JOURNAL OF LAW

TSU FACULTY OF LAW

№2, 2023

CONTENTS

Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№2, 2023

უნივერსიტეტის გამომცემლობა

UDC(uak) 34(051.2)
s-216

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

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

Online Edition of the Journal is available on the website: www.jlaw.tsu.ge

Table of Contents

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7691

Elza Chachanidze*

Theft, a "Multi-faceted" Crime Against Property

Vakhtang Batonishvili's Law Book indicates that theft can be of various sorts and "multi-faceted". The ancient Georgian law addresses some similar crimes against property, robbery, piracy, and theft. In all three cases, property was appropriated. Unlike robbery and piracy, theft was not an overt act of violence. Following the legal norms of the old Georgian law, different types of theft can be tentatively classified into the basic, qualified, and privileged composition of the crime. Qualified theft was usually tried in the Court of the King and the thief was sentenced to death or facial mutilation. The main component of theft was the punishment in the form of property compensation, which was determined by the value of the stolen item. The annals of law provide information about the manner of compensation of double, triple, five times, or seven times for that which the thief contributed. The payment of seven times was mostly prescribed, from which a double share of the compensation was given to the victim, and the rest to a specific official, or the state, in general. Based on the above, most of the norms on theft in the old Georgian law are aimed at protecting private and public interests. The private interest was satisfied by the transfer of two parts of the payment of seven times to the owner of the thing, while the rest belonged to the state.

Keywords: *Stealing, Theft, Property Compensation, Compensation of Seven Times.*

1. Introduction

In the introductory part of the monuments of ancient Georgian law, the legislators indicate the various types of crime, which resulted in the creation of specific law books. The introduction to the law of King Giorgi (1334-1335) specifies the punishment for murdering a man, breaking into the church,[1] and wives stealing. A separate chapter is dedicated to piracy[2] and the punishment of pirates[3]

* Doctor of Law, Assistant Professor at Ivane Javakhishvili Tbilisi State University faculty of Law. https://orcid.org/0009-0009-8716-0261.

1 Mkrekheli – a robber of the church. *Sulkhan-Saba Orbeliani,* Georgian Dictionary I., prepared according to Autographic Lists, Study and the Index Part included by *Abuladze I.,* Tbilisi, 1991, 490 (in Georgian).490; Means equal. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 775 (in Georgian).

2 Piracy – plundering, robbing. *Chubinashvili D.,* Georgian-Russian Dictionary, and Edition, prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 645 (in Georgian).

3 Pirate – an extortioner, a robber, committing violence at sea. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd ed., prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 699; A thug, *Sulkhan-Saba Orbeliani,* Georgian Dictionary I., prepared according to Autographic Lists, Study and the Index Part included by *Abuladze I.,* Tbilisi, 1991, 461 (in Georgian).

in the monument (Articles 44, 45).[4] In the introduction to the Book of Law (1381-1386), Agbugha Atabag-Amirspasalari mentions prescribing the payment[5] for "stealing horses of the armies" and the punishment for piracy.[6] In the law of the Catholicos (1543-1549), it is mentioned that "many immoralities and inadmissible things got rampant: killing a man, buying a man, breaking into a church,[7] and improper actions."[8]

The listed crimes include several terms denoting the encroachment of property: robbery, piracy, and theft. "Krehkhva" means robbery, piracy is attacking and extorting; burglary and theft were considered of the same meaning.[9]

The Minor Canon Law (Mcire Sjuliskanoni) and Great Law of God (Didi Sjuliskanoni) and Deeds of the 12th, 13th, and 16th apply the terms "stealing", "thief", and "stolen". In the law of Beka-Agbugha (1295-1386), both the terms "thief", "theft" and "stolen"[10] are used. The term "thief" is also applied in the Law of Catholicos (Articles 5, 6).[11] "Stealing" is an older term. From the 18th century, instead of "stealing" the term "theft" was established in the old Georgian law. In the Law Book of Vakhtang Batonishvili, there is a separate "Section about theft and its punishment" (Articles 150-159).[12] In the mentioned part of the Law Book the legislator refers to the terms "stealing" and "stolen" but the action is implied "theft".

Vakhtang Batonishvili notes in the Law Book that theft is of "many" sorts (Article 150).[13] Based on the "diversity" of theft, we would like to classify the existing norms toward theft: determine the kinds of actions considered as theft following the old Georgian law, distinguish the main, privileged components of theft, and theft committed under aggravating factors, allege the punishments for theft and find out if theft should be fallen under the category of private delict or considered a crime.

---

4 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 419-420 (in Georgian).

5 Payment for stealing, *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 1005 (in Georgian).

6 Punishment, compensation, fine – Ibid.

7 Krekhva-robbery, stealing. *Sulkhan-Saba Orbeliani,* Georgian Dictionary I., prepared according to Autographic Lists, Study and the Index Part included by *Abuladze I.,* Tbilisi, 1991, 388 (in Georgian); *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 628 (in Georgian).

8 Improper – inappropriate. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 1289 (in Georgian).

9 Burglary, theft. *Sulkhan-Saba Orbeliani,* Georgian Dictionary I., prepared according to Autographic Lists, Study and the Index Part included by *Abuladze I.,* Tbilisi, 1991, 581 (in Georgian). *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, Prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 1005 (in Georgian).

10 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 519 (in Georgian).

11 Ibid, 394.

12 Ibid, 519, 521.

13 Ibid, 519.

2. The Elements of Theft by Old Georgian Law

2.1. The Concept of Theft in Ancient Georgian Law

To define the concept of theft we refer to the Greek law applied in the Law Book of Vakhtang VI which indicates thug and thief. A thug[14] robs a passenger on the road and might kill him (Articles 36, 37).[15]

A thief steals secretly without an open force (Article 323).[16]

According to the Customs Code of Georgia, the concept of theft used to include almost all crimes[17] against property. Following the explanation of N. Urbneli, robbery is a different action from piracy. The researcher thinks that Agbugha does not strike a line between robbery and piracy.[18]

The monuments of law demonstrate that the legislator distinguished a pirate from a thief. Article 164 of the Beka-Agbugha Law makes a list of the persons whose murder did not have to be paid the blood price by a murderer.[19] The list cites a pirate and a thief which indicates that these terms had different meanings.

Article 3 of the Law Book of Vakhtang Batonishvili prescribes the obligation of the judge to question a thief, a thug, a liar, or a false witness during the hearing of a case.[20] In this norm, the list also includes "thug" and "thief", which means that the meanings of these terms do not coincide.

Robbery also differed from theft. According to the ruling of Bagrat VII [1616-1619], two honorable men appointed by the king had to find out[21] what was the "loot and stolen" within the areas of Teimuraz Mukhran-Batoni and Nugzar Eristavi of Aragvi. In this case, robbery and theft are not identified with each other. A defining characteristic of robbery, piracy is the apparent nature of the action, which is followed by violence and appropriation of things. For example, Article 123 of the Bagrat Kurapalati Law, prescribes the punishment for dragging and robbing a man[22]. Article 97 of the Beka-Agbugha Law draws attention to robbery, which is manifested in the fact of attacking and robbing a merchant for taking his goods.[23] In Article 166 of the Beka-Agbugha Law, robbery is related

---

14 Robber-burglar, thug, pirate, thief. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 8. Burglar-pirate, thief. *Sulkhan-Saba Orbeliani,* Georgian Dictionary I., prepared according to Autographic Lists, Study and the Index Part included by *Abuladze I.,* Tbilisi, 1991, 40 (in Georgian).

15 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 141 (in Georgian).

16 Ibid, 203.

17 *Davitashvili G.,* Types of crimes in Georgian Common Law, Tbilisi, 2017, 456 (in Georgian).

18 *Khizanashvili N. (Urbneli),* Selected Writings, Prepared according to Autographic Lists, Study and the Index Part included by *Dolidze I.,* Tbilisi, 1982, 496 (in Georgian).

19 *Dolidze I.*, Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, 1963, 472 (in Georgian).

20 Ibid, 480.

21 *Dolidze I.,* Georgian Legal Monuments, Vol. IV, Court Decisions (XVI-XVIII century), Tbilisi, 1972, 54 (in Georgian).

22 *Dolidze I.,* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi,1963, 467 (in Georgian).

23 Ibid, 463.

to capturing[24] a man. Article 44 of the Law of King George refers to piracy, which means stealing live cattle or other things, breaking into a house, and taking away some property, murdering the owner of the property, the servant, or the chaser by the pirate.[25] Unlike robbery and piracy in old Georgian law, theft was deemed as an appropriation of the thing. The object of theft could be livestock or any inanimate object.[26] It was also possible to steal a serf. The book of the donation to Bichvinta of Besarion Catholicos [1742-1769] mentions that two peasants stole a serf from Bugashvili and sold them in Akhaltsikhe.[27] According to the old Georgian law, land could also be the subject of theft. According to the ruling of 1642, Merab and Makharebel Sulkhanishvili had a dispute over the former vineyard. Merab accused Makharebel of seizing the vineyard.[28] Another party stated that he had bought the land from Mr. Javakhishvili.[29]

Following the judgment of 1772, the plaintiffs complained that Shoshia Dedanashvili had misappropriated the estate and the land. None of the parties had written records or witnesses. If the defendant expressed an oath of the truth, the land would remain with Shoshia Dedanashvili.[30]

Iv. Javakhishvili suggested that in the period of King Tamar, as a person was obliged to deliver a found stolen item, the person who stored and appropriated it would be expected to be punished.[31] This idea is confirmed by Article 92 of the Beka-Agbugha Law. The legislator indicates that if the finder of the item did not locate it, he would be considered a thief.[32] Regarding the mentioned issue a similar norm is met in the Law of Davit Batonishvili (Article 123).[33]

2.2. Basic Components of Theft

Article 62 of the Beka-Agbugha Law can be deemed as the main component of theft.[34] The norm states that the prescribed punishment applies to the theft of any item. Emphasis is not placed on the offender, the circumstances of the offense, or the place where the theft was committed.

The last paragraph of Article 44 of the Law of King George defining compensation for all types of theft, can also be attributed to the main content.[35]

---

24 Ibid, 470.
25 Ibid, 419.
26 Ibid, 419.
27 *Dolidze I.,* Georgian Legal Monuments, Vol. III, The Monuments of Ecclesiastics (XI-XIX century), Tbilisi, 1970, 880 (in Georgian).
28 The ruined vineyard *Chubinashvili D.,* Georgian-Russian Dictionary, and Edition, prepared for Printing and Foreword by *Shanidze A.,* Tbilisi,1984, 946 (in Georgian).
29 *Dolidze I.,* Georgian Legal Monuments, Vol. IV, Court Decisions (XVI-XVIII century), Tbilisi, 1972, 83-84 (in Georgian).
30 Ibid, 638.
31 *Javakhishvili Iv.,* Works in Twelve Volumes, Vol. VII, 1984, 228 (in Georgian).
32 *Dolidze I.,* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi,1963, 461 (in Georgian).
33 *Purtseladze D.* (David Batonishvili Law, published the text and added research), Tbilisi 1964, 71 (in Georgian).
34 *Dolidze I.,* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi,1963, 448 (in Georgian).
35 Ibid, 419.

Article 6 of the order by Svimon I of 1590 establishes punishment for theft of land in the administration of the king.[36]

Article 154 of Vakhtang Batonishvili's Law Book[37] also refers to the basic components of theft. The norm states that the punishment is applied for any form of theft, "stealing items of big or small size, many or few of them, inside or outside", except for the qualified compositions indicated by the legislator.

The mentioned four sources of law do not define theft. They provide a similar type of punishment and property compensation which was determined by the value of the stolen item. However, the amount of compensation was different in the above-listed cases. According to the law of Beka-Agbugha, if the thief could not return the thing, he had to pay double compensation following the law of King George, triple the amount by the Order of Svimon I and seven times the payment under the law of Vakhtang Batonishvili.

2.3. Qualified Compositions of Theft

By the old Georgian law, the aggravating factor of theft was the repeated commission. The Deed of Giorgi III (1170) mentions that a man who stole several times had to be punished by "hanging or expelling".[38] Under Georgian Common Law, the mentioned factor led to a more severe punishment of the offender. The thief could be stoned to death, banished, physically harmed, or restricted on the right to liberty.[39]

G. Nadareishvili explains the article 150 of the law book of Vakhtang Batonishvili that "persistent stealing" should mean the repeated commission of theft.[40] The general decree to punish appropriately for stealing suggests that a severe punishment would have been applied rather than property compensation.

An aggravating factor of theft was considered breaking into an "honorable" place. The place of honor was the ruler's cashier's box, a church, and a farm (Beka-Agbugha Law, Article 152).[41] Following the canonical law (Article 167) attached to the Law of Beka-Agbugha, for this crime, a culprit was prescribed branding eyes with heated pieces of iron or cutting off hands and feet.[42] The mentioned aggravating factor is established by the law of Vakhtang Batonishvili. The king and the

---

36 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 204 (in Georgian).

37 *Dolidze I.,* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi,1963, 519 (in Georgian).

38 *Dolidze I.,* Georgian Legal Monuments, Vol.II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 22, by *D. Chubinashvili* expelling is removal or dispossession by power of the law *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 212, 228 (in Georgian).

39 *Davitashvili G.,* Types of crimes in Georgian Common Law, Tbilisi, 2017, 507-508 (in Georgian).

40 *Nadareishvili G.,* Private and Public Punishments in Feudal Georgia, "Almanac" journal, 2000, No. 14, 112 (in Georgian).

41 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 469 (in Georgian).

42 Ibid, 470.

Catholicos could prescribe punishment for the destruction of a cross and an icon, and breaking into the ruler's cashier's box, (Article 155).[43] The referenced provision indicates that the act was a serious crime and the punishment would be more severe than paying the compensation of seven times.

By article 3 of the Catholics Law [1543-1549], a man had to be mutilated[44] for taking out for taking out an item of the church which meant getting disabled.[45]

"Taking out" is supposed to be theft, referring to Article 2 about breaking into the church and robbing of an icon.[46]

Four of the nine articles of the Decree of Svimon I about piracy [1590] refer to theft. Article 3 of the Order of Simon I can be appraised as a qualified composition, based on which a thief committing the crime on the way to the war should be brought to the Court of the King.[47] Iv. Surguladze has explained that this type of theft meant robbing the military camp. In this case, the pirate investigators had no right to punish the thief themselves.[48]

According to Vakhtang Batonishvili's law, the theft committed during the military campaign was also considered a grave crime however, it did not fall under the category of crimes that were judged by the king. The legislator regarded it as a great shame to steal a horse, weapon, clothes, chain, and armor during a military campaign. The crime was prescribed the payment of seven times the value of a stolen item and half the "price of blood (Article 152)[49] which meant paying the amount for a murder. The legislator has established two types of property punishments for this crime.

Following the Greek law in the Low Book Collections of King Vakhtang, theft in the army was also considered a grave crime. For stealing a weapon, a thief was beaten "strongly", and for stealing a horse or other cattle in the army, the criminal was cut off a hand (Article 316).[50]

Comparing the norm in the Deed of King Svimon and Vakhtang Batonishvili's Law Book about theft committed during a military campaign, in terms of the severity of the crime Greek law is more similar to the Deed of King Simon. Indeed, the type of punishment is not directly defined in the Deed of King Simon but the reference to the fact that the pirate investigators had no right to punish the offender and the case had to be discussed at the Court of the King indicates that an offender would be applied severe punishment.

---

43 Ibid, 520.

44 Ibid,394.

45 To get disabled. *Sulkhan-Saba Orbeliani,* Georgian Dictionary I., prepared according to Autographic Lists, Study and the Index Part included by *Abuladze I.,* Tbilisi, 1991, 207 (in Georgian).To get wounded-*Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, prepared for Printing and Foreword by Shanidze A., Tbilisi, 1984, 442 (in Georgian); A cripple-an injured man. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 1781 (in Georgian).

46 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 394 (in Georgian).

47 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 204 (in Georgian).

48 *Surguladze Iv.,* From the History of Georgian State and Law, Tbilisi, 1963, 51 (in Georgian).

49 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 519 (in Georgian).

50 Ibid, 202.

The payment of seven times the amount of compensation and half the "blood price", the amount for murder was prescribed for robbing a woman by removing a weapon or jewelry tied (Article 153).[51] Responsibility was aggravated by the fact that the crime was committed against a woman. For example, according to the Criminal Deed of Svimon I, 1592, the offender had to pay ten thousand for verbally insulting a woman, while insulting a man was valued at five thousand.[52]

An aggravating factor of theft was breaking into a house and robbing it while the family was at home (Article 151). In addition to paying seven times the value of the stolen item/items, the criminal had to pay half of the "blood price". If the thief could not pay, he had to hand over his wife and children, "goods" and purchases to the victim.[53] According to Georgian Common Law, burglary of a house was contemplated as a more serious crime. Besides seven times the value the burglar had to pay additional compensation.[54]

All three Articles of Vakhtang Batonishvili's Law Book condemn two types of property punishments. Only Article 151 indicates an alternative punishment that would be inflicted if the criminal did not have the opportunity to pay the property compensation. Dissimilarly to the norms mentioned above, by Article 151 the liability for the crime committed by the thief was imposed upon his family as well. In contrast, under Greek law only the criminal accepted liability following the mentioned main composition (Article 375) where it is stated that "the children of the thief" did not have to take responsibility for the crime. (Article 310).[55]

Regarding the above-mentioned norms of Vakhtang Batonishvili's Law Book (Articles 151, 152, 153), we can say that the payment of seven times the property compensation and the "blood price" was made for the benefit of the victim. In the text, it is indicated that "seventh and half of the blood price shall be given to the robbed".[56]

2.4. Privileged Components of Theft

In addition to the qualified compositions, we can also distinguish the privileged components of theft. Articles 4 and 5 of the Order of Svimon I [1590] can be deemed as a privileged composition against the piracy investigator. Under Article 4, the theft committed before the capture of Gori Fortress was punished more lightly, by paying three times the value of the item. Iv. Surguladze explains the imposition of a lighter sanction by the fact that Gori was conquered by "foreigners" (Ottomans).[57] The mentioned reason is related to one specific fact, and it could not have a general deterrent value.

---

51 Ibid, 519.

52 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 206 (in Georgian).

53 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 519 (in Georgian).

54 *Davitashvili G.,* Types of crimes in Georgian Common Law, Tbilisi, 2017, 493 (in Georgian).

55 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 201 (in Georgian).

56 Ibid, 519.

57 *Surguladze Iv.,* From the History of Georgian State and Law, Tbilisi, 1963, 52-53 (in Georgian). Ivane Surguladze assumes that this might be the period of Ottoman domination over Gori Castle when Svimon I took the castle around 1579 (in Georgian).

According to the 5th article, if the thief "stole something from the non-hostile community" he would have to pay five times the amount for compensation.[58] Thefts committed outside the country were also punished more lightly. In these cases of theft, the pirate investigators could punish the offender. Iv. Surguladze notes that the mitigation of the punishment grounded on the specified basis is also found in Dasturlamali of Vakhtang VI.[59] Under the Georgian Common Law, theft committed in one's community and village was negatively evaluated, while it was regarded as normal outside the location.[60]

Ancient Georgian law does not contain the types of theft underlined by Greek law, for example, an "obvious theft" and a "hidden robbery"[61] which must derive from Roman law.[62] Such classification of theft is mentioned by the Great Law of God (Didi Sjuliskanoni).[63]

3. Punishments Imposed for Theft

3.1. Death Penalty and Mutilation Punishments

In the old Georgian law, repeated commission of a crime was considered an aggravating factor. The Deed of George III (1170) states that a man who stole several times had to be punished by "hanging or expelling".[64]

The death penalty for theft was sentenced even in the 13th century. Referring to the mentioned issue, Iv. Javakhishvili cites chronicler's annals that during administrating Mestumre Jikur (Mestumre, an inferior of Mandaturtukhutsesi, Chief overseer of the court) "a thief and a thug was not found in the realm of King Davit VII Ulu. If they were caught, they would be strapped to a pole."[65]

Under Greek law, repeatedly committing a crime was an aggravating factor of liability, which was applied to prescribe punishment. Article 318 might be divided into two parts. Following the one part a thief having once stolen an item, would have to pay double the amount of the stolen item. In another part of the article, stealing many times, and a lot was punished by cutting off a hand.[66]

According to Article 3 of the Law of Catholicos [1543-1549], a thief for breaking into the church was punished with mutilation.[67]

---

58 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 204 (in Georgian).

59 *Surguladze Iv.,* From the History of Georgian State and Law, Tbilisi, 1963, 52 (in Georgian).

60 *Davitashvili G.,* Types of crimes in Georgian Common Law, Tbilisi, 2017, 478 (in Georgian).

61 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 201 (in Georgian).

62 *Surguladze N.,* Institutes of Justinian, 2002, 204-205 (in Georgian).

63 *Gabidzashvili E., Gyunashvili E., Dalakadze M., Ninua G.,* Great Law of God (Didi Sjuliskanoni), 1975, 176 (in Georgian).

64 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 22-23 (in Georgian).

65 *Javakhishvili Iv.,* Works in Twelve Volumes, Vol. VII, 1984, 227 (in Georgian).

66 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 202 (in Georgian).

67 Ibid, 394.

All the types of theft that were to be tried at the king's court indicated that the offender would be severely punished, in particular, by applying capital punishment, or mutilation of the body.

According to Article 167 of the Beka-Agbugha Law, theft in an "honorable" place was punished by branding eyes with heated pieces of iron or cutting off hands and feet.[68]

Based on all the above norms, it is clear that the death penalty or mutilation of the body was imposed for theft committed under aggravating factors, while the aggravating factors were considered to be the repeated commission of the same or similar offenses in "honorable" places.

3.2. Property Punishments

Based on the sources of old Georgian law, we can say that the main punishment for theft was property compensation, which depended on the value of the stolen item. N. Urbneli thought that the payment of seven times the amount of the stolen item was related to King Vakhtang because before that a thief was charged to pay double the amount of value.[69]

According to the Georgian Common Law, even in law, the compensation for theft was paid seven times the amount of value.[70] Also, several annals confirm that the above-mentioned compensation was applied even before Vakhtang Batonishvili. Following the charter of immunity by the Eristavi of Kartli, Grigol Surameli (1245-1250), the stolen item was returned to the owner, and seven times the value of the property belonging to the Eristavi was donated to the Shio-Mghvime Monastery.[71]

In the donating book of Eristavi Shalva Kvenifneveli to Largvis of 1470, is indicated that a thief had to pay seven times the amount to the Church.[72] Eristavi Shalva of Kvenifneveli, as well as Eristavi Grigol Surameli, gave their shares to the church.

Following the Order of King Svimon I about the piracy investigators [1590] a thief was asked to pay seven times the value for the theft in the territory under the jurisdiction of the king. Two shares of the payment belonged to the owner, four to the king, and one to the piracy investigator (Article 6).[73]

According to Vakhtang Batonishvili's Law Book, the thief had to compensate seven times the amount of the stolen item. The disposal of the compensation depended on the social status of the victim. If the victim was a nobleman, he would receive full compensation from the offender, and if the victim was a peasant, the double amount of compensation would be given to the peasant, and the rest to the state (Article 154).[74]

---

68 Ibid, 469.

69 *Khizanashvili N. (Urbneli),* Selected Writings, Prepared according to Autographic Lists, Study and the Index Part included by *Dolidze I.,* Tbilisi, 1982, 502 (in Georgian).

70 *Davitashvili G.,* Types of crimes in Georgian Common Law, Tbilisi, 2017, 488 (in Georgian).

71 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 38 (in Georgian).

72 Ibid, 142.

73 Ibid, 204.

74 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 219 (in Georgian).

The punishment for theft is determined by the social status in Davit Batonishvili's Law. Peasants and soldiers were punished with beatings and had to pay property compensation, while "noble" people were sentenced to half a month in prison and payment of property compensation.[75]

Dasturamali also mentions the payment of seven times the value for theft. If the owner of the stolen was a nobleman, six shares were paid to him and one was given to Khevistavi (a ruler of Khevi). If a peasant was robbed, two shares belonged to the peasant, one to Khevistavi and four to the master (Batoni).[76] The same punishment was imposed by the Khevistavi of Karai.[77] The distribution of property compensation depending on the social status is indicated in Vakhtang Batonishvili's Law Book as in Dasturlamali but with one significant difference, if a nobleman was robbed, one out of seven shares was given to Khevi. The payment of seven times the amount was inflicted on theft by the rules of Kaykuli. One share belonged to the owner, four were given to the master, and one to Mouravi (principal administrator). If a foreigner was found to have stolen an item, the owner received four shares, one belonged to the master, and two were taken by a principal administrator (Mouravi).[78]

Al. Vacheishvili cites a document of 1713 issued to the head of Davit Gareja Monastery as an example of paying seven times the amount for theft. Following the document two shares of the payment belonged to the owner of the item, four to the head of the church, and one to the principal administrator (Mouravi).[79]

The Ruling of Erekle II about the royal and principal administrator (Mouravi) shares of payment for compensation in Kyzik [1744-1762] indicates that two shares of the seven times the amount was granted to the master, one to Khevistavi, two to the master, and one-third to the Mouravi.[80]

According to the Ruling on compensation for murder and robbery of the servant working on the piece of land belonging to Ninotsminda and Davit Gareja Monastery Complex [1771][81] if the servant of the feudal or the feudal robbed a servant of the church, he had to pay seven times the value: two shares of the payment would be given to the master of the servant, five would be taken by the ruler. If the servant of the church stole the money from the feudal or his servant he was charged to pay the same compensation: two shares would be given to the owner and five would belong to the church.[82]

Revaz Andronikashvili determined the shares of payment for compensation to the principal administrator (Mouravi) of Kiziki [1802] – two shares of the payment of seven times the amount for

---

75 *Purtseladze D.* (David Batonishvili Law, published the text and added research), Tbilisi 1964, 105-106 (in Georgian).

76 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 277 (in Georgian).

77 Ibid, 323.

78 Ibid, 311.

79 *Vacheishvili Al.,* Essays from the History of Georgian Law, Vol. II, 1948, 52 (in Georgian).

80 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 411 (in Georgian).

81 A piece of land that is ruled by a king., *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 1153 (in Georgian).

82 *Dolidze I.,* Georgian Legal Monuments, Volume IV, Court Decisions (XVI-XVIII century), Tbilisi, 1972, 625 (in Georgian).

theft belonged to the owner of the stolen, one to the Khevistavi, two shares to the master, and a third to the Mouravi.[83]

The Book of Family Separation (1712),[84] also imposes the payment of seven times the value for theft but it does not specify the division of the compensation.

The discussed historical sources define the issue of distribution of seven times the amount, in which the double amount of the value of the stolen items was to be given to the owner, and the remaining share to a specific official, or the state, in general.

In addition to seven times the value, there was also a payment of five times the value of the stolen item. According to Article 5 of the Order of Svimon I [1590], five times the amount was to be paid by the offender for stealing the property of the community. Two shares belonged to the owner and the king and the one to the piracy investigator.[85]

The payment of five times the amount for theft is mentioned in the report of Grigol Dadiani to Solomon II [1792][86] as well as in the account of Eudemon Mangleli on the development of Methrevani village [1678-1683].[87]

The Law Book of Vakhtang Batonishvili suggests the reduction of punishment for a thief (Article 249)[88] who confessed the crime and asked for forgiveness. He was forgiven for three times the amount and had to compensate four times the value of the stolen.

The social status of the victim was important in the distribution of seven times the amount for compensation but some legislators did not specify the issue of distribution of property compensation.

The ancient Georgian law also mentions a payment of three times the value of the stolen item. According to the last paragraph of Article 44 of the Law of King Giorgi, all kinds of theft were punished by paying "one share to the owner and the two for others".[89] The text does not emphasize that the compensation belonged only to the owner of the item.

According to Article 4 of the Order issued by Simon I on the piracy investigation [1590], the thief who committed the crime before the capture of Gori Fortress was punished by paying three times the value of the item. One share was given to the master (Batoni), one half to the king, and a half to the pirate investigator.[90]

---

83 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 559 (in Georgian).

84 *Dolidze I.,* Georgian Legal Monuments, Volume IV, Court Decisions (XVI-XVIII century), Tbilisi, 1972, 245 (in Georgian).

85 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 204 (in Georgian).

86 Ibid, 204.

87 *Dolidze I.,* Georgian Legal Monuments, Vol. III, The Monuments of Ecclesiastics (XI-XIX century), Tbilisi, 1970, 584 (in Georgian).

88 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 544 (in Georgian).

89 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 419 (in Georgian).

90 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 204 (in Georgian).

Following Article 62 of the Beka-Agbugha Law Book, if a thief stole a horse or other items, the owner would pay one as much the value of "the stolen item". If the stolen item could be returned, double the value of the item would be paid to the victim.[91]

Under Greek law, the payment of four times the amount had to be paid for theft during the day, and a double value for the stealth theft (Article 311).[92] Armenian law also mentions the same type of payment for theft (Articles 223, 227).[93]

Iv. Javakhishvili supposes that the term "Tavni" means paying the value of the stolen item to the owner. The thief had to return the item to the owner or pay compensation,[94] in addition to paying seven times the amount. Information about the payment of "Tavni" is provided by the Charter of Immunity of Grigol Surameli, Eristavi of Kartli (1245-1250)[95], Article 62 of the Law of Beka-Agbugha[96] and Article 44 of the Law of King Giorgi.[97]

The thief had the liability to return the stolen thing, as well as the person who found the stolen thing (Vakhtang Batonishvili's Law Book, Article 156-158).[98] Armenian law also compelled a thief to give the stolen thing back to the owner (Article 244, 245).[99] A similar norm is found in Greek law (Article 314).[100]

Vakhtang Batonishvili's Law Book (Articles 151, 152, 153) prescribes sanctions with the three qualified components of theft which made the thief pay the "compensation of seven times the amount" and half of the blood price to the owner of the item.

The property compensation for the theft committed on church-owned land belonged to the church. On the instructions of the Catholicos-Patriarch Joseph, Sakhltukhutsesi (lord chancellor in feudal Georgia) Giorgi was assigned [1757] to beg the inhabitants for the Church Tax in the canonical territory, which included bread, wine, meat, and silk. The instruction also refers to the fines and the taxes for family separation, holding feasts, and stolen items.[101]

During the reign of Erekle II, fines were imposed for theft. The principal administrator of the city [1784-1790] made a thief and a whore pay a fine. A tenth of the payment belonged to the principal administrator (Mouravi) and the rest was granted to the viceroy of the feudal.[102]

---

91 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 448 (in Georgian).

92 Ibid, 201.

93 Ibid, 303, 303-304.

94 *Javakhishvili Iv.,* Works in Twelve Volumes, Vol. VII, 1984, 232 (in Georgian).

95 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 38 (in Georgian).

96 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 448 (in Georgian).

97 Ibid, 419

98 Ibid, 520.

99 Ibid, 310, 310-311.

100 Ibid, 202.

101 *Dolidze I.,* Georgian Legal Monuments, Vol. III, The Monuments Ecclesiastics (XI-XIX century), Tbilisi, 1970, 840-841 (in Georgian).

102 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 496 (in Georgian).

The Decree of Erekle II regarding his "sons" (1791) indicates that the fine prescribed for theft should be divided into three parts: two shares belonged to the master (Batoni), and a third of the fine was to princes.[103]

3.3. Other Punishments

Article 151 of the Vakhtang Batonishvili's Law Book (burglary of a house) also defines an alternative punishment. In the case of non-payment for the blood price, the thief had to hand over his family and property to the victim.[104] The handover of a person due to the impossibility of payment of property compensation is confirmed by the case of Lavarsab Shioshvili [1713]. Brother of the thief, Giorgi Shioshvili claimed that his brother had stolen a horse from Durmishkhan Guramishvili. As the thief could not pay any other compensation, he had the son taken away and given to the victim instead of compensation.[105] Thus, paying compensation by men was an accepted norm at that time. According to the Deed of Levan Dadian on the renewal of the estates of the church [1611-1657], ten peasants had to be paid for inappropriate actions around the territory of the church in Khobi, burglary of peasants, stealing cattle, breaking into the palace, or the church.[106]

In all three cases, the punishment seems to be the same, handing over the person to the owner of the stolen item. Following Article 151 of the law of Vakhtang Batonishvili, handing over the thief and his family members and a child of a thief to the victim based on the above-mentioned ruling of 1713, is different from giving ten peasants for theft prescribed by the Deed of Levan Dadiani.

The transfer of peasants meant that a peasant was perceived as a thing, property, which could be the subject of compensation. In the first and second cases, handing over an offender or his family to the owner of the stolen item meant that the free person would become the belonging to the victim.

In addition to the punishments listed above, the church also imposed punishment on the thief. In the last part of the Beka-Agbugha Law (canonical law, p. 167), the church would curse the thief.[107] On the grounds of the decision of the Sixth Church Council, if the thief confessed to the crime, he was punished with one year of non-communion. In case of relapsed criminal behavior, he could not receive the Holy Communion for two years.[108] According to church law, it was possible to lighten and aggravate the punishment. Confessing the theft and returning the stolen item was punished by the sentence of 40 days in prison, and for committing the crime again, two years in prison. If the thief repented of his crime, he was prescribed the punishment of six months of non-communion. The

---

103 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 524 (in Georgian).

104 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 519 (in Georgian).

105 *Dolidze I.,* Georgian Legal Monuments, Volume IV, Court Decisions (XVI-XVIII century), Tbilisi, 1972, 251 (in Georgian).

106 *Dolidze I.,* Georgian Legal Monuments, Vol. II, Secular legislative monuments (X-XIX centuries), Tbilisi,1965, 251 (in Georgian).

107 *Dolidze I.,* Georgian Legal Monuments, Vol. 1, Vakhtang VI Law Books Collection, (X-XIX centuries), Tbilisi, 1963, 471 (in Georgian).

108 *Gyunashvili E. (publishers of the text),* Minor Law of God (Mtsire Sjuliskanoni), 1975, 176 (in Georgian).

punishment for stealing an item belonging to the church was determined by three years of non-communication.[109]

4. Conclusion

The monuments of the old Georgian law prove that theft was distinguished from burglary and piracy. The main reason for this difference lies in nonviolent theft.

The diversity of theft made it possible to classify crimes into basic, privileged, and qualified components. Apart from the theft committed with an aggravating factor, the main punishment for theft was property compensation, which was determined according to the value of the stolen item.

We can single out three forms of payment for the mentioned compensation. The first is the payment of the compensation for the stolen item to the owner; the second includes the compensation given to the owner of the item and the state, master, or church, and the third is the payment of compensation for the state or church. This means that the majority of thefts committed against private individuals fall under the category of delict. It is identified by Article 62 of the Beka-Agbugha Law when the thief had to pay double the compensation to the owner if the stolen item was not returned. Also, according to the law of Vakhtang Batonishvili, seven times the amount of property compensation belonged to the owner of the item, if he was a nobleman. Thus, the type of delict was determined not by an action per se, but by the social status of the owner of the stolen thing. If the peasant got something stolen, two shares of the seven times the amount for the committed theft were given to the peasant, the rest to the state.

The three types of theft in Vakhtang Batonishvili's Law Book (Articles 151, 152, 153) can be considered as a private delict because the payment of seven times the value and half of the blood price was made for the victim. Based on the mentioned norms, Vakhtang Batonishvili expanded the scope of private delict about theft.

Following the norms and deeds of the monuments of old Georgian law, we can say that the property compensation for theft was seven times the amount of which two shares belonged to the owner of the item, and the rest to the state. Hence, both the public and private interests were fostered but most of the compensation belonged to the state, which demonstrates the priority of protecting the public interest.

Bibliography:

1. *Gabidzashvili E., Gyunashvili E., Dalakadze M., Ninua G. (publishers of the text),* Great Law of God (Didi Sjuliskanoni), 1975, 176 (in Georgian).
2. *Gyunashvili E. (publishers of the text),* Minor Law of God (Mtsire Sjuliskanoni), 1975, 120, 176 (in Georgian).
3. *Davitashvili G.,* Types of crimes in Georgian Common Law, Tbilisi, 2017, 456, 507-508, 493, 478, 488 (in Georgian).

[109] Ibid, 120.

4. *Dolidze I. (text publisher),* Georgian Legal Monuments, Vol. I, Vakhtang VI Law Books Collection, Tbilisi,1963, 141, 201, 202, 203, 303, 304, 310, 394, 419, 420, 448, 449, 461, 463, 467, 469, 470, 472, 480, 519, 520, 544 (in Georgian).
   Dolidze I. (text publisher), Georgian Legal Monuments, Vol. II. Secular legislative monuments (X-XIX centuries), Tbilisi, 1965, 22, 23, 38, 142, 204, 206, 210, 277, 311, 323, 411, 496, 524, 559 (in Georgian).
5. *Dolidze I. (text publisher),* Georgian Legal Monuments, Vol. III, The Monuments Ecclesiastics (XI-XIX century), Tbilisi, 1970, 584, 840, 841, 880 (in Georgian).
6. *Dolidze I. (text publisher),* Georgian Legal Monuments, Vol. IV, Court Decisions (XVI-XVIII century). Tbilisi, 1972, 54, 83, 84, 245, 251, 625, 638 (in Georgian).
7. *Vacheishvili Al.,* Essays from the History of Georgian Law, Vol. II, 1948, 52 (in Georgian).
8. *Nadareishvili G.,* Private and Public Punishments in Feudal Georgia, "Almanac" journal, 2000, No. 14, 112 (in Georgian).
9. *Sulkhan-Saba Orbeliani,* Georgian Dictionary, I. prepared according to Autographic Lists, Study and the Index Part included by *Abuladze I.,* Tbilisi, 1991, 40, 207, 490, 461, 388, 581 (in Georgian).
10. *Surguladze Iv.,* From the History of Georgian State and Law, Tbilisi, 1963, 51-53 (in Georgian).
11. *Surguladze N.,* Institutes of Justinian, 2002, 204-205 (in Georgian).
12. *Purtseladze D.*, David Batonishvili Law (published the text and added research), Tbilisi 1964, 71, 105-106 (in Georgian).
13. *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd Edition, prepared for Printing and Foreword by *Shanidze A.,* Tbilisi, 1984, 8, 228, 442, 628, 645, 699, 775, 946, 1005, 1153, 1289, 1781 (in Georgian).
14. *Khizanashvili N. (Urbneli),* Selected Writings, Prepared according to Autographic Lists, Study and the Index Part included by *Dolidze I.,* Tbilisi, 1982, 496, 502 (in Georgian).
15. *Javakhishvili Iv.,* Works in Twelve Volumes, Vol. VII, 1984, 227-228, 232 (in Georgian).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7692

Zhiron Khujadze*

Kafka, Benjamin, Derrida: On Violence, Law and Justice**

The present text is the second part of the article published in the previous issue of the journal. If in the initial section Kafka's parable "Before the Law" was considered from the philosophical thinking of Walter Benjamin, on the one hand, from Talmudic categories, and on the other hand, from the perspective of the violent nature of law, in the subsequent section the parable will be deconstructed by Derrida, on the one hand, through a quasi-psychoanalytical reading and utilizing Freudian concepts, and on the other hand, by investigating the relationship between law and justice as the aporetic experience between the universal and the singular.

***Key Words**: Derrida, Kafka, Benjamin, Freud, Before the Law, Literature, Law, Justice, Deconstruction, Aporia.*

1. Introduction

Kafka's parable "Before the Law" is a legend rich in interpretative possibilities. The text encourages us to interpret it, yet no *elucidation* can be fully *legal, legitimate, just, or non-violent.* While the initial part of the article explored the relationship between Kafka and Benjamin, the latter part shifts its focus to Kafka and Derrida.

Derrida's critique of Western philosophy centers on the thinking within the *metaphysics of presence. Presence,* as the central and founding principle that defines language as an expression of existing, *unfairly* excludes the possibility of being/non-being *distinct* from it. Metaphysics establishes binary oppositions such as that between life/death, speech/writing, nature/culture, sanity/madness, legality/illegality, where the former represents the *presence*, that is, the foundation, and the latter signifies a *deviation* from the presence. Derrida endeavours to *deconstruct* this mode of thinking, aims to read texts *justly*.

In the first part, Derrida, through a *fair* reading of Kafka's parable, illustrates that the founding act of a social institution diverges from the structure of legality/illegality and from the conventional boundaries of an event, while in the second part, he expounds on law and justice in the context of the relationship between the general and the unique, and discusses the possibility of *just decision* within the aporetic experience that binds the two together.

---

* 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. https://orcid.org/0009-0001-0076-0451.

** The following text is the second part (the end) of the article published in the previous issue of the journal. See: *Khujadze Zh.,* Kafka, Benjamin, Derrida: On Law, Violence and Justice, Journal of Law № 1, 2023, 85-97.

2. Derrida and Kafka: Law without History and Justice as Deconstruction

2.1. The Founding of Law: An Event Where Nothing Happens

Numerous authors have indeed examined Kafka's parable, however, of paramount significance is Jacques Derrida's lecture "Before the Law" delivered in London in 1982, where he poses a crucial question of under what jurisdiction and by whose authority does the text belong to literature.[1] Derrida's address extends beyond the realm of literature, placing a greater emphasis on the law – whether it be moral, political, natural, legal, or of another kind – that establishes something, prohibits or permits, excludes or includes, denies or affirms. To determine whether a text possesses literary or non-literary essence, it must be brought before the law, however, Kafka's parable is itself "Before the Law", that is, it already covers the chief question.

Derrida centers his attention on Kant's Second Critique (*Critique of Practical Reason*), asserting that the law (pure morality), while having categorical authority, is without history or genesis. The law (the law of laws) cannot be the story and cannot give rise to it, and if someone tells the *story* about the law, it can concern only the modes of its revelation. Since the parable does not specify the nature of the law in question, we should envision it as the law of the laws: the law as such, as the origin of countless other laws, as the first, as preceding all other laws, that is, before the law. In Kafka's parable the countryman tries to penetrate the law by the authority of the story (or through it?), struggles to fulfill his aim, cannot enter into a relation with it, cannot make it present, because the place and the origin of the law, essential knowledge for its approach, remain indeterminate. It is not historical, recognizable, or temporal. Being untraceable to a source, embarking on a journey to its abode or origin proves impossible. The relationship with the law and the fulfillment of the imperative "you must", should be apprehended as if devoid of history, or at least as if no longer hinged on its historical demonstration.[2]

However, Derrida in his analysis of the parable goes beyond Kant's moral law, employs a quasi-psychoanalytical approach rooted in Freud's ideas. In *Totem and Taboo* Freud explores the origin of moral prohibitions by observing the totemic system within primitive societies, names the categorical imperatives in Kant's sense, which were initiated by the "event", namely the murder of the primeval father by his sons who had an ambivalent emotional attitude towards him, on the one hand, they hated him because perceived as an obstacle in the pursuit of power and satisfaction of sexual demands, and on the other hand, they also loved and admired him. They wanted to take the father's place, to monopoly power and control over the tribe's females. However, when they satisfied their hate by father's removal and carried out their wish for identification with him, their animosity waned, replaced by tender emotions that eventually transformed into remorse. A sense of guilt was formed and the dead father became stronger than the living had been. As a result, the brothers condemned what their father forbade them in his presence. The brothers declared the killing of the father substitute, the totem, not allowed and thus condemned the murder. The two fundamental taboos of totemism, which

1 *Derrida J.,* Before the Law, in: Acts of Literature, *Attridge D. (ed.),* New York, London, 1992, 181-220.
2 Ibid, 191-192.

originated from the sense of guilt of the son and correspond with the two repressed wishes, are prohibition of murder and incest. Within primitive people sexual intercourse and marriage between members of the same clan are not allowed, which represents the exogamy associated with the totem. A totem usually is an animal that is considered sacred, although there is a tradition when at feast times the clan kills its totem and then bewails the murdered animal, but after this mourning there follows joy, therefore, a holiday is a solemn violation of the prohibition and loud gaiety is a part of it. A totem animal is a substitute for the father whose killing is forbidden, but it still causes contradictory, changing feelings – both grief and a festive mood. Freud associates the origin of morality with these two prohibitions. Yet, they stem from distinct needs. The first, the sparing of the totem animal rests upon emotional values, the other, the repression of sexual desires had a strong practical foundation. Though the brothers united to overcome the father, however, each became the other's rival in the struggle for women, so in the condition of impossibility of identifying a definitive "sole master", it was necessary for peaceful coexistence to make this concession.[3]

The murder of the father led to his eternal life. A failed crime begets a moral reaction, so morality emerges from a useless crime whose intended purpose remains unfulfilled since the *murder* failed to achieve its objective. However, as Derrida observes: "in fact, it inaugurates nothing since repentance and morality had to be possible *before* the crime."[4] Freud envisioned an event he believed was the origin of morality, however, this "story" is constructed on "as if", that is, it is not a story but a quasi-event that both demands and annuls narrative. Since the dead father wields more power than a living one, logically, he would have been more dead in life than *post mortem*, therefore, the murder of the father does not qualify as an event in the conventional sense, nor as the origin of moral laws. It is the fictive narrativity, that is, the simulacrum of narration and not merely the narration of an imaginary history. It is "as if", an event without event, a pure event where nothing truly transpires, for no one could have been present at the place of its "happening". Yet, precisely this nature renders it the origin of both literature and law – a story told, a rumor spread, without author or end, yet inevitable and unforgettable:

"Nothing new happens and yet this nothing new would instate the law, the two fundamental prohibitions of totemism, namely murder and incest. However, this pure and purely presumed event nevertheless marks an invisible rent in history. It resembles a fiction, a myth, or a fable, and its relation is so structured that all questions as to Freud's intentions are at once inevitable and pointless ("Did he believe in it or not? did he maintain that it came down to a real and historical murder?" and so on)."[5]

A few remarks regarding Freud: Derrida brings attention to Freud's concept of repression, closely tied to the notion of upright position or elevation. Assuming an upright position, drawing oneself up serves to create a distance between a person's nose and sexual zones – anal or genital. Freud observes that just as we turn our heads and noses away in moments of disgust, the preconscious similarly shies away from the memory, which is repression. The uprightness, distance, purity are what

3 *Freud S.,* Totem and Taboo, *Brill A.A. (trans.),* London, 1919, ch.4.5.
4 *Derrida J.,* Before the Law, in: Acts of Literature, *Attridge D. (ed.),* New York, London, 1992, 198.
5 Ibid, 199.

repression produces as the foundation of morality.[6] This *elevated state* is exemplified in the figure of the doorman who addresses the countryman as great lords do and ascends in stature as the narrative unfolds, while the countryman's height diminishes. Another observation: Although Derrida does not refer explicitly to Freud's *Beyond the Pleasure Principle*, a parallel can be drawn between the instinct of self-preservation i.e. conservative drives and the doorkeeper who safeguards life, protecting the countryman from his desire for death until it arrives "naturally". Absolute pleasure, the union with the law of laws that is death, is deferred by the guardian. Indeed, the doorkeeper does not declare that the man from the country will never access the law, he does not impose an absolute prohibition, instead there is a postponement, a delay.[7] It is impossible to enter into a relation with the law as a prohibited place, just as attaining full cognizance of death within life is. The relation with the law itself is possible through interactions with its representatives, its guardians, and death is not a direct experience but something to come, deferred before coming, always distant, and thus always close as inevitable. The guard ensures that the man does not have direct contact with the death, which is impossible, yet this very impossibility necessitates protection and avoidance. The doorkeeper indeed functions as the guardian of life, but he also serves the death by preparing the man for his expiry.

The law remains unfathomable and inaccessible. The doorman guards nothing (the death is nothing?). It is impenetrable even when presents or promises itself. When it comes to confronting law face to face "the story becomes the impossible story of the impossible. The story of prohibition is a prohibited story."[8] It does not declare "I am" as long as it "is not". it is an ought. It says "you ought to" and this "ought" does not derive from an "is". An ought holds the connection only with another ought, and so endlessly.

The man from the country stands before the lowest of the doorkeepers. Hierarchically inferior, however, is the first. The first who establishes the initial connection with the man. The doorkeeper deliberately refrains from specifying the number of guards, implying that they are innumerable and that the hierarchy has no ultimate endpoint. We can draw parallels to Hans Kelsen's legal philosophy. Kelsen asserts that because the law operates as a hierarchical system of norms, it is essential that the "basic norm" be presupposed by the juristic mind, that citizens ought to obey the prescriptions of the historically first constitution. What's intriguing is that later Kelsen characterizes the basic norm as a genuine fiction. He invents a story as if there is a basic norm that does not end the chain of authorization at historically first constitution, that is, at the factual level. This "as if" (*Als Ob*) is prompted by the influence of Hans Vaihinger's fictionalism. Even Kant's categorical imperative relies on a similar construct: "Act *as if* the maxim of your action were by your will to turn into a universal law of nature." The term "as if" generates a quasi-event, indicating a non-existent history, time and place, which even a pure positivist like Kelsen found necessary to justify his theory.[9]

---

6 Ibid, 193-194.

7 *De Ville J.,* Jacques Derrida: Law as Absolute Hospitality, *Goodrich P., Seymour D. (eds.),* Abingdon, 2011, 88-90.

8 *Derrida J.,* Before the Law, in: Acts of Literature, *Attridge D. (ed.),* New York, London, 1992, 200.

9 See: *Khujadze Zh.,* Hans Kelsen's Basic Norm: Transition from the Transcendental-Logical Condition to a Fiction, Journal of Law № 2, 2022, 5-17.

In the parable we read that the man stoops to peer through the gateway of the law. So is the law positioned low, beneath, or down? Who or what is the law? *das Gesetz* is neither male nor female, neither masculine nor feminine, it recognizes no sexual and grammatical gender, and we remain uncertain of its identity. When we use the expression "to lay down the law", does it imply that the law is positioned down or below? When we use the terms like "sitting judge" or "court sitting" we are indeed referring to a seated position. Could this suggest that the law is in a seated posture, making it challenging to stand in front of it? to be before it?[10]

"Not now" – the doorkeeper tells the man. Is the man early or is he late? His arrival is already belated. The man's coming is inevitably tardy, for he has been always awaited, but his responsibility extends beyond those who awaited him. He bears responsibility for the future, for the potentiality forever slipping through his grasp. He shoulders the weight of what he did not commit but was imposed upon him by the fiction. He carries the burden of the primal father's murder and this primordial guilt will shadow him throughout his life. In *The Trial* Josef K. himself propels the process, comes and goes, legitimizes the endless cycle of process renewal. The court wants nothing from him, when he comes it receives him, when he goes it lets him go. Yet Josef K. is always anxious. As a "Freudian neurotic" he has a problem with himself, or rather with a haunting sense of guilt within himself.

In *Being and Time* Heidegger brings up the concept of primordial Being-guilty which is the existential condition for the possibility of the "morally" good and "morally" bad. This concept cannot be defined by morality, instead morality already presupposes it.[11] Derrida links this originary Being-guilty (*Schuldigsein*) with the act of Being responsible, Being forewarned, of having to answer-for before any debt, any fault, any determined law, that is, beyond any knowledge and any consciousness.[12]

Entry into the law *is deferred* by the very nature of the law. The secret is nothing and this nothing should remain secret. The doorkeeper guards nothing. There is nothing before the law, no story. The doorkeeper closes the door, ends the "story" and something is ended that had never begun or we didn't hear of its beginning. The man meets his end. He cannot arrive at arriving and cannot end at ending. The text, being unique, reveals only about itself and nothing more. The text is an endless *différance*, an inaccessible one that lasts until the death of the man. We cannot *touch* the text, nor change it, for it is singular much like the law destined solely for the man. Literature is impossible without an absolutely singular creation that also converges with the universal. The man failed to comprehend that an entrance was for the one, it was singular, for he erroneously assumed that it should have been universal. As Derrida concludes: "He had difficulty with literature."[13]

Freud's text can be seen as "literature". It narrates an event that signifies "nothing else", thus marking the inception of "nothing". It exclusively speaks about itself. Each text establishes its own rules and exists before the laws emerged in another, potentially more authoritative texts that are

---

10 *Derrida J.,* Before the Law, in: Acts of Literature, *Attridge D. (ed.),* New York, London, 1992, 207.

11 *Heidegger M.,* Being and Time, *Macquarrie J., Robinson E. (trans.),* Oxford & Cambridge, 1962, 332.

12 *Derrida J.,* The Post Card: From Socrates to Freud and Beyond, *Bass A. (trans.),* Chicago & London, 1987, 264, fn.10.

13 *Derrida J.,* Before the Law, in: Acts of Literature, *Attridge D. (ed.),* New York, London, 1992, 213.

protected by more powerful guardians (authors, publishers, critics, academics, librarians, lawyers, etc.) Being *before the law* doesn't entail a direct encounter with the law itself, but rather with its representatives and guardians, such as interpreters, enforcers, or executors. It is true that the formal imposition of legal order on literary works by juridical and political institutions took hold in the late 17th century, still, *literariness* outpaces this. Literariness transcends boundaries, masters laws, and plays on the horizon of difference where singularity and universality intersect in a fictional moment.

2.2. Law and Justice: Aporia of Calculable and Incalculable

Pierre Legrand in an essay (2019) provocatively titled "Jacques Derrida Never Wrote about Law" delves into the English translation of Derrida's works and expresses suspicion that the terms *droit* or *loi* used by Derrida may not perfectly align with the Anglophone concept of *law*. The irreducible indefinetiness of the language renders an exact equivalence across languages unattainable. That is why Derrida introduces the concept of *transformation* instead of translation. To underscore Derrida's deep affinity for the French language, Legrand recalls an interview Derrida gave to Le Monde in August 2004, just a few months before his passing (at a time when Derrida was already aware of his terminal illness), where he openly expresses his abiding love for the French language – language that preceded the realization of his own presence before himself. In short, in Legrand's view, Derrida was a French scholar, who spoke French, wrote in French, and lived in France, whose understanding of law should have been rooted in French legal culture steeped in positivism and distinctly removed from the legal thought prevailing in common law systems.[14]

Translating Derrida's English translation into Georgian and then providing commentary, analysis, or criticism takes on a parabolic nature. The dual transformation, the quest for traces inscribed by the text, prompts us to ponder if there exists something beyond the text itself? ("*Il n'y a pas de hors-texte*" – how should one translate this *hors-texte?* is it outside the text or outside-text? There is nothing outside the text, or there is no outside-text?).

In October 1989, the colloquium "Deconstruction and the Possibility of Justice" took place at Cardozo Law School, where Derrida delivered the first part of the text "Force of Law: 'The Mystical Foundation of Authority'"[15] in English. The Second part was read at the colloquium at the University of California in April 1990, titled "Nazism and 'The Final Solution': Probing the Limits of Representation". The complete version of the text was published in Cardozo Law Review, with the French original on the left-hand pages and the English translation on the right-hand.

It is intriguing how the translator, Mary Quaintance, seems to "rebel" against Derrida himself. In her translation of the text, she prioritizes the spoken word over the written version, occasionally disregards the author's instructions, alters sentence meanings, and at times retains easily translatable words in French. Similarly, just as Derrida deviates from the agreement to speak in English, commencing with the first words in French ("*C'est ici un devoir ...*"), the translator also breaches the

---

14 *Legrand P.,* Jacques Derrida Never Wrote about Law, in: Administering Interpretation: Derrida, Agamben and the Political Theology of law, *Goodrich P., Rosenfeld M. (eds.),* 2019, 105-109.

15 *Derrida J.,* Force of Law: "Mystical Foundation of Authority", in: Deconstruction and the Possibility of Justice, *Quaintance M. (trans.), Cornell D., Rosenfeld M., Gray Carlson D. (eds.),* London, 1992, 1-67.

contract with the author. She translates not only the essay in an abstract sense but Derrida himself, along with his behavior and moral stance.[16] Consequently, the translation of the translation can be seen as a rebellion against rebellion. This rebellion is not aimed at a particular author but at language as an instrument, at the inherent impossibility of achieving precise translation.

"Force of Law" is a text that endeavors to deconstruct the Western political tradition from Plato's Republic to the Holocaust. Deconstruction not as abolition or dismantling, but as a genealogical, historical analysis of the evolutionary path, different stratum under (or through) the influence of which concepts were formed, changed, legitimized, extended, canceled, assimilated, differed, etc. Derrida addresses critics who accuse him of advocating the impossibility of rational grounding and justification, an allegation they attribute to Derrida's proximity to the philosophical and political *Dezisionismus* of Martin Heidegger and Carl Schmitt. However, Derrida's analysis differs from Heidegger's or Schmitt's *Destruktion*. He does not reject the entire tradition in which the author himself operates and from which he evaluates events, but rather the violent mechanisms established by the tradition, which lack a reasonable or inevitable basis, and instead are adopted as a result of an arbitrary and groundless *decision*. Thus, Derrida initiates the discourse with a sense of reluctance, being obliged to speak in the language of the "other" and on a topic he did not choose. This is his obligation, governed by the rules of the Cardozo Law School, or more broadly, by the hegemony of the United States, hence, the English language. As John McCormick points out, this alludes to the first book of Plato's *Republic*, where Socrates, under "friendly coercion", is compelled to discuss justice. In Socratic dialogue passionate disorder is introduced by the rhetorician Thrasymachus who asserts that justice is the dominion of the powerful, of the strong. Critics of deconstruction insist that Derrida should provide resolutions for ethical-political issues and propose feasible, programmatic approaches. Derrida retraces the trial of Socrates, where he stands accused of nihilism and indecisiveness, for not embracing the narrative of enlightenment which posits the existence of clearly emancipatory institutions.[17]

In the first part of the text Derrida discusses the relationship between law and justice, their inherently distinct and non-inclusive nature, and the violent moment characteristic of law, while in the subsequent section he conducts an analysis of Benjamin's essay "Critique of Violence". The moment of founding violence (Unlike Benjamin, Derrida does not rigidly separate lawmaking violence from law-preserving, since the founding violence is constantly echoed in conservative violence that always reiterates the tradition of its origin, thus, ultimately *keeps* a foundation destined to be repeated continuously), which is demanded for the inauguration of a new law or a new state and which accompanies the revolutionary actions, Derrida calls uninterpretable, undecipherable, and consequently, mystical. A successful revolution "justifies violence" only retrospectively, after it has been executed, therefore, self-legitimizes itself based on an interpretative model designed to assess an already established outcome. This happens in the future anterior (*futur antérieur*) and never in the present. Performative violence lacks a tangible basis, its origin is confined to itself. It cannot find

---

16 *Jacobson A.J.,* Authority: An Hommage to Jacques Derrida and Mary Quaintance, Cardozo Law Review, Vol. 27, № 2, 2005, 791-795.

17 *McCormick J.P.,* Derrida on Law: Or, Poststructuralism Gets Serious, Political Theory, Vol. 29, № 3, 2001, 395-398.

grounding in any legal act as it precedes the law. A revolutionary act defies categorization as either legal or illegal, for it rejects the very law that deems it *illegal*, and, in turn, establishes a new law that, at the moment of its execution, could offer no pronouncement on its validity simply because it had not yet been instituted as law. For law to manifest in history, it requires an act *before the law, prior to the rule*, that is, it requires a performative act.[18]

Derrida adopts the term "performative" from the British philosopher of language John Austin who in speech act theory distinguishes between two forms of linguistic activity: constative and performative. The former pertains to utterances that can be evaluated in terms of truth and falsity, while in the case of the latter the speech act establishes, produces, or transforms an event and it occurs as the doing of an action that eludes assessment in terms of truth. An illustration of the constative is the sentence: "The sun rises in the east", whereas an example of the performative is when someone in the act of getting married says "I agree". These words don't merely describe but effect change. Acts of this nature encompass promising, forgiving, betting, apologizing, and others. While the success of a constative statement hinges on its agreement with truth, a performative statement also has conditions for its efficacy, namely, conventions. For instance, the phrase "I agree" holds no weight if one's status during the wedding ceremony is not defined as either the groom or the bride. These conventions grant authority to performatives.[19] However, in the realm of law, Derrida posits that reaching the point of origin, the convention that empowers law without leaning solely on itself, proves to be an insurmountable challenge. Each attempt or inquiry in this direction merely propels us one step backward, leaving the question unresolved of the origin of these conventions which serve as *success conditions* for legal authority. This is the *mystical* threshold that is insuperable. The violence that institutes authority ultimately operates within a cycle of self-legitimation.[20]

Derrida here invokes Kafka's parable, asserting that the law is transcendent in the sense that it has to be *founded* by the man as something yet to come with violence. However, it is important to note that this "to come" should not be interpreted conventionally. Here "to come" is not what we can imagine, predict, or envision in the present, but rather a realm beyond knowledge and information. The inaccessible transcendence of the law before which man finds himself takes on a theological essence to the extent that the law depends only on man, on the performative act by which he inaugurates it: "the law is transcendent, violent and non-violent, because it depends only on who is

---

18 *Derrida J.,* Force of Law: "Mystical Foundation of Authority", in: Deconstruction and the Possibility of Justice, *Quaintance M. (trans.), Cornell D., Rosenfeld M., Gray Carlson D. (eds.),* London, 1992, 35-37, 55.

19 See: *Austin J.L.,* How to Do Things with Words, Oxford, 1962, 1-11. In "Declarations of Independence" Derrida poses the question of who signs the declarative act which founds an institution. Such an act is performative, it does what it says it does. The Declaration of Independence is signed by the representatives of the people, that is, the signature is executed in the name of the people. However, the question arises: are the people already liberated and proclaiming freedom already attained, or do they achieve freedom the moment the declaration is signed? Derrida answers that before the declaration these people as an entity did not exist, that is, the signature gives birth to the signer. The representation only truly assumes its representative nature after the act of signing, essentially existing in the future present tense. See: *Derrida J.,* Declarations of Independence, New Political Science, Vol. 7, Iss. 1, 1986, 7-15.

20 *Derrida J.,* Force of Law: "Mystical Foundation of Authority", in: Deconstruction and the Possibility of Justice, *Quaintance M. (trans.), Cornell D., Rosenfeld M., Gray Carlson D. (eds.),* London, 1992, 14.

before it – and so prior to it, on who produces it, founds it, authorizes it in an absolute performative whose presence always escapes him. The law is transcendent and theological, and so always to come, always promised, because it is immanent, finite and so already past."[21]

At the outset of the initial section Derrida highlights the English idiomatic expression "to enforce the law" which, when translated into French as "*appliquer la loi",* loses this allusion to the force. Similarly, in Georgian, *„კანონის აღსრულება"* fails to convey that law inherently embodies authorized *force*. The force of law justifies itself through its application, through its forced execution. The ability to be enforced is an inherent aspect of law, just as the use of force is:

"The word "enforceability" reminds us that there is no such thing as law (*droit*) that doesn't imply *in itself, a priori, in the analytic structure of its concept*, the possibility of being "enforced," applied by force. There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth."[22]

How do we discern between the force of law and the violence that appears unjust? In other words, how do we differentiate legitimate force from unjust violence, or a just exercise of power from its opposite? What form of violence precedes the emergence of legitimate power, the very violence required to establish it, and yet cannot itself be authorized by any anterior legitimacy? Therefore, in this initial moment, it is neither legal nor illegal, founded nor unfounded, as it transcends such dichotomies. Derrida makes a crucial distinction between law and justice, invoking Pascal and Montaigne. Pascal quotes Montaigne, mentioning the "mystical foundation of authority" in which Montaigne implies that laws deserve obedience not because they are just, but simply because they are laws. Laws gain their binding authority by referring to themselves. The violent structure of the founding act encompasses performative, i.e. interpretative violence, which is a precondition for the establishment of any institution. The "mystical" aspect lies in the fact that the origin of power, authority, is self-derived; it is violence without justification.[23]

Because the law is founded, constructed on interpretable and transformable textual strata, therefore, it can be deconstructed. However, justice, in its essence, remains impervious to deconstruction. Derrida asserts: "Deconstruction is justice", signifying the crucial moment when it becomes necessary and yet impossible *to reconcile* the deconstructibility of law, legality, legitimacy, or legitimation with the undeconstructibility of justice. Deconstruction is the possibility of experiencing the impossible. It is at this moment when the concept of aporia (Greek *a-poros a-not, poros – passage*) comes into play, which in ancient philosophy means an irresoluble impasse. Justice is an experience of aporia. When we presume that the law has been correctly applied and enforced, we should not equate it with the fulfillment of justice, for law is not justice. If the law is an element of

---

21 Ibid, 36.

22 Ibid, 6. The term "force" encompasses meanings of coercion and violence, much like the word "Gewalt" used by Benjamin, which signifies force, violence, coercion, power, and authority.

23 Ibid, 10-14. Derrida takes the use of the word "mystical" in the Wittgensteinian direction. In *Tractatus Logico-Philosophicus* Wittgenstein says: "There is indeed the inexpressible. This shows itself; it is the mystical." *Wittgenstein L.,* Tractatus Logico-Philosophicus, *Ogden C.K. (trans.),* London, 1922, 6.522.

calculation, the justice is incalculable, however, the aporetic experience is that this incalculable still demands calculation, uncountable demands counting, unproportionable demands proportioning, as some form of *decision* is more *just* than *no decision* at all. Consequently, the distinction between law and justice lies in the disparity between generality and uniqueness. The general can be subjected to calculation, whereas the unique resists such treatment. Given that the individual to whom something *is addressed* is always unique, idiomatic, singular, and justice as law (rather than justice in itself) seems to suppose the generality of a norm, then: "How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself *as* other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case?"[24]

Derrida outlines three aporias concerning the relationship between law and justice. First: for an act to be deemed just or unjust, one must possess the freedom and responsibility for his own actions, thoughts, and decisions. However, a just decision must always adhere to a rule, it must always operate within a calculable and programmable order (pure improvisation cannot constitute *a decision*). Nonetheless, if the act merely entails the application of a rule, the enactment of a program, or the execution of a calculation, it might be deemed legal, but it would be erroneous to assert that the decision was just. This is because, for a decision to be truly just, it requires, for instance, that a judge not only follows a rule of law but also, on each occasion, re-adopt, re-affirm, re-confirm its value by a reinstituting act of interpretation, as if, ultimately, nothing of the law existed beforehand, as if the judge, in each case, were inventing the law afresh. Hence, the novel decision must simultaneously align with the law (with its general nature) and deviate from it. Each new decision is inherently unique, demanding diverse interpretations. The judge must institute the law, freshly re-establish, "re-invent" it. However, this endeavor should always maintain a connection with the law and its principles, as "pure interpretation" does not constitute a decision.[25]

---

[24] Ibid, 17. Derrida, when discussing the "other" as singular, references Emmanuel Levinas, acknowledging a certain affinity with his ideas. He quotes a passage from Levinas's book *Totality and Infinity*, concerning the relation to others as justice. Levinas delves into the relationship between the same and the other. On the one hand, he provides a critical evaluation of Husserl's philosophical framework wherein the other is experienced by me not through his direct ownness, but through the mediation of intentionality, that is, through the phenomenological reduction in self-closure. On the other hand, Levinas engages in a critical appraisal of Heidegger's philosophy. Heidegger posits that being-with-others constitutes an inauthentic mode of existence. Being-a-whole for Dasein is existential isolation that must be manifested in being-towards-death. The all-encompassing presence, the impossibility of non-being, and the reduction to sameness represent elements of ontological totality that must be overcome, and Levinas identifies this moment in the face of the other that is an image of absolute alterity, a completely uncomprehended phenomenon of other's ownness into myself, an inexhaustible, absolute responsibility for the other. Levinas ponders the problematics of language and observes that the rejection of synchrony signifies the point at which language presents itself not merely as an utterance of being, but also as the responsibility for the other, which makes necessary the saying and the said as a response. This response is infinite, for in its transcendence it is infinitely other, ruptures ontological finitude. See: *Nakhutsrishvili L.,* Ontology and Ethics in Emmanuel Levinas' Philosophy, Tbilisi, 2011, 3-52 (in Georgian).

[25] *Derrida J.,* Force of Law: "Mystical Foundation of Authority", in: Deconstruction and the Possibility of Justice, *Quaintance M. (trans.), Cornell D., Rosenfeld M., Gray Carlson D. (eds.),* London, 1992, 22-23.

Second: Justice is undecidability, or perhaps more precisely, the responsibility of deciding the undecided, that is, the possibility of the impossible, an extraordinary experience. A decision that has not undergone the ordeal of the "undecidable" would merely fall within the realm of the calculable or programmable, and thus cannot be rightfully labeled as just. However, the decision to calculate doesn't pertain to the calculable domain. In this sense, a decision is never fully or *presently* just, as contemporaneity fails: if a decision has not yet been made in accordance with the rule, it cannot be deemed just, and if it follows the rule transformed, confirmed, reinvented, we still cannot call it just, as this fresh interpretation is not absolutely guaranteed by anything, and any such guarantee would reduce the decision to a mere calculation. Ultimately, every decision remains not completed, it is never "passed" or past. In the words of Derrida, it is the infinite idea of justice:

"… infinite because it is irreducible, irreducible because owed to the other, owed to the other, before any contract, because it has come, the other's coming as the singularity that is always other. This "idea of justice" seems to be irreducible in its affirmative character, in its demand of gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without rationality. And so we can recognize in it, indeed accuse, identify a madness. And perhaps another sort of mystique. And deconstruction is mad about this kind of justice."[26]

[26] Ibid, 25. To grasp Derrida's concept of justice as madness, it is essential to revisit his work "Cogito and the History of Madness" (1963), where he engages with Foucault's *History of Madness*. Derrida suggests that madness lacks a distinct historical foundation or a moment of differentiation from reason, as Foucault posits, has in mind the classical age, specifically the 17th and 18th centuries (1650-1800). Derrida argues that language and sentence, as forms of order, as the exclusion of madness, inherently signify rationality and meaning, thus represent different being than madness is. We should seek this moment in "act of force" which gives rise to historicity and language in general. The exclusion of madness occurs simultaneously with the emergence of historicity. The Greek logos already constitutes the break with madness. Madness, however, is not entirely divorced from sanity (similar to the relationship between justice and law). Derrida, like Foucault (who identifies the first philosophical assessment of madness in Descartes' *Meditations*), delves into Descartes' *Meditations* and argues that Descartes' bringing of evil genius who casts doubt even on truths that escape natural doubt, such as mathematics, signifies a departure from both the rational and the irrational, marks a moment of "total madness" where the distinction between reason and unreason becomes impossible (madness is not an appearance of total error – i.e. I think even if I'm mad) for which I bear no responsible because it is "inflicted upon me by the other". This moment serves as the zero point where meaning and non-meaning intersect. Derrida emphasizes that madness is not external to philosophy. At the moment of cogito's founding, clarity has not yet fully materialized, here madness and sanity are not yet differentiated (This moment eludes Foucault's understanding, as he attempts to establish differences in historical moments and determined structures). In Descartes' philosophy, God serves as the guarantor of the cogito, protecting him from "madness." The act of expressing thought, transferring it into language, articulating it whether to oneself or to another, is already considered non-madness. In cases of insanity, it would be impossible to articulate one's thoughts either to oneself or to others using "reasonable" language. Justice is madness because it transcends the realm of the rational, reaching a point of intersection where law, as an order, must extend beyond its confines and be shared with incalculable. See: *Derrida J.,* Cogito and the History of Madness, in: Writing and Difference, *Bass A. (trans.),* Chicago, 1978, 31-63. Also see: *De Ville J.,* Jacques Derrida: Law as Absolute Hospitality, *Goodrich P., Seymour D. (eds.),* Abingdon, 2011, 95-107. When it comes to the concept of a gift without return, exchange, or reciprocity, Derrida engages with the insights of Marcel Mauss, a renowned French sociologist and anthropologist, who consideres the notion of gift within archaic societies. According to Mauss, a key element of a gift is an

Third: the urgency of justice. Justice does not and cannot wait, a just decision is always required immediately. It cannot be lost in infinite information and in the rules or hypothetical imperatives that could justify it. Even with ample time and the right knowledge, the moment of *decision* remains a finite moment of urgency. It cannot simply be an outcome of theoretical or historical knowledge, as it constantly ruptures the preceding knowledge. This "rupture" is urgently required. And the instant of decision is madness, as Kierkegaard says. Justice is to come (*à venir*). Its time is never arrived, and the moment of its decision is never passed. We should always say "perhaps" for justice. It is always a possibility, the possibility of an event that exceeds rules, calculation. However, as Derrida observes, and this is a crucial moment for the text to break away from the nihilistic grounds, undecidability is not an alibi for staying out of juridical-political battles (this infinite idea of justice is always *very close* to the worst, depraved calculation, that is, the risk of its name being appropriated and distorted is great). The Declaration of the Rights of Man and the abolition of slavery are remarkable milestones, representing substantial progress.[27] Derrida mentions the movement "Critical Legal Studies" whose proponents seek to infuse a deconstructive approach into legal discourse. Instead of purely speculative, theoretical, academic understanding, they aspire to change things in life, in the *polis*, in the world, and this should be so.[28]

A just decision cannot be "past" or "passed", because it is recursive, elusive, all over again and always disputes the "justness" of the decision. Justice and deconstruction share a spectral nature. In *Specters of Marx*, Derrida explores Shakespeare's *Hamlet*, in which the past appears as a ghost to the present to rectify a fault, a crime. The right only emerges after the crime (original sin) for which the *succeeding* generation bears responsibility. It is always for the second generation, always late, and

obligation. The gift is the subject of circular exchange and it is circumscribed by economic self-interest. Giving alms to the poor, sharing food and drink are categorized as "obligatory gifts" mandated by the gods to further bestow prosperity upon the givers. Furthermore, the gift is seen as a mechanism for averting conflict (even "exogamy", when women of one tribe are "gifted" to another, is considered a form of present-giving), thus it serves a practical purpose. Mauss contends that in modern societies the understanding, implementation, and application of the concept of justice, which is rooted in the notion of obligation, is a substitute for "gift". Derrida, however, disputes Mauss's assessment of exchangeability and reversibility and observes that the act of returning something leads to the annulment of the gift (Like Mauss, Derrida discusses *potlach* which departs from the conventional understanding of "gift" because at this time what happens is the extreme, madly destruction and consumption of the gift without the motive of giving and expecting a return). A gift can only exist when, consciously or unconsciously, there is no intention of debt, reciprocity, contract, or exchange. Once a gift appears as a "gift", it essentially annuls, destroys itself. Thus, a gift only retains its true essence when it is not acknowledged as a gift by the donator or the donatee. If one gives with "the intention of giving", he is doomed to self-praise, so by developing this feeling, he returns the gift to himself. Therefore, if we want to commit an act of giving that breaks away from this system of reciprocal exchange, we should resort to "absolute forgetting". Absolute forgetting is not a psychoanalytic category, for example – repression, insofar as it does not retain the concept of the gift, not even in the unconscious. See: *Derrida J.,* Given Time: I. Counterfeit Money, *Kamuf P. (trans.),* Chicago and London, 1992, 10-17, 24-27, 37-48. Also see: *De Ville J.,* Jacques Derrida: Law as Absolute Hospitality, *Goodrich P., Seymour D. (eds.),* Abingdon, 2011, 122-126.

[27] *Derrida J.,* Force of Law: "Mystical Foundation of Authority", in: Deconstruction and the Possibility of Justice, *Quaintance M. (trans.), Cornell D., Rosenfeld M., Gray Carlson D. (eds.),* London, 1992, 26-28.

[28] Ibid, 8-9.

therefore, destined for inheritance. Hamlet, who wasn't a witness to the initial crime and can only reconstruct what has already been "committed", is burdened with the task of *setting it right* after the apparition of the ghost. In Hamlet's phrase: "The time is out of joint: O cursed spite, That ever I was born to set it right!" (Act I, Scene V), the words "The time is out of joint" signify the disruption of the usual, historical flow of time, representing the pivotal moment of possibility for justice. This rupture, this disadjustement separates law (which is identical to the usual flow, order) from justice, as the foreseeability of the law is destabilized, rendering it incapable of programmatic implementation. This rupture creates a space for the relation to the *other*, the recognition of the other as singular, that defies generalization, conventional flow and calculation. Disjuncture of the time presents a possibility to deconstruct time, history, and its laws.[29]

Kafka's countryman might align with the classical natural law theory – he might be the one who assesses the legal force of the law based on the demands of justice and contends that justice, unlike the law, is not before, that is, in front of, but rather resides within the law. This view suggests that if justice is to be attributed to anything, it inherently dwells within the essence of that thing. It embodies a religious or philosophical concept, rather than a political one, for political, legal, and economic justice are influenced by temporal and spatial considerations, arising from calculations and evaluations. Perhaps, when the man thinks that law should be accessible at all times and to everyone, he means a just law, and the guardian knows the distinction between law and justice, yet acknowledges that discussions about the coming of justice are met not with a categorical "no" but rather with expressions like "not now" or "perhaps".

In the parable we glimpse the essence of justice in that mystical moment where a narrative unfolds of a radiance that streams inextinguishably from the gateway of the Law. The man, shrouded in darkness and robbed of sight, yet feels (or sees?) this light. We discern a likeness between deciding the undecidable and seeing the unseen. The light in the dark embodies a contradiction, a "madness" intrinsic to justice, one that justice requires. This requirement finds fulfillment at the end of life, yet it is realized not consciously, but through the gleam, by not understanding, because the arrival of justice eludes *clear* perception. This happens when the old man has regressed into a child, or when he meets the mystical conditions – he is blind who sees and an old who becomes childish.

3. Conclusion

Kafka's parable "The Knock at the Manor Gate" recounts the tale of a townsman whose sister knocks on the gate (or merely threatenes it with her hand), and as a result, his brother is taken to the village inn, where the judge is already waiting for him, greets the man with the words: "I'm really sorry for this man." The room resembles a prison cell, in the middle of which stands something that looks half a *pallet*, half an *operation table*. The parable concludes with the man's words: "Could I endure any other air than prison air now? That is the great question, or rather it would be if I still had any prospect of release."[30]

[29] *Derrida J.,* Specters of Marx, *Kamuf P. (trans.),* New York and London, 1994, 21-26.
[30] *Kafka F.,* The Great Wall of China and Other Pieces, *Muir W., Muir E. (trans.),* London, 1946, 125-126.

Perhaps *this* townsman and *that* countryman are brothers. The *mystical* story of the townsman commences within the village, while the countryman lingers at the city's outskirts, awaiting permission to enter the law. Their destinies appear to have diverged – one confined, the other at liberty. Yet, they ultimately meet the same *ending*. The *closing* of both narratives remains ambiguous, violent and open to diverse interpretations. Both texts stand as singular entities, yet we can still assert a kinship between them, that these two men are brothers. This *assertion*, however, is far from assured. Similarly, the law, fable, myth, or tale is not guaranteed by anything.

A pallet or an operation table? Now one, now the other, or rather, ***as you like it.***

Bibliography:

1. *Austin J.L.,* How to Do Things with Words, Oxford, 1962, 1-11.
2. *Derrida J.,* Before the Law, in: Acts of Literature, *Attridge D. (ed.),* New York, London, 1992, 181-220.
3. *Derrida J.,* Cogito and the History of Madness, in: Writing and Difference, *Bass A. (trans.),* Chicago, 1978, 31-63.
4. *Derrida J.,* Declarations of Independence, New Political Science, Vol. 7, Iss. 1, 1986, 7-15.
5. *Derrida J.,* Force of Law: "Mystical Foundation of Authority", in: Deconstruction and the Possibility of Justice, *Quaintance M. (trans.), Cornell D., Rosenfeld M., Gray Carlson D. (eds.),* London, 1992, 1-67.
6. *Derrida J.,* Given Time: I. Counterfeit Money, *Kamuf P. (trans.),* Chicago and London, 1992, 10-17, 24-27, 37-48.
7. *Derrida J.,* Specters of Marx, *Kamuf P. (trans.),* New York and London, 1994, 21-26.
8. *Derrida J.,* The Post Card: From Socrates to Freud and Beyond, *Bass A. (trans.),* Chicago & London, 1987, 264.
9. *De Ville J.,* Jacques Derrida: Law as Absolute Hospitality, *Goodrich P., Seymour D. (eds.),* Abingdon, 2011, 88-90, 95-107, 122-126.
10. *Freud S.,* Totem and Taboo, *Brill A.A. (trans.),* London, 1919, ch.4.5.
11. *Jacobson A.J.,* Authority: An Hommage to Jacques Derrida and Mary Quaintance, Cardozo Law Review, Vol. 27, № 2, 2005, 791-795.
12. *Heidegger M.,* Being and Time, *Macquarrie J., Robinson E. (trans.),* Oxford & Cambridge, 1962, 332.
13. *Kafka F.,* The Knock at the Manor Gate, in: The Great Wall of China and Other Pieces, *Muir W., Muir E. (trans.),* London, 1946, 125-126.
14. *Khujadze Zh.,* Hans Kelsen's Basic Norm: Transition from the Transcendental-Logical Condition to a Fiction, Journal of Law № 2, 2022, 5-17.
15. *Legrand P.,* Jacques Derrida Never Wrote about Law, in: Administering Interpretation: Derrida, Agamben and the Political Theology of law, *Goodrich P., Rosenfeld M. (eds.),* 2019, 105-109.
16. *McCormick J.P.,* Derrida on Law: Or, Poststructuralism Gets Serious, Political Theory, Vol. 29, № 3, 2001, 395-398.
17. *Wittgenstein L.,* Tractatus Logico-Philosophicus, *Ogden C.K. (trans.),* London, 1922, 6.522.
18. *Nakhutsrishvili L.,* Ontology and Ethics in Emmanuel Levinas' Philosophy, Tbilisi, 2011, 3-52 (in Georgian).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7693

Mikheil Bichia*

The Content of the Right in the Civil Law

Determining the content of the civil right and its main features is one of the most important issues of civil law. The aim of the research is firstly to critically analyze the theories about a right, and then determine the content of the civil right and its features. We will try to throw light on the methodological foundations of civil rights and the relationship between its legal and factual origins.

Clarifying the issue is important to define the legal nature of civil rights and make out what a subject can protect, where the actual opportunity of a person ends, and from which moment it acquires a legal form. Accordingly, the topic is engrossing from the perspective of legal protection of interests of a subject which provides it with more practical significance.

The research has revealed that theories of rights are flawed and cannot explain the legal nature of rights individually. Therefore, a right should not be reduced to only one component recognized by either one or the other theory. It is appropriate to consider a right in close relation to a duty and distinguish it from the actual possibility. A civil right is studied as an opportunity provided by civil law to perform an action that can be based on both law and contract. This is especially noteworthy within the framework of the principle of "Everything that is not prohibited is permitted". Accordingly, the scope of the concept of civil rights should be much wider than the content of public rights.

Keywords: *Right, Signs of right, Civil Rights, Theories, Criticism*

1. Introduction

One of the important issues in the science of civil law is to clarify the content of civil rights. It is also a condition to determine the concept of civil rights and the scope of its protection. However, before identifying the essence of civil rights, it is appropriate to analyze the theories about a right to define its concept and signs. So, the theoretical and practical significance of the research is considerable.

The main goal of the research is to ascertain the exceptional features of the theories about rights and distinguish both positive and negative aspects of these concepts through their critical analysis. In addition, it is necessary to study the basis of right, its legal nature, and the difference from the actual possibility.

* Doctor of Law, Visiting lecturer of Ivane Javakhishvili Tbilisi State University, Professor of European University (Tbilisi), Expert in Accreditation of Higher Education Programs, Chief Researcher at the Institute of Law, https://orcid.org/0000-0003-2297-0326.

Simultaneously, the research aims to identify the content of civil rights and the extent of its concept by employing the theoretical analysis of rights. In this context, it is essential to explicate the role of the principle of private autonomy in determining the content of civil rights. This is the basis for purifying the scope of the concept of civil rights. Therefore, the research implies not only the content of civil rights but also the study of its main features.

The issue is based on the normative-dogmatic method to thoroughly explore the concept of theories. However, the method of synthesis and analysis is also applied in the research because it is the critical understanding of the theories that can lead to the clarification of the legal content of rights and get the results of the research accentuated by comparing the common features.

2. Critical analysis of the theories of right and the main features of right

2.1. Critical analysis of theories

2.1.1. Theory of Will

The theory of Will was active until the middle of the 19th century and **discussed right with the help of will**. According to the theory, the main component of right is the will of a human to be able to enforce or waive some duty on the part of another person.[1] Windscheid considered right as the power of will conferred by law.[2] In this sense, the freedom of an individual was regarded as the space dominated by the will of the person, that is, the right.[3]

According to the theory of will, the law establishes rules which give a person the opportunity to act. Therefore, the will of a person is decisive for the execution of an order (Befehl). Consequently, Right is the power of will transferred to the subject by law.[4] Thus, the law confers willpower on the subject who exercises the command established by law. **In this way, the order established by law turns into the order of a subject of law in which the will of a person is essential**. Consequently, following Windscheid, the most important component of right is the willpower or will of a free individual.[5]

Birling's "power theory" (Machttheorie) is one of the interesting understandings of the theory of will. It does not distinguish between right and authority. Based on Birling, authority is a law associated with the ability of a person to act the way he desires.[6] In this case, will is necessary for the existence of right. However, this hypothesis fundamentally contradicts the entire set of definitions of

---

1 Magaziner Ya. M., Selected works on the general theory of law, St. Petersburg, 2006, 153 (in Russian).

2 *Vacheishvili Al.*, General Theory of Law, Tbilisi, 2010, 181 (in Georgian); *Windscheid B.,* Pandektenrecht, 3 Aufl., 1873, § 37

3 *Savigny F. C. von*, System des heutigen römischen Rechts, Bn. 1, 1840, § 4, 7.

4 *Windscheid B.*, Lehrbuch des pandektenrechts, 7 Aufl., I Band Frankfurt a.M., 1891, § 37, S. 87 f; *Schorder R.*, (unter Mitarbeit von *Bar fred G. anspeter Hafermark, Dostal C., Bedau M., Moller Ulr., Revermann M.*), Einfuhrung in die Rechtsgeschichte, Quellensammlung zur vorlesung mit erlauterungen,14. Aufl., 2005, 146.

5 *Windscheid-Kipp B.*, Pandektenrecht, 9. Aufl., 1906, § 37; *Reiser L.*, Der Stand der Lehre vom subjektiven Recht in Deutschen Zivilrecht, Juristen Zeitung, 16. Jahrg. Nr. 15/16, 1961, 465.

6 *Surguladze I.,* Government and Law, translated by *Gamkrelidze O.,* Tbilisi, 2002, 94 (in Georgian).

positive legislation because right is often attributed to those subjects who cannot execute a will, for example, an unborn child.[7]

The theory of will exposes several flaws:

a. It ignores that the will should not be a compulsory element of right because sometimes a legally valid will cannot be addressed. For example, a child has the right to inherit but the will expressed by him is not legally sufficient to create a legal result. That is why, a custodian is appointed as the legal representative of a child. Thus, the will is essential not for the existence of a right but for its realization.[8]

b. The will theory cannot explain the essence of right, because if will is an individual mental act, a subject who is not a natural person, cannot have a right.[9]

c. The concept of right should be considered with duty. If the right existed without the duty it would become a purely social phenomenon, not a legal one. However, duty is the tool to distinguish the concept of right from the concept of power, because duty is necessary for determining the concept of right. **Duty acquires a legal character only if there is a corresponding right**; Otherwise, it will not be a legal, but a moral duty.[10]

So, the will theory cannot fully explain the right. A right might include legal power or ability but it is not limited to that.

2.1.2. Theory of Interests

The theory of will was **opposed by the theory of interests, according to which the will necessarily needs a certain goal** because without it the will simply remains devoid of content.[11] Accordingly, the theory of interest explains the **essence of law based on interest**. In this sense, the right is a legally protected interest. Unlike the theory of will, it no longer contradicts the thesis that children do not have a conscious will despite having a right.[12]

The theory of interests (Jhering)[13] combined material and formal basis in the concept of right. The **substantive (material) element refers to the practical purpose of right**, in particular, obtaining benefits, and profits, which is ensured by law. **The formal component considers this goal as a means, to be specific, legal protection,** a lawsuit, or understanding of rights serves to ensure the satisfaction of the interest, therefore, rights are legally protected interests.[14] So, the first is the basis of rights, the second is regarded as a means of its protection.[15]

---

7 Ibid, 96.

8 *Uex R.,* Philosophy of Law: A Very Short Introduction, Tbilisi, 2012, 153-154 (in Georgian).

9 *Gokieli F.*, Right, Journal "Law", No. 8-9, 1992, 65; On criticism of the will, see. *Amiranashvili G.,* Concept and structure of civil rights, Journal "Justice and Law", No. 4, 2015, 140 (in Georgian).

10 *Surguladze I.,* Government and Law, translated by Gamkrelidze O., Tbilisi, 2002, 113 (in Georgian).

11 *Jhering R. von*, Geist deutschen romischen Rechts, III 1, 1. Aufl., 1865, §§ 60, 61; *Reiser L.*, Der Stand der Lehre vom subjektiven Recht in Deutschen Zivilrecht, Juristen Zeitung, 16. Jahrg. Nr. 15/16, 1961, 465.

12 See. *Magaziner Ya. M.,* Selected Works on the General Theory of Law, St. Petersburg, 2006 (in Russian).

13 *Rozhdestvensky A*., Fundamentals of the General Theory of Law: Course of Lectures, 1912, 121 (in Russian).

14 Jhering R. von., Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, 3. Auflage, Leipzig, 3, Teil, 1, Abt., 1877, § 60, 327; Schröder R. (unter Mitarbeit von Haferkamp Fred G. Bär

A right implies the ability of a person to satisfy his/her interests through the authorized action which is ensured by the duty of the other(s). The goals of a legitimate person are achieved by fulfilling rights however, the legal possibilities of a person are limited. They are precisely defined and a person can act only within this framework.[16] This is a social interest recognized by law. **However, all legitimate interests have the status to be protected by law**; The interest is protected by law, which is recognized by the legislator in the way of conferring a right to its bearer as a means of satisfying the interest.[17]

The purpose of a person's right is to satisfy his real and objective interest. The interest from its subjective individual point of view can create a right if it (interest) is desirable and useful only for those who want to fulfill it. Therefore, will and interest are very close. Following the mentioned, Diug correctly concludes that if **a right is a legally protected interest, it must also include the concept of will,** in this case, the sharp contrast between the theories of will and interests is exaggerated.[18]

A **right is** not only an interest, it is **a legally protected interest**; The concept of legal protection defines not only the right but also the situation of the obliged person, whether specifying directly or not, at least indirectly. That is why it is necessary to distinguish interest from its legal protection. Only interest is useless in conveying the legal concept of rights. Using the concept of legal protection can explain both rights and duties, but it is incomplete to explain the right.[19]

In consequence, the theory of interests is not flawless: first of all, **there is a legally protected interest that is not a right, and on the contrary, there is a right that has no interest in its implementation**. For example, the right of ownership of a thing has no value, or the right of a custodian, who should have no interest in transferring the asset of a minor.[20] The theory of interests cannot explain this; **In addition, the right and its individual-psychological experience of feeling belong to different spheres in respect of methodology.** In particular, a right is a non-existing (ideal) event while the experience of an individual is existing (real). i.e. they are events of completely different connotations. The right exists, regardless of whether the subject experiences it or tries to exercise it. For example, an unborn child cannot experience rights, but it may have defined rights.[21] The mentioned right is applied in the Civil Code of Georgia: the right to be an heir (the first sentence of Article 11 of the Civil Code of Georgia). From this point of view, the theory of interests cannot separate the real and non-existing (ideal) events from each other.

Hans peter, Dostal C., Bedau M., Möller, Ulr., Revermann, M., Einführung in die Rechtsgeschichte, Quellensammlung zur Vorlesung mit Erläuterungen, 14. Auflage, 2005, 147 (in German).

15 *Rozhdestvensky A.,* Fundamentals of the General Theory of Law: Course of Lectures, 1912, 121 (in Russian).

16 *Alekseev S. C.,* General Theory of Law, B. 2 т., Moscow, 1982, 114-116 (in Russian).

17 *Krasheninnikov E.,* Interest Protected by Law and Means of Its Protection in the Materials of the Scientific Conference – Issues in the Theory of Protective Legal Relations, Yaroslavl, 1991, 12 (in Russian).

18 *Surguladze I.*, Government and Law, translated by *Gamkrelidze O.,* Tbilisi, 2002, 100-102 (in Georgian).

19 Ibid, 102-103

20 *Magaziner Ya. M.*, Selected Works on the General Theory of Law, St. Petersburg, 2006, 155 (in Russian).

21 See *Gamkrelidze O.,* Irodion Surguladze and his book "Government and Law", Tbilisi, 2002, 21 (in Georgian).

2.1.3. Mixed Theory

It is possible to discuss **the Mixed Theory**[22] by comparing the **theories of interests and will**. In 1890, Bernacik speculated the idea that right must have included both will and purpose as they conditioned each other. Later (in 1892) Elinek identified will and interest as the necessary elements of right. According to Elinek, the right is the power of a human will recognized and protected by law, aimed at the benefit or satisfaction of interest.[23]

Elinek noted that any human act must have the content. The law does not recognize a simple will. **Law provides the content for a human will, protects it, and creates proper conditions, so, a person can easily use this.** The content leads an individual to realize his goals. What is kindness from an objective point of view expresses interest from a subjective point of view. **However, there must be another element in right – will. It is applied to achieving goals realized by an individual and the law**. Elinek believes a will is the material component of the right while goodness (interest) is a formal element.[24] In this sense, the will must be directed to a specific interest, otherwise it can remain devoid of the content. The right cannot be understood only as a legally protected interest. The will can steer an interest and become a form of its realization. Accordingly, the right should be understood as the interest (good) protected by the recognition of human will. **Therefore, recognition of will is perceived as a formal moment of right while interest is a material sign, and their unity creates a synthetic coherence**.[25]

At the same time, the theories of will and interests are considered the right from an individual-psychological perspective, which belongs to the real field. **Accordingly, here the right is understood as an event outside the legal area**. So, this theory is only an attempt to explain the problem more completely. Different legal areas of rights are determined not only by the anatomical, physiological, or psychological characteristics of people but also by the individual structure of the existing legal system **because law and order are legal categories.**[26]

It is correctly acclaimed that if law originates in society, the concept of right should include a social aspect, and a right-holder cannot be an independent person but a member of society. On this basis, the material sign of the right is public and private interests, while the purely formal sign of the right is expressed in the protection of the interest.[27] **Since the purpose of the law is to correlate legal interest with social interest and pave the way for positive actions, this is the legal regulation of public relations**. Therefore, legal interests are also social, but they are auxiliary, "instrumental" in nature, and foster to achieve a social goal.[28] Thus, the right is not separated from social reality; it includes legal and social foundations.

---

22 See *Surguladze I.*, Government and Law, translated by Gamkrelidze O., Tbilisi, 2002, 107 (in Georgian).

23 *Magaziner Ya. M., Selected Works on the General Theory of Law, St. Petersburg, 2006, 155-156 (in Russian).*

24 *Vacheishvili Al.,* General Theory of Law, Tbilisi, 2010, 183 (in Georgian).

25 *Gokiel F.*, Right, Journal "Law", No. 8-9, 1992, 69 (in Georgian).

26 *Gamkrelidze O.*, Irodion Surguladze and his book "Government and Law", Tbilisi, 2002, 25-26 (in Georgian).

27 *Ninidze T.*, Live Icon of Dignity, Journal. "Georgian SSR. Herald of the Academy ", Series of Economics and Law, No. 3, 1987, 64 (in Georgian).

28 Ibid, 69.

The right has one significant feature – its non-use does not change the right and its scope of application. The existence or non-existence of the right does not depend on the manifestation of will by the subject of law.[29]

As said, **the objectivity of rights and duties is expressed in the fact that they do not obey the regularity of real life.** In addition, **law and sociology have their consistency**. If law is explained by sociological regularities, then it will be sociology and not law. As for fact and law, they do not have the same content; They are two different realms of the same reality.[30]

Mixed Theory also has several flaws: a. **In the mixed theory, it is hard to separate will and interest but they are not identical**; b. According to the mixed theory, **right is considered a subjective-psychological and, therefore, a real phenomenon**. This excludes the determination of the legal content of the right, because reasoning in this way goes beyond the scope of legal research, however, in law the legal nature of right is more important than its actual origin. Consequently, the legal nature of the right is not explained in this theory; c. since the mixed theory includes the will and interest theories, it logically reproduces the shortcomings of these concepts.

2.1.4. The Rejection Theory

According to the rejection theory, **the existence of right is rejected**. From this point of view, the right is not considered an independent category, but only one of the modifications of private law.[31] This concept was followed by Diuges who believed that the right should be understood as a relationship between two subjects. Therefore, an **isolated person not have a relationship with others cannot have rights**. Therefore, an individual can have rights only in society. A human is also considered essentially a social being; He/she cannot live without society; He has always lived in society. Hence, if a person can have rights in society, the emphasis on the rights of people isolated from society is inconsistent.[32]

The French scholar Diuges noted that the outdated concept of rights had to be banished from legal science.[33] According to him, the norm of law does not contribute to relations between people or produce any right and duty; they are created only by the power of desire to possess certain things. Following this norm, a man acquires the power to desire, not to possess. The power of will is not a right, it is an objective power of will causing a legal result. **An objective norm of action is perceived as an objective power that belongs to an individual**. At the same time, the individual is obliged to fulfill an objective duty which is already interesting for law. Indeed, a legal norm cannot create a right, but it can create a subjective legal situation as a result of a legal act. **A legal act is a form that is applied by norms to express the will of a subject to create rights**. Accordingly, a legal act produces

---

29 *Gamkrelidze O.,* Introduction I. On Surguladze's work "Authority and Law", Tbilisi, 2002, 20 (in Georgian).

30 Ibid, 30.

31 See *Gokiel F.*, Right, Journal "Law", No. 8-9, 1992, 71 (in Georgian).

32 *Diuges L.*, General Transformations of Civil Law since the Napoleonic Code, translated by Sivers M. M., M., 1919, 16-17 (in Russian).

33 *Duguit L.,* L'Eétat, Le Droit Objectif et Lo Positive, Paris, 1901, 147, cited from the work*: Rozhdestvensky A.,* Mathematical research, part I, 1913, 16 (in Russian).

a legal effect. This legal result is called "subjective legal status" as it arises based on the will of the subject, for example, the legal status of ownership. Therefore, according to Diuges, the concept of right should be replaced by the concept of subjective legal status, because it is more precise.[34]

Comte also rejects the concept of the civil right. By him, a person has a duty to everyone, but no one has a right in essence. In other words, no one has any other right than the right to perform his/her duty.[35]

Rozhdestvensky did not share the opinion of Diuges and noted that **the existence of the right should be determined by the norm of law**. Legal norm does not create a right but it justifies its existence in such a way that gives power to each participant of the legal relationship to acquire, possess, and incline a right. That is why, if the existence of the right is excluded, logically, the actuality of legal norms will lose its meaning. It is significant not to deny the existence of right, but to formulate its legal concept.[36]

A right is neither a legally protected interest nor a legal freedom of the subject. It always reflects the authority granted to the subject. This is its legal origin. In this sense, the right is the action of the subject's legal force or legal power over the object. That is why, a lawyer has to discern a right as a legal power or authority that has nothing to do with actual power. There is no direct connection **between legal and other types of power. Accordingly, if a person has a legal power to exercise his authority, it does not mean that he has actual power simultaneously.** For example, if a child inherits wealth from his father, he has a lot of legal power but he might not have actual power over it. Conversely, a slave may have very significant actual power but he/she does not have any legal power at all.[37]

According to classical doctrine, right includes a prerogative that can be applied by an individual to exercise power over a thing or about other people. Following social doctrine, the law does not recognize or regulate anything except different legal situations between individuals, which are defined by restrictions, conditions, and duties as well as by freedom, power, or rights.[38]

In the end, the Rejection Theories are not flawless either: firstly, it is outlined in the creation of one **extreme from another and the exclusion of the existence of right** instead of explaining its essence. It leads to avoiding solving the problem; Second, by joining **the relations a person gains rights. Talking about its absence means the absence of a perso**n. He/she is a member of society who obtains rights during the interaction with others to protect his interests and not to mistreat the interests of others by applying his right. Thus, arguing about the absence of the right is unjustified and can take us away from the main goal – to determine the essence of the right.

---

34 *Rozhdestvensky A.*, The Theory of Subjective Public Rights: A Critical-Systematic Study, Part I. Main Questions of the Theory of Subjective Public Rights, M., 1913, 16-17 (in Russian).

35 *Comte A.*, System of positive politics, ed.1, 1890, (in French) cited from the work: Diuges L., General Transformations of Civil Law since the Napoleonic Code, translated by Sivers M. M., M., 1919, 15 (in Russian).

36 *Rozhdestvensky A.,* The Theory of Subjective Public Rights: A Critical-Systematic Study, Part I. Main Questions of the Theory of Subjective Public Rights, M., 1913, 20 (in Russian).

37 Ibid, 22-24.

38 *Morandier L. J., Civil Law of France, translated by Fleishitz E. A., T. 1, M., 1958, 39-40 (in Russian)..*

2.2. The main features of the right

By analyzing the theories about the right, it is possible to distinguish the main features of the right.

a) **The right must be acquired by law**. An authority is not recognized as a right by law if it is admitted by custom or morality.

b) **The right must belong to a person** (individual and legal entity). The Civil Code prevents the existence of rights without subjects;

c) **Right is the power of will**. It provides the right holder with the ultimate decision-making power to perform a certain action of his own free will. In addition, the right protects the freedom of individuals;

d) **The purpose of rights is to satisfy human interests**.[39]

Consequently, right is an entitlement to satisfy certain interests. It coexists with duty. **A right cannot exist without a duty** and vice versa which makes a correlation[40] between them. The duty is a true source of rights that contributes to fulfilling the right to demand. This connection is stipulated by necessity. Accordingly, **the right, which does not coincide with any duty, loses the nature of a legal concept and during its implementation becomes a bare force**, a coercion that is used by one subject against another. The concepts of right and duty cannot exist separately from each other.[41]

Rights and obligations are formed with the origin of a legal relationship. **A legal relationship is infected by legal fact that makes rights and obligations connected to a specific subject and object**.[42] Then arises a question: can the right exist outside of the civil legal relationship?

For O. Ioffe **the right taken outside the legal relationship turns into the so-called "social zero"**. That is why the study of rights and duties is successful only if rights and duties are presented as the elements of a legal relationship and the legal content of this relationship.[43] The main feature of right is that the ability to act is recognized by law; A right must be opposed to a duty. If the right is considered within the legal relationship, as the right coexists with the duty, the duty cannot be outside the legal relationship.

3. The capacity for a conception of civil rights

3.1. The term "civil rights"

First of all, it should be determined what relationship exists between "objective right" and "subjective right", because this identification can logically determine the aptness of using the term "civil right".

---

39 See. *Brox H.*, Allgemeiner Teil des Bürgelichen gesetzbuchs, sechste auflage, Köln-berlin-münchen, 1982, 242-243; *Brox H., Walker W.-D.*, Allgemeiner Teil des BGB, 30. Auflage, München, 2006, 318-319; *Bichia M.*, Legal Obligational Relations, 3rd Ed., Tbilisi, 2020, 19 (in Georgian).

40 See *Surguladze I.*, Government and Law, translated by Gamkrelidze O., Tbilisi, 2002, 134-139; *Kapanadze O.*, Historical Review of Civil Rights Theories, Journal "Young Lawyers", No. 5, 2016, 76 (in Georgian).

41 See. *Surguladze I.*, Government and Law, translated by Gamkrelidze O., Tbilisi, 2002, 110 (in Georgian).

42 *Bichia M.*, Methodological Issues of Civil Legal Relations, TSU "Journal of Law", No. 1-2, 2010, 96-97 (in Georgian).

43 See. *Ioffe O. S., Shargorodsky M. D.*, Questions of the Theory of Law, M., 1961, 227, 229 (in Russian).

In foreign legal literature, law and rights are expressed by one term – "right" (Recht, pravo). Therefore, to find the dissociation between "law" and "right", it was necessary to add the term "subjective" or "objective" to the right.[44] For example**, German lawyers use "law" with the term "objective right" and someone's right with the term "subjective right"**.[45]

Thus, "objective right" includes legal norms that may establish the requirement of one person to protect the good of another.[46] This requirement is reinforced in the law of private individuals. Subjective right is the individualization of these norms. It is an authority that provides the possibility of doing something. So, there is such a relationship between law and right: the existence of right depends on the content and nature of law. Based on implementing norms subjects can acquire certain rights.[47]

Georgian language does not need conveying the concepts of "subjective right" and "objective right", because "objective right" is replaced by the term "law", and "subjective right" by the term "right".[48] However, as a right belongs to individuals, it is subjective[49] and it does not require any additional term.[50]

The Civil Code of Georgia applies the term "civil right". For example, according to the first part of Article 10 of the Civil Code of Georgia, the exercise of civil rights does not depend on the political rights provided for by the Constitution or other public law laws. The legislator establishes a norm for ensuring the uniformity of terms, which means that the terms used in the Civil Code shall be used uniformly in all other legal acts (Article 1519 of the Civil Code of Georgia). Therefore, it is preferable to use the term "civil right".

3.2. The essence of civil rights

The content of the legal relationship **includes the right (legal possibility of action) and duty (necessity of action established by law) of the subjects.**[51] German literature emphasizes that the private legal relationship contains the right and its interrelated duty.[52] A right takes the form of a

---

44 *Mautner T.*, How Rights Became "Subjective", in: RationJuris, Vol. 26, No.1, 2013, 114.

45 *Sharon Byrd B., Hruschka J.*, Kant's Doctrine of Right: A Commentary, Cambridge, 2010, 28; *Bichia M.*, The Concept and Content of Civil Legal Relations, Doctoral Seminar Paper, Tbilisi, 2009, 21-22 (in Georgian).

46 *Fikentscher W., Heinemann A.*, Schuldrecht, 10. Auflage, Berlin, 2006, 19.

47 About the subjective and objective right, see, *Ioffe O.S.*, Soviet Civil Law, General Part. Right of Property General Doctrine of Obligations L., 1958, 70-71; (in Russian) *Bydlinski P.* (Hrsg.), Bürgerliches Recht, Springers Kurzlehrbücher der Rechtswissenschaft, Bürgerliches Recht, Band I, Allgemeiner Teil, dritte, überarbeitete Auflage, WienNewYork, 2005, 13, 62.

48 See. *Chanturia L.*, General part of civil law, Tbilisi, 2011, 98 (in Georgian).; *Belov V. A.*, Civil Law, Book. I, General Part, Introduction to Civil Rights, 3rd edition, Moscow, 2014, 23-27 (in Russian).; For another opinion, see *Kereselidze D.*, The most general systematic concepts of private law, Tbilisi, 2009, 76-80 (in Georgian).

49 *Mautner T.*, How Rights Became "Subjective", in: Ration Juris, Vol. 26, No.1, 2013, 112.

50 *Fikentscher W., Heinemann A.*, Schuldrecht, 10. Auflage, Berlin, 2006, 19.

51 *Alekseev S.*, General Theory of Law. vol. II, Moscow, 1982, 114 (in Russian).

52 See. *Brox H.*, Allgemeiner Teil des Bürgelichen Gesetzbuchs, Sechste Auflage, Köln-Berlin-München, 1982, 240; *Brox, H., Walker W.-D.*, Allgemeiner Teil des BGB, 30. Auflage, München, 2006, 315.

request and implies a freedom or an opportunity that an entitled person can use for good, for bad, or not at all. Rights provide individuals with the power to require their interests to be protected.[53] A person is given the right to satisfy his/her interests. Here the influence of the Theory of Interests is obvious but it is important to highlight the active role of an authorized person.[54]

A right is the means, **extent,** and **scope of the possible action provided by law**. In addition, the right should mean asserting the request to the debtor and ensuring its voluntary fulfillment within the regulatory relationship. Besides, the possibility of performing the permitted actions is provided by the performance[55] of a debtor. This is natural because the right is opposed to the corresponding duty. However, the right and duty work for the same goal, the interests of the person authorized by law.[56] Thus, **the right can be interpreted as the possibility of the action of a specific person ensured by law and the performance of the debtor.**[57]

In German law, private law is considered as an essential element of private legal relations. It includes the power[58] or authority[59] entitled to the subject by private law.

A civil right is a legal power (possibility) granted to the participant of civil relations by civil law to protect one's interests, including through the court. **Civil rights are enshrined in the Civil Code, agreements, and statutes of legal entities**.[60]

3.3. The role of private autonomy in determining the capacity for a conception of civil rights

Private autonomy involves the self-regulation of relationships by people and prohibits the intervention of a state or third parties. In this case, the relationship is regulated based on the free will of a person which is legally binding. Accordingly, private autonomy is featured with the **two most fundamental characteristics: (a) the free will of individuals and (2) the recognition of will as binding by law**. Legal consequences arise as a result of providing the created relationship with such an effect by law. Hence, will have a legal force because the law recognizes the autonomous will of a person.[61]

Civil law applies the principle ” everything which is not forbidden is allowed". i.e. **Freedom in civil law is limited by law** (Part 2 of Article 10 of the Civil Code). Additionally, the **imperative norms[62] of the civil law protect the freedom of others from the abuse of rights and establish certain limits**, which should not be exceeded by a subject. Therefore, the law also determines the

---

53 *Menke C.,* Subjektive Rechte: Zur Paradoxie der Form, Zeitschrift für Rechtssoziologie, 29, Heft 1, 2008, 90.

54 See. *Bydlinski P.*, Grundzüge des Privatrechts für Ausbildung und Praxis, 7. Auflage, Wien, 2007, 14.

55 *Ioffe O. S.*, Legal relations under Soviet Civil Law, L., 1949, 49, 53; *Bratus S.N.*, Subjects of Civil Law, M., 1950, 11 (in Russian).

56 *Ioffe O. S., Shargorodsky M. D.,* Questions of the Theory of Law, M., 1961, 223.

57 *Bratus S.N.*, Subjects of Civil Law, M., 1950, 13 (in Russian).

58 *Brox H.*, Walker W.-D., Allgemeiner Teil des BGB, 30. Auflage, München, 2006, 315-316.

59 *Bork R.*, Allgemeiner Teil des Bürgerlichen Gesetzbuchs, 2. Auflage, Tübingen, 2006, 116.

60 *Chanturia L.,* General part of civil law, Tbilisi, 2011, 98 (in Georgian).

61 *Artunç Ç. E.*, Vertragsfreiheit als Erscheinungsform der Privatautonomie im deutschen Zivilrecht, Annales de la Faculté de Droit d’Istanbul, XL, N57, Yıl 2008, 296-297.

62 *Jorbenadze S.*, Freedom of Contract in Civil Law, Tbilisi, 2017, 85 (in Georgian).

scope of private autonomy. The action resulting from private autonomy can have legal effects only when a legislator gives it freedom. Consequently, the legislator is allowed to limit private autonomous action.[63] The purpose of civil laws is to ensure the freedom of civil circulation in the territory of Georgia unless the exercise of such freedom prejudices the rights of third parties (Article 9 of the Civil Code of Georgia).

Even within the framework of private autonomy, a person has the freedom to regulate private legal relations with others through contracts. This freedom includes the freedom to conclude a contract, terminate contractual relations, and qualify the content and form of the contract.[64] **In Civil law, disposition must derive from law**. By circumventing the law, a subject cannot become a bearer of disposition, acquire, exercise, or enforce his/her rights.[65]

An obvious manifestation of the autonomy of parties is the right of private law entities to conclude **such an agreement that is not provided by law but does not contradict it**. For example, an essential condition of a contract is that one party invests and another one profits from performing certain works.[66]

4. Conclusion

As research has indicated, each theory has flaws. The **theory of will considers a will to be a central and necessary component of right**, however, the right cannot be reduced to the will. Will is an individual-psychic act, a real event. In addition, the theory of will does not specify that the right should be considered together with the duty, which determines the ideal (legal) nature of a right. Thus, **the theory of will considers the right to be a non-legal (factual) event**, which takes the discussion beyond the science of law.

According to the theory of interests, an interest is a real psychological phenomenon. The main interest of a **right is combining subjective-psychological aspects**. However, the psychological perception of a right belongs to the real realm, and the right to the ideal. Therefore, events from **the area of the already non-existent and existing – are disarranged in the theory of interests**.

Mixed Theory was an attempt to explain the essence of a **right by comparing the theory of interests with the theory of will but unsuccessfully.** In the mentioned case the will and the interest are not separated, and the legal nature of a right is not analyzed. Mixed Theory replicates the flaws of theories of will and interests as well.

Rejection Theory moves from one e**xtreme to another extreme denying the existence of a right and moving away from the main task – to explain the essence of a ri**ght.

---

63 *Artunç Ç. E.,* Vertragsfreiheit als Erscheinungsform der Privatautonomie im deutschen Zivilrecht, Annales de la Faculté de Droit d'Istanbul, XL, N57, Yıl 2008, 296-298.

64 *Huemer D., Lenz W., Kerschner F., Lux D., Schlager J., Szep C., Wittmann E., Schlager S., Trausner M.,* Handbook of Contract Drafting: Civil Law, Corporate Law, Tax Law, For Practice and Study, edited by Kerschner F., 2013, 29.

65 *Khetsuriani J.*, Functions of Civil Law, Vol. 1995, 102 (in Georgian).

66 Ruling No. As-1300-1320-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia dated March 27, 2012 (in Georgian).

Research shows that law is not an authority established by custom or morality; **it must be recognized by law to be considered a right.** However, a right must belong to the person and includes the power of will that a person uses to satisfy his interests. **The fulfillment of the right is ensured by the duty of the obliged person because the right exists only together** with the duty as they are related categories.

It has been decided that the **usage of the term "civil right" is more appropriate than "subjective civil right". This develops from the principle of ensuring the unity of** concepts recognized by law. In addition, it has been revealed that **civil rights are the legal power conferred on a subject of civil relations by civil law to require a certain action, refrain from** acting, and get protected by the court.[67] This power is based on both civil law and statutory contracts.

So, compared to public rights, the **concept of civil rights is much more extensive**. The subject of a private legal relationship has the authority to carry out any action not prohibited by law. Nevertheless, a person's freedom of action is limited by law and the rights of third parties, because the subject can act freely as long as the interests of third parties are not violated.

Bibliography:

1. Civil Code of Georgia, 26/06/1997 (in Georgian).
2. *Alekseev S.C.*, General Theory of Law, V. 2 vols., Moscow, 1982, 114-116 (in Russian).
3. *Amiranashvili G.*, Concept and structure of civil rights, Journal "Justice and Law", №4, 2015, 140 (in Georgian).
4. Annales de la Faculté de Droit d'Istanbul, XL, N57, Yıl 2008, 296-298.
5. *Artunç Ç. E.*, Vertragsfreiheit als Erscheinungsform der Privatautonomie im deutschen Zivilrecht,
6. *Belov V. A.*, Civil Law, T. I, General Part, Introduction to Civil Law, 3rd ed., Moscow, 2014, 23-27 Annales de la Faculté de Droit d'Istanbul, XL, N57, Yıl 2008, 296-298 (in Russian).
7. *Bichia M.*, Legal Obligational Relations, 3rd ed., Tbilisi, 2020, 19 (in Georgian).
8. *Bichia M.*, Methodological Issues of Civil Legal Relations, TSU "Journal of Law", № 1-2, 2010, 96-97 (in Georgian).
9. *Bichia M.*, The Concept and Content of Civil Legal Relations, Doctoral Seminar Paper, Tbilisi, 2009, 21-22, (in Georgian).
10. *Bork R.*, Allgemeiner Teil des Bürgerlichen Gesetzbuchs, 2. Auflage, Tübingen, 2006, 116.
11. *Bratus S.N.,* Subjects of Civil Law, M., 1950, 11, 13 (in Russian).
12. *Brox H.*, Allgemeiner Teil des Bürgelichen Gesetzbuchs, Sechste Auflage, München, 1982, 242-243.
13. *Brox H., Walker, W.-D.*, Allgemeiner Teil des BGB, 30. Auflage, München, 2006, 318-319.
14. *Bydlinski P.* (Hrsg.), Bürgerliches Recht, Springers Kurzlehrbücher der Rechtswissenschaft, Buergerliches Recht, Band I, Allgemeiner Teil, dritte Auflage, WienNewYork, 2005, 13, 62.
15. *Bydlinski P.*, Grundzüge des Privatrechts für Ausbildung und Praxis, 7. Auflage, Wien, 2007, 14.
16. *Chanturia L.*, General part of civil law, Tbilisi, 2011, 98 (in Georgian).

[67] *Chanturia L.*, General Part of Civil law, Tbilisi, 2011, 98 (in Georgian).

17. *Comte A.*, System of positive politics, ed. 1, 1890, 361 (in French) cited from the work: *Diuges, L.*, General Transformations of Civil Law since the Napoleonic Code, translated by Sivers M. M., M., 1919, 15 (in Russian).
18. *Diuges L.*, General Transformations of Civil Law since the Napoleonic Code, translated by *Sivers M. M.*, M., 1919, 15-17 (in Russian).
19. *Duguit L., The State, objective law and positive law, Paris*, 1901, 147, (in French) cited from the work: *Rozhdestvensky A.*, The Theory of Subjective Public Rights: A Critical-Systematic Study, Part I. Main Questions of the Theory of Subjective Public Rights, M., 1913, 16 (in Russian).
20. *Fikentscher W., Heinemann A.*, Schuldrecht, 10. Auflage, Berlin, 2006, 19.
21. *Gamkrelidze O.*, Irodion Surguladze and his book "Government and Law", Tbilisi, 2002, 20-21, 25-26 (in Georgian).
22. *Gokieli F.*, Right, Journal "Samartali", No. 8-9, 1992, 65, 69, 71 (in Georgian).
23. *Huemer D., Lenz W., Kerschner F., Lux D., Schlager J., Szep C., Wittmann E., Schlager S., Trausner M.*, Handbuch Vertragsgestaltung: Zivilrecht, Geselschaft, Steuerrecht, Für Praxis und Studium, herausgegeben von *Kerschner F.*, 2013, 29.
24. *Ioffe O. S.*, Legal relations under Soviet Civil Law, L., 1949, 49, 53 (in Russian).
25. *Ioffe O. S., Shargorodsky M. D.*, Questions of the Theory of Law, M., 1961, 227, 229 (in Russian).
26. *Ioffe O. S.*, Soviet Civil Law, General Part. Property Right. General Doctrine of Obligations, L., 1958, 70-71 (in Russian).
27. *Jorbenadze S.*, Freedom of Contract in Civil Law, Tbilisi, 2017, 85 (in Georgian).
28. *Jhering R. von*, Geist deutschen romischen Rechts, III 1, 1. Aufl., 1865, §§ 60, 61.
29. *Jhering, R. von,* Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, 3. Auflage, Leipzig, 3, Teil, 1, Abt., 1877, § 60, 327.
30. *Kapanadze O.*, Historical Review of Civil Rights Theories, Journal "Young lawyers", № 5, 2016, 76 (in Georgian).
31. *Kereselidze D.*, The most general systematic concepts of private law, Tbilisi, 2009, 76-80 (in Georgian).
32. *Khetsuriani J.,* Functions of civil law, Tbilisi. 1995, 102 (in Georgian).
33. *Krasheninnikov E.*, Interest Protected by Law and Means of Its Protection in Materials of the Scientific Conference – Issues in the Theory of Protective Legal Relations, Yaroslavl, 1991, 12 (in Russian).
34. *Magaziner Ya.M.*, Selected Works on the General Theory of Law, St. Petersburg, 2006, 153, 155-156 (in Russian).
35. *Mautner T.*, How Rights Became "Subjective", In: Ration Juris, Vol. 26, No1, 2013, 112.
36. *Menke C.*, Subjektive Rechte: Zur Paradoxie der Form, Zeitschrift für Rechtssoziologie, 29, Heft 1, 2008, 90.
37. *Morandier L. J.*, Civil Law of France, translated by *Fleishitz E. A.*, T. 1, M., 1958, 39-40 (in Russian).
38. *Ninidze T.*, Live Icon of Dignity, Journal "Georgian SSR. Herald of the Academy", Series of Economics and Law, No. 3, 1987, 64 (in Georgian).
39. *Reiser L.*, Der Stand der Lehre vom subjektiven Recht in Deutschen Zivilrecht, Juristen Zeitung, 16. Jahrg. Nr. 15/16, 1961, 465.
40. *Rozhdestvensky A.*, Fundamentals of the General Theory of Law: Course of lectures, M., 1912, 121 (in Russian).

41. *Rozhdestvensky A.*, The Theory of Subjective Public Rights: A Critical-Systematic Study, Part I. Main Questions of the Theory of Subjective Public Rights, M., 1913, 16-17, 20, 22-24 (in Russian).
42. Ruling No. As-1300-1320-2011 of the Civil Affairs Chamber of the Supreme Court of Georgia dated March, 27.2012 (in Georgian).
43. *Savigny F. C. von*, System des heutigen römischen Rechts, Bn. 1, 1840, § 4, 7.
44. *Schorder R.,* (unter Mitarbeit von *Bar fred G. anspeter Hafermark, Dostal C., Bedau M., Moller Ulr., Revermann M.*), Einfuhrung in die Rechtsgeschichte, Quellensammlung zur vorlesung mit erlauterungen,14 (neu barbeitete) Aufl., 2005, 146.
45. *Sharon Byrd B., Hruschka J.,* Kant's Doctrine of Right: A Commentary, Cambridge, 2010, 28.
46. *Surguladze I.*, Government and Law, translated by *Gamkrelidze O.*, Tbilisi, 2002, 94, 96, 100-102, 110, 134-139.
47. *UEx R.*, Philosophy of Law: A Very Short Introduction, Tbilisi, 2012, 153-154 (in Georgian).
48. *Vacheishvili Al.*, General theory of law, Tbilisi, 2010, 181, 183 (in Georgian).
49. *Windscheid B.,* Lehrbuch des pandektenrechts, 7 Aufl., I Band Frankfurt a.M., 1891, §37, S. 87 f.
50. *Windscheid B.,* Pandektenrecht, 3 Aufl., 1873, §37.
51. *Windscheid-Kipp B.,* Pandektenrecht, 9. Aufl., 1906, § 37.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7694

Tamar Mskhvilidze*

Lex situs, as a Regulative Principle of the Right to the Object of Cultural Heritage

Unethical, immoral trafficking of cultural property is illegal in most states. The commercial imperative is not responsive to the cultural flow, the importance of inter-generational transmission of culture, or the need to take control over the free movement of cultural property. The demand for antiquities greatly exceeds the diminishing legitimate supply. Suppliers (robbers, dealers, brokers) evade the law when making transnational transactions. Private international law can play a vital role in regulating the cross-border transfer of cultural goods.

Keywords: *Choice of Law, Jurisdiction, Illegal trade in cultural objects, The Bona Fide Purchaser, The Legality of an object.*

"Since physical cultural heritage is one of the world's most important non-renewable resources, a special effort is needed to redress the imbalance between our needs and its protection."[1]

1. Introduction

Cultural objects form separate classes of objects that speak to the human condition and reflect the life conditions of individuals and communities. People tend to develop an emotional attachment to antiquities. Defining art is quite difficult. It has been called an "unimaginable resource" that can make everything visible and clear.[2] The free and joyous activity creates art, transforms experience, or alleviates suffering.[3] Its effect can make a bulwark against an oppressive social order or prompt us to pursue cooperation.[4] Globalization has led to a rise of an interest in the economic exploitation of cultural heritage, and the effects of the liberalization of trade in goods and services in a market economy have affected cultural identity and diversity. Cultural heritage is admitted as a mechanism for sustainable enhancement and an important tool for the economy of developing countries. In terms of the evolution of international trade, the media, and technology, local cultures attract more

* Doctor of Law, assistant professor of Akaki Tsereteli State University, senior researcher-collaborator of the Law Institute of the European University. https://orcid.org/0000-0001-6795-1941.

1 *Bernard M., Jokilehto F. Jukka.,* Management Guidelines for World Cultural Heritage Sites, ICCROM, Second Edition, 1998, Rome.

2 *Baudrillard J.,* The Conspiracy of Art, tr A Hodges, The MIT Press, 2005,65.

3 *Gilkey L.B.,* Can Art Fill the Vacuum in D Apostolos-Cappadona (ed), Art, Creativity and the Sacred, 1996, 187-189.

4 *Tolstoy L.,* What Is Art? tr A Maude The Brotherhood Publishing Company, 1898, 210.

attention.[5] Cultural heritage law is a conceptual framework in a legal form and mirrors the trends and development of international cultural law and its interaction with other areas of law. It emerged as a separate category of law in 1990. The cultural component of the cultural heritage is capable of carrying a composite meaning that embraces the tangible results of cultural activities, the processes of artistic and scientific creativity, and the ways of life of groups and communities.[6] Today's art market is a multibillion-dollar industry. The sale of art objects is an intercontinental, transnational trade and easily crosses national borders.[7] The tentacles of illicit trade permeate the cultural life of society in both developed and developing economies. Cultural trafficking replaces art and cultural objects. Traffickers try to avoid legal claims by moving cultural heritage objects. The sale of illegally obtained objects in the art market worldwide is an important commercial activity, with a large number of dealers involved in the international trade of this type of product.

Private international law is called upon to assert its role in the international market for antiquities and art. The true owner (individuals, museums, or businesses) or the source state tries to obtain restitution or return of an object that has been stolen, looted, excavated, or smuggled into another jurisdiction. Most of the crimes do not meet with criminal punishment. The owners have to prefer civil actions. Due to illegally removed archaeological or cultural objects, states or owners file a lawsuit in the country of illegal trade or transit where the conflicts are regulated by the rules of private international law. A defendant with prior knowledge of an impending claim can relocate a cultural object to avoid the establishment of jurisdiction based on the location of the object. Protection encompasses interim measures that are designed to prevent action to evade a return procedure after the unlawful removal of a cultural object from the territory of a particular state.[8] Cultural heritage law

---

5 *Belder L.,* The legal protection of cultural heritage in international law and its implementation in Dutch Law, 2013, 24.

6 Roodt *C.,* The Role of Private International Law in the Protection of Art and Cultural Objects, 2015, 3, 6.

7 In the report of the UNESCO Institute for Statistics on the International Flow of Cultural Goods and Services, cultural heritage is discussed as the so-called Part of the "basic cultural goods". In 2002, legal trade in cultural goods reached 3.7% of the total "major cultural goods" and amounted to $1,807.4 billion in exports and $2,644.2 billion in imports. The EU is the market leader in both imports and exports of heritage goods. In 2005, the EU exported 87% and imported 38.5%, while the US exported 9.4% and imported 54%. In 2008, global sales of fine and decorative arts comprised €42.2 billion which is 12% less than the peak of €48.1 billion in 2007. As a result of the global recession, in 2009 sales of decorative arts comprised €42.2 billion which is 12% less than the peak of €48.1 billion in 2007. As a result of the global recession, in 2009 sales decreased by approximately 26% to 31.3 billion euros. In 2010 Art market was considered to be growing again, due to the important role of China. 6 billion euros of sales came to the auction which was 23% of the global market. Today, the internet has become an important platform for art trade. The increase in the value of cultural goods, facilitated by the development of transportation and communication, led to the illegal export of antiquities and cultural objects. The annual value of this new form of illegal global industry is over a billion dollars. According to Interpol, this illegal international market is second only to drug trafficking and arms trade. In the EU's 2012 Trafficking Report, the illegal art trade is listed as one of the largest criminal trades. <http://www.interpol.int/en/Crime-areas/Works-of-art/Frequently-asked-questions> [21.09.2023]; *Belder L.,* The Legal Protection of Cultural Heritage in International Law and its Implementation in Dutch Law, 2013, 66.

8 *Roodt C.,* The Role of Private International Law in the Protection of Art and Cultural Objects, 2015, 16-17.Transnational trafficking of cultural property through clandestine excavations or illegal removals has become a major problem. Many sites of ancient civilizations have been recklessly looted and are already

greatly influences the choice of law concept and its scope. Private international law, to protect art and cultural objects, can offer different models and guidelines for fighting against illicit trade. Both disciplines manage global legal diversity in the context of merging private and public law. Private international law defines the rights of cultural institutions, owners, owners, dealers and traffickers.[9]

2. The Context in Which Private International Law Meets Cultural Heritage

Iran v. Berend, one of the most conspicuous cases[10] concerns the permanent deprivation of ownership of cultural heritage, the extremely enduring problem of efficient regulation in the illegal market of treasure, and the ineffective measures to prevent the alienation and trade of the items on the black market. In a recent case before the High Court in London, a dispute over the antiquity of the ancient city Persepolis involved the possibility of enforcing Iran's national patrimony law under English conflict of laws principles. However, the judge declined to apply the principle of renvoi. If he had held for Iran under this conflict of laws theory, perhaps the private law of England and Wales would have become a powerful basis for source nations seeking to enforce their national patrimony declarations abroad.

The case concerned a fragment of an Achaemenid limestone relief, carved in the first half of the fifth century B.C. The carving had been buried from the time of the invasion of Alexander the Great until 1932 when it was excavated by Ernst Herzfeld. Persepolis is a historic monument, and many Iranians view Persepolis in much the same way as the Greeks view the Acropolis.[11]

In 1974 Denyse Berend, a French citizen, purchased the relief at an auction in New York through an agent. For 30 years the limestone relief hung in her Paris home. but on April 19 an injunction was granted in favor of Iran which sought to block the sale temporarily. Under certain legal provisions, the discussion about the alienation of the object was postponed until the final consideration of the case. Iran sought the return of the object as a part of a national monument. Berend defended her claim for ownership on three grounds. First, she argued the fragment should be classified as movable property. Under English conflict of laws regulation, French law should govern the dispute; because under the Lex situs principle, Berend obtained title only when she took delivery of the object in France, in November 1974. Second, Berend also argued that she took possession in good faith and obtained a good title under article 2279 of the French Civil Code. Thus, she would have obtained a title by prescription under article 2262 of the French Civil Code.[12]

---

irretrievably lost to human cultural heritage and future research. Not only is this a frequent attack on people's cultural heritage, but it is also a growing source of funding for war and terrorist activities in conflict zones. Press Office of the Federal Government Commissioner for Culture and the Media / Press and Information Office of the Federal Government, 11044 Berlin, Key aspects of the new Act on the Protection of Cultural Property in Germany, 2016, 6 (in Georgian).

9 Roodt *C.,* The Role of Private International Law in the Protection of Art and Cultural Objects, 2015, 35.

10 *Fincham D.,* Rejecting Renvoi for Movable Cultural Property: The Islamic Republic of Iran v. Denyse Berend International Journal of Cultural Property, 2007, 111-116. *Routledge C. F.,* International Law and the Protection of Cultural Heritage, 2010, 151.

11 In theory, many scholars suspect that the reliefs inspired the sculptors who created the Parthenon. *Sadigh S.,* Cultural Heritage Network, Court of London Ignores Iran's Ownership of Achaemenid Bas-relief, 2007, 132.

12 *Fincham D.,* Rejecting Renvoi for Movable Cultural Property: The Islamic Republic of Iran v. Denyse Berend International Journal of Cultural Property, 2007, 112.

Initially, Iran argued that the fragment should be classified as immovable property. When it was sitting in Persepolis, it was hardly movable, at least until it was cut away. This argument was rejected by the judge, however, he made clear that as a matter of English and French law, the fragment was to be characterized as movable property. Forced to admit that the object was movable, Iran argued that the English court should have applied French international private law and used the doctrine of renvoi. Renvoi describes the situation in which a court appeals the material and conflict of law regulations of a foreign state which may sometimes refer back to the law of a third nation, which was Iran in this case. In introducing renvoi, Iran also argued that a French Judge would find an exception to the general Lex situs rule and apply Iranian law by looking to the policy embodied in some international agreements to which France has agreed in recent years, including the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. Iran asserted that a French judge should have applied Iranian law in these circumstances because the relief was taken from Persepolis after 1932. Renvoi has never been applied to movables in English law. Justice framed the issue as follows: as a matter of the English conflict of laws rules, in determining the question of title to the fragment as movable property situated in France, will the English court apply only the relevant substantive provisions of French domestic law or apply the relevant international private law?[13]

Iran indicated a general desire to apply the rules of the nation in which an object is located, however, to get this result, the court would have to invoke the rather difficult and controversial doctrine of renvoi. An English judge ruled out the use of a reference to movable cultural property. He noted that the Lex situs norm or the location of the object determined the application of French conflict of law rules. In this case, a defendant acting in good faith would have acquired title to the fragment by taking possession of it in November 1974.

Ultimately, the English judge had to interpret the French law. The judge found it less likely to apply Iranian law by the French court. Based on the testimony of two French legal experts, the court presented several considerations why the French side would deny it. First, there was no precedent for such an application in France. Second, by not acting to incorporate the UNESCO convention into domestic law French legislature strongly indicated its unwillingness to be bound by its provisions. Third, the application of the Iranian law would mean that there were no limitations provisions in the case. Fourth, the Iranian legislature would not have any provisions allowing for compensation to Berend for her purchase of the relief in good faith.[14]

In the case, *Government of Peru v. Johnson,* the Government of Peru,[15] plaintiff in this action, contended that it was the legal owner of eighty-nine artifacts, supposedly stolen or illegally excavated pre-Columbian gold, ceramic, and textile artifacts. Peru, following its law, asserted pre-Columbian sites in the country to be the property of the state. The US federal district court rejected Peru's request

---

13 *Fincham D.,* Rejecting Renvoi for Movable Cultural Property: The Islamic Republic of Iran v. Denyse Berend International Journal of Cultural Property, 2007, 112.

14 Ibid., 114,115.

15 *Fincham D.,* How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property, Columbia Journal of Law and the Arts, 2009, 117-118; *Routledge C.F.,* International Law and the Protection of Cultural Heritage, 2010, 151.

because the state failed to prove whether the law applied to the excavation of the objects. According to the law of Peru, artifacts in historical monuments, including unregistered artifacts, are the property of the state. This rule of law could not affect the judge's reasoning noting that "things will remain in a private collection, such things can be transferred through a gift deed, in law or will." Conforming to the court decision, it could not sufficiently establish whether Peru had ever tried to reclaim ownership of the items before they were removed from the country. Thus, Peruvian law did not provide much more than export restrictions.

3. The Right to Own a Cultural Object in Private International Law

The trade-in cultural objects in liberal capitalist societies are characterized by the commercial imperative that the bona fide purchaser of a moveable object should gain the right to ownership regardless of provenance. The market facilitates the ease of ownership and the development of commerce in many countries around the world. The norms of conventional business may apply to the transfer and exchange of many art forms, but the protection of museum exhibits, the pieces obtained on the black market, and some forms of local cultural heritage require different rules and approaches.[16] This feature is most prominent at art fairs where culture is a globally traded commodity, the market largely unfettered, and the mechanisms keeping illegal self-interests in check completely ineffective in capitalist markets.[17] The transboundary transfer of a material cultural object deprives the true owner of the right to his ownership and the object loses its special status because the state cannot control its export. Import and export control measures as a normative basis for international regulation are controversial because a state might have to establish ownership by filing a lawsuit. A common law legal system provides a country with a right to ownership of undiscovered archaeological objects is a recognized basis for a claim for restitution. The validity of transferring movable property is regulated by the widespread principle of Lex situs: the law of the jurisdiction where the object was located at the time of the transaction.[18] The principle of Lex situs affects the right to transfer property and refers to the law of that area where the item was transferred. It can make the individuality of a cultural object ineffective. The court of the country can avoid this consequence after it decides to apply foreign law

[16] For example, a purchaser of cultural property in Germany must trust the seller to adequately and reasonably verify the provenance of the property to avoid being subject to a return claim by another state based on illegal export. Legitimate art dealers are protected by law who, considering qualifications and their association's codes of conduct, are adequate intermediaries between buyer and seller. This is designed to limit trade in art and antiquities to items of legal and unequivocal provenance. The sale of stolen, illegally excavated, or imported cultural property is prohibited in Germany. This prohibition applies not only to the professional art market but also to anyone selling cultural heritage items (including via the Internet). In addition, dealers of cultural objects are required to keep records of their transactions. As in Austria and Switzerland, the shelf life has become 30 years instead of 10 in Germany. Press Office of the Federal Government Commissioner for Culture and the Media / Press and Information Office of the Federal Government, 11044 Berlin, 2016 Key aspects of the new Act on the Protection of Cultural Property in Germany,11.

[17] Roodt *C.,* The Role of Private International Law in the Protection of Art and Cultural Objects, 2015, 13.

[18] *Staker C.,* Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations, 58 Brit. Y.B. Int'l L., 1988, 151, 164.

on the protection of archaeological objects, regulations on the export and import of cultural heritage, and legal declarations[19] of state ownership of undiscovered antiquities.

The case illustrating the application of Lex situs involved precious, miniature carvings and works stolen from England and the objects of Japanese cultural heritage, Netsuke, which were transported and sold in Italy.[20] The works then found their way back to England when a purchaser in good faith delivered them to an auction house for sale. The owner filed a lawsuit against the auctioneer. According to the defendant, although the items were returned to the nation where they were stolen, the plaintiff had no legal claim because the sale was done in good faith and Italian law recognized the defendant's right to property. The English court agreed, holding the validity would be determined according to Italian law, which was the law of the place where the goods were situated at the time they were transferred. Following the judge, the title of a bona fide purchaser was superior to that of the original owner, even in the case of a stolen moveable object. Under Italian private law, a bona fide purchaser who buys a thing from a non-owner seller immediately acquires ownership upon the conclusion of the transaction. The court did not consider the case based on the factor of cultural value of the carvings. If the court had applied English law, the statute of limitations would not have expired. The statute of limitations does not apply to claims for compensation by the dispossessed owner if the acquisition was made in bad faith. The statute of limitations begins to run only upon the first bona fide transfer of the stolen property. Under Italian private law, a purchaser in good faith who buys a thing from a non-owner seller immediately acquires ownership upon the completion of the transaction.[21] The court did not consider the case allowing for the factor of cultural value of the carvings. If the court had applied English law, the statute of limitations would not have expired. The statute of limitations does not refer to claims for compensation by the dispossessed owner if the acquisition was made in bad faith. The statute of limitations begins to be set only upon the first bona fide transfer of the stolen property.[22]

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects refers to the return of an object to its original owner, a state, an individual, or a legal entity. Article 3(1) of the convention establishes the rule of *nemo dat quod non habet* (‘’no one can give what they do not

---

19 There is an opinion that the Lex situs rule considers the relationship between the true owner and the bona fide purchaser, and does not take into account the relationship between the owner and the thief. It gives importance to the post-theft transaction but ignores how the crime affects the owner's practical interests. The Lex situs principle reinforces the commercial imperative applied to transactions involving cultural objects. By reference to private international law, an applicable law must be chosen in favor of the party who has lost property due to theft, and time must not affect the right forfeited. *Roodt C., Miller D. C.,* Stolen Cultural Property: Implications of Vitium Reale in Private Law and Private International Law, 2013, 1, 3, 6.

20 *Winkworth v Christie Manson and Woods Ltd* 1980; *Fincham D.,* How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property, Columbia Journal of Law and the Arts, 2009, 115. *Roodt C., Miller D.C.,* Stolen Cultural Property: Implications of Vitium Reale in Private Law and Private International Law, 2013.

21 *Gazzini I.F.,* Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes, Transnational Publishers Inc, 2004, xxiii.

22 S. 4 of the Limitation Act 1980. Kenyon and MacKenzie (n 9) 241. *Miller D.C.,* Stolen Cultural Property: Implications of Vitium Reale in Private Law and Private International Law, 2013, 4.

have"). In the case of movable objects, this rule favors the original owner over a purchaser in good faith. The fact of purchasing the item in good faith cannot be opposed to the request to return the item. The Convention does not allow a presumption of bad faith on the part of the owner in the absence of an export certificate. Moreover, it does not prevent trade that is legal under the Lex situs through the calculated tricks of professional traffickers adroit at the transnational movement of cultural objects. The result in Winkworth would not have been different even if the UNIDROIT Convention had been incorporated into English law.[23]

In the case of Iran v. Barakat Galleries,[24] the Republic of Iran brought a claim against an international gallery in the Great Britain and was able to apply its national law under the Lex situs rule. The issue concerned eighteen antiquities, 5,000-year-old carved jars, cups, and bowls, allegedly excavated in the Jiroft region of Iran. For the issue of ownership, Iran founded the claim under the National Heritage Protection Act of 1930 and 1979. These laws authorized the confiscation of antiquities that were removed and taken out of the country without prior government notification or permission.[25] The preliminary issues were (i) whether Iran could show that it had a sufficient title to sue in conversion, and if so (ii) whether the Court should recognize and enforce that title to admit a claim in conversion against the defendant. By Article 26 of the Civil Code of the Islamic Republic of Iran, fortifications, fortresses, moats, military earthworks, arsenals, weapons, stores, warships, and similarly the furniture and buildings of the Government buildings and telegraph wires, museums, public libraries, historical monuments and similar objects, in brief whatever property movable or immovable is in use by the Government for the service of the public or the profit of the state, may not privately be owned. The same provisions shall apply to property that shall have been appropriated for the public service of a province, city region, or town. Iran argued that the 1979 Law on the Prevention of Unauthorized Archaeological Excavations claimed the state as the owner of all its undiscovered antiquities. The court of appeals allowed Iran to return the objects. The court believes "that it is not the label which foreign law gives to the legal relationship, but its substance, which is relevant. If the rights given by Iranian law are equivalent to ownership in English law, then English law would treat that as ownership for the conflict of laws."[26] Making the decision the judge noted: " Given our conclusion that the finder did not own the antiquities (and the fact, as was common ground, that the owner of the land from which they came had no claim to them), there are only two possibilities. Either they were "bona vacantia" to which Iran had an immediate right of possession and which would become Iran's property once Iran obtained possession and which could not become the property of anyone else or they belonged to Iran from, at least, the moment that they were found. Iran's rights to antiquities found

---

23 *Roodt C., Miller D.C.,* Stolen Cultural Property: Implications of Vitium Reale in Private Law and Private International Law, 2013, 5.

24 See: <https://plone.unige.ch/art-adr/cases-affaires/jiroft-collection-2013-iran-v-barakat-galleries> [21.09.2023]. *Fincham D.,* How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property, Columbia Journal of Law and the Arts, 2009, 118.

25 *Government of Islamic Republic of Iran v. The Barakat Galleries Ltd.* 2007. *Belder L.,* The legal protection of cultural heritage in international law and its implementation in Dutch Law, 2013, 22.

26 *Fincham D.,* How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property, Columbia Journal of Law and the Arts, 2009, 120.

were so extensive and exclusive that Iran was properly to be considered the owner of the properties found."

The court concluded: "The claim of Iran was given for conversion under English law. The state owns the property in the same way as the citizen, there is no obstacle to vindicate".[27] In this case, we can see that the UK court considered the national public interest of another sovereign state in protecting national cultural heritage to be more important than the legal protection of the private property rights of the Gallery, which considered that the purchase of cultural objects in European auction houses (in Switzerland, France and Germany) had resulted in securing a title that could be upheld in court.[28] This is in contrast to earlier similar cases in which UK judges had decided that public law provisions of other states could not prevail over legitimate private property rights in the UK courts.[29]

A remarkable case is the 2009 Schoeps v Museum of Modern Art, where the Picasso painting "Boy Leading a Horse"[30] was given to his wife as a wedding gift in 1927 by Paul von Mendelssohn-Bartholdi, a German banker of Jewish origin. In the 1930s he sold the painting against his will because of Nazi duress. It was delivered to a Jewish dealer in Switzerland in 1934. The painting was sold to an art dealer in 1936 who bequeathed it to the Museum of Modern Art in New York.[31] Paul's heirs filed a lawsuit against the museum. A temporary transfer to Swiss territory meant that Swiss law was less likely to apply. According to the court, the issue had to be governed by German law. Following the New York conflict of law regulations, there were five factors to be considered: the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties. All five of these factors support the application of German law to the issue of whether the transfer of these German-held Paintings was a product of Nazi duress. If German law applies, the next issue is whether one is talking about the ordinary German Civil Code, or whether the standard that should be invoked is that contained in Military Government Law 59 ("MGL 59"), a law put in place by the Allies during the postwar occupation of Germany that establishes a presumption that property was confiscated if it was transferred between January 30, 1933, and May 8, 1945, by a person subject to Nazi persecution. However, this regulation did not replace the German Civil Code. It simply established a limited regime under which claims brought in a particular tribunal, which no longer exists, and by a given deadline, which has passed, were entitled to a special presumption, which is no longer available. Despite the scant information about the paintings, their transfer was explained by the historical circumstances of the economic pressure of the Nazi regime directed against the Jews and their property. According to relevant provisions of the German Civil Code, the plaintiff's evidence was

---

27 Ibid.

28 Regulations of 3 Nov. 1930 (Iran National Heritage Protection Act), articles 17, 18, 25, 41 and 51. *Belder L.,* The legal protection of cultural heritage in international law and its implementation in Dutch Law, 2013, 22.

29 Attorney General of New Zealand v. Ortiz 1984, King of Italy v. de Medici 1918. *Belder L.,* The Legal Protection of Cultural HJeritage in International Law and its Implementation in Dutch Law, 2013, 22.

30 *Kreder J.A.,* The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust? Oregon Law Review, Vol. 88, 2009, 65-72.

31 *Symeonides S. C.,* The American Choice-of-Law Revolution: Past, Present and Future, Martinus Nijhoff Publishers 2006,15-24.

sufficient to establish factual issues as to whether the claim should be upheld under § 138 and/or § 123. Claimants have adduced competent evidence that Paul never intended to transfer his painting and that he was forced to transfer it only because of threats and economic pressures by the Nazi government. Although German law governed the issue of duress, the second question that had to be clarified was the validity and legal consequences of the sale to the dealer in 1936, since this sale could protect the rights of the bona fide purchaser – the Museum of Modern Art, even if the transfer was forced. The New York law administered the issue for claimants. As mentioned by the museum, the arrangement had to be done according to the norms of Switzerland, where the sale took place. New York case law has long protected an owner's right to recover stolen property, even in the possession of a bona fide purchaser. Under Swiss law, owners of stolen goods receive less protection. The exception enabling the owner of lost or stolen property to reclaim it even from a good faith purchaser applies only for five years. Regarding the transfer of property, the law of the country where the transfer took place is relevant. Such a result is not inevitable if the other country has a more significant relationship with the parties and the property that becomes applicable. When the parties do not intend that the property will remain in the jurisdiction where the transfer took place, that forum will have a lesser interest in having its law applied. The painting was held at the time of its sale by the Galerie Rosengart in Lucerne, Switzerland, which was run by Thannhauser, a legally independent entity. It was immediately shipped to New York where the purchaser lived, and the painting was paid for by a check made out to a New York bank. The owner of the painting whether Paul, his wife, or Thannhauser, was not a Swiss resident or citizen at the time. The work has been in New York for over 70 years and now it is the property of a major New York cultural institution. Under these circumstances, the New York law applies to the sale of the painting. The Museum asserted that the claim experienced an unreasonable length of time. According to the court decision, German law governed the issue of duress related to the sale or transfer of the painting, while New York law governed whether the plaintiffs' claims were allowable. In an order dated January 20, 2009, the court also indicated that New York law, not Swiss law, applies to the issues raised by the parties regarding the validity and legal effect of transferring the property to Paley, the US purchaser. The case ended in February 2009 with a settlement between the parties, the painting remained at the museum. The principle of Lex situs has a simple function: when an object is purchased in good faith, it will be protected even if its location changes in the future. The principle has a practical advantage, because “the country in which the thing is located has an effective power over the movable property.” In addition, this norm reinforces the principle of good faith, allowing states to determine the applicable law on property within their jurisdiction. Importantly, the principle promotes commercial convenience and predictability, as the buyer only needs to determine the law of one jurisdiction before entering into a transaction.[32]

4. Conclusion

In recent years, the issue of how objects of art and antiquities end up in public and private collections has become increasingly active. Despite the tendency to prevent the flow of illegal cultural property, courts

[32] Roodt *C.,* The Role of Private International Law in the Protection of Art and Cultural Objects, 2015, 115.

dealing with cultural heritage property disputes fail to administer justice effectively, quickly, and objectively, and ignore the rights of owners and possessors.

Private international law can provide states with regulatory tools to control the requirements of the market and closely align demand planning cycles with ethical aspirations. The demand leads to the looting of cultural material, feeds the black market, and contributes to the outflow of cultural heritage objects. Therefore, effective mechanisms are needed to ensure that legislation sets appropriate standards for trading and purchasing property.

Bibliography:

1. *Baudrillard J.,* The Conspiracy of Art, tr A Hodges, The MIT Press, 2005, 65.
2. *Belder L.,* The Legal Protection of Cultural Heritage in International Law and its Implementation in Dutch Law, 2013, 22, 24, 66.
3. *Feilden B.M., Jokilehto J.,* Management Guidelines for World Cultural Heritage Sites, ICCROM, 2nd Edition, 1998, Rome.
4. *Fincham D.,* Rejecting Renvoi for Movable Cultural Property: The Islamic Republic of Iran v. Denyse Berend International Journal of Cultural Property, 2007, 111-116, 112, 114.
5. *Fincham D.,* How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property, Columbia Journal of Law and the Arts, 2009, 115, 118, 120.
6. *Gazzini I.F.,* Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes, Transnational Publishers Inc, 2004, xxiii.
7. *Gilkey L.B.,* Can Art Fill the Vacuum in D Apostolos-Cappadona (ed), Art, Creativity and the Sacred, 1996, 187-189.
8. *Roodt C.,* The Role of Private International Law in the Protection of Art and Cultural Objects, 2015, 3, 6, 16-17, 13, 35, 115.
9. *Roodt C., Miller D.C.,* Stolen Cultural Property: Implications of Vitium Reale in Private Law and Private International Law, 2013, 1, 3-6.
10. *Routledge C. F.,* International Law and the Protection of Cultural Heritage, 2010, 151.
11. *Sadigh S.,* Cultural Heritage Network, Court of London Ignores Iran's Ownership of Achaemenid Bas-relief, 2007, 132.
12. *Symeonides S. C.,* The American Choice-of-Law Revolution: Past, Present and Future, Martinus Nijhoff Publishers 2006, 15-24.
13. *Staker C.,* Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations, 58 Brit. Y.B. Int's L., 1988, 151, 164.
14. *Tolstoy L.,* What Is Art? The Brotherhood Publishing Company, 1898, 210.
15. *Kreder J.A.,* The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust? Oregon Law Review, Vol. 88, 2009, 65-72.
16. Press Office of the Federal Government Commissioner for Culture and the Media / Press and Information Office of the Federal Government, 11044 Berlin, Key aspects of the new Act on the Protection of Cultural Property in Germany, 2016.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7695

Ketevan Kochashvili*

Liability without Fault – an Exception to the General Rule of Private Law

The principle of Fault liability is a general rule for the substantive branch of private law – civil law, and liability without fault – the so-called Strict liability, as it is referred to in Anglo-American law, is an exception to this rule. Both the provisions of the national and unified law provide for the exemption of releasing the participant in civil circulation from liability due to natural or social circumstances because it would have been impossible to have foreseen or avoided the incident if he had shown the necessary foresight and diligence because of the extraordinary and insurmountable nature of this circumstance. It should be noted that such circumstances in the scope of liability without fault cannot ensure the release of a person from responsibility. A creditor participating in a legal relationship, in the event of a delay in receiving performance, or a debtor because of exceeding the deadline to fulfill the obligation, regardless of their fault, bears the risk of performance of the obligation. Also, the owner of the source of increased danger is responsible for the damage caused to another person by the object or activity considered as a source of danger, regardless of his fault. Civil liability insurance is considered as a deterrent to no-fault liability, regarded as an injustice allowed by law. On the one hand, it socializes the risk for the person liable for the damage, on the other hand, it is found as a means of balancing the interests of the victim.

Keywords: *Fault, Strict Liability, Impossibility of Performance, Default, Increased Risk, Liability Insurance*

The paper is dedicated to professors – ***Tamar Chitoshvili, Mariam Tsiskadze, Mzia Dundua, Irina Akubardia and Maya Kopaleishvili,*** *whose love, wise advice, warmth, love and care follows me since I was a student, whose support, at the most difficult stage of my life, is unforgettable.*

1. Introduction

Since the early stage in the development of Rome Law a universal formula has been applied: everyone is liable only for damages caused by their own culpable actions. Fault is a necessary condition for civil liability both in contract and tort law. However, there is an exception to this general rule, in the form of strict liability which includes liability without fault. In this case, the person has to take responsibility for only the damage and breach of fiduciary duty including prudence and diligence,

* Doctor of Law, member of the Institute of Contemporary Private Law at Ivane Javakhishvili Tbilisi State University.

and characteristic of the average participant in civil circulation is not considered. The damage might occur thanks to simple (casus) or qualified fortuitous circumstances (force majeure), which does not depend on the will of a debtor or is out of his control that is also the reason for releasing a person from liability, however, due to the essence of strict liability, the general rule appears to be ineffective. We find liability without fault in contract law, e. g; obligee in default, loss of a generic thing or the damage caused by a source of increased danger in tort law.

2. The Grounds for a Release of Liability

2.1. Casus and Force Majeure

The principle of Fault Liability (a person is responsible only for intentional or negligent conduct)[1] is a cornerstone of every cultural legal order.[2] The general rule assumes the person is liable not for the damage but for the fault. When the fact of causing damage is sufficient to impose the liability of compensation on the debtor and the guilt is not decisive for the determination of liability, strict liability has to be applied.[3] If the damage is generated by such accidental circumstances that do not depend on the will of the violator of the law or it is out of control and risk of a debtor, the person is released from liability.[4] Also, liability is removed when a person cannot avoid or overcome accidental circumstances.[5] e.g. According to France, the debtor is not liable for non-fulfillment of an obligation if he proves that the cause of the damage was such an obstacle that he cannot have foreseen at the time of concluding the contract. According to the Civil Code (Article 1147), the debtor is released from compensation for damages if the non-performance is caused by an external cause that cannot be blamed on him.[6]

The doctrine of civil law distinguishes between a simple case – **casus**[7] and a qualified case, an irresistible force – **force majeure**. The latter is today considered an adequate means of indicating the case of complete impossibility.[8] In modern legal systems, "force majeure", which originates from the Roman concept of vis major (objective factors that do not depend on the will of a particular person)[9],

---

1 *Surguladze Iv.,* Essays from the History of Political Doctrines of Georgia, Tbilisi, 2001, 27 (in Georgian).

2 *Pokrovsky I.A.,* Main problems of civil law, M., 1998, 286 (in Russian).

3 *Bachiashvili V.,* Secondary requirements considering the characteristics of the mixed contract, the dissertation for obtaining the academic degree of Doctor of Law, TSU, Tbilisi, 2019, 159 (in Georgian).

4 *Windscheid B.,* On obligations under Roman law, St. Petersburg, 1875, 42 (in Russian).

5 *Lando O.,* Non-performance (breach) of the contract, Journal. "Review of Georgian Law", Vol. 14, 2013-2014, 111 (in Georgian).

6 *Zweigert K., Kotsi H.,* Introduction to comparative jurisprudence in private law, Vol. II, translated from the Russian edition by E. Sumbatashvili, translation ed. and the author of the last words is T. Ninidze, Tbilisi, 2001, 190 (in Georgian).

7 In ancient Georgian law, for example, in the works of Davit Batonishvili (Bagrationi) where the differentiation of fault is deeply discussed, some of the different types of carelessness might be cases (casus). Iv. Surguladze, Essays from the History of Political Doctrines of Georgia, Tbilisi, 2001, 142 (in Georgian).

8 *Talon D.,* Complicated Performance, Journal. "Review of Georgian Law," Vol. 14, 2013-2014, 97 (in Georgian).

9 *Dozhdev D.V.,* Roman private law, M., 2002, 494 (in Russian).

acts as a general contractual principle as a basis for excluding liability regardless of whether it is stipulated in the contract or not.[10] Both simple and qualified cases appear to be extraordinary, special in nature, unforeseen, unexpected, insurmountable in the given conditions and make performance impossible.[11] The case is internal, and the force majeure is external concerning the activity of a person, which is connected with arising damage. Their main feature is that circumstances preventing the fulfillment of the obligation are beyond the control of the debtor, thus, the debtor is not directly liable, or cannot be assumed depending on the content of the contract.[12] In addition, if it was possible to foresee these consequences in advance, a simple accident would also be avoided (eg, if the trading subject was aware that the consumer demand for the goods would decrease, he would no longer buy new goods and evade damage), and the inevitability of irresistible force would also be seen in this case. An irresistible force refers to natural disasters (floods, earthquakes, etc.), unpredictable political and economic factors, social changes: inflation, economic crisis, armed conflicts, export bans, and others. Also, the futility of performance might be caused by the damage to the debtor's health or death in the case of personal obligation or destruction and damage of the subject of performance, loss of a debtor's right to it.[13] There is an interesting case in Georgian judicial practice when the parties considered a violation of public order as force majeure by the agreement. That would prevent them from performing their obligations under the contract, and none of the parties would be responsible for failure to fulfil the obligation. The mentioned circumstance has occurred, public order was violated and the criminal was prosecuted for having the crime that represents the most dangerous illegal action forbidden by law.[14]

2.2. Impossibility of Performance and its Types

In the European civil doctrine, the terms of chance occurrence and force majeure are often replaced by the concept of impossibility of performance, which is distinguished in different ways, particularly: **natural** (performance is impossible due to the destruction of the item or the death of the debtor),[15] **objective** (it is impossible to fulfill the liability not only for a specific debtor, but also for any person), **subjective** (it is related to the personality of the debtor, his physical, financial, intellectual, emotional or other incapacity),[16] **physical** (the performance is impossible according to the

---

10 *Chitashvili N.,* The impact of changed circumstances on the performance and possible secondary remedies of the parties (comparative analysis), Tbilisi, 2015, 52 (in Georgian).

11 *Kaplunova E.S.,* Force majeure and related concepts, Abstract, Tomsk-2005 (in Russian).

12 *Chitashvili N.,* Legal prerequisites of Hardship and force majeure, jubilee collection dedicated to the 60th anniversary of Professor Besarion Zoidze, ed. *Chanturia L., Burduli I.,* Tbilisi, 2014, 338 (in Georgian).

13 *Vashakidze G.,* Commentary on the Civil Code, Book III, authors collective, ed. *Chanturia L.,* Tbilisi, 2019, 575; (in Georgian).

14 Case No. 3K/504-01, 25.07.2001, *Nachkbia A.,* Interpretations of Civil Legal Norms in the Practice of the Supreme Court (2000-2013), Tbilisi, 2014, 138, 140 (in Georgian).

15 *Begiashvili N.,* Impossibility of performing the obligation (comparative-legal analysis), Journal. "Table of Contents", No. 1(2), 2011, 18 (in Georgian).

16 *Zoidze B.,* Commentary on the Civil Code of Georgia, Book III, authors collective, ed. *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Tbilisi, 2001, 374 (in Georgian).

laws of nature, e.g. the promised item has been destroyed in the way it cannot be restored),[17] **factual** (The item or right to be transferred to the creditor no longer exists), **legal** (in this case a person performs a specified activity in the way of providing a right or object which is prohibited by law),[18] **economic** (the action for contractual liability is unacceptable for the obligor from an economic point of view. The performance is still possible, but impossibility is based on changes in circumstances: money inflation, increase in product prices, etc.),[19] **permanent** (such impossibility occurs when the purpose of the agreement is in question and another party cannot be required to remain bound by contract until the obstacle is removed),[20] **temporary** (impossibility, particularly of brief duration, the merely excusing performance until it subsequently becomes possible to perform rather than excusing performance altogether).[21] **Full and partial impossibility (**at this time the issue of sharing the physical and legal object to the contract is of decisive importance as is the circumstance of whether the creditor has lost interest in the partial performance of the obligation or not).[22]

According to the doctrine of force majeure or non-culpable impossibility, the debtor is freed from contractual liability and the obligation to pay for damages.[23] (However, the creditor has the right to such remedies as suspension of reciprocal performance, termination of the contract),[24] because no one is bound to perform what is not possible to be performed. Nevertheless, according to the European Court of Justice, force majeure cannot be limited to the concept of absolute impossibility of performance, it must include unusual circumstances arising beyond the control of the contracting party. The elimination of the consequences despite reasonable prudence and care, is impossible to achieve without extremely heavy costs.[25]

---

17 This kind of impossibility is synonymous with objective impossibility, perhaps even subjective: e.g. The debtor is unable to perform the promised work because of illness. *Medicus D.,* Schuldrecht I, Allgemeiner Te; 15Auflage, Munchen, 2004, Rn 366. Referred to: Zoidze T., Impossibility of performing obligations according to Georgian and German law, Journal. "Private Law Review," No. 2, 2019, 150.

18 *Kropholler I.,* German Civil Code, Study Commentary, Tbilisi, 2014, 150 (in Georgian).

19 *Legashvili D.,* Impact of changed circumstances on contractual relations, Journal. "Journal of Law", No. 2, 2013, 95 (in Georgian).

20 Palandt-Heinrich, the opinion is indicated: *Kropholler I.,* German Civil Code, educational commentary, 13th edition, translators: *Darjania T., Chechelashvili Z., ed. Chachanidze E., Darjania T., Totladze L.,* Tbilisi, 2014,151 (in Georgian).

21 *Maisuradze A.,* Impossibility of performing the obligation in German and Georgian civil law, Journal. "Justice and Law", No. 2, 2013, 43 (in Georgian).

22 *Shakiashvili B.,* Impossibility of performing the contractual obligation, abstract, Tbilisi, 1998, 11 (in Georgian).

23 *Chitashvili N.,* Hardship and impossibility of performance arising from changed circumstances, Journal. "Journal of Law", No. 2, 2011, 153. According to another opinion, the impossibility of performance of the obligation is one of the breaches of obligation, which leads to the release of the debtor from the obligation of primary performance, and not from civil-legal responsibility, in general. Thus, in each specific case, the debtor is obliged to perform another performance instead of the primary obligation, typically, the obligation to compensate for damages. Medicus, Schuldrecht I, Allgemeiner Teil, 17, Aufl.C.H.Beck, Munich, 2006, 114, 294. Referred to: *Begiashvili N.,* Relation of transferring of the risk with the performance of obligation (on the example of contracts concluded on movable property), Tbilisi, 2021, 105.

24 *Lando O.,* Non-performance (breach) of contract Journal. " Georgia Law Review", Vol. 14, 2013-2014, 113.

25 *Chitashvili N.,* Adaptation of the contract to the changed circumstances as a legal consequence of Hardship, "Journal of Law", No. 1, 2014, 206 (in Georgian).

2.3. Concept of Force Majeure provided by Uniform Acts

Taking into consideration the circumstances independent of the will of the debtor, both unified acts and the positive law of a country provide the possibility of releasing a debtor from performing the obligation. According to the UN "Convention on the International Sale of Goods" (Vienna Convention), a party to the contract is released from liability for not performing the obligation if it proves that the non-fulfillment of an obligation was caused by: a) an event beyond his control b) if the party could not reasonably consider the occurrence of the event at the stage of concluding the contract and c) the capability to avoid or overcome the obstacle or expected consequences.[26] According to the European contract law, the non-performance of the obligation by the party can be considered valid if he/she proves that the non-performance was caused by an irresistible force and at the time of concluding the contract, he/she was not required to reasonably take it into account, avoid or overcome the objection or its consequences (Article 8:108).[27]

3. Cases of Strict Liability

3.1. General Overview

Despite the abovementioned, both continental European and common law recognize cases of imposing liability on a person even if there are circumstances beyond the control of the debtor. In continental European law liability in the absence of fault is an exception to the general rule in common law, while it is a general principle in contract law. In American law, fault as a condition of liability is mainly considered in tort law and it is not essential to find fault when assigning liability to the debtor for breaching a contract.[28] It is important whether a debtor violates the obligation in case of fault or without it, the fact is non-performance of the contract.

Strict liability is applied for manufacturers of substandard products in the USA. In particular, to impose liability on a manufacturer a victim does not need to find fault with the manufacturer, it is enough to gain the facts about defective products and injuries. German and Georgian private law also share the principle of no-fault liability applicable to the manufacturer. In German law, liability rests with a person who contributed to adverse health effects caused by manufacturing low-quality products.[29] According to the separate norms of Article 1009 of the Civil Code of Georgia, strict liability can be imposed on a producer but there are cases of relief from liability: the manufacturer of the product is released from liability if the damage was caused by force majeure, e.g. a strong storm or

---

26 *Chitashvili N.,* Legal prerequisites of Hardship and force majeure, jubilee collection dedicated to the 60th anniversary of Professor Besarion Zoidze, Tbilisi, 2014, 326 (in Georgian).

27 Basic principles of European contract law, translated by Z. Chechelashvili, Georgian private law, Collection 2004, 255 (in Georgian).

28 *Chanturia L.,* Corporate management and the responsibility of managers in corporate law, Tbilisi, 2006, 373 (in Georgian).

29 *Zoidze T.,* Compensation for damage caused by a defective product, comparative analysis of Georgian and German law, Tbilisi, 2016, 114-115 (in Georgian).

earthquake, sudden increase or decrease in voltage, damage to electrical equipment or the property of a customer.[30]

No-fault liability is imposed on the entrepreneur who fails to fulfill his obligations to the subjects in French and Russian law. In particular, French commercial law provides for resting liability with an entrepreneur if the contract does not establish it only for fault.[31] Also, following Article 401-(3) of the Civil Code of Russia, in case of non-fulfillment or improper fulfillment of an obligation, a person is liable to the contrast both in case of fault and damage caused by force majeure, if the principle of obligation is not established by law or contract.[32]

In contract law, no-fault liability is often associated with the obligee in default and the breach of the performance by the obligor or the loss of the generic thing. Also, strict liability can be determined by the definition of the contract, a specific reservation, giving a debtor a certain guarantee, and established practice between the parties, while in tort law liability without fault is established in case of causing damage by a source of increased danger.

3.2. bligee in Default

Continental European and common law doctrines recognize the strict liability for the person authorized to accept the performance (the creditor) and the entity obligated to perform (the obligor or debtor) in case of obligee defaults. A person who is authorized to accept performance and delays acceptance is deemed to be guilty of delay. Accordingly, he is liable for the destruction or damage to the thing, if he/she cannot prove that the party in whose hands the object was, is responsible for this result, or if the object would have perished in all cases.[33]

According to the French Civil Code (Article 1138, sentence 2), although the buyer under the contract of sale becomes the owner of the item from the time of execution of the contract, he is not the increased danger for the thing in case of oblige in default.[34] Also, based on the common law, when the performance is delayed, an obligor is responsible for non-fulfillment of the obligation even when the debtor cannot be charged with non-fulfillment caused by accident or force majeure.[35] The Civil Code of Georgia also provides for the liability of the debtor and the creditor without fault in case of delay of performance.

The Civil Code of Georgia is applied for the liability of an obligor or a creditor when the performance is delayed. In particular, following Article 393, a creditor will bear the legal burden of default by an obligee: he/she is obliged to pay the obligor extra costs for keeping the object of the contract, also, the creditor bears the risk of accidentally deteriorating or perishing the object, and in the presence of a monetary obligation, he has the right to receive interest. When an obligee is in default,

---

30 *Zoidze T.,* Compensation for damage caused by a defective product, comparative analysis of Georgian and German law, Tbilisi, 2016, 168 (in Georgian).

31 *Bushev A.Yu., Makarova O.A., Popondopulo V.F.,* Commercial law of foreign countries, M., St. Petersburg, 2003, 125 (in Russian).

32 Civil Law, I, 2nd ed. Under. ed. *Sukhanova E.A., M.,* 2003, 450 (in Russian).

33 *Pobedonostsev K.P.,* Course of civil law, part 3, Contracts and obligations, M., 2002 (in Russian).

34 <Oceanlaw.ru/wp-content/uploads/2018/02/Фр.Кодекс-123> [21.09.2023] (in Russian).

35 *Zarandia T.,* Place and Terms of Performance of Contractual Obligations, Tbilisi, 2005, 127 (in Georgian).

the obligor shall be liable for the non-performance of an obligation if the performance proves to be impossible because of the obligor's intention or gross negligence. In addition, the impossibility of performance of the obligor must be in casual connection to the obligee in default by the creditor. If it becomes clear from the circumstances of the case that the obligor would not have been able to perform the obligation even if the creditor had not postponed the deadline for acceptance of the performance, the debtor would not be able to enjoy the privilege established by the norm.[36]

The Civil Code of Georgia applies two mutually contradictory norms for imposing liability on the obligor without fault: Articles 401-402. Following Article 401, no default shall be deemed to have occurred if the obligation is not performed due to circumstances not caused by the obligator's fault. So, he does not have to pay for damage to another party.

Thus, the term "obligee in default" refers to the obligor, and the creditor is entitled to claim damages caused by the delay in performance only if the obligor is to blame for delaying the performance.[37]

Contrary to the above, Article 402 of the Civil Code provides the liability of the obligor for delaying the performance regardless of fault. If an obligor is in default, he/she shall be liable for any negligence, even for an accident unless he/she proves that the damage would have occurred even if the obligation had been performed in time. Comparing the mentioned norms, it is not clear what is the essential difference between them, what is the basis of imposing strict liability on the debtor. Upon logical reasoning, the difference lies in the cause of the damage; in one case the cause is the delay in performance while in another — the impossibility of performance.

According to the civil doctrine, the delay in performance occurs when the obligor does not fulfill her/his obligation that is still executable, and if certain circumstances make performance impossible for a long time, the impossibility of performing the obligation determines the delay in performance.[38] If it is still possible for the debtor to perform, the creditor has the right to claim the damages caused by the delay at the same time of performing the obligation. In addition, the fault of the debtor is a necessary element of his liability, and if the performance of the obligation becomes impossible because of independent circumstances mitigating at the time of performing, the debtor is obliged to recover for damages caused by the delay in performance and the impossibility of performing.[39] However, in the latter case, liability arises regardless of the debtor's fault.

What circumstances explain the imposition of liability without the fault of the debtor, simple (casus) or qualified (force majeure) case is a recognized basis for exemption from responsibility? There is indeed no adequate causal connection between the delay in performing and the impossibility of performance caused by accidental circumstances arising in the process of delaying the performance

---

36 *Vashakidze G.,* Commentary on the Civil Code, year III, collective of authors, ed. Chanturia L., issue, 2019, 575 (in Georgian).

37 *Machaladze S.,* Compensation of damages for breach of obligation (comparative analysis of Georgian and German legislation), Journal. "Review of Georgian Law", special edition, 2004, 76 (in Georgian).

38 *Kyots H., Lorman F.,* Introduction to the obligation law, In the book: Problems of the civil and business law of Germany, M., 2001, 53 (in Russian).

39 Palandt, Heinrichs, the opinion is indicated: *Machaladze S.,* compensation for damage in case of breaching obligation (Comparative analysis of Georgian and German legislation), journal. "Review of Georgian Law", special edition, 2004, 95 (in Georgian).

when an obligor is not liable for his/her failure to perform, however, the delay in performance of the contract makes the mitigation of liability void.

An obligor who does not fulfill his obligations in time cannot enjoy the privileges of liability. The only "way out" for an obligor is to prove that the damage would have occurred even if the obligation was performed in time. Such a solution to the issue was still offered in Roman Law by Sabinus and Cassius for making a bailment contract based on the principle of justice if the obligation was protected by principles of good faith.[40] If the debtor cannot prove the absence of a causal connection between the delay and the impossibility of performance, he/she will be imposed liability.[41] Article 405-(1) of the Russian Civil Code regulates the case of delaying the performance, according to which an obligor is liable for the damage caused by the delay and the impossibility of performance due to the circumstances arising by chance.[42]

3.3. Liability in the Case of Perishing a Generic Thing

The subject of performance can be an individually defined or a generic thing. In the first case, the thing is "unique" or a thing separated from the common genus, and in the second case – subjects are identified by general features: the natural, technical, or economic properties of the item. As a rule, generic things in civil circulation are determined by quantity, size, or weight because of these properties they may be substituted.[43] In addition, the generic thing may turn into an individual one when the subject of legal relations separates it from the common mass of things and vice versa, for example, individual products put in different boxes or containers are stored in the warehouse because of mixing.[44]

If a thing of an individual use is destroyed, the performance of an obligation is nullified and a creditor has to compensate only for damages, because the transfer of another, even high-value thing is not considered the performance, and the creditor is not obligated to accept other performance.

If the thing of performance is generic, the obligor shall always perform the obligation. In this case, the scope of performance includes all the generic things and the debtor can still be compelled to deliver a thing of the same kind:[45] this modern approach is based on the principle in Roman law[46]: **genus non-perit** – generic thing never perishes. The obligation to perform with a generic thing is deemed to be dispelled only when the things of the given family disappear from civil circulation or their purchase acquires extremely large costs that are unacceptable based on the principle of justice.[47]

---

40 *Dozhdev D.V.,* Roman private law, M., 2002, 501 (in Russian).

41 *Zoidze B.,* Commentary on the Civil Code of Georgia, Book III, authors collective, ed. *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Tbilisi, 2001, 425-426 (in Georgian).

42 Commentary on the Civil Code of the Russian Federation, part 1, edited by *Sadikov O.N., M.,* 1997, 397 (in Russian).

43 *Totladze L.,* Commentary on the Civil Code, Book II, Property law, authors collective, ed. *Chanturia L.,* Tbilisi, 2018, 6 (in Georgian).

44 *Kobakhidze A.,* Civil law, general part, chapter, 2001, 243 (in Georgian).

45 *Tsertsvadze G.,* Contract law, authors collective, ed. *Jugheli G.,* Tbilisi, 2014, 456 (in Georgian).

46 *T. Shotadze,* Property Law, Tbilisi, 2014, 71 (in Georgian).

47 *Zoidze B.,* Commentary on the Civil Code of Georgia, Vol. III, authors collective, ed. *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Tbilisi, 2001, 329 (in Georgian).

3.4. Liability for Damage Caused by a Source of Increased Risk

3.4.1. The Concept of the Source of Increased Danger

In tort law, a common cause of no-fault liability is the damage caused by a source of increased risk. The concept of danger belongs to the category of possibility and refers to the situation including the possibility of damage at a certain time and in a certain situation:[48] "damage is more likely to occur than not to occur".[49] According to the doctrine, the concept of a source of increased danger includes those objects that are impossible to control by a man (theory of the object) or doing activity that creates an increased danger for the surrounding people (theory of the activity)[50] despite the adoption of appropriate precautionary measures and observance of technical safety rules.[51] The sources of increased danger are vehicles,[52] high-voltage energy, chemical, and biological substances, wild animals, etc.

3.4.2. The Owner of the Source of Increased Danger and the Presumption of his Fault

Civil law imposes liability on the persons who legitimately carry out the activities related to the source of increased danger, the obligation to compensate for the damage caused by the "dangerous" object or action to the rights and legal interests of other persons.[53] For example, German law recognizes the strict liability of railways. Natural disasters, floods, blizzards, and avalanches do not release the railway from responsibility, except for those cases when the negative consequences could not have been avoided even by taking precautionary measures, in particular, the use of a safety warning system (SWS), speed reduction.[54] The owner of the source of increased danger is not deemed to be the one who performs the management following the labor relationship. Accordingly, he/she is not responsible to the victim, but the owner can file a regressive claim against him/her if the damage

---

48 *Tsereteli T.,* Public danger and lawlessness in criminal law, Tbilisi, 2006, 175 (in Georgian).

49 *Tskitishvili T.,* Delicts creating a threat to human life and health, Vol. 2015, 94 (in Georgian).

50 *Fleishitz E.A.,* Obligation from causing harm and unjust enrichment, M., 1951, 132 (in Russian).

51 In the common law system, the court determines this activity based on the following circumstances: 1) degree of risk whether there is an increased risk of harm; 2) human ability to stop the danger arising from the mentioned activity; 3) unusual nature of the given activity; 4) appropriateness of the place of activity; 5) Reciprocity of public benefit and public danger arising from the given activity. *Osakve K.,* Comparative law in schemes. General and special part, M., 2002, 268 (in Georgian).

52 "Transport" from Lat. The word is (transporto) and means "to move". It is defined as the field of economy, farming, as ameans of cargo and passenger transportation. The word derived from it – "transportation" means moving someone or something utilizing a vehicle. 4 types of transport are distinguished: rail, road, water (sea, river) and air. *Gabichvadze Sh.,* Civil legal regulation of cargo and passenger transportation by air, Tbilisi, 2013, 18 (in Georgian).

53 *Todua M., Willems H.,* Obligatory Law, Tbilisi, 2006, 53. *Иванова Ю.А., Ериашвили Н.Д* (in Georgian)., *Радченко Т.В.,* Grounds for the offensive and change online for harm celebrated by the source of the carried- out fable, ж. "Journal of international civil and commercial law", No. 1, 2021, 20 (in Georgian).

54 *Zweigert K., Kotzi H.,* Introduction to comparative jurisprudence in the field of private law, Vol. II, Tbilisi, 2001, 344.

was caused by this person's culpable influence on the source of danger.[55] If the source of increased danger is directly or indirectly owned, the direct owner is responsible, and in the case of co-ownership, the one who exercised actual control at the time of the damage.[56] In civil law, the fault of the owner of the source of increased danger is presumed. It is possible to release from liability if a person can prove that the damage was caused by force majeure or any other external factor that is not related to the object or activities connected to it, the culpable action[57] of the victim, or the wrongful deeds of other persons as a result of the item leaving the source owner's possession against his will (the first sentence of Article 1079-1, Civil Code of Russian Federation).[58] In French law, "external force" is considered to be the basis for releasing the owner of the item from liability, which refers to 1) circumstances arising from an unforeseen basis of an external nature (force majeure); 2) the fault of the injured person; 3) fault of a third person.[59]

3.4.3. Effects of Encroachment upon the Goods by a Transport Vehicle

The civil law of Georgia, in particular, the norms of tort law regulate the compensation for injury caused by a vehicle as a source of increased danger. The owner of the vehicle is deemed to be the person who exercises actual control over it on a legal ground. A driver who benefits from the use of a vehicle, and also creates a potential danger for other traffic participants, is more identified with the owner than with other traffic participants who, as a result of the use of the source of increased danger, have suffered damage by encroaching on their legal good.[60] If a person operates a vehicle without the permission of its owner (an unlawful owner) and causes injury to a person, liability is imposed on the offender, not the owner of the vehicle.[61] The latter will only be liable for damages if the use of the object becomes possible due to his culpable action (for example, leaving the door of the vehicle open, etc.).[62]

The obligation to compensate for damage arises if the operation of the vehicle caused injury, regardless of whether the damage occurred during the performance of official duties, by the voluntary action of the owner, or by the personal use of the vehicle.[63] Article 999 of the Civil Code of Georgia establishes the liability without fault of the owner of a vehicle for damages caused during the carriage of passengers or freight. In particular, he/she shall compensate the injured person if the operation of his vehicle resulted in the death, injury, or disability of an individual. The imposition of the mentioned

---

55 *Maidanik L.A., Sergeeva N.Yu.,* Financial liability for damage to health, M., 1953, 30 (in Russian).

56 Civil law, Ed. *Sergeeva A.P., Tolstogo Yu.K.,* 4th ed., vol. 3, M., 2005, 55 (in Russian).

57 *Zweigert K., Kotzi H.,* Introduction to comparative jurisprudence in private law, vol. II, Tbilisi, 2001, 355. Nbbn (in Russian)

58 <rulaws.ru/gk-rf-chast-2/Razdel iV/glava-59/paragraph-1.statya-1079> [21.09.2023].

59 *Tsuladze M.,* Grounds for releasing the owner of the source of excessive danger from liability (research according to Georgian and French law), Journal. "Journal of Law", No. 1, 2015, 289 (in Georgian).

60 *Henshel S.,* Methodology of processing civil cases, Tbilisi, 2009, 202 (in Georgian).

61 *Berekashvili D., Todua M., Chachava S., Dakhmishvili Z.,* Methodology of case resolution in civil law., Tbilisi, 2015, 56 (in Georgian).

62 *Berekashvili D., Todua M., Chachava S., Dakhmishvili Z*., Methodology of case resolution in civil law., Tbilisi, 2015, 58 (in Georgian).

63 *Bichia M.,* Legal Obligatory Relations, Vol., 2016, 307 (in Georgian).

strict liability is caused by the fact that the vehicle is a potentially dangerous thing as its use poses a certain danger to other persons involved in road traffic. As law and order allow the use of potentially dangerous things, compensation tightens the responsibility for those who receive benefits from the use of such things. Thus, it is a liability for a permissive risk.[64]

The liability without fault for the owner of the vehicle, in particular, an aircraft, is determined by the Air Code of Georgia (Article 82). It regulates the compensation for damage caused by colliding two aircraft: In this situation, the cargo carrier is responsible for the death or damage to the health of the passenger or damage to the property of a third party on board. In addition, he/she has the right to make a retroactive demand against the guilty entity.[65]

4. The action of the source of increased danger in times of extreme necessity

A source of increased danger can avoid danger in a situation of extreme necessity. Even though the damage caused by the use of a source of increased danger and extreme necessity is compensated, in the latter case, the person causing the damage might be fully or partially released from the liability for making compensation for the damage, if this obligation is fully imposed on the person in whose interests he acted. Thus, it is essential to figure out which norms should be applied in the above-mentioned situation. There is an opinion that if the damage is caused by the source of increased danger in the case of extreme necessity, and the extent of the damage is known from the beginning, the rules of extreme necessity must be applied. But if the damage is caused without correct perception of the specifics of the source of increased danger and the extent of the expected damage, the person is imposed liability according to the relevant norms of tort law which are applied in the case when the damage is caused by the nature of the source of increased danger and is not subject to the full control of the human mind.[66]

5. Discussing the Relevance of the Principle of Liability without Fault

How relevant is liability in the absence of fault based on risk alone? Under the civil legal doctrine, the concept of risk implies the danger of unforeseen property or personal adverse consequences,[67] a person's mental attitude to the result of their own or other people's actions, as well as the result of the occurrence, which was expressed by the awareness of negative consequences.[68] It is considered that the owner of the source of increased danger is aware of the risk of his reasonable action, and the chances of negative effects. In this case, the risk is considered as the minimum degree[69]

---

64 *Henshel S.,* Methodology of processing civil cases, Tbilisi, 2009, 192 (in Georgian).

65 *Gabichvadze Sh.,* Civil legal regulation of cargo and passenger transportation by air, Tbilisi, 2013, 187 (in Georgian).

66 *Ninidze T.,* The legal nature of the obligation to compensate for damages caused in a situation of extreme necessity, collection: "Current issues of Soviet Civil Law and Process", Volume, 1977, 72-73 (in Georgian).

67 *Sobchak A.,* On some controversial issues of the general theory of legal responsibility, g. "Jurisprudence", No. 1, 1968, 55 (in Russian).

68 *Oykhgenzikht V.A.,* Category of risk in Soviet civil law, g. "Jurisprudence", No. 5, 1971, 65 (in Russian).

69 Civil Law, I, 2nd ed. Pod. ed. *Sukhanova E.A., M.,* 2003, 453 (in Russian).

of fault, which is the basis for imposing liability on this person.[70] The theory of strict liability is based on the principle of social responsibility for permissible risk. If a person pursuing his/her goals carries out activities that pose a high risk to the surrounding people should be imposed liability if the risk is the cause of injury.[71] A part of theorists justify the principle of no-fault liability in retrospect of protecting the interests of the victim and consider it a manifestation of legal socialization.[72] The development and creation of powerful industries increase the possibility of damage to human life, health, and property. Sources of danger require strict regulation because the activities related to them violate social order and create danger for the whole society.[73] In addition, deviating from the principle of fault when the liability falls on even the most profoundly wise person for the cause of damage despite taking all measures of prudence, is legally and ethically wrong.

6. Liability Insurance as a Strict Liability Mechanism

The institution of liability insurance contributes to finding a solution to the disposal of strict (absolute) liability, which is based on the principle of distribution of damage. At the beginning of the 20th century, law experts identified the inevitable introduction of liability insurance: "The idea of insurance is knocking on the door of our consciousness... it has a great future."[74] As a rule, a person signs an insurance contract with an insurance company to ensure compensation for damage caused by destructive forces of nature or other harmful factors:[75] **under the insurance contract the insurer shall be obligated to compensate the insured for the damages resulting from the occurrence of an insured event, subject to the terms of the contract (Sentence I of Part I of Article 799 of the Civil Code), the policyholder shall pay the insurance contribution (premium)- (Part II of Article 799 of the Civil Code).**

The goal of full insurance and civil liability insurance is to restore the property that existed before the occurrence of the insured event. Compensation for the damages resulting from the occurrence of an insured event, i.e. payment of insurance compensation by the insurer, is the main purpose of insurance and the main duty of the insurer.[76] The civil-legal liability insurance is not limited to the compensation of no-fault damages, it is also applied to cover compensation for at-fault

---

70 According to one opinion, the basis of civil-legal liability in the implementation of a wrongful and innocent act is risk. B. "Pravovedenie", No. 5, 1971, 67; On the other hand, compensation for damages is considered a form of liability only when it is based on a guilty act. *Krasavchikov O.A.,* Compensation for damage, (in Russian) caused by a source of increased danger, M., 1966, 142 (in Georgian).

71 *Chokheli N., Kereselidze D.,* The issue of civil liability for damage caused by activities dangerous to the environment in Georgian legislation, Journ. "Review of Georgian Law", first-second quarter, 2000, 84 (in Georgian).

72 *Khokhlova G.V.,* The concept of civil liability, In the book: Current problems of civil law, Issue 5, ed. *Vitryanskogo V.V., M.,* (2002, 72 (in Russian).

73 *Tsikarishvili K.,* Liability without fault in Anglo-American criminal law. A legal anomaly or an effective mechanism of regulation, Journal. "Law," No. 1, 2000, 70 (in Georgian).

74 *Pokrovsky I.A.,* Main problems of civil law, M., 1998, 290 (in Russian).

75 *Tsiskadze M.,* Commentary on the Civil Code of Georgia, Vol. IV, Vol. II, authors collective, ed. *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Tbilisi, 2001, 106 (in Georgian).

76 *Gvaramia L.,* Legal bases of the application of civil liability insurance, Journal "Law", No. 10-11-12, 2000, 59 (in Georgian).

damages.[77] In this case, the insurance company has the right to subrogation of the person causing the damage. It is possible to insure both contractual and non-contractual liability, which is either voluntary or mandatory. The liability insurance of the owner of the increased risk source is mandatory because the object is the bearer of more risk. Accordingly, the legislator is obliged to make safe circulation conditions, even by neutralizing the expected risk. The traditional institution of property liability often fails to provide compensation for damages caused by the mentioned threat. Liability insurance serves to protect the interests of both the owner and the victim. A poor person, who causes damage, is less likely to be guaranteed a victim.[78] He/she has the right to apply independently to the insurance company, the solvent debtor.[79] Compulsory civil liability insurance makes it possible to socialize the insurance risk and distribute the damages award to the persons bearing the risk by creating an insurance fund.[80] German and Georgian law apply the source of increased risk, in particular, mandatory liability insurance of vehicle owners, e.g. Law "On Mandatory Civil Liability Insurance of Motor Vehicle Owners" (27.06.1997). In this case, the purpose of the insurance is, on the one hand, to release the owner of the transport from the property liability that is imposed for the damage to a third party (victim) resulting from the operation of the transport, on the other hand, to provide compensation for the damage to the victim, which is a guarantee of reliable protection of his life, health, and property.[81] Both the owner of the vehicle and the insurer are released from liability to the victim if the insured event is caused by the intentional act of the victim or force majeure.

Also, the Air Code of the Russian Federation provides for compulsory liability insurance for the owners of aircraft. The owner of the aircraft shall insure the liability for the damage to the lives, health of passengers, their luggage, or property of third parties as a result of operating the vehicle.[82]

Thus, if the principle of no-fault liability ignores the interests of the one who inflicted the damages and refers to the interests of the victim, property liability insurance is associated with the protection of the interests of the victim, effectively eliminating no-fault liability. Liability insurance aims at protecting the economic interest of the insured person at the expense of releasing from liability that may be imposed on him by third parties.[83]

The recognized expert in the European unified law (Коциоль) fairly points out that in the context of life insurance, with the distribution of damage, the social law achieves a better distribution of the victim's damage to the social insurance system.[84]

---

77 *Zoidze B.,* For the issue of property liability insurance of car owners, Journal. "Soviet Law", No. 4, 1984, 24-25 (in Georgian).

78 *Zoidze B.,* Constitutional control and order of values in Georgia, Tbilisi, 2007, 19-20 (in Georgian).

79 *Medicus D.,* Certain types of obligations in the German Civil Code. In the book: Problems of Civil and Business Law in Germany, M., 2001, 150 (in Russian).

80 *Zoidze B.,* Constitutional control and order of values in Georgia, Tbilisi, 2007, 20 (in Georgian).

81 *Tsiskadze M.,* Compulsory civil liability insurance of motor vehicle owners, Journal. "Review of Georgian Law", I-II quarter, 1999, 66 (in Georgian).

82 Commercial law of Russia, pod. ed. *Puginsky B.I., M.,* 1999, 119 (in Russian).

83 *Mossanelidze N.,* Subrogation as a way to satisfy the request of an insurer, Tbilisi, 2016, (in Georgian)

84 *Kotsiol H.,* Harmonization and fundamental issues of European tort law, g. "Bulletin of Civil Law", No. 5, 2017 (vol. 17). academia.edu/36323157/Translation-of-H-Koziols-Harmonisation-and-Fundamental-Questions-of-European-Tort law (in Russian).

7. Conclusion

Thus, in civil law, a person is not liable for failure to perform obligation, if the reason for non-fulfillment was an obstacle beyond his control. Such an obstacle is considered irresistible force-force majeure which is often replaced by the concept of impossibility in various forms. According to the doctrine of force majeure, the debtor is released from the obligation of performance and damages, because no one is obliged to perform what cannot be performed. If this rule does not apply, it is called liability without fault. For example, a creditor who delays performance bears certain burdens regardless of fault. He takes the risk of accidental death and damage to the thing but an unexpected circumstance arising in the process of obligee in default which makes performance impossible, does not release a debtor from liability because default annuls the benefit established by law. Also, the owner of the source of increased danger is liable to the victims for the damage caused by this object or activity, although he/she has taken all measures to avoid the danger. In this way, the most prudent and diligent participant of the civil circulation can be charged with civil liability. The institution of liability insurance regulates this evil devised by law.

Bibliography:

1. Bachiashvili V., Secondary requirements taking into account the peculiarity of the mixed type of contract, dissertation for obtaining the academic degree of Doctor of Law, TSU, Tbilisi, 2019, 159 (in Georgian).
2. Basic provisions of European contract law, translated by Z. Chechelashvili, Collection of Georgian private law, 2004, 255 (in Georgian).
3. *Begiashvili N.,* Impossibility of performing the obligation (comparative-legal analysis), Journ."Sarchevi", No. 1(2), 2011, 18 (in Georgian).
4. *Begiashvili N.,* The relationship between the transferring of risk and the performance of obligations (on the example of contracts concluded on the movable property), Tbilisi, 2021, 105 (in Georgian).
5. *Berekashvili D., Todua M., Chachava S., Dakhmishvili Z.,* Methodology of case resolution in civil law, Tbilisi, 2015, 56, 58 (in Georgian).
6. *Bichia M.,* Legal Obligatory Relations, Vol., 2016, 307 (in Georgian).
7. *Bushev A.Yu., Makarova O.A., Popondopulo V.F.,* Commercial law of foreign countries, M., St. Petersburg, 2003,125 (in Russian).
8. *Chanturia L.,* Corporate management and the liability of managers in corporate law, Tbilisi, 2006, 373 (in Georgian).
9. *Chitashvili N.,* Adaptation of the contract to the changed circumstances as a legal consequence of Hardship, "Journal of Law", No. 1, 2014, 206 (in Georgian).
10. *Chitashvili N.,* Hardship and Impossibility of performance arising from changed circumstances, Journal. "Journal of Law," No. 2, 2011, 153 (in Georgian).
11. *Chitashvili N.,* Impact of changed circumstances on the performance of obligations and possible secondary remedies of the parties (comparative analysis), Tbilisi, 2015, 52 (in Georgian).
12. *Chitashvili N.,* Legal prerequisites of Hardship in performance and force majeure, jubilee collection dedicated to the 60th anniversary of Professor Besarion Zoidze, ed. *Chanturia L., Burduli I.,* Tbilisi, 2014, 326, 338 (in Georgian).

13. *Chokheli N., Kereselidze D.,* The issue of civil liability for damage caused by activities dangerous to the environment in Georgian legislation, Journ. "Review of Georgian Law", first-second quarter, 2000, 84 (in Georgian).
14. Civil law, Ed. *Sergeeva A.P., Tolstogo Yu.K.,* 4th ed., vol. 3, M., 2005, 55 (in Russian).
15. Civil Law, I, 2nd ed. Under. ed. *Sukhanova E.A., M.,* 2003, 450, 453 (in Russian).
16. Commentary on the Civil Code of the Russian Federation, part 1, edited by *Sadikov O.N.,* M., 1997, 397 (in Russian).
17. *Dozhdev D.V.,* Roman private law, M., 2002, 494, 501 (in Russian).
18. *Fleishitz E.A.,* Obligation from causing harm and from unjust enrichment, M., 1951,132 (in Russian).
19. *Gabichvadze Sh.,* Civil legal regulation of cargo and passenger transportation by air transport, Tbilisi, 2013, 18, 187 (in Georgian).

Georgian and German law, Tbilisi, 2016, 114-115, 168 (in Georgian).

Georgian Law", I-II quarter, 1999, 66 (in Georgian).

20. *Gvaramia L.,* Legal bases of the application of civil liability insurance, Journal. "Law", No. 10-11-12, 2000, 59 (in Georgian).
21. *Henshel S.,* Civil Case Processing Methodology, Tbilisi, 2009, 192, 202 (in Georgian).
22. Iv. Surguladze, Essays from the History of Political Doctrines of Georgia, Tbilisi, 2001, 27, 142 (in Georgian)
23. *Ivanova Yu.A., Eriashvili N.D., Radchenko T.V.,* Grounds for the offensive and the content of
24. *Kaplunova E.S.,* Force majeure and related concepts, Abstract, Tomsk-2005 (in Russian) <Dissercat.com/content/nepreodolimaya-sila-i-smezhnye-s-nei-ponyatiya> [21.09.2023].
25. *Khokhlova G.V.,* The concept of civil liability, In the book: Current problems of civil law, Issue 5, ed. Vitryanskogo V.V., M., 2002, 72 (in Russian).
26. *Kobakhidze A.,* Civil law, general part, chapter, 2001, 243 (in Georgian).
27. *Kotsiol H.,* Harmonization and fundamental issues of European tort law, g. "Bulletin of Civil Law", No. 5, 2017 (vol. 17) (in Russian) <academia.edu/36323157/Translation-of-H-Koziols-Harmonisation-and-Fundamental-Questions-of-European-Tort law> [21.09.2023].
28. *Kötz H., Lorman F.,* Introduction to the law of obligations, In the book: Problems of civil and business law in Germany, M., 2001,53 (in Russian).
29. *Krasavchikov O.A.,* Compensation for harm caused by a source of increased danger, M., 1966, 142.
30. *Kropholler I.,* German Civil Code, educational commentary, 13th edition, translators: *Darjania T., Chechelashvili Z., editors: Chachanidze E., Darjania T., Totladze L,* Tbilisi, 2014, 150 (in Georgian).
31. *Lando O.,* Non-performance of the contract (breach), Journal. "Review of Georgian Law", Vol. 14, 2013-2014, 111, 113 (in Georgian).
32. *Legashvili D.,* Impact of changed circumstances on contractual relations, Journal. "Journal of Law", No. 2, 2013, 95 (in Georgian).

liability for harm caused by a source of increased danger, g. "Journal of International Civil and Commercial Law", No. 1, 2021, 20 (in Russian).

33. *Machaladze S.,* Compensation for damages in case of breaching obligation (comparative analysis of Georgian and German legislation), Journal. "Review of Georgian Law", special edition, 2004, 76, 95 (in Georgian).
34. *Maidanik L.A., Sergeeva N.Yu.,* Financial liability for damage to health, M., 1953, 30.

35. *Maisuradze A.,* Impossibility of performing the obligation in German and Georgian civil law, Journal. "Justice and Law", No. 2, 2013, 43 (in Georgian).
36. *Medicus D.,* Certain types of obligations in the German Civil Code. In the book: Problems of civil and Business Law in Germany, M., 2001, 150 (in Russian).
37. *Motsonelidze N.,* Subrogation as a way to satisfy the request of an insurer Tbilisi, 2016, 131 (in Georgian).
38. *Nachkbia A.,* Definitions of civil legal norms in the practice of the Supreme Court (2000-2013), Tbilisi, 2014, 138, 140 (in Georgian).
39. *Ninidze T.,* The legal nature of the obligation to compensate for damages caused in a situation of extreme necessity, collection: "Current issues of Soviet Civil Law and Process", volume, 1977, 72-73 (in Georgian).
40. *Osakwe K.,* Comparative law in schemes. General and special part, M., 2002, 268 (in Russian).
41. *Oykhgenzikht V.A.,* Category of risk in Soviet civil law, g. "Jurisprudence", No. 5, 1971, 65, 67.
42. *Pobedonostsev K.P.,* Course of civil law, part 3, Contracts and obligations, M., 2002 (in Russian).
43. *Pokrovsky I.A.,* Basic problems of civil law, M., 1998, 286, 290 (in Russian).
44. *Shakiashvili B.,* Impossibility of performing the contractual obligation, abstract, Tbilisi, 1998, 11 (in Georgian).
45. *Shotadze T.,* Property Law, Tbilisi, 2014, 71 (in Georgian).
46. *Sikarishvili K.,* Liability without fault in Anglo-American criminal law. A legal anomaly or an effective mechanism of regulation, Journal. "Law," No. 1, 2000, 70 (in Georgian).
47. *Sobchak A.,* On some controversial issues of the general theory of legal responsibility, g. "Jurisprudence", No. 1, 1968, 55 (in Russian).
48. *Talon D.,* Complicated Performance, Journ. "Review of Georgian Law," Vol. 14, 2013-2014, 97.
49. The commercial law of Russia, pod. ed. *Puginsky B.I., M.,* 1999, 119 (in Russian).
50. *Todua M., Willems H.,* Obligatory Law, Tbilisi, 2006, 53 (in Georgian).
51. *Totladze L.,* Commentary on the Civil Code, Book II, Property law, authors collective, ed. *Chanturia L.,* Tbilisi, 2018, 6 (in Georgian).
52. *Tsereteli T.,* Public danger and lawlessness in criminal law, Tbilisi, 2006, 175 (in Georgian).
53. *Tsertsvadze G.,* Contract law, authors collective, ed. *Jugheli G.,* Tbilisi, 2014, 456 (in Georgian).
54. *Tsiskadze M.,* Commentary on the Civil Code of Georgia, Vol. IV, Vol. II, authors collective, ed. *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Tbilisi, 2001, 106 (in Georgian).
55. *Tsiskadze M.,* Compulsory civil liability insurance of motor vehicle owners, Journ. "Review of
56. *Tskitishvili T.,* Crimes that endanger human life and health, Tbilisi, 2015, 94 (in Georgian).
57. *Tsuladze M.,* Grounds for releasing the owner of the source of excessive danger from liability (research according to Georgian and French law), Journal. "Journal of Law", No. 1, 2015, 289 (in Georgian)
58. *Vashakidze G.,* Commentary on the Civil Code, Book III, authors collective, ed. *Chanturia L.* (ed.) 2019, 575 (in Georgian).
59. *Windscheid B.,* On obligations under Roman law, St. Petersburg, 1875, 42 (in Russian).
60. *Zarandia T.,* Place and Terms of Performance of Contractual Obligations, Tbilisi, 2005, 127 (in Georgian).
61. *Zoidze B.,* Commentary on the Civil Code of Georgia, Books III, authors collective, ed. *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Tbilisi, 2001, 329, 374, 425-426 (in Georgian).

62. *Zoidze B.,* Constitutional control and order of values in Georgia, Tbilisi, 2007, 19-20 (in Georgian).
63. *Zoidze B.,* for the issue of property liability insurance of car owners, Journ. "Soviet Law", No. 4, 1984, 24-25 (in Georgian).
64. *Zoidze T.,* Compensation for damage caused by a defective product, comparative analysis of
65. *Zoidze T.,* Impossibility of performing obligations according to Georgian and German law, Journal "Private Law Review," No. 2, 2019, 150, 151 (in Georgian).
66. *Zweigert K.,* Kotsi H., Introduction to comparative jurisprudence in the private law, Vol. II, translated from the Russian edition by E. Sumbatashvili, translation ed. and the author of the last words is T. Ninidze, Tbilisi, 2001, 190, 344, 355 (in Georgian).
67. <Oceanlaw.ru/wp-content/uploads/2018/02/Фр.Кодекс-123> [21.09.2023].
68. <rulaws.ru/gk-rf-chast-2/Razdel iV/glava-59/paragraph-1.statya-1079> [21.09.2023].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7696

Irakli Kandashvili*

The Representation in Mediation

The aim of the article is, on the one hand, to make mediation popular as a new mechanism to resolve a dispute among practicing lawyers, and on the other hand, to emphasize the role of a representative in mediation by lawyers and explain that representation is a typical activity in the process of the new dispute settlement to prepare lawyers for dealing with the peculiarities of the process and develop the appropriate representational skills to perform their functions successfully.

Key Words: *Mediation, Legislative Regulation, Civil Procedure Law, Amicable Dispute Resolution Court Mandated Mediation, Preference for Mediation.*

1. Introduction

The development pace of the modern world requires society to evolve and implement all possible means and mechanisms for making peace and progress in the world not to lose more time and rational actions. Society should understand well that world peace, the introduction of social dialogue, and a culture of dialogue in society – will be achieved through the development and greater acceptance of each other in everyday life, which has been a great challenge for the last centuries however, all countries are trying to establish legislative branches at the state level to reduce disputes in courts and tension in society.[1]

This reality is featured by frequent conflicts that separate the parties from each other, cut off the connections, and prompt to find a solution through navigating legal labyrinths, which is harmful to the interests of both parties. The already achieved result is less relevant[2] and causes further potential disputes because no one adapts to the status[3] of the loser or the guilty due to the nature of a human.

The main way society can find[4] is connected to the negotiations, mutual acceptance, and figuring out a reciprocally beneficial final decision[5] which is convenient for everyone by legal regulations, however, several circumstances prevent the reality from transforming into everyday actual actions. The effective application of the negotiation platform should become the settlement conditions of local and global conflicts if legal mechanisms guarantee the result of the negotiations, the disputing

* Doctor of Law, Professor at Grigol Robakidze University, Adjunct Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law, the Chairman of LEPL "Mediators Association of Georgia", the Chairman of the Educational Council of LEPL Georgian Bar Association. https://orcid.org/0000-0002-7651-9277.

1 *Ware S.J.,* Principles of Alternative Dispute Resolution, 3rd Ed, West Academic Publishing, 2016, 393.

2 *Feehily R.,* International Commercial Mediation, Cambridge University Press, 2022, 3.

3 *Vries T.*, Mediation als Verfahren konsensualer Streitbeilegung, Peter Lang Internationaler Verlag der Wissenschaften, 2012, 115.

4 *Palmeter D., Mavroidis P.C., Meagher N.*, Dispute Settlement in the World Trade Organization (practice and procedure), 3rd Edit, Cambridge University Press, 2022, 11.

5 *Campbell C.*, International Mediation, Wolters Kluwer, Special Issue, 2020, 32.

parties will try to avoid tension and maintain peaceful regulation, especially if they have the expectations that the decisions made by their engagement will be enforceable.

For this purpose, society has always been in search of effective ways to resolve the dispute, which would most satisfy their needs and match the real interests of the parties. This type of search and planning automatically leads to legal ways that determine the legal policy of the state which responds the interest and need of the society to the interest of the state – citizens have and need.

The occupancy of simple, effective, timely accessible forms of dispute resolution mechanisms for the disputing parties is a current need.[6]

The interests of a state have always been consistent with the necessity discussed above, because on the one hand, with the development of similar capabilities, the judiciary is allowed to relieve the accumulated and ongoing proceedings, and on the other hand, it fulfills a great social function when instead of the court trying to end the dispute by other legal means, the parties preserve the resources of their relations applying the alternative mechanisms. The parties do not get the syndrome of winning and losing which makes it easier for the representatives of society and business to continue living together, having a relationship, and doing business even in a conflict. In other words, it is the macro-level interest of a state as well as the micro-interest[7] of each party to find a mechanism for getting an effective dispute resolution without a waste of time and finances that contribute to actually saving resources, and keeping social peace.

Taking into account the above-mentioned necessity and reality, it was completely logical and consequently predictable that alternative means of dispute resolution, which represent constructive mechanisms for the effective elimination of social tension[8] and conflicts in society, would be widely applied and used by members of society. The political and legal associations of states have a strong desire to promote the introduction of alternative mechanisms to resolve disputes in everyday life.[9] Almost all states have adopted alternative means of dispute resolution, a characteristic of mediation.[10] In this regard, some countries historically have an experience of settling disputes with the mediation method or similar forms, which usually plays a positive role in integrating[11] this institution into the current legal system.

---

6 *Carvalho J.M., Carvalho C.,* Online Dispute Resolution Platform in Alberto de Franceschi (ed), European Contract Law and the Digital Single Market –The Implications of the Digital Revolution, Intersentia, 2016, 245,

7 *Steffek F.,* Mediation, in The Max Planck Encyclopedia of European Private Law, Volume II, *Basedow J., Hopt J.K., Zimmermann R., Stier A.,* Oxford University Press, Oxford, 2012, 1163.

8 *Steffek F*., Mediation, in The Max Planck Encyclopedia of European Private Law, Vol. II, *Basedow J., Hopt J.K., Zimmermann R., Stier A.*, Oxford University Press, Oxford, 2012, 1162.

9 *Esplugues C., Marquis L.,* New Developments in Civil and Commercial Mediation, Springer, Vol. 6, 2015, 2.

10 Jeong S., Critical consideration of court mediation in Korea, in *Brinkmann M., Effer-Uhe D.O., Vőlzmann-Stickelbrock B., Wesser S., Weth S.,* Festschrift for Hanns Prűtting, Dogmatics in the Service of Justice, Legal Certainty and Legal Development, Carl Heymanns Verlag, Cologne, 2018, 831.

11 *Creutzfeldt N.,* Trust in out-of-court dispute resolution, Journal for Conflict Management, Verlag Otto Schmidt, Cologne, issue 1/2016, 15.

Mediation is defined as a process[12] that helps the parties involved in the conflict to resolve the dispute through negotiations. Mediation is a negotiation when a professional negotiator – a mediator assists the parties in communicating with each other. Unlike typical negotiation, this is a negotiation process with the involvement of a third neutral person that is a new and effective possibility to settle the dispute between the parties.

The main goal of establishing mediation is to enable the parties to terminate the dispute with the best solution to their interests and to eliminate[13] the conflict. They do not end the dispute with the other party, but create a condition for keeping the business or personal relationship with the party in civil forms in the future. Mediation does not construe the events that occurred in the past, it helps the parties[14] find the best solution from the current impasse to continue the future relationship by their interests;[15] The parties achieve results by conducting negotiations with each other, therefore, the substantive part of the mediation process includes negotiation, and these two concepts should be considered synonymous with the difference that the negotiations between the parties in mediation are facilitated by a third neutral entity – the mediator, and the function of a negotiator lies in the organization of effective negotiations.

Negotiations conducted in mediation help the parties in self-determination, in recognizing the real reasons and approach[16] of the disputing parties to their demands. In the legal literature mediation is referred[17] to as a "future-oriented process";[18] Mediation allows the parties to achieve a long-term result[19] if the process is successfully conducted and completed, especially, since the parties in conflict can apply mediation at any stage of the dispute however, the earlier[20] mediation is initiated, the parties are enabled to start the formal negotiation process and make the agreement on the dispute.[21] In the negotiation process, the parties try to agree upon the truth[22] because the rules of law do not decide what they believe to be right, it is well known to everyone that in some cases justice and legality are not compatible theses with each other, therefore, applying the negotiation mechanism within the

---

12 *Trossen A*., Mediation (un)geregelt, Win-Management Verlag, Műhlberg, 2014, 37, 49.

13 *Greger R., Unberath H.,* MediationsG: Recht der Alternativen Konfliktlosung, Kommentar, C.H.BECK, Műnchen, 2012, 97.

14 *Jones G., Pexton P.,* ADR and Trusts: An International Guide to Arbitration and Mediation of Trust Disputes, Spiramus Press, 2015, 33.

15 *Wode M., Rabe C.S.*, Mediation, Springer, Berlin, 2014, 27.

16 *Alexander N.,* Global Trends in Mediation, 2nd Ed, Kluwer Law International, the Netherlands, 2006, 10.

17 *Trossen A.,* Mediation (un)geregelt, Win-Management Verlag, Műhlberg, 2014, 470.

18 *Deixler-Hűbner A., Schauer M.,* (Hrsg) Alternative Formen der Konfliktbereinigung, MANZ'sche Verlags- und Universitätsbuchhandlung, Wien, 2016, 188.

19 *Kaiser P., Gabler A.M.,* Prozessqualität und Langzeiteffekte in der Mediation, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 6/2014, 180.

20 *Fenn P.,* Commercial Conflict Management and Dispute Resolution, Routledge, New York, 2017, 68.

21 *Roberts M.M.,* Mediation in Family Disputes, Ashgate Publishing Ltd, Burlington, 2014, 180.

22 *Wendland M.,* Mediation und Zivilprozess, Mohr Siebeck, Tubingen, 2017, 216, 217. See also, Chitashvili N., Fair Settlement as Basis for Ethical Integrity of Mediation, "Alternative Dispute Resolution Yearbook", 2016, 12, ff. <https://adryearbook.tsu.ge/index.php/ADR/article/view/3025> [21.09.2023].

mediation, the parties make an effort to establish the truth through an agreement, and how fair[23] it is for both parties, it should be decided by them. In general, fairness is a characteristic standard of the concept of mediation.[24]

For the very perception of mediation, the parties need to understand well that they always benefit from mediation. They may not be able to terminate[25] the negotiations in mediation with a specific agreement however, they will be more aware of the causes of the conflict and the dispute than before the mediation, which may later become a prerequisite for the dispute. Therefore, participation in the mediation process always brings positive results for the parties if the party understands the content of the mediation and knows how to use the information that this process gives him.[26] It is common in the literature when mediation can be depicted as a profitable process[27] for both parties because, with the correct and effective use of mediation, both parties can reach an agreement beneficial to their interests;[28] While both parties are affected by the human or financial costs incurred on court proceedings or arbitration proceedings, and the victory achieved by one of the parties is illusory.[29]

The process of negotiation in mediation is confidential, in which the parties, voluntarily,[30] with the involvement of a third independent and impartial mediator,[31] who does not have any authority to make a decision, try to reach an agreement suitable to their interests[32] without court, find the terms of an agreement acceptable[33] to both parties by negotiation considering their goals.[34]

This process has its specific component which must appear to give mediation, as an experienced neutral third party[35] provided with special skills, the negotiation process[36] between the parties, a really

---

23 *Windisch K.,* Fair und/oder gerecht? Fairnesskriterien in der Mediation, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 2/2015, 55.

24 *Steffek F., Unberath H., (eds), Genn H., Greger R., Menkel-Meadow C.,* Regulating Dispute Resolution ADR and Access to Justice at the Crossroads, Hart Publishing, Oxford and Portland Oregon, 2013, 17.

25 *Teply L.L.,* Legal Negotiation in a Nutshell, 4th Ed, West Academic Publishing, 2023, 22.

26 *Ahmed M.,* An Investigation into the Nature and Role of Non-Settled ADR in International Journal of Procedural Law, Vol. 7, intersentia, Cambridge-Antwerp-Portland, 2017, 216-217.

27 *Deixler-Hűbner A., Schauer M.,* (Hrsg) Alternative Formen der Konfliktbereinigung, MANZ'sche Verlags- und Universitätsbuchhandlung, Wien, 2016, 21.

28 *Tsuladze A.,* Comparative Analysis of Georgian Court Mediation, publishing house "World of Lawyers", Tbilisi, 2017, 14 (in Georgian).

29 *Bevan A.,* Alternative Dispute Resolution, Sweet & Maxwell, London, 1992, 1.

30 *Hirsch G.,* Alternative Streitbeilegung: ein neuer Zugang zum Recht, *Honorati C., Ohly A., Padovini F., Hirsch G., Picotti L., Knauer C.,* Patentrecht ADR Wirtschaftsstrafrecht, Műller Verlag, Heidelberg, 2017, 64.

31 *Steffek F.,* Mediation, in The Max Planck Encyclopedia of European Private Law, Volume II, *Basedow J., Hopt J.K., Zimmermann R., Stier A*., Oxford University Press, Oxford, 2012, 1162.

32 *Hirsch G.,* Alternative Streitbeilegung: ein neuer Zugang zum Recht, *Honorati C., Ohly A., Padovini F.*

32 *Hirsch G.,* Alternative Streitbeilegung: ein neuer Zugang zum Recht, *Honorati C., Ohly A., Padovini F., Hirsch G., Picotti L., Knauer C.,* Patentrecht ADR Wirtschaftsstrafrecht, Műller Verlag, Heidelberg, 2017, 69.

33 *Bäumerich M.,* Gűterichter und Mediatoren im Wettbewerb, Duncker&Humblot, Berlin, 2015, 23.

34 *Feehily R.,* International Commercial Mediation, Cambridge University Press, 2022, 99.

35 *Hale T.,* Between Interests and Law, Cambridge University Press, Cambridge, 2015, 54.

wide area of self-establishment and practical application[37]: getting the public completely informed that mediation is the negotiation process and the parties in this process should be involved for a specific purpose: it is to end the dispute through negotiation, in which the parties directly or through their representatives try to reach an agreement.[38]

2. The Parties and Their Representatives in the Negotiation Process within the Mediation

The negotiation process, unlike other resolution mechanisms of dispute, capacitates the parties to manage the process, to get directly involved in the process of clarifying the issues or to use representatives. Most importantly, the parties have the opportunity to obtain the final result by eliminating the misunderstanding between them and terminating the dispute with an agreement. Negotiation is a kind of "temporary educational" process when parties with different views exchange ideas and interests from their perspective driven by the interest of agreement.[39] Negotiation is the art of compromise,[40] during which the parties have to make concessions, that is, the parties involved in this process should understand that by initiating negotiations, they indicate their willingness to make certain concessions. The approach that "concession is weakness" and "cannot" make concessions in negotiations contradicts the essence of this process.

The approach that negotiation is a "learned skill"[41] is increasingly becoming established in the modern developed world. Negotiation skills are already taught in higher educational institutions or professional associations, it is especially recommended for lawyers to learn this art because having communication with two parties with different interests, the technique of negotiation is vital for doing their professional activity.[42]

A lawyer should be able to distinguish the type of case when the parties can try to settle, and the cases that exclude achieving an agreement and the parties have to get the justice system to solve legal problems. The representative involved in the process shall recognize that not all disputes are subject to settlement, however, this does not exclude the involvement of the party and its representative in trying to terminate the dispute. Taking into account personal or business needs or approaches, a settlement cannot be reached,[43] because in some cases the specific circumstances of the dispute do not allow the parties any other option. Therefore, the parties and their representatives allow for a possible settlement and then take consistent steps, and after exhausting all means of resolving, they always remain assured of access to justice. Accordingly, considering the mentioned important reservation, when the time and

---

36 *Willis T., Wood W.,* Alternative Dispute Resolution in Golden J., Lamm C., International Financial Disputes Arbitration and Mediation, Oxford University Press, Oxford, 2015, 72.

37 *Moore C.W.*, The Mediation Process, 3rd Ed, Jossey-Bass Publishing, San Francisco, 2003, 467.

38 *Feehily R.,* International Commercial Mediation, Cambridge University Press, 2022, 11.

39 *Feehily R.,* International Commercial Mediation, Cambridge University Press, 2022, 11.

40 *Wenke A.R.,* The Art of Negotiation for Lawyers, Richter Publications, 1985, 3.

41 *Frascogna X.M., Hetherington L, H.,* The Lawyer's Guide to Negotiation, 2nd Ed, American Bar Association, 2009, 3.

42 *Teply L.L.,* Legal Negotiation in a Nutshell, 4th Ed, West Academic Publishing, 2023, 1.

43 *Wenke A.R.,* The Art of Negotiation for Lawyers, Richter Publications, 1985, 3

financial costs are minimal, and the statute of limitations is guaranteed by procedural standards, either party has no loss. Simultaneously, the parties and their representatives should realize that failure to reach an agreement during the negotiation process does not mean having wasted time[44] because their direct involvement in the negotiation process enables the parties to get valuable information, to discern the approach of another party to the issue or recognize their weak and strong sides if the dispute continues.

To successfully terminate the negotiation it is necessary to arrange a structured process,[45] which is led by a third neutral negotiator – a mediator, who is an independent and impartial figure from the parties and is driven by the sole function – to help the parties to make a decision, while he/she does is not a subject provided with similar powers. It is the format that mediation offers to the negotiating parties, and therefore, it is common when in the literature mediation is referred to as negotiation with the involvement of a third neutral person.

Negotiations in mediation are conducted by the parties, however, the involvement of lawyers in this process is convenient and justified because they have relevant knowledge[46] and experience to arrange negotiations in mediation,[47] provide the parties with convenient pieces of advice, and make a final, legally risk-free decision, so, to the subjects, participating in the process, mediation should be "a piece of cake".[48]

3. The Role of a Representative in the Negotiation and the Scope of Involvement in Participation

Discussing alternative means of dispute resolution, some believe that applying to a lawyer in the negotiation process of mediation is not necessary because the parties can protect their interests in a non-competitive and legal process which will save money; There is also an opinion that lawyers considering their nature, are focused on the interests of a client and cannot contribute to the successful conduct of the negotiation process, however, analyzing the issue, it is concluded that the lawyer is only a creator of additional value in such a process because he/she has to use the information obtained during the negotiation process, asses expected legal risks considering the actual circumstances, which helps the attorney[49] to form the right position and finally end the dispute by agreement if there is a possible settlement resource. In the ongoing negotiations in the mediation process, the representative should perform the function of a "peacemaker".[50]

---

44 Ibid., 5.

45 *Feehily R.,* International Commercial Mediation, Cambridge University Press, 2022, 12.

46 *Wenke A.R.,* The Art of Negotiation for Lawyers, Richter Publications, 1985, 5.

47 *Teply L.L.,* Legal Negotiation in a Nutshell, 4th Ed, West Academic Publishing, 2023, 8.

48 *Elkington A., Greene J., Morgan G., Shield G., Simmonds T.,* Skills for Lawyers, Jordan Publishing Limited, 2003, 97.

49 *Menkel-Meadow J.C., Love P.L., Schneider A.K., Sternlight R.J.,* Dispute Resolution Beyond the Adversarial Model, Wolters Kluwer Law & Business, Aspen Publishers Inc, 2011, 53.

50 *Walker S., Smith D.,* Advising and Representing Clients at Mediation, Wildy, Simmonds &Hill Publishing, London, 2013, 3.

Today, many lawyers are involved in mediation as mediators or representatives[51] of the parties, the latter playing an important role[52] in legal practice. The involvement of lawyers in the process of ongoing negotiations in mediation is of fundamental importance[53] because lawyers can provide the attorneys with the right perception of mediation and make their effective involvement in the negotiation process.[54] On the other hand, lawyers represent the primary source for the parties regarding the negotiations to be held within mediation and emerge trust in the mentioned alternative means of dispute resolution. Although a certain part of the public has a misconception[55] about the function and results of mediation, this new institution is becoming more popular every day.

For the negotiation process in mediation as a new institution to have practical results, on the one hand, it means the statistics of actual settlement of disputes by agreement, which on the other hand is automatically related to the goal of relieving the congestion of the court, all parties need to get involved in the process and accurately fulfill their obligations. However, the decisive role in this process is assigned to the representatives of the parties as the lawyer is the person who determines the successful course of the mediation therefore, the parties should concentrate on choosing a lawyer for mediation. On the one hand, the lawyer must comprehend the essence of mediation and negotiations, and on the other hand, have relevant experience of representation in mediation negotiations in a practical way, because even if one inappropriate word and approach of the lawyer to the other party, the negotiation can fail.[56] The lawyer prepares his client for mediation and selects the right negotiation strategy for his attorney.[57] In mediation negotiations, a person equipped to the function of a representative, who is a lawyer in many cases, must make the party discern the difference[58] between his real interests and the legal requirements set by him/her that get the party focused on the real interests and can develop options with the representative to reach an agreement.

At the initial stage of the negotiations, the attorney takes counsel from the lawyer about the extent to which mediation is a positive event for the dispute. In Georgia where negotiations in mediation are not a traditional alternative mechanism for resolving disputes and the awareness of the public about mediation is quite low, the role of a lawyer is more important. If the party does not have a recommendation[59] from a lawyer to initiate mediation, it will refrain[60] from applying for mediation. Mediation is the best way for a lawyer to practice negotiation and serve the client's interests, as it allows them to decide their fate.[61]

---

51 *Haft F., von Schlieffen K.G.*, Handbuch Mediation, C.H.BECK, Munchen, 3 Auflage, 2016, 107, 108.
52 *Reuben C.R.*, The Lawyer Turns Peacemaker, A.B.A.J, 1996, 54, 55.
53 *Margaret S.H.*, The Blackwell Handbook of Mediation, Blackwell Publishing, Great Britain, Oxford, 2006, 89.
54 *Dingle J., Kelbie J.,* The Mediation Handbook, 2nd ed, Unity Press, 2014, 114.
55 *Leung E*., Mediation: A Cultural Change, Asian Pacific Law Review, 2009, 17.
56 Ibid.
57 *Eidenmuller H.*, Alternative Streitbeilegung, Verlag C.H.Beck Munchen, 2011, 147.
58 *von Maik B.*, Guterichter und Mediatoren im Wettbewerb, Duncker & Humblot, Berlin, 2015, 23.
59 *Goodman A.,* Mediation Advocacy, 2nd ed, Nova, 2010, 5.
60 *McLaren H.R., Sanderson J.*, Innovative Dispute Resolution: The Alternative, Thomson Carswell, 2006,4-2
61 *Hollander J.,* Mediation for Civil Litigators, Irwin Law Inc, 2013, xviii.

Many lawyers participate[62] in mediation, either as a representative of a party or as a mediator,[63] and their involvement in the process provides for further popularization of mediation and increases awareness in society. Lawyers who are involved in the negotiation as representatives in the mediation process assume the obligation of their constructive involvement[64] to assist the parties in the negotiations and not hinder the prospects of settling the dispute by putting their role forward. However, this does not diminish the role of the institution of the representative, on the contrary, it is a protected and guaranteed right, a kind of expression of "representative democracy" that is ensured in the process of negotiation in mediation.[65]

Along with the introduction of mediation in all jurisdictions, the lawyer must provide[66] the party with complete and comprehensive information about the mentioned alternative means of resolving the dispute. Although the final decision on applying the mentioned mechanism is the privilege[67] of the party, however, the lawyer is obliged to inform about the means and advise the mediator about the advantages and drawbacks of a specific dispute. The lawyer must also clearly explain to the attorney that during the negotiation, the party should focus on its interests and not on legal grounds, as well as determine the content of the mediation and make the final decision but full responsibility for the outcome rests with the party. Representation in mediation, including by a lawyer, involves providing the attorney with full information about the process, correct advice on the necessity of mediation for a specific dispute, and selecting a mediator with appropriate knowledge, experience, and skills depending on the content of the dispute.

Following the amendments to the Code of Ethics of the Bar Association on December 8, 2012, the abovementioned ethical obligation appeared in the Code of Ethics of the Bar Association of Georgia.[68]

Mediation is not a panacea.[69] Regardless of mediation, the parties can still reach the jurisdiction of the court.[70] However, the people involved in the process of the dispute, especially lawyers should be aware of the place and role of mediation in the legal system, and their roles and functions in the process of mediation negotiations not to miss the opportunity to enjoy new opportunities. Mediation

---

62 *Englert K., Franke H., Grieger W.*, Streitlosung ohne Gericht – Schlichtung,Schiedsgericht und Mediation in Bausachen, Werner Verlag, 2006, 253.

63 ***Chitashvili N.,* Specificity of Some Ethical Duties of Lawyer Mediators and Necessity of Regulation, TSU Journal od Law, #2, 2016, 23-40.**

64 *Pruckner M.,* Recht der Mediation, Linde Verlag Wien, Wien, 2003, 32.

65 *Fischer E.*, Sozialwissenschaftliche Theoriebildung und das Problem der Mediation, Peter Lang Verlag, Frankfurt, 2006, 17.

66 *Steffek F.*, Mediation und Justiz in Das Neue Mediationsgesetz, Fischer Christian., Unberath Hannes., Verlag C.H.Beck, Munchen, 2013, 35

67 *Schmidt F., Lapp T., Monßen H.G.,* Mediation in der Praxis des Anwalts, Verlag C.H.Beck, Műnchen, 2012, 22.

68 The Code of Ethics of the Georgian Bar Association, <www.gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf> [21.09.2023] (in Georgian).

69 *Brand J., Steadman F.. Todd C.,* Commercial Mediation, Iuta&Company, 2nd Ed, 2016, v.

70 *Niedostadek A.*, Mediation bei Arbeitsplatzkonflikten und der Grundsatz der Freiwilligkeit, Zeitschrift fur Konflikt-Management, 17 Jahrgang,Heft 2/2014, Januar/Februar, Seiten 1-32,PVSt 47561, 55. (in Georgian).

can become a cure, a "conflict screening"[71] if a correct analysis of the current dispute takes place which will lead to at least, determining the correct ways of resolution.

During the representation in mediation negotiations, lawyers have to transform the legal approach and temporarily change the previous attitudes developed over the years, in particular, the issue of the legal proceedings, who asks somebody for something, who is asked, and on what basis is being asked,[72] is temporarily leveled during the negotiations. In mediation, the parties have to make some compromises if accommodation of an agreement and utterly exhausting the issue is the main priority for them. The parties of the process[73] best know what is possible to reach an agreement and what they are ready to agree on. In mediation, the issue is not resolved according to legal correctness, but the parties agree on the conflict, confrontation, and dispute.[74] Accordingly, the main question expressed in this section- who asks somebody for something, who is asked, and on what basis is being asked, is unlikely to be the main priority for one or another party. This question is constructed by the lawyer backing the attorney taking into account the main interests.

To be a successful representative in mediation, a lawyer needs special training, because the skills acquired by a lawyer for the implementation of advocacy activities are not sufficient for full-fledged representation in mediation.[75] In mediation, the lawyer must have complete information about the mediators, their activities, how to choose the right and necessary mediator[76] for the case, and what to expect, otherwise, he will harm the interests of the client. It should be considered that law schools do not train future lawyers in practical mediation skills[77] which raises a logical question: how can a lawyer be successful in mediation?

It is common for lawyers to perceive the case of mediation as their case, while this case is of a specific client and he/she wins or loses the dispute.[78] Therefore, clients always prefer to resolve the conflict by spending less time and money, and if the lawyer is capable of tracking client satisfaction, it is double valued by a client. Accordingly, the correct perception and application of mediation by the lawyer is a mutually beneficial process during the deliberation.[79]

lawyers should believe in the effectiveness of mediation. They ought not to have the feeling of being a competitor or taking hold of the activities. In this direction, the Bar Association has a vital role in developing mediation into a powerful institution and establishing it in Georgia.

---

71 *Ponschab R.*, Verhandlungsfuhrung: Mutter aller Konfliktlosungen, ADR-Verfahren im Vergleich –Teil 9, Zeitschrift fur Konflikt-Management, 17 Jahrgang,Heft 1/2014, Januar/Februar, Seiten 1-32,PVSt 47561, 7.

72 Ibid.4.

73 *Wendenburg F.,* Mediation –flexible Gestaltung innerhalb fester Strukturen, Zeitschrift fur Konflikt-Management, 17 Jahrgang, Heft 2/2014, Januar/Februar, Seiten 1-32, PVSt 47561, 36.

74 *Ponschab R.,* Verhandlungsfuhrung: Mutter aller Konfliktlosungen, ADR-Verfahren im Vergleich –Teil 9, Zeitschrift fur Konflikt-Management, 17 Jahrgang,Heft 1/2014, Januar/Februar, Seiten 1-32, PVSt 47561, 4.

75 *Goodman A.,* Mediation Advocacy, 2nd ed, Nova, 2010, 1.

76 Ibid.6.

77 *Hollander J.,* Mediation for Civil Litigators, Irwin Law Inc, 2013, xix.

78 Ibid., 1.

79 *Stephen W.J.,* Principles of Alternative Dispute Resolution, West Academic Publishing, 2016, 391.

There is an interesting international-level discussion about whether the lawyer must be involved in the mediation or not.[80] A large part of the legal community agreed that it is up to the domestic legislator of a country to consider its needs and reality.[81]

However, it has been established for years at the international level that if a lawyer is representative, the process has an additional advantage, especially during the mediation of complex commercial disputes, because the parties consider the mediation performed by a specialist lawyer[82] to be a precondition for the achievement of success however, the lawyer in mediation mainly conducts a dialogue focused on the interests of the parties, and not on legal norms.[83] The lawyer is centered on legal evaluations, which in turn, makes it easier for the attorneys to clarify the issue and actively participate in the process. Moreover, some non-lawyer representatives confirm that mediation with the engrossment of a lawyer mediator or lawyer representatives is a more effective process.[84]

The involvement of lawyers as representatives in mediation is of fundamental importance[85] because lawyers have an opportunity to create the correct perception of mediation to clients and make their functional engrossment in the mediation process. On the other hand, lawyers are the primary source of mediation for the parties and a causal factor in the emergence of trust in this alternative means of dispute resolution. In addition, lawyers apply the ethical rules and standards stipulated by the code[86] in a country, however, as a non-lawyer is allowed to perform the function of a representative, it is recommended to set the minimum standards for mediation that the participants involved in the mediation follow. But every type of representative has the same obligation, which is the main function of the representative in mediation:

- They shall evaluate the case and advise the attorney if the dispute is appropriate for mediation;[87]

- to explain the advantages and disadvantages of mediation and its purpose;

- Following the interests of the attorney, the function of "fighter" should be replaced by the function of "sage advisor" to help the attorney reach an agreement.[88]

- To advise the attorney to introduce mediation at the right time,[89] because the parties are not often ready for mediation, and it does not result in success, therefore, the lawyer should carefully assess and counsel his/her client about the right time and the stage for initiating mediation.

---

80 *Goodman A.,* Mediation Advocacy, 2nd Ed, Nova, 2010, 25.

81 §1 Abs. 1 RBerg; zur Frage der Erlaubnispflicht im Falle `gerichtsnaher` Mediation ausfuhrlich Volkmann, SchiedsVZ, 2004, S.245 ff.

82 *Goodman A.,* Mediation Advocacy, 2nd ed, Nova, 2010, 1.

83 *Greger R., Unberath H.,* Die Zukunft der Mediation in Deutschland, 2008, Verlag C.H.Beck Munchen 2008, 5.

84 *Walker S., Smith D.,* Advising and Representing Clients at Mediation, Wildy, Simmonds &Hill Publishing London, 2013, 55.

85 *Margaret S.H.,* The Blackwell Handbook of Mediation, Blackwell Publishing, Great Britain, Oxford, 2006, 89.

86 *Chern C.,* International Commercial Mediation, Informa London, 2008, 122.

87 *Eberhardt H.,* Rechrsschutzversicherung und außergerichtliche Konfliktslősung, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 3/2014, 85.

88 *Pramhofer K.,* Gerichtsnahe Mediation beim Handelsgericht Wien-ein Erfolgsprojekt, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 3/2014, 82.

- to make a correct analysis of the issue, in particular, if another party aims at exploring the weaknesses of the party through initiating the mediation process,[90] and mediation does not strive to reach an agreement at all, or the contrary, in case of necessity, to take a similar procedural step, in agreement and consent with the client (the "principle of fly fishing")[91]

- to select the right mediator for the case;

- to determine the circle of persons who are required to be involved in mediation;

- provide complete control at all stages of mediation;

- to work on the terms of the agreement announced during the mediation process;

- to select and agree the best conditions for the client with the party;

- Legal advisers in mediation should realize that the advice provided for the parties before the start of the mediation may be changed[92] several times because the exchanged position statements to reach an agreement often require the transformation of the legal position. Therefore, legal representatives must be ready for the mentioned, but the attorney should also be warned about the similar features of mediation so as not to lose the client's faith in his qualifications.

- to draw up the contract act and correctness as against the addressees of the laws;

- To make timely identification of the futility of continuing mediation and stopping it;

Taking into account that admitting any person as a representative in civil disputes in the first instance remains a challenge for justice today, which is one of the obstacles to the implementation of quality justice. Considering the position, which is, on the one hand, the open position of the Bar Association, as well as a large part of the legal community, that it should become mandatory to have a lawyer in the courts of first instance, it becomes clear that shortly even conducting the mediation process without a lawyer may become inconceivable, which additionally increases the role and importance of lawyers in the successful use of mediation as an alternative means of dispute in the Georgian reality.

A lot can be said and written about the mentioned, however, I have to say about the non-alternative issue, a characteristic feature for a lawyer involved in mediation,[93] which will help them, as representatives in mediation, to bring the process to an amicable end to the current dispute, because mediation is a kind of challenge for lawyers, following their main function has always been to fight for the client's interests and demands to be fully satisfied. In the mediation negotiation, they should look at reality in a different way, which requires a certain psychologically[94] correct approach and analysis which is new for active, even more experienced, lawyers.

---

89 *McLaren H.R., Sanderson J.*, Innovative Dispute Resolution: The Alternative, Thomson Carswell, 2006, 4-2.

90 *Genn H.,* Judging Civil Justice, The Hamlyn Lectures 59th series, Cambridge University Press, Cambridge, 2010, 113.

91 *Kwan Lun M.I.*, Alternative Dispute Resolution of Shareholder Disputes in Hong Kong, Cambridge University Press., Cambridge, 2017, 95.

92 *Arthur W.R.*, Contemporary Issues in International Arbitration and Mediation, Martinus Nijhoff Publishers Netherlands/Leiden, 2013, 349

93 *Dingle J., Kelbie J.,* The Mediation Handbook, 2nd Ed, Unity Press, 2014, 113.

94 *Goodman A.,* Mediation Advocacy, 2nd ed, Nova, 2010, 17.

Such skills and techniques of producing mediation are difficult to be exhaustive, however, several main issues can be touched on, which are among them recognized in international practice:[95]

a) Taking into account that the function of the mediator in mediation is to facilitate the ongoing process, during which the main case is carried out by the parties and their representatives, it is self-evident that the lawyer and his communication skills are given decisive importance because the correct and timely communication of the lawyer with his client can lead to the ultimate end of mediation. But in mediation, the mediator has limited capability to give any kind of legal advice or assessment to the parties, therefore, the party is fully dependent on the advice and analysis skill of its representative, which requires well-timed communication between the lawyers and the client, including the mediator, and of course, with the other party and his lawyer.

b) A lawyer participating in mediation must be well-versed in negotiation techniques to use them for the client's interests. Also, a lawyer should have the ability to receive and process information, because the correct analysis of information enables the party to reach an agreement taking into account their interests.[96]

c) It is important for a lawyer to possess the technique of asking questions[97] to analyze the information that he must first receive from the mediator and then the other party during the process. In the mediation process, the mediator usually has complete information from both parties but the mediator is not allowed to disclose it. Therefore, the lawyer needs to ask the mediator the right question to get the information and analyze it to make certain conclusions in terms of further planning of the process.

d) It is also essential for the lawyer to be an “active listener"[98] because a lot of information is collected during the mediation process coming from the other party and the mediator that needs to be fully received and analyzed. According to the practice, the representative gets tired of obtaining information or believes that he is hearing irrelevant information but he must have the ability to listen completely, and then find out the differences between primary and secondary sources of information.

e) Following the above-mentioned, a lawyer needs to have the same ability of analytical thinking as a representative has in the mediation process because the heard and accumulated information requires a correct analysis from the party. The emotionally charged party cannot evaluate the information, and this function is performed by the lawyer. In the mediation process, the lawyer analyzes the ample terms of the agreement offered by the other party and selects the best one for his attorney.

f) A sense of creative thinking is also important for a lawyer because in some cases the mediation does not provide a legal solution to the issue, and the parties agree on alternative terms to the existing legal requirements. The lawyer needs to develop the mentioned options, taking into

---

95 *Eidenmuller H., Wagner G.,* Mediationsrecht, Verlag Otto Schmidt, Kőln, 2015, 35

96 *Abramson H., Ingen-Housz A.,* ADR in Business, Vol. II, Wolters Kluwer Law & Business, the Netherlands. 2011, 312.

97 *Picker B.,* Mediation Practice Guide: A Handbook for Resolving Business Disputes, American Bar Association, 2nd ED, Washington, 2003, 91.

98 *Eidenmuller H., Wagner G.*, Mediationsrecht, ottoschmidt, 2015, 36.

account the legal goal of the party, which requires an innovative approach to the issue, and not to solve the issue with legal templates.

g) In addition, the lawyer has to visualize the information that alters during the mediation process. By applying visual means, the attorney perceives changing conditions and their contents during the process of the agreement which plays a decisive role in terminating the process.

h) In mediation, along with all other functions, the lawyer conducts negotiations with the other party and its representative. He applies to a mediator to arrange the negotiation but the main planner, strategist, and direct actor of the negotiation is the lawyer. The involvement of a mediator in the process is also planned by the lawyer and agreed with the client accordingly. In court, he formulates the demands and positions of the parties in the legal framework and justifies them in the process. As the lawyer has to navigate a lot of issues simultaneously, his legal professional preparation should be sufficient. Being a representative is even more difficult in mediation because he should realize the type of negotiation dispute,[99] the interests of the other party, and even the skills of the representative of the other party in the negotiation. Also, the representative has to consider the interests of an attorney to agree upon the mediation and the further activities of his lawyer to achieve the planned result. Besides, the representative should consider the factual circumstances of the particular dispute to persuade and cajole the other party and figure out the weak points of his plan.[100]

To achieve success, lawyers involved in mediation should pay attention to several additional issues:

a) Lawyers must preside over the vocabulary used in mediation, moreover, sentences and phrases with accusatory remarks can cause a negative attitude from the other party, therefore, lawyers involved in mediation must be vigilant not to cause even more alienation and tension between the parties.

b) To realize the acceptance of their offers, lawyers should put themselves in the place of the other party.

c) Lawyers should evaluate all the strengths and weaknesses of their cases and the interests and wishes of their clients, as well as the maximum and minimum of achieving the agreement. Several studies conducted on mediation demonstrated that well-prepared parties for mediation are an unconditional prerequisite[101] for an amicable end to the dispute.

d) In the process of mediation, the lawyer must select the right time for his party to make the first offer to the other party under specific conditions for an agreement to end the dispute but the legal capacity of an offer (the maximum or the minimum) must be considered to provide his party to manipulate within the offer after hearing the response of the other party to the offer.[102]

e) To show respect to all parties involved in the process with his verbal and non-verbal expressions, gestures, and addresses.[103]

---

99 *Frascogna J., Hetherington H.L,* The Lawyer's Guide to Negotiation, American Bar Association, 2009, 11.

100 *Hollander J.,* Mediation for Civil Litigators, Irwin Law Inc, 2013, 6, 7.

101 Ibid., 28.

102 *Ponschab R.*, Verhandlungsfuhrung: Mutter aller Konfliktlosungen, ADR-Verfahren im Vergleich –Teil 9, Zeitschrift fur Konflikt-Management, 17 Jahrgang,Heft 1/2014, Januar/Februar, Seiten 1-32,PVSt 47561, 5.

103 *Nelson M.R.,* Nelson on ADR, Thomson Carswell, 2003, 58.

The stage of preparation for mediation is selecting the right mediator for the dispute by the parties. In some jurisdictions, the court appoints a mediator in case of disagreement between the parties therefore, both parties should agree on the candidacy considering the specifics and content of their dispute taking into account the experience and knowledge of a mediator because in case of disagreement, the mediator chosen at random, can appear to be with a paucity of awareness and skills that results in the damage to the interest of the party.[104]

Conducting negotiations in two forms is the main tool[105] to achieve an agreement in mediating the interests of a client. Negotiation is a process that amalgamates legal training and experience, personal skills, and only a good combination of the mentioned provides a result in negotiations.[106] Society regards a lawyer as a good negotiator, under this perception most states, including the government of the United States of America,[107] hire lawyers to conclude negotiations (negotiations for international trade relations, e.g. North American Free Trade Agreement, negotiations in the field of copyright law, the issues related to trade, and others). Recently, in Europe and the United States of America has been developed a training program for lawyers "Mediation Advocacy",[108] which provides lawyers with the suitable skills to conduct correct and successful mediation.

Lawyers apply the same standard in the mediation process as when representing in court, particularly, to protect the best interest of their attorney[109] however, the difference refers to the form in which the lawyer has to exercise his authority. He should comprehend that he has to work in an alternative format of resolving the dispute chosen by the client, during which the current conflict a negotiated settlement must be reached by consensus[110] rather than being won through the adversarial process, which is the challenge for lawyers in some cases.

The main function of the representative in mediation is to assess the suitability of his client's dispute for mediation and select the strategy to apply a specific form of mediation.

In the case of achieving an agreement in the process of mediation, the lawyer drafts the agreement[111] and works on it with the other party.[112]

Following the new approach being established in Europe, representation[113] in the mediation of civil and commercial disputes is a different direction for persons engaged in legal work and requires specific training and appropriate marketing to provide consumers with access to persons who perform representation in mediation. Lawyers are traditionally associated with the court and the competitive process, which is a historical assessment of their activities however, the modern perception and

---

104 *Hollander J.,* Mediation for Civil Litigators, Irwin Law Inc, 2013, 27.
105 *Frascogna J., Hetherington H.L.,* The Lawyer's Guide to Negotiation, American Bar Association, 2009, 1.
106 Ibid., 2.
107 Ibid., 2.
108 *Brown H., Marriott A.,* ADR Principles and Practice, Sweet & Maxwell, Thomson Reuters, 2011, 405.
109 Ibid., 405.
110 <http://www.mediationadvocates.org.uk> [21.09.2023].
111 *Blake S., Browne J., Sime S.,* The Jackson ADR Handbook, 2nd Ed, Oxford University Press, Oxford, 2016, 40.
112 *Brown H., Marriott A.,* ADR Principles and Practice, Sweet & Maxwell, Thomson Reuters, London, 2011, 423.
113 *Goodman A.,* Mediation Advocacy, 2nd Ed, Nova, 2010, 175.

understanding of those activities in mediation needs their effective involvement and action in the matrix of alternative means of dispute resolution.[114]

4. Conclusion

Today, mediation is the fastest developing alternative means of dispute resolution in the world,[115] which is characterized by the involvement of a third[116] independent, unbiased, and neutral person,[117] within the framework[118] of a confidential and structured process, delegating the opportunity for the parties to decide on the dispute to the conflict, which is the main feature of the European[119] and non-European perception of mediation. Mediation is an effective alternative tool[120] for conflict resolution because, in this process, a third neutral person(s) helps the parties to the conflict to reach an agreement[121] tailored to their interests.

The correct approach and positioning of the parties to each other is extremely important in the effective negotiation process because the parties unlike other mechanisms to settle the dispute, appear to be the decision-making subjects in mediation. Thus, if the representatives are not provided with representative skills, the parties are expected to deal with much more difficulty in reaching an agreement.

Therefore, along with the introduction of mediation as a new mechanism for resolving disputes, it is equally important to inform a wide circle of lawyers about the institution of representation in mediation and train them in the relevant skills related to representation in mediation. Only taking such subsequent steps can ensure the successful operation of this new mechanism in the country.

Bibliography:

1. The Code of Ethics of the Georgian Bar Association, <www.gba.ge/uploads/files/regulaciebi/eTikis_kodexi.pdf> [21.09.2023] (in Georgian).
2. *Abramson H., Ingen-Housz A.,* ADR in Business, Vol. II, Wolters Kluwer Law&Business, the Netherlands, 2011, 312.
3. *Ahmed M.,* An Investigation into the Nature and Role of Non-Settled ADR in International Journal of Procedural Law, Vol. 7, intersentia, Cambridge-Antwerp-Portland, 2017, 216, 217.
4. *Alexander N.,* Global Trends in Mediation, 2nd Ed, Kluwer Law International, the Netherlands, 2006, 10.
5. *Alexander N.*, International and Comparative Mediation, Wolters Kluwer, 2009, 1.

114 *Boulle L., Field R.,* Australian Dispute Resolution, Lexis Nexis Butterworths, 2017, 152.
115 *Alexander N.*, International and Comparative Mediation, Wolters Kluwer, 2009, 1.
116 *Blake S., Browne J., Sime S.,* The Jackson ADR Handbook, 2nd Ed, Oxford University Press, Oxford, 2016, 144.
117 *Trenczek T.M.A., Berning D., Lenz C., Will H.D.,* Mediation und Konfliktmanagement, Handbuch, 2. Auflage, Nomos, Baden-Baden, 2017, 50.
118 *Tutzel S., Wegen G., Wilske S.,* Commercial Dispute Resolution in Germany, 2nd Ed, C.H.BECK, Munchen, 2016, 191
119 EU-Mediationsrichtlinie 2008, Art. 3a.
120 *Berkel G.,* Zur Diskussion gestellt: Deal Mediation als Konfliktbeilegung, Zeitschrift für Konfliktmanagement (ZKM), Verlag Otto Schmidt, Kőln, 2018, 61.
121 *Germund R.,* Außergerichtliche Streitbeilegung durch Co-Mediation, Pro Business GmbH, Berlin, 2012, 3.

6. *Arthur W.R.*, Contemporary Issues in International Arbitration and Mediation, Martinus Nijhoff Publishers, Netherlands/Leiden, 2013, 349.
7. *Bäumerich M.,* Gűterichter und Mediatoren im Wettbewerb, Duncker&Humblot, Berlin, 2015, 23.
8. *Berkel G.,* Zur Diskussion gestellt: Deal Mediation als Konfliktbeilegung, Zeitschrift fűr Konfliktmanagement (ZKM), Verlag Otto Schmidt, Kőln, 2018, 61.
9. *Bevan A.,* Alternative Dispute Resolution, Sweet & Maxwell, London, 1992, 1.
10. *Blake S., Browne J., Sime S.,* The Jackson ADR Handbook, 2nd Ed, Oxford University Press, Oxford, 2016, 40.
11. *Boulle L., Field R.,* Australian Dispute Resolution, Lexis Nexis Butterworths, 2017, 152.
12. *Brand J., Steadman F.. Todd C.,* Commercial Mediation, Iuta&Company, 2nd Ed, 2016, v.
13. *Brown H., Marriott A.,* ADR Principles and Practice, Sweet & Maxwell, Thomson Reuters, London, 2011, 423.
14. *Campbell C*., International Mediation, Wolters Kluwer, Special Issue, 2020, 32
15. *Carvalho J.M., Carvalho C.,* Online Dispute Resolution Platform in Alberto de Franceschi (ed), European Contract Law and the Digital Single Market –The Implications of the Digital Revolution, Intersentia, 2016, 245, 246.
16. *Chitashvili N.,* Specificity of Some Ethical Duties of Lawyer Mediators and Necessity of Regulation, TSU Journal od Law, #2, 2016, 23-40.
17. *Chitashvili N.,* Fair Settlement as Basis for Ethical Integrity of Mediation, "Alternative Dispute Resolution Yearbook", 2016, 12, ff. <https://adryearbook.tsu.ge/index.php/ADR/article/view/3025> [21.09.2023].
18. *Creutzfeldt N.*, Vertrauen in Außergerichtliche Streitbeilegung, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 1/2016, 15.
19. *Deixler-Hűbner A., Schauer M.,* (Hrsg) Alternative Formen der Konfliktbereinigung, MANZ'sche Verlags- und Universitätsbuchhandlung, Wien, 2016, 188.
20. *Dingle J., Kelbie J.,* The Mediation Handbook, 2nd ed, Unity Press, 2014, 114.
21. *Eberhardt H.,* Rechrsschutzversicherung und außergerichtliche Konfliktslősung, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 3/2014, 85.
22. *Eidenmuller H.*, Alternative Streitbeilegung, Verlag C.H.Beck Munchen, 2011, 147.
23. *Eidenmuller H., Wagner G.,* Mediationsrecht, Verlag Otto Schmidt, Kőln, 2015, 35.
24. *Elkington A., Greene J., Morgan G., Shield G., Simmonds T.,* Skills for Lawyers, Jordan Publishing Limited, 2003, 97.
25. *Englert K., Franke H., Grieger W.*, Streitlosung ohne Gericht – Schlichtung,Schiedsgericht und Mediation in Bausachen, Werner Verlag, 2006, 253.
26. *Esplugues C., Marquis L.,* New Developments in Civil and Commercial Mediation, Springer, Vol. 6, 2015, 2.
27. EU-Mediationsrichtlinie 2008, Art. 3a.
28. *Feehily R.,* International Commercial Mediation, Cambridge University Press, 2022, 3.
29. *Fenn P.,* Commercial Conflict Management and Dispute Resolution, Routledge, New York, 2017, 68.
30. *Fischer E*., Sozialwissenschaftliche Theoriebildung und das Problem der Mediation, Peter Lang Verlag, Frankfurt, 2006, 17.
31. *Frascogna X.M., Hetherington L, H.,* The Lawyer's Guide to Negotiation, 2nd Ed, American Bar Association, 2009, 3.

32. *Genn H.,* Judging Civil Justice, The Hamlyn Lectures 59th series, Cambridge University Press, Cambridge, 2010, 113.
33. *Germund R.,* Auβergerichtliche Streitbeilegung durch Co-Mediation, Pro Business GmbH, Berlin, 2012, 3.
34. *Goodman A.,* Mediation Advocacy, 2nd ed, Nova, 2010, 5.
35. *Greger R., Unberath H.,* MediationsG : Recht der Alternativen Konfliktlosung, Kommentar, C.H.BECK, Műnchen, 2012, 97.
36. *Haft F., von Schlieffen K.G.*, Handbuch Mediation, C.H.BECK, Munchen, 3 Auflage, 2016, 107, 108.
37. *Hale T.,* Between Interests and Law, Cambridge University Press, Cambridge, 2015, 54.
38. *Hirsch G.,* Alternative Streitbeilegung: ein neuer Zugang zum Recht, *Honorati C., Ohly A., Padovini F., Hirsch G., Picotti L., Knauer C.,* Patentrecht ADR Wirtschaftsstrafrecht, Műller Verlag, Heidelberg, 2017, 64.
39. *Hollander J.,* Mediation for Civil Litigators, Irwin Law Inc, 2013, xviii.
40. *Jeong S.,* Kritische Betrachtung űber die Gerichtsmediation in Korea, in Brinkmann M., Effer-Uhe D.O., Vőlzmann-Stickelbrock B., Wesser S., Weth S., Festschrifr fur Hanns Prűtting, Dogmatik im Dienst von Gerechtigkeit, Rechtssicherheit und Rechtsentwicklung, Carl Heymanns Verlag, Kőln, 2018, 831.
41. *Jones G., Pexton P.,* ADR and Trusts: an International Guide to Arbitration and Mediation of Trust Disputes, Spiramus Press, 2015, 33.
42. *Kaiser P., Gabler A.M.,* Prozessqualität und Langzeiteffekte in der Mediation, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 6/2014, 180.
43. *Kwan Lun M.I.*, Alternative Dispute Resolution of Shareholder Disputes in Hong Kong., Cambridge University Press., Cambridge, 2017, 95.
44. *Leung E*., Mediation: A Cultural Change, Asian Pacific Law Review, 2009, 17.
45. *Margaret S.H.*, The Blackwell Handbook of Mediation, Blackwell Publishing, Great Britain, Oxford, 2006, 89.
46. *McLaren H.R., Sanderson J.*, Innovative Dispute Resolution: The Alternative, Thomson Carswell, 2006, 4-12.
47. *Menkel-Meadow J.C., Love P.L., Schneider A.K., Sternlight R.J.,* Dispute Resolution Beyond the Adversarial Model, Wolters Kluwer Law&Business, Aspen Publishers Inc, 2011, 53.
48. *Moore C.W.*, The Mediation Process, 3rd Ed, Jossey-Bass Publishing, San Francisco, 2003, 467.
49. *Nelson M.R.,* Nelson on ADR, Thomson Carswell, 2003, 58.
50. *Niedostadek A.*, Mediation bei Arbeitsplatzkonflikten und der Grundsatz der Freiwilligkeit, Zeitschrift fur Konflikt-Management, 17 Jahrgang,Heft 2/2014, Januar/Februar, Seiten 1-32,PVSt 47561, 55.
51. *Palmeter D., Mavroidis P.C., Meagher N.*, Dispute Settlement in the World Trade Organization (practice and procedure), 3rd Edit, Cambridge University Press, 2022, 11.
52. *Picker B.,* Mediation Practice Guide : A Handbook for Resolving Business Disputes, American Bar Association, 2nd ED, Washington, 2003, 91.
53. *Ponschab R.*, Verhandlungsfuhrung: Mutter aller Konfliktlosungen, ADR-Verfahren im Vergleich – Teil 9, Zeitschrift fur Konflikt-Management, 17 Jahrgang,Heft 1/2014, Januar/Februar, Seiten 1-32,PVSt 47561, 7.
54. *Pramhofer K.,* Gerichtsnahe Mediation beim Handelsgericht Wien-ein Erfolgsprojekt, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 3/2014, 82.

55. *Pruckner M.,* Recht der Mediation, Linde Verlag Wien, Wien, 2003, 32.
56. *Reuben C.R.*, The Lawyer Turns Peacemaker, A.B.A.J, 1996, 54, 55.
57. *Roberts M.M.,* Mediation in Family Disputes, Ashgate Publishing Ltd, Burlington, 2014, 180.
58. *Schmidt F., Lapp T., Monßen H.G.,* Mediation in der Praxis des Anwalts, Verlag C.H.Beck, Műnchen, 2012, 22.
59. *Steffek F.,* Mediation, in The Max Planck Encyclopedia of European Private Law, Volume II, Basedow J., Hopt J.K., Zimmermann R., Stier A., Oxford University Press, Oxford, 2012, 1163.
60. *Stephen W.J.,* Principles of Alternative Dispute Resolution, West Academic Publishing, 2016, 391.
61. *Teply L.L.,* Legal Negotiation in a Nutshell, 4th Ed, West Academic Publishing, 2023, 22.
62. *Trenczek T.M.A., Berning D., Lenz C., Will H.D.,* Mediation und Konfliktmanagement, Handbuch, 2.Auflage, Nomos, Baden-Baden, 2017, 50.
63. *Trossen A*., Mediation (un)geregelt, Win-Management Verlag, Műhlberg, 2014, 37, 49.
64. *Tsuladze A.,* Comparative Analysis of Georgian Court Mediation, publishing house "World of Lawyers", Tbilisi, 2017, 14 (in Georgian).
65. *Tutzel S., Wegen G., Wilske S.,* Commercial Dispute Resolution in Germany, 2nd ed., C.H.BECK, Munchen, 2016, 191.
66. *von Maik B.*, Guterichter und Mediatoren im Wettbewerb, Duncker &Humblot, Berlin, 2015, 23.
67. *Vries T*., Mediation als Verfahren konsensualer Streitbeilegung, Peter Lang Internationaler Verlag der Wissenschaften, 2012, 115.
68. *Walker S., Smith D.,* Advising and Representing Clients at Mediation, Wildy, Simmonds &Hill Publishing, London, 2013, 55.
69. *Ware S.J.,* Principles of Alternative Dispute Resolution, 3rd ed, West Academic Publishing, 2016, 393.
70. *Wendenburg F.,* Mediation –flexible Gestaltung innerhalb fester Strukturen, Zeitschrift fur Konflikt-Management, 17 Jahrgang, Heft 2/2014, Januar/Februar, Seiten 1-32, PVSt 47561, 36.
71. *Wendland M.,* Mediation und Zivilprozess, Mohr Siebeck, Tubingen, 2017, 216, 217.
72. *Wenke A.R.,* The Art of Negotiation for Lawyers, Richter Publications, 1985, 3.
73. *Willis T.,Wood W.,* Alternative Dispute Resolution in Golden J., Lamm C., International Financial Disputes, Arbitration and Mediation, Oxford University Press, Oxford, 2015, 72.
74. *Windisch K.,* Fair und/oder gerecht? Fairnesskriterien in der Mediation, Zeitschrift fur Konflikt-Management, Verlag Otto Schmidt, Koln, Heft 2/2015, 55.
75. *Wode M., Rabe C.S.*, Mediation, Springer, Berlin, 2014, 27.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7697

Natia Chitashvili*

Strengthening the Legal Guarantees of Mediation Confidentiality with Contractual Mechanisms

Confidentiality is a central essential feature[1] of mediation, a fundamental principle, and one of the most important ethical obligations[2] of a mediator which enhances open, honest communication[3] between the parties and the self-expression of their interests, needs, and concerns in a safe environment.[4] Confidentiality is often an incentive to initiate a mediation process because the interest of confidentiality can be realized from a continuum of dispute resolution systems through the use of the mediation process which ensures the non-disclosure of information. A special interest of a party in confidentiality may be driven by the desire to avoid the precedent of a court decision.

The article analyzes the importance of confidentiality in terms of privacy, the obligation of a mediator to inform the parties, and the standards for the safe sharing of confidential information. The article aims to explore the prominence of privacy and legal guarantees, identify possible challenges of implementing confidentiality, and indicate the need to strengthen protection through contractual mechanisms.

***Keywords**: Mediation, Confidentiality, Confidentiality Agreement, Mediation Settlement, Burden of Proof, Safe Negotiation, Contractual Penalty, Individual Meeting, Breach of Confidentiality*

---

* Doctor of Law, Associate Professor of the Faculty of Law at Ivane Javakhishvili Tbilisi State University, Member of the Executive Board of Mediators Association of Georgia, Master Trainer of Mediators, Executive Director of the National Center for Alternative Dispute Resolution, Mediator. https://orcid.org/0000-0002-5050-0711.

1 *Deason E.E.,* The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability, Vol. 85, Issue 1, 2001, 38; *Kirtley A.,* Mediation Privilege Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, Journal of Dispute Resolution, Vol. 1995, Issue 1, 11; *Macturk Ch. H.,* Confidentiality in Mediation: The Best Protection Has Exceptions, 19 Am. J. Trial Advoc., 1995-1996, 424; *Harman J.*, Mediation Confidentiality: Origins, Application and Exceptions and Practice Implications, Australasian Dispute Resolution Journal, 28(2), 2017, 106; *Alexsander N., Chong S., Giorgadze V.,* The Singapore Convention on Mediation, A Commentary, Wolters Kluwer BV, The Netherlands, 2022, 5.97; *Schau J.F.,* View from the Middle of the Road, A mediator's Perspective on Life, Conflict and Human Interaction, AuthorHouse, 2013, xix.

2 *Chen A. (ed.),* Zhao Y., Mediation and Alternative Dispute Resolution in Modern China, Springer, Hong Kong, 2022, 63; *Turner C., Wählisch M.,* Rethinking Peace Mediation Challenges of Contemporary Peace-Making Practice, Bristol University Press, 2021, 310; *Garner B. (ed.),* Black's Law Dictionary, 8th ed., Thomson West, 2004, 1315; *Wendel B. W.,* Professional Responsibility, Examples and Explanations, Aspen Publishers, United States of America, 2007, 138.

3 *Foster T.N., Prentice S.,* The Promise of Confidentiality in Mediation: Practitioners' Perceptions, Journal of Dispute Resolution, Vol. 2009, Issue 1, 164.

4 *Boulle L.,* Mediation, Principles, Process, Practice, LexisNexis Butterworths, 3rd edition, 2011, 673; *Leimguber D.,* Public Interest and Mediator's Ethical Dilemma, Australian Dispute Resolution Journal, 24 (3) 2013, 187; *Butler V.F.,* Mediation: Essentials and Expectations, Dorrance Publishing Co., Inc., 2004, 6.

1. Introduction

Mediation confidentiality is an expression of the fundamental, constitutional right to privacy.[5] "Information privacy concerns the collection, use, and disclosure of personal information… Information privacy increasingly incorporates elements of decisional privacy as the use of data both expands and limits individual autonomy. Mediation Confidentiality protects the parties from intrusion by the state and gives parties control over what information they choose to share with others."[6] Confidentiality of personal life means "inviolability of personal dignity and autonomy", it is a zone of prima facie autonomy, of presumptive immunity[7] from regulation. The right to privacy is related to the principle of voluntariness of mediation and confidentiality at the basic stage. Mediation gets individuals to make their individual choices (safely, independently N.Ch.) that define who we are and how we live our daily lives.[8]

Confidentiality enjoys a wide range[9] of cumulative protections.[10] The regulatory provisions of confidentiality are met in the mediation laws,[11] codes of ethics, guidelines of professional organizations, rules of the mediation provider organization, and mediation agreements (expressed or implied).[12] Thus, the obligation of confidentiality has both a legal and contractual nature.[13]

Mediation is a safe space for negotiation[14] where the parties are given the opportunity for emotional and legal self-determination (self-determination of the overriding personal and/or legal interest) in the environment free from the risks[15] of disclosure. In the process of mediation, the negotiation

---

5 *Oberman S.,* Confidentiality in Mediation, An Application of the Right to Privacy, 27 Ohio St. J. on Disp. Resol. 539, 2012, 539-640.

6 *D.J.,* Rotenberg M., Information Privacy Law, Aspen Publishers, 2003, 1.

7 *Henkin L.,* Privacy and Autonomy, Colum. L. Rev., Vol. 74, 1974, 1425.

8 *Rubenfeld J.,* The Right of Privacy, Harv. L. REv., Vol. 102, 1989, 802.

9 *Goldsmith J.-C., Ingen-Housz A., Pointon G.,* ADR in Business: Practice and Issues Across Countries and Cultures, Kluwer Law International, 2011, 652.

10 *Titi C., Gómez K.F.,* Mediation in International Commercial and Investment Disputes, Oxford University Press, 2019, 330.

11 *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 422.

12 *Alexsander N., Chong S., Giorgadze V.,* The Singapore Convention on Mediation, A Commentary, Wolters Kluwer BV, The Netherlands, 2022, 5.98.

13 *Titi C., Gómez K.F.,* Mediation in International Commercial and Investment Disputes, Oxford University Press, 2019, 330.

14 *Collins P., Demeter D., Douglas S.,* Dispute Management, Cambridge University Press, 2021, 82, 180; *Maser Ch., Polio C.A.,* Resolving Environmental Conflicts, 2nd ed., Taylor and Francis Group, Roca Raton, London, New York, 2012, 154; *Regina W.F.,* Applying Family Systems Theory to Mediation, University Press of America, Lanham, Boulder, New York, Toronto, Plymouth, UL, 2011, 59; *Rue N.N.,* Everything You need to know about Peer Mediation, The Rosen Publishing Group, New York, 2001, 13. *Taylor A.,* The Handbook for Family Dispute Resolution, Mediation Theory and Practice, Jossey-Bass, 2002, Preface Xiii; Importance of Confidentiality Principle in the Mediation Process, Alternative Dispute Resolution)Yearbook, 2013, 41-69, <https://adryearbook.tsu.ge/index.php/ADR/issue/view/617/124> [23.08.2023]; See also, Competency Framework for mediators, approved by Executive Council of LEPL Mediators Association of Georgia, <https://mediators.ge/uploads/files/61b754d735a26.pdf> [22.08.2023] (in Georgian).

15 *Gill P.,* When Confidentiality Is Not Essential to Mediation and Competing Interests Necessitate Disclosure, Journal of Dispute Resolution, 2006, Vol. 2006, Issue 1, 292,

often goes beyond the legal conditions of the dispute during the court proceedings, because the participants of the conciliation process need to find out the real reason for disagreement including not only the legal interest but also the expansion of the area of exchange resources/goods and provide a comparison of overlapping and mutually beneficial interests that ensures their coexistence.

Considering the conceptual nature and essential purpose of mediation, it is natural that the idea of communication with legal issues refers to many emotional, and personal interests and makes the inevitable need to share confidential information between the mediator and the parties. The legal guarantees of confidentiality are a fundamental element of building trust in the process and the mediator as well, and "the incentive to participate in the mediation process."[16] "Confidentiality protects the process, participants and public interest"[17], also "the integrity of the mediation ethics in the process".[18] Without trust, the parties cannot participate in the voluntary agreement process, cooperate actively, unify for common interests, and achieve an openness with the mediator and self-determination of the parties.

Confidentiality often "replaces the mutual trust of the parties" in the mediation process which assists the strongly conflicting parties in finding some form of communication[19] with each other. The capacity to make decisions independently and free[20] from any influence, in mediation among other multifaceted aspects, also means having a "guarantee[21] of the confidentiality at a mediation session and negotiation consequences",[22] the mediation participant should be protected from the pressure of public opinion or expected social censure because fear often leads people to make decisions in the way of having the desire to present themselves with a strong personality and identity in the society to "keep their faces".[23] In addition, "confidentiality also serves the principle of increasing the effectiveness of

---

16 *Alexsander N., Chong S., Giorgadze V.,* The Singapore Convention on Mediation, A Commentary, Wolters Kluwer BV, The Netherlands, 2022, 5.97.

17 *Shapira O.,* A Theory of Mediators' Ethics, Foundations, Rationale and Application, Cambridge University Press, 2016, 274; *Kirtley A.,* Mediation Privilege Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, Journal of Dispute Resolution, Vol. 1995, Issue 1, 1-54; *Brooker P.,* Mediation Law, Journey Through Institutionalism to Juridification, Taylor & Francis, 2013, 109.

18 *Lee J.A., Giesler C.,* Confidentiality in Mediation, Harv. Negot. L. Rev., Vol. 3, 1998, 290. Confidentiality encourages neutral facilitators as mediators cannot be required to testify or disclose information excluding legitimate exceptions provided by law (in Georgian). The Hong Kong Civil Procedure „White Book" in *Moscati M.F., Palmer M., Roberts M.,* Comparative Dispute Resolution, Edward Elgar Publishing, 2020, 234.

19 *Gill P.,* When Confidentiality Is Not Essential to Mediation and Competing Interests Necessitate Disclosure, Journal of Dispute Resolution, 2006, Vol. 2006, Issue 1, 294; Regarding the lack of trust between the parties in the mediation process and, accordingly, the need for confidentiality, see: *Brown K.L.,* Confidentiality in Mediation: Status and Implications, Journal of Dispute Resolution, Vol. 1991, Issue 2, 310.

20 *Butler V.F., Mediation:* Essentials and Expectations, Dorrance Publishing Co., Inc., 2004, 6.

21 See Paragraph 9 of Article 8 of the Law of Georgia "On Mediation": on the principle of free, independent and informed decision-making by the parties.

22 Patent Mediation Guide, Federal Judicial Center, lulu.com publisher, 2020, 7.

23 *Bader E.E.,* The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle, Pepp. Disp. Resol. L. J., Vol. 10, Iss. 2, 2010, 1, and fully 183-214. See also, *Bader E.,* The Psychology of Mediation: (Part I) Issues of Self and Identity, Translator *Burduli L.,* TSU "Alternative Dispute Resolution –

the process because the production of formal documentation, and accounting [protocol, track-records, N.Ch.] is not required[24] considering the need for dynamic self-determination of the parties, the informal and flexible nature of mediation."[25] To ensure the safety of the parties during the mediation process, and make the public (including the legal community) perceive the ethical integrity of mediation, it is essential to have legal guarantees of mediation in court referred to mediation cases and the correct definition of their use in science and practice.[26] So, "the set of rules regulating mediation as a conciliation shall furnish sustainable guarantees for protecting against harmful disclosure of confidential facts and information." These guarantees are a core part of the mediation institution and a particularly important reason why the relevant legislation needs to be properly applied.[27]

Guarantee of confidentiality. "Achieving a mutually acceptable agreement requires sharing the sensitive information between the parties. Determining the scope of information disclosure, the party may raise doubt regarding the protection of confidentiality of the information and its applicability in court-connected processes. Confidentiality also has a deterrent function[28] against the use of information in bad faith and even in the case of disagreement, protects the parties from harm in the process of dispute resolution.[29] The procedural advantage of private mediation is also the confidentiality of the mediation process as a fact,[30] which ensures the closure of the process and the content of the negotiation to competitors, customers, and suppliers."[31]

Yearbook" 2020, 212 and ff. (in Georgian) <https://adryearbook.tsu.ge/index.php/ADR/article/view/3002/3186> [22.08.2023].

24 *Butler V.F.,* Mediation: Essentials and Expectations, Dorrance Publishing Co., Inc., 2004, 6.

25 The Hong Kong Civil Procedure „White Book" in *Moscati M.F., Palmer M., Roberts M.,* Comparative Dispute Resolution, Edward Elgar Publishing, 2020, 234; *Chen A. (ed.), Zhao Y.,* Mediation and Alternative Dispute Resolution in Modern China, Springer, Hong Kong, 2022, 28.

26 *Alexsander N., Chong S., Giorgadze V.,* The Singapore Convention on Mediation, A Commentary, Wolters Kluwer BV, The Netherlands, 2022, 5.97; *Lee J.A., Giesler C.,* Confidentiality in Mediation, Harv. Negot. L. Rev., Vol. 3, 1998, 292.

27 On the importance of open communication between the mediator and the parties, see UNCITRAL Model Law on International Commercial Conciliation, with Guide to Enactment and Use 2022, United Nations Publication, New York, 2004, para, 58, 39, <https://uncitral.un.org/sites/uncitral.un.org/files/ media-documents/uncitral/en/03-90953_ebook.pdf> [21.08.2023]. see Also, Reich J.B., A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure, J. Disp. Resol., 2001, 213-15.

28 In the absence of a guarantee of the inadmissibility of applying confidential information as evidence, the parties would certainly, have an aspiration to use the confidential information of the other party in their confrontational proceedings before the proceedings. See *McIssac H.,* Confidentiality Revisited California Style, 39 Fam. Ct. Rev. 405, 2001, 406-407, cited in *Bostinelos T.,* A Happier Ending for Everyone: Resolving Adoption Disputes Between Putative Fathers and Adoptive Parents Through Clinical Mediation, 15 Pepp. Disp. Resol. L.J, Vol.15, 435, https://digitalcommons.pepperdine.edu/drlj/vol15/iss2/6 [30.08.2023].

29 *Rufenacht M.D.,* Concern over Confidentiality in Mediation – An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act, Journal of Dispute Resolution, Vol. 2000, Issue 1, 114.

30 Excluding the exceptions provided by law: Article 7, paragraph 3, Article 9, paragraph 4 of the Law "On Mediation".

31 *Abramson H. I.,* Mediation Representation, Advocating as a Problem-solver in any country or Culture, 2nd ed., National Institute for Trial Advocacy, 2010, 146-147.

Without solid guarantees of the confidentiality of mediation communication, private mediation cannot develop in the state because it requires voluntary initiation of mediation by the parties. Also, during the process of mandatory mediation, the requirement of compulsory attendance is limited to a few sessions which is not a sufficient condition to reach a voluntary and desirable agreement for the parties imbued with distrust towards mediation. In the end, court-mandated mediation cannot contribute to strengthening private mediation[32], getting mediation established in the system of social values of the nation, and leading a community-inspired approach to dispute resolution.

2. The Standard of Informing the Participants about the Scope of Mediation Confidentiality

2.1. The Obligation to Inform Parties and Representatives

The guarantees of confidentiality significantly shape the confidence of parties in the security and safety[33] of the mediation process and assist the parties make an informed decision[34] about participating in the mediation process. The legal order of both Georgia, EU countries, and the USA[35] stipulates the obligation of the mediator to inform the parties about the mentioned principle before starting the mediation process. The obligation to inform generally applies to all principles of mediation,[36] however, due to the special importance of confidentiality, the requirement to inform about the scope of the mentioned principle is also supported by an independent legal provision:"Before the initiation of mediation, the mediator shall be obliged to inform the parties about confidentiality and its scope."[37] Despite the numerous exceptions to the principle of confidentiality

32 "Privatization" of mediation.

33 *Roberts M.,* Mediation in Family Disputes, Principles of Practice, 4th ed., Ashgate, 2014, 121.

34 Paragraph 9 of Article 8 of the Law of Georgia "On Mediation": The mediator helps the parties to reach an agreement to resolve the dispute taking into account the principle of free, independent, and informed decision-making by the parties regarding both the mediation process and its final result. According to Article 4, Part 3 of the Code of Ethics of Georgian Mediators, the promotion of the principle of self-determination means that the parties shall be allowed to make a voluntary and informed decision by their interests on both the content of the dispute and procedural issues of mediation.

35 In the German doctrine, there is an opinion that by participating in the mediation process, the parties implicitly agree to all the principles applicable in the mediation process (including confidentiality) and the obligations arising from it. When evaluating the consent expressed by the parties to confidentiality, the court must take into consideration the circumstances of the case and the intended purposes of the parties. See §§133, 157 of the German Civil Code on the manifestation of will. However, following the prevailing opinion after being expressly informed about confidentiality, the parties must give written or, oral consent to the obligation of confidentiality. *Nadja M.A.,* International and Comparative Mediation, Legal Perspectives, Kluwer Law International, 2009, 288. See Also, *Rufenacht M.D.,* Concern over Confidentiality in Mediation – An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act, Journal of Dispute Resolution, Vol. 2000, Issue 1, 115; On the binding nature of the confidentiality agreement, see Also, Patent Mediation Guide, Federal Judicial Center, lulu.com publisher, 2020.

36 The first paragraph of Article 8 of the Law "On Mediation": (Article 8. Conducting mediation): 1. Before starting the mediation, the mediator must inform the parties about the principles of mediation process...

37 Paragraph 6 of Article 10 of the Law of Georgia "On Mediation".

and the legal nature of the issue, the mediator should explain the mentioned issue to the parties clearly and completely. Explaining confidentiality is essential even when the parties are accompanied by legal representatives. Awareness of legal representatives about mediation does not eliminate the obligation of the mediator to inform because the person in charge of the process should be the warrantor of safety and the source of information about the substantive-procedural advantages of mediation. Since the processes are removed from a public witness, negating any possibility the dispute's resolution will have any public educational or deterrent value.[38] That is why confidentiality is not an absolute obligation[39] and it is subject to exceptions established by the law to protect a legitimate purpose and legitimate interest (life, health, prevention of illegal actions/damage, protection of the best interest of minors[40]).[41] Before initiating mediation the fulfillment of the obligation to disclose general information as well as the information about individual meetings means interpreting[42] the limit of providing information to the maximum extent considering exceptional circumstances[43] in accordance with the principles and rules determined by the law. The mentioned rule is applied for keeping safety of the parties and advance procedural information.

Before initiating the mediation (at the opening stage) full information about the confidentiality standard (general rule and exceptions) also means that if during the process of mediation there is revealed a need to protect a person's life, health, freedom, and/or the best interests of a minor, the mediator is required to notify the appropriate bodies and agencies instead of providing the parties with the information about the expected disclosure. The necessity to inform about confidentiality in advance is supported by the fact that (before disclosure) informing the parties about the expected disclosure of information for the second time can hinder or make the main purpose to protect the good (e.g. life, health, freedom, interest of a minor) impossible.[44]

Since trust in the mediator and open communication is a requirement for the continuous self-determination of the party, the clarification of the confidentiality standard to the individual meeting should also be carried out by the mediator at the beginning of each private session (individual meeting).[45] The mediator shall obtain permission to write notes for the accuracy of the information and

---

38 Zekoll J., Bälz M., Amelung I. (eds.), Formalisation and Flexibilisation in Dispute Resolution, Brill Nijhoff, Lei-den/Boston, 2014, 65-66.

39 *Atlihan M.E.,* A New Suggestion on the American Experience of the Limits of Mediation Confidentiality, Law and Justice Review, Issue 23, 2022, 47.

40 The public interest in protecting the best interests of a child outweighs the interest in ensuring privacy. *Roberts M.,* Mediation in Family Disputes, Principles of Practice, 4th ed., Ashgate, 2014, 219.

41 *Alexsander N., Chong S., Giorgadze V.,* The Singapore Convention on Mediation, A Commentary, Wolters Kluwer BV, The Netherlands, 2022, 5.98.

42 Ibid., paragraph 3 of Article 10. The confidentiality standard for individual meetings refers to the 'in-confidence approach' (as opposed to the 'Open Communication Approach'), which means that the individual session is completely confidential unless the party specifically indicates the exceptions to the other party to the mediator. (in Georgian) see Titi C., *Gómez K.F.,* Mediation in International Commercial and Investment Disputes, Oxford University Press, 2019, 330.

43 Ibid., paragraph 4 of Article 10.

44 The threat of abduction of a child in a family dispute, the discovery of expected violence against a child or a family member, etc. (in Georgian)

45 *Stitt A.,* Mediation: A Practical Guide, Routledge-Cavendish; 1st edition, Routledge-Cavendish, 2004, 1-166.

define the autonomy of the party while determining the scope of information to be transferred to another party.[46]

The correct definition of considering information as confidential is necessary for the parties to discern that through mediation they cannot "close" non-confidential information in its nature to make it inadmissible evidence.[47] "If it was possible to obtain the evidence from another source outside the space of mediation, then it cannot benefit from the qualified privilege[48] of the inadmissible evidence and confidentiality". Misconceptions about the nature of confidential information can lead to applying for mediation in bad faith.

2.2. The Obligation to Inform Third Parties

The obligation of confidentiality is multi-layered and addressed by both third parties outside the process (external confidentiality) and the participants in the process (internal confidentiality)[49] which binds all participants[50] in the process. Informing about the obligation to protect confidentiality shall also be carried out by third parties participating in the mediation. It is recognized in legal doctrine and practice that a lot of participants in the mediation process make it more difficult and may even become impossible to maintain confidentiality.[51] Nevertheless, the mediator should provide procedural guarantees to protect confidentiality taking into account the necessities of the parties.[52]

---

46 See also, *Collins P., Demeter D., Douglas S.,* Dispute Management, Cambridge University Press, 2021, 200.

47 *Hopt K.J., Steffel F.,* Mediation – Principles and Regulation in Comparative Perspective, Oxford University Press, 2013, 50.

48 *Feehily R.,* International Commercial Mediation, Law and Regulation in Comparative Context, Cambridge University Press, 2022, 281.

49 *Titi C., Gómez K.F.,* Mediation in International Commercial and Investment Disputes, Oxford University Press, 2019, 330; *Kiser R.,* Professional Judgement for Lawyers, Edward Elgar Publishing, 2023, 209-210.

50 *Hardy S., Rundle O.,* Mediation for Lawyers, CCH Wolters Kluwer Business, 2010, 481. Mediation provider organizations are also bound by confidentiality standards. For details, see: *Chitashvili N.,* Framework for Regulation of Mediation Ethics and Targets of Ethical Binding TSU Law Faculty "Journal of Law", #1, 2016, 39-47.

51 *Collins P., Demeter D., Douglas S.,* Dispute Management, Cambridge University Press, 2021, 249.

52 In Georgia, the mediator faces a particularly big challenge in collective labor conflicts when the number of mediation participants is often several hundred or thousands, and the parties have an interest to participate in the mediation process due to the lack of trust in their representatives. (Generalized mediation practice of Natia Chitashvili as a collective labor conflict mediator for 2017-2023). In this case, the mediator must balance the principle of self-determination and informed decision-making of the parties with the obligation to conduct a due, effective process. In particular, the results of the flexible negotiations conducted through the representatives should be gradually agreed with the parties in the way of constant communication with them. In the practice of collective labor mediation, there are many cases when the parties requested to make a video recording or, moreover, to broadcast it live, subsequently, in case of non-fulfillment of the terms of the settlement, the legitimacy of making the recording to apply the recording in this case can lose the importance to the mediation, it will no longer be recognized as inadmissible evidence, it can harm the trust of the society as a mediation institution, as well as the quality of the process, because it makes impossible to provide mutual sharing of useful confidential information, self-determination of the parties and open, reliable communication. In general, in a collective dispute, if no confidentiality guarantees are specifically agreed upon confidentiality agreement, the parties have the right to share information used in mediation. So,

When a party initiates the involvement of a family member or other third party in a joint/individual meeting, the mediator shall explain to a third party the content and scope of the obligation of confidentiality. Also, if the parties have concluded (or intend to conclude) an independent agreement on confidentiality with a defined contractual penalty for a breach of confidentiality, a third party must understand that he/she will also have to join the sanctions by signing the agreement. Considering the mentioned risks, third parties may prefer to attend only the individual meeting of that party which invited them to be involved in the process to manage the disruptive threat of self-determination of another party, open communication, or breach of confidentiality caused by another participant in the negotiation and, what is most important for them, to limit the scope of received confidential information.

Attending an individual meeting with a third party, the obligation of confidentiality remains within the scope of the information shared at the private meeting, and in the case of making an independent contract on confidentiality, the third party is required in advance to concur with participating in the mediation process and sign the contract. When a third party takes part in an individual mediation session, it is also essential for the mediator to clarify with the other participant of mediation whether the information is allowed to be shared only with the party or it can also be shared with the certain third-party invited by that party. Thus, the participation of third parties in the process gets the mediator to make a special effort to ensure confidentiality.

After realizing the risks of duties, third parties may refuse to participate in the process and be bound by confidentiality obligations. If third parties are supposed to hinder the process, elucidating the risks can be considered an important strategy of mediation to remove them from the process. The basic rule of mediation is that parties and third parties together with the mediator are subject to a single legal order of protecting confidentiality, including the mechanisms of liability provided by law or the contractual agreement of the parties.[53]

The issue of third-party confidentiality is particularly challenging concerning an online mediation process which may be attended off-camera by third parties who have not consented to perform the obligation of confidentiality. In this case, there can be two solutions, arranging the camera with full-room coverage, and secondly, considering a special contractual reservation in the mediation agreement,[54] following which the parties shall perform the obligation not to make the confidential

in collective disputes, the parties often resort to the mechanism of publicizing the result of the mediation profession (for example, holding press conferences and publicizing the details of the agreement) to subsequently make the breach of the obligation by one party the basis for considering him as a dishonest party in the eyes of society and social partners. Strict enforcement of confidentiality guarantees against the will of the parties would undermine the parties' confidence in the mediation and would substantially undermine the ethical integrity of the process. *Lee J.A., Giesler C.,* Confidentiality in Mediation, Harv. Negot. L. Rev., Vol. 3, 1998, 286.).

53 See:*Foster T.N., Prentice S.,* The Promise of Confidentiality in Mediation: Practitioners' Perceptions, Journal of Dispute Resolution, Vol. 2009, Issue 1, 165.

54 Regarding the convenience of considering a special confidentiality clause/agreement which third parties see: *Hardy S., Rundle O.,* Mediation for Lawyers, CCH Wolters Kluwer Business, 2010, 481. *Esplugues C., Marquis L.,* New Developments in Civil and Commercial Mediation, Global Comparative Perspectives, Springer, 2015, 282; *de Palo G., Trevor MB. (eds.),* EU Mediation, Law and Practice, Oxford University Press, 2012, 101, Rn. 9.26.

communication of the mediation available to third parties. Disobeying this stipulation shall be interpreted as a violation of the mediation settlement or a breach of the agreement on mediation which will lead to the application of contractual sanctions of a specific amount (a breach of contract). In addition, at the beginning session of the mediation, special emphasis shall be placed on protecting confidentiality and prohibiting recording of the session.[55] An important content element of the definition may be a normative rule on the prohibition of using confidential information as a piece of evidence in court[56] or other[57] (arbitration, disciplinary[58]) proceedings. Interpreting the rule of the prohibition of applying confidential information as evidence, it is important to get the participants aware of the qualification of information as confidential.[59] In particular, for the information to be considered confidential, it is essential to take the mediation process as a main source of information that enables one to obtain the mentioned information. The scope of confidential information may also be determined by the agreement of confidentiality.

3. Handling and Applying the Confidential Information in Negotiation Process

3.1. Categorization of Confidential Information in Mediation Representation Plan

Even in the presence of guarantees, the realization of the interest in protecting confidential information may meet certain challenges, which raises the need to strengthen guarantees to protect confidentiality through contractual mechanisms.

The construction of the representation plan in mediation is created by (1) investigation and configuration of the client's interests, (2) identification and minimization of the factors hindering their implementation, considering expected risks, and (3) classification of information to be applied in the mediation process.[60] Information is the foundational element of the Mediation Representation Trian-

---

55 *Lee J., Lim M., Hadikusumo J. (eds.),* Contemporary Issues in Mediation, Vol.7, Singapore International Mediation Institute, 2022, 96.

56 Article 104 (1^1) of the Civil Procedure Code of Georgia: The court shall not accept as evidence information or documents disclosed under the terms of confidentiality in a judicial meditation process unless otherwise agreed between parties 1^2. The procedure under paragraph 1^1 of this Article shall not apply if the information and document disclosed under the terms of confidentiality in the judicial mediation process is submitted to a court by the party who disclosed it, or if the other party kept this information and/or document or obtained it and submitted it to the court using other means determined by law.

57 Paragraph 2 of Article 10 of the Law of Georgia "On Mediation": the participant of Mediation shall not use the information determined by this article during court or arbitration proceedings or in the process of review of a dispute by any other means unless otherwise provided for by law.

58 24/04/2021, Article 13.1.5 of "Regulations on Disciplinary Proceedings of Mediators of Mediators Association of Georgia": The investigative panel will not take into account the evidence obtained in violation of law, the hidden video/audio recording of the mediation process. Regarding the inadmissibility of recording the mediation process. *Jasper M.C.,* You've Been Fired: Your Rights and Remedies, Oceana Publications, 2005, 46; *Butler V.F.,* Mediation: Essentials and Expectations, Dorrance Publishing Co., Inc., 2004, 6; Patent Mediation Guide, Federal Judicial Center, lulu.com publisher, 2020, 7.

59 Paragraph 1 of Article 10 of the Law of Georgia "On Mediation".

60 *Abramson H.I.,* Mediation Representation, Advocating as a Problem-solver in any country or Culture, Second Edition, National Institute for Trial Advocacy, 2010, 10.

gul, on which the component of interests and constraints is based.[61] A safe mediation process also means sorting information by a lawyer or a participant party at the stage of preparation for the mediation process which includes drawing up the plan of representation in the mediation or the strategy for participation in it. The information can be shared only with the mediator at an individual meeting but it is expected to be safe for being disclosed at the general meeting. Structuring the information related to the mediation process also implies the information that may be inappropriate to be shared with any participants of the mediation process. This provides the party with an opportunity to prevent or reduce the risks of breaching confidentiality which means completing the mediation process without going the sensitive information beyond the scope of an individual meeting with an impartial and independent mediator. As ensuring the protection of confidential information is the main professional obligation of a mediator and the existential basis for maintaining his/her professional reputation, the mediator is interested in fortifying professional ethics and personal reputation. As "the mediator has an independent institutional interest in the protection of confidentiality",[62] the risk of a breach of confidentiality[63] can come from the parties who may hypothetically need to apply confidential information to the detriment of the adversary. However, the viability of such a mutual interest in damage in a collaborative process is less realistic, even if it is unreasonable to completely exclude the existence of unscrupulous participants.

3.2. The Danger of Entrusting Confidential Information and the Strategic-procedural Need for Disclosure

Information, on the one hand, helps the parties to define mutual interests, and the factors hindering their implementation and develop smooth implementation of interest-based cooperation. On the other hand, disclosing information about one's interests can make unfavorable conditions for arranging negotiations and trade – for an exchange to take place, another party[64] or participant can present hard conditions to fulfill, for example, a high contractual price or the demand for an interest concession. In this case, finding out more information about the interests of the party drives the negotiator to manipulate this information, especially if the party is not focused on reaching an agreement. When a party acts in bad faith, it can bring the negotiation to a dead-end. It is very important to rationally analyze the associated risks of sharing information while providing consultation with the client by a mediator or a representative and agree on the platform – personal or joint meeting, the stage of the process, or circumstances when information of interest may be shared. Along with determining the scope of information sharing, the party should concur on applying the authority of a mediator to share the information acquired during the private meeting with another party

---

61 Ibid.

62 *Reuben R.C.,* Court Issues Major Ruling on Mediation Confidentiality, University of Missouri School of Law Scholarship Repository, Faculty Publications, Dispute Resolution Magazine,Vol. 6, 1999, 25, <https://scholarship.law.missouri.edu/facpubs/812> [30.08.2023].

63 *Henke E.-M.,* Confidentiality in the Model Law and the European Mediation Directive, GRIN Verlag, 2011.

64 Ibid. See also, *Brown K.L.,* Confidentiality in Mediation: Status and Implications, Journal of Dispute Resolution, Vol. 1991, Issue 2, 310.

in a certain approach and with specific preconditions. Although the parties have the opportunity to manage the exchange of information during joint and individual meetings, in the mediation process it is possible to change the initial strategy of the party regarding the addressee of the information sharing. Sharing confidential information with the opposite negotiator may be necessary to process objective data, gain the confidence of another party, prepare it for reality, and arrange for the mediator to effectively perform the reality testing. "The disclosure of confidential information may become necessary for one party to gain the trust of another party and obtain the opportunity to explain the importance of its objective need and the reason for the unchanged position during the mediation process. "[65]

The party can review the initial strategy with the assistance of the mediator, according to which the party did not plan to disclose specific confidential information to the other party, but in the process, the party, with the help of the mediator or independently, realized that sharing confidential information could be more useful for the agreement.

To illustrate the mentioned case, it is possible to specify many examples applied in practice.

Let's examine a case when a mediator has to discuss the legal risks of proceeding in court and the strong and weak (including legal) positions of the parties during personal meetings.[66] At the meeting with the mediator, a party can share the information about the evidence that another party is not aware of (e. g. the party assumes that an authorized video recording that proves that another party did not show up at work, has already been deleted). According to its initial strategy, the party does not present this information in court and in mediation to submit it in the court at a certain stage of the proceedings and increase the chances of the case being resolved in its favor. The motivation for not sharing information at an early stage may also be the intention to prevent another party from developing a different defense strategy or creating rebuttal evidence. After receiving the mentioned confidential information, the mediator finds out the legal position of the party, which provides him/her with the confidence to resolve the dispute and gain an emotional concept of legal advantage. However, the mediator analyzes simultaneously that the confidential information can prepare the other party for concurring as it accelerates the awareness of the risks of starting or continuing court proceedings.[67]

Naturally, in this case, the obligation of the mediator confidentiality implies that the mentioned information should not be disclosed without the permission of the information holder party, even with the motivation to facilitate the agreement. Also, there is a procedural chance of a real arrangement of the agreement between the parties and a rational understanding of the evidence capabilities of another party. The mediator does not have the right to interfere with the autonomy of a party in providing direct advice on sharing specific information with the other party. Nevertheless, one of the sub-

---

65 *Orme -Johnson C., Cason-Snow M.,* Basic Mediation Training Trainer's Manual, 2002.

66 The so-called "Legal Reality Test", which involves the process of identifying the Best Alternative to Mediation Settlement (BATNA), the Worst Alternative to Mediation Settlement (WATNA) and the Possible Area of Negotiation (ZOPA). See one of the sub-competencies of content management skills from the framework system of mediators' competencies: mediator shall encourage the objective assessment of the legal perspective of the case by legal representatives to define the area of negotiation and make an informed decision by the parties. Mediator shall effectively use of the techniques of Reality Tests.

67 It depends on whether the case involves private or judicial mediation.

competencies of mediator management suggests that the mediator should take the initiative to obtain permission for the disclosure of ideas or proposals to the other party and transmit the permitted information in an acceptable form[68] if the mediator believes that the transmission of specific information with the consent of the party may serve the purpose of a reasonable agreement. In the mentioned casus the mediator makes the party think about the necessity of keeping the information confidential from the other party, the risks associated with the transfer of information, or on the contrary, refuses to provide information if it can accelerate the maturity of the party to perceive the legal reality and considering the increased risks of litigation get another negotiator to be more motivated for the achievement of agreement.[69]

The party, after examining its interests and strategy, is allowed to choose between sharing the information with the other party. If the intention of keeping information confidential is to win the case in court, is it possible to get a result that is substantially close to the desired one in a short time? i.e. In mediation, the interest of "winning" should be realized by timely agreement of reasonable and useful accord ("develop options for mutual gains").

The disclosure of confidential information may be impartially necessary to manage the joint sessions and analysis of objective data (for example, the value of property, expertise, cadastral survey drawing, and analysis of the organization's budget). For instance, during a collective dispute about increasing wages, it may be vital for employees to be aware of the amount of managers' salaries or company profits to make a rational decision on a fair and realistic rise in wages. Considering the objective capabilities of the enterprise can guide the employees in avoiding asking for such a wage increase in the absence of objective data that exceeds the company's financial opportunities. If the objective data is not integral to research and apply rationally, positioning with unrealistic requirements always leads the process to a dead-end.

Thus, during the mediation process, a party may have to alter the status of confidential information as initially intended only for the mediator and decide to share specific data not only with the mediator but also with another party. The mentioned change of strategy may be followed by the risks of expected violation of confidential information which can prevent the party from providing the information. And withholding useful information can prevent the process of collaboration and achievement of mutual benefits. To share information safely and securely, additional mechanisms of protecting confidentiality need to be created which will be talked about below in the context of contractual guarantees.

---

[68] The mediator's competence framework, approved by LEPLthe Mediators Council of Georgia the Council of Mediators of the State Council of Georgia, <https://mediators.ge/uploads/files/61b754d735a26.pdf> [22.08.2023].

[69] In general, the mediator has an important role in determining and making the parties think about what information to convey and at what stage can be useful for an agreement or, on the contrary, hamper negotiation. One of the most important functions of a mediator is to use information strategically and to withhold sensitive information [subject to the will of the parties] until trust is still established between the parties. See *Richbell D.,* Mediation in Construction Disputes, Blackwell Publishing, 2008, 76. The prerequisite for the success of mediation is the formation of trust between the parties and the mediator. See *Betancourt J.C., Crook J.A.,* ADR, Arbitration and Mediation, A Collection of Essays, Author House Publishing, 2014, 118.

4. The Fragility of Confidentiality Guarantees Considering the Gravity of Burden of Proof

A significant obstacle to the application of confidentiality guarantees can be created by the complexity of the burden of proof of the confidentiality of information and the amount of damage caused by the breach.

Although confidentiality in the principle of mediation provides the guarantee of disusing the information as an evidence in court, the disclosure of sensitive information may still be related with certain risks. First of all, the confidential information can be applied to figure out the strong and weak legal positions of a negotiator, interests and strategy to manage the dispute in court. Also, the receiving party may use it to form a new strategy, gain a dominant influence in the negotiation process, and deal with legal risks in court. The mentioned danger is especially real when the receiving party does not willingly participate in making agreements and conducts deceptive negotiations. The legal guarantee of confidentiality can be weakened by the heavy burden of proof and the possibility-based fragility for damages in case of non-pecuniary damages or loss of income. If the party applied the information disclosed under the term of confidentiality during the mediation process as evidence or disclosed it to third parties, the legal mechanism of confidentiality protection naturally comes into effect, although its implementation can often be associated with an unrealistically big effort for the party bearing the burden of proof. First of all, the party providing the information has to assert the confidential nature of the information which could become available to the party violating the confidentiality only during the mediation process. The scope of the allegation of a defendant also includes alleging the fact of a breach of confidentiality and the extent of his/her actions.

Referring to the confidentiality claim, it is essential to determine the damages caused by the breach of confidentiality. Considering the legal nature of the obligation to protect confidentiality, damage may not be material, or destruction to property or contents. The breach of confidentiality may adversely affect the non-property interests, honor, dignity, personal business, or organizational reputation and lead to client attrition. In the case of reputational infringement, the consequences of an unlawful act may materialize in the long term, and in the case of a breach of confidentiality, it cannot result in material loss. In this case, it may be extremely difficult or even impossible to compensate for moral damages or unearned revenue due to the strict standard of proof and the normative requirement of substantiating complex legal prerequisites. The difficulty in measuring the amount of damage may lead the party to the impossibility of realizing the right to compensation for damage. Thus, for the guarantee of confidentiality protection not to lose its legal force, it is important to reinforce the normative regime of confidentiality protection with contractual mechanisms. In particular, the parties should use the opportunity to sign an independent agreement on confidentiality to regulate the scope of confidential information and possible actions. This contributes to be considered/or not considered a breach of confidentiality and a violation of the abovementioned contractual obligation.

5. Strengthening the Guarantees of Confidentiality through Contractual Mechanisms

5.1. Contents/Scope of a stand-alone Confidentiality Agreement

Signing a stand-alone confidentiality agreement the parties manage the legal consequences of a breach of confidentiality with a contractual autonomy beyond the arrangement of legal protection which is supported by normative regulation.[70] According to the Unified Mediation Act[71] adopted in the USA in 2003, the parties are given the authority to independently determine the scope of confidentiality considering the mandatory requirements established by law. The same privilege of the parties is enshrined in the Model Standards of Conduct for Mediators.[72]

An independent agreement on the scope of confidentiality means concurring on the content of confidentiality and the introduction of compensation mechanisms in case of its violation before starting the mediation process.[73] Also, the mentioned agreement includes the determination of content/category of information to be protected by confidentiality[74] – for example, information related to the method of distribution of profits, health conditions, etc. The confidentiality agreement defines the violation of confidentiality, the binding period for the parties, applying legal remedies, and others. The agreement relieves a party of bearing the burden of proof in the event of litigation. Concurring on the scope of a breach of confidentiality makes it easier to prove an intentional unlawful act in court.

The confidentiality agreement should indicate that confidentiality applies not only to the specific content of the mediation communication but also to any dispute that may arise from the confidential content of the mediation communication.[75]

The parties should concur on the contractual penalty for a breach of confidentiality which in case of complication of proving the damage can provide the opportunity to compensate the party for "minimum damage" or serve as a restraining function to the breach of obligation.[76] Determining contractual penalty naturally does not deprive the party of the right to pursue a claim for damages, but often the damage is not specified in an actual property loss and contractual penalty appears as the only mechanism to compensate the violated property/non-property interests. "The purpose of contract law

---

70 Patent Mediation Guide, Federal Judicial Center, lulu.com publisher, 2020, 7.

71 Uniform Mediation Act, 2003.

72 Model Standards of Conduct for Mediators, 2005, Standard V(D).

73 In Ireland, most mediation agreements (where the parties agree to use mediation) contain confidentiality clauses. *Goldsmith J.-C., Ingen-Housz A., Pointon G.,* ADR in Business: Practice and Issues Across Countries and Cultures, Kluwer Law International, 2011, 652.

74 *Foster T.N., Prentice S.,* The Promise of Confidentiality in Mediation: Practitioners' Perceptions, Journal of Dispute Resolution, Vol. 2009, Issue 1, 164, For further reference: Uniform Mediation Act, Wash. Rev. Code § 7.07.070 (2006).

75 *Roberts M.,* Mediation in Family Disputes, Principles of Practice, 4th ed., Ashgate, 2014, 216.

76 About the function of restraining from a breach of obligation and the compensation for minimal damage of the contractual penalty, see: *Chitashvili N.,* The Function of Penalty to Ensure the Performance Interest and Compensation of Damages, Journal of Comparative Law, 2/2020, 7-24, <http://lawjournal.ge/5164115661615-2/> [30.08.2023] (in Georgian).

is not to protect only the financial interests of the parties",[77] because the good to be protected by the law is often the implementation of non-property interests stipulated by the contract.[78]

Contractual penalty can be defined[79] by the rate of damages stated in a mediation agreement which estimates anticipated actual damages. That does not create a paradigmatic contradiction with the essence of a breach of contract. In particular, the agreement on a higher penalty can be made with an assumption of the extent of the expected damage that may be related to the failure of the contractual interest in case of a breach of the obligation.[80] Considering a higher penalty, the parties often express their desire to assert heavy contractual liability for a breach of an important contractual interest. As one of the main factors to select the mediation process is to ensure confidentiality, determining the amount of damages it should be taken into account that confidentiality reveals a significant breach and ratifies a contractual interest of a party. Defining contractual penalties for failure to perform confidentiality obligations is already an initial indicator of the importance of fulfilling the obligation. By establishing a contractual penalty for a breach of confidentiality, the creditor indicates the expectation of timely fulfillment of a specific condition. The creditor bears the burden of proof for a written agreement on contractual penalty[81] and a breach of obligation.[82] The amount of penalty does not need to be proven[83] which is agreed by doctrine and law. However, it is necessary to analyze the content and elements of the burden of proof[84] for the breach of obligation.

In the process of proving the breach of confidentiality obligation, a creditor must demonstrate not only the breach as an objective fact,[85] the extent of the action, but also the impact of the breach on the violation of the contractual interest, which in fact, implies an assessment of the importance and

---

77 *Hachem P.,* Agreed Sums Payable upon Breach of an Obligation, International Commerce and Arbitration (Book 7), Eleven International Publishing, *Schwenzer I.* (Series Editor), 2011, 91.

78 *Chitashvili N.,* The Function of Penalty to Ensure the Performance Interest and Compensation of Damages, Journal of Comparative Law, 2/2020, 10 <http://lawjournal.ge/5164115661615-2/> [30.08.2023] (in Georgian).

79 *Carter J.W., Peden E.,* A Good Faith Perspective on Liquidated Damages, The University of Sydney Law School, 2007, 1; *Jajodia G.,* Remedies for Breach of Contract, April 2012, 8.

80 *Chitashvili N.,* The Function of Penalty to Ensure the Performance Interest and Compensation of Damages, Journal of Comparative Law, 2/2020, 7-24, <http://lawjournal.ge/5164115661615-2/> [30.08.2023] (in Georgian).

81 About the mandatoty form of the contractual penalty. *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 594 (in Georgian); *Chanturia L., Zoidze B.,* Commentary to the Civil Code of Georgia, Book 3, General part of Obligatory Law, Tbilisi, 2001, 491 (in Georgian).

82 Regarding the precondition of guilt to compensate the penalty, see: Decision #2ბ/3112-14 of Chamber of Civil Dispoutes of the Tbilisi Court of Appeal of February 24, 2015; Janoschek, Beck'scher Online-Kommentar, BGB Stand, 01.05.2014, Edition 31, &339, Rn.3-6, cited by *Meskhisvili K.,* The Contractual Penalty (theoretical aspects, judicial practice), Journal. "Review of Georgian Business Law", 3rd edition, Tbilisi, 2014, 20 (in Georgian).

83 Judgment of Tbilisi Court of Appeal, March 4, 2014 #2b/5911-13, 4.1 (in Georgian).

84 *Meskishvili K.,* The Contractual Penalty (theoretical aspects, judicial practice), Journal. "Review of Georgian Business Law", III edition, Tbilisi, 2014, 6.

85 Regarding recognition of the breach of obligation as an objective fact, see: *Markesinis S.B., Unberath H.,* Johnston A., The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 387.

level of the breach of confidentiality obligation from the creditor. Thus, the burden of proof for a breach of obligation must combine the objective preconditions with subjective elements[86] (the importance of the breach of obligation, severity, and relation to the degree of violation of the contractual interest). The subjective prerequisites for imposing the contractual penalty influence the extent of applying legal remedies – in particular, the amount of penalty for a breach of the obligation of confidentiality should be imposed following a confidential process.

By vesting the burden of proof for determining the scope of the contractual interest in the creditor, and rescinding the amount of the penalty by the debtor, the court has the guidance to identify the degree of non-fulfillment of the obligation and the significance of the violation in terms of non-performance of the contractual interest. Naturally, the court interprets the contract without assessing the level of a breach of obligation by the party and tries to evaluate the breach of obligation by weighing it against the contractual interest, however, to maximize the principle of contractual freedom, the party should present indicators of contractual expectation, interest and its breach, which makes the court orientate on the process of defining the purpose of the contract to determine the amount of the penalty. In particular, to identify the extent of compensating the interest of the violated performance by the contractual penalty. As the debtor is given the right to a qualified decrease in the amount of penalty,[87] and the court can be provided with the authority to reduce it – it is important to evaluate the obligation of a creditor about the significance of the violation and the violated contractual interest, which will furnish the creditor with an opportunity to diminish the prospect of reducing the amount of the contractual penalty set by the court to enhance the protection of the confidentiality interest.[88]

So, the proper implementation of the burden of proof for imposing the contractual penalty strengthens the idea of agreeing to confidentiality and reduces the likelihood of decreasing the amount of penalty determined by the court.

5.2. The Advantage of Having a Written Confidentiality Agreement Deparate from a Mediated Dettlement

The agreement of confidentiality can be made in the form of a textually independent agreement or integrated into the mediation settlement. Concluding a confidentiality agreement as a separate document may be appropriate for keeping the contents of the mediation settlement confidential. If a dispute about the violation of confidentiality is dealt with by the court under the conditions of an independent contract on confidentiality, there cannot be a chance to submit and disclose other terms of

---

86 *Todua M. (ed.), Gagua I.,* Business Disputes and Court practice, Tbilisi, 2017, 55 (in Georgian).

87 *Meskishvili K.,* The Contractual Penalty (theoretical aspects, judicial practice), Journal. "Review of Georgian Business Law", III edition, Tbilisi, 2014, 6, 20, 23 (in Georgian); *Ioseliani N.,* Inappropriateness of Strict Contractual Penalty and the Role of the Court to Protect Civil Interests, Faculty of Law, Tbilisi State University, Law Journal, #1, 2016, 63 (in Georgian).

88 About the restraining function for a breach of obligation and the compensation for minimal damage of the contractual penalty, see: *Chitashvili N.,* The Function of Penalty to Ensure the Performance Interest and Compensation of Damages, Journal of Comparative Law, 2/2020, 16-17 <http://lawjournal.ge/5164115661615-2/> [30.08.2023] (in Georgian).

the mediation settlement to the court. However, the content of the mediation settlement may be applied to interpret a separate provision of the confidentiality agreement, and the court can need to acknowledge the terms of the mediation settlement to determine the implied intent or general contractual interest of the parties. Accordingly, a separate confidentiality agreement can be defined as a clause about the interpretation of the same agreement: the court shall be allowed to use the text of the mediation settlement which with the agreement of confidentiality will be interpreted as two textually different but content-unified agreements forming a general contractual interest.

The convenience of signing an agreement on confidentiality as an independent act can also be stated by the fact that the parties may not reach a mediation settlement, but only agree to settle the issues of confidentiality.

5.3. Procedural stage of signing a confidentiality agreement and participating entities

It is important to define the procedural stage of signing an independent confidentiality agreement. At the beginning of the mediation, the parties must give their informed consent to the validity of the legal standard of confidentiality, and at the end of the mediation process, agree on special conditions for confidentiality. However, if the parties fail to reach a mediated settlement, the receiving party who does not need confidentiality, can lose motivation to pledge to an agreement of confidentiality. In the event of failure to concur, the unscrupulous party may refuse to sign an additional agreement of confidentiality with malicious intent. Considering the mentioned risks, it is prudent for the mediator to provide the parties with information about the opportunity of making a special agreement of confidentiality at the beginning of the mediation process, especially if the necessity of protection of confidentiality with the parties is extremely evident. If the parties agree on special reservations about confidentiality at the beginning of the process or sign a separate, special agreement on confidentiality, it will drive the mentioned parties to conduct open communication and effectively lead the process of self-determination and cooperation.

The contract of confidentiality can be signed with a separate mediator (regarding confidential information disclosed at an individual meeting), and between the participants of the negotiation and/or third parties and parties involved in the process. The role of a lawyer to inform the client about the mentioned opportunity is very important. The lawyer-representative should perform his/her duty from the stage of developing the representation plan. The parties need to be properly informed about the advantages of the confidentiality agreement not only by the legal representatives but also by the mediator even at the preparatory stage of the process. This contributes to devising the strategy of the parties and exchanging information securely.

So, the agreement on mechanisms of protection of confidentiality should further strengthen and expand the regime of confidentiality for the parties.

6. Conclusion

The research has highlighted the importance of informing the parties before the extent of confidentiality. Indeed, informing the parties before the exceptions to confidentiality in the short term

may hinder the level of sincerity of the participants of mediation and the effectiveness of the process, but in the long term, this is the only viable solution to protect the parties and the institution of mediation.[89] Informing prior also ensures the smooth performance of the obligation of legitimate disclosure of information to protect the public interest.

The essential finding of the research is the necessity to strengthen the fragile legal guarantees of protecting confidentiality with contractual mechanisms. By signing an independent confidentiality agreement, regulating the scope of confidential information, and defining sanctions for its violation, the potential of mediation as a process is expanded.

The mentioned potential considering the strengthening of protecting contractual regime includes the implementation of such rights (loss of income, compensation for moral and reputational damage) and content-procedural resources that are often unrealistic to be implemented by the court rules, taking into account the heavy burden of proof, strict legal guidelines, which are the main preconditions for executing similar requirements by the Georgian legal order

Bibliography:

1. Civil Procedure Code of Georgia, 14//11/1997 (in Georgian).
2. Law of Georgia "On Mediation", 18/09/2019 (in Georgian).
3. The Competency Framework for Mediators, approved by the Executive council of LEPL Mediators Association of Georgia, <https://mediators.ge/uploads/files/61b754d735a26.pdf> [22.08.2023] (in Georgian).
4. "Regulations on Disciplinary Proceedings of Mediators" LEPL Mediators Association of Georgia, 24/04/2021 (in Georgian).
5. Uniform Mediation Act, 2003.
6. UNCITRAL Model Law on International Commercial Conciliation, with Guide to Enactment and Use 2022, United Nations Publication, New York, 2004, para, 58, 39, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf> [21.08.2023].
7. Model Standards of Conduct for Mediators, 2005.
8. *Abramson H. I.,* Mediation Representation, Advocating as a Problem-solver in any country or Culture, 2nd ed., National Institute for Trial Advocacy, 2010, 10, 146-147.
9. *Alexsander N., Chong S., Giorgadze V.,* The Singapore Convention on Mediation, A Commentary, Wolters Kluwer BV, The Netherlands, 2022, 5.97, 5.98.
10. *Alfini J.J., Press Sh. B., Stulberg J.B.,* Mediation, Theory and Practice, Reporter's Notes, 3rd ed., LexisNexis, 2013, 422.
11. *Atlihan M.E.,* A New Suggestion on the American Experience of the Limits of Mediation Confidentiality, Law and Justice Review, Issue 23, 2022, 47.
12. *Bader E.,* Psychology of Mediation: (part I), Mediator's Issues of Self and Identity, translator. *Burduli L.,* Alternative Dispute Resolution Yearbook 2020, 212 et seq., <https://adryearbook.tsu.ge/index.php/ADR/article/view/3002/3186> [22.08.2023] (in Georgian).

[89] *Brown K.L.,* Confidentiality in Mediation: Status and Implications, Journal of Dispute Resolution, Vol. 1991, Issue 2, 334.

13. *Bader E.E.,* The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle, Pepp. Disp. Resol. L.J., Vol. 10, Iss. 2, 2010, 1, 183-214.
14. *Betancourt J.C., Crook J.A.,* ADR, Arbitration and Mediation, A Collection of Essays, AuthorHouse Publishing, 2014, 118.
15. *Bostinelos T.,* A Happier Ending for Everyone: Resolving Adoption Disputes Between Putative Fathers and Adoptive Parents Through Clinical Mediation, 15 Pepp. Disp. Resol. L.J, Vol.15, 435, https://digitalcommons.pepperdine.edu/drlj/vol15/iss2/6 [30.08.2023].
16. *Boulle L.,* Mediation, Principles, Process, Practice, LexisNexis Butterworths, 3rd edition, 2011, 673.
17. *Brooker P.,* Mediation Law, Journey Through Institutionalism to Juridification, Taylor & Francis, 2013, 109.
18. *Brown K.L.,* Confidentiality in Mediation: Status and Implications, Journal of Dispute Resolution, Vol. 1991, Issue 2, 310, 334.
19. *Butler V.F.,* Mediation: Essentials and Expectations, Dorrance Publishing Co., Inc., 2004, 6-7.
20. *Carter J.W., Peden E.,* A Good Faith Perspective on Liquidated Damages, The University of Sydney Law School, 2007, 1.
21. *Chanturia L., Zoidze B.,* Commentary on the Civil Code of Georgia, Book 3, General Part of Obligatory Law, Tbilisi, 2001, 491 (in Georgian).
22. *Chen A. (ed.), Zhao Y.,* Mediation and Alternative Dispute Resolution in Modern China, Springer, Hong Kong, 2022, 28, 63.
23. *Chitashvili N.,* Framework for Regulation of Mediation Ethics and Targets of Ethical Binding TSU Law Faculty "Journal of Law", #1, 2016, 39-47.
24. *Chitashvili N.,* The Function of Penalty to Ensure the Performance Interest and Compensation of Damages, Journal of Comparative Law, 2/2020, 10, 16-17, 7-24, <http://lawjournal.ge/5164115661615-2/> [30.08.2023] (in Georgian).
25. *Collins P., Demeter D., Douglas S.,* Dispute Management, Cambridge University Press, 2021, 82, 180, 200, 249.
26. *de Palo G., Trevor M.B. (eds.),* EU Mediation, Law and Practice, Oxford University Press, 2012, 101, Rn. 9.26.
27. *Deason E.E.,* The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability, Vol. 85, Issue 1, 2001, 38.
28. *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 594 (in Georgian).
29. *Eloshvili N.,* Importance of Confidentiality Principle in the Mediation Process, Alternative Dispute Resolution Yearbook, 2013, 41-69, <https://adryearbook.tsu.ge/index.php/ADR/issue/view/617/124> [23.08.2023].
30. *Esplugues C., Marquis L.,* New Developments in Civil and Commercial Mediation, Global Comparative Perspectives, Springer, 2015, 282.
31. *Feehily R.,* International Commercial Mediation, Law and Regulation in Comparative Context, Cambridge University Press, 2022, 281.
32. *Foster T.N., Prentice S.,* The Promise of Confidentiality in Mediation: Practitioners' Perceptions, Journal of Dispute Resolution, Vol. 2009, Issue 1, 164-165.
33. *Garner B. (ed.),* Black's Law Dictionary, 8th ed., Thomson West, 2004, 1315.
34. German Civil Code, transl. *Chechelashvili Z.,* 2nd ed., Tbilisi, 2019, §§133, 157 (in Georgian).

35. *Gill P.,* When Confidentiality Is Not Essential to Mediation and Competing Interests Necessitate Disclosure, Journal of Dispute Resolution, 2006, Vol. 2006, Issue 1, 292, 294.
36. *Goldsmith J.-C., Ingen-Housz A., Pointon G.,* ADR in Business:Practice and Issues Across Countries and Cultures, Kluwer Law International, 2011, 652.
37. *Hachem P.,* Agreed Sums Payable upon Breach of an Obligation, International Commerce and Arbitration (Book 7), Eleven International Publishing, Schwenzer I. (Series Editor), 2011, 91.
38. *Hardy S., Rundle O.,* Mediation for Lawyers, CCH Wolters Kluwer Business, 2010, 481.
39. *Harman J.*, Mediation Confidentiality: Origins, Application and Exceptions and Practice Implications, Australasian Dispute Resolution Journal, 28(2), 2017, 106.
40. *Henke E.-M.,* Confidentiality in the Model Law and the European Mediation Directive, GRIN Verlag, 2011.
41. *Henkin L.,* Privacy and Autonomy, Colum. L. Rev., Vol. 74, 1974, 1425.
42. *Hopt K.J., Steffel F.,* Mediation – Principles and Regulation in Comparative Perspective, Oxford University Press, 2013, 50.
43. *Ioseliani N.,* Inappropriateness of Strict Contractual Penalty and the Role of the Court to Protect Civil Interests, Faculty of Law, Tbilisi State University, Law Journal, #1, 2016, 63 (in Georgian).
44. *Ioseliani N.,* The Contractual Penalty, "Georgian Notary", 2-3, 2005, 20 (in Georgian).
45. *Jajodia G.,* Remedies for Breach of Contract, April, 2012, 8.
46. *Jasper M.C.,* You've Been Fired: Your Rights and Remedies, Oceana Publications, 2005, 46.
47. *Kirtley A.,* Mediation Privilege Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, Journal of Dispute Resolution, Vol. 1995, Issue 1, 11, 1-54.
48. *Kiser R.,* Professional Judgement for Lawyers, Edward Elgar Publishing, 2023, 209-210.
49. *Lee J., Lim M., Hadikusumo J. (eds.),* Contemporary Issues in Mediation, Vol.7, Singapore International Mediation Institute, 2022, 96.
50. *Lee J.A., Giesler C.,* Confidentiality in Mediation, Harv. Negot. L. Rev., Vol. 3, 1998, 290, 292, 286.
51. *Leimguber D.,* Public Interest and Mediator's Ethical Dilemma, Australian Dispute Resolution Journal, 24 (3) 2013, 187.
52. *Macturk Ch. H.,* Confidentiality in Mediation: The Best Protection Has Exceptions, 19 Am. J. Trial Advoc., 1995-1996, 424.
53. *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 387.
54. *Maser Ch., Polio C.A.,* Resolving Environmental Conflicts, 2nd ed., Taylor and Francis Group, Roca Raton, London, New York, 2012, 154.
55. *Meskishvili K.,* The Contractual Penalty (Theoretical Aspects, Judicial Practice), journal. "Review of Georgian Business Law", III edition, Tbilisi, 2014, 6, 20, 23 (in Georgian).
56. *Moscati M.F., Palmer M., Roberts M.,* Comparative Dispute Resolution, Edward Elgar Publishing, 2020, 234.
57. *Nadja M.A.,* International and Comparative Mediation, Legal Perspectives, Kluwer Law International, 2009, 288.
58. *Oberman S.,* Confidentiality in Mediation, An Application of the Right to Privacy, 27 Ohio St. J. on Disp. Resol. 539, 2012, 539-640.

59. *Orme -Johnson C., Cason-Snow M,* Basic Mediation Training Trainer's Manual, 2002.
60. Patent Mediation Guide, Federal Judicial Center, lulu.com publisher, 2020, 7.
61. *Regina W.F.,* Applying Family Systems Theory to Mediation, University Press of America, Lanham, Boulder, New York, Toronto, Plymouth, UL, 2011, 59.
62. *Reich J.B.,* A Call For Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure, J. Disp. Resol., 2001, 213-215.
63. *Reuben R.C.,* Court Issues Major Ruling on Mediation Confidentiality, University of Missouri School of Law Scholarship Repository, Faculty Publications, Dispute Resolution Magazine,Vol. 6, 1999, 25, https://scholarship.law.missouri.edu/facpubs/812 [30.08.2023].
64. *Richbell D.,* Mediation in Construction Disputes, Blackwell Publishing, 2008, 76
65. *Roberts M.,* Mediation in Famili Disputes, Principles of Practice, 4th ed., Ashgate, 2014, 216, 121.
66. *Rubenfeld J.,* The Right of Privacy, Harv. L. Rev., Vol. 102, 1989, 802.
67. *Rue N.N.,* Everything You need to know about Peer Mediation, The Rosen Publishing Group, New York, 2001, 13.
68. *Rufenacht M.D.,* Concern over Confidentiality in Mediation – An in-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act, Journal of Dispute Resolution, Vol. 2000, Issue 1, 114-115.
69. *Schau J.F.,* View from the Middle of the Road, A mediator's Perspective on Life, Conflict and Human Interaction, AuthorHouse, 2013, xix.
70. *Shapira O.,* A Theory of Mediators' Ethics, Foundations, Rationale and Application, Cambridge University Press, 2016, 274.
71. *Solove D.J., Rotenberg M.,* Information Privacy Law, Aspen Publishers, 2003, 1.
72. *Stitt A., Mediation:* A Practical Guide, Routledge-Cavendish; 1st edition, Routledge-Cavendish, 2004, 1-166.
73. *Taylor A.,* The Handbook for Family Dispute Resolution, Mediation Theory and Practice, Jossey-Bass, 2002, Preface Xiii.
74. *Titi C., Gómez K.F.,* Mediation in International Commercial and Investment Disputes, Oxford University Press, 2019, 330.
75. *Todua M. (ed.), Gagua I.,* Business Disputes and Court Practice, Tbilisi, 2017, 55 (in Georgian).
76. *Turner C., Wählisch M.,* Rethinking Peace Mediation Challenges of Contemporary Peace-Making Practice, Bristol University Press, 2021, 310.
77. *Wendel B. W.,* Professional Responsibility, Examples and Explanations, Aspen Publishers, United States of America, 2007, 138.
78. *Zekoll J., Bälz M., Amelung I. (eds.),* Formalisation and Flexibilisation in Dispute Resolution, Brill Nijhoff, Lei-den/Boston, 2014, 65-66.
79. Judgement #2ბ/3112-14 of Chamber of Civil Disputes of the Tbilisi Court of Appeal, February 24, 2015.
80. Judgment of the Tbilisi Court of Appeal, March 4, 2014 #2ბ/5911-13.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7698

Irina Batiashvili*

Importance of Aging Policy

An aging policy in the near perspective is beneficial for the country, because the state's income will increase, and more people will be involved in the labor sector. This will help prolong both physical and psychological healthy life. The aforementioned is evidenced by the examples of Israel and Canada, as well as the recommendations of the United Nations and the International Labor Organization and the vision of the European Union on promoting the employment of the older population.

Age division and the development of specific terms (Older persons and Seniors) will help the state create the state program for specific age group citizens. Also, these terms will help to eliminate negative stigmas related to age and aging in the labor market. Individual employment programs and the state subsidy mechanism for improving the skills of older workers will contribute to the sustainable development of employment in Georgia. The mentioned issues respond to the association agreement concluded between the European Union and Georgia.

Keywords: *Aging Policy; Subsidize retraining; Pension increase mechanism.*

1. Introduction

About 8.5% of the world's population (617 million) are over 65 years old. According to a 2015 UN report, this percentage is predicted to increase to nearly 17% of the world's population, or 1.6 billion, by 2050.[1] According to the National Institute on Aging ("NIA") and the National Institutes of Health ("NIH"), the older population demographics are growing rapidly relative to the rest of the world's population.[2] Population aging is also noticeable in the context of Georgia. According to the data of the National Statistics Office of Georgia, as of 2023, people aged 65 and older will make up approximately 15.6% of the population.[3] The mentioned indicator can be increased to 21 percent by

* PhD Candidate of Caucasus International University, Researcher of the Analytical Department of the Ministry of Justice of Georgia on the rights of older persons, and Consultant to the Director General of LLC "Tbilisi Energy" on Gender Issues. https://orcid.org/0009-0001-7397-9411.

1 *Childs J.,* Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention, Journal of Comparative and International Aging Law & Policy, 11, 2020, 141-170.

2 The NIH and the US Census Bureau are collaborating to ensure that data collected is used to "better understand the course and implications of population aging." World's Older Population Grows Dramatically, Nat'l Inst. of Health, March 28, 2016, <https://www.nih.gov/news-events/news-releases/worlds-older-population-growsdramatically> [21.09.2023].

3 National Statistics Office of Georgia, Demographic situation in Georgia, <https://www.geostat.ge/ka/modules/categories/41/mosakhleoba> [21.09.2023].

2030.[4] The National Human Rights Protection Strategy adopted for 2022-2030 emphasizes the issue of gender and age equality, improvement of social conditions, sustainable and inclusive economic development, and employment. Accordingly, it is meant to develop a general strategy for the protection of human rights based on facts.[5] Also, according to the resolution of the Parliament on the National Strategy for the Protection of Human Rights, in the process of preparation and adoption of thematic strategic documents and action plans, it is essential to promote inclusiveness and the participation of relevant interested parties. From this point of view, special importance is given to the involvement of civil society, which implies the active participation of professional and academic circles, the non-governmental sector, and human rights organizations in the process of preparing decisions. For this purpose, it is recommended to create consultative platforms with interested parties according to sectors. These platforms will be intensively used.[6] Strategic intelligence based on scientific evidence is a new and positive trend.[7] The use of research and innovation for the well-being of citizens and the enhancement of state power is recognized across Europe. Evidence-based strategic intelligence is widely recognized in research and innovation (R&I).[8] The result of the use of research and innovation is targeted funding and the creation of an effective teaching system.[9]

On the background of the aforementioned demographic processes, it becomes increasingly urgent to create appropriate normative regulations for the protection of the rights of the older population. Everyone must have the opportunity to age with dignity. To create decent living conditions for people, the state should develop an aging policy, which includes recognizing the rights of the older and senior persons, improving social security, and promoting education and employment. In Georgia, there is currently no normative act regulating the rights of older population.

The aim of the legal regulation on the protection of the rights of older and senior citizens may be the following: improving the legal, economic, and social conditions of the older population; eliminating discrimination; developing opportunities for independent living; creating decent living conditions in old age; using labor rights and other income-generating opportunities; reflecting gender policy in aging policy and vice versa.

In the first article of the Universal Declaration of Human Rights, the basis of human dignity and, accordingly, human duties are explained in a way: All human beings are born free and equal with

---

4 On the approval of the "Concept of State Aging Policy on the Issue of Population Aging in Georgia" Resolution of the Parliament of Georgia, 5146-IIს, 27/05/2016, <https://matsne.gov.ge/ka/document/view/3297267?publication=0> [21.09.2023].

5 On the approval of the "National Strategy of Georgia for the Protection of Human Rights (for the years 2022-2030)", Parliament of Georgia, 2663-XIმს-Xმპ, 23/03/2023.

6 On the approval of the "National Strategy of Georgia for the Protection of Human Rights (for the years 2022-2030)", Parliament of Georgia, 2663-XIმს-Xმპ, 23/03/2023.

7 *Buehrer S., Schmidt K. E., Rigler D., Rachel P.,* How to Implement Context-Sensitive Evaluation Approaches in Countries with still Emerging Evaluation Cultures, Public Policy and Administration, 2021, Vol. 20, Nr. 3, 368-381.

8 Ibid.

9 *Batiashvili I.,* Promoting the Development of Gender Policy in Georgia According to a Review of Analyses Conducted by The Fraunhofer Institute for Systems and Innovation Research ISI, Germany, Karlsruhe, September 2023.

dignity and rights. They are endowed with a mind and a conscience and must behave towards each other in a spirit of brotherhood.[10] **The Madrid International Plan of Action on Aging aims to create an environment for older people full of opportunities.**[11] The above-mentioned goal was further specified by the United Nations and a vulnerable group of special importance (older women) was selected (singled out) from the category of the older population. The goal of the 2030 sustainable development agenda became strengthening older women and eliminating the negative stigmas against them.[12] According to the recommendation of the 2011 General Assembly, member states should strengthen their capacities in terms of effective data collection to better assess the situation of older citizens and establish adequate monitoring mechanisms for programs and policies aimed at reinforcing universally recognized rights of older persons. Data should be collected on older people living in urban, suburban, and rural areas. The state should collect separate data on older people in vulnerable situations. Older women or older people living in poverty are considered vulnerable groups.[13] Article 23 of the European Social Charter also focuses on the possibility of older people to live with dignity. (Georgia has not ratified the mentioned article). According to Article 349 of the Association Agreement between Georgia and the European Union and the European Atomic Energy Community and their member states, the parties will continue dialogue and cooperation on (Decent Work Agenda) employment policy, health, and safety at work, social dialogue, social protection, social engagement, promotion of inclusion, of gender equality, of non-discrimination, and development of corporate and social responsibility and thereby contribute to more and better jobs, poverty reduction, enhanced social integration, sustainable development, and improved living standards. Cooperation based on the exchange of information and best practices can include:

- Employment policies – aimed at creating more and better jobs and decent working conditions, including reducing the shadow economy and informal employment;
- Promoting active labor market measures and effective employment services to modernize the labor markets and adapt them to the needs of the labor markets;

---

10 United Nations, Universal Declaration of Human Rights, 60th Anniversary, Special Edition, Georgia Office of the United Nations Department of Public Information, Office of the United Nations High Commissioner for Human Rights, Georgia, 1948-2008.

11 Committee on Economic, Social and Cultural Rights, United Nationas Hum. Rts, Off. Of the Hihgh Comm'r, <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> [11.03.2020]; ("The Committee was established under [United Nations Economic and Social Council ("ECOSOC")] Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the [ECOSOC] in Part IV of the Covenant."). The main function of the CESCR is to oversee the covenant implementation by states parties. See UN Committee on Economic, Social and Cultural Rights (CESCR), ECOINET. The committee strives to hold constructive discussions with state representatives regarding application of the terms of the covenant. The committee also assists governments in fulfilling their responsibilities under the covenant through policy and legislation aiming to secure and protect social, economic, and cultural privileges.

12 United Nations, General Assembly, Resolution adopted by the General Assembly on 17 December 2018, 73/143. Follow-up to the Second World Assembly on Ageing, Seventy-third session, A/RES/73/143, 09/01/2019.

13 United Nations, General Assembly, Report of the Secretary-General, A/66/173, 22/07/2011. (Follow-up to the Second World Assembly on Ageing).

- improving more inclusive labor markets and social security systems that include socially disadvantaged people, including people with disabilities and people belonging to minority groups;
- Equal opportunities and anti-discrimination, which aims to strengthen gender equality and ensure equal opportunities between men and women. Also, the aforementioned aims to fight against discrimination based on gender, racial or ethnic origin, religion or belief, age, disability, or sexual orientation;
- Social policies aimed at strengthening social security and social protection systems in terms of equity, access, and financial sustainability.[14]

2. The Legal Regulation of Older population's and Older Women's Rights in Canada

The statutory regulation of the rights of older persons and the environment adapted to them are outlined in the Canadian legal system. Canadian Charter of Rights and Freedoms (constitutional law) prohibits discrimination based on age, as do the Canadian Human Rights Act and Provincial Human Rights codes.[15] Canadian Charter of Rights and Freedoms [16] is part of the Canadian Constitution – the supreme law in all of Canada.[17] The charter was signed in 1982. In Canada, the anniversary of the Charter is celebrated on April 17. Canadian constitutional law recognizes age as one of the grounds for discrimination. Accordingly, the mentioned ground enjoys high protection at the normative level. According to the first paragraph of Article 15 of the Charter (rights of equality), Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[18] Also, the Charter declared that the Parliament of Canada may from time to time make laws in relation to old age pensions in Canada, but no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of a Provincial Legislature in relation to old age pensions.[19]

An example of a provincial code is the Ontario Human Rights Code.[20] The Ontario Human Rights Code, enacted in 1962, prohibits actions that discriminate against people based on a "protected ground" in a "protected social area." The Code protects against discrimination on the grounds of age. The Code is administered by the Ontario Human Rights Commission, Canada's oldest commission.

---

14 Association agreement between the European Union and the European Atomic Energy Community and their Member states, of on the one part, and Georgia, of the other part, International Treaty and Agreement of Georgia Minister of Foreign Affairs of Georgia, 27/06/2014, <https://matsne.gov.ge/document/view/2496959?publication=3> [21.09.2023].

15 <https://laws-lois.justice.gc.ca/eng/acts/h-6/> [21.09.2023].

16 Canada Constitution Act, 1982 Endnote (81), PART I, Canadian Charter of Rights and Freedoms, 1867 to 1982, <https://laws-lois.justice.gc.ca/PDF/CONST_TRD.pdf> [21.09.2023].

17 <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/> [21.09.2023].

18 Canada Constitution Act, 1982 Endnote(81), PART I, Canadian Charter of Rights and Freedoms, 1867 to 1982, Article 15 (1), <https://laws-lois.justice.gc.ca/PDF/CONST_TRD.pdf> [21.09.2023].

19 Canada Constitution Act, 1982 Endnote(81), PART I, Canadian Charter of Rights and Freedoms, 1867 to 1982, Article 94 (A), <https://laws-lois.justice.gc.ca/PDF/CONST_TRD.pdf>[21.09.2023].

20 <https://www.ohrc.on.ca/en/ontario-human-rights-code> [21.09.2023].

The Code prohibits discrimination and harassment in the following protected areas: accommodation (housing), contracts, employment, goods, services, and facilities, membership in unions, trade or professional associations.[21]

Also, in several normative acts, relevant provisions for the protection of the rights of older persons are outlined. In Canada (13 provinces), the rights of older citizens (older individuals) are defined in statutory acts at the level of provincial legislation. In Manitoba and Alberta provinces, forms of older adult abuse are defined as abuse that occurs in the caring process of older individuals.[22] The Yukon province defines "abuse" and "neglect" as deliberate mistreatment of an adult that causes the adult physical, mental, or emotional harm, or causes financial damage, or includes sexual assault. The protection of the rights of the older people in the Canadian legal system can be found in three areas: the pension system (social security), the legal duty of everyone to provide necessaries of life to a person under his charge due to the person's age by the Criminal Code, and employment programs for the older persons. Under S.215 of the Criminal Code of Canada, Everyone is under a legal duty to provide necessaries of life to a person under his charge if that person is unable, by reason of age or other cause.[23]

In Canada, in July 2022, the pension rate for senior citizens (age 75 and over) increased by 10%. The data table below is taken from the official website of Canada's Old Age Security (OAS). The size of the pension rate in Canada depends on the period of residence in Canada. However, it is interesting that Canada calls people over the age of 75 seniors and thus divides the older and the senior older people in the pension scheme by age and terminologically.[24] This emphasizes how important it is to plan the state policy in a targeted manner for people of different ages. Accordingly, the division into age categories will help the state to match/allocate employment programs and social security to the relevant groups. Hence, the terminological division of age categories can also be used in Georgia, following the example of Canada: the older and the senior.

The increase in the pension for the over-75s can be assumed to be related to the more passive use of labor rights for the over-75s compared to the labor rights of the under-75s. This is evidenced by Canada's official statistics in the "Working after 65" publication. From the data used by the "Canada Labor Force Survey", figure 2 and Table 1 on page 5 are noteworthy, where employment statistics are divided into age groups: 65-69 women and men and 70+ women and men.[25] Statistics show that the

---

21 Canadian Center for Diversity and Inclusion, Overview of Human Rights Codes by Province and Territory in Canada, 2018, <https://ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf> [21.09.2023].

22 Protection for Persons in Care Act, C.C.S.M., c. P144, s.1, <https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/p211.html>. [21.09.2023]. Protection for Persons in Care Act, R.S.A. 2000, c. P-29, s.1.

23 Criminal Code (R.S.C., 1985, c. C-46), <https://laws-lois.justice.gc.ca/eng/acts/C-46/section-215.html> [21.09.2023].

24 Old Age Security (OAS) pension amounts – October to December 2023, <https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/payments.html> [21.09.2023]; <https://www.criminalcodehelp.ca/offences/violent-offences/elder-abuse/#:~:text=QUICK%20TAKEAWAY,provincial%2Fterritorial%20and%20federal%20governments> [21.09.2023].

25 *MacEwen A.,* Working After Age 65, Alternative Federal Budget 2012 Technical Paper, Canadian Center for Policy Alternatives, 2012, https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2012/04/WorkingAfter65.pdf [21.09.2023].

labor potential of people under 70 years of age is significantly different and more active than the potential of employees over 70 years of age. Canada publishes these types of age-segregated labor force statistics.

Old Age Security (OAS) pension amounts – October to December 2023

Age	Maximum monthly payment amount	To receive the OAS your annual net world income in 2022 must be
65 to 74	$707.68	Less than $142,609
75 and over	$778.45	Less than $148,179

In Canada, the employment of older individuals and the activation of their labor potential is a constituent element of improving the rights of the older population. According to the publication "Working After Age 65", Older workers make up a great proportion of the paid part-time workforce in Canada.[26] Statistics in the publication reveal that many Canadians are now delaying retirement and choosing to work longer. Length of working time may be linked to high positions, such as managerial positions, and to the low income of some people in old age, such as not having enough savings for retirement. Persons aged 65 and over are still in the paid workforce, a very large proportion of those workers today are in part-time jobs and in self-employment. Accordingly, self-employment and part-time work are widespread in the older workforce of Canada (Figure 5 – Statistics, pg. 8. Table 1, pg. 5)[27]. The publication also contains statistics about demanding jobs and relevant occupations that offer the opportunity to work part-time and also, match older workers' skills (pg. 9, table 2), In particular: the sales and service occupations, which is more flexible.[28]

Noteworthy is that Canadian provinces promote the employment of older persons by developing appropriate programs. In particular, a pilot project has been developed by the Manitoba Chamber of Commerce.[29] The program connects older persons with employers using an online database that focuses on the skills of older persons rather than professions. Also, in 2023, the Manitoba Government

---

26 *MacEwen A.,* Working After Age 65, Alternative Federal Budget 2012 Technical Paper, Canadian Center for Policy Alternatives, 2012.

27 <https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2012/04/Working After65.pdf> [21.09.2023].

28 *MacEwen A.,* Working After Age 65, Alternative Federal Budget, 2012 Technical Paper, Canadian Center for Policy Alternatives, 2012.

29 The Pilot Project of Manitoba Chamber of Commerce: creative job-matching, skills matching, and retraining programs.

initiated a new client-determined community care pilot program for home and community care.[30] The participants of this program will be older people who need complex assistance so they can remain in their own homes. This program will be launched in 2024 and relevant service providers will be involved.[31]

The Federal/Provincial/Territorial Ministers Responsible for Seniors Forum plays the important role regarding to the rights of older population of Canada. Federal/Provincial/Territorial Ministers Responsible for Seniors Forum is an intergovernmental body established to share information, discuss new and emerging issues related to seniors, and work collaboratively on key projects. .[32] The Labour Force Participation Working Group is part of the Federal/Provincial/Territorial (FPT) Forum of Ministers Responsible for Seniors. Employment and Social Development Canada (ESDC) is the department of the Government of Canada responsible for developing, managing and delivering social programs and services. Employment and Social Development Canada (ESDC) works to improve the standard of living and quality of life for all Canadians. This is done by promoting a labour force that is highly skilled. We also promote an efficient and inclusive labour market.[33] Their policies are diverse and cover the issue of care, accommodation and a friendly work environment for the older population.[34]

A policy on age-friendly workplaces includes three elements: 1.Promoting older worker participation; 2. A self-assessment tool for employers (which Canada developed); 3. An age-friendly workplace – Charter.[35]

In this way, Canada contributes to the development of an efficient and inclusive labor market.[36]

The negative impact of Covid-19 on the older population was discussed at the Federal, Provincial and Territorial (FPT) Ministers Responsible for Seniors Forum in 2022. There was also the issue of active supporting older and senior Canadians. The meeting was co-chaired by Canada's Minister of Seniors, Kamal Khera, and Ontario's Minister for Seniors and Accessibility, Raymond Cho.[37]

A healthy work environment means more productive and engaged employees. An important aspect of creating a healthy work environment is cultivating a workplace culture that embraces and values workers of all ages and abilities. Employers that retain older workers are retaining experience,

---

30 News Release – Manitoba, Manitoba Government Announces New Client-Determined Community Care Pilot For Home and Community Care, August 1, 2023, <https://news.gov.mb.ca/news/index.html?item=60118&posted=2023-08-01> [21.09.2023].

31 Manitoba, A Great Place to Age: Provincial Seniors Strategy, 2023 February, Manitoba Government. <https://gov.mb.ca/seniors/docs/seniors_strategy_2023.pdf> [21.09.2023].

32 <https://www.canada.ca/en/employment-social-development/corporate/seniors/forum/labour-force-participation.html> [21.09.2023].

33 <https://www.canada.ca/en/employment-social-development.html> [21.09.2023].

34 The Federal/Provincial/Territorial Seniors Forum, Government of Canada, <https://www.canada.ca/en/employment-social-development/corporate/seniors/forum.html> [21.09.2023].

35 Ibid.

36 <https://www.canada.ca/en/employment-social-development.html> [21.09.2023].

37 <https://www.gov.nl.ca/releases/2022/cssd/0224n06/> [21.09.2023].

corporate knowledge, productivity, and diversity in their workplaces.[38] Any sized business or workplace can become age-friendly and adopt age-friendly practices. Québec's participation in the development of this document was aimed at sharing expertise, information and best practices.[39]

A checklist for human resource planning, for example:

- The company knows the age profile of our workforce;
- The company offers support in effective retirement planning, including the financial and non-financial aspects of retirement (e.g., phased retirement);
- The business case for recruiting and retaining older workers is well understood in the organization;
- The company has policies that recognize the diversity of all workers, including older workers;
- Companys' pension plan (where applicable) offers an option for gradual retirement with a gradual decrease in work hours and increase in pension benefits.[40]

In 2018, the Department of Employment and Social Development Canada prepared a document on "Promoting the Labour Force Participation of Older Canadians".[41] It is a fact that Canada is experiencing a low birth rate and an increase in the life expectancy of its citizens. the number of people aged 55 and over increased from 6 million in the mid-1990s (around 20% of the population) to 11 million in 2016 (around 30% of the population). Although not all regions are equally affected by population aging, the number of individuals 55 and over is expected to reach 17 million by 2036 (almost half of the expected population).[42] Accordingly, Canada provides both improving legal rights for older people and analyzing the impact of various government policies on the challenges faced by older workers concerning their participation in the labor market. At the same time, Canada is developing a policy of training, employment, and incentives for older people.

In the past, economic growth was mainly driven by large cohorts of youth entering the labour market. However, with population aging, to maintain its pace of improvement in living standards, Canada will have to rely more heavily on productivity growth and increased labour force participation of all working-age Canadians, particularly older Canadians and groups that are underrepresented in the labour market.[43] In addition, rapid globalization and technological changes have led to the changing

---

38 Age-Friendly Workplaces: A Self-Assessment Tool for Employers, the Federal/Provincial/Territorial Ministers Responsible for Seniors Forum, Human Resources and Skills Development Canada, Her Majesty the Queen in Right of Canada, 2012.

39 The Federal/Provincial/Territorial Ministers Responsible for Seniors Forum, Age-friendly workplaces: A self-assessment tool for employers, Publishing Services Human Resources and Skills Development Canada, <https://www.canada.ca/content/dam/esdc-edsc/documents/corporate/seniors/forum/tool.pdf> [21.09.2023].

40 Ibid.

41 Employment and Social Development Canada, Promoting the Labour Force Participation of Older Canadians, 2018, Federal/Provincial/Territorial Ministers Responsible For Seniors, <https://www.canada.ca/content/dam/canada/employment-social-development/corporate/seniors/forum/labour-force-participation/labour-force-participation-EN.pdf> [21.09.2023].

42 <https://www.canada.ca/en/employment-social-development/corporate/seniors/forum/labour-force-participation.html#h2.2> [21.09.2023].

43 Employment and Social Development Canada, Promoting the Labour Force Participation of Older Canadians, 2018, Federal/Provincial/Territorial Ministers Responsible For Seniors, <https://www.

nature of work. The traditional employee/employer relationship is evolving, sometimes leading to less secure relationships, as well as increases in different types of work. The economy is also restructuring, resulting in more opportunities that require highly skilled and knowledgeable workers. Making the adjustment to this new reality may be more difficult for some older workers. Paragraph 1.2 of the above-mentioned document reviews the challenges and opportunities of the aging population, according to which several factors can explain the increase in the participation of the elderly in the labor market in recent years, namely: improved health and life expectancy; relatively fewer physically demanding jobs; later labour force entry because of more years in school; higher levels of education; cultural shift (for example, valuing work more than retirement); the need for social interaction and to keep busy; greater need to work for financial reasons (fewer private pension plans, lower savings rates and lower returns on savings, fear of outliving retirement savings); changes to the retirement income system (additional flexibility that facilitates working while receiving retirement benefits); and a tightening of the labour market, resulting in businesses being more likely to hire and retain older individuals (National Seniors Council, 2011; Carrière et al., 2015).[44]

According to paragraph 2.4 of Chapter Two (Employment Legislation) of the paper "Promoting the Labour Force Participation of Older Canadians", In 2017, the federal budget proposed changes to the Canada Labor Code that would allow employees to request more flexible work schedules, such as flexible start and finish working times, the ability to work from home, and new unpaid leave to help balance family responsibilities. In June 2017, the Government of Ontario introduced Bill 148, which proposed comprehensive changes to Ontario's Employment Standards Act, 2000 and the Labour Relations Act, 1995. These comprehensive changes would increase the minimum wage, ensure part-time, temporary, casual and seasonal workers doing the same job as full-time workers are paid the same hourly wage, ensure that all workers are entitled to 10 personal emergency leave days (including two paid ones), and step up enforcement of employment laws, all of which could help attract or retain older workers.[45]

Older people (older workers) skills development programs[46] have been operating in Canadian provinces since 2006. The Government of Canada's Targeted Initiative for Older Workers (TIOW), which ran from 2006 to 2017, was a federal/provincial/territorial cost-shared initiative designed to assist unemployed older workers living in vulnerable communities of up to 250,000 people with their reintegration into the workforce. The main specificity of the mentioned program was that the skills development program was individually tailored to the needs of provinces and regions. For example, in Newfoundland and Labrador and in the Northwest Territories, TIOW projects were mainly focused on developing workers' skills for the tourism industry. One TIOW program in Nunavut was designed to support local elders in enhancing the skills they needed to restore local elders' traditional role as teachers of cultural knowledge, skills, and languages for younger generations.[47]

---

canada.ca/content/dam/canada/employment-social-development/corporate/seniors/forum/labour-force-participation/labour-force-participation-EN.pdf> [21.09.2023].

44 Ibid.

45 Ibid.

46 Canada's Targeted Initiative for Older Workers (TIOW), <https://www.canada.ca/en/employment-social-development/corporate/seniors/forum/labour-force-participation.html#h2.4-3.6> [21.09.2023].

47 Ibid.

Analysis of the above reveals that like most industrialized countries and Canada, Georgia's population and workforce is aging. Also, it is necessary to take into account the Canadian approach in the direction of implementing a thoughtful policy and developing relevant documents.

Aging trends affect Canada's future social and economic well-being and require thoughtful policies.[48] Research "Understanding the Impact of Public Policies and Programs on the Labor Market Decisions of Older Workers" builds upon the 2018 FPT Seniors Forum report on "Promoting the Labour Force Participation of Older Canadians – Promising Initiatives". The document "Understanding the Impact of Public Policies and Programs on the Labor Market Decisions of Older Workers" will help to develop a targeted program for older employees.[49] According to the analysis of the Canadian government policy on improving the rights of older citizens, three positive influencing factors are highlighted: 1. Financial incentives for both employer and employee. 2. Skills development. 3. Impact of pension reforms on older women.

2.1. Financial Incentives[50]

Western Europe, Canada, Australia, and the United States of America encourage the retention and re-entry of older workers into the labor market by using financial incentive mechanisms.

Various forms of financial incentives may be used, including:

Financial incentives for employers (e.g. wage subsidies);

Financial incentives for older workers earnings supplements and tax credits), and financial incentives through broader tax policy that can influence the motivation of and need for individuals to extend their working lives and decisions of employers.

A big challenge is the development of effective financial incentive programs. Incentives must be large enough to induce a change in the behavior of employers and/or older workers. Implementation of wage subsidy programs can be particularly challenging to avoid unintended behaviors, such as employers terminating an unsubsidized employee to hire an individual eligible for a subsidy.

Several factors influence the effectiveness of financial incentives:

- Whether participation in a program is voluntary;
- The length of time an older worker may have been unemployed or out of the labor force;
- Individuals' financial and personal circumstances (housing income and wealth, health, marital status, partners' retirement status);
- Labor market conditions (incentives can be expected to be less effective when there is strong labor market demand).

---

48 Employment and Social Development Canada, Understanding the impact of public policies and programs on the labour market decisions of older workers, Federal/Provincial/Territorial Ministers Responsible For Seniors, 2019 June, <https://www.canada.ca/content/dam/canada/employment-social-development/corporate/seniors/forum/labour-market-decisions-older-workers/labour-market-decisions-older-workers-EN.pdf> [21.09.2023].

49 Ibid.

50 Ibid.

As for the issue of financial incentives for employers, it is a widespread practice, especially in the direction of wage subsidies.[51] Stigmas associated with older people's productivity negatively affect employers' decision to hire older people. Perceptions of employers about potential training and onboarding costs are linked with the process of recruitment of older individuals. These costs may not accompany the adaptation process of an older employee at all. In this case, the state subsidy mechanism encourages the employer to hire the older individual. The most common type of employer financial incentives are wage subsidies. This is intended to compensate employers for hiring older workers whom the employer might otherwise be hesitant to hire. Wage subsidies are typically temporary measures lasting from six to 12 months.

2.2. Skills Development[52]

According to the concept of workability, ongoing engagement of older workers in the labor market requires them to possess the requisite qualifications and skills to remain productive. As skills are built throughout one's career, initiatives that support lifelong learning and skill development play an important role in workers remaining productive as they get older. The lower participation of older employees in training and educational programs is due to the following factors:

- reluctance on the part of employers to invest in training for older workers. – This is possibly due to a misconception that there isn't sufficient return-on-investment to warrant training workers who might exit the labour force in the very near-term.
- lack of interest in skills development on the part of older workers themselves. – This is possible because they consider themselves too old for training, have no personal interest in obtaining new skills, don't plan to remain in the labour force long enough to warrant additional training, or do not find training approaches to be suitable for their learning needs.
- The inappropriateness of age-specific training approaches to older workers' learning needs. – One of the most important factors influencing the success of initiatives aimed at improving the skill sets of older workers and jobseekers is how training is being delivered. It is best that training for older workers be tailored to their unique circumstances and learning styles. Learning is likely to be more effective if it is self-paced, job-related, and work-integrated.

Government support for the training of older workers can take many forms, including publicly funded training; financial support for training (for example, job training grants); skills coaching; and working with education providers.

---

[51] Employment and Social Development Canada, Understanding the impact of public policies and programs on the labour market decisions of older workers, Federal/Provincial/Territorial Ministers Responsible For Seniors, 2019 June, <https://www.canada.ca/content/dam/canada/employment-social-development/corporate/seniors/forum/labour-market-decisions-older-workers/labour-market-decisions-older-workers-EN.pdf > [30.09.3023].

[52] Employment and Social Development Canada, Understanding the impact of public policies and programs on the labour market decisions of older workers, Federal/Provincial/Territorial Ministers Responsible For Seniors, 2019 June, <https://www.canada.ca/content/dam/canada/employment-social-development/corporate/seniors/forum/labour-market-decisions-older-workers/labour-market-decisions-older-workers-EN.pdf> [30.09.3023].

Regarding training programs directly funded by the government: Canada offers training for older workers and jobseekers. The purpose of these training and learning programs is to support the updating of skills of older employees. In the short-term perspective, training is an important tool to support older workers, improve their employability, and increase their productivity.

2.3. The Issue of Older Women:

Women account for a little more than half the population in Canada (50.9% in 2016), among people aged 65 years and older, the number of women exceeds the number of men by more than 20 percent, and in the 85-and-older population, there are about two women for every man.[53]

Despite implementing retraining and employment programs, several information gaps remain. Specifically: policies and programs associated with job matching, recruitment services, and targeted support for older women seeking self-employment. A study by the Employment and Social Development Canada showed that the Old Age Security pension system (There are few pension incentives at early retirement age) may affect the labor force participation of women aged 60 years. The participation of older women in the labor market has a positive impact.[54]

Elderly (older and senior citizens) Mediation Centers have been established in Canada in order to reduce and eliminate discrimination against the aged population and to support the full participation of the older persons in public life. This simplifies and facilitates the realization of the rights of the older people. Canada has plety of examples of elder mediation mechanisms.[55]

2.4. Mediation for Older and Senior Persons:

A publication on the official website of the Government of Canada emphasizes the benefits of mediation for seniors and older citizens: RESEARCH REPORT Exploring the Role of Elder Mediation in the Prevention of Elder Abuse Final Report (November 30, 2010).[56] In Canada, various organizations are implementing the functions of the Center for the Protection of Elders' Rights and Mediation, mostly financed by the provinces.[57]

---

53 Employment and Social Development Canada, Promoting the Labour Force Participation of Older Canadians, 2018, Federal/Provincial/Territorial Ministers Responsible For Seniors, <https://www.canada.ca/content/dam/canada/employment-social-development/corporate/seniors/forum/labour-force-participation/labour-force-participation-EN.pdf> [21.09.2023].

54 Employment and Social Development Canada, Understanding the impact of public policies and programs on the labour market decisions of older workers, Federal/Provincial/Territorial Ministers Responsible For Seniors, 2019 June, <https://www.canada.ca/content/dam/canada/employment-social-development/corporate/seniors/forum/labour-market-decisions-older-workers/labour-market-decisions-older-workers-EN.pdf> [30.09.2023].

55 Canadian Network for the Prevention of Elder Abuse (CNPEA); House of Commons Standing Committee on Justice and Human Rights; The Canadian Centre for Elder Law, an Elder Mediation British Columbia.

56 Research report Exploring the Role of Elder Mediation in the Prevention of Elder Abuse Final Report (November 30, 2010), <https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mp-pm/p1.html> [21.09.2023].

57 The Canadian Centre for Elder Law, CNPEA (Canadian Network for the Prevention of Elder Abuse), Elder Abuse Prevention Ontario – Mostly funded by the Government of Ontario, it provides training, education, and specific events to address complex issues of stigma and violence against older persons. Elder Mediation

The Ministry of Health must monitor incidents of violence in care facilities based on the Long-Term Care Homes Act of 2007.[58]

The development of appropriate individual (focused on a specific sector) employment programs will be a good practice in the process of implementing the aging policy of Georgia. Also, in the legislation of Georgia, it is possible to reflect the legal regulation supporting the retraining/upgrading of skills, the purpose of which will be the financial encouragement of the labor sector and the promotion of sustainable employment, in particular, **paragraph 4 should be added to Article 22 of the "Labor Code of Georgia" of the Organic Law of Georgia, according to which, by the joint decision of the state and the employer, older employees can participate in vocational training or qualification raising training courses for effective fulfilling their official duties. The employee's participation in this course will be considered in working time and compensated by the state subsidy mechanism.**

Also, by creating a mediation center for older persons, Georgia ensures the strengthening of intergenerational solidarity and relations, the elimination of discrimination against the aging population, and their full participation in public life. This will promote the realization of the rights of the older citizens.

The main functions of the mediation center may be:

- Play the role of a mediator: in behavioral, psychological, and social issues, helping older persons in forming fruitful relationships with family or social workers, in the relationship with the employer;
- providing information on state activities regarding the rights of the senior or older persons;
- Informing about current and relevant information regarding fraudulent schemes (fraudulent schemes whose victims are mainly elderly).
- Processing and collecting data about the conditions of older persons in accordance with demand (demand from older persons to collaborate with the mediation center).
- Developing general goals of state importance together with scientific institutes and then conducting joint research by state funding.

3. Brief Analysis of the Pension System of France [59]

"Retirment security is not an expense we cannot afford. On the contrary, it is investment we cannot avoid. Our economy will benefit. Our society will benefit. Our people will benefit if we undertake the macro and micro challenges of this issue".[60]

Canada, an Elder Mediation British Columbia, an Elder Mediation Atlantic Canada, Elder Mediation International Network (provides certification for mediators in elder mediation field).

58 <https://www.ontario.ca/laws/statute/07l08#BK27> [21.09.2023].

59 This chapter is based on: The Permanent Parliamentary Gender Equality Council, Report: An Analysis of the inclusion of domestic workers/informal economy actors in the pension scheme with the aim of formalizing the informal economy, author Irina Batiashvili, 2023 <https://parliament.ge/media/news/genderuli-tanastsorobis-sabchom-2022-2024-tslebis-samokmedo-gegmashi-tsvlilebebi-sheitana> [21.09.2023].

The France pays special attention to the issue of physical and financial resources spent by its citizens for maternity leave and child-rearing (Increases in length of insurance for maternity leave and child-rearing – The child-rearing increase). **It is necessary to mention one of the characteristics of the French Social Security System (pension schemes), which generally helps the sustainable development of social security in terms of gender equality and meanwhile is a good incentive for the formalization of the informal economy.**

France has one of the best practices for involving self-employed workers and informal economy actors in the pension system. Also, The French Social Security System encourages the employment policy of older workers and recognizes unpaid child-rearing work in pension schemes. As of today, the French pension scheme[61] consists of two parts:[62]

1. Basic pensions under the general scheme;
2. Compulsory supplementary pension scheme

From the basic pensions under the general scheme, it is important for the mentioned paper:

Multiple-pension claimants: the single pension claim for aligned scheme members;[63] Lura[64] for individuals who have belonged to at least 2 of the following so-called "aligned" schemes:

- The general salaried workers' scheme[65]
- The agricultural employees' scheme[66]
- The self-employed workers' scheme[67]

As of today, French law has changed and through Lura, members who are also referred to as "multiple-pension claimants," are only required to submit a single pension claim and only draw a single pension (rather than several as before).[68]

An individual can submit a pension claim to any of the pension funds to which they have belong. The funds then work together to compile the information needed to process the claim and calculate the pension.[69]

In general, the competent scheme to calculate and pay the applicant's pension is the last one to which they belonged. However, priority rules may apply instead: this is the case when the insured was last a member of two aligned schemes at the same time or when Lura does not apply to their last scheme of membership.

---

60 *Moseley-Braun C.,* Women's Retirement Security, Elder Law Journal, 1996, 4(2), 493-498.

61 In France, private-sector employees' basic pensions are topped up by the compulsory supplementary pension scheme Agirc-Arrco, which is also financed on a pay-as-you-go basis.

62 <https://www.cleiss.fr/docs/regimes/regime_france/an_3.html> [21.09.2023].

63 Multiple-pension claimants: the single pension claim for aligned scheme members (liquidation unique des régimes alignés/ Lura).

64 LURA stands for Liquidation Unique de retraite de base des Régimes Alignés.

65 Régime général des salaries.

66 Régime des salariés agricoles.

67 craftsmen, merchants, manufacturers.

68 Ministry of the Economy, Finance and the Recovery of France, Pension Projections for the 2021 Ageing Report Country Fitche, France, Final Version – March 2021, <https://economy-finance.ec.europa.eu/system/files/2021-05/fr_-_ar_2021_final_pension_fiche.pdf> [21.09.2023].

69 <https://www.cleiss.fr/docs/regimes/regime_france/an_3.html> [21.09.2023].

The member's single retirement pension is calculated and paid as if they had belonged to only one of their participating schemes.[70]

Calculation formula:

Pension = Average yearly income × rate × accrued length of insurance / maximum length of insurance taken into account.[71]

For clarity, let's explain each pension component one by one:

- Average yearly income: the sum of the individual's average salaries and income for their 25 best years under all aligned schemes combined. This sum must not exceed the amount of the applicable annual social security ceiling for each year being counted.
- Rate: between 37.5 and 50%. When the rate is determined based on length of insurance, length of insurance and equivalent periods accrued under the aligned schemes to which Lura applies are counted in addition to length of insurance under the other compulsory schemes to which the individual has belonged. The number of quarters credited under these schemes cannot exceed 4 per calendar year.
- Accrued length of insurance: total of all quarters credited to the individual's account under the aligned schemes to which Lura applies.

It is necessary to mention three characteristics of the French pension schemes, which generally helps the sustainable development of social security in terms of gender equality:

1. Once a claimant has reached a certain age, their pension will be calculated at the full rate regardless of how many quarters they have accrued. This age ranges from 65 to 67, as determined by the claimant's year of birth and circumstances.
2. The child-rearing increase. A parent can be awarded a length of insurance increase of up to 8 quarters per child:

- 4 quarters for maternity leave (90 days of daily benefits accrue a quarter) or adoption,
- 4 quarters of child-rearing over the 4 years that follow the child's birth or adoption.

Pensions may be increased for the following reasons:

- The child-rearing increase: Individuals who have raised 3 children for at least 9 years before their 16th birthday are entitled to a 10% pension increase. The increase is awarded to each parent receiving a retirement pension.
- The pension-rate increase: Members who work beyond the age of automatic full-rate pension entitlement and whose aggregated length of old-age pension insurance under all basic pension schemes combined entitles them to a full-rate pension can continue working in order to increase the amount of their pension. For each quarter accrued beyond statutory pension age and after accruing the required length of insurance for full-rate pension entitlement, the member's pension will be increased by 1.25% per quarter (with a cap of 4 quarters per year).

[70] <https://www.cleiss.fr/docs/regimes/regime_france/an_3.html> [21.09.2023].
[71] Ibid.

Regarding the regulation of the minimum pension, the minimum. The Minimum pension (minimum contributif) is granted to members:[72]

- who are entitled to a full-rate basic pension under the general scheme,
- and have claimed all of their basic and supplementary retirement pension entitlements, the total amount of which (basic plus supplementary, public and private sector combined), does not exceed €1,352.23* per month.
- It comes to €684,13 per month, and can be paid along with supplements earned due to length of insurance or other factors. Whatever the circumstances, the minimum pension cannot bring the total amount of personal pensions (basic and supplementary) above a certain set monthly amount (€1,352.23*).

The basic retirement pension cannot exceed 50% of the social security ceiling (€1,833 per month in 2023).

On January 1st, 2019, in order to promote the employment policy, a temporary pension increase system (Agirc-Arrco scheme) was activated. It is intended as an incentive for members to keep working beyond the age at which they become eligible for a full-rate retirement pension. The increase depends on how many years a person continues to work without receiving a pension despite reaching the retirement age:

The member applies for a supplementary retirement pension 2 or more years after they became eligible for the full rate under the basic scheme: A 1-year pension increase of:

- 10% will apply if your supplementary retirement pension claim is postponed by two years,
- 20% if it is postponed by 3 years,
- 30% if it is postponed by 4 years.[73]

Based on the analysis of the French pension schemes (the French Social Security System), it is possible to assume that an increase in the state pension of Georgia for older and senior women due to childbirth and child-rearing, will be an effective tool. For example, with the corresponding amendment to Article 7, Clause 2 of the Law of Georgia on State Pensions. Also, in Article 32, Clause 12 of the Law of Georgia on Funded Pensions, it is better to make an amendment: if participant of funded pensions system will phostpnhone retirement pension and will continiue working beyoned the retirement age, the pension amount will be increased by a certain percentage for the benefit of the participant. This will be a good financial incentive.

---

[72] In the English version of the paper of Batiashvili I. "Importance of Aging Policy" the percentage of the amount of pension is renewed according to the official version of the French social security system's new percentages, <https://www.cleiss.fr/docs/regimes/regime_france/an_3.html> (As of May 1st, 2023.)

[73] <https://www.cleiss.fr/docs/regimes/regime_france/an_3.html> [21.09.2023]. <https://www.service-public.fr/particuliers/vosdroits/F15396?lang=en> [21.09.2023].

4. Conclusion

The association agreement concluded between the European Union and Georgia testifies to the relevance of the development of Georgia's aging policy, both in the direction of strengthening the right to equality, and employment, expanding the labor market, and sustainable development of the state.

An aging policy is good for the country's prosperity in the near perspective (Short-term outcome). An example of this is Canada. In the development of the aging policy, the main focus should be on employment and the creation of an age-friendly working environment. The above-mentioned aspects are emphasized in: the European Union Pact 2007/78/EC, the relevant document of the 66th session of the United Nations[74], studies carried out by the United Nations[75], Madrid International Action Plan, the relevant publications of International Labor Organization[76], Aging Policy of Israel[77], Aging Policy of Canada and The French Social Security System (Retirement, and Pension schemes).

Age division and the development of specific terms will help the state create the state program for specific age group citizens. Also, these terms will help to eliminate negative stigmas related to age and aging in the labor market. Considering older persons and senior older persons as different groups

---

74 United Nations, General Assembly, Report of the Secretary-General, A/66/173, 22/07/2011. (Follow-up to the Second World Assembly on Ageing).

75 World Population Ageing, supra note 2, at 9. United Nations Department of Economic and Social Affairs, Population Division (2020). World Population Ageing 2020 Highlights: Living arrangements of older persons (ST/ESA/SER.A/451); United Nations, General Assembly, Resolution adopted by the General Assembly on 17 December 2018, 73/143. Follow-up to the Second World Assembly on Ageing, Seventy-third session, A/RES/73/143, 09/01/ 2019; United Nations, General Assembly, Report of the Secretary-General, A/66/173, 22/07/2011. (Follow-up to the Second World Assembly on Ageing).
C.E.S.C.R., 4 2nd Sess., General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) 29, U.N. Doc. E/C. 12/GC/20 (July 2, 2009); Committee on Economic, Social and Cultural Rights, United Nations Hum. Rts Off. Of the High Comm'r, <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> [11.03.2020];
The Independent Expert on the Enjoyment of All Human Rights by Older Persons, nited Nations Hum. Rts Off. Of the High Comm'r, <http://www.ohchr.org/EN/Issues/ OlderPersons/IE/Pages/IEOlderPersons. aspx> [11.03.2020]; ("In May 2014, the Human Rights Council appointed Ms. Rosa Kornfeld-Matte as the first Independent Expert on the enjoyment of all human rights by older persons."). Office of the High Commissioner for Human Rights, Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper, August 2012.

76 ILO: Changing patterns in the world of work, Report of the Director-General, International Labour Conference, 95th Session, 2006, Report I (C), Geneva, 2006. ILO, Gender Equality at the Heart of Decent Work, Work and Family, 2009, 3, <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/ documents/publication/wcms_101758.pdf> [21.09.2023]. International Labour Office, Gender Promotion Programme, Realizing decent work for older women workers, Geneva, 2001, <http://www.ilo.org/ public/english/employment/skills/older/download/olderwomen.pdf> [21.09.2023].
International Labour Conference; 98th Session, 2009, Report VI, Gender equality at the heart of decent work, Sixth item on the agenda, 150.

77 *Batiashvili I.,* Older Women and Integrating a gender Perspective in Employment Policy, Law and World, (№26), Vol. 9, Issue 2, June 2023, 99-11.

helps to increase the labor potential of the older people and serves to reduce false assumptions related to aging and finally eliminate it.

Correspondingly funding/subsidization of the salary and retraining program of older workers by the state can bring positive results in promoting the professional development of older people. This is an effective tool for supporting older workers. The existence of the state mechanism for financing or subsidizing the salary and retraining program of the employed older person will help this person in the professional development and the comprehensive performance of official duties.

The statutory regulation of the rights of older persons and the environment adapted to them are outlined in the Canadian legal system. The protection of the rights of the older people in the Canadian legal system can be found in three areas: the pension system (social security), the legal duty of everyone to provide necessaries of life to a person under his charge due to the person's age by the Criminal Code, and employment programs for the older persons. In Canada, the employment of older persons and the activation of their labor potential is a constituent element of improving the rights of older persons. The age and terminological division of different age groups in the Canadian pension system once again emphasizes how important it is to plan the government's aging policy in a targeted manner. Also, the aforementioned develops the opinion that the older persons and the senior older persons are not one monolithic group. Accordingly, the division into age categories will help the state to separate employment programs and social security into the relevant groups. The analysis of Canada's Initiative “Targeted Initiative for Older Workers” on the retraining of the older people shows that Georgia should also consider Canada's approach in the direction of producing a full-fledged policy and developing relevant documents.

An innovation of the state policy on the protection of the rights of the older and the senior older persons can become a mediation center for the older and the senior older persons.

Encouraging employment policy based on the pension system can be a practical concept for Georgia. Also, the policy of France (The French Social Security System) is impressive both in the part of the basic pension, where a significant contribution of the state can be seen and in the part of the additional cumulative pension, which is determined by the contributions of private sector actors. In this part, the state plays the role of a calculating mechanism. The possibility of a Child-related increase in the length of insurance by the French pension scheme has a double positive effect: 1. It promotes that women have more interest in being employed in the formal economy and at the same time being involved in the pension system; 2. the compulsory (not because of legal basis) interval in employment due to child care after childbirth will not affect the pension (in the case of Georgia, accumulative pension).

Like most industrialized countries, like Canada, Georgia's population and workforce are aging (statistical information is provided in the introduction), and therefore effective examples of skills development, tailored employment, and financial incentives are essential in Georgia's aging policy planning.

Bibliography:

1. Association agreement between the European Union and the European Atomic Energy Community and their Member states, of on the one part, and Georgia, of the other part, International Treaty and Agreement of Georgia Minister of Foreign Affairs of Georgia, 27/06/2014, <https://matsne.gov.ge/document/view/2496959?publication=3>[21.09.2023].
2. European Social Charter, Minister of Foreign Affairs of Georgia, International Treaty and Agreement of Georgia, 03/05/1996, <https://matsne.gov.ge/ka/document/view/1392164?publication=0> [21.09.2023].
3. National Statistics Office of Georgia, Demographic situation in Georgia, <https://www.geostat.ge/ka/modules/categories/41/mosakhleoba> [21.09.2023].
4. On the approval of the "Concept of State Aging Policy on the Issue of Population Aging in Georgia" Resolution of the Parliament of Georgia, 5146-IIს, 27/05/2016, <https://matsne.gov.ge/ka/document/view/3297267?publication=0> [21.09.2023].
5. On the approval of the "National Strategy of Georgia for the Protection of Human Rights (for the years 2022-2030)", Parliament of Georgia, 2663-XIმს-Xმპ, 23/03/2023.
6. United Nations, Universal Declaration of Human Rights, 60th Anniversary, Special Edition, Georgia Office of the United Nations Department of Public Information, Office of the United Nations High Commissioner for Human Rights, Georgia, 1948-2008.
7. *Batiashvili I.,* The Permanent Parliamentary Gender Equality Council, Report: An Analysis of the inclusion of domestic workers/informal economy actors in the pension scheme with the aim of formalizing the informal economy, 2023 <https://parliament.ge/media/news/genderuli-tanastsorobis-sabchom-2022-2024-tslebis-samokmedo-gegmashi-tsvlilebebi-sheitana> [21.09.2023].
8. *Buehrer S., Kalpazidou Schmidt E., Rigler D., Rachel P.,* How to Implement Context-Sensitive Evaluation Approaches in Countries with still Emerging Evaluation Cultures, Public Policy and Administration, Vol. 20, Nr. 3, 2021, 368-381.
9. *Batiashvili I.,* Promoting the Development of Gender Policy in Georgia According to a Review of Analyses Conducted by The Fraunhofer Institute for Systems and Innovation Research ISI, Karlsruhe, 2023.
10. *Childs J.,* Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention, Journal of Comparative and International Aging Law & Policy, 11, 2020, 141-170.
11. Canada Constitution Act, 1982 Endnote (81), Part I, Canadian Charter of Rights and Freedoms, 1867 to 1982, <https://laws-lois.justice.gc.ca/PDF/CONST_TRD.pdf> [21.09.2023].
12. https://www.ohrc.on.ca/en/ontario-human-rights-code> [21.09.2023].
13. Canadian Center for Diversity and Inclusion, Overview of Human Rights Codes by Province and Territory in Canada, 2018, <https://ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf> [21.09.2023].
14. Protection for Persons in Care Act, C.C.S.M., c. P144, s.1.Protection for Persons in Care Act, R.S.A. 2000, c. P-29, s.1 https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/p211.html) [21.09.2023].
15. Criminal Code (R.S.C., 1985, c. C-46), <https://laws-lois.justice.gc.ca/eng/acts/C-46/section-215.html> [21.09.2023].
16. Old Age Security (OAS) pension amounts – October to December 2023 <https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/payments.html; https://www.criminalcodehelp.

ca/offences/violent-offences/elder-abuse/#:~:text=QUICK%20TAKEAWAY,provincial%2 Fterritorial %20and%20federal%20governments> [21.09.2023].
17. *MacEwen A.,* Working After Age 65, Alternative Federal Budget 2012 Technical Paper, Canadian Center for Policy Alternatives, 2012, <https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2012/04/WorkingAfter6> [21.09.2023].
18. *MacEwen A.,* Working After Age 65, Alternative Federal Budget 2012 Technical Paper, Canadian Center for Policy Alternatives, 2012.
19. News Release – Manitoba, Manitoba Government Announces New Client-Determined Community Care Pilot For Home and Community Care, August 1, 2023, <https://news.gov.mb.ca/news/index.html?item=60118&posted=2023-08-01> [21.09.2023].
20. Manitoba, A Great Place to Age: Provincial Seniors Strategy, 2023 February. Manitoba Government, <https://gov.mb.ca/seniors/docs/seniors_strategy_2023.pdf> [21.09.2023].
21. The Federal/Provincial/Territorial Seniors Forum; Government of Canada, <https://www.canada.ca/en/employment-social-development/corporate/seniors/forum.html> [21.09.2023].
22. The Federal/Provincial/Territorial Ministers Responsible for Seniors Forum, Age-friendly workplaces: A self-assessment tool for employers, Publishing Services Human Resources and Skills Development Canada, <https://www.canada.ca/content/dam/esdc-edsc/documents/corporate/seniors/forum/tool.pdf> [21.09.2023].
23. Employment and Social Development Canada, Promoting the Labour Force Participation of Older Canadians, 2018, Federal/Provincial/Territorial Ministers Responsible For Seniors, <https://www.canada.ca/content/dam/canada/employment-social-development/corporate/seniors/forum/labour-force-participation/labour-force-participation-EN.pdf> [21.09.2023].
24. Canada's Targeted Initiative for Older Workers (TIOW), <https://www.canada.ca/en/employment-social-development/corporate/seniors/forum/labour-force-participation.html#h2.4-3.6> [21.09.2023].
25. C.E.S.C.R., 4 2nd Sess., General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) 29, U.N. Doc. E/C. 12/GC/20 (July 2, 2009).
26. Committee on Economic, Social and Cultural Rights, United Nations Hum. Rts Off. Of the High Comm'r, <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> [11.03.2020].
27. Employment and Social Development Canada, Understanding the impact of public policies and programs on the labour market decisions of older workers, Federal/Provincial/Territorial Ministers Responsible For Seniors, 2019 June, PDF ISBN: 978-0-660-31049-7
28. ILO: Changing patterns in the world of work, Report of the Director-General, International Labour Conference, 95th Session, 2006, Report I (C), Geneva, 2006.
29. ILO, Gender Equality at the Heart of Decent Work, Work and Family, 2009, 3. <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_101758.pdf>. [21.09.2023].
30. International Labour Office, Gender Promotion Programme, Realizing decent work for older women workers, Geneva, 2001, <http://www.ilo.org/public/english/employment/skills/older/download/olderwomen.pdf> [21.09.2023].
31. International Labour Conference; 98th Session, 2009; Report VI; Gender equality at the heart of decent work; Sixth item on the agenda, 150.

32. The Long-Term Care Homes Act, 2007, <https://www.ontario.ca/laws/statute/07l08#BK27> [21.09.2023].
33. World's Older Population Grows Dramatically, Nat'l Inst. of Health, (March 28, 2016), <https://www.nih.gov/news-events/news-releases/worlds-older-population-grows-dramatically> [21.09.2023].
34. *Moseley-Braun C.,* Women's Retirement Security. Elder Law Journal, 1996, 4(2), 493-498.
35. Ministry of the Economy, Finance and the Recovery of France, Pension Projections for the 2021 Ageing Report Country Fitche, France, Final Version – March 2021, <https://economy-finance.ec.europa.eu/system/files/2021-05/fr_-_ar_2021_final_pension_fiche.pdf> [21.09.2023].
36. Office of the High Commissioner for Human Rights, Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper, August 2012.
37. Older Women and Integrating a gender Perspective in Employment Policy, Law and World, (№26), Vol.9, Issue 2, 2023, 99-11, <https://doi.org/10.36475/9.2.8> [21.09.2023]
38. The Independent Expert on the Enjoyment of All Human Rights by Older Persons, United Natioans Hum. Rts. Off of the High Comm'r, <http://www.ohchr.org/EN/Issues/ OlderPersons/IE/Pages/ IEOlderPersons.aspx> [11.03.2020].
39. World Population Ageing, supra note 2, at 9. United Nations Department of Economic and Social Affairs, Population Division (2020). World Population Ageing 2020 Highlights: Living arrangements of older persons (ST/ESA/SER.A/451);
40. United Nations, General Assembly, Resolution adopted by the General Assembly on 17 December 2018, 73/143. Follow-up to the Second World Assembly on Ageing, Seventy-third session, A/RES/73/143, 09/01/ 2019.
41. United Nations, General Assembly, Report of the Secretary-General, A/66/173, 22/07/2011. (Follow-up to the Second World Assembly on Ageing).
42. United Nations, General Assembly, Resolution adopted by the General Assembly on 17 December 2018, 73/143. Follow-up to the Second World Assembly on Ageing, Seventy-third session, A/RES/73/143, 09/01/ 2019.
43. United Nations, General Assembly, Report of the Secretary-General, A/66/173, 22/07/2011. (Follow-up to the Second World Assembly on Ageing).
44. <https://laws-lois.justice.gc.ca/eng/acts/h-6/>[21.09.2023].
45. <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/> [21.09.2023].
46. <https://www.cleiss.fr/docs/regimes/regime_france/an_3.html> [21.09.2023].
47. <https://www.cleiss.fr/docs/regimes/regime_france/an_3.html> [21.09.2023].
48. <https://www.canada.ca/content/dam/canada/employment-social-development/corporate/seniors/forum/labour-market-decisions-older-workers/labour-market-decisions-older-workers-EN.pdf> [21.09.2023].
49. <https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mp-pm/p1.html> [21.09.2023].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7699

Sopiko Bakhbakhashvili*

Historical Evolution of Secured Creditors' Satisfaction in Georgian Insolvency Law: A Comparative Analysis with International Standards

Secured creditors hold a pivotal position in shaping the business sector, given their substantial market influence. To ensure their protection, it is essential that the regulatory norms governing insolvency in the country adhere to internationally recognized standards. In pursuit of this goal, the Law of Georgia "On Rehabilitation and The Collective Satisfaction of Creditors' Claims," enacted on April 1, 2021, is noteworthy. This legislation, diverging significantly from its predecessor, meticulously addresses the role of secured creditors and delineates the criteria for their satisfaction within the framework of Georgian insolvency law.

The objective of this paper is to conduct a systematic analysis of the role played by secured creditors and the historical evolution of satisfying their requirements within the framework of Georgian insolvency law. Simultaneously, the study aims to assess how the enacted Georgian insolvency law aligns with the recommendations, principles, and directives of international organizations.

***Keywords**: Fulfilling secured creditors' requirements, historical overview, international standards, comparative analysis, prioritization of secured rights.*

1. Introduction

Insolvency law is vital for business relationships. To ensure effective functioning and competitiveness, simplifying the closure processes is just as important as facilitating the ease of starting a business.[1] The key to a sustainable and developed economy lies in a thriving business sector. In the absence of efficient and effective insolvency procedures, a society may face economic and financial crises.[2] Hence, for the economy of a developing country like Georgia, it is crucial to establish well-organized legal regulations in line with international standards to ensure stability and growth.

Georgian law faced a serious challenge in this aspect. In the 2014 Doing Business report by the World Bank, Georgia was ranked 88th concerning insolvency and creditor satisfaction.[3] The data for 2019 and 2020 showed only slight improvements and still presented unfavorable results.[4] Furthermore, an evaluation report from the USAID project G4G explicitly stated that Georgian insolvency law

* Master of Laws, legal adviser to the Ministry of Justice of Georgia. https://orcid.org/0009-0005-7857-5562.

1 The Government of Georgia, Strategy for the Socio-Economic Development of Georgia, Georgia 2020, 28-30 (in Georgian).

2 International Monetary Fund, Ordinary and Effective Insolvency Procedures, Legal Department, 1999, 1

3 The Government of Georgia, Strategy for the Socio-Economic Development of Georgia, Georgia 2020, 30 (in Georgian).

4 <https://subnational.doingbusiness.org/en/data/exploretopics/resolving-insolvency/score> [20/06/2023].

negatively impacted the rights of secured creditors.[5] Hence, there was a need for the country to take decisive measures in the realm of insolvency law, leading to the enactment of a new insolvency law in 2020. The law, in stark contrast to the preceding legal regulations, comprehensively addressed the roles of secured creditors, expanded the scope of their authority, and bolstered guarantees of protection. These amendments have made these issues highly relevant in both legal and business contexts.

The paper aims to provide a comprehensive examination of Georgian insolvency laws, with a particular focus on the role and significance of secured creditors, as well as the regulations governing the satisfaction of their demands. Through a historical review, the study aims to evaluate the changing legal status of secured creditors, determining whether there is a progressive or regressive trend over time.

The paper incorporates perspectives and viewpoints from international organizations such as the EU, the UN, and the World Bank regarding the satisfaction of secured creditors and their alignment with the current legal regulations in force in Georgia.

2. The Significance and Role of Secured Creditors in the Law of Georgia on Bankruptcy Proceedings

The Law of Georgia on Bankruptcy Proceedings[6] was a groundbreaking legislative act in the history of independent Georgia. It distinctly aimed to underscore the significance of preserving enterprises through rehabilitation,[7] thereby addressing the demands of creditors.

The Law of Georgia on Bankruptcy Proceedings categorized creditors into two main groups: bankruptcy creditors, as defined by the law, and creditors without the status of bankruptcy creditors, even though they had some connection to the insolvent debtor.

According to the law, for someone to be recognized as a bankruptcy creditor, two prerequisites must be met. Specifically, individuals qualified as bankruptcy creditors were those holding a valid property claim against the debtor at the commencement of bankruptcy proceedings,[8] and this claim must have originated prior to the initiation of the bankruptcy proceedings. In essence, the obligation to fulfill this claim in its entirety should have been established before the commencement of the proceedings.[9]

The 1996 bankruptcy law recognized additional categories of creditors beyond those previously mentioned. Distinctions in their treatment were delineated based on the preferential and specific nature of their claims, with secured creditors benefiting from this particular legal status. The legislation

---

5 ISET, Regulatory Impact Assessment (RIA) of the selected topics under the Draft Law on Rehabilitation and Collective Satisfaction of Creditors, Final Report, 2019, 6 (in Georgian).

6 See Law of Georgia "on Bankruptcy Proceedings", the Gazette of the Parliament of Georgia, 30.07.1996.

7 *Kadaria S.,* Historical Development of the Rehabilitation Process, Journal of Law, №1, 2022, 197 (in Georgian).

8 See Law of Georgia "on Bankruptcy Proceedings", first paragraph of Article 6, the Gazette of the Parliament of Georgia, 30.07.1996.

9 *Migriauli R.,* Introduction to Bankruptcy Law, 2nd Revised Edition, Tbilisi, 2006, 70-72 (in Georgian).

specified additional creditor categories, namely insolvency estate creditors, property creditors, and secured creditors. Distinctions among these groups were predicated on the varied legal foundations substantiating their respective claims.[10]

a) Insolvency estate creditors

The concept of an insolvency estate creditor was foreign to Georgian insolvency law. The law provided for insolvency estate claims, i.e., claims arising from the bankruptcy estate. Consequently, individuals with the right to such claims were referred to as insolvency estate creditors in the literature. The insolvency estate creditor differed from all other types of creditors, as only their claim was directly addressed to the estate of bankruptcy.[11]

While a prerequisite for an individual to qualify as a bankruptcy creditor was the existence of a claim before the commencement of proceedings, the insolvency estate creditor's claim emerged after the initiation of proceedings. Consequently, the claim of the bankruptcy creditor was directed toward the debtor, whereas that of the estate creditor was directed to the bankruptcy estate, given that such a claim materialized after the establishment of the estate itself.[12]

The insolvency estate creditors had the highest privileges due to their secure status. This security, not in the traditional proprietary security, stemmed from insolvency law, which granted them this distinct privilege.[13] The creditors of the insolvency estate were defined as individuals financially dependent on the insolvent debtor, within the scope of the subsistence minimum, the court, the bankruptcy administrator, and others.[14]

b) Property creditors

The Law of Georgia on Bankruptcy Proceedings did not provide a specific definition for a property creditor, making their identification dependent on the nature of the claim. Specifically, if the debtor held an asset to which a third party had ownership rights, the bankruptcy administrator was required to return the said asset to the rightful owner and exclude it from the bankruptcy estate.[15]

A property creditor was an individual whose assets were mistakenly included in the bankruptcy estate. In such instances, the bankruptcy administrator was obligated to promptly return these assets to the stakeholder. Alternatively, the law allowed the creditor to seek satisfaction of their claim through legal proceedings in court.[16]

---

10 Ibid, 84-85.

11 *Schnitger H., Migriauli R.,* the Law of Georgia on Insolvency, Characterization and Comparison with the Law of Georgia on Bankruptcy Proceedings and International Standards, Tbilisi, 2011, 83 (in Georgian).

12 *Migriauli R.,* Introduction to Bankruptcy Law, 2nd Revised Edition, Tbilisi, 2006, 96-99 (in Georgian).

13 Ibid, 100-101.

14 See Law of Georgia "on Bankruptcy Proceedings", Article 19, the Gazette of the Parliament of Georgia, 30.07.1996.

15 See Law of Georgia "on Bankruptcy Proceedings", first paragraph of Article 20, the Gazette of the Parliament of Georgia, 30.07.1996.

16 *Migriauli R.,* Introduction to Bankruptcy Law, 2nd Revised Edition, Tbilisi, 2006, 90 (in Georgian).

c) Secured creditors

Unlike regular property creditors, secured creditors agreed to include the secured asset in the insolvency estate. However, depending on the nature of the proprietary security (such as a mortgage or a pledge), the secured creditor sought preferential satisfaction of their claim. Much like the property creditor, the secured creditor's claim was founded on proprietary security, originating prior to the initiation of insolvency proceedings. The secured creditor did not participate in the proceedings, as the bankruptcy administrator was obliged to promptly sell the secured asset and fulfill such a claim immediately after the commencement of the proceedings.[17]

It is noteworthy that the law specifically emphasized only one form of security for a claim – namely, the pledge. However, a systematic analysis of the law and a review of the practice reveal that the legislator, in essence, treated mortgages similarly to pledges.[18]

3. The Role and Significance of Secured Creditors in Accordance with the Law of Georgia on Insolvency Proceedings

When examining the historical evolution of Georgian insolvency law, it's evident that the Law of Georgia On Insolvency Proceedings introduced less favorable provisions, considerably impacting the circumstances for creditors. This was mainly because the law aimed for a quick resolution of the debtor's bankruptcy. However, many rules were unclear, and important issues were often not addressed,[19] negatively impacting the legal standing of secured creditors.

The Law of Georgia on Insolvency Proceedings introduced the concepts of insolvency creditors, new creditors, and secured creditors.[20]

Under the 2007 Act, an insolvency creditor[21] was essentially synonymous with the previously discussed bankruptcy creditor.[22] Regarding insolvency estates and property creditors, the 2007 law, unlike the 1996 law, did not explicitly define them. However, a careful analysis allows easy identification of these creditors. In terms of both rights and consequences, they were quite similar to their counterparts in the previous legislation.

The Law of Georgia on Insolvency Proceedings defined a secured creditor as either an existing creditor or a new creditor "whose claim is secured by a mortgage, lien, or other means of securing liabilities under the Tax Code of Georgia."[23]

---

17 *Ibid.*

18 See Law of Georgia "on Bankruptcy Proceedings", 2nd paragraph of Article 20, the Gazette of the Parliament of Georgia, 30.07.1996.

19 Ministry of Justice of Georgia, Explanatory Note on the Draft Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, 2 (in Georgian).

20 *Migriauli R.,* Key Features of the New Insolvency Law, Journal "Business and legislation", 2009 (in Georgian).

21 See Law of Georgia "on Insolvency Proceedings", sub-paragraph "I" of Article 3, Legislative Herald of Georgia, 31/03/2007.

22 *Migriauli R.,* Key Features of the New Insolvency Law, Journal "Business and legislation", 2009 (in Georgian).

23 See Law of Georgia "on Insolvency Proceedings", sub-paragraph "L" of Article 3, Legislative Herald of Georgia, 31/03/2007.

According to the law, even a new creditor is considered a secured creditor, but in practice, this does not make much of a difference.[24] Hence, the distinction between the definitions of secured creditors in the 1996 and 2007 laws in this section seems more like a formality.

Furthermore, the 2007 law included the tax authority among secured creditors. This addition allowed the tax authority to use collateral on the debtor's property for securing debt payments, thereby broadening the scope of secured creditors.[25]

Finally, it is noteworthy that while the 2007 law introduced the concept of a secured creditor, it lacked a clear regulation comparable to the 1996 law.[26] The 1996 law more precisely defined both the scope of the secured creditor's actions in satisfying the demand and the amount of satisfaction.[27]

4. The Legal Nature and Significance of Secured Creditors in Accordance with the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims.

Under the new legal framework, the role, protection guarantees, authority scope, and methods of meeting requirements for secured creditors have been revised and aligned with leading international practices.

Unlike its predecessors, the 2020 Law on Rehabilitation and the Collective Satisfaction of Creditors' Claims does not explicitly address the concept of a creditor. In contrast to Georgian law, the German Insolvency Code explicitly defines a creditor. It states, 'the assets involved in the insolvency proceedings shall serve to satisfy the liquidated claims held by the personal creditors against the debtor on the date when the insolvency proceedings were opened (creditors of the insolvency proceedings).[28]

The mentioned definition aligns with Georgian reality to a certain extent, although it does not encompass all individuals who can be identified as creditors in cases of insolvency.[29] The same observation applies to the definitions of creditors found in previous Georgian legislative acts. Hence, the current approach of Georgian law appears more reasonable and precise. A creditor's status is based on the content of their claim, so the nature of the claim determines the creditor's status in insolvency, allowing for a more detailed classification within the legal system.[30]

---

24 *Schnitger H., Migriauli R.,* the Law of Georgia on Insolvency, Characterization and Comparison with the Law of Georgia on Bankruptcy Proceedings and International Standards, Tbilisi, 2011, 83, 51 (in Georgian).

25 See Law of Georgia "on Insolvency Proceedings", sub-paragraph "L" of Article 3, Legislative Herald of Georgia, 31/03/2007.

26 See Law of Georgia "on Bankruptcy Proceedings", 2nd paragraph of Article 20, Legislative Herald of Georgia, 30.07.1996.

27 *Meskhishvili K., Batlidze G., Amisulashvili N., Jorbenadze S.,* Fundamentals of Insolvency Proceedings in Accordance with the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi 2021, 50 (in Georgian).

28 German Insolvency Code, Section 38.

29 F.e.: unliquidated claim.

30 *Meskhishvili K., Batlidze G., Amisulashvili N., Jorbenadze S.,* Fundamentals of Insolvency Proceedings in Accordance with the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi 2021, 50 (in Georgian).

Regardless of the variety of claims a creditor may have, we should categorize them in various directions. Before classifying creditors into specific categories, a thorough analysis of the nature of their demands is essential. These demands could include liquid or unliquidated claims, matured or unmatured (future) claims, contingent claims, and others.[31] The 2020 law introduces a precise categorization of creditors' claims, playing a crucial role in ensuring fair and equitable satisfaction of creditors.

a) Secured creditors

Secured creditors play a particularly crucial role in insolvency law, whose significance is derived from the nature of proprietary security.

Generally, employing methods to secure a claim acts as a form of assurance for the creditor, ensuring that the demand will be satisfied even if the debtor fails to fulfill their obligation. This serves as a safeguard for the legal interests of the creditor.[32] "It allows debtors to use the full value of their assets to obtain credit and develop their enterprises. In the case of default by a debtor, a secured transactions law seeks to ensure that the value of the encumbered assets protects the secured creditor."[33] Thus, these relationships are widely recognized in civil law.

"The basic function of a security right is to minimize the risk of non-performance of the loan. This risk is eminent when the debtor becomes insolvent. In this sense, the value of a security right depends on its treatment during insolvency. Hence, "an efficient system of secured credit requires an effective and flexible enforcement of security rights", particularly in insolvency proceedings."[34]

As emphasized by the United Nations, the clarity of rules in insolvency laws is paramount for the accessibility of secured credit. Clear rules enable secured creditors to define the risks associated with credit more effectively.[35]

Reflecting the legal status of secured creditors is challenging in legislation, hence, this matter has been a recurring subject of discussion.[36] For instance, the Insolvency Act of 1986 in Great Britain, one of the pioneering legislations to introduce the mentioned concept with precision, defines a secured creditor, in relation to a company, [as] a creditor of the company who holds in respect of his debt a security over property of the company.[37]

The Georgian insolvency legal framework presents a restricted definition of secured creditors.[38] A secured creditor is specifically one whose claim is secured solely by a mortgage or a pledge,

---

31 UNCITRAL, Legislative Guide on Insolvency Law, United Nation, New York 2005, 249.

32 *Zarandia T., Jugheli T.,* Securing Claims with Movable Property in Georgian Law, Legal Journal of Judges Association of Georgia "Justice and Law", N2, 2009, 27 (in Georgian).

33 UNCITRAL, Legislative Guide on Secured Transactions, United Nation, New York 2010, 423 (II).

34 *Brinkmann M.,* The Position of Secured Creditors in Insolvency, European Company and Financial Law Review, 2008, 249.

35 UNCITRAL, Legislative Guide on Secured Transactions, United Nation, New York 2010, 425.

36 *Schnitger H., Migriauli R.,* the Law of Georgia on Insolvency, Characterization and Comparison with the Law of Georgia on Bankruptcy Proceedings and International Standards, Tbilisi, 2011, 90 (in Georgian).

37 Insolvency Act 1986, UK, 182.

38 ISET, Regulatory Impact Assessment (RIA) of the selected topics under the Draft Law on Rehabilitation and Collective Satisfaction of Creditors, Final Report, 2019, 22 (in Georgian).

following the procedures outlined in the Civil Code of Georgia.[39] The legislator reasonably delineates pledge and mortgage, given their direct connection to the debtor's property (both immovable and movable). Their accessory nature ensures the satisfaction of creditors' claims when necessary.

It's worth noting that unlike the 2007 law, the current regulation no longer designates the tax authority as a secured creditor. Although the Revenue Service can use a tax lien-mortgage on a debtor's property based on the Tax Code,[40] it's important to highlight that this measure is specifically for settling tax debt. It's not a contractual security, but a legal requirement.[41]

b) Unsecured creditors

The category of unsecured creditors may consist of individuals holding claims of both insolvent and new creditors, as well as those with contingent, unliquidated, indefinite, preferential claims, and others. All these types of creditors share a common characteristic: unlike secured creditors, they lack the privilege of satisfying their claims through security. Consequently, they form a relatively vulnerable category during insolvency proceedings.

Creditors play a crucial role in the debtor's business, particularly following the commencement of insolvency proceedings.[42] Recognizing their pivotal role, many insolvency laws aim to maximize creditor involvement in proceedings[43] without upsetting the balance or granting them excessive powers in matters unrelated to their legal status.

Moreover, these laws strive to consider the unique characteristics of creditors, based on the nature of their claims, determining the most suitable time and extent for their satisfaction within insolvency proceedings.[44]

5. Fundamental Principles for Satisfying Secured Creditors Following International Organizations' Recommendations

International organizations consistently underscore in their recommendations that the presence of a robust legal system is crucial, particularly in developing countries, for the protection and effective realization of secured rights. Despite the attractiveness of the business market in these countries due to low taxes and inexpensive labor, the presence of flawed legislative and executive systems undermines the ability of business entities to seek substantial collateral to safeguard their claims. This, in turn,

---

39 See the Law of Georgia "on Rehabilitation and the Collective Satisfaction of Creditors' Claims", sub-paragraph "T" of Article 3, Legislative Herald of Georgia, 25/09/2020.

40 See the Law of Georgia "Tax Code of Georgia", Article 239, Legislative Herald of Georgia, LHG, 54, 12.10.2010.

41 *Meskhishvili K., Batlidze G., Amisulashvili N., Jorbenadze S.,* Fundamentals of Insolvency Proceedings in Accordance with the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi 2021, 78 (in Georgian).

42 UNCITRAL, Legislative Guide on Insolvency Law, United Nation, New York 2005, 190.

43 *Kasak A.,* Is Full Preference for a Secured Claim in Insolvency Proceedings Justified?, Juridica International, 2019, 113.

44 UNCITRAL, Legislative Guide on Insolvency Law, United Nation, New York 2005, 190-191.

hinders the stable development of business within the country.[45] Hence, international organizations urge developing countries to align their legislation as closely as possible with the best international practices.

Given the obligations outlined in the association agreement, special importance is placed on Directive (EU) 2019/1023 of the European Parliament and of the Council dated June 20, 2019. This directive addresses preventive restructuring frameworks, discharge of debt, disqualifications, and measures to enhance the efficiency of procedures related to restructuring, insolvency, and debt discharge. It also amends Directive (EU) 2017/1132 (Directive on restructuring and insolvency).[46] The Directive underscores once again the pivotal role of secured creditors in insolvency law.

The directive highlights the importance of sorting creditors of the insolvent debtor into different classes for fair treatment of similar rights. These classes should be established at the national level, grouping creditors based on shared interests, rights, and claims. Classes can be established on various grounds according to national needs, although the directive mandates the separate consideration of secured and unsecured creditors in all cases, "As a minimum, secured and unsecured creditors should always be treated in separate classes.".[47]

The United Nations, in its guidelines, adopts a similar approach, emphasizing that clear rules within insolvency laws are crucial for the availability of secured credit. These rules should cover the rights of secured creditors, the guarantees ensuring their protection, and the scope of satisfaction. Such clarity is essential to accurately defining the risks associated with credit.[48] According to the UN guide, states should recognize and emphasize the distinctive role of secured creditors in insolvency law.[49] Legislative priorities should be assigned to determining the costs of insolvency proceedings and ensuring the satisfaction of secured creditors.[50]

Following the World Bank's principles, it is recommended to promptly address secured creditors' claims during insolvency proceedings by utilizing funds obtained from the sale of secured assets. The organization emphasizes that such property cannot be utilized to satisfy other creditors' claims until the secured creditors' claims are fully addressed or until they provide their consent to such utilization,[51] "The priority of secured creditors in their collateral should be upheld and, absent the secured creditor's consent, its interest in the collateral should not be subordinated to other priorities granted in the course of the insolvency proceeding. Distributions to secured creditors should be made as promptly as possible."[52]

---

45 The World Bank Group, Principles for Effective Insolvency and Creditor/Debtor Regimes, Washington DC 2021, 5.

46 < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023> [01.09.2023].

47 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, 9. (44).

48 UNCITRAL, Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, United Nation, New York 2014, 63

49 UNCITRAL, Legislative Guide on Secured Transactions, United Nation, New York 2010, 425 and 25.

50 UNCITRAL, Legislative Guide on Insolvency Law, United Nation, New York 2005.

51 The World Bank Group, Principles for Effective Insolvency and Creditor/Debtor Regimes, Washington DC 2021, 26.

52 Ibid (C12).

In general, the overarching goal of insolvency law is to apply an equitable approach to all creditors. Nevertheless, due to various distinguishing factors, this often results in the creation of a priority-based hierarchy, a structure that tends to be unique to each country. The principles of international organizations provide nations with general frameworks and alternative approaches. States are granted the flexibility to determine the sequence of creditor satisfaction in both rehabilitation and bankruptcy systems based on their specific national requirements.

6. Examining the Historical Evolution of Secured Creditor Satisfaction and Assessing the Alignment of Current Legislation with International Standards

Satisfying secured creditors in insolvency proceedings is one of the most pivotal challenges for the legislator.[53] According to Brinkmann[54] "it may be regarded as a waste of time to ask whether the priority of the secured creditor is justified; after all, the priority of the secured creditor was and is accepted in one form or another in all jurisdictions."[55] Priority for secured creditors is a defendable policy choice on efficiency grounds.[56]

The 2020 law has undergone significant amendments departing from the previous approach to the satisfaction of secured creditors, aligning it with the best international practices.

6.1. The Satisfaction of Secured Creditors in Accordance with the Law of Georgia on Bankruptcy Proceedings

Under the 1996 law, secured creditors did not have the right to segregate the asset from the insolvency estate and request its transfer to themselves. Instead, these secured assets were deemed integral to the insolvency estate. Nonetheless, they were authorized to request the sale of the secured items and the priority satisfaction of their claims with the proceeds.[57]

Consequently, the secured creditor was distinguished from a bankruptcy creditor and received separate satisfaction outside the scope of bankruptcy proceedings. The bankruptcy administrator initially prioritized satisfying secured creditors before directly addressing the claims of bankruptcy creditors.[58]

It is worth noting that, unlike the 2007 Act, the 1996 Act did not impose any restrictions on the sale of the insolvency estate.[59] Consequently, secured creditors were not required to wait for an auction to satisfy their claims.

---

53 *Keay A.*, Insolvency Law: A Matter of Public Interest?, Northern Ireland Legal Quarterly, 2000, 1.

54 Dr. Moritz Brinkmann M., professor for insolvency law at the University of Bonn, Germany.

55 *Brinkmann M.,* The Position of Secured Creditors in Insolvency, European Company and Financial Law Review, 2008, 251.

56 *Eidenmuller H.*, Secured Creditors in Insolvency Proceedings, European Company and Financial Law Review, 2008, 274.

57 *Migriauli R.,* Introduction to Bankruptcy Law, 2nd Revised Edition, Tbilisi 2006, 90-91 (in Georgian).

58 *Meskhishvili K., Batlidze G., Amisulashvili N., Jorbenadze S.,* Fundamentals of Insolvency Proceedings in Accordance with the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi 2021, 78-79 (in Georgian).

59 See Law of Georgia "on Bankruptcy Proceedings", First paragraph of Article 26, the Gazette of the Parliament of Georgia, 30.07.1996.

Nevertheless, it is essential to highlight that the 1996 law introduced a fundamentally different approach to meeting the demands of secured creditors, particularly in terms of the amount of satisfaction for their claims. Specifically, the law deviated from the general rule set by the Civil Code of Georgia, which stipulates that the creditor's claim must be entirely satisfied from the proceeds of the item's sale.[60] It stipulated that the secured creditor could only satisfy ¾ of the claim from the proceeds of the realization of the secured object, while the remaining amount was allocated for the liquidation of assets and the administration of bankruptcy proceedings.[61]

6.2. Satisfying Secured Creditors in Accordance with the Law of Georgia on Insolvency Proceedings

The Insolvency Act of 2007 introduced significant changes, replacing many aspects of the 1996 Act, particularly in addressing the satisfaction of secured creditors.

The major change was in neglecting a crucial aspect of satisfying secured claims, a feature inherent in commercial law. The 2007 law effectively relinquished the secured creditors' right to pursue claims directly from the secured subject in full and with preferential treatment, separately from other creditors.[62]

In return, the law granted secured creditors a more robust entitlement to fulfill their claims compared to unsecured creditors. In particular, they were positioned in the 4th priority, indicating that all secured claims, including those secured under the Tax Code of Georgia, would be satisfied after covering procedural expenses and the debts incurred by the debtor from the date of the court ruling on the admission of the insolvency petition.[63] In reality, secured claims were no longer linked to specific assets but were fulfilled using funds from the sale of the overall insolvency estate, which was an unusual rule.

The 2007 law presented an issue as it failed to account for the established order of security claims outlined in the Civil Code. For example, if multiple mortgages were registered on a property, each had an equal opportunity for satisfaction in insolvency proceedings, proportionate to their respective demands.[64]

---

60 See the Law of Georgia "Civil Code of Georgia", Article 308, the Gazette of the Parliament of Georgia, 31, 24.07.1997.

61 See Law of Georgia "on Bankruptcy Proceedings", Paragraph 2 of Article 20, the Gazette of the Parliament of Georgia, 30.07.1996.

62 *Meskhishvili K., Batlidze G., Amisulashvili N., Jorbenadze S.,* Fundamentals of Insolvency Proceedings in Accordance with the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi 2021, 79 (in Georgian).

63 See Law of Georgia "on Insolvency Proceedings", First paragraph of Article 40, Legislative Herald of Georgia, 31/03/2007

64 *Meskhishvili K., Batlidze G., Amisulashvili N., Jorbenadze S.,* Fundamentals of Insolvency Proceedings in Accordance with the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi 2021, 80 (in Georgian).

6.3. Satisfaction of Secured Creditors under the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims"

Special treatment and respect for secured creditors is a common feature in all European insolvency regimes,[65] and Georgia embraced this principle in the enactment of the 2020 law. In particular, the 2020 law reinstated the connection between secured creditors and the encumbered objects, and it considered the hierarchy of collateral security.[66]

The law restricts the preferential claim of secured creditors to the debtor's other unencumbered assets. The remaining assets of the debtor can only be utilized to settle the debts of secured creditors if they are not completely satisfied with the secured property and the creditor seeks to recover the outstanding portion from other assets.[67] However, in this situation, the creditor loses the secured status and advantages, transitioning into the category of unsecured creditors.[68]

6.3.1. Throughout the Rehabilitation Process

Throughout the rehabilitation of the enterprise, the fundamental principle for satisfying secured creditors is that they should not receive a reduced amount than what they would have obtained through the realization of the secured subject.[69] A court shall not approve a rehabilitation plan with altered content.[70]

In the 2020 law, the legislator incorporated mandatory provisions regarding the satisfaction of secured creditors. Throughout the rehabilitation processes, rehabilitation costs shall be satisfied preferentially,[71] followed by priority given to the satisfaction of claims arising after the delivery of a ruling declaring an application for insolvency admissible and opening a rehabilitation regime.[72] This should occur without prejudice to the rights of secured creditors.[73]

Therefore, the drafting of a rehabilitation plan must be designed to ensure the swift, efficient, and complete satisfaction of the secured creditors' demands.[74]

---

65 The European Law Institute (ELI), Instrument of the European Law Institute, Rescue of Business in Insolvency Law, 2017, 243

66 Ministry of Justice of Georgia, Explanatory Note on the Draft Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, 16 (in Georgian).

67 See the Law of Georgia "on Rehabilitation and the Collective Satisfaction of Creditors' Claims", Paragraph 4 of Article 105, Legislative Herald of Georgia, 25/09/2020.

68 *Meskhishvili K., Batlidze G., Amisulashvili N., Jorbenadze S.,* Fundamentals of Insolvency Proceedings in Accordance with the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi 2021, 79 (in Georgian).

69 Unless there is consent from the said creditors.

70 See the Law of Georgia "on Rehabilitation and the Collective Satisfaction of Creditors' Claims", Article 83, paragraph 2, sub-paragraph "D", Legislative Herald of Georgia, 25/09/2020.

71 Ibid, First paragraph of article 79.

72 See the Law of Georgia "on Rehabilitation and the Collective Satisfaction of Creditors' Claims", First paragraph of article 80, Legislative Herald of Georgia, 25/09/2020.

73 *Ibid*, First paragraphs of articles 79 and 80.

74 The World Bank Group, Principles for Effective Insolvency and Creditor/Debtor Regimes, Washington DC, 2016, 25.

As secured creditors reestablished their legal ties with the encumbered assets, the legislator introduced the option to remove moratorium measures on specific items,[75] enabling their sale during rehabilitation processes.

A court may make a decision on cancelling certain moratorium measures on the basis of a well-founded application of a creditor, a debtor, a manager, or other stakeholders.[76] If a rehabilitation manager fails to apply to the court for the release from a moratorium and the sale of property used as collateral, they must prove that the property, for which the creditor seeks the removal of specific moratorium measures and sale, is necessary for achieving the purposes of rehabilitation.[77] The court should issue the final decision.[78]

Hence, even under the rehabilitation regime, secured creditors retain the option to directly satisfy their claims by liquidating the secured asset, if this does not prevent the full implementation of the rehabilitation plan.

In addition, where a debtor has a secured contractual obligation relationship with a creditor, the duration of which exceeds 5 years, and the debtor fulfills the current obligations arising from this relationship, the claim arising from said relationship shall be satisfied with the continuation of the existing contractual relationship, irrespective of the rehabilitation plan, unless this causes evident damage to the creditor.[79]

6.3.2. Throughout the Bankruptcy Process

Throughout the enterprise bankruptcy proceedings, where creditor satisfaction follows a strict legal order, secured creditors, owing to their secured claims, are excluded from the distribution ranks of the insolvency estate.[80] Their satisfaction is aligned with these processes.

The law provides secured creditors with the ability to seek satisfaction in accordance with the mortgage/pledge agreement, with the order determined by the rules of the registration of the security measure.[81]

A cursory examination of these regulations may lead practitioners to mistakenly perceive secured creditors as entirely excluded from insolvency proceedings. However, the matter is more nuanced. The European Union, in its directive, explicitly emphasizes the significance of safeguarding relatively vulnerable creditors and urges states to establish a legal framework that avoids granting an indefinite advantage to any class of creditors, irrespective of their priority.[82]

---

75 See the Law of Georgia "on Rehabilitation and the Collective Satisfaction of Creditors' Claims", First paragraph of article 58, Legislative Herald of Georgia, 25/09/2020.

76 Ibid, First paragraph of article 87.

77 ISET, Regulatory Impact Assessment (RIA) of the selected topics under the Draft Law on Rehabilitation and Collective Satisfaction of Creditors, Final Report, 2019, 44 (in Georgian).

78 See the Law of Georgia "on Rehabilitation and the Collective Satisfaction of Creditors' Claims", 2nd paragraph of article 87, Legislative Herald of Georgia, 25/09/2020.

79 Ibid, Paragraph 3 of article 87.

80 See the Law of Georgia "on Rehabilitation and the Collective Satisfaction of Creditors' Claims", First paragraph of article 104, Legislative Herald of Georgia, 25/09/2020.

81 Ibid, Article 105.

82 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, 11.

Therefore, the 2020 law establishes the responsibility of the bankruptcy manager to base each decision on the best interests of the creditors' community, inclusive of the creditor ranks specified in Article 104 of the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims. This obligation is directly tied to the satisfaction of secured creditors, as they are unable to request the sale or transfer of ownership of the secured object without considering the interests of other creditors.[83] The secured asset must remain within the insolvency estate until the bankruptcy manager resolves its fate, ensuring its optimal sale for maximum returns.[84] If the bankruptcy manager reasonably decides it is best for the collateral to stay in the insolvency estate and be sold as a going concern,[85] secured creditors cannot oppose this decision solely based on the nature of the collateral provision outlined in civil law.

It is noteworthy that if a secured creditor's claim cannot be fully satisfied due to the insufficient proceeds from the sale of the collateral, the unsatisfied portion of the claim will be included in the rank of unsecured claims.[86]

7. Conclusion

Following the research, it is evident that the Law of Georgia on Rehabilitation and Collective Satisfaction of Creditors' Claims provides the most comprehensive and sophisticated framework for satisfying secured creditors.

The 2020 law eliminated many of the unfair practices outlined in the Law of Georgia on Insolvency Proceedings. Specifically, the 2020 law reinstated the link between secured creditors and the encumbered assets, allowing them again to prioritize the satisfaction of their claims through the subject of security. Simultaneously, the law took into account the hierarchy of secured interests and rectified the unjust approach that granted equal satisfaction opportunities to all secured creditors, irrespective of the timing of their registration.

In conclusion, the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims mostly aligns with international standards and best practices, especially in addressing the satisfaction of secured creditors.

Bibliography:

1. Insolvency Act 1986, UK.
2. German Insolvency Code, 05.10.1994.

---

83 *Meskhishvili K., Batlidze G., Amisulashvili N., Jorbenadze S.,* Fundamentals of Insolvency Proceedings in Accordance with the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi 2021, 83 (in Georgian).

84 See the Law of Georgia "on Rehabilitation and the Collective Satisfaction of Creditors' Claims", First and 2nd paragraphs of article 101, Legislative Herald of Georgia, 25/09/2020.

85 the so-called: Sale of going concern.

86 See the Law of Georgia "on Rehabilitation and the Collective Satisfaction of Creditors' Claims", Paragraph 4 of article 105, Legislative Herald of Georgia, 25/09/2020.

3. Law of Georgia "Civil Code of Georgia", the Gazette of the Parliament of Georgia, N786, 24.07.1997.
4. Law of Georgia "Tax Code of Georgia", Legislative Herald of Georgia, N3591, 12.10.2010.
5. Law of Georgia "on Bankruptcy Proceedings", the Gazette of the Parliament of Georgia, N286, 30.07.1996.
6. Law of Georgia "on Insolvency Proceedings", Legislative Herald of Georgia, N4522, 31/03/2007.
7. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019,
8. Law of Georgia "on Rehabilitation and the Collective Satisfaction of Creditors' Claims", Legislative Herald of Georgia, N7165-Iს, 25/09/2020.
9. *Brinkmann M.,* The Position of Secured Creditors in Insolvency, European Company and Financial Law Review, 2008, 249, 251.
10. *Eidenmuller H.,* Secured Creditors in Insolvency Proceedings, European Company and Financial Law Review, 2008, 274.
11. *Kadaria S.,* Historical Development of the Rehabilitation Process, Journal of Law, №1, 2022, 197 (in Georgian).
12. *Kasak A.,* Is Full Preference for a Secured Claim in Insolvency Proceedings Justified?, Juridica International, 2019, 113.
13. *Keay A.,* Insolvency Law: A Matter of Public Interest?, Northern Ireland Legal Quarterly, 2000, 1.
14. *Meskhishvili K., Batlidze G., Amisulashvili N., Jorbenadze S.,* Fundamentals of Insolvency Proceedings in Accordance with the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi, 2021, 50, 78-79, 83 (in Georgian).
15. *Migriauli R.,* Introduction to Bankruptcy Law, 2nd Revised Edition, Tbilisi, 2006, 70-72, 84-85, 90-91, 96-99 (in Georgian).
16. *Migriauli R.,* Key Features of the New Insolvency Law, Journal "Business and legislation", 2009 (in Georgian).
17. *Schnitger H., Migriauli R.,* The Law of Georgia on Insolvency, Characterization and Comparison with the Law of Georgia on Bankruptcy Proceedings and International Standards, Tbilisi, 2011, 51, 83, 90 (in Georgian).
18. *Zarandia T., Jugheli T.,* Securing Claims with Movable Property in Georgian Law, Legal Journal of Judges Association of Georgia "Justice and Law", N2, 2009, 27 (in Georgian).
19. The European Law Institute (ELI), Instrument of the European Law Institute, Rescue of Business in Insolvency Law, 2017.
20. The Government of Georgia, Strategy for the Socio-Economic Development of Georgia, Georgia 2020 (in Georgian).
21. International Monetary Fund, Ordinary and Effective Insolvency Procedures, Legal Department, 1999.
22. ISET, Regulatory Impact Assessment (RIA) of the selected topics under the Draft Law on Rehabilitation and Collective Satisfaction of Creditors, Final Report, 2019 (in Georgian).
23. Ministry of Justice of Georgia, Explanatory Note on the Draft Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims (in Georgian).
24. United Nations Commission on International Trade Law (UNCITRAL), Legislative guide on insolvency law, United Nation, New York 2005.
25. United Nations Commission on International Trade Law (UNCITRAL), Legislative Guide on Secured Transactions, United Nation, New York 2010

26. United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, United Nation, New York 2014
27. The World Bank Group, Principles for effective insolvency and creditor/debtor regimes, Washington DC, 2016.
28. The World Bank Group, Principles for effective insolvency and creditor/debtor regimes, Washington DC, 2021.
29. <https://subnational.doingbusiness.org/en/data/exploretopics/resolving-insolvency/score>[20.06.2023].
30. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023> [24.07.2023].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7700

Mariam Gaiparashvili*

Determining Amount of the Moral Damages in Cases of Health Damage

The article discusses the specifics of compensation for moral damages and the method of calculation in case of the health damage. The article presents definitions and decisions from the practice of the common courts, where the gaps and inconsistent approach caused by the vague record of the law are clearly visible.

Moreover, it presents the results of comparative legal research. In particular, the legislation and practice of the following countries have been studied: Austria; USA; Belgium; Bulgaria; United Kingdom; Germany; Spain; Slovakia; Hungary; Croatia; Greece; Estonia; Lietuva; Latvia; Portugal; Finland.

Keywords: *compensation, amount, delict.*

1. Introduction

The method of calculating damages and its philosophical significance originates from Aristotle's "Nicomachean Ethics".[1] Even today, many scholars believe that "corrective" compensation of damages should be the basis of tort law. However, they are in the minority and looking at torts from a purely economic perspective is rejected.[2] This is evidenced by the widespread practice of compensation for moral damages, which is based on the principles of both local and international law.

Article 13 of the European Convention on Human Rights obliges states to effectively protect the rights deriving from the Convention. The right to an effective remedy is an auxiliary right. Based on the article 13, the States may be required to adopt new regulations to ensure compliance with the obligations of article 13.[3] According to the practice of the European Court of Human Rights, moral damages as a form of compensation must be available under domestic law as an effective remedy, and this obligation is envisaged in Article 13.[4]

This paper specifies and discusses only the issue of determining the amount of moral damages in cases of health damage as a result of a tort.

The first chapter of the paper analyzes the approach of Georgian law regarding the amount of moral damages. What are the criteria for determining the amount and how consistent is the case law? The second chapter is devoted to comparative legal research and analyzes the legislation and practice

* PhD Student at Ivane Javakhishvili Tbilisi State University Faculty of Law. https://orcid.org/0009-0000-9873-8326.

1 *Aristotele, Ethics of Evdemos*, Book IV, ed. Merani, 2016, 105-106.

2 *Levmore S.,* Foundations of Tort Law, Foundation Press / Thomson Reuters, 1994, 61-62.

3 *Grabenwarter C.*, *European Convention on Human Rights: Commentary,* Bloomsbury Publishing, 2014, 328.

4 *Keenan v. United Kingdom, [2001] ECHR (no. 27229/95),* §130; *Kontrova v Slovakia, [2007] ECHR (no. 7510/04)*, §64; *Poghosyan a Baghdasaryan v Armenia, [2012] ECHR (no. 22999/06),* §46.

of other countries on determining the amount of moral damages. The last chapter is a summary and provides recommendations from the study.

2. Approach of the Georgian Law Regarding Determination of the Amount of Moral Damages

Determining the amount of non-material (moral) damages for physical pain and suffering is one of the biggest challenges for Georgian courts. National legislation provides the victim of a tort with the opportunity to claim compensation for moral damages. However, the legislator does not establish the criterion by which the scope of compensation for moral damages should be determined.

Article 413 of the Civil Code of Georgia refers only to reasonable and fair compensation. Accordingly, the mentioned issue is subject to the court's reasoning and in each specific case, it is done taking into account the peculiarities of the case itself.

According to the definition of the Supreme Court of Georgia, when determining the amount of moral damages, the following is acceptable:[5]

- the severity of the damage;
- subjective attitude of the victim towards moral damage;
- intensity of feelings;
- significance of the violated right;
- the extent is determined both by the severity of the damage and the degree of culpability;
- compensation for moral damage is determined by the court in monetary form independently of compensation for property damage;
- the amount of compensation should not be unreasonably increased and exceed the economic capabilities of a specific country;
- no matter how big the compensation is, it still cannot restore the victim's mental state before the intrusion, the main goal of compensation for moral damages is not the restitution of violated rights, because the damage caused does not have a monetary equivalent;
- its purpose is to ease the suffering caused by the damage of intangible good, to reduce the severity and intensity of negative feelings.[6]

The absence of additional criteria in the law regarding the amount of compensation for moral damages creates many challenges in practice. Courts have not even agreed on general criteria, which gives different results in similar cases. And the victim is completely entrusted to the judge's subjective opinion when determining the amount of damages. Therefore, in many decisions, the court system is either inconsistent and/or determines a disproportionately small amount. For illustration, it is enough to consider a few cases regarding moral damages:

---

5 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of May 16, 2019 in the case BS-327-309(2k-07); Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of December 27, 2012 in the case BS-78-78(K-12).

6 Ibid.

- The victim received severe burns and needed to use a hearing aid. It is also significant that he was a music teacher and after losing his hearing he became incapacitated. The court considered the determination of 4,000 GEL as moral damages to be reasonable.[7]
- The victim lost both upper limbs, the first instance considered 100,000 GEL as fair compensation for the plaintiff, and the cassation court considered 300,000 GEL. The court explained that the obligation derives from the delict liability due to which he/she suffered physical loss – amputation of limbs and psychological suffering during his/her adolescence, which manifests itself in each specific case and periodically based on the physically expressed form of the injuries inflicted on him/her and the emotionally (psychologically) constantly overcoming obstacles.[8]
- Due to the damage inflicted on the victim (a 9-year-old child), one hand was amputated, while the other hand became non-functional. The court awarded the defendant 100,000 USD in moral damages.[9]
- After receiving an industrial injury, the victim lost 100% of his/her ability to work and became a disabled person (loss of lower limbs). According to the court's decision, 50,000 GEL was determined as moral damages.[10]
- As a result of a traffic accident, the victim had a severe brain injury, due to which he became a disabled person. According to the court's decision, 7,000 GEL was determined as moral damages.[11]
- As a result of the traffic accident, the victim had both brain and body injuries, with multiple fractures. According to the court's decision, 5,000 GEL was determined as moral damages.[12]
- Due to incorrect diagnosis, the patient's health condition worsened significantly. In addition, he underwent an unnecessary surgery. While considering the issue of compensation for moral damages, the court evaluated the situation of assets of the defendant along with the situation of the plaintiff. Because the moral damages "cannot be a kind of punishment of the defendant, which will stop his activity and functioning." The moral damages was determined in the amount of 20,000 GEL.[13]

---

7 Decision of the Civil Chamber of the Supreme Court of Georgia of July 10, 2018 in the case AS-660-660-2018.

8 Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of December 23, 2016 in the case AS-543-518 2016.

9 Civil, Entrepreneurial and Bankruptcy Chamber of the Supreme Court of Georgia, decision of October 22, 2003 in case AS-43-745-03.

10 Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of January 1, 2014 in the case AS-756-717-2013.

11 Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of July 4, 2011 in case AS-762-818-2011.

12 Decision of May 24, 2019 of the Civil Affairs Chamber of the Supreme Court of Georgia in case AS-238-2019.

13 Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of January 22, 2016 in the case AS-1102-1038-2015.

- Due to incorrect treatment by the dentist, the patient lost healthy teeth. 2,000 GEL was determined as moral damage.[14]
- Due to a traffic accident, the person's skull was damaged (the right hemisphere was replaced with plastic) and spine. Moral damage was determined in the amount of 7,000 GEL.[15]
- The convict was harmed due to repeated stenting – he/she was forced to endure unbearable pain, due to which he/she harmed himself/herself several times. However, he/she did not give his/her consent to the treatment methods, because the doctor did not report anything. The appellate court determined the amount of moral damages at 3,000 GEL. The Supreme Court overturned the decision because a causal link between stenting and pain could not be proven.[16]
- As a result of a medical error, a person lost a kidney. The Court of Appeal determined the amount of moral damages at 5,000 GEL.[17]
- The child did not receive timely medical care in summer school. He had broken his hand and had to endure physical pain for several days. The court determined the amount of moral damages at 3,000 GEL.[18]

As the reviewed cases have shown, in some cases the court determines very small amounts for moral damages. For example, 4,000 GEL was allocated to a fire victim, for whom the damage was particularly painful both physically and emotionally. He lost his hearing, which reduced his enjoyment of life and also made him unable to work. Therefore, the court was not guided by proper criteria.

Besides, the court does not differentiate what form of delict caused the damage and does not determine the amount accordingly. For example, a person lost a kidney as a result of a medical error, and the court determined 5,000 GEL as the amount of moral damages. Living without a kidney significantly reduces the quality of life and requires special care and attention of the medical staff. These facts were not taken into account when determining the amount.

Additionally, it should be noted that the amount of moral damages for the delict resulting from a car accident is similar in all decisions. In these cases, the court tries to be guided by common criteria and the amount of money is similar in all cases. However, this equal and blanket approach creates an unequal result, because the imposition of 7,000 GEL for damages with a temporary effect, as well as for damages that cause permanent disability, is not proportionate and cannot perform a compensatory function.

---

14 Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of January 9, 2014 in the case AS-714-677-2013.

15 Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of June 14, 2013 in the case AS-95-90-2013.

16 Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of May 11, 2018 in the case AS-111-111-2018.

17 Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of July 1, 2013 in the case AS-247-237-2013.

18 Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of July 11, 2019 in case AS-669-2019.

It is also significant that the court does not discuss the circumstances of the damaging action, nor the pain and suffering experienced. One of the cases mentioned above concerned the improper medical care of a convict and the suffering he experienced over a long period of time. The court determined the amount of moral damages in the amount of 3,000 GEL. The European Court of Human Rights considers similar cases in the context of Article 3 of the Convention (prohibition of inhuman treatment), which is a particularly serious violation. This conclusion is consequently reflected in the amount of moral damage. These issues are not assessed in the the decision of the Tbilisi Court of Appeals.

Mo, the court assesses the harm caused to the children quite strictly, which has caused a long-term/permanent limitation of opportunity, and orders the defendant to pay a large amount of money.

3. Comparative Analysis – Amount Determined for Moral Damages

Countries have different approaches to determining the amount of moral damages:

- Some of the countries only establish criteria by legislation and entrust the question of the amount to the discretion of the judge;
- There are countries that develop guidelines to ensure equal treatment, where they determine the degrees and amounts of damages in a scheme;
- The third group includes countries that legislate an upper limit of moral damages to avoid the threat of differential treatment.

3.1. Unites states of America

In the state of Columbia, according to the established practice the judge instructs the jury what to consider when determining the amount of moral damages.[19] In the United States, it is common for moral damages to be set at particularly high rates because they take into account the physical and emotional suffering that a physical injury or other type of tort may cause.

However, there is no uniform approach in the country and the practices of the states are quite different from each other. The United States of America is the only country that meets the criteria of all three groups listed above. For example, the New Hampshire Supreme Court found the limiting moral damages (capped at $875,000) is unconstitutional.[20] A similar precedent exists in the practice of the Supreme Court of Washington.[21] However, there are several states that limit the amount of moral damages, and the amounts vary widely.[22]

---

19 *Allstate Ins. Co. v. Ramos*, (D.C. 2001), 782 A.2d 280, 282: "The extent and duration of any physical injury sustained by the Plaintiff, the effects that any physical injury have on the overall and physical and emotional well-being of the Plaintiff. Any physical pain and emotional distress that the Plaintiff has suffered in the past. Any inconvenience that the Plaintiff has experienced. Any medical expenses incurred by the Plaintiff. Any loss of earnings incurred by the Plaintiff".

20 *Brannigan v. Usitalo*, (N.H. 1991), 587 A.2d 1232.

21 *Sofie v. Fibreboard Corporation*, (Wash. 1989), 771 P.2d 711.

22 *Plosser W. M.,* Sky's The Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule, Mondaq, 2018.

3.2. United Kingdom

Unlike the USA, in England, a special parliamentary body (Law Commission) introduced a guidance document that helps the judge to determine the amount of moral damages. The document discusses the disputed issues and provides maximum and minimum amounts for damages, which are based on various factors.[23] The commission first conducted work on this issue in the 70ies and issued recommendations.[24] Later in the 90ies it worked on the essence of exemplary damage and in 1997 published a report that was not shared.[25] In 1999, it estimated the costs of medical care in case of physical damage.[26]

Apart from the charts, this document is a kind of generalization and brings together all important decisions on this issue, separated by form of damages/cases and highlights the issues that should be taken into account when determining the amount. For example, age, intensity of pain, interference in profession, state of disability, decrease in quality of life and others. This document does not include a mere list of numbers, but analyzes the practice and examines the precedents of other countries.

The responsibility for determining the amount was taken by a special body (Judicial Studies Board, replaced by the Judicial College after the 2011 reform). The amount guideline was first published in 1992 and is usually updated annually.[27] The document is of an auxiliary nature and has no binding force.

In the table, the injuries are divided into categories of severity, for example, an injury that caused death, an injury to internal organs, or a facial injury, and so on. And then, within each category, each specific damage is separated, for example, brain damage.

Amounts of money usually increase over the years. For example, severe psychiatric damages were £36,000-£76,000 in the 10th Edition,[28] £43,000-£92,000 in the 14th Edition,[29] and £46,000-£98,000 in the 15th Edition. In 2022, the 16th edition was published, increasing the amounts and responding to the challenges of inflation, as well as adding new categories, such as sexual assault cases.[30]

3.3. Belgium

Legislation of Belgium does not regulate the amount of moral damages caused by an illegal act at the legislative level. The amount of money is determined by all judges according to their inner

---

23 Dicument published in 1995, Damages for Personal injury: non-pecuniary loss, A Consultation Paper, Law Commission Consultation Paper No140; Conclusion LC257.

24 <https://bit.ly/3aTirEx> [20.08.2023].

25 <https://bit.ly/3MNpImT> [20.08.2023].

26 <https://bit.ly/3txs4zz> [20.08.2023].

27 <https://www.judiciary.uk/about-the-judiciary/training-support/judicial-college/governance/> [20.08.2023].

28 10th edition of the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* (JC Guidelines).

29 14th edition of the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* (JC Guidelines).

30 Judicial College Guidelines 16th Ed.

beliefs. However, there is a pre-designed table of quantities that is not binding and is more of a helpful guide.[31]

3.4. Hungary

There is a special provision in the Hungarian legislation, which imposes the obligation to pay moral damages in case of illegal actions of the state.[32]

In addition, the Civil Code regulates restitution issues.[33] According to section 2:52, the amount of the compensation is determined by the judge, who takes into account the severity of the violation, whether the act was committed once or several times, the severity of the responsibility, the impact of the act on both the victim and the environment.[34] Section 2:53 specifically establishes the obligation to pay damages if a person's personality rights are violated.

Accordingly, the amount of moral damage compensable by administrative and civil law has no upper limit. However, the country's legislation independently separates procedural violations of criminal law, where there are certain guidelines for determining the amount. For example, the law establishes a rule for compensation if a person is wrongly found guilty and deprived of liberty.[35] The length of imprisonment is taken into account. According to the special law, moral damages for imprisonment are calculated in a special way, ranging between 3500-7000 HUF.[36]

3.5. Austria

Austrian law does not specify the method of determining the amount of moral damages. However, there is one exception for wrongful convictions that result in imprisonment. The legislation determines a maximum of 50 euros as moral damages for the day of detention.[37]

The amount of moral damages is decided by the judge based on his inner faith and according to the following criteria: severity, duration and intensity of emotional and physical suffering. However, despite these criteria, the subjective element in determining the amount is crucial.[38]

---

31 ECPRD (The European Centre for Parliamentary Research and Documentation), Request n°: 4213, Response of the Parliament of Belgium.

32 *"..Everyone shall have the right to demand compensation, as specified in an act of Parliament, for damages unlawfully caused by the authorities in discharging their duties."* (Article XXIV para 2).

33 Civil Code sets forth both the *Restitution* (Section 2:52-2:53) and *the liability for the actions of public authorities* which latter is the special form of liability. The general liability rules (see Section 6:518-534) are also applicable, <http://njt.hu/cgi_bin/njt_doc.cgi?docid=159096.370225> [20.08.2023].

34 (3)The court shall determine the amount of restitution in one sum, taking into account the gravity of the infringement, whether it was committed on one or more occasions, the degree of responsibility, the impact of the infringement upon the aggrieved party and his environment.

35 Act on Criminal Proceeding, Articles 844-855 <http://njt.hu/cgi_bin/njt_doc.cgi?docid=202672.367021> [20.08.2023].

36 Government Decree No. 138/2018. (VII. 26.), <http://njt.hu/cgi_bin/njt_doc.cgi?docid=209618.357306> [20.08.2023].

37 § 5 para 2 Strafrechtliches Entschädigungsgesetz 2005

38 *Oliphant K. & Wright R. W, (Eds.),* Medical Malpractice and Compensation in Global Perspective, Tort and Insurance Law, de Gruyter, 2013, 27

The Austrian court tried to balance the subjective element with an objective assessment. For this purpose, the court started to produce statistical data every year, which reflected the type of damage and the amount of compensation awarded.[39] The auxiliary table lists the severity of suffering (strong, moderate, and mild) as well as its duration (in days). The table indicates how much money should be allocated per day.[40]

The analysis of court decisions over the years reveals that the amount increases over the years, and also, for similar damages, more or less similar amounts of compensation are awarded.[41]

3.6. Croatia

Croatian legislation provides for compensation for moral damages for illegal imprisonment.[42] The amount is given in proportion to the days of illegal detention and the table is developed by the Ministry of Finance to respect the principle of equal treatment and also to take into account the socio-economic capabilities of the country.

Regarding moral damage, the court judges from its point of view, whether it is illegal deprivation of liberty or other cases. It is guided by the general criteria of the law, which does not consider the amount.[43]

3.7. Portugal

Legislation of Portugal does not determine the amount of moral damages. According to the Civil Code, the severity of the damage and the violated right must be taken into account. The same article determines the compensation received by the wife/partner and children in case of the death of a close person. In the absence of such, parents receive compensation.[44] When determining the amount, the judge also takes into account the degree of culpability and the economic situation of the victim.[45]

3.8. Greece

Articles 105 and 932 of the Civil Code establish the obligation to pay moral damages if the tort was committed by a private person or a representative of an administrative body. These articles do not specify the amount of compensation and state that it should be reasonable.

---

39 <https://bit.ly/39hKhtX> [20.08.2023]; Table of 2019 in German <https://bit.ly/3zzeIX3> [20.08.2023]; 2020: <https://bit.ly/3Qkw6Vu> [20.08.2023].

40 <https://www.koerperverletzung.com/schmerzensgeld-oesterreich/#Die_Schmerzensgrade-Trias> [20.08.2023].

41 <https://bit.ly/3zQdaIH> [20.08.2023].

42 Constitution of the Republic of Croatia, Article 25; the Criminal Procedure Act, Article 14 and Article 573.

43 Article 1100 of the Civil Obligations Act.

44 Article 496 of the Civil Code, <https://bit.ly/3zxWHZc> [20.08.2023].

45 Article 494 of the Civil Code, „where the liability is based on recklessness, compensation may be set, in an equitable manner, in an amount lower than that which would correspond to the damages caused, provided that this is warranted by the degree of culpability of the perpetrator, both his/her economic situation and that of the injured party, as well as the other circumstances of the case“, <https://bit.ly/3Hiyl7K> [20.08.2023].

In addition, the Greek constitution has strengthened the possibility of compensation for moral damages in case of illegal conviction.[46] As for the limits of the compensation, it is determined in Article 540 of the Criminal Procedure Code.[47]

3.9. Estonia

The right to compensation for moral damages is enshrined in Article 25 of the Constitution of Estonia. In addition, in case of illegal detention, moral damages are compensated based on a special act.[48] In case of unlawful deprivation of liberty, damages are calculated according to calendar days. The monetary value of the day varies based on the country's economic statistics.

3.10. Bulgaria

In Bulgaria, moral damages are compensated in case of illegal punishment, damage to reputation and dignity, loss of capacity, suffering, violation of personal rights, etc. According to the legislation, the amount of money is determined by the court.[49]

3.11. Lithuania

In case of violation of the right by the state in Lithuania, a person can directly claim damages from the Ministry of Justice, which has a set limit – 1500 euros for moral damages.

The Civil Code (Article 6.272) does not set limits on the amount to be compensated and, therefore, the amount is decided by the judge. It is also significant that in 2006 the Constitutional Court of the country recognized the provision that determined the upper limit of moral damages in cases of illegal convictions as unconstitutional. The court explained that it is not permissible for the legislature to limit the discretion of the court, especially when it is discussing the determination of the amount of moral damages in the case of tort caused by the state.[50]

3.12. Slovakia

In Slovakia, the criteria for determining moral damages are stipulated by legislation.[51] In particular, when estimating the quantity, the following are taken into account:

---

46 Art. 7§4 of the Constitution.

47 Law 4620/2019.

48 Compensation for Damage Caused in Offence Proceedings Act, Article 11, <https://bit.ly/3xlXrhz> [20.08.2023].

49 Art. 52 of the Obligations and Contracts Act.

50 The Constitutional Court of the Republic of Lithuania: *the legislature has no constitutional powers to establish any maximum sizes of damage inflicted upon the person by the state institutions or officials, which is subject to compensation, which would restrict the court and would prevent it from awarding just compensation for that material and/or moral damage sustained by the person*, Ruling on the compensation for damage inflicted by unlawful actions of interrogatory and investigatory bodies, the prosecutor's office, and a court, <https://bit.ly/3mI0SKv> [20.08.2023].

51 Act No. 514/2003 Coll. on Liability Caused during the Exercise of Public Authority, Section 17.

- quality of life of the victim;
- the environment in which he/she lives and works;
- the significance of the damage and the circumstances that caused it;
- Impact of damage on the personal life of the victim;
- Impact of damage on the victim's social life;

3.13. Latvia

The Constitutional Court of Latvia initiated a case regarding the constitutionality of the compensations' law.[52] The Constitutional Court of Latvia initiated a case regarding the constitutionality of the compensations' law. The disputed law regulates the compensation for the damage caused to a person during criminal proceedings and the imposition of an administrative fine. According to the law, the average amount is 7,000 euros, and if the damage is particularly severe, it is 10,000 euros, as for the case of health damage – 30,000 euros. The Constitutional Court did not recognize the contested norm as unconstitutional.[53]

3.14. Spain

According to Article 292 of the Criminal Code,[54] as a result of judicial error if a person's property or other rights are damaged due to the incorrect functioning of the court, he/she will receive compensation from the budget. According to Article 294 of the Spanish Criminal Code, a wrongfully convicted person has the right to claim moral damages if the prerequisites defined by law exist.[55] However, the Constitutional Court recognized the scope of the law as unconstitutional and determined that moral damages should be extended to illegal imprisonment on any grounds.[56]

The amount of moral damages in civil cases is not regulated at the legal level in Spain and is decided on a case-by-case basis. The victim's age, conviction status, salary and etc. are taken into account.

---

52 Section 14(4) of the Law on Compensation for Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Violations, Section 92 of the Constitution of Latvia, <https://bit.ly/3xJC5vH> [20.08.2023].

53 <https://bit.ly/3xKMyHp> [20.08.2023].

54 Criminal Code (Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal), <https://bit.ly/3xLk9kD> [20.08.2023.

55 "Those who, after having been remanded in custody, are acquitted for the (1) non-existence of the alleged act or, (2) for the same reason, there is a dismissal of the accusation, shall have the right to compensation, provided that they have suffered damages".

56 Constitutional Court, eliminates the limitation of the two cases of Article 294 and extend the compensation for moral damages to those who have suffered remand detention and who are subsequently acquitted, whatever the cause. The Case 85/2019 of the Constitutional Court (Plenary), of 19 June, Rec. 4314/2018, declares the unconstitutionality and nullity of the paragraphs "for the non-existence of the imputed act" and "for the same cause" of Article 294.1, <https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/25972> [20.08.2023].

State responsibility for damages is regulated by several laws: the Constitution,[57] special acts on administrative procedures [58] and the public sector.[59] However, even in this case, the amount of moral damage is not determined.

In Spain, an annex to one of the orders[60] regulates the calculation of compensation for torts in traffic accidents. Often, the courts used this appendix by analogy and extended it to other types of delicts (non-traffic cases), however, according to the Supreme Court, this annex has no binding force and is only an auxiliary tool.

Hence, the right to compensation for moral damages is enshrined in criminal, administrative and civil laws. However, the legislation does not regulate the amount of moral damages. The only exception is traffic accidents, where the rule/table for calculating economic damages along with moral damages is provided.

3.15. Finland

In Finland, moral damages are regulated by the Torts Act.[61] And compensation for illegal conviction is regulated by a special law.[62]

The amount of moral damages is determined by the court, but if the dispute arises from an illegal conviction or other crime, the victim of which is a resident of Finland, and the crime occurred in Finland, the legislation determines the upper limit of damages, because the amount is reimbursed by the state.[63] The number will be revised every 3 years.

3.16. Germany

Under German law, the amount of moral damages determined in case of wrongful conviction and imprisonment is 25 euros per day.[64] In other cases, the amount of moral damages is not predetermined.

---

57 Article 106.2 Spanish Constitution: "Private individuals shall, under the terms established by law, be entitled to compensation for any loss that they may suffer to their property or rights, except in cases of force majeure, whenever such loss is the result of the operation of public services".

58 Act 39/2015, of 1 October, on Common Administrative Procedure for Public Administrations, <https://www.boe.es/buscar/act.php?id=BOE-A-2015-10565> [20.08.2023].

59 Act 40/2015, of 1 October, on the Legal Regime of the Public Sector (Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público), <https://www.boe.es/buscar/act.php?id=BOE-A-2015-10566> [20.08.2023].

60 Royal Legislative Decree 8/2004, of 29 October, approving the revised text of the Law on civil liability and insurance in motor vehicle traffic, <https://www.boe.es/buscar/act.php?id=BOE-A-2004-18911> [20.08.2023].

61 Chapter 5 of the Tort Liability Act.

62 The Act on Compensation for Crime Damage, 1204/2005.

63 <https://www.finlex.fi/sv/laki/ajantasa/2005/20051204> [20.08.2023].

64 Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen vom 8. März 1971 (BGBl. I S. 157), das zuletzt durch Artikel 6 Absatz 19 des Gesetzes vom 13. April 2017 (BGBl. I S. 872) geändert worden ist, <https://www.gesetze-im-internet.de/streg/BJNR001570971.html> [20.08.2023].

Compensation for non-material (moral) damages is provided for by paragraph 253 of the Civil Code.[65] The severity of the injuries, the emotional and/or physical suffering caused by them, the duration and the degree of culpability of the defendant are taken into account when assessing damages.

The analysis of the decision of the German court reveals that the damages imposed in similar cases are more or less similar and the amount is increased taking into account aggravating circumstances.[66] For example, on holidays and/or vacation days, the amount of moral damages may increase because the victim cannot take advantage of these days.[67]

The interpretations of the court in the part of the imposition of moral damages and the relation to criminal law are interesting. In one of the cases, the court considered the case of a woman who was a victim of sexual violence. The victim "had multiple bruises on her body and severe mental disorder. The abuser beat her for 3.5 hours, strangled her, tore her hair and threatened her with death. The fact that the offender was imprisoned for 6.5 years did not reduce the amount of the compensation amount. The court considered that the imprisonment of the offender represented compensation for moral damages to society, not to the victim herself."[68]

As a conclusion, it should be noted that the countries can be divided into three categories:

- **The amount of moral damages is determined by the opinion of the judge:** Belgium; Portugal; Bulgaria; Slovakia.
- **The amount of moral damages is determined at the legislative level for several cases (mainly illegal convictions):** Hungary; Croatia; Greece; Estonia; Lithuania; Latvia; Finlad; Germany; Several States of USA (some countries impose limit to all cases).
- **Reference/recommendation tables, which determine the amount of moral damages according to the degrees of damage:** Austria; United Kingdom; Spain.

Consequently, countries which, like Georgia, rely only on the opinion of the judge when determining the number, are few. It should be noted that the legislation of these countries is quite detailed and defines the criteria.

4. Conclusion

As the research has shown, there are many gaps and ambiguity in the Georgian legislation and practice. In particular, the provision of the law regarding the amount of moral damages is general and does not include specific criteria. The amount of moral damages imposed by court decisions is often not proportional to the harm caused. In addition, in case of analogue/similar factual circumstances, the amounts of damages imposed differ significantly.

---

65 See online: <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0761> [20.08.2023].

66 A collection of summaries of special decisions of the German federal courts regarding moral damages. Electronic Law Library, <http://www.library.court.ge/upload/moraluri%20ziani%20asdasfda.pdf> [20.08.2023].

67 Ibid, 80-81.

68 Ibid, 58.

It is desirable to create an interdisciplinary commission that will work on an in-depth study of the problem. It will analyze all decisions and generalize the findings. In addition, it will make a comparative legal analysis and develop recommendations based thereon. A similar precedent exists in the United Kingdom, where a special parliamentary body (Law Commission) has conducted a study and developed a detailed guiding document that helps the judge to assess the criteria for moral damages and determine the amount. Representatives of special fields must be invited to the commission, who will be able to assess the damage from a medical and other professional perspective. When discussing harm, one must consider its impact on the victim's entire life. After an assessing how significant the harm is (physically, mentally, socially) in percentages, a recommendation table/criteria should be developed, indicating the estimated amounts. Moreover, it must be defined what is the impact of specific type of damage on health and, in general, the quality of life. Recommendations/tables developed by the UK and Austria may be used as a guide.

The conclusion drawn up regarding the quantity should be of a recommendatory nature and it cannot have a binding force.

The existing wording of the law, which leads to many gaps and ambiguity in practice, has been confirmed by the present study. Accordingly, the legislation should be narrowed down based on comparative legal analysis. The legislator should develop the criteria for the judge to consider when determining the amount of moral damage.

The practice of developed countries shows that all countries at a certain stage began to critically analyze decisions on moral damages. They developed and published statistical data every year. The report outlined the decisions, in particular, what was the actual harm and what the amount of the moral damages was. This allowed judges to make more or less similar decisions and also revealed disproportionate amounts. This rule promoted both transparency and unification of approaches.

Therefore, the common courts of Georgia should issue a similar report on an annual basis, which will reflect all the cases where the defendant was ordered to pay moral damages; indicating the amount and the form of the damage caused? This will help to establish a uniform practice and also increase transparency.

Implementation of all the above recommendations will significantly improve the observance of the principle of equality in proceedings. The introduction of criteria at the legislative level and the introduction of a recommendation table will prevent radically different results on similar facts, as well as create adequate expectations for the parties.

Bibliography:

1. European Convention on Human Rights, 1950.
2. Constitution of Greece, 11/06/195.
3. Constitution of Spain, 31/10/1978.
4. Constitution of the Republic of Croatia, 22/12/1990.
5. Act No. 514/2003 Coll. on Liability Caused during the Exercise of Public Authority, Slovakia 28/10/2003.
6. Act of Spain 39/2015, of 1 October, on Common Administrative Procedure for Public Administrations.

7. Act of Spain 40/2015, of 1 October, on the Legal Regime of the Public Sector.
8. Civil Code of Georgia, records of the Parliament of Georgia, 31, 24/07/1997
9. Civil Code of Hungury, 01/05/1960.
10. Civil Code of Portugal, 26/11/1966.
11. Civil Obligations Act of republic of Croatia, 04/03/2005.
12. Code of Criminal Procedure of Hungury, 31/12/1978.
13. Compensation for Damage Caused in Offence Proceedings Act, Estonia 01/05/2015.
14. Consttitution of Latvia, 15/02/1922.
15. Criminal Code of Spain, 23/11/1995.
16. Finland Act 1204/2005 on Compensation for Crime Damage, 29/12/2005.
17. Fundamental Law of Hungary, 18/04/2011.
18. Government Decree of Hungury No. 138/2018 (VII. 26.).
19. Law of Greece 4620/2019, ΦΕΚ Α 96, 11/06/2019.
20. Law on Compensation for Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Violations, Latvia 30/11/2017.
21. Obligations and Contracts Act of Bulgaria, State Gazette No. 275/22.11, 1950.
22. Royal Legislative Decree of Spain 8/2004, of 29 October.
23. Tort Liability Act of Finland, 1974.
24. Bürgerliches Gesetzbuch, Ausfertigungsdatum: 18.08.1896 Vollzitat: "Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002.
25. Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen vom 08/03/1971.
26. 10th, 14th, 15th, 16th editions of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (JC Guidelines).
27. *Aristotle, Ethics of Eudemos, Book IV, Meran, 2016.*
28. *Collection of Summaries of Special Decisions of German Federal Courts on Moral Damages, Electronic Law Library.*
29. Damages for Personal injury: non-pecuniary loss, A Consultation Paper, Law Commission Consultation Paper No140 and Law Com No 257.
30. ECPRD (The European Centre for Parliamentary Research and Documentation), Request n°: 4213, Response of the Parliament of Belgium.
31. *Grabenwarter C.*, *European Convention on Human Rights: Commentary,* Bloomsbury Publishing, 2014**.**
32. *Levmore S.,* Foundations of Tort Law, Foundation Press / Thomson Reuters, 1994.
33. *Oliphant K. & Wright R. W, (Eds.),* Medical Malpractice and Compensation in Global Perspective, Tort and Insurance Law, de Gruyter, 2013.
34. *Plosser W. M.,* Sky's The Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule, Mondaq, 2018.
35. Recommendations of the Supreme Court of Georgia on the problematic issues of civil law judicial practice, 2007.
36. *Allstate Ins. Co. v. Ramos*, (D.C. 2001), 782 A.2d 280, 282.
37. *Brannigan v. Usitalo*, (N.H. 1991), 587 A.2d 1232.
38. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia on May 16, 2019 in the case BS-327-309(2k-07).

39. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of December 27, 2012 in the case BS-78-78(K-12).
40. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of July 11, 2019 in case AS-669-2019.
41. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of May 24, 2019 in case AS-238-2019.
42. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of July 10, 2018 in the case AS-660-660-2018.
43. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of May 11, 2018 in case AS-111-111-2018.
44. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of December 23, 2016 in the case AS-543-518 2016.
45. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of January 9, 2014 in the case AS-714-677-2013.
46. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of January 1, 2014 in the case AS-756-717-2013.
47. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of July 1, 2013 in the case AS-247-237-2013.
48. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of June 14, 2013 in the case AS-95-90-2013.
49. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of July 4, 2011 in case AS-762-818-2011.
50. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia dated October 22, 2003 in the case AS-43-745-03.
51. Keenan v. United Kingdom, [2001] ECHR (no. 27229/95).
52. Kontrova v Slovakia, [2007] ECHR (no. 7510/04).
53. Poghosyan a Baghdasaryan v Armenia, [2012] ECHR (no. 22999/06).
54. Sofie v. Fibreboard Corporation, (Wash. 1989), 771 P.2d 711.
55. Strafrechtliches Entschädigungsgesetz 2005.
56. The Case 85/2019 of the Constitutional Court (Plenary) of 19 June, Rec. 4314/2018.
57. The Case No. 23/04 of the Constitutional Court of 19/08/20016.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7701

Sandro-Giorgi Sarukhanishvili*

Practical Consequences of the Annulment of the Minute of the General Meeting of Partners for Third Parties

The General Meeting is a critical governmental body of the capital companies. The decision of the general meeting is a legal document of great consequence; however, the significance of the minutes of the general meeting depends on the ownership structure. The general meeting and the minutes of the general meeting are the main legal activities of the company that have legal consequences for partners as well as third parties in the obligation relationship with the companies. Furthermore, private and public establishments have no unified practice on which transactions of the corporation require the decision of the general meeting and which do not. The separate article of the consolidated law on Entrepreneurs of Georgia regulates the possibility of the rescission of the decision of the general meeting, in the case the partner attends the general meeting and does not give his/her consent to the decision. The purpose of the paper is to determine the judicial practice and juxtapose it with the scientific theory, in particular, to what extent the judicial practice and the theory are close to each other and what consequences it may have in future; the main question arises if third parties will be able to protect their rights and ensure the continuance of the obligatory relationship in case of the annulment of the minutes of the general meeting. The paper discusses the nature and characteristics of the general meeting and the formal and substantial grounds for invalidating the decision of the general meeting; the article examines the judicial practice regarding the relevance of the annulment of the minutes of the general meeting.

Key Words: *Minutes of the General Meetings, Decision of the Partner, General Meeting, Annulment of the General Meeting.*

1. Introduction

The General Meeting is a structural entity of the capital companies that manage the company, the importance of the general meeting is emphasised not only by the legislation of Georgia but also by the regulations of the European Union, in particular, the structure of the corporation should comprise a general meeting of shareholders and executive organ.[1] The minutes of the general meeting are an important legal document,[2] however, the role of the general meeting in the corporation governance is

* Ph.D. student of Sulkhan-Saba Orbeliani University. https://orcid.org/0000-0001-5753-1898.

1 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) article 38.

2 *Udrescu D.,* Theoretical and Practical Aspects Concerning the Causes for Annulment of GMS Decisions, The Annals of "Dunarea de Jos" University of Galati Fascicle I, Economics and Applied Informatics, Vol. XV, N2, 2009, 847.

not universal, rather the role of the general meeting depends on the ownership structure of the company.[3] Under the legislation of Georgia, the general meeting and the minutes of the general meeting are not only the managing function of the corporation, but a significant legal action that has legal consequences.[4]

The decision of the general meeting and the invalidity of the minutes of the general meeting have a certain impact on third parties when companies are in a relationship with them.[5] For instance, the annulment of the minute may lead to the annulment of a pledge of the bank credit agreement.[6] Moreover, private or public institutions do not have the same approach when a certain transaction requires minutes, which causes uncertainty.[7] The new consolidated version of the special law of Georgia, with a separate article, regulates the possibility of the rescission of a decision of the general meeting when a partner participates in and attends the general meeting and votes against such a decision.[8] In this case, defining the judicial practice regarding the invalidity of the minutes of the general meeting has immense importance in order to define the best possibilities to protect the rights of the third party.

2. Social Research Methods

The paper employs social research methods, in particular Deep Interviews, one of the qualitative research methodologies. Seven respondents from the bank were interviewed between March 27 and April 3, 2023; their responsibilities include providing legal advice regarding loan documentation for retail, MSME and SME loans, checking the legal accuracy of credit and other documents, including agreements between the bank and companies, minutes of general meetings, they control the documentation of loan collateral, such as mortgages, guarantees etc., compliance of legal and internal bank documents with the legislation of Georgia and bank standards. In addition, on May 15, 2023, the respondent from "Index LLC" was interviewed, the person who carried out the registration of transactions for the public registry agencies, responsibility included receiving all the documents for the registration of the transactions. During the interviews the following questions were asked: the position

---

3 *Sáez M.I., Riaño D.,* Corporate Governance and the Shareholders' Meeting: Voting and Litigation, European Business Organization Law Review, Vol. 14, No. 3, 2013, 390.

4 *Gaina V., Gaina A.,* The Legal Regime of the Decisions Adopted by the General Assembly of Members/Shareholders of the Commercial Company (GAM), Conference Paper: Supplement of Valahia University Law Study, *Stan M. (ed.)*, Târgoviște, 2017, 241-242.

5 *Laprade F.M.,* Rights and Obligations of Shareholders, National Regimes and Proposed Instruments at EU Level for Improving Legal Efficiency, Study of Directorate-General for Internal Policies of European Parliament, 2012, 106.

6 Decision of the Panel of Civil Cases of the Tbilisi City Court, Case №2/27085-21, 03.06.2022, (in Georgian).

7 Deep Interviews with the employees of the TBC JSC were conducted from the 27th of Mart to the 3rd of April of 2023 (original is kept to the Author), (in Georgian); Deep Interviews with LLC Index were conducted on the 15th of May 2023 (original is kept to the Author), (in Georgian); The Response of the National Agency of Public Registry of the Ministry of Justice of Georgia, № 112768, (in Georgian).

8 Law of Georgia on Entrepreneurs, Article 93, Clause 1, and Article 93, Clause 1, Sub-Clause a, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021.

of an employer, and job description; there were questions about the working process, for instance, whether they examined the minutes of the general meeting, what they paid attention to, whether the company's partner changed, what they did. The information obtained is important in order to establish the facts regarding the criteria for the legal assessment of the general meeting minutes; the employers of the bank had the experience of assessing and examining such documents during the working process and determining their compliance with the legislation of Georgia and intrabank standards. Qualitative research methodologies make it possible to describe the research object as it is seen by those who are in immediate contact with the object[9]. For the research purpose, public information was requested from the National Agency of Public Registry of the Ministry of Justice of Georgia in order to determine the practice of the agency pertaining to the examination and assessment of the minutes of the general meeting.[10]

Comparative legal methods were used during the research; the legal practice of the European Union and its member states was applied, in particular, the legal practices of Central European states, the Netherlands, Poland, Romania, and Lithuania to determine formal and substantive criteria for the minutes of the general meeting, in which cases the courts annul the minutes and what are the consequences of the annulment. The experience of those countries demonstrates the approach of the developed states regarding the issue which is useful for comparison since Georgia adopted its legislation regarding the entrepreneurs from the Netherlands and Central European Countries, and Georgia has a common communist history and close economic development with the Eastern European Countries.

3. Decision of the Partners and its Annulment

3.1. Legal Nature of the General Meeting of Partners

The general meeting has broad power; in addition to structural and internal corporate decisions, these include the decisions on the uncommon course of business that are not specified in the statute of the companies.[11] The general meeting is not only a structural entity of the corporation but also an agreement between partners,[12] therefore, the agreement is subject to the provisions of the civil code of Georgia.[13] On important issues, voting is carried out unanimously or by a majority unless the law stipulates that the decision is made with the consent of all partners.[14]

---

9 *Zurabishvili T.,* Qualitative Methods in Social Research, Tbilisi, 2006, 6-7.

10 The Application was submitted on the 11th and 22nd of May, the Response was received on the 31st of May № 112768 (the Original is kept to the Author).

11 *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Maghradze G., Egnatashvili D.,* Corporate Law*,* 1st ed., Tbilisi, 2021, 321-323. (in Georgian)

12 Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-73-73-2018, decision of 23.03.2022, para. 18.3.2; 28. (in Georgian). Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-851-795-2017, Decision of 20.04.2018, para. 18, (in Georgian).

13 Judgement of the Civil Chamber of the Court of Appeals, Case №2ბ/2309-2019, 25.12.2019, para. 4.1, (in Georgian)

14 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1251-2021, 11.02.2022, para. 109, (in Georgian).

In the legal doctrine, there are diverse opinions regarding the purposes of the general meeting, some believe that the purpose of the general meeting is to satisfy the partners' intentions and goals, and others think that the general meeting is the manifestation of the partners' will.[15] However, capital companies are not the property of any person, it is founded at the will of the partners,[16] and the general meeting with the body of a company with management powers is the main governmental body: a director represents a company,[17] and the general meeting is an essential structural and governmental part of the capital companies; this two-tier governance and dualism maintains a strict separation of responsibility and corporate governance.[18] Consequently, the purpose of the general meeting is to determine the main course of the company's activities, ensure the accountability of the director, and create a forum for discussions between the director and partners.[19] In relations with the company, partners are not a third party,[20] they have the right to receive any information about the corporation, on the other hand, the director is obliged to provide them with this information; this right cannot be limited even if the information is volumetric,[21] moreover, the European states prefer to allocate more monitoring power to the general meeting of partners.[22] Accordingly, one of the functions of the general meeting is to create a forum between the director and the partners to ensure the proper management of the companies.

Another purpose of the general meeting is to make a decision on the key issues of the company's activities.[23] Therefore, the general meeting has an important role due to its formal and substantive function; the general meeting represents the will of partners not in accordance with the number of participants, but in accordance with the shares of partners in the capital.[24] Moreover, the general meeting represents the will of the company, this will is not the same will of an individual

---

15 *Catea R.,* Practical Aspects Regarding the Claim for the Annulment of the Resolutions of the General Meeting of Shareholders, from a Substantial and Procedural Perspective, Lex ET Scientia International Journal, No. 24, Vol. 2, 2017, 16.

16 *Makharoblishvili G.,* Dogmatic-Theoretical Separation of Entrepreneurial Entities on the Foundation of Capital Companies, Journal of Law, №2, 2011, 107-108, (in Georgian).

17 Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-868-2021, Judgment of 20.10.2022, para. 9, (in Georgian).

18 *Spasevski D.,* General Meeting of Shareholders According to the Legal Framework of Germany, United Kingdom and North Macedonia, Iustinianus Primus Law Review, Vol. 10, No. 1, 2019, 11.

19 *De Jong A., Mertens G., Roosenboom P.,* Shareholders' Voting at General Meetings: Evidence from the Netherlands, ERIM Report Series, 2004, 3.

20 *Daghie D.,* Considerations on the Annulment of the Resolution Issued by the General Meeting of Shareholders, Conference Paper: Supplement of Valahia University Law Study, *Stan M. (ed.)*, Târgoviște, 2019, 143.

21 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-54-2022, 28.09.2022, (in Georgian), paras. 19 and 21.

22 *Van der Elst C.,* Shareholder Rights and Shareholder Activism: The Role of the General Meeting of Shareholders, Annals of the Faculty of Law – Belgrade Law Review: Journal of Legal and Social Sciences, Vol. 59, No. 3, 2012, 63.

23 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-863-813-2015, 17.12.2015, para. 1.6, (in Georgian).

24 *Chanturia L., Ninidze T.,* Commentary on Law of Georgia on Entrepreneur, 3rd ed. Tbilisi, 2002, 117, (in Georgian).

partner, i.e. the general meeting is not a sum of the will of partners, but the will of the corporation as an independent entity.[25] The decision of the general meeting is made by a majority of the wills, not by consensus,[26] and the rights of the minority and dominant partners must be ensured, especially when a corporation is a closed capital company in which partners lack the possibility to trade their shares; these circumstances induce discord among partners.[27] Dominant partners are able to have a significant influence on the general meeting, however, the dominant position must not be employed to harm either the interest of the company or cause harm to the minority partners.[28] When the dominant partner exercises executive functions and represents the corporations to third parties, this creates the basis for the partner to pursue his/her own interest and remove the minority partner from corporate governance.[29] Thus, the powers of the director and the partners are separated, even if the partner and the director are the same person.[30] The director is responsible for the negative consequences that result from the execution of the decisions of the general meeting, which are based on the will of the dominant partner, infringe on the rights of the minority partner and do not conform to the best interest of the corporation.[31] Furthermore, partners have fiduciary duties owing each other,[32] and every decision in the corporation ought to be made in concordance with the best interest of the corporation;[33] therefore, the minority partner has the possibility to defend his/her rights from infringement by filing an application for the annulment of the minutes of the general meeting as well as claiming for damage from the director.[34]

---

25 *Gaina V., Gaina A.,* The Legal Regime of the Decisions Adopted by the General Assembly of Members/Shareholders of the Commercial Company (GAM), Conference Paper: Supplement of Valahia University Law Study, *Stan M. (ed.)*, Târgoviște, 2017, 241.

26 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-851-795-2017, 20.04.2018, para. 18, (in Georgian); Law of Georgia on Entrepreneurs, Article 37, Clause 1 and 2, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021 Law of Georgia on Entrepreneurs, Article 9^1, Clause 2 and 9, Legislative Herald of Georgia, 21-22, 28/10/1994 [Invalid Legal Act since 02.08.2021].

27 *Miller S.K.,* Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of the German, United Kingdom, and French Close Corporation Problem, Cornell International Law Journal, Vol. 30, No. 2, 1997, 385.

28 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-979-2022, 27.12.2022, paras. 13-14, (in Georgian).

29 *Miller S.K.,* Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of the German, United Kingdom, and French Close Corporation Problem, Cornell International Law Journal, Vol. 30, No. 2, 1997, 386.

30 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1353-2022, 23.01.2023, para. 9-13, (in Georgian).

31 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-73-73-2018, 23.03.2022, paras. 18.3.1 და 19, (in Georgian).

32 *Cahn A.,* The Shareholders' Fiduciary Duty in German Company Law, Shareholders' Duties, *Birkmose H.S. (ed.)*, Wolters Kluwer, 2017, 355.

33 *Chanturia L.,* Corporate Governance and Liability of Directors in Corporation Law, Tbilisi, 2006, 305, (in Georgian).

34 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1199-2019, 20.01.2022, para. 28, (in Georgian).

Certification of the will of partners has several forms: firstly, it is the statute of the company, when the partners make a decision to found a corporation,[35] and, secondly, the minutes of the general meeting of the partner when the meeting is held.[36] Participation of partners in voting is a declaration of the will, and the compilation of the will establishes the will of the company; the validity of the partners' will is proved by the minutes of the general meeting.[37] The decision of the general meeting is the agreement between partners which is subject to the provisions of the Civil Code of Georgia as well as the provisions of the Law of Georgia on Entrepreneurs.[38] Consequently, the partners, as well as the body of a company with management powers can file an application for the annulment of the minutes of the general meeting[39] if either of them thinks that the decision made by the general meeting is not in conformity with the best interest of the corporation since the director is obliged to make every necessary step to achieve the objectives provided by the articles of the statute and act out of the interests of the company.[40] In case the partner poses a threat to the interest of the company, the body of a company with management powers can take measures against this partner in order to protect and secure the interests of the corporation.[41] Partner also has the possibility to file an application for the annulment of the minutes if the general meeting decision is a void transaction, thus, the rights of the partner are violated.[42]

To sum up, capital companies are not the property of any person who founded them, and the general meeting of the partners, together with the director, is the governmental body of the corporation; the dualist system of corporate government ensures a strict separation of responsibility and management. The general meeting is an agreement among the partners, it has broad powers that comprise the decisions on the companies' uncommon course of business. The will of a partner is declared at the general meeting and certified in the minutes of the general meeting; the minutes are an important legal document. The general meeting declares the will of the company, which is constituted and shaped by the majority of the will of all partners and the will of the partner reflects the share of the partner in the capital. Participation of partners in voting is a declaration of the will; the compilation of their will determines the will of the corporation. The purpose of any decision in a company is the

---

35 *Makharoblishvili G.,* Dogmatic-Theoretical Separation of Entrepreneurial Entities on the Foundation of Capital Companies, Journal of Law, №2, 2011, 107, (in Georgian).

36 Law of Georgia on Entrepreneurs, Article 38, Clause 1, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021.

37 *Chanturia L.,* Ninidze T., Commentary on Law of Georgia on Entrepreneur, 3rd ed. Tbilisi, 2002, 305, (in Georgian).

38 Brožová S., The Nature and Legal Effects of Shareholders Agreements in the Czech and Slovak Private Law and its Interpretation, European Scientific Journal, Vol. 15, No. 31, 2019, 4.

39 *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Maghradze G., Egnatashvili D.,* Corporate Law*,* 1st ed., Tbilisi, 2021, 330, (in Georgian).

40 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1077-2018, 21.11.2019, paras. 11.1 and 17, (in Georgian).; Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-612-571-2017, 28.07.2017, para. 24.4, (in Georgian).

41 *Rhee R.J.,* The Tort Foundation of Duty of Care and Business Judgment, Notre Dame Law Review, Vol. 88, No. 3, 2013, 1183.

42 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1319-2018, 21.05.2021, para. 171, (in Georgian).

protection of the interests of the corporation so that the rights of the minority partners are not violated by the dominant partners.

3.2. Annulment of the Minutes of the General Meeting

3.2.1. Formal Grounds for the Invalidity of the Decision of the General Meeting

The decision of the general meeting is a voidable transaction and, thus, can be declared invalid if the essence does not comply with the legislation of Georgia, and the requirements of the company's statute, and the violation is substantial.[43] The annulment of the minute of the general meeting makes sense when the decision of the partner or partners is disputed by another partner, whether the legitimate interest of the claimant is justified and the annulment has legal consequences for the plaintiff.[44] In the case of annulment, it is determined whether the violation is procedural or substantial, and it ought to be determined whether the interests of the company are damaged.[45]

The violation of the procedural requirements is the absolute formal ground for the invalidity of the decision of the general meeting,[46] since the partner of a company has active processual status;[47] therefore, the general meeting ought to be convened and certified in accordance with the statute of the company and the provisions of the law; in particular, the competent person must convene the general meeting, and the partners must be invited to the meeting as it is established by the statute, the writing notice pertaining to the convention of the general meeting must contain the brand name of the company, the place, date or time of the general meeting.[48] The formal ground of the consolidated law on Entrepreneurs is enumerated in detail, then it was in the invalid law.[49] In the case of a violation of the procedure of convening the general but all the partners attend the meeting and give their consent for convening the meeting and they do not require to postpone the meeting, then the formal criteria of the annulment are excluded.[50] The decision of partners should not create an unequal situation for or violate the interest of other partners, moreover, the formal aspect of the decision-making should be adhered to, in particular, if the decision-making requires a unanimous vote, it must be adopted

---

43 Law of Georgia on Entrepreneurs, Article 93, Clause 1, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021.

44 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-73-73-2018, 23.03.2022, para. 23, (in Georgian).

45 *Sáez M.I., Riaño D.,* Corporate Governance and the Shareholders' Meeting: Voting and Litigation, European Business Organization Law Review, Vol. 14, No. 3, 2013, 368.

46 *Gaina V., Gaina A.,* The Legal Regime of the Decisions Adopted by the General Assembly of Members/Shareholders of the Commercial Company (GAM), Conference Paper: Supplement of Valahia University Law Study, *Stan M. (ed.)*, Târgoviște, 2017, 249.

47 *Daghie D.,* Considerations on the Annulment of the Resolution Issued by the General Meeting of Shareholders, Conference Paper: Supplement of Valahia University Law Study, *Stan M. (ed.)*, Târgoviște, 2019, footnote 21, 143.

48 Law of Georgia on Entrepreneurs, Article 39, Clause 1, Subclause a-d, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021.

49 Comp. Law of Georgia on Entrepreneurs, Article 9^1, Clause 1 and 2, Legislative Herald of Georgia, 21-22, 28/10/1994 [Invalid Legal Act since 02.08.2021].

50 Law of Georgia on Entrepreneurs, Article 36, Clause 7, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021.

unanimously.[51] If it is clear from the minutes of the general meeting that the voting rights of the partners are violated or the fiduciary duties of partners are infringed, in this case, the decision of the general meeting is declared invalid in accordance with the judicial practice of Germany, Austria and Czechia.[52]

The duty of information of the partner is a significant criterion for the possible invalidation of the decision of the general meeting, this principle prevents the director from the deliberate decisions.[53] In some cases, the ground of the annulment was the legal capacity of the general meeting, when the number of the partners attending the general meeting in question was not enough for the quorum.[54] However, the invalidation of the decision depends not only on the quorum if the decision is not made unanimously on the issue which arises from the uncommon course of business that is not based on the purposes provided for by the statute, therefore, the declaration of the will of all partners is necessary.[55]

To sum up, the violation of the procedural requirements is an absolute formal ground for declaring invalid the decision of the general meeting, in particular, the general meeting should be convened and certified in accordance with the statute of the company and the provisions of the law; the new law on entrepreneurs has detailed description of the criteria for the drafting the minutes of the general meeting, which is the reflection of the judicial practice in the law. The purpose of the strict regulation of the law is to prevent deliberate decisions of the directors, ensure the quorum, protection of the rights of partners and the principles of informing the partner.

3.2.2. Substantial Grounds for the Invalidity of the Decision of the General Meeting

The decision made by the majority should not put any partner in an unequal position,[56] in this case, the discussion of the content of the minutes of the general meeting is critical. The court considers and assesses the subject of the minutes, it assesses the declared will and juxtaposes it to the facts, comparing them and making conclusions; after the consideration of all these, the court decides the practicability of the annulment of the minutes; It is important for the court that, after the examination of the parties, the explanations of the parties do not contradict the content of the minutes of the general meeting of partners, which affects the inner conviction of the court. [57]

---

51 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-48-2022,16.09.2022, para. 34, (in Georgian).

52 *Laprade F.M.,* Rights and Obligations of Shareholders, National Regimes and Proposed Instruments at EU Level for Improving Legal Efficiency, Study of Directorate-General for Internal Policies of European Parliament, 2012, 59.

53 Decision of the Panel of Civil Cases of the Tbilisi City Court, Case №2/27085-21, 03.06.2022, para. 6.2, (in Georgian).

54 *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Maghradze G., Egnatashvili D.,* Corporate Law*,* 1st ed., Tbilisi, 2021, 325, (in Georgian).

55 Judgement of the Civil Chamber of the Court of Appeals, Case №2ბ/90-19, 25.12.2019, para. 31, (in Georgian).

56 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1319-2018, 21.05.2021, para. 139, (in Georgian).

57 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-558-2021, 26.06.2022, para. 19, (in Georgian); Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-477-2020, 20.10.2022, (in Georgian).

The decision of the general meeting may be annulled and invalidated in full or part if the decision does not fall within the scope of authority of the general meeting under the statute if the general meeting made a decision on an amendment which contradicts the law, if the decision contravened provisions of law primary purpose of which was to protect the creditors' rights, if the decision contravened public order or moral standards.[58] The decision made by dominant partners at the general meeting ought to be in concordance with the development goals of the company or fulfilment of its undertaken obligations, and not to the personal interests of the dominant partners.[59] In order to protect the rights of the partner the invalidation of the decision is possible if the minority partner does not consent to it,[60] since the minority partner can appeal against the decision in the case his/her own rights are violated and the legitimate interests exist,[61] and the annulment of the minutes of the general meeting has legal consequences for the plaintiff,[62] i.e., the violated right of the plaintiff will be able to restore.[63]

The substantial part of the general meeting is assessed by the grounds of avoidance of a transaction, such as avoidance of transaction under duress, including the duress by the third parties,[64] which can be identified if the case of duress is mentioned in the minutes of the general meeting.[65] The person with the right of rescission can apply to the court based on the provisions of the civil code of Georgia concerning the validity and avoidance of a transaction.[66] Therefore, on the ground of the rescission of an authorised person, the court applies the legal requirements of the avoidance of a transaction;[67] the law demonstrates it by stipulating that one of the grounds for the annulment of the decision is that it contradicts the law and moral standards. However, the main principle of the court for invalidating the minutes of the general meeting when it is rescinded by a partner or partners, is that the

---

58 Law of Georgia on Entrepreneurs, Article 39, Clause 1, Sub-Clause e, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021.

59 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-73-73-2018, 23.03.2022, para. 18.3.1, (in Georgian).

60 *Catea R.,* Practical Aspects Regarding the Claim for the Annulment of the Resolutions of the General Meeting of Shareholders, from a Substantial and Procedural Perspective, Lex ET Scientia International Journal, No. 24, Vol. 2, 2017, 16.

61 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-979-2022, 27.12.2022, para. 18, (in Georgian).

62 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-502-2020, 27.09.2022, para. 11, (in Georgian).

63 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1841-2019, 30.09.2020, para. 17, (in Georgian).

64 Judgement of the Civil Chamber of the Court of Appeals, Case №2ბ/2309-2019, 25.12.2019, para.8, (in Georgian).

65 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-33-33-2018, 02.08.2019, para. 23.1-23.3, (in Georgian).

66 *Chanturia L.,* Ninidze T., Commentary on Law of Georgia on Entrepreneur, 3rd ed. Tbilisi, 2002, 305, (in Georgian).

67 *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Maghradze G., Egnatashvili D.,* Corporate Law*,* 1st ed., Tbilisi, 2021, 327-330, (in Georgian).

annulment must have its legal consequences for the partners, the partner must have his/her legitimate interest, and the annulment must be prerequisite for restoring the violated rights.[68]

Unlike Georgia, the court of Denmark has the competence to change the content of the minutes of the general meeting and declare it invalid in full.[69] Georgia has its own solid judicial practice when the decision of the general meeting cannot be declared invalid, moreover, the court does not discuss the legitimacy of its content, in particular, the decision on the dismissal of the director.[70] The Georgian judicial practice is a correct approach as long as the decision of the general meeting is the inter-partner relationship and the court should not have control over that matter,[71] − it is impossible to resolve the corporate policies and inter-partner relationship with the involvement of the court;[72] the decisions on the governance of the company are made at the general meeting and the courts are limited to monitoring the protection of the minority partners' rights.[73] It is noteworthy, that the skills of the director, who enforces the decision of the general meeting, is critical for the development of the company, therefore, the partners have the right to dismiss the director at any time to mitigate risk.[74] Besides, the partner who sells his/her shares of a company and preserves the right of redemption, before the seller redeems her/his shares, the buyer-partner has all the rights and obligations of the partner; hence the former partner who redeems the shares has no opportunity to appeal against the decisions made by the partner prior the redemption.[75] In accordance with the EU directive,[76] the transparency of the norms and provisions regulating the relationship between the company and third parties, as well as the relationships among the members of the corporation is essential; in order to protect the third parties, it is important to restrict the possibilities of invalidating the transactions between the company and third parties for those obligations which entered into force, as well the

---

68 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-731-2021, 30.09.2021, (in Georgian).

69 Laprade F.M., Rights and Obligations of Shareholders, National Regimes and Proposed Instruments at EU Level for Improving Legal Efficiency, Study of Directorate-General for Internal Policies of European Parliament, 2012, 98.

70 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-477-2020, 20.10.2022, (in Georgian).

71 *Zurabiani L.,* Essence, Function and Reception of the Business Judgment Rule in the Corporate Law of Georgia, German-Georgian Journal for Comparative Law, №5, 2020, 41, (in Georgian).

72 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1059-2019, 20.09.2019, para. 28, (in Georgian).

73 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1141-2018, 30.11.2018, II-3.2, (in Georgian).

74 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-612-571-2017, 28.07.2017, para. 24.3, (in Georgian).

75 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-896-2019, 30.11.2021, para. 20, para. 38, (in Georgian).

76 The implementation of this very directive is envisaged by the Association Agreement between The EU and Georgia, *see: Bakakuri N., Gelter M., Tsertsvadze L., Jugeli G.,* Corporate Law, Tbilisi, 2019, 37-50, (in Georgian).

retroactive force of the annulment, and the third parties should have time to object to any declaration of nullity.[77]

To sum up, the decision made at the general meeting is an agreement between partners, the agreement is a voidable transaction and, thus, is subject to the provisions of the civil code of Georgia as well as the provisions of the Law of Georgia on Entrepreneurs. As for the content of the minutes of the general meeting, the court considers and assesses the declared will and juxtaposes it to the facts, comparing them and deciding whether to declare null or declare the validity of the decision of the general meeting. The decisions ought to be under the scope of authority of the general meeting, should not contradict the law, public order and moral standards, and should protect the creditors' rights. The decision ought to conform with the interests of the company, the development goals of the corporation and the fulfilment of the undertaken obligations, as well as the interest of the minority partners must be protected. The substantial part of the general meeting is assessed by the grounds of avoidance of a transaction, such as avoidance of transaction under duress, including the duress by the third parties, which can be identified if the case of duress is mentioned in the minutes of the general meeting. The decisions which regulate inter-partner relationships are rarely annulled or are not invalidated by the court unless the minority partners' rights are violated, protection of which is observed by the court.

The main purpose of the formal and substantial avoidance of the minutes of the general meeting is to protect the interests of the company without violation of the minority partners' rights, as well as to prevent the deliberate actions of the director. The director is responsible for the negative consequences that result from the execution of the decisions of the general meeting, which are based on the will of the dominant partner, therefore the decision of a partner or partners is not subject to unconditional enforcement if the best interests of the company are compromised. For the partner's part, the minority partner has the right to protect her/his rights by the rescission of the decision of the general meeting as well as filing an application to claim for damage from the director. Consequently, the partner and the body of a company with management powers can file the application for the annulment of the minutes of the general meeting.

4. The Annulment of the Minutes of the General Meeting and Methods of Legal Protection of Third Parties

4.1. Determination of Power and Preventive Measures

4.1.1. Scope of Authority of the General Meeting

The annulment of the decisions of the general meeting has serious legal consequences for the creditors, for instance, when the company decides whether to take out a credit or pledge collateral.[78] The developed countries of Europe do not have a unified approach to what scope of authority the

[77] Directive (EU) 2017/1132 of the European Parliament and of the Council Relating to Certain Aspects of Company Law (Codification), Official Journal of the European Union, Document 32017L1132, 2017, recitals 5-6.

[78] Decision of the Panel of Civil Cases of the Tbilisi City Court, Case №2/27085-21, 03.06.2022, (in Georgian).

general meeting is and when the director needs its consent; some countries consider the matters of taking out credits from financial institutions, collaterals to loans under the powers of the general meeting, and others of the director.[79] Moreover, it is important to determine what is ordinary and what is the uncommon course of business in order to be more specific about the matters when the decision must be made by the general meeting. Some scholars reckon that the credit agreements with banks in a prudential amount are the company's ordinary course of business,[80] and the decisions on the ordinary course of business are made by the directors; matters about the uncommon course of business are decided by the general meeting.[81] However, there is no single approach in the practice regarding the determination of the company's ordinary and uncommon course of business, every case must be assessed individually and the company ought to prove what is within the scope of the course of business and what is not.[82]

The corporate law of Georgia, in turn, obliges companies and the body of a company with management powers to enforce the decisions under the scope of authority of the general meeting.[83] In addition, the director is responsible for observing the procedure for convening the general meeting.[84] Therefore, in the case of the defect of will, the validity of the agreement between the director and third parties depends on the good faith of the contracting party,[85] since good faith is the founding principle of the law of obligations,[86] it is the cornerstone of civil circulation and a general principle of guidance for private law relations.[87] The good faith of the contracting parties is set if the decision to enter the obligation relations with the company is based on the information registered in the companies register;[88] accordingly, the source for determining the scope of the body of a company with management powers is the statute of the company which is publicly accessible in Georgia.

---

79 *Van der Elst C.,* Shareholder Rights and Shareholder Activism: The Role of the General Meeting of Shareholders, Annals of the Faculty of Law – Belgrade Law Review: Journal of Legal and Social Sciences, Vol. 59, No. 3, 2012, 54-57.

80 *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Maghradze G., Egnatashvili D.,* Corporate Law*,* 1st ed., Tbilisi, 2021, 322-323, (in Georgian).

81 *Van der Elst C.,* Shareholder Rights and Shareholder Activism: The Role of the General Meeting of Shareholders, Annals of the Faculty of Law – Belgrade Law Review: Journal of Legal and Social Sciences, Vol. 59, No. 3, 2012, 55.

82 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-197-2020, 16.10.2020, para. 33, (in Georgian).

83 *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Maghradze G., Egnatashvili D.,* Corporate Law*,* 1st ed., Tbilisi, 2021, 316, (in Georgian); Law of Georgia on Entrepreneurs, Article 34, Clause 4, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021.

84 *Sáez M.I., Riaño D.,* Corporate Governance and the Shareholders' Meeting: Voting and Litigation, European Business Organization Law Review, Vol. 14, No. 3, 2013, 373.

85 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-559-2019, 04.12.2019, para. 307, (in Georgian).

86 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1416-2022, 07.02.2023, para. 61, (in Georgian).

87 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1252-2020, 29.09.2021, (in Georgian).

88 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-559-2019, 04.12.2019, para. 307, (in Georgian).

Consequently, it is essential, before the third party accepts the decision of the general meeting of the companies and enters into the agreement with them, that the contracting parties assess the content of the minutes of the general meeting, conformity to the company's statute and the legislation of Georgia. The third parties, with all the information at their disposal, must be convinced that the company declared the will to enter into the obligation relations with them appropriately.

4.1.2. Determination of Powers of Management

The company may rescind the contracts with the third parties if it was concluded the management powers of the body of a company were limited, the third party and the person with powers of representation act together to damage the company.[89] A limited powers of management of the body of a company implies, in turn, defining the scope of the powers of representation and powers of management under the statute of the company and laws.[90] Consequently, the third party must consider the case when the director and the dominant partner are the same person. In this case, the minutes of the general meeting exist formally, and the will of the company is declared, nevertheless, the minority partners enjoy extensive procedural rights and may file an application to the court for the violated rights in question if the company has suffered the damage.[91] Therefore, the minutes of the general meeting and all the contracts concluded based on the minutes will be annulled if the agreements with the third parties are damaging to the company and the minority partner proves at the court. In these circumstances, the third parties must check the publicly accessible information about the company, they must be convinced that the power of representation is not limited and then enter into the agreement with the company for the purpose of complying with the standards of good faith.

As was mentioned, the court declares the minutes of the general meeting invalid if the annulment contributes to the restoration of the violated right and the plaintiff has a legitimate interest; in other cases, the court considers that the legal ground for the annulment of the decision of the general meeting is not present. Evaluating the judicial practice, it is important to check all those documents which are accessible publicly by the banks so as not to doubt the good faith of their intentions; particularly, in contractual relations, the companies have to envisage all the legal risks and assess those as equal part of the transaction.[92]

---

89 Law of Georgia on Entrepreneurs, Article 42, Clause 3, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021; Law of Georgia on Entrepreneurs, Article 9, Clause 4, Legislative Herald of Georgia, 21-22, 28/10/1994 [Invalid Legal Act since 02.08.2021]

90 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-197-2020, 16.10.2020, para. 28, (in Georgian).

91 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-687-658-2016, 06.11.2018, (in Georgian).

92 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-310-2022, 16.12.2022, para. 18, (in Georgian); Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-354-2021, 25.06.2021, para. 112, (in Georgian); Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1417-2018, 16.11.2020, para. 17, (in Georgian).

4.2. Change in the Partners and Validity of the Minutes of the General Meeting

The judicial practice of Georgia sets apart inter-corporate relations and relationships with third parties for the purposes of simplifying civil rotation.[93] Companies and their partners are separated from each other as two independent persons − the partner not as an owner, but as a beneficiary.[94] Consequently, the partners' common will forms the company's common will thus it is essential to discuss the cases when the company declared its will earlier and after its declaration the partner was changed.

The rights and obligations of a partner vary depending on the shares the partner owns in the company.[95] The decision of the general meeting doesn't need to be voted unanimously, the common will of the company is declared by the partners attending the general meeting and voting for or against the proposed subject matter.[96] Unless otherwise provided for by the statute, a limited liability company adopts a decision by a majority of three-quarters of the votes of participants in voting.[97] Therefore, if the party of credit relationships, such as surety, owner of the collateral, borrower, or co-borrower, is a legal person, then a bank examines the statute of the company, the powers of representation and powers of management of the body of a company, then the bank evaluate formal and substantial part of the minutes of the general meeting, the data about the partners and the information confirming their scope of power, what decisions partners made, whether all the partners participated at the general meeting or not, the general meeting had the right to make a decision; if some partners did not participate in the meeting then the general meeting must be certified by the notary and in this case the bank examines if there is mentioned that the procedure for convening the general meeting was observed. In case the company submitted the minutes of the general meeting to the bank, on the basis of which it enjoys the credit products, or the company is the owner of the collateral, it is a surety, but then a partner or partners are changed, in particular, a new partner has entered or a successor has replaced the previous partner, the bank examines the shares with voting rights of the new partner in the company to provide the company with a new credit product or add a new collateral owner of which is the company. If the bank discovers that after presenting the minutes of the general meeting, the shares of the partners have been distributed in such a way that the remaining partners with less than 70% of the shares give their consent on a specific matter, then the bank asks the company to present new minutes of the general meeting, which approves the previous decisions of the general meeting

---

93 Decision of the Constitutional Court of Georgia on the Case №1/1/543 "Metalinvest LLC" v. the Parliament of Georgia, 29.01.2014, II-19, (in Georgian); Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-197-2020, 16.10.2020, para. 30, (in Georgian).

94 *Jugeli G., Giguashvili G.,* Commentaries on the Draft Law of Georgia on Entrepreneur (Edition of 09.02.2021), Tbilisi, 2021, 42, (in Georgian). 42, (in Georgia); Law of Georgia on Entrepreneurs, Article 20; Law of Georgia on Entrepreneurs, Article, 5^8, Clause 3, Legislative Herald of Georgia, 21-22, 28/10/1994 [Invalid Legal Act since 02.08.2021].

95 The Complete List of Shareholder Rights, ob., <https://bit.ly/3ZUdlvy>[09.04.2023]

96 *Uliasz R.,* Procedural Flaws of Shareholders' Resolutions – A Comparative Approach, Review of European and Comparative Law, Vol. 51, No. 4, 2022, 95–96.

97 Law of Georgia on Entrepreneurs, Article 124, Clause 3 and Article 195, Clause 3, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021.

pertaining to the disbursement of the credit products and the use of the company's property as collateral, acting a company as a surety.[98] Unlike the banks, the National Agency of Public Registry of the Ministry of Justice of Georgia has a different practice; in case the company has earlier submitted the minutes of the general meeting to complete a registration procedure of a mortgage agreement, the agency always requires a renewed decision of the partners when the partner or partners are changed in the company's ownership structure; the agency does not take into account the percentage of the shares that are changed.[99] If all the company's shares come to be held by a single partner, when the single-partner company applies to the bank, the bank requires the decision of the partner which considers the disbursement of credit products, the permission to the management body of a company to use company's own property as collateral to secure the obligation,[100] while the National Agency of Public Registry does not require a decision of a partner to complete a registration procedure in case the partner and the director are the same person.[101]

The approach of the banks is an additional protection procedure to avoid the annulment of the minutes of the general meeting and observe the good faith standard. The decisions of the general meeting create, change or terminate a civil-law relationship,[102] it is subjected to the provisions of the civil law regulating the transactions; therefore, the institution of Subsequent Consent (Approval) applies,[103] which has retroactive force, and the expressed will is valid from the moment of the conclusion of the voidable transaction.[104]

The banks and the Agency have different approaches to the assessment and evaluation of the validity of the minutes of the general meetings and the decision of the partner; the practice of the Agency is based on Article 8, Clause 3 of the Law of Georgia "on the Public Registry" stipulating that "a registration body may request the submission of additional documents or information related to the registration procedure that is necessary to make a decision on the issue raised in the application"; and the Agency interprets the validity of the declaration of will in accordance to the civil law of Georgia.[105] The different practice of the Agency is determined by the fact that the Agency protects

---

98 Deep Interviews with the employees of the TBC JSC were conducted from the 27th of Mart to the 3rd of April of 2023 (original is kept to the Author), (in Georgian).

99 The Response of the National Agency of Public Registry of the Ministry of Justice of Georgia, № 112768(original is kept to the Author), (in Georgian).

100 Deep Interviews with the employees of the TBC JSC were conducted from the 27th of Mart to the 3rd of April of 2023 (original is kept to the Author), (in Georgian).

101 Deep Interviews with LLC Index were conducted on the 15th of May 2023 (original is kept to the Author), (in Georgian); The Response of the National Agency of Public Registry of the Ministry of Justice of Georgia, № 112768(original is kept to the Author), (in Georgian).

102 *Sikorska-Lewandowska A.,* The Legal Nature of Resolutions of the Governing Bodies of Companies and Their Challengeability in the Light of the Provisions of Polish Law, Acta Iuris Stetinensis, Vol. 27, No. 3, 2019, 153.

103 Civil Code of Georgia, Article 101, Parliamentary Gazette, 31, 24/07/1997.

104 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1412-1332-2017, 14.11.2018, para. 1.3.5, para. 1.3.6, (in Georgian).

105 The Response of the National Agency of Public Registry of the Ministry of Justice of Georgia, № 112768(original is kept to the Author), (in Georgian).

itself from the alleged annulment of the minutes of the general meeting as long as the registration body cannot complete the transactions that may be invalidated based on the law.[106]

The approaches of banks and the National Agency of Public Registry to determine the validity of the minutes of the general meeting differ. The banks take into account the changes in the company's ownership structure; if the shares of the new partner or partners exceed 70%, banks require the company to submit a renewed decision of the general meeting, while the Agency requires the minutes without fail. In case the director and the partner are the same person, the Agency does not need a decision of the partner for the purpose of completing the registration procedure, but the decision of the partner is essential for the banks in any case. Therefore, the bank and the Agency try to establish their standard of the validity of the minutes of the general meeting or the decision of the partner to avoid the future annulment of the document.

4.3. de lege ferenda, The Principles of Law for the Legal Protection of Third Parties

The judicial practice of Poland demonstrates that the minutes of the general meeting may be annulled on the basis of the provisions of the civil code stipulating that a transaction may be declared invalid,[107] in case a legal transaction which is contrary to the law or intended to circumvent the law,[108] and based on the provisions relating to the defect of the declaration of will.[109] However, the provisions of the civil code are not applied separately from the law on Entrepreneurs, but in harmony with it, and based on the procedure provided for in the corporate laws.[110]

The law of Georgia on Entrepreneurs, likewise, stipulates the management body of a company, a member of that body, or a participant partner in the general meeting has the right to file an application for the annulment of the decision of the general meeting if it substantially violates the requirements of the legislation of Georgia or the statute.[111] The corporate law of Georgia is unclear regarding the consequences of the annulment of the minutes of the general meeting. The law obliges the management body to submit to the registration authority a legally effective court decision on the annulment of a decision of the general meeting and the previously registered decision ought to be changed.[112] Following the teleological interpretation of the law, the invalidation of the decision of the general meeting is possible in cases when, as a result, the changes in the registry authority are necessary. However, as the practice indicates the annulment of the minutes is not an independent

---

106 Commentaries on the Civil Code of Georgia, Book II, Law of Things, Chanturia L. (ed.), Tbilisi, 2018, 530, (in Georgian).

107 *Smanio I.,* Admissibility of Using the Provisions of the Polish Civil Code as a Basis for Declaring Resolutions of Meetings of Capital Companies Invalid, Prawo i Więź, No. 35, Vol. 1, 2021, 29.

108 Case C-520/21, Arkadiusz Szcześniak v. Bank M. SA [ECJ], Opinion of Advocate General Collins, delivered 16 February 2023(1), para. 7.

109 *Smanio I.,* Admissibility of Using the Provisions of the Polish Civil Code as a Basis for Declaring Resolutions of Meetings of Capital Companies Invalid, Prawo i Więź, No. 35, Vol. 1, 2021, 36.

110 Id., 42.

111 Law of Georgia on Entrepreneurs, Article 93, Clause 1 and Clause 2, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021.

112 Id., Article 39, Clause 2 and Article 40, Clause 1.

claim, but a prerequisite for other claims,[113] thus, the authorised body, whether it is a director, a partner or a group of partners, applies for the annulment of a voidable transaction concluded with third parties, even if the annulment of the minutes of the general meeting is not directly claimed, but indirectly the claim implies the annulment of the minutes as well, the court will consider the issue and if the court satisfies the claim it also indirectly declares the decision of the general meeting invalid.[114]

The court applies not only the Law on Entrepreneurs but also the Civil Procedure Code of Georgia, the judicial practices of ECtHR[115] and the Civil Code of Georgia,[116] that demonstrates the wide range of argumentation processes for the judgment. A judge is not a law-maker, a judge interprets what is already a part of the legal materials[117] and is limited to the claim of the parties of the lawsuits.[118] The interpretations of the judge are not his/her personal opinion of what is right and what is wrong, but the individuation of law from the principles of law,[119] from the various areas of law, established in the network of legal rules, with the determination of the structure of the law and finding the connections with other laws.[120] Furthermore, to resolve the case, the court must maintain balance so as, on the one hand, not to intervene in the scope of powers of the general meeting, and not to violate the principle of autonomy of the company and the general meeting,[121] and on the other hand, to refer to the principles of the law. The facts are necessary for the courts to resolve the case, every case depends on fact-finding;[122] the parties of the lawsuits are responsible for the facts, especially, the factual circumstances on which the parties base their claim or counterclaim,[123] and the court cannot correct procedural mistakes made by the parties during the litigation.[124] Consequently, if the declaration of the will of partners has the ground for the annulment of the minutes of the general

---

113 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-33-33-2018, 02.08.2019, para. 31, (in Georgian); Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1841-2019, 30.09.2020, paras. 18-19, (in Georgian).

114 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1199-2019, 20.01.2022, para. 31, (in Georgian).

115 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-731-2021, 30.09.2021, para. 17, para. 22, paras. 31-33, (in Georgian), Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1319-2018, 21.05.2021, para. 132, (in Georgian).

116 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1319-2018, 21.05.2021, para. 106, (in Georgian).

117 *Partsvania M.,* Contra Legem: Interpretation: A Curious Decision from the Practice of Administrative Legal Proceedings, Journal "Legal Methods", №3, 2019, 99.

118 Civil Procedure Code of Georgia, Article 248, Parliamentary Gazette, 47-48, 31/12/1997.

119 *Partsvania M.,* Contra Legem: Interpretation: A Curious Decision from the Practice of Administrative Legal Proceedings, Journal "Legal Methods", №3, 2019, 58.

120 *Penner J.,* The Individuation of the Law of Property, New York, 1997, 38.

121 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1141-2018, 30.11.2018, II-3.1 და II-4, (in Georgian).

122 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-558-2021, 26.06.2022, para. 10, (in Georgian).

123 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-354-2021, 25.06.2021, para. 102, (in Georgian).

124 Id., para. 101.

meeting, nevertheless, the court finds that nothing would have been changed in the content of the minutes, in this case, the court should not declare the minutes invalid as long as the main principle for the annulment of the decision of the general meeting is when the basic rights of partners are violated.[125]

The good faith of the contractual party must be considered if the court declares null and void the minutes of the general meeting based on which the credit agreement was concluded. The creditor ought to examine all the accessible documents which provide an additional basis for the claim for damages under the tort liability.[126] The violation of the fiduciary duty by a director is part of tort law.[127] A partner or creditor has the right to claim damages based on tort liability if the director breaches fiduciary duty.[128] The duty of the director to the partner does not run directly but through the corporation, thus, it is not easy to determine the duty of the director to the partners.[129] Moreover, limited powers of the bodies of a company flowing from the statute or the decisions of authorised bodies, cannot be employed against the third parties, even if the decision is published.[130] In practice, as theoretically provided for in the doctrine, the powers of the director and the powers of the company should be separated; the court speaks of the need for separation of powers even when the director and the partner are the same person.[131] Since the partner-director enjoys the dominant power to influence the internal corporate relations and external relations with the third parties, minority partners, therefore, should protect their rights by not claiming for the annulment of the minutes of the general meeting, but by claiming for the compensation of damages the company suffered by the director.[132]

In order to bring about a conclusion, the court is limited to the factual circumstances on which the parties of lawsuits based their claim when considering the case of the annulment of the minutes of the general meeting. When Interpreting the Law of Georgian on Entrepreneurs, the court may apply to the civil code of Georgia and the principles of laws. Therefore, any cases of the annulment of the decisions of the general meeting depend on the legal tactics of the parties in the litigation, in particular, what facts are presented to the court and how the principles of law are used in the course of the legal argumentations.

---

125 *Sáez M.I., Riaño D.,* Corporate Governance and the Shareholders' Meeting: Voting and Litigation, European Business Organization Law Review, Vol. 14, No.. 3, 2013, 375.

126 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1199-2019, 20.01.2022, para. 41, (in Georgian).

127 *Rhee R.J.,* The Tort Foundation of Duty of Care and Business Judgment, Notre Dame Law Review, Vol. 88, No. 3, 2013, 1142.

128 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1199-2019, 20.01.2022, para. 42, (in Georgian).

129 *Rhee R.J.,* The Tort Foundation of Duty of Care and Business Judgment, Notre Dame Law Review, Vol. 88, No. 3, 1183-1184.

130 Directive (EU) 2017/1132 of the European Parliament and of the Council Relating to Certain Aspects of Company Law (Codification), Official Journal of the European Union, Document 32017L1132, 2017, art. 9, para. 2

131 Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-851-795-2017, 20.04.2018, para. 19, (in Georgian).

132 id.

5. Conclusion

The dualist system of a capital company separates the powers and responsibilities of the director and partner, even if the partner is the director of the company. The general meeting has broad powers and comprises the decisions regarding the uncommon course of business of a company and the votes cast by a majority of partners constitute and shape the will of the company itself. The validity and declaration of will of a partner are certified in the minutes of the general meeting. The responsibility of the director is to execute the decisions of the partners and to protect the company from all the negative consequences that result from the enforcement of the minutes of the general meeting. In case the partner poses a threat to the interest of the company, the body of a company with management powers can take measures against this partner to protect and secure the interests of the company and file an application for claiming the annulment of the minutes of the general meeting or decision of the partner. The purpose of any decision in a company, in turn, is to protect the interests of the company so that the rights of the minority partners are not violated by the dominant partners. The minority partner has the possibility to protect his or her rights by appealing against the decision of the general meeting as well as filing an application for claiming damages the company suffered from the director.

The court examines formal and substantial grounds for the annulment of the decisions of the general meeting, in particular, if the minority partners' rights are protected. If a partner rescinds the decision of the general meeting, the court declares the minutes null and void in the following cases: 1) the annulment of the decision has legal consequences for the partner; 2) the legitimate interest of the partner is justified, and 3) the restoration of the plaintiff's right is possible. The law of Georgia on Entrepreneurs is vague regarding the consequences of the annulment of the minutes of the general meeting. According to the law the invalidation of the decision of the general meeting is possible in cases when, as a result, the changes in the registry authority are necessary. However, the court clarifies that the annulment of the partners' decision is not an independent claim, but a prerequisite for other claims, in particular, if the statement of claim considers the avoidance of such transactions which caused damages for the company, but the annulment of the minutes of the general meeting is not directly claimed, the court invalidates the transactions and, thus, indirectly declares the decision of the general meeting invalid.

The annulment of the decisions of the general meeting has serious legal consequences for the third parties such as the creditors and registration authority. The Law of Georgia on Entrepreneurs does not define the ordinary course of business and uncommon course of business, neither legal doctrine nor judicial practice has a common approach to the issue. The unified criteria for assessing the validity of the minutes of the general meeting do not exist, which is why the banking institutions and the National Agency of Public Registry have diverse approaches.

Good faith is the only method for banks to protect themselves from the negative consequences resulting from the annulment of the minutes of the general meeting. The good faith is set, when deciding to have the obligation relations with the company, by the information the contractual party possesses. The accessible information must be registered in the companies register; therefore, it is essential, before the financial institution accepts the decision of the general meeting of the companies and enters into the agreement with them, that the contracting parties assess the content of the minutes

of the general meeting, conformity to the company's statute and the legislation of Georgia and must be convinced that the power of representation is not limited.

Analysing private and judicial practice, there are different approaches for assessing the validity of the minutes of the general meeting. In addition, the Law of Georgia on Entrepreneurs is unclear and does not provide substantial criteria for the annulment of the minutes. Consequently, the corporate law and the general provision of the civil code are utilized together. It must be mentioned that civil laws have to be employed in the context of the interpretation of the Law of Georgian on Entrepreneurs so that the interests of all parties of the transactions be observed. To protect the third parties, it is essential to restrict the possibilities of invalidating the transactions between the company and third parties for those obligations which entered into force.

Bibliography:

1. Law of Georgia on Entrepreneurs, Legislative Herald of Georgia 875-Vრს-Xმპ, 02/08/2021.
2. Directive (EU) 2017/1132 of the European Parliament and of the Council Relating to Certain Aspects of Company Law (Codification), Official Journal of the European Union, Document 32017L1132, 2017, <http://data.europa.eu/eli/dir/2017/1132/oj> [04.07.2023].
3. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE),<https://eur-lex.europa.eu/eli/reg/2001/2157/oj> [04.07.2023].
4. Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 31/12/1997.
5. Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997.
6. Law of Georgia on Entrepreneurs, Legislative Herald of Georgia, 21-22, 28/10/1994 [Invalid Legal Act since 02.08.2021].
7. *Burduli I., Makharoblishvili G., Tokhadze A., Zubitashvili N., Aladashvili G., Maghradze G., Egnatashvili D.,* Corporate Law, 1st ed., Tbilisi, 2021, 316, 321-323, 325, 327-330 (in Georgian)
8. *Bakakuri N., Gelter M., Tsertsvadze L., Jugeli G.,* Corporate Law, Tbilisi, 2019, 37-50, (in Georgian).
9. *Brožová S.,* The Nature and Legal Effects of Shareholders Agreements in the Czech and Slovak Private Law and its Interpretation, European Scientific Journal, Vol. 15, No. 31, 2019, 4.
10. *Catea R.,* Practical Aspects Regarding the Claim for the Annulment of the Resolutions of the General Meeting of Shareholders, from a Substantial and Procedural Perspective, Lex ET Scientia International Journal, No. 24, Vol. 2, 2017, 16.
11. *Chanturia L.,* Corporate Governance and Liability of Directors in Corporation Law, Tbilisi, 2006, 305, (in Georgian).
12. *Chanturia L.,* Ninidze T., Commentary on Law of Georgia on Entrepreneur, 3rd ed. Tbilisi, 2002, 117, 305, (in Georgian).
13. Commentaries on the Civil Code of Georgia, Book II, Law of Things, *Chanturia L.* (ed.), Tbilisi, 2018, 530, (in Georgian).
14. *Daghie D.,* Considerations on the Annulment of the Resolution Issued by the General Meeting of Shareholders, Conference Paper: Supplement of Valahia University Law Study, *Stan M.* (ed.), Târgoviște, 2019, 143.
15. *De Jong A., Mertens G.,* Roosenboom P., Shareholders' Voting at General Meetings: Evidence from the Netherlands, ERIM Report Series, 2004, 3.

16. *Gaina V., Gaina A.,* The Legal Regime of the Decisions Adopted by the General Assembly of Members/Shareholders of the Commercial Company (GAM), Conference Paper: Supplement of Valahia University Law Study, Stan M. (ed.), Târgoviște, 2017, 241, 242, 249.
17. *Jugeli G., Giguashvili G.,* Commentaries on the Draft Law of Georgia on Entrepreneur (Edition of 09.02.2021), Tbilisi, 2021, 42, (in Georgian).
18. *Laprade F.M.,* Rights and Obligations of Shareholders, National Regimes and Proposed Instruments at EU Level for Improving Legal Efficiency, Study of Directorate-General for Internal Policies of European Parliament, 2012, 59, 98, 106.
19. *Makharoblishvili G.,* Dogmatic-Theoretical Separation of Entrepreneurial Entities on the Foundation of Capital Companies, Journal of Law, №2, 2011, 107-108, (in Georgian).
20. *Miller S.K.,* Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of the German, United Kingdom, and French Close Corporation Problem, Cornell International Law Journal, Vol. 30, No. 2, 1997, 385, 386.
21. *Partsvania M.,* Contra Legem: Interpretation: A Curious Decision from the Practice of Administrative Legal Proceedings, Journal "Legal Methods", №3, 2019, 58, 99, (in Georgian).
22. *Penner J.,* The Individuation of the Law of Property, New York, 1997, 38.
23. *Rhee R.J.,* The Tort Foundation of Duty of Care and Business Judgment, Notre Dame Law Review, Vol. 88, No. 3, 2013, 1142, 1183, 1184.
24. *Sáez M.I., Riaño D.,* Corporate Governance and the Shareholders' Meeting: Voting and Litigation, European Business Organization Law Review, Vol. 14, No. 3, 2013, 368, 373, 375, 390.
25. Shareholders' Duties, *Birkmose H.S.* (ed.), Wolters Kluwer, 2017, 355.
26. *Sikorska-Lewandowska A.,* The Legal Nature of Resolutions of the Governing Bodies of Companies and Their Challengeability in the Light of the Provisions of Polish Law, Acta Iuris Stetinensis, Vol. 27, No. 3, 2019, 153.
27. *Smanio I.,* Admissibility of Using the Provisions of the Polish Civil Code as a Basis for Declaring Resolutions of Meetings of Capital Companies Invalid, Prawo i Więź, No. 35, Vol. 1, 2021, 29, 36.
28. *Spasevski D.,* General Meeting of Shareholders According to the Legal Framework of Germany, United Kingdom and North Macedonia, Iustinianus Primus Law Review, Vol. 10, No. 1, 2019, 11.
29. *Udrescu D.,* Theoretical and Practical Aspects Concerning the Causes for Annulment of GMS Decisions, The Annals of "Dunarea de Jos" University of Galati Fascicle I, Economics and Applied Informatics, Vol. XV, No.2, 2009, 847.
30. *Uliasz R.,* Procedural Flaws of Shareholders' Resolutions – A Comparative Approach, Review of European and Comparative Law, Vol. 51, No. 4, 2022, 95-96.
31. *Van der Elst C.,* Shareholder Rights and Shareholder Activism: The Role of the General Meeting of Shareholders, Annals of the Faculty of Law – Belgrade Law Review: Journal of Legal and Social Sciences, Vol. 59, No. 3, 2012, 54-57, 63.
32. *Zurabiani L.,* Essence, Function and Reception of the Business Judgment Rule in the Corporate Law of Georgia, German-Georgian Journal for Comparative Law, №5, 2020, 41.
33. *Zurabishvili T.,* Qualitative Methods in Social Research, Tbilisi, 2006, 6-7, (in Georgian).
34. Case C 520/21, Arkadiusz Szcześniak v. Bank M. SA [CJEU], Opinion of Advocate General Collins, delivered16 February 2023(1).

35. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1416-2022, 07.02.2023, (in Georgian).
36. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1353-2022, 23.01.2023, (in Georgian).
37. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-979-2022, 27.12.2022, (in Georgian).
38. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-310-2022, 16.12.2022, (in Georgian).
39. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-868-2021, 20.10.2022, (in Georgian).
40. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-477-2020, 20.10.2022, (in Georgian).
41. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-54-2022, 28.09.2022, (in Georgian).
42. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-502-2020, 27.09.2022, (in Georgian).
43. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-48-2022,16.09.2022, (in Georgian).
44. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-558-2021, 26.06.2022, (in Georgian).
45. Decision of the Panel of Civil Cases of the Tbilisi City Court, Case №2/27085-21, 03.06.2022, (in Georgian).
46. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-73-73-2018, 23.03.2022, (in Georgian).
47. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1251-2021, 11.02.2022, (in Georgian).
48. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1199-2019, 20.01.2022, (in Georgian).
49. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-896-2019, 30.11.2021, (in Georgian).
50. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-731-2021, 30.09.2021, (in Georgian).
51. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1252-2020, 29.09.2021, (in Georgian).
52. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-354-2021, 25.06.2021, (in Georgian).
53. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1319-2018, 21.05.2021, (in Georgian).
54. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1417-2018, 16.11.2020, (in Georgian).

55. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-197-2020, 16.10.2020, (in Georgian).
56. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1841-2019, 30.09.2020, (in Georgian).
57. Judgement of the Civil Chamber of the Court of Appeals, Case №2ბ/2309-2019, 25.12.2019, (in Georgian).
58. Judgement of the Civil Chamber of the Court of Appeals, Case №2ბ/90-19, 25.12.2019, (in Georgian).
59. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-559-2019, 04.12.2019, (in Georgian).
60. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1077-2018, 21.11.2019, (in Georgian).
61. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1059-2019, 20.09.2019, (in Georgian).
62. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-33-33-2018, 02.08.2019, (in Georgian).
63. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1141-2018, 30.11.2018, (in Georgian).
64. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-1412-1332-2017, 14.11.2018, (in Georgian).
65. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-687-658-2016, 06.11.2018, (in Georgian).
66. Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-851-795-2017, 20.04.2018, (in Georgian).
67. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-612-571-2017, 28.07.2017, (in Georgian).
68. Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia, Case №ას-863-813-2015, 17.12.2015, (in Georgian).
69. Decision of the Constitutional Court of Georgia on the Case №1/1/543 “Metalinvest LLC” v. the Parliament of Georgia, 29.01.2014, (in Georgian).
70. The Response of the National Agency of Public Registry of the Ministry of Justice of Georgia, № 112768(original is kept to the Author), (in Georgian).
71. Deep Interviews with LLC Index were conducted on the 15th of May 2023 (original is kept to the Author), (in Georgian).
72. Deep Interviews with the employees of the TBC JSC were conducted from the 27th of Mart to the 3rd of April of 2023 (original is kept to the Author), (in Georgian).
73. <https://bit.ly/3ZUdlvy> [09.04.2023].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7702

Maia Kopaleishvili*

Impeachment of the President and the practice of the Constitutional Court of Georgia

The article discusses the conclusion of the Constitutional Court of Georgia on the impeachment of the President. On October 16, 2023, the Constitutional Court of Georgia rendered a conclusion "On Violation of the Constitution by the President of Georgia" (case № 3/1/1797). In the practice of proceedings of the Constitutional Court, consideration of the issue of impeachment took place for the first time therefore, it has a precedential value. The present article discusses the extent to which the Constitutional Court has realized the importance of constitutional control when concluding the issue of impeachment.

The article presents the essential shortcomings of evaluating the issue by the court. In particular, the article discusses the effectiveness of constitutional control, the issue of the autonomous content of the constitutional terms, the formal definition of the norms of the constitution, and the issue of the normative content and establishing the facts by the court.

Three judges expressed a dissenting opinion on the mentioned conclusion. The article reviews the issues that point out the dissenting opinion.

The article also scrutinizes the legal nature of the conclusion rendered by the court.

Keywords: *Impeachment of the President, Conclusion of the Constitutional Court, Status and Authority of the President, Normative Content of the Constitutional Norm, Rule of Autonomous Interpretation of the Constitutional Norm, Assessment of Facts by the Court, Legal Nature of the Conclusion.*

1. Introduction

On October 16, 2023, the Constitutional Court of Georgia rendered a conclusion "On Violation of the Constitution by the President of Georgia"(case №3/1/1797).[1] In the practice of proceedings of the Constitutional Court, the issue of impeachment took place for the first time therefore, it has a precedential value. Thus, the approaches of the court presented in the conclusion may become decisive for evaluating the constitutionality of the actions of executives in the future. This article discusses the extent to which the Constitutional Court discerned the importance of constitutional control when concluding the issue of impeachment.

* Doctor of Law, Professor of Ivane Javakhishvili Tbilisi State University Faculty of Law, former member of the Constitutional Court of Georgia (2009-2019). https://orcid.org/0009-0004-7203-9147.

1 Conclusion № 3/1/1797 of the Constitutional Court of Georgia dated October 16, 2023 (in Georgian).

The issue of impeachment involves political and legal importance. The legal literature focuses on the political and the legal side of impeachment. In particular, impeachment is a mechanism to remove the official from office who, due to misconduct, no longer deserves trust. The purpose of the impeachment process is to find out whether the official has lost the trust of the people due to wrongdoing and what is more appropriate in the relevant situation – to retain the position or remove him/her from office. Evaluating this issue requires applying political criteria that is the entitlement of the political body – Parliament.[2] Notwithstanding the above, once the issue of impeachment is referred to the Constitutional Court to assess the constitutionality of the action, the issue takes legal significance. Following the case of the Georgian model, the participation of the Constitutional Court of Georgia in the impeachment procedure significantly changes the nature of the impeachment, initiating the impeachment procedure and rendering the final verdict is ensured by the Parliament – a political body, thus, the Georgian model of impeachment is a political-legal institution.[3]

According to Article 48, Paragraph 2 of the Constitution of Georgia,[4] the Constitutional Court of Georgia confirms/or does not confirm the violation of the Constitution by an official. The primary purpose of the Constitution is to assess the constitutionality of those actions that became the basis for impeachment. The Constitutional Court should refrain from evaluating the actions and/or alleged actions of the officials, which did not become the basis for raising the issue of removal from office by the process of impeachment. This is further clarified by Article 26, Paragraph 4 of the Organic Law of Georgia "On the Constitutional Court of Georgia", based on which, examining the case of impeachment of a person provided by the Constitution, the Constitutional Court evaluates only the action that is considered grounds for impeachment by the members of the parliament.[5]

Taking account of the fact that the opinion of the court may serve as the basis for the removal of an official provided by the Constitution, the role of the Constitutional Court is immense in assessing the constitutionality of the action of an official. In addition, "in the process of interpretation of the Constitution, the Constitutional Court must ensure the protection of the order established by the Constitution, the understanding of the provisions of the Constitution following their objectives and values."[6]

2. Factual Circumstances of the Case

2.1. The Norm of the Constitution which was Claimed to be Violated by the President of Georgia

The authors of the constitutional submissions believed that the President of Georgia violated Article 52, Paragraph 1, sub-paragraph "a" of the Constitution of Georgia: The President of Georgia

---

2 *Gotsiridze E.,* For the Political Nature of Impeachment, "Justice and Law" journal, №1(44)15, 19 (in Georgian).

3 *Khetsuriani J.,* The Power of the Constitutional Court of Georgia in the Impeachment Process, "Justice and Law" journal, № 2/3, 45/46, 53 (in Georgian).

4 Constitution of Georgia, Article 48 (in Georgian).

5 Organic Law of Georgia "On the Constitutional Court of Georgia", Art. 26, 4 (in Georgian).

6 Decision № 2/7/667 of the Constitutional Court of Georgia of December 28, 2017, on the case "JSC Telenet". against the Parliament of Georgia, II-62 (in Georgian).

shall: "with the consent of the government, exercise representative powers in foreign relations, negotiate with other states and international organizations, conclude international treaties, and accept the accreditation of ambassadors and other diplomatic representatives of other states and international organizations; upon nominations by the Government, appoint and dismiss ambassadors and other heads of diplomatic missions of Georgia" . In the course of hearing the case on the merits, only the following entry was identified as a disputed provision: "The President of Georgia, with the approval of the government, exercises representative powers in foreign relations, conducts negotiations with other states and international organizations...".

2.2. The Authors of the Constitutional Submission

On September 14, 2023, the members of the Parliament of Georgia[7] applied to the Constitutional Court of Georgia with a constitutional submission (registration No. 1797). Following the constitutional submissions, the president needs the approval of the Georgian government not only for conducting international negotiations and concluding international agreements but also for the exercise of representative authority in foreign relations in any form.

Following the constitutional submission No. 1797, the President of Georgia, Salome Zurabishvili, without the consent of the Government of Georgia, made three working visits (to the President of the Federal Republic of Germany on August 31, 2023, to the President of the European Council on September 1, 2023, and to the President of the French Republic on September 6, 2023) and within the framework of these visits held working meetings violating the requirement of the Constitution of Georgia.

2.3. Representatives of the President

The representatives of the President of Georgia noted that the President had not violated the Constitution. Article 52, Paragraph 1, sub-paragraph "a" of the Constitution of Georgia ought not to be completely understood as the president is bound by the government and cannot act in foreign relations without its permission. The constitutional status of the President of Georgia should be taken into consideration. Article 49 of the Constitution of Georgia defines the actual legal status of the President, according to which the President of Georgia is the head of the state of Georgia, the guarantor of the country's unity and national independence, and the Supreme Commander-in-chief of the Defense Forces of Georgia. The status of the President of Georgia provides the head of state with the authority to represent Georgia in foreign relations independently, within the framework of Article 49 of the Constitution, without the special consent of the government (paragraph 3 of Article 49 of the Constitution of Georgia). The authority granted to the President within the mentioned provision does not require the approval of the government. The Constitutional Court must distinguish between the normative content of Article 49, Paragraph 3 of the Constitution, and Article 52, Paragraph 1, sub-paragraph "a" of the Constitution. It is essential to evaluate the purpose of the mentioned norms in the constitutional and legal order. The President of Georgia acted in support of the European integration

[7] Irakli Kobakhidze, Shalva Papuashvili, Mamuka Mdinaradze, and other 80 members.

course announced by the government. The mere fact of a meeting does not constitute evidence that representative powers have been exercised or that negotiations have taken place. Diplomatic practice covers a wide range of activities, making treaties, or communication in formal formats. The exchange of ideas is the most important thing in diplomatic practice. Maintaining contact, relations, and communication between the heads of state plays a vital role in protecting the interests of the state and establishing friendly and trust-based relations between the countries. Such actions are necessary to build trust in the relationship and expand the circle of supporters of the country's interests.

3. Substantial Circumstances of Deficiencies in the Evaluation of the Issue by the Court

3.1. The Question of the Effectiveness of Constitutional Control

The Court jeopardized the effectiveness of constitutional control over the impeachment and left the final decision with the Parliament to make the final decision on the case. Although the impeachment is political,[8] the court should be guided by the principle that the actions of the official are evaluated following the values provided by the constitution, and in case of confirmation of the violation of the constitution, to ensure the stability of the constitutional order, the political subjects of the parliament will have to confirm the conclusion of the Constitutional Court. In particular, the court noted that "the court centers upon the following: despite the confirmation of the legal grounds of impeachment, it is constitutionally justified that the person who committed the impeachment act should not be removed from office. This indicates that signifying the Constitution, all kinds of "violations of the Constitution" or actions "with the signs of crime" do not create a real need for removal from office. The Parliament shall asses the need optionally in the presence using political criteria."[9] Also, "in addition, the court explains that the existence of a legal basis for the impeachment of the President does not oblige the members of the Parliament to support the verdict of impeachment. Solving the issue with political expediency, they should act with political criteria coordinating the idea of impeachment and make a decision accordingly." Henceforth, with such an interpretation, the Constitutional Court reduced the effectiveness of constitutional control on the issue of impeachment.[10]

3.2. The Issue of Autonomous Content of Constitutional Terms

The Constitutional Court clarified the content of Article 48 of the Constitution of Georgia. However, the court did not pay attention to the autonomous content[11] of constitutional terms. Their interpretation should be done taking account of the goals of the constitution, in this certain case, the goals of impeachment. In particular, the court refrained from defining important constitutional terms and indicated, "In the grounds of impeachment – "violation of the Constitution" or "presence of signs

---

8 *Gotsiridze E.,* For the Political Nature of Impeachment, "Justice and Law" journal, № 1(44)15, 19 (in Georgian).

9 Ibid, II-21.

10 Ibid, II-78.

11 Decision № 2/2/579 of the Constitutional Court of Georgia dated July 31, 2015, on the case "Georgian citizen Maya Robakidze vs. Parliament of Georgia", II-19 (in Georgian).

of crime" – the ordinary understanding of these concepts should be implied... According to the court, the autonomous definition of these terms would be necessary and relevant if the positive conclusion of the Constitutional Court automatically entails the dismissal of the relevant official, or if it exercises further constitutional control over the verdict of the Parliament.[12]

3.3. Formal Interpretation of Constitutional Norms by the Court and the Issue of Refraining from Verifying the Normative Content of Constitutional Norms

3.3.1. Article 49[13] of the Constitution of Georgia

The Constitutional Court did not take account of the status of the President of Georgia as the head of state and the powers, the normative content of Article 49 of the Constitution of Georgia, paragraph 3 of the same article, according to which the President of Georgia represents the country in foreign relations.[14] The court considered that the powers of the president should be specified individually in the constitution, while the constitution indicates that the president of Georgia exercises other powers defined by the Constitution (see. Article 52, Paragraph 1, subparagraph "h" of the Constitution of Georgia). Article 52 does not cover the mentioned issue but it might be verified in other articles of the Constitution. The court did not take into account that the content of the actions of an official must be evaluated by each specific individual case, and the Constitution cannot provide a certain list of actions. The court could not make a correct interpretation of the factual circumstances of the case considering the threat of "government arbitrariness" which eventually led the court to the wrong conclusion. In particular, the court noted: "The Constitutional Court clarifies that such a connection between the "status of the president" and the "powers of the president" does not mean the constitutional status of the president as the founder of the authority, which is not directly provided by the constitution. It might be the authority of an exclusive character shared with other constitutional body/bodies, or completely symbolic in nature. An ambivalence and indeterminacy of official powers of constitutional bodies will undermine the effectiveness of the system to separate powers and create the danger of arbitrariness. Therefore, it is inadmissible, based only on Article 49, under any component of the status of the president, to accept the power of the president, which is not defined by the norms of the constitution".[15]

This approach of the Constitutional Court is wrong because such an interpretation of the Constitution does not correspond to the constitutional order. It evolves the norms of the Constitution into a formal requirement and excludes the content. The norms of the Constitution and the status and authority of constitutional institutions should be interpreted by the principles of a legal, democratic

---

12 Conclusion № 3/1/1797 of the Constitutional Court of Georgia of October 16, 2023, II-20 (in Georgian).

13 Article 49. Status of the President of Georgia: 1. The president of Georgia is the Head of the state of Georgia and is the guarantor of the country's unity; 2. The president of Georgia is the Supreme Commander-in-Chief of the Defense Forces of Georgia; 3. The President of Georgia shall represent Georgia in foreign relations (in Georgian).

14 Constitution of Georgia, Article 49, 3 (in Georgian).

15 Conclusion № 3/1/1797 of the Constitutional Court of Georgia of October 16, 2023, II-37 (in Georgian).

state, constitutional values, and the constitutional requirement of integration into European and Euro-Atlantic structures.

The status of the head of state of Georgia confers a legal status on the president. The legal status in turn is a set of rights and duties that determines the position of the President, including in the system of foreign relations. Accordingly, the President of Georgia, as the head of state, acted following Article 49 of the Constitution, within the scope of her authority granted by the normative content of the standard. Accordingly, the court should have evaluated the three foreign visits as the powers of the president given by the Constitution.

3.3.2. Article 52, Paragraph 1, Sub-paragraph "a" of the Constitution of Georgia

The Constitutional Court did not observe the normative content of Article 52, Paragraph 1, sub-paragraph "a" of the Constitution of Georgia, but interpreted this norm in a formal and literal sense, and defined all the actions of the President, the grounds for impeachment in the context of Article 52, Paragraph 1, sub-paragraph "a". In addition, the Constitutional Court made a dangerous interpretation and considered that the President can only carry out all kinds of foreign relations with the approval of the Government of Georgia. The court rejected its practice, according to which the terms established by the Constitution have an autonomous meaning. It did not separate from each other the following terms provided by Articles 49 and 52 of the Constitution: "represents Georgia in foreign relations" and "performs representative powers in foreign relations with the consent of the government." In addition, the court misconstrued the facts and considered that the impugned meetings were inconsistent with the purposes of Article 52, Paragraph 1, sub-paragraph "a" of the Constitution. Fearing threats that the president might "undermine the government's competence in foreign relations,"[16] the court concluded that the president cannot represent Georgia in foreign relations without the consent of the government and the terms of Article 49, Paragraph 3, and Article 52, Paragraph 1, sub-paragraph "a" have the same normative content. This is a wrong assessment and contributes to the establishment of an anti-constitutional interpretation of the norms of the Constitution. Besides, we can recall the practice of the Constitutional Court, when considering one of the cases,[17] the same term ("legal the court verdict entered into force") provided by two different articles of the Constitution (Paragraph 5 of Article 31 and sub-paragraph "d" of Article 39, Paragraph 5) interpreted in different contexts. The court noted that the same entry specified in two different articles was subject to autonomous interpretation, taking into account the purpose of the norm. Considering the issue of impeachment, the court fully agreed with the authors of the submissions about their opinions, shared their definitions, and noted that " Following Article 52, Paragraph 1, sub-paragraph "a" of the Constitution, any conversation, a mutual exchange of ideas, making commitments or communications can be implied because they ensure a legal or political result, including an international agreement, and constitutes the implementation of foreign policy over which the government has the exclusive authority. The court mentions that if it shares the position of the president's representatives concerning the issue of "negotiations", the

[16] Ibid, II-52 (in Georgian).

[17] Decision № 3/2/1473 of the Constitutional Court of Georgia dated September 25, 2020, on the case "Nikanor Melia v. Parliament of Georgia", II-20-23 (in Georgian).

president's working visits and protocol meetings with officials indicate that the president exercised her representative authority in foreign relations under Article 52, Paragraph 1, sub-paragraph "a" of the Constitution.

As noticed, the court interprets the mentioned norm more broadly than the Constitution provides.[18]

3.3.3. Establishing the Facts by the Court

The court shared the position of the authors of the submission, without any investigation. Considering that all three disputed actions of the President of Georgia constituted negotiations for Article 52, Paragraph 1, sub-paragraph "a" of the Constitution, the authors of the submissions neither present the factual circumstances confirming this nor were they investigated by the court.

In particular, the court noted that during the working meetings with the presidents of the Federal Republic of Germany, the Republic of France, and the European Council, the President of Georgia represented the state and people of Georgia in foreign relations without the consent of the Government of Georgia, and held negotiations with the presidents of foreign states and international organizations on foreign political issues, the integration of Georgia into European Union in the capacity of the President of Georgia and compliance with the formal protocol.[19]

4. A Dissenting Opinion

The mentioned conclusion is followed by a dissenting opinion[20] of three judges (the Constitutional Court consists of 9 judges). Considering the number of authors of the dissenting opinion, it is clear how inappropriately the court (the conclusion was reached by 6 judges) underestimated the goals and purpose of the legal side of impeachment. The dissenting opinion indicates that the court incorrectly interpreted the constitutional mandate of the Institute of the President of Georgia, as well as the essence and purpose of the constitutional provision determining the consent of the government to the exercise of representative powers by the president in foreign relations. Simultaneously, converting the violation of the constitution considered as a basis for impeachment to a formal violation of any degree, the importance[21] of judicial control in this process decreased. Thus, the dissenting opinion presents the position of three judges.

5. The Conclusion of the Constitutional Court and its Legal Nature

In its conclusion, the Constitutional Court confirmed the violation of the Constitution by the President. The conclusion was sent to the Parliament on 18.10.2023. The Parliament of Georgia did not take into account the conclusion and did not impeach and remove the President from office.

---

18 Conclusion №3/1/1797 of the Constitutional Court of Georgia of October 16, 2023, II-64 (in Georgian).

19 Ibid, II-65 (in Georgian).

20 Dissenting opinions of the judges of the Constitutional Court of Georgia – Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi related to the Plenum of the Constitutional Court of Georgia dated October 16, 2023, № 3/1/1797 (in Georgian).

21 Ibid, 2.

There arises a question of whether the President is obliged to comply with the conclusion of the Constitutional Court or not, which confirmed the violation of the Constitution concerning the three European visits of the President on the issue of European integration. However, during the voting in the Parliament (18.10.2023), the political body did not decide on a removal of the President from office by impeachment.

First of all, the decision of the Constitutional Court should be distinguished from the conclusion on confirmation of a violation of the Constitution by the President, which is not supported by not less than two-thirds of the full composition of the Parliament during the voting at the Parliament session. As a rule, the decision is required to be implemented. Non-implementation or hindering implementtation of the court decision is punished by law.[22] The conclusion of the court on the impeachment procedure is not a decision, it is one of the acts of the Constitutional Court, and following the results of voting in the parliament, it may be mandatory or advisory in nature.[23] The conclusion of the court about the violation of the Constitution becomes binding only if the Parliament votes to support the decision to dismiss the official.

Although the court confirmed the violation of the constitution by the president, two-thirds of the full membership of the parliament did not support the conclusion during the voting at the parliament session. Considering the normative content of Article 48 of the Constitution, the official (the President of Georgia) is not removed from office and continues to hold office in the legal and institutional order provided by the Constitution.

Accordingly, from the moment when the Parliament did not decide on the impeachment of the President, № 3/1/1797, 16.10.2023, the conclusion of the Constitutional Court took a consultative nature, it does not have a binding character.

The conclusion (№ 3/1/1797. 16.10.2023) of the Constitutional Court is advisory which is indicated by the Constitutional Court following paragraph 78 of the conclusion. The court notes that the existence of a legal basis for the removal of the president from the position of the president by impeachment does not oblige the members of the parliament to support the impeachment verdict. Solving the issue of political expediency, they should act with political criteria corresponding to the idea of impeachment and make a decision accordingly.

It should be considered that the Constitutional Court of Georgia, according to the current legislation, cannot deviate from its authority in its conclusion and discuss the issue/action of foreign relations, which did not become the basis for impeachment. It is entitled to discuss only the constitutionality of those actions (actions/inactions) which, according to the constitutional submissions, became the basis for initiating the impeachment process. Accordingly, taking into account the advisory nature of the conclusion, the mentioned conclusion cannot become a punishment mechanism for the President of Georgia for future visits. The conclusion cannot create a basis for legal responsibility, and cannot serve to punish the official.

---

22 Constitution of Georgia, Article 62, Paragraph 1 (in Georgian).

23 *Kakhiani G.,* Constitutional Control in Georgia, Tbilisi, 2011, 259-261 (in Georgian).

6. Conclusion

The arguments and approaches of the court discussed in this article may contribute to the inefficiency of the constitutional control of the Constitutional Court, and impair the development of law and the practice of the court. This article will help to focus on the issues that are of essential importance for developing constitutional control and determining the correct practice of the court on the issue of impeachment.

Bibliography:

1. Constitution of Georgia, 24/08/1995 (in Georgian).
2. Organic Law of Georgia "On the Constitutional Court of Georgia", 31/01/1996 (in Georgian).
3. *Gotsiridze E.,* for the political nature of impeachment, "Justice and Law" journal,
№ 1(44)15, 19, 21, 78 (in Georgian).
4. *Khetsuriani J.,* The Power of the Constitutional Court of Georgia in the Impeachment Process, "Justice and Law" Journal, № 2/3, 45/46, 53 (in Georgian).
5. *Kakhiani G.,* Constitutional control in Georgia, Tbilisi, 2011, 259-261 (in Georgian).
6. Conclusion № 3/1/1797 of the Constitutional Court of Georgia dated October 16, 2023, regarding the violation of the Constitution by the President of Georgia (in Georgian).
7. Decision № 2/7/667 of the Constitutional Court of Georgia dated December 28, 2017, on the case "JSC Telenet" against the Parliament of Georgia (in Georgian).
8. Decision № 2/2/579 of the Constitutional Court of Georgia dated July 31, 2015, on the case "Georgian citizen Maya Robakidze against the Parliament of Georgia" (in Georgian).
9. Decision No. 3/2/1473 of the Constitutional Court of Georgia dated September 25, 2020, in the case "Nikanor Melia v. Parliament of Georgia", II-20-23 (in Georgian).
10. Dissenting opinion of the judges of the Constitutional Court of Georgia – Irine Imerlishvili, Giorgi Kverenchkhiladze, and Teimuraz Tughushi regarding the opinion of the Plenum of the Constitutional Court of Georgia of October 16, 2023 N3/1/1797 (in Georgian).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7703

David Lominashvili*

Challenges to Adopting a Complete Law in a Legal State

Nowadays, the law-making process in the legal state faces new challenges that are closely related to the rapid development of democratic processes in the states. Accordingly, as a key instrument to form legal states, maintain peace and unity among people and develop statehood, requires to be refined.

Keywords: *Rule of law, democratic society, law-making, law, parliament, principle.*

1. Introduction

Today, a big part of society agrees that the main value of democracy is the protection of human rights and freedom. From the perspective of protecting human rights, the complete law appears to be the most productive mechanism. Only the formal law-making process can ensure the realization of human rights. To achieve the aforementioned, it is necessary to fully reflect the fundamental elements of modern democracy in legal acts, which in turn, implies emphasizing the law-making process.

"For the law to enhance strong authority in the state and achieve effectiveness, it has to meet the requirements of modern legislative techniques. Legislative technique is a defined system of principles, and criteria, which must be followed in the process of creating legislative and legislative acts. Performing the technical side of law-making activity in a highly qualified manner is one of the essential prerequisites for making a perfect legislative base".[1]

2. Current Challenges

To obtain a complete law in a legal state, it is important to comply with the following requirements:

The clarity of the norm. The principle of a legal state ensures legal trust, which requires clarifying legal norms. The regulatory norms must be evaluated to identify a regulatory framework for interested parties to sufficiently clarify the specific legal situation and determine their actions. The regulation which refers to the restriction of a right, should be predictable and assessable for a citizen. Nevertheless, the real law-making does not always meet the requirements of the principle to clarify the norms. In this case, the court has a decisive role in determining human acts by law applying decisions, resolutions, and court rulings.

Systematicity and Non-contradiction[2]. The legal state imposes the relevant norms of the law that arrange for a citizen not to be vulnerable to conflicts of duties. This evades the norm collision leading to different and contradictory legal consequences.

---

* Doctor of Law, Professor of Technical University of Georgia. https://orcid.org/0009-0003-0204-287X.

1 *Bezhashvili L.,* Legislative Technique, a Methodical Textbook of Law-Making, Tbilisi, 2012, 10 (in Georgian).

2 *Khubua G.,* Theory of Law, Tbilisi, 2015, 50-56 (in Georgian).

Legislative control through the executive bodies[3]. In many countries, the Ministry of Justice has a branch that examines whether the procedure is by the law and the requirements of good law have been followed. For example, in Britain was created a group of civil servants and scientists who provided the government with sage pieces of advice to improve the efficiency of the state. A similar special instance can be created in the parliament where the decisions might be made based on relevant laws. The Members of Parliament usually have the pertinent knowledge and competence to understand and scrutinize the multifaceted requirements of good law.

Getting scientists involved in legislative procedures[4]**.** For example, in Germany, scientists are often asked for an expert opinion on the measurement of the effectiveness of the law in compliance with the constitution and identify individual requirements of the law in terms of socio-political, economic, ecological, etc.

Getting scientists engaged in public discussions. Laws are refined by getting the interested public groups involved in the legislative public hearings. Public discussions make clear the expectations of public groups from the new legal norms of the law. Public hearings allow arranged discussions with the public circles about the goals and individual provisions of the law, which can be considered as a mechanism for promoting the adoption of a "good law"

To manage the law-making process properly and raise the quality of legislation, it is important to ensure the main principles of law-making, which "are the basic and starting provisions of making a law".[5] Among these principles, it is important to note:

Generally recognized principles:

- The principle of equality before the law
- The principle of proportionality of public and private interests
- The principle of openness and expressing the opinion by the interested party[6]
- The principle of separation of powers

Fundamental specific principles of law-making:[7] The principle of exercising discretionary powers is described as a right to set the legal regulation by way of a subject who is granted such discretionary power.

- The principle of humanism[8]
- The principle of professionalism[9]

---

3 Regulatory impact analyzis, Best Practices in OECD countries, 1997, 33-89, http://www.oecd.org/gov/regulatory-policy/35258828.pdf> [01.08.2023].

4 Regulatory impact analyzis, Best practices in OECD countries, 1997, 33-89, http://www.oecd.org/gov/regulatory-policy/35258828.pdf> [01.08.2023].

5 *Bezhashvili L.,* Legislative Technique, a Methodical Textbook of Law-Making, Tbilisi, 2012, 16 (in Georgian).

6 *Sigali M.,* Seven Principles to Improve the Law-making Process in Georgia, 2005, 59-69 (in Georgian).

7 <https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet_3.23_FundamentalLegislativePinciples.pdf >, Fundamental legislative principles, updated July 2015.

8 Fundamental legislative principles, updated July 2015. <https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet_3.23_FundamentalLegislativePrinciples.pdf >, [01.08.2023].

- The principle of permanent technical perfection of the adopted legal act[10]
- We consider the importance of each principle to provide a complete law

The principle of equality before the law. The principle of equality before the law is one of the cornerstone principles in the legislative process. It is important to consider the precondition for the origin of the principle of equality before the law, "it was found as the basic principle of law even in antiquity. In the words of Pericles, the political leader of democratic Athens, "Athenian laws provided for equal justice to all, regardless of their private differences." (431 AD)" [11]

In 1776, Thomas Jefferson was charged by Congress with authoring the "Declaration of Independence of the United States of America". The Declaration claims: humans are created equal and that they are endowed by their Creator with certain inalienable Rights, that among them are: Life, Liberty, and the pursuit of happiness. To assert these rights, governments are formed, which receive their legitimate authority from the people.[12]

One aspect of the principle of equality before the law is equality in the legislative process. Equality in the legislative process implies the equal participation of all people in making the law that affects them. Equality in the legislative process can be direct and indirect.

The principle of proportionality of public and private interests. In lawmaking, "exercising discretionary powers, the paramount importance is attached to the principle of proportionality of public and private interests."[13] The essence of the principle of proportionality of public and private interests lies in the equal distribution of public and private interests in creating the legal norm.

In law-making, "when the bureaucratic apparatus of the ministries develops analysis and forecast of enhancement, the goals and priorities of the law which it should be based on, are determined by the parliament and the government. The goals and priorities provide information about the expected from the new regulatory norms. The goal is to strike a balance between public and private interests being in contradiction with each other and achieve a consensus-based compromise. It indicates the guidance for the law to change the social, economic, or political reality."[14]

"One of the most important conditions for the stability of the modern state is the correct and fair determination of priorities between private and public interests, the creation of a reasonably balanced system of relations between the government and people. This, first of all, finds expression in an adequate legal device of the content and scope of each specific right.[15] Adopting a specific legal norm,

---

9 *Bezhashvili L.,* Legislative Technique, a Methodical Textbook of Law-Making, Tbilisi, 2012, 51-88 (in Georgian).

10 Sigali M., Seven Principles to Improve the Law-making Process in Georgia, 2005, 69-76 (in Georgian)

11 *Gotsiridze E. et al.,* "The Right to Freedom and Equality before the Law", Commentary on the Constitution of Georgia. Chapter two. Georgian citizenship, Basic human rights and freedoms,Tbilisi, 2013, 59 (in Georgian).

12 America's Founding Documents <https://www.archives.gov/founding-docs/declaration>, [01.08.2023].

13 <https://geolaw.wordpress.com/2012/11/29/დისკრეციული-უფლებამოსილ/> [01.08.2023].

14 *Wurttemberg T.,* Procedural Aspects of Legislative Initiative, Georgian Law Review, 7/2004-2/3, 256 (in Georgian).

15 Decision N1/2/384 of the Constitutional Court of Georgia, July 2, 2007, on the case "Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze, and Neli Dalalishvili against the Parliament of Georgia" (in Georgian).

the Parliament should correctly assess the impact of the adopted legal norm on public and private interests, whether it can give priority to any of them or lead to the unjustified restriction of private interests. In case the restriction of public interests is inevitable, then the least harmful measures need to be introduced in the legislative process.[16] The principle of proportionality is a method applied by the constitutional courts of different countries of the world to eliminate the conflict between fundamental rights. In addition to the mechanism of the Constitutional Court, for example, the European Court of Human Rights also props the issue of public and private interests to maintain the balance between human rights, which requires the interpretation of the European Convention on the Protection of Human Rights that certainly leads to the challenges of law-making.[17]

During lawmaking, particular attention should be paid to the severity of the expected threat to legal welfare. This legal good is, on the one hand, a specific right, that needs to be limited, and, on the other hand, the protection of public interest requires to interfere with the right. If all the previous conditions, grounds, or rules for interference with the right are not clear enough, not only can this cause the risk of excessive interference with the right, but also the chance of wrongly satisfying public interests. Consequently, a reasonable and proportional rate of private and public interests cannot be achieved. Even such a norm regulating interference with the right cannot meet the requirements of the principle of proportionality."[18]

The principle of openness and expressing an opinion by the interested party[19]**.** For the development of a democratic society, the openness of the legislative process is important to adopt sophisticated and complete legislative acts, get the interested parties involved in the legislative process, and consider their views. Interested parties are citizens, the associations of citizens, specialists, experts, and non-governmental organizations, those who can be affected by the new legislative acts. They have the opportunity to provide advice and information to the persons implicated in the legislative process which will help a legislator to avoid undesirable results. The members of society, including minority groups, should have the opportunity to contribute to the drafting process and analysis.[20]

To make the law-making process open, the law-maker must ensure the timely delivery of the information related to the legislative process and the copies of bills to citizens, citizen associations, specialists, experts, and non-governmental organizations. The information related to the law-making process can be actively applied to introduce interested parties to:

- Mass media, particularly: newspapers, magazines, TV-radio programs, video and
- film documentaries, bulletins, books with a circulation of more than 500 and
- other periodical or one-time publications, if they are intended for public dissemination
- of information. Publishing houses, periodical press, television and radio broadcasting

---

16 <https://geolaw.wordpress.com/2012/11/29/ დისკრეციული-უფლებამოსილ/> [01.08.2023].

17 Proportionality: an assault on human Rights?, Oxford academic, international journal of constitutional law, Vol. 7, Issue 3, 1 July 2009.

18 Decision #1/3/407 of the Constitutional Court of Georgia, December 26, 2007, on the case "Young Lawyers Association of Georgia and Georgian citizen Ekaterine Lomtatidze against the Parliament of Georgia.

19 *Sigali M.,* Seven Principles to Improve the Law-making Process in Georgia, 2005, 59-69 (in Georgian).

20 Ibid.

- editorial offices, news agencies, and other institutions that produce and distribute various
- information;
- Official websites;
- Social networks;
- Communication technologies;
- Means of online dissemination of information;
- Direct meetings with citizens, citizens' associations, field specialists, experts and non-
- governmental organizations;
- Discussion about a bill in different focus groups.

The law-making process will be successful if after introducing the bill and the information related to the legislative process to the interested parties, the legislator considers their opinions, comments, and suggestions, collates them, estimates the expected results, and within the discretionary authority, makes a decision whether to take them into account or not. "The parliament has a special responsibility to protect the principles discussed above. The Parliament should ensure the publicity, clarity, and stability of laws, considering the opinions, comments, and proposals of the interested parties and make the appropriate decision" [21]

Based on the above, we can conclude that as a result of the openness of the law-making process and following the principle of presenting the opinion by the interested party, we will get refined, perfect, and such legal acts that express the interests of the voters.

The principle of separation of powers. In the process of law-making, it is important to correctly implement the principle of separation of powers and separate the functions between the branches of government. Developing laws often raises the question if the law should identify all the issues in detail during the application or if it is enough to regulate only the main issues and grant broad discretionary powers to the administrative bodies for implementing laws".[22]

To refine the law-making process, one of the challenges is to correctly implement the principle of separation of powers and functions between the branches of government. The legislative and executive authorities shall respect each other's competence which the majority of laws state today. Under the existing legal framework, the majority of laws regulate specific public relations and laws in the way of reducing instructions.

The norm of each law includes the main directions of domestic and foreign policy determined by the legislative authority. Also, it establishes the mechanisms to enforce a specific legal norm. An "optically correct means of making a decision is the circumstance when the decision is made by the body which meets the relevant prerequisites considering its organization, function, authority and procedural rules."[23]

---

21 "The Rule of Law-A Guide for Politicians" Raoul Wallenberg Institute of Human Rights and Humanitarian Law and The Hague Institute for the Internationalization of Law, 2012, 16 (in Georgian).

22 *Wuttenberger T.,* Procedural Aspects of Legislative Initiative, Georgian Law Review, 7/2004-2/3, 258 (in Georgian).

23 *Izoria L.,* Modern State and Modern Administration, Tbilisi 2009, 195 (in Georgian).

I think that the existing practice in Georgia for the legislative authority to make regulations by law, particularly, the issues arising while applying the law, should be reviewed because the main function of the legislative authority is to determine the main directions of the country's domestic and foreign policy through the implementation of the legislative authority. The main function of the executive branch is to enforce laws, rule a country, and implement domestic and foreign policies. So, the legislative authority should define the policy in-laws, and the executive authority has to create the mechanisms for its implementation and enforce it.

The principle of exercising discretionary powers in the legislative process only for the purpose for which the legislator has been granted the power. "Legal decisions made within the discretionary authority are the actions which have to be carried out based on legal authority. They are legally significant if they lead to the creation, modification or termination of obligations"[24] A legislator has the obligation to regulate a specific issue in a non-discriminatory manner. This obligation follows the law-making process despite the fact that it is aimed at the regulation of constitutional rights or legal interests..."[25]

"The Parliament of Georgia is the highest representative body of the country, which exercises the legislative power"[26] and adopts the laws that facilitate the development of the country, protect the rights of citizens, etc.

"Legislative activity is one of the most important functions of the Parliament. The authority vested in it by the basic law of the country determines a central place in the system of government bodies.[27]

Legislative bodies in democratic states are equipped with similar powers. The first part of the first article of the Constitution of the US claims "All legislative power herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives". Section 8 of the same article indicates that the Constitution grants the Congress of the US the power to make the laws that shall be essential and binding for executing the powers enumerated in Section 8 of the Constitution of America, and other powers provided by the Constitution are conferred upon the Government of the United States, or any department or an official.[28]

The texts of the constitution cover the following records: "has the right", "can issue laws", and "can adopt laws." The constitutions furnish the bodies with the legislative power and discretionary authority to adopt laws. Discretionary power provides freedom to the legislature to choose the most acceptable decision from several decisions in the legislative process and make the law that corresponds to the will of their constituents, the people who gave them the legislative power.

---

24 *Cipelius R.,* The Doctrine of Legal Methods, Munich 2006, 130 (in Georgian).

25 Decision of the Constitutional Court of Georgia of February 4, 2014 N#2/1/536, II-21. Citizens of Georgia – Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze against the Minister of Labor, Health and Social Protection of Georgia, (in Georgian).

26 Constitution of Georgia, The Parliament of Georgia 24/08/1995, Article 48., as of November 1, 2017 (in Georgian).

27 *Macharadze Z.,* Legislative Process in Bicameral Parliaments of Foreign Countries, Law Magazine "Sarchevi", N1-2(3-4), 2012, 154 (in Georgian).

28 Constitution of the United States of America 1787 (in Georgian).

"A state, in general, is based on justice and democratic legitimacy, not only is it important for interpretation, but also it facilitates a right choice of alternatives of action during making a decision within discretionary authority. Based on this, the administrative discretionary authority should legitimately strike a balance of interests, which is fair from the perspective of consensual representations of a majority of society. Briefly, the decision made within discretionary authority is not unquestionably free, but at least, according to its intention, it must make the right choice between different alternatives of action".[29]

To realize the mentioned principle in the law-making process, I think it is important to determine whether it is really necessary to implement legislative changes to achieve the goals and objectives, or if there are other alternative means of attaining the same goal because it is important to exercise discretionary powers only for that purpose which a legislator has been vested this authority in.

The principle of humanism. Protection of the principle of humanism in the legislative process means strengthening the rights and freedoms of citizens in the adopted legal act, respecting different opinions, and putting people of different beliefs and cultures on equal terms. Also, the principle of humanism includes adopting such legislative acts that get everyone to be treated equally, regardless of race, skin color, language, sex, religion, political and other views, national, ethnic, and social affiliation, origin, property, and rank status, place of residence.[30]

Respecting different opinions in the legislative process should be considered as a modern challenge of the legislative process. Legislators should carefully listen to people with various opinions, appreciate their views, and adopt laws by reaching a consensus with them.

As a rule, in the parliaments, one party or a union of parties has obtained the number of mandates that are sufficient to pass laws. Based on the current legislation, they legitimately have the right to adopt the laws they consider essential for the ascend of the country. The regulatory norms of the legislative process theoretically provide an opportunity to take into account the dissenting opinion of the opposition/minorities but practical provision of this has few legal guarantees. Naturally, in the mentioned case, the majority holds sizable advantages over the minority which leads to endangered humanistic value in the legislative process.

Talking about the principle of humanism in the legislative process, it is necessary to discuss the consequences of the non-fulfillment of the principle of humanism. It can lead to a rejection of the rights and freedoms of citizens, put people of different faiths or cultures in unequal conditions, and challenge comments, proposals, and dissenting opinions expressed concerning acceptable legal norms. This can cause conflict between members of society and neglect of legitimate interests of individuals with distinct views which might prevent the development of democracy and the establishment of peace and solidarity.

I think the development of law-making has reached the stage when the norms of regulating the legislative process need to be reviewed. It is essential to emerge the legal norms that will create

---

29 *Cipelius R.,* Doctrine of Legal Methods, Munich 2006, 134 (in Georgian).

30 *Steiner J., Woods L., Twigg-Flesner C.,* Textbook on EC Law, Oxford, University Press, 2003, 51-56, <http://www.open.edu/openlearn/ocw/pluginfile.php/637921/mod_resource/content/1/w100_4_reading18.pdf, [01.08.2023].

legislative guarantees to adopt legislation through accommodating an agreement with the people having different perspectives. For example, in the relevant legislative acts must be made a reservation that a bill will be considered adopted if it is supported by at least "X" deputies of the majority and more than "Y" deputies of the minorities. The members of the Parliamentary majority and minority must justify their decision and should not artificially prevent the adoption of laws aimed at the normal development of the country, and the realization of universally recognized human rights and freedoms in life.

Professionalism principle. In terms of legal techniques, the creation of sophisticated legal bills depends on professional lawyers, their skills, and practical experience. In democratic countries experienced lawyers successfully promote legislative activities. Developing countries are lacking in professional law-making lawyers which directly affects adopting legislative acts.[31]

It does not require additional reasoning that "A law is as precise as it uses the formal and plain language".[32] This means that concerning legal techniques laws must be sophisticated, complete, and properly redacted. The law should be drafted in such a way as to be intelligible, above all, to those directly affected by it because people cannot obey laws if they do not understand their meanings. Laws must not disclose gaps or conflicts in the light of certain interpretations.

Law-making can be a form of art; there is a space of creativity within the law because a lawmaker tries to express the will of a legislator concisely and comprehensively.[33] The law-maker has to incorporate the hypothesis, disposition, and sanction of law into one legal norm. Also, the law-maker should indicate the conditions and circumstances in the norm of law because their occurrence is necessary for implementing the rule established by the norm (hypothesis), developing a direct rule of conduct (disposition), and establishing coercive measures for violation of the rule of conduct provided for by the disposition (sanction).[34]

A legislator has a special responsibility as he/she has to ensure the conciseness and completion of laws and correctness in their editing which requires a lot of mental work, theoretical knowledge, and practical experience.[35]

Parliament members, civil servants, non-governmental organizations, experts, and specialists are involved in the legislative process. That is why these persons should have the appropriate education, knowledge, and experience to perform the work. Lawyers must be involved in the legislative process because the legal educational program includes those components that develop important skills for law-making.

We can consider the involvement and aspiration of states in the professional training of lawmakers for the improvement of their qualifications as a modern challenge to the legislative process.

---

31 *Sigali M.,* Seven Principles to Improve the Law-making Process in Georgia, 2005, 71-76 (in Georgian).

32 *Cipelius R.,* Doctrine of Legal Methods, Munich 2006, 136 (in Georgian).

33 Legislation handbook, The drafting process, <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/drafting-process.aspx>, [01.08.2023].

34 *Intskirveli G.,* General Theory of State and Law, Tbilisi University Publishing House, 2003, 155-165 (in Georgian).

35 *Sigali M.,* Seven Principles to Improve the Law-making Process in Georgia, 2005, 73 (in Georgian).

The principle of permanent technical completion of the adopted legal act. Many laws have been created throughout the history of humankind. Many of them laid the foundation for the legislative process and established new rules in life, which became the basis for the development of the legislative process and its completion.

The history of law-making has developed along with the state. The tradition of law-making has always been in coexistence with the formation of political power of a state. For example, based on the annals, Georgian statehood and law were formed in the first millennium BC which has experienced a lot of changes.

Friedrich Carl von Savigny, one of the founders of the historical school of law, believed that law developed over time and space along with society, its customs, culture, political system, and economic structure.[36]

Supporters of natural law believe that law does not change over time and it cannot be different in various societies. According to them, the improvement of legislation and making changes in it cannot occur in parallel with ascending society and states.[37]

Humanity has experienced amazing technical progress from the Stone Age to nanotechnology, therefore, the issued legal acts have been revised or require to be revised as well as new legal relationships need to be regulated. Adopted legal acts demand constant technical improvement following the development of civilization. It is necessary:

a) revise the applicable laws;

b) the existing legal framework should be brought into compliance with the requirements of modern society;

c) create a legislative basis for the establishment of new democratic governmental institutions;

d) New public relations should be regulated by legislation.

e) As the legal philosopher Lon Fuller said, laws should be general.[38]

According to all mentioned before, raising the quality and efficiency of the legislative process is of grea

3. conclusion

To conclude, in order to obtain efficiency in law it is essential:

Openness of the legislative process which means arranging consultations with interested parties and the public in an early stage of law-making. It is important to have a regulatory framework that identifies the details of consultation.

Based on the principle of equality the maximum involvement of citizens in the legislative process excludes the adoption of legislation that does not express their will.

Adopting a specific legal norm, the Parliament should protect proportionality and assess the impact of the adopted legal norm on public and private interests. If the restriction of private interests is

---

36 *Garishvili M.,* The Introduction to the Philosophy of Law, the Course of Lectures, 2010, 110 (in Georgian).

37 Ibid, 76.

38 <https://www.civiceducation.ge/ka/lessons/2-25> [01.08.2023].

inevitable, there should be used the least damaging means for private interests and compensation for the damage.

Making balance between branches of government. For this purpose, the legislative power should define the policy in the laws, and the executive power should have the means to enforce the laws, and the domestic or foreign policy of the country.

In the legislative process, discretionary authority should be exercised only for the purpose for which the legislator has been granted this authority.

Legislators shall listen attentively to people with different opinions, respect their views, and impose laws in a way of reaching a consensus.

Thus, to ensure the realization of human rights, it is important to fully deliberate the basic elements of modern democracy in legal acts, which in turn, implies accepting the principles of making a law in the law-making process.

We think that the democratic society has reached the stage of development when it is important to regulate issues to create a guarantee for the fulfillment of the tasks defined by the strategic documents of a country. For this, from the regulation defined with detailed legislative acts, we should move to legislative acts reflecting principles and policies.

Also, for the law-making process to be a productive mechanism for protecting human rights, it is necessary to:

Executive authorities should develop enforcement mechanisms for the laws imposed by legislative authorities.

The legislative authority must effectively use the control function of the government and monitor how well the executive authorities implement the main directions of the country's domestic and foreign policy defined by the laws.

We think that the observance of the above-mentioned universally recognized principles in the legislative process will create the legal guarantees and basis to establish a high standard of the legislative process and lead the entities involved in the legislative process to a new stage of development.

Bibliography:

1. Constitution of Georgia, The Parliament of Georgia 24/08/1995, Article 48., as of November 1, 2017 (in Georgian).
2. Constitution of the United States of America 1787 (in Georgian).
3. *Bezhashvili L.,* Legislative Technique, a Methodical Textbook of Law-Making, Tbilisi, 2012, 10, 16, 51-88 (in Georgian).
4. *Cipelius R.,* Doctrine of Legal Methods, Munich 2006, 130, 134, 136 (in Georgian).
5. Fundamental legislative principles, updated July 2015. <https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet_3.23_FundamentalLegislativePrinciples.pdf >, [01.08.2023].
6. *Garishvili M.,* The Introduction to the Philosophy of Law, the Course of Lectures, 2010, 110 (in Georgian).

7. *Gotsiridze E. et al.,* "The Right to Freedom and Equality before the Law", Commentary on the Constitution of Georgia. Chapter two. Georgian citizenship, Basic human rights and freedoms,Tbilisi, 2013, 59 (in Georgian).
8. *Intskirveli G.,* General Theory of State and Law, Tbilisi University Publishing House, 2003, 155-165 (in Georgian).
9. *Izoria L.,* Modern State and Modern Administration, Tbilisi 2009, 195 (in Georgian).
10. *Khubua G.,* Theory of Law, Tbilisi, 2015, 50-56 (in Georgian).
11. Legislation Handbook, The drafting process, <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/drafting-process.aspx>, [01.08.2023].
12. *Macharadze Z.,* Legislative Process in Bicameral Parliaments of Foreign Countries, Law Magazine "Sarchevi", #1- 2(3-4), 2012, 154 (in Georgian).
13. Proportionality: an assault on human Rights?, Oxford academic, international journal of constitutional law, Vol. 7, Issue 3, 1 July 2009.
14. Regulatory impact analyzis, Best practices in OECD countries, 1997, 33-89, http://www.oecd.org/gov/regulatory-policy/35258828.pdf> [01.08.2023].
15. *Sigali M.,* Seven Principles to Improve the Law-w, 2005, 73, 59-69, 71-76, 69-79 (in Georgian).
16. *Steiner J., Woods L., Twigg-Flesner C.,* Textbook on EC Law, Oxford, University Press, 2003, 51-56, <http://www.open.edu/openlearn/ocw/pluginfile.php/637921/mod_resource/content/1/w100_4_reading18.pdf>, [01.08.2023].
17. The Rule of Law-A Guide for Politicians" Raoul Wallenberg Institute of Human Rights and Humanitarian Law and The Hague Institute for the Internationalization of Law, 2012, 16 (in Georgian).
18. *Wuttenberger T.,* Procedural Aspects of Legislative Initiative, Review of Georgian Law 7/2004-2/3, 258 (in Georgian).
19. Decision N1/2/384 of the Constitutional Court of Georgia, July 2, 2007 on the case "Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili against the Parliament of Georgia" (in Georgian).
20. Decision of the Constitutional Court of Georgia of February 4, 2014 N#2/1/536, II-21. Citizens of Georgia – Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze against the Minister of Labor, Health and Social Protection of Georgia (in Georgian).
21. <https://www.civiceducation.ge/ka/lessons/2-25> [01.08.2023].
22. <https://geolaw.wordpress.com/2012/11/29/diskreciuli-uflebmosil/> [01.08.2023].
23. <https://www.archives.gov/founding-docs/declaration> [01.08.2023].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7704

Tamar Gvaramadze*

Fair Administrative Procedures and European Standards

The article reviews important international standards for the definition of the right to fair administrative procedures guaranteed by the Constitution of Georgia. It is important to ascertain the constitutional standard of rights and also determine the impact on already well-established standards of administrative proceedings within the framework of administrative law.

The research develops the opinion that the gradually advanced principles of modern good administration include the right to good governance, which refers to the right to fair administrative procedures protected by the Constitution of Georgia. As Georgia belongs to the European legal system, the practice of the European Court of Human Rights and the decisions of the Committee of Ministers of the Council of Europe are considered when discussing international standards. The article also examines the practice of the Constitutional Court of Georgia concerning the right to fair administrative procedures at the time of research.

In conclusion, following the practice of the European Court of Human Rights are the elements that define the right to fair administrative procedures, including making decisions: within a reasonable time, after a thorough examination of the circumstances accompanied by proper justification, protection of the legitimate trust of interested parties, making the balance between public and private interests, writing out the procedures clearly and obviously, etc.

Keywords: *Fair Administrative Procedures, Good Governance, Human Rights, European Court of Human Rights.*

1. Introduction

As a result of the most important changes made in the Constitution of Georgia in 2017, the supreme law of the country assigned the rights of academic freedom, physical inviolability and access to the internet to the number of fundamental human rights.[1] Also, it was included the rights to fair administrative procedures, access to public information, informational self-determination and compensation for damages caused by public authorities.[2] The first paragraph of Article 18 of the Constitution of Georgia states: "Everyone has the right to a fair trial conducted under the authority of

* Doctor of Law, Associate Professor of the Faculty of Law of Tbilisi Ivane Javakhishvili State University; First Deputy Public Defender of Georgia. https://orcid.org/0009-0001-9771-3175.

1 *Kublashvili K.,* Shortcomings and Challenges of the New Edition of the Constitution of Georgia, in Collection: Review of Constitutional Law, *Vardzelashvili K. (ed.),* #14, Tbilisi, 2020, 85-86, <https://ewmi-ruleoflawgeo.org/uploads/files/597114fpGEO.pdf.pdf.pdf> [14.08.2023].

2 Constitution of Georgia, Articles 17, 18, 27, The Gazette of the Parliament of Georgia, 31-33, 24/08/1995.

an administrative body within a reasonable time."[3] The fair administrative proceedings as a right are entrenched in Georgian legislation. The most important principles and procedural guarantees of administrative proceedings have been established by the General Administrative Code since 2000[4,] however, since 2017, the right to fair administrative procedures has acquired constitutional legal authority and significance.

The article aims to review the important international standards for the interpretation of the mentioned constitutional norm. On the one hand, it is valuable to provide the constitutional standard of the right. On the other, it is also essential to determine the extent of influence on already well-established standards of administrative proceedings within the framework of administrative law. In addition to the practical importance, this is the first attempt to discuss the issue in the academic space from this perspective which can inspire more and more in-depth scientific discussions in the future.

According to Professor Paata Turava, the basic right to fair administrative procedures binds three branches of government.[5] It makes legislative authority impose a law regulating administrative proceedings by the basic rights guaranteed by the constitution whereas the judicial and executive authorities are obliged to interpret the norms of the law in compliance with basic rights and ensure their enforcement accordingly.[6] The research and analysis of the standard of the right in all three directions is significant, however, within the framework of the article, the administrative fair procedures protected by the basic right are discussed to implement public administration. The practice of the Constitutional Court of Georgia is of great importance in defining the basic rights established by the Constitution. Taking into account a short period after implementing the 2017 amendments to the Constitution of Georgia and the long-term consideration of cases in the Constitutional Court, the court has made interpretations of the right to fair administrative proceedings in only a few cases which are briefly reviewed in the article.

As already mentioned, the article discusses international standards to define the right to fair administrative proceedings, which is one of the first attempts in the Georgian academic space. Georgia belongs to the European legal system, and when it comes to legal standards, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention) and the practice[7] of the European Court of Human Rights (hereinafter referred to as the Strasbourg Court), as well as the standards set by European Council of Ministers following the decisions of the committee[8], acquire particular importance.

---

3 Ibid, Article 18.

4 Law of Georgia "General Administrative Code of Georgia", Legislative Herald of Georgia, 32(39), 15/07/1999.

5 *Turava P.,* Fair administrative proceedings as a basic constitutional right and its institutional guarantee, in the collection of articles: Protection of human rights: legislation and practice, *Korkelia K. (ed.),* Tbilisi, 2018, 248, <https://library.iliauni.edu.ge/wp-content/uploads/2021/06/42.-adamianis-uphlebatha-datsva-kanonmdebloba-da-praqtika-statiatha-krebuli.pdf> [14.08.2023] [14.08.2023].

6 Ibid.

7 *Gvaramadze T.*, Georgian Administrative Law: From Soviet Era to European Standards, Book Title: Good Administration and the Council of Europe: Law, Principles, and Effectiveness, *Shtelkens Ul. Andrijauskaitė Ag.* (*eds.*), Oxford University Press, 2020, 707.

8 *Shtelkens Ul. Andrijauskaitė Ag.,* Added Value of the Council of Europe to Administrative Law: The Development of Pan European General Principles of Good Administration by the Council of Europe and

The practice of the Strasbourg Court is appreciable because of the amendments made to the law of Georgia on normative acts, which indicate that the application of the norms of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Additional Protocols, the definitions of the European Court of Human Rights are considered the official interpretations of the Convention norms and Additional Protocols. And the applicant of the mentioned norms can rely on these definitions.[9] Thus, the practice of the Strasbourg Court is of special importance for the formation and development of the domestic legal standard.

The article is concerned with the principles of good administration, however, considering the purpose and scope of the article, it is impossible to discuss in depth the concepts of public administration and good governance, as well as their relationship.[10] In addition, the article does not review different scientific opinions[11] about the correlation between public/good governance and the right to fair administrative procedures. The article accepts the opinion of some scientists[12] based on Article 41 of the EU Charter of Fundamental Rights which establishes the right to good administration.[13] Following the mentioned opinion, the gradually developed concept of modern good governance includes the right to good administration which refers to the right to fair administrative procedures protected by the Constitution of Georgia.

The methodology of the research involves general scientific (historical) analysis and special-normative, dogmatic, systematic, and comparative-legal research methods.

2. The Interpretations of the Constitutional Court of Georgia

The interpretations of the Constitutional Court of Georgia referring to fair administrative proceedings are scarce because they are only related to the evaluations made at the stage of accepting a few claims for consideration.[14] Despite the scarcity, these interpretations are still important. In the

their Impact on the Administrative Law of its Member States, Discussion Papers, 86, German Research Institute for Public Administration Speyer, 2017, 34-43.

9 Law of Georgia "On Normative Acts", Prima Article 7, Legislative Gazette, 33, 09/11/2009 (in Georgian).

10 *Comp. Kalichava K.,* Public Administration in the Perspective of Administrative Science, Textbook of administrative science, Volume IV, *Khubua G., Kalichava K. (eds),* Publications of the Institute of Administrative Sciences of TSU, Tbilisi, 2018, 63-86 (in Georgian).

11 Comp. *Eberhard B.,* The Concept of Public Administration, Handbook of Administrative Science, Volume IV, *Khubua G., Kalichava K. (eds.),* Publications of the Institute of Administrative Sciences of TSU, Tbilisi, 2018, 89-100 (in Georgian).

12 *Stelkens Ul., Andrijauskaitė Ag.,* Good Administration and the Council of Europe, Law, Principles, and Effectiveness, *Stelkens Ul., Andrijauskaitė Ag. (eds.),* Oxford University Press, First Edition, 2020, 109-112.

13 Charter of Fundamental Rights of the European Union, (2000/C 364/01), Official Journal of the European Communities, 18.12.2000, <https://www.europarl.europa.eu/charter/pdf/text_en.pdf> [17.08.2023].

14 Ruling of the Constitutional Court of Georgia No. 2/15/1403, in the case of Sulkhan Gvelesiani v. Parliament of Georgia, 2019, <https://constcourt.ge/ka/judicial-acts?legal=1794&scrollheight=2906.39990234375> [16.08.2023], Constitutional Court of Georgia Judgment No. 1/13/1560, in the case of Zauri Shermazanashvili v. Parliament of Georgia, 2021, <https://constcourt.ge/ka/judicial-acts?> [16.08.2023] (in Georgian).

ruling[15] on the case of Sulkhan Gvelesiani v. Parliament of Georgia, the court indicates that the constitutionally guaranteed right to timely and fair consideration of the case by an administrative body, within the framework of administrative proceedings, creates a procedural guarantee of protection of constitutional rights and/or-+legal interests.[16] Simultaneously, the Constitutional Court defines that the right to fair administrative proceedings is not related to providing the scope of material rights, but only makes the possibility of effective protection of such rights and interests.[17] Under the assessment of the Constitutional Court, the right is intervened when regulations limit the procedural guarantees related to the timely and fair consideration of the case in the administrative body.[18] However, the Court still has not discussed the meaning of the timeliness of a hearing and the elements of a fair hearing. For example, whether this right includes complying with the constitutional standard of convincing evidence, which is implicitly indicated in one of the rulings.[19]

Referring to one of the cases,[20] which was not accepted for consideration, the Constitutional Court notes that there is no universal definition of the concept of a fair process and invariable criteria. According to this assessment, the fairness of the process does not depend on the presence or absence of one specific aspect or element of the process in isolation, but on the course of the proceedings as a whole. Within the scope of this dispute, the court also indicated that the right to a fair trial includes, among other things, the right to impartial proceedings. The court points out that the requirement of impartiality to the administrative body applies not only to the decision but also to the process through which the decision is made. Following the court, the administrative body should perform its functions without nepotism or bias towards the participant in the proceedings. The court considered that the protection of the right to a fair procedure and ensuring impartiality could be achieved by inviting a relevant specialist/expert, based on which the administrative body has to make an unbiased decision.[21]

In the future, identifying the legal standard and defining the right by the court will be most important, therefore, the court indicates that the scope and extent of the right is determined following the relevant practice of the Constitutional Court.[22] For example, on February 25, 2021, the claim[23] was

---

15 Ruling of the Constitutional Court of Georgia No. 2/15/1403, in the case of Sulkhan Gvelesiani against the Parliament of Georgia, 2019, <https://constcourt.ge/ka/judicial-acts?legal=1794&scrollheight=2906.39990234375> [16.08.2023] (in Georgian).

16 Ibid.

17 Ibid.

18 Ruling of the Constitutional Court of Georgia No. 2/15/1403 Ruling in the case of Sulkhan Gvelesiani v. Parliament of Georgia, 2019, <https://constcourt.ge/ka/judicial-acts?legal=1794&scrollheight=2906.39990234375> [16.08.2023] (in Georgian).

19 Ruling of the Constitutional Court of Georgia No. 1/13/1560, in the case of Zauri Shermazanashvili v. Parliament of Georgia, 2021, <https://constcourt.ge/ka/judicial-acts?legal=11622&scrollheight=3020> [16.08.2023] (in Georgian).

20 Ruling of the Constitutional Court of Georgia No. 1/6/1608, in the case of Matsatso Tefnadze against the Government of Georgia, 2022, <https://constcourt.ge/ka/judicial-acts?legal=13669&scrollheight=4591.2001953125> [16.08.2023] (in Georgian).

21 Ibid.

22 Ruling of the Constitutional Court of Georgia No. 2/15/1403 Ruling in the case of Sulkhan Gvelesiani v. Parliament of Georgia, 2019, <https://constcourt.ge/ka/judicial-acts?legal=1794&scrollheight=2906.39990234375> [16.08.2023]. (in Georgian).

registered in the Constitutional Court – Levan Alafishvili, a legal entity of the Parliament of Georgia and a public law, against the director of the "Unified National Accreditation Body – Accreditation Center", in which the claimant challenges the constitutionality of the legal norm that provides the administrative body with the authority to establish rules of administrative proceedings different from legislative regulations. For instance, a specific rule – not to register the application of the interested person and not to start administrative proceedings if this application does not fully comply with the established requirements of the administrative body.[24] The court still has not decided to start considering the merits of this case however, its explanations will be significant.

3. European Standards of Good Administration

3.1. Principles of a Good Administration Defined by the Committee of Ministers of the Council of Europe

Having regard to pan-European administrative law, since the 70s of the last century, the recommendations of the Committee of Ministers of the Council of Europe have had particular importance as they define a good administration that pertains to the soft law.[25] For years, the Council of Europe had not been interested in the cases of administrative law, and these types of disputes had not been considered even by the Strasbourg Court.[26] Only in 1971, in the case of Ringeisen, the court indicated that the right to a fair trial could cover a case even if the domestic legislation of the country considered it as an administrative dispute, but in conformity with the requirements of Article 6 of the European Convention, it fell into the category of criminal or civil cases.[27] In the following years, with the development of the practice of the Strasbourg Court, the Committee of Ministers of the Council of Europe created standard procedures for additional protection. In the 70s the council began working on the procedures that were based on the report of four European scientists (Prof. Leobenstein (Vienna), Christenson (Copenhagen), Fromont (Dijon), Vade (Oxford).[28] They pointed out that while some international instruments protected criminal and civil rights, the similar was not practiced in the direction of administrative law. Professor Vade also proposed to adopt the Charter of Fair Administrative Procedures of the Council of Europe.

In 1971, the Committee of Ministers of the Council of Europe created a special sub-committee, which surveyed 17 member countries to study the main institutions of administrative law. Taking into

---

23 Constitutional lawsuit N1573, Levan Alafishvili, a legal entity of the Parliament of Georgia and public law against the director of the "Unified National Accreditation Body – Accreditation Center", 2021, <https://constcourt.ge/ka/judicial- acts?legal=10745&scrollheight=200> [25.08.2023] (in Georgian)..

24 Ibid.

25 *Stelkens Ul., Andrijauskaitė Ag.,* Good Administration and the Council of Europe, Law, Principles, and Effectiveness, *Stelkens Ul., Andrijauskaitė Ag., (eds),* First Edition, Oxford University Press, 2020, 100.

26 *Leuprecht M.,* The Contribution of the Council of Europe to Reinforcing the Position of the Individual in Administrative Proceedings, Roundtable with European Ombudsmen*,* Strasbourg, *1985,* 1-10.

27 Ibid.

28 *Leuprecht M.,* The Contribution of the Council of Europe to Reinforcing the Position of the Individual in Administrative Proceedings, Roundtable with European Ombudsmen*,* Strasbourg, *1985,* 4-5.

account the opinions of the mentioned sub-committee, the Council of Europe developed many recommendations regarding various procedural issues.[29]

In 1977, the Committee of Ministers of the Council of Europe approved the text of a very important resolution and defined five main principles to be followed and taken into account during the implementation of public administration.[30] In particular, the right of an interested person to submit opinions during the administrative proceedings, study the material related to the case, have a representative, make a reasoned decision, and get properly explained about the right to appeal[31], is the fundamental principle of modern administration.[32]

In subsequent years, the Ministerial Committee on Public Administration approved many other important recommendations. In 1980, the Council adopted Recommendation N (80) 2 concerning the Exercise of the Discretionary Powers.[33] Although the member states of the Council of Europe requested broader powers of administration, the document indicated that powers should not have been enforced in a biased manner or breached the scope of authority. Concerning discretionary authority, the recommendation included the following elements: a) the purpose for which this authority is granted; b) impartiality and objectivity; c) equality before the law; d) reasonableness and proportionality.[34]

In 1981, the Committee of Ministers approved a recommendation on ensuring access to information protected in public institutions. The Committee took into account all the main issues that modern regulation of access to public information requires.[35]

Recommendation Rec 2004 (20), which is related to the court control of administrative acts, is also important. It was adopted by the Committee of Ministers of the Council of Europe in 2004.[36]

Other recommendations approved by the Committee of Ministers establish important principles of public administration, which also protect human rights.[37] The Council of Europe approved the Code

---

29 Ibid, 1-10.

30 Council of Europe, Committee of Ministriters, Final Activity Report, Submitted to the Committee of Ministers, Strasbourg, 1977, 12-19, <https://rm.coe.int/native/0900001680516 51e> [17.08.2023].

31 Resolution (77) 31, On the Protection of the Individual concerning the Acts of Administrative Authorities, Council of Europe, Committee of Ministriters, 1977, <https://rm.coe.int/09000016804dec56> [15.10.2020].

32 *Gvaramadze T.,* Ombudsman Institute – as an alternative appeal mechanism in the field of public administration, Journal of Law, *Burduli Ir. (ed.),* #2, 2020, 147, <https://jlaw.tsu.ge/index.php/JLaw/issue/view/607/109> [17.08.2023] (in Georgian).

33 Recommendation No. R (80) 2, Concerning the Exercise of the Discretionary Powers By Administrative Authorities, Council of Europe, Committee of Ministries, 1980, <https://rm.coe.int/cmrec-80-2-concerning-the-exercise-of-discretionary-powers-by-administ/1680a43b39 > [17.08.2023].

34 Ibid.

35 Recommendation No. R (81) 19, Concerning the Access to Information Held by Public Authorities, Council of Europe, Committee of Ministriters, 1981. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f7a6e> [17.08.2023].

36 Recommendation No Rec (2004) 20, On Judicial Review of Administrative Acts, Council of Europe, Committee of Ministriters, 2004, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805db3f4#globalcontainer> [25.08.2023].

37 For example, Recommendation No R (97) 7, on Local Public Services and the Rights of their Users, Council of Europe, Committee of Ministriters, 97, <https://rm.coe.int/cmrec-97-7-on-local-public-services-and-rights-of-their- users/1680a43b65> [17.08.2023]. Recommendation No. R (2000) 10, on Codes of

of Good administration, Rec (2007) 7.[38] The recommendation identifies the principles on which the activities of administrative bodies are based. In particular, the principles of lawfulness, equality, impartiality, and proportionality, as well as the principles of legal certainty and foreseeability. The recommendation defines the principle of making decisions within a reasonable period and enables private persons to participate in the adoption of administrative decisions. The recommendation in the administrative decision includes both individual decisions and normative acts. In addition, according to the recommendation, the decisions can be taken by public institutions or based on requests from individuals. Following the procedures, the recommendation also mentions the need to specify the rule in the act for appealing it, to forward the application to another institution, in case this act is not admissible to this body. If the administrative body intends to make a restrictive decision, the interested person should be allowed to present his opinions to the body independently or through a representative. The recommendation also involves justifying decisions and the rules to get them comprehended, assuring their effective implementation by the officials, and the possibility to annul them as well as appealing mechanisms, including a one-time submission.[39]

According to scholars, the recommendations of the Council of Europe are an important source for the Strasbourg Court, especially after the 2000s, when the court significantly relied on the recommendations of the Committee of Ministers to define the rights protected by the Convention and develop its practice.[40]

3.2. Strasbourg Case Law

3.2.1. Why is Case Law Important?

The European Convention on Human Rights is a constitutional document for the Council of Europe that ensures membership of the Council after its ratification and implementation.[41] According to Professor Ulrich Stelkens, the line of court decisions points to the facts that national courts must apply and interpret the Convention.[42] In 2022 the Parliament of Georgia made amendments to the General Administrative Code of Georgia, which will promote implementing Strasbourg court

Conduct for Public Officials, Council of Europe, Committee of Ministriters, 2000, <https://rm.coe.int/16805e2e52> [17.08.2023]. Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2014)7 on the protection of whistle-blowers < https://rm.coe.int/16807096c7 > [17.08.2023].

38 Recommendation CM/Rec(2007)7, on Good Administration, Council of Europe, Committee of Ministriters, 2007, <https://rm.coe.int/cmrec-2007-7-of-the-cm-to-ms-on-good-administration/16809f007c> [17.08.2023].

39 Recommendation CM/Rec(2007)7, on Good Administration, Council of Europe, Committee of Ministriters, 2007, <https://rm.coe.int/cmrec-2007-7-of-the-cm-to-ms-on-good-administration/16809f007c> [17.08.2023].

40 *Stelkens Ul., Andrijauskaitė Ag.,* Good Administration and the Council of Europe, Law, Principles, and Effectiveness, *Stelkens Ul., Andrijauskaitė Ag., (eds),* First Edition, Oxford University Press, 2020, 101-102.

41 Ibid, 124.

42 Ibid, 125.

decisions at the national level. This is an additional chance to make national legislation and practice correlate with the best modern standards of human rights protection.[43]

Thus, to define fair administrative proceedings as a basic right, considering the implemented legislative changes, it is essential to review the practice of the Strasbourg Court, especially, since it is required in the process of making decisions by various administrative bodies.

3.2.2. How the Case-Law of the Court of Strasbourg Developed and What are the Modern Standards

According to Professor Stelkens, the Strasbourg Court had resolved the disputes related to public administration for years but it had avoided recognizing good administration as a right in the Convention. Moreover, following the assessments of scientists, despite the procedural similarities, the right to a fair trial protected by Article 6 of the European Convention had included only procedural guarantees in the court, not administrative discussions.[44] For example, no specific reference had been made to taxation matters, which were normally not based on discretion but on the application of more or less precise legal rules.[45]

However, the situation significantly changed after the Grand Chamber of the Strasbourg Court issued its decision in 2000 in Bayeller v. Italy. Under researchers, the Strasbourg Court defined the requirements and principles for administrative bodies for the first time. In particular, decisions must be made within a reasonable timeframe considering appropriate procedures and consistent rules (established practice).[46]

In the case of Moskal v. Poland, the court used the term "a good administration" for the first time and pointed out that considering disputes related to public administration, administrative authorities should act in a reasonable time and consistently.[47]

According to Professor Stelkens, the principle of good administration is the framework which required to be used.[48]

In the following years, the court specified the same three principles in the decisions. The development of practice led to the emergence of new definitions which also created the standard of a good administration. For example, in the case of Bērziņš and Others v. Latvia,[49] it is indicated that the Convention primarily protects practical and effective rights which is reflected in the assessment of

---

43 Explanatory card on the draft bill of Georgia "On Amendments to the General Administrative Code of Georgia", <https://info.parliament.ge/file/1/BillReviewContent/304307> [16.04.2023] (in Georgian).

44 *Stelkens Ul., Andrijauskaitė Ag.,* Good Administration and the Council of Europe, Law, Principles, and Effectiveness, *Stelkens Ul., Andrijauskaitė Ag., (eds),* First Edition, Oxford University Press, 2020, 126.

45 *Fortsakis Th. P.,* The Role of Individual Rights in the Europeanization of Tax Law, Book Title: Human Rights and Taxation in Europe and the World, *Kofter/Poiares Maduro/Pistone (eds.),* Amsterdam, 2011, 96.

46 *Stelkens Ul., Andrijauskaitė Ag.,* Good Administration and the Council of Europe, Law, Principles, and Effectiveness, *Stelkens Ul., Andrijauskaitė Ag., (eds),* First Edition, Oxford University Press, 2020, 126.

47 Moskal v. Poland, (Application no. 10373/05), [2010], ECHR, < https://hudoc.echr.coe.int/GEO?i=001-94009> [20.08.2023].

48 *Stelkens Ul., Andrijauskaitė Ag.,* Good Administration and the Council of Europe, Law, Principles, and Effectiveness, *Stelkens Ul., Andrijauskaitė Ag. (eds),* First Edition, Oxford University Press, 2020, 126.

49 Berzins and Others v. Latvia, (Application no. 73105/12*),* [2021], ECHR, <https://hudoc.echr.coe.int/eng?i=001-212012> [18.08.2023].

circumstances beyond the case of the national court, including not only the proportionality of compensation concerning the property, but also the actions, processes, and means applied by administrative authorities. In this context, the court emphasizes the legal predictability of administrative bodies, regardless of whether it derives from normative regulation or practice. The Strasbourg Court also points out that referring to the public interest, administrative authorities must act within a reasonable time ensuing a set of relevant rules, consistent with a good administration.[50]

Before this case, the Grand Bench of the Strasbourg Court had made the same interpretation of the case of Broniowski v. Poland (2004).[51] Regarding the public interest in this case the Strasbourg Court points out that the discretion of the administrative bodies is quite broad which is caused by political, economic or social factors. The conventional control over this case is revealed in the assessment of reasoning and argumentation of decisions.[52]

In the case of Bērziņš and Others v. Latvia,[53] the Strasbourg Court also notes that the requirement to keep the balance between private and public interests is not met if a disproportionate and excessive burden is put on a private person.[54] However, it also mentions that like other cases related to the branches of public administration, the public interest in environmental management issues is particularly high and the state is provided with more freedom of action and wider discretion than in cases where only civil rights are involved.[55] The court also indicates if the applicant was informed about the established restrictions, regulations, or rules of ownership, the scope of the resulting trust, and the possibilities of appeal.[56] Regarding this case, the main argument for the court to determine the violation of the property right was the failure of administrative bodies for about ten years to meet the legal obligations within their discretion to resolve the issue in a timely and efficient manner.[57]

In the case of Cakarević v. Croatia, the Strasbourg Court defines another element of a good administration and focuses on a case when a person has legitimate expectations of an unlawful decision made by administrative authorities in error, and subsequently, the burden of the error, including the financial burden, is transferred to the interested party. The court perceives that as a disproportionate interference with the right.[58] The Strasbourg Court develops an approach to a good administration protecting the principle of legal clarity, which in turn, is one of the fundamental aspects

---

50 Berzins and Others v. Latvia, (Application no. 73105/12), [2021], ECHR, <https://hudoc.echr.coe.int/eng?i=001-212012> [18.08.2023].

51 Broniowski v. Poland (Application no. 31443/96), [2004], ECHR, <https://hudoc.echr.coe.int/eng?i=001-61828> [19.09.2023].

52 Ibid.

53 Berzins and Others v. Latvia, (Application no. 73105/12), [2021], ECHR, <https://hudoc.echr.coe.int/eng?i=001-212012> [18.08.2023].

54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid.

58 Čakarevic v. Croatia (Application no. 48921/13), [2018], ECHR, <https://hudoc.echr.coe.int/eng?i=001-182445> [19.08.2023].

of the rule of law.[59] The court believes that administrative authorities should take appropriate measures not to impose a disproportionate burden on an interested party.[60]

Concerning the case Rysovsky v. Ukraine, the Strasbourg Court regards the principle of good administration as the obligation of administrative bodies to specify clear and transparent procedures that make their activities predictable. Also, they reduce errors and contribute to the legal validity of civil transactions that affect real property interests.[61] The same case features the principle that does not exclude the correction of mistakes made by administrative bodies but it must not lead to a disproportionate interference with the right, and administrative bodies should not be allowed to benefit from their mistakes or avoid responsibilities. The Court of Strasbourg indicates in other cases that administrative bodies must not be able to invalidate the property-related act which arises the necessity of applying for adequate reimbursement to the interested parties or compensating for damages in another form.[62] In the same case, the Strasbourg court regards the invalidity of the enabling act as complex from the moment of starting its adoption when the legislation does not provide sufficient warrants against abusing the rights of public officials. Also, when the official is given such authority without specific basics at any time and the participation of the person affected by this act. Also, the court considers that limitless time for the official authority to review his decisions, including after discovering an error, significantly undermines the basis of legal certainty.[63]

The case Rysovsky v. Ukraine is distinguished by expressing disapproval of the court with the inconsistent, uncoordinated, and contradictory actions and decisions of public officials. The court decision assesses: "The incoherent and uncoordinated manner in which the authorities treated the applicant's situation created a continuous ambiguity for his entitlement to the plot of land, lasting since 1992, which is nearly twenty years…" [64] However, in the Court's view, irrespective of any financial repercussions, the frustration that could naturally result from such a prolonged ambiguous situation constitutes in itself a disproportionate burden, which has been further aggravated by the absence of any reparation for the applicant's perpetual inability to take up his formal entitlement to the plot of land.[65]

In the case of Bejnarović and Others v. Lietuva, as in the previous case, the Court appraised the conflict between two important principles of administrative law, trust, and legality, and pointed out that good administration includes the interest in correcting errors and illegal decisions by

---

59 Nejdet Şahin adn Perihan Şahin v. Turkey (Application no.13279/05), [2011], ECHR, <https://hudoc.echr.coe.int/eng?i=001-114761> [25.08.2023].

60 Zolotas v. Greece, (Application no. 66610/09), [2013], ECHR, <https://hudoc.echr.coe.int/eng?i=001-116441> Romeva v. North Macedonia (Application no. 32141/10), [2020], ECHR, <https://hudoc.echr.coe.int/eng?i=001-198885> [25.08.2023].

61 Rysovskyy v. Ukraine, (Application no. 29979/04), [2012], ECHR, <https://hudoc.echr.coe.int/GEO?i=001-107088> [20.08.2023].

62 Ibid.

63 Ibid.

64 Rysovskyy v. Ukraine, (Application no. 29979/04), [2012], ECHR, <https://hudoc.echr.coe.int/GEO?i=001-107088> [20.08.2023].

65 Ibid.

administrative bodies, however, correcting illegality should not be made at the expense of bona fide stakeholders, by imposing liability on them.[66]

The same interpretation was made by the Strasbourg Court in the case of Ibrahimbeyov and others v. Azerbaijan, indicating that good administration requires not suffering individuals from the burden of correcting the mistakes of administrative bodies. Good administration includes the availability of compensation for damages to the parties with bona fide interests.[67] The court has made a similar interpretation concerning many other cases.[68]

The Court also considered the issue of legitimate trust to administrative bodies in the case of Lelas v. Croatia, in which it is explained that the interested party acting in good faith has an expectation of the legal actions and decisions of public officials when officials follow the established rules and requirements. Obviously, except for those exceptional cases when the person knew or should have known that the officials did not have the authority to make such decisions. An interested party ought not to verify whether officials are conducting internal rules that are not publicly available. The interested parties should not suffer from the burden of non-compliance with established rules by Strasbourg Directive.[69]

The principles of a good administration have been mentioned by the Strasbourg Court in most cases related to the realization of property rights, but not only. For example, the Dadouchi v Malta refers to the recognition and registration of the marriage concluded abroad, in Malta. According to Article 8 of the Convention, the Strasbourg Court regards the actions of administrative bodies as interference with the right protected by the Convention on the following grounds: when the established requirements are not clear, understandable, and predictable to perform, administrative bodies act arbitrarily. The court castigated the body for not having checked the data citizenship and redirected the interested party to another agency, which in turn, refused to provide the information. [70]

The Court considered the case of Lombardi Valauri v. Italy in the context of freedom of expression. It decided that the dismissal of the employee from the occupied job position based on the Faculty Board's decision which following administrative rules regarded the view of the lecturer in clear opposition to their Catholic teaching, without hearing him and examining circumstances, was a violation of right protected by the European Convention.[71]

---

66 Beinarovic and Others v. Lithuania, (Applications nos. 70520/10, 21920/10 and 41876/11), [2018], ECHR, <https://hudoc.echr.coe.int/eng?i=001-183540 > [19.08.2023].

67 Ibrahimbeyov and Others v. Azerbaijan, (Application no. 32380/13), [2023], ECHR, <https://hudoc.echr.coe.int/eng?i=001-223021> [25.08.2023].

68 Tumeliai v. Lithuania, (Application no. 25545/14), [2018], ECHR, <https://hudoc.echr.coe.int/eng?i=001-179885> Paleviciute and Dzidzeviviene v. Lithuania, (Application no. 32997/14), [2018], https://hudoc.echr.coe.int/eng?i=001- 179825> [25.08.2023].

69 Lelas v. Croatia, (Application no. 55555/08 [2010], ECHR, <https://hudoc.echr.coe.int/eng?i=001-98827> [25.08.2023].

70 Case of Dadouch v. Malta, (Application no. 38816/07), [2010], ECHR, <https://hudoc.echr.coe.int/GEO?i=001-99883> [25.08.2023].

71 Lombardi Vallauri v. Italy, (Application no. 39128/05), [2010], ECHR, <https://hudoc.echr.coe.int/GEO?i=001-95150> [23.08.2023].

4. Conclusion

The constitutional amendments of 2017 ensured the constitutional recognition of fair administrative procedures as a basic human right. The presented research reviewed the important international standards for defining the right that is guaranteed by the Constitution of Georgia.

The establishment of constitutional rights is not a one-off process, and defining the right to fair administrative procedures will continue alongside the development of the practice of national and international courts. However, such discussion can contribute to the protection of human rights in the process of implementing public administration as well as make the need for further research more apparent in academic circles.

Taking into account the decisions of the Strasbourg Court discussed in the article and the standards established by the Council of Europe, it is possible to highlight several issues concerning the right to a good administration or fair administrative proceedings. In particular:

- Administrative procedures should be written clearly and unambiguously to reduce the number of mistakes made by officials as well as interested parties can understand the rules properly;
- In the process of public administration, decisions should be made within a reasonable period, the period should not be artificially extended and make interested parties confused for a long time;
- Decisions must be made after properly examining circumstances and facts, substantiated and supported with legal arguments;
- Interested parties must be allowed to present their opinions, positions, and pieces of evidence; such guarantees should be feasible;
- The relevant balance should be ensured between private and public interests;
- Administrative bodies should not make people in good faith take responsibility for the negative consequences of their own mistakes and illegal actions when they have completely legitimate expectations.

The article does not review all the decisions of the Strasbourg Court or all the recommendations approved by the Council of Europe, however, this short list is enough to make clear the fair administrative proceedings and how important it is to understand and consider these issues to implement effective public administration following the best standards in Georgia.

Bibliography:

1. Constitution of Georgia, The Gazette of the Parliament of Georgia, 31-33, 24/08/1995 (in Georgian).
2. Law of Georgia “General Administrative Code of Georgia”, Legislative Herald of Georgia, 32(39), 15/07/1999 (in Georgian).
3. Law of Georgia “On Normative Acts”, Legislative Herald of Georgia, 33, 09/11/2009 (in Georgian).

4. *Eberhard B.,* The Concept of Public Administration, Textbook of Administrative Science, Volume IV, *Khubua G., Kalchava K. (eds),* Publications of the Institute of Administrative Sciences of TSU, Tbilisi, 2018, 89-100 (in Georgian)
5. Explanatory card on the draft law of Georgia "On Amendments to the General Administrative Code of Georgia" <https://info.parliament.ge/file/1/BillReviewContent/304307> [16.04.2023] (in Georgian).
6. *Fortsakis Th. P.,* The Role of Individual Rights in the Europeanization of Tax Law, Book Title: Human Rights and Taxation in Europe and the World, *Kofter/Poiares Maduro/Pistone (eds.),* Amsterdam, 2011, 96.
7. *Gvaramadze T.,* Georgian Administrative Law: From Soviet Era to European Standards, Book Title: Good Administration and the Council of Europe: Law, Principles, and Effectiveness, *Shtelkens UL. Andrijauskaitė Ag., (eds.),* Oxford University Press, 2020, 707.
8. *Gvaramadze T.,* Ombudsman Institute – as an alternative appeal mechanism in the field of public administration, Journal of Law, Burduli Ir. (ed.), #2, 2020, 147, <https://jlaw.tsu.ge/index.php/JLaw/issue/view/607/109> [17.08.2023] (in Georgian).
9. *Kalichava K.,* Public Administration in the Perspective of Administrative Science, Textbook of Administrative Science, Volume IV, *Khubua G., Kalichava K. (eds),* Publications of the Institute of Administrative Sciences of TSU, Tbilisi, 2018, 63-86 (in Georgian).
10. *Kublashvili K.,* Shortcomings and Challenges of the New Edition of the Constitution of Georgia, in Collection: Review of Constitutional Law, *K. Vardzelashvili (ed.),* #14, Tbilisi, 2020, 85-86, <https://ewmi-ruleoflawgeo.org/uploads/files/597114fpGEO.pdf.pdf.pdf> [14.08.2023] (in Georgian).
11. *Leuprecht M.,* The Contribution of the Council of Europe to Reinforcing the Position of the Individual in Administrative Proceedings, Roundtable with European Ombudsmen, Strasbourg, 1985, 1-10.
12. *Shtelkens UL. Andrijauskaitė Ag.,* Added Value of the Council of Europe to Administrative Law: The Development of Pan-European General Principles of Good Administration by the Council of Europe and their Impact on the Administrative Law of its Member States, Discussion Papers, 86, German Research Institute for Public Administration Speyer, 2017, 34 – 43.
13. *Stelkens Ul., Andrijauskaitė Ag.,* Good Administration and the Council of Europe, Law, Principles, and Effectiveness, *Stelkens Ul., Andrijauskaitė Ag., (eds.),* Oxford University Press, First Edition, 2020, 101-102, 109-112, 124-126.
14. *Turava P.,* Fair administrative proceedings as a basic constitutional right and its institutional guarantee, in the collection of articles: Protection of human rights: legislation and practice, *Korkelia K. (ed.),* Tbilisi, 2018, 248, <https://library.iliauni.edu.ge/wp-content/uploads/2021/06/42.-adamianis-uphlebatha-datsva- kanonmdebloba-da-praqtika-statiatha -krebuli.pdf> [14.08.2023].
15. Recommendation CM/Rec(2007)7, on Good Administration, Council of Europe, Committee of Ministriters, 20.06.2007, <https://rm.coe.int/cmrec-2007-7-of-the-cm-to-ms-on-good-administration/16809f007c> [17.08.2023].
16. Recommendation No R (97) 7, on Local Public Services and the Rights of their Users, Council of Europe, Committee of Ministriters, 01.04.1997, <https://rm.coe.int/cmrec-97-7-on-local-public-services-and-rights-of-their-users/1680a43b65> [17.08.2023].
17. Recommendation No Rec (2004) 20, On Judicial Review of Administrative Acts, Council of Europe, Committee of Ministriters,15.12.2004, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805db3f4#globalcontainer> [25.08.2023].

18. Recommendation No. R (2000) 10, on Codes of Conduct for Public Officials, Council of Europe, Committee of Ministriters, 11.05.2000, <https://rm.coe.int/16805e2e52> [17.08.2023]. Charter of Fundamental Rights of the European Union, (2000/C 364/01), Official Journal of the European Communities, 18.12.2000, <https://www.europarl.europa.eu/charter/pdf/text_en.pdf> [17.08.2023].
19. Recommendation No. R (80) 2, Concerning the Exercise of the Discretionary Powers By Administrative Authorities, Council of Europe, Committee of Ministriters, 11.03. 1980, <https://rm.coe.int/cmrec-80-2-concerning-the-exercise-of-discretionary-powers-by-administ/1680a43b39 > [17.08.2023].
20. Recommendation No. R (81) 19, on the Access to Information Held by Public Authorities, Council of Europe, Committee of Ministriters, 25.11. 1981, <https://rm.coe.int/CoERMPublicCommonSearch Services/DisplayDCTMContent?documentId=09000016804f7a6e> [17.08.2023].
21. Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2014)7 on the protection of whistle-blowers, 30.04.2014, <https://rm.coe.int/16807096c7> [17.08.2023].
22. Resolution (77) 31, On the Protection of the Individual concerning the Acts of Administrative Authorities, Council of Europe, Committee of Ministriters, 28.09. 1977, <https://rm.coe.int/09000016804dec56> [15.10.2020].
23. Ruling of the Constitutional Court of Georgia No. 1/6/1608, in the case of Matsatso Tefnadze against the Government of Georgia, 2022, <https://constcourt.ge/ka/judicial-acts?legal=13669&scrollheight=4591.2001953125> [16.08.2023] (in Georgian).
24. Constitutional Court of Georgia Judgment No. 1/13/1560, in the case of Zauri Shermazanashvili v. Parliament of Georgia, 2021, <https://constcourt.ge/ka/judicial-acts? (in Georgian).
25. Ruling of the Constitutional Court of Georgia No. 2/15/1403, in the case of Sulkhan Gvelesiani v. Parliament of Georgia, 2019, <https://constcourt.ge/ka/judicial-acts?legal=1794&scrollheight=2906.39990234375> [16.08.2023],
26. Constitutional lawsuit N1573, Levan Alafishvili, a legal entity of the Parliament of Georgia and public law against the director of the "Unified National Accreditation Body – Accreditation Center", 2021, <https://constcourt.ge/ka/judicial-acts?legal=10745&scrollheight=200> [25.08.2023] (in Georgian).
27. Ibrahimbeyov and Others v. Azerbaijan, [2023], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-223021> [25.08.2023].
28. Berzins and Others v. Latvia, [2021], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-212012> [18.08.2023].
29. Romeva v. North Macedonia, [2020], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-198885> [25.08.2023].
30. Čakarevic v. Croatia, [2018], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-182445> [19.08.2023].
31. Beinarovic and Others v. Lithuania, [2018], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-183540 > [19.08.2023].
32. Tumeliai v. Lithuania, [2018], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-179885>
33. Paleviciute and Dzidzeviviene v. Lithuania, [2018], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-179825> [25.08.2023].
34. Zolotas v. Greece, [2013], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-116441 > [25.08.2023].
35. Rysovskyy v. Ukraine, [2012], ECtHR, <https://hudoc.echr.coe.int/GEO?i=001-107088> [20.08.2023].

36. Nejdet Şahin and Perihan Şahin v. Turkey, [2011], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-114761> [25.08.2023].
37. Moskal v. Poland, [2010], ECtHR, < https://hudoc.echr.coe.int/GEO?i=001-94009> [20.08.2023].
38. Dadouch v. Malta, [2010], ECtHR, <https://hudoc.echr.coe.int/GEO?i=001-99883> [25.08.2023].
39. Lelas v. Croatia, [2010], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-98827> [25.08.2023].
40. Lombardi Vallauri v. Italy, [2010], ECtHR, <https://hudoc.echr.coe.int/GEO?i=001-95150> [23.08.2023].
41. Broniowski v. Poland, [2004], ECtHR, <https://hudoc.echr.coe.int/eng?i=001-61828> [19.09.2023].
42. Council of Europe, Committee of Ministriters, Final Activity Report, Submitted to the Committee of Ministers, Strasbourg, 1977, 12-19, <https://rm.coe.int/native/090000168051651e> [17.08.2023].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7705

Khatuna Loria*

Personal Application – the Basis for Dismissal of a Public Servant

The dismissal of a public servant based on a personal application is a discretional (optional) ground for dismissal which is related to the right of a person. It is a refusal of service but on the other hand, it obligates a public institution to obey a choice of a person. The article reviews the issues followed by the dismissal of a public servant on this basis. It also highlights the freedom of an officer's will, the purpose of protecting the interest of public service, and judicial practice, and the restriction of the right to dismiss the personal application.

Keywords: *Personal Application, Declaration of Will, Dismiss*

1. Introduction

One of the important issues in the labor-legal relationship is the manifestation of will which is related to the exclusion of forced labor. This is primarily provided by the Constitution of Georgia,[1] international acts, and legislation as well. "No person shall be deprived of the right to quit the public service (in a specific position) as it is his/her constitutional right, and no one has the right and legal opportunity to force a public servant into performing public duties."[2] The Constitution of Georgia "protects a person from forced labor which is a violation of dignity."[3]

The public holds conflicting views about bureaucracy and civil servants. In one case, bureaucracy seems to frighten and confuse society[4] but the bureaucracy enhances the quality of life for citizens and the functioning of state institutions where public officials are the main interest groups. By one hypothesis majority of civil servants are decent people.[5] In the modern state, New Public Management (NPM) considers the public as a consumer,[6] whose opinion and degree of satisfaction are of paramount importance to the state. Only legal and economic security can contribute to ensuring a high level of performing a task by a public servant.[7]

---

* Doctor of Law, TSU, Faculty of Law, Associate Professor. https://orcid.org/0009-0001-0569-0640.

1 Constitution of Georgia, 1995, <https://matsne.gov.ge/ka/document/view/30346?publication=36> (in Georgian).

2 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of January 11, 2018, the case #AS-663-659(K-17) (in Georgian).

3 Decision №2/2-389 of the Constitutional Court of Georgia ოწ October 26, 2007, in the case of Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia (in Georgian).

4 *Rosenbloom D.H., Kravchuk R.S., Clerkin R.M.*, Public Administration, Understanding Management, Politics, and Law in the Public Sector, 2015, 483.

5 Ibid, 549.

6 Ibid, 479.

7 Bundesverfassungsgericht, BVerfG, Beschluss vom 28. Mai 2008 – 2 BvL 11/07.

For mutual good faith, the termination of the service relationship should be "planned" except for the cases provided by law. It must not harm the legitimate interest of the public service and the rights of an employee. Civil service is not always expected to have the resources to replace an employee, but it should be prepared for any personnel outflow. In general, the dismissal of an employee will be considered legal if the procedures established by law are followed. A personal application is not a valid ground for the dismissal of an employee therefore, it is not found in Article 107 of the Law on Public Service of Georgia. The personal application is considered by the law as a non-mandatory (discretionary) basis for dismissal. The discretion is directed not to a dismissal as a result, but to the occurrence of this result in time.[8] Dismissing an employee based on an application the main key issue is to determine whether the right to resign is related to his desire and free choice. Sometimes terminating the service on account of personal application can meet with approval and be morally justified if it is based on the desire of an employee.[9]

2. An application – Declaration of Intent

A civil servant has the right granted by the legislation to refuse the status of a public official (freedom of labor). The application of a public servant for dismissal is presumptively a declaration of his intent. The intent must be declared freely, without restrictions, and protected from negligent influences. Thus, the issue of free expression of intent is subject to investigation and evaluation.[10] Determining the authenticity of the declaration of intent" serves the realization of the principle of freedom for the declaration of intent, which implies that a specific action, choice, decision must reflect the true wish of a person, it must not be provoked by violence, coercion, threats, blackmail, promises, and formed by the dishonest influence of another person."[11]

According to literature reviews the validity of the declaration of intent means its suitability for the origin, change, or termination of the legal relationship.[12] Years ago it was believed that because of the strict subordinate nature of administrative-legal relations, there was no free will. The contemporary approach has changed the perception, and even in public legal relations "the manifestation of free will has become a necessary condition for private interest".[13]

A personal application constitutes a legitimate basis for the dismissal of an employee, if the fact of influencing the intent (coercion, intimidation, threats, deception, etc.) is not proven. Therefore, when an official applies to the court for the annulment of the decision on dismissal by a personal application, the validity of the intent is challenged. The court must examine and determine whether an

---

8 This issue will be discussed below.

9 *Rosenbloom D.H., Kravchuk R.S., Clerkin R.M*., Public Administration, Understanding Management, Politics, and Law in the Public Sector, 2015, 552-553.

10 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of January 11, 2018, case No. BS-663-659. (K-17) (in Georgian).

11 Ibid.

12 *Chanturia L.,* Introduction to the General Part of the Civil Law of Georgia, Tbilisi, 1997, 313 (in Georgian).

13 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 284 (in Georgian).

intent is affected. In interpreting the declaration of intent, it is essential to identify the final result that a participant of the legal relationship intended.[14]

There are cases when an employee's resignation is related to his direct supervisor's desire (pressure, threats, etc.). According to the assessment of the Court of Cassation, "the main task of judicial bodies is to distinguish cases when an intent of a person is shaped by his/her attitudes, prospective plans, degree of self-esteem and others."[15]

Threats of "disciplinary violence"[16] are frequently applied. Dismissal as a measure of disciplinary responsibility is the most severe measure, which, in addition to a severe immediate consequence (loss of a job), has a restrictive nature for holding a position in the public service for one year in the future.[17] Accordingly, a civil servant prefers to give up his service with a personal application.

However, voluntary dismissal is related to the preservation of the reputation of an employee when because of the second negative assessment dismissal is inevitably expected and an official chooses "bad" to save himself from the "worse" and leaves the job by his application. On this occasion, an official makes his/her decision, and coercion or violence against the intent shall not be considered. In one of the cases, the civil servant requested to be dismissed not because of failing in the attestation phase, but based on his application. It is easily seen that the dismissal serves the interests of the official.[18] The law does not restrict the right of an employee to be dismissed by personal application, even if he expects to be dismissed on another basis according to the law.

The number of employees to have been dismissed based on their applications is suspiciously high. We can consider the studies published by the Civil Service Bureau as evidence. According to the 2022 data from the Public Service Bureau, 2,770 civil servants were dismissed from public service on their initiative, and 383 civil servants were dismissed on the initiative of a public institution.[19] I think these numbers make one wonder why an official wants to leave his/her job when the law provides him/her with guarantees of stability, and social and legal protection. Public service is an interesting career considering the guarantees that the state offers.[20] As a result, when an officer declines the offer, it can be a reason for suspicion and should be examined to exclude the risk of influence. The court considered the abovementioned number of applications requesting dismissals so suspicious.[21]

---

14 Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of June 28, 2011, case # AS-377-357-2011 (in Georgian).

15 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of February 18, 2014, case BS-463-451 (K-13) (in Georgian).

16 Ibid.

17 According to Article 27 of the Law on Public Service, a person will not be accepted into public service if he is dismissed. from public service for disciplinary misconduct and 1 year has not passed since dismissal for disciplinary misconduct (in Georgian).

18 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia, September 11, 2008, case #BS-434-417(K-08) (in Georgian).

19 See 2022 statistics on public service, <http://csb.gov.ge/media/3513/897787.pdf> [21.09.2023] (in Georgian).

20 *Wiederkehr S.,,* Mitarbeitermotivation im Ofentlichen Dienst am beispiel der Wissenschaftlichen Bibliotheken in Deutschland, 2014, 20-21 (in German)

21 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of December 24, 2020, case # BS-898 (K-19). (in Georgian).

An application of an employee does not give rise to the expectation of immediate dismissal. The application should be a real statement of an applicant's intention.[22] The main purpose of conducting proceedings (investigation, study of the circumstances) on the application is to exclude the possibility of influence. In this regard, the Chamber for Administrative Cases of the Supreme Court of Georgia made an interesting decision before the 2015 Public Service Law. The 1997 Law on Public Service[23] did not directly include any reservations based on the declaration of intent, however, the court established the need for determination of the validity of an intent when an applicant is dismissed. As there was no special reservation in the law, the Court applied to the provisions of the VI General Administrative Code of Georgia (general provision of production, simple administrative production).[24] In the decision, the court assessed the reality, the established practice, and the issue related to the declaration of intent of the officer.[25] The decision is about the vicious practice that involves repeated cases of "regulation of relations behind the law." In the same decision, the court states that this trend " is the result of complete ignorance and disrespect of the status, disobedience, and neglect of the legal framework, lack of professional self-respect and human dignity from the head of the civil service and a civil servant "

The court is quite critical of his obligation to be firm and principled due to his status as a civil servant and, if necessary, to fight for the protection of his rights, otherwise "An official cannot be a defender of public interests and the rights of each member of society."[26] The 2015 Law on Public Service was written directly about a 14-day period, which is an opportunity for the public institution to study the circumstances of the case and determine the validity of the declaration of intent. As a civil servant, he/she was given a chance to analyze and change his/her decision. The issue is resolved in favor of an employee if he/she refuses to be dismissed and withdraws an application. The public institution is deprived of the opportunity to dismiss him/her and if an officer changes the decision, he/she can keep the position. The law does not require justification from an employee for a withdrawal of the application. Thus, the law exempts the applicant from the additional burden of justifying the reason for the application or its refusal. Such a reservation is applied in favor of the interest of the officer.

The peculiarity of the law is the fact that it obliges the public institution to investigate the validity of the applicant's intent while withdrawing the application it requires to scrutinize a refusal. The latter is an unconditional basis for a civil servant to keep his/her position because a refusal excludes the possibility of dismissing an official.

Unlike the Labor Code of Georgia, the Law on Public Service[27] does not specify the written form of the application, however, it refers to the registration of the application, and simultaneously,

---

22 *Kharshiladze I., Kasradze I.,* Guarantees of the Legal Protection of Civil Servants, Georgian-German Journal of Comparative Law, 12/2022, 21-22 (in Georgian).

23 Law of Georgia on Public Service, 1997 (repealed), <https://matsne.gov.ge/ka/document/view/28312?publication=111> [21.09.2023]. (in Georgian)

24 See General Administrative Code of Georgia, 32(39), 15/07/1999 (in Georgian).

25 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of February 18, 2014, case# BS-463-451 (K-13) (in Georgian).

26 Ibid.

27 Organic Law of Georgia, Labor Code of Georgia, LHG, 75, 27/12/2010 (in Georgian).

following the definition of Article 2 of the General Administrative Code of Georgia, the application must be in writing.[28] Accordingly, there must be a form of the declaration of intent – a compulsory written statement. "The protection of the written statement not only includes evidence of the declaration of intent but it also has a warning function."[29]

The public institution does not take responsibility to foresee how much the living conditions and socioeconomic situation of the dismissed official will be aggravated, however, for looking into the validity of the intent, many issues should be investigated: age, marital status, seniority, Bank guarantees[30] to keep logic between the true intent and the result of granting the application.

Of course, not every case can be made suspicious, however, based on adverse economic and social conditions, giving up the job voluntarily raises a question about a conscious choice. According to the decision of the Constitutional Court, "the right to free personal development includes freedom of a person to choose his means to protect his physical or mental integrity despite consequences."[31] Thus, the evaluation of the declaration of intent implies the exclusion of influence on him, and not the determination of expected results this person can acquire from his own decision. It is the best practice that the official not only considers the application to indicate the validity of intent but also assists the civil servant in discerning the consequences of his decision, especially if the person was under strong emotional stress and could not rationally foresee the result.

3. Is a Civil Servant Obliged to Justify the Motif for Dismissal in the Application?

According to the general rule, it is in the interest of the applicant to indicate not only the request but also the circumstances on which he bases this request [32]because that is important for deciding in his favor. As for the application for dismissal, the law does not require a servant to indicate the basis of his desire. This means that the legislator "doesn't care" about the reason for the request for dismissal. There are cases in practice when the public official indicates the grounds for the request of dismissal (another job, family conditions, etc.), however, this is not done by legal obligation.

As the Court of Cassation notes considering the application for dismissal submitted by an employee, "the administrative body is not obliged to establish the true intention of an employee, which is confirmed even by the fact that in case of leaving a job based on a personal application, it is not mandatory to indicate the reason for leaving the job in the application. The necessity to establish the

---

28 *Kereselidze D., Chachava S., Zaalishvili V., Shvelidze Z., Meskishvili K.,* Commentary on the Labor Code of Georgia, Tbilisi, 2023, 551 (in Georgian).

29 *Biolingi H., Lutringhaus P.,* Systematic Analysis of the Foundations of Separate Requests of the Civil Code of Georgia, 2009, 30 (in Georgian).

30 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of May 13, 2021, case #BS-724(2k-20) (in Georgian).

31 Decision #2/4/532,533 of the Constitutional Court of Georgia on October 8, 2014, Citizens of Georgia – Irakli Kemoklidze and Davit Kharadze against the Parliament of Georgia (in Georgian).

32 It means a typical case of an application, when the applicant, to strengthen his right, formulates a request in an argumentative manner and presents the facts confirming the request (in Georgian).

validity of the intent of the employee arises when a specific factual situation provides the ground for doubting the validity of the applicant's declaration of intent."[33]

Therefore, the official is neither obliged to indicate the reason for the dismissal nor is he required to justify the reason for his/her requests to leave the application unconsidered.

4. Legal Form of Dismissal of an Employee

The relevant official must issue an individual administrative-legal act on the dismissal of the employee, which is subject to the requirements of the General Administrative Code of Georgia and, accordingly, it must be substantiated.

Regardless of the reason for the dismissal, this requirement obliges the relevant official to issue a justified individual administrative-legal act. This reservation is related to the legal obligation of the administrative body, the public institution, and the compatibility of the decision with the law. Making the reasoned decision accessible for review is a prerequisite for entering it into force. These measures are the burden of the administrative body.

5. Terms

The Law of Georgia "On Public Service" does not establish the term for applying with a personal

application. A professional civil servant is appointed on the open-ended agreement, which creates an expectation of stability but this does not exclude the possibility of dismissal of an official. For example, in case of reorganization, the public institution is obliged to follow the procedure established by the law and warn the official 1 month before the dismissal. This period is related to the preparation of an employee for the outcome and providing the opportunity to plan his/her future. The warning period serves the purpose of causing little harm to the employee by dismissal.[34] The Court of Cassation explains that "the obligation of the administration to give the advance notification about the expected dismissal is a legal guarantee of the worker provided by law to be prepared for facing up the fact of dismissal."[35] There is a question of whether we apply a certain term for notifying the public institution to be prepared to accept the request of an official for the dismissal or not.

In case of reorganization, the prior notification of an employee serves to protect his/her interest while the term related to a personal application would be considered as the defense of the interest of public service. Our legislation does not establish a specific period before which the public service should be notified about the desire to be dismissed. Unlike Georgia, for example, Estonian legislation

---

33 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 13, 2022, case # BS-140(K-22). (in Georgian).

34 *Shvelidze Z., Bodone K., Todria T., Khazhomia T., Gujabidze N., Meskhishvili K.,* Labor Law of Georgia and International Labor Standards, 2017, 257 (in Georgian).

35 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of February 6, 2007, case #BS-822-788 (K-06) (in Georgian).

provides for a 30-day notice period, and in some cases, the term may be 10 days or less depending on the reasons for dismissal (e.g. illness, marital status, etc.).[36]

Section 33 Paragraph 1 third of the German Federal Civil Service Act (BBG)[37] provides for the dismissal of an employee based on an application (appeal of an employee). The law establishes 2 weeks when the official can refuse to consider the application, however, with the consent of the public institution, it is possible to withdraw the application even after this period has expired. According to BBG, the application must be in writing. The law does not set any time limit, which means that the official can use this right at any time, nevertheless, the dismissal of the official is the authority of the public institution, therefore, the dismissal is based on the application after the decision is issued. German law furnishes the delay of dismissal for no more than 3 months depending on the need to fulfill the obligations of the official.[38] There is a conflict between the legitimate interests of public service and the dismissal of a civil servant. The law cannot refuse to dismiss an official, however, such a reservation allows the public institution to meet the expectations that the public official's obligation represents. This 3-month term reservation can be used in a specific case. The absence of such a term in the law on public service does not imply a complete disregard for the interest of the public service. As mentioned above, the law provides the levers that are used to meet the interest of public service.[39] Here, the emphasis is on targeted spending of funds[40] which public service applies for creating a protective mechanism following its legitimate interests. As for the interest of an official, it is clear that the absence of reservation on terms gives the official a wide opportunity to use the right to resign by personal application at any time. Unlike the civil service, the Labor Code of Georgia stipulates the obligation for an employee to notify an employer in writing 30 days earlier in case of being dismissed on his initiative.[41] Also, the does not provide the direct provision of the term to grant the application of the civil servant. According to Article 109, Clause 3 of the Law on Public Service, from the registration of the application for dismissal to the issuance of the individual administrative-legal act on dismissal, the civil servant has the right to request the application to be left unreviewed. This application must be granted however, this record does not provide an accurate period. The 14-day period established by Paragraph 2 of the same Article, is not an extreme period for withdrawing the application. The public institution may need more than 14 days to consider the request of the official for dismissal or taking into account some circumstances (e. g. the interest of the public service, the unfulfilled obligation of the official) require a period of more than 14 days. The law does not make a reservation on a specific term, but on that period before the decision is made which the official can use to request the application to be left unconsidered. In such a case, the official's request has binding force and the public institution is obliged to obey it. Therefore, the withdrawal of the application

---

36 Estonian Civil Service Act.

37 Bundesbeamtengesetz (BBG), Ausfertigungsdatum: 05.02.2009 (in Georgian).

38 Bundesbeamtengesetz (BBG), Ausfertigungsdatum: 05.02.2009.

39 Refers to Article 54, Clause 6 of the Law on Public Service (in Georgian).

40 *Turava P., Firtskhalashvili A., Dvalishvili M., Tsulaia I., Kardava E., Sanikidze Z., Makalatia E.,* Law of Georgia on Public Service, Comments, Kardava *E. (ed.),* Tbilisi, 2018, 193 (in Georgian).

41 Organic Law of Georgia, Labor Code of Georgia, 17/12/2010, <https://www.matsne.gov.ge/ka/document/view/1155567?publication=24> 21.09.2023] (in Georgian).

before making the decision excludes the possibility of dismissal of the official. Only the appeal of an employee is not enough for dismissal, but the period to satisfy the request. Still, Article 95[42] of the 1997 Law of Georgia "On Public Service" provided for the dismissal of an official his/her initiative, according to which "an official shall be is dismissed from work on the basis of a personal application, if the superior official or organization having the right to hire him/her satisfies the written application." According to the content of the norm, only desire was not considered as a mandatory basis for dismissal, the law stipulated the satisfaction of a written application as a condition. Hence, the norm did not create the application as an unconditional basis for dismissal but the consent of the decision-maker. The law did not point out the procedure, deadlines, or any other circumstances that could be related to the possibility of a person being dismissed at his/her initiative.

The primacy of the interest of public institutions does not conflict with the constitutional right to freedom of labor. According to the decision of the Constitutional Court of Georgia, "Freedom of labor covers the right of a person to perform the acceptable work"[43] Also, according to the practice of the Constitutional Court, freedom of labor implies the right to give up this work, which guarantees protection from forced labor.[44] A public institution has no right to force a person to continue his activity. Therefore, the public servant's application should be upheld. The main issue here is related to the time when the authority of the official can be terminated. This is the issue that the law connects with the will of the employer. A decision is made based on the legitimate interest of the public service. Considering the time, it is necessary to take into account both the desire of the civil servant – to release him in time and the legitimate interest of the public service – the dismissal of the civil servant should not hinder the functioning of the public service.

The Law on Civil Service recognizes two possibilities for dismissal based on a personal statement:

1. Immediate release – the application is satisfied immediately to achieve the instant result, that the applicant requests;

2. "Deferral" of release, satisfaction is not immediate but subject to a certain period or condition.

In the first case, there is no suspicion of influencing the formation of the will (there is no basis for deception, coercion, threats, or pressure) and the immediate dismissal of the employee does not contradict the law and the interest of the public service. The will is assumed to belong to the applicant, he has no unfulfilled obligation to the service and his release does not threaten the functioning of the public service.

In the second case, the reason for the delay can be 14 days or more, which is used to examine the question of 1. whether there is an influence on the will and 2. a legitimate interest of the public service that precludes immediate dismissal. For example, when certain procedures are required for the

---

42 Law of Georgia on Public Service, 1997 (repealed), <https://matsne.gov.ge/ka/document/view/28312?publication=111> (in Georgian).

43 Decision No. 2/2/565 of the Constitutional Court of Georgia of April 19, 2016, on the case "Citizens of Georgia – Ilia Lezhava and Levan Rostomashvili against the Parliament of Georgia", II-35 (in Georgian).

44 Decision № 2/2-389 of the Constitutional Court of Georgia dated October 26, 2007, on the case of Georgian Citizen Maya Natadze and Others Against the Parliament of Georgia and the President of Georgia, II-19.

dismissal of an employee not to disrupt the operation of the service, also, finding and replacing a suitable staff, or when there is an unfulfilled obligation (until this obligation is fulfilled). The Chamber of Cassation explains that "writing a notice of dismissal does not release the official from the obligation to perform official duties, the official is released from service only if the statement is approved. Until then, the civil servant continues the labor relationship with the administrative body, and fulfills the assigned duties."[45]

The Law on Public Service, based on the objectives of public service, provides for a reservation related to the fact that "if the duration of the professional development program exceeds 3 months and this program is financed by a public institution, based on the contract concluded between the public servant and the public institution, the public servant does not have the right to be dismissed from the service of this program on his initiative within 1 year of completion. This rule does not apply if the official reimburses the public institution for the expenses incurred for his professional development."[46] The competition indeed provides a basis for determining the suitability of the candidate's knowledge and skills for the position to be held, but this is not enough for the professional development of the official. The legislation obliges the civil servant not to stop developing his/her knowledge and skills which are promoted by the public sector through different educational courses and programs.[47] The "investment" that the public institution puts in the development of the individual needs[48] of the employee should be used for the further evolvement of the public institution. Taking this principle into account, the legislator established the limitation of a dismissal by personal statement. This reservation derives from the principle of public services of exercising official authority economically and effectively by the official who is not allowed[49] to use the property and other resources of the public institution for personal purposes. Thus, the law protects the benefit received by the official from the expenses incurred by the public service and tries to preserve it to be used for the public institution. It is an exception if the civil servant reimburses the costs incurred for this course, in such a case the civil servant will benefit from the possibility of being dismissed from the service by a personal statement.

6. Does the Employee Have the Right to Apply for Dismissal during the Period of Suspension of Employment?

According to the explanation of the court of cassation, the suspension of the labor relationship implies the suspension of all the powers of the administrative body towards the employee.[50] the suspension of the powers is mutual and limits the ability of the public institution to issue an act

[45] Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 28, 2006, case# OE-235-224(A-06). (in Georgian).

[46] See Articles 54, 108-109 of the Law on Public Service, https://matsne.gov.ge/ka/document/view/3031098?publication=46 (in Georgian).

[47] *Turava P., Firtskhalashvili A., Dvalishvili M., Tsulaia I., Kardava E., Sanikidze Z., Makalatia E.,* Law of Georgia on Public Service, comments, Kardava *E. (ed.),* 2018, 191-192 (in Georgian).

[48] Ibid, 193.

[49] Law on Public Service, 2015, Art. 76.

[50] Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of April 5, 2016, case # OF-653-645 (2C-15). (in Georgian).

towards the employee. Despite this, the civil servant does not have the right to appeal with a limited application, while the public institution is limited in the capability of dismissing the civil servant during the period of suspension.

In one of the cases, to verify the absence of the desire to be dismissed, the official referred to the fact that he submitted the statement while on vacation. The court considered that "the legislation did not prohibit or limit the civil servant, even while on vacation, to make a decision about being dismissed, therefore, the administration was allowed to consider the application and satisfy it."[51]

The court also did not consider the application of a person to leave work while keeping a medical card to be credible. "Requesting to be dismissed from work while keeping a medical card makes the appeals implausible." As stated in the court decision, "this factual circumstance has a decisive importance to assess the legality of the impugned order."[52]

As mentioned above, the official has the right to appeal at any time, even when his authority has been suspended. Following the law, the suspension of authority means the temporary release of the official from the performance of official functions,[53] during this period the status and position of an official are preserved. If we take into account the court decision on mutual suspension of authority the public institution has no right to decide on the suspended official, but without a decision, the application of an official for dismissal cannot be satisfied. Thus, such a definition of the court should not apply to this particular case.

7. Protection of Rights

One of the challenges of public service reform is the stability of the official, which must be ensured. "The dismissal of an official should not depend on the changes[54] in government and public institution." The government decree determined that the principle of personnel stability requires the law to precisely define the legal basis for the dismissal of an official and the legal and social guarantees of his protection.[55]

One of the decisions of the German Constitutional Court indicated that civil servants should be effectively protected from arbitrary dismissal and its consequences.[56] Maintaining the principle of stability and continuous activity of a civil servant should be the function not only of the legislator but also of justice, to exclude the possibility of unjustified dismissal of the civil servant.[57]

---

51 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of April 5, 2016, case # OF-154-144(2C-07). (in Georgian).

52 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of April 5, 2016, case # OF-941(2C-20). (in Georgian).

53 Article 55 of the Law on Public Service (in Georgian).

54 Resolution No. 627 of the Government of Georgia on approval of the concept of public service reform and some related measures, 11/19/201(in Georgian).

55 Ibid.

56 Bundesverfassungsgericht, BVerfG, Beschluss vom 14.Januar 2020, 2 BvR 2055/16.

57 *Rensen H., Brink S.,* Linien der Rechtsprechungdes Bundesverfassungsgerichts – erörtert von den wissenschaftlichen Mitarbeitern, Berlin, 2009,244-246.

The subordinate attitude indeed means executing the tasks and instructions of the superior in the vertical to ensure the effective management[58] of organizational tasks, but this does not justify allowing to accomplish illegal instructions. Otherwise, public officials are formally accountable for conduct beyond their control.[59] Unfortunately, the term "cleansing" is generally used in practice to get rid of unwanted people.[60]

I think one of the important challenges is to maintain the stability of the civil servant. The stability of civil servants provides steadiness and neutrality[61] about the changing political orientation of service.

The lifetime employment and appointment to a position on the legal status of civil servant dominated German civil service from the 19th century.[62]

An important task of administrative proceedings is to take into account the requirements of effective legal protection.[63]

In the meritocratic system, under the conditions of social order, the social status, and income of a person are related to his achievements and ability.[64] Its preservation is particularly important and is often possible through litigation.

An official who is dismissed from public service by personal application and subsequently appeals to the court due to pressure and threats, in many cases indicates these facts in a claim, and not in dealings with an administrative body. Based on judicial practice, if the court does not have evidence of such illegality (coercion, deception, threat) in the case, the claim is not satisfied. If "the plaintiff has failed to meet the burden of proof imposed on him", this is grounds for dismissal of the claim.[65]

Coercion and threats are criminal offenses, but if the latter is proved during the trial, the court cannot be a criminal prosecution body, in this case, there is sufficient reason for the application not to be considered as an expression of the will, and accordingly, the claim must be satisfied.

In this case, the basis for satisfying the application is to determine whether the dismissal was lawful or not, which means that the applicant was not being discriminated in the reasoning. The Constitution of Georgia "considers the constitutional guarantees related to the position of a person employed in the public service – not to be dismissed from work without justification, to be protected from any external interference."[66] In this regard, justice offers quite interesting practice.

---

58 *Rosenbloom D.H., Kravchuk R.S., Clerkin R.M.*, Public Administration, Understanding Management, Politics and Law in the Public Sector, 2015, 546.

59 Ibid.

60 *Ludwig von Mises*, Bureaucracy, 1944, 119-120.

61 Bundesverfassungsgericht, BVerfG, Beschluss vom 28.5.2008.

62 Bundesverfassungsgericht, BVerfG, Beschluss vom 28. Mai 2008 – 2 BvL 11/07.

63 Bundesverfassungsgericht, BVerfG, Beschluss vom 09 Juli 2007 – 2 BvR 206/07.

64 *Rensen H., Brink S.*, Linien der Rechtsprechungdes Bundesverfassungsgerichts – erörtert von den wissenschaftlichen Mitarbeitern, Berlin, 2009, 229 (in German).

65 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of May 30, 2023, case #OF-496(C-22) (in Georgian).

66 The decision of the Constitutional Court of Georgia on July 29, 2014, on the case N3/2/574, a citizen of Georgia Giorgi Ugulava against the Parliament of Georgia (in Georgian).

In one of the cases, the Court of Cassation gave a harsh assessment of the practice established in Georgia over the years, according to which officials were dismissed beyond administrative proceedings. That was completely inconsistent with "modern administration standards hinder establishing the credibility with its population, gaining the authority and fulfilling international obligations imposed by the country."[67] Thus, the court established a strict test in assessing the legality of the decision before adopting the law in 2015 and indicated the need to conduct administrative proceedings and investigations. Following judicial practice even when it is not necessary to comply with the 14 calendar days stipulated by the Law of Georgia "On Public Service", the administrative body is obliged to conduct administrative proceedings and ascertain whether an official has a desire to be dismissed from the position.[68]

"The Court of Cassation considers that following justice in identical legal disputes judicial bodies have to distinguish cases when the will of a person is formed by his moods, attitudes, prospective plans, self-esteem, etc. On the one hand, the formation of the will can be conditioned by the low awareness about the obligations of public service, absolute obedience to the administration, and bribes (promotion, salary increase, bonus transfer, etc.). On the other hand, the will may be affected by coercion, or threats, due to the special condition of a public servant (health, difficult social situation, family status, etc.). Without establishing the mentioned facts, it will be impossible to exercise the right to judicial protection."[69] In one of the cases, before writing the application for dismissal, the plaintiff took an insurance card at work on the same day and applied to the bank for a loan a few days earlier, which makes the Appeals Chamber believe that the plaintiff was fired from the job. He did not intend to write the application about the dismissal.[70]

In its decision, the court states that a public official, who has the status and corresponding legal guarantees, is obliged to protect his rights, otherwise "he cannot respect and defend the rights of each member of society."[71] Practically, the court, according to his high reputation, defined the obligation of the civil servant to care for his rights.

In one of the cases, the Administrative Chamber of the Tbilisi Court of Appeals considered the application about the dismissal illogical and unconvincing, according to which, a person wrote the application about the dismissal 5 days before achieving retirement security (considering the period of stay at the disposal of personnel) and limits this important social right.[72] Based on the legislation of

---

67 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 29, 2014, case #BS-69-67(K-14) (in Georgian).

68 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 13, 2022, case #BS-140(K-22) (in Georgian).

69 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of January 11, 2018, case #BS-663-659 (K-17) (in Georgian).

70 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of March 28, 2017, case #BS-802-794(K-16) (in Georgian).

71 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of January 11, 2018, Case #BS-663-659 (K-17) (in Georgian).

72 Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of February 7, 2019, case #BS-1467(K-18) (in Georgian).

Georgia, it is possible to set a request for dismissal by personal statement at any time, however, in some cases, suspicious circumstances may raise questions about the validity of the will.

8. Conclusion

Despite the changes made in the legislation, the number of officials dismissed by personal application is still suspiciously high. We cannot always think about cases of coercion and pressure towards them, but the number of people leaving the service by personal application still raises doubts.

The legitimate expectation that the rights of civil servants protected by the law will be guaranteed, gives rise to procedural rights[73] to use the opportunity provided by the law to protect his rights.

The absence of a reason for dismissal in the application cannot be the basis for avoiding administrative proceedings on this application. Judicial practice demonstrates the following picture:

1. The validity of the applicant's will is disputed;

2. There is a request to leave the application unconsidered, but despite this fact, a decision about the dismissal of the employee has been made.

In the first case, the validity of the will must be identified to exclude the fact of influencing it, and in the second case, there is an evident violation of the law because it is imperatively established that in case of a request to leave the application unreviewed, the official should not be dismissed. If in the first case, it is necessary to stop the proceedings, in the second case the request of the applicant should be satisfied in keeping the position without any research. I think, if the legal dispute on this matter ends in favor of the official, the facts of the challenge to the will, proven in the court should be the basis for disciplinary responsibility against the relevant official so that it has a preventive value to avoid such vicious practice in the public service.

I think that in the Law of Georgia on Civil Service, not only paragraph 6 of Article 54, which is related to a financial obligation but also other unfulfilled obligations, which can also be considered as an obstacle to the dismissal of an official, should be indicated as a barrier to the dismissal of an employee. e.g. Not doing the work or delaying the completion of such work (transferring the work to another official) will harm the legitimate interest of the public service. Thus, only financial interest cannot be considered as a hurdle to dismissal based on a personal application.

The term of consideration and approval of the application requesting dismissal should be reasonable so as not to interfere with the further activities of the employee. This is supported by the fact that according to Article 18 of the Constitution of Georgia, the right to a fair consideration of the case by the administrative body is guaranteed. Due to public objectives, it is possible to delay the dismissal of the official, which may interfere with his plans. Hence, it is desirable to make a reservation in the law regarding the maximum period that can be used to satisfy the application of the official for public purposes.

---

[73] *Stott D., Felix A.,* Principles of administrative law, London, 1997, 152.

Bibliography:

1. Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995 (in Georgian).
2. Organic Law of Georgia, Labor Code of Georgia, 75, 27/12/2010 (in Georgian).
3. Law of Georgia on Civil Service, 2015 (in Georgian).
4. Law of Georgia on Public Service, Department of the Parliament, 45, 21/11/1997 (repealed on 27.10.2015, No. 4346) (in Georgian).
5. General Administrative Code of Georgia, LHG, 32(39), 15/07/1999 (in Georgian).
6. Resolution No. 627 of the Government of Georgia on approval of the concept of public service reform and some related measures, 11/19/2014 (in Georgian).
7. Estonian Civil Service Act.
8. 2022 statistics on public service, <http://csb.gov.ge/media/3513/897787.pdf> [21.09.2023] (in Georgian).
9. *Biolingi H., Lutringhaus P.,* Systematic analysis of the foundations of separate requests of the Civil Code of Georgia, 2009, 30 (in Georgian).
10. *Chanturia L.,* Introduction to the general part of the civil law of Georgia, Tbilisi, 1997, 313 (in Georgian).
11. *Cardona F.,* Support for Improvement in Governance and Management, A joint initiative of the OECD and the European Union, principally financed by the EU, Integrating National Administrations into the European Administrative Space, Budva, Montenegro, 2009, 7.
12. *Kereselidze D., Chachava S., Zaalishvili V., Shvelidze Z., Meskishvili K.,* Commentary on the Labor Code of Georgia, Tbilisi, 2023, 551 (in Georgian).
13. *Kharshiladze I., Kasradze I.,* Guarantees of the legal protection of civil servants, Georgian-German Journal of Comparative Law, 12/2022, 21-22 (in Georgian).
14. *Ludwig von Mises*, Bureaucracy, 1944, 119-120.
15. *Rensen H., Brink S.*, Linien der Rechtsprechungdes Bundesverfassungsgerichts – erörtert von den wissenschaftlichen Mitarbeitern, Berlin, 2009, 244-246.
16. *Rosenbloom D.H., Kravchuk R.S., Clerkin R.M*., Public Administration, Understanding Management, Politics, and Law in the Public Sector, 2015, 483, 546, 552-553.
17. *Shvelidze Z., Bodone K., Todria T., Khazhomia T., Gujabidze N., Meskhishvili K.,* Labor Law of Georgia and International Labor Standards, 2017, 257 (in Georgian).
18. *Stott D., Felix A*., Principles of administrative law, London, 1997,152.
19. *Turava P., Firtskhalashvili A., Dvalishvili M., Tsulaia I., Kardava E., Sanikidze Z., Makalatia E.,* Law of Georgia on Public Service, comments, *Kardava E. (ed.),* 2018, 191-193 (in Georgian).
20. *Wiederkehr S.,* Mitarbeitermotivation im Ofentlichen Dienst am beispiel der Wissenschaftlichen Bibliotheken in Deutschland, 2014, 20-21.
21. Zoidze B., Reception of European private law in Georgia, Tbilisi, 2005, 284 (in Georgian).
22. Bundesbeamtengesetz (BBG), Ausfertigungsdatum: 05.02.2009.
23. Bundesverfassungsgericht, BVerfG, Beschluss vom 14. Januar 2020, 2 BvR 2055/16.
24. Bundesverfassungsgericht, BVerfG, Beschluss vom 28. Mai 2008 – 2 BvL 11/07.
25. Bundesverfassungsgericht, BVerfG, Beschluss vom 09 Juli 2007 – 2 BvR 206/07.
26. Decision No. 2/2/565 of the Constitutional Court of Georgia dated April 19, 2016, in the case "Citizens of Georgia – Ilia Lezhava and Levan Rostomashvili against the Parliament of Georgia", II-35 (in Georgian).

27. Decision of the Constitutional Court of Georgia dated October 8, 2014 #2/4/532,533 Citizens of Georgia – Irakli Kemoklidze and Davit Kharadze against the Parliament of Georgia (in Georgian).
28. The decision of the Constitutional Court of Georgia of July 29, 2014, in the case N3/2/574, a citizen of Georgia Giorgi Ugulava against the Parliament of Georgia (in Georgian).
29. Decision № 2/2-389 of the Constitutional Court of Georgia dated October 26, 2007 in the case of Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia (in Georgian).
30. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of May 30, 2023, case #BS-496(K-22) (in Georgian).
31. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of January 13, 2022, case #BS-941(2k-20) (in Georgian).
32. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 13, 2022, case # BS-140(K-22) (in Georgian).
33. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of May 13, 2021, case #BS-724(2k-20) (in Georgian).
34. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of December 24, 2020, case # BS-898 (K-19) (in Georgian).
35. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of February 7, 2019, case #BS-1467(K-18) (in Georgian).
36. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of January 11, 2018, case #BS-663-659(K-17) (in Georgian).
37. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of March 28, 2017, case #BS-802-794(K-16) (in Georgian).
38. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of April 5, 2016, case # BS-653-645 (2k-15) (in Georgian).
39. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 29, 2014, case #BS-69-67(K-14) (in Georgian).
40. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of February 18, 2014, case BS-463-451(K-13) (in Georgian).
41. Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of June 28, 2011, case # AS-377-357-2011 (in Georgian).
42. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of September 11, 2008, case #BS-434-417(K-08) (in Georgian).
43. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of April 18, 2007, case #BS-154-144(2K-07) (in Georgian).
44. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of February 6, 2007, case #BS-822-788(K-06) (in Georgian).
45. Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 28, 2006, case# BS-235-224(K-06) (in Georgian).
46. Decision of the Tbilisi Court of Appeal #3b/1907-15 (in Georgian).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7706

Giorgi Cherkezia*

Definition of Legal Norms by Administrative Court

The court system is independent and it is exercised by the Constitutional Court of Georgia and the General Courts of Georgia.[1] As it is well known, the function of the court is to decide the disputed issue in favor of the side towards which the scales of law and justice lean, and not only to control the relevant systems, but also to promote their formation and development[2]. Court independence is a prerequisite for the fundamental guarantee of the rule of law and due process. A judge must inspire public confidence in the independence, fairness and impartiality of the law.[3]

The purpose of this article is to determine the peculiarity of the interpretation of the administrative norm by the court. A parallel will be made with the approaches established in the European experience and literature.

***Key words**: court, administrative board, definition of norm, role of judge.*

1. Introduction

Law is a complex science field, where the analysis of the theories of legal norms is aimed at reducing and studying each norm to small parts, therefore the question of interpretation of a legal norm by a judge causes a discussion among scientists[4]. First of all, in each definition, it is interesting how the identification criteria were established during the formation of the norm, which norm we are dealing with, and whether there is extensive realism, which, in other words, is an expression of the true will of the norm.[5] In addition, jurisprudence analyzes such legal relations that are regulated by relevant norms and constituent elements. which finds itself in constant renewal and development.[6]

In the legal literature, a number of types of norm definitions are distinguished, including: official and unofficial, authentic, legal definition, casual definition, subjective, objective, word-for-word definition, grammatical, logical, historical definition, teleological, spatial, restrictive and others.[7] However, it is interesting to see what methodology the court applies when interpreting the relevant norms, whether there is a methodology used by the judge.

---

* PhD Student at Ivane Javakhishvili Tbilisi State University Managing partner at International Consulting Company " Black Sea Law Group". https://orcid.org/0009-0000-0189-1763.

1 Constitution of Georgia, Art. 59.

2 *Bator M.,* What is wrong with Supreme Court, University of Pittsburgh Law Review, Vol. 51, Issue 3, 1990, 697.

3 Ethics of Judge <http://hcoj.gov.ge/ka/> [06.08.2023].

4 *Walt B., Bonczek G., Scepankova E.*, *Matthes F*., Semantic Types of Legal Norms in German Laws: Classification and Analysis Using Local Linear Explanations, Law Journal Library, 43, 2019.

5 *Narvaez M. M*., Expressing Norms Theory of Norms, Journal for Constitutional Theory and Philosophy of Law, Vol. 25, 43-100, 2015.

6 *Dewitt A.,* Classification and Restatement of the Law, Illinois Law Review, 622, 1919-1920.

7 *Tumanishvili G.,* Introduction in Civil law of Georgia, Tbilisi, 2012, 23 (in Georgian).

Court interpretation means clarifying the meaning of the legal norm by the court, which is carried out in order to correctly apply the norm in the court. Such definitions are also important for subordinate bodies. Thus, the court resolves this or that disputed legal relationship on the basis of the relation of the relevant law, which is carried out through the correct interpretation of the law, i.e. clarifying the true meaning, solving the intention of the legislator revealed in the appropriate set of words. The interpretation of the law is accompanied by a kind of difficulty in the case when the norm is not clear and consistent in meaning, its literal application contradicts the purpose of the law, and cannot provide a correct, fair solution to a specific relationship. However, it is interesting to see the practice established by the Supreme Court regarding the interpretation of certain norms and the precedents of the correct understanding and application of this practice by the courts of first and second instance.[8]

The mentioned issue is quite important both in labor and other categories of administrative disputes. In particular, recent judicial practice has shown that the majority of judges do not use the prerogative to return the case, unless the specific evidence or a certain part of the case is so unexamined that it is practically impossible to make a decision. On the other hand, there are frequent cases when, during the consideration of the cases of two persons dismissed on the basis of one act, one judge invalidated the dismissal and fully satisfied the claim, while the other judge invalidated the order of dismissal and returned the case to the administrative body without deciding the issue. In practice, there are decisions of 2023, where the legal entity won the case in all three instances, the administrative body issued a new act, which was completely invalidated by the court of first instance, and the appellate court partially satisfied it and returned the case back to the administrative body. Full interpretation of the norm is extremely dangerous both in terms of appeal to the court and in terms of its effectiveness. What is a reasonable period of time from the application to the court until the final decision is made, has become the basis of many discussions and discussions, but it depends on the judge how to use the discretion granted to him by law.[9]

2. The "Final Word" of the Court and the Prerogative of Returning the Case Back

The court has the prerogative of the "final word" in administrative cases, which means that if the disputed act is against the law and it harms the legal right or interest of the claimant, the court will issue a decision to declare the act unconditionally null and void. This rule also applies to a binding lawsuit, within the scope of which the court is authorized to settle the disputed issue with its decision, if the aforementioned does not require an additional examination of the circumstances of the case and the decision of the issue does not belong to the discretionary authority of the administrative body.

The full control of the court is even when the court cancels the repealed act without deciding the issue and returns it to the administrative body for a new decision with specific instructions. If the court considers that the disputed act was issued without investigating and assessing the circumstances essential to the case, the court is entitled to declare the act as invalid without any clarification of the

[8] Supreme Court of Georgia, Decision №1246-821(K-05).

[9] This case has been appealed to the court of appeals. It will be quite interesting what will be the decision of the Supreme Court and how the practice will follow.

disputed issue and instruct the administrative body to issue a new act after investigating and assessing the circumstances. The same rule applies to a binding lawsuit, when the disputed issue requires additional investigation of the circumstances of the case, therefore the court verifies the legality of the refusal and instructs the administrative body to issue the act requested by the plaintiff with a specific reference. In this case, the administrative body does not have the prerogative of the final decision, because the right of full content control ultimately remains with the court.[10] However, the court always tries to make a decision on the case where all the facts and details are investigated.[11]

Defects in the law are revealed during the implementation of law enforcement activities, where the activity of the courts occupies a special place, since it is at their disposal that they have real opportunities to identify and overcome the deficiencies in the legal norms, through their interpretation.[12] Courts are trying to eliminate existing judicial defects. In the professional interpretation of the legal norm, the judge is bound by both procedural (principles of procedural law) and substantive legal restrictions (obligation to make a reasonable decision). Without applying the mentioned principles, any definition will be arbitrary. If a corresponding norm of law or law is found, the judge checks its effectiveness in time and according to the circle of persons, determines the conditions of its unified interpretation in court decisions. If the judge determines that the interpreted legal norm is not flawed, the adequate interpretation is used. When one or another uncertainty is found in a legal norm, its expansive definition is used, when the norm is interpreted more broadly than its literal meaning, or restrictive definition, when the norm is interpreted narrower than its literal meaning, as a result of which the true content of the norm is determined.[13] The norm interpreted by the judge should not leave the parties feeling unclear about this decision, but his interpretation should strengthen the idea of the law more.[14]

The approach of the Supreme Court is also interesting, where it is emphasized that the definition of the Court of Cassation is casual. The Supreme Court does not make an abstract, general definition of the norms, if the factual circumstances important for the resolution of the dispute need to be examined by the body, the court is deprived of the opportunity to discuss the correctness of the definition of the norms, because the first test for the implementation of subsumption is to determine the perfection of the factual circumstances.[15] The cassation chamber also explained that the law is a means of implementing the purpose of the legislator and it must be interpreted within the scope of the purpose of the legislator and its implementation, at which point the will of the legislator must be determined. The definition of the law is based on certain principles: the principle of objectivity – that the definition should be based on the text of the law and express the will of the legislator; The principle of unity – every norm should be read systematically, in the logical context of the text of the law; The principle of genetic definition – the goal and intention of the legislator must be taken into

---

10 *Kalichava K.,* Justice and Law, Tbilisi, 2021, 20 (in Georgian).

11 *Carter F.,* Mechanical Details of Opinion Writing, Nebraska Law Review, Vol. 20, Issue 1, 76

12 *Kokhreidze L.,* Problems of Interpretation of Some Civil-legal Norms in the Consideration of Disputes Related to Inheritance, Justice and Law, 2014, 11.

13 Ibid, 13.

14 *Palmer J.,* A Definition of Law, American Bar Association Journal, Vol. 22, Issue 1, 69-70.

15 Supreme Court of Georgia, Decision №BS-309-309 (2K-18).

account. Thus, the law should be interpreted in accordance with the mentioned principles. Specification of the norm, its factual elements and legal consequences is carried out through the definition of the concepts used in the norm.[16] With a similar approach, the judge becomes the "author" and "writer" of democracy, who has assumed the role of "education" of the society.[17]

2.1. The Definition of the Norm by the Judge as a Ground for the Developing Law

A judge should not refrain from engaging in prohibited activities that will contribute to the development of legislation and the legal system[18]. In the modern conditions of the formation of the legal state, the problem of defining the norms of the law is particularly relevant, as it is related to the raising of the legal culture and legal consciousness of the society. Interpretation of the law involves explaining the vague norms of the law and determining the meaning of the words. Law expresses legal concepts in words. Understanding the law means that the words of the law are given the general representational content that these words are meant to convey. If the law gives the judge some freedom in making a decision, then the decision should be made based on the judge's legal awareness. For the judiciary, acting in accordance with the law means making a judicial decision only within the framework of the applicable law. Norms should be interpreted only on the basis of legal methodology. If there is a flaw in the legislation, the judge's argumentation should be made only in accordance with the immanent principles of the Constitution. It should be noted here that the judge, while interpreting the norm, is not free in every way to arbitrarily decide the case based on his personal legal feelings. At this time, he is obliged to first exhaust all the possibilities of knowledge in order to find the way of the error, which is the most relevant in relation to a specific case or corresponds to the existing judicial practice. As the Federal Constitutional Court of Germany has established, "the law enforcer obeys not only the law, but also justice". Accordingly, the interpretation of the norm by judges during the implementation of judicial activities is a legitimate basis for the development of law, which derives from the "principle of justice of the law. "[19]

In a democratic state, it is the duty of the court that the judge upholds the law impartially and without prejudice. The judicial functions of a judge are of paramount importance compared to all other types of his activities, the primary duty of a judge is to perform judicial powers, the main element of which is the consideration of cases and the rendering of decisions, which require the interpretation of the law and the application of the norms provided by the law. On the other hand, the acts of explanation of the legal norm represent a process formed by the combination of three main elements: understanding, explanation and the act of explanation of their accumulation.[20]

In the theory, the explanatory act (interpretive act) is considered as a legally important document, which includes specific normative correspondence and is aimed at determining the true meaning

---

16 Supreme Court of Georgia, Decision №BS-942-938 (K-17).

17 *Strawn U.,* The Judge's Role as an Educator, University of Bridgeport Law Review, 1987, 371.

18 *Dreher C.,* The Judge's Role, Judges Journal, Vol. 35, Issue 3, 1996, 16.

19 *Kipshidze Sh.,* The Judicial Law as a Source of Legislation, Journal of Law, №1, 2018, 209-210 (in Georgian).

20 Bangalore Principles of Judicial Conduct and Commentaries, German Society for International Cooperation

of the content of the legal norm. Official explanatory acts, along with normative-legal and judicial acts, are legal acts, therefore they are characterized by the same features that characterize legal acts in general. Those administrative bodies that do not have a law-making function should interpret legal norms only within and within the scope of the norm to be explained. It is not allowed to establish new norms by them.[21]

In society, there is a clear opinion about various events, the interests of minorities and majorities, the interests of vulnerable groups, and at least objective approaches to issues, however, the judge must be able to interpret the norm in such a way that his decision forms a strong and united society through ethics and sociological aspects.[22] The final word received by the judge should not create new ambiguities and uncertainties, especially when the court sends the act back to the administrative body for consideration.

Parallel to this principle, the principle of comprehensive and objective investigation of the circumstances of the case by the administrative court based on the public interest, to collect factual circumstances and evidence on its own initiative, to make a decision to present additional information and evidence. The administrative process is distinguished by its inquisitorial nature, as it is focused on the protection of public norms, thus it differs from the civil process, where private legal interests are protected. If in the process of considering the administrative dispute the court is not satisfied with the evidence presented by the parties and considers that it is insufficient for the objective investigation of the facts of the case and the determination of the objective truth in the case, it shall, on its own initiative, ensure the search for evidence and the examination of the circumstances. It should also be taken into account that the court may focus on such circumstances and evidence that the parties did not present to the court during the process.[23]

2.2. Definition of the Norm in Terms of Enforcement of Rulings and Decisions in Administrative Cases

The discretionary rights of the judge in the consideration of administrative cases are particularly important, and the more democratic the state is, the more the role of the judge increases.[24] Although the judge, due to the performance of the function assigned to him, cannot take the place of the administrative body, he is obliged to provide reasonable control over the exercise of discretionary powers by the administrative body, in particular, the principle of proportionality. It is important to ensure that every right is protected as much as possible during the process, as mentioned in Article 13 of the European Convention of Human Rights. The remedy must meet the requirements of Article 6 of the Convention, it must ensure a fair and proper hearing. It is impossible for the remedy to be effective if the judge cannot make a decision within a reasonable time. Moreover, it cannot be effective if the

---

21 *Mosulishvili A.,* Concept of law, essence, necessity of content fulfillment – A prerequisite for strengthening the authority of law, Academic Bulletin, Grigol Robakidze University, No. 4, 2015, 62 (in Georgian).

22 *Laub R.,* The Judge's Role in a Changing Society, Judicature, Vol. 53, 1969, 140.

23 *Gvamichava T.,* Admissibility of the Cassation Complaint in the Administrative process, (comparative analysis), Dissertation, Tbilisi, 2017, 52 (in Georgian).

24 *Schwarzer W.,* Managing Civil Litigation: The Trial Judge's Role, Judicature, Vol. 61, Issue 9, 1978, 402.

judge's decision is not executed in a timely manner, according to the law. Therefore, the judge should play an active role in the enforcement of the decision he has made, using various means.[25]

The role of judges in the execution of the decisions made in administrative cases is very important. The Consultative Council of European Judges (CCJE) believes that the principles of "mutatis mutandis" applicable to enforcement related to civil cases also apply to administrative cases, regardless of whether the case is brought against an individual or a public institution. In a state where the principle of the rule of law is respected, public institutions are most obliged to respect the decisions made by the court and "ex officio" are obliged to execute such a decision in a timely manner. The European Court of Human Rights has considered the application submitted by the applicants who either have not yet applied for enforcement proceedings or have to apply for this procedure. In this regard, the court stated that "a person who has obtained an enforceable decision as a result of successfully winning a dispute against the state should not be obliged to apply for enforcement proceedings in order to enforce such a decision." When recourse to enforcement becomes necessary, States should ensure that their national legislation provides for disciplinary and civil proceedings against public officials who refuse or delay the enforcement of a judgment. In such cases, the issue of civil liability of the civil servant may also arise.[26]

The principle – "The court knows the law" – gives rise to certain contradictions in practice.[27] A dispute resolved in favor of that side may have a long way to go, as even a slight ambiguity in the resolution part can cause problems at the enforcement stage. To summarize, it should be said that the enforcement mechanism should be very fast and flexible, so that non-enforcement of the decision does not create a feeling of inefficiency in the court. The efficiency of the enforcement mechanism contributes to the integration of society and reduces potential criticism,[28] which is based on clear and transparent decisions by the court.

3. Interpretation of the Acts by the Administrative Bodies and Control of the Court

According to the legislation, There are difference between individual administrative-legal act and normative acts. An individual administrative-legal act is addressed to a person or a limited circle of persons, while a normative act contains a general rule of conduct for permanent or temporary and multiple use. According to the content of the relationship regulated by the administrative act, it is separated into imperative character, specific legal relationship-determining character, right or legal relationship-determining existence-absence, preventive, repressive, equipping, limiting, etc.[29] Those mentioned acts are issued by administrative bodies.

---

25 Young Lawyers Association of Georgia., The right to a fair court, Tbilisi, 2001, 194 http://old.supremecourt.ge/files/upload-file/pdf/mosamartleta.qcevis-wes1.pdf last verified [10.08.2023]

26 Consultative Council of European Judges, Decision No. 10, 2010, 9.

27 *Chachava S.,* Competition of Claims and Claim Basis in Private Law Dissertation Thesis, 2010, 42 (in Georgian).

28 *Bridges C.,* Enforcing Integrity, Indiana Law Journal, Vol. 87, 2012, 1083.

29 *Turava P.,* Handbook of General Administrative Law, Tbilisi, 2005, 120 (in Georgian).

Administrative body, this is every state or municipality body/institution, a legal entity under public law (except for political and religious associations), as well as any other entity that performs public legal authority based on the legislation of Georgia.[30] In addition, it should be noted that the administrative bodies carry out their activities within the scope of their powers and discretion. Discretionary power gives the administrative body or official the freedom to choose the most acceptable decision from several decisions in accordance with the law based on the protection of public and private interests. The control of relevant decisions belongs to the sphere of activities of the judiciary.

Discretionary authority is understood as legally "bounded freedom", since it is limited by the purpose and scope of the norm of discretionary authority. In the administrative legislation of Georgia, such norms, which talk about the exercise of discretionary powers, dominate in the Code of Administrative Offenses of Georgia, which refers to the authority of the administrative body to use the possibility of imposing a monetary fine for an administrative offense. In such a situation, the discretionary power provides more scope for exercise of internal belief, at which point the administrative body is obliged to act in accordance with its duty and to use said scope for the purposes and within the scope of the law. Such application of the legal norm derives from the mandatory principles of the rule of law and, in particular, from the principle of equality. Incorrect use of internal beliefs is subject to verification by administrative courts.[31]

3.1. Decisions Made in the Frames of Discretion

For the first time, the term "discretion" was used in the United States of America in the Fox Act of 1792, which gave judges the right to refer to the jury and interpret both the content of the applicable norm and to express their own opinion about the case.[32]

Decisions made within the framework of discretionary authority belong to the field of actions that are carried out on the basis of legal authority. Actions taken on the basis of discretionary authority are legally significant if they lead to the creation, modification or termination of obligations. Thus, for example, the constitution gives the parliament the power to make laws, and the legislation on local self-government gives these bodies the right to make legal decisions within the scope of their powers. As for the limitation of discretionary powers, it is done not only on the basis of the enabling norm, but also by the legal context. It follows from the principle of the superior legal force of the law that the decision made on the basis of discretionary authority should not contradict the norms of the law. First, the constitutional provision that all people are equal before the law. The limits of discretionary authority, at least for administrative discretionary authority, are traditionally established in the norm providing the authority itself.[33]

---

30 General Administrative Code of Georgia, Art. 2, Par. "A".

31 *Tskhadadze K.,* Relevance of Constitutional-legal Principles for Administrative law, Administrative Law, 2016, 11 (in Georgian).

32 *Bingham L.,* The discretion of the Judge, Denning Law Journal, 1990, 27.

33 *Cipelius R.,* Doctrine of Legal Methods, 10th Edition, Munich, 2006, 113.

An important factor is to distinguish between the administrative bodies themselves, which carry out public administration. The process of forming the will of a specific administrative body is important in the organizational arrangement of public administration. The will of a monocratically organized institution is determined by one head. In the case of a collegial body, the decision is made on the basis of the will of the majority of equal, authorized persons. In a monocratic system, the leader has the right to make sole decisions, he is also the superior official of the employees in the institution. The decision-making process is fast and the entity responsible for the decision is clearly defined. In a collegial body, its chairman is only the first among equals (primus interpares). The decision-making process is defined by law. The decision is not taken individually, but collegially. A necessary element is the quorum, which implies the prerequisite for the authority to hold a meeting to make a decision, that the meeting must be attended by more than half of the members, and the prerequisite for making a decision, that it must be supported by more than half of the members present at the meeting. It is not the individual member who is responsible for the decision made, but the body, regardless of the position of its individual member.[34]

3.2. Control Types of Public Governance

It is known that there are separate types of public governance control, including official and disciplinary control (the right of a superior official to control employees); Sectoral and legal control (implemented by the principle of subordination); Parliamentary control (the Government of Georgia is accountable only to the Parliament) and judicial control.

Judicial control of public administration differs from all the above-mentioned types of control, it is more directed to the protection of the subjective rights of citizens and other persons of private law. The main guarantee of achieving this is the independence of the court from other bodies of government. At the same time, lawsuits regarding the annulment of an administrative act or the issuance of such an act, in addition to the protection of individual rights, also imply an objective verification of the legality of public administration. And if the judge finds signs of a crime in a given case, then he has the right to apply to the relevant law enforcement authorities for further action. It should also be taken into account that the court is not authorized to check disputed acts in all cases. Control of the legality of public administration in the court should be carried out under the condition of full observance of the principle of separation of powers. Georgian law only in certain exceptional cases allows the so-called "popular lawsuit" authority (eg, in the field of environmental protection). From this point of view, Georgian law is more oriented towards the French model (which recognizes the extended right of action based on interest) and differs from the model of right of action based on the principle of the norm of protection established in German law (which in German law is compensated by the altruistic right of action of environmental organizations).[35]

---

34 *Turava P.,* Administrative Proceedings in Public Service, Tbilisi 2020, 156 (in Georgian).

35 *Kalichava K.,* Head of Administrative Science, Tbilisi, 2018, 362.

4. Conclusion

The result of the explanation should be clear, understandable and there should not be any doubts about the accuracy of the conclusion. The definition does not create new legal provisions, it provides redundant information. The result of the interpretation is different depending on the relationship between the textual expression of the norm and its true content.

The analysis of the practice of the Court of Cassation gives us a full reason to conclude that most often the importance of the case for the development of law is due to a gap in the legislation. Considering that the court of cassation was created not only for the protection of individuals but also public interests, the establishment of a uniform judicial practice, as well as the development of law, serves the realization of the public purpose of the court of cassation.

There is no hierarchy of definitions, there are reasonable steps: grammatical definition, systematic definition and teleological, if necessary, historical (when the correctness of the norm is in doubt), legislative and judicial definition. In the process of the relationship, the definition of the legislator is of decisive importance (definitional norms, general binding force). The definition of the court is not the law and the judge uses it without explaining the norm. If the interpretation of the law produces an unjust result, then it must be interpreted against the meaning of the statute.[36]

Bibliography:

1. Constitution of Georgia.
2. General Administrative Code of Georgia;
3. Bangalore Principles of Judicial Conduct and Commentaries, German Society for International Cooperation.
4. *Bator M.,* What is wrong with Supreme Court, University of Pittsburgh Law Review, Vol. 51, Issue 3, 1990, 697.
5. *Bingham L.,* The Discretion of the Judge, Denning Law Journal, 1990, 27.
6. *Bridges C.,* Enforcing Integrity, Indiana Law Journal, Vol. 87, 2012, 1083.
7. *Carter F.,* Mechanical Details of opinion writing, Nebraska Law Review, Vol. 20, Issue 1, 76.
8. *Chachava S.,* Competition of Claims and Claim Basis in Private Law Dissertation Thesis, 2010, 42 (in Georgian).
9. *Cipelius R.,* Doctrine of Legal Methods, 10th Edition, Munich, 2006, 113.
10. *Dewitt A.,* Classification and Restatement of the Law, Illinois Law Review, 622, 1919-1920.
11. *Dreher C.,* The Judge's Role, Judges Journal, Vol. 35, Issue 3, 1996, 16.
12. *Gvamichava T.,* Admissibility of the Cassation Complaint in the Administrative Process, (comparative analysis), Dissertation, Tbilisi, 2017, 52 (in Georgian).
13. *Kalichava K.,* Head of Administrative Science, Tbilisi, 2018, 362 (in Georgian).
14. *Kalichava K.,* Justice and Law, 2021, 20 (in Georgian).
15. *Khubua G.,* Methods of Law, Tbilisi, 2018, 1 (in Georgian).
16. *Kipshidze Sh.,* The Judicial Law as a Source of Legislation, Journal of Law, №1, 2018, 209-210 (in Georgian).

[36] *Khubua G.,* Methods of law, Tbilisi, 2018, 1 (in georgian).

17. *Kokhreidze L.,* Problems of Interpretation of Some Civil-legal Norms in the Consideration of Disputes Rrelated to Inheritance, Justice and Law, 2014, 11 (in Georgian).
18. *Laub R.,* The Judge's Role in a Changing Society, Judicature, Vol. 53, 1969, 140.
19. *Mosulishvili A.,* Concept of Law, Eessence, Necessity of Content Fulfillment – A Prerequisite for Strengthening the Aauthority of Llaw, Academic Bulletin, Grigol Robakidze University, No. 4, 2015, 62 (in Georgian).
20. *Narvaez M. M*., Expressing Norms Theory of Norms, Journal for Constitutional Theory and Philosophy of Law, Vol. 25, 43-100, 2015.
21. *Palmer J.,* A Definition of Law, American Bar Association Journal, Vol. 22, Issue 1, 69-70.
22. *Schwarzer W.,* Managing Civil Litigation: The Trial Judge's Role, Judicature, Vol. 61, Issue 9, 1978, 402.
23. *Strawn U.,* The Judge's Role as an Educator, University of Bridgeport Law Review, 1987, 371.
24. *Tskhadadze K.,* Relevance of Constitutional-legal Principles for Administrative Law, Administrative Law, 2016, 11 (in Georgian).
25. *Tumanishvili G.,* Introduction in Civil law of Georgia, Tbilisi, 2012, 23 (in Georgian).
26. *Turava P.,* Administrative Proceedings in Public Service, Tbilisi, 2020, 156 (in Georgian).
27. *Turava P.,* Handbook of General Administrative Law, 2005, 120 (in Georgian).
28. *Walt B.*, *Bonczek G.*, *Scepankova E.*, *Matthes F*., Semantic Types of Legal Norms in German Laws: Classification and Analysis Using Local Linear Explanations, Law Journal Library, 43, 2019.
29. Young Lawyers Association of Georgia, The right to a fair court, Tbilisi, 2001, 194 http://old. supremecourt.ge/files/upload-file/pdf/mosamartleta.qcevis-wes1.pdf last verified [10.08.2023].
30. Ethics of Judge http://hcoj.gov.ge/ka/ [Checked on 06.08.2023].
31. Consultative Council of European Judges., Decision No. 10, 2010, 9.
32. Supreme Court of Georgia, Decision №BS-309-309 (2K-18).
33. Supreme Court of Georgia, Decision №BS-942-938 (K-17).
34. Supreme Court of Georgia, Decision №1246-821(K-05).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7707

Besik Meurmishvili•

Systematic Understanding of the Function of Public Criminal Prosecution

Public prosecution is one of the necessary and important institutions for effective obstruction of justice. Applying this legal instrument reduces crime, eliminates fear of crime, and strengthens faith in the rule of law in society. Therefore, an accurate understanding of the definition of public criminal prosecution is a kind of guarantee for the correct determination of the criminal law policy for a state. Today, the function of public criminal prosecution is represented on a fairly wide scale in the space of Georgian criminal procedure. This function needs to be further refined and established in a new way to make it more flexible and effective. For this, it is essential to have a clear legal definition of the concept of public criminal prosecution and accurately determine and manage the scope and terms of the prosecution.

Keywords: *Public Criminal Prosecution, Public Interest, Procedural Coercion Measures, Procedural Actions, Indictment Activities, Recognition of a Person as the Accused.*

1. Introduction

The function of public criminal prosecution is one of the necessary and important mechanisms of traditional justice. Every state tries to ensure and establish law and order through this institution in complex with other legal mechanisms. The role of functioning criminal prosecution is vital for the peaceful life of society.

There are many opinions about criminal prosecution;[1] The legal space of criminal procedure seems to abound with scientific works[2] and practical recommendations regarding the mentioned issue; In practice, serious questions about the function of criminal prosecution are not often met but this is not enough. Criminal prosecution is such a multifarious varied and problematic topic that it has not lost its relevance even now. Accordingly, the purpose of this article is: to highlight some problems related to the function of criminal prosecution, to make a theoretical and practical, systematic analysis of these issues and to form a modern, new vision about the function of criminal prosecution and other elements concerned with it.

Today criminal procedural law is in constant development and dynamics. There are many changes in the current criminal procedure law. Lots of new institutions[3] are introduced, and several

• Doctor of Law, Assistant-professor of Ivane Javakhishvili Tbilisi State University (in Georgian). https://orcid.org/0009-0005-5807-9932.

1 *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings, (Investigation Stage), "Meridian" Publishing House, Tbilisi, 2015, 79-92 (in Georgian).

2 Ibid. *Abashidze G.,* Prosecutor's Discretionary Powers on Carrying out Criminal Prosecution, (Georgian Model of Discretionary Criminal Prosecution), Tbilisi, 2011; *Kamisar Y., Lafave W.R., Israel J.H., King N.J.,* Basic Criminal Procedure, Cases, Comments and Questions, Eleventh Edition, Thomson West, 2005, 24.

3 For example, the coordinator of the witness and the victim, etc. (in Georgian).

new questions and problems arise from a practical and theoretical point of view. Accordingly, considering these changes, it is interesting, even necessary, to review the approaches to the function of criminal prosecution and other related topics once again and anchor new opinions in the space of criminal procedure, which will have solid theoretical and practical foundations.

So, the following paper examines: The concept of criminal prosecution and the approaches of the European Court of Human Rights to its function; Scales of criminal prosecution; Relation of the equality of arms and adversarial principle to the function of criminal prosecution; Criminal prosecution term; Possibilities and degree of legal impact from a victim in case of refusal or termination of criminal prosecution.

Naturally, the range of issues listed above is not enough to fully understand the function of criminal prosecution. It is necessary to continue the research on this topic, develop and publish new works, and study the current practice to make a deeper analysis and understanding of this extremely important function.

2. Concept of Criminal Prosecution, Scope, and Interpretations of the European Court of Human Rights

It is known that the current criminal law procedural legislation does not consider the interpretation of criminal prosecution, but its definition[4] is provided in the scientific literature. In particular, criminal prosecution is defined as: "procedural activity carried out by a person based on the authority granted by the Criminal Procedure Code, which includes the protection of public interest, the disclosure and punishment of the person who committed the crime, after the assessment of actual data (facts and evidence), appropriate procedural actions against the accused, including the implementation of indictment activities in the stage of investigation and during the consideration of the case in the court."[5]

In addition, the structure of criminal prosecution is also discussed in the legal literature with relevant schemes[6] based on which we can perceive the concept and scope of the function of criminal prosecution in the space of criminal procedure of Georgia. In particular, criminal prosecution is initiated in two ways: 1. Detention of a person; 2. Recognition of a person as an accused. Completion of these two actions is sufficient to initiate criminal prosecution. So, to start a criminal prosecution, it is necessary to appear a specific person[7] in the criminal process who has been charged[8] with

---

4 *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings. (Investigation Stage), "Meridian" Publishing House, Tbilisi, 2015, 79 (in Georgian).

5 Ibid. 309 (in Georgian).

6 *Beltadze V.,* The Concept of the Function of Criminal Prosecution by the Criminal Law of Georgia; Journal "Justice and Law", #2(37)13, 146 (in Georgian); *Abashidze G.,* The Prosecutor as a Subject of Criminal Prosecution (at the stage of investigation), Tbilisi, 2011, 69-70 (in Georgian).

7 See. appendix #1.

8 *Papiashvili Sh.,* The Problem of Initiating a Criminal Case and Criminal Prosecution in the Criminal Process, Tbilisi, 1999, 24 (in Georgian); *Papiashvili Sh., Tevzadze A.,* Inspection of Materials and Initiation of Criminal Case and Prosecution, Tbilisi, 2002, 99-101(in Georgian); Practical guide in criminal proceedings (a guide for prosecutors and investigators), General Prosecutor's Office of Georgia, 2007,12 (in Georgian).

committing a crime. However, the legal literature provides different opinions about the criminal prosecution which is considered as a separate, independent stage[9] and it starts just from the moment of the beginning of the investigation without the accused[10], etc. In this regard, the approach of the European Court is also interesting. In particular, according to the interpretation of the European Court of Human Rights, criminal prosecution begins when the actions are taken against a specific subject, based on which this person can commit a crime and be rendered justice.[11] These actions may also include investigative actions, but in this case, it is a broad definition of criminal prosecution.[12]

The European Court, as well as the current Criminal Procedure Legislation of Georgia (Article 167), connects the initiation of criminal prosecution to a specific entity[13] that appears as an accused in the criminal process. Therefore, it is possible to say that in terms of the initiation of criminal prosecution, there is no inconsistency between the approaches of the European Court and the Georgian criminal procedure. Moreover, concerning legal development, such an advanced country as England has a narrow understanding of the definition of criminal prosecution. In England, the prosecution of a person begins when a criminal case is transferred to the Crown Prosecutor to assess whether a prosecution would maintain public confidence in the courts and the administration of justice.[14] In this regard, there is another approach in Georgian criminal procedural law. Criminal prosecution in Georgia is more extensive and widely represented; The prosecution begins immediately after the person is arrested or recognized as an accused, and at the stage of investigation, it is carried out by conducting various procedural actions; Criminal prosecution includes requesting the court for applying preventive measures by the prosecutor, the dismissal of the accused and a motion of the parties for seizure of property in the court, etc.[15] In addition, the criminal prosecution continues in court, and this is confirmed not only by the legal literature[16] but also by the current criminal procedural legislation (Article 250). So, criminal prosecution is the most powerful function of the prosecutor that combines many procedural actions. This raises the natural question of whether such a broad function of criminal prosecution in the legal space of Georgia can prevent the effective implementation of this function. If

---

9 *Gogshelidze R.,* The Role of the Prosecutor's Office in a Democratic Society; "Law" magazine, 2002, #9-10, 71-75 (in Georgian).

10 *Bouloc B., Stefani G., Levasseur G.,*Procédure pénale, 23e édition, Paris, 2012, 144-145, 166-167; *Dubina I.A.,* Objectives of Pre-trial Criminal Proceedings and the Role of the Prosecutor in Achieving Them., Dissertation for the degree of candidate of legal sciences, Volgograd, 2006, 109 (in Russian); Comp. *Molins F.,* L'action public, 2009, (dernière mise à jour: 2013) 8-9.

11 Case of Foti and Others v. (Application no. 7604/76; 7719/76; 7781/77; 7913/77) Kangasluoma v. Finland, no 48339/99, ECHR, June 14, 2004; Zana v. Turkey, no 69/1996/688/880, ECHR November 25, 1997.

12 Criminal Law Process of Georgia, Private Part, 2nd edition, collective of authors, *Mamniashvili M., Ghakhokidze J., Gabisonia I.* (ed.) publishing house "World of Lawyers", Tbilisi, 2013, 116-117 (in Georgian).

13 Regarding the mentioned position, see additionally: Criminal Procedural Law of Georgia, (private part), collective of authors, editor: *Papiashvili L.* "Meridian" publishing house, Tbilisi, 2017, 63 (in Georgian).

14 Le Code des procureurs de la Couronne, par. 3-4, <https://www.cps.gov.uk/sites/default/files/documents/publications/FRENCH-Code-for-Crown-Prosecutors-October-2018.pdf> [20.09.2023].

15 Criminal Procedural Law of Georgia, (private part), collective of authors, editor: *Papiashvili L.,* "Meridian" publishing house, Tbilisi, 2017, 75-82 (in Georgian).

16 Ibid. 69-72.

we look at legally advanced countries (England, the USA, France)[17], criminal prosecution is not so widely applied. For example, prosecution does not include procedural coercion measures while in Georgian criminal procedural law plays a critical role.[18] In addition, the consideration of procedural coercion measures in criminal prosecution creates certain difficulties and contradictions.[19] For example, the problem of arresting an initial subject of prosecution.[20] Talking about the scale of the criminal prosecution the issue of implementing the criminal prosecution in the court is also interesting. Criminal prosecution is carried out in support of the state accusation[21] but it is necessary to find out how it is continued in the higher instances or if it makes a start in the courts of appeal and cassation. In this case, questions refer to the transfer of the prosecution from one instance court to another. This issue was not a complication under the Criminal Procedure Law of February 20, 1998, because according to the above-mentioned law, the judgment provided by the court entered into force and ensured the enforcement after the expiration of the 1 month of appeal (Article 602).[22] The parties had the opportunity to appeal to a higher court as there was not the enforcement of the sentence. The criminal prosecution had to continue because the process of the enforcement of the sentence had not started yet, and by appealing the verdict, the judge (accused) and the prosecutor were still legally in an enduring criminal procedure relationship. The prosecutor by performing the last action[23] in the court fulfilled his function to support the accusation but the criminal prosecution was not finally over; There was a loophole in the procedure legislation to continue the criminal prosecution in an uninterrupted mode in case of appealing the verdict (the execution which had not started yet). Based on the presumption of innocence, a person could not be called guilty because the judgment had not entered into legal force. This rule was changed during the 1998 Procedure Legislation (Article 602).[24] According to the current Criminal Procedure Code, a judgment shall enter into force and be enforced upon its public announcement by the court (Article 279). This means that the person has already been

---

17 *Wade M.,* The Power to Decide – Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today, 2006, 108-109, <http://link.springer.com/chapter/10.1007%2F978-3-540-33963-2_2#page-1>, [20.09.2023]; Le Code des procureurs de la Couronne, par. 3-4, https://www.cps.gov.uk/sites/default/files/documents/publications/FRENCH-Code-for-Crown-Prosecutors-October-2018.pdf> [20.09.2023]; *Kamisar Y., Lafave W.R., Israel J.H., King N.J.,* Basic Criminal Procedure, Cases, Comments and Questions, 11th Edition, Thomson West, 2005, 9-16; *Bouloc B., Stefani G., Levasseur G.,*Procédure pénale, 23e édition, Paris, 2012, 137-167, 573-623; *Larguier J.,* Procédure pénale, 18e édition, Paris, 2001, 85-88; *Guinchard S., Buisson J.,* Procédure pénale, Paris, 2000, 492-494.

18 *Mamniashvili M., Ghakhokidze J. Gabisonia I.* (*eds.),* Criminal Law Process of Georgia, Private Part, 2nd ed., Collective of Authors, publishing house "World of Lawyers", Tbilisi, 2013, 119 (in Georgian).

19 *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings, (Investigation Stage), "Meridian" Publishing House, Tbilisi, 2015, 117-134 (in Georgian).

20 Ibid. 134-136.

21 Ibid. 237. Comp. *Kobaladze P.,* For Mutual Separation of the Functions of Supporting State and Criminal Prosecution, magazine, "Justice and Law", #3(22)09 (in Georgian).

22 See <https://matsne.gov.ge/ka/document/view/31882?publication=51> [20.09.2023].

23 *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings, (Investigation Stage), "Meridian" Publishing House, Tbilisi, 2015, 235 (in Georgian); Comp. *Laliashvili T.,* Georgian Criminal Process, General Part, Publisher "World of Lawyers", Tbilisi, 2015 (in Georgian).

24 See <https://www.matsne.gov.ge/ka/document/view/31882?publication=103> [20.09.2023].

found guilty and since the process of enforcement of a sentence has been started, the criminal procedure relationship between the state and the convicted person has already ended (the convicted person has entered into a sentence-enforcement legal relationship with the state). Consequently, criminal prosecution (it is a procedure activity[25]) can no longer continue perpetually in the courts of higher instance. So, the legislator introduced a new approach; In particular, the criminal prosecution in the courts of appeal and cassation can be resumed in case of appealing the sentence. The criminal prosecution started in the investigation stage proceeds continuously in the Court of First Instance if the prosecutor has decided to continue the criminal prosecution while the prosecution in the appeal and cassation stages can be resumed which depends on an appeal of the judgment of conviction already entered into legal force by the authorized entity. At this time, the convicted person is simultaneously in criminal procedure and enforcement relations with the state. The mentioned reasoning is extremely important for a systematic understanding of the scope of the criminal prosecution: the criminal prosecution started in the investigation stage can be continued continuously in the Court of First Instance (the first stage); The prosecution is completed during the substantive consideration of the case, with the last action of the prosecutor. After that, in the appeal (the second stage) and cassation (the third stage) stages, the criminal prosecution can be resumed.

3. Equality and Adversarias Principle and the Function of Criminal Prosecution

From the perspective of the research, another important issue is the correlation of equality and adversarial between the arms to the function of criminal prosecution. The concept and meaning of the mentioned principle are not fully defined in the legal literature.[26] For instance, protecting the rights of the accused person before starting the criminal prosecution against him. By the Criminal Procedure Code, upon the commencement of a criminal prosecution, criminal proceedings shall be carried out based on the equality of arms and adversarial principle (Article 9). Therefore, in criminal proceedings, the defense appears in legal terms and acquires its procedural power after the initiation of criminal prosecution.[27] Unfortunately, the answer to the following questions if a person against whom criminal prosecution has not been initiated yet and in the shortest period[28] he can be known as an accused, has the opportunity to prepare for the defense and participate in the proceedings in any way, get acquainted with the materials of the criminal case or use the right of defense, is negative. This person is provided with the rights and duties of the accused and allowed to fully participate in the criminal process after initiating criminal prosecution against him. However, before receiving the status of the

[25] For details see *Abashidze G.,* Criminal Prosecution as a Function of the Prosecutor and its Implementation at the Investigation Stage, "Universal" publishing house, Tbilisi, 2018 (in Georgian).

[26] *Giorgadze G.,* Competitive Nature of Criminal Justice Process in Georgia, a collection of scientific works: The Impact of European and International law on Georgian Criminal Procedural Law, scientific eds.: *Tumanishvili G., Jishkariani B., Shrami E.,* "Meridiani" Publishing House, Tbilisi, 2019, 282-294 (in Georgian).

[27] *Lomsadze M.,* Criminal Law Process (Seventh Revised and Completed Edition), "Bona Causa", publishing House, Tbilisi, 2018, 44-45 (in Georgian).

[28] For example, in traffic accidents and other crimes, when the alleged perpetrator of the crime has been identified only formal actions stipulated by the law can be performed to charge this person.

accused, a person remains outside the proceedings while the prosecution is free to investigate and gather evidence to get the person charged. Based on all of the above, there arises a question of whether the rights of the accused person are limited at this time or not, also, if the equality and adversarial principle needs to be interpreted in a broader sense. The above-mentioned issue is not odd to the criminal procedure of European countries. For example, France failed to solve the problem referring to a person who had not been accused yet and waiting to get the status of an accused had many limited rights to defend himself.[29] This issue was regulated in forming the institution of "assisted witness". The witness assisted is a person involved in the criminal case. It is an intermediate status between that of the witness and that of the indicted. This status gives rights before the investigating judge. It may change during the procedure.[30] It would be better to introduce the institution of "assisted witness" in the space of Georgian criminal procedure because the person exposed as a result of the investigation would be able to participate in the criminal legal process before the charges are filed against him and protect his rights. Simultaneously, the balance characteristic of equality of arms and adversarial principle would be maintained from the beginning.

Therefore, it is appropriate to amend the Criminal Procedure Code and define a new subject of the process – an "assisted witness", who will have the following rights (*Article 49[1]* – rights and obligations of an assisted witness: 1. An assisted witness shall have all rights of a witness; 2. An assisted witness shall also have the right to: a) to have a lawyer at his own expense or the expense of the state provided by law; b) to obtain and submit evidence independently or through a lawyer by the procedure established by the Code; c) to request the carrying out of investigative actions and provision of evidence to refute the charges or mitigate the liability; d) to request the presence of a lawyer during the investigative actions conducted with his/her participation.[31]

An "assisted witness" should be recognized by the resolution of the investigator or prosecutor.

The rights of a prosecuted person before receiving the status of an accused were provided by the Criminal Procedure Legislation of February 20, 1998.

In particular, according to Article 24, Section 51 of the above-mentioned Code, a person, against whom the collection of evidence was ensured but the criminal prosecution had not been initiated, had the right to file a complaint with the superior prosecutor or depending on the scene of investigation request the timely initiation of criminal prosecution. Such a complaint was beneficial for the accused person because by initiating criminal prosecution against him, he would be able to defend himself.[32] However, this approach is not considered completely correct as the person against whom the

---

29 Code de procédure pénale, (français), art. 113-1, 113-2; Dernière mise à jour des données de ce code : 01 avril 2023, <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/>, [20.09.2023]; *Larguier J.,* Procédure pénale, 18e édition, Paris, 2001, 161-162, 173-174; *Gutsenko K.F., Golovko L.V., Filimonov B.A.,* Criminal Law Process of the Western States, translation from Russian, scientific ed. *Gogshelidze R.,* Tbilisi, 2007, 429-430 (in Georgian).

30 Ibid.

31 *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings, (Investigation Stage), "Meridian" Publishing House, Tbilisi, 2015, 318-319 (in Georgian).

32 *Meishvili Z., Zorbenadze O.,* Commentaries on the Criminal Procedure Code of Georgia (as of December 31, 2006), Tbilisi, 2007, 82-87; See also, Criminal Procedure Code of Georgia of February 20, 1998, as of February 01, 2006, Article 24 (in Georgian).

evidence is being collected must be provided with some rights before the criminal prosecution, and he should not request the initiation of the prosecution for this purpose. In this regard, the sharing of the French model (assisted witness) is more appropriate than the provision established by the 1998 Procedural Law.

4. The Term of Prosecution

The term of criminal prosecution is also quite exceptional. The mentioned issue is related to the term of staying as an accused. According to the current criminal procedure, before a preliminary hearing, a person may be indicted due to a single episode of crime for no longer than 9 months, unless he was charged with another crime during this period. Upon expiration of the above period, the criminal prosecution against the person shall be terminated (Article 169). So, based on the current criminal procedure, the term of criminal prosecution against a person is clearly defined in the investigation stage of 9 months. Undoubtedly, the criminal prosecution is carried out in the court during a hearing on the merits, that is why, the term of the criminal prosecution in the court is also noteworthy. In this regard, the current criminal procedure indicates nothing. Thus, there is no term for criminal prosecution during considering the case, which is a drawback. The uncertainty of the prosecution term prolongs the remaining as an accused who is not in agreement with the protection of human rights. Indeed, the status of the accused is also empowering because he has many rights to protect himself but remaining accused for a long time cannot always have a positive effect on him, and specifying this term in the criminal procedure contradicts the expediency of justice (Article 8), this fact also hurts a person's business reputation, etc. In addition, the term of being accused cannot exceed 9 months while a person is in custody, but a person who is not in custody even after a preliminary hearing maintains the status of an accused until the court renders the judgment; At this time, a court of first instance shall render the judgment not later for 24 hours after the judge of preliminary decides to refer the case for a hearing on the merits (Article 185, Section 6). If we add up the 9 months of being an accused before the preliminary hearing and the 24 months for rendering the judgment, it turns out that a person, who is not in custody, can be an accused for 33 months which also contradicts the principle of expediency justice. As mentioned above, after the expiration of the 9 months of being accused before the preliminary hearing, the person is automatically dismissed from the charge, while the expiration of the 24 months for deciding in court (for example, the violation of this term by the judge) is not related to the dismissal of the charge. The above term may be violated but the person retains the status of the accused. Thus, to protect the interests of the accused, it is necessary and important that during a hearing on the merits of the case in court, the term of remaining a person as an accused is determined by the applicable procedure.

5. The Procedure Opportunity of a Victim to Influence the Decision taken by the Prosecutor Regarding the Criminal Prosecution

In addition to the above-mentioned issues, the opportunity for a victim to have a legal influence on the refusal or termination of criminal prosecution by the prosecutor and his legal status are also noteworthy. The problem mentioned above is not new. Around the topic there were discussions and

debates, it was also written in the scientific literature.[33] Some changes were indeed made in the procedure legislation, but the problem has not been solved. Since the implementation of the Criminal Procedure Code of 2009, the right of a victim to appeal the decision made by the prosecutor to refuse or terminate criminal prosecution has been changed several times. Initially, the victim had the right to appeal the above-mentioned decisions only to the superior prosecutor (Articles 106, 168). From July 24, 2014, if a particularly serious crime was committed the victim already had the right after the superior prosecutor to apply to the court for the appeal of the prosecutor's decision.[34] From July 21, 2018, the victim was given the chance to appeal the decisions made by the prosecutor on the cases subordinated to the state inspector.[35] After that, according to procedure legislation, the victim is provided with the right to appeal the prosecutor's decision on termination of criminal prosecution of domestic violence and other family crimes, as well as the serious crimes under the jurisdiction of the Special Investigation Service (Article 106). As for the refusal of criminal prosecution, according to the current procedure legislation, such a decision of the prosecutor may be appealed to the superior prosecutor. The decision of a superior prosecutor shall be final and may not be appealed, except when a particularly serious crime a crime which is under the jurisdiction of the Special Investigation Service, has been committed (Article 168). As can be seen from the above, the victim did not have the right to apply to the court with a request to resume or initiate criminal prosecution for all categories of crimes and influence the decision made by the prosecutor, which was wrong following this paper. On July 27, 2023, the First Panel of the Constitutional Court of Georgia adopted decision #1/5/1355,1389 which confirmed the validity of the opinion revealed in the work. In particular, the words of Article 106, Section 11, Sentence 2 of the Code of Criminal Procedure of Georgia, "The decision of the superior prosecutor is final and may not be appealed, except when a particularly serious crime has been committed" (the edition valid until October 15, 2019) and the words of the 2nd sentence of the 2nd part of Article 168 "The decision of the superior prosecutor is final and may not be appealed". The Constitutional Court indicated in the above-mentioned decision that as a result of committing a crime a victim suffers from physical, moral, and psychological stress, as well as material damage. Accordingly, to restore/protect his violated rights, he shall be considered a subject of the right to a fair trial.[36] The right of the victim to appeal the decision of the prosecutor on a refusal or termination of the criminal prosecution can be considered as one of the important mechanisms of control used by the state bodies.[37] The right of the appeal allows him to reexamine the legality of the refusal to initiate the prosecution again through the state authorities.[38] In addition, the Constitutional Court indicated in its decision that the decision made by the prosecutor to refuse to initiate prosecution or terminate the

---

33 *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings, (Investigation Stage), "Meridian" Publishing House, Tbilisi, 2015, 272-280; Criminal Procedural Systems of the European Union Countries, translated from English: *Tsikarishvili K.,* scientific ed. *Gvenetadze N.,* Tbilisi, 2002, 131- 132 (in Georgian).

34 <https://www.matsne.gov.ge/ka/document/view/2434580?publication=0 > [20.09.2023].

35 <https://www.matsne.gov.ge/ka/document/view/2434580?publication=0 > [20.09.2023].

36 Decision №1/5/1355,1389 of the Constitutional Court of Georgia of July 27, 2023, Samson Tamariani, Malkhaz Machalikashvili and Merab Mikeladze against the Parliament of Georgia, 23 (in Georgian).

37 Ibid. 51.

38 Ibid.

prosecution can be clear and comprehensible, but mistakes cannot be excluded; Moreover, judicial control over the aforementioned decisions of the prosecutor is important to eliminate the risk of the abuse of power or arbitrariness.[39] The differentiation of victims according to the categories of crimes (less serious, serious, and especially serious) was considered unacceptable by the Constitutional Court. Everyone has an identical interest in monitoring the decision made by the prosecutor through the court, and this interest is equally important for all categories of crime victims.[40]

Considering the above-mentioned and also other arguments,[41] the Constitutional Court recognized unconstitutional the legal prohibition of appeal of the decision made by the prosecutor on the refusal to initiate criminal prosecution for less serious and serious crimes. In addition, the futility of appealing the decision made by the prosecutor on the termination of prosecution for less serious and serious crimes was declared unconstitutional. Regarding the latter case, the Constitutional Court discussed the version of the Code of Criminal Procedure valid until October 15, 2019.

The above-mentioned constitutional decision of Georgia is quite correct because according to this article, every person, including a victim, should have the opportunity to apply to the court to restore their violated right without being limited by the category of crime. It is not clear why the legislator singled out the right of the victim to influence the initiation or resuming of criminal prosecution by appealing to the court only for family, especially serious crimes and crimes under the jurisdiction of the Special Investigation Service. If we have a look at the above-mentioned changes in Articles 106 and 168 of the current criminal procedure, it is obvious that the rights of a victim to appeal to the court have been clearly but insufficiently increased. Victims should be allowed to file an appeal in all categories of crimes and influence the initiation and implementation of effective criminal prosecutions. This will also affect the prosecutor's decision to refuse or terminate the prosecution, as well as the rendering of correct, fair, and justified judgment by the superior prosecutor. A clear example of this is the approach of European countries to the mentioned issue, for example, France.[42] This was also confirmed by the decision of the Constitutional Court of Georgia. Therefore, an amendment should be made to Article 106 of the current Criminal Procedure Code, according to which the victim will be given the right to appeal the decision of the prosecutor on the termination of criminal prosecution in court for all categories of crimes. The Constitutional Court discussed the issue concerning Article 106 but the version is valid until October 15, 2019.

6. Conclusion

In conclusion it should be mentioned:

- It is necessary to define the concept of criminal prosecution in the current criminal procedural legislation. This will contribute to understanding the concept of criminal prosecution;

- For the effective implementation of the prosecution function, it is appropriate to present it in a narrow sense, which implies the segregation of separate procedural mechanisms from this function;

---

39 Decision № 1/5/1355,1389 of the Constitutional Court of Georgia of July 27, 2023, Samson Tamariani, Malkhaz Machalikashvili and Merab Mikeladze against the Parliament of Georgia, 52 (in Georgian).

40 Ibid. 63.

41 For details see ibid.

42 *Bouloc B., Stefani G., Levasseur G.,* Procédure pénale, 23e edition, Paris, 2012, 293, 614-619.

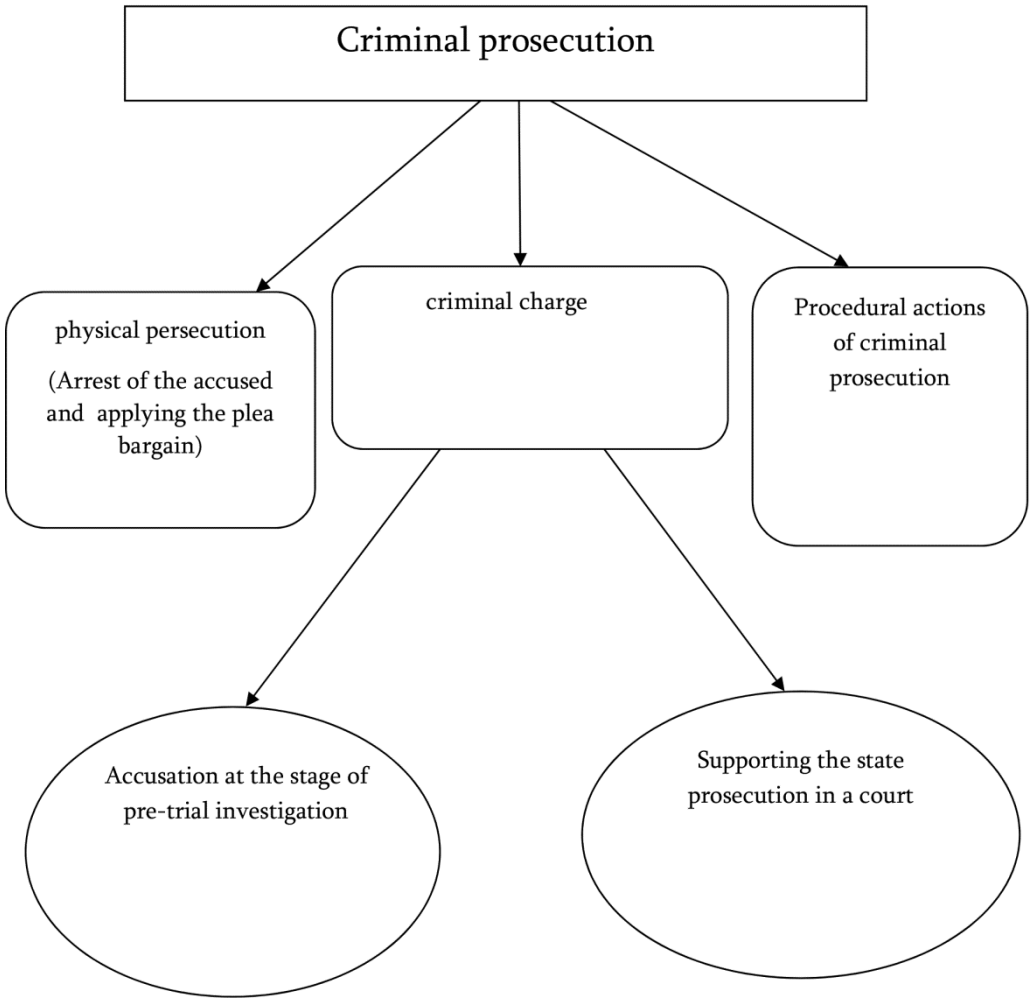
- Criminal prosecution should begin at the stage of the investigation, continue during the consideration of the case in the court of first instance, and can be renewed in the courts of appeal and cassation instance;

- To improve the legal status of a person to be charged with criminal law, it is necessary to provide him/her with procedural rights before starting criminal prosecution. For this purpose, it is appropriate to introduce the institution of "assisted witness" in the Georgian criminal procedural space;

- To ensure speedy justice, it is necessary to clearly define the time limit for criminal prosecution in the current criminal procedural legislation. Currently, there is a problem with the term of keeping a person as an accused in court;

- It is convenient to improve the quality of legal influence on termination of criminal prosecution. Victims of all categories of crimes should have the right to appeal to the court the decision made by the prosecutor to terminate the criminal prosecution.

Appendix #1



Bibliography:

1. Criminal Procedure Code of Georgia, Tbilisi, October 9, 2009 (in Georgian).
2. Criminal Procedure Code of Georgia, February 20, 1998, as of February 1, 2006.
3. The Law of Georgia of July 24, 2014 "On Amendments to the Criminal Procedure Code of Georgia", #2518-რს <https://www.matsne.gov.ge/ka/document/view/2434580?publication=0> [20.09.2023].
4. Law of Georgia of July 21, 2018 "On Amendments to the Criminal Procedure Code of Georgia" #3276-რს, <https://www.matsne.gov.ge/ka/document/view/4276661?publication=3> [20.09.2023].
5. Le Code des procureurs de la Couronne, <https://www.cps.gov.uk/sites/default/files/documents/publications/FRENCH-Code-for-Crown-Prosecutors-October-2018.pdf> [20.09.2023].
6. Code de procédure pénale, (français), Dernière mise à jour des données de ce code: 01 avril 2023, <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/> [20.09.2023].
7. *Abashidze G.,* Criminal prosecution as a function of the prosecutor and its implementation at the investigation stage, "Universal" publishing house, Tbilisi, 2018 (in Georgian).
8. *Abashidze G.,* Prosecutor's Discretionary Powers on Carrying out Criminal Prosecution, (Georgian Model of Discretionary Criminal Prosecution), Tbilisi, 2011 <https://js.ugd.edu.mk/index.php/scgw/article/download/3118/2829/> [20.09.2023].
9. *Abashidze G.,* The Prosecutor as a Subject of Criminal Prosecution (at the stage of investigation), Tbilisi, 2011, 69-70 (in Georgian).
10. *Beltadze V.,* The Concept of the Function of Criminal Prosecution by the Criminal Law of Georgia; Journal "Justice and Law", #$2^{(37)}$13, 146 (in Georgian).
11. *Bouloc B., Stefani G., Levasseur G.,* Procédure pénale, 23e edition, Paris, 2012, 137-167, 144-146, 166-167, 293, 573-623, 614-619.
12. Criminal Law Process of Georgia, Private Part, 2nd edition, collective of authors, *Mamniashvili M., Ghakhokidze J., Gabisonia I.* (ed.) publishing house "World of Lawyers", Tbilisi, 2013, 116-117, 119 (in Georgian).
13. Criminal Procedural Law of Georgia, (private part), collective of authors, editor: *L. Papiashvili*, "Meridian" publishing house, Tbilisi, 2017, 63, 75-82 (in Georgian).
14. Criminal Procedural Systems of the European Union Countries, translated from English: *Tsikarishvili K.,* scientific editor of the publication: *Gvenetadze N.,* Tbilisi, 2002, 131-132 (in Georgian).
15. *Dubina I.A.,* Objectives of Pre-trial Criminal Proceedings and the Role of the Prosecutor in Achieving Them., Dissertation for the degree of candidate of legal sciences, Volgograd, 2006, 109 (in Russian);
16. *Giorgadze G.,* Competitive Nature of the Criminal Justice Process in Georgia; A collection of scientific papers: The Impact of European and International Law on Georgian Criminal Procedure Law, scientific eds.: *Tumanishvili G., Jishkariani B., Shrami E.,* "Meridian" publishing house, Tbilisi, 2019, 282-294 (in Georgian).
17. *Gogshelidze R.,* The Role of the Prosecutor's Office in a Democratic Society; "Law" magazine, 2002, #9-10, 71-75 (in Georgian).
18. *Guinchard S., Buisson J.,* Procédure pénale, Paris, 2000, 492-494.
19. *Gutsenko K.F., Golovko L.V., Filimonov B.A.,* Criminal Law Process of the Western States, translation from Russian, scientific ed. *Gogshelidze R.,* Tbilisi, 2007, 429-430 (in Georgian).
20. *Kamisar Y., Lafave W.R., Israel J.H., King N.J.,* Basic Criminal Procedure, Cases, Comments and Questions, Eleventh Edition, Thomson West, 2005, 9-16, 24.

21. *Kobaladze P.,* For Mutual Separation of the Functions of Supporting State and Criminal Prosecution, magazine, "Justice and Law", #3(^{22})09 (in Georgian).
22. *Laliashvili T.,* Georgian Criminal Process, General Part, "World of Lawyers", Tbilisi, 2015.
23. *Larguier J.,* Procédure pénale, 18th edition, Paris, 2001, 85-88, 161-162, 173-174.
24. *Lomsadze M.,* Criminal Law Process (Seventh Revised and Completed Edition), "Bona Causa", publishing House, Tbilisi, 2018, 44-45 (in Georgian).
25. *Meishvili Z., Zorbenadze O.,* Commentaries on the Criminal Procedure Code of Georgia (as of December 31, 2006), Tbilisi, 2007, 82-87 (in Georgian).
26. *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Proceedings (Investigation Stage), "Meridian" Publishing House, Tbilisi, 2015, 79-92, 117-134, 134-136, 235, 237, 272-280, 309, 318-319 (in Georgian).
27. *Molins F.,* L'action public, 2009, (dernière mise à jour: 2013), 8-9.
28. *Papiashvili Sh. Tevzadze A.,* Inspection of Materials and Initiation of Criminal Case and Prosecution, Tbilisi 2002, 99-101.
29. *Papiashvili Sh.,* The Problem of Initiating a Criminal Case and Criminal Prosecution in the Criminal Process, Tbilisi, 1999, 24 (in Georgian).
30. Practical Guide in Criminal Procedural Matters (guide for prosecutors and investigators), General Prosecutor's Office of Georgia, Tbilisi, 2007, 12 (in Georgian).
31. *Wade M.,* The Power to Decide – Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today, 2006, <http://link.springer.com/chapter/10.1007%2F978-3-540-33963-2_2#page-1> [20.09.2023].
32. Foti and Others v. Italy (Application no. 7604/76. 7719/76. 7781/77. 7913/77).
33. Zana v. Turkey, no 69/1996/688/880, ECHR 25 November, 1997.
34. Kangasluoma v. Finland, no 48339/99, ECHR, 14 June, 2004.
35. Decision №1/5/1355,1389 of the Constitutional Court of Georgia of July 27, 2023, Samson Tamariani, Malkhaz Machalikashvili and Merab Mikeladze against the Parliament of Georgia, 23 (in Georgian).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7708

Levan Zakalashvili*

Practical Problems of Distinguishing Bribery from Crimes against Property

The fight against corruption is a global and one of the most pressing problems for countries. Bribery is the most serious corruption crime according to Georgian criminal law. However, corruption, in addition to bribery, can be committed by using the official position, involving crimes against property, such as "misappropriation or embezzlement" and "fraud". In Georgian judicial practice, it is often problematic to distinguish bribery from the mentioned crimes against property. This article is dedicated to demonstrating the significant gaps in the decisions of judicial and investigative bodies in this regard. It proposes ways to solve the problem of differentiating these crimes from each other, ensuring accurate legal classification of the act.

Key words: *corruption, bribery, crime against property, use of official position, qualification.*

1. Introduction

Corruption (corrumpo) is a Latin word that literally means to ruin, spoil, destroy, tempt, pervert, bribe, distort, and falsify[1]. Corruption is one of the most pressing and problematic issues in the world. According to the preamble of the European Convention, "Corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.[2]" The destructive effect of corruption on the state is also indicated by the words of the then UN Secretary General Kofi Annan in the Foreword of the UN (United Nations) Convention against Corruption, who compares corruption to an insidious plague.[3] Georgia, along with other international documents, is a signatory party of these two crucial conventions, and since the civilized countries of the world agreed on the destructive effects of corruption and the Western nations began to actively fight against corruption, Georgia, after gaining independence in 1991, established a internal legal framework and implemented international legislation. In addition to incorporating pertinent articles into the Criminal Code, Georgia enacted the Law of Georgia on Conflict of Interest and Corruption in Public Service on October 17, 1997. It was amended on November 30, 2022, and

* PhD Student, invited lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law. https://orcid.org/0009-0009-7802-0232.

1 The National Parliamentary Library of Georgia, Digital Encyclopedic Dictionary <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=5&t=3657> [14.03.2023]

2 Cited: the Preamble of Criminal Law Convention on Corruption (Council of Europe; Done at Strasbourg, 1999).

3 Foreword of United Nations Convention against Corruption, New York, 2004. <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> [15.03.2023].

renamed the "Law of Georgia on the Fight against Corruption."[4] This law provided a definition of what constitutes a corruption offense. Furthermore, since 2005, Georgia has periodically approved national anti-corruption strategies and their implementation plans. These initiatives aim to effectively combat corruption[5]. The reforms undertaken in recent decades have brought Georgia closer to EU integration, which in itself imposed more obligations concerning the effective fight against corruption. Pursuant to the Association Agreement between Georgia and the European Union, Georgia is obligated to implement vital international standards to combat corruption, both in the public and private sectors.[6] It is well recognized that corruption can manifest in various forms, including within public service and private sector.

As rightly pointed out, "„Corruption" is a word whose many meanings, even if only law and government are considered, range from simple bribery to arrangements with profound implications for constitutional and even international law"[7]. Therefore, corruption is not merely a domestic concern, it is also a pressing international problem. Truly corruption does not mean only bribery.Corruption, according to Article 3 of the Law of Georgia "On the Fight against Corruption," is defined as "the use of one's position or related opportunities by a person to receive property or other benefits prohibited by law, as well as transferring or assisting in the receipt and legalization of such benefits." Consequently, the crime of corruption can be committed both by taking a bribe by a public official in the execution of their official duties (as stipulated by Article 338 of the Criminal Code, in the private sector – by Article 221 of the Criminal Code), as well as misappropriation or embezzlement of state or private property by using the official position (as defined in Article 182, Part 2, subsection "d" of the Criminal Code). The crime of "Misappropriation or embezzlement" outlined in Article 182 of the Criminal Code of Georgia (to denote this crime in English, the word "Embezzlement" is used mainly, sometimes – "Misappropriation") is regarded as a corruption offense in international agreements and the above-mentioned UN Convention against Corruption, in Articles 17 and 22, obliges parties to criminalize "Embezzlement" in both public and private sectors. "A general definition of corruption is the use of public office for private gain. This includes bribery and extortion, which necessarily involve at least two parties, and other types of malfeasance that a public official can carry out alone, including fraud and embezzlement"[8]. As mentioned, bribery requires a second party in addition to a public official, and a corruption crime such as embezzlement or fraud can be carried out by a public official alone without a second party. It is also possible to commit a corruption crime by using one's official position, by fraudulently acquiring the property of the state or a private person, which (provided by subsection "a" of part 3 of Article 180 of the Criminal Code).

---

4 Law of Georgia "On the Fight against Corruption", Legislative Herald of Georgia, 17/10/1997.

5 See for example: Decree N550 of the President of Georgia "On Approval of the National Anti-Corruption Strategy of Georgia" – 24/06/2005, (Expired -04/06/2010)/

6 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. 30.08.2014, article 17.

7 *Schroth P. W.,* Corruption and Accountability of the Civil Service in the United States. The American Journal of Comparative Law, Vol. 54, 2006, 553–579.

8 *Gray C.W., Kaufmann D.,* article Corruption and Development, Finance & Development, March 1998, 7, <https://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/gray.pdf> [16/03/2023].

The topicality of the topic is the gaps in the court's decisions, when separating the mentioned crimes from each other and correctly qualifying them. In addition to the fact that the punishments corresponding to the mentioned articles are different, in general "qualification implies the exact correspondence of the norm to the action"[9] and a specific action must be qualified as a specific crime[10]. Therefore, it is crucial to accurately determine whether an individual's conduct constitutes "bribery" or a particular property-related offense. Moreover, the statute of limitations for criminal liability exemption varies. For official crimes (including those under Article 338) the statute of limitations is 15 years for both less serious and serious crimes and in the case of other less serious and serious crimes (among crimes against property) – 6 and 10 years, respectively. The task and purpose of the topic is to present relevant practical problems and propose ways to solve them.

2. Main Features of Bribery and Corruption Crimes against Property in Georgian Legislation

Bribe-taking, as mentioned, is provided for by Article 338 of the Criminal Code of Georgia, and it is the most serious crime in the chapter of official crimes, which encompasses: "*Taking or demanding by an official or a person equal thereto, directly or indirectly, of money, securities, other assets, pecuniary gain or of any other unlawful advantage, or accepting an offer or promise thereof for his/her own benefit or for the benefit of another person in order for the official or the person equal thereto to take or not to take certain actions during the exercise of his/her official powers for the benefit of the bribe-giver, or to use his/her official standing to achieve similar goals, or to exercise official patronage".* The first part of this crime is punishable by imprisonment for a term ranging from six to nine years, while the third part carries a penalty of eleven to fifteen years of imprisonment. The legal good, protected from this crime is the prestige and authority of the state government and governance, local self-government bodies, as well as their normal, legal functioning.[11]As mentioned, bribery is considered a mutual crime, necessarily requiring the presence of a bribe-giver, whose actions are separately penalized under Article 339 of the Criminal Code.

As for the misappropriation committed by using the official position, which is provided for by subsection "d" of part 2 of Article 182 of the Criminal Code, as a rule, the offender typically acts alone, without the involvement of any necessary accomplice. The perpetrator of the crime provided for in this article, is a special person in whose rightful possession or management the property is, and in the case of subsection "d" of part 2, the perpetrator of this crime may be a public official, similar to the composition of the crime of bribery. Article 182 of the Criminal Code of Georgia establishes the definition of this crime: "*Unlawful appropriation or embezzlement of another person's property or property rights provided this property or property rights were lawfully held or managed by the misappropriator or embezzler"*. For subsection "d" of part 2 of the mentioned article (embezzlement

---

9 Verdict of the Supreme Court of Georgia on February 10, 2020 in case №57ა3.-19.

10 *Nachkebia G.,* The general theory of qualifying an action as a crime, ed. "Innovation", Tbilisi, 2010, 11-14 (in Georgian).

11 *Lekveishvili M., Todua N.,* in the book: *Lekveishvili M., Todua N., Mamulashvili G*., Private Part of Criminal Law, book II, Tbilsi, 2020, 390 (in Georgian).

or embezzlement through the use of official position) for the commission of this crime, a fine or imprisonment for a term of four to seven years is provided as a punishment. Along with unlawful appropriation, this article also defines embezzlement, however, in this case, the misappropriation will be subject of the discussion. In addition, it should be noted that according to Article 182 of the Criminal Code of Georgia, misappropriation and embezzlement are artificially distinguished from each other, and accordingly, the practice draws the line between them according to whose benefit the illegal acquisition of property took place (if it is for the benefit of the offender – it is considered misappropriation, while it is for the benefit of others – embezzlement). Such a reasoning is also developed in the Georgian legal literature, where it is mentioned that unlawful appropriation is manifested in the illegal possession of someone else's property for one's own benefit,[12] and it is considered that during appropriation, the offender acts with the intention to use the property for his own benefit.[13] Meanwhile, in legislations of European countries, misappropriation refers to the taking possession of property for one's own benefit, as well as for the benefit of others, and the legal classification is not affected by whose benefit it was done. For example, according to paragraph 246 of the German Criminal Code, misappropriation is provided, which implies appropriation not only for oneself, but also for someone else, a third party. In Germany, the reason for adding the involvement of a third party in appropriation, was to prevent the offender from denying to have committed misappropriation for himself in order to evade criminal liability[14].

As it turns out, the executors of Articles 182 and 338 of the Criminal Code can be identical. It is undisputed that in both cases the motive of the offender is greed, but the difference between them is that in the case of Article 338 of the Criminal Code, the official receives property or any other property rights (gets rich) from another person, for whom he performs a specific action related to his service and in the case of Article 182 of the Criminal Code, a person becomes rich not with the property transferred by a third party, but at the expense of the property of a public or private organization, which is in the lawful possession or management of the person.

As a rule, in practice, when a problem arises as to under what article should adjacent delicts be classified, first of all, it is necessary to correctly define these norms. The definition of the norm implies the clarification of its essence and purpose, so to determine what content the legislator embedded in it[15]. In addition to classical interpretation methods, there is also a comparative-legal method. The comparative-legal method is often called the fifth method of law definition[16]. Clarification of the content of the norm begins with a grammatical definition[17]. In this case, when it is not possible to distinguish between bribery and crimes against property in practice, the wrong interpretation of the norm is less of a problem. Oftentimes, such actions can not be legally classified

---

12 *Lekveishvili M., Todua N., in the book: Lekveishvili M., Todua N., Mamulashvili G.,* Private part of criminal law, book I, seventh edition, Tbilisi, 2019, 521 (in Georgian).

13 *Tsulaya Z.,* Private Part of Criminal Law, (Volume II), Tbilisi, 2001, 90-91 (in Georgian).

14 *Kühl in: Lackner/Kühl,* Strafgesetzbuch: StGB Kommentar, 29. Aufl. 2018, § 246, Rn 8.

15 *Intskirveli G.,* General Theory of the State and Law, Tbilisi, 2003, 171 (in Georgian).

16 *Häberle P.*, Grundrechtsgeltung und Grundrechtsinterpretation im Vefassungsstaat Zugleich zur Rechts-vergleichung als `fünfter" Auslegungsmethod, in.: Juristische Zeitschrift, 1989, 193.

17 *Khubua G.,* Theory of Law, Tbilisi, 2003, 153 (in Georgian).

because factual circumstances and practical nuances are not established/investigated. Such a problem arises not only when distinguishing Article 338 of the Criminal Code from Article 182 of the Criminal Code, but also when distinguishing it from Article 180 of the Criminal Code – when fraud, i.e. fraudulent acquisition of property is committed using an official position. As mentioned previously, in the case of Articles 182 and 180, the criminal commits the crime of corruption alone, however, when a second party appears during the commission of these crimes, who helps the official commit the crime, then arises the problem of separating bribery from other crimes.

3. Practical Problems of Action Qualification

As mentioned earlier, the problem of distinguishing bribery, the crime under Article 338 of the Criminal Code from the crimes against property, arises when another, third person helps the official to commit the crime against property. Such problems in practice appear most often in the so-called "Atkat"(kickback) crimes. the so-called "Atkat" is "an amount that an official receives from a company or a person to whom he illegally or unfairly transferred budget funds by prior agreement[18]." This type of crime mainly occurs during procurement by state organizations through tender or direct methods, where the official attempts to obtain any property benefit illegally. In practice, there are often cases where crimes of this type are wrongly classified as bribery (taking a bribe, Article 338 of the Criminal Code) or commercial bribery (Article 221 of the Criminal Code). This is certainly incorrect because, from the definition of "Atkat", it can be seen that in reality, an official (in whose administration the budgetary funds of the agency are) with a prior agreement aims to illegally receive funds from a person or enterprise, which money was illegally or unfairly transferred from the budgetary funds of his own organization. In practice, is such cases, where the head of any state or other organization (for example, the head of a local municipality) signs a purchase agreement with the head of an enterprise that has previously negotiated with him for the purchase of goods or services necessary for the agency and transfers 150,000 GEL from the organization on the basis of this agreement, while for the fulfillment of this obligation 100,000 GEL was quite sufficient (this amount includes the profit of the enterprise). In addition, the head of the organization had previously agreed with the entrepreneur that after depositing the funds, the entrepreneur would return the excess amount, 50,000 GEL, to the head of the agency in the form of cash, or transfer it to a private bank account convenient for him. At such a time, the entrepreneur is also satisfied, because 100,000 GEL was completely sufficient to fulfill the obligations stipulated in the contract, and after paying the expenses, the profit from this amount remained, and the head of the agency is also satisfied, because he illegally received 50,000 GEL.

In practice, law enforcement bodies, after discovering such facts, qualify the actions of these persons as bribery, namely, taking 50,000 GEL as a bribe and giving a bribe on the part of the entrepreneur. The court also issues a verdict based on these articles, when the physical transfer of money to the official is confirmed by indisputable evidence, without having the opportunity to investigate the factual circumstances in detail, due to the principle of adversarial proceedings, if the

[18] Dictionary of Corruption <https://csogeorgia.org/ge/newsPost/27763> [17.03.2023].

defense side did not raise this issue. As a rule, it is written in the indictment that the head of the agency demanded and accepted 50,000 GEL as a bribe from the entrepreneur in exchange for giving him an advantage (which means signing a contract in his favor without a tender/competition). This classification is not correct, because the fact that the official himself illegally withdrew this amount from the property fund of the organization, and in reality in such a case, the official does not receive the money from the entrepreneur, but transferred this amount to the entrepreneur himself, in order to bring it back to him later. This 50,000 GEL is the so-called "Atkat". In this case, here is a misappropriation of funds (50,000 GEL) in his rightful possession and control by the official, using his official position, and the entrepreneur did not give this money to the official as a bribe, but he technically helped the official in misappropriating this amount. Accordingly, the entrepreneur's action should be categorized not as bribery, but as assistance in misappropriation (Article 182 of the Criminal Code). If the contract had been signed at the market price, hypothetically 100,000 GEL (where the entrepreneur should have a legal profit of 10,000 GEL as a result of the performance of the work) and not for 150,000 GEL and the official demanded that if he did not give 5,000 GEL from his profit, he would terminate the contract and he did not transfer the amounts provided for in the contract, in such a case there would be bribery, because the entrepreneur gave 5,000 GEL from his own profit, and not the amount that was extra, illegally transferred from the organization in the previous case and the goal from the beginning was that this money would be illegally owned by a public official. It is possible that, in practice, the so-called "Atkat" crime often occurs in various modifications. For instance, an official might manipulate the terms of a tender to favor a specific entrepreneur, ensuring that no other competitors can win the bid. Subsequently, under a prearranged agreement, the official deposits a significantly larger sum than required for the contract, intending to retrieve these excess funds from the entrepreneur later. In such cases, it constitutes misappropriation rather than bribery. Even though the official manipulates the tender terms to guarantee the entrepreneur's exclusive victory, the entrepreneur does not offer the money as a bribe. Instead, he assist in the misappropriation by returning the excessively transferred funds. A pertinent question arises: does it matter from whom the offer comes, from the side of the entrepreneur or from the side of the official? Of course, in such cases, it does not matter from whom the offer comes, the main thing is at whose expense the public official gets rich. This is the way to solve such a problem, although often neither law enforcement agencies nor courts go into these details, which leads to incorrect qualifications.

In summary, it can be said that if the goal of the official, who is the head of the organization, is to get back from the entrepreneur in the form of personal benefit the over-transferred budget Money wich was in his rightful ownership and management, this should be qualified as misappropriation by using the official position, according to Article 182, Part 2, subsection "d" of the Criminal Code of Georgia. If the money is a large amount (over 10,000 GEL), then the aggravating circumstance provided for in subsection "e" of part 3 of the same article will additionally appear. If an entrepreneur gives his personal money to an official, in exchange for giving him a certain advantage (even adjusting the tender to him, or declaring him the winner without competition, etc.) – it will be Bribe-taking and Bribe-giving.

4. Analysis of Judicial Practice

As noted, law enforcement and courts often overlook the factual nuances that are important in distinguishing between these crimes. In July 2022, in one of the criminal cases in the proceedings of the General Prosecutor's Office of Georgia, the court found an official of one of the state companies guilty of taking a particularly large bribe from an entrepreneur (the crime provided for in Article 338, Part 3, subsection "e" of the Criminal Code)[19], so that there is no discussion at all about the circumstances that could be presented, that it would be more appropriate to qualify this person's action as a crime against property. According to this verdict, one of the heads of the state enterprise, who also held the position of the head of the procurement department, in order to receive financial benefits in the form of a bribe, pre-adjusted the list of equipment to be purchased in the tender and their specifications to the enterprise negotiated with him, and as a result, this enterprise was declared the winner[20]. The court established in the judgment that the amounts to be transferred/transferred under the contract, are almost twice as high of the cost of the delivered goods (equipment). In other words, a person equal to an official, not only adjusted the terms of the tender and announced the winner of the enterprise, but based on the contract signed with him, he charged amounts much higher than the value of the goods. In this and similar subsequent tenders, the discrepancy amounted to 594,545 GEL. The judgment mentioned that the implicated official accepted a total of 215,025 GEL as a bribe from the entrepreneur within the scope of these two tenders, leading to his conviction under the aforementioned articles.

From the factual circumstances mentioned in the judgment, it appears that the culprit was one of the heads of the enterprise, who decided a number of issues, including the issue of the tender announcement, the list of products to be purchased, the prices, and who would be the winner. All this indicates that the funds of this state enterprise, which were transferred to the entrepreneur, were in his rightful ownership and management. Therefore, if the factual circumstance was established in the case that, with the efforts of the official, with a premeditated intention, the entrepreneur transferred amounts artificially higher than the price of the products provided for in the contract in order that a part of these funds would later be returned back, then the above-mentioned amount of 215,025 GEL would not constitute a bribe, but rather a so-called "Atkat" and his action would be qualified as misappropriation of a large amount of funds belonging to the organization under the rightful possession and control of the official position, a crime provided for in Article 182, part 2, subsection "d" Part 3, subsection "b" of the Criminal Code, which is punishable by imprisonment for a term of 7 to 11 years, while the article provided for in the sentence provides for imprisonment for a term of 11 to 15 years.In the scenario, that the rightful possession and management of these funds by the official, which is characteristic of misappropriation, would be disputed, then it would be more appropriate to qualify the action as fraudulent appropriation of a large amount of funds belonging to the organization by using the official position, as a group (together with the entrepreneur), the crime is provided for in Article 180 part 2, subsection "a" Part 3, subsection "a"and "b" of the Criminal Code, which provides

[19] Verdict № 1/3631-22 of July 11, 2022 of the Criminal Affairs Board of Tbilisi City Court.
[20] Verdict № 1/3631-22 of July 11, 2022 of the Criminal Affairs Board of Tbilisi City Court, 3-4

for imprisonment for a term of 6 to 9 years. As is known, fraud, unlike misappropriation, does not need a special executor (that is, it is not necessary that the illegally acquired property was in the legitimate possession and control of the offender) and the method of acquisition is deception. Of course, if an entrepreneur and an official of a state organization (who does not have this property in legitimate ownership or control) agreed in advance to sign a contract on artificially inflated amounts, with the aim that they would jointly own (split) the excess funds transferred from the organization, through the actions of these individuals, the victim would be a legal entity – a state organization, and it would appear to be fraud.

Also, according to the judgment of the Tbilisi City Court, a main specialist of the technical supervision department of one of the municipalities was found guilty of bribery under Article 338, Part 1 of the Criminal Code[21]. According to the verdict, his role involved supervising and controlling the renovation and provision of amenities for one of the kindergartens as outlined in the state procurement contract.In addition, it is noted that the said civil servant suggested to the representative of the company producing the works that he would include the plaster-board ceiling installation works (2,330 GEL) already completed by another company in the act of delivery and acceptance (Form N2) over the works performed by his enterprise as if these works were also this company performed, in which the entrepreneur was supposed to pay him half of the value of the work allegedly performed, when the corresponding amount was deposited from the municipality based on this act. They agreed, and when the entrepreneur, on the basis of this false delivery and acceptance act deed drawn up by a specialist, was overcharged for the amount of work that he did not actually complete, he transferred half of this amount to the mentioned public official on the same day, according to the agreement[22]. It is true that the verdict states that the public official and the entrepreneur agreed and one demanded a bribe and the other gave the money as a bribe, but is this actually bribery? This question arises because this amount, which they divided, based on their own actions, illegally, was overpaid by the municipality. Misappropriation is excluded here, because it can be said that the municipal funds were not in the proper possession and management of the chief specialist of the municipality, because he had the technical function of supervising and controlling the works, which is subject to additional expertise even after the final completion of the works. Therefore, he cannot be the executor of misappropriation, but in this case it would be appropriate to qualify the official's action not by taking a bribe, but by using his official position, by fraud committed as a group, because it was on the basis of a false acceptance-handover act drawn up by them (where the volume and cost of works were artificially increased), the City Hall was deceived and transferred too much money to the entrepreneur, who was illegally owned by the employee of the municipality and the entrepreneur as a group. Accordingly, it would be correct if the action of a public official was qualified as fraud, together with an entrepreneur.

A similar problem arises when corruption crimes are committed in the private sector. As is known, “bribery” in the private sector is provided for by Article 221 of the Criminal Code of Georgia and it is called “commercial bribery” instead of “taking and giving bribes”. By their legal structures, these articles are almost similar, and the main difference is that the the executor of Article 221 is not a

[21] Verdict № 1/4929-16 of February 16, 2017 of the Criminal Affairs Board of Tbilisi City Court.

[22] Verdict № 1/4929-16 of February 16, 2017 of the Criminal Affairs Board of Tbilisi City Court's, 2

civil servant or a person equal to him, but the head of an enterprise or other organization or a person employed there.

In 2019, the Rustavi City Court found the head of one of the company's departments and his employee guilty under subsection "a" of section 4 of Article 221 of the Criminal Code, which refers to commercial bribery committed as a group[23]. According to the judgment, they were responsible for making and providing a detailed list of materials needed to repair the machinery of the enterprise. A tender was announced by their company for ongoing repair and maintenance of equipment. They, the representatives of the winning company in the tender, in order to cover the real value of the services provided within the tender (in return), demanded the transfer of 5,440 GEL stipulated in the tender contract. In particular, in exchange for the transfer of this amount, the culprits prepared a fake delivery and acceptance certificate of the completed work, where they indicated that the company participating in the tender, compared to the real one, performed works worth approximately 8,000 GEL. Instead, they took the requested 5,440 GEL[24]. In this case, the same problem that was discussed above is present. In particular, if as a result of the actions of the criminals (artificially increasing the amounts in the acts of delivery and acceptance), 8,000 GEL was transferred excessively to the enterprise performing the works, the enterprise announcing the tender was harmed and deceived by this amount and the criminals and the company carrying out the works, fraudulently took possession of this amount. That is, they did not take 5,440 GEL as a bribe, but this amount actually represents the so-called "Atkat" out of 8,000 GEL, which was illegally or unfairly transferred from the budget of the enterprise based on false documents drawn up by criminals. Accordingly, the criminals and the persons performing the works, as a group, using their official status, fraudulently took 8,000 GEL belonging to the organization, of which 5,440 GEL was received by one party in the form of so-called "Atkat",, and the rest illegally remained with the enterprise performing the works. Accordingly, the qualification of the actions of the persons convicted by the verdict would be more proper under Article 180, Part 2, Sub-Clause "A" and Part 3, "A" and "B" Sub-Clauses of the Criminal Code, which provides for a greater punishment than that specified in the verdict – commercial Bribery clause[25].

5. Conclusion

The practical problems and judicial decisions discussed in the paper clearly show that it is often not so easy to decide whether a specific corrupt act is legally classified as bribery or as a corresponding crime against property, because the perpetrator of the crime against property can also be the perpetrator of bribery (including a public official). However, it is very important to resolve this issue correctly, even based on the criminal law principle, according to which no one should be held accountable for an act that he did not commit, while the act actually committed by a person carries lesser penalties. Nor can a harsher punishment be imposed on someone than the punishment that was

[23] Verdict № 1-387-19 of September 2, 2019 of Rustavi City Court.
[24] Verdict № 1-387-19 of September 2, 2019 of Rustavi City Court, 3
[25] See Articles 180 and 221 of the Criminal Code of Georgia.

used at the time of the crime[26]. As mentioned, the crime under Article 338 of the Criminal Code – bribery – carries higher penalties than the corresponding crimes against property. In addition, as stated, the classification of an act as a crime means the exact compliance of the norm with the act, and in addition, different statutes of limitation for exemption from criminal liability apply to these articles. Since corruption is one of the important problems of the development of states, therefore, it is true that law enforcement agencies should implement strict measures and policies to fight corruption crimes, but of course, it is necessary investigate the actual circumstances and details thoroughly in order to properly qualify the act.

Finally, as a conclusion, it can be said that practicing lawyers should pay attention to the fact that the difference between bribery and crimes against property is that in the case of Article 338 of the Criminal Code, the official receives property or any other property benefit (gets rich) from another private person, in exchange for specific actions. In contrast, under Articles 182 and/or 180 of the Criminal Code, the person gets rich not with the property transferred by a third party, but at the expense of the property of the public or private organization of which he was the representative. When accepting a bribe, a person receives personal benefit at the expense of another, third party, and in the case of misappropriaton/fraud – at the expense of the employing state or private organization. In order to find out these circumstances, during the investigation, it is necessary to determine whose money the public official took possession of, was it the possession of money belonging to the state organization using his official position, or the money transferred to him from personal funds by a private person in exchange for something. It is also important, at the investigation stage, to restore as closely as possible the nuances of the agreement, which were discussed in advance by the negotiated public official and private person regarding specific amounts.

Bibliography:

1. Law of Georgia "On the Fight against Corruption", Legislative Herald of Georgia, 17/10/1997.
2. Criminal Code of Georgia, Legislative Herald of Georgia,, 22/07/1999.
3. Decree N550 of the President of Georgia "On Approval of the National Anti-Corruption Strategy of Georgia", 24/06/2005, (repealed – 04/06/2010).
4. Association Agreement between the European Union and Georgia, 30/08/2014
5. European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950.
6. Criminal Law Convention on Corruption (Council Of Europe; Strasbourg, 1999)
7. United Nations Convention Against Corruption (New York, 2003).
8. *Gray C.W., Kaufmann D.,* Corruption and Development, Finance & Development / March 1998, 7.
9. *Intskirveli G.*, General Theory of State and Law, Tbilisi University Publishing House, Vol. 2003, 171 (in Georgian).
10. *Khubua G.,* Theory of Law, Meridiana Publishing House, Tbilisi, 2004, 153 (in Georgian).
11. *Lekveishvili M., Todua N., Mamulashvili G.,* Private part of criminal law, book I, ed. "Meridian", Tbilisi, 2019, 521 (in Georgian).

[26] See the last sentence of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950.

12. *Lekveishvili M., Todua N., Mamulashvili G.,* Private part of criminal law, book II, Tbilisi, 2020, 390 (in Georgian).
13. *Nachkebia G.,* The general theory of qualifying an action as a crime, ed. "Innovation", Tbilisi, 2010, 11-14 (in Georgian).
14. *Schroth P. W.,* Corruption and Accountability of the Civil Service in the United States. The American Journal of Comparative Law, vol. 54, 2006, 553–579.
15. *Tsulaya Z.,* Private part of criminal law. (Volume II) Ed. "Intelligence", Tbilisi, 2001, 90-91 (in Georgian).
16. *Häberle,* P., Grundrechtsgeltung und Grundrechtsinterpretation im Vefassungsstaat Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethod, in.: Juristische Zeitschrift, 1989.
17. *Lackner/Kühl, Strafgesetzbuch:* StGB Kommentar, 29. Aufl. 2018, § 246, Rn. 1-15.
18. Verdict №1/3631-22 of July 11, 2022 of the Criminal Affairs Board of Tbilisi City Court's.
19. Verdict of the Supreme Court of Georgia on February 10, 2020 in case №57ა3.-1919;
20. Verdict № 1-387-19 of September 2, 2019 of Rustavi City Court.
21. Verdict № 1/4929-16 of February 16, 2017 of the Criminal Affairs Board of Tbilisi City Court.
22. <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=5&t=3657> [14.03.2023].
23. <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> [15.03.2023].
24. <https://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/gray.pdf> – [16/03/2023].
25. <https://csogeorgia.org/ge/newsPost/27763> – [17.03.2023**].**

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7709

Natia Merebashvili*

Gender-based Domestic Violence Against Women

Violence against women is widespread issue and crime all around the world. Despite that states and international organizations have made great efforts in this direction, the latent nature of this crime and the existing Stereotyped attitudes prevent it from being effectively combated, especially if there is gender-based violence, which is much more difficult to effectively respond to and prevent than a one-time, violence as situational action. Gender-based violence is more prevalent in cases of domestic violence and this makes it even more difficult to detect the crime, its correct classification and fight against it.

The article reviews the compatibility of Georgian National Legislation with International Documents regulating this issue, the nature of gender-based violence, the issue of defining motive in criminal cases and Practice of Georgian and European Courts of human rights.

Key words: *Violence against women, gender discrimination, domestic violence.*

1. Introduction

Gender-based violence is a widespread and urgent issue and a serious crime in the world affecting people of all ages and backgrounds. Despite that states and international organizations have made great efforts in it, studies show that the problem is much more global than common criminal activity. It requires a complex approach, both in terms of supporting the victims of gender-based violence and imposing an adequate responsibility measure on the perpetrators, as well as making changes in criminal law policy and legislation. However, much more is needed rather than responding to what happened, because such violence can cause devastating consequences for the victim, minors, and those around them. To fight against this crime, raising public awareness is of great importance, since gender discrimination and the violence caused by it are often the result of society's stereotyped attitude towards the victim.

The World Health Organization defines violence against women and girls, mostly intimate partner violence, as "a major public and clinical health problem and gross human rights violation." It is rooted in and perpetuates gender inequalities. According to the World Health Organization statistics, globally, one in three women experience physical and/or sexual violence in her lifetime, that is a stark reminder of the scale of gender inequality and discrimination against women.[1]

It can be said that in the Georgian legislative area and practice, discussion on gender-based domestic violence has started not long ago, and therefore, there are differences of opinions. The

* PhD Student of Ivane Javakhishvili Tbilisi State University Faculty of Law. https://orcid.org/0009-0003-6156-9743.

1 Violence against women <https://www.who.int/health-topics/violence-against-women#tab=tab_1> [21.09.2023].

challenges in defining the motive of gender discrimination in the criminal act should also be noted. In order to respond appropriately to this category of crime and to have a tangible result in the fight against it, it is important to evaluate accurately – what is Violence motivated by gender discrimination, what are the prerequisites for it and why the state should be focused on the accurate evaluation of the perpetrator's actions, adequate responsibility and prevention of this crime.

2. Compatibility of Georgian National Legislation with International Framework Documents

On September 22, 1994, the Parliament of Georgia ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – adopted by the United Nations of on December 18, 1979. For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[2]

The Convention is the most important international women's rights document and establishes the obligations of the signatory states to provide guarantees for the realization of these rights. However, important legislative and practical reforms on the topic of violence against women and gender discrimination on the part of the state have started gradually since 2014.

The Law on Elimination of All Forms of Discrimination, adopted on May 2, 2014, is a special regulatory framework document for ensuring equality in Georgia, the purpose of which is to eliminate all forms of discrimination and ensure equal enjoyment of the rights established by the legislation of Georgia for any individual.

On May 11, 2011, in order to promote international cooperation for the elimination of violence against women and domestic violence, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) was developed, the purpose of which is to prevent violence and protect women from all forms of violence.

According to the preamble of the Convention, member states of the Council of Europe and other signatories recognize that the realization of de jure and de facto equality between women and men is a key element in the prevention of violence against women. Recognizing that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.[3]

Among the signatory states of the 2014 document, Georgia became the 23rd country that ratified the Istanbul Convention in 2017. The Convention promotes the elimination of all forms of discrimination against women and the establishment of real equality between women and men. In addition,

[2] UN Convention on the elimination of All Forms of Discrimination against Women, part 1, article 1, 18/12/1979.

[3] The Council of Europe's Istanbul Convention on Violence against Women, 11/05/2011.

it also creates a complex framework and political course to protect and assist victims of violence against women and domestic violence.

Article 6 of the Convention defines the obligation to conduct a gender-sensitive policy, which implies the responsibility of the parties to include gender perspectives in the implementation of the provisions of the given convention and their impact assessment and to promote and successfully implement policies of equality between women and men and the empowerment of women.

The Convention came into effect in Georgia on September 1, 2017. During the last 6 years, Georgia has taken important steps to improve the condition of women, prevent discrimination and protect women's rights. Significant progress has been made in terms of establishing gender equality in the direction of legislative and policy reform.

In order to improve and strengthen the national framework for gender equality in relation to the Istanbul Convention, several laws have been amended. According to the amendments, the Criminal Code defined stalking and punishability (Article 151^1), criminalized forced sterilization and female genital mutilation (Article 133^2). Also, committing gender-based crime was recognized as an aggravating circumstance in relation to such crimes as murder (Article 109), incitement to suicide (Article 115), intentional serious bodily injury (Article 117), intentional less grave bodily injury (Article 118). [4]

The aggravating factors of the crime were determined by Article 53^1 of the Criminal Code. Committing a crime on the basis of race, skin color, language, sex, sexual orientation, gender, gender identity, age, religion, political or other views, disability, citizenship, national, ethnic or social affiliation, origin, property or birth status, place of residence or other attribute of discrimination on grounds of intolerance shall be an aggravating circumstance of liability for all relevant crimes under the Criminal Code.

The aforementioned amendments to the Criminal Code are aimed at purposefully fighting against those crimes committed under the influence of stereotyped attitudes towards a specific gender.

It is significant that in the Constitution of Georgia, with the changes made in 2018, there was a record of ensuring essential equality for the first time. Article 11 of the Constitution of Georgia defines that the State shall provide equal rights and opportunities for men and women and focuses on ensuring the substantive equality of men and women and to eliminate inequality and obliges the state to develop and implement laws, policies and programs to ensure equal opportunities and equal outcomes for women and men.[5]

3. Gender Discrimination as Motive for Domestic Violence Against Women

3.1. The Concept of Gender Discrimination

According to the Istanbul Convention, gender-based violence against women refers to violence directed against women because they are women or violence affecting them disproportionately.[6]

4 Criminal Code of Georgia, July 22, 1999.
5 Constitution of Georgia, August 24, 1995; Constitutional Law N2071 of Georgia of March 23, 2018.
6 The Council of Europe's Istanbul Convention on Violence against Women, 11/05/2011.

According to General Recommendation N19 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which refers to violence against women, gender-based violence seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. Gender-based violence is violence that is directed against a woman because she is a woman or that affects women disproportionately. These acts include physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.[7]

As Practice has shown, gender-based violence occurs most often in cases of domestic violence, which in turn belongs to the most hidden form of violence against women. According to the analysis published on the website of the Prosecution Service of Georgia "Gender-based discrimination motive in cases of violence against (2022)", in 2022, out of 1069 persons charged with criminal charges for violence committed on the basis of gender discrimination, 912 persons are accused of family crimes, and 157 – of non-family crimes.[8]

"Family violence is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes".[9] "The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality".[10]

Legislation should remove the defense of honor in regard to the assault or murder of a female family member, as an opportunity to exclude or relieve liability for similar actions.[11]

For the purpose of the Istanbul Convention, "gender" shall mean the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men. According to the convention, "violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. [12]

In order to find out whether the crime was committed with the motive of gender discrimination, it should be determined whether the perpetrator's criminal act is due to the influence of gender stereotypes or not. Gender stereotype is a radically different assessment of the similar behavior of men and women.[13] Consequently, men's perpetration of domestic abuse is grounded in inequalities in power between women and men, and social norms for male/female relationships.

---

7 UN Convention on the elimination of All Forms of Discrimination against Women, General Recommendation No. 19, Paragraph 6, 1992.

8 Gender-based discrimination motive in cases of violence against, <https://pog.gov.ge/uploads/a97a2799-genderuli-diskriminaciis-motivi-2022.pdf> [21.09.2023].

9 UN Convention on the elimination of All Forms of Discrimination against Women, General Recommendation No. 19, 1992. Comments on specific articles of the Convention.

10 Ibid.

11 UN Convention on the elimination of All Forms of Discrimination against Women, General Recommendation No. 19, 1992. Comments on specific articles of the Convention 24 (S) (i).

12 The Council of Europe's Istanbul Convention on Violence against Women, 11/05/2011.

13 *Bakradze M., Kvirikashvili M., Merebashvili N.,* A Practical Toolkit for Judges and Prosecutors to Guarantee Women's Access to Justice, 2016, 41-42.

Whilst the majority of perpetrators are men, this does not mean that men do not experience domestic abuse and, like women, may suffer damage to their physical mental health. However, there are important differences between male violence against women and female violence against men, specifically the amount, severity and impact of abuse. Acknowledgement of the gendered nature and characteristics of domestic abuse is therefore crucial for devising preventative, response and intervention strategies for those who experience it.[14]

Therefore, gender-based crimes are mainly committed because the social expression of the victim is not compatible with the perpetrator's perception of his/her gender and gender role conformity. Accordingly, sex and gender in this context are completely different dimensions, and the circumstances of a specific crime determine the motivation and attitudes of the person who commits the crime.

The results of the 2020 study "Men, Women and Gender Relations in Georgia: Public Perceptions and Attitudes" carried out within the scope of the United Nations Development Program, the United Nations Women's Organization and the United Nations Population Fund Joint Program "For gender equality in Georgia", show the existing gender inequality in public perceptions. It is true that the spread of stereotypes related to gender roles has significantly declined in the recent period and there has been growing awareness of the need for gender equality, however, certain inequitable perceptions of women in public life and women's leadership continue to persist.[15]

It should be noted that until 2020, Georgia did not have a unified methodology for producing statistics on crimes committed on grounds of intolerance with discrimination basis. On September 23, 2020, with the support of the Council of Europe, a memorandum of cooperation was signed between Ministry of Internal Affairs of Georgia, Office of the Prosecutor General of Georgia, Supreme Court and National Statistical Service on the production of statistics of crimes committed on grounds of intolerance with discrimination basis and the issuance of a unified report, on the basis of which, on March 1 of each year, data of the previous reporting year are published on the website of the National Statistical Service of Georgia.[16]

3.2. Judgements of the European Court of Human Rights on Gender-Based Violence

As it has been already mentioned, gender inequality often creates the basis for violence and, accordingly, for inappropriate responses to violence. And the attitude of law enforcement officers and courts is often directly correlated with the creation of a violent environment based on discrimination.

In the precedent case of the European Court of Human Rights, *Opuz V. Turkey*, the Court noted that according to the international-law rules and principles, accepted by the vast majority of States, the

---

14 *Burman M.,* Gender aspects, Gender and Domestic abuse, <https://www.improdova.eu/project/gender/index.php> [21.09.2023].

15 Men, Women and Gender Relations in Georgia: Public Perceptions and Attitudes", 2020, <https://www.undp.org/sites/g/files/zskgke326/files/migration/ge/UNDP_GE_DG_gendersurvey_report_2020_geo.pdf> [21.09.2023].

16 2020 Activity Report of the Office of the Prosecutor General of Georgia, 2021, <https://pog.gov.ge/uploads/42f3329b-saqarTvelos-prokuraturis-saqmianobis-2020-wlis-angarishi.pdf> [21.09.2023].

State's failure – even if unintentional – to protect women against domestic violence breached women's right to equal protection of the law. Domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. [17]

In the case, M.*G. V. Turkey*, the European Court of Human Rights said that the state's failure to protect women from domestic violence breached women's right to equal protection of the law and that judicial passivity contributed to domestic violence in the country.[18]

Also, in the case of *Durmaz v. Turkey*, the court found that Article 2 of the Convention had been violated. Turkish authorities had failed to carry out an effective investigation into woman's suspicious death and the court concluded that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.[19]

With impunity for the perpetrator, the European Court of Human Rights also discussed a certain denial on the part of national authorities as to the seriousness of domestic violence, and as to the particular vulnerability of the victims of this violence. By regularly turning a blind eye to the repetition of acts of violence and threats against the victim's life, the domestic authorities created a climate conducive to this violence. [20]

The above-mentioned cases show that the role of the state in creating a gender-equal non-violent environment is great and should be expressed in the development of gender-sensitive legislation, its implementation, production of accurate statistics, preparation of national and agency-level strategies and action plans, which will contribute to the fight against gender stereotype inciting violence.

4. Identifying Gender Discrimination as Motive in Criminal Cases

4.1. Circumstances that Point to Discrimination as Motive

Identifying the motive in cases of domestic violence, domestic crime, and violence against women is a crucial prerequisite for the correct legal classification of the act and for determining the appropriate punishment corresponding to its gravity. To establish gender discrimination as a motive for the crime, it is necessary to assess whether the action exhibits preconditions, attitudes, control of women's behavior, possessive attitudes, and the deterioration of social roles resulting from stereotypical views on women's gender roles and the patriarchal environment. The influence of these stereotypical views often drives violence based on gender discrimination, and these views can manifest in various ways. Each specific case must be evaluated, taking into account its unique circumstances.

Obviously, the causes of domestic violence are various. "As a result of the public research conducted in Georgia, the majority identifies unemployment, alcoholism, drug addiction and other socio-economic problems as the main cause of domestic violence. The listed factors only affect the

[17] *Opuz V. Turkey*, № 33401/02; 09/06/2009.
[18] M.G. v. Turkey, № 646/10; 22/03/2016.
[19] Durmaz v. Turkey, № N3621/07; 13/02/2015.
[20] Halime Kilic v. Turkey, N63034/11; 28/06/2016.

level of violence and, to some extent, can be considered as elements that incite it. When it comes to reasons, the most important elements are power and control."[21]

Coercive control is a critical factor that distinguishes the different types of relationships in which intimate partner violence occurs.[22]

Control of behavior is often expressed by coercion, threats, intimidation, isolation, emotional violence, control of social life, activities, relationships with family, friends, acquaintances, making independent personal decisions, often accompanied by economic violence.

The demonstration of the control of behavior, the victim's disobedience to this control, or sometimes the aggressor's subjective perception that the victim is trying to escape the control, becomes the very reason for violence. Therefore, physical or sexual violence are tools that abusers use to achieve coercive control over their victims. Coercive control is a practical expression of cultural gender stereotypes of male dominance and female subservience. It is also believed that coercive control, more than physical abuse, contributes to the devastating psychological effects of domestic violence on many of its victims, such as depression, anxiety and post-traumatic stress disorder.[23]

Some argue that there are two different types of violence against women by men. The main pattern of the first type of violence is "intimate terrorism" (referred to by the term "patriarchal terrorism" in earlier works)[24], the main characteristics of which are controlling behaviors and the attempt by the abuser to have general control over the partner. This form of violence is mainly characteristic of domestic crime. In contrast, "situational couple violence" is not about trying to exercise general control over a partner and is an escalation of a specific conflict into violence. Violence in these relationships usually does not escalate and is limited to a specific conflict incident. It seems to be equally initiated by men and women.[25].

In the national survey of violence against women, which refers to attitudes in Georgian reality to gender relations and violence against women, the trend of accepting unequal gender norms was highlighted:

The majority of women (66%) and men (78%) agree with the opinion that the most important role of a woman is to keep things in order at home. At the same time, almost half of men (42%) believe that a wife should obey her husband. 22% of women and 31% of men believe that wife beating is justified in certain cases. Both male (50%) and female (33%) respondents believe that intimate partner violence is a matter of personal life and no one should interfere in it. Within the framework of

---

21 *Meskhi M.,* Violence in Family – Moral and Legal Aspects of the Problem, TSU International Law Journal, 2011, 61-62.

22 *Johnson MP.,* Conflict and control: Gender symmetry and asymmetry in domestic violence. Violence against Women, 2006, 1003–1018.

23 Stark E., Reply to Michael P. Johnson's conflict and control: Gender symmetry and asymmetry in domestic violence, Violence against Women. 2006, 1019–1025.

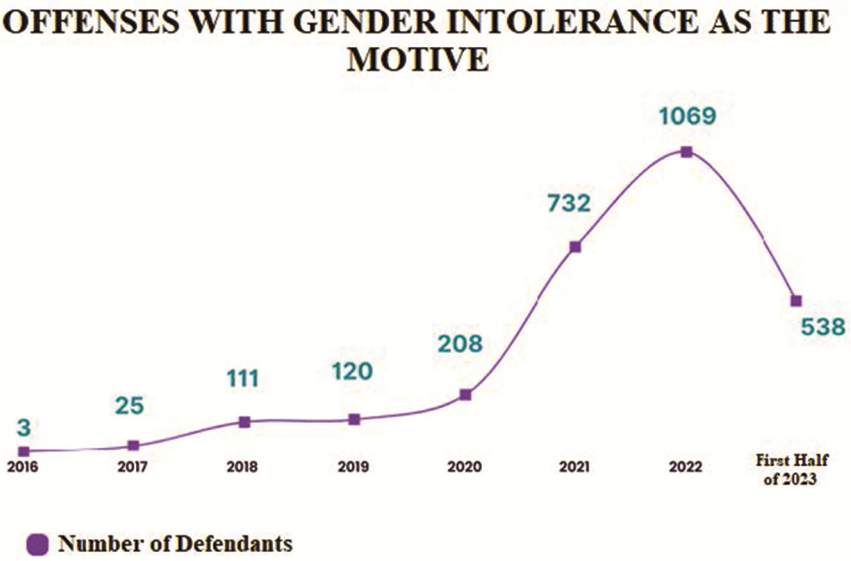
24 *Johnson M., Leone J.,* The differential effects of intimate terrorism and situational couple violence: Findings from the National Violence against Women Survey, Journal of Family Issues, 2005, 26 (3), 322–323.

25 *Johnson M., Leone J.,* The differential effects of intimate terrorism and situational couple violence: Findings from the National Violence against Women Survey. Journal of Family Issues, 2005, 26 (3), 322–323.

the research, the opinion was also voiced – "if a neighbor beats his wife, *i.e.* from this man's point of view, the wife deserved it" (state a male participant from a rural focus group).[26]

It should be noted that identifying gender discrimination as the motive behind violent acts has been a challenge in investigations for years. It was often not possible to establish the mentioned motive beyond the violence attributed to "domestic disagreements", "jealousy" or "revenge".

Taking a look at statistics by the year reveals that the crime of intolerance to gender was identified only in cases against 3 defendants in 2016, 25 in 2017, 111 in 2018, 120 in 2019, 208 in 2020, 732 in 2021, and 1,069 in 2022, including 4 persons facing combined gender and other forms of discrimination (ethnic, national and social affiliation, limited opportunities). The statistical data for 2022 showed a 46% increase in the initiation of criminal prosecutions, which on its part is 128,9% more than the total of 467 prosecutions initiated in 2016-2020. In the first half of 2023, criminal prosecution was initiated against 538 individuals with gender intolerance as the motive, including 2 individuals facing combined gender and other forms of discrimination (such as sexual orientation and religion). Among those granted the procedural status of victim, 533 were women, 1 was a transgender woman, and 6 were men.[27]



4.2. Analyzing the Case Law

Among the persons convicted by the courts for crimes committed on the basis of discrimination, the number and percentage of those who have committed crimes based on gender intolerance as the motive prevails.

[26] National Study on Violence against Women in Georgia, 2017. <http://gender.geostat.ge/gender/img/publicationspdf/National%20VAW%20Study%20Report%20Geo.pdf> [21.09.2023].

[27] The Activity Report of the Prosecution Service of Georgia for the First Half of 2023.

It should be noted that in 2022, compared to 2021, the number of convicts against whom the court applied Article 53^1 §1 of the Criminal Code as an aggravating circumstance increased by 120%, and it is mainly related to the increase in the number of convicts who committed crimes based on gender intolerance as the motive, which shows the increasing trend over the reporting years. According to statistical data, Article 53^1 §1 of the Criminal Code is applied mainly in relation to persons convicted of crimes of domestic violence, threats against a family member, the number of which has increased in 2022 compared to 2021.[28]

In the most of the cases, in relation to crimes committed on the basis of intolerance, the court uses imprisonment or probation as punishment. It should be noted that in 2022, compared to 2021, the share of imprisonment in the punishments applied by the court to persons convicted of crimes committed with the motive of intolerance has increased and the proportion of conditional sentences has decreased.[29]

It is important to discuss the element of discrimination in the indictment and, accordingly, in the judgment issued by the court, in order to give the correct legal classification to the action and accordingly, with reference to Article 53^1 of the Criminal Code, to determine an adequate punishment.

In recent years, court judgments have increasingly discussed the discrimination as the motive, especially in cases of domestic crime.

For example, in one of the judgments in a murder case, the court finds the fact established that any action of the victim should have been agreed upon with the defendant in advance and that the murdered woman should have obeyed the rules established by the defendant. The court relied on the witnesses' testimony that the defendant had complete control over the victim, the deceased had no right to leave the house without informing him, and the defendant would set a time for the victim whenever she left the house, she had no right to do anything without the agreement of her spouse. The defendant often shouted at her and verbally abused her. Therefore, the court found that the murder had a qualifying element in the form of gender discrimination, which is provided for by of Article 109 (h) of the Criminal Code. The court explains that "it refers to the case when the motive for the murder is the victim's gender. Thus, it is necessary to determine that the dominant motive of the murder was the victim's gender."[30]

In the same judgment, the court reasons that when legally classifying the crime with the aforementioned aggravating factor, it is necessary to establish that the person was aware of such qualifying factor and that this should include his intention. In this case, the dominant motive for the murder was the victim's gender, which was manifested in the fact that "the defendant perceived the deceased as his property, who had no right to decide at her own volition when, for how long and

---

28 The 2022 Unified Statistical Report on Crimes Committed on Grounds of Intolerance with Discrimination Basis https://www.geostat.ge/media/51737/diskriminacia_2022.pdf; The 2021 Unified Statistical Report on Crimes Committed on Grounds of Intolerance with Discrimination Basis, <https://www.geostat.ge/media/43558/diskriminaciis-niSniT_2021.pdf> [21.09.2023].

29 The 2022 Unified Statistical Report on Crimes Committed on Grounds of Intolerance with Discrimination Basis https://www.geostat.ge/media/51737/diskriminacia_2022.pdf; The 2021 Unified Statistical Report on Crimes Committed on Grounds of Intolerance with Discrimination Basis, <https://www.geostat.ge/media/43558/diskriminaciis-niSniT_2021.pdf> [21.09.2023].

30 Judgment by Sighnaghi District Court dated May 29, 2023 case #1/6-23.

where she would go, that her every step should have been agreed with the accused and that the deceased should have obeyed the rules laid down by him". Thus, the court considered it established that the murder was caused by the influence of gender stereotypes, the desire to demonstrate the superior status of the man in the family, as well as possessive attitude."[31]

In contrast, in another criminal case, the judge did not consider the attempted murder of a family member to be gender-based, noting that this fact required special substantiation and concurrence of facts and circumstances. However, at the court session, the victim confirmed that the accused "always had the attitude that he is a man. He has the right to everything and he knows better what I need, who to be friends with; he was angry at the advice given by me because I am a woman and he is a man, he did not like me to go to relatives, I must have his permission, he also protested against me holding and checking my phone, he considered that I was his property and he would treat me as he wanted, and that was the reason of all the beatings..." She confirmed this when testifying in court.

Moreover, as the witnesses explained, the victim was afraid that the defendant would rush to her house and beat her, "as a man and a person with full rights over her, so to speak, her master, he seemingly had the right to abuse S. and she should have stayed quiet..."[32]

At the same time, it should be noted that not only the motive of the crime and the correct legal classification are important and noteworthy, but also the prevention of further influence on the victim after charges are filed against the defendant, since often, pressure on the victim not to testify against the perpetrator is a continuation of the existing stereotypical and discriminatory attitude towards her.

5. Conclusion

In conclusion, it can be said that in recent years, the approach of law enforcement officers and the court to identifying gender discrimination as the motive in criminal cases has changed significantly. Practice has shown that in course of investigations or trials pertaining violence against women, domestic crime and femicide, emphasis is put on identifying gender discrimination as the motive. However, there are still different approaches and challenges in practice in this area.

Practically, in all cases of violence against women, it should be established whether the motive for committing the crime was the perpetrator's aggression against the stereotypically recognized role of women and behavior contrary to "traditions", a completely different assessment of "forgivable" behavior for men and women, justice restored in the name of "dignity", demonstration of power and control of behavior and so on. The prosecutor and the judge, respectively, in the indictment and judgment should discuss the mentioned motive, give appropriate qualification to the action of the perpetrator and implement the appropriate response provided by the law.

Gender discrimination is both the cause and the result of the crime perpetrated on a basis of a such motive. Stereotyped, discriminatory and intolerant attitudes often become the cause of violence, and at the same time, violence committed on grounds of intolerance with discrimination basis itself creates an environment for discrimination. Therefore, attention should be focused – first of all, on

[31] Judgment by Sighnaghi District Court dated May 29, 2023 case #1/6-23.
[32] Judgment by Tbilisi City Court of March 29, 2021, case #1/4487-20.

correctly seeing the motive of the criminal act, determining the stereotypical and anti-discrimination factors that determine this motive, raising awareness and enhancing effective response to the crime, which is expressed in the sensitive attitude of law enforcement officers and the court, adopting adequate penalties and empowering the victim.

Bibliography:

1. Constitution of Georgia, August 24, 1995.
2. Constitutional Law #2071 of Georgia of March 23, 2018.
3. Criminal Code of Georgia, July 22, 1999.
4. *Bakradze M., Kvirikashvili M., Merebashvili N.,* Practical Manual for Judges and Prosecutor to Safeguard Access to Justice for Women, 2016.
5. *Meskhi M.,* Violence in Family – Moral and Legal Aspects of the Problems, TSU International Law Journal, 2011.
6. *Johnson M., Leone J.,* The differential effects of intimate terrorism and situational couple violence: Findings from the National Violence Against Women Survey. Journal of Family Issues, 2005.
7. Johnson MP., Conflict and control: Gender symmetry and asymmetry in domestic violence. Violence against Women, 2006.
8. *Stark E.,* Reply to Michael P. Johnson's conflict and control: Gender symmetry and asymmetry in domestic violence. Violence against Women, 2006.
9. The Council of Europe's Istanbul Convention on Violence against Women, 11/05/2011.
10. UN Convention on the elimination of All Forms of Discrimination against Women, General Recommendation No. 19, 1992.
11. UN Convention on the elimination of All Forms of Discrimination against Women, part 1, article 1, 18/12/1979.
12. The Activity Report of the Prosecution Service of Georgia for the First Half of 2023.
13. The 2022 Unified Statistical Report on Crimes Committed on Grounds of Intolerance with Discrimination Basis, <https://www.geostat.ge/media/51737/diskriminacia_2022.pdf> [21.09.2023].
14. Gender Discrimination as the Motive in Cases of Violence against Women and Domestic crime, 2021, <https://pog.gov.ge/uploads/a97a2799-genderuli-diskriminaciis-motivi-2022.pdf> [21.09.2023].
15. The 2022 Unified Statistical Report on Crimes Committed on Grounds of Intolerance with Discrimination Basis, <https://www.geostat.ge/media/43558/diskriminaciis-niSniT_2021.pdf> [21.09.2023].
16. The 2020 Activity Report of the Prosecution Service of Georgia, 2021. <https://pog.gov.ge/uploads/42f3329b-saqarTvelos-prokuraturis-saqmianobis-2020-wlis-angarishi.pdf> [21.09.2023].
17. Men, Women, and Gender Relations in Georgia: Public Perceptions and Attitudes, 2020, <https://www.undp.org/sites/g/files/zskgke326/files/migration/ge/UNDP_GE_DG_gender-survey_report_2020_geo.pdf> [21.09.2023].
18. National Study on Violence against Women in Georgia, 2017, <http://gender.geostat.ge/gender/img/publicationspdf/National%20VAW%20Study%20Report%20Geo.pdf > [21.09.2023].
19. Gender aspects, Gender and Domestic abuse, Michele Burman <https://www.improdova.eu/project/gender/index.php> [21.09.2023].

20. Violence against women <https://www.who.int/health-topics/violence-against-women#tab=tab_1> [21.09.2023].
21. Halime Kilic v. Turkey, N63034/11; 28/06/2016.
22. M.G. v. Turkey, N646/10; 22/03/2016.
23. Durmaz v. Turkey, N3621/07; 13/02/2015.
24. Opuz V. Turkey, N33401/02; 09/06/2009.
25. Signaghi District Court Judgment #1/6-23 dated May 29, 2023.
26. Tbilisi City Court Judgment #1/4487-20 dated March 29, 2021.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7710

George Bakhturidze*

Implementation Questions of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) in Georgia**

The World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) is an international treaty established by WHO to address the global health issue of tobacco consumption, necessitating implementation at the national legislative level.

The article explores the global problem of tobacco use and how it led to the creation of an international treaty to regulate it. It discusses how the FCTC was planned and Georgia's role in it. The analysis covers the legal side of the FCTC, including international and local rules for putting it into action. The article also talks about the challenges that have made it difficult to meet the FCTC's obligations from both legal and political viewpoints. This is the first attempt to explain the FCTC and the issues it faces in being adopted and carried out in Georgia.

***Keywords**: FCTC, tobacco control, global health law, implementation of international norms, tobacco epidemic.*

1. Introduction

Over the past few decades, tobacco use has emerged as a significant challenge to global public health. The tobacco epidemic has claimed the lives of 100 million people in the last century, surpassing the number of casualties from both world wars.[1] In 1998, former WHO Secretary-General Gro Harlem Brutland described tobacco use as "one of the greatest public health disasters in human history. "[2] [3]

---

* Academic Doctor of Health Policy; Research Associate, Georgia State University (GSU), Atlanta, USA Candidate of Juris Doctor in international law, the Faculty of Law of Iv. Javakhishvili Tbilisi State University (TSU). https://orcid.org/0000-0002-5578-5189. The author of the article declares no conflict of interest, having never had any direct or indirect relations with the tobacco industry or persons related to the tobacco industry.

** I would like to express my appreciation to Mrs. Irine Kurdadze, the director of the International Law Institute of TSU, for providing valuable comments and recommendations during the preparation of the article. I am also thankful to Prof. Lukasz Gruszczynski, our Polish colleague in international law and a renowned expert in the field, whose important suggestions elevated the research article to a professional level. Additionally, I extend my gratitude to Carrie Whitney from the CDC Foundation and Dr. Lucy Popova from Georgia State University for their valuable comments.

Financial support for the Postdoctoral Fellowship in Global Tobacco Research was provided by the *Bloomberg Initiative to Reduce Tobacco Use* through the CDC Foundation with a grant from Bloomberg Philanthropies. The findings and conclusions in this report are those of the author and do not necessarily represent the official position of the CDC Foundation.

1 WHO Report on the Global Tobacco Epidemic, 2008.

2 *Brutland GH.*, Speech at Tsinghua University, Beijing, China. November 22, 1998.

3 Note: It was Ms. Brutland who initiated the first modern convention – the Framework Convention on Tobacco Control (hereinafter the FCTC), which aims at reducing the global tobacco epidemic. (in Georgian)

Tobacco claims the lives of over 8 million people annually, including approximately 1.3 million non-smokers exposed to second-hand smoke. Roughly 80% of the world's 1.3 billion tobacco users reside in low- and middle-income countries.[4] Addressing this critical global challenge requires countries to embrace decisive actions and adhere to the WHO's Framework Convention on Tobacco Control (hereinafter "FCTC") as well as the United Nations Sustainable Development Goals.[5] The ultimate goal of the WHO is to end the tobacco epidemic in the 21st century with the "Endgame for Tobacco" policy.[6] [7]

Roughly 15% of global deaths are estimated to be linked to smoking;[8] in Georgia, it is 22%, given the higher than average prevalence of tobacco use (28%).[9] Annually, tobacco consumption in Georgia leads to the deaths of 11,400 individuals, with at least 2,100 being passive smokers.[10] Furthermore, the comprehensive yearly negative economic impact linked to tobacco use surpassed 825 million GEL in 2018 (equivalent to approximately 330 million USD at that time), constituting 2.43% of the gross domestic product.[11]

For decades, the socio-economic and health challenges stemming from tobacco consumption in Georgia have been tied to the degree of successful and prompt execution of international obligations outlined in the FCTC.

2. The Legal Nature and Main Directions of the FCTC

The title "framework convention" in a treaty signifies the unity of general international norms to be incorporated within national legislation. The word "framework" is present in the titles of international conventions, it is seldom used e.g., the UN Framework Convention on Climate Change

4 WHO, Tobacco-Key Facts, <https://www.who.int/news-room/fact-sheets/detail/tobacco> [27.05.2020].

5 WHO/EURO, Tobacco Control & the Sustainable Development Goals, <https://www.euro.who.int/__data/assets/pdf_file/0020/340193/TOBACCO-CONTROL-AND-THE-SUSTAINABLE-DEVELOPMENT-GOALS_Edited.pdf> [01.09.2023].

6 WHO, Director-General Considers the Tobacco EndGame. Dr. Margaret Chan, DG WHO, New Delhi, 11.09.2013, <https://www.who.int/dg/speeches/2013/tobacco_endgame_20130911/en/> [01.09.2023].

7 Note: the term "tobacco finishing" or the so-called the "Tobacco End Game" policy was first used by WHO Director-General Ms. Margaret Chan at a conference held on September 10-12, 2013in New Delhi, India. At this conference, it was announced for the first time that by 2050, countries must be able to end the tobacco epidemic, meaning the consumption of any tobacco product would become less than 5%. The author of this article personally participated in the conference. In addition, at that time the head of the WHO mission in India was Mrs. Nata Menabde, who later served as the executive director of the WHO office in the United Nations in 2015-2022.

8 *Ritche H, Roser M*., Smoking, Our Worlds Data source, revised substantially in Nov 2019, <https://ourworldindata.org/smoking> [01.09.2023].

9 Georgian National Center for Diseases Control and Public Health (NCDC). Tobacco National Survey, 2020. Retrieved from <https://ncdc.ge/#/pages/file/fa339295-6e09-4139-9d89-2ed16a91fe82> [01.09.2023].

10 United Nations Development Programme, Tobacco Control Policy Investment Case – Georgia, United Nations, New York, 2018 (in Georgian).

11 Ibid.

or the Framework Convention for the Protection of National Minorities, etc. Hence, framework conventions set forth broad regulatory norms and obligations, while protocols typically aim to establish more specific regulations and obligations.[12] [13] The Framework Convention on the Ozone Layer and its Montreal Protocol (1985) on Substances that Deplete the Ozone Layer (Montreal Protocol of 1987) or the Framework Convention on Climate Change (1992) and its Kyoto Protocol (1997) are some examples in this regard.[14]

The FCTC, adhering to general norms, outlines specific requirements and deadlines for parties to adopt suitable and effective legislative, executive, administrative, or other measures to implement the relevant articles.[15]

Specifically, Article 11 of the FCTC stipulates that parties must align with international norms to meet tobacco packaging and labeling requirements within a three-year timeframe.[16] In accordance with Article 13, the prohibition of tobacco advertising, promotion, and sponsorship must be enacted within five years, aligning with the constitution or constitutional principles of the respective country.[17] [18]

We emphasize certain obligations from the FCTC that are supported by evidence as curbing tobacco consumption:[19]

- Price and non-price measures;
- Protection from exposure to tobacco smoke;
- Regulation of tobacco product disclosures;
- Packaging and labelling of tobacco products;
- Education, communication, training and public awareness;
- Ban of Tobacco advertising, promotion and sponsorship;
- Demand reduction measures concerning tobacco dependence and cessation;
- Fight against Illicit trade in tobacco products;
- Sales to and by minors;

---

12 *Bodansky D.*, The Framework Convention/Protocol Approach, WHO/NCD/TFI/99.1, 1999, 15 <https://apps.who.int/iris/bitstream/handle/10665/65355/WHO_NCD_TFI_99.1.pdf?sequence=1&isAllowed=y> [01.09.2023].

13 *Martz-Luck N.*, Framework Conventions as a Regulatory Tool, Gottingen Journal of International Law 1 (2009) 3, 439-458.

14 Ibid.

15 WHO Framework Convention on Tobacco Control, 21/05/2003, <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006] (in Georgian).

16 Ibid, Article 11 (in Georgian).

17 Ibid, Article 13 (in Georgian).

18 Article 13 of the Framework Convention stipulated that countries should ban advertising, promotion and sponsorship of tobacco products within 5 years of becoming a member of the Convention. However, the US delegation categorically disagreed with such an imperative ban. Due to this position, in the last 6th round of negotiations, the adoption of the framework convention was practically impossible, as the text had to be adopted by consensus (in Georgian).

19 WHO Framework Convention on Tobacco Control, 21/05/2003, Articles 6-20. <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006] (in Georgian).

- Provision of support for economically viable alternative activities;
- Protection of the environment and the health of persons;
- Tobacco industry liability;
- Research, surveillance and exchange of information.

The first paragraph of Article 2 suggests that for enhanced human health protection a party has the discretion to implement measures more stringent than what the FCTC mandates.[20] Similar regulations are included in other conventions, e.g., UN conventions "Against Corruption",[21] "Against Transnational Organized Crime",[22] "Against Illegal Transit in Narcotic Drugs and Psychotropic Substances",[23] and others.

While the FCTC does not outline specific consequences for failing to meet obligations, a state's reputation being damaged is an important factor that affects its vested interest. In this regard, the reports submitted by parties on the FCTC implementation serve as a valuable mechanism. These reports are presented to the Conference of the Parties (COP) through the FCTC Secretariat, following a similar process as observed in other conventions.[24] [25] [26]

Should a dispute arise between parties in the application of the FCTC and prove unresolvable through negotiations, the COP may potentially initiate a special arbitration procedure. It's important to note that such a situation has not arisen thus far.[27] Using the "Paris Agreement" of the United Nations Framework Convention on Climate Change as a comparable international agreement, it's noteworthy that in the initial six months of 2018 alone, the Permanent Court of Arbitration oversaw 17 environmental and energy disputes involving both private commercial entities and public subjects.[28]

The FCTC does not allow parties to make reservations, a provision found in certain other conventions. For example, reservations are not allowed in the UN Convention on the "Law of the

---

20 Ibid, Article 2. (in Georgian)

21 United Nations Convention Against Corruption, UN Office on Drugs and Crime, New York, 2004, <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf> [01.09.2023].

22 United Nations Convention Against Transnational Organized Crime and the Protocols thereto, <https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf> [01.09.2023].

23 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998, <https://www.unodc.org/pdf/convention_1988_en.pdf> [01.09.2023].

24 WHO Framework Convention on Tobacco Control, Article 21, 21/05/2003 (in Georgian). <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006].

25 *Korkelia K.,* International Agreement in International and Domestic Law, Tbilisi University Publishing House, 1998, 93-95. (in Georgian)

26 *Shaw M*., International Law, Cambridge University Press, 2008, 49-51.

27 WHO Framework Convention on Tobacco Control, Article 27, 21/05/2003, (in Georgian) <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006].

28 International Chamber of Commerce (ICC), Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 53 <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>.

Sea", the "Rome Statute of the International Criminal Court", the "Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption", etc.[29] [30] [31] [32]

The right to make reservations is a mechanism for expressing the sovereignty of nations. It provides numerous countries with the chance to join multilateral agreements. The Vienna Convention "On the Law of Treaties" (hereinafter "Vienna Convention") outlines the methods and procedures for challenging reservations that run counter to the objectives of the international treaty. Additionally, the convention acknowledges the presumption of the absence of reservations implied by the international treaty.[33] [34]

The parties participating in the formulation of the FCTC explicitly chose not to allow reservations.[35] This decision appears to be driven by the intention to safeguard the Convention's objectives and fundamental principles, as well as to preempt potential challenges from the tobacco industry and countries under its influence. For instance, a representative of the US delegation cited the prohibition of reservations as a key factor in America's decision to abstain from joining the FCTC.[36] The delegation held the view that the prohibition of reservations and the broad restrictions on tobacco advertising, promotion, and sponsorship outlined in Article 13 were deemed incompatible with the Constitution of the USA. This obstacle was surmounted on March 1, 2003, during the conclusive phase of negotiations when the draft text of the FCTC received approval. Subsequently, in May 2003, it was presented and officially approved by the WHO General Assembly.[37] [38] [39] As of August 25, 2023, the USA has not become a member of the FCTC.

---

29 United Nations, Final Clauses of Multilateral Treaties, Handbook, 2003, 47. <https://treaties.un.org/doc/source/publications/FC/English.pdf>.

30 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. < https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en >

31 International Criminal Court, Rome Statute of the International Criminal Court, Rome, 17 July 1998. < https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

32 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Concluded 29 May 1993, NCCH. < https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>

33 *Shaw M*., International Law, Cambridge University Press, 2021, 797-806.

34 Articles 19-23, Vienna Convention on the Law of Treaties, 23/05/1969, <https://matsne.gov.ge/document/view/2608263?publication=0> [11/12/2014]. (in Georgian)

35 WHO Framework Convention on Tobacco Control, Article 30, 21/05/2003, <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006]. (in Georgian)

36 *Jacob, G*., "Without Reservation", Chicago Journal of International Law, 5(1), 2004, 288-302. <https://chicagounbound.uchicago.edu/cjil/vol5/iss1/19>

37 World Health Organization, History of the WHO Framework Convention on Tobacco Control, Geneva, 2009. < https://iris.who.int/bitstream/handle/10665/44244/9789241563925_eng.pdf?sequence=1>

38 WHO Framework Convention on Tobacco Control, Article 13, 21/05/2003, <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006]. (in Georgian)

39 Note: The parties compromised and at the 6th last round of negotiations, with an attempt of WHO General Secretary Gru Harlem Brutland and communications with the White House, the text retained the non-reservation, however, Article 13 stated that each Party, in accordance with its constitution or constitutional principles, undertakes to ensure a comprehensive ban on tobacco advertising, promotion and sponsorship. (in Georgian)

The existing count of parties to the FCTC, which stands at 182 out of the 193 UN member states, suggests that the stipulations and commitments within the FCTC are agreeable to a significant number of members. Nevertheless, certain countries, prior to signing or ratifying the FCTC, submitted declarations to the WHO on particular issues or related to the country, without officially making reservations.[40]

Amendments to the FCTC can be enacted through the prescribed procedure outlined in Article 28 of the FCTC.[41] Unlike some conventions, where these procedures may not be explicitly specified, the adjustments can be made in alignment with Article 40 of the "Vienna Convention".[42] As of August 25, 2023, amendments or annexes have not been added to the FCTC.

It is also possible to withdraw from the treaty at any time after two years from the date on which the FCTC has entered into force by a party. The withdrawal shall take effect upon expiry of one year from the date of receipt by giving the Depositary a written notification, or on such later date as may be specified in the notification of withdrawal.[43] As of August 25, 2023, none of the parties has left the FCTC.

The text of the FCTC was adopted by consensus. However, concerning the adoption of a Protocol, as per Article 33 of the FCTC, if consensus cannot be reached for protocol adaption, it can be accepted by a three-fourths majority vote of the COP attendees.[44] The only protocol, the "Protocol on the Elimination of Illegal Trade in Tobacco Products", which developed within the FCTC, was adopted by consensus.[45]

3. International legal and local norms for implementing the international agreement and the FCTC

Based on one of the main principles of international law, "Pacta sunt servanda," states are bound to fulfill the obligations they undertake in good faith pursuant to a bilateral or multilateral treaty.[46] [47] [48] [49]

The Vienna Convention explicitly states that a state cannot claim the invalidity of its consent to be bound by a treaty due to a violation of a provision of its internal law regarding the competence to

---

40 United Nations Treaty Collection, WHO Framework Convention on Tobacco Control, Registration 27.02.2005, #41032, Signatories: 168, Parties: 182. <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en> [19.09.2020].

41 WHO Framework Convention on Tobacco Control, Article 28, 21/05/2003, <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006] (in Georgian).

42 Article 40, Vienna Convention on the Law of Treaties, 23/05/1969, <https://matsne.gov.ge/document/view/2608263?publication=0> [11/12/2014] (in Georgian).

43 Ibid, Article 31. (in Georgian)

44 Ibid, Article 33. (in Georgian)

45 UN Treaty Collection, a Protocol to Eliminate Illicit Trade in Tobacco Products, Seoul, 12 November 2012. Entered into force since 25 September 2018, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4-a&chapter=9&clang=_en>

46 Eriashvili N. (ed.). International Law, Just Georgia, 2010, 106. (in Georgian)

47 Aleksidze L. Modern international law, publishing house "Innovation", 2010, 95. (in Georgian)

48 Article 26, Vienna Convention on the Law of Treaties, 23/05/1969, <https://matsne.gov.ge/document/view/2608263?publication=0> [11/12/2014]. (in Georgian)

49 *Shaw M.*, International Law, Cambridge University Press, 2008, 50.

conclude treaties unless the violation was clear and involved a rule of its internal law of fundamental importance.[50]

The procedure described above does not possess a universally accepted definition within both international treaties and academic literature. As a result, a variety of terms, including "implementation," "execution," "realization," "use," "protection," etc. are utilized.[51] [52] In this instance, the term "implementation" will be employed, as it more effectively highlights the process required to incorporate the majority of international agreements into the country's legislation. Following the enactment of the prescribed legislation, we will then proceed with the term "realization." When addressing the FCTC, it becomes imperative to effectuate pertinent legislative changes.[53]

The signing of the FCTC is a confirmation of a strong political will of a country at an international level. Georgia signed the treaty on February 20, 2004.[54] Ratification of the FCTC took about two years because of a certain barrier created by the Minister of Economy at that time and later by the State Minister of Reforms.[55] The legal issue arose when the State Minister of Reforms initiated the repeal of the Georgian law titled "On Issuing Licenses in the Sector of Food Products and Tobacco Production." It is worth noting that this law was revoked just two weeks after the ratification of the FCTC on December 28, 2005.[56] [57] Although Article 15 of the FCTC suggested the introduction of a license, this obligation was not mandatory. According to Article 15, paragraph 7 of the FCTC, each party was encouraged to undertake suitable measures to prevent illegal trade, which might include the implementation of licensing.[58] After this record had been correctly interpreted, the barrier was removed.

At the first stage, only the text of the FCTC was ratified by the Parliament on December 16, 2005, and the consideration of amendments to the legislation was postponed for the near future.[59] The

---

50 Article 46, Vienna Convention on the Law of Treaties, 23/05/1969, <https://matsne.gov.ge/document/view/2608263?publication=0> [11/12/2014]. (in Georgian)

51 Vienna Convention "On the Law of Treaties", 23/05/1969, <https://matsne.gov.ge/document/view/2608263?publication=0> [11/12/2014]. (in Georgian)

52 Gaverdovsky A.S., Implementation of international law. Kyiv, 1980, 265. (in Russian)

53 Eriashvili N. (ed.). International Law, Just Georgia, 2010, 24. (in Georgian)

54 Decree # 5 of the President of Georgia dated January 12, 2014, R. About granting authority to Adamia, <https://matsne.gov.ge/ka/document/view/34762?publication=0>. (in Georgian)

55 Biographical Dictionary of Georgia, Kakha Bendukidze, <http://www.nplg.gov.ge/bios/ka/00011484/>. (in Georgian)

56 On the Revocation of the Law of Georgia "On Issuing a License in the Field of Food Products and Tobacco Production", # 2575, 28/12/2005, <https://matsne.gov.ge/ka/document/view/904?publication=0>. (in Georgian)

57 Article 15, paragraph 7, WHO Framework Convention on Tobacco Control, 21/05/2003, <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006]. (in Georgian)

58 Paragraph 4 of Article 15, Law of Georgia "On International Agreements of Georgia", Department of Parliament, 44, 11/11/1997, <https://matsne.gov.ge/document/view/33442?publication=16> [22.12.2018]. (in Georgian)

59 On ratification of the World Health Organization Framework Convention on Tobacco Control, #2301, 16/12/2005, <https://matsne.gov.ge/ka/document/view/43474?publication=0>. (in Georgian)

instrument of ratification of the FCTC was handed over to the UN as the depositary on February 14, 2006. The FCTC entered into force and became binding for Georgia after 90 days, on May 15, 2006.[60]

The package of legislative amendments necessary to implement the FCTC was soon withdrawn by the State Minister of Reforms and the process of legal implementation of the FCTC was prolonged. Only in 2008 the package was accepted by the Parliament.[61]

The set of amendments represented the initial effort to fulfill the commitments outlined in the FCTC. While it was not all-encompassing, and the administrative mechanism appeared to be lacking, it marked a significant starting point when contrasted with Georgia's 2003 Law on Tobacco Control. Advertising, promotion and sponsorship of tobacco products were not prohibited (the deadline for Georgia as a party to the FCTC was until May 15, 2011).[62] The problems concerning the enforcement part remained unsolved.[63]

In 2010, only the title of the law "On Tobacco Control" was changed and the laws of Georgia "On Food and Tobacco" and "On Trade in Tobacco Products" were repealed.[64] [65] [66] By abolishing these laws, the state came into the resistance with the implementation of Article 15 of the FCTC.

Tobacco control activities intensified in 2013 when the Governmental Commission was established in March, and in July when the government approved the corresponding state strategy, and again in November with approvement of the national action plan on tobacco control for 2013-2018.[67] [68] [69] They did meet the requirements of the second paragraph of Article 5 of the FCTC. In 2013, the Mission of the FCTC Secretariat provided relevant notes and proposals to the Government of Georgia.[70]

---

60 United Nations Treaty Collection, WHO Framework Convention on Tobacco Control, Registration 27.02.2005, #41032, Signatories: 168, Parties: 182, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en> [19.09.2020].

61 Amendments and Additions to the Law of Georgia "On Tobacco Control in Georgia", #941, 30/12/2008, <https://matsne.gov.ge/ka/document/view/17608?publication=0>. (in Georgian)

62 Ibid. No steps have been illustrated concerning the complete prohibition of tobacco advertising, promotion, and sponsorship, except for the principle that acknowledges the right to live in an environment free from tobacco advertising and to be shielded from its impacts.

63 On making additions and amendments to the Code of Administrative Offenses of Georgia, #3136, 05/12/2003, <https://matsne.gov.ge/ka/document/view/13144?publication=0>. (in Georgian)

64 On Tobacco Control, #4059-RS, 15/12/2010, <https://matsne.gov.ge/document/view/1160150?publication=7> [15/07/2020]. (in Georgian)

65 On Food and Tobacco, #2212, 29/12/2010, <https://matsne.gov.ge/document/view/11938?publication=11>. (in Georgian).

66 On trade in tobacco products, #3013, 29/12/2010, <https://matsne.gov.ge/document/view/12982?publication=3>. (in Georgian).

67 On forming the government commission to strengthen tobacco control measures in Georgia, Resolution of the Government of Georgia #58, 15/03/2013, <https://matsne.gov.ge/document/view/1874677?publication=0>. (in Georgian)

68 On approval of the state strategy for tobacco control of Georgia, Resolution of the Government of Georgia, #196, 30/07/2013, <https://matsne.gov.ge/document/view/1978972?publication=0>. (in Georgian)

69 2013-2018 Tobacco Control Action Plan, Resolution of the Government of Georgia, #304, 29/11/2013, <https://matsne.gov.ge/document/view/2096830?publication=0>. (in Georgian)

70 Assessment of Implementation Needs of the World Health Organization Framework Convention on Tobacco Control in Georgia, Convention Secretariat, Geneva, June 2013. (in Georgian).

The two-year (2015-2016 years) negotiations with the Parliament of Georgia proved unsuccessful. Consequently, before the conclusion of the Parliament of the 8th convocation in June 2016, the legislative initiative was endorsed by Mrs. Guguli Magradze, the First Deputy Chairperson of the Integration Committee on the European Union. The author of the legislative package was the Tobacco Control Alliance.[71] The government was actively resistant to enacting meaningful legislative reforms in tobacco control, primarily due to business interests.[72]

The 9th convocation of the Parliament, subsequent to the resolution on November 30, 2016, proceeded with the regulation initiated by the 8th convocation. The Parliament's Bureau introduced a set of proposals aimed at aligning tobacco control legislation with the provisions of the FCTC.[73]

At the beginning of 2017, the Public Defender issued a special report discussing the situation with regard of Tobacco Control and appealed to the Parliament to incorporate the FCTC into current legislation as soon as possible.[74]

Following several months of parliamentary deliberation, led by Mr. Akaki Zoidze, the head of the Health and Social Affairs Committee, and driven by a robust political commitment from the parliament, comprehensive and impactful tobacco control measures were endorsed in the third reading on May 17, 2017. The majority of these measures took effect on May 1, 2018.[75] Also, it was possible to implement the administrative measures reform. Consequently, the process of law enforcement became more flexible and effective, which provided 96% compliance of the law through the appropriate public monitoring.[76] [77] The reform is in compliance with the guidelines for the implementation of the FCTC and some requirements of Articles 8 to 14. However, the complete prohibition of tobacco advertising, promotion and sponsorship provided in Article 13 of the FCTC was achieved on September 1, 2018, after seven years.[78]

Article 5.3 of the FCTC remains unfulfilled. To implement this provision, the law "On Tobacco Control" mandated the government to endorse the normative act titled "Protecting the State Policy Related to Tobacco Control in Public Institutions and Establishing the Rule of Communication of

---

71 The decision of the Bureau of the Parliament of Georgia on the initiation of the procedure to review the draft of the normative act, Parliament of Georgia, #417/4, 13.06.2016, <https://info.parliament.ge/file/1/BillReviewContent/123029?>. (in Georgian).

72 The government is against Guguli Maghradze for the bill on tightening tobacco control, Business Media Georgia, 15.07.2016, < https://bm.ge/ka/article/mtavroba-tambaqos-kontrolis-gamkacrebaze-guguli-magradzis-kanonproeqtis-winaagmdegia/4919> (in Georgian).

73 Resolution of the Parliament of Georgia on the advisability of continuing the review procedures of bills submitted to the Parliament of the previous convocation, Kutaisi, 30.11.2016, #37-1c, <https://info.parliament.ge/file/1/BillReviewContent/136733?>. (in Georgian)

74 The special report on the situation in the field of tobacco control, Public Defender (Ombudsman) of Georgia, 2017, 37-38. (in Georgian).

75 Regarding Amendments to the Law of Georgia "On Tobacco Control", Parliament of Georgia, 07-3/592/8, <https://info.parliament.ge/#law-drafting/12109> (in Georgian).

76 Ibid., "About changes in the Code of Administrative Offenses of Georgia" (in Georgian)

77 Bakhturidze G., Assessment of the impact of the law on tobacco control on the health and economy of the population of Georgia, Tbilisi, December 2019, <https://www.ncdc.ge/Handlers/GetFile.ashx?ID=92a34feb-3a6b-4895-b623-042279397f18 > (in Georgian).

78 Article 13, Paragraph 2, WHO Framework Convention on Tobacco Control, 21/05/2003, <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006] (in Georgian)

State Servants with the Tobacco Industry" by June 1, 2018. Although work on the document recommenced in December 2022, as of August 25, 2023, the Ministry of Finance has not yet approved the document uploaded to the government portal. It is noteworthy that in November 2019, the Parliament concluded its work on the final report concerning the enforcement of the law "On Tobacco Control".[79] By the resolution on April 13, 2021, the Parliament provided a positive assessment of the state of enforcement of the law "On Tobacco Control" and instructed the government to take appropriate measures to ensure the timely adoption of the above-mentioned normative act.[80]

Ultimately, while some nations fully adhere to the FCTC and others fall short, there is a noticeable improvement in the global situation. Specifically, the worldwide prevalence of tobacco use declined from 22.8% to 17% between 2007 and 2021. This reduction translates into 300 million fewer smokers today. However, 44 countries, representing up to 2.3 billion inhabitants, have not made progress in any of the directions outlined in the MPOWER strategy endorsed by the World Health Organization (M – monitoring tobacco use, P – protection from tobacco smoke, O – offering support to quit tobacco use, W – warning about the dangers of tobacco, E – enforcement of the ban on tobacco advertising, promotion, and sponsorship, R – raising taxes on tobacco). Additionally, the introduction and regulation of novel tobacco products present a significant challenge.[81] Since 2018, Georgia has stood out as one of the successful nations in implementing comprehensive tobacco regulations, ensuring their enforcement, and in turn witnessing declining trends in tobacco consumption.[82] Nevertheless, the regulation of novel tobacco products continues to pose a challenge.

4. Conclusion

The FCTC of the World Health Organization is the first WHO international health treaty which aims at reducing the global burden of tobacco use.[83]

Georgia actively participated in the development of the FCTC, but its ratification and subsequent implementation proved to be challenging, primarily due to a lack of political will and significant influence from the tobacco industry on the government. The FCTC Secretariat consistently aimed to assist member developing countries, including Georgia, in meeting their obligations under the FCTC, offering relevant missions and providing technical or financial support. However, compliance with Article 13, which required a complete prohibition of advertising, promotion, and

---

79 Healthcare and Social Issues Committee of the Parliament of Georgia. Post legislative scrutiny (PLS) on the Law of Georgia "on Tobacco Control". Final Report. 2019, 12-13, <http://www.parliament.ge/ge/ajax/downloadFile/132417/jandacvis_komit_broshura_GEO>.

80 Resolution of the Parliament of Georgia "On Tobacco Control" regarding the state of enforcement of the Georgian law # 455-Ims-Xმპ, <https://matsne.gov.ge/ka/document/view/5148191?publication=0> [14/04/2021]. (in Georgian)

81 World Health Organization, WHO Report on the Global Tobacco Epidemic, Protect People from Tobacco Smoke, 2023 <https://www.who.int/initiatives/mpower>

82 *Bakhturidze G., Peikrishvili N., Gvinianidze K.,* Impact of Comprehensive Smoke-free Policy on SHS Exposure and Health Condition of the Georgian Population, Tobacco Prevention&Cessation, 7(70), 2021, 1-6. <https://doi.org/10.18332/tpc/143329>

83 WHO Framework Convention on Tobacco Control, 21/05/2003, <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006] (in Georgian).

sponsorship of tobacco products, was initiated by Georgia only in September 2018 instead of the original deadline of May 15, 2011.

Furthermore, the fulfillment of other FCTC obligations took a considerable amount of time. Comprehensive legislative changes for the implementation of FCTC Articles 8-14, along with improvements in relevant administrative mechanisms, were made only after 12 years of FCTC membership. The primary obstacle to FCTC implementation was the government's economic team. However, according to the "Vienna Convention" and the Georgian Law "On International Agreements," institutions of the executive power are the primary bodies responsible for making international agreements, despite violating the law both before and after the Convention entered into force.

Even after the FCTC's requirements became obligatory, and to this day, the government has failed to meet the demands outlined in Article 5.3 of the Framework Convention and Article 4, paragraph 6 of the law "On Tobacco Control". For over five years, the government has not approved the relevant normative act, which would ensure transparency in relations between representatives of executive structures and the tobacco industry. Efforts towards implementing other obligations under the FCTC and fully harmonizing them in national legislation are also lacking in effectiveness.

Urgent attention should be given to the legal regulation of novel and tobacco related products (among them are non-nicotine e-cigarettes/hookahs, herbal smoking products, and so on). This recommendation comes from the World Health Organization (WHO), the Parties to the FCTC, and the European Union. However, the adoption of such regulation continues to present a challenge for Georgia. It is crucial to heed the WHO's call and encourage countries to promptly transition from tobacco control measures to "tobacco endgame" policies. This transition aims to rapidly reduce the consumption of tobacco products, especially among future generations, thereby minimizing socio-economic and health burdens as much as possible.

Bibliography:

1. Vienna Convention "On the Law of Treaties", 23/05/1969, <https://matsne.gov.ge/document/view/2608263?publication=0> [11/12/2014] (in Georgian).
2. On ratification of the World Health Organization Framework Convention on Tobacco Control, #2301, 16/12/2005, <https://matsne.gov.ge/ka/document/view/43474?publication=0> (in Georgian).
3. "On the Revocation of the Law of Georgia "On Issuing a License in the Field of Food Products and Tobacco Production", # 2575, 28/12/2005, <https://matsne.gov.ge/ka/document/view/904?publication=0 > (in Georgian).
4. Regarding making additions and amendments to the "Code of Administrative Offenses of Georgia", #3136, 05/12/2003, <https://matsne.gov.ge/ka/document/view/13144?publication=0> (in Georgian).
5. On amendments and additions to the "Tax Code of Georgia", #2955, 28/04/2006, <https://matsne.gov.ge/ka/document/view/26224?publication=0> (in Georgian).
6. "About tobacco control in Georgia "On Amendments and Additions to the Law of Georgia, #941, 30/12/2008, <https://matsne.gov.ge/ka/document/view/17608?publication=0> (in Georgian)
7. Law of Georgia "On Tobacco Control", #4059-RS, 15/12/2010, <https://matsne.gov.ge/document/view/1160150?publication=7> [15/07/2020] (in Georgian).
8. Law of Georgia "On Trade in Tobacco Products", #3013, 29/12/2010, <https://matsne.gov.ge/document/view/12982?publication=3> (in Georgian).

9. Law of Georgia "On International Agreements of Georgia", Herald of the Parliament, 44, 11/11/1997, <https://matsne.gov.ge/document/view/33442?publication=16> [22.12.2018] (in Georgian).
10. Law of Georgia "On Food and Tobacco", #2212, 29/12/2010, <https://matsne.gov.ge/document/view/11938?publication=11> (in Georgian).
11. The Constitution of Georgia, Herald of the Parliament of Georgia, 31-33, 24/08/1995, <https://matsne.gov.ge/document/view/30346?publication=36> [29/06/2020] (in Georgian).
12. Resolution of the Government of Georgia "Tobacco Control Action Plan for 2013-2018", #304, 29/11/2013, <https://matsne.gov.ge/document/view/2096830?publication=0> (in Georgian).
13. Resolution of the Government of Georgia "On Approval of the State Strategy for Tobacco Control of Georgia", #196, 30/07/2013, <https://matsne.gov.ge/document/view/1978972?publication=0> (in Georgian).
14. Resolution of the Government of Georgia "On the creation of a government commission to strengthen tobacco control measures in Georgia", #58, 15/03/2013, <https://matsne.gov.ge/document/view/1874677?publication=0> (in Georgian).
15. World Health Organization Framework Convention on Tobacco Control, 21/05/2003, <https://matsne.gov.ge/ka/document/view/3800638> [05/06/2006] (in Georgian).
16. *Aleksidze L.,* Modern international law, publishing house "Innovation", 2010, 95 (in Georgian).
17. *Bakhturidze G.,* Assessment of the impact of the law on tobacco control on the health and economy of the population of Georgia, Tbilisi, December 2019, <https://www.ncdc.ge/Handlers/GetFile.ashx?ID=92a34feb-3a6b-4895-b623-042279397f18> (in Georgian).
18. United Nations Development Programme, Tobacco Control Policy Investment Case – Georgia, United Nations, New York, 2018 (in Georgian).
19. *Eriashvili N. (ed.),* International Law, Justice in Georgia, 2010, 24, 106 (in Georgian).
20. Final Report on the Control of the Enforcement of the Law of Georgia "On Tobacco Control", Health Protection and Social Affairs Committee of the Parliament of Georgia, 2019, 12-13, <http://www.parliament.ge/ge/ajax/downloadFile/132417/jandacvis_komit_broshura_GEO> (in Georgian).
21. *Korkelia K.,* International Agreement in International and Domestic Law, Tbilisi University Press, 1998, 93-105, 140-144, 157 (in Georgian).
22. Biographical Dictionary of Georgia, Kakha Bendukidze, <http://www.nplg.gov.ge/bios/ka/00011484/> (in Georgian).
23. "Special report on the situation in the field of tobacco control", Public Defender (Ombudsman) of Georgia, 2017, 37-38 (in Georgian).
24. WHO Implementation Needs Assessment of the Framework Convention on Tobacco Control in Georgia, Convention Secretariat, Geneva, June 2013 (in Georgian).
25. United Nations Convention Against Corruption, UN Office on Drugs and Crime, New York, 2004, <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf> [01.09.2023].
26. United Nations Convention Against Illicit Traffic in Narcotic Drags and Psychotropic Substances, 1998, <https://www.unodc.org/pdf/convention_1988_en.pdf> [01.09.2023].
27. United Nations Convention Against Transnational Organized Crime and the Protocols thereto, <https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf> [01.09.2023].

28. United Nations (UN) Treaty Collection, a Protocol to Eliminate Illicit Trade in Tobacco Products, Seoul, 12 November 2012. Entered into force since 25 September 2018, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4-a&chapter=9&clang=_en> [01.09.2023].
29. United Nations Treaty Collection, WHO Framework Convention on Tobacco Control, Registration 27.02.2005, #41032, Signatories: 168, Parties: 182 <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en> [19.09.2020].
30. World Health Organization (WHO), International Sanitary Regulations, Official Records N 37, Geneva, April 1952, 1 <https://apps.who.int/iris/bitstream/handle/10665/85636/Official_record37_eng.pdf?sequence=1&isAllowed=y>.
31. *Bodansky D.*, The Framework Convention/Protocol Approach, WHO/NCD/TFI/99.1, 1999, 15 <https://apps.who.int/iris/bitstream/handle/10665/65355/WHO_NCD_TFI_99.1.pdf?sequence=1&isAllowed=y> [01.09.2023].
32. *Brutland GH.*, Speech at Tsinghua University, Beijing, China. November 22, 1998.
33. *Collishaw N.*, An International Framework Convention for Tobacco Control. in *Lu R., Mackay J., Niu S., Peto R.* (*eds*), Tobacco: the Growth Epidemic, Springer, London, 2000, 410-422.
34. *DeLand K., Lien G., Wipfli H.*, The WHO Framework Convention on Tobacco Control and the Tobacco Free Initiative, *Mitchell A., Voon T (eds.),* The Global Tobacco Epidemic and the Law, Edward Elgar, Cheltenham, UK, 2014, 11-25.
35. Georgian National Center for Diseases Control and Public Health (NCDC). Tobacco National Survey, 2020, <https://ncdc.ge/#/pages/file/fa339295-6e09-4139-9d89-2ed16a91fe82> [01.09.2023].
36. *Gostin L, O'Neill T.,* Global Health Law: a Definition and Grand Challenges, Public Health Ethics, Vol. 1, #1, 2008, 53-63.
37. Guidelines, and Policy Options and Recommendations for Implementation of the WHO FCTC. [30/07/2022], <https://fctc.who.int/who-fctc/overview/treaty-instruments> [01.09.2023].
38. International Chamber of Commerce (ICC), Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 53, <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf> [01.09.2023].
39. *Jacob G.*, "Without Reservation", Chicago Journal of International Law, 5(1), 2004, 288-302 <https://chicagounbound.uchicago.edu/cjil/vol5/iss1/19> [01.09.2023].
40. *Martz-Luck N.*, Framework Conventions as a Regulatory Tool, Gottingen Journal of International Law 1, 20093, 439-458.
41. *McCarthy M.*, A Brief History of the World Health Organization. The Lancet, 360, 2002, 1111.
42. *Fidler DP.*, International Law and Infectious Diseases, Clarendon Press, Oxford 1999, 28-35.
43. Parties of the Framework Convention on Tobacco Control, last update 3 March 2021, < https://fctc.who.int/who-fctc/overview/parties> [01.09.2023].
44. *Rafols X.,* International Law and Global Health: an Overview, Paix et Securite Internationals, #3, 2015, 35, 41, 45.
45. *Ritche H, Roser M.*, Smoking, Our World Data source, revised substantially in Nov 2019, <https://ourworldindata.org/smoking> [01.09.2023].
46. *Rugar J.,* Normative Foundations of Global Health Law, Georgetown Law Journal, 96(2), 2008, 423-443.
47. *Shaw M.*, International Law, Cambridge University Press, 2008, 49-51.
48. *Shaw M.*, International Law, Cambridge University Press, 2021, 797-806.

49. *Taylor AL*., International Law, and Public Health Policy, International Encyclopedia of Public Health, First Edition, Vol. 3, 2008, 667-678.
50. United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> [01.09.2023].
51. United Nations, Final Clauses of Multilateral Treaties, Handbook, 2003, 47. <https://treaties.un.org/doc/source/publications/FC/English.pdf> [01.09.2023].
52. 56th World Health Assembly, Resolution WHA56.1, WHO Framework Convention on Tobacco Control, Geneve, 21.05.2003.
53. World Health Organization, Director-General Considers the Tobacco EndGame. Dr Margaret Chan, DG WHO, New Delhi, 11.09.2013, <https://www.who.int/dg/speeches/2013/tobacco_endgame_20130911/en/> [01.09.2023].
54. World Health Organization/EURO, Tobacco Control & the Sustainable Development Goals, <https://www.euro.who.int/__data/assets/pdf_file/0020/340193/TOBACCO-CONTROL-AND-THE-SUSTAINABLE-DEVELOPMENT-GOALS_Edited.pdf> [01.09.2023].
55. World Health Organization, The Feasibility of Developing and International Instrument for tobacco control, Report by the Director-General, EB97/INF.DOC./4, 30.11.1995, <https://apps.who.int/iris/bitstream/handle/10665/172800/EB97_Inf.Doc-4_eng.pdf?sequence=1&isAllowed=y> [01.09.2023].
56. World Health Organization. A History of the WHO Framework Convention on Tobacco Control, <https://www.who.int/features/2003/en/08_gallery1.html> [2020].
57. World Health Organization, History of the WHO Framework Convention on Tobacco Control, Geneva, 2009 <https://iris.who.int/bitstream/handle/10665/44244/9789241563925_eng.pdf?sequence=1> [01.09.2023].
58. World Health Organization (WHO) Report on the Global Tobacco Epidemic, 2008.
59. World Health Organization, Tobacco Control Country Profiles, Geneve, II edit. 2003, <https://www.who.int/tobacco/global_data/country_profiles/en/> [01.09.2023].
60. World Health Organization, Tobacco Free Initiative, Frequently Asked Questions about the WHO FCTC Entry into Force, <https://www.who.int/tobacco/framework/faq_entry_force/en/#:~:text=Why%20will%20the%20WHO%20FCTC%20enter%20into%20force%20on%2027%20February%202005%3F> [01.09.2023].
61. World Health Organization, Tobacco Free Initiative, WHA48.11, An International Strategy for Tobacco Control, 12.05.1995, <https://www.who.int/tobacco/framework/wha_eb/wha48_11/en/> [01.09.2023].
62. World Health Organization, Tobacco Free Initiative, WHA49.17, International Framework for Tobacco Control, 25.05.1996, <https://www.who.int/tobacco/framework/wha_eb/wha49_17/en/> [01.09.2023].
63. World Health Organization, Tobacco Free Initiative, WHA52.18, Towards a WHO Framework Convention on Tobacco Control, 24.05.1999, <https://www.who.int/tobacco/framework/wha_eb/wha52_18/en/> [01.09.2023]
64. World Health Organization, Tobacco Free Initiative (TFI), Who We Are, <https://www.who.int/tobacco/about/en/> [01.09.2023].
65. World Health Organization, Tobacco-Key Facts, <https://www.who.int/news-room/fact-sheets/detail/tobacco> [27.05.2020].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2023.7711

Ketevan Kukava*

Balancing the Right to Privacy and National Security Interests in the Digital Age

In order to protect national security, the states widely use secret surveillance measures and monitor electronic communications, which poses high risks of arbitrariness and abuse of power. Modern technologies enable the states to collect and process personal data on an unprecedented scale. Therefore, the most important challenge in today's world is to determine how to protect national security and prevent serious crimes without violating human rights.

The judgments of the European Court of Human Rights provide guidance in terms of balancing the right to privacy and security interests. The present article aims to discuss the development of the case law of the European Court and the legal safeguards for protecting the right to privacy when the state carries out secret surveillance measures.

Keywords: *secret surveillance, personal data, national security, international communications, bulk interception.*

1. Introduction

In parallel with rapid technological development, society has witnessed the normalization of secret surveillance. With the passage of time, methods of surveillance change, develop and become more sophisticated. It can be asserted that forgoing privacy and individual liberty is the price society pays in exchange for security and public order.

Respect for private life is a precondition for a free and democratic society. At the same time, this right is not absolute and it can be restricted to pursue certain legitimate aims when it "is necessary in a democratic society." Protection of national security is among such legitimate aims.

Digital technologies significantly increased the scale of secret surveillance. The interests of security require certain restriction of rights and the implementation of covert measures. At the same time, the absence of efficient oversight over such methods poses a threat to democratic values. Such a threat exists especially in such circumstances when covert measures are directed towards every person, regardless of the existence of a reasonable suspicion.

The use of measures that have a proactive nature gives rise to controversy. The state interferes in individuals' freedom, privacy, and communications not because of what they have actually done, but because of the danger that might emerge later on.[1]

* Ph.D. student of Ivane Javakhishvili Tbilisi State University Faculty of Law. https://orcid.org/0000-0003-3956-5730.

1 *Fenwick H.,* Proactive Counter-Terrorist Strategies in Conflict with Human Rights, International Review of Law, Computers & Technology, Vol. 22, No. 3, 2008, 259-260.

Protection of national security and the prevention of crimes are among the most important obligations of a state. However, when fulfilling this obligation, the risk of arbitrariness and abuse of power is considerably high. These risks are exacerbated by the covert nature of the implemented measures, which decreases the degree of accountability of security services. Therefore, the most important challenge in today's world is to determine how to protect national security and prevent serious crimes without violating human rights.

The judgments of the European Court of Human Rights (hereinafter – "Court" or "European Court") provide guidance in terms of balancing the right to privacy and security interests. Considering the threats emerging from terrorism and transnational crimes, the present article aims to discuss the development of the case law of the European Court and the legal safeguards for protecting the rights to privacy when the state carries out secret surveillance measures.

2. Monitoring of Electronic Communications and the Right to Privacy – Which Direction Does the Case Law of the European Court of Human Rights Develop?

According to Article 8 of the European Convention on Human Rights (hereinafter –"Convention"),

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[2]

Technology significantly changes the way people communicate and live, which also changes surveillance practices and our perception and expectation of privacy.[3] Technological progress greatly affected the development of the European Court's case law as well.

The Court had to consider the compliance of secret surveillance regimes with the Convention on several occasions. Notably, the mere storage of data relating to the individual's private life constitutes interference within the meaning of Article 8.[4] "The fact that the stored material is in coded form, intelligible only with the use of computer technology and capable of being interpreted only by a limited number of persons, can have no bearing on that finding."[5]

---

2 European Convention on Human Rights, Article 8, Council of Europe, 1950.

3 *Stepanovic I.,* Preventing Terrorism or Eliminating Privacy? Rethinking Mass Surveillance after Snowden Revelations, Strani Pravni Zivot (Foreign Legal Life), 2015(4), 236.

4 Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08, § 244.
Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, § 330.
Amann v. Switzerland, [2000], ECtHR, N 27798/95, § 69.
S. and Marper v. the United Kingdom, [2008], ECtHR, N 30562/04, 30566/04, § 67.

5 Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08, § 244.

Important information about individuals may be revealed not only by the content of the communication but also by metadata. Those data, taken as a whole, may allow the creation of a portrait of a person and the drawing of precise conclusions concerning the individual's private life.[6]

Any use of computer systems by individuals leaves a digital footprint. Considering the increasing capabilities of modern technologies (for example, linkage and extracting completely new information), it can be declared that "insignificant" or "irrelevant" data no longer exist.[7] In the era of big data, "all personal data processing potentially affects privacy in the broad sense."[8]

An effective fight against terrorism and organized crime is essential for protecting national security. To achieve this aim, the states widely use secret surveillance measures and monitor electronic communications, which pose a high risk of arbitrariness and abuse of power.

In the Internet age, the distinction is made between mass surveillance and targeted surveillance as well as internal and foreign surveillance.[9] Notably, the European Court sets different standards with respect to monitoring of communications of the individuals on the state's territory, on the one hand, and the individuals beyond its jurisdiction, on the other.

In 2006, the European Court confirmed the compliance of strategic monitoring of international communications with the Convention in the case of *Weber and Saravia v. Germany.*[10] The Court declared the application inadmissible because the interference in the applicants' rights was "necessary in a democratic society" and considerable safeguards against abuse were provided.[11] The legislation laid down strict conditions with regard to the transmission of data obtained by means of strategic monitoring[12] and provided for the destruction of personal data as soon as they were no longer needed to achieve the lawful purpose.[13] Besides, it was mandatory to inform relevant individuals as soon as notification could be carried out without jeopardizing the purpose of monitoring.[14]

In 2008, the European Court unanimously found the violation of Article 8 in the case of *Liberty and Others v. the United Kingdom*[15] due to a wide discretion conferred by the national legislation on the executive branch to intercept and examine external communications. According to the Court's assessment, the domestic law did not indicate with sufficient clarity the scope or manner of exercise of the State's wide discretion and did not ensure adequate protection against abuse of power. In

---

Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, § 330.

6 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, [2014], CJEU, C-293/12, C-594/12, § 27.

7 *Karaboga M., Matzner T., Obersteller H., Ochs C.,* Is there a Right to Offline Alternatives in a Digital World? in Data Protection and Privacy: (In)visibilities and Infrastructures, *Leenes R., Brakel R.v., Gutwirth S., Hert P.D.,* (eds), Springer International Publishing AG, 2017, 45.

8 *Hijmans H.,* The European Union as Guardian of Internet Privacy, The Story of Art 16 TFEU, Law, Governance and Technology Series, Vol. 31, Springer International Publishing Switzerland, 2016, 70.

9 Ibid, 104.

10 Weber and Saravia v. Germany, [2006], ECtHR, N 54934/00.

11 Ibid, §§ 117-118.

12 Ibid, § 122.

13 Ibid, § 132.

14 Ibid, § 136.

15 Liberty and Others v. the United Kingdom, [2008], ECtHR, N 58243/00.

particular, the legislation did not set out in an accessible manner the procedure to be followed for selecting for examination, sharing, storing and destroying intercepted material.[16]

The case law of the European Court also includes judgments that focus on the surveillance of the communications of individuals within the territorial jurisdiction of the state. In 2015, in the case of *Roman Zakharov v. Russia*[17] the Grand Chamber unanimously found the violation of Article 8 because the Russian legislation did not lay down effective safeguards against arbitrariness and the risk of abuse. Such risks are inherent to secret surveillance and they are "particularly high in a system where the secret services and the police have direct access, by technical means, to all mobile-telephone communications.[18]

According to the Court's assessment, the circumstances in which the public authorities could resort to secret surveillance measures were not determined with sufficient clarity; provisions on discontinuation of surveillance did not provide sufficient guarantees against arbitrariness; the legislation permitted the automatic storage of clearly irrelevant data and did not clearly determine the circumstances in which the intercepted material was stored and destroyed after the end of a trial; the authorization procedures did not ensure the use of surveillance measures only when "necessary in a democratic society;" the supervision of interceptions did not comply with the requirements of the independence and was not sufficient to exercise an effective and continuous control; the effectiveness of the remedies was undermined by the absence of notification and adequate access to documents relating to interceptions.[19]

Notably, in this case, the Grand Chamber reiterated the importance of the verification of a reasonable suspicion against the person concerned, in particular, whether there are factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that endanger national security.[20]

The European Court of Human Rights discussed the issue of striking a balance between national security and the right to privacy in the case of *Szabó and Vissy v. Hungary*. In its judgment of 2016, the Court pointed out that according to the legislation of Hungary, the scope of the surveillance measures could include virtually anyone; they were carried out by the executive branch and without an assessment of strict necessity; new technologies allowed the state to intercept masses of data and there was no any effective remedy, let alone the judicial one.[21] Consequently, in this case, the European Court found a violation of Article 8.

Despite the judgment delivered in favor of the right to privacy, the argumentation of the Court gave rise to criticism: According to the concurring opinion of Judge Pinto de Albuquerque, in its reasoning, the Court chose the lower standard – "individual suspicion" instead of a "reasonable suspicion," which significantly diminishes the degree of protection set out in the case of *Zakharov.* According to his assessment, "any kind of "suspicion" will suffice to launch the heavy artillery of

16 Ibid, § 69.
17 Roman Zakharov v. Russia, [2015], ECtHR, N 47143/06.
18 Ibid, § 302.
19 Ibid.
20 Ibid, § 260.
21 Szabó and Vissy v. Hungary, [2016], ECtHR, N 37138/14, § 89.

State mass surveillance on citizens, with the evident risk of the judge becoming a mere rubber-stamper of the governmental social-control strategy."[22] "Individual suspicion" equates to overall suspicion and the judgment creates the impression that the Chamber condones widespread "strategic surveillance" for the purposes of national security.[23]

2.1. Normalization of mass surveillance of international communications for the purpose of safeguarding national security

The European Court's lenient approach towards large-scale surveillance was further strengthened by the Grand Chamber's two similar judgments delivered on May 25, 2021.[24] When assessing the secret surveillance regimes of the United Kingdom[25] and Sweden,[26] the Grand Chamber noted that considering current threats and sophisticated technology, bulk interception regimes are not *per se* non-compliant with Article 8 and the decision to operate such a regime in order to identify threats to national security falls within the state's margin of appreciation. Both applications concerned bulk interception of cross-border communications by the intelligence services.

The Court referred to previous cases (*Weber and Saravia v. Germany; Liberty and Others v. the United Kingdom*) and highlighted 6 minimum requirements developed in its case law that should be set out in law: the nature of offences that may give rise to an interception order; a definition of the categories of people liable to have their communications intercepted; a limit on the duration of interception; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; the circumstances in which intercepted data may or must be erased or destroyed.[27]

The Grand Chamber emphasized that those cases were more than 10 years old, and in the intervening years, technological developments have significantly changed the way in which people communicate.[28] Considering the development of modern communication technologies, the Court deemed it necessary to adapt the general approach towards targeted surveillance to the specificities of the bulk interception regime.

According to the Grand Chamber, the first two of the above-mentioned six "minimum safeguards" relating to the targeted interception (namely, the nature of offences that may give rise to an interception order and the categories of people liable to have their communications intercepted) are

---

22 Szabó and Vissy v. Hungary, [2016], ECtHR, N 37138/14, Concurring Opinion of Judge Pinto De Albuquerque, § 35.

23 Ibid.

24 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15.
Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08.

25 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15.

26 Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08.

27 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, § 335.
Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08, § 249.

28 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, § 341.

not readily applicable to a bulk interception regime. Similarly, the requirement of "reasonable suspicion", which can be found in the Court's case law on a targeted interception in the context of criminal investigations is less relevant for the bulk interception regime, the purpose of which is in principle preventive, rather than for the investigation of a specific criminal offence.[29]

In order to ensure the compliance of the bulk interception regime with the Convention, the Grand Chamber determined new safeguards to be defined by the domestic legal framework:

1. the grounds on which bulk interception may be authorized;
2. the circumstances in which an individual's communications may be intercepted;
3. the procedure to be followed for granting authorization;
4. the procedures to be followed for selecting, examining, and using intercept material;
5. the precautions to be taken when communicating the material to other parties;
6. the limits on the duration of interception, the storage of intercept material and the circumstances in which such material must be erased and destroyed;
7. the procedures and modalities for supervision by an independent authority of compliance with the above safeguards and its powers to address non-compliance;
8. the procedures for independent *ex post facto* review of such compliance and the powers vested in the competent body in addressing instances of non-compliance.[30]

According to the Court's assessment, the Swedish bulk interception system was based on detailed legal rules, was delimited in scope, and provided for safeguards.[31] The main features of the interception regime met the Convention requirements and in most aspects were "necessary in a democratic society."[32] At the same time, the Grand Chamber identified the following three shortcomings: the absence of a clear rule regarding the destruction of the intercepted material that did not contain personal data;[33] the absence of a legal requirement that consideration be given to the privacy interests of the individual concerned when making a decision to transmit intelligence material to foreign partners;[34] the absence of an effective *ex post facto* review.[35]

The Grand Chamber highlighted the importance of additional safeguards when transmitting material obtained by bulk interception to foreign states.[36] According to the Court, the absence of a requirement in the Swedish legislation to assess the necessity and proportionality of intelligence sharing was a significant shortcoming.[37] Furthermore, there was no obligation to analyze and

---

29 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, § 348.
Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08, § 262.

30 Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08, § 275.
Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, § 361.

31 Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08, § 367.

32 Ibid, § 373.

33 Ibid, § 342.

34 Ibid, §§ 326-330.

35 Ibid, §§ 359-364.

36 Ibid, § 276.

37 Ibid, § 326.

determine whether the foreign recipient of intelligence offered an acceptable minimum level of safeguards.[38]

The Grand Chamber took into account the unpredictability of situations that may warrant cooperation with foreign intelligence partners. Therefore, the law cannot provide an exhaustive and detailed list of such situations when the transmission of data is permissible.[39] At the same time, the legal regulation and practice must limit the risk of abuse and disproportionate interference with Article 8 rights.[40]

Ultimately, the Grand Chamber considered that the Swedish bulk interception regime was not in compliance with Article 8 of the Convention as it did not provide sufficient safeguards against arbitrariness and abuse of power.

As for the bulk interception in the United Kingdom, the Court identified the following fundamental deficiencies in this regime: the absence of independent authorization, the failure to include the categories of selectors[41] in the application for a warrant, and the failure to subject selectors linked to an individual to prior internal authorization.[42]

Furthermore, the Grand Chamber assessed the compliance of the interception regime with Article 10 of the Convention – freedom of expression. According to the Court, before the intelligence services used selectors or search terms known to be connected to a journalist, or which would make the selection of confidential journalistic material for examination highly probable, authorization by a judge or other independent and impartial decision-making body was necessary.[43] The legislation of the UK did not lay down this requirement.[44]

As for requesting and receiving intelligence from non-contracting states, according to the Court's assessment, it had a clear legal basis and pursued legitimate aims. The legislation clearly regulated the circumstances and conditions on which the authorities could request material from a foreign state. The procedures for storing, accessing, examining, using, and communicating the material to other parties, and the erasure and destruction of the material obtained were sufficiently clear and provided adequate safeguards against abuse.[45]

Ultimately, the Grand Chamber found a violation of Articles 8 and 10 of the Convention with respect to the bulk interception regime and acquisition of communications data from Communications Service Providers. As for requesting and receiving intelligence from foreign intelligence services, the Court considered that this regime was compliant with the Convention.

Despite the fact that the violation of the right to privacy was found in both cases, the European Court identified such shortcomings that "require comparably easy fixes."[46] Due to the lenient approach towards strategic surveillance, these judgments of the Grand Chamber gave rise to criticism.

---

38 Ibid.
39 Ibid, § 323.
40 Ibid.
41 Selector means specific identifier, for example, name, email address, etc.
42 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15.
43 Ibid, § 448.
44 Ibid, § 456.
45 Ibid, §§ 501-508.
46 *Milanovic M.,* The Grand Normalization of Mass Surveillance: ECtHR Grand Chamber Judgments in Big Brother Watch and Centrum för rättvisa, EJIL:Talk! 2021, <https://www.ejiltalk.org/the-grand-

According to the partly concurring and partly dissenting opinion of Judge Pinto de Albuquerque, the judgment delivered in the case of *Big Brother Watch and Others* fundamentally alters the existing balance between the right to respect for private life and security interests, as it admits non-targeted surveillance of electronic communications. He concludes that with this judgment the Strasbourg Court opened the gates for an electronic "Big Brother" in Europe.[47]

Furthermore, Judge Albuquerque disagreed with the majority's opinion on the point that the exchange of intercept material with foreign intelligence services did not violate Articles 8 and 10. The Court's judgment indicates that the transfer of bulk material to foreign intelligence services should be subject to "independent control", but the receipt of such material should not be. According to Albuquerque's assessment, if the safeguards are not sufficient with regard to direct surveillance carried out by the United Kingdom, they should be considered inadequate for indirect surveillance as well, resulting from the receipt of third-party intercept material, even more so where this party is not a signatory to the Convention.[48]

A different legal regime with regard to the receipt of material from foreign intelligence services poses the risk that, in order to circumvent the strict supervision in Europe, European intelligence agencies may ask foreign counterparts to collect the information they are not allowed to gather themselves and request to transfer this material to them.[49]

In this case, finding the violation of the right to privacy was also considered a "pyrrhic victory",[50] as there is "no longer a question about the *legality* of mass surveillance policies, but rather a question relating to *how* to operate it."[51] Moreover, this judgment is considered not a "landmark victory" but rather a definitive normalization of mass surveillance by the Grand Chamber,[52] which raises questions about a certain "fragmentation" of European data protection law. [53]

---

normalization-of-mass-surveillance-ecthr-grand-chamber-judgments-in-big-brother-watch-and-centrum-for-rattvisa/> [31.07.2023].

47 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, Partly Concurring and Partly Dissenting Opinion of Judge Pinto De Albuquerque, §§ 59-60.

48 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, Partly Concurring and Partly Dissenting Opinion of Judge Pinto De Albuquerque, § 51.

49 *Sloot B.v.d.,* Big Brother Watch and Others v. the United Kingdom & Centrum for Rattvisa v. Sweden: Does the Grand Chamber Set Back the Clock in Mass Surveillance Cases? European Data Protection Law Review (EDPL), Vol. 7, No. 2, 2021, 325.

50 *Christakis T.,* A Fragmentation of EU/ECHR Law on Mass Surveillance: Initial Thoughts on the Big Brother Watch Judgment, European Law Blog, 2018, <https://europeanlawblog.eu/2018/09/20/a-fragmentation-of-eu-echr-law-on-mass-surveillance-initial-thoughts-on-the-big-brother-watch-judgment/> [31.07.2023].

51 Ibid.

52 *Milanovic M.,* The Grand Normalization of Mass Surveillance: ECtHR Grand Chamber Judgments in Big Brother Watch and Centrum för rättvisa, EJIL:Talk! 2021, <https://www.ejiltalk.org/the-grand-normalization-of-mass-surveillance-ecthr-grand-chamber-judgments-in-big-brother-watch-and-centrum-for-rattvisa/> [31.07.2023].

53 *Christakis T.,* A Fragmentation of EU/ECHR Law on Mass Surveillance: Initial Thoughts on the Big Brother Watch Judgment, European Law Blog, 2018, <https://europeanlawblog.eu/2018/09/20/a-fragmentation-of-eu-echr-law-on-mass-surveillance-initial-thoughts-on-the-big-brother-watch-judgment/> [31.07.2023].

3. Different legal standard with regard to international communications – "electronic big brother" or reinforced national security regime?

The recent case law of the European Court of Human Rights demonstrates that in the interests of national security, the existence of different legal standards with respect to cross-border communications is justified. In this case, the state has broad power in terms of bulk interception of communications, but a further examination of collected data should be subject to strict requirements.

Mass surveillance implies large-scale data collection with the hope of obtaining useful information. Considering the potential of big data, the targeted collection that aimed to avoid searching for "the needle in the haystack" was changed by a new paradigm, according to which "finding a needle in a haystack is not only possible but also practical: in order to find the needle you have to have a haystack."[54] Such an approach raises legitimate questions in terms of human rights protection as it gives the impression that the mass surveillance practice treats ordinary people as potential suspects.[55]

Notably, this approach has supporters as well. Lubin discusses in detail the arguments, which justify different standards with respect to international communications:

1) The state has myriad options for conducting investigations within its jurisdiction. Therefore, the need to carry out covert, let alone bulk interception of communications, is innately reduced. The state can use less intrusive methods to achieve the same legitimate aim. On the other hand, the abilities of a state beyond its jurisdiction are significantly limited.[56]
2) The state has more technological capacities to carry out surveillance of electronic communications in its jurisdiction than abroad. In other words, the states often have statutory access to the communications grid for conducting warranted interceptions. It can also compel telecommunication companies to provide it with additional access to their networks or disclose certain user information from their database. The state does not possess such abilities with respect to international communications.[57]

Ultimately, Lubin recognizes the legitimacy behind certain limited legal differentiations with regard to domestic and foreign surveillance and declares that in fighting for a universal and unified standard of privacy the human rights defenders are losing the far bigger war.[58]

A similar approach is reflected in the 2018 judgment of the Chamber: The Government has considerable powers and resources to investigate persons within the British Islands, however, they do not have the same powers with regard to persons outside the territorial jurisdiction of the United Kingdom.[59]

---

54 *Hijmans H.,* The European Union as Guardian of Internet Privacy, The Story of Art 16 TFEU, Law, Governance and Technology Series, Vol. 31, Springer International Publishing Switzerland, 2016, 100.

55 *Stepanovic I.,* Preventing Terrorism or Eliminating Privacy? Rethinking Mass Surveillance after Snowden Revelations, Strani Pravni Zivot (Foreign Legal Life), 2015(4), 239.

56 *Lubin A.,* We Only Spy on Foreigners: The Myth of Universal Right to Privacy and the Practice of Foreign Mass Surveillance, Chicago Journal of International Law, Vol. 18, No. 2, 2018, 530-531.

57 Ibid, 532-533.

58 Ibid, 551.

59 Big Brother Watch and Others v. the United Kingdom, [2018], ECtHR, N 58170/13, 62322/14, 24960/15, § 518.

According to the judgment of the Grand Chamber in this case, while the interception and even examination of communications of persons within the surveilling state might not be excluded, the stated purpose of bulk interception is to monitor the communications of persons outside the state's territorial jurisdiction, which can not be monitored by other forms of surveillance.[60]

Siofra O'Leary's opinion with regard to striking a fair balance between competing interests is also noteworthy: "The quite legitimate ascendancy of data protection as a fundamental right, and its increased and indeed fundamental importance in this digital age, should not obscure the fact that balancing means just that – the careful weighing and consideration of two competing rights and interests. Just as the interests of public safety and law enforcement will sometimes have to give way to the right to privacy, so the right to privacy may on occasion need to yield to competing considerations."[61]

On the other hand, when operating the bulk interception system, there will always be a temptation to exceed powers, because "if the boundaries of state discretion are wide, even the most stringent policing of them does little to safeguard against abuse."[62] Therefore, there is a high risk that "a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it."[63] When people can not know whether their communications are being targeted, but are aware that there is a strong probability that the monitoring is being carried out, they may adapt their behavior.[64] This may have a "chilling effect" on the realization of fundamental rights, which poses a serious threat to the rule of law and democratic values.

4. Authorization of Secret Surveillance Measures by Independent Body

When secret surveillance measures are carried out, independent supervision constitutes one of the most important safeguards against arbitrariness and abuse. Supervision is necessary at all stages: when the surveillance is ordered, while it is being carried out, and after it has been terminated.[65] When assessing the authorization procedures, the Court takes into account the following factors: the authority competent to authorize the surveillance, its scope of review and the content of the interception authorization.[66]

It has been suggested that in the sphere of mass surveillance, the key shortcoming is the Court's reticence to make judicial authorization mandatory.[67] According to the European Court, "in a field

---

60 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, § 344.

61 *O'Leary S.,* Balancing Rights in a Digital Age, Irish Jurist, Vol. 59, 2018, 92.

62 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, Partly Concurring and Partly Dissenting Opinion of Judge Pinto de Albuquerque, § 33.

63 Szabó and Vissy v. Hungary, [2016], ECtHR, N 37138/14, § 57.

64 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, Joint Partly Concurring Opinion of Judges Lemmens, Vehabović and Bošnjak, § 11.

65 Roman Zakharov v. Russia, [2015], ECtHR, N 47143/06, § 233.

66 Ibid, § 257.

67 *Watt E.,* The Right to Privacy and the Future of Mass Surveillance, International Journal of Human Rights, Vol. 21, No. 7, 2017, 789.

where abuse is potentially so easy in individual cases and could have such harmful consequences for a democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge."[68] Judicial authorization is an important safeguard but it is not mandatory.[69] The case law of the European Court demonstrates that authorization of surveillance by the other independent body meets the requirements of the Convention.[70] What matters most is that this body should be independent of the executive.[71]

For example, the Court considered that the combination of oversight mechanisms in Germany was in compliance with the Convention, although the judicial authorization of the surveillance was not ensured. In this case, the supervision was carried out by G 10 Commission, chaired by the person qualified to hold judicial office.[72]

In the case of *Zakharov,* the Grand Chamber pointed out that according to Russian legislation, authorization was granted by the judge, however, the scope of the review was limited. The courts were not required by the domestic legislation and in practice, they did not verify whether there was a "reasonable suspicion" against the person concerned and did not apply the "necessity" and "proportionality" test.[73]

Swedish legislation required the authorization of surveillance by the Foreign Intelligence Court, which according to the European Court's assessment, met the requirement of independence. The president and vice-president of the Foreign Intelligence Court were permanent judges. All members were appointed by the Government, and they had four-year terms of office.[74] Except in urgent cases, a privacy protection representative also participated in the court sessions, who was a judge, a former judge, or an attorney. This person acted independently and in the public interest and had access to all the case documents.[75]

Notably, in his concurring opinion, Judge Pinto de Albuquerque highlighted the fact that the Swedish Foreign Intelligence Court was not an ordinary court. The Government appointed its members for a four-year mandate and their appointment was renewable, which strengthened their political ties to the Government.[76] The privacy protection representative, who acted in the public interest and not in the interest of any affected individual, was also appointed by the Government with a

---

68 Klass and Others v. Germany, [1978], ECtHR, N 5029/71, § 56.
Szabó and Vissy v. Hungary, [2016], ECtHR, N 37138/14, § 79.

69 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, § 351. Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08, § 265.

70 Klass and Others v. Germany, [1978], ECtHR, N 5029/71, § 51.
Weber and Saravia v. Germany, [2006], ECtHR, N 54934/00, § 115.

71 Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08, § 265.
Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, § 351.

72 Klass and Others v. Germany, [1978], ECtHR, N 5029/71, § 56.

73 Roman Zakharov v. Russia, [2015], ECtHR, N 47143/06, §§ 262-263.

74 Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08, § 296.

75 Ibid, § 297.

76 Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08, Concurring Opinion of Judge Pinto de Albuquerque, § 9.

renewable mandate.[77] Therefore, the Foreign Intelligence Court was more akin to a political body than to a truly independent judicial authority.[78]

When assessing the legislation of the United Kingdom, the Grand Chamber considered that the major shortcoming was the authorization of the bulk interception by the Secretary of State and not by a body independent of the executive.[79]

In summary, the case law of the European Court demonstrates that the states are afforded certain discretion in terms of selecting oversight mechanisms. In order to prevent human rights violations, the degree of independence of the supervisory authority and the exercise of genuine control is decisive, which implies the assessment of the necessity and proportionality of secret surveillance measures.

5. Conclusion

The development of digital technologies created an unprecedented opportunity for secret surveillance. Considering the threats derived from terrorism and transnational crimes, the states use sophisticated technologies to protect national security." The techniques applied in such monitoring operations have demonstrated a remarkable progress in recent years and reached a level of sophistication which is hardly conceivable for the average citizen."[80]

Modern technologies enable States to collect and process personal data on an unprecedented scale. The relevant bodies monitor the communications that may include information about the imminent threat.

The recent judgments of the European Court demonstrate that the aim of fighting terrorism and protecting national security justifies the large-scale processing of data and mass monitoring of international communications. The Court's case law reveals different legal standard with respect to the interception of communications of individuals outside the state's jurisdiction. "The court is tolerant of an argument that different forms of surveillance activities might justify different frameworks of privacy regulations."[81]

The States are afforded certain discretion in terms of selecting the means to protect national security. The European Court explicitly recognized the importance of mass surveillance for protecting national security and considered the bulk interception of international communications to be a legitimate state practice.

Unlike the targeted interception, bulk interception is used for foreign intelligence gathering and the identification of new threats. The recent case law of the European Court demonstrates that the requirement of a "reasonable suspicion" is not relevant in the context of bulk interception of cross-border communications, which serves preventive purposes rather than the investigation of a specific criminal offence.

---

77 Ibid.

78 Ibid.

79 Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15, § 377.

80 Szabó and Vissy v. Hungary, [2016], ECtHR, N 37138/14, § 68.

81 *Lubin A.,* We Only Spy on Foreigners: The Myth of Universal Right to Privacy and the Practice of Foreign Mass Surveillance, Chicago Journal of International Law, Vol. 18, No. 2, 2018, 536.

In order to ensure the compliance of the bulk interception regime with the Convention, in 2021 the Grand Chamber laid down the new safeguards to be provided by the domestic legislation, however, some of them require clear interpretation in the national law.

The rule of law requires that the executive authorities' interference with an individual's rights should be subject to effective control.[82] Although judicial control offers the best guarantees of independence and impartiality,[83] the case law of the European Court demonstrates that the oversight by the other independent body also meets the requirements of the Convention. This body must be independent of the executive and ensure genuine control.

The standard set by the European Court with respect to the intelligence sharing regime is problematic as it poses the risk of "indirect surveillance" – circumventing the legislative requirements and effective supervision by receiving intelligence obtained by a third party.

In conclusion, striking a fair balance between the right to privacy and national security interests remains one of the most topical and problematic issues in European human rights law. The state's wide discretion and the covert nature of the implemented measures pose a high risk of human rights violations. Strong safeguards against abuse of power are decisive for ensuring a fair balance and effective protection of democratic values.

Bibliography:

1. European Convention on Human Rights, Council of Europe, 1950.
2. *Christakis T.,* A Fragmentation of EU/ECHR Law on Mass Surveillance: Initial Thoughts on the Big Brother Watch Judgment, European Law Blog, 2018, <https://europeanlawblog.eu/2018/09/20/a-fragmentation-of-eu-echr-law-on-mass-surveillance-initial-thoughts-on-the-big-brother-watch-judgment/> [31.07.2023].
3. *Fenwick H.,* Proactive Counter-Terrorist Strategies in Conflict with Human Rights, International Review of Law, Computers & Technology, Vol. 22, No. 3, 2008, 259-260.
4. *Hijmans H.,* The European Union as Guardian of Internet Privacy, The Story of Art 16 TFEU, Law, Governance and Technology Series, Vol. 31, Springer International Publishing Switzerland, 2016, 70, 100, 104.
5. *Karaboga M., Matzner T., Obersteller H., Ochs C.,* Is there a Right to Offline Alternatives in a Digital World? in Data Protection and Privacy: (In)visibilities and Infrastructures, *Leenes R., Brakel R.v., Gutwirth S., Hert P.D.,* (eds), Springer International Publishing AG, 2017.
6. *Lubin A.,* We Only Spy on Foreigners: The Myth of Universal Right to Privacy and the Practice of Foreign Mass Surveillance, Chicago Journal of International Law, Vol. 18, No. 2, 2018, 530-533, 536, 551.
7. *Milanovic M.,* The Grand Normalization of Mass Surveillance: ECtHR Grand Chamber Judgments in Big Brother Watch and Centrum för rättvisa, EJIL:Talk! 2021, <https://www.ejiltalk.org/the-grand-

[82] Klass and Others v. Germany, [1978], ECtHR, N 5029/71, § 55.
Szabó and Vissy v. Hungary, [2016], ECtHR, N 37138/14, § 77.
[83] Ibid.

normalization-of-mass-surveillance-ecthr-grand-chamber-judgments-in-big-brother-watch-and-centrum-for-rattvisa/> [31.07.2023].

8. *O'Leary S.,* Balancing Rights in a Digital Age, Irish Jurist, Vol. 59, 2018, 92.
9. *Sloot B.v.d.,* Big Brother Watch and Others v. the United Kingdom & Centrum for Rattvisa v. Sweden: Does the Grand Chamber Set Back the Clock in Mass Surveillance Cases? European Data Protection Law Review (EDPL), Vol. 7, No. 2, 2021, 325.
10. *Stepanovic I.,* Preventing Terrorism or Eliminating Privacy? Rethinking Mass Surveillance after Snowden Revelations, Strani Pravni Zivot (Foreign Legal Life), 2015(4), 236, 239.
11. *Watt E.,* The Right to Privacy and the Future of Mass Surveillance, International Journal of Human Rights, Vol. 21, No. 7, 2017, 789.
12. Centrum för Rättvisa v. Sweden, [2021], ECtHR, N 35252/08.
13. Big Brother Watch and Others v. the United Kingdom, [2021], ECtHR, N 58170/13, 62322/14, 24960/15.
14. Szabó and Vissy v. Hungary, [2016], ECtHR, N 37138/14.
15. Roman Zakharov v. Russia, [2015], ECtHR, N 47143/06.
16. Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, [2014], CJEU, C-293/12, C-594/12.
17. Liberty and Others v. the United Kindgom, [2008], ECtHR, N 58243/00.
18. S. and Marper v. the United Kingdom, [2008], ECtHR, N 30562/04, 30566/04.
19. Weber and Saravia v. Germany, [2006], ECtHR, N 54934/00.
20. Amann v. Switzerland, [2000], ECtHR, N 27798/95.
21. Klass and Others v. Germany, [1978], ECtHR, N 5029/71.

Cover Designer:

Mariam Ebralidze

Compositor:

Nino Vacheishvili

Technical Editorial Group:

Natia Chitashvili

Ana Mghvdeladze

Elene Nozadze

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