the Criminal Procedure Code of Georgia deals with the grounds for criminal prosecution, detention and recognition as an accused.

* Doctor of Law, Professor of the David Aghmashenebeli University of Georgia.

Article 3 of the Criminal Procedure Code of Georgia, which gives the definitions of basic terms, does not define *detention*. However, *detention* is defined in Article 170(1) of the same Code.

The article considers such important issues as: how logical and acceptable is the definition of detention in Article 170(1) of the Criminal Procedure Code of Georgia and if the concept of detention should be defined alongside other terms? Which norm is used to determine 30 days period for arrest warrant and give the prosecution this period to execute an arrest warrant? Whether the extension of 30 days period established for search and seizure is reasonable to detention, as to the type of compulsory measure? What are the issues with the execution of arrest warrants and should an arrest warrant issued by a court be appealable? Regarding the latter, the article considers different views what thus allowing a more complete analysis of the issue. Do the non-appealability of arrest warrants and non-examination of its lawfulness deprive the person of the opportunity to enjoy the right to claim damage caused by illegal arrest because his/her freedom is restricted?

2. Concept and Grounds for Detention

According to Paragraph One of Article 13 of the Constitution of Georgia, human freedom shall be protected. "Other paragraphs of the same article provide guarantees of human freedom, in which the procedural side of freedom is ensured. "Other paragraphs of the same article provide guarantees of human freedom, in which the procedural aspect of freedom is provided".[1] Interference with human freedom is more important, and the Constitution establishes special regulations against it.[2]

The XVIII Chapter of the Criminal Procedure Code of Georgia gives the grounds for criminal prosecution, as well as the issues of detention and recognition as an accused. Article 3 of the Criminal Procedure Code of Georgia, which gives the definitions of basic terms, does not define *detention*. However, *detention* is defined in Paragraph One of Article 170 of the Criminal Procedure Code of Georgia: "Arrest is a short-term restriction of a person's freedom", while Paragraph Two of the same Article states: "A person shall be considered arrested from the moment when his/her freedom of movement is restricted. From the time of arrest, a person shall be recognized as an accused." "In addition to restricting freedom of movement, a person's ability to contact the outside world is also restricted during his/her detention."[3] Noteworthy, the definition of term *detention* is given not among the definition of terms, but in private part of the Code. The effective Criminal Procedure Code of Georgia does not explain the procedural legal type of detention either. Article 134 of the previous Criminal Procedure Code of Georgia dated 20 February 1998 immediately explained that detention is a form of legal coercion in criminal proceedings. Paragraph 6 of Article 200 of the effective Criminal Procedure Code of Georgia states: "... who was subjected to arrest as a coercive measure in criminal procedure...". From this extract, one may conclude that the effective Criminal Procedure Code of Georgia considers arrest/detention as a measure of legal coercion in criminal proceedings.

---

1 *Kublashvili K.,* Fundamental Right, Tbilisi, 2008, 133 (in Georgian).

2 Decision of the Constitutional Court of Georgia № 2/1/415 of April 6, 2009 in the case of the Public Defender of Georgia v. Parliament of Georgia, II-2.

3 *Tugushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Judicial Practice of the Constitutional Court of Georgia, Tbilisi, 2013, 108 (in Georgian).

According to Paragraph 6 of Article 2 of the Law on Normative Acts: "A Code is a systematized normative act covering legal norms regulating particular (uniform) social relations", i.e. the advantage of the Code is that it has systematized norms. With this, it can be concluded that it would have been better if the concept of detention had been explained in the definition of basic terms given by Article 3 of the Criminal Procedure Code of Georgia, rather than in the private part of the Criminal Procedure Code of Georgia (Article 170 and Paragraph 6 of Article 200 of the Criminal Procedure Code of Georgia). In addition, for the sake of systematization of the Code, it might have been better to define the concept of detention in Article 3 of the Criminal Procedure Code of Georgia, entitled "Definition of basic terms for the purposes of this Code," and to write down that detention is a short-term restriction of freedom and a coercive measure. However, as the definition of detention is given in the V Chapter giving the grounds for initiating criminal prosecution, and the detention of a person automatically entails criminal prosecution, it is reasonable to explain the definition of detention as given in Article 170 of the Criminal Procedure Code of Georgia.

According to Article 171(1) of the Criminal Procedure Code of Georgia, a court decision for detention is not appealable, and the problem stems from the absence of the right to appeal. The fact is that the private norm of the Criminal Procedure Code of Georgia regulating the detention explicitly states that the decision to detain a person is not appealable. As a result, it is not possible to specify any other general norm for appealing an arrest warrant.

The Criminal Procedure Code of Georgia recognizes two types of a person's detention: with or without a court decision. In the case of detention, there are two opposing values: the person's freedom and the legitimate interest of the state in solving the crime.[4]

In case of detention without a court decision, the Criminal Procedure Code of Georgia does not give a norm that would expressly obligate the court to verify the lawfulness of detention without a court decision. Article 197 of the Criminal Procedure Code of Georgia regulates the procedure for the initial appearance of the accused in court and the issues to try. However, the given article does not expressly state that the court is obligated to check the lawfulness of detaining without a court decision and to clarify if it was necessary to detain a person without a court decision. Based on subparagraphs "g" and/or "h" of Article 197(1) of the Criminal Procedure Code of Georgia and the fact that the effective Criminal Procedure Code of Georgia uses a mixed court control model of limitation of human rights and freedoms, it may be said that the court is not only authorized, but also obliged to discuss and verify the lawfulness of detaining a person without his/her permission during the initial appearance of the accused in court. This obligation stems from Article 13(4) of the Constitution of Georgia, according to which: "A person shall be informed of his/her rights and grounds for arrest immediately upon being arrested. A person may request the assistance of a lawyer immediately upon being arrested. This request must be satisfied." Whether a detained person was explained his/her rights immediately after detention should be examined during the initial appearance of the accused in court, because it is at this stage that subparagraph "g" of Article 197(1) obliges the judge to inquire the accused whether he/she has any claims or motion regarding the violation of his rights. Even this

[4] Decision of the Constitutional Court of Georgia № 2/1/415 of April 6, 2009 in the case of the Public Defender of Georgia v. Parliament of Georgia.

argument is absolutely sufficient for the judge during the initial appearance to verify the lawfulness of a person's detention without a court decision, to verify if the person's rights were protected during the detention and whether the accused has any claims or complaints regarding the violation of his/her rights.

Judicial practice of verifying the lawfulness of detaining a person without a court decision is not uniform. Sometimes, a court, on its own initiative, even without a party's motion, considers and verifies the lawfulness of detaining a person without a court decision.[5] It is not uncommon for a court recognizing the detention without a court decision illegal during the initial appearance of the accused in court based on the motion of the defense.[6] However, judicial practice encounters cases when the court in its ruling does not consider or verify the lawfulness of detaining a person without court permission.[7] The court does not verify the lawfulness of a person's detention in cases of extreme necessity, even with the motion of the defense. Ruling № 10a/1629 of April 14, 2021 by the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court is an example.[8] It is reasonable to examine whether there were grounds for a person's arrest immediately by the court without a court decision, since the person's freedom is interfered.

In conclusion, it can be said that judicial practice in this regard is not uniform. Although the Criminal Procedure Code of Georgia does not explicitly obligate the court to verify the lawfulness of a person's detention without a court decision during the initial appearance of the accused in court, the analysis of the decisions of the Constitutional Court of Georgia and the European Court of Human Rights as well as articles of the Criminal Procedure Code of Georgia show that the court is not only authorized, but also obliged to verify the lawfulness of a person's detention without a court decision even without a motion of the defense.

3. Absence of Legal Grounds in Setting the Term of Execution of an Arrest Warrant

Part 1 of Article 171 of Georgia's Criminal Procedure Code, as the title suggests, should govern the term of execution of a court decision as well as the legal grounds for its determination. However, neither this standard nor the articles of the Criminal Procedure Code of Georgia that directly regulate detention issues, immediately define the term of execution of an arrest warrant issued by the judge.

Judicial practice in determining the term of execution of an arrest warrant is not uniform even here. Notwithstanding the absence of the legal grounds for an arrest warrant, the usual judicial practice for the court is to give the prosecution the time limit of thirty (30) days to execute an arrest warrant. However, this term was set to fifteen (15) days in exceptional cases.[9] Furthermore, in judicial practice, sentences where the judge does not specify the term of an arrest warrant execution are known. For example, with decision № 6244-19 of April 18, 2019 issued by the Criminal Case Investigation, Pre-

5 Decision of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court № 10a/2054 of May 8, 2021.

6 Decision № 10a/39-20 of Tetritskaro District Court dated November 18, 2020.

7 Decision № 10/a-14-21 of Tetritskaro District Court dated May 24, 2021.

8 Decision № 10a/1629 of April 14, 2021 by the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court.

9 Decision of Gurjaani District Court of July 22, 2020, № 10a/63-20.

Trial and Substantive Trial Panel of Tbilisi City Court, the judge did not specify any term of execution of the arrest warrant.[10] The determination of a thirty (30) day term of execution of the arrest warrant by the court, and general determination of this term, is based on Article 112(3) of the Criminal Procedure Code of Georgia, according to which "A decision ordering a search or seizure shall be invalid, unless the investigative action is initiated within 30 days". By analogy with this norm, court sets a 30 (thirty) days term for the prosecution to execute the arrest warrant.

According to Article 2(3) of the Criminal Procedure Code of Georgia, "In case of a gap in the legislation of Georgia, the criminal procedure rules may be applied by analogy, unless this limits human rights and freedoms provided for by the Constitution of Georgia and international treaties". Despite this, "The legislator explicitly and imperatively forbade the application of the law or justice by analogy, or extended interpretation of the law when using a criminal procedural legal enforcement measure, that is, it is allowed to interpret the law literally. This is because a criminal procedural legal enforcement measure directly limits some or other fundamental human right provided for by the Constitution, what, according to the Constitution, is allowed only in cases directly envisaged by law."[11] Besides this argument, it may be considered that the application of the rule of analogy of Article 112(3) of the Criminal Procedure Code of Georgia when determining a 30-day term violates the principle of lawfulness. The latter is a special norm governing the invalidation of a search and seizure decision unless this investigative action is initiated within 30 days. The extension of this clause to detention is rather problematic due to the particular nature of the norm. Furthermore, Article 112 of the Criminal Procedure Code of Georgia is not the norm regulating the validity period of detention and its application depends on the opinion of the judge.

Article 5(3) of the Organic Law "On Normative Acts" expressly prohibits the application of special (exceptional) norms by analogy. Furthermore, Article 7 of the same Law gives the classification of normative acts, stating that an organic law has greater legal power than a law. As a result, the Organic Law "On Normative Acts" has greater legal power than the Criminal Procedure Code of Georgia, which means that the 30-day period given in Article 112(3) of the Criminal Procedure Code of Georgia should not be used by analogy, because it is a special norm, while the Organic Law prohibits using a special norm by analogy, despite the fact that Article 2(3) of the Criminal Procedure Code of Georgia allows the application of analogy.

There is a second argument, in addition to the one stated above. In particular, Article 112 of the Criminal Procedure Code of Georgia regulates the conduct of investigative actions by court decision. Searches and seizures are investigative actions, and the 30-day period specified for them can be applied to investigative actions only, whereas detention, unlike them, is a coercive measure. Consequently, the 30-day period specified by a legislator for investigative action is intended for such actions only, and depending on the definition of the norm, can be applied to the investigative actions, but not to detention, which is a type of coercive measure, not an investigative action.

---

[10] Decision of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court № 4230-19 of April 18, 2019.

[11] *Meishvili Z., Jorbenadze O.,* Comments to the Criminal Procedure Code of Georgia, Tbilisi, 2007, 309 (in Georgian).

From the foregoing, it is clear that the current Criminal Procedure Code of Georgia lacks an article that allows the court to determine the period of execution of an arrest warrant, while the Law of Georgia "On Normative Acts" forbids the use of a special norm by analogy.

For the reasons stated above, it is advisable to add the following clause to Paragraph One of Article 171 of the Criminal Procedure Code of Georgia: "The court shall determine the period of execution of an arrest warrant for individual cases based on the facts of the case, which will be nullified unless the given coercive measure is carried out within 15 days of the judgment's release".

A logical question arises as to the time limit: why not, for example, the 30-day period specified for the search and seizure, but 15 days? "The released judgment must be enforced as soon as possible because reasonable assumption may disappear if too much time passes between the judgment's release and enforcement."[12] Not only might the standard of reasonable assumption disappear, but so might the grounds on which the arrest warrant was issued.

Grounds for arrest, such as the threat of fleeing, not appearing before the court, destroying evidence relevant to the case, or committing a new crime, are high-risk situations that require immediate action to ensure that the investigation is not obstructed while obtaining relevant evidence, and delays can cause irreparable harm to the investigation in contrast to a search or seizure, where a warrant may be issued on the grounds that "the item to be seized will be delivered to the site of the seizure/search in the future".[13]

Based on the foregoing, the 15-day period is a reasonable time frame within which the prosecution can effectively enforce the judgment. Furthermore, the legislator should give the court the authority to further examine the procedure of execution of its judgment and determine whether the grounds for the court issuing the arrest warrant were still valid at the time of execution of the judgment. It is also necessary to verify whether the arrest warrant was issued lawfully and in accordance with the requirements of Article 171(1) of the Criminal Procedure Code of Georgia.

4. Lack of Control over the Execution of an Arrest Warrant

According to Article 171(1) of the Criminal Procedure Code of Georgia, upon the prosecutor's motion, the court, without oral hearing, shall try the motion to decide whether to release a decision to detain a person. According to 4-year statistics of Tbilisi City Court, in 2017, 307 prosecutor's petitions to issue a decision of detention were filed before Tbilisi City Court, which satisfied 263 petitions; In 2018, 581 petitions were filed, with 555 petitions granted; In 2019 and 2020, the number of such petitions was 796 (709 granted) and 661 (548 granted), respectively.[14] The statistics evidence that the court mostly grants the prosecutor's petition and issues an arrest warrant, while according to the study: "The groundlessness of the judges' decisions on prosecutors' petitions to the court regarding person's detention is actually that they lack specific, reasoned or supported references to relevant factual

---

12 *Papiashvili L., Tumanishvili G., Akubardia I., Gogniashvili N., Ivanidze M.,* Criminal Procedure Law of Georgia, Tbilisi, 2017, 453 (in Georgian).

13 Ibid.

14 Statistics of Tbilisi City Court, <https://tcc.court.ge/ka/Statistics> [10.04 2021].

materials explaining why a person should be arrested and what circumstances should be considered, or why a person should not be arrested."[15]

In some cases, the court sets a 30-day deadline for the prosecutor's office to execute an order and delivers a decision on a person's detention due to the risk of destroying important case materials. The prosecution, despite being given a 30-day period to execute the order, executes it on, say, the twentieth or twenty-fifth day, when one of the grounds for issuing the arrest warrant is an immediate threat of destroying important case information. This threat is immediate when any delay may result in the destruction of information critical for the investigation. As a result, when the threat of destroying important case information is the sole reason for issuing an arrest warrant and the prosecutor's office detains a person on the twentieth or twenty-fifth day, the court must examine whether the risk existed on the twentieth or twenty-fifth day from the arrest warrant release. Even this reason should be sufficient for one-time appeal of an arrest warrant.

On one occasion, on April 18, 2019, the judge of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court issued an arrest warrant on the grounds that there was a risk that the person would flee.[16] Due to the risk of fleeing, the prosecutor's office executed the order as soon as on May 8, 2019 and in fact detained the person on the twentieth day after the order was issued.[17]

It is true that the court issues an order for detention on the prosecutor's motion when the term of the warrant execution is beyond the court control and the warrant enforcement is the competence of the law enforcement machinery, but when the order is issued on the grounds that there was a risk of person's fleeing in the given period and is executed by the prosecution, e.g. on the twentieth day after issuance and detains the person on the grounds of the risk of fleeing, the court should at least be able to examine the fact of execution of its order, especially when the defendant contests it.

Furthermore, the court issues an order for detention without oral hearing, based solely on the information from the prosecutor's motion and without being aware of the opposing party's position. The target of the arrest is not even notified when the arrest warrant is judged. Accordingly, at this stage, both the judgment and decision of the court are based entirely on the position of one party (the prosecution), and a person may be arrested by court decision. However, after the arrest, the accused should have the right to one-time appeal of the court decision on detention and have his arguments heard.[18] In its decisions, the Constitutional Court emphasized the importance of protecting the right to oral hearing.[19]

---

15 *Sulakvelidze D., Dzebniauri G., Chomakhashvili K., Tomashvili T., Mataradze T.,* Study of The Detention Standards and Practice in Accordance with the Criminal Procedure Code of Georgia, Tbilisi, 2017, 30 (in Georgian).

16 Decision of the judge of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court № 6244-19, dated April 18, 2019.

17 See Detention Protocol of 08.05.2019 on Criminal Case № 009200219001.

18 When considering the constitutional claim "Mikheil Haindrava v. Parliament of Georgia," the Parliament representative explained that the review of the order of detention takes place during the revision of the preventive measure what is not true and does not correspond to the reality. I will talk about this issue in Chapter Three.

19 Decision of the Constitutional Court of Georgia of February 27, 2014 in the case of Georgian citizen Ilia Chanturaia v. Parliament of Georgia, № 2/2/558, II, 42.

When the court makes a decision for detention, the facts and grounds once established by reasonable assumption are no longer examined, because the arrest warrant is not appealable. This deprives a person of the right to contest and verify the validity and lawfulness of the court's assessment of the grounds presented by one party only. He should be given the opportunity to prove a different reality and have an illegal decision reversed.

Furthermore, a person may have absolute evidence (e.g., evidence of being abroad at the time the crime was committed in Georgia) to overturn the verdict passed solely on the basis of the prosecution's information. If so, as the appeal is filed with the court of a higher instance, the arrest warrant issued against him will be cancelled and he will be released without having to prove any new substantive circumstances. Here, we deal with the lack of right of appeal, what, in turn, deprives a person of the right to allege his position and protect his freedom.

Aside from the foregoing, Article 13(6) of the Constitution of Georgia states: "A person whose freedom has been restricted unlawfully shall have the right to compensation". The fact that an arrest warrant is not appealable and its lawfulness cannot be verified deprives the person of even a theoretical possibility of exercising the mentioned right. If a person does not have the right to contest unlawful restriction of his freedom, he will never be able to prove an unlawful act against him as a fact.

Since the lawfulness of the court's decision is subject to re-examination by the court, without the right to apply to court, a person is deprived of the opportunity to verify the lawfulness of an arrest warrant and prove illegal restriction of his freedom, what is the grounds for claiming compensation under Article 13(6) of the Constitution of Georgia. The person will not be able to claim compensation unless the fact of illegal detention is established by the court. The mechanism of appeal gives a person the legal grounds to contest the lawfulness of detention and claim compensation as a result.

Paragraph "g" of Article 197(1) of the Criminal Procedure Code of Georgia deserves attention. According to it, a magistrate judge shall, at the initial appearance of the accused in court, ask the accused whether he/she has any complaint or motion with regard to the violation of his/her rights. It is a common practice to interpret this norm as a detainee's right at his initial appearance in court to appeal an arrest warrant before a magistrate judge that was issued by a judge of the same instance. This is a misinterpretation of the norm, because at the initial appearance, the court is looking at possible violation of the rights, degrading treatment, or torture against the accused during the enforcement of the court decision, rather than judging the lawfulness of the decision. Furthermore, different judges of the same instance have no authority to judge the correctness of each other's decisions.

A number of issues arise when a person is detained by a court decision, and one of the most important is the issue discussed above. Thus, the court must have the right to examine the execution of an order of detention issued by it, and an accused must have an opportunity to prove an unlawful restriction of his/her freedom in order to claim compensation later on.

5. Decision of the Constitutional Court Regarding the Opportunity to Appeal an Arrest Warrant

On June 17, 2022, the Constitutional Court of Georgia dismissed constitutional claim № 1464 (Mikheil Khaindrava v. Parliament of Georgia), which challenged the constitutionality of the second sentence of Article 171(1) of the Criminal Procedure Code of Georgia (the said decision is not appealable) in relation to the first sentence of Article 31(1) of the Constitution of Georgia. The decision of the Constitutional Court does not stand up to criticism.[20]

The above-mentioned decision of the Constitutional Court of Georgia is hardly adequate. Obvious gaps stem from the misinterpretation of the norm what is a dangerous precedent because it seems that the aim and the purpose of the norm of the Panel of the Constitutional Court are not understood properly. In paragraph 16 of the decision, the Constitutional Court states that detention is an investigative act. Such judgment cannot be considered right, since detention is not an investigative act. Under Article 200(6) of the Criminal Procedure Code of Georgia, detention is a coercive measure in criminal proceedings. Furthermore, in addition to this argument, the IV Chapter of the Criminal Procedure Code of Georgia considers investigation and investigative acts, without mentioning detention. The legislator regulates this issue in the V Chapter of the Criminal Procedure Code of Georgia seeing detention precisely as a measure of criminal coercion. Moreover, in the annual statistics of the City Court, detention is listed among coercive measures.

In Paragraph 20 of the said ruling, the Constitutional Court clarifies that a decision to detain a person is not completely beyond the court control, and in support of this opinion refers to Paragraph "g" of Article 197 of the Criminal Procedure Code of Georgia: "whether the accused has any complaint or motion with regard to the violation of his/her rights" and relying on this clause, judges as follows: "at the initial appearance of the accused in court, during the establishment of the above-given questions, if the accused presents a complaint regarding his/her detention, or mediates regarding the violation of his/her rights, of which the court is sure, the court may consider such detention ungrounded and/or illegal, with the reason for detention being insufficient, and refuse to apply arrest as a preventive measure against the detainee." This judgment of the Constitutional Court does not stem from the requirements of the Criminal Procedure Code of Georgia, or from the instructions of Article 197 of the same Code. The fact is that in case of violation of rights, the court may (but not necessarily) not apply imprisonment as a preventive measure what does not make the applied measure of detention illegal. This is natural, because a person may be detained lawfully, but his rights may be violated by degrading treatment during the detention. The unlawful act committed during the enforcement of this measure is a crime of its own, although it does not automatically mean that the preventive measure should be considered unlawful. The lawfulness of an arrest warrant, no matter how unlawful or ungrounded it is, will not be tested at the initial appearance of the accused in court, even though a judge will inquire of the accused at trial whether he/she has any complaints or motions regarding the violation of his/her rights. Rather, the court only evaluates whether the defendant's rights were

[20] See special opinion of the judge of the Constitutional Court Giorgi Kverenchkhiladze regarding the decision of the First Panel of the Constitutional Court № 1/4/1464 of June 17, 2022.

violated in the execution of the order by e.g., inhuman or degrading treatment, torture, etc. Furthermore, different judges of the same instance are not allowed to judge the appropriateness of each other's decisions. A judge of the first instance (magistrate judge) may not judge the lawfulness of an arrest warrant issued by another (magistrate) judge of the same court or revise it, as this is expressly forbidden by the Criminal Procedure Code of Georgia and this is how the court practice has developed. [21]

According to Article 95(1) of the Criminal Procedure Code of Georgia: "A participant in criminal proceedings may, in cases directly provided for and in the manner prescribed by this Code, appeal an action or decision of a court, prosecutor or investigator". Following the instructions of this norm, the legislator immediately specifies that the Criminal Procedure Code of Georgia must explicitly state where a court decision/ruling shall be appealed. Otherwise, it will not be judged by the court. Another proof is found in the clarification of the Investigative Panel of Tbilisi Court of Appeals: "According to Article 95(1) of the Criminal Procedure Code of Georgia, a court decision may be appealed only in cases directly provided for and in the manner prescribed by the Code, and what a party is not entitled to according to the procedural legislation may not be granted by the court and such explanation may not have legal force".[22] Besides, Article 20(3) of the Criminal Procedure Code of Georgia explicitly states that a complaint against a judgment received within the jurisdiction of a magistrate judge of a district (city) court shall be tried by the Investigative Panel of the Court of Appeals. Therefore, no matter how illegal or unreasonable the judge trying the preventive measure considers the arrest warrant, he/she is not authorized to judge it. This means that the revision of a decision of a judge of the first instance is possible only by a judge of a higher instance, since a court of the same instance is not authorized to judge the same issue twice.

The fact that the legislator does not allow a (magistrate) judge during the initial appearance to judge the lawfulness of an order issued by a judge of the same instance is also proved by Article 206(8) of the Criminal Procedure Code of Georgia, which clarifies that when judging a preventive measure by the first instance court, substantially new information/facts must be presented if imprisonment as a preventive measure is to be changed. It is clear that here, no detention is meant, but a reservation about the preconditions for changing the kind of preventive measure.

Notably, the above-mentioned Decision № 1/4/1464 of June 17, 2022 of the First Panel of the Constitutional Court of Georgia is supplemented by the special opinion of the judge of the Constitutional Court Giorgi Kverenchkhiladze stating that the Constitutional Court assessed the legal facts incorrectly. He fully agreed with the authors of the constitutional claim and explained that the Constitutional Court should have fully satisfied the claim and recognized unconstitutional the second sentence of Article 171(1) of the Criminal Procedure Code of Georgia in relation to Clause One of Article 31 of the Constitution of Georgia.[23]

---

21 See Decision № 1g/1362-17 of November 29, 2017 of the Investigative Panel of Tbilisi Court of Appeals.

22 Decision № 1g/1362-17 of November 29, 2017 of the Investigative Panel of Tbilisi Court of Appeals.

23 Special opinion of the judge of the Constitutional Court Giorgi Kverenchkhiladze regarding the decision of the First Panel of the Constitutional Court № 1/4/1464 of June 17, 2022.

6. Comparative Legal Analysis

Article 14 of the Code of Criminal Procedure of Estonia refers to the adversarial court procedure.[24] The Code of Criminal Procedure of Estonia distinguishes between the status of a suspect and an accused. According to Article 34(6) of the Code of Criminal Procedure of Estonia, the suspect has the right to take part in the hearing of an application for an arrest warrant in court. Article 131(2) of the same Code regulates the case in which, on the order of a Prosecutor's Office, an investigative body shall convey a suspect or accused with regard to whom an application for an arrest warrant has been prepared to a preliminary investigation judge for the hearing of the application. Article 385 of the Code of Criminal Procedure of Estonia lists the matters, which are not appealable. Paragraph 28 of this article prohibits appealing a decision to arrest a person. However, it should be noted that despite not appealing such a decision, a person has the opportunity to be heard by the court before the court makes a decision of detention.

Article 4 of the U.S. Federal Law deals with the detention of a person.[25] The Law recognizes two cases of detention: one by a police officer and the other by a court. A police officer detains a person provided there is a probable cause standard. A police officer who detains a person without a court decision must prove before the court that probable cause existed and that it was necessary to detain the person.

Probable cause is a reasonable belief based on the facts and information, which existed before the arrest. This is the standard used by the judge when issuing an arrest warrant. There is a discussion with the defendant about the issuance of an arrest warrant. Article 37 of U.S. Federal Law lists the matters that cannot be appealed. Section 37(c) of the U.S. Federal Law deals with an arrest order that is not appealable, but even here the person's right to be heard is compensated by judging his arrest in his presence.

The Criminal Procedure Code of Georgia of February 20, 1998, in contrast to the current Criminal Procedure Code, regulated the issues related to detention more effectively. Article 12(3) of the Criminal Procedure Code of Georgia of February 20, 1998 expressly prohibited a person's detention for more than 48 hours. Article 134 of the same Code listed the types of coercive measures in criminal proceedings, and the list given in subparagraph "b" of the same article specified term *detention*, thus recognizing detention as a type of coercive measures, unlike the present Criminal Procedure Code of Georgia.

Article 146^1 of the Criminal Procedure Code of Georgia of February 20, 1998 regulated the issue of verifying the lawfulness of detention. According to Clause One of this article, a person released from custody was entitled to file a motion to the court on the location of investigation requiring the verification of the lawfulness and validity of his/her detention. Within ten days from the date of motion, the judge considered the question of the lawfulness and validity of the detention once. Clause Two of the given article dealt with recognizing the detention unlawful, a case where the

---

[24] Code of Criminal Procedure of Estonia, <https://www.riigiteataja.ee/en/eli/530102013093/consolide> [04.05.2021].

[25] U.S. Federal Law, enforced on March 21, 1946, as amended to December 1, 2020.

procedure for detention under Article 145 of this Code was essentially violated, or where the detention did not serve the purpose of detention under Article 141 of this Code. Clause Three explained when the detention was unreasonable, and Clause Four stated that if the judge determined that the detention was unlawful or ungrounded, he/she would recognize this fact and immediately order compensation to the person released from custody.

7. Conclusion

A number of problematic issues arise in practice when the court issues an arrest warrant, in particular, there is no legal basis to determine the period of execution of an arrest warrant. The 30-day period specified in Article 112(3) of the Criminal Procedure Code of Georgia is set by the court by analogy of a special rule, the action it is not entitled to under the Organic Law "On Normative Acts".

Besides, the court should have the right to verify the execution of the arrest warrant issued by it, especially when the warrant is issued due to the threat of fleeing and, based on the above, the prosecution's order is executed with some delay (e.g. after 20 days).

The inability to appeal the arrest warrant deprives the defendant of the right to claim damages later on, but most important problem is the lack of a leverage to protect one's freedom, since the current legal norm, despite the interpretation of the Constitutional Court, does not give a defendant (defense) the right to appeal a court order. Without the right to appeal an arrest warrant, an accused is deprived of his/her right to challenge the lawfulness of the factual and formal grounds established by the court against him.

Bibliography:

1. The Constitution of Georgia, 24/08/1995.
2. Organic Law of Georgia "On Normative Acts", 09/06/2022.
3. The Criminal Procedure Code of Georgia, 06/09/2022.
4. The Criminal Procedure Code of Georgia, 30/02/1998 (invalid).
5. Code of Criminal Procedure of Estonia, adopted on 02/12/2003, enforced on 07/01/2004, <https://www.riigiteataja.ee/en/eli/530102013093/consolide> [05.04.2021].
6. U.S. Federal Act as amended to December 1, 2020, effective date: 21/03/1946.
7. *Kublashvili K.,* Fundamental Rights, Tbilisi, 2008, 133 (in Georgian).
8. *Meishvili Z., Jorbenadze O.,* Comments to the Criminal Procedure Code of Georgia, Tbilisi, 2007, 309 (in Georgian).
9. *Sulakvelidze D., Dzebniauri G., Chomakhashvili K., Tomashvili T., Mataradze T.,* Study of The Detention Standards And Practice In Accordance With The Criminal Procedure Code of Georgia, Tbilisi, 2017, 30 (in Georgian).
10. *Tugushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and the Case Law of the Constitutional Court of Georgia, Tbilisi, 2013, 108 (in Georgian).
11. *Papiashvili L., Tumanishvili G., Akubardia I., Gogniashvili N., Ivanidze M.,* Criminal Procedure Law of Georgia, Tbilisi, 2017, 453 (in Georgian).

12. Decision of the Constitutional Court of Georgia of June 17, 2022 in the case of Mikheil Khaindrava v. Parliament of Georgia", № 1/4/1464.
13. Decision of the Constitutional Court of Georgia of February 27, 2014 in the case of Georgian citizen Ilia Chanturaia v. Parliament of Georgia, № 2/2/558.
14. Decision of the Constitutional Court of Georgia of April 6, 2009 in the case of Public Defender of Georgia v. Parliament of Georgia, № 2/1/415.
15. Decision of Gurjaani District Court of July 22, 2020, № 10a/63-20.
16. Decision of the judge of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court № 6244-19, dated April 18, 2019.
17. Decision of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court № 10a/2054 of May 8, 2021.
18. Decision of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court № 10a/1629 of April 14, 2021.
19. Decision of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court № 4230-19 of April 18, 2019.
20. Decision № 10a/39-20 of Tetritskaro District Court dated November 18, 2020.
21. Decision № 10/a-14-21 of Tetritskaro District Court dated May 24, 2021.
22. Detention Protocol of 08.05.2019 on criminal case № 009200219001.
23. Statistics of Tbilisi City Court, <https://tcc.court.ge/ka/Statistics> [10.04.2021].
24. Mikheil Khaindrava v. Parliament of Georgia, <https://constcourt.ge/ka/judicial-acts?legal=4873&fbclid=IwAR2OSP7kNRSPlJXREGYFAP6yX4G1yZ_VcDNz0-WldghCGs91tanW6at4ENI> [16.04.2021].

Nino Begalishvili*

State Immunity from Execution under the "United Nations Convention on the Jurisdictional Immunities of States and their Property" (UN Convention) in the Process of Execution of Arbitral Awards against States*

The present article focuses on the examination of state immunity in the process of execution of arbitral awards under the UN Convention. It studies the effectiveness of the UN Convention in the light of domestic and international laws on State immunity. Within the scope of this area of research, the article discusses the approaches of Anglo-American, French and Swiss legal systems.

Keywords: *Execution of arbitral awards against states, UN Convention, State immunity from execution.*

1. Introduction

The ultimate purpose of international arbitration is the recognition and enforcement of an arbitral award.[1] However, one of the important barriers in the execution of the arbitral award made against the state is the state immunity.[2]

The growing participation of states in commercial activities in the last century has indicated the need to revise[3] the principle of absolute immunity in a number of countries and triggered the development of the doctrine of restrictive state immunity, which was shared by the majority of states, and has been reflected in their domestic legislation and judicial practice.[4] Unlike absolute, the doctrine of restrictive state immunity distinguishes between the state's non -governmental – *jure gestionis* and governmental – *jure imperii* acts and only in the case of the latter the state can plea the sovereign immunity.[5] With the introduction of restrictive state immunity, the issue of state immunity from jurisdiction has been somehow resolved in the process of recognition and enforcement of arbitral

---

* PhD student, invited Lecturer at Ivane Javakhishvili Tbilisi State University, Faculty of Law.

* Original paper of the author has initially been published in Georgian in TSU Journal of Law, 2022 #2 Georgian Edition, pp.309-323 <https://jlaw.tsu.ge/index.php/JLaw/issue/view/728/233>; English translation is performed by Ana Marjanidze.

1 *Bishop D.R., Crawford J. R., Reisman W. M., et al, (eds),* Foreign Investment Disputes: Cases, Materials and Commentary, 2nd ed., Kluwer Law International, 2014, 1177.

2 *Blackaby N., Partasides C., Redfern A., Hunter M*., Redfern and Hunter on International Arbitration, 6th ed., Oxford, 2015, 654.

3 *Shaw M. N*., International Law, 5th ed., Cambridge, 625.

4 See *Fox H*., International Law, *Evans M. D*., (ed), 2nd ed., Oxford, 2006, 368; *Shaw M. N*., International Law, 5th ed., Cambridge, 630-63.

5 *Brownlie I.,* Principles of International Public Law, *Kukulava G., Meunargia S., Siradze E., Glurjidze E., (translators), Khidasheli T. (ed.),* 7th ed., Vol., 2010, 358 (in Georgian).

awards, however, the immunity from execution remains as "the last bastion."[6] The matter is complicated by the fact that according to both the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – the New York Convention) [7] and the Convention on the International Center for Settlement of Investment Disputes (hereinafter – the ICSID Convention),[8] the issue of immunity from execution shall be resolved according to national legislation.[9]

One way to address the existing divergent practice of the doctrine of state immunity is to develop and codify legally binding rules incorporated into the national legislation or directly applied by national courts as domestic legislation.[10] "The 2004 UN Convention on Jurisdictional Immunities of States and Their Property"[11] (hereinafter – the UN Convention) is an example of such an attempt and an important step in the process of harmonization of international law on state immunity.[12]

The UN Convention, although it has not yet entered into force,[13] is still of great importance, as it is the first universal international convention on state immunity.[14] It is noteworthy that the restrictive state immunity doctrine and exceptions from state immunity set forth under the UN Convention are taken into account and accepted in the legislation and judicial practice of a number of states.[15] But the regulatory mechanism of state immunity proposed by the UN Convention is also not flawless and raises questions regarding a number of issues.

The article is aimed at identifying the essence of the problem regarding the state immunity from execution in enforcement proceedings of international arbitral awards on the basis of a comparative analysis for the future regulation of state immunity. The mentioned issue is also relevant in relation to Georgia.

Although, Georgia is not a member of the UN Convention, but the country has not adopted legislation on state immunity either, and therefore it is important to determine the main issues that will contribute to the regulation of the plea of state immunity in Georgia in executing proceedings of arbitral awards against states.

---

6 *Ostrander J.,* The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgement, Berkley Journal of International Law, Vol. 22, 2004, 541-582.

7 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention"), 330 UNTS, 1958, 38.

8 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), 575 UNTS, 1965, 159.

9 ICSID Convention, 575 UNTS, 1965, 194, Art. 54.3; The New York Convention, 330 UNTS, 1958, Art. 3.

10 *Fox H. QC., Webb Ph.,* The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 287

11 United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (UN Convention), UN General Assembly, A/59/508, 02/12/2004, https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf> [17.06.2022].

12 *Fox H. QC., Webb Ph.,* The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 287

13 Convention has been ratified only by 22 states and signed by 28 states. At least 30 states must ratify the convention to enter into force. see UN Convention, 575 UNTS, 1965, Art. 30.

14 *Fox H*., International Law, *Evans M. D*., (ed), 2nd ed., Oxford, 2006, 367.

15 Ibid, 368.

2. State Immunity from Execution

The UN Convention sets forth different legal regimes on state immunity from jurisdiction and state immunity from execution, thereby directly underlining the fact that the state's waiver from immunity from jurisdiction does not imply its consent to pre-judgment or post-judgment measures of constraint.[16]

It should be noted that the concept of "measures of constraint" in the UN Convention is given as a general term and not specific coercive measures in use in the legislation of any country.[17] Since measures of constraint vary widely in states' practice, it would be difficult, if not impossible, to find a definition that would encompass measures of constraint in all legal systems. Accordingly, the authors of the Convention considered it sufficient to give examples of the most easily understood and notable measures of constraint such as: attachment, arrest and execution of court decisions, including arbitral awards.[18]

In respect of state immunity from execution, the UN Convention lays down the general rule that none of the aforementioned pre-judgement or post- judgement measures of constraint may be taken against a state in connection with a proceeding before a court of another state.[19] Here, the UN Convention enumerates the exceptions to this general rule, which are related to a) state's expressed consent to the taking of such measures as indicated,[20] b) allocation or earmarking of the property by the state for the satisfaction of the claim, which is the object of that proceeding,[21] and c) when it has been determined that the property is specifically in use or intended for use by the state for purposes other than government non-commercial purposes, and the property is located in the territory of the forum state.[22] The first two exceptions are common to pre-judgment and post-judgment measures of constraint, while the third exception applies only to post-judgment measures of constraint.[23]

2.1. Waiver of Immunity

State immunity from execution, like state immunity from jurisdiction, is not absolute and can be waived by the state.[24] Under the UN Convention the member states are entitled to expressly consent to the taking of measures of constraint: a) by international agreement; b) by arbitration agreement or in a written contract; or c) by a declaration before the court or by a written communication after a dispute

16 UN Convention, 575 UNTS, 1965, Art. 20.

17 Draft Articles on Jurisdictional Immunities of States and their Property, with Commentaries by International Law Commission (ILC Commentary), Yearbook of the International Law Commission, Vol. 2, Part 2, 1991, 55.

18 ILC Commentary (1991), 55-56.

19 UN Convention, 575 UNTS, 1965, Arts. 18, 19.

20 Ibid, Art. 19 (a).

21 Ibid, Art. 18 (b), Art. 19 (b).

22 Ibid, Art. 19 (c).

23 Ibid, Arts. 18, 19.

24 *Gerlich O.,* State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille's Heel of the Investor-State Arbitration System?, The American Review of International Arbitration, Vol. 26, № 1, 2015, 65.

between the parties has arisen.[25] This applies to both pre-judgement and post-judgement measures of constraint.[26]

It should be noted that express consent can be declared by the state both in relation to measures of constraint and property, or both. In addition, the consent can be both of a general nature and made in relation to specific measures of constraint and/or property.[27]

A state may withdraw its consent to immunity from execution only under the terms of international agreement, or of the arbitration agreement or the written contract.[28] As for declaration of consent or a written communication after the dispute has arisen, according to the Commentaries by International Law Commission (hereinafter – ILC Commentary), once the proceedings before a court have begun, consent to the state immunity cannot be withdrawn. [29]

It is worth noting that the UN Convention on immunity from execution, as well as measures to secure a claim, is closer to the United Kingdom State Immunity Act[30] (hereinafter – UK SIA) and the European Convention on State Immunity (hereinafter – the European Convention) [31] than to the Foreign Sovereign Immunities Act of the United States (hereinafter – US FSIA)[32]. In particular, similar to UK SIA, the UN Convention requires an express consent to the use of measures of constraint, although it can also be given verbally, unlike UK SIA and the European Convention, for which giving written consent is mandatory.[33] In addition, according to all three acts property not used for commercial purposes can be executed,[34] whereas under US FSIA in the case of an express or implied (except in the case of immunity from attachment, where consent must be made expressly)[35] waiver from immunity from execution, execution is permitted only against property used in commercial activities.[36]

2.2. Allocation or Earmarking State Property for the Satisfaction of the Claim

The UN Convention also excludes the state's right to plea immunity from execution in the event that the state allocates or earmarks its property for the satisfaction of a claim in court proceedings.[37] Allocation or earmarking of property means that the state has identified the property for the purpose of

---

25 UN Convention, 575 UNTS, 1965, Arts. 18 (a), 19 (a).
26 Ibid.
27 ILC Commentary (1991), 58.
28 Ibid.
29 Ibid.
30 The United Kingdom State Immunity Act of 1978 (SIA), 17 ILM 1123 (1978).
31 European Convention on State Immunity of 1972 (European Convention), ETS 74, 11 ILM 470 (972); see also *Reinisch A.,* European Court Practice Concerning State Immunity from Enforcement Measures, European Journal of International Law, Vol. 17, 2006, 805.
32 The Foreign Sovereign Immunities Act of the United States of 1976 (28 USC), 15 ILM 1388 (1976).
33 UN Convention, 575 UNTS, 1965, Arts. 18 (a), 19 (a); SIA, 17 ILM 1123 (1978), Sec. 13 (3); European Convention, ETS 74, 11 ILM 470 (972), Art. 23.
34 Ibid.
35 28 USC, 15 ILM 1388 (1976), §1610 (d) (1).
36 Ibid, §1610 (a)(1).
37 UN Convention, 575 UNTS, 1965, Art. 19 (b).

paying debts.[38] This may be considered a form of a waiver of state immunity from execution against state assets, expressed by action rather than statement.[39]

Neither US FSIA nor UK SIA and the European Convention contain such a norm. However, an implied waiver of immunity from execution on specific property under USC § 1610(a)(1) may be considered earmarking of property, provided that the property is used for commercial purposes.[40] In the case of UK SIA, the reasoning of the House of Lords in the *Alcom*[41] case is interesting, according to which the allocation of assets to satisfy obligations arising from a commercial transaction may indicate that the property is "in use or intended for use for commercial purposes" under the commercial exception under section 13(4) of UK SIA.[42] A similar approach to the exceptions related to commercial assets and separate property blurs the distinction between the two exceptions and raises the question of whether they should exist independently.[43]

2.3. Commercial Exemption and Territorial Nexus

The UN Convention codifies restrictive state immunity, establishing a commercial exception to state immunity for post-judgment measures of constraint. In particular, according to Article 19(c) of the UN Convention, no post-judgment measures of constraint, such as attachment, arrest and execution, may be taken against the property of a state in connection with a proceeding before a court of another State unless "the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."[44]

The commercial exception establishes a "purpose test" as it considers property that is "directly in use, or intended for use by the State for other than government non-commercial purposes."[45] In this regard, the UN Convention does not differ from US FSIA and UK SIA, which in the case of commercial exceptions to execution also emphasize the purpose of the use of the property and

---

38 *Gerlich O.,* State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille's Heel of the Investor-State Arbitration System?, The American Review of International Arbitration, Vol. 26, № 1, 2015, 70.

39 *Fox H. QC., Webb Ph.,* The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 631.

40 *Gerlich O.,* State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille's Heel of the Investor-State Arbitration System?, The American Review of International Arbitration, Vol. 26, № 1, 2015, 70.

41 *Alcom Limited v Colombia,* [1984] 74 ILR 170, 185 (HL).

42 Ibid, see also, *Fox H. QC., Webb Ph.,* The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 631-632.

43 *Gerlich O.,* State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille's Heel of the Investor-State Arbitration System?, The American Review of International Arbitration, Vol. 26, № 1, 2015, 70.

44 UN Convention, 575 UNTS, 1965, Art. 19 (c).

45 Ibid.

establishes that enforcement is permissible against property that is "used for a commercial activity"[46] in one case, and in the other case – is "in use or intended for use for commercial purposes."[47]

In the case of commercial exceptions the UN Convention also establishes a requirement of territorial nexus with the state in which the property is located.[48] It should be noted that the requirement of territorial connection under the UN Convention does not apply in cases of waiver of immunity and exceptions to the allocation or earmarking of property by the state, and measures of constraint can be taken regardless of whether the said state property is located in the territory of the forum state or not.[49] The requirement of territorial connection with the state in which the property is located is not provided for by any of the exceptions to immunity from execution under UK SIA,[50] unlike US FSIA, which directly requires that property used for commercial purposes be located in the US territory for all exceptions to immunity from execution.[51]

2.4. State Property Protected by State Immunity

Whether commercial or public in nature, certain categories of property will always be considered property for sovereign purposes and will therefore always be subject to state immunity.[52] Article 21 of the UN Convention establishes a non-exhaustive list of state property that shall not be considered as "property specifically in use or intended for use by the State for other than government non-commercial purposes" according to the commercial exception provided for in Article 19(c) of the UN Convention. This list contains the following categories of property:

a) Property, including any bank account, used or intended for use in the performance of the functions of diplomatic missions of the State or its consular institutions, special missions, missions to international organizations or delegations to international organizations or international conferences;

b) Property of a military nature, or property used or intended for use in the performance of military functions;

c) Property of the central bank or other monetary authority of the state;

d) Property, which is part of the cultural heritage of the state, or part of its archive, which is not placed on sale, or is not intended to be placed on sale;

e) Property that is part of the exposition of objects that have scientific, cultural or historical interest and that is not placed on sale, or is not intended to be placed on sale.[53]

It is noteworthy that state immunity applies to the above-mentioned property only in the case of the commercial exception provided for in Article 19(c) of the UN Convention, which means that any

---

46 28 USC §1610 (a), §1610 (a) (2), 15 ILM 1391 (1976).
47 SIA, Sec 13(4), 17 ILM 1126 (1978).
48 UN Convention, 575 UNTS, 1965, Art. 19 (c).
49 UN Convention, 575 UNTS, 1965, Art. 19; ILC Commentary (1991), 57.
50 SIA, Sec 13(3), Sec 13(4), 17 ILM 1126 (1978).
51 28 USC §1610 (a), §1610 (b), 15 ILM 1391 (1976).
52 *Gerlich O.,* State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille's Heel of the Investor-State Arbitration System?, The American Review of International Arbitration, Vol. 26, № 1, 2015, 73.
53 UN Convention, 575 UNTS, 1965, Art. 21.

of the above-mentioned categories of property or part of them may be subject to pre-judgment or post-judgement measures of constraint on the basis of the state's consent to the above or the allocation of state property in accordance with Article 18 (a)(b) and Article 19(a)(b) of the UN Convention.[54]

It is worth noting that, in addition to the property of diplomatic missions and military property, which were already protected by the national legislation on state immunity,[55] the UN Convention introduced such categories of property under the protection of state immunity from execution, such as property that forms part of the state's cultural heritage and archives and is not intended for sale, which represents novelty.[56] It should also be noted that recently, the protection of the state property with immunity, which is part of the exposition of the state with cultural, scientific or historical interest, is gaining more importance.[57] By protecting such a category of property, the UN Convention echoes the recent practice of national courts, which, when justifying the issue of protecting state property with state immunity, increasingly emphasize the public use and purpose served by state property, rather than the fact of state ownership of this property.[58] In this regard, the example of Switzerland in the high-profile case of *Noga* is interesting.[59] In 2005, the Swiss company *NOGA*, in order to enforce the arbitral award against Russia, requested the seizure of 54 samples of paintings from the Pushkin Museum in Moscow sent for exhibition to Switzerland, which was approved by the Swiss District Court. However, this decision was not taken into account by the Swiss Federal Council, by whose decree the seizure of the painting samples was lifted and the samples were returned to Russia.[60] In justifying its decision, the Swiss Federal Council relied on the norms of international law, according to which national cultural treasures are public property and are not subject to confiscation.[61]

It is worth noting that precisely after the *NOGA* case, and in light of the difficulties faced by British museums due to the lack of appropriate legislation to protect foreign cultural objects sent for exhibition in the UK, in 2007 the United Kingdom introduced into enforcement legislation a clause providing immunity from attachment for foreign cultural objects that would be sent for temporary public exhibition to any museum or gallery in the United Kingdom.[62] It is obvious that the mentioned issue is becoming more and more urgent and requires appropriate legal regulation. Immunity protection of the mentioned category of property under the UN Convention is a confirmation of the recognized principle of international law that cultural objects of a foreign country are for public purpose and are not subject to confiscation.[63] Although the UN Convention has not entered into force

---

54 Ibid, Art. 21 (2).
55 *Fox H. QC., Webb Ph.,* The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 519.
56 Ibid, 532-533.
57 Ibid, 533-534.
58 Ibid, 519.
59 Ibid, 519, see also, *Woudenberg N.,* State Immunity and Cultural Objects on Loan, Leiden – Boston, 2012, 310-314.
60 See, *Woudenberg N.,* State Immunity and Cultural Objects on Loan, Leiden – Boston, 2012, 310-314.
61 Ibid, 314.
62 *Fox H. QC., Webb Ph.,* The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 534-535.
63 *Woudenberg N.,* State Immunity and Cultural Objects on Loan, Leiden – Boston, 2012, 314.

yet, under its influence, several states have adopted relevant legislation protecting foreign cultural objects sent for exhibition with immunity from attachment.[64]

2.4.1. Property of Diplomatic Missions

Property of diplomatic missions and central banks is a popular target for creditors in the process of enforcement of arbitral awards.[65]

The general principle of state immunity protecting premises of diplomatic mission and other property with immunity is widely recognized and upheld by states at the legislative and judicial level.[66] The UN Convention emphasizes the fact that diplomatic property should serve the exercise of diplomatic authority of the state. Otherwise, it is not subject to immunity protection.[67]

In practice, difficulties arise in relation to the so-called "mixed accounts", when expenses with both public and commercial purposes are financed from the common account of the diplomatic mission.[68] Recent case law supports the presumption that government property is used for official purposes until proven otherwise.[69] As a result, embassies' bank accounts are treated as a single indivisible sovereign asset that is immune from execution.[70] In the *Philippine Embassy* case, the Federal Constitutional Court of Germany ruled that, upon claim, a general account of a foreign embassy, "which is opened in the forum state and whose purpose is to cover the costs of the embassy, is not subject to execution by the forum state."[71] The mentioned decision of the Federal Constitutional Court of Germany became a precedent for the courts of other countries in the cases related to the so-called "mixed accounts".[72] However, the US is an exception in this regard, where in its decision of 1980, the District Court found that it was possible to separate the purposes for which a bank account was opened on behalf of a diplomatic mission.[73] Otherwise, in the court's view, any property would be

---

64 France (1994), Germany (1999), Austria (2003), Belgium (2004), Switzerland (2005), certain US states (New York, Texas). See *Fox H. QC., Webb Ph.,* The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 535. See also, 64 *Woudenberg N.,* State Immunity and Cultural Objects on Loan, Leiden – Boston, 2012.

65 *Liber E Timber Corp v.* Liberia, (1987), 659 F Supp 606; *Sedelmayer v. Russian Federation*, VII ZB 9/05, (2005), NJW-RR 2006, 198.

66 Vienna Convention on the Law of Treaties, 23/05/1969, Article 22, Section 3; SIA, Sec 16(1), 17 ILM 1126 (1978).

67 ILC Commentary (1991), 59.

68 *Fox H. QC., Webb Ph.,* The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 524.

69 Ibid, 526.

70 *Yang X.,* State Immunity in International Law, Cambridge, 2012, 84.

71 *The Philippine Embassy case*, (1997) UN Legal Materials, 297.

72 Based on this case, the Austrian Supreme Court changed its practice, according to which, it separated the embassy's bank account for commercial and diplomatic use, and declared the embassy's general account immune from execution. See. *Republic of 'A' Embassy Account case*, (1986), 77 ILR 489; *Leasing West Gulf V People's Demomcratic Republic of Algeria*, (1986), 116, ILR 527; The opinion of the German Constitutional Court was shared by the United Kingdom Court in *Alcom v Republic of Colombia*, [1984] AC 580, 74 ILR 170; The Netherlands, France and Belgium also supported the same opinion. See. *Netherlands v Azeta BV*, (1998), 128 ILR 688; *Dumez v Iraq*, (1999), 27 ILR 144.

73 *Birch Shipping Corpn v. Embassy of the United Arab Republic of Tanzania*, (1980), 63 ILR 527.

protected by immunity for some period based on its use for a minor public purpose.[74] Therefore, if the embassy wanted its general bank account to be immune from execution, the embassy had to ensure that funds for public purpose were separated from funds for commercial purposes.[75] However, a US District Court later declined to attach a diplomatic mission's bank account to enforce an ICSID arbitral award against a foreign state, on the grounds that the attachment was contrary to the obligation of the United States under Article 25 of the Vienna Convention, according to which the forum State must provide all necessary conditions for diplomatic missions to perform their functions, although no provision of the Vienna Convention establishes the right to enjoy diplomatic immunity from attachment of official bank accounts used or intended to be used by a diplomatic mission.[76] A similar decision was made by the German court in the high-profile *Sedelmayer* case,[77] when Franz Sedelmayer requested execution against VAT refundable amount for the Russian Embassy in Germany in enforcement proceedings of the arbitral award rendered by the Arbitration Institute of the Stockholm Chamber of Commerce against the Russian Federation.[78] As expected, the court recognized the mentioned assets as protected by immunity from execution.[79]

However, it is remarkable that despite many years of unsuccessful enforcement proceedings of the arbitral award rendered in the *Sedelmayer* case, in 2011 the Swedish Supreme Court upheld the decision of the Court of Appeal regarding the attachment of property belonging to the Russian Federation and the income from its leasing, on the grounds that the court did not find convincing the evidence presented by the Russian side regarding the use of the mentioned property for "public purposes."[80] It should be noted that the alleged property was owned by the trade delegation of the Russian Federation until 1976, and then, as the court found, it was leased for private commercial purposes and was not used by Russian diplomats or high-ranking officials to exercise sovereign functions, as the Russian side claimed.[81]

The above-mentioned decision of the Swedish Supreme Court is significant in relation to the UN Convention in several respects. In particular, the Sedelmayer decision was the first decision in which restrictive state immunity was recognized by the Supreme Court in enforcement proceedings in

74 Ibid.

75 Ibid.

76 *Liber E Timber Corp v.* Liberia, (1987), 89 ILR 360; *Foxworth v. Permanent Mission of the Republic of Uganda to the UN*, (1992), 99 ILR 139.

77 *Sedelmayer v. Russian Federation*, VII ZB 9/05, (2005), NJW-RR 2006, 198; ob. *Blane A.,* Sovereign Immunity as a Bar to the Execution of International Arbitral Awards, International Law and Politics, Vol. 41, 2009, 469.

78 Kammergericht Berlin, (2003) SchiedsVZ, 2004 99; See also *Franz Sedelmayer v Russian Federation*, Award, SCC, (1998) <https://www.italaw.com/sites/default/files/case-documents/ita0757.pdf> [04.05.2022].

79 Ibid.

80 *Sedelmayer v Russian Federation,* SSC, (2011), <https://jusmundi.com/en/document/decision/en-mr-franz-sedelmayer-v-the-russian-federation-decision-of-the-swedish-supreme-court-friday-1st-july-2011#decision_1343> [21.07.2022].

81 Ibid.

Sweden,[82] and in making this decision the Supreme Court relied on the UN Convention, even though the UN Convention is not yet in force. Namely, the Swedish Supreme Court established a commercial exception based on the relevant provision of the UN Convention,[83] at which point it highlighted two important issues: 1) the alleged property was not "in use or intended for use by the state for other than government non-commercial purposes" and 2) the property was being used for commercial purposes during the litigation period.[84] The court also determined that the alleged property was not used by the Russian Federation for a diplomatic mission or other state purposes, also emphasizing the periodicity of the property's use, nor did it support the opinion that the premises would house persons with diplomatic immunity in future, as it is important for the UN Convention that the property be used for non-commercial purposes during the period of the enforcement proceedings. [85]

2.4.2. Property of the Central Bank

It is remarkable that the UN Convention grants central bank property greater protection with state immunity from execution than other institutions, agencies or independent entities.[86] In particular, the wording of Article 21(c) of the UN Convention shows that the property of the Central Bank, regardless of whether it is used for commercial or non-commercial purposes, is considered as property in use or intended for use by the state only for government non-commercial purposes.[87] The application of undoubted presumption of immunity to central bank property, which is reflected by both UK SIA and US FSIA, dates back to the 1970s, when the US and the UK, as investment centers for foreign reserves, recognized the necessity for central bank property to be protected by state immunity.[88] This recognized necessity was reflected in the relevant legislation in the form of special provisions on immunity for central bank property, which was also shared by the UN Convention.[89]

Adoption of a diverse legal regime in terms of the immunity protecting central bank assets is largely seen as a political decision rather than a fulfillment of obligations under international law, which meant encouraging foreign countries to place their foreign reserves in foreign countries.[90] In this regard, it is interesting to what extent immunity from execution should be extended to the use of

---

82 However, this was not the first court ruling on restrictive state immunity. In 1999, in *Vasteras Municipality v Iceland* case, the Court discussed state immunity from jurisdiction and applied this reasoning to the *Sedelmayer* case; *Belohlavek A. J., Rozehnalova N., (eds),* Czech and Central European Yearbook of Arbitration – 2012: Party Autonomy versus Autonomy of Arbitrators, Vol. II, 2012, 69-70, 61-81, See Quote: *Ergnstrom, Marian,* Restrictive Absolutes: Using Party Autonomy to Reconcile Absolute Immunity with the Liberal Standard for Restrictive Immunity Adopted by the Swedish Supreme Court in the Sedelmayer Decision.

83 Ibid, 69-73, 61-81.

84 Ibid, 69, 61-81.

85 Ibid, 72-73, 61-81.

86 *Fox H. QC., Webb Ph.,* The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 528.

87 Ibid.

88 Ibid, 529.

89 Ibid.

90 *Blair W.,* The Legal Status of Central Bank Investments under English Law, Cambridge Law Journal, Vol. 57, Issue 2, 1998, 378.

state reserves in the Central Bank through investment or other commercial means. Although such funds are not "used" for sovereign purposes, in enforcement proceedings of the ICSID arbitral award against Kazakhstan,[91] the English court found that such use of central bank assets ultimately served to the performance of sovereign purposes for future generations, therefore, such transactions were immune from execution.[92]

However, there is also a different approach of states that do not recognize the presumption of immunity of central bank property.[93] For example, French courts apply the same legal regime to central banks as to other state entities.[94] Therefore, if the central bank is an independent legal entity its assets are subject to execution, provided that merely the bank's own creditors, not the state's creditors, have access to them.[95] The issue of presumption of immunity also does not arise in Switzerland, where in one case the Swiss Supreme Court rejected the presumption that all funds of the Libyan Central Bank were intended for sovereign purposes.[96] The Supreme Court ruled that merely those assets at issue that are designated solely for the performance of sovereign functions can benefit from immunity, and issued an enforcement order on the disputed assets.[97]

3. Conclusion

In conclusion, it can be said that the UN Convention provides an opportunity to create a certain kind of unified legal space, which should contribute to the harmonization of national judicial practice. The UN Convention covers all the main principles of state immunity recognized today, which are in consistence with the existing legislation on state immunity.[98] In particular, these principles are the following:

a. the state is protected by state immunity according to the principle of customary international law;[99]

b. In general, states are immune from the jurisdiction of the courts of another state, [100] and their assets are protected from execution, except for exceptional cases defined by the UN Convention; [101]

---

91 *AIG Capital Partners Inc and Anr v. Republic of Kazakhstan,* [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420, 129 ILR 589, § 92.

92 Ibid.

93 *Gerlich O.,* State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille's Heel of the Investor-State Arbitration System?, The American Review of International Arbitration, Vol. 26, № 1, 2015, 73.

94 *Foster G. K.,* Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgements against States and their Instrumentalities, and Some Proposals for its Reform, Arizona Journal of International and Comparative Law, Vol. 25, Issue 3, 2008, 686.

95 *Gerlich O.,* State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille's Heel of the Investor-State Arbitration System?, The American Review of International Arbitration, Vol. 26, № 1, 2015, 74.

96 *Libyan Arab Socialist People's Jamahiriya v. Actimon SA,* (1985), 82 ILR 30, 31.

97 Ibid.

98 *Yang X.,* State Immunity in International Law, Cambridge, 2012, 455.

99 UN Convention, 575 UNTS, 1965, Preamble, §1.

c. The UN Convention distinguishes between immunity from jurisdiction and immunity from execution and establishes that the state's waiver of immunity from jurisdiction does not imply a waiver of immunity from execution, and a separate consent is required for the latter. [102] Accordingly, the UN Convention regulates state immunity from execution independently from state immunity from jurisdiction.[103]

d. Article 19 of the UN Convention contains the requirement of territorial connection, namely, in the case of a commercial exception to immunity from execution, the property subject to execution must be located "in the territory of the State of the forum."[104]

The goal of the UN Convention was the substantial harmonization of judicial practice of states related to state immunity. [105] Due to the fact that the UN Convention has not yet entered into force, the signatory countries are not obliged to fully comply with its requirements, although they are under an obligation not to undermine the object and purpose of the Convention before its entry into force.[106] The preamble of the convention expresses the belief of the authors of the convention that the convention will contribute to the codification and development of international law. [107] Although the UN Convention is not a flawless mechanism for overcoming state immunity in the recognition and enforcement of arbitral awards against a state, the best measure of its authority is the application of its provisions by both domestic[108] and international[109] courts.[110]

Bibliography:

1. Vienna Convention on the Law of Treaties, 23/05/1969.
2. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), 575 UNTS, 1965, 159.
3. European Convention on State Immunity of 1972 (European Convention), ETS 74, 11 ILM 470 (972).
4. The Foreign Sovereign Immunities Act of the United States of 1976 (28 USC), 15 ILM 1388 (1976).
5. The United Kingdom State Immunity Act of 1978 (SIA), 17 ILM 1123 (1978).

---

100 Ibid, Art. 5.
101 Ibid, Arts. 7-21.
102 Ibid, Art. 20.
103 *Yang X.,* State Immunity in International Law, Cambridge, 2012, 455.
104 UN Convention, 575 UNTS, 1965, Art. 19 (c).
105 UN Convention, 575 UNTS, 1965, Preamble; The law adopted by the People's Republic of China in 2005, which also grants the property of the central bank immunity from execution and prohibits the use of pre-judgement and post-judgement measures of constraint against it, can be considered as a confirmation of this opinion. see Fox H. QC., Webb Ph., The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 529-530.
106 Vienna Convention on the Law of Treaties, 23/05/1969.
107 UN Convention, 575 UNTS, 1965, Preamble.
108 *Gerlich O.,* State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille's Heel of the Investor-State Arbitration System?, The American Review of International Arbitration, Vol. 26, № 1, 2015, 64.
109 Ibid, see also, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening),* [2012] ICJ, 99, 123, < https://www.icj-cij.org/en/case/143> [15.03.2022].
110 Ibid.

6. United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (UN Convention), UN General Assembly, A/59/508, 02/12/2004, https://treaties.un.org/doc/source/Recent Texts/ English_3_13.pdf> [17.06.2022].
7. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), 330 UNTS, 1958, 38.
8. Draft Articles on Jurisdictional Immunities of States and their Poroperty, with Commentaries by International Law Commission (ILC Commentary), Yearbook of the International Law Commission, Vol. 2, Part 2, 1991, 55.
9. *Belohlavek A. J., Rozehnalova N., (eds),* Czech and Central European Yearbook of Arbitration – 2012: Party Autonomy versus Autonomy of Arbitrators, Vol. II, 2012, 69-73, 61-81.
10. *Bishop D.R., Crawford J. R., Reisman W. M., et al, (eds),* Foreign Investment Disputes: Cases, Materials and Commentary, 2nd ed., Kluwer Law International, 2014, 1177.
11. *Blackaby N., Partasides C., Redfern A., Hunter M*., Redfern and Hunter on International Arbitration, 6th ed., Oxford, 2015, 654.
12. *Blair W.,* The Legal Status of Central Bank Investments under English Law, Cambridge Law Journal, Vol. 57, Issue 2, 1998, 378.
13. *Blane A.,* Sovereign Immunity as a Bar to the Execution of International Arbitral Awards, International Law and Politics, Vol. 41, 2009, 469.
14. *Brownlie I.,* Principles of International Public Law, *Kukulava G., Meunargia S., Siradze E., beGlurjidze E., (translators), Khidasheli T., (ed.),* 7th ed., Tbilisi, 2010, 358 (in Georgian).
15. *Foster G. K.,* Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgements against States and their Instrumentalities, and Some Proposals for its Reform, Arizona Journal of International and Comparative Law, Vol. 25, Issue 3, 2008, 686.
16. *Fox H*., International Law, *Evans M. D*., (ed), 2nd ed., Oxford, 2006, 368.
17. *Fox H. QC., Webb Ph.,* The Law of State Immunity, Revised and Updated 3rd ed., Oxford, 2015, 287, 367-68, 519, 524, 528-35, 631-32.
18. *Gerlich O.,* State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achille's Heel of the Investor-State Arbitration System?, The American Review of International Arbitration, Vol. 26, № 1, 2015, 64-65,70, 73-74.
19. *Ostrander J.,* The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgement, Berkley Journal of International Law, Vol. 22, 2004, 541-582.
20. *Reinisch A.,* European Court Practice Concerning State Immunity from Enforcement Measures, European Journal of International Law, Vol. 17, 2006, 805.
21. *Shaw M. N*., International Law*,* 5th ed., Cambridge, 625, 630-63.
22. *Woudenberg N.,* State Immunity and Cultural Objects on Loan, Leiden – Boston, 2012*,* 310-14.
23. *Yang X.,* State Immunity in International Law, Cambridge, 2012, 84.
24. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), [2012] ICJ, 99, 123, < https://www.icj-cij.org/en/case/143> [15.03.2022].
25. Sedelmayer v Russian Federation, SSC, (2011), < https://jusmundi.com/en/document/decision/en-mr-franz-sedelmayer-v-the-russian-federation-decision-of-the-swedish-supreme-court-friday-1st-july-2011#decision_1343> [21.07.2022].
26. AIG Capital Partners Inc and Anr v. Republic of Kazakhstan, [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420, 129 ILR 589, § 92.

27. Sedelmayer v Russian Federation, VII ZB 9/05, (2005), NJW-RR 2006, 198.
28. Kammergericht Berlin, (2003) SchiedsVZ, 2004, 99.
29. Netherlands v Azeta BV, (1998), 128 ILR 688; Dumez v Iraq, (1999), 27 ILR 144.
30. Sedelmayer v Russian Federation, Awards, SCC, (1998) <https://www.italaw.com/sites/default/files/case-documents/ita0757.pdf> [04.05.2022].
31. The Philippine Embassy case, (1997) UN Legal Materials, 297.
32. Foxworth v Permanent Mission of the Republic of Uganda to the UN, (1992), 99 ILR 139.
33. Liber E Timber Corp v Liberia, (1987), 659 F Supp 606;
34. Republic of 'A' Embassy Account case, (1986), 77 ILR 489;
35. Leasing West Gulf V People's Demomcratic Republic of Algeria, (1986), 116, ILR 527;
36. Libyan Arab Socialist People's Jamahiriya v. Actimon SA, (1985), 82 ILR 30, 31.
37. Alcom v Republic of Colombia, [1984] 74 ILR 170, 185 (HL).
38. Birch Shipping Corpn v Embassy of the United Arab Republic of Tanzania, (1980), 63 ILR 527.

Elza Chachanidze*

Protection of Human Dignity in Case of Insult Committed by Action in Ancient Georgian Law

Apart from human life and health, honor and dignity are among the important values. The violation of honor and dignity of a person can be committed by slander and insult. As for Insult, it can be committed by action, or be verbal. The subject of the research is the study of insults carried out by actions in ancient Georgian law, as actions that violate human dignity. The clarification of terms related to the mentioned issue allows for discovering what kind of actions were considered insults. In ancient Georgian Law, the term "swearing" was used to express verbal insult. As for insult committed by action, in addition to "insult", the terms „shaming", "disgrace", and "dishonor" are used in the legal monuments. The fact of responsibility for insult is often confirmed by "dishonorable" punishment imposed by the legislator and used by the court. Determining "dishonorable" punishment as a sanction for beating or for some kind of health damage allows us to conclude that the mentioned actions were also considered insults in ancient Georgian law.

The types and forms of insults committed by action were various and therefore they can be conditionally divided into several groups. Actions that are directly aimed to humiliate a person's dignity, for example, cutting off the beard, tearing off, tying up, removing armor, beating. Insults committed during an attack, damage to health, as an action against the honor of a person, and actions against the honor of the family can be grouped separately. At the same time, in the monuments of the ancient Georgian law and in the court rulings, there are other cases of insult committed by action.

As punishment for an insult committed by action was mainly determined the blood price and "dishonorable" punishment. How important and valuable it is to protect the legal good, is reflected in the punishment imposed for committed action. In the old Georgian law, the sanctions established for insults committed by action were mostly equal to the punishments determined for damage to human life or serious damage to health.

Keywords: *Dignity, Honor, Insult, Shaming, Disgrace, Dishonor.*

1. Introduction

In ancient Georgian Law, the term "Insult" was used with a different meaning besides the violation of the dignity and honor of a person. Sources of Law confirm that violation of established rules and norms was considered as an insult.[1] On the other hand, in addition to "insult", other terms are

* Assistant Professor of Ivane Javakhishvili Tbilisi State University, Faculty of Law, Doctor of Law.

1 In the Consecration of Myron (XIII century) it is indicated that the violation of the sentence established by the Archil king and approved by the Catholicos of Kartli, Mikael, was punished by expulsion from the

found in the monuments of law, for example, "shaming", "disgrace", "and "dishonor"[2] to express the action that harms the dignity and honor of a person. Derived from "dishonor", the term "dishonorable" punishment will help us to represent instances of an insult committed by action. Punishment was imposed for dishonorable insults[3], which was expressed in the payment of property compensation, and its amount, as well as the price of blood, depended on the social status of the person. The imposition of "dishonor" as a sanction by legislators and court decisions will allow us to consider a specific action as an act committed against honor.

Violation of human dignity can be committed verbally or by action. In ancient Georgian law, verbal insult was expressed by the term "swearing", while "disgrace" meant insult committed by action (Article 17[4] of the Law of Catholicos, Deed of Levan Dadiani (XVII century)[5], "Vahanis Kvabta Gangeba" (XIII century).[6]

The purpose of the research is to show how much human dignity and honor were protected in ancient Georgian law, what kind of actions were perceived as insults committed by action, what kinds of punishments were used, and, accordingly, how severely the "dishonorable" treatment of a person was punished.

2. Actions Directed Against Human Dignity

According to the old Georgian law, it is established to punish such actions, which in addition to the honor and dignity of a person, also violate other legal goods. At the same time, some norms impose punishment directly for insults committed by action. Article 144 of the Bagrat Kurapalat Law

church and cutting off a body part. *Dolidze Is. (Publisher of the Text)*, Monuments of Georgian Law, Vol. II, Secular Legislative Monuments (X-XIX Centuries), Tbilisi, 1965, 49 (in Georgian).

2 Dishonor – I became dishonored. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd ed., Prepared for Printing and Preface Added by *Shanidze A.,* Tbilisi, 1984, 276 (in Georgian). Dishonorable, disgraceful – disrespectful, inappropriate, incompetent. Dishonorably, disgracefully – disrespectfully, unfairly. Dishonesty, disgrace -dishonor, defame. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd ed., Prepared for Printing and Preface Added by *Shanidze A.,* Tbilisi, 1984, 1264. Dishonored – honor is destroyed. Sulkhn-Saba Orbeliani, Georgian Dictionary, II, Prepared According to the Autograph Lists, Researched and Attached a Dictionary of Definitions – *Abuladze I.,* Tbilisi, 1993, 165 (in Georgian).

3 "Dishonorable" punishment – dishonorable, a punishment for dishonor, that is, unforgivable itself. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd ed., Prepared for Printing and Preface Added by *Shanidze A.,* Tbilisi, 1984, 1124 (in Georgian).

4 Article 17 of the Law of Catholicos deals with insulting Catholicos and bishops. The legislator has specified both forms of insult. Verbal insult is referred to as "swearing", and actual insult is referred to as "dishonor". *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang VI, 1963, 396 (in Georgian).

5 Deed of Levan Dadian (1611-1657). A monk's dishonesty or swearing was punished by paying a thousand "potinats". The payment was made in favor of the monk. *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. II, Secular Legislative Monuments (X-XIX Centuries), 1965, 210 (in Georgian).

6 Vahanis Kvabta Gangeba (1204-1234) Clause 2 of the monument talks about insulting and swearing of a younger monk in terms of honor or age by a monk, which would lead to the expulsion of the monk from the monastery. *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. III, Church Legislative Monuments (XI-XIX Centuries), Tbilisi, 1970, 142 (in Georgian).

can be considered as such: "cutting and tearing off of the beard was punished by paying two gershes[7]."[8] It seems that the cutting and tearing off of the beard was considered a more serious offense than the "minor wound", as it was determined by double the amount of punishment imposed on "Gersh" for this form of insult.

K. Kekelia notes that in ancient Georgian, shaving the hair and beard symbolized putting a person in a disenfranchised, humiliated position. As an example, he cites the court ruling of 1770, according to which the court ordered payment of five grains of barley for cutting off a priest's beard.[9]

Arresting a person was also considered as shaming. According to Article 18 of the Beka-Agbugha law, the oppression of a person, arresting a person accompanied by beating, tying, removing armor,[10] and other things was punished by paying half of the blood price. This was a punishment directly imposed for insult. If at the same time, there was a wounding, the court should also have applied the sanction for wounding according to the severity of the wound.[11]

The question arises if we can consider removing armor and other things as robbery in this case. According to Georgian customary law (particularly in Khevsureti) it was considered an insult to remove and tear out weapons during a fight.[12] The mentioned action would probably not be considered an offense against property even in the given norm. In this case, we rely on the fact that the legislator does not prescribe the payment of seven or any other heavier punishment for the mentioned action. He did not consider removing and tearing out armor and other things as actions that required independent legal assessment, unlike wounding. We cannot consider the obligation to return armor and other things as a punishment. The same applies to beating, for which was not prescribed an independent punishment. In case of wounding, blood price had to be paid additionally according to the evaluation of the wound. It is emphasized in the norm that the price of blood for wounding should not be included in half the price of blood prescribed for shaming, in other words, the severity of the wound should have been assessed separately.

There is a similar norm in the law book of Vakhtang Batonishvili (Article 61), particularly, if a man would have caught another person in his estate for a minor nuisance, oppressed him, tied him up, removed his armor, beat him, had to pay half of the blood and return the weapon. If, in addition to the

---

7 Gersh – a small wound. Sulkhan-Saba Orbeliani, Georgian Dictionary, I, Prepared According to the Autograph Lists, Researched and Attached a Dictionary of Definitions by *Abuladze I.,* Tbilisi, 1991, 157 (in Georgian).

8 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang VI, 1963, 468 (in Georgian).

9 See: *Kekelia M.*, Offenses Against Human Life, Health, Honor and Dignity in Ancient Georgian Law, Tbilisi, 2015, 217 (in Georgian); *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. IV, Court Rulings (XVI-XVIII Century), Tbilisi, 1972, 600-601 (in Georgian).

10 Armor – a piece of armor, a weapon of war, or a chain worn on the body. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd ed., Prepared for Printing and Preface Added by *Shanidze A.,* Tbilisi, 1984, 4 (in Georgian).

11 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang VI, Tbilisi, 1963, 431 (in Georgian).

12 *Davitashvili G.,* Types of Offenses in Georgian Customary Law, Tbilisi, 2017, 535 (in Georgian).

listed actions, a person was wounded or killed at the same time, in addition to half-blood, the punishment for wounding or murder was also imposed on the offender.[13]

Bringing a defeated man home was considered a shame (Article 19 of Beka-Agbugha Law). For the said action, the criminal had to pay half of the blood price and return the weapon that was taken away. Similar to Article 18, Article 19 also provides an additional sanction in case of wounding.[14] According to the law of Beka-Agbugha, insult in the mentioned form was considered a more serious crime than serious damage to health.[15] In Vakhtang Batonishvili's law (Article 57)[16] there is a similar norm to Article 19 of the Beka-Agbugha law.

By comparing the mentioned norms, it can be seen that the actions listed in the law of Beka-Agbugha and Vakhtang Batonishvili are perceived as a violation of a person's honor, for which the same punishment is imposed that was expressed in the payment of half the blood price.

Article 20 of Beka-Agbugha Law also talks about bringing a person home and „eating bread for shame", for which "the true blood"[17] should have been paid, which meant determining the price of fair blood. The indication that eating bread is done for shame indicates that the person's goal is to insult a person, based on which we can say that the committed action is a delict directed against human dignity.

It was considered a more serious form of insult when, as a result of oppression, a man was tied with a rope, and "thin clothes" were wrapped around his head (Article 21 of the Beka-Agbugha Law).[18] In this case, "all the blood" was imposed as a punishment. The legislator notes that no greater shame exists.[19] This form of insult was equated with the death of a person, which can be seen in the prescribed punishment.[20]

Some of the above-mentioned cases of shaming a person were also considered as insults by Georgian customary law.[21]

3. Insults Committed During the Attack

According to Georgian customary law (Svaneti, Khevsureti), it was considered a severe insult to enter someone else's house without permission for any reason, which represented an independent

---

13 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang VI, Tbilisi, 1963, 498 (in Georgian).

14 Ibid, 432.

15 Ibid, 428.

16 Ibid, 497.

17 Ibid, 432.

18 Ibid.

19 Ibid.

20 According to N. Khizanashvili, the mentioned norm refers to insulting the elderly. *Khizanashvili N. (Urbneli),* Selected Writings, Prepared for Printing, Biographical Materials, and Notes were Attached by *Dolidze Is.,* Tbilisi, 1982, 488 (in Georgian). M. Kekelia believed that Article 21 does not refer to a person's age, but to social seniority. *Kekelia M.,* Offenses Against Human Life, Health, Honor and Dignity in Ancient Georgian Law, Tbilisi, 2015, 214-215 (in Georgian).

21 *Davitashvili G.,* Types of Offenses in Georgian Customary Law, Tbilisi, 2017, 530, 535 (in Georgian).

offense. If another crime was committed while breaking into someone else's house, the person would have to be fined, both for breaking into the house and for another crime.[22]

The ruling of Simon II includes many accusations of the parties in the criminal case. Among them is an accusation that can be classified as a real insult. The plaintiff complained that he was attacked at home, his family was robbed and ravaged, and his wife and children barely survived. He considers this as an unseemly act and "death". The court notes that this was a great shame and unseemly action for the plaintiff, for which they had to pay fifty tumans (old Georgian money) as "Saukacuro", which meant „dishonorable punishment"[23] and return what was taken from the house.[24]

The ruling of Teimuraz II of 1743 also includes various types of punishable actions, including an attack at home. The court determined "for the top sitting and pulling down and embarrassing female child half of the blood of the respected man – six thousand tetris for this assault towards home." Since the criminal would not be able to pay the blood price due to his low social status, the court imposes public shaming of the offender as a punitive measure.[25] G. Nadareishvili cites Article 13 of the Beka-Agbugha Law to compare the above-mentioned ruling, which also talks about „top sitting and shaming of mothers[26]"; where the imposed punishment is also similar, half of the blood price, and in case of its non-payment, the application of public shaming as a punishment, which meant stripping he offender down to his panties, „pulling down for seven steps" and striking with the stick three times. Because this kind of punishment was very insulting to a person's dignity, at the queen's request, a criminal was sometimes exempted from this punishment.[27]

In the criminal ruling of Rostom King of 1640, the plaintiff argued that his family was attacked to kill and shame him. He considered the assault of "Jalabi" (family)[28] and shame to be such a grave insult that he preferred death to such shame.[29]

Article 35 of the Beka-Agbugha Law talks about the "dishonoring" of a nobleman. According to Khizanashvili N., "dishonoring" meant insulting by hand.[30] For the things taken, or for any other kind

---

22 Ibid, 531-532.

23 *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd ed., Prepared for Printing and Preface Added by *Shanidze A.,* Tbilisi, 1984, 1123 (in Georgian).

24 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. IV, Court Rulings (XVI-XVIII Centuries), Tbilisi, 1972, 58 (in Georgian).

25 Ibid, 356.

26 *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd ed., Prepared for Printing and Preface Added by *Shanidze A.,* Tbilisi, 1984, 473 (in Georgian).

27 Ibid. *Nadareishvili G.,* Protection of Human Honor and Dignity According to the Monuments of Georgian Feudal Law and Court Practice Materials, Journal of "Almanaxi", 2000, № 14, 64-65 (in Georgian). *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 429-430 (in Georgian).

28 Jalabi – Household, wife and children, family. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd ed., Prepared for Printing and Preface Added by *Shanidze A.,* Tbilisi, 1984, 1764 (in Georgian).

29 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. IV, Court Rulings (XVI-XVIII Centuries), Tbilisi, 1972, 82 (in Georgian).

30 See *Khizanashvili N. (Urbneli),* Selected Writings, Prepared for Printing, Biographical Materials and Notes were Attached to it by *Dolidze Is.,* Tbilisi, 1982, 466 (in Georgian).

of damage, they must fully compensate the lord, and they must also pay half of the blood price. Half of the blood price should be the fine imposed directly for the insult.[31]

Article 97 of the Beka-Agbugha Law imposes liability for several crimes: robbery, wounding, and dishonoring, which were committed during an attack on a merchant on the road. All three actions (robbery, wounding, and dishonoring) are legally assessed. The value of the property taken for robbery must have been paid twice. The judge should have applied the punishment determined for wounding and dishonoring.[32] Based on Article 97 of the Beka-Agbugha Law Book, we can say that the indicated "dishonoring" did not include wounding at the same time. As for the punishment of "dishonoring", the judge should have relied on the norms of the Beka-Agbugha law, where specific cases of insults are indicated. For example, Article 13 of the Beka-Agbugha law book talks about assault and shaming of family members, for which the criminal should have paid half of the blood price, or publicly humiliating punishment.[33]

Vakhtang Batonishvili's law (Articles 51-56) also establishes a separate punishment for home invasion. Murder and wounding committed during an attack were punished more severely.

4. Damage to Health as an Act Against Dignity

When discussing Article 18 of the Beka-Agbugha Law and Article 61 of the Vakhtan Batonishvili Law, it was mentioned that beating was considered an insult. The assumption was based on the fact that if there was wounding along with "dishonorable" actions, the judge should have determined the punishment according to the severity of the wounding. There was no separate punishment for beating, and the act was punished like any other kind of "dishonoring". According to existing reports, the beating was perceived as an insult even by Georgian customary law.[34]

In the book sent by Anton I to the ruler of Sagarejo (1786), he talks about a widow who was once beaten by his people, and her arm was broken, and her head was also broken while beating her the second time. Anton I demanded from the ruler to take from the offender the "dishonorable" punishment for the committed actions and give it to the widow.[35] As we mentioned above, the "dishonorable" punishment was imposed as a punishment for insults, and if we rely on the mentioned document, we can say that beating, bodily injury, in particular, breaking the hand, and breaking the head were considered actions against a person's dignity. The same information is provided by the ruling of 1770. One grain of barley is imposed as a fine for breaking the nose (one tuman and five minaltuns).[36]

---

31 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. III, Church Legislative Monuments (XI-XIX Centuries), Tbilisi, 1970, 437 (in Georgian).

32 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 463 (in Georgian).

33 Ibid.

34 Ibid, *Davitashvili G.,* Types of Crimes in Georgian Customary Law, Tbilisi 2017, 382 (in Georgian).

35 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. III, Church Legislative Monuments (XI-XIX Centuries), Tbilisi, 1970, 966 (in Georgian).

36 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. IV, Court Rulings (XVI-XVIII Centuries), Tbilisi, 1972, 602 (in Georgian).

Two articles (Articles 109 and 126) refer to the issue of beating in Bagrat Kurapalat law.[37] Article 126 imposes responsibility only for beating, and Article 109 – for beating and breaking into the church. Article 126 imposed the payment of the half blood price for beating, but for the beating along with breaking into the church – the full blood price, which has been due to the fact that by the actions specified in Article 109, two objects were violated, by beating the human dignity, and by breaking into the church – the honor of the church. We must suppose that half of the full blood was imposed for beating and the other half for humiliating the honor of the Church.

K. Kekelia considered beating as a serious form of insult. As proof of this, he cites one of the complaints that has been submitted to Queen Darejan (1797), in which a man who has been beaten twice writes that he has "twice been murdered".[38]

G. Nadareishvili cites the ruling of 1782 as an example of beating as an insult. According to the ruling, both parties were peasants, and both parties insulted each other verbally, which is why the court did not impose punishment for swearing; However, the peasant hit the neighbor four times with his stick, because of which he had to invite the offended person to his house, host to him and apologize to him. Nadareishvili explains the application of the said sanction instead of material compensation with the fact that the peasants did not have the means to pay the fine.[39]

The ruling of Teimuraz II of 1743 also proves that beating was considered an insult. According to the ruling, two servants beat the plaintiff's son, for which the court imposed the payment of "dishonorable" punishment. The said punishment meant handing over one of the servants with his wife and children, and his share of goods (except the estate) to the victim.[40] In ancient Georgian law, one of the types of punishment was to hand over the offender and his family to the injured party. As we have already mentioned, the "dishonorable" punishment represented material compensation, the amount of which depended on the social status of the person, like the price of blood. It seems that there is a contradiction between the imposition of a "dishonorable" punishment on the one hand by the court and the indication that the offender should have handed over his servants, wives, and children, and his property to the victim, on the other hand. Can we say that handing over is an alternative punishment for "dishonorable" punishment? Vakhtang Batonishvili's law book states that there were not "many Tetri" (money) in Kartli, and instead of money, the blood price could be paid with cattle, gold, a peasant, an estate, or other property (Articles 18-22).[41] That it is used in this sense to give out the servant, his wife and children, and their property, is indicated by the fact that it is done for "dishonorable" punishment. In the ruling, the court discusses the episode of another crime, for which the criminal was ordered to pay the blood price, but indicates that the person has a low social status and may not be able to pay the blood price, for which a public shame should have been imposed as a

---

37 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 465, 467 (in Georgian).

38 See *Kekelia M.,* Offenses Against Human Life, Health, Honor and Dignity in Ancient Georgian Law, Tbilisi, 2015, 203 (in Georgian).

39 See *Nadareishvili G.,* Protection of Human Honor and Dignity According to the Monuments of Georgian Feudal Law and Court Practice Materials, Journal of "Almanaxi", 2000, № 14, 64 (in Georgian).

40 Ibid, 64-65.

41 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 486-487 (in Georgian).

punishment.[42] When using an alternative sentence, the legislature or court indicates that the person cannot pay compensation and another type of punishment must be used.

In one of the rulings of the 16th century, regarding the punishment imposed in relation to insult, the court indicates that monetary compensation is not a "dishonorable" punishment, because the party did not have the means to pay the "dishonorable" punishment[43]. In this case, the court orders the person to pay one thousand Tetris (money), therefore there is monetary compensation. Then the question arises, why didn't the court consider this compensation to be a "dishonorable" punishment? As mentioned earlier, "dishonorable" punishment depended on a person's social status. We can conclude that the committed insult deserved heavier punishment, but considering the person's material situation, the court could not set the amount of compensation corresponding to the person's honor and insult.

It was considered a severe form of beating if they abused a person to whom they had to show special respect. According to Article 65^1 of Vakhtan Batonishvili's law book, if a wife hit or injured her husband, she would have been punished with severe torturing and great suffering from the Catholicos.[44] It seems that such an action from the wife towards her husband was in the jurisdiction of the king and the Catholicos. The same can be said about causing suffering and disrespectful treatment to the wife by her husband (Article 64)[45], for which the king and the Catholicos would have tied up and scolded such a man.

For the parent's beating by the child, or for doing unseemly actions, or for doing some other wrongful act to the parent, the legislator points out that there is a violation of the tenth commandment. If the commission of such an act became known, the Catholicos and the king should have made him "reimburse", and in other cases, the pastor had to impose a "Sakanono" (legal punishment[46] (Article 78^1, 79).[47]

An aggravating circumstance was also the serf's disrespect towards his lord. According to Article 259 of Vakhtang Batonishvili's law, if a serf hit his lord with a stick, or beat him, he was punished by having his hand cut off, or he had to pay the price of his hand.[48]

The disrespect committed by the wife towards the husband, or vice versa, the disrespect of the wife by the husband, the disrespect of the parent by the child, and the disrespect of the lord by the serf, went beyond the scope of "ordinary" insults. This is indicated by the punishments used. If in other

---

42 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. II, Secular Legislative Monuments (X-XIX Centuries), Tbilisi, 1965, 355-356 (in Georgian).

43 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. IV, Court Rulings (XVI-XVIII Centuries), Tbilisi, 1972, 50 (in Georgian).

44 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 499 (in Georgian).

45 Ibid, 498.

46 Sakanono – The recompense of sin. Sulkhan-Saba Orbeliani, Georgian Dictionary, II, Prepared According to the Autograph Lists, Research, and Glossary Search Engine was Attached by *Abuladze I.,* Tbilisi, 1993, 32 (in Georgian).

47 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 501 (in Georgian).

48 Ibid, 547.

cases of insult committed by action, the payment of material compensation was imposed in the form of a blood price, in these cases they used a symbolic measure of responsibility, great torment, suffering, tying up of the person, and ecclesiastical punishments were used. Unlike other types of insults, the said crimes were directly under the jurisdiction of the king and the Catholicos.

There are several articles in the "Dzeglis Dadeba" where payment of "Uarzangoba" was imposed for wounding. "Urzangoba" was a material compensation and meant a punishment imposed for dishonor.[49] According to N. Khizanashvili, "Uarzangoba" was different from blood price and was a special penalty.[50]

The second part of Article 32 of "Dzeglis Dadeba" imposes liability for a wounding that was visible, but the person "was not injured and the injury didn't appear", for which three "Uarzangoba" were to be paid.[51] According to Article 38, one "Uarzangoba" was to be paid to a person for wounding, if the wound was not visible and no injury occurred. An additional sanction was also used in the named articles, the offender had to pay the costs of treatment. As can be seen from the cited norms, the visibility of the wound was a decisive factor in the evaluation of the injury.

According to Articles 39 and 40 of the "Dzeglis Dadeba", the "Uarzangoba" was imposed for "breaking teeth".[52] G. Nadareishvili notes, that breaking teeth was perceived as an offense against the appearance and health of a human, the legislator perceived it as both bodily injury and a violation of human dignity and honor.[53]

If we compare the named four articles with other articles of "Dzeglis Dadeba" (Articles 32-37), that deal with wounding and hurting others[54], it can be said that light forms of wounding can be considered offenses committed by action according to the imposed punishment, and wounding, which was accompanied by serious bodily injury, can be considered as crimes against health. In other monuments of ancient Georgian law, we don't find cases of imposing a "dishonorable punishment" for wounding. According to Georgian customary law, murder, wounding, and mutilation, violating property, were considered insults.[55] Imposing a "dishonorable punishment" for wounding and minor damage to health in "Dzeglis Dadeba" and therefore, perception of these actions as insults could be caused by the fact that the named law book was created for Mtiuleti, where "Customs were used and the beginnings of the tribal structure were strong."[56]

---

49 *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd ed., Prepared for Printing and Preface Added by *Shanidze A.,* Tbilisi, 1984, 1235 (in Georgian).

50 See *Khizanashvili N. (Urbneli),* Selected Writings, Prepared for Printing, Biographical Materials and Notes were Attached to it by *Dolidze Is.,* Tbilisi, 1982, 331, 345 (in Georgian); *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 415 (in Georgian).

51 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 416 (in Georgian).

52 Ibid, 417.

53 Ibid, *Nadareishvili G.,* Protection of Human Honor and Dignity According to the Monuments of Georgian Feudal Law and Court Practice Materials, Journal of "Almanaxi", 2000, № 14, 62 (in Georgian).

54 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 415 (in Georgian).

55 *Davitashvili G.,* Types of Offenses in Georgian Customary Law, Tbilisi, 2017, 524 (in Georgian).

56 Ibid, *Surguladze Iv.,* Sources of the History of Georgian Law, Tbilisi, 2000, 80 (in Georgian).

5. Actions Against the Dignity of the Family

Vakhtang Batonishvili's law (Article 42) lists ten grounds for exemption from liability. Three of these grounds did not impose punishment for the murder of a person by the husband. In one case, when the husband would have caught his wife during adultery and killed her; the second – when would have caught a man with his wife or child and killed him; the Third – when the serf would have caught his lord with his wife and killed him.[57] All three grounds are similar. The last ground is especially worth paying attention to. A serf, who is obliged to show special respect to his lord, is excused by the law from killing lord.[58] Since the dignity of the serf is more valuable than the life of the lord, this indicates that according to the old Georgian law, insulting a man in this way was one of the gravest crimes.

Cases of insults against family dignity can be conditionally divided into several types: insult caused by adultery, abandonment of the husband, abandonment of the wife, and abduction of the wife.

Compared to other cases of adultery, "flirting and seducing" with relatives or with a married woman living with his man in the same house was considered a more serious offense (Article 23 of the Beka-Agbugha Law).[59] A full blood price was paid to the woman's husband, and a public punishment was also imposed, which meant taking the offender out naked and with a rope tied around his neck.[60] One could redeem oneself from public punishment by paying a double blood price.[61] Since the public punishment is equal to double the price of blood, the said action as a whole was assessed with the price of three blood.

In the case of adultery, the extent of punishment was influenced by whether the husband abandoned his wife or not (Article 26 of Beka Agbugha Law[62], Article 41 of Beka Agbugha Law[63], Articles 71 and 86 of Vakhtang Batonishvili Law[64]). In most cases, the full blood price payment is imposed in favor of the husband for such action.

---

57 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 493 (in Georgian).

58 Article 259 of the Vakhtang Batonishil Law is almost similar to the third circumstance mentioned above, although it prohibits the serf from killing the lord in this case. The mentioned norm contradicts Article 42 and this norm may represent a further addition. *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 547 (in Georgian).

59 Flirting – desire, Sulkhan-Saba Orbeliani, Georgian Dictionary, I, Prepared According to the Autograph Lists, Research, and Glossary Search Engine was Attached by *Abuladze I.,* Tbilisi, 1991, 23 (in Georgian). Seducing – a bad name in the country, the name was broken. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd ed., Prepared for Printing and Preface Added by *Shanidze A.,* Tbilisi, 1984, 865 (in Georgian).

60 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 433 (in Georgian).

61 See *Kekelia M.,* Offenses Against Human Life, Health, Honor and Dignity in Ancient Georgian Law, Tbilisi, 2015, 214 (in Georgian).

62 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 434 (in Georgian).

63 Ibid, 440.

64 Ibid, 500, 503.

Fornication was punished more lightly. According to the ruling of 1763, if fornication was committed with the consent of a widow, the man had to pay half of the blood price. Compensation indicated in the ruling corresponds to the half-blood price of a peasant according to Vakhtang Batonishvili Law (Six Tumans).[65] The widow's penalty ("dishonorable" punishment) was paid for the boy born from the woman's first husband. As evidenced by the ruling, it was possible for the judges to mitigate the punishment, which in this case was expressed in the reduction of the compensation.[66]

K. Kekelia considered abandonment of the husband as an insult committed to husband. Among the monuments of Georgian law, he cites Article 32 of the Beka Agbugha Law and Article 74 of the Vakhtang Batonishvili Law Book.[67] Mentioned articles are similar. The lawmaker focuses on the woman's shameless act and the entire blood price should have been paid in favor of her husband.[68] Even though there is a long time gap between the law of Beka-Agbugha and the law of Vakhtang Batonishvili, the perception in relation to the indicated action in the society did not seem to have changed, and the legislator's evaluation of the action is the same because the form and extent of the punishment are similar. Insulting the dignity of the husband in the mentioned form is equalized to the price of human life by blood price.

A husband's abandonment of his wife is valued at half the price of blood. Is implied that the husband abandons his wife without reason (Dzeglis Dadeba, Articles 21 and 25 and 25[69], Article 29[70] of Beka Agbugha law), but according to Articles 72 and 73[71] of Vakhtang Batonishvili's law book, abandonment of a wife was punished in the same way as an abandonment of a husband. The husband had to pay the full blood price. In Article 72, there is an additional reference to the return of a woman's dowry.

Regarding the abandonment of the wife, we should pay attention to Article 23 of the Catholicos Law.[72] If the husband left his wife without reason, he should have been expelled from the church and punished with death. The authenticity of the mentioned norm is doubted because of the punishment imposed for abandonment of the wife and also by the fact that the named norm is written at the end of the legal monument, after the signatures.

Abduction of the wife was an insult to the husband's dignity, which was also a severe form of insult. The abduction of a wife can be conventionally divided into two types: the abduction of a wife with the woman's consent and without the woman's consent.

---

65 Ibid, 489.

66 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. IV, Court Rulings (XVI-XVIII Centuries), Tbilisi, 1972, 489-490 (in Georgian).

67 See *Kekelia M.,* Offenses Against Human Life, Health, Honor and Dignity in Ancient Georgian Law, Tbilisi, 2015, 216 (in Georgian).

68 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 500 (in Georgian).

69 Ibid, 411.

70 Ibid, 435.

71 Ibid, 500.

72 Ibid, 397.

Article 47 of Beka Agbugha law and Article 85 of Vakhtang Batonishvili's law book are similar. In both cases, the wife is abducted by force, for which they had to pay double the amount of the blood price to the husband.

Since the abduction of the wife did not happen by the woman's will, a separate punishment is imposed for assault, the amount of which should have been determined according to the "special rule for assault".[73] The compensation for assault is specified in the Article 85 of the Vakhtang Batonishvili Law Book, which was the price of one whole blood.[74] The issue of returning stolen items and dowry is mentioned.

Article 46 of the Beka-Agbugha law book and Article 84 of the Vakhtang Batonishvili law are also similar.[75] Both refer to the abduction of a wife, which was carried out with the woman's consent. The mentioned action was also punished by paying a double blood price. The issue of dowry was regulated by them. Comparing the discussed articles of the mentioned legal monuments, it can be seen that the abduction of the wife whether by force or by woman's will, was punished in the same way, they were distinguished by the punishment imposed for assault.

The last part of Article 86 of Vakhtang Batonishvili's law refers to the abduction of a wife, for which the woman's abductor had to pay whole blood to her husband.[76] Although there is no indication in the norm that abduction takes place with the consent of a woman, but the said circumstance must be assumed, and the basis of this assumption is the circumstance that the abduction is preceded by the fact of adultery.

There are several other articles in the monuments of law, which also refer to the abduction of a woman, and the action mentioned in these norms was punished by paying the full blood price. In contrast to other similar norms, Article 165 of the Beka Agbugha law imposed an ecclesiastical punishment in addition to the blood price, the offender should have been "cursed, damned and anathematized in the name of God".[77]

Article 23 of Dzeglis Dadeba talks about the abduction of a crowned wife.[78] Half of the blood price stipulated by the named norm is a relatively light punishment for kidnapping a woman. A mitigating circumstance is likely to be the following indication – "did not cohabitate". Perhaps the norm considered the abduction of a wife when this action did not result in the cohabitation of a man and a woman.

It was a mild form of insult when the engaged woman was abducted. According to article 24 of Dzeglis Dadeba, for the abduction of a wife, who had exchanged crosses[79], one-sixth of the blood

---

73 Ibid, 442.

74 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 502, 503 (in Georgian).

75 Ibid, 503.

76 Ibid.

77 Ibid, 471.

78 Ibid, 412. The crowned wife means a legal wife when the couple is married by the rule of the church. *Khizanashvili N. (Urbneli),* Selected Writings, Prepared for Printing, Biographical Materials, and Notes were Attached to it by *Dolidze Is.,* Tbilisi, 1982, 335 (in Georgian).

79 The woman with exchanged crosses is not yet a wife, she is only engaged. See Ibid.

price was to be paid.[80] In this case, there is no indication whether this happened with the woman's consent or not.

Most of the mentioned norms impose liability for actions against the honor of the husband, as evidenced by the payment of the blood price in favor of the husband.

6. Other Cases of Insult Committed by the Action

In addition to the examples of insults committed by the actions listed above, there are other cases of violation of human dignity in legal monuments and court decisions. For example, the kidnapping of a maid (Article 24 of the Beka-Agbugha Law[81]) was perceived as an insult to the owner.[82]

Violation of graves[83], insulting the judge[84], a "cattle drive"[85], disposal of found items[86], perjury in court[87], appropriation of property (Alexander V verdict on stealing captives,[88] 1592 blood verdict of Simon I for stealing a horse or a yoke[89]), sale of men (book of donations to Bichvinti by Catholicos Grigol Lortkipanidze, 1712).[90] For all the listed actions, a "dishonorable" punishment was imposed as a punishment.

Article 152 of Vakhtang Batonishvili's law states that stealing a horse, clothes, or armor during a war is a great shame. The criminal must give seven times the amount of the stolen things to the owner and pay half of the blood.[91] One act violates property rights and human dignity. In this case, a fine of seven times the value of the items is imposed for violation of property rights, and half of the price of blood for embarrassment. The different actions in the list and their one common feature – the imposition of a "dishonorable" punishment for these actions, indicates that in all these cases there was a violation of human dignity.

---

80 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 412 (in Georgian).

81 Ibid, 433.

82 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. IV, Court Rulings (XVI-XVIII Centuries), Tbilisi, 1972, 227-228 (in Georgian).

83 Ibid, 302-303. *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. II, Secular Legislative Monuments (X-XIX Centuries), Tbilisi, 1965, 434 (in Georgian).

84 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 551 (in Georgian).

85 Ibid, 468.

86 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. IV, Court Rulings (XVI-XVIII Centuries), Tbilisi, 1972, 270-271 (in Georgian).

87 Ibid, 545-546.

88 Ibid, 415-416.

89 Ibid, 302-303. *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. II, Secular Legislative Monuments (X-XIX Centuries), Tbilisi, 1965, 206 (in Georgian).

90 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. III, Church Legislative Monuments (XI-XIX Centuries), Tbilisi, 1970, 669 (in Georgian).

91 *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 519 (in Georgian).

7. Conclusion

A person's surname, “name”, and land were the circumstances that determined a person's honor in ancient Georgian law. When deciding the question of punishment for actions against honor and dignity, the listed circumstances were taken into account, buthe honor of the peasant might have beenas more valuable than the honor of the lord during an insult. This is reflected in the list of grounds for exemption from liability in Vakhtang Batonishvili's law.

The insult committed by the action could be of various types. Conventionally, it is possible to divide cases of an insult into several types. Actions that are directly aimed to humiliate a person's dignity, for example, cutting off the beard, tearing off, tying up, removing armor, oppression. This kind of insult was mainly punished by paying half the blood price, which was equivalent to serious damage to health. There are also such actions that insult the dignity, for which the entire blood price had to be paid by the offender, in this case insulting a person was equal to the blood price imposed for a person's life.

An attack accompanied by committing “unforgiveness” was considered a disgrace to a person, and it was also considered an insult to humiliate the family. The insult committed during the attack was estimated at half the price of blood according to the existing norms. If the attack resulted in wounding or murder, the punishment was determined separately for these actions.

Actions against family dignity, namely adultery, abandonment of the husband, abandonment of the wife, and abduction of the wife were considered more serious forms of insult. In most cases of insults committed in this form, payment of the entire blood price was imposed, and for some actions, double the blood price had to be paid in favor of the person offended. Most of the mentioned cases of insults violated the dignity of the husband.

In comparison to the listed cases against human dignity, health damage was punished more lightly, which was perceived as an insult in the old Georgian law. Four cases of beating and wounding/injury are considered in this category. Based on the review of the norms and court rulings in the law books, it can be said that in ancient Georgian law, the beating was considered an act against human dignity. As a punishment for this kind of insult, the offender paid a “dishonorable” punishment in favor of the offended person. As we have already mentioned, “dishonorable” punishment was a punishment imposed for dishonorable insults. As for wounding/injury, we find payment of “dishonorable” punishment for these actions only in the Dzeglis Dadeba, which also in light forms of wounding/injury, when the wound was not visible. In the monuments of law, and in the court decisions, there are also individual cases, for which also the payment of “dishonorable” punishment was imposed, and therefore these actions were also evaluated as insults.

As can be seen, in the monuments of ancient Georgian law, great attention is paid to the protection of human dignity. This is evidenced by the abundance of legal norms that determine the responsibility of persons for various types of insults committed by actions.

Bibliography:

1. *Chubinashvili D.,* Georgian-Russian dictionary, 2nd ed., Prepared for Printing and Preface added by *Shanidze A.,* Tbilisi,1984, 4, 276, 316, 473, 865, 1123-1235, 1264 (in Georgian).
2. *Davitashvili G.,* Types of Offenses in Georgian Customary Law, Tbilisi, 2017, 382, 524, 530-532, 535 (in Georgian).
3. *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. I, Collection of Law Books of Vakhtang, Tbilisi, 1963, 396-397, 411-412, 415- 417, 433-436, 440-442, 467, 493, 428-432, 463, 467-468, 471, 486-487, 489, 497-503, 547, 519, 551 (in Georgian).
4. *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. II, Secular Legislative Monuments (X-XIX Centuries), Tbilisi, 1965, 49, 206, 210, 355-356, 434 (in Georgian).
5. *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. III, Church Legislative Monuments (XI-XIX Centuries), Tbilisi, 1970, 142, 437, 641, 669, 966 (in Georgian).
6. *Dolidze Is. (Publisher of the Text),* Monuments of Georgian Law, Vol. IV, Court Rulings (XVI-XVIII Centuries), Tbilisi, 1972, 50, 58, 82, 227-228, 270-271, 302-303, 415-416, 489-490, 545-546, 600-602 (in Georgian).
7. *Kekelia M.,* Offenses Against Human Life, Health, Honor and Dignity in Ancient Georgian Law, Tbilisi, 2015, 203, 214-217 (in Georgian).
8. *Khizanashvili N. (Urbneli),* Selected Writings, Prepared for Printing, Biographical Materials and Notes were Attached to it by *Dolidze Is.,* Tbilisi, 1982, 331, 335, 345, 466, 488 (in Georgian).
9. *Nadareishvili G.,* Protection of Human Honor and Dignity According to the Monuments of Georgian Feudal Law and Court Practice Materials, Journal of "Almanaxi", 2000, № 14, 62, 64-65 (in Georgian).
10. Sulkhan-Saba Orbeliani, Georgian Dictionary, I, Prepared According to the Autograph Lists, Researched and Attached a Dictionary of Definitions by *Abuladze I.,* Tbilisi, 1991, 23, 154, 157 (in Georgian).
11. Sulkhan-Saba Orbeliani, Georgian dictionary, II, Prepared According to the Autograph Lists, Research, and Glossary Search Engine was Attached by *Abuladze I.,* Tbilisi, 1993, 32, 165 (in Georgian).
12. *Surguladze Iv.,* Sources of the History of Georgian Law, Tbilisi, 2000, 80 (in Georgian).

Cover Designer:

Mariam Ebralidze

Compositor:

Nino Vacheishvili

Technical Editorial Group:

Ana Mghvdeladze

Davit Chichikoshvili

Printed in Ivane Javakhishvili Tbilisi State University Press

---

1, Ilia Tchavtchavadze Ave., Tbilisi 0128

Tel 995(32) 225 04 84, 6284/6279

https://www.tsu.ge/ka/publishing-house

Nana Chigladze
Municipal Elections: Peculiarities and Challenges in Georgia

Irakli Kakhidze
Challenges of Implementing the "Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority" in Georgia

Saba Elizbarashvili
Resignation of a Member of Parliament – The Disputed Essence of the 5th Paragraph of the 39th Article of the Constitution of Georgia and a Practice Leading to its Unconstitutional Interpretation

Beka Zegardeli
The Historical and Legal Role of Georgia in 1917-1918 for the Unity of the Caucasus

Maia Kopaleishvili
Constitutional Guarantees of Protection against Unjustified Dismissal of Officials with an Important Public Legal Function in a Democratic Society

Khatuna Loria
Assurance of an Administrative Body – the Basis of Legal Reliance

Meri Agapishvili
The Issue about the Provision for Damage Inflicted by Preventive Security Measures upon Adjudicating the Dispute over Legality of Enabling Individual Administrative-legal Acts

Lali Papiashvili
Problematic Aspects of Criminal Adjudication in Cases of Sexual Violence against Minors

Elguja Tavberidze
Legal Regulations and Practical Features of a Person's Arrest with a Court Ruling

Lela Nozadze
The Court Practice of Imposing Fine towards Juvenile and Litigated Issue of Its Enforcement

Tamar Sadradze
Inappropriateness of Prohibiting Appealing an Arrest Warrant

Nino Begalishvili
State Immunity from Execution under the "United Nations Convention on the Jurisdictional Immunities of States and their Property" (UN Convention) in the Process of Execution of Arbitral Awards against States

Elza Chachanidze
Protection of Human Dignity in Case of Insult Committed by Action in Ancient Georgian Law