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Mikheil Bichia* **Ilona Gagua****

Historical Foundations of an Informed Consent of a Patient and Contemporary Challenges in Practice

The idea of protecting the patient's informed consent is not an offspring of the modern era. It was known in the antique period, but it had a different meaning – the concept of informed consent was based on the patient's social status. The long-standing paternalistic attitude disregarded the patient's will and gave the doctor absolute freedom to decide on the issues related to medical intervention for the patient. This approach was based on the belief that the doctor knows what would be better for the patient.

At the beginning of the twentieth century, priority was given to the principle of patient's personal autonomy, which slowly deepened its roots in judicial practice. Modern reality pays attention to the patient's free will, thereby bringing to the forefront the idea of respect for human personal autonomy and dignity. For this purpose, the most important postulates of giving the patient's informed consent (voluntatiness, ability to understand, the patient's authority to make decisions, etc.) were formulated, which cumulatively require protection.

The issue of distribution of the burden of proof is noteworthy. Clinics must work hard to meet their burden of proof, as violations of informed consent are grounds for nonpecuniary damages. If it is accompanied by inhuman or degrading treatment, this is considered a qualifying factor in the European Court of Human Rights and increases the amount of compensation for non-pecuniary damage.

In the field of effective protection of rights, it is important to consider more the approaches of the European court practice of human rights. For this purpose, not only the formal aspect of informed consent should be in focus, but also the protection of its content.

Keywords: *personal autonomy of a patient, paternalism, historical excurse, modern approaches, court practice, burden of proof, compensation*

1. Introduction

When did the idea of a patient's informed consent emerge? What factors contributed to its emergence and how did its form vary in different eras? These are the key issues, which are primarily of interest in a historical context, for which the historical method must be applied. However, these

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issues are also important from a legal perspective, as with their help it can be determined in what form the informed consent originally existed – was it initially formed as a legal concept or later acquired a legal nature? How was informed consent protected in different times and what is the purpose and importance of researching this issue? The topic defines the origins of the idea of the patient's informed consent and will illustrate the features of its development, as well as provide an opportunity to understand the modern vision of it. This is important not only from a theoretical but also from a practical point of view as judicial practice should reflect modern trends and requirements as well.

At the same time, the issue is of interest to the field of medicine. The task is to determine what is the importance of the procedural and substantive parts of the patient's informed consent. While the patient's informed consent is studied by various fields of science, logically, this issue is mainly under the focus of law and medicine.

The abovementioned circumstances are a precondition for clarifying the modern understanding of the patient's informed consent. Accordingly, when the legal content of the informed consent and the mandatory components for granting it are determined, it will be possible to easily evaluate this or that case based on their characteristics. Here, it is interesting to see what approaches Georgia and the European Court of Human Rights have regarding the patient's informed consent. This needs to be studied in depth. This, on its part, is important for the complete and effective protection of the patient's interests.

Therefore, this paper is an attempt to study the historical, philosophical, medical and legal foundations of a patient's informed consent and to determine the relevant implications.

2. The Origins of the Paternalistic Approach

The classical documents in medical historyare the writings of Hippocrates (5th-4th centuries BC) and Thomas Percival's "Medical Ethics" (1803). However, the main concern of these works was to determine how to avoid disclosing information that could harm patients. The ethics of the doctor was also the ethics of non-disclosure of information, in which the right to the patient's consent was practically not considered.[1] In addition, issues of medical ethics and deontology are reflected in the ancient sources. Examples of this are the "Laws of Hammurabi" (ancient Babylonian laws, 18th century BC to BC), Hippocrates' "On Physicians", "Oath" and "Laws" (V-IV century BCE), the Indian "Book of Life" ("Ayurveda" – 5th-4th centuries BCE). The term "ethics" was first used by Aristotle (384-322 BCE).[2]

In ancient Greece, society consisted of free people and slaves. Thus, a doctor could have students from any group. However, after receiving education, they mastered the art of medicine in order to become "doctors". Plato considered masters true physicians, and referred to helpers/assistants

1 *Beauchamp T. L.*, Informed consent: Its History, Meaning and Present Challenges, Cambridge Quarterly of Healthcare Ethics, 20 (04), 515.

2 *Gabunia L., Khetsuriani Sh., Gamkrelidze N., Gumbaridze L., Varazi E.,* Medical Deontology and Prevention of Iatrogenic Diseases, Tbilisi State Medical University, Collection of Scientific Works, N53, 2019, 29 (In Georgian).

as "others". These doctors treated patients differently depending on their social status.[3] Doctors, who were slaves, treated slaves and never explained the details of the treatment to the patients. However, doctors who were free men treated free patients, explained to them the nature of the illness without revealing everything about the condition or its prognosis, and prescribed medication only after obtaining consent. A person trained in public relations or doctors trained in persuasion were sometimes called in to gain this consent. In his book The Statesman, Plato describes that if a doctor forces his patient to do right against accepted norms, it is not considered wrong. Even before Plato, Hippocrates pointed out that the patient must be informed so that he can cooperate with the doctor and give his consent.[4]

Hence, in ancient Greece, a patient's participation in the decisions on medical treatment was considered undesirable. It was generally recognised that a doctor's primary task was to instil the patient's confidence in treatment; Any disclosure of information about possible complications can negatively affect the patient's trust. Later, in the Middle Ages, medical letters encouraged doctors to apply the method of conversation as an opportunity to provide comfort and hope to the patients, thus emphasising that a doctor must have possessed the skills of manipulation and lying. It was widely believed that authority had to be combined with obedience for treatment to be effective. During the Age of Enlightenment, a new belief emerged that patients should be able to listen to the doctor, although deception was still considered necessary to facilitate patient care. In the 1800s, medical professionals were divided on whether to inform patients about unfavourable prognosis . However, most doctors at that time opposed informing them about their health condition.[5]

In fact, the aspects discussed above express the idea of paternalism. The etymology of paternalism is based on the Latin word pater ("father") and patriarchal cultures in which the father was considered the head of the family, an authority figure responsible for the welfare of family members and other subordinates. The term "paternalism" emerged at the end of the 19th century as part of a critique of the inherent value of personal freedom and autonomy. It was associated with excessive protection, which is usually a violation of personal freedom and human autonomy with the intention of creating good or protecting one's interests.[6] Therefore, the paternalistic model was directly related to the patriarchal culture. Its fundamental characteristic was the objectification of the patient. In this sense, the patient was considered an "adult child" who is not able to make a correct, independent and informed decision.[7]

Both paternalism and autonomy aim to benefit the patient, although paternalism is considered the opposite of autonomy. This approach is explained by the fact that the doctor always knows better

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3 *Dalla-Vorgia P., Lascaratos J., Skiadas P., Garanis-Papadatos T.*, Is consent in medicine a concept only of modern times? Journal of Medical Ethics, 2001, 27(1), 59, DOI:10.1136/jme.27.1.59.

4 *Kumar NK.,* Informed consent: Past and present. Perspectives in Clinical Research, 4(1), 2013 Jan, 21-22, DOI: 10.4103/2229-3485.106372.

5 *Murray P. M.*, The History of Informed Consent, The Iowa Orthopedic Journal, Vol. 10, 1990, 104.

6 *Rocio F.-B., Macarena S.-I., Ricardo O., Carmen H., Jose M. R. C., Alfonso C. J.,* Paternalism vs. Autonomy: Are They Alternative Types of Formal Care? Frontiers in psychology, Vol. 10, 2019, 1460-1461.

7 *Klimovich A. I.,* Evolution of doctor-patient communication models in modern medicine, Bulletin of Polotsk State University, Series E, Pedagogical Sciences, Philosophy, №15, 2019, 89. (in Russian).

than the patient what is good for the patient. It was this kind of representation between the patient and the doctor that led to great criticism.[8] It is this notion of the patient-doctor relationship that has drawn much criticism. In paternalism, a doctor makes decisions based on what they consider to be the best interests of the patient, even for patients who are capable of making their own decisions.[9] Under paternalism, the physician was obligated to act in the best medical interests of the patient, whereby the physician considered a "good patient" to be one who submissively accepted the passive role of the infant.[10]

They distinguish between strict and soft, wide and narrow, and active and passive paternalism. As per soft or weak paternalism, the doctor or the state helps the patient to make choices that the patient would have made if he had the willpower and the reason. Under soft paternalism, it is legitimate to interfere with the means agents choose to achieve their own ends if those means do not meet those ends. Strict paternalism prohibits some things and gives the decision-making mandate to others instead. In contrast, milder paternalism is aimed only at weakening the patient's decisions so as not to result in a particular violation of freedom of choice. According to strict paternalism, people can be mistaken or confused about their own goals, and it is legitimate to intervene to prevent uncertainty. This type of paternalism assumes that a person refuses to allow another person to make an autonomous decision when making a choice.[11]

In fact, **the word "paternalism" has acquired a purely negative connotation**, whereas previously it meant paternal care. Before, the patient appreciated this care; now they have decided to determine their own fate, to make free choices based on their own values and beliefs, regardless of the dominating doctor.[12] Therefore, Dworkin rightly remarked that paternalism is a gross interference with the freedom of human action, which is justified by doing good deeds and the interest of protecting the patient's welfare, happiness, needs, interests or values.[13]

From ancient times, the paternalistic attitude of doctors towards patients was replaced by the idea of informed consent from the beginning of the 20th century.[14] The matter is that in the 20th century, decision-making within the framework of the paternalistic "standard of care" framework gradually changed to a more patient-oriented concept: "A person is the master of their own body..." According to this idea, consent must be given voluntarily by an authorised person (the patient), who is well informed about the risks and alternatives to the treatment to be undertaken.[15]

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8 *Komrad M. S.*, A defense of medical paternalism: maximizing patients' autonomy, Journal of Medical Ethics, 9(1), 1983, 38-39.

9 *Sandman L., Munthe C.*, Shared Decision Making, Paternalism and Patient Choice, Health Care Analysis, 18(1), 2009, 61.

10 *Kaba R., Sooriakumaran P.*, The evolution of the doctor-patient relationship, International Journal of Surgery, №5, 2007, 59.

11 *Rodriguez-Osorio C. A.*, *Dominguez-Cherit G.*, Medical decision making: paternalism versus patient-centered (autonomous) care, Current opinion in critical care, Vol. 14, 2008, 709-710.

12 *Krechetova M. V.*, Informed consent for medical intervention, To help the practicing nurse, № 4 (88), 2021, 11. (in Russian).

13 *Dworkin G.*, Paternalism, in: Morality and the law (ed. *Wasserstrom R.*), Belmont California: Wadsworth, 1971, 107, 108; *Dworkin G.*, Paternalism, The monist, 56 (1), 1972, 65.

14 *Kumar NK.*, Informed consent: Past and present, Perspectives in Clinical Research, Vol. 4, Issue 1, 2013, 24.

15 *Murray P. M.*, The History of Informed Consent, The Iowa Orthopaedic Journal, Vol. 10, 1990, 109.

3. Emergence of Informed Consent and Judicial Precedents

Earlier philosophers spoke of "natural rights" that people are given from birth. In modern language, they are called "basic human rights". They are protected in democratic countries and enshrined in international agreements. Socrates, Plato and Aristotle recognised the purpose of ethics and analysed the normative-ethical ideals that influence human life. However, later, at the beginning of the 20th century, philosophers focused on linguistic details or the "logical analysis" of "moral semantics and other matters of metaethics." It has to be mentioned that when doctors, who were under the influence of the political ideology of the authorities, rejected the German government guidelines of 1931 on the modern requirement of informed consent and the independence of ethical expertise, the shoking experiments of the Nazis on humans shook the philosophers. This created the foundation for the widely recognized Nuremberg Code. The principle of informed consent was the most comprehensive among its 10 principles. The Declaration of Helsinki later addressed the importance of review by an ethics committee, which included an informed consent document.[16]

During the Third Reich, Nazi scientists in Germany conducted various and often fatal medical experiments on concentration camp inmates. These experiments were not carried out on voluntary basis. For the most parts, trials were conducted on Jews, Roma and Slavs. After the end of the war, the United States brought the question of the responsibility of twenty Nazi scientists to the International Military Tribunal in Nuremberg, Germany for war crimes and crimes against humanity. Eventually, seven Nazi scientists were sentenced to death, and eight – to various terms of imprisonment. As part of its final decision, the tribunal developed ten principles that later became known as the "Nuremberg Code". It contained the first international rules regarding the conduct of scientific research on humans. According to the code, obtaining voluntary consent from a person is considered an absolute necessity. This means that this person must be able to give consent (capacity); Consent must be freely given and the patient must have sufficient time to think, understand and make an informed decision.[17]

The current concept of informed medical consent differs from the Prussian Directive of 1900 and the Reich Government Directive of 1931. In the post-war regulations, some basic elements can be identified, along with other ethical issues regarding human experimentation. The 1947 Nuremberg Code was widely recognized as the first document on ethical regulations for conducting research on humans through informed consent.[18]

Several decisions on informed consent were made in In American law between 1905-1914.[19] At the beginning of the 20th century, the debate on the concept of informed consent began with four court decisions, which laid the foundation for the principle of patient autonomy. These decisions began in

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16 *Kumar NK.*, Informed consent: Past and present. Perspectives in Clinical Research, 4(1), 2013, 22, doi: 10.4103/2229-3485.106372.

17 *Schuman J.*, Beyond Nuremberg: A Critique of "Informed Consent" in third World Human Subject Research, Journal of Law and Health, Vol. 25, 2012, 124-125.

18 *Vollmann J., Winau, R.*, Informed consent in human experimentation before the Nuremberg code, British Medical Journal, Vol. 313, No. 7070, 1996, 1447.

19 *Dennis B. P.*, The origin and nature of informed consent: Experiences among vulnerable groups, Journal of Professional Nursing, 15(5), 1999, 281.

1905 with the cases of "Mohr v. Williams" and "Pratt v. Davis", then added the cases of "Rolater v. Strain" and "Schloendorff v. Society of New York Hospital." These decisions reinforced the principle of patient autonomy, which in medicine and science was finally established as the foundation for informed consent.[20]

"Mohr v. Williams" is the first major consent case. Mohr consented to surgery on the right ear to remove the diseased parts of the ear. He consented after consulting the family doctor, who was also present at the operation. However, after the anaesthetic was administered to the plaintiff, the surgeon discovered that the patient's right ear was not as diseased as they thought, but the left ear had serious problems. The surgeon thought that the patient should be operated on the left ear and not the right, so he performed the procedure on the left ear. Ms Mohr sued the surgeon after the operation caused further loss of hearing. He claimed that the operation was carried out without his consent, which is why this action was illegal.[21] The court ruled in her favour, emphasizing that consent was not implied, but related to a specific procedure.[22]

In the case of "Pratt v. Davis" in 1905, a court decision in Illinois was appealed by the plaintiff – Parmelia Davis. She sued the surgeon because a hysterectomy (removal of the uterus) wasperformed on the patient without her consent. The doctor had obtained consent for a previous operation however admitted that he had not gotten consent for the second procedure and had not disclosed to the patient that he intended to perform a hysterectomy to treat Mrs. Davis's epileptic seizures. The surgeon testified that he intentionally misled the plaintiff as to the purpose of the operation. He argued that since Ms. Davis was epileptic, she was unable to consent or reasonably assess her own condition. In this case, the court noted that the patient has the right to give consent, which prohibits a doctor or surgeon, no matter how experienced and eminent they may be, from violating the patient's bodily (physical) integrity without the patient's permission.[23]

In 1914, in the United States court practice, in the case of "Schloendorff v. Society of New York Hospital, the court explained that every adult of sound mind has the right to determine for himself what shall be done to their body; a surgeon who performs a operation without the patient's consent is considered an "aggressor", for whichthere are held therefore liable for the harm caused.[24] The term "informed consent" acquired legal force in this case when it was determined that Ms. Schlendorf had given informed consent only for a diagnostic study. The examination was performed under anaesthesia, but the patient was not aware of any tumour that the surgeon had excised without informing her of a possible adverse outcome, and therefore no consent was obtained from the patient.[25]

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20 *Bazzano L. A., Durant J., Brantley P. R.*, A Modern History of Informed Consent and the Role of Key Information, Ochsner Journal, Vol. 21, Number 1, Spring 2021, 81.

21 *Mohr v. Williams – 95 Minn. 261, 104 N.W. at 13, 1905.*

22 *Dennis B. P.*, The origin and nature of informed consent: Experiences among vulnerable groups, Journal of Professional Nursing, 15(5), 1999, 281.

23 *Pratt v Davis, 118 I ll App 161, 1905*; *Bazzano L. A., Durant J., Brantley P. R.*, A Modern History of Informed Consent and the Role of Key Information, Ochsner Journal, Vol. 21, Number 1, Spring 2021, 82.

24 *Schloendorff v*. *Society* of *New York Hospital*, *105* N.E. 92, *N.Y.* 1914.

25 *Kumar N. K.*, Informed consent: Past and present. Perspectives in Clinical Research, Vol. 4, Issue 1, 2013, 22, doi: 10.4103/2229-3485.106372.

Here, the importance of the patient's informed consent and the obligation to express their will was highlighted, which was the basis for the further development of the doctrine. [26]

These were landmark cases that set the legal precedent for protecting patient autonomy, with the plaintiffs being women at a time when women did not have the right to vote in the US, closely linking the right to patient autonomy to a woman's right to consent to medical procedures on her own body. Nevertheless, the principle of informed consent did not become legally mandatory until this term was first publicly reflected in court documents in the 1957 case of " Salgo v. Leland Stanford, Jr. University Board of Trustees."[27]

The point is that in the 1950s and 1960s, the duty to obtain consent in some areas of medicine, such as surgery, became a clear duty to disclose certain forms of information and obtain consent through the courts, both in practice and research. Such a development of events required a new term, and therefore the word "consent" was added before the term "informed" and finally became "informed consent". This term first appeared in the publicly known decision in the case of "Salgo v. Leland Stanford, Jr. University Board of Trustees" (1957). According to the factual circumstances, the plaintiff, Mr Martin Salgo, had aortic atherosclerosis and underwent a trans lumbar procedure to determine its extent. Aortic exploration involved anaesthesia and injection of a material into the aorta to localize the block; X-rays of his gastrointestinal tract were necessary. The doctor stated that his clinical findings were confirmed by further tests, which indicated that removing and replacing a segment of the aorta would help his condition. According to the doctor, such an operation would improve blood circulation in the legs and back, and prolong the patient's life. The doctor did not explain to the patient all the risks of the proposed procedure, however, noted that his circulatory condition was quite serious. The physician reported to the referring physician to perform an aortogram so that appropriate surgery could be performed. Also, it was necessary to examine the gastrointestinal tract. During this procedure, the patient was gived a a contrast agent injection the aorta to detect blockage, and the procedure resulted in permanent paralysis of his lower limbs.[28]

Eventually, Mr Salgo sued the university medical center and its chief surgeon because they had not disclosed the potential risk to him. According to the California Court of Appeals, each physician must have practical knowledge, and fully disclose to the patient the potential risks of the procedure, and the physician shall be held liable, should they not disclose the information that the patient needs for making an informed decision on the medical procedure.[29]

Providing information on the risks and alternatives of treatment is not a new obligation, but only a logical continuation of the already existing duty to inform about the nature and results of treatment. In essence, based on this case, not only new elements were introduced into the law, but also the history

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26 *Cruz P. De*, Comparative Healthcare Law, London, Sydney, 2001, 326.

27 *Bazzano L. A., Durant J., Brantley P. R.*, A Modern History of Informed Consent and the Role of Key Information, Ochsner Journal, Vol. 21, Number 1, Spring 2021, 82.

28 *Salgo v. Leland Stanford*, Jr. University Board of Trustees, District Court of Appeal, First District, October 22, 1957, No. 17045.

29 *Bazzano L. A.*, Durant J., Brantley P. R., A Modern History of Informed Consent and the Role of Key Information, Ochsner Journal, Vol. 21, Number 1, Spring 2021, 82.

of informed consent started. The court focused not only on whether informed consent had been given but also on whether the patient had been adequately informed about the consent.[30]

Later, international guidelines such as the World Medical Association's 1964 "Helsinki Declaration" provided further direction for medical researchers. Nevertheless, the Nuremberg Code remains the most authoritative legal and ethical document governing international research standards.[31]

In 1972, decisions were made in courts of three different US States that reinforced the idea of informed consent and brought to the forefront the importance of its moral requirements. These landmark cases are: Canterbury v. Spence[32], Cobbs v. Grant, and Wilkinson v. Vesey. The Canterbury case focused on the standard of disclosure of information to the patient. The court explained that the patient's right to independent choice determines the scope of the duty to disclose information. This right can be effectively exercised only when the patient has sufficient information to make an informed choice.[33]

These cases established the legal basis and principle of informed consent, as well as the duty of physicians to obtain informed consent for diagnostic and/or therapeutic medical procedures. The concept of informed consent for research on human subjects initially arose as a result of World War II crime investigations.[34]

After the World War II, specifically in 1947, the world adopted the Nuremberg Code, which defined as its first principle that voluntary consent from the patient is necessary to conduct a medical procedure. The purpose of this law was to prohibit experimentation on humans without free and informed consent. Since then, several international documents have reflected the right to give free and informed consent to medical and scientific research experiments. Of particular importance are the Universal Declaration of Bioethics and Human Rights, the 2005 UNESCO Declaration and the 1997 Oviedo Declaration, which intelligibly provide for the right to give informed consent to medical intervention.[35]

Since Beauchamp and Childress published Principles of Biomedical Ethics in 1977, autonomy has been widely recognized as one of the starting points of medical ethics, along with the principles of beneficence, avoidance of harm, and justice.[36] In the medical literature, authors use a "liberal

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30 *Beauchamp, T. L.*, Informed consent: Its History, Meaning and Present Challenges, Cambridge Quarterly of Healthcare Ethics, 20 (04), 516.

31 *Schuman J.*, Beyond Nuremberg: A Critique of "Informed Consent" in third World Human Subject Research, Journal of Law and Health, Vol. 25, 2012, 125.

32 *Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).*

33 *Beauchamp T. L.*, Informed consent: Its History, Meaning and Present Challenges, Cambridge Quarterly of Healthcare Ethics, 20 (04), 516.

34 *Bazzano L. A., Durant J., Brantley P. R.*, A Modern History of Informed Consent and the Role of Key Information, Ochsner Journal, Vol. 21, Number 1, Spring 2021, 82.

35 *Acosta Juana Vaccines I.*, Informed Consent, Effective Remedy and Integral Reparation: An International Human Rights Perspective, Universitas. Bogota (Colombia), No131: 19-64, julio-diciembre de 2015, 25-26.

36 *Murgic L., Hebert C. P., Sovic S., Pavlekovic G.*, Paternalism and autonomy: views of patients and providers in a transitional (post-communist) country, BMC Medical Ethics, 16:65, 2015, 1; *R. Gillon*, Medical ethics: Four principles plus attention to scope, Brit MedJ, Vol. 309, 1994, 184.

individualist concept of autonomy," whereby patients are decision-makers who act consciously, without external or internal controlling influences.[37]

4. Dignity of an Individual and Personal Autonomy of a Patient

Today, a new relationship has emerged between the doctor and the patient, which is based on cooperation. According to this approach, the doctor should understand the patient as unique.[38]

Informed consent is based on the principle of respect for personal autonomy and the idea that the directly authorised person has the right to control his medical care and participation in research. This principle rests on both ethical and legal basis. It is significant that the theory of informed consent was developed (originated) precisely from ethical teachings and was reflected in modern American law. Protecting the patient's interests in this type of decision-making process is clearly consistent with American society's principle of respect for the inviolability of an individual. However, this goal cannot be achieved only through legal initiatives. Moreover, they require a respectful dialogue with the patient about their condition and care, an empathetic treatment that supports the patient's medical decision-making.[39]

The principle of informed consent is based on the notions of liberal individualism expressed by Western philosophers of the eighteenth and nineteenth centuries. The requirement of informed consent is based primarily on the moral principle of personal autonomy.[40] Ideals of personal autonomy stipulate that a person's "personal self-governance" should be free from the control of others or interference from other parties. In this form, this principle is based on two fundamental ideas: **(a) everyone has an individual right to govern themselves and (b) everyone has the opportunity to freely choose their destiny. The requirement of informed consent** is also based on these two theoretical foundations.[41]

Personal autonomy of the patient is one of the leading concepts in bioethics, by which the patient directly has the right to decide independently whether to undergo an operation or not. The patient's personal autonomy is not limited to the recognition of autonomy; It includes more – respect for patient autonomy. According to Kant's deontological ethics, the principle of respect for autonomy arises from the idea that each person is an indisputable superior value, which is why they have the authority to decide their own destiny. If a person is a means of achieving one's own ends, disregarding the will of that person violates their autonomy,[42] human dignity, and ignores their personality.[43]

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37 *Murgic L., Hebert C. P., Sovic S., Pavlekovic G.*, Paternalism and autonomy: views of patients and providers in a transitional (post-communist) country, BMC Medical Ethics, 16:65, 2015, 1-2.

38 *Kaba R., Sooriakumaran P.*, The evolution of the doctor-patient relationship, International Journal of Surgery, №5, 2007, 64-65.

39 *Del Carmen M. G., Joffe S.*, Informed consent for Medical Treatment and Research: A Review, The oncologist, №10 (8), 2005, 640.

40 *Gordon E.*, Multiculturalism in medical decisionmaking: The notion of informed waiver, Fordham Urban Law Journal, Vol. 23, No 4, 1996, 1321, 1326-1327.

41 *Schuman J.*, Beyond Nuremberg: A Critique of "Informed Consent" in third World Human Subject Research, Journal of Law and Health, Vol. 25, 2012, 129-130.

42 See, *Chachibaia, T.,* Bioethical Aspects of Legal Norms of Medical Activity, Tbilisi, 2005, 47-48 (In Georgian).

Dignity implies a moral state on which autonomy is based. Man is granted autonomous rights because he has dignity.[44] Autonomy is considered to be the basis of personality and any common sense. [45] In order not to violate the right to self-determination of a person, it is necessary to considerthe will of a capable (competent) patient. Autonomy is one of the defining components of human honour and dignity. Oart of the broader concept of human dignity is integrated into the right to self-determination, which means recognizing an individual'sl freedom.[46]

Thus, respecting autonomy is a moral obligation to respect the autonomy of others.[47] The patient is an authorised person to determine what to do with their body and health. Medical manipulation without their consent violates the freedom of the patient. Therefore, if this operation is successfully carried out, in Germany, the illegitimacy of the doctor's action is considered to be a disregard of the patient's will, in which the general personal right is violated.[48] **For instance,** a patient was placed in a clinic and treated against their will. The court noted that non-substantial infringement of a person's physical inviolability should also be considered a violation of the right to protection of personal life where the action was taken against their will. In addition, the patient was forcibly administered the drug, which is also considered a violation of privacy.[49]

5. Rules for Issuing Informed Consent and Modern Judicial Practice

5.1. Rules for Issuing Informed Consent

Today, informed consent includes five components:

1. Voluntariness;
2. The ability to make decisions;
3. Disclosure of information about the patient's medical condition;
4. The ability to understand; and
5. Decision-making authority.[50]

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43 *Martini S.*, Die Formulierung der Menschenwürde bei Immanuel Kant in: Vortragsskript eines im WiSe 2005/06 gehaltenen Referats im Rahmen des rechtsphilosophischen Seminars "Die aktuelle Werte-Debatte" bei Prof. *Klaus Adomeit* (Freie Universität Berlin), 2005/06, 5-7.

44 *Schaber P.*, Menschenwürde und Selbstverfügung, Zurich, In: *Byrd Sharon B.; Hruschka J.; C. Joerden Jan*, Themenschwerpunkt: Recht und Ethik im Werk von Jean-Jacques Rousseau, Berlin, 2012, 319.

45 See *Pfordten Dietmar von der*, Zur Würde des Menschen bei Kant, In Fünf Untersuchungen "Menschenwürde, Recht und Staat bei Kant", 1. Auflage, Mentis, Paderborn, 2009, 19.

46 Decision N213-14 of March 12, 2018, of the Civil Cases Chamber of the Tbilisi City Court. *Bichia M.,* Features of Protecting the Patient's Personal Autonomy and of Giving Informed Consent (Georgian and European Approaches), "Law and World", 5(12), 2019, 52-53 (in Georgian).

47 *Gillon R.*, Medical ethics: Four principles plus attention to scope, Brit MedJ, Vol. 309, 1994, 185.

48 *Ehmann H.*, Der Begriff des Allgemeinen Persönlichkeitsrechts als Grundrecht und als absolute-subjektives Recht, in: Festschrift für Apostolos Georgiades, Athen; München, 2005, 128; *Ehman H.,* The Concept of General Right to Personality as a Fundamental Right and an Absolute Right, Georgian Translation, translated by *Bichia M.,* TSU "Journal of Law", N2, 2013, 239. (In Georgian).

49 *Storck v. Germany, 16 June 2005, no. 61603/00*.

50 *Del Carmen M. G.*, *Joffe S.*, Informed Consent for Medical Treatment and Research: A Review, The Oncologist, №10 (8), 2005, 637.

The patient may turn to relatives for advice, whose opinion may influence the patient's choice, however, where the patient perceives this advice as additional information for decision-making, **then their final decision is still considered autonomous**.[51] Hence, voluntariness requires that the patient is free from coercion and pressure in making the decision. Coercion refers to physically inappropriate pressure from individuals or institutions that limit the patient's choices. First, doctors must find out the patient's goals, then present them with appropriate treatment options designed with those goals in mind, and finally give advice.[52]

One of the components of informed consent is the ability to make decisions. This is the patient's ability to make decisions about their healthcare. Accordingly, there is a presumption that a person has the capacity to make a decision until evidence to the contrary is proven.[53] **When the patient cannot understand the nature of the medical intervention and its side effects, there is only one way for him to agree to the medical manipulation.**[54] This entails coercion and violates the principle of voluntary informed consent, which is not allowed.[55]

Also, informed consent includes **disclosure of information to the patient about the medical intervention to be performed and the medical condition**. In this case, the patient is provided with the necessary information to understand the essence of the medical procedure. The information provided relates to the treatment method and purpose, risks, potential benefits and possible alternatives. When disclosing information, simple language should be used, information should be given to the patient in simple language, through simple explanations.[56]

Moreover, **the informed consent document should not contain complex and specific medical terminology.** This is natural as the patient does not have special (medical) knowledge, and in the presence of specific terminology, an ordinary person cannot understand the provided information without further explanations.[57] This may involve the use of medical terminology. For example, the European Court of Human Rights found in one case that the patient did not understand the term "sterilization" which referred to informed consent. Therefore, it was emphasised that the **Latin terminology reflected in the patient's consent document should be understandable to the applicant**.[58] In addition, the patient should have time to understand the expected results, and risks and, having them in mind, decide whether to sign the consent form or not before the operation.[59]

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51 See, *Chachibaia, T.,* Bioethical Aspects of Legal Norms of Medical Activity, Tbilisi, 2005, 47-48 (In Georgian).

52 *Del Carmen M. G., Joffe S.*, *Informed consent for Medical Treatment and Research: A Review*, The Oncologist, №10 (8), 2005, 637.

53 *Ibid.*

54 *V.C. v. Slovakia*, no. 18968/07, November 8, 2011; Ruling N2b/2951-18 of February 28, 2019, of the Civil Cases Chamber of the Tbilisi Court of Appeals.

55 See *Bichia M.,* The Golden Rules of Giving Informed Consent According to the European Court of Human Rights Practice, in the collection of articles: "Protection of Human Rights: International and National Experience", ed. *Korkelia K.,* Tbilisi, 2022, 183-184 (in Georgian).

56 *Del Carmen M. G., Joffe S.,* Informed consent for Medical Treatment and Research: A Review, The Oncologist, 10 (8), 2005, 637.

57 Decision N213-14 of March 12, 2018, of the Civil Cases Chamber of the Tbilisi City Court (In Georgian).

58 *A.S. v. Hungary*, CEDAW/C/36/D/4/2004, August 29, 2006.

59 *E. Hyslop*, European Causation in Tort Law: a Comparative Study with emphasis on Medical Law in the United Kingdom, Germany and Frand and Luxembourg, A thesis submitted for a degree of PhD, Luxembourg, 2015, 169.

Hereby, **the aspect of decision-making by the patient regarding medical intervention should be considered**. Decision-making authority is no less important when giving informed consent. In this case, the most important thing is that it is the patient who has the authority to allow the doctor to carry out the proposed treatment.[60]

5.2. The Most Recent Judicial Practice in Informed Consent

In the law of medicine, the Convention "On Human Rights and Biomedicine" is critical and used in everyday medical practice. According to Article 5 of this Convention, any intervention in the field of health must be carried out after obtaining the voluntary and informed consent of the person. The patient has the right to receive appropriate information in advance about the purpose and nature of the intervention, consequences and risks, as well as, is to freely withdraw consent at any time.[61] According to Article 6 of the same convention, if a minor, as per the law, is incapable of giving consent, the intervention may be carried out with the permission of their representative or an authority or a person or an institution defined by law. When an adult is legally incapable of giving consent due to mental disorder, disease or other similar reason, intervention may be carried out with the permission of their representative or a statutory authority or a person or an institution.

In the practice of the European Court, Glass v. The United Kingdom[62] is noteworthy. Here it was confirmed that a seriously ill child underwent surgery to relieve upper airway obstruction. Post-operative complications (infections) made it necessary for him to be put on a breathing machine. In the first stage, the mother was involved in making treatment decisions. The doctors noted that, despite the best treatment, the patient would not survive, and the patient's family expressed their discontent. The patient's condition indeed improved and the patient was discharged, but a few days later he returned to the clinic with a respiratory tract infection. Considering the serious condition of the child's health, the doctors offered the mother to use diamorphine to alleviate the child's suffering, which the mother refused. The child's condition worsened to such an extent that he was considered to be in the terminal stage of the disease, requiring pain relief. Despite the family's opposition, the doctors and the clinic administration decided to give the patient diamorphine. In a few days, the patient's condition improved.

In the same case, **the medical staff had the burden of proof** that the use of diamorphine without informed consent was due to an emergency. The defendants failed to meet their burden of proof. There was resistance from the family both in the first and second stages of treatment. However, it was clear from the notes of one of the doctors that **the parent's objection could be overcome by applying to the court**. This rule was provided by the law in force in the respondent state. By ignoring these requirements, Article 8 of the European Convention was violated.[63]

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60 *Del Carmen M. G., Joffe S.*, Informed consent for Medical Treatment and Research: A Review, The Oncologist, 10 (8), 2005, 637.

61 *Dove E.S.*, The EU General Data Protection Regulation: Implications for International Scientific Research in the Digital Era, in Journal of Law, Medicine & Ethics, 2018, 1021-1022.

62 *Glass v. The United Kingdom*, 9 March 2004, no. 61827/00.

63 *Glass v. The United Kingdom*, 9 March 2004, no. 61827/00.

G.M and Other v. The Republic of Moldova[64] is an interesting case. It concerned the termination of pregnancy and the implantation of contraceptives in the bodies of three women with mental disorders. The applicants were beneficiaries of a special medical institution for some time. The doctor of the same institution raped them and made them pregnant. The first applicant had an artificial termination of pregnancy at 17-18 weeks, and the second applicant at 6-7 weeks. Both applicants claimed that they had implanted contraceptives. As for the third complainant, according to her explanation, she became pregnant as a result of the rape, and after she protested, she was placed in another institution and forcibly terminated the pregnancy, and a contraceptive was inserted into her body. However, according to the current legislation of Moldova, forced termination of pregnancy (Art. 151), as well as termination of pregnancy at the 12th week (Art. 159), illegal sterilization by a doctor (Art. 160) is punishable. The applicants argued that the forced medical interventions without their consent were due only to their mental disorder and not for any other reason, such as a risk to the health of the child or the mother. Ultrasound studies presented by the first applicant in the case indicated the presence of a foreign body in the patient's cervical cavity as of April 2014. Thus, an **assumption** was made about the presence of a contraceptive device in the patient's body, however, no investigation was conducted to exclude or confirm this fact. Since an effective investigation was not conducted, in the case of the second and third complainants, **in the absence of prima facie evidence**, the respondent government was taked with rebuting the presumption that contraceptive measures were not used against the beneficiaries. The government could not rebut this presumption. Given these circumstances, the court found the violation of Article 3, instead of Article 8 of the European Convention, as it was established that abortions were performed without consent and the use of contraceptives on patients with mental disorders, who were raped by a doctor in the receiving institution of the same institution .[65]

CASE OF Y.P. v. RUSSIA is noteworthy as well. The patient complained that **the doctors of the maternity hospital sterilised her without her consent,** which was not necessary to save her life. Two years later, when the woman decided to have a child with her husband, she found out that she could get pregnant only through in vitro fertilisation. The national court found against the applicant that there was a medical reason – a ruptured uterus, due to which there was a risk of heavy bleeding. Doctors sterilised the fallopian tubes to prevent further pregnancy. However, the Strasbourg Court did not consider this intervention to be a necessary measure, as it did not serve to save the patient's life. Therefore, a violation of Article 8 of the European Convention was found.[66]

In other disputes, the Strasbourg Court found unauthorised sterilisation without unavoidable medical necessity to be a measure of interference with the patient's right that violated Article 3 of the Convention. This was due to the fact that the applicants belonged to a **vulnerable group** (Gypsies/Roma) and were in the early stages of reproductive life.[67]

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64 *G.M. and Others v. The REPUBLIC OF MOLDOVA*, no. 44394/15, 22/02/2023.

65 *G.M. and Others v. The Republic of Moldova*, no. 44394/15, 22/02/2023.

66 *Y.P. v. RUSSIA***,** no.43399/13, 20/12/2022, §.36

67 *V.C. v. Slovakia*, no. 18968/07, 8 November 2011, §§ 116-19; *N.B. v. Slovakia*, no. 29518/10, 12 June 2012, §§ 79 -80.

Thus, in these types of cases, the clinic bears the burden of proof that it fulfilled its duty to fully inform and explain the medical manipulation. The starting principle of this is that the medical institution providing the service has the authority to develop medical cards, and contracts, as well as a document about the patient's prior, clearly stated, informed consent.

In Georgian judicial practice, shall be noted case[68] where the contract concluded with the patient on the implantation of an artificial crystal provided **for non-surgical intervention, through a seamless laser operation with the insertion of an artificial crystal of the posterior cell.** In the course of the operation, it was found that the patient had a lump on the back capsule of the crystal, in the centre. It was necessary to remove it surgically and, instead of the artificial crystal of the posterior cell, an artificial crystal of the anterior cell was inserted. Two stitches were used on the cornea of the eye. Changes in the patient's eye were detected during the operation, which led to the implantation of an artificial lens not in the back, but in the front cell. The examination conducted on the case considered all actions of the surgeon to be justified.

In addition, the clinic presented the patient's informed consent document, which, in the clinic's opinion, comprehensively described the course of treatment and possible risks. According to the court, **this document did not regulate the disputed medical manipulation.** The court shared the patient's opinion that they signed the consent a few hours before the operation and were not given detailed information. The court considered that the patient signed the document with an unstable psycho-emotional background, that is when they were preparing for the operation and the situation did not correspond to the standard of reasonable judgment of a person in a normal non-stressful state (a medical assistance agreement was concluded, the patient signed the consent and the surgical operation was performed on the same day). In this case, the patient failed to meet the burden of proof in the medical malpractice section. Therefore, the claim for compensation for material damages was unsuccessful, based on Articles 992 and 1007 of the Civil Code of Georgia (hereinafter – CCG), although the **claim for moral damages** was satisfied within the framework of Article 413 of the CCG **due to the violation of the standard of patient awareness**.[69]

It should be remarked here that the illegal placement of a person in a hospital is also a restriction of a person's privacy and freedom as it is **presumed that the patients experience severe spiritual pain and psychological and emotional stress.** For the purpose of involuntary psychiatric assistance, the forced placement of a patient in a psychiatric facility, when there was no medical evidence for this, was assessed by the Court as a violation of Article 5, Paragraph 1, Subsection "e" of the European Convention (Restriction of Immunity and Freedom).[70]

Also, it is evident in Georgian judicial practice that simply the existence of an informed consent document is not satisfactory, it is essential for it to have a sufficiently specific form, which prevents disputes related to the violation of the patient's right to proper information. In one case, it was determined that a patient underwent surgery on the same day he signed a consent form for surgical

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68 Ruling of the Civil Cases Chamber of the Supreme Court of Georgia (Hereinafter – SCGR), July 26, 2019, №ას-645-2019 (in Georgian).

69 SCGR, July 26, 2019, №ას-645-2019 (in Georgian).

70 SCGR, December 22, 2023, №ას-1444-2022 and March 16, 2021, №ას-1129-2020 (In Georgian).

services. After the operation, the patient lost the sensitivity of the lower limbs, and in order to evacuate the bruises, it was necessary to perform another surgery. The patient signed a consent form for reoperation, however, **it did not state that the operation could cause paraplegia of the lower limbs,** which they experienced after the operation. The clinic could not confirm the circumstance **included in the subject of their proof** that the patient was informed about the possible post-operation complications.[71]

As for compensation for moral damages, it is impossible to determine the price of each person's health or life. Hence, the purpose of compensating moral damages is, to some extent, to alleviate the pain and discomfort experienced.[72] In Georgian judicial practice, when determining the amount of non-pecuniary damages, they are guided by the criteria of **reasonableness and fairness**, and also take into account the mental or physical suffering experienced by the victim and the guilt of the person causing the damage, when compensation for damage depends on the culpable action.[73] **The moral damage caused by violation of the body and/or health may not be derived directly from the violation of the law**, but may be a **consequence of it**, such as unsuccessful treatment, long-term helpless condition, the impossibility of active life, change of the rhythm of life and lifestyle, decrease in the joy of life due to the ineffectiveness of treatment, nervous tension that makes a person have an inferiority complex or other negative feelings. However, in this case, it must be proven that the victim's moral **feelings and spiritual suffering are the result of the violation of the body or health.**[74]

In the Strasbourg Court practice, the amount of compensation depends on the degree of violation, for example, in case of violation of Article 3 of the European Convention, the amount of moral damages is higher than in case of violation of Article 8 of the same Convention.

6. Final Provisions

As the research shows, the concept of informed consent has existed even in ancient times, although it differed from its modern understanding. Namely, the essence of informed consent in antiquity was determined by the social status of the patient.

In the beginning, there was clearly established paternalistic approach, which viewed the patient as a passive infant and giving the doctor full authority to decide on the issues of medical intervention on behalf of the patient. This was dictated by the idea that the doctor knew best what would be best for his patient. A paternalistic approach in the field of medical law was in effect for a long time. However, at the beginning of the 20th century, the paternalistic approach was replaced by the principle of

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71 SCGR, June 11, 2021 №ას-253-2021 (in Georgian).

72 See *Gagua, I.,* Burden of Proof in Non-pecuniary Damages, Journal "Justice and Law", N4 (72), 2021, 74 (in Georgian).

73 In case of medical manipulation during the planned operation without informed consent of the patient, 5000 GEL was charged to the clinic in favour of the patient. See SCG, July 26, 2019, №ას-645-2019 (in Georgian).

74 SCGR, September 10, 2015, №ას-979-940-2014; *Bichia, M.,* Some Aspects on Compensating for Non-property Damages, Journal "Justice and Law", No. 3 (51), 2016, 107 (in Georgian).

protecting the patient's personal autonomy. Records of the protection of patient informed consent have emerged in American court decisions, which have become a prerequisite for greater attention to patient personal autonomy.

The personal autonomy of the patient was strengthened in the field of deontology and thus the respect for patient autonomywas emphasised. Soon, its close connection **with the protection of human dignity, on which autonomy is based, became apparent,** and autonomous rights are granted to humans because they have dignity, was soon revealed.[75] **Respect for autonomy in reality implies a moral duty to respect the autonomy of others.**[76] The patient is considered an authorized person to freely determine the fate of their body or health. At this time, the patient's will to medical intervention should be taken into account, otherwise their personal autonomy will be violated.

With the Association Agreement with the European Union, Georgia undertook to develop legal cooperation based on human rights and basic freedoms. From the perspective of approximation with EU Acquis, it is noteworthy **to pay close attention to the relevant decisions of the European Court of Human Rights** (paragraph 2). The decisions of the European Court of Human Rights and the national courts of Georgia confirmed that **the manner and content of the patient informed consent should not only have a formal meaning,** but such consent should be unambiguous, sufficiently specific, well thought out and granted in advance.

The issue is also significant in terms of the distribution of the burden of proof, because in cases of urgent necessity, when obtaining informed consent before medical intervention is excluded, **the clinic bears the burden of proving both the urgency of the medical intervention and reasonableness and foreseeability of consecutive actions.** Upon confirmation of a breach of duty by the medical institution, the patient gains the right to claim compensation for non-propety damage. The European Court of Human Rights uses Articles 8 and/or 3 for non-pecuniary damage compensation. The case provided under Article 3 is considered a serious violation, which increases the amount of compensation for non-property damage. In fact, in the case of violation of informed consent, "**inhuman or degrading treatment" established by Article 3 is considered a qualifying circumstance, due to which the amount of compensation for moral damages** increases.

The national courts of Georgia use Articles 18 and 413 of the Civil Code as the grounds for compensation for moral damages. The judicial practice of Georgia emphasizes that the amount of moral damage must be determined in each specific case, taking into account the individual features of the case itself.

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Psychologist's Institute in the Context of a Multidisciplinary Approach to Juvenile Justice

The article is devoted to presenting the role and importance of the psychologist's institute as a guarantor of a child's rights protection in the implementation of a child's ***right to justice in civil proceedings*** *and offers recommendations in terms of strengthening and increasing the efficiency of the said institution.*

Keywords: *psychologist, juvenile justice, child-friendly justice, multidisciplinary approach, umbrella rights of a child.*

1. Introduction

The field of juvenile justice is quite broad and at the same time very delicate. Since the rights of minors are often violated during the administration of justice, juvenile justice systems should strive to reduce and prevent the risks of violations of the rights of minors. In many states, juvenile justice effectively replaces the protection and welfare systems for disadvantaged, impoverished, orphaned, or abandoned children.[1] For these reasons, during the last decades, the international community has drafted and continues to draft legal documents for the juvenile justice system.

The road to European integration poses an array of challenges for Georgian legislation and judicial practice. One of them is the harmonization of Georgian legislation and judicial practice in the field of juvenile justice with the international and, therefore, European standards recognized by the European Union. The founder of the latter is the Convention on the Rights of the Child[2], although it cannot establish the exact procedural requirements for ensuring a specific right. The Convention establishes a standard to be shared by national laws.

Until 2019, the Georgian legislation did not reflect the basic elements of child-friendly justice in the areas governed by civil and administrative law. This gap was filled significantly in 2019 with the adoption of the Code of Children's Rights (hereinafter – CCR).[3] It recognized that programs for the

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2 UN Convention on the Rights of the Child of November 20, 1989, Legislative Herald of Georgia, <https://matsne.gov.ge/ka/document/view/1399901?publication=0> [29.01.2024], ratified by Georgia in 1994, effective since 02/07/1994 (In Georgian).

3 Law of Georgia "Code of Children's Rights", Legislative Herald of Georgia, 5004-I, 20/09/2019, <https://matsne.gov.ge/ka/document/view/4613854?publication=4> [29.01.2024] (In Georgian).

protection and support of children's rights should be implemented by the principle of prioritizing the best interests of the child, and imposed an obligation on state bodies, individuals, and legal entities to determine the best interests of the child and carry out their mandatory assessment in compliance with the basic criteria established by the CCR. **One of these criteria and the most important one is the assessment and consideration of the child's psychological and physical well-being, and legal, social, and economic interests by specialized persons with a multidisciplinary approach.** [4] Achieving the mentioned goal is hardly conceivable without the work of a specialized, strong, and well-organized institution of psychology. Judges or others involved in the process cannot be expected to "know it all", hence, people who have acquired specialized knowledge through education and experience, who are often called upon to share opinions in court or before legislatures, are welcome.[5]

The purpose of this work is to present the role and importance of the institution of psychologists as the guarantor of the basic rights of a child and to promote the strengthening and effectiveness of this institution.

2. The Main Legal Source of the European Standard of Juvenile Justice. International Instruments

"The 20th century left an indelible mark in the history of mankind. Finally, children were recognized as subject to rights that should be treated with dignity and respect"[6] and history, with the adoption of the Convention on the Rights of the Child[7] under the auspices of the United Nations, was divided into pre-1989 and post-1989 eras. With a new perception, a child was presented as a worthy, capable person, who is endowed with the ability to protect their own rights.

The 1989 Convention on the Rights of the Child is the fruit of a consensus reached through a process aimed at establishing high standards. It is the primary European standard for the rights of minors and has been ratified by 195 states[8]. It explained and recognized the basic rights of children –

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4 Law of Georgia "Code of Children's Rights", Legislative Herald of Georgia, 5004-I, 20/09/2019, <https://matsne.gov.ge/ka/document/view/4613854?publication=4> [29.01.2024]. Article 5 (5, 7) (In Georgian).

5 *Okoye, J. U., Oraegbunam, I. K.,* Some pathways for psychology's influence on legal system. African Journal of Law and Human Rights, 3(1), 2019, 46.

6 *Sahovic N. V., Doek E. I., Zermatten J.,* The Rights of the Child in International Law (Rights of the Child in a Nutshell and in Context: all about Children's Rights), Bern, 2012, ed. Translation by *Aleksidze L., Khutsishvili K.,* Tbilisi, 2015, XV, evaluation of Dr. Jan Gehl, Chairman of the UN Committee on the Rights of the Child, in the foreword of the publication. (In Georgian).

7 UN Convention on the Rights of the Child of November 20, 1989, Legislative Herald of Georgia, <https://matsne.gov.ge/ka/document/view/1399901?publication=0> [29.01.2024], ratified by Georgia in 1994, entry into force 02/07/1994. (In Georgian).

8 196 states have signed the UN Convention on the Rights of the Child; however, the United States of America has not yet ratified it. Three additional acts were adopted to supplement the Convention: The Optional Protocol to the Convention on the Rights of the Child "On Child Trafficking, Child Prostitution and Child Pornography" (2000), the Optional Protocol to the Convention on the Rights of the Child "On the Participation of Children in Armed Conflict" (2000) and the Rights of the Child Optional Protocol of the Convention "On Communication Procedures" (2011). <https://www.unicef.org/child-rights-convention/frequently-asked-questions> [29.01.2024].

persons under the age of 18. Since then, a number of legal acts have been adopted by the international community, which directly relate to children's rights and access to justice in the context of civil and administrative legislation: the UN "Convention on Persons with Disabilities" (2008)[9]; **General comments of the UN Committee (guidelines):** General Comment of the Committee on the Rights of the Child No. 5[10] (2003) "General Measures for the Implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44 (6)); General Comment of the Committee on the Rights of the Child No.12[11] (2009) "The right of the child to be heard"; General Comment No.14[12] of the Committee on the Rights of the Child (2013) "The right of the child to have his or her best interests taken into account"; General Comment No. 6[13] (2005) of the Committee on the Rights of the Child "Regarding unaccompanied and separated children" Treatment outside the country of origin"; Council of Europe Guidelines on the Protection of Individuals with Automatic Processing of Personal Data[14]; Council of Europe Policy Guidelines on Integrated National Strategies for the Protection of Children[15]; Child-Friendly Justice Guidelines of the Council of Europe[16], etc.

3. The Main Legal Source of Juvenile Justice in Civil Disputes as per Georgian Legislation

After the Constitution of Georgia, the UN Convention on the Rights of the Child stands hierarchically higher than all the laws and organic laws of Georgia[17]. The Constitution of Georgia defines provisions on "physical education of children and youth and their involvement in sports", "right to education" and "protected recognition of the rights of mothers and children" (Articles 5, 27,

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9 UN Convention on Persons with Disabilities (2008), ratified by Georgia in 2013. <https://matsne.gov.ge/ka/document/view/2334289?publication=0> [29.01.2024] (In Georgian).

10 General Comment No. 5 of the Committee on the Rights of the Child (2003) "General Measures for the Implementation of the Convention on the Rights of the Child" (Articles 4, 42 and 44 (6)) <https://digitallibrary.un.org/record/513415?ln=en> [29.01.2024].

11 General Comment No. 12 of the Committee on the Rights of the Child (2009) "The right of the child to have his views heard" <https://digitallibrary.un.org/record/671444?ln=en> [29.01.2024].

12 General Comment No. 14 of the Committee on the Rights of the Child (2013) "The right of the child to have his or her best interests taken into account" <https://digitallibrary.un.org/record/778523> [29.01.2024].

13 General Comment No. 6 of the Committee on the Rights of the Child (2005) "Treatment of Unaccompanied and Separated Children Outside the Country of Origin" <https://digitallibrary.un.org/record/566055?ln=en> [29.01.2024].

14 Council of Europe Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data <https://matsne.gov.ge/ka/document/view/1244845?publication=0> [29.01.2024]. Entered into force 01.10.1985; Ratified by Georgia 14.12.2005; (In Georgian)

15 Council of Europe Policy Guidelines on Integrated National Strategies for the Protection of Children from Violence <https://rm.coe.int/168046d3a0> [29.01.2024].

16 Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice <https://rm.coe.int/16804b2cf3> [29.01.2024] – Adopted by the Committee of Ministers of the Council of Europe on November 17, 2010.

17 Organic Law of Georgia "On Normative Acts" Legislative Herald of Georgia, 1876, 09/11/2009, <https://matsne.gov.ge/ka/document/view/90052?publication=37> [29.01.2024] (Article 7(3)) (In Georgian).

30). However, not only do these specified norms create solid constitutional guarantees for the protection of the rights of the child as an independent subject bearing rights.[18]

The development of a child-friendly justice system in Georgia began in 2009 with the adoption of the Juvenile Justice System Reform Strategy, which is an annually updated document[19]. In 2015, the Code of Juvenile Justice was adopted[20], which established guarantees for the protection of the best interests of minors in contact with the criminal justice system and took into account: professionals' mandatory specialization, multidisciplinary approach, and consideration of individual needs when making decisions.

In 2019, the CCR clearly and unambiguously recognized a child's right to justice without age restrictions (Art. 13.1): a child has the right to apply to the court and/or relevant administrative body for the protection of their rights and to benefit from a justice system that is for the child: accessible, age-appropriate, easily understandable for a child, fast, fair, consistent, adapted to their rights and needs, showing respect for the child's dignity and private life.

CCR (Art. 3, Art. 69) defined a child-friendly justice system as a system that ensures respect and effective realization of all the rights of the child based on the principles of the child's participation, prioritizing their best interests, respecting the dignity of the child, inadmissibility of unequal treatment, and the rule of law. It is implemented by specialized professionals and is accessible to the child, appropriate for their age, easy for them to understand, fast, fair, coherent, and adapted to their rights and needs.

The right to a fair trial recognized by the Convention on Human Rights and Fundamental Freedoms (Article 6) and guaranteed by the Constitution of Georgia (Article 31) applies, naturally, to minors as well. However, it, in turn, requires detailed procedural guarantees. The Civil Procedure Code is also the main legal source of juvenile justice in civil disputes[21]. However, a number of issues on how to realize the rights of the child in civil and administrative justice are not procedurally provided for in the procedural codes of the respective areas. Thus, a set of issues depends on the court's opinion and established practice. While it is true that such an approach might better take account of the peculiarities of a specific child and individual case, it also makes the justice process unclear for the interested parties. Establishing clear and unambiguous procedural rules is especially important for minors so that they can even independently defend their rights and interests in court without obstacles.

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18 It is desirable to strengthen the basic principles of protection of children's rights in the Constitution of Georgia so as to foster the accountability of the state and create a constitutional guarantee of effective protection of rights.

19 Criminal Justice System Reform Strategy of the Interagency Coordinating Council for the Reform of the Criminal Justice System, 2015, Ministry of Justice of Georgia, <https://justice.gov.ge/files/ZZVEkJ2awXHd.docx1> [29.01.2024], 71 (In Georgian).

20 Law of Georgia "Juvenile Justice Code", 3708-IIს, 24/06/2015 (In Georgian). <https://matsne.gov.ge/ka/document/view/2877281?publication=22> [29.01.2024].

21 Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, 1106, 14/11/1997, <https://matsne.gov.ge/ka/document/view/29962?publication=149> [29.01.2024] (In Georgian).

4. Principles of Child-friendly Justice. Umbrella Rights

The UN Committee on the Rights of the Child has recognized some of the rights of the child, due to their importance, as principles for dealing with issues related to the child, without the protection of which any other child's rights cannot be fully realized: when the Committee on the Rights of the Child was establishing guidelines for the submission of its initial report, it created a cluster called "General Principles" and combined Four rights recognized by the 1989 Convention: Prohibition of discrimination – Article 2 of the Convention; The right to respect the true interests of the child – Art. 3; Right to life, survival and development – Art. 6; The right to respect the child's views – Art. 12. For the exercise of any right provided for by the Convention, it is important to determine, at the same time, whether the mentioned principles are respected. This also applies to the implementation of justice. They are substantive and procedural rights and are referred to as umbrella provisions[22].

CCR recognized the umbrella provisions declared by the Convention as basic principles of justice. As principles of proceedings, it fostered the following: participation of the child (Art. 78); giving preference to the best interests of the child (Art. 75, 81); respecting the dignity of the child; inadmissibility of unequal treatment (Art. 74); multidisciplinary approach and participation of specialized professionals (also Art. 72, 73); respect for personal life – protection of confidentiality (Art. 71); priority consideration of cases related to the child's interests (Art. 76); Access to information for children (Art. 70); the child's right to legal assistance (Art. 79, 70, 74); the child's right to representation (Art. 80).

5. Multidisciplinary Approach and the Principle of Specialized Professionals' Participation

Civil litigation with a multidisciplinary approach serves to ensure the right to justice in the context of umbrella rights. This is determined by the content of the umbrella rights – principles. As mentioned above, all the rights of the child are considered "under the cover" of the umbrella principles. Accordingly, it is important to protect basic rights through the imminence of the psychologist's involvement and the use of the psychologist's special knowledge. The specialization of a psychologist is mandatory for the protection of all these four rights.

Regardless of whether or not a specific norm on civil proceedings provides for a multidisciplinary approach in resolving the issue, Art. 69[23], Art. 72[24] and Art. 73[25] apply to them as well (for instance, the Civil Code provides for the involvement of social services when deciding on the place of residence of children and their support (Art. 1128), but there is no reference to social services, for example, in the norm of limiting parental rights and duties (Art. 1205), Also in the norm of

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22 Committee on the Rights of the Child General Comment No. 12 (2009) "The Right of the Child to Have Their Views Heard", <https://digitallibrary.un.org/record/671444?ln=en> [29.01.2024].

23 Basic principles of child-friendly justice.

24 A multidisciplinary approach.

25 Specialization of professionals.

deprivation of parental rights and duties (Art. 1206), however, the requirements of Art. 69 and Art. 72 of the Civil Code must be observed.

a. Content of the Multidisciplinary Approach

The multidisciplinary approach includes the assessment of the child's psychological, social, emotional, and physical health.

b. Purpose of the Multidisciplinary Approach

The purpose of the multidisciplinary approach is to conduct legal proceedings taking account of the child's age and maturity (an easy-to-understand, consistent process for the child), to avoid repeated questioning and re-victimization of children, and to determine their best interests.

c. Participants in the Multidisciplinary Approach

Social workers, experts, medical experts, psychologists, pediatricians, police officers, prosecutors, and lawyers participate in the application of the multidisciplinary method (Art. 72 of the CCR).

d. Procedural Guarantee and Substantive Legal Basis of Multidisciplinary Approach

A number of provisions in procedural legislation create procedural guarantees for a multidisciplinary approach. For example, Art. of the Code of Civil Procedure. 204 – Invitation of a specialist, Art. 162 – appointment of expertise; Art. 354 – Determining the circumstances of the case at the initiative of the court.[26]

The legal basis for using a multidisciplinary approach is also provided in a number of norms of the Civil Code of Georgia[27]. E.g., Art. 1128. Deciding the children's place of residence and their maintenance – 1. If the spouses have not agreed on the place of residence of their children and on the funds to be paid for their maintenance after the divorce, the court shall be obligated, when granting the divorce, to determine which parent is to be awarded custody of the child, as well as the amount of the maintenance (alimony) and the parent responsible for its payment. 2. In the cases provided for in this article, if necessary, a guardianship and custodianship authority shall be involved in the proceedings. Art. 1198^{1}. The right of a minor to protection – 1. A minor shall have the right to be protected from their parent/legal representative who abuses the minor's rights. When a minor's rights and legitimate interests are breached, including when both or one of the parents fails to fulfill or improperly fulfills the duties related to the upbringing and education of the child, or abuses a parental right, the minor may independently apply to guardianship and custodianship authorities. Art. 1200. Raising children by mutual agreement of parents – 1. Parents shall decide all matters relating to the upbringing of children by mutual agreement. 2. When parents are in disagreement, a court shall settle the disagreement with the participation of the parents. In that case, the right of a parent to be a representative of the child in a legal dispute shall be suspended. A guardianship and custodianship authority shall appoint a child's representative who is to represent the child's interests in court

[26] Law of Georgia "Civil Code of Georgia", Legislative Herald of Georgia, 1106, 14/11/1997, <https://matsne.gov.ge/ka/document/view/29962?publication=149> [29.01.2024] (In Georgian).

[27] Law of Georgia "Civil Code of Georgia", Legislative Herald of Georgia, 786, 24/07/1997, <https://matsne.gov.ge/ka/document/view/31702?publication=117> [29.01.2024] (In Georgian).

proceedings. Art. 1201. Place of residence of a minor child in case of divorce of the parents – 1. When parents live apart due to divorce or for any other reason, they shall agree on who will have the right to decide with whom the minor child is to live. 2. When parents disagree, the dispute over the custody of the minor shall be resolved by a court, taking account of the child's interests. In that case, the right of a parent to be a representative of the child in a legal dispute shall be suspended. A guardianship and custodianship authority shall appoint a child's representative who is to represent the child's interests in court proceedings. Art. 1242. Deciding on adoption – based on an adoptive parent's application, a decision on adoption shall be made by a court according to the place of residence of the adoptive parent or the prospective adoptee after the guardianship and custodianship authority provide its report.

e. Determining Factors of Specialization of Professionals Participating in the Process

The following factors determine the need for specialization of professionals participating in the litigation process: provision of litigation by persons with special knowledge; the need to have personal and professional compliance with the obligations imposed by the participants; the need to avoid risks and dangers of any form of child abuse in the relevant field; Ensuring the use of a multidisciplinary approach method.

f. Participants of The Institutional System of Specialization

The institutional system of specialization includes persons working with children and working on children's issues: lawyers, prosecutors, police officers, judges, mediators, social workers, psychologists, and other specialists.

g. The Principle of Multidisciplinary Approach and International Practice

Legislations in almost 16 European countries reinforce the obligation to comprehensively study the situation of the child participating in civil and administrative court proceedings. For this purpose, the child's condition is assessed from the legal, psychological, social, emotional, physical health, and cognitive perspectives. This multidisciplinary approach functions as a formal collaboration procedure between the court and professionals from various state agencies working on children's issues[28].

For instance, the Austrian Civil Code recognizes a multidisciplinary approach as one of the means of determining the best interests of the child. It establishes that the "welfare of the child" should be the guiding principle of decision-making and establishes the main evaluation criteria for the judge: physical and psychological protection and safety of the child; respect and acceptance of the child by the parents; promoting the child's skills, interests and development; child's opinions; In case of enforcement of the decision against the will of the child, to prevent the expected harm to the child; Avoiding any kind of violence, abuse and danger to the child; Ensuring that the child maintains contact with both parents; The conflict between the senses of loyalty and guilt in the child should be avoided; respecting the interests and rights of the child, their parents and the environment; Multidisciplinary approach to child witnesses and victims[29].

[28] See the report "Child-friendly Justice. Study of Legislation" developed within the framework of the joint project of EU and UNICEF – "Improving Access to Justice and Developing a Child-Friendly Justice System in Georgia" <https://www.unicef.org/georgia/media/1481/file/Legislative%20Analysis%20GEO.pdf> [10.01.2024] (In Georgian).

[29] Ibid.

The above is recognized in Iceland, Norway, and Sweden, which operate "children's homes" for cases of child abuse. Social workers, forensic experts, pediatricians, police, and prosecutors work together. They share functions among themselves. The child is interviewed once by a specialist, who is listened to by other participants of the process through a video connection in another room. These houses have medical examination facilities and a psychological assistance service[30].

6. Evaluation of the Psychologist in the Multidisciplinary Aspect of Litigation

Psychology influences the legal system in many ways, notably through expert testimony, *amicus curiae*[31] opinion submissions, wide dissemination of research findings, influencing legislative bodies, and, to put it mildly, influencing public policy[32]. In a narrower sense, the role of the psychologist is also important in terms of exercising the right to respect the child's opinion. The psychologist must provide the court with information about the child's psycho-emotional state, how well he can adequately perceive the process, and whether he is emotionally ready for the hearing.

The Committee on the Rights of the Child points out: "A child cannot be heard effectively in an environment that is intimidating, hostile, insensitive or inappropriate for their age."[33] And this can be ensured with the participation of a specialist – a psychologist. The European Court of Human Rights, in T&W v. United Kingdom, found that the ritual environment of the Crown Court was murky and intimidating for an eleven-year-old child, with the result that children could not enjoy their right to a fair trial[34].

The Supreme Court of Georgia emphasizes the importance of psychological examination, the involvement of a psychologist in the consideration of family legal disputes, precisely for the purpose of implementing the basic rights of the child and, therefore, ensuring the right to a fair trial. It is welcome that this approach existed even before the adoption of CCR. For example, *"when it comes to determining the residence of a minor and regulating relations with parents who live separately, the conclusions made by persons working on minors' affairs or relevant specialists (psychologists) require special caution" (see decision of the Supreme Court of Georgia ას-53-51-2016, 06.07.2016). The court of cassation explains that based on the evidence presented in the case, explanations of the parties, and psychologists, not a single component is proven that would deem the father's place of residence as the preferable residence for the minor. The case presents the opinions of the representative of the guardianship and custodianship authority and the psychologist that it is better to determine the mother's place of residence for the minor. "At the same time, the risks related to the child should be measured, which on one hand, entails changing the child's place of residence and*

30 Ibid.

31 *Lat.* A Friend of the Court

32 *Okoye, J. U., Oraegbunam, I. K.,* Some pathways for psychology's influence on legal system. African Journal of Law and Human Rights, 3(1), 2019, 46.

33 Committee on the Rights of the Child General Comment No. 12 (2009) "The Right of the Child to Have Their Views Heard", <https://digitallibrary.un.org/record/671444?ln=en> [29.01.2024].

34 T v. United Kingdom – Application No. 24724/94, ECtHR, 16 December 1999, <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58593%22]}> [29.01.2024].

environment and, on the other hand, separation from the mother. In addition, in order to determine the child's place of residence, it is necessary to study such criteria as the child's attachment to one of the parents, the child's age, the parents' moral and other personal qualities, the child's relationship with both parents, the capability of creating appropriate conditions for the upbringing and development of the child, the family situation of the parents living separately."... "Thus, taking into account the above-mentioned criteria, the child's attachment to one of the parents shall be under focus. The court should examine according to the psycho-pedagogical expertise, towards which parent the child feels more sympathy and staying with whom would be more beneficial for their mental development. Undoubtedly, the child's relationship with the parent is not decisive, yet the mentioned criterion, together with other criteria, requires a relevant observation." (see decision of the Supreme Court of Georgia ას-1062-996-2012, 22.01.2013). [35]

"According to the first paragraph of Article 3 of the Convention on the Rights of the Child of November 20, 1989, in all actions against children, regardless of whether they are addressed by state or private institutions working on social security issues, courts, administrative or legislative bodies, attention is primarily paid to ensuring the best interests of the child... In the Chamber of Cassation's opinion, when it comes to determining a minor's place of residence and regulating relations with parents who live separately, the conclusions made by persons working on minors' cases or relevant specialists (psychologists) require special caution. In this context, the Court of Cassation will focus on the ***case materials****." ... "There is no relevant conclusion of a specialist that would describe and analyze the situation and emotional feelings of A, who was left alone, which would have allowed us to judge the best interests of the children. From this point of view, the Chamber of Cassation also considers the fact that from the explanations given by the psychologist to the district court, it is not clear at all what psychological problems the other child may cause by assigning one of the children to the father; The psychologist recommends parents to take responsibility for the formation and restoration of children's relationship with their parents, to avoid the intervention of third parties, which will bring negative consequences, and at the same time, to eliminate possible negative effects expected from adaptation process to the environment, the psychologist deems it important that the environment itself is not violent."* [36]

"In the decision of the court of the second instance, there are a set of procedural flaws, a clear example of which is that there is no recommendation from the social service, as well as a ***psychologist's report*** *on to what extent it would be appropriate for the minor to stay with the father at night if the interruptions in the relationship between father and son continue in the future."* [37]

In the cases above, reference to the application of Article 354 of the Civil Procedure Code in the context of using a multidisciplinary approach in the litigation is noteworthy: Unlike other categories of

[35] Decision Nას-1449-1369-2017 of April 20, 2018, of the Civil Affairs Chamber of the Supreme Court of Georgia. (In Georgian).

[36] Decision Nას-53-51-2016 of July 6, 2016, of the Civil Affairs Chamber of the Supreme Court of Georgia. (In Georgian).

[37] Decision Nას-434-2021 of July 30, 2021, of the Civil Affairs Chamber of the Supreme Court of Georgia. (In Georgian).

civil cases, family legal disputes are saturated with inquisitorial elements, therefore, as per Article 354 of the Civil Procedure Code, the legislator allows for the circumstances of the case to be determined at the court's initiative.[38]

Emphasis on the need for a higher degree of psychologist involvement in the context of a multidisciplinary approach can be inferred from the decision of the European Court of Human Rights "G.S. v. Georgia" (Complaint N2361/13. July 21, 2015)[39], where the Strasbourg Court focuses on the assessment of the child's medical report, psychological and social services reports by the national courts: *§59. As for the evaluation of the reasoning of the national courts in the light of Article 8 of the Convention, "the court ignored the risks identified in the same report (meaning medical, psychological and social service reports) should the boy have remained in Georgia." It should be noted that according to the medical report of January 12, 2011, the boy was diagnosed with adjustment disorder (see § 12). Then, the social workers concluded in the report of 12 April 2011 that the boy had a lack of relationship problem with his parents (see § 17). The psychologist went further and noted in the report of May 3, 2011, that, in addition to the problem of insufficient relationship with his parents, L. had gotten psychological trauma "due to the current difficult and uncertain situation" (see § 19). The Supreme Court has indeed recognized the lack of contact problem with parents (see § 26). However, in determining the boy's best interests, ignored the said findings. Such an approach is difficult to correspond with the requirement of a detailed investigation of the child's situation, which is enshrined in the Hague Convention and also in Article 8 of the Convention (see Karrer, cited above, §§ 46-48 and İlker Ensar Uyanık v. Turkey, no. 60328/09, §61 -62, 3 May 2012). "There was no expert opinion in the case indicating that the boy's return to Ukraine would exacerbate the boy's psychological trauma (compare Neulinger and Shuruk, §143, and X. V. Latvia, § 116, both cited above). Unfortunately for the court, none of the reports offered an analysis of the probable consequences of L.'s return to Ukraine; There was neither the examination of possible related risks (see Karrer v. Romania, no. 16965/10, § 46, 21 February 2012, and Blaga v. Romania, no. 54443/10, §82, 1 July 2014). The psychologist's report only mentioned that the boy suffered psychological trauma and needed help (see § 19),"(§55) "The court considers that the above-mentioned shortcomings, expert examinations and other evidence of the case could not lead the Supreme Court to a sufficient and appropriate to justification in its decision. In addition, the latter failed to correctly determine L.'s best interests based on the specific circumstances of the case. It failed to establish a fair balance between the conflicting interests of the parties as well. (§62)* [40].

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38 Regarding the reasoning for using this norm for determining the best interests of minors, see the decision of the European Court of Human Rights of February 2, 2016, N. Ts. and others v. Georgia. <https://www.matsne.gov.ge/ka/document/view/3295053?publication=0> [29.01.2024] (In Georgian).

39 The decision of the European Court of Human Rights "G.S. v. Georgia", complaint N2361/13. July 21, 2015 <https://matsne.gov.ge/ka/document/view/3276261?publication=0> [29.01.2024] (In Georgian).

40 *See Also §57, 58 of the decision: "57. Based on the above, as well as taking account of the facts that no examination was conducted on the consequences of L.'s father's separation from his family, as well as the fact that the boy's future living conditions in Ukraine were not considered, the court determines that the government's argument on possible psychological trauma should L. had been separated from his father and his father's family was wrong. 58. Thus, it appears that there was no direct and convincing evidence in the case to assume a "serious risk" of the child's return to Ukraine. Given these circumstances, it is not*

The importance of a multidisciplinary approach in terms of the exercise of the child's right to be heard, the evaluation of the child's development and best interests, and the violation of "procedural justice" by the national courts in this direction is indicated in the Strasbourg court decision on N. Ts. and others v. Georgia: *§81. "The enjoyment of parent and child being together is a fundamental element of family life, and it is in the best interests of children to be provided with the means to develop in a perfect and harmonious environment." However, in the assessment of their best interests, the local courts failed to pay adequate attention to one important fact: the boys did not want to return to their father. §82. In this regard, the Court refers to several reports that establish that the maternal family's negative attitude towards G.B. was a factor in shaping the boys' relationship with their father. But however manipulative the mother's family may have been, the evidence presented to national courts regarding the children's hostility towards their father was unequivocal. The latest report of the social workers of January 4, 2012, mentions the particularly severe degree of alienation of the children from their father (see § 27-28). §83. In addition, the court deems the reports of various psychologists crucial, as they point out the potential danger to the boys' mental health in the event of their forcible return to G.B. (see § 14-15, 29). Under these circumstances, taking such a drastic measure without considering appropriate transition and preparatory measures to help rebuild the relationship between the boys and their estranged father appears to be against the children's best interests."* [41]

7. The Qualification of the Specialists and the Standards of Ethics

According to the tenth chapter of the CCR and Civil Procedure Code (Articles 5^1, 162, 204), a psychologist can become a participant in the process based on the court's reasoned ruling, at the court's initiative, and/or at a party's request. Such a ruling cannot be appealed separately, and as per Art. 377 of the Civil Procedure Code shall be appealed together with the final decision. A psychologist may be involved by the guardianship and custodianship body while investigating the issue within their authority to make the relevant (to be submitted to the court) conclusion. The court is entitled to invite this psychologist to the courtroom as a specialist.

By legislation, the "State Care and Assistance Agency for Victims of Trafficking" is considered the successor of the legal entity under public law (LEPL) "Social Service Agency" in terms of guardianship and care, as well as international adoption, within the limits of the powers granted to it by Georgian legislation.

The agency shall ensure the functions of the central and local guardianship and custodianship authority provided by the legislation on the territory of Georgia, as well as – the function of the central guardianship and custodianship authority for adoption in another state, implement the state policy in guardianship, care, support, adoption and foster care, carry out and coordinate the processes of

entirely clear why, on what specific grounds, the national courts relied on and concluded that there was a serious risk of psychological or physical trauma, or even unbearable conditions, if the boy was returned to Ukraine (compare Maumousseau and Washington, cited above, §§ 63 and 74)".

41 The decision of the European Court of Human Rights of February 2, 2016, N. Ts. and others v. Georgia. <https://www.matsne.gov.ge/ka/document/view/3295053?publication=0> [29.01.2024] (In Georgian).

guardianship, care, support, adoption and foster care, as well as implement the functions assigned by the legislation on family disputes; ensure the functions of the central and local guardianship and custodianship authority provided for by the legislation on the territory of Georgia, as well as ensure the function of the central guardianship and custodianship authority for the purposes of adoption in another state; legal (if necessary, legal protection of interests) and/or psychological-social assistance/rehabilitation and/or organization/reception of medical services within the framework of a shelter and/or crisis center and/or other similar services for victims of human trafficking, violence against women and/or domestic violence, and/or sexual violence (with their dependents); promotion of reintegration into family and society, provision of interpreter and/or other services; in the case of round-the-clock services, provision of temporary safe accommodation, food, hygiene and other means of primary use and, if necessary, clothing; Organization/receipt of legal (if necessary, protection of legal interests) and/or psychological-social assistance and/or medical assistance within the services of the crisis center for alleged victims of human trafficking (trafficking), violence against women and/or domestic violence, sexual violence, together with their dependents, provision of interpreter and/or other services, as well as in the case of round-the-clock services, provision of temporary safe accommodation, food, hygiene and other means of primary use and, if necessary, clothing [42]. **Thus, in certain cases,** the agency, as per the needs of court proceedings, ensures the participation of its staffer psychologist in them. However, specifically, neither the role and functions of psychologists nor their specialization are established here. Accordingly, the challenges related to the psychologist's institution are uniform, regardless of whether the court invites them at its initiative or the initiative of a participant in the process.

a. Qualification

Despite the importance of the psychologist's participation in juvenile justice and their evaluation, the minimum qualification requirements for psychologists involved in legal proceedings in the context of a multidisciplinary approach have not been established. There is neither professional training nor a control body for psychologists adapted to court needs. In addition, the small number of psychologists involved in juvenile proceedings is particularly concerning[43]. At the same time, within the framework of continuing education of candidate judges and current judges, attention should be

[42] 21. Regulation of LEPL State Care and Assistance Agency for Victims of Trafficking <https://atipfund.moh.gov.ge/res/docs/saagentos_debuleba_2020.pdf> [29.01.2024].

[43] It is worth thinking about whether it would be justified, at least until this problem is solved systematically, to share the practice of some countries, where in some cases, a psychologist-consultant with appropriate specialization appears in the role of a court employee and helps the court in conducting communication with the participant of the juvenile process, or answers the questions of the judge/assistant immediately if necessary... This approach can be used predominantly in the courts of first instance. Obviously, in this regard, it would be interesting to hear the opinions of both the judges and the corps of psychologists. In addition, *see Bartol, C.R. and Bartol, A.M. (2008). Introduction to Forensic Psychology. Research and Application. (2nd edition). Barnes & Nobles, NY; Veera Raghavan, Vimala (2009). Handbook of Forensic Psychology. Select Scientific Publishers, New Delhi.*

paid to developing the knowledge and skills that will help them become critical "users" of psychologists' evaluations.[44] In this regard, the use of the interdisciplinary teaching model is justified.

The need to enhance the use of social science by the legal system is recognized in modern doctrine: One way to increase the use of social science by the legal system is through education. Exposure to social science is likely to make lawyers and judges more receptive to social science research and psychologists' testimony. Moreover, judges and lawyers are likely to become more critical of evidence that lacks a weak or solid scientific basis. Legal training for psychologists is likely to have beneficial effects. Psychologists with a sophisticated understanding of the law are better equipped to ask questions and find answers that benefit the legal system. They may be able to communicate their findings more clearly to lawyers.[45]

b. Specialization

International standards give special importance to the specialization of persons working with children in the field of justice, as well as to the standard of determining their qualifications[46].

The Council of Europe recommends that member states create a system of judges and lawyers specialized in children's cases and develop courts that take into account a combination of legal and social elements for the benefit of children and their families. The Council of Europe guidelines explain that all professionals working with children should receive the necessary interdisciplinary training on children's rights, different age needs, and child-friendly processes. They should also be trained in communication methods with children of any age and development, especially concerning children in vulnerable situations.[47]

CCR establishes the specialization of persons producing the multidisciplinary process and explains that the juvenile justice process is carried out only by persons specialized in it (Art. 73).

Specialization of professionals is also required by the Civil Procedure Code:

In the process related to the protection of the rights of minors, a judge, a lawyer, a social worker, and/or another appropriate invited expert based on the needs of minors who are specialized in the methodology of the relationship with minors and other related matters shall be involved- Art. 5^1; A

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44 *Okoye, J. U., Oraegbunam, I. K.,* Some pathways for psychology's influence on legal system. African Journal of Law and Human Rights, 3(1), 2019, 51, "...in the United States, new efforts are underway to educate judges on scientific reasoning and to train them to be critical consumers of scientific research. In response to the US Supreme Court decision, the US Federal Judicial Center (a research branch of the US federal courts) has established several training programs to help judges responsibly fulfil their expanded gatekeeping role..."

45 *Okoye, J. U., Oraegbunam, I. K.,* Some pathways for psychology's influence on legal system. African Journal of Law and Human Rights, 3(1), 2019, 51.

46 Already in the previous century, the "Beijing Rules" explained: "Staff should be given such training that will enable them to effectively carry out their assigned responsibilities, in particular, training in child psychology, child welfare and international standards and norms of human rights and children's rights." Interrogation of children should be carried out by specially trained professionals. See A/RES/40/33 30. United Nations Standard Minimum Rules for the Administration of Juvenile Justice. "Beijing Rules" – <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/477/40/PDF/NR047740.pdf?OpenElement> [29.01.2024].

47 European Council Guidelines on Child-friendly Justice, directive 2012/29/EU, Art. 23 (2) (b); Guidelines on Child-friendly Justice Art. 64.

minor shall have the right to apply to the court for protecting their rights and legal interests. In that case, a court shall assign a procedural representative and hear the case. A minor plaintiff shall have the right to disagree with his/her procedural representative and defend himself/herself on his/her own. The court shall engage guardianship and custodianship authorities in such a case. – Art. 81^1. When reviewing the cases related to the recognition of a person as a recipient of support, as well as the return of an unlawfully displaced or unlawfully detained child or the exercise of the right to a relationship with the child, specialized persons participate in the case – Chapter $XLII^2$ and $XLIV1^1$.

Having the specialization is obligatory by law for different professionals as well as for psychologists participating in the justice process. However, despite the requirements of the Code, the agency responsible for the psychologists' training is not defined, and there is no qualification requirement/criterion, training module, or other instruction for psychologists participating involved in the process of studying minors or other related issues. This will not contribute to the effective participation of a psychologist in the juvenile justice process.

In juvenile cases, the court needs to be assured that the psychologist involved in the case has special expertise in the matter which they are called on to testify or prepare an evaluation and on which the court is to make its findings. [48]

c. Ethics

The presence of ethical norms/codes would help ensure the appropriate role of the psychology institute in the justice process. An example of this is the ethical norms of the American Psychological Association. The association's guidelines[49], stipulate that psychologists generally do not conduct psychological evaluations in child protection matters in which they currently have or have ever been

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48 *Okoye, J. U., Oraegbunam, I. K.,* Some pathways for psychology's influence on legal system. African Journal of Law and Human Rights, 3(1), 2019, 50.

49 Interestingly, for example, according to the American Psychological Association guidelines, psychologists receive specialized knowledge. In the development of this guideline – the Code of Ethics for Psychologists, the questions that psychologists are often asked to answer as evaluators of child protection cases are taken into account. These are: what kind of violence is committed against a child; If so, how badly did it affect the child's mental well-being? What therapeutic interventions would be recommended to help the child? Whether the parent(s) can successfully treat the child to prevent future harm; If yes, how? If not, why? What will be the psychological effect on the child if they are returned to the parent(s)? What will be the psychological impact of separation from the parent(s) or termination of parental rights? and others.
The guidelines, the Code of Ethics for Psychologists, has also been developed taking account of issues such as psychologists' attempt to gather information about family history, assess relevant personality functioning, assess the child's developmental needs, examine the nature and quality of the parent-child relationship, and assess evidence of trauma; Psychologists analyze specific risk factors such as substance abuse or chemical dependency, domestic violence, health status of family members, and the overall family context; Psychologists consider information from other sources, including assessments of cultural, educational, religious, and social factors.
The guidelines are a revised version of the 1999 Child Welfare Psychological Assessment Guidelines (APA, 1999). These guidelines are based on the Ethical Principles of Psychologists and the American Psychological Association (APA) Code of Conduct („Ethics Code") (APA, 2002a, 2010). Guidelines for Psychological Evaluations in Child Protection Matters. <https://www.apa.org/practice/guidelines/childprotection?fbclid=IwAR0rb98EmoPRV3UXZUEo> [29.01.2024].

involved in a therapeutic role for the child or immediate family, which could compromise their objectivity. However, this does not prevent psychologists from giving testimonies as facts regarding the therapy treatment of children, parents, or families. Additionally, during psychological evaluations in child protection, psychologists do not treat any of the evaluation participants as therapy clients.[50]

In an article on expert witnesses, Sacks described three roles that can be assigned to expert psychologist witnesses. The first role is that of the "behavioral educator" who seeks to present a complete and accurate picture of the current state of psychological knowledge.[51] In the second role, the "philosopher-lawyer," the expert makes concessions to the adversarial climate of the courtroom and allows personal values to shape the testimony. He might say, "There's a greater good at stake in this case, and that's, for example, desegregating schools, making sure this kid goes to the right home, etc." ... This, of course, means giving evidence that involves clever editing, selective, overshadowing, exaggerating or obfuscating.[52] The third role is the "hired gun": here the expert essentially "sells out" and capitulates to the conflicting demands of the courtroom. A "hired gun" intentionally frames testimony to help the hiring attorney. Many commentators have criticized experts who are willing to play the role of "guns for hire".[53] Obviously, such action is unjustified from an ethical point of view, however, there are no rules of ethics specifically regulating the professional behavior of forensic psychologists. Nor is the body for disciplinary proceedings of representatives of this profession defined. It should be noted that it is extremely rare for an expert witness who misrepresents research findings to be prosecuted for these actions. Perjury requires lying about verifiable facts. Experts are invited to offer expert opinions, and as opinions are neither true nor false, even highly unusual opinions cannot be described as lies. An expert may be biased unaware of relevant research, or incompetent, but that does not equate to lying.[54] Ideally, expert witnesses summarize research findings in a clear, unbiased manner. One of the ethical dilemmas that expert testimony raises is that psychologists can all too easily get caught up in the flow of the person who hired them.[55]

Psychologists should primarily be committed to their discipline. This is especially important in proceedings involving minors or the protection of their rights. It is the prioritization of the children's best interests that in their cases determines the need for high qualification, specialization, and strict

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50 *Ibid.*

51 *Okoye J. U., Oraegbunam I. K.,* Some pathways for psychology's influence on legal system. African Journal of Law and Human Rights, 3(1), 2019, 48.

52 *Ibid.*

53 *Okoye J. U., Oraegbunam I. K.,* Some pathways for psychology's influence on legal system. African Journal of Law and Human Rights, 3(1), 2019, 48-49. *Margaret Hagen, an experimental psychologist, wrote a scathing indictment of clinical psychologists and other mental health professionals who testified in court as experts. In her book The Whores of Court, Hagan cites several cases where psychotherapists, social workers, and psychiatrists made sweeping claims that have no research support, such as being able to tell whether a specific young child is lying or having a particular memory. Or if someone is experiencing traumatic stress syndrome. She claims that these "magicians" and "self-proclaimed psycho-experts" are often motivated by the money they receive for their testimony, or are missionaries, with a desire to promote a particular cause.*

54 *Okoye J. U., Oraegbunam I. K.,* Some pathways for psychology's influence on legal system. African Journal of Law and Human Rights, 3(1), 2019, 49.

55 Ibid, 48.

adherence to ethical norms of participating psychologists. At the same time, an adequate understanding and analysis of social scientific methods by the court is important, because ultimately it is the judges who must play the role of an effective gatekeeper, they must take responsibility for the study of scientific methods as well.[56] This is a two-way process, on the one hand, psychologists must be able to provide the court with qualified conclusions/testimony relevant to their specialization in juvenile cases, and on the other hand, judges, at the time of making the final decision, must be able to become critical evaluators of the service provided in conjunction with other evidence presented in the case, based on their inner beliefs and the law.

The influence and relevance of psychology to law is enormous, even though psychology is descriptive, law is prescriptive. Whereas psychology tells us how people behave, law tells us how people must behave... Law is achieved through the accumulation of court decisions, psychology progresses through the accumulation of data produced by scientific methods.[57]

8. Conclusion

The important role of the psychologist in terms of effective implementation of the child's right to justice requires the provision of training for relevant specialists by the state agencies (so that they know the peculiarities of working with children, communication and survey methodology, with the help of which the child's trauma will be minimized and obtaining the most objective and exhaustive information, etc.). Although the specialization of psychologists is mandatory according to the CCR, the agency responsible for the training of these persons is not defined, it is unclear how the psychologist's specialization should be assessed by the judges.

It is noteworthy that the general norms regarding the involvement of a specialist and the appointment of an expert are established in the legislation (Articles 204, and 162 of the Civil Procedure Code). `The prerequisites for the psychologist's involvement cannot be exhaustively determined by the law, and as such prerequisites, we should consider the necessity of assessing the child's needs and psychological support, the need to study the child's general psycho-emotional state, evaluate and consider their opinion, etc. The inclusion of a psychologist in the case is a rather broad discretionary power of the court, however, it would be appropriate to single out certain issues, in the study of which the involvement of a psychologist would be recommended, if not in a normative manner, at least by a uniform judicial practice.

It is important to determine the agency responsible for the training/retraining of psychologists in juvenile justice specialization and the development of a quality control system. The role of higher education institutions is also essential. In this regard, steps should be taken both at the internal systemic level of higher education and state agencies in terms of creating the specialization standard and determining the agency responsible for retraining.

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56 Ibid.

57 *Okoye J. U., Oraegbunam I. K.,* Some pathways for psychology's influence on legal system. African Journal of Law and Human Rights, 3(1), 2019, 46.

The right to a fair trial recognized by the 1950 Convention on Human Rights and Fundamental Freedoms (Article 6) and guaranteed by the Constitution of Georgia (Article 31) requires ensuring detailed procedural guarantees in the legislation.

To provide a high standard of justice for the child, in the context of a multidisciplinary approach, the need to involve a psychologist as a specialist/expert in the litigation process is indisputable. Therefore, to protect the true interests of the child, it is important to improve the legislation in this direction and introduce a uniform practice through the definitions of the applicable norms.

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The Content and Structure of the Decision adopted by the Court of First Instance according to the Civil Procedure Norms of Georgia and Germany

Georgian judicial practice indicates that for 25 years of operation of the Civil Procedure Code, in relation to the structure and content a certain legal tradition has been formed.

There is a certain perception of Article 249 of the Code of Civil Procedure of Georgia, which the courts usually apply. The article analyzes to what extent this structural, content and stylistic standard correspond to the requirements of the law and the needs of the addressees of the decision, and how it can be possible to change and improve the existing practice.

Subsequently, the author reviews the relevant norms of Georgian and German law and offers Georgian judges an alternative method of decision structuring. The article also contains some stylistic and content recommendations.

Keywords: *Court decision, structure, style, motivational part, descriptive part*

1. Introduction

The court decision is the final document of the court process which provides the circumstances of the case and justifies the outcome of the trial. For this, the decision must clearly report facts and legal assessment presented by the parties. The purpose of the court is to convince the parties and public of the correctness of the decision. The prime addressees of the decision are the parties to the dispute. The text of their decision ensures an opportunity to judge the correctness of the decision and decide if it is appropriate to be appealed. The addressee of the decision is the Court of the Second Instance, for which the decision is the subject to verification and the source of discerning the motivation of the court. The addressees of the decision are also lawyers who do not have direct contact with a specific dispute (judges, legal consultants, lawyers, scientists) and society on some occasions. According to the interests of all these addressees, the least requirement for a decision is the material facts and legal reasoning to be complete and understandable. This purpose is served by the norms of procedural law on the structure and content of the decision, which we will evaluate in detail below.

The aim of this article is to review the norms and established court practice of the Civil Procedure Codes of Georgia and Germany on first instance decisions in civil litigation cases. Simultaneously, I will refer to the expediency of changing the observed practice and promotion to increase the transparency of decisions.

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2. Norms on the Content and Structure of Procedural Law Decisions

The content and structure of the decision of the Court of First Instance are regulated by Articles 249 of the Civil Procedure Code of Georgia and 313 of the German Civil Procedure Code. To simplify their comparison, separate parts of these norms can be grouped according to the subject of regulation as follows.

CPC Georgia Article 249	CPC Germany Article 313
1. The decision consists of introduction, descriptive, motivational and resolution parts. 2. The introductory part of the decision indicates the time and place of its making, the name and composition of the court making the decision, the secretary of the court session, the parties, representatives, and the subject of the dispute.	The decision contains: 1) naming the parties, their legal representatives and procedural representatives; 2) Naming the court and the judges who participated in making the decision; 3) on the day of the oral hearing 4) the conclusion of the decision 5) factual circumstances of the case 6) Justification of the decision
3. The descriptive part of the decision specifies the claim of the plaintiff, the approach of the defendant to the claim, the circumstances under which the court reaches the conclusions or avoid evidences.	2. The factual circumstances of the case should include the applications of the parties emphasizing their demands and the means of attack and defense related to these demands. The explanation of the situation and the dispute should be indicated on documents in writing.
4. The motivational part of the decision should mention the legal assessment and the laws by which the court was guided.	3. The reasoning of the decision contains the considerations on which the decision is based from a factual and legal point of view.
5. The resolution part of the decision must include the conclusion of the court on the satisfaction or rejection of the claim fully or in part, allocation of court costs, as well as the term and procedure for appealing the decision.	

The German part is translated as literally as possible. I will apply the terms used by the GCPC in the relevant context with reference of German law. So, for example, instead of the "reasoning for the decision" (Entscheidungsgründe), I will use the "motivational part", the factual circumstances of the case (Tatbestand), will be replaced with the "descriptive part", and in place of the "conclusion of the decision" (Urteilsformel), I will apply the "resolution part".

3. Content and Structure of the Decision

Before we discuss the structure of the decision, I will supply all the information that the decision should provide. Since Georgian and German civil procedure law are based on the same principles, this list is essentially the same in both laws. The judicial practice of both countries reveal that despite the differences between the specific norms, the decisions in both Georgia and Germany correspond to this list in terms of content. The differences are only in the sequence and partly, in the style of forming individual parts. Therefore, I think that the decision should contain the information presented below.

1. Information about the actual dispute (court, parties, their representatives, case number, decision date, case review date, etc.)
2. What do the parties demand? What do they want to achieve?
   Here, I mean the claim and the position of the defendant. For example, imposing a payment of 20,000 GEL on the defendant (the demand of a plaintiff) and failing to satisfy the claim (defendant's position)
3. Which factual circumstances are undisputed?
   This part contains the facts that both parties assert in their definitions or one party affirms and another admits the existence of that fact. In German law, the facts are considered undisputed if only one party asserts, another is silent to these facts.
4. Which factual circumstances are in question and what do the parties claim about them?
5. What evidences did the parties present?
6. Which evidence was rejected by the court?
   Here, I mean those evidences which the law excludes from consideration (for example, Article 102, Part 3, Article 103, Part 3 of the Civil Code).
7. What did the court define based on the evaluation of the evidence regarding the contested factual circumstances (in Georgian law, for example, according to Article 105 of the Civil Code)?
   Here, I mean the facts, the existence of which the court has convinced itself.
8. How was the court convinced of the existence or non-existence of this disputed circumstance?
   This refers to the argumentation of the court about its belief in the existence or non-existence of the disputed fact following Section 3 of Article 105 of the Civil Code: “the opinions that are the basis of the internal belief of the court”.
9. Which disputed factual circumstances did the court consider as existing or non-existent on the ground of the principle of competition and the norms on the distribution of the burden of proof?
   Here, I mean the cases when the court itself was not convinced of the existence or non-existence of the fact. In this situation the explanation about the relevant circumstances made by the party bearing the burden of proof is imprecise or the evidences are inadequate.

10. Justification of the result of point 9.

11. Disputed factual circumstances which have not got legal significance for making the decision and because of this the court has neither determined nor considered it determined.
    For example, if the court has already reached the conclusion that in accordance with Article 84 of the Civil Code of Georgia, there has not been an avoidance within a year, the invalidity of the contract due to deception is already excluded for this reason. The circumstances related to actual deception are legally insignificant for making the decision.

12. Explaining lack of decisive significance of a specific disputed fact, i.e. justification of the previous paragraph 11.
    This justification is usually very short ("Because the defendant did not declare the recusal within the specified period, the invalidity of the transaction is excluded. Therefore, the court leaves open the question about occurring fraud contract.").

13. Legal Views of the Parties

14. History of the process
    Here, I mean activities of procedural importance, such as a motion, extension or limitation of a claim, recusal, recognition.

15. Provision of law by the court on the basis of facts established or deemed to be established.
    Here, I mean the actual process of subsumption which includes comparing the factual circumstances with the norms of law and explaining the norms of law.

16. Conclusion on Claim, Execution and Procedural Costs.

17. Reference to the term and procedure for appealing the decision.

If we compare this list and the norms mentioned above, we will notice two things:

First of all, it is obvious that in German and Georgian law, the introductory parts and conclusion are neither completely identical in content nor in their approaches to the structure of the decision. In the German decision, the conclusion pursues the introduction while in the Georgian one it comes after the motivational part. The German decision does not indicate an appeal. This reference is met following the motivational part. There are other minor differences in content, but not essential and we will not discuss them in this paper.

The second and more important issue is that neither the German nor the Georgian legal norm specifically mentions all the suggested points and applies only general guidelines, which is a common phenomenon in the context of such legislative techniques. In German law, this ambiguity does not cause problems at all because in accordance to a very old and established legal tradition, the basic principle of structuring a decision is that legal argumentation should be only in the motivational part. The future lawyer gets used to this kind of structure in a student period. Such uniformity of judicial practice, of course, facilitates the orientation of the "trained" reader in the text of the decision.

In Georgian law the situation is not so clear. If we interpret the text of Article 249 of the Civil Code in a narrow sense, some of the points mentioned above will not be included in the decision at all.

For example, the legal opinion of a plaintiff is neither "the established circumstances of the case" nor "the claim of the plaintiff". Therefore, if we want to consider the legal opinion of the plaintiff within the scope of Article 249 of the Civil Code, we must interpret the "circumstances of the case" very broadly or refer to "the claim of the plaintiff" or another legal argument because saying nothing about the legal opinions of the parties in the decision can't be a serious alternative.

I will point out another problem: when the norm tells us that "circumstances established by the court" belong to the descriptive part, what does the legislator mean: the circumstances established on the basis of inner belief, the circumstances found already established or the entire content of the case? If specifically established or considered established circumstances are implied, should the corresponding justification be in the descriptive part?

Here, I will indicate the examples and note that a number of problems relating to the explanation of Article 249 of the Civil Code and structure of a decision concern the separation of the descriptive and motivational parts. Before I share my opinion about these issues, I will review the law practice of both countries regarding the content and structure of the descriptive part.

4. Descriptive Part

4.1. Germany

Unlike the Civil Procedure Code of Georgia, the German Code of Civil Procedure does not refer to an evidence or its assessment at all. The norm deals only with the statements of the parties (Anträge, in Georgian terminology "request" and "the position of a claimant" in a narrow sense) and means of an attack and a defense. The latter refers to the explanations of the parties regarding the factual circumstances in order to substantiate their own position (in the terminology of the GCPC, the factual circumstances confirming the request and the arguments). The German procedural code does not provide the factual circumstances determined by the court and the evaluated evidences in the descriptive part. The descriptive part is neutral with respect to disputed circumstances. The court does not convey its approach to the burden of proof or any other legal issue.

The established structure of court practice in Germany is as follows:[1]

1. Introduction

   The introduction usually consists of one very general sentence. For example: "The parties dispute the validity of the will to terminate the employment contract".[2]

2. Undisputed factual circumstances

   This section contains the facts asserted by both parties in their pleadings and the facts that one part affirms but another is silent to them.

   This part does not convey the facts that one part clearly disputes but it provides an inappropriate explanation.[3] For example, if the plaintiff requests paying the price of the purchase on the basis

[1] For details see BeckOK ZPO/Elzer, 46. Ed. 1.9.2022, ZPO § 313 Rn. 138 ff. Also, Commentary on the Code of Civil Procedure, Selected Articles / Hagenloch, 2020, p. 952-967 (in Georgian).

[2] Anders/Gehle, Das Assessorexamen im Zivilrecht, 14. Auflage, A Rn. 43.

that the defendant has not paid it yet, and the defendant claims without any specification that the price has been paid, depending on the distribution of the burden of proof, the court will ultimately determine that the contention of the defendant is insignificant and when making decision the non-payment of the price will be taken into consideration. In such a case, the court will not set the fact of non-payment in the undisputed factual circumstances, and in the disputed circumstances will convey the explanation of the defendant that he paid the price. The motivational part includes a legal assessment of this definition of the defendant and the determination of its impropriety and insignificance.

3. Contested definition of a plaintiff
   Here, the court presents the plaintiff's explanation of the disputed facts. The plaintiff's legal opinions are briefly reflected here.

4. The so-called "Process History"
   This part contains the facts of procedural importance, such as changing the claim, partial rejection of the claim, partial recognition of the claim.

5. Requests of the parties
   This part reflects what specific legal result the plaintiff wants to achieve and the position of the defendant in this regard. for example:
   "The plaintiff demands the defendant to be ordered to pay 2,000 GEL to the plaintiff.
   The defendant requests the claim to be dismissed."

6. The contested definition of the defendant
   Like the contested definition of the claimant, the definitions and legal opinions of the defendant are presented here.

7. General reference to the explanations of the parties and the documents of the criminal case. Such a reference is widespread however, the scientific literature considers it quite rightly unnecessary.[4]

From the structure of the descriptive part presented above, it is clear that the descriptive part does not contain any legal assessment. In simple terms, the descriptive part informs the court about the facts, the desires and legal opinions of the parties, the procedure from the beginning of the process to the decision. The motivational part includes the approaches of the court to the mentioned above, the evaluation of the evidences and the legal estimations of facts. An exception is the application of the third part of Article 138 of the Civil Code which takes place latently when undisputed circumstances are separated. According to this norm, the facts that one party does not dispute will be considered admitted if the intention to dispute does not derive from other explanations of this party. By belonging such facts to undisputed factual circumstances, the court considers them recognized without referring

[3] Feskorn in: Zöller, Zivilprozessordnung, § 313 Form und Inhalt des Urteils, Rn. 13.

[4] See.For example, Anders/Gehle, Das Assessorexamen im Zivilrecht, 14. Auflage, A Rn. 73; MüKoZPO/Musielak, 6. Aufl. 2020, ZPO § 313 Rn. 15.

to this norm. As this is a common practice, it is clear to the parties why this circumstance was found to be undisputed in the factual circumstances.

4.2. Georgia

The structure of the descriptive part in Georgian judicial practice is as follows:

1. Claim
   Request ("LTD A must be charged of paying 20,000 GEL to LTD "B")
   Factual circumstances and legal arguments which the plaintiff bases the claim on ("The claim is based on the following factual circumstances: ..."). Here is conveyed how the plaintiff described the circumstances of the case (factual side) and why he/she thinks that he/she a disputed claim based on these circumstances (legal side).

2. Defendant's position
   Defendant's position in a narrow sense ("the defendant did not recognize the claim").
   Factual circumstances and legal arguments on which the defendant bases the rejection of the request ("The defendant indicates that ...").

3. Factual circumstances
   3.1. Undisputed Factual Circumstances
   3.2. Established Disputed Factual Circumstances

In this sub-chapter, the court conveys which circumstances of the case it was convinced of based on the evidence, and which circumstances it considered to be established or not established depending on the burden of proof.

The court indicates the evidences in the relevant place when referring to the disputed circumstances. The court presents the pleadings (for example, the recognition of the claim) in the first and second subsections.

As we can see, the main difference between the German and Georgian decisions is that the descriptive part in the Georgian decision is not neutral to the facts.

When interpreting Article 249 of the Civil Code, the courts consider that the motivating part should be restricted by the incorporation of the law (subsumption) in a narrow sense. Following the text of the norm, such an understanding is completely possible. However, there is one problem directly related to such an understanding.

Such a division between the descriptive and motivational parts leads to the fact that the court is forced to speak about substantive law issues in the descriptive part, particularly, the composition of the norm is used as the basis of the request and special rules on the burden of proof. In this way, the actual legal argumentation is partially replaced with the descriptive part. In other words, the court, before starting the legal evaluation of the request, precedes the narration and in the descriptive part tells us that the existence of a specific circumstance is legally important, why it is important and who had to prove the facts. Not infrequently, this legal argumentation is an essential and decisive part of the legal assessment of the case. As a rule, the court is forced to mention the same issues once again in the

motivational part. I think that this complicates the understanding of the decision and is inconsistent with the division of functions between the descriptive and motivational parts. In addition, there is another peculiarity in Georgian judicial practice, which I consider problematic, arising from the structure described above. At the beginning of the descriptive part, courts present the positions of the parties in detail. Because a part of the factual circumstances, not rarely a large part, is indisputable, we find a certain part of the already described circumstances once again in the sub-chapter "Undisputed factual circumstances". The reader is forced to read the same story twice.

4.3. Opinion Regarding the Structure and Content of the Descriptive Part

Despite the problems mentioned above, the observant reader has an opportunity to get aware about the factual circumstances of the case and the reasoning of the court within the existing practice. Nevertheless, I believe that the transparency of judicial decisions can be improved by several structural changes.

I have already mentioned above that the 3rd part of Article 249 of the Civil Code is not formulated so specifically that the scope of the descriptive part can be easily defined. There is no similar problem with the introductory, motivational and resolution parts. The relevant norms (Parts 2, 4 and 5 of Article 249 of the Civil Code) are quite clearly drawn up. Therefore, I consider it appropriate to define the volume of the descriptive part with a negative separation through a systematic explanation.

The descriptive part should contain everything that is necessary for making a perfect decision, and simultaneously, it does not belong to the introductory, motivational and resolution parts. The resolution and introductory parts are completely unproblematic in this respect. As for the motivational part, the law indicates that the legal assessment and the laws by which the court was guided should be mentioned there. Therefore, any legal assessment ought to be excluded from the descriptive part. An exception to this principle should be made only in relation to rejected evidences because the law clearly designates that the relevant considerations should be ptovided in the descriptive part. The circumstances considered to be established discerning the burden of proof, should be discussed in the motivational part because it is a legal assessment. The direct result of such an interpretation of Article 249 of the Civil Code is that "established factual circumstances" are given a wide meaning. It should mean not only the circumstances which the request or acceptance is based on, but the circumstances of the case in a broad sense, i.e. all material and statements before and during the process. Establishing by the court means not only defining the existence of a factual circumstance, but also determining what the parties have mentioned about the circumstance in the proceedings and how they assess it as a matter of law.

In accordance with such a definition of Article 249 of the Civil Code, the structure and content of the descriptive part should be as follows:

1. **Claim and plaintiff's position**

   The presentation of the positions of the parties should be very brief. It is quite enough for the court to convey the request ("The plaintiff demands from the defendant to be paid 20,000 GEL"), the ground of this request ("The plaintiff bases the claim on the agreement of

purchasing a car"), the position of the defendant ("The defendant does not recognize the claim") and a short reference why he does not recognize the lawsuit ("He claims that he has already paid the price of purchase").

2. Undisputed factual circumstances

Undisputed factual circumstances must include all circumstances that are indisputable because both parties uniformly describe it or because one party asserts it and another party admits its existence (Article 131 of the Civil Code). It is not necessary to specifically indicate why these facts are indisputable. It is enough to specify the relevant page of the case. As a rule, the narrative should be chronological. It is better for the judge to point out the disputed circumstances in a very brief manner and in a chronologically correct order of this part (for example: "At 5.22 o'clock, after damaging the car, the plaintiff contacted the defendant's employee G. The content of this conversation is disputed between the parties (see below ...)").

Here I would refrain from quoting the rule established in German practice, that in indisputable circumstances are also conveyed those circumstances which the opposite party is silent to. Unlike the German Civil Procedure Code, the Georgian Civil Procedure Code does not include a norm that equates such silence with direct confession. Practically, based on the principle of competitiveness, such silence will lead us to confession in Georgian procedural law. However, I think that due to the absence of a specific procedural norm, it is not appropriate to present such circumstances directly as undisputed circumstances.

Taking into account the 4th of Article 201 of the Civil Code (the obligation of the defendant to express his/her opinion on the factual circumstances in the reply) and the first and second parts of Article 217 of the Civil Code (the right of the parties to make an explanation after the judge has established the disputed and undisputed circumstances), the situation described here (silence of the party to the factual circumstances cited by the opposite part) should not be frequent.

3. Disputed factual circumstances

3.1. An explanation of a plaintiff about disputed circumstances

3.2. An explanation of the defendant about disputed circumstances

In these parts, a brief presentation of the explanations of the parties is sufficient, if, depending on the specifics of the case, the literal presentation of the explanations is not necessary. It is not essential to emphasize that the defendant denies the existence of the disputed circumstances presented by the plaintiff, and on the contrary, that the plaintiff denies the existence of the disputed circumstances presented by the defendant. This follows from the fact that the explanations of the parties are included in "controversial factual circumstances".

3.3. Disputed factual circumstances established by the court

In this part, the court must indicate only the circumstances that the court has established based on the evaluation of the evidence, and the evidence on the ground of which it has established these circumstances.

Example: “According to the following evidence, the court found that the defendant gave the plaintiff 2,000 GEL on February 25, 2018: the testimony of witness G (the report of the meeting, p. 4, p. 134), handwritten note on the payment of the amount (p. 25)”).

It is better to provide the process of evaluation of the evidence in the motivational part. At first sight, such a distribution contradicts the requirement of Article 249 of the Civil Code that “legal assessment” should be mentioned in the motivational part, which, in a narrow sense, means only the description of the relationship of the law. However, the possibility of providing the evaluation of evidence in the motivational part is indicated by the 3rd part of Article 249, which emphasizes that in the descriptive part should be ‘’briefly’’ indicated “the evidence on which judicial conclusions are based”. Briefly indicating the evaluation of the evidence in many cases, particularly assessing the counter-testimony of witnesses is completely impossible. The court evaluates the evidence for its inner conviction hinged on their comprehensive, complete and objective review, as a result of which it draws up a conclusion on the presence or absence of circumstances important to the case (Part 2 of Article 105 of the Civil Code). The opinions, which are the basis of the inner conviction of the court, must be provided in the decision (CPC Article 105, Part 3). Given these requirements, it is difficult to convey the basis of the internal belief of the court (for example, about the reliability of the testimony of a witness) with only a short reference. The disputed circumstances, which the court did not determine due to a lack of legal significance or did not determine directly according to the evidence, are considered in the motivational part.

I don't find it necessary to assign a name to the separate parts of “disputed factual circumstances”. It is enough to number (3.1, 3.2, 3.3) and start the narration accordingly (“The plaintiff explains that ...” or “The plaintiff claims the following: ...”, “The court established the following factual circumstances: ...”).

4. Legal opinions of the parties

The legal views of the parties should be provided here in more detail than in the first two subsections of the descriptive part. It is not mandatory to quote the arguments of the parties literally. It is necessary and sufficient to convey the essential meanings of the arguments of the parties and indicate the norms which the parties base their demands and objections on.

5. The evidence rejected by the court

In this subsection, the court must indicate which evidence was not taken into account and justify the reason. Here are considered the evidences which cannot prove the factual circumstances following the special procedural norms (Part 3 of Article 102, Part 3 of Article 103 of the Civil Code).

The structure of the descriptive part proposed here has one important advantage over current practice. Within this structure, the court is not forced to mention legal issues in the descriptive part. For better clarification I will give one example from Georgian judicial practice:

The defendant states that the claim of the plaintiff is obsolete. The plaintiff disagrees with him on this issue however, he does not provide any specific explanation or provide any evidence to the court about the attempt to satisfy the request before the expiration of the statute of

limitations. Based on the burden of proof and the principle of competition, the court stated that there was no attempt to satisfy the claim. Discussing the beginning of the term and the reasons for being the circumstances established by it, the court provided the descriptive part in the subsection "disputed factual circumstances".

On this occasion, following existing practice, the court was forced to discuss legal issues in the descriptive part, which contradicts the function of the descriptive part. It would be much better if in the descriptive part the court had mentioned the facts provided by the parties and the way of their legal evaluation. In the motivational part, the court could have noted and justified the existence of the claim, evaluated the explanations of the defendant as insufficient and proved that the claim was outdated and must not have been satisfied.

4.4. Obligation to "Briefly" Describe the Circumstances of the Case

Both Georgian and German law instruct the judge to briefly convey the circumstances of the case in the descriptive part. Briefly conveying, of course, requires some intellectual work. The judge has to summarize and structure the explanations of the parties, focus on the important issues and omit unimportant details. Providing the explanations of the parties without shortening is much easier for the court but it is exhausting and complicating for a reader to understand. That is why the legislator instructs the judge to be concise.

It is difficult to define in detail what "briefly" means. The legislator entrusts the judge to summarize the circumstances of the case. At least a few general principles can be distinguished:[5]

Literal rendering of any document or explanation is justified only if the text is short or the particular conceptualization is legally important.[6]

For example, if the parties have signed a purchase agreement and do not dispute the fact of signing the agreement, its content and explanation, then it is not appropriate to quote the text of this agreement literally. If the parties disagree on the content of the contract, it is acceptable to quote the part that was ultimately relevant to the decision.

Legally important circumstances should be well described. A legally insignificant circumstance, which any party considers legally appreciable, can be very briefly provided.[7] The judge should not mention the facts and details, which according to the opinion of the parties, have no legal importance for making the decision.[8]

It is appropriate to refer to any page or document in the case, but it does not change the provision of the essential circumstances of the case and the legal arguments of the parties. The text should make the decision clear.

In general, the judge should always keep in mind that no one reads the decision of the court for getting pleasure or intellectual exercising, therefore, the time required to read and understand the decision should be shrunk to a minimum.

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5 See also, BeckOK ZPO/Elzer, 46. Ed. 1.9.2022, ZPO § 313 Rn. 150.
6 Anders/Gehle, Das Assessorexamen im Zivilrecht, 14. Auflage, A Rn. 47.
7 Anders/Gehle, Das Assessorexamen im Zivilrecht, 14. Auflage, A Rn. 40.
8 MüKoZPO/Musielak, 6. Aufl. 2020, ZPO § 313 Rn. 12.

4.5. Separation of legal assessment and description of the circumstances of the case

As I mentioned earlier, the descriptive part serves to provide the circumstances of the case. The legal arguments of the parties also belong to these circumstances. According to them, in the descriptive part, the court does not express its own opinion, but only repeats the arguments of the parties. The legal assessment and argumentation of the court must be provided in the motivational part.

Unfortunately, in Georgian judicial practice we meet the legal assessment and the determination of the fact not sufficiently separated from each other. As a result of this, in the descriptive part the court sometimes "determines" what cannot be determined as factual circumstances.

For example, the court determines that the defendant violated the obligation arising from the loan agreement. The fact that could be established regarding this case was the payment of money (cash or money transfer) at a certain point in time. As for the proper performance of the contract, it depends on the content of the contract, relevant legal norms and factual circumstances. A finding that a person has breached a contract is a legal assessment, not a factual description. In the subsection of the descriptive part "Determined disputed factual circumstances", the following sentence "The obligations assumed by the assignment agreement shall be considered fulfilled by T." is not correct. This proposal is also the result of a legal assessment. Fulfillment of an obligation is not a circumstance that can be proved in reality, without the interpretation of the requirements of the contract and the law, and without reference to the law. I note that in the motivational part of the cited decision, the court explained in detail and very convincingly why it considers the obligations fulfilled. The only problem is that the court informed us about the result of this justification in the wrong place, in the descriptive part, in the form of "established factual circumstances".

Another notable example of indivisibility of facts and assessments is when the court "states" that the agreed default interest is not reasonable. The reasonableness of the default interest is not a factual circumstance that can be determined by the court. Actually, the court considered the amount of default interest unreasonable. In this particular case, the court also substantiated its assessment in the motivational part. Thus, this decision is also justified in the end however, it is confusing due to the improper separation of facts and assessments.

5. Motivational part

5.1. Germany

In German decisions, the pleadings begin with a brief summary introduction, in which the court informs about a conclusion on each claim or counterclaim.[9] For example: "The claim for paying the price of the purchase is admissible and substantiated in the amount of 12,000 euros. The counterclaim is admissible, but unsubstantiated."

Then, in separate subsections, the court explains why the claim should be satisfied or rejected. Individual subsections are separated from each other only by numbering. The use of titles is not accepted.

[9] BeckOK ZPO/Elzer, 46. Ed. 1.9.2022, ZPO § 313 Rn. 216

Each sub-chapter begins with a statement which norm provides a plaintiff with the right to claim.[10] If the claim is not satisfied, the court will consider the claim separately, taking into account all the norms that the plaintiff indicated or even without the reference of a plaintiff, based on the presented facts.[11]

Considering the basis of each claim, the court first establishes the legal requirements for the claim and then sequentially checks if these requirements are met or not. Evaluation of specific evidence is done by checking the premise that these evidences are supposed to confirm. If a particular claim does not exist due to the non-fulfilment of one of the requirements, the examination of the other requirements is not accepted, however, sometimes the court indicates that the claim does not exist because of the non-fulfillment of some other requirements. Such an additional indication is not prohibited but it is not necessary either.

As part 3 of Article 313 of the Civil Code of Germany requires brevity of justification, abstract reasoning not directly related to the case is unacceptable in the motivational part. Despite this fact, it is possible to find the solutions in which this rule is not strictly observed.

Detailed explanation of the reasoning of a particular legal or factual issue should correspond with the complexity of the issue. If there is an established opinion of the Supreme Court on a specific legal issue, then a brief presentation of this opinion and reference to the relevant decision is completely sufficient.[12] If the court relies on an opinion different from the existing judicial practice, then the explanation should be very accurate.[13]

After reviewing the claims, the court gives brief substance to the costs, enforcement, and, if necessary, leave to appeal.

5.2. Georgia

According to the existing judicial practice, the motivational part includes only the legal assessment, thus, it is essentially different from the German judicial practice.

Sharing my opinion about the descriptive part, then in addition to the subsumption, the motivational part should provide how the court was convinced of the existence of this or that disputed fact, which disputed facts the court considered established and which disputed factual circumstances were not necessary to establish due to a lack of legal significance.

On the other hand, the requirements for the motivational part are the same in German and Georgian law.

The legislator in the 3rd part of Article 249 of the Civil Code does not emphasize the necessity of shortness of justification, however, based on the function of motivational part and the decision in general, I think that the judges in Georgia should strive to conduct themselves in a way that can convince the parties.

Following the principle of transparency, it is necessary the motivational part to be well structured. In this regard, it would be good to share the German experience. I will focus on several issues:

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10 Anders/Gehle, Das Assessorexamen im Zivilrecht, 14. Auflage, B Rn. 36.
11 Anders/Gehle, Das Assessorexamen im Zivilrecht, 14. Auflage, B Rn. 40.
12 Anders/Gehle, Das Assessorexamen im Zivilrecht, 14. Auflage, B Rn. 30.
13 MüKoZPO/Musielak, 6. Aufl. 2020, ZPO § 313 Rn. 17.

It is essential to start the legal assessment of the claim with a conclusion ("The plaintiff has the right to demand 200,000 GEL from the defendant according to the article of the Civil Code ... or "The claimant's demand for paying 200,000 GEL by the defendant does not derive from the article of the Civil Code ...").

After that, it is appropriate to quote the relevant norm and list the preconditions for the request based on this norm. Subsequently, the court checks and substantiates the presence or absence of each precondition by referring to other norms, explaining and comparing them with the factual circumstances.

In the current Georgian decisions, the motivational part begins with a summary conclusion ("the claim should (not) be satisfied"), which is appreciated.

As for the legal assessment of individual requests, we sometimes meet less structured texts. There are cases when the assessment begins not with a conclusion, but with adducing a norm. Often this norm is not even the basis of the discussed requirement, but a general norm. There are also cases when the preconditions of the decisive norm of the dispute are not clearly established after the citation of the norm.

It is advisable to pay a lot of attention to the issues which the parties are disputing about. As for the rest of the issues, it is enough to mention them shortly.

For example, if the parties do not dispute the existence of a claim, it is not necessary to discuss these points in detail and apply to judicial practice and commentaries. If the parties do not disagree on the conclusion of the contract, the following sentence is not necessary:

"According to Article 327, Part 1 of the Civil Code of Georgia, the contract is considered concluded if the parties have agreed on all its essential conditions in the provided form".

Unfortunately, in current practice such cases are not rare.

It is also inappropriate to give a detailed account of the accepted part of the claim. In general, with regard to the motivational part, one should always take into account what is not the function of the decision.

The function of the judgment is not to provide a reader with legal education or to show a special discipline of the judge in the given field of law. Therefore, the used texts, which we sometimes find in decisions, are completely ineffective. In this regard, I will give two examples from Georgian judicial practice:

In the first case, the issue concerns the validity of terminating the employment relationship, taking into account Article 37 of the Labor Code. Before referring to the content of this article, the court reviews Article 42 of the Constitution, Article 2 of the Civil Code, Article 115 of the Civil Code, Article 30 of the Constitution, indicates the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Fundamental Freedoms, the African Charter on Human and Peoples' Rights and the Charter of Fundamental Rights of the European Union.

This part of the decision is more than two pages, and it is completely insignificant for the reasoning of the decision. Of course, in certain cases and in the appropriate context, all this can be important. For example, if one of the parties believes that the applied norm is unconstitutional, the court must justify why it does not agree with this opinion. Ignoring this issue due to the second part of

Article 6 of the Civil Code is not allowed. However, the above decision does not indicate that there was any dispute in this regard.

According to the same considerations, it is unnecessary to make a general discussion about the principle of private autonomy and its scope, when the court uses a specific norm for the refusal of a contract. The text of this norm conveys that the legislator does not consider the principle of private autonomy to be limitless.

Of course, I do not underestimate the importance of general principles. It may be necessary to apply them when explaining or comparing a specific norm. However, in time of such need, it is better to start with a specific norm and then invoke general principles within the legal argumentation. The abstract introduction only creates the impression that the court is trying to raise the qualifications of an inexperienced reader, which prompts the qualified reader to "skip" the text.

6. Decision style

I will focus on several important issues related to decision-making style:

In German decisions, we meet the full name of the plaintiff and the defendant only in the introductory part. Then the court refers to them only as "plaintiff" and "defendant", which makes the decision very short and easy to read. I think it would be good to implement this in the Georgian court practice. Currently, in Georgian decisions the part is mentioned as according to its role ("plaintiff" or "defendant"), as well as by its full name ("Batumkhidmsheni", joint-stock company).

I also consider appropriate the common method for contracts, when the author determines how he will refer to this or that person or object later. If a particular person, who is not a part to the dispute but is frequently met in the decision, it is pertinent to indicate in parentheses how we refer to him/her later.

Example: There was an agreement between the plaintiff and the insurance company "New Georgian Insurance" LTD (next time as "the insurer") on the insurance of the vehicle owned by the plaintiff.

The same technique can be used for other names. For example, if the only insurance contract is mentioned in the case, it would be better if the contract is referred to only once, in the beginning, in legal name and with the date.

In Georgian judicial practice, it is widespread to clearly separate the evidence which the court relied on. It is accepted that the description of a circumstance should be followed by the text in the way of skipping a line:

"The court relies on the following evidence:

- a claim
- statement of defense
- Order of June 1, 2018
- explanations of the parts"

The judge often indicates the relevant volume and sheet of the case. The obligation to refer to the evidence is stipulated by Article 249.

As for the volume and style of this reference, I think that these references should be formulated in the way not to be interrupted. First of all, it would be good if we could replace the standard introduction "the court relies on the following evidence" with a simple "see". Alternatively, a comma can be used instead of giving a new line for each argument. All this reference can be visually separated from the main text by using a smaller font size. It would be ideal to move the references to a footnote.

In Georgian judicial practice the full rendering of the name of the law is accepted. Abbreviations are usually used in German decisions (BGB, ZPO, StGB). If the law is not very widely known, the courts use the full name at the first mention and add the abbreviation in parentheses, then apply only the abbreviation (for example: Gesetz zur Sicherung der Sozialkassen im Baugewerbe vom 24.05.2017 (im Nexten: SokaSiG)). Such abbreviations, I think, should be introduced in Georgian practice for those laws that have a particularly long name. Of course, this does not concern the Constitution of Georgia. The abbreviation can be inappropriate and less effective from the perspective of text economy.

It is accepted practice to list the norms by which the court was guided after the conclusion in the motivational part. This might be due to the fact that Article 249 of the Civil Code literally instructs the judge to note these norms however, I doubt that the legislator meant such a list. In any case, the list has less practical value.

The court should indicate the same norms in the appropriate place in the next text of the motivational part, so, even without this list it is clear to the reader which norms the court was guided by. The probability that the reader will first "revise" the listed norms and then continue reading, is very small.

In Georgian court decisions, we often come across the sentences which express a judicial opinion.

Example: "Based on the legal assessment of the established factual circumstances, the court believes that the claim of the plaintiff Ministry of Economy and Sustainable Development of Georgia should not be satisfied."

Such phrases are relatively rare in German decisions. As a rule, courts use such an introduction when the evaluation of the evidence is based on a complex and multifaceted analysis or when it is about a very controversial legal issue.

The author of the entire decision is the court. Therefore, the reader knows that those parts of the text, which the court does not present as an explanation or opinion of any part, express the opinion of the court. Thus, in the sentence quoted above, it was not necessary to indicate that the said is a judicial opinion.

Of course, there are situations where pointing at the court as a source of the opinion is appropriate. Especially when the legal issue is complex and the positions of parts are well-argued, such an emphasis shows reasonable skepticism about one's position and respect for the parties.

This note also applies to other similar introductory phrases, such as "the court indicates that" and "the court notes that".

In addition, the sentence quoted above is the best example of unnecessary volubility. In particular, it was not necessary to indicate that the court came to the conclusion "on the basis of the legal assessment of the established factual circumstances". It was already clear what basis the decision is made on. Also, it was not in need to indicate the full name of the plaintiff and emphasize that the claim was of the plaintiff. In the end, only the last four words of the entire sentence were necessary: "The claim should not be satisfied."

It is appreciable that unlike the German practice, courts in Georgia use a numerical structure (1., 1.1, 1.1.1, etc.) for designing the decision. The descriptive part of the German decisions is not divided into subsections at all, which makes it impossible to directly refer to the descriptive part in the motivational part (for example, "see 1.1.2"). In the motivational part, mixed numbering is used in German decisions (I. A. 1. a. etc.), and only the last indicator of the structure is indicated before each subsection (for example, a.). The drawback of such a practice is that it is not obvious at first glance which subsection the text belongs to.

Finally, I want to point out that it would be good if the names in the published decisions were anonymized with only one hyphen (for example, "m-s"). Currently, anonymization seems to use as many hyphens as there are letters in the name ("m----------s"). This defeats the purpose of anonymization and makes reading difficult.

In summary, we can say that there are some essential differences in the structure and content of the decision in German and Georgian law. Nevertheless, the basic principles are similar, and in order to improve transparency and readability, it is appropriate to take into account the German judicial practice in certain aspects.

7. Conclusion

In summary, we can say that there are some essential differences in the structure and content of the decision in German and Georgian law. Nevertheless, the basic principles are the same, and in order to improve transparency and readability, it is appropriate to take into consideration the German judicial practice in certain aspects.

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Analysis of the fulfilment of obligations under the EU – Georgia Association Agreement in the field of Occupational Safety***

(Legislative Compliance and Effectiveness of Implementation)

The purpose of this study is to analyze the fulfilment of the obligations assumed by the Association Agreement with the European Union in the field of occupational safety, the legal compliance of Georgian legislation with the directives of the Council of Europe and the conventions of the International Labor Organization, and the effectiveness of the enforcement of labour safety standards at different stages of the labour legislation reform implemented in 2015-2023.

The analysis of the achievements and challenges of the latest reform in the field of occupational safety is based on the analysis of annual reports of international organizations, labour inspection, as well as the results of written and oral surveys of stakeholders in the field of occupational safety, which highlight proposals for legislative improvement in the field of labour inspection and recommendations for improving the effectiveness of enforcement.

The results of the study were generalized in the form of the latest challenges and recommendations in the field of occupational safety, which determine the proposals for the expansion of labour legislation and the improvement of the effectiveness of enforcement.

Key words: *labour safety, labour inspection, informal employment, labour law reform, safe working environment, informal employment, international labour organization, heavy, harmful and hazardous work.*

I. Normative Reform of the Occupational Safety System

1. Stages of Reform and Main Achievements in 2015-2023

EU policies encourage and promote social dialogue at the European level. EU regulations in the field of social policy include minimum standards of labour legislation in the direction of occupational

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safety, equality, health, and prohibition of discrimination. The most important formative element of social policy is the policy of social security law.

According to Article 7 of "International Covenant on Economic, Social and Cultural Rights"[1], where Georgia is a party, the right of each individual to just and favourable conditions of work is recognized, which, among other legal aspects, implies safe and healthy working conditions. According to the official commentary sources of this article of the Covenant, the formation of an effective model of labour inspection is most important for meeting the stated requirement.[2]

The deregulation model chosen by the Labour Code of Georgia adopted in 2006 was based on the assumption that it would help attract investments and create new jobs. Based on the code, the existing laws on collective agreements, labour disputes, employment conditions, labour inspection, employment agency, and labour administration of Georgia were abolished.[3] Along with the economic policy of deregulation of the labour market due to ideological views[4], the mechanisms for the protection of workers' rights at different levels were abolished.[5] Since the adoption of the Association Agreement, the state has initiated the gradual restoration of labour market institutions. Several progressive actions have been taken, and proactive measures aimed at implementing legislative reform and restoring labour inspection have been undertaken.[6]

Along with the obligations under international agreements, EU-Georgia Association Agreement[7] became the catalyst in the process of forming an effective labour inspection system. Since then, the Georgian state has been gradually and consistently forming the occupational safety system harmonized with international standards. In 2018-2023, Georgia went through several stages of radical transformation in its journey towards forming an occupational safety regulatory framework and its enforcement mechanism.[8]

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1 International Covenant on Economic, Social and Cultural Rights, December 16, 1966, Art. 7 (b) <https://matsne.gov.ge/document/view/1483577?publication=0> [05.05.2024].

2 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 7 April 2016, 44th session, E/C.12/GC/23, <https://www.refworld.org/docid/5550a0b14.html> [05.05.2024].

3 See the critical opinions on the abolition of labour inspection – Human Rights Education and Monitoring Center (EMC), „An Assessment of the Labour Inspection Mechanism and a Study of Labour Rights Conditions in Georgia", 2017; Georgian Trade Union Confederation, „What consequences can the lack of labour inspection lead to? April 28, 2014.

4 *Diakonidze A.,* Labour and Employment Policy in Georgia – Facade Institutions, International Actors and Fighting of Ideas, 2018, Reference: Labour Inspection Service Assessment, Social Justice Center, 2021, 11. Also see: *Chanturidze G.,* Abolition of Labour Inspection in Georgia Consequences for Workers and the Economy, Friedrich-Ebert-Stiftung Georgia, 2018, 3, <https://library.fes.de/pdf-files/bueros/georgien/14675.pdf> [05.05.2024].

5 For the detailed information about the consequences of the lack of labour inspection see: Labour Inspection Service Assessment, Social Justice Center, 2021, 11-12, with further references. Also see: *Chanturidze G.,* Abolition of Labour Inspection in Georgia Consequences for Workers and the Economy, Friedrich-Ebert-Stiftung Georgia, 2018, 4-5, <https://library.fes.de/pdf-files/bueros/georgien/14675.pdf> [05.05.2024].

6 ILO, Georgia's Parliament adopts historic labour law reform package, 2020, <https://www.ilo.org/moscow/news/WCMS_758336/lang--en/index.htm> [05.05.2024].

7 Labour Inspection Service Assessment, Social Justice Center, 2021, 13.

8 See Annex #2 the letter of Georgian Trade Unions Confederation to Ms. Salome Kurasbediani – the Deputy Chair of the Environmental Protection and Natural Resources Committee.

By the Association Agreement, Georgia undertook the obligation of legal approximation of domestic labour regulations with the EU Acquis.[9] As per Articles 229.2 and 229.3 Georgia is obliged to respect, promote and realise in its legislation and practice, as well as in its whole territory the internationally recognized core labour standards as embodied in the fundamental International Labour Organization (ILO) conventions. Georgia committed to actively incorporating into its legislation and diligently implementing the fundamental, priority, and other ILO conventions ratified by Georgia and the member states of the European Union.[10]

Following the signing of the Association Agreement, successive Association Agendas for the periods of 2014-2017, 2017-2020, and 2020-2023[11] were formulated which outlined plans for establishing the national inspection model.

The establishment of the labour inspection in Georgia was preceded by the adoption of the labour conditions monitoring program. On February 5, 2015, the Government of Georgia adopted an Ordinance "On the Approval of the Working Conditions Monitoring State Program,"[12] which aimed at preventing the violation of occupational safety norms and assisting employers in ensuring a safe and sound environment.[13] The target group of the program was employers, who had agreed to participate in the program. The objectives of the program were raising awareness, informing employers and employees, and consulting on identified violations.

In 2015, the Department of Labour Conditions Inspection was established at the Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia[14]. Its mandate allowed for monitoring labour safety upon the employers' preliminary approval and giving unbinding recommendations.[15]

In 2016, the Working Conditions Monitoring State Program was renamed as Labour Conditions Monitoring State Program. Moreover, upon approval, along with inspecting occupational safety and

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9 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. Chapter 14. Employment, Social Policy, and Equal Opportunities <https://matsne.gov.ge/ka/document/view/2496959> [05.05.2024].

10 The list of priority conventions of ILO <https://www.ilo.org/global/standards/introduction-to-international-labour- standards/conventions-and-recommendations/lang--en/index.html> [05.05.2024].

11 Association Agenda between the European Union and Georgia, 2014-2016, 2017-2020, 2020-2023.

12 The Ordinance #38, dated 2015/5 February, of the Government of Georgian "On the Approval of the Working Conditions Monitoring State Program", <https://matsne.gov.ge/document/view/2719707?publication=0> [05.05.2024].

13 The letter of Georgian Trade Unions Confederation to Ms. Salome Kurasbediani – the Deputy Chair of the Environmental Protection and Natural Resources Committee.

14 <https://www.matsne.gov.ge/ka/document/view/2817403?publication=0> [05.05.2024].

15 For further information, see: EMC, An Assessment of the Labour Inspection Mechanism, 2017, <https://emcrights.files.wordpress.com/2017/01/research-labour-rights.pdf> [05.05.2024]. Also see: Joint Staff Working Document, Association Implementation Report on Georgia, Brussels, 25.11.2016 SWD(2016) 423 final, 2016, <https://www.eeas.europa.eu/sites/default/files/1_en_jswd_georgia.pdf> [05.05.2024]; *Chanturidze G.,* Abolition of Labour Inspection in Georgia Consequences for Workers and the Economy, Friedrich-Ebert-Stiftung Georgia, 2018, 3, <https://library.fes.de/pdf-files/bueros/georgien/14675.pdf> [05.05.2024].

healthcare norms, it became possible to inspect the implementation of requirements of labour legislation.[16]

Under the 2017-2020 Association Agenda between the European Union and Georgia, Georgia made a short-term commitment to ensure a legislative framework that would define the supervisory functions of the labour inspection system in the field of occupational health and safety and to remove the restrictions on the powers of inspectors in the existing legislation in accordance with the ILO standards. Association Agenda also defined the state's objective (medium-term commitment) to continue work on establishing an effective labour inspection system, which would be equipped with appropriate competence and capacity by ILO standards for a full inspection of working conditions and labour relations.[17]

Within the framework of the 12th round of the annual Human Rights Dialogue between Georgia and the European Union, in 2019, the European Union recommended the creation of a comprehensive labour inspection.[18]

"The Government of Georgia, through the agreements signed with the European Union and the United States of America, committed to strengthening the labour legislation, supervision and enforcement mechanisms... Georgia undertook the obligation to continue working to create a full-fledged labour inspection system equipped with the appropriate competence and capacity by 2020, which would be able to monitor all working conditions and inspection of labour relations per the ILO standards"[19].

On March 21, 2018, with the adoption of the Law of Georgia "On Occupational Safety" the Labour Inspection Service was empowered with the authority to conduct unscheduled inspections and levy fines, however, the scope of application was limited to the economic activities determined by the

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16 The letter of Georgian Trade Unions Confederation to Ms. Salome Kurasbediani – the Deputy Chair of the Environmental Protection and Natural Resources Committee, with reference to: Ordinance #19, of January 18, 2016 of the Government of Georgia "On the Approval of Labour Conditions Monitoring State Program 2016", <https://matsne.gov.ge/ka/document/view/3165494?publication=0> [05.05.2024].
Ordinance #627, of December 29, 2016 of the Government of Georgia "On the Approval of Labour Conditions Monitoring State Program 2017", <https://matsne.gov.ge/ka/document/view/3525727?publicaAon=0> [05.05.2024].
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17 Association Agenda between Georgia and European Union 2017-2020, pg. 22, <https://mfa.gov.ge/pfiles/files/EU-Georgia_association_agenda_-2017-2020.pdf> [05.05.2024].

18 Explanatory note on the Law of Georgia on Labour Inspection Service.

19 "No Year Without Death" – A Decade of Deregulation Puts Georgian Miners at Risk, Human Rights Watch, 2019, <https://www.hrw.org/ka/report/2020/01/08/332898> [05.05.2024].

government, which only covered heavy, harmful and hazardous works.[20] The list of such works was approved by the Ordinance of the Government of Georgia in 2018.[21] The Labour Inspection Department was granted the authority to impose fines; however, unconditional access to workplaces remained a problem.[22] The Labour Inspection Department did not have unlimited access to workplaces. For unscheduled inspections, approval from a court was required.[23] The pivotal measure in determining the effectiveness of the inspection system lies in empowering the supervisory body with the authority to conduct unplanned inspections and impose sanctions. Hence, the normative reality provided by the Law on Labour Inspection Service in terms of the limited mandate of the inspection was not in line with Article 3(a) of the ILO Convention #81.[24]

On October 2, 2018, the Parliament of Georgia voted in favour of the draft organic law on "Occupational Safety"[25], which expanded the inspection's mandate to cover all sectors of the economy, to meet the requirements of EU Acquis.[26]

During the above-mentioned period, drafting and improving of normative acts regulating occupational safety matters was carried out with the participation of stakeholders, in the tripartite format of social partnership.

According to the explanation by the Georgian Trade Unions Confederation, in 2018-2020 the working group created in the tripartite format of social partnership drafted the following by-laws regulating the issues of occupational safety (which eventually entered into force):

- Ordinance "On the Approval of the Methods for Determining the Priority Directions of Economic Activities, and the Rules for Risk Assessment;"[27]

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20 For the purposes of this organic law, the list of heavy, harmful and hazardous work involving an increased level of danger was determined by the Government of Georgia in consensus with the Social Partners.

21 Ordinance of the Government of Georgia No. 381 dated 27 July 2018 "On approval of the list of heavy, harmful and hazardous work involving an increased level of danger", <https://matsne.gov.ge/ka/document/view/4277583?publication=0> [05.05.2024].

22 The letter of Georgian Trade Unions Confederation to Ms. Salome Kurasbediani – the Deputy Chair of the Environmental Protection and Natural Resources Committee.

23 *Chanturidze G.,* Abolition of Labour Inspection in Georgia Consequences for Workers and the Economy, Friedrich-Ebert-Stiftung Georgia, 2018, 3, <https://library.fes.de/pdf-files/bueros/georgien/14675.pdf> [05.05.2024].

24 Article 3(a) of the Convention on Labour Inspection, the mandate of labour inspection covers the issues of working hours, wages, safety, health and welfare, youth employment, and other related issues. See Labour Inspection Service Assessment, Social Justice Center, 2021, 17, further citing Human Rights Watch, ''No Year Without Deaths- A decade of Deregulations Puts Georgian Miners at Risk", January 8, 2019, <https://bit.ly/3xy56Ie> [05.05.2024]. Also see: *Chanturidze G.,* Abolition of Labour Inspection in Georgia Consequences for Workers and the Economy, Friedrich-Ebert-Stiftung Georgia, 2018, 3, <https://library.fes.de/pdf-files/bueros/georgien/14675.pdf> [05.05.2024].

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26 Association Implementation Report on Georgia, European Commission, Brussels, 30.1.2019 SWD(2019) 16 final, 15, <https://www.eeas.europa.eu/node/57453_en>. See also, 2021 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/georgia/> [05.05.2024].

27 Ordinance №80, February 6, 2020, of the Government of Georgia "On the Approval of the Methods for Determining the Priority Directions of Economic Activities, and the Rules for Risk Assessment," <https://matsne.gov.ge/ka/document/view/4793337?publication=1> [05.05.2024].

- Ordinance "On the Approval of the Rules and Conditions of Entry and Inspection of Objects Subject to Inspection;"[28]
- Ordinance "On the Approval of the List of Heavy, Harmful and Hazardous Work Involving an Increased Level of Danger;"[29]
- Order "On the Approval of List of Heavy, Harmful and Hazardous Work Involving an Increased Level of Danger for Persons under 18;"[30]
- Order "On the Approval of the Rules on Risk Assessment at Workspace;"[31]
- Order "On the Approval of the Rules and Form of Registration of Workplace Accidents and Occupational Diseases, Investigation Procedures and the Rules of Reporting;"[32]
- Order "On Determining the Proportional Annual Working Time for Night Work and the Approval of the Periodicity and Scope of Preliminary (before employment) and Subsequent Periodical Medical Examination for a Night Worker,"[33] etc.

On February 19, 2019 the Organic Law on Occupational Safety was adopted, which annulled the March 7, 2018 Law of Georgia on Occupational Safety.

At the beginning of 2019, the Parliament of Georgia, by carrying out major reforms of the Labour Code and developing the Law on Labour Inspection Service, provided a major boost to promoting the establishment of a better balance between the rights and interests of workers and employers.[34] From May 2019 to September 2020, the ILO provided extensive assistance in the drafting process of the reform package by providing comparative legislative information, drafting

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28 Ordinance #99, of 10 February, 2020, "On the Approval of the Rules and Conditions for Entry and Inspection of Entities Subject to Inspection", <https://matsne.gov.ge/ka/document/view/4796359?publication=3> [05.05.2024].

29 Ordinance of the Government of Georgia No. 381, dated 2018/27 July, "On the Approval of the List of Heavy, Harmful and Hazardous Works Involving an Increased Level of Danger", <https://matsne.gov.ge/ka/document/view/4277583?publication=0> [05.05.2024].

30 Order No. 01-126/ბ, November 30, 2020, of the Minister of the Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia "On the Approval of the List of Heavy, Harmful and Hazardous Works Involving an Increased Level of Danger for Persons under 18." Available at: <https://matsne.gov.ge/ka/document/view/5033680?publication=0> [05.05.2024].

31 Order №01-15/ბ, January 30, 2020 of the Minister of Georgia of Internally displaced Persons from Occupied Territories, Labour, Health and Social Affairs on the "On the Approval of the Rules on Risk Assessment at Work Space", <https://matsne.gov.ge/ka/document/view/4776091?publication=1> [05.05.2024].

32 Order №01-11/ბ, September 12, 2018 of the Minister of Georgia of Internally displaced Persons from Occupied Territories, Labour, Health and Social Affairs "On the Approval of the Rules and Form of Registration of Workplace Accidents and Occupational Diseases, Investigation Procedures and the Rules of Reporting, <https://matsne.gov.ge/document/view/4307493?publication=4> [05.05.2024].

33 Order №01-79/ბ, September 7, 2021 of the Minister of Georgia of Internally displaced Persons from Occupied Territories, Labour, Health and Social Affairs "On Determniming the Proportional Annual Working Time for Night Work and the Approval of the Periodicity and Scope of Conducting Preliminary (before employment) and Subsequent Periodical Medical Examination for a Night Worker," <https://matsne.gov.ge/document/view/5251745?publicaAon=0> [05.05.2024].

34 ILO, Georgia's Parliament adopts historic labour law reform package, 2020, https://www.ilo.org/moscow/news/WCMS_758336/lang--en/index.htm [05.05.2024].

amendments, organizing consultations with the government, social partners, and other stakeholders, and participating in parliamentary hearings. The main goal of the reform was to enhance the alignment of Georgian labour legislation with relevant ILO conventions and EU directives within the scope of the EU-Georgia Association Agreement, according to which Georgia committed to harmonizing its legislation.[35]

2019 Organic Law on "Occupational Safety" is the main legal source of regulation for workplace health and safety and is based on the EU framework directive.[36] With this organic law the state undertook to transform Labour Inspection Department, established in 2015, into a legal entity under public law, and to create a legal framework for its functioning. By the force of the organic law, starting from September 2019, limitations on workspace access for the labour inspectors were lifted.[37] Before the adoption of the organic law, the supervisory body was not entitled to unlimited access to workplaces in every area of economic activities.[38]

The reform in occupational safety was preceded by studying international experience and research of the national context. In the process of consultations with the stakeholders[39] research-based recommendations from human rights organisations,[40] international partners, and social surveys were taken into consideration.

In 2018-2019 Government ordinances on the approval of the "Labour Conditions Monitoring State Program" were adopted.[41] On August 1, 2018 the norms establishing liability for non-compliance

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35 ILO assistance for the reform process was provided within the framework of the Project "Improved Compliance with Labour Laws in Georgia", funded by the United States Department of Labour and the Project "Inclusive Labour Markets for Job Creation", funded by the Government of Denmark (Danida). See: ILO, Strong Labour Laws Make Decent Work a Reality, <https://www.ilo.org/resource/strong-labour-laws-make-decent-work-reality> [05.05.2024]. ILO, Georgia's Parliament adopts historic labour law reform package, 2020, <https://www.ilo.org/moscow/news/WCMS_758336/lang--en/index.htm> [05.05.2024].

36 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work

37 As per Article 16.5 of the Organic Law of Georgia on Occupational Safety: "The supervisory body is entitled to inspect any workspace subject to inspection without preliminary notice, at any hour of the day or night time, to carry out inspection of the workspace, examination or test which is necessary to ensure the effective enforcement and application of the occupational safety norms. The rules and conditions of workspace access and inspection are determined by the government's ordinance."

38 Public Defender – Human Rights Report 2018, pg. 186, <https://www.ombudsman.ge/res/docs/20190426205713194 66.pdf> [05.05.2024].

39 Human Rights Education and Monitoring Center, "Labour Reform Under Threat", July 3, 2020, <https://shroma.ge/en/news-en/labor-reform-under-threat/> [25.10.2023]. Also see: Human Rights Education and Monitoring Center, "The European Parliament calls on Georgia to support the labour law reform", 17.09. 2020, https://csogeorgia.org/index.php/en/newsPost/26012 [05.05.2024].

40 Human Rights Education and Monitoring Center, EMC & GYLA: We Call on Parliament to Carry out Labour Reform, 22.06.2020; Human Rights Education and Monitoring Center, Labour Relations and Social Protection During the Pandemic – Report on Georgia, 11.12. 2020.

41 Ordinance #603, dated 2017/29 December, of the Government of Georgia "On the Approval of Labour Conditions Monitoring State Program 2018", <https://matsne.gov.ge/ka/document/view/3977116?publicaAon=0> [05.05.2024].

with labour safety norms entered into force and the list of heavy, harmful, and hazardous work involving an increased level of danger.[42]

In 2018, the "Accredited Program for the Training of Occupational Safety Specialists" was launched. Within its framework labour safety specialists were systematically trained.

On April 27, 2020, the draft law "On Labour Inspection Service" was initiated, which defined the core principles for the functioning of a legal entity under public law, the scope of competence, directions of activity, standards of its independence, transparency, and accountability, issues related to ensuring the effective application of labour norms. The purpose of the formation of the Labour Inspection Service as LEPL was to exercise effective supervision over the protection of labour rights and labour safety by employers.

The Law on Labour Inspection Service was based on the ILO Approach to Strategic Compliance Planning for Labour Inspectorates. The conceptual basis of the model in question is to focus on proactive, purpose- and needs-oriented, strategy development and implementation. An important component of strategic compliance is the engagement of employees and employers, their representatives, governmental and non-governmental organisations, the media, and all interested entities (who can influence compliance with the law). Hence, according to the strategic compliance model, not only the labour inspection but also all stakeholders participate in the implementation of the law so that compliance is ensured.[43]

2. The Mandate of the Labour Inspection Service and Institutional Capacity Building since 2021

On September 29, 2020, the Parliament of Georgia adopted a reform package of fundamental amendments to the labour law, which encompassed crucial guarantees for the protection of occupational safety.[44] The reform has been recognised as unprecedented by international organisations.[45]

The expansion of the mandate of the Labour Inspection and institutional strengthening can be recognized as the most extensive and fundamental innovation of the legislative changes implemented

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Ordinance #682, dated 2018/31 December, of the Government of Georgia "On the Approval of Labour Conditions Monitoring State Program 2019", <https://matsne.gov.ge/ka/document/view/4443902?publicaAon=0> [05.05.2024].

42 Articles 17.1, 17.2, and Articles 18-22 of the 2018 Law of Georgia on "Occupational Safety"; Ordinance of the Government of Georgia No. 381 dated 27 July 2018 "On approval of the list of heavy, harmful and hazardous work involving an increased level of danger", <https://matsne.gov.ge/ka/document/view/4277583?publication=0> [05.05.2024].

43 ILO Approach to Strategic Compliance Planning for Labour Inspectorates, 2017, <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_606471.pdf> [05.05.2024], Referenced in: Explanatory note on the Law of Georgia on Labour Inspection Service.

44 Human Rights Education and Monitoring Center, ''EMC: despite the positive changes, problems remain in labour law", September 29, 2020. Compare: Labour Rights in Georgia, Research Report, 2021, 6-7, <https://georgia.peopleinneed.net/media/publications/1653/file/labour-rights-in-georgia_people-in-need.pdf>

45 Georgia's Parliament Adopts Historic Labour Law Reform Package, https://www.ilo.org/moscow/news/WCMS_758336/lang--en/index.htm [21.10.2023]; ILO, Strong Labour Laws Make Decent Work a Reality, <https://www.ilo.org/global/about-the-ilo/multimedia/video/institutional-videos/WCMS_815366/lang--en/index.htm> [05.05.2024].

in 2020.[46] The Labour Inspection Service started to operate in its full mandate on January 1, 2021.[47] By the requirements of the reformed Labour Code of Georgia and the organic law "On Occupational Safety", the mandate of the independent Labour Inspection Service, also acquired the function of monitoring the full range of labour rights, in addition to occupational safety, which contributed to the bolstering of institutional capacities within labour inspection, facilitating its evolution into a highly effective mechanism.[48] According to Article 75.1 of the Labour Code of Georgia, the Labour Inspection is entitled to ensure effective enforcement of labour law norms. It should be noted that the mandate of the labour inspection was extended to both the private and public sectors, meaning that the labour inspection became authorized to supervise the enforcement of labour norms in the public service as well.[49]

3. Cooperation in Tripartite (Board of Advisors) and Other Formats

The formation and subsequent improvement of the labour safety policy took place within the tripartite social dialogue.[50] Two organisations have been selected as representatives at the national level – the Georgian Trade Union Confederation and Georgian Employers' Association.

In terms of providing recommendations on the strategy, functioning, and activities of the Labour Inspection Service, an important role was played by the advisory body, the Board of Advisors, established in 2021 by Article 9 of the Law of Georgia "On Labour Inspection Service."[51] As per Article 1(b) of the 1978 Labour Administration Convention,[52] the coordinating and supervisory role of the central inspection body would facilitate the establishment and application of a consistent inspection policy and overall integrated strategy across the national territory. Such policies should have been formulated after consultation and cooperation with the social partners.[53] The rules for recruitment for the Labour Inspection Service were in line with structure and organisation principles

46 Labour Inspection Service Assessment, Social Justice Center, 2021, 18-19.

47 ILO, Strong Labour Laws Make Decent Work a Reality, <https://www.ilo.org/global/about-the-ilo/multimedia/video/institutional-videos/WCMS_815366/lang--en/index.htm> [05.05.2024].

48 Given that the content of labour norms under the Labour Code is quite broad, the mandate of the Labour Inspection Service includes not only state overseeing labour rights and occupational safety issues, but also ensuring effective enforcement against forced labour and trafficking.

49 For a comparative legal study of labor inspection mandates across the EU see: *Liu K.,* Protection of Health and Safety at the Workplace A Comparative Legal Study of the European Union and China, Springer Nature Singapore, 2020, 1-227.

50 In November 2017, Georgia ratified a priority ILO convention #144 on Tripartite Consultation.

51 See 2023 Report of International Labour organization, <https://www.ilo.org/budapest/countries-covered/georgia/WCMS_888396/lang--en/index.htm> [05.05.2024]. On the importance of cooperation with social partners in the process of forming the labor inspection system, see: Labour Inspection, International Labour Office, International Labour Conference, 95th Session, Geneva, Switzerland, 2006, 54-59.

52 C150 – Labour Administration Convention, 1978 (No. 150).

53 Guidelines on General Principles of Labour Inspection, International Labour Organization, Geneva, Ilo, 2022, Guideline 2.1.1; 2.1.4. 2.2.7. 2.2.8. <https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@lab_admin/documents/genericdocument/wcms_844153.pdf> [05.05.2024].

2.4., 2.2.7,[54] and 2.2.8[55] of ILO Guidelines on General Principles of Labour Inspection and the persons included representatives of the Parliament of Georgia, Georgian Employers' Association, Georgian Trade Union Confederation.[56] Hence, the Board of Advisors became one of the crucial instruments for tackling the challenges in occupational safety and improving the status quo in this area.[57]

In terms of cooperation with governmental organisations, the Labour Inspection Service signed a memorandum of understanding with the LEPL National Agency of State Property of the Ministry of Economy and Sustainable Development. Within the framework of this cooperation, the parties, in case of detection of violations at the workplaces, would issue relevant recommendations to state enterprises.[58]

In 2018, a joint monitoring group of the Labour Inspection Department and the Technical and Construction Supervision Agency of the Ministry of Economy was established to supervise labour conditions in organisations with dangerous, heavy, harmful, and hazardous work to human life and health.[59]

In 2019, cooperation was formed with Tbilisi State Medical University, the Ministry of Economy and Sustainable Development of Georgia, Tbilisi City Hall, as well as the Georgian Bar Association, and the 112 Emergency Response Center of the Ministry of Internal Affairs of Georgia. In 2021, one of the evaluation reports on the labour inspection critically evaluated the absence of a memorandum of understanding between the Ministry of Internal Affairs and the Labour Inspection Service.[60] In this regard, the most important accomplishment of the reform was the improvement of the statistical registration system for workplace accidents. According to the Georgian Trade Unions Confederation, the achievements of the reform had a direct impact on employees and were reflected in

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54 Labour inspectorates should collaborate with workers' and employers' organisations in the design, adoption and review of inspection policies, strategies, or programmes and plans. This collaboration may take different forms such as through national tripartite consultative bodies, agreements on coordination and cooperation, joint committees, consultations, and the organisation of campaigns. <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_844153.pdf> [05.05.2024].

55 Collaboration with social partners is an essential element for the effectiveness of the labour inspection system. This collaboration must be operationalized at national, territorial and enterprise level. <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_844153.pdf> [05.05.2024].

56 See <https://lio.moh.gov.ge/main.php?lang=1&id=20221225013835176412811l> [05.05.2024]; Article 9 of the Law of Georgia on Labour Inspection Service. On the expansion of the membership of the commission and corresponding extension of the Board of Advisors, see: "New Confederation of Trade Unions, 2021 – Arguments in Favour of Georgia's New Confederation of Trade Unions' Participation in Tripartite Commission of Social Partners," Referenced: *Tskitischvili D., Natsvlishvili V., Kajaia S., Shvelidze Z.*, Decent Work Agenda – Assessment of Needs and the Agenda, Tbilisi, 2022, 132; *Tchubabria T., Mamaladze E.,* Labour Inspection in Georgia, Challenges and the Road Ahead, Open Society Foundation, Social Justice Centre, 2022, 3.

57 he letter of Georgian Trade Unions Confederation to Ms. Salome Kurasbediani – the Deputy Chair of the Environmental Protection and Natural Resources Committee.

58 Labour Inspection Service Assessment, Social Justice Center, 2021, 25.

59 Ibid.

60 Labour Inspection Service Assessment – 2021, 28.

the statistics of injuries and deaths at workplaces, which were not produced by any state body until 2019, except for the Ministry of Internal Affairs, which only counted the cases where a criminal investigation had been launched. The main source of information was the data on workplace accidents provided by Georgian Trade Unions Confederation member organisations. Specifically, the number of workplace accidents in 2006 was 55, in 2008 -72, in 2009 – 97, in 2010 – 249, in 2011 – 74, in 2012 – 147, in 2013 – 72, in 2014 – 107, in 2015 – 123, in 2016 -142, in 2017 – 97.[61] In addition, the statistics did not include the number of employees who fell ill at workplaces with professional diseases or died later due to professional diseases and industrial injuries.[62] This data did not give a complete picture, since at that stage companies had no obligation to report accidents to the Labour Inspection Department. This shortcoming was corrected by forming coordinated cooperation with the Ministry of Internal Affairs.

According to the 2022 report of the Labour Inspection Service, within the scope of its mandate, LEPL Labour Inspection Service closely cooperates and uses the referral mechanism with agencies such as the Ministry of Internal Affairs of Georgia, the Agency for State Care and Assistance for the (Statutory) Victims of Human Trafficking and the Social Services Agency. The report covers the cooperation with the Ministry in specific areas, including the collection and processing of statistical data on workplace accidents.[63] Also, communication is ongoing with other agencies that are members of the Inter-agency Coordination Council implementing measures against human trafficking.[64]

In the context of following the principle of cooperation between labour inspection and various stakeholders, the role of the Labour Inspection Service remains an independent state prerogative. It is only through an efficient public inspection system that the effectiveness of sanctions, capable of deterring violations, can be ensured.[65]

Thus, as a result of the latest regulatory reform, new OSH rules have been introduced. The organic law "On Occupational Safety" and many other by-laws were adopted, based on which reform was carried out and a new body was created with a corresponding mandate, both in the field of occupational safety and employee rights. Additionally, significant steps were taken in terms of reflecting EU directives, obligatory under the EU-Georgia Association Agreement, in Georgian legislation. Important regulations were adopted, and the number of labour inspectors increased, which ensures control over the effective implementation of labour safety regulations.[66]

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61 Official Data of Georgian Trade Unions Confederation on the Injured and Dead at Workplaces, see: https://lio.moh.gov.ge/editor/upload/20230425042928-LCID%20Report%20_2015%20-%202017.pdf [05.05.2024].

62 The letter of Georgian Trade Unions Confederation to Ms. Salome Kurasbediani – the Deputy Chair of the Environmental Protection and Natural Resources Committee.

63 Labour Inspection Service Report – 2022, 43.

64 Ibid, 42.

65 See ILO guideline 2.2.12. – Guidelines on General Principles of Labour Inspection, International Labour organization, Geneva, Ilo, 2022, 13, <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_844153.pdf> [05.05.2024].

66 The letter of Georgian Employers' Association to Ms. Salome Kurasbediani – the Deputy Chair of the Environmental Protection and Natural Resources Committee.

II. Implementation of Directives under Annex XXX in the Field of Occupational Safety

According to the 2023 report of the European Commission, "the analysis of Georgian legislation shows that the state has largely reflected the EU standards in most areas of labour law."[67] According to the 2023 report of the ILO, since 2018 the shifts in the field of occupational safety after the labour reform have brought consistent progress in terms of legal approximation with EU Acquis. The application of international labour standards in judicial practices has increased, which was facilitated by capacity-building efforts targeted at judges, practicing lawyers, and government employees.[68]

After the signing and entry into force of the Association Agreement, Georgia has taken significant steps to approximate its legislation to 26 EU directives on labour, health, and safety (with a 5–9-year implementation plan[69]). From them, besides the framework directive, Georgia has achieved full legal approximation with the directive on the medical treatment on board vessels and partial approximation with the directive on temporary or mobile construction sites.

For this study, based on the information obtained from the occupational safety supervisory body and other stakeholders, as of October 30, 2023, in Georgian legislation: 6 directives were fully reflected, 2 directives – partially, the legislative package drafted in compliance with 3 directives is ready for scrutiny in the working/technical group of the tripartite commission, drafts the normative acts in line with 5 directives have been prepared, 10 directives require translation, processing, and examination.

Namely, as of 2023, the following directives have been reflected in Georgian legislation:

1. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work;

2. Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC;

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67 Analytical Report following the Communication from the Commission to the European Parliament, the European Council and the Council Commission Opinion on Georgia's application for membership of the European Union, European Commision Joint Staff Working Document, Brussels, 1.2.2023 SWD(2023) 31 final, Chapter 19, Social Policy and Employment, 31 <https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-02/SWD_2023_31_Georgia.pdf> [05.05.2024].

68 International Labour organization – 2023, <https://www.ilo.org/resource/about-ilo-georgia> [05.05.2024]. See also: Training on International Labour Standards and Labour Code for City Court Judges in Georgia, <https://www.ilo.org/moscow/news/WCMS_850521/lang--en/index.htm> [05.05.2024]; ILO launches a Capacity Building Programme for Labour Inspection in Georgia, <https://www.ilo.org/moscow/news/WCMS_735852/lang--en/index.htm> [05.05.2024]; COVID-19 Impact on Labour Disputes and Case Law Developments in Georgia Discussed at Bench-Bar Meeting, https://www.ilo.org/moscow/news/WCMS_851395/ lang--en/index.htm [05.05.2024].

69 *Kardava E., Jgerenaia E.,* Labour Righrs Protection as part of the European Integration Policy – Perspectives of Developments within the AA, The VLAP and the Social Charter, 2016, 7, <https://library.fes.de/pdf-files/bueros/georgien/13152.pdf> [05.05.2024]; *Chanturidze G.,* Abolition of Labour Inspection in Georgia Consequences for Workers and the Economy, Friedrich-Ebert-Stiftung Georgia, 2018, 3, <https://library.fes.de/pdf-files/bueros/georgien/14675.pdf> [05.05.2024].

3. Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC);

4. Council Directive 92/58/EEC of 24 June 1992 on the minimum requirements for the provision of safety and/or health signs at work (ninth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC);

5. Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC);

6. Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC);

7. Council Directive 92/29/EEC of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessels;

8. Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile constructions sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC;

OSH directives of Annex XXX of the Association agreement have been reflected in the following normative acts:

1. Organic Law of Georgian "On Occupational Safety;"

2. Ordinance #341 of July 1, 2022 of the Government of Georgia "On the Approval of Technical Regulation on Minimum Requirements for Safety and Health at Workplace;"

3. Ordinance #590 of December 23, 2022 of the Government of Georgia "On the Approval of Technical Regulation – Minimum Safety and Health Requirements for Using Personal Protective Equipment at Workplace;"

4. Ordinance #457 of September 16, 2022 of the Government of Georgia "On the Approval of Technical Regulation – on the Minimum Requirements for the Provision of Safety and/or Health Signs at Work;"

5. Ordinance #477 of October 27, 2017 of the Government of Georgia "On the Approval of the Technical Regulation on the Safety Requirements for the Work at a Height."

6. Ordinance #167 of May 1, 2023 of the Government of Georgia "On the Approval of the Technical Regulation on the Minimum Safety and Health Requirements for Handling Weights Manually;"

7. Order #5 of December 13, 2018 of the Head of the Maritime Transport Agency of the Ministry of Economy and Sustainable Development of Georgia "On the Approval of Minimum Safety and Health Standards on the Sea Vessels under the State Flag;"

The following 18 OSH directives of Annex XXX of the Association Agreement remains to be reflected for the years 2021-2023:

1. Directive 2002/44/EC of the European Parliament and of the Council of 25 June 2002 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from

physical agents (vibration) (sixteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);

2. Directive 2009/148/EC of the European Parliament and of the Council of 30 November 2009 on the protection of workers from the risks related to exposure to asbestos at work (Codified version) (Text with EEA relevance);

3. Directive 1999/92/EC of the European Parliament and of the Council of 16 December 1999 on minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres (15th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);

4. Directive 2006/25/EC of the European Parliament and of the Council of 5 April 2006 on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);

5. Council Directive 93/103/EC of 23 November 1993 concerning the minimum safety and health requirements for work on board fishing vessels (thirteenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC);

6. Directive 2009/104/EC of the European Parliament and of the Council of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (Codification of the directive 89/655/EEC, which was amended by directives 95/63/EC and 2001/45/EC) (Text with EEA relevance);

7. Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral- extracting industries through drilling (eleventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC);

8. Council Directive 92/104/EEC of 3 December 1992 on the minimum requirements for improving the safety and health protection of workers in surface and underground mineral-extracting industries (twelfth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC);

9. Directive 2004/37/EC of the European Parliament and of the Council of 29 April 2004 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Sixth individual Directive within the meaning of Article 16(1) of Council Directive 89/391/EEC) (codified version) (Text with EEA relevance);

10. Directive 2000/54/EC of the European Parliament and of the Council of 18 September 2000 on the protection of workers from risks related to exposure to biological agents at work (seventh individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);

11. Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);

12. Directive 2003/10/EC of the European Parliament and of the Council of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);

13. Directive 2004/40/EC of the European Parliament and of the Council of 29 April 2004 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (18th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);

14. Commission Directive 91/322/EEC of 29 May 1991 on establishing indicative limit values by implementing Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work;

15. Commission Directive 2000/39/EC of 8 June 2000 establishing a first list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work (Text with EEA relevance);

16. Commission Directive 2006/15/EC of 7 February 2006 establishing a second list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC and amending Directives 91/322/EEC and 2000/39/EC (Text with EEA relevance);

17. Commission Directive 2009/161/EU of 17 December 2009 establishing a third list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC and amending Commission Directive 2000/39/EC (Text with EEA relevance);

18. Council Directive 2010/32/EU of 10 May 2010 implementing the Framework Agreement on prevention from sharp injuries in the hospital and healthcare sector concluded by HOSPEEM and EPSU (Text with EEA relevance).

As explained by the Georgian Trade Unions Confederation based on the "Association Agreement" and the Organic Law of Georgia "On Occupational Safety", the Government of Georgia undertook to adopt by-laws – technical regulations that will regulate occupational safety issues in various sectors of economic activity in Georgia. The by-laws of Georgia or "technical regulations," which have entered into force since 2013, cover only a certain segment of economic activity." Hence, due to the absence of regulations, the supervisory body cannot inspect economic sectors that have not been covered by technical regulations yet.

The necessity of enhancing the legislative framework regulating occupational safety through the adoption of by-laws is unanimously recognized by all stakeholders in the field and all subjects involved in this study.

As explained by the Labour Inspection Office, the drafting process of by-laws was carried out within the "Twinning" program, where the Parliamentary committee members were also engaged. The term of validity of the project expired at a certain stage in 2023. As a result, the process of adoption of technical regulations was halted to a certain extent, however, the preparation and processing of draft regulations was still underway. By the end of the year, the EU confirmed to support the extension of the project. The second stage of the "Twinning" program should be possible to be launched from the beginning of 2024, allowing to resume the process of adopting technical regulations.

According to the Labour Inspection Service, from the required documents under the Association Agreement, only the ones imposing large economic costs for enterprises have remained. Thus, the harmonisation process should be managed through a realistic understanding of the national context

and measurement of available financial resources. For instance, one of the technical regulations, that needs to be adopted, requires passport and retooling for the machinery at enterprises. In Georgia, the main industrial facilities are outdated. When adopting the aforementioned technical regulation, a solution that aligns with practical realities shall be sought. Simply adopting this regulation and blindly enforcing its obligations could result in the closure of numerous companies or an abrupt increase in their operational costs.

The representative of the Georgian Trade Unions Confederation emphasized the need for general norms of temperature control in open space. Labour Inspection Service provided that on January 15, 2014, the Government of Georgia adopted ordinance #69 on the approval of the Technical Regulation on the Hygienic Requirements for the Microclimate in Workspace. This regulation does not cover the temperature control norms for outdoor work. For instance, roads are built during summertime as the population leaves larger cities. Hence, to meet occupational safety standards, the need to control the temperature for outdoor work gets on the agenda. The Inspection controls the process by requiring the employers to schedule work shifts and limit the work during certain periods of the day, where the temperature is high. Certainly, the Inspection cannot constantly supervise whether the shift schedules are being followed, hence, the normative regulation of the mentioned issue can be an effective means. The existence of a legal requirement may enhance compliance with outdoor labour safety norms.

III. The Importance of Ratifying Occupational Safety Conventions of the International Labour organization

Georgia has ratified 18 ILO conventions (among them, 17 are in force).[70] In the field of occupational safety, ILO has adopted Occupational Safety and Health Convention of 1981 (No. 155)[71], Promotional Framework for Occupational Safety and Health Convention of 2006 (No. 187)[72], Labour Inspection Convention of 1947 (No. 81)[73], Labour Inspection (Agriculture) Convention of 1969 (No. 129)[74], Occupational Health Services Convention of 1985 (No. 161)[75], Safety and Health in Mines Convention of 1995 (No. 176)[76], Domestic Workers Convention of 2011 (No. 189)[77], Social Security (Minimum Standards) Convention of 1952 (No. 102)[78].

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70 Including them 3 Conventions on Freedom of Association, Collective Bargaining and Industrial Relations, 2 on Forced Labour, 2 on Reduction of Child Labour and Rights of Children/Youth, 2 on Equal Opportunities and Equal Treatment, 1 on Tripartite Consultations, 3 on Employment Policy and Promotion, 1 in the field of human resources development, 1 working time, 1 social policy, 1 on protection of seafarers.

71 C155 – Occupational Safety and Health Convention, 1981 (No. 155).

72 C187 – Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

73 C081 – Labour Inspection Convention, 1947 (No. 81).

74 C129 – Labour Inspection (Agriculture) Convention, 1969 (No. 129).

75 C161 – Occupational Health Services Convention, 1985 (No. 161).

76 C176 – Safety and Health in Mines Convention, 1995 (No. 176).

77 C189 – Domestic Workers Convention, 2011 (No. 189).

78 C102 – Social Security (Minimum Standards) Convention, 1952 (No. 102).

The Association Agreement emphasizes the importance of ratifying ILO priority conventions. According to the recommendation of the Public Defender of Georgia in 2018, taking timely steps in this regard remains an absolute necessity, as the issue of their ratification has been emphasized since September 1, 2014, with the Association Agreement[79] with the European Union[80]. According to ILO Committee of Experts, the Labour Inspection Convention (No. 87) which envisages the inspection of labour rights and occupational safety rules, belongs to the list of priority conventions[81]. It is also noteworthy to start the procedures required for ratifying the Labour Inspection (Agriculture) Convention (No. 129) and Occupational Safety and Health Convention (No. 155). **According to the Georgian Trade Unions Confederation, as a result of active advocacy on the international level by the world and local trade unions, labour safety is recognised as a fundamental right,[82] which means that the ILO member states, including Georgia, are obliged to implement the mentioned conventions (No. 155, No. 187) regardless of ratification. The ratification of these conventions is an important step in terms of fulfilling the Association Agreement and improving the country's international image.**

Georgian Trade Unions Confederation explains that the issue of ratifying separate conventions in the field of labour safety at the initiative of the same organisation is a part of the action plan of the Tripartite Commission of Social Partnership of Georgia. Georgian Trade Unions Confederation, the Public Defender of Georgia, and non-governmental organisations underline the importance and recommend the ratification of the following conventions: Labour Inspection Convention of 1947 (No. 81), Occupational Safety and Health Convention of 1981 (No. 155), Employment Injury Benefits Convention of 1964 (No. 121), Labour Inspection (Agriculture) Convention of 1969 (No. 129), Promotional Framework for Occupational Safety and Health Convention of 2006 (No. 187).

An inquiry has been made into the stance of the Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health, and Social Affairs of Georgia. According to the official information provided by the Ministry, the Tripartite Commission of Social Partnership serves as a decision-making and consulting body in the realm of labour and other associated relations. Discussing the issues of ratifying ILO conventions is one of the functions of the Commission. Its members have drafted an action plan for 2023-2024, which aims to discuss the possibilities for ratifying a number of ILO conventions.

The Ministry stated that for this purpose, the plan includes the following conventions in the field of occupational safety: 1. Occupational Safety and Health Convention (No. 155); 2. Promotional Framework for Occupational Safety and Health Convention (No. 187); 3.

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79 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. Article 229.4.

80 Public Defender – Human Rights Report 2018, pg. 187, <https://www.ombudsman.ge/res/docs/2019042620571319466.pdf> [05.05.2024].

81 The list of ILO priority conventions, <https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations> [05.05.2024].

82 The right to occupational safety comes from the constitutional origin of health protection and is loaded with the content of a fundamental right. *Świątkowski A. M.,* Labour Law, Council of Europe, Fifth Edition, Wolters Kluwer, 2023, ebook, note 467.

Safety and Health in Mines Convention (No. 176); 4. Labour Inspection (Agriculture) Convention (No. 129).

According to the Ministry, based on the principles of social dialogue and taking into account the existing practice, the Tripartite Commission will discuss the possibilities of ratifying the above-mentioned conventions, and the decision on each convention is based upon the assessment of the regulatory impact assessment and relevant conclusions.

According to the information provided to the Parliament of Georgia, by the Ministry and the Georgian Trade Unions Confederation, in 2022, the Tripartite Commission made a decision to ratify the Labour Inspection Convention (No. 81) and Forced Labour Convention (No. 29). Preparatory work is currently underway; however, the conventions have not yet been ratified.

Even though Georgia has not ratified ILO Conventions in the field of labour safety, a number of international standards stipulated by the ILO Conventions has been reflected in Georgian legislation. For instance, introducing unscheduled inspections in 2019 has brought the institutional functions of the Labour Inspection Service to the international standards. Specifically, Labour Inspection Convention (No. 81)[83], Labour Inspection (Agriculture) Convention (No. 129)[84], and the protocols to the Labour Inspection Convention of 1947[85].

The expansion of the Inspection mandate was the reflection of Article 3 (a) of the Labour Inspection Convention (No. 81), as per which, the mandate of an inspection should cover the issues of working hours, wages, safety, health and welfare, youth and child employment and other related issues. The legislative expansion of the Labour Inspection mandate with the 2020 reform, according to the report of the International Labour Organization, the introduction of adequate enforcement mechanisms in order to establish an effective model of labour inspection, served the actual implementation of the requirements of ILO Convention No. 81 and the fulfilment of other international obligations undertaken by Georgia.[86]

Indeed, Georgian legislation in terms of occupational safety is closely in line with standards outlined in the conventions; however, the recommendation to ratify these conventions cannot be recognized as fulfilled. This substantial alignment of Georgia's labour safety legislation with the provisions of the conventions No. 81 and No. 129, should further facilitate the ratification.[87]

IV. Expanded Mandate of Labour Inspection Service and Conceptual Innovations of the Legislative Reform

Based on the legislative acts passed in the field of labour inspection in 2019-2021, the most important functional innovations and principles of occupational safety supervision were

[83] CO81, 1947, Art. 12.1, Art. 18. See also: Supervisory powers: Inspection actions, in particular inspection visits. Reference: Guidelines on General Principles of Labour Inspection, International Labour organization, Geneva, Ilo, 2022, Guideline 5.2.1. <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_844153.pdf> [05.05.2024].

[84] C129, 1969, Art. 16.1, Art. 24.

[85] P081, 1995, Preamble, Art.1.

[86] International Labour Organization, Progress Assessment of the Labour Inspection System in the Republic of Georgia Chapter II. International Labour Standards, 2016, 3.

[87] Public Defender – Human Rights Report 2018, pg. 27, <https://www.ombudsman.ge/res/docs/2019042620571319466.pdf> [05.05.2024].

implemented, which played a pivotal role in shaping an efficient institutional model for labour inspection.

As per the ILO Labour Inspection convention No. 81, one of the most important prerequisites for the actualisation of the right to "decent work" is the existence of an effective labour inspection[88]. In response to the mentioned international obligation, through the latest legislative reform, the Inspection Service was granted the authority to monitor any workplace or workspace, upon a complaint, as well as on its initiative, without prior notice.[89] Based the list of priority sectors adopted by the Government, the Chief Labour Inspector approves the list of specific organisations working in priority sectors, which are subject to scheduled inspection[90].

The Labour Inspection Service has been given extensive powers to ensure safety at work. In particular, in accordance with Article 16.4 of the Law of Georgia "On Occupational Safety", the supervisory body controls the implementation and application of occupational safety norms, investigates accidents and professional diseases at the workplace and registers them as per the procedures stipulated in Georgian legislation.

Court order is only required in cases where there is a reasonable suspicion of forced labour and labour exploitation.[91] In these instances as well, the Inspection Service is entitled to enter, without prior notice, any building/space at any time of the day.

The Inspection is authorised to request the inviolability of the workplace for the period necessary for inspection, to search, request and examine any material, document, or information related to a possible violation. As well as, take a sample of any object, material or ambient air, make measurements, records, photograph, videotape, and make extracts.

Where the legislation provides alternative administrative penalties, the Labour Inspection Service shall enjoy discretionary power[92] in deciding when and which administrative penalty must be

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88 *Chanturidze G.,* Abolition of Labour Inspection in Georgia Consequences for Workers and the Economy, Friedrich-Ebert-Stiftung Georgia, 2018, 3, <https://library.fes.de/pdf-files/bueros/georgien/14675.pdf> [05.05.2024].

89 Labour Inspection convention No. 81, 1947, Art. 12; Guidelines on General Principles of Labour Inspection, International Labour organization, Geneva, Ilo, 2022, Guideline 5.2.1.1.(a) <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_844153.pdf> [05.05.2024].
Common Principles of Labour Inspection in Relation to Health and Safety in the workplace, Adopted at the 69th SLIC Plenary in Luxembourg, 13 November 2015, 8, <https://ec.europa.eu/social/BlobServlet?docId=15615&langId=en> [23.10.2023].
Comp.: On the possible expansion of Labour Inspection Service rights in the Labour Code, the Business Association of Georgia once again explains the position of business, <https://bag.ge/ge/advocacy/ongoing-topics?n=1462> [21.10/2023].

90 Ordinance #99, dated 2020/10 February, " On the Approval of the Rules and Conditions for Entry and Inspection of Entities Subject to Inspection". Available at: https://matsne.gov.ge/ka/document/view/4796359?publication=3

91 Unlike the limited mandate under the 2018 law "On Occupational Safety", where unscheduled inspection had to be approved by courts.

92 The approach of particular legal orders to the discretionary powers of inspectors can be found in the work: Labour Inspection, International Labour Office, International Labour Conference, 95th Session, Geneva, Switzerland, 2006, 94; Supporting Compliance of Occupational Safety and Health Requirements –

applied[93]. The law introduces the principle of proportionality where administrative penalties are used, necessitating the application of a proportional level of liability taking account of the severity of the violation. **The obligation to apply adequate penalties is stipulated in Article 18[94] of Convention No. 81 and Article 24 of Convention No. 129[95].** Therefore, the normative principles and policies of adequate sanctioning in the national Georgian inspection model align with the standards endorsed by the ILO conventions[96].

To encourage the detection of violations of labour safety norms, the Inspection Service adheres to the principle of confidentiality[97]. Confidentiality guarantees ensure that any complaint received by the Labour Inspection Service and/or an interview conducted by a labour inspector is fully confidential.[98] The labour inspector, along with all employees of the Labour Inspection Service[99], is obligated not to disclose the identity of the source of the complaint or the interviewed person. When carrying out the inspection, the Labour Inspection Service does not indicate that the process was initiated in response to the receipt of a complaint. Disclosure of information about the source of the complaint or the interviewed person is permitted solely with the consent of the said person or under circumstances stipulated by law. In case of violation of these obligations, a labour inspector may be dismissed from their position or be subject to other disciplinary measures.[100] The obligation of confidentiality is valid for life, even after the termination of the official authority[101]

A labour inspector is entitled to question any individual in the workplace or workspace, to summon the employer, employee or any other person to the Labour Inspection Service under

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European Labour Inspections Systems of Sanctions and Standardised Measures, European Agency for Safety and Health at Work, 2023, 1-5, <https://osha.europa.eu/sites/default/files/Supporting-Compliance-Workplace-Safety-Requirements_EN.pdf> [05.05.2024].

93 The Law of Georgia of September 29, 2020 "On Labour Inspection Service", Article 20.4.

94 "Adequate penalties for violations of the legal provisions enforceable by labour inspectors and for obstructing labour inspectors in the performance of their duties shall be provided for by national laws or regulations and effectively enforced."

95 Adequate penalties for violations of the legal provisions enforceable by labour inspectors in agriculture and for obstructing labour inspectors in the performance of their duties shall be provided for by national laws or regulations and effectively enforced.

96 See Guidelines on General Principles of Labour Inspection, International Labour Organization, Geneva, Ilo, 2022, Guideline 6.3.1. (2) <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_844153.pdf> [05.05.2024].

97 The Law of Georgia "On Labour Inspection Service", Article 4.3(d)

98 In some countries, the institution of taking an oath by the inspector before taking office has been strengthened, which also provides for the recognition of the obligation to protect confidentiality. ob. Labour Inspection, International Labour Office, International Labour Conference, 95th Session, Geneva, Switzerland, 2006, 72-75.

99 Guidelines on General Principles of Labour Inspection, International Labour Organization, Geneva, Ilo, 2022, Guideline, Occupatinal Ethics, 4.5.4. <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_844153.pdf> [05.05.2024].

100 The Law of Georgia "On Labour Inspection Service", Article 18.2 and Article 19; See identical ethical obligations: Guidelines on General Principles of Labour Inspection, International Labour organization, Geneva, Ilo, 2022, Guideline 4.5.2. <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_844153.pdf> [05.05.2024].

101 Labour Inspection, :International Labour Office, International Labour Conference, 95th Session, Geneva, Switzerland, 2006, 74.

confidentiality and to converse with them. A labour inspector shall not be authorised to request the said person to provide information which would expose them.[102]

Hence, Georgian legislation is in line with Articles 15 (b) (c) of the ILO Convention No. 81 in terms of protection of confidentiality.

The following administrative penalties can be applied for violation of labour norms (including the requirements provided for by the organic laws "Labour Code" and "On Occupational Safety", as well as, the labour contract and other acts): warning, fine, suspension of the work process.

The legislation provides for the compulsory enforcement measures where an imposed fine or default charges are not paid within the established time limit.

V. Effectiveness of the Labour Inspection System and Recent Challenges in 2021-2023

1. Trends in decreasing accidents and policies for raising awareness.

After the expansion of the Labour Inspection Service mandate, according to labour rights organisations, occupational safety and health standards were in line with international norms in all major industries. Occupational safety experts were actively involved in responding to complaints, as well as in the process of assessing labour safety conditions. During 2021, the Inspectorate was responsible for overseeing the compliance of labour conditions with the COVID-19 safety norms. During the pandemic, the majority of inspections were devoted to the enforcement of the COVID-19 regulations[103]. In the interviews conducted for the purposes of this research, the head of the Progressive Forum positively commented on the monitoring of occupational safety standards during the pandemic.

According to the GTUC data, 33 workers died and 252 were injured in work-related accidents in 2021, and 39 died and 249 were injured in 2020. The mining and construction sectors remained particularly dangerous[104]. According to the explanation received from the Labour Inspection Service of Georgia during the preparation of this report, the institutional strengthening of the labour inspection system contributed to the effective enforcement of the legislation, resulting in the decreased number of fatal accidents, which is a crucial achievement in the area of occupational safety and health (OSH). If we compare the recorded and processed data in the reporting period of 2022 to the initial period of the reform, i.e. the period of the adoption of the Law of Georgia "On Occupational Safety" – in 2018, the number of fatal cases as a result of accidents in the workplace was reduced by 41%, by approximately

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102 The Law of Georgia "On Labour Inspection Service", Article 16.2(h), (i).

103 2022 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2022, 55 <https://www.state.gov/wp-content/uploads/2023/03/415610_GEORGIA-2022-HUMAN-RIGHTS-REPORT.pdf> [25.10.2023]; 2021 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2021, 84, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/georgia/> [05.05.2024].

104 2021 Country Reports on Human Rights practices: Georgia, U.S. Department of State, 2021, 84, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/georgia/> [05.05.2024].

22% compared to 2019, and by 5% compared to 2021. Decreasing trend in the fatal cases is maintained in the 2023 data.

In the nine months of 2023, the numbers of recorded reports made by the employers as per order №01-11/ნ of the Minister of Georgia of Internally displaced Persons from Occupied Territories, Labour, Health and Social Affairs reached 264 fatal and non-fatal injuries. Among them: 186 accidents of medium severity; 51 accidents of high severity; 27 fatal accidents.

It shall be noted, that alongside the provided data, the outcomes of the inquiry conducted by the Occupational Safety Supervision Department are currently undergoing manual processing. Consequently, the compiled data will be comprehensively presented in the 2023 Activity Report of the Labour Inspection Service.

As explained by the Inspectorate, according to the goals and methodology of the Organic Law of Georgia "On Occupational Safety", the Labour Inspection Service has refined and developed the system of recording workplace accidents.[105] In addition, due to the memorandum of cooperation with 112, as well as the sanctions imposed on companies in 2020-2021 due to their non-compliance with reporting requirements on accidents, the increase in the number of inspections, along with awareness raising, the rise in reporting of the said matter is evident.

According to the Labour Inspection Service, the decrease in the number of accidents was the result of the introduction of the fundamental principles of occupational safety norms and appropriate safety standards for sectors involving higher risk, the creation of supervisory body, increased number of inspections, awareness raising and in general, complex approaches which are implemented gradually over the years through proactive or reactive measures.

Business association within the scope of the interview given for the purposes of this study echoes the main achievements of the labour safety reform: "In some industries, awareness and sense of responsibility in the part of labour safety has been raised, taking records of accidents has improved, which allows for the implementation of appropriate analysis, conclusions and preventive measures; In some sectors, the number of accidents has decreased substantially, which is partly due to the labour reform."

The Public Defender of Georgia stated that despite the decrease in the number of accidents, there is still a need to continue active work, taking account of the challenges in terms of awareness about labour safety. In the direction of effective protection and enforcement of occupational safety norms, challenges are, on the one hand, in the low awareness of employers and employees about the norms and the obligation to follow them, and, on the other hand, in indifferent attitude towards the fulfilment of obligations imposed by legislation. The frequency of violations detected by the Labour Inspection Service *(for example, in 2022, 8,728 references were issued for violations of labour safety norms, and 3,369 references for violations of the Labour Code norms)* indicates that employers

[105] Comparative legal analysis of foreign laws on registration of accidents and occupational diseases, see: ILO Standards on Occupational Safety and Health, Promoting a Safe and Healthy Working Environment, International Labour Office, Committee of Experts on the Application of Conventions and Recommendations, Geneva, Switzerland, 2009, 82-84, <https://www.google.ge/books/edition/ILO_Standards_on_Occupational_Safety_and/-rqvnMH_n8MC?hl=ka&gbpv=1> [05.05.2024].

systematically ignore the norms of labour legislation. Therefore, it is important to intensively carry out inspections, timely monitor, and continue appropriate activities in the direction of awareness raising.

The Labour Inspection Service believes that the increase in the number of detected violations is due to the increased number of labour inspectors and inspections carried out for the purpose of supervising the implementation of labour safety norms. Despite the increase in detected violations, non-use of individual protective measures by employers is gradually decreasing. In this regard, 10% of the detected violations in 2019 were related to the non-use of personal protective equipment, in 2020 – 9%, in 2021 – 7.7%, in 2022 – 7%.

It should be noted here that the interviews with the Labour Inspection Service and the Business Association, highlighted the need to establish the quality standard for personal protective equipment or collective protective equipment, introduce legal mechanisms of certification for their introduction to the market or on-site production.

During the interviews with the nongovernmental organization Progressive Forum, the issue of overdue adoption of the minimum insurance package was highlighted. According to the Labour Inspection Service, for the effective implementation of the social guarantee of mandatory insurance, with the help of the ILO, a minimum package of mandatory health insurance was developed for those employees in heavy, harmful and hazardous jobs. Although the approval of the mentioned package is delayed, it is planned to be adopted at the beginning of 2024.

The decreasing trends in the number of employees who died of workplace accidents, which has been maintained since 2018, after the adoption of the Law of Georgia "On Occupational Safety", speaks of the effectiveness of the targeted policies and the activities planned in strategic documents.

The Labour Inspectorate considers it appropriate to implement the following measures to minimize accidents:

- Facilitating the gradual removal of outdated machinery and equipment;
- Improvement of technologies, activation of engineering control[106] and training of employees as per technological advancements require;
- Informing the workforce as much as possible about fundamental labour rights;
- Enhancing youth awareness by organizing various awareness-raising and educational initiatives;
- Ensuring quality products (collective or personal protection equipment) on the local market;
- Providing the incentives for the organisations that protect occupational safety and general labour norms.

GTUC states that the effective implementation of occupational safety norms is hindered by the low awareness of employers on labour standards, often, the lack of willingness to comply with them, and the avoidance of relevant financial costs.[107]

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106 *Kim Y., Park J., Park M.,* Creating a Culture of Prevention in Occupational Safety and Health Practice, Safety and Health at Work, 7, 2016, 95.

107 The letter of Georgian Trade Unions Confederation to Ms. Salome Kurasbediani – the Deputy Chair of the Environmental Protection and Natural Resources Committee.

According to the official position of the Labour Inspection Service, along with the reform, awareness-raising of employers and employees has an important role. Proactive (scheduled inspections, information campaigns, etc.) and reactive (unscheduled inspections, such as complaint inspection, inspection due to a workplace accident, or other unscheduled inspections) activities, have contributed to the evolution of the culture of protecting occupational safety norms. Raising the culture and awareness of labor safety is an expression of the preventive function of the labour inspection system.[108] Labour Inspection (Agriculture) Recommendation No. 133[109] is devoted to the importance of education and awareness-raising and provides for the obligation of states to conduct an awareness-raising and wide-ranging educational campaign.[110]

The supervisory body explained that in 9 months from 2018 to 2023, more than 330 information meetings were held with employers and employees, representatives of business associations, and other stakeholders regarding the obligations stipulated by the law. Along with the legislative changes, 49 informative/educational videos[111] were created and disseminated via the website, television, and social networks. Thematic brochures and posters were prepared and distributed within the framework of inspections and information campaigns on legislative news. It is noteworthy that the Service consults interested persons in written or verbal communication, through the hotline, social network or official correspondence. Additionally, interested persons have an opportunity to receive face-to-face consultation service at the central office in Tbilisi, and regional offices in Batumi or Kutaisi.

Despite the effective policy aimed at awareness-raising, according to the Inspection Service, due to the occupational safety deregulation in 2006, the awareness is still low. Thus, this lack of awareness caused by cultural changes in the field remains the main challenge. According to the Business Association, a significant difficulty is the underqualification of the workforce, which includes the improper understanding of the importance of observing labour safety norms.

For the purposes of this study, the Business Association explained that, in any case, awareness-raising measures are insufficient. It is particularly problematic that in practically all cases the employer is responsible for the violation of labour safety norms when the employees do not adequately understand their critical and decisive role in protecting occupational safety conditions. In the written explanation, the Public Defender emphasised that the annual reports of the labour inspection highlight that awareness regarding labour rights, including safety norms, is still quite low among both – employers and employees. This is evidenced by the high rate of violations detected through inspections.

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108 About the preventive function of the labor inspection, see: Labour Inspection, :International Labour Office, International Labour Conference, 95th Session, Geneva, Switzerland, 2006, 29-47.

109 R133 – Labour Inspection (Agriculture) Recommendation, 1969 (No. 133), <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R133> [05.05.2024].

110 Labour Inspection, International Labour Office, International Labour Conference, 95th Session, Geneva, Switzerland, 2006, 30.

111 See Labour Inspection Service YouTube channel: <https://www.youtube.com/@LabourInspection> [01.05.2024] and the website of the service: <https://lio.moh.gov.ge/news2.php?lang=1&uid=20230108002220724278437 2&page=1> [05.05.2024].

Representatives of the non-governmental sector unanimously emphasize the importance of joint campaigns and information meetings aimed at raising awareness, supported by the state's commitment to enhancing the culture of labour safety.

Despite the high rate of detected violations, in the Labour Inspectorate's opinion, one of the most important achievements of the reform, after the Organic Law of Georgia "On Labour Safety" was extended to all areas of economic activity, **is the increased rate of correction of violations based on the instructions given upon the initial inspection**. Since September 1, 2019, this indicator has maintained growing trend (in 2020 – 8%, in 2021 – 28%, in 2022 – 52%, and in 2023 it will be equal to 57%[112]).

According to the Labour Inspection Service, awareness can be raised through proactive/reactive inspections, media campaigns, social media channels, direct meetings, hotline. In this process, the Service uses and it is crucial to use printed or electronic materials prepared specifically for this purpose.

Moreover, the Inspection Service deems it essential to increase the social responsibility of business and their motivation. For this purpose, it is crucial to gradually plan positive approaches to promote the observance of norms (e.g. to identify, through supervision, the protected business operator of the year), to cover as many strategic advertising spaces of all regions as possible, especially in the locations where a significant number of business entities is represented (the service in the mentioned direction requires the allocation of appropriate spaces intended for social purposes).

In addition, the Service believes it is essential to plan an awareness-raising campaign for developing the skills of the labour force, which, especially in the case of daily labourer, will include activities such as organising information meetings, online training platforms, as well as providing printed materials. The labor safety system cannot be effective in the conditions of inappropriate labor safety culture in workplaces.[113] In 1993, the ACSNI Human Factors Study Group defined safety culture as "the product of individual and group values, attitudes, perceptions, competencies and patterns of behavior that can determine the commitment to, and the style and proficiency of an organization's health and safety management system".[114] Organizational culture also plays an important role in the security risk assessment process.[115] Many organizations internationally that have introduced new occupational safety management strategies have failed to demonstrate improved effectiveness because these strategies did not consider the impact of organizational culture on the enforcement of occupational safety standards.[116]

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112 See Activity Reports of the Labour Inspection Service <https://lio.moh.gov.ge/index.php?lang=1> [05.05.2024].

113 *Hale A.R., Hovden J.,* Management and culture: the third age of safety, in: *Feyer A-M., Williamson A. (eds.),* Occupational injury: risk, prevention and intervention. London (UK): Taylor & Francis, 1998, 129-66; See also: *Samanta S., Gochhayat J.,* Critique on occupational safety and health in construction sector: An Indian perspective, Materials Today: Proceedings, Volume 80, Part 3, 2023, 3016-3021, <https://www.sciencedirect.com/science/article/abs/pii/S2214785321049701?via%3Dihub> [05.05.2024].

114 Health and Safety Commission (HSC), ACSNI Study Group on Human Factors. 3rd Report: Organizing for Safety. London (UK): HSC, 1993.

115 *Kogi K.,* Work Improvement and Occupational Safety and Health Management Systems: Common Features and Research Needs, Industrial Health 2002, 40, 128.

116 *Kim Y., Park J., Park M.,* Creating a Culture of Prevention in Occupational Safety and Health Practice, Safety and Health at Work, 7, 2016, 90.

In the educational component, the Inspection Service also considers creating a platform for close cooperation with the Ministry of Education and Science of Georgia in the direction of higher or professional education, which will contribute to the sustainable strengthening of the occupational safety culture in the long term.

2. Effective Implementation of Technical Regulations in a Workspace and Consolidated Policy of the Social Partners

During the interviews, the stakeholders declared a unified position that effective implementation of technical regulations in occupational safety should be facilitated by a consolidated information campaign and measures aimed at adequate technical instruction. This implies that all social partners take responsibility for implementing a consistent and planned policy to enhance awareness in the field of occupational safety.

The Labour Inspection States that, in collaboration with the Business Ombudsman, Revenue Service and social partners, the active information campaign should be continued, including information meetings, sharing digital video materials and information leaflets to ensure the availability and accessibility of information on new occupational safety rules.

3. Strengthen Human Resources by Increasing the Number of Labour Inspectors and Occupational Safety Specialists

During the research process, the necessity to increase the number of occupational safety specialists became evident, as well as, a direct correlation between the Inspection's institutional capacity and the quantitative aspects of human resources, and the effectiveness of the labour supervision function, especially in terms of an expanded supervisory mandate (including, on the labour migration).

Many stakeholders engaged in the study, including the Labour Inspection, deem it necessary to increase the number of occupational safety specialists and equip the inspection system with additional human resources. According to a representative of the Georgian Young Lawyers' Association, the emergence of a new profession of occupational safety specialist has created a new employment opportunity in the labour market. However, the lack of qualified specialists results in a situation where multiple employers may hire the same specialist. This creates the risk of improper performance of responsibilities, by the same occupational safety specialist at different premises, even when they are qualified and experienced. The lack of qualified occupational safety specialists is eventually reflected in the quality of monitoring of labour safety standards in companies. The full involvement of occupational safety specialists in companies should become part of the professional responsibility of the employer but also the professional responsibility of the said specialists. GYLA stated that it is also important to set some accountability of occupational safety specialists with the labour inspection to supervise the dynamics of the performance of occupational safety standards.

The research made evident the importance of increasing the number of labour inspectors for the efficiency of the inspection system. Specifically, the European Commission in its 2022 report stated

that the staffing of the Labour Inspection Service with additional human resources and the expansion of the mandate creates the opportunity to enhance occupational safety and protection of labour rights in the country[117]. According to the US Department of State 2021 report, the authority of the Labour Inspection Office has been extended to all sectors of the economy since 2021, which includes the competence of unplanned inspection and imposition of sanctions. The government has effectively enforced the law with a policy of adequate sanctions, considering the severity of violations; however, the insufficient number of inspectors in 2021 has hindered the full-fledged enforcement of the law.[118] By August 2022, the Labour Inspection Office had a total of 96 inspectors and 21 in the regions. Throughout the year, inspectors have been trained on various important topics, including, monitoring forced labour and labour exploitation, effective communication, and labour and technical safety in mining industries. However, as per the Trade Unions, there is a need for more trained labour inspectors.[119]

According to the international principle of professionalism in the field of labour inspection, properly trained specialists should uphold the values of professionalism, ethical integrity, consistency, justice and transparency. This requires a comprehensive training that goes beyond technical aspects, and encompasses formal guidelines[120] to cultivate overall inspection skills.

Quantitative growth dynamics of labour inspectors in 2018-2023 and target benchmarks. According to the Labour Inspection, the number of labour inspectors has been increasing gradually since 2018. The number of labour inspectors set by the state in 2018 was 40 units, and by 2023 there are 123 staff units, which also includes the Head of the Division, who, along with governance, also performs the supervisory function. In addition to Tbilisi, there are two regional offices in Batumi and Kutaisi, which cover Imereti and Adjara regions. Since the national center is the Tbilisi Inspection Service, the monitoring process from Tbilisi is also active in the regions.

As explained by the Inspection, if we take account of the ILO standard while determining the number of inspectors (1 inspector per 20,000 employees in transitional economies[121]) and the 2023 (II quarter) employee quantitative data[122] of National Statistics Office of Georgia, the number of

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117 Council of European Union, Brussels, Association Implementation Report on Georgia , 2022, 10.8.2022 SWD(2022) 215 final, 17, <https://www.ecoi.net/en/file/local/2078335/ST_11784_2022_INIT_en.pdf%3B+filename%2A%3DUTF-8%27%27ST_11784_2022_INIT_en.pdf> [05.05.2024].

118 2020 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2021, 77, <https://www.state.gov/wp-content/uploads/2021/10/GEORGIA-2020-HUMAN-RIGHTS-REPORT.pdf> [05.05.2024]; 2021 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2021, 84, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/georgia/> [05.05.2024].

119 2022 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2022, 57, https://www.state.gov/wp-content/uploads/2023/03/415610_GEORGIA-2022-HUMAN-RIGHTS-REPORT.pdf [05.05.2024].

120 ILO Curriculum on Building Modern and Effective Labour Inspection Systems, Policy and Planning of Labour Inspection, Module 3, ILO, p.9, principle 11 < https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_856560.pdf> [05.05.2024].

121 <https://www.ilo.org/static/english/intserv/working-papers/wp041/index.html#:~:text=The%20ILO's%20policy%20and%20technical,countries%20(ILO%2C%202006)> [05.05.2024].

122 <https://www.geostat.ge/ka/modules/categories/683/dasakmeba-umushevroba> [05.05.2024].

inspectors – 66 meets the requirement. However, this approach is not in line with the international standards and fundamental principles that Article 10 of the ILO Convention No. 81 states clearly in terms of the component of the basic indicators determining the number of labour inspectors, which is the main means of calculating the number of target benchmarks (E.g.: the essence of the duties to be performed; Size, type of activity, current situation, number of employees and classification by jobs, number and complexity of legal norms, material-technical means, working conditions in which labour inspector is carrying out their duties). Although the current number of labour inspectors exceeds the recommended ILO standard, the issue of cultural differences and relatively low awareness in the regions should be considered.

According to the labour supervisory body, the number of persons employed in the second quarter of 2023 is 1,327,400. Accordingly, there are 12,406 employees[123] per one labour inspector. As of October 2023, there are 248,170 active business entities, leading to a ratio of up to 2,319 business operators per inspector for supervision. It must be noted that ratio has been calculated not on an individual basis for each of the 123 inspectors but rather for groups of inspectors, considering that each visit involves at least two inspectors and may vary from one visit to another.

In response to this issue, Business Association stated that it is not advisable to divert (even partially) the Inspection's limited resources towards the areas of the economy, where there is an insignificant or no threat to employees' health or life (e.g., office work).

According to the study, it can be concluded, that for the realization of universal occupational safety rights, the lack of human resources should not be a reason for risks even in the low-risk sector.

The Labour Inspection Service explained that strengthening its role and increasing the number in the state depends on the following factors:

- The share of the number of employees and the expanded mandate due to current legal norms and/or active entities on a sectoral level;
- The enhancement of labour legislation, taking account of the Association Agreement and international standards;
- To facilitate the transition from informal to formal sectors, encouraging promotional measures, including strengthening social protection mechanisms and their relevant implementation;
- Increasing general employment in the country;
- Expansion of the labour inspectors' mandate in line with increased international obligations, which requires relevant financial support from the state budget.

The Labour Inspection expects that the increase in the number of labour inspectors will lead to a rise in the number of entities to be inspected based on risk levels. This will automatically prioritise and increase the number of proactive measures. As a result, with the increase in the share of proactive activities, the number of unplanned inspections is expected to decrease. Consequently, more companies are likely to voluntarily comply with safety norms.

[123] <https://www.geostat.ge/ka/modules/categories/683/dasakmeba-umushevroba> [05.05.2024].

Considering that the mandate of the labour inspection has been extended to the field of migration, the issues of control of the minimum salary of doctors and nurses, the Labour Inspection Service deems it appropriate to increase the number of inspectors by 25 in 2024, and in the following years, the target benchmark can be set up to 200 inspectors.

This directly depends on the larger budget funding, for which the Inspection has introduced its needs to the relevant bodies. The current national context suggests that the increased number of inspectors directly relates to the enhancement of supervision of occupational safety.

4. Expanded Inspection Mandate to the Field of Labour Migration and Related Institutional Needs

In the 2020-2021 reports of the US Department of State, an opinion is expressed regarding the lack of regulation of labour conditions for migrant workers:

"While the government did not keep specific data on migrant labourers in the country, the Public Service Development Agency issued up to 5,000 residence permits annually to migrant workers[124]."

In response to this challenge, in 2023, amendments were made in the Law of Georgia "On Labour Migration" and the Law of Georgia "On Labour Inspection Service", which aim to regulate the role of the Labour Inspection in enforcing the norms regulating labour migration. This ensures the transparency of processes arranged by private or business entities arranging employment relations outside of Georgia, as well as, the employment of foreigners who do not have a permanent residence permit in Georgia by local employers.

According to the amendments, the norms of the Law of Georgia "On Labour Migration" were added in the definition of "Labour Norms"[125]; the Labour Inspection Service, in carrying out its activities, will be guided by the Law of Georgia "On Labour Migration" along with the legislative acts of Georgia defined by the law of Georgia "Labour Inspection Service"[126]; In order to carry out the inspection, the labour inspector is authorized to issue an individual legal act for an administrative offense within the scope of the Law of Georgia "On Labour Migration", draw up a report of administrative offense, apply the measures of administrative liability and issue relevant instructions[127]; administrative responsibility for violation of labour norms is also defined by the Law of Georgia "On

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124 2021 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2021, 85, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/georgia/> [05.05.2024]; 2020 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2021, 78, <https://www.state.gov/wp-content/uploads/2021/10/GEORGIA-2020-HUMAN-RIGHTS-REPORT.pdf> [05.05.2024]; This indicator was 2,749 quantitative units in 2022. See: 2022 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2022, 56, <https://www.state.gov/wp-content/uploads/2023/03/415610_GEORGIA-2022-HUMAN-RIGHTS-REPORT.pdf> [05.05.2024].

125 Amendments to Article 3(a) (Definitions) the Law of Georgia "On Labour Inspection Service".

126 Amendments to Article 4.1 (Principles of the activities of the Labour Inspection Service) the Law of Georgia "On Labour Inspection Service".

127 Amendments to Article 16.2(m) (Procedure for carrying out inspections) the Law of Georgia "On Labour Inspection Service".

Labour Migration"[128]. The Labour Inspection Service enjoys the discretionary authority to determine when and which administrative fines should be applied within the scope of the Organic Law of Georgia "Labour Code", the Organic Law of Georgia "On Occupational Safety" and the Law of Georgia "On Labour Migration", and in case of imposing a fine – its amount. The administrative fine should be proportionate to the violation[129].

The amendments to the Law of Georgia "On Labour Migration" significantly expand the mandate of the Labour Inspection Service to the direction of prevention of illegal migration, forced labour, labour exploitation, and trafficking.[130] This further increases the service's ability to proactively plan specific measures to protect the labour migrants' rights. For this purpose, the service is actively participating in creating an electronic platform, which will give the Service the opportunity to identify those business entities that are closely involved in regular migration for either intermediate purposes or directly in the direction of employment of labour migrants.

Moreover, extending inspection to the migration area puts more emphasis on the need of increasing human resources of the Labour Inspection Service.

5. Classification of Accredited Programs and importance of Profile Specialisation in the Wake of the Wider Implementation of Directives

In the research process, stakeholders emphasized the lack of certified labour inspection specialists and incomplete profile qualifications, especially in the heavy and hazardous industries. Considering this, representatives of the non-governmental sector and employers suggested implementing additional specialization in the accredited programs of the Labour Inspection, taking into account the sectoral, profile specifics (for example, the construction sector, extractive industry). According to non-governmental organisations, the Progressive Forum and the Georgian Young Lawyers Association, the general profile accreditation course, which includes all sectoral directions, may be sufficient for a labour safety specialist only in low-risk enterprises. The same organisations state that since technical regulations and labour safety norms can be updated periodically, it should be advisable to have the obligation to periodically renew certification, train labour safety specialists and raise their qualifications to ensure regular detailed inspection of specific activities.

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128 In the Law of Georgia "On Labour Inspection Service", Article 20.1(c) was added after Article 20.1(b) (Administrative liability for the violation of labour norms).

129 Amendments to the Law of Georgia "On Labour Inspection Service", Article 20.4.

130 About the mandate of the labor inspection in the field of international migration, see: Labour Inspection, International Labour Office, International Labour Conference, 95th Session, Geneva, Switzerland, 2006, 54; Migration, Globalization and Decent Work: What Role for Labour Inspection? A Panel Contribution, International Association of Labour Inspection, 11th Congress 13-14 June 2005 Geneva, International Labour Organization, <https://www.globalmigrationpolicy.org/articles/globalization/Migration,%20Globalization,%20Decent%20Work%20-What%20Role%20for%20Labour%20Inspection,%20TARAN%20-IALI%20Geneva%20Jun06-1.pdf> [05.05.2024]; Labour inspection and monitoring of recruitment of migrant workers, Labour Migration branch Labour Administration, Labour Inspection and Occupational Safety and Health branch, ILO, Final Draft 2022, <https://www.fairrecruitmenthub.org/sites/default/files/2022-04/Brief%20-%20Labour%20inspection%20and%20monitoring%20of%20recruitment%20of%20migrant%20workers.pdf> [05.05.2024].

The Head of the Progressive Forum deems it important to include occupational safety as a mandatory subject in engineering-technical university education curricula, which will increase the understanding and use of labour safety standards in the specialists' work process. In the long term, all risk-bearing professions can be subject to certification, which will lead to the enhancement of the labour safety system, as representatives of adjacent professions (e.g.: engineers, builders), who lead the relevant facilities, will ensure that occupational safety standards are met in the process of professional activity. As of today, it is impossible to carry this out in the short run and preparation of the national context, as well as the educational system is essential. As per current legislation, personnel training and technical instruction in a company is entrusted to labour safety specialists, which cannot be an effective and viable solution in the long run.

Labour Inspection Service explained that the general accreditation program establishing minimum requirements was approved in 2018. In 2021, when the number of labour specialists increased, the accreditation program also changed, and the mandatory requirements for the accreditation program increased. The entities responsible for providing training and assessment to labour inspectors underwent a division. As of today, exams are organised at premises of different universities, while accredited organisations are in charge of assessment. This reform of the accreditation system has ensured quality enhancement, which is evident throughout the training programs, as well as during the occupational safety monitoring process.

Today, there are several qualification modules in the field of occupational safety: a full specialist course, which grants the qualification to carry out monitoring in all areas, an accredited program for low- and medium-risk facilities, and a special accredited program.[131] The current accreditation program is divided with sectoral classifier – risk areas. Certainly, specialization in the profile direction would have been ideal, however, taking into account that technical regulations have not yet been adopted in all fields (for example, in the field of metallurgy), and due to this lack of special technical domestic norms at this stage, it is not feasible to develop adequate qualification programs. Thus, the reform can be visualized in three phases. The first two stages of the reform were implemented in 2018 and 2021. In the upcoming stages, in line with legislative evolvements, it is possible to create additional profile specialization establishing an ideal institutional model. Today, full accreditation programs are more attractive for the majority who want to get accredited, as it allows the mobility of labour safety specialists and simultaneous activity in different sectors. At this stage, work with a wide profile is of greater interest to occupational safety specialists.

During the interview, GYLA suggested technical education to be defined as a qualification prerequisite for the admission of candidates to the labour inspectors' accreditation programs.

Labour Inspection Service explained that when the Labour Inspection Department was established in 2015, the ILO experts actively delivered training courses for local specialists, where the Georgian side raised the issue of the appropriateness of the mandatory requirement of technical knowledge. The ILO experts themselves did not hold technical education and did not support setting a

[131] Amendments (of 14.09.2021) to the order No. 01-25/ნ, of October 13, 2018, of the Minister of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia "On the Approval of the the Volume, Procedures and Terms for Carrying Out Accredited Programs for Labour Inspection Specialists".

narrow qualification prerequisite either. In the subsequent phase, the appropriateness of the mentioned matter was evaluated, considering national practices. **Experience has shown that the introduction of technical education requirements turned out to be quite restrictive and led to the shortcoming of seeing labour safety issues through a narrow prism.** The effectiveness of specialists' work increased greatly when representatives of various professions were given the opportunity to use their diverse knowledge in occupational safety monitoring. Thus, the stance of Labour Inspection Service is that it is crucial to develop professional risk assessment skills in the field of labour safety. Understanding of the requirements of the technical regulation is achievable in the conditions of possessing professional competencies. The admissibility of any professional background in the field of occupational safety specialist training makes the monitoring system more effective.

6. The Scope of Inspection in Semi-formal and Informal sectors

The informal economy accounts for a large proportion of workers, especially in developing countries. However, occupational safety and health legislation often does not apply to such workplaces or, if it does, is not effectively implemented and enforced.[132]

Among the difficulties of 2020-2021, extending labour safety standards to the informal sector should be highlighted. According to the 2020 US Department of State report, more than 35 per cent of non-agricultural workers were employed in the informal sector. And the guarantees provided by the labour law did not apply to those who perform work outside the "organised labour conditions". NGOs reported that workers in the informal sector were vulnerable to exploitation. These workers were the most affected by the restrictions of the COVID-19 pandemic as well[133].

According to the National Statistics Office data, in the non-agricultural sector, the share of informally employed people in the labour force was 28.8 per cent, although the GTUC states that this number is 45 per cent. 2021 publication of the Social Justice Center informs that the only social safety net was targeted social assistance, which was not in direct correlation with a person's employment status.[134]

The 2022 US Department of State report stated that "there were frequent cases involving drivers in the tourism sector driving for more than 15 consecutive hours. The law does not adequately ensure the safety of those involved in informal and nonstandard work, and the Labour Inspectorate does not possess the mandate or resources to adequately cover informal and nonstandard employment sectors[135]."

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132 *Rantanen J.,* Occupational health services for the informal sectorAfrica Newsletter on Occupational Health and Safety, No. 2 [Internet], 2009 [cited 2015 Sep 17], <https://www.scirp.org/reference/referencespapers?referenceid=1817647> [05.05.2024].

133 2020 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2021, 78, <https://www.state.gov/wp-content/uploads/2021/10/GEORGIA-2020-HUMAN-RIGHTS-REPORT.pdf> [25.10.2023]; 2021 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2021, 85, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/georgia/> [05.05.2024].

134 2022 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2022, 57, https://www.state.gov/wp-content/uploads/2023/03/415610_GEORGIA-2022-HUMAN-RIGHTS-REPORT.pdf [05.05.2024].

135 2022 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2022, 57, <https://www.state.gov/wp-content/uploads/2023/03/415610_GEORGIA-2022-HUMAN-RIGHTS-REPORT.pdf> [05.05.2024].

In this regard, after expanding the labour inspection mandate to labour rights, the Inspection is entitled, while inspecting substantive legal rights, to identify the cases where there is no employment contract or where the employment relationship is disguised by a different type of contract. Upon identifying such violation of rights and qualifying the relationship as an employment, the labour inspectorate is entitled to apply occupational safety standards to the actual employee and initiate liability procedures for violations of labour safety norms. The difficulty of monitoring the informal sector is largely related to the quantitative challenges in human resources – inspectors, which is disproportionate to the percentage share of informal employment in the labour market. **The difficulties in overseeing the informal sector cannot solely be attributed to limitations in the labour inspection mandate. The inspectorate is authorized to broaden the scope of labour safety control beyond employment, and cover the area of work performance, where the employers are obligated to ensure adherence to safety regulations not only for their employees but also for third parties.**

When discussing the informal sector, its two forms should be distinguished: the fully informal sector, which carries out economic activities without registration, and the mixed informal sector, where the formal sector uses informal employment.[136] As explained by Business Association, the impossibility of extending the norms of labour safety to the fully informal sector (as opposed to mixed) causes a sense of injustice in organised, registered businesses as it results in unequal legal regime. Considering the small size or infrequency of the subject's activity, they are less likely/difficult to be detected by the regulator, which allows them to ignore labour safety norms.

As the Inspectorate stated, to be covered with occupational safety norms, it is required for the economic activity to be recorded in the registry of economic activities. This was a historic goal of legislators during the drafting process. The inspection mandate does not cover unregistered entities. Where an organisation is not registered in line with requirements of Georgian legislation, this falls within the scope of competence of the Revenue Service and the full control of the informal employment shall not be considered within the Inspection's mandate.

According to Progressive Forum, the share of informal employment in total employment is almost half of the labour market, which leaves informal business outside the labour safety mandate and tax system. One possible solution could involve implementing social guarantees and tax systems that incentivize unorganised businesses to formalize.

The mandate of Labour Inspection Service covers informal employment, where it is concentrated within formal employment. For instance, if an entity is being inspected in labour rights direction, during which a case of informal employment is detected (performance of work without an employment contract), then the highest limit of sanction will be applied by the inspection.

While it's accurate that the labour inspection mandate doesn't extend to informal employment within the unregistered entities (such as family farms), certain legal safeguards have been established

[136] For more information about forms of informal employment, see: *Sivakami N., Acharya S.S., Panneer S.,* Health, Safety and Well-Being of Workers in the Informal Sector in IndiaLessons for Emerging Economies, Springer Nature Singapore, 2019, 1-274.

to counterbalance this limitation, particularly in the realm of forced labour control. To prevent the Labour Inspectorate's mandate from being perceived as oppressive, the Inspectorate was authorized to conduct, with the court's permission, unscheduled inspections of any building or premises, day or night, upon reasonable doubt of forced labour or labour exploitation. In this regard the ordinance of March 7, 1996 of the Government of Georgia "On Approval of the Rules for State Supervision to Prevent and Respond to Forced Labour and Labour Exploitation". ILO study highlights that **the share of informal employment in the total employment in the labour market of EU member states is significant[137]. Worldwide, the share of informal employment in total employment is 61.2%[138]. Taking into account the practices of EU member states, the inspection system is effectively constrained from entering family farms.**

The Labour Inspection Service, within its competence, records the violations identified through the supervision of the implementation of the norms of the Labour Code. Hence, in 2021, for the violations of Article 12.2 (1) and 12.3 on the employment contract, warning as an administrative liability was applied to 52 entities; In 2022, administrative liability was applied to 62 entities, among them, 14 were fined and 48 were given a warning; In 2023, administrative liability was applied to 43 entities, among them, 9 were fined and 34 were given a warning. As per the current legislation, there is a distinction made between the qualifying and distinctive features of services and employment contracts. The necessity for further legislative enhancement in this regard lacks clarity. Georgian Judicial Law shall resolve the issue of minimal protection standards and recognition of non-standard form of employment – gig-work (specifically, couriers) as an employment relationship, upon completion of the litigation in the third instance of the court.

Informal employment is an equally large-scale problem internationally, along with the Labour Inspection Service many international actors are involved in its management.[139]

7. Correlation of Breaches of Occupational Safety Norms and Labour Rights and the Dual Mandate of the Labour Inspection Service

During the interview, a representative of the non-governmental sector stated that the Georgian legislation narrowly considers issues of occupational safety only in the workspace and does not relate it to labour rights, which is not in line with international labour standards. The Progressive Forum and the Labour Inspection, suggest that excessive working hours can be directly correlated to the risk of an accident and hence, the impact on occupational safety norms. The Progressive Forum notes that the

137 Overview of the informal economy in the European Union, <https://www.ilo.org/budapest/WCMS_751319/lang--en/index.htm> [05.05.2024].

138 Women and men in the informal economy: A statistical picture. Third edition, International Labour Organization, 2018, <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf> [05.05.2024].

139 On the advantages of the targeted policy of formalization of the informal sector, the accompanying socio-economic and state importance, see: *Williams C.C.,* A Modern Guide to the Informal Economy, Edward Elgar Publishing Limited, 2023, 165-166.

mining industry in Chiatura stands out, especially due to the intricate challenges in labour rights and occupational safety, caused by the work schedule (10-day shaft regimen). This warrants specific attention and oversight by the state. The case of Chiatura is even more noteworthy, as since 2017, the state has appointed a special manager, due to challenges in labour rights, as well as environmental issues. The topic has a social dimension. State control of occupational safety standards becomes challenging due to short-term subcontractors who lack the motivation to adhere to labour regulations. Remuneration is based on the hourly rate, which motivates the employees to overwork, as a result, the probability of accidents increases. The Labour Inspection Service uses mechanisms such as a recommendation or suspension of activities to avoid the risk of an accident at hazardous workplaces. In such cases, the Inspection covers labour rights and occupational safety norms. The labour inspection often carries out joint monitoring of both safety standards and labour rights, so as to see the occupational safety issues in the light of labour rights. It is impossible to assess the violations of labour rights without overlooking at their consequences, hence, the analysis of the occupational safety situation. The oversight responsibilities for occupational safety (The Organic Law of Georgia "On Occupational safety") and labour rights (The Organic Law of Georgia "Labour Code") are concurrently interpreted within the institutional framework of the Labour Inspection Service. The pertinent departments of the Inspection Service maintain coordination.

The impact of labour rights on occupational safety is evident not only in high-risk enterprises but also in the low-risk sector. For instance, **in retail, the actual amount of work of supermarket consultants often involves the functions and responsibilities of different positions (cleaner, cashier, product placer, etc.). When these terms are agreed upon in the contract, and there are no violations of working time or other labour rights, the Labour Inspection is not entitled to assess the fairness of the terms of employment,** unless the employer does not have a set work schedule and does not have assigned personnel to each position. A legislative initiative concerning this issue could have promoted the protection of labour rights and hence, occupational safety. However, in the context of the existing normative reality, the performance of various duties during the work day cannot be grounds for the Labour Inspection to apply the relevant legal definition and a sanctioning measure.

According to the Labour Inspection Service, in 2018-2021, a widespread practice in the retail sector was the so-called "collective responsibility" regime of supermarket employees. This implied the obligation to compensate for product loss or for expired product, irrespective of any employee's fault. This ugly practice was eliminated through public notice of the Inspection to supermarket networks, **leading to a significant decrease in similar occurrences. As of today, the main problem in retail is a low pay and combining several roles agreed upon in the contract with the employer. In the retail sector, labour conditions of employees are supervised periodically (once in every 2-3 months).** The number of reports/complaints made by employees has significantly fallen compared to 2021.

Hence, as the Labour Inspection Service states, if during the inspection of occupational safety rules, labour rights violations are detected, or vice versa, the scope of monitoring will expand on the

ground of the responsible inspector's initiative and **will cover the consequential violations within the scope of an unscheduled inspection, which is guaranteed by the Inspection mandate. The monitoring of labour rights is not conducted without giving consideration to their impact on occupational safety norms.**

Use of occupational safety protection measures by fixed-term employees. According to the report from the US Department of state, fixed-term workers hesitated to raise concerns to their employers about conditions jeopardizing their health and safety, as they believed it could serve as grounds to decline contract renewal. This situation was particularly acute in a specific industrial city where the local population depended on the a single business entity[140]. These challenges were overcome to a certain extent by strengthening the legal guarantees of open-ended contract and implementing awareness raising measures about occupational safety. Covid-19 aggravated the situation, putting employees in precarious position due to their social insecurity and inability to demand adequate working conditions[141].

US Department of State report states that in July 2022 with the involvement of GTUC and other parties, passed regulations defined by Association Agreement with the EU to ensure safe working conditions at workplace. The regulations apply to workplaces, including internships, and covers issues of adequate desk space for each employee, temperature in closed working spaces, rest, changing and shower rooms.[142]

8. Criteria for Selecting Business Entities for Scheduled Inspections

The rules for planned inspection initiated by the inspection service is defined according to the list of priority sectors approved by the Government of Georgia, and the list of specific organisations working in priority sectors subject to scheduled inspection is drawn up by the Chief Labour Inspector[143]. Labour inspection system evaluation reports state that the legislation does not specify what are the criteria for drawing up the list of sectors and entities subject to scheduled inspection, and whether or not, if at all, it is influenced by publicly available information about the existent violations. As for the unscheduled inspection, it can be carried out at the initiative of the inspectorate or other entities. According to the assessment of the Social Justice Center, on the one hand, the authority of the Labour Inspection Service to proactively conduct inspections on its own initiative should be regarded

[140] 2021 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2021, 84, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/georgia/> [05.05.2024].

[141] 2021 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2021, 84, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/georgia/> [05.05.2024].

[142] 2022 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2022, 55-56, <https://www.state.gov/wp-content/uploads/2023/03/415610_GEORGIA-2022-HUMAN-RIGHTS-REPORT.pdf> [05.05.2024].

[143] Ordinance #99, of 10 February, 2020, "On the Approval of the Rules and Conditions for Entry and Inspection of Entities Subject to Inspection". Available at: <https://matsne.gov.ge/ka/document/view/4796359?publication=3>

positively, however, at the same time, the associated risks can be dispelled by offering a high legal standard of justification for unscheduled inspections[144].

Criteria to be considered when selecting an object to be inspected. During the interview Labour Inspection Service stated that the selection criteria of an entity to be evaluated is established by the legislation. Namely, ordinance №80, of February 6, 2020 of the Government of Georgia "On the Approval of the Methods for Determining the Priority Directions of Economic Activities, and the Rules for Risk Assessment." International labour standards recognize the objective criteria to be considered while selecting entities to be inspected, which are given in detail in Resolution 80. As per international labour standards the following factors should be taken into account in the selection process of enterprises:

a) **Size of enterprise.** Larger enterprises potentially affect more working lives and therefore may be given priority over smaller enterprises. However, other factors also need to be considered, as explained below.

b) **Likely compliance.** Even if an enterprise has no adverse compliance record, if there is a serious risk or hazard on site, this may increase the likelihood of non-compliance and thus the probability of inspection. So construction sites (if within the inspection mandate) will tend to be visited more frequently than, say, small garages.

c) **History of compliance.** Individual enterprises with records of poor compliance are given higher ratings, and are therefore likely to be inspected more often, especially if the employers are also uncooperative. The different combinations of ability and willingness to comply with conditions should also be taken in account in differentiating between target groups.

d) **Management of working conditions.** Enterprises with poor management of safety and health and other workplace issues are likely to be inspected more often than those with good management systems.

e) **Specific risks.** Enterprises subject to significant risks (asbestos, noise, falls from heights, etc.) or using dangerous technologies (forklifts, boilers, etc.) could be targeted for inspection visits.

f) **New enterprises.** Many inspectors will prioritize new enterprises, discussing factory layouts, ventilation, lighting, etc. with them, so as to ensure optimal working conditions from the outset.

g) **Time elapsed** since the last routine inspection is also an important factor.

h) **National or local programmes.** Enterprises that fall within the ambit of national or local programmes are automatically included in inspection plans. This may also mean that inspectors focus on particular issues during their routine inspections.[145]

The setting precise and comprehensive criteria for the selection of the enterprises to be inspected was considered a limiting factor of the mandate of the labour inspection. The opinion that

144 Labour Inspection Service Assessment, Social Justice Center, 2021, 20-21.

145 ILO Curriculum on Building Modern and Effective Labour Inspection Systems, Policy and Planning of Labour Inspection, Module 3, ILO, 12 <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_856563.pdf > [05.05.2024].

the labour inspectorate should be given freedom within its institutional discretion in the process of proactive selection of entities was highly supported.

9. The Scale of Unscheduled Inspection

US Department of State report states that in 2022 labour inspectors conducted unscheduled visits to workplaces and monitored OSH and labour rights violations[146]. Georgian legislation sets legal grounds for conducting unscheduled inspection visits[147]. According to the International Labour Organization recommendations, in order to ensure the effective enforcement of OSH norms, it is advisable to further expand the discretion of the labour inspectorate, to conduct inspections without prior warning on its own initiative and to ensure that workplaces are visited with the sufficient frequency to expand the scale of enforcement of relevant norms.[148] Clearly, the increase in the frequency of unscheduled inspections should be carried out while increasing the human resources of the Labour Inspectorate and the number of inspectors. According to the annual report of the European Commission, additional staffing of the Labour Inspection Service and expanding its mandate creates an opportunity to strengthen supervision of labour safety and labour rights.[149]

When discussing the increase in the scale of unscheduled inspection, **the international principle of risk focus and proportionality** should be taken into account:

Enforcement needs to be risk-based and proportionate: the frequency of inspections and the resources employed should be proportional to the level of risk and enforcement actions should be aimed at reducing the actual risk posed by infractions.[150]

In the research process, the data showing the ratio of unscheduled and scheduled inspections were obtained from the Labour Inspection. See the table below.

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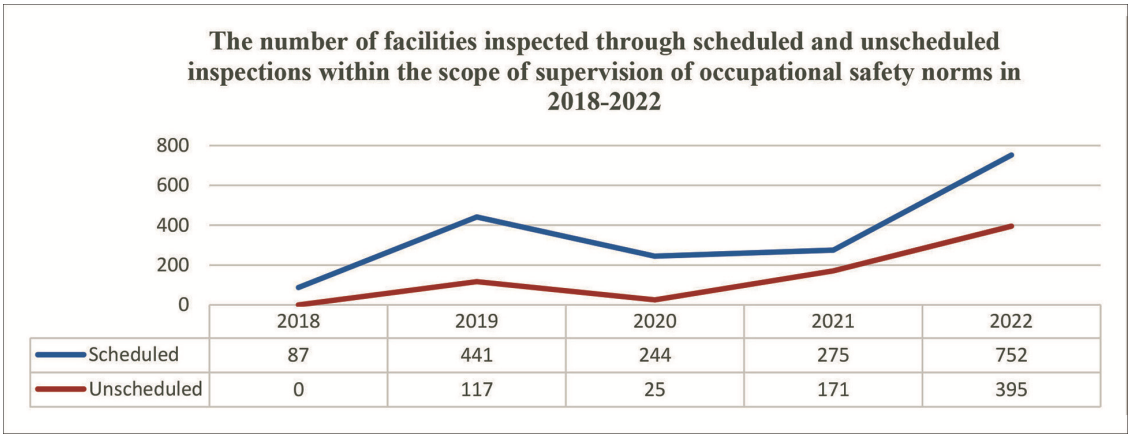
146 2022 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, 2022, 57, https://www.state.gov/wp-content/uploads/2023/03/415610_GEORGIA-2022-HUMAN-RIGHTS-REPORT.pdf [05.05.2024].

147 Ordinance #99, of 10 February, 2020, "On the Approval of the Rules and Conditions for Entry and Inspection of Entities Subject to Inspection". Article 11.2: Unscheduled inspection of an entity is carried out on the ground of the decision of Chief Labour Inspector: a) In response to the complaints, applications, hotline reports, etc., made by government institutions, local government bodies, organisations, citizens; b) To inquire into the workplace accident or on the ground of a reasonable doubt of such accident; c) In case of accidents, which did not lead injuries; d) In cases of detecting circumstances, which indicate to professional diseases of employees, <https://matsne.gov.ge/ka/document/view/4796359?publication=3> [05.05.2024].

148 2023 Report of International Labour organization. About the ILO in Georgia <https://www.ilo.org/budapest/countries-covered/georgia/WCMS_888396/lang--en/index.htm> [05.05.2024].

149 Council of European Union, Brussels, Association Implementation Report on Georgia, 2022, 10.8.2022 SWD(2022) 215 final, 17, <<https://www.ecoi.net/en/file/local/2078335/ST_11784_2022_INIT_en.pdf%3B+filename%2A%3DUTF-8%27%27ST_11784_2022_INIT_en.pdf> [05.05.2024].

150 ILO Curriculum on Building Modern and Effective Labour Inspection Systems, Policy and Planning of Labour Inspection, Module 3, ILO, p.9, principle 3, <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_856563.pdf > [05.05.2024].



	2018	2019	2020	2021	2022
Scheduled	87	441	244	275	752
Unscheduled	0	117	25	171	395

As the Labour Inspection Service explained, the increase in unscheduled inspections depends on the number of accidents and complaints. As the decision on unscheduled inspection is made by the Chief Labour Inspector as per the ordinance "On the Approval of the Rules and Conditions for Entry and Inspection of Entities Subject to Inspection", and the inspection can be conducted without notice, at any time of the day or night, in any workplace or workspace, at this stage there is no necessity of legislative support in this regard.

10. The Appropriateness of the Standard of "Reasonable Doubt" and the Scope of the Inspection's Discretion in Response to Reports on Occupational Safety Violations

Article 11.2 (a) of the ordinance #99, of 10 February, 2020, "On the Approval of the Rules and Conditions for Entry and Inspection of Entities Subject to Inspection" stipulates that the unscheduled inspection of an entity is carried out on the ground of complaints, applications, hotline reports, etc., made by government institutions, local government bodies, organisations, citizens (within the bounds of reason, upon reasonable doubt). This approach has been critically assessed in Social Justice Center report: "Where an interested person reports a violation of labour rights to the labour inspectorate, it is unclear what standard constitutes 'reasonable doubt'." In other words, it is unclear, how the rationale behind the doubt can be assessed and which methods should be applied to verify the accuracy of the information provided to the inspection, if not the visit to the premises in question. Introduction of a general standard of "reasonable doubt" in the legislation creates the risk of inconsistent and arbitrary interpretation, which may become the basis for an unjustified refusal by the labour inspectorate to inspect a particular employer; Therefore, the mentioned legislative norm requires additional definition[151].

When discussing the admissibility of the standard of reasonable doubt, Article 12.1 (b) of Labour Inspection Convention No. 81 should be taken into account, where standard of "reasonable doubt" is determined as the criterion for deciding on unscheduled inspection[152]. The abovementioned

[151] Labour Inspection Service Assessment, Social Justice Center, 2021, 21-22.

[152] "...to enter by day any premises which they may have reasonable cause to believe to be liable to inspection".

critical opinion implies that the notification of the person concerned can itself be considered as a prerequisite for reasonable doubt, which may have a certain degree of credibility. However, on the other hand, the content of the notification itself must meet a certain degree of reasonableness, taking into account the additional circumstances investigated, so that the mechanism of the notification does not become a mechanism of unreasonable, abusive use of the Labour Inspection's resources. This standard can be considered as a protective shield to prevent the ungrounded claims.

The analysis of the reasonable doubt test involves the exclusion of subjective assessment and putting it within reasonable frames of objective limitation. This can be done in the following way: For assessment, the labour inspectorate must investigate the relevant circumstances with the complainant prior to the inspection, and if it is found that the scale of the action, about which the notification was made, should its existence be confirmed, will be considered a violation of occupational safety rules, the grounds for launching an inspection shall be deemed reasonable.

The existence of a reasonableness test somewhat shifts the burden of credibility and relevance of the author of a notification. Primarily, the existence of a rebuttable presumption of prima facie[153] infringement by the complainant should be checked. In order to raise a prima facie rebuttable presumption, the notifier must provide relevant information and available facts that form sufficient grounds for raising suspicions of violations. To conduct the inspection, the Labour Inspectorate must suspect the presence of a presumption and likelihood of a violation, which will be confirmed or disproved through an unscheduled inspection.

It is important to note that in **the absence of a legal prerequisites for reasonableness of an unscheduled inspection, and considering the confidentiality guarantees for the notifier, there exists a hypothetical probability or a relevant perception that the labour inspectorate may exercise its mandate arbitrarily, lacking reasonable suspicion.** Hence, the reasonable doubt clause in the legislation creates guarantees of validity of conducting unscheduled inspections and the legitimate use of the authority.

Claim can be raised to the Public Defender's Office where the Inspection refuses to launch investigation on the ground of a notification[154]. The Ombudsman is authorized to request from the Inspection an unscheduled inspection of the employer on the basis of the alleged violation of labour safety rules[155].

The same topic was discussed during the interview with the Labour Inspection Service. As explained by the Chief Labour Inspector, where the notification is made by an employee, only two

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153 Based on the first impression; accepted as correct until proved otherwise.

154 As per Article 13 of the law of Georgia of May 16, 1996 "On the Public Defender of Georgia": The Public Defender shall examine the complaints and applications of citizens of Georgia and those of aliens and stateless persons, as well as of non-governmental organisations, dealing with the violation of human rights and freedoms provided for by the Constitution and legislation of Georgia, by international treaties and agreements to which Georgia is a party, caused by actions or decisions of public authorities, national or local, public or private organisations, institutions, enterprises, public officials and legal persons.
Also, Article 14.1: The Public Defender shall examine an application or complaint on the violations of human rights and freedoms, where the claimant: a) Questions the decision of a public institution.

155 Article 3 (n) of the Law of Georgia "On Labour Inspection Service", the definition of persons entitled to raise claims.

facts are inquired into in order to launch investigation. First, the status of an employee making the notification, and the identity of a business entity where the alleged violation took place. As per Article 13.1 (c) of the law "On Labour Inspection Service" the ground for launching an inspection can be a confidential notification by any identifiable person. However, it is important to ensure that the mechanism is not abused by companies to the detriment of competitors.

11. Proactive Sanctioning Policy

11.1. The System of Sanctioning and the Methodology of Application

An effective and proactive sanctioning policy is the most important feature for the efficiency of the labour inspection system. Strengthening of proactive (preventive) sanctioning policy[156] involves employing liability measures not to establish a punitive system but to incentivize voluntary adherence to labour safety regulations.[157] "Sanctions have an important preventive function to the extent that the risk of being fined encourages employers to comply with their legal obligations[158]." Sanctioning policy should stand on the principle of proportionality and consistency.[159] The principle of selectivity should be considered. Promoting compliance with occupational safety norms and enforcement of the rules to some extent should be entrusted to market forces, the private sector and civil society. Inspection and enforcement cannot be applied always in every case, as the regulatory aims can be equally achieved through other reasonable proactive means[160].

On the issue of labour inspection sanctioning policy, a number of stakeholders deem it inadvisable to use a warning as the dominant form of administrative measure. According to the International Labour Organization, the sanctions policy of the Labour Inspection Service was remarkably mild in the first year of its functioning. Fines accounted for only about 2% of

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156 ILO Curriculum on Building Modern and Effective Labour Inspection Systems, Policy and Planning of Labour Inspection, Module 3, ILO, 9, principle 3, <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_856563.pdf > [05.05.2024].

157 From Sanctions and Remedies to Prevention Mechanisms: The Effective Application of Labour Law Before and Beyond Courts in Italy, in: *Jorens Y.,* The Lighthouse Function of Social Law, Proceedings of the ISLSSL XIV European Regional Congress Ghent 2023, Springer, 2023, 599-610.

158 ILO Curriculum on Building Modern and Effective Labour Inspection Systems, Policy and Planning of Labour Inspection, Module 3, ILO, 8, <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_856563.pdf> [05.05.2024].

159 For example, in the Czech Republic, priority is given to the sanction of warning and reference, failure of which leads to financial sanctions. ob. *Falkner G., Treib O., E.,* Compliance in the Enlarged European Union Living Rights Or Dead Letters? Ashgate, 2008, 54. Throughout the EU, the need to maintain a balance between warnings and fines, the need for inspectors to perform both a supervisory and an educational role in the inspection process, is emphasized. ob. Supporting Compliance of Occupational Safety and Health Requirements – European Labour Inspections Systems of Sanctions and Standardised Measures, European Agency for Safety and Health at Work, 2023, 5, <https://osha.europa.eu/sites/default/files/Supporting-Compliance-Workplace-Safety-Requirements_EN.pdf> [05.05.2024].

160 ILO Curriculum on Building Modern and Effective Labour Inspection Systems, Policy and Planning of Labour Inspection, Module 3, ILO, principle 4, https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_856563.pdf > [05.05.2024].

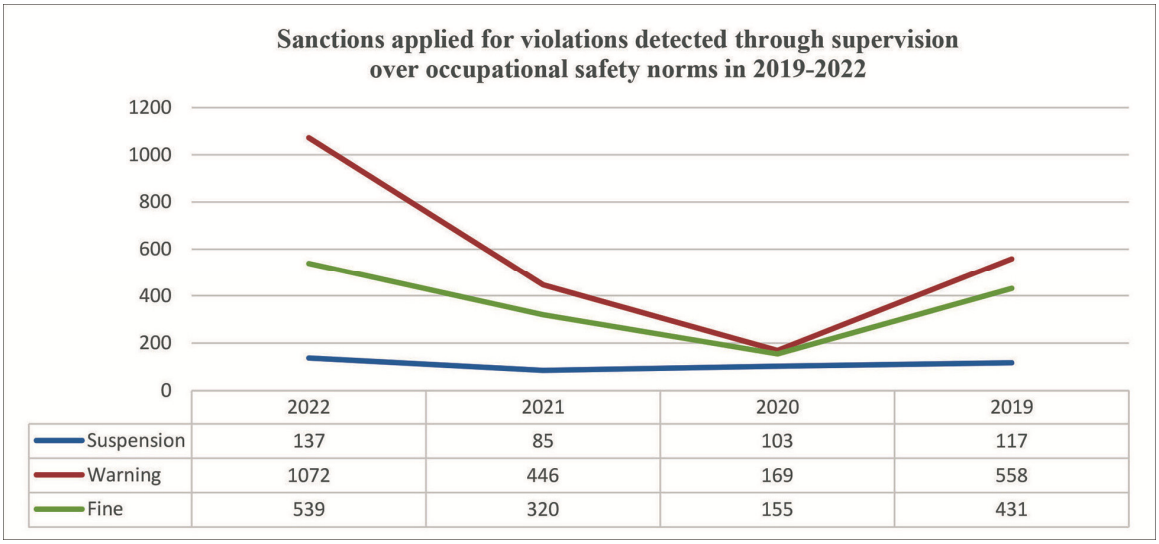
administrative sanctions issued in 2021. In 2022, the approach changed and fines were applied to approximately one-third of administrative offenses[161].” The Public Defender informed that the policy of pressing criminal charges in cases of workplace accidents was not strict either[162].

The labour inspectorate's sanctioning policy has been gradually tightened to ensure a reasonable period of time for raising awareness and adapting working conditions to new labour safety requirements. Taking account of the period passed since the occupational safety reform, and along with the awareness-raising campaign, as well as the increase in the number and qualifications of occupational safety specialists, the approach to sanctioning has been tightened to ensure the cease of the breach of norms, with the adherence to the principle of proportionality.

Based on the effective control of the implementation of the recommendations, the rate of fulfilment of the instructions issued after the initial inspection, according to the Labour Inspection Service, equals 57% as of 9 months of 2023. The rate of implementation of the given recommendations is the determining criterion of the effectiveness of the sanctioning mechanism.

For the purposes of this report, the quantitative/percentage ratio of sanctions (warnings, fines, suspension of work processes) applied to violations of labour safety norms from 2018 to 2023 (for each individual year) has been examined.

The results are presented in the table below.



	2022	2021	2020	2019
Suspension	137	85	103	117
Warning	1072	446	169	558
Fine	539	320	155	431

During the interviews with the stakeholders, it was examined, how the dominant form of administrative measure – warning – suffices its preventive purpose, taking into account the results of secondary verification/elimination of violation.

[161] 2023 International Labour organization Report <https://www.ilo.org/budapest/countries-covered/georgia/WCMS_888396/lang--en/index.htm> [05.05.2024].

[162] To see the statistics, see Public Defender Human Rights Report – 2018, pg. 188-189 <https://www.ombudsman.ge/res/docs/20190426205713194 66.pdf> [05.05.2024].

According to the Labour Inspection, the current approach to sanctioning – mainly applying warning as a form of sanction in case of detected violations – is the internationally accepted and recognized practice of modern labour inspection. It should be noted that under the current legislation, non-compliance with the instructions issued during the initial inspection **is a ground for fines or suspension of the work process in the repeated inspection; however, there are a number of clauses, which provide for fines as primary sanction in specific cases, and where the critical non-compliance is detected – suspension of the work process.** For instance, for all companies that do not have an occupational safety specialist as required by law, the Labour Inspection Service will apply a fine as an administrative sanction, which can be deemed appropriate considering the above-mentioned factors.

In addition, it shall be taken into account that across the world a labour inspection is an agency focused on prevention and not on sanctioning, therefore the warning mechanism is in line with international standards, the preventive purpose of the warning and the effect is clearly visible in the positive statistics of fulfilling recommendations and performance indicators.[163]

Administrative liability for breaching labour norms is outlined in the following legislations: the Organic Law of Georgia "On Occupational Safety," the Organic Law of Georgia "Labour Code," and the Law of Georgia "On Labour Migration. "

The following administrative penalties may be applied for the violation of labour norms: a) a warning; b) a fine; c) a suspension of the work process.

The Labour Inspection Service enjoys a discretionary power in deciding, within the scope of the Organic Law of Georgia the "Labour Code", the Organic Law of Georgia "On Occupational Safety", and and the Law of Georgia "On Labour Migration" when and which administrative penalty must be applied, and, in the case of a fine, the amount of the fine to be imposed. The administrative penalty shall be commensurate with the violation.

According to the supervisory body, a reasonable time for remedying the identified violation is determined through consultations with the employers' or the employees' association (if any) and/or the employees' representative. This requires an individual approach. Hence, setting uniform criteria for determining reasonable time is not advisable. The decision should be made case-by-case.

11.2. Reforming the Procedures for Appeal

In contrast to the pre-reform period[164], a uniform practice has been established, according to which the applied sanction is first appealed administratively in the Inspection and then there is an opportunity to appeal to the court. There is an exemption to this general rule, where it is admissible to appeal to the court directly. This is the case when the Chief Labour Inspector issues an individual administrative act regarding the fine. The Chief Labour Inspector issues the above-mentioned act imposing a sanction of double the amount when a person does not pay the fine within the 30-day

[163] The rate of fulfilment of instructions issued after the initial inspection within the scope of supervision, has increased significantly, since the Organic Law of Georgia "On Labour Safety" was expanded to all sorts of economic activity. Since September 1, 2019, the growth trend has been maintained: 8% in 2020, 28% in 2021, 52% in 2022, and 57% in 9 months of 2023. Annual reports of the Labour Inspection Service. See: <https://lio.moh.gov.ge/index.php?lang=1> [05.05.2024].

[164] Labour Inspection Service Assessment, Social Justice Center, 2021, 24.

period determined by law. In order to review the submitted appeals, the Complaints Review Commission was established at the Labour Inspection Service; The decision of the commission is appealed to the court.

The statistics of the existing court disputes showcase the fairness of the Labour Inspection's policy of sanctioning. **Starting from 2020 to the reporting period of the third quarter of 2023, 107 cases were registered in the courts in the field of occupational safety, of which the court did not consider / 2 cases were decided in favour of the plaintiffs.**

11.3. Assessing the Rationale behind Strict Sanctioning

This study has inquired into the stakeholders' stance on the advisability of stricter sanctioning. Business Association does not believe tightening the sanction is the only and best way to prevent violations; First of all, they deem it necessary to analyse in detail already implemented activities of the labour inspection, to systematize the inspection results in a way that it would allow us to determine with high probability what was the reason/motive for committing each offense, in which part of the management of the company in general and the labour safety system in particular are problems evident more frequently, which lead to violation; how do the companies respond to warnings and at what extent are the repeated inspection results satisfactory. A number of other components can be taken into account. Analysing them will lead to the decision on the revision of sanctions which will be objectively reasoned and not dependent on the subjective feeling of the stakeholders or on fragmented information.

The same organisation explains, that fines imposed in number of cases reach large amounts. Data on incidents and sanctions is regularly processed and analysed. The results are used to identify rooms for improvement and develop targeted interventions. The Association welcomes the approach to pay particular attention to high-risk sectors such as construction, mining, where occupational safety incidents are more frequent. The organisation believes that the current sanctioning system is notably strict, particularly in light of its imposition of additional penalties for non-compliance with instructions. The primary objective of sanctions should be ensuring adherence to labour safety regulations, prioritizing the well-being of employees. Consequently, achieving a balance between punitive measures and providing opportunities for rectifying non-compliance through corrective actions and enhanced safety practices becomes crucial. Encouraging the development of a culture of adherence to occupational safety rules can enhance the efficacy of current sanctions. The presence of a workplace safety culture fosters a proactive mindset in identifying and mitigating hazards, resulting in a decrease in workplace accidents, injuries, and illnesses. It improves employee productivity and the overall efficiency of the organisation.

According to the Association's written response, company management must actively participate in safety programs, allocating sufficient resources to support safety initiatives. And the state should come up with solutions to stimulate those businesses that spend substantial resources for safety equipment. By setting a positive example, managers can influence employees to prioritize safety in their daily work. In order for company managers to fully understand all existing threats, it is important to train the company's directorate (management) on labour safety issues and, accordingly,

introduce them to best practices and examples. This will lead to decision-makers who are more aware and hence, more effectively respond to threats. "The active participation of managers, supervisors and workers is considered crucial, especially in the phase of risk assessment implementation. Researches carried out on an international scale clearly prove that the awareness of the importance of active cooperation in the process of risk assessment is increasing in organisations."[165]

The Association recommends that it is crucial to concurrently establish a system of employee engagement, participation, and motivation in companies alongside the implementation of the safety system. This responsibility falls on the management, as they come to realize, through training and observation, the significance of each healthy employee to the company, the associated costs with violations and the impact on both the affected employee and the company's reputation. Improving the company's labour safety culture requires a complex approach that includes: determination of everyone's responsibility (from management to ordinary employees), education and training[166], impact assessment of all possible risks on a person, in short and long run. Complex security includes the analysis of 3 components: the correlation and interdependence of human, organisational and technological aspects. A systematic approach to all these processes creates an opportunity to form an occupational safety at workplaces.

The urgency of consolidated policy in forming occupational safety culture is unanimously agreed upon by all stakeholders in the field.

11.4. The Possible Expansion of Municipal Inspection Mandate and Coordination with the Labour Inspection Service

During interview with the head of the Progressive Forum, Mr. Dimitri Tskitishvili, emphasis was placed on the necessity to expand the mandate of the Municipal Inspection process to regions in the construction sector oversight. Currently, there is a notable concentration of this process in Tbilisi. Additionally, the discussion highlighted the disparities in sanctions (imposed by Municipal Inspection) between the Tbilisi area and the regions. According to Mr. Tskitishvili, a significant facilitating factor in enhancing the labour safety system in the regions is the collaborative and integrated efforts of the government, Labour Inspection, and Municipal Inspection. Such cohesive group has a history of successful experiences in previous years in Georgia, and it played a pivotal role in a major transformation in the safety rules in the construction sector.

The representatives of the Labour Inspection explained that occupational safety is exclusively an issue belonging to its mandate. The Municipal Inspection of the City Hall controls the issue of compliance of construction with the project. If the mandate of the Municipal Inspection of the City Hall is expanded to the regions, the Labour Inspection Service expresses readiness to continue coordinated cooperation with them. If occupational safety issues are detected during the inspection carried out within the mandate of the Municipal Inspection, the Labour Inspection is also involved in a

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165 *Kogi K.,* Work Improvement and Occupational Safety and Health Management Systems: Common Features and Research Needs, Industrial Health 2002, 40, 126.

166 *Hughes Ph., Ferrett E.,* Introduction to Health and Safety at Work, Routledge, 2011, 186.

coordinated manner. In terms of sanctions, the constitutional principle shall be observed – that two institutions do not apply a double penalty for the same violation at the same time.

11.5. The Issue of Proactive Disclosure of Identifying Information about Sanctioned Companies

In the course of this research and during the stakeholder interviews, the issue of disclosure of the identifying information about the sanctioned companies was discussed.

Concerning the matter, key stakeholders in occupational safety emphasized the potential necessity for the proactive disclosure of identifying information about companies. This move could enhance the deterrent effect on those violating labour safety norms. GYLA emphasized the public interest in being informed about the occupational safety violations by companies, so as to enhance trust in inspectors' work and overall transparency of the supervisory body. The Business Association, on the other hand stated that such disclosure might lead to campaigned attacks on some companies. In such cases it often becomes impossible to defend oneself through legislative means. The Business Association considers the use of this mechanism as an additional "punishment". The organisation states, that there is no question that the company must be held responsible for the violation of the law, even by using the most severe measures; however, no other action that exacerbates the company's situation, adds further challenges, and creates additional problems should be employed within the boundaries of a legal response.

During the interviews of one of the non-governmental organisations, it was mentioned that challenges arise when seeking information from the labour safety supervisory body, concerning the identification of inspected entities or identified violations.

According to the Employers' Association, the publication of identifying information of organisations that violate occupational safety norms carries a number of risks, mainly reputational or legal: 1. Harm to the company image: Revealing the identification details of entities breaching labour safety regulations has the potential to significantly damage their company's image and reputation. This adverse publicity may result in diminished trust from consumers, investors, and other stakeholders, and could additionally lead to prolonged legal conflicts. 2. Public reaction. The disclosure of such data can cause public outrage and strongly negative feedback against the organisation. This can lead to protests and negative media coverage, further damaging their reputation. 3. Loss of business opportunities. Organisations with a poor safety record (their data is published) may find it difficult to attract new customers or business partners. 4. Employee retention and recruitment challenges: Revealing identification information about the company can impact an organisation's capacity to retain current staff members and attract new professionals. Prospective employees may hesitate to join an organisation with a track record of safety breaches.

Representatives of the Committee on Occupational Safety of the Employers' Association believe that the opposite approach, where, companies that fully comply with safety rules and successfully implement systems are made public will be welcome. In this context, it is essential to establish clear and inambiguous criteria and mechanisms. Using these criteria, information on the safest companies will be made public. Provision of any kind of privilege for the companies included in this list, e.g., on

the direction of public procurement, will further incentivize the companies. This, again. will contribute to the establishment of a culture of occupational safety in the workplaces.

According to the official position of the Employers' Association, in the circumstances when one of the main challenges is, on the one hand, enhancing the qualifications of labour safety specialists and, on the other hand, raising the awareness of employees, taking additional measures against employers will further complicate the process of implementing regulations and promote vicious practices to avoid liability measures in any form. The so-called Blacklisting may in its essence serve good purposes, however, given its negative consequences, it will be an additional sanction/penalty for employers. In addition, when discussing the lack of awareness of labour safety specialists and employees, this problem is even deeper in general public, which is why company's presence on the blacklist might be perceived in a completely different light and cause the company's image to be undeservedly damaged. The imposition of such "sanction" is also inadmissible given the fact that it does not have foreseeable outcomes, it is difficult to determine in advance what negative consequences it will bring to the company, what extent the material or non-material damage caused by it will reach, etc. In the case of sanctions stipulated by the law, it is predictable for the company in advance what measure of responsibility will follow its specific action, which is why the existence of such a "sanction" at the legislative level, the consequences of which are not clear and predictable for the subject, will always be against the law and will contradict the fundamental principles of the law. In the case of legal sanctions, a company can predict in advance what measure of responsibility will follow its specific action, which is why the existence of such "sanction" with unpredictable consequences, will always be against the law and will contradict its fundamental principles.

The Labour Inspection Office states that there is no need to disclose the identifying information of a company on the official website. This holds true especially when the information, barring commercial and other confidential details, is readily accessible to interested persons and competent agencies upon official request.[167] For the purposes of preparation of this research, the Labour Inspection Office provided the information that was shared by this institution with non-governmental organizations and other interested persons based on their request regarding the results of the inspection of a particular company. The agency explained, that upon request, information is provided, however with observations of certain time frames (e.g., quarterly data) and keeping the the principle of confidentiality of commercial and personal information in mind. Thus, the providing information about inspected or violating entities to the non-governmental sector is ensured within a reasonable time frames, even though it cannot be carried out immediately, as the data depersonalisation requires the mobilization of additional human resources.

[167] Regarding the importance of the obligation to protect confidentiality when recording and providing statistical information, see: Article 15 of the Labour Inspection Convention, 1947 (No. 81) <https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312226> [05.05.2024]; Article 20 of the Labour Inspection (Agriculture) Convention, 1969 (No. 129), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C129> [05.05.2024]; Collection and Use of Labour Inspection Statistics, A Short Guide, International Labour Organization, 2016, 5, <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/ documents/publication/wcms_537155.pdf> [05.05.2024].

The Labour Inspectorate explained, that the disclosure of the identification data can have an enormous negative effect on a company's reputation and commercia activities. **This makes the disclosure an independent and additional sanction. In addition, the decision of the Labour Inspectorate to sanction the company can be appealed in court. The ongoing irreversible process of reputational discrediting of the business entity may persist until the final resolution of the matter in the judicial system. This could render the rehabilitation of the already damaged business reputation unattainable.**

The Inspection stated that it only publishes the data of companies in particular cases, where entities did not fulfil the recommendations of the inspection or have a record of a dire violation, which justifies the use of reputational pressure to force them to ensure compliance with safety norms.[168] For instance, along with applying sanctions and suspension of activity, the labour inspectorate disclosed information about an entity on the ground of a dire violation, where the employer physically abused an employee. In all other instances, the Agency does not deem the disclosure of the identification information advisable. This is due to the guarantees of confidentiality in international and national legal documents.

11.6. Developing an Occupational Safety Rating System for Companies and Taking the Appropriate Indicator into Account in the Process of Public Procurement

According to the recommendation of the head of the non-governmental organisation "Progressive Forum", in the process of public procurement, where the main purchaser is the state, it is important to include the occupational safety component as a mandatory condition. In the application, the financial cost allocated for the protection of occupational safety must be determined with a fixed interest rate (especially in the construction sector, infrastructural construction projects, taking account of the relevant risks) and should not be subject to revision-reduction based on negotiations. With this change, companies that adhere to labour safety norms will have a competitive advantage in the procurement process. Bona fide companies should enjoy certain advantages and incentives in obtaining public funding. If the stated standard is set through public procurement, it will become an example, spread and be used in the private sector, which also widely carries out activities within public tenders. The state itself has the greatest role in the effective enforcement of labour safety standards, to establish a high state and guideline standard in occupational safety, to give the privilege of using state resources to those organisations that have a positive history of compliance with

[168] For example, in Spain and Portugal, together with sanctions, it is allowed to publish information about violations of labor safety norms by the organization only in case of particularly serious violations. In Portugal, restrictions on participation in tenders for those entities found to be non-compliant with labor safety norms have been reinforced as an additional liability, along with sanctions. ILO Standards on Occupational Safety and Health, Promoting a Safe and Healthy Working Environment, International Labour Office, Committee of Experts on the Application of Conventions and Recommendations, Geneva, Switzerland, 2009, 34, <https://www.google.ge/books/edition/ILO_Standards_on_Occupational_Safety_and/-rqvnMH_n8MC?hl=ka&gbpv=1> [05.05.2024].

occupational safety norms. This is an approved practice in developed countries that is encouraged by the state policy of labor safety.[169]

It is also important to develop a ranking of companies in the field of compliance with occupational safety norms. The companies with a high rate of compliance will give an advantage in the process of public procurements. This measure can be laid down with the amendments to the law "On Public Procurements."

Mr. Tskitishvili discussed the example of Malaysia, where infrastructural projects are widely implemented, the development and update of the ranking list of companies has been subjected to a self-regulation mechanism and is carried out not by the state, but by the relevant association.

The Inspection believes that such incentivizing mechanism will motivate the companies to adhere to occupational safety norms. If relevant amendments are passed in the procurement legislation, the Labour Inspectorate will engage in the implementation of the said innovation in a coordinated manner.

Thus, both the Progressive Forum and the supervisory agency of labour safety for the legislative purposes propose to give priority to the observance of labour safety norms in state tenders.

According to the Employers' Association, the formation of a ranking can truly become an incentivising mechanism for strengthening the occupational safety system. Correct and valid criteria shall be developed as the forming principle of ranking and it should be ensured that the overall process of ranking is transparent and objective.

11.7. Merging Electronic Databases for the Classified Record and Analysis of the Statistical Data

According to the Labour Inspectorate, as of 2023, several electronic programs are in use, which are in the development and improvement phase, including the electronic inspection system (LIOS.MOH.GOV.GE, launched with the support of International Labour Organization), electronic system for the determined minimum hourly wage for doctors and nurses (MINWAGE.MOH. GOV.GE), accredited labour safety specialist program (OSHTESTING.MOH.GOV.GE) and electronic labour migration system (LABOURMIGRATION.MOH.GOV.GE). The work on merging these electronic systems and managing them through the principle of one window is ongoing.

12. The Control Mechanism for Professional Diseases

During the interviews, the problem of the lack of means for examination and identification of occupational diseases in the domestic space was highlighted. The non-governmental organisation "Progressive Forum" and the GTUC point out that only registering accidents resulting from industrial trauma and the absence of statistics on occupational diseases[170] (production of which is an employer's obligation) are shortcomings. According to the Progressive Forum representative, regulations in the area of professional diseases are not functional.

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169 *Hughes Ph., Ferrett E.,* Introduction to Health and Safety at Work, Routledge, 2011, 81.

170 The letter of Georgian Trade Unions Confederation to Ms. Salome Kurasbediani – the Deputy Chair of the Environmental Protection and Natural Resources Committee.

The Inspection Service explained that the issue of lack of research organisations is solvable. The institutional and expert knowledge of N. Makhviladze State Institute of Labour, Medicine and Ecology shall be fully used for the purposes of establishing new research centres and training of human resource. Establishing new centres, which will be founded on the knowledge of well-experienced staffers of Makhviladze Institute and will develop this legacy is crucial. According to the Head of the Labour Inspection Office, in the drafting process of technical regulations, the Labour Inspection Office and the Makhviladze Institute cooperate to some extent, however, for more coordinated work, it would be better to create a certain institutional and organised cooperation platform or a subordinate unit, in order to allow the Labour Inspection to properly use and develop the research potential of this institute. The representative of Progressive Forum suggested that the resources of the said research institute should be used in the implementation of professional disease prevention methodology.

In order to identify an occupational disease, it is necessary to conduct several studies in order to determine the correlation between production activity and what diseases it can cause. At the initial stage of starting a job, an objective and proper diagnosis of health condition is necessary, in order to be able to monitor and evaluate the continuous process of development of the professional disease. Submitting a document showing the state of health for starting the service should not be a formal requirement. It is essential so that the control of occupational diseases can be carried out objectively.

Even though the order №01-11/ნ, of September 12, 2018, of the Minister of Georgia of Internally Displaced Persons from Occupied Territories, Labour, Health and Social Affairs "On the Approval of the Rules and Form of Registration of Workplace Accidents and Occupational Diseases, Investigation Procedures and the Rules of Reporting" is in place, the frequency/periodicity of the health check-ups, which shall be ensured by employers, is not determined.

13. Additional factors hindering the effectiveness of the protection and enforcement of occupational safety rights

In addition to the issues highlighted in the research, other additional factors significantly affect the process of effective work performance.

The Employers' Association singles out three factors which are worthy of attention:

"**Lack of resources** – is an important factor that hinders the effective implementation of occupational safety norms. Companies may find it difficult to allocate sufficient financial, human and technological resources to ensure compliance with safety regulations. E.g., insufficient level of qualification of staffers to manage safety, or outdated equipment and infrastructure. In the process of entrepreneurial activity, companies in most cases set the budget on an annual basis, therefore, taking into account economic risks and other environmental factors, the allocation of an additional budget for new needs, including innovations to be implemented for labour safety (be it equipment, safety systems, etc.) is a rather problematic issue and in some cases, it is even impossible.

Lack of employee participation. Employees play a crucial role in ensuring the safety of themselves and others. Consequently, their lack of involvement can hinder the effective implementation of occupational safety norms, when employees are not properly informed or involved

– and this is often caused not by the company's refusal to involve them in the process, but by the lack of interest/motivation on the part of the employees themselves to participate in the process. It should be noted here that the object of inspection is mainly the employers and the issue of their compliance with the regulations. Due to this, the employees consider themselves less accountable. The Organic Law of Georgia "On Occupational Safety" provides for the obligations of the employee, to which they must adhere, so as to ensure occupational safety standards. However, in this regard too, the employer is inspected, and in the case of non-fulfilment of their obligations by the employee, the employer is held fully responsible. In this case, the main problem is the absence of risk/expectation of responsibility for the consequences of non-fulfilment of obligations on the part of the employees.[171]

Economic factors, in some cases, can be a barrier to the implementation of labour safety norms.[172] A large number of companies that work in a competitive environment with small profit margins and do not fully understand the essence of the occupational safety system perceive investments for the purpose of safety as an additional financial burden. Such companies are already trying to reduce costs as much as possible, and in the direction of labour safety, use the so-called "ostrich approach" – when they think about OSH standards only in the short term. They ignore problems and risks. Cases/incidents are treated as simple failures. They act only when the inspection service appears on the spot. Especially for medium-sized and small enterprises, the costs increase even more –the same occupational safety is equally required for companies employing 5 or 10 people and organisations with 200 or more employees. Small and medium-sized businesses in particular have limited financial resources, and their adherence to occupational safety norms is unfortunately formal in many cases. It would have been much more effective if the law had a liberal approach towards them, which also implies individually determining the deadline for fulfilling the instructions and taking into account the interests of the company in this process, so that the instructions are truly implemented to ensure labour safety and not, hypocritically, to avoid responsibility."

Prolonged litigation and delay in receiving compensation. According to the assessment GTUC, the biggest challenge is the delay in legal disputes on violation of labour safety standards. However, practice shows that in cases of violations of safety standards in the labour relationship, the injured person or a member of a victim's family [in case of the victim's death], is often forced to accept a relatively low amount of compensation offered by the employer to compensate for the damage

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171 Violation of labor safety rules by employees is considered a gross violation in Spain and Brazil. In Morocco, such misconduct will result in immediate dismissal without compensation. Sanctions are established in the USA and Thailand. See: ILO Standards on Occupational Safety and Health, Promoting a Safe and Healthy Working Environment, International Labour Office, Committee of Experts on the Application of Conventions and Recommendations, Geneva, Switzerland, 2009, 66, <https://www.google.ge/books/edition/ILO_Standards_on_Occupational_Safety_and/-rqvnMH_n8MC?hl=ka&gbpv=1> [05.05.2024].

172 On the importance of financial factors in the process of introducing labor safety norms in the conditions of a growing competitive market, see: Sousa V., *Almeida N.M., Dias L.A.,* Risk-based management of occupational safety and health in the construction industry – Part 1: Background knowledge, Department of Civil Engineering, Architecture and GeoResources, Universidade de Lisboa – IST, Av. Rovisco Pais, Lisbon, Safety Science 66 (2014) 75–86, Portugal 1049-001.

experienced, and not to continue the legal dispute for establishing responsibility and for full compensation of damages. There are several reasons. The first is that in many cases, criminal prosecution is pressed against a lower-level employee, who in fact [and not according to legal documents] would not be in charge of complying with labour safety standards due to various circumstances, and therefore, the interest of the victim or his family member in bringing the criminal case to a court is low. Second, the victim often needs financial support at the initial stage of treatment, and the lengthy processes take away this opportunity. Third, other factors that appear in long-term labour relations – employment of another family member in the organisation, etc.

Given the reality of overcrowding of the courts, it is important to timely determine the minimum package of mandatory insurance for heavy, harmful and dangerous work for the timely receipt of compensation by employees and the effective implementation of social security. As noted in the study, the minimum insurance package has been developed and it is important to accelerate its adoption in 2024.

Lack of trust for confidentiality and reliability of the inspection system. The representative of the Legal Assistance Center of GYLA mentioned that between June and August 2023, the organisation offered approximately 500 consultations on labour law matters. Out of these, only 38 services were related to labour inspection issues. According to the GYLA representative, this might suggest a low awareness in society on one hand and, on the other hand, it indicates a lack of confidence in reporting to the Inspection due to the fear of confidentiality breaches and potential subsequent dismissal. GYLA informs the citizens, who approach them regarding labour inspection matters, that public institutions, including the Labour Inspection Office, bear a specific responsibility for safeguarding entrusted confidential information. The law outlines the liability of any inspectorate employee for violating confidentiality. However, for employees who would like to make a report, the fact that the identity of the person making a notification may not remain confidential due to human relations and communication creates a barrier to submitting a report. The representative of the NGO states that citizens apply to the labour inspectorate mainly when they have already been dismissed or there is already a dismissal dispute. Often, employees may use the reporting mechanism to the labour inspectorate as a means of intimidating the employer and preventing further violations in labour relations. Thus, it is important to raise employees' awareness and bolster confidence in safely accessing mechanisms for the protection of occupational safety rights. The role and significance of the Labour Inspection Service in safeguarding occupational safety rights need to be more widely recognized and apparent to the public. This will reinforce the credibility of the supervisory agency.

VI. Final Recommendations for Legislative Enhancement and Improvement of Field Policy

Based on the research conducted during the preparation of this report, as a result of the analysis of the achievements and challenges of the normative reform, as well as the comparison of the institutional experiences of the interested domestic and international organizations, it is possible to

formulate summary recommendations for the improvement of the labour safety legislation, strengthening the effectiveness of enforcement and advancing sectoral policy:

1. Simultaneously with the renewal of the "Twining" program with the support of the European Union, it is important to continue the work and gradually implement 18 directives that must be adopted by 2021-2023 in the field of labour safety and health protection in accordance with the Annex XXX of the Association Agreement. As of October 30, 2023, 6 directives have been fully reflected in the legislation of Georgia, 2 directives have been reflected partially, and the draft, prepared in accordance with 38 directives, is ready for discussion within the technical working group of the Tripartite Commission, drafts of normative acts have been prepared in accordance with 5 directives, and 10 directives need to be translated, processed and examined.

2. Taking into account the expanded mandate of the labour inspection in the area such as the prevention of illegal migration, forced labour, labour exploitation, and trafficking, as well as effective implementation of domestic legislation in accordance with the Association Agenda, the institutional strengthening of the labour supervision agency should be promoted by increasing the human resources of inspectors. The target indicators of the quantitative increase of inspectors should be established by balancing the financial resources of the budget and the objective needs of the inspection system.

3. In the format of cooperation with municipalities (based on their work specificity), as well as with the Ministry of Regional Development and Infrastructure of Georgia and the Ministry of Economy and Sustainable Development, the issue of the feasibility of development and the possibility of enforcement of the norms establishing the temperature control during the work performance in open space must be studied. It is also important to maintain the practice of labour inspection to use mechanisms for monitoring shift schedules and working hours at high temperatures.

4. Despite the implementation of the international standards recognized by the Association Agreement in the domestic legislation, the issue of ratification of the conventions itself is also important. Within the framework of the action plan developed by the tripartite social partnership commission, the feasibility of ratifying the following priority and fundamental conventions was discussed: No. 81 ("Convention concerning Labour Inspection in Industry and Commerce"), No. 155 ("Convention concerning Occupational Safety and Health Convention and the Working Environment") and No. 187 ("Promotional Framework for Occupational Safety and Health Convention"). It is important to consider ratification of conventions 121-2 ("On assistance due to injury to the employee's health while performing work duties"), No. 129 ("On labour inspection in agriculture") and No 176 ("On safety and hygiene of labour in mines"), through the assessment of the impact of regulation and the preparation of relevant conclusions.

5. For the effective implementation of the social guarantee of mandatory insurance and in response to the requirements of the labour safety legislation, the minimum package of mandatory health insurance, already developed with the help of the International Labour Organization, for those employed in heavy, harmful and hazardous jobs should be adopted.

6. In order to further improve the increasing dynamics of accident reduction, it is advisable to strengthen the general targeted state policy in the field of awareness-raising,[173] to systematically

[173] *Kim Y., Park J., Park M.,* Creating a Culture of Prevention in Occupational Safety and Health Practice, Safety and Health at Work, 7, 2016, 95; *A. M.,* Labour Law, Council of Europe, Fifth Edition, Wolters Kluwer, 2023, ebook, note 482.

inform the workforce about fundamental labour rights; The consolidated awareness-raising campaign shall be expanded by organizing educational/informational activities, to cover the strategic advertising spaces of possibly all regions, especially in those locations where a significant number of business entities are represented;

7. It is important to raise the awareness of the employees and strengthen their confidence in the labour inspection in terms of safe access to protection mechanisms (confidential notification) for violations of labour safety. For this, it is necessary to strengthen the public perception of the role and importance of labour inspection in the field of protection of the right to labour safety.

8. It is reasonable to establish a platform for close cooperation with the Ministry of Education and Science of Georgia in the general educational, higher or professional direction within the educational component, in order to promote the sustainable strengthening of the labour safety culture in the long term.[174]

9. After the adoption of technical regulations and the legislative expansion envisaged by the Association Agenda, it is important to gradually implement additional specialization in the labour inspector accreditation programs, taking into account the sectoral, profile specifics (construction sector, mining industry, etc.). At this stage, taking into account the imperfect existence of special technical norms and sectoral legislation (e.g. metallurgy legislation) in the domestic area, it is not possible to develop specialized qualification programs, which is why the existing model of classification of risk areas of accreditation programs by sector is acceptable.

10. Due to the gradual improvement and updating of the technical regulations and labour safety norms, it is reasonable for those labour safety specialists who have been awarded the qualification of labour safety specialist on the basis of a training program completed in the framework of professional and/or higher education in an authorized educational institution, to establish the obligation of periodic certification renewal (periodic certification) or alternatively, the requirement of periodic retraining and upgrading of qualifications taking into account the innovations in the sector.

11. In order to identify the fully (and not mixed) informal sector, attract it to the formal sector and spread labour safety standards to it, it is advisable to continue the coordinated institutional cooperation between the Revenue Service and the Labour Inspection. The state should continue to introduce such social guarantees and tax regimes, which will increase the motivation to put an unorganised business in the framework of the tax system and labour safety protection and to formalize employment.

12. It is important to sustainably maintain the methodology of supervision by the labour inspection in relation to labour safety and labour rights under the two-layer mandate of the supervisory agency. The effect of the violation of labour rights must be seen in terms of impact on labour safety,

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[174] Internationally, the component of teaching labor safety standards is provided at almost all educational levels, in professional training programs, and is an expression of state labor safety policy. For examples of EU member states and the United Kingdom, see: ILO Standards on Occupational Safety and Health, Promoting a Safe and Healthy Working Environment, International Labour Office, Committee of Experts on the Application of Conventions and Recommendations, Geneva, Switzerland, 2009, 37, <https://www.google.ge/books/edition/ILO_Standards_on_Occupational_Safety_and/-rqvnMH_n8MC?hl=ka&gbpv=1> [05.05.2024].

which may give rise to the need to transform scheduled inspections into unscheduled inspections.

13. Taking into account the criteria defined by legislation for the selection of objects to be evaluated in a scheduled manner, the labour inspection shall maintain its discretion in the process of proactive selection of objects to be evaluated. Increase in the scale of unplanned inspection depends on both the number of accidents and notifications, as well as the increase in human resources of labour inspectors.

14. In the absence of a legal prerequisite of reasonable doubt for an unplanned inspection and taking into account the obligation to protect the confidentiality of the author of the notification, there may be a hypothetical probability or a relevant perception that the labour inspection will use its mandate without reasonable doubt, on its initiative. Thus, contrary to the expressed critical opinion, the maintenance of the legal provision of reasonable doubt creates guarantees for the validity of the conduct of unplanned inspections and the lawful exercise of power by the inspection service. In addition, it is important to determine whether the employee has an employment relationship with the company at the time of notification because any identifiable subject can initiate a notification towards the labour inspection on the violation of labour safety norms.

15. It is important to maintain the existing proactive (preventive) sanctions policy as the most important feature determining the effectiveness of the labour inspection system, which provides for the use of liability measures not to form a punitive system, but to encourage voluntary compliance with labour safety rules.

16. The policy of scheduled supervision of the implementation of the given recommendations, which, in accordance with the existing practice, implies the analysis of the growth rate of the correction of the violation after the initial inspection, must be preserved in the conditions of preventive sanctions policy.

17. The data of organizations that maintain a high rating of compliance with labour safety norms may be published. In order to encourage voluntary compliance with labour safety norms, it is possible to form a ranking system of companies based on impartial, valid and transparent criteria.

18. In the effective enforcement of labour safety standards, in addition to the labour inspection, the state itself has an important role in establishing a high state and regulatory standard in the field of protection of the labour safety norms and encouraging the private sector to adhere to the state standard. It is important for the state to stimulate those companies that spend substantial resources on safety equipment and consider labour safety as a daily priority of their care. From this point of view, it may be advisable to form a rating system of companies and consider a high rate of compliance with labour safety norms as a competitive advantage in the process of selecting companies during the state tender. The privilege of using state resources through the mechanism will be given to those organizations that have a positive history of compliance with labour safety norms.

19. In the state procurement process, it is important to start discussions on reasonability of considering the labour safety component as a mandatory tender condition, which, among other things, implies the determination of the mandatory and fixed rate of the financial spending allocated for labour safety protection (especially in high-risk industries) without the possibility of revision-reduction. With this amendment, companies that ensure compliance with labour safety norms will

maintain a competitive advantage in the tender process. In order to put the mentioned mechanism into effect, it is necessary to make amendments to the legislation on state procurement.

20. It is important to start developing a methodology for investigative diagnostics, registration and prevention of occupational diseases, to form an effective, long-term and gradual policy for the control of occupational diseases. Therefore, the coordinated and institutional cooperation between the Labour Inspection and the N.Makhviladze S/R Institute of labour Medicine and Ecology, in order to effectively use the research potential of the institute in the field of diagnosis of occupational diseases and training of human resources.

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Transactions Concluded Under Duress and Immoral Transactions: Comparative Analysis

The following article examines legal transactions concluded under the defect of declaration of intent, more precisely, the interrelation of transactions concluded under duress (Article 85 of the Civil Code) and immoral transactions (Article 85 of the Civil Code). Confusion between immoral agreements and duress in Georgian judicial practice is commonplace. Duress, as a socially unacceptable conduct, is often viewed as an immoral behaviour, regardless, immorality ground might not lead to the voidness of a transaction. The article explores German and English judicial practices and legal literature to provide an enhanced understanding of the interrelation between the said transactions. Considering that Georgian law stands closely with German law, drawing parallels with it is a logical approach. As for English law, it is one of the first countries in the world to adopt the concept of "undue influence" (immorality). In terms of immoral agreements, the article does not focus on the immoral transactions in their content (e.g. prostitution), but rather on the transactions, which, at a glance, are neutral, yet their motive or purpose is immoral.

Keywords: *immoral, duress, transactions, undue influence, distinction criteria, defect of declaration of intent*

1. Introduction

The Civil Code of Georgia (hereinafter – Civil Code) regulates the agreements concluded under the defect of declaration of intent and considers different forms of violation of consent with relevant legal consequences. The defect of declaration of intent entails the scenario, where the explicit consent does not correspond with the intrinsic intent, and the transaction was concluded upon explicit consent.[1] Immoral transactions and duress stand as exemplary illustrations of agreements concluded under the lack of consent. Georgian courts have different and, in most cases, contradictory approaches towards these two institutes. An apt portrayal was an infamous "Rustavi-2" case, where a party claimed annulment of a contract on the purchase of shares, on the grounds of duress. The courts of all three instances adjudicated in favour of the claimant, albeit, with different reasonings. The first and second instance courts deemed the purchase contract immoral and, hence, found it void on the grounds of disproportionality between the service provided and the price paid, whereas the Grand Chamber of the Supreme Court of Georgia, in contrast to both instances of the court, ruled that the contract was made under duress. The latter did not take account of the reasoning provided by the lower instances, that the

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1 *Chanturia L.,* General Part of Civil Law, "Samartali" Publishing, Tbilisi, 2011, 331 (in Georgian).

presence of the disproportion in the obligations undertaken by the parties to the contract suffices for it to be found immoral. As per the Supreme Court's interpretation, for a transaction to be deemed void on the grounds of immorality, one of the parties must have abused their market power or taken advantage of another party's vulnerability or naivety.[2]

This and other rulings illustrate that there is no clear demarcation line between articles 85 and 54 of the Civil Code, which undermines the principle of legal certainty and destroys the opportunity for the addressees to foresee the legal consequences.[3]

In light of the points raised above, through comparative, logical and analytical methodology, the paper aims to find out the features of transactions made under duress and immoral transactions, explore the interrelation between them and propose orientation criteria for differentiating these transactions.

2. Transactions Made Under Duress

2.1. The Doctrine of Duress in Georgian Law

The notion of agreements made under duress is well-defined in Georgian legal literature. Duress entails transactions made under the defect of declaration of intent, where the freedom of contractual intent is clearly undermined.[4] The party exerting duress does not mislead another party to declare intent but rather violates their free will.[5] Even though the consenting party, who can also be referred to as the victim of duress, understands the circumstances and does not wish to conclude a contract, their freedom is undermined in a manner which eventually leads them to formally make a decision.[6] As per predominant belief, duress entails psychological pressure, i.e. threatening, which is a message on the future peril, so as to influence the declaration of intent of the addressee of the threat and coerce them into sealing a contract. It is not required for the threatener to have the intent to bring the "promised" negative consequences. Should the addressee perceive the threat as genuine, it shall suffice.[7] Plenty of court rulings provide that the grounds for voidness of a contract may arise from influence exerted on

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2 Compare., Ruling of the Constitutional Court of Germany BGHZ [2001] 146, V ZR 437/99.

3 Ruling №3/7/679 of December 29, 2017, of the Constitutional Court of Georgia on the case "Broadcasting Company Rustavi-2 LTD" and "TV-company Sakartvelo LTD" v Parliament of Georgia (in Georgian).

4 *Rusiashvili G.,* Civil Code Commentary, Book One, *Chanturia (Ed.)*, Tbilisi, 2017, Article 85, Field 1 (in Georgian).

5 *Chanturia L.,* General Part of Civil Law, "Samartali" Publishing, Tbilisi, 2011, 380 (in Georgian). *Rusiashvili G.,* Civil Code Commentary, Book One, *Chanturia (Ed.),* Tbilisi, 2017, Article 85, Field 1 (in Georgian).

6 *Chanturia L.,* General Part of Civil Law, "Samartali" Publishing, Tbilisi, 2011, 381 (in Georgian). Ruling #ას-132-124-2015 of April 29, 2015, of the Supreme Court of Georgia (in Georgian). Ruling #ას-333-314-2014 of July 21, 2014, of the Supreme Court of Georgia (in Georgian). Ruling #ას-170-163-2013 of May 27, 2013, of the Supreme Court of Georgia (in Georgian). Ruling #ას-1796-1773-2011 of January 23, 2012, of the Supreme Court of Georgia (in Georgian).

7 *Rusiashvili G.,* Civil Code Commentary, Book One, Chanturia (Ed.), Tbilisi, 2017, Article 85, Field 15 (in Georgian).

the declaration of intent of the other party, such that, depending on its clear or actual nature, the court may deem that the consent could not have freely formed.[8]

2.2. The Doctrine of Duress in English Law

The House of Lords has distinguished two elements: (1) Inducement of will; and (2) Illegitimate pressure[9]; In terms of the former, the law looks into whether the victim of coercion could express their free will while concluding a contract; For the latter, the nature of the pressure shall be explored – whether the coercer employed illegitimate pressure.[10]

English law places significant emphasis on the nature of pressure. It differentiates illegitimate pressure[11] from, so-called, general pressure, which is allowed and does not lead to the annulment of a transaction. General pressure is fully legitimate and exists in any society, which recognises competition.[12] General pressure is one of the features of a pre-contractual negotiation process, and it might be highly emotional and even aggressive. At a glance, a negotiation process might resemble a relationship between a coercer and their victim. Moreover, a contract might not bring desirable consequences for everyone and the law does not expect this either, however, when the contract brings negative consequences to parties, it cannot necessarily be considered as illegitimate pressure. In one of the judicial cases, a party threatened a counterparty that they would not purchase shares from the latter unless the counterparty agreed to additional conditions. A defendant, who wished to timely achieve an agreement, agreed on the proposed conditions, yet they raised a claim on the voidness of the contract, stating that their consent was given under pressure. The court found, that the contract should have remained in force, as the pressure at hand was commercial pressure and not coercion.[13]

For the contract to be found void, the court must determine whether the victim was under "illegitimate pressure".[14]

For the definition of illegitimate pressure, special emphasis shall be put on the content of the threat – where the threat is illegitimate, it will fall within the scope of illegitimate pressure. E.g., a threat of violence against a person, in all cases, will be deemed as illegitimate pressure.[15]

Moreover, in some cases, lawful threats may be considered as illegitimate pressure. For instance, where a person is threatening to harm themselves and, in this manner, forces the other party to sign a contract, such pressure will be considered illegitimate and the contract will be made void.[16]

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8 Ruling # ას-475-2020 of November 11, 2021, of the Supreme Court of Georgia (in Georgian). Ruling # ას-664-635-2016 of March 2, 2017, of the Supreme Court of Georgia, para. 211 (in Georgian).

9 "Illegitimacy".

10 Universe Tankships Inc of Monrovia v International Transport Worker's Federation, [1982] 2 All ER 67, *House of Lords*.

11 "Illegitimate pressure".

12 *Atiyah*, *PS.,* An Introduction to the Law of Contract, 5th ed Clarendon Oxford, 1995, 266.

13 *Pao On v Lau Yiu Long,* [1980] UKPC 17, Court of Appeal of Hong Kong.

14 *Tetzlaff N.,* What is Duress in Contract Law, Smith and Partners, 2021, <https://smithpartners.co.nz/business-law/contract-law/contract-law-duress/> [20.01.2024].

15 Ibid.

16 Ibid.

2.2.1. The Forms of Duress

In English law, three forms of duress are distinguished: duress of persons, duress of goods and economic duress.

Duress of a person is the most explicit form of duress as it entails inflicting a threat on the other party's life, health, freedom or physical comfort, to coerce them into concluding a transaction.[17]

Where there is physical violence, for instance, when somebody is physically forced to sign an agreement, it shall not be considered a contractual relationship. German contract law directly indicates that the main element of contracts concluded under duress is psychological pressure i.e. threatening.[18]

In English law, they often refer to the Australian case Barton v Armstrong as a prime example of duress. In this case, Barton sought voidness of the contract, where they agreed to purchase Armstrong's shares in the company. The court found that Armstrong was threatening Barton with death. Barton genuinely feared for his life and thought that Armstrong was planning to kill him unless he signed the contract. During the litigation, upon presenting the facts of threatening and relevant evidence, the burden of proof shifted to Armstrong, who was to prove that the conclusion of the contract had not resulted from the threats he had made. The latter was not able to rebut the presumption of duress.[19]

The doctrine of duress of goods has widely found a place in English law.[20] In Maskell v Horner, the plaintiff was deprived of a large sum without any legitimate grounds, along with being threatened that his market stall would be shut down and all the goods would be taken away. The court ruled in favour of the plaintiff on returning the sums paid. The court stated that when a person pays a certain amount they are not obliged to pay and the act of seizure of goods does not have any legitimate ground, they will have a right to reclaim the goods seized.[21] Skeate v Beale led to different consequences. The landlord threatened the tenant to terminate the tenancy contract, evict them from the apartment and sell the movables (which were purchased by the tenant) if the tenant did not pay the rent as per the agreement. The tenant raised a claim against the landlord, that the latter's demand was duress and that the rental agreement for the said amount was concluded under duress. The court did not consider the contract to be concluded under duress and upheld it.[22] It is noteworthy, that the landlord threatened the tenant with selling the items and not, for instance, with burning or destroying them. In this case as well, along with the legitimacy of the demand to pay sums, a crucial importance was attributed to the nature of the threat.

The difference between these two cases lies in the legitimacy of the grounds for fulfilling obligations, and the similarity – assessing the nature of the threats. In the first case, the contract on the payment was concluded under duress, upon threatening and the defendant lacked a legitimate basis to

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17 *Cartwright J.,* Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts, Clarendon paperbacks, 1991, 153.

18 German Civil Code < https://www.gesetze-im-internet.de/bgb/> [20.01.2024], §123, 1990.

19 *Barton v Armstrong*, [1973] UKPC 27, The court of appeal of the supreme court of new south wales, judgment of the lords of the judicial committee of the privy council.

20 *Skeate v Beale,* [1841] 11 Ad&El 983, Court of the Queen's Bench, England and Wales.

21 *Maskell v Horner*, [1915] 3 KB 106, Senior Courts of England and Wales.

22 *Skeate v Beale*, [1841] 11 Ad&El 983, Court of the Queen's Bench, England and Wales.

demand payments, whereas in the second case, the tenancy contract had been concluded upon free declaration of intent and demanding money through making threats served the purpose of executing the legitimate contract.

It is a different discussion whether fulfilling a legitimate claim through threatening can be permitted, where the threatening itself is unlawful. In Sibeon v The Sibotre, the judge provided that threats made by one party to fulfil the contract concluded under mutual consent of both parties, such as threats of burning their house or expensive artworks (threats about the property) can be considered duress.[23]

Accordingly, when examining coercion against property in English law, it is not only the legal basis of the contract that must be considered but the content and form of the threat itself.

As for economic duress, it was determined in Crocker v. Schneider and it refers to gaining undue benefits by abusing someone's weak position, financial stress or hopeless situation, which would not be possible had the person in question been in different circumstances.[24] For instance, in B&S Contractors v Victor Green Publications an organiser undertook an obligation to place stands in the exhibition hall "Olimpia", however, a week before, they informed their client that they would not perform this obligation unless the client paid more. The consequences of not placing the stands would put the client in a devastating position as this could harm their reputation and might have caused claims for damages against them. The court found that the organiser had led the client to a dead-end and benefited from their hopeless position. Hence, the payment was made under duress and the court granted the client's claim for reimbursement of the sum.[25] In the case at hand, a party benefitted from the weak position of the client and anticipated financial stress. They received such benefits, which would not have been possible in healthy, competitive and equal trade relations.

2.3. German Doctrine of Duress

In the Civil Code of Germany (hereinafter, BGB) duress is regulated in §123 which entails the right to rescind on the grounds of deceit or threatening: (1) A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid the declaration.[26] As per the German Civil Code Commentary, according to the 2nd alternative of the first part of the norm, a threat is an intimidation to commit future evil (harm) when the threatener claims that they can execute the said action and is even willing to do so if the victim of coercion does not show the consent desired to the threatener.[27] Unlawfulness of threat, similar to English law, is in focus in German law as well. BGB Commentary provides that unlawful is the threat when the aim and the means to achieve this aim are not in line. For instance, a person owed a debt to another person for a long time. The latter happened

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23 *Sibeon v The Sibotre*, [1976] 1 Lloyd's Rep 293, England and Wales High Court.

24 *Crocker v. Schneider*, [1984] 683 S.W.2d 335, Court of Appeals of Tennessee, Western Section, at Jackson USA.

25 *B&S Contractors v Victor Green Publications*, [1984] ICR 419, Court of Appeal England and Wales.

26 *Kropholler J.,* German Civil Code, Study Comment, 13th rev. ed., *translated by Zurab Chechelashvili and Tornike Darjania,* Tbilisi, 2014, §123, 49 (in Georgian).

27 Ibid.

to learn that the debtor had committed theft. The creditor threatened the debtor with informing the authorities if the debtor did not fulfil their obligation. The mentioned threat is unlawful and the deal concluded under it will be subject to voidness. In contrast, a threat is an appropriate means of achieving a legitimate interest in the following case: the creditor threatens the debtor with a lawsuit should they not pay the debt.[28]

In both cases, a creditor demands the contractual performance of a debtor, which, supposedly, has arisen on legitimate grounds. However, in the former case, the creditor is putting pressure by threatening to report to authorities, whereas in the latter – by raising a claim. It is a person's lawful and social-ethical obligation to provide the authorities with information on a potential crime. A failure to report a crime is a punishable conduct in both, Georgian and German legislation. Manipulating a person by criminal liabilities (by reporting a crime) cannot be a legitimate ground for threats and a contract concluded on this basis, even though it serves the purpose of fulfilling a legitimate demand, cannot be considered valid. In the second case, a completely legitimate warning on raising a claim, cannot be considered illegitimate threatening, and hence, cannot be made void.

The nature of threatening itself is emphasised in German law, albeit, as opposed to English law, the legal basis of a contract made under duress. In one of the cases, a creditor forced a representative of a debtor (a legal person) to sign a settlement agreement, otherwise, they would initiate insolvency procedures against them (a debtor). German courts did not deem this act as duress, as the creditor and the debtor were in legal relations already, which was not legally questionable, a creditor had a legitimate interest in their demands to be fulfilled, whereas the debtor had an alternative not to sign a contract and avoid an agreement.[29]

2.4. Comparison of Georgian, German and English Doctrines of Duress

The definitions for articles regulating duress in Georgian and German law are relatively similar – in both cases, the focus is directed towards the promise of the future "evil", which must be perceived by the victim as real. Georgian and German doctrines of duress are wider than the English, as they do not require the unlawfulness of coercion for the contract to be considered concluded under duress. English law differentiates duress of persons, duress of goods and economic duress, whereas in Georgian and German laws duress is not limited in addressees or forms and it entails any action, which is intended to instil future evil and fear if it is perceived seriously by the victim.

In German judicial practice, emphasis is also placed on the grounds for obligations that have arisen between the parties. A contract may be considered to have been concluded under duress where the coercion is legitimate, albeit the coercer demands the performance from the victim without any grounds.

The main difference between Georgian, German, and English approaches lies in the fact that Georgian and German systems provide a wider interpretation of duress, whereas English law requires a higher extent of pressure and coercion in order to find a contract concluded under duress.

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[28] *Kropholler J.,* German Civil Code, Study Comment, 13th rev. ed., *translated by Zurab Chechelashvili and Tornike Darjania,* Tbilisi, 2014, §123, 49 (in Georgian).

[29] BGH, [2013] IX ZR 204/12.

In addition, Georgian and German legislation focuses more on the validity of the expressed will of the person under threat and not on the liability of the coercer. Hence, German and Georgian laws, first hand, check, whether the contract has been concluded under the expression of free will/consent and put less emphasis on assessing the form of pressure, unlike English law. English courts, unlike German legislation, do not rely on the principle of freedom of contract, as an inherent part of the concept of duress and the court rulings are based on the shortcomings in the consent of a victim.[30]

3. Immoral Agreements/Agreements Concluded under Undue Influence

3.1. Immoral Agreements in Georgian Law

In Georgian law, an utterly general substance of the article on immoral agreements does not allow for a deep understanding of this institute. Moreover, judicial practice is scarce. For instance, we encounter the definition of immorality provided by the Supreme Court of Georgia in terms of a contract of suretyship.[31] As per the reasoning of the Cassation Court (Supreme Court), putting obligations on a surety, who reached the age of majority several months before the conclusion of the contract, under a suretyship agreement goes against the norms of decency and is void under Article 54. Based on the analysis of this ruling, it is difficult to formulate the set of criteria for immoral agreements, as the court focused on underaged sureties, yet there is alternative reasoning in the legal literature[32] that a mutually binding agreement concluded between two adults does not in itself constitute an argument for the invalidity of this manifestation of consent. The agreement shall be made void on the grounds of its immoral nature, more precisely, through the reasoning that the agreement had been concluded by psychological pressure on a surety, violated their rights and contradicted moral principles.[33] The prerequisites for the invalidity of this type of suretyship have been identified: a financial burden that is significantly greater than the surety's capabilities; close private connections between the surety and the main obligee (e.g. spouse, child, parent); Undertaking an obligation in suretyship based on an emotional connection can deprive the surety of the full protection of their own interests from the beginning (including the ability to reject the suretyship obligations); subordination and the abuse of such subordination by the creditor.[34]

Besides suretyship, in Georgian judicial practice, due to strict reality, there are a number of decisions, where agreements between a state and a person have been found void on the grounds of immorality. For instance, a contract for a gift of a car between the parents of a convicted person and

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30 *Lawson F.H.,* The Rational Strength of English law, Stevens & Sons Ltd, London 1951, 58.

31 The ruling №ას-726-2019 of July 5, 2019, of the Supreme Court of Georgia (in Georgian).

32 *Kavshbaia N.,* Voidness of a Transaction on the Grounds of Immorality, analysis of the ruling on the case საქმე №ას-726-2019 of February 9, 2019, of the Supreme court of Georgia, "Georgian-German Journal of Comparative Law", 1/2020, Tbilisi, 2020, 62 (in Georgian).

33 *Compare* BGH, [1994] NJW, IX ZR 227/93.

34 *Kavshbaia N.,* Voidness of a Transaction on the Grounds of Immorality, analysis of the ruling on the case საქმე №ას-726-2019 of February 9, 2019, of the Supreme court of Georgia, "Georgian-German Journal of Comparative Law", 1/2020, Tbilisi, 2020, 62 (in Georgian).

the Ministry of Internal Affairs of Georgia which led to the approval of a plea bargain in favour of the accused.[35]

3.2. Transactions Made under Undue Influence in English Law

In English law, unlike Georgian, unlawful and immoral transactions, as well as, transactions going against public order are placed under the same umbrella term – illegal transactions. This term entails agreements subject of which are criminal actions, as well as public misdemeanours. In English judicial decisions, we find the term "undue influence" to characterise immoral deals, which are a mechanism of exercising control over the person whose actions become questionable. The purpose of undue influence is to undermine another person's free will and limit it to the extent that it affects their free choice.[36]

In Scurry v. The Cook Court explained that for an influence to be "undue," it must neglect the will of a person and substitute with the will of the person exercising influence.[37] By undue influence one party gains unfair privilege over the other, albeit, it cannot be concluded, that any influence is undue "for, it is not forbidden for a person to put proper influence on the other party for their own benefit." Undue influence was introduced to apply to cases where the contract is concluded under pressure, however, this pressure is not duress.

In English law, four equally important elements of undue influence are distinguished, which, in combination, can provide for a presumption that one party is signing an agreement under the absence of free consent. These elements are as follows:[38]

1. Vulnerability of the victim[39] – the victim must be sensitive to the manipulations of the other party. This can be established by the nature of the relationship between the parties, the victim's limited abilities or their current mental or psychological state.
2. The authority of the person exercising influence – there must be a type of relationship between the parties that is a prerequisite for the emergence of trust.
3. Tactics – the person exercising influence must use certain tactics to influence the victim. These tactics may include controlling the necessities of life, such as food, medicine, etc. Also, non-physical influences, including affection, ignorance, humiliation, etc.
4. Unfair consequences – there must be unfair consequences for the victim, which caused them to suffer economically.

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35 Decision №2ბ/4686-13 of April 15, 2014, of the Chamber on Civil Cases of the Tbilisi Court of Appeals (Compare Judgement of the European Court of Human Rights of May 19, 2004, on Gusinskiy v. Russia; Decision #ას-15-15-2016 of March 1, 2016, of the Chamber on Civil Cases of the Supreme Court of Georgia) (in Georgian).

36 ***Tidwell v. Critz*, (1981) 248 Ga.US 201.**

37 *Scurry v. Cook*, [1950] 59 S.E.2d 371, Supreme Court of Georgia.

38 *Andrews N.,* Contract Law, 11- Duress, Undue Influence and Unconscionability, Cambridge University Press, Cambridge, 2011, 306.

39 "Vulnerability".

3.2.1. Classes of Undue Influence

In Bank of Credit & Commerce International v Aboody the Court of Appeal of England developed three different classes of undue influence[40]: Class 1 includes actual undue influence and the burden of proof of actual damages (manifest disadvantage) is the prerogative of the plaintiff or alleged victim.[41] The influence must be obvious and conspicuous and must be demonstrated in a specific material damage (loss).[42] The most recent example of factual undue influence is Whittle v Whittle, one of the rare cases where a court found undue influence and made a will void on that basis. Mr Whittle passed away on December 7, 2016, at the age of 92. He drafted his first and only will in November 2016, a month before he passed. He left a car collection and a garage to his son David, provided that he would free the territory, whereas the rest of the remaining vast property was left to daughter Sonya and her partner in equal parts. David raised a claim seeking the voidness of the will on the grounds of undue influence. The actual damages consisted of the property worth billions as David was supposed to inherit. The claimant argued that the will was drafted under the undue influence of his sister, who persuaded the father, that David was a thief and lived an immoral way of life. She shared these accusations with their father when he had already fallen unwell. During the trial, Sonya could not substantiate the accusations against her brother and therefore could not refute that the will had been drafted under her negative influence.[43]

The second and third classes are Classes 2a and 2b, which entail an alleged undue influence. These classes do not require to prove that undue influence has taken place, albeit, in the first case, it is required that a relationship based on special trust between the parties, arising out of a particularly close relationship between the parties, is proved to exist, e.g.: spouses, parents and children; whereas in the second case (Class 2b), a relationship between the parties arises from the law, a contract or another type of an agreement (often confidential), e.g., doctor/patient, attorney/client, spiritual father/parish, employee/employer, roommates, and other similar relationships. In both instances, where the transaction carried out is unusual and cannot be explained by the nature of the relationship between the parties and one party has suffered actual damages (Manifest Disadvantage), the presumption of undue influence arises and the burden of proof is shifted to the person who exercises influence, i.e. the defendant. For example, when a client gifts their own home to the attorney and through this, suffers damages, the presumption of undue influence from the attorney arises and hence, the attorney shall prove that the client's will was free of any influence.[44]

3.3. Immoral Transactions in German Law

The German doctrine of duress (BGB 123) is narrow for protecting every kind of freedom of choice. In situations, where certain actions or circumstances may be "indecent", they fall within the

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40 <https://www.claims.co.uk/knowledge-base/contract-law/duress-undue-influence-in-contracts> [20.01.2024].

41 *Edwards v Edwards*, (2007) 481 P.2d US 432.

42 *CIBC Mortgages v Pitt*, [1994] UKHL 7, House of Lords.

43 *Whittle v Whittle*, [2022] EWHC 925 (Ch), England and Wales High Court (Chancery Division) Decisions.

44 <https://www.claims.co.uk/knowledge-base/contract-law/duress-undue-influence-in-contracts> [20.01.2024].

scope of the general rule of BGB Paragraph 138. This normative provision is a primary legal source for regulating duress in German doctrine and results in the voidness of transactions "which do not comply with the norms of decency." In German law immoral transactions and unlawful transactions are given in separate paragraphs (BGB 134; 138), whereas transactions which go against public order are not mentioned.

As per BGB Paragraph 138, a transaction offends common decency where (a) its conclusion is induced; (b) through the abuse of dominant position and (c) one party deliberately uses such dominant position. The analysis of the combination of these elements determines whether a transaction contradicts the sense of fairness of each person.[45] As per German law, the voidness of a transaction on the grounds of indecency is possible where the violation stems from the content of the transaction (e.g., a contract on committing a crime), however, frequently, incompliance with moral norms derives only from the features characteristic of the transaction as a whole. In this case, the motive and purpose of the transaction shall be taken into consideration.[46] The transaction might not be objectively indecent as of a particular time (e.g., gifting the only apartment), yet, the motive and the purpose (gifting it to a mistress/lover) might lead to voidness as per Paragraph 138. The subjective element must be present for both parties, where the violation of the norms of decency is directed against society or third parties; Where it is directed against the other party, unilateral violation of the norms of decency suffices. Awareness about the violation of moral norms should be differentiated from knowledge of immoral circumstances, which is not required in any case.[47] According to the judicial practice, the moment of concluding the transaction is crucial to assess the violation of moral norms.[48]

It must be noted, that German courts have set circumstances when undue influence takes place outside of the relationships based on special trust. There are many different types of dominant positions, which can lead to undue influence. For instance, an entity in a dominant market position, public authority, a landlord, an employer and a banker have been identified as holding dominant positions. They can impede the freedom of choice of a party.[49]

3.4. Comparison of Georgian, English and German Transactions under Undue Influence

English, as well as, German law, compared to Georgian, provide much detailed definitions of undue influence/immorality. In Georgian law, the article, which more clearly defined immoral transactions has been annulled, whereas Article 54 of the Civil Code is general and it is impossible to find specific criteria in it. Hence, the load is shifted to the courts, which must develop uniform criteria for finding a transaction immoral.

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45 *Hadjiani A.*, Duress and Undue Influence in English and German Contract Law: a comparative study on vitiating factors in common and civil law, Oxford U Comparative L Forum, 2002.

46 Ibid.

47 *Kereselidze D.,* The Most General Systemic Notions of Private Law, European and Comparative Law Institute, Tbilisi, 2009, 357 (in Georgian).

48 Ibid.

49 *Hadjiani A.*, Duress and Undue Influence in English and German Contract Law: a comparative study on vitiating factors in common and civil law, Oxford U Comparative L Forum, 2002.

The parts on the burden of proof also differ. In English law, the presumption of undue influence arises where one person trusts the other (special relationship) (1), a person exercising an influence causes actual damages to the other person and benefits from it (2) and the victim of the influence is put in an unfavourable position, a person exercising an influence acknowledges said facts (factual and constructive knowledge) (3).

In English law, upon the presence of these three elements, it is presumed that the other two elements are also at hand: causal relation (4) and the violation of the freedom of choice (5).[50] As per English law, for the presumption to arise, it is sufficient for a party to prove the presence of elements 1, 2 and 3 (Classes 2a and 2b) or elements 1, 2, 3, 4, 5 (Class 1), to create a presumption of undue influence and shift the burden of proof to the potential influencer. German and Georgian laws provide for different rules. In both approaches, the claimant shall prove the cumulative presence of all elements (1, 2, 3, 4, 5) to create the presumption of immorality of the transaction and the burden of proof to shift. Therefore, in English law, the burden of proof of undue influence is lighter for a victim than it is in German and Georgian systems.

4. Conclusion

Upon comparing transactions concluded under duress and immoral transactions it has been concluded that duress is the strongest form of pressure, which entails obvious and gross violation of free will. The English doctrine of duress, compared to Georgian and German ones, is narrower and is mainly focused on the legal nature of the threat, whereas Georgian and German approaches put emphasis on the fault in the consent. In all three jurisdictions, in case of duress, coercion of consent does not take place silently, but rather the victim understands the real circumstances and does not wish to establish legal relations, yet, they are deprived of freedom of choice, as in their subjective perception their life/health, property or economic state is under threat.

The limited notion of duress is made complete with the concept of undue influence. In this case, the influence on the consent, compared to duress, is rather subtle. Within the scope of the undue influence doctrine, all three legal systems require the assessment of material unfairness. For the transaction to be deemed immoral, besides the encroachment on the free will characteristic for duress, the element of immorality shall be at hand. The probability of the presence of an element of immorality is high where there is subordination, close relationships or relationships based on trust, one party has suffered damages and the other party has benefitted in a manner which would have been impossible in different circumstances. Moreover, the influence has been exercised through pre-determined tactics.

Unlike the English approach, Georgian and German laws do not put emphasis on close relationships, albeit, inequality of the parties is still a crucial component. Georgian and German approaches are based on more of a general definition – where a transaction is concluded only due to one party abusing its market power, or benefiting from a counter-party's dire state or innocence, then it can be concluded that an immoral transaction is at hand.

[50] *Lloyds Bank v Bundy*, [1974] EWCA Civ 8, Court Of Appeal, Salisbury County Court UK.

In addition, unline the duress doctrine, in the case of immoral transactions, the weight of the subjective element (awareness) is lighter and the main focus is directed towards the objective circumstances – the German approach presumes that subjective features are at hand even when the party turns a blind eye to the unfavourable state of the other party.

In all three legislations, the burden of proof in undue influence is lighter than in duress. Where in case of duress it is required to prove the presence of specific circumstances of undermining the consent, in undue influence, the presence of certain preconditions automatically creates the presumption which shifts the burden of proof in favour of the alleged victim. The burden of proof is even lighter to carry for a victim in English law, where showcasing the existence of a special relationship, actual damages and benefits enjoyed by the person who exercises the influence suffice to create the presumption of undue influence. It is not required to prove the existence of the causal connection and violation of freedom of choice.

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The Problem of Defining the Scope of Support on the Example of Minor Everyday Transactions

Legal Capacity reform has laid the foundation for discussion on interesting, complex and important issues at both the international and national levels. This article is devoted to the issue of appointing support for a person with psychosocial needs, using the example of minor everyday transactions. The regulations in the Civil Code of Georgia and the Procedural Code, as well as court practice, have been evaluated in accordance with international norms and the decision of the Constitutional Court of Georgia. As a conclusion, the author's vision is proposed in relation to the above-mentioned issues.

Keywords: *person with psychosocial needs, private autonomy, legal capacity, mental health, beneficiary of support, minor everyday transactions.*

1. Introduction

Legal capacity reform is rightly regarded as "the most important issue facing the international legal community at the moment".[1] Legal capacity is a part of private autonomy, which falls under the right of personal self-determination,[2] it is given to a person not by the state or law, but by nature.[3] Within the framework of private autonomy, an important and key prerequisite is the aspect that the expression of will, which has legal force, should be based on the possibility of making decisions freely.[4] One of the most fundamental constitutional characteristics inherent to a subject is precisely the capacity for will, which gives rise to legal consequences.[5]

The main basis for the reform of legal capacity and the introduction of a support system in Georgia was the decision made by the Constitutional Court of Georgia and the United Nations Convention on the Rights of Persons with Disabilities (hereinafter: the Convention).[6]

The Convention is undoubtedly a landmark and significant occurrence in the field of human rights protection.[7] It does not create new rights[8], but rather adapts the spectrum of existing rights to the context of disabilities.[9]

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1 See: Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session.

2 BVerfGE 99, 383 (389).

3 *Basedov I.,* Private Autonomy in European Civil Law, Private Autonomy as a Fundamental Principle of Private Law (Conference Proceedings), *Zarandia T., Kurzinski-Singeri E., Shatberashvili L.,* (ed.) Publishing House of Ivane Javakhishvili Tbilisi State University, 2020, 15 (In Georgian).

4 *Klumpp S., J.* von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – Buch 1: Allgemeiner Teil, Vorbemerkung vor §§ 104 ff, Sellier-de Gruyter, 2021, Rn. 7.

5 *Zoidze B., "*Legal Subjectivity of a Person with Psychosocial Needs," Tsu Law Review, #1, Tbilisi, 2016, 31 (In Georgian).

6 "Convention on the Rights of Persons with Disabilities", United Nations, Treaty Series 2515, 2006, 3.

According to Article 12 of the Convention, all people are equal regardless of the presence of mental and intellectual problems, and persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Thus, a medical diagnosis is no longer a basis for declaring a person legally incapacitated. The Convention represents **a "paradigm shift" from traditional medical approaches to human rights-based approaches**. The starting point of this concept is the recognition that persons with disabilities, like others, have rights best summarized in the format of fundamental principles: independence, freedom of choice, full participation, equality, and human dignity.[10]

The legal regulation regarding the protection of the rights of persons with mental and intellectual disabilities[11] was deemed unconstitutional by the Constitutional Court of Georgia on October 8, 2014. Consequently, the Georgian Parliament was obligated to reform and adopt legislation that was in line with the human rights standards[12] set forth in the Constitution of Georgia and also complied with the requirements of the Convention.

Before the implementation of the reform, the judicial status of individuals with mental and intellectual disabilities could be described as "civil death."[13] However, with the reforms enacted in 2015, they were declared fully capable of acting, and the term "person with psychosocial disabilities" was introduced. This term encompasses individuals with various physical, mental/intellectual impairments, whose different disabilities might interfere with their full and effective participation in societal life, requiring support and assistance for the exercise of their right to independent decision-making and informed, reasoned decision-making within the judiciary. Thus, based on the fourth part of Article 12 of the Civil Code of Georgia, **a person with psychosocial needs has full legal capacity.**

In short, **if previously persons with disabilities were invisible to civil law, the changes recognized their civil legal capacity**. [14] The model based on the rights of persons with disabilities

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7 See: *Eaton J., Carroll A., Scherer N., Daniel L., Njenga M., Sunkel Ch., Thompson K., Kingston D., khanom G., Dryer S.,* Accountability for the Rights of People with Psychosocial Disabilities: An Assessment of Country Reports for the Convention on the Rights of Persons with Disabilities, Health and Human Rights Journal, Vol. 23 #1, 2021, 175.

8 See: Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law, UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, April 2014, 1, 1.1.

9 See: *Degener T., de Castro M.GC.* Toward Inclusive Equality: Ten Years of the Human Rights Model of Disability in the Work of the UN Committee on the Rights of Persons with Disabilities. In: *Felder F., Davy L., Kayess R.* (eds.) Disability Law and Human Rights. Palgrave Studies in Disability and International Development, Palgrave Macmillan, 2022, Cham. 30.

10 "Human Rights: A Reality for All" Council of Europe Disability Strategy 2017-2023, Council of Europe, para. 11 (in Georgian).

11 In accordance with international approaches, the terminology used prior to the legislative change for indicating mental and intellectual disabilities is not used in this paper.

12 Explanatory note on "amendments on Georgian civil code", parliament of Georgia, web page, <https://info.parliament.ge/file/1/BillReviewContent/64346? > [08.01.2024] (in Georgian).

13 See: Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities, *Commissioner for Human Rights*, 2012, 9.

14 See also: the decision of the Constitutional Court of Georgia on October 8, 2014, in the case of "Citizens of Georgia – *Irakli Kemoklidze* and *Davit Kharadze* v. Parliament of Georgia" (#2/4/532,533), II, 10 (in Georgian).

involves a shift from the paradigm of substituted decision-making to a model of supported decision-making. [15]

Persons with intellectual and psychosocial disabilities are particularly restricted by the existence of substituted systems and the denial of their legal capacity. The UN Committee on the Rights of Persons with Disabilities has emphasized that **having the status of a person with disabilities or certain health problems (including physical or sensory impairments) cannot be grounds for denying their legal capacity and other rights**." [16]

It is interesting to evaluate to what extent, in the example of the Civil Code, the appointment of support in the part of everyday transactions aligns with international standards and the decision of the Constitutional Court of Georgia, and to what extent the private autonomy of persons with mental and intellectual disabilities is protected in this regard. Additionally, what problems accompany the implementation of international standards in national legislation in this specific example of legal capacity?

2. Generally About Contractual Capacity (Geschäftsfähigkeit)

The essential sign of a legal subject is capacity for rights and legal capacity.[17]Legal capacity defines a subcategory of capability. **The term "Legal capacity" *(handlungsfähigkeit)* is not used in the German Civil Code, and in norms, legal capacity is the focus**.[18] Contractual capacity should be defined as an ability of a person, granting an individual legal rights under their own name within the civil legal system.[19] The subcategories of legal capacity include marriageability *(Ehefähigkeit)* and Testamentary capacity (*Testierfähigkeit).*

As noted at the beginning, the principle of private autonomy is manifested in the freedom of legal relations, but this freedom makes sense when a person can also take responsibility for their actions. Another subcategory of the ability to act is **delictual capacity** – the ability to independently bear civil legal responsibility. More specifically, this means a person's ability to be liable for the damage they cause. [20]

In Georgian civil law, full legal capacity is linked to reaching the age of 18. There are two cases of limited legal capacity: a person aged 7-18 (Article 14, part one of the Civil Code) [21] and an adult

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15 See: Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law, UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, April 2014, 1.3.

16 See: Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law, UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, April 2014, 1.9.

17 *Khubua G.,* Theory of Law, "Meridiani" publishing house, Tbilisi, 2011, 202 (in Georgian).

18 *Palandt O., Ellenberger J.,* Bürgerliche Gesetzbuch Kommentare, 78. Auflage, C.H. Beck, München, 2019, §104, Rn. 1.

19 See: *Klumpp S.,* J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – Buch 1: Allgemeiner Teil, Vorbemerkung vor §§ 104 ff, Sellier-de Gruyter, 2021, Rn. 35.

20 *Bitter G., Röder S.,* BGB, Allgemeiner Teil, 4., neu bearbeitete Auflage, Verlag Franz Vahlen München, 2018, 115, Rn. 1.

21 In accordance with the fifth part of Article 12 of the Civil Code, the court may also recognize a minor as a recipient of support within the scope where, according to legislation, the minor does not require the consent

who abuses alcohol or narcotic substances and, because of this, puts their family in a difficult material condition (Article 16, part one of the Civil Code). [22] As for incapacity, only the case of minors (0-7 years) remains after the changes. A person with psychosocial needs is fully capable and is appointed support in the areas determined by the court.

3. The Issue of minor everyday Transactions According to §105a of the German Civil Code (GCC)

3.1. Legislative Innovation in the German Civil Code

With the legislative changes of July 23, 2002, amendments were made to the German Civil Code regarding the institution of contractual capacity. Specifically, a new norm was added concerning the making of everyday transactions. §105a was introduced into the Civil Code after a long-standing demand for a reform of legal incapacity in Germany. [23] One of the **objectives of these changes was the social emancipation of persons with mental and intellectual problems and the increase of their personal responsibility**. [24]

The aim of the new standard was to provide opportunities for individuals with mental and intellectual health issues to ensure that they "conduct daily transactions independently and responsibly in situations of low financial means."[25]

The adoption of §105a also aimed to strengthen the legal rights of individuals with mental health problems to self-determination in personal matters.[26] It should also be noted that the current legislative grounds of the Civil Code (CC §104 II and §105 paragraphs) regarding the contractual capacity of adults have not been changed.

Canaris[27] proposed the thesis that the nullity of the expressed will of an incapacitated person, motivated by the protection of the person's interests, represented an excessive interference in private autonomy and contradicted the constitution. He suggested changing the existing norms using the analogy of §107 and subsequent paragraphs of the GCC. However, it should be noted that the proposed version might not be adequately justified. [28]

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of a legal representative for the exercise of their rights and duties. For more details, see: *Zoizde B., Kordzaia T.,* Commentary on the Civil Code, Book I, Tbilisi, 2017, 67-76 (in Georgian).

22 For more, see: *Chanturia L.,* General Part of Civil Law, 'Law' Publishing, Tbilisi, 2011, 180-184 (in Georgian).

23 "Natürlichen Geschäftsunfähigkeit".

24 *Palandt O., Ellenberger J.,* Bürgerliche Gesetzbuch Kommentare, 78. Auflage, C.H. Beck, München, 2019, §105a Rn. 1.

25 See: *Löhnig M., Schärtl Chr.,* Zur Dogmatik Des § 105a BGB" Archiv Für Die Civilistische Praxis 204, no. 1, 2004, 25–58.

26 Deutscher Bundestag: BT- Drs. 14/9266, 43.

27 See: *Canaris C.,* "Verstöße Gegen Das Verfassungsrechtliche Übermaßverbot Im Recht Der Geschäftsfähigkeit Und Im Schadensersatzrecht." Juristen Zeitung 42, no. 21,1987, 993–1004.

28 *Casper M.*, Geschäfte des täglichen Lebens – kritische Anmerkung zum neuen § 105 a BGB, NJW 2002, 3429.

Therefore, despite the fact that paragraphs §104 and §105 of the Civil Code remain unchanged until today, it is noteworthy that the German Parliament has not yet declared a connection and mandatory harmonization between the norms of fairness and non-legal personality.[29]

Later, guardianship and care regulations again underwent modernization with the aim of achieving compliance with the requirements of the Convention.[30]

3.2. Preconditions

According to §105a of the GCC, if an adult incapacitated person makes an everyday transaction that can be executed with a small amount of money, then the contract made by them is considered valid concerning performance and, in the case of agreement, also regarding counter-performance as soon as the performance and counter-performance are executed. This rule does not apply in cases where there is a significant risk to the person's or the incapacitated person's property.

3.2.1. Subject

According to the German Civil Code, legal incapacity is considered in two cases: a person under the age of 7 **and a person (regardless of age) who is in a state of mental disorder that excludes the free expression of will if the condition is not temporary by its nature**. For example, drug intoxication or delirium (a disturbance of consciousness) [31] are temporary disorders of mental activity by nature and are not included in the scope of §104 II of the GCC. [32] Temporary mental disorders are regulated separately by civil codes. [33]

Thus, from the record of the GCC, the only basis for a person's legal incapacity due to medical conditions is a pathological state of mental condition. It does not matter which case provided by the medical classification it belongs to. [34] According to the GCC, all diseases or disorders that exclude the free expression of will are important[35] and should be considered when determining legal incapacity.

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29 Deutscher Bundestag: BT-Drs. 11/4528, 137 f., see: *Brosey D./Jürgens A.,* Betreuungsrecht Kommentar, 7., vollständig überarbeitete Auflage, C.H.Beck, München, 2023, § 104 Rn. 1.

30 Deutscher Bundestag: BT-Drs. 19/27287.

31 Delirium is a mental/psychic state of a person in which the person is confused and unconscious. Delirium can also cause hallucinations and changes in attention, mood or behavior, judgment, muscle control, and sleep patterns. Symptoms of delirium usually appear suddenly and are short-lived. Delirium can be caused by infection, dehydration, medications, or a serious illness. see: NCI Dictionary of Cancer Terms, National Cancer Institute at the National Institutes of Health. see also: *Ramírez Echeverría MdL, Schoo C, Paul M.,* Delirium. [Updated 2022 Nov 19]. In: StatPearls [Internet]. Treasure Island (FL): StatPearls Publishing; 2024 Jan, < https://www.ncbi.nlm.nih.gov/books/NBK470399/ > [09.01.2024].

32 *Bitter G., Röder S.,* BGB, Allgemeiner Teil, 4., neu bearbeitete Auflage, Verlag Franz Vahlen, München, 2018, 117, Rn. 8.

33 See: *Chanturia L., Commentary on the Civil Code, Book I, Tbilisi, 2017, 336-341 (in Georgian) Article 58, Law of Georgia, Civil Code of Georgia*, 24/07/1997.

34 Cf.: *Spickhoff A.,* Münchener Kommentar zum Bürgerlichen Gesetzbuch, 8. Aufl. Verlag C.H.Beck, 2019, Rn. 10.

35 *Brosey D., Jürgens A.,* Betreuungsrecht Kommentar, 7., vollständig überarbeitete Auflage, C.H.Beck, München, 2023, § 104 Rn. 2.

The determining factor is not the mental/cognitive aspect of the person but the degree to which the expression of will is free.[36]

According to the practice of the Federal Court of Germany, after analyzing all aspects, it should be assessed whether a person can make a free decision or, conversely, whether the formation of will should not be considered freely expressed if it results from "uncontrolled instincts and ideas." [37]

3.2.2. The Term "Everyday"

According to the doctrine, the term "everyday transactions" includes both remunerative and gratuitous transactions[38] that can be classified as "everyday/daily life."[39] The qualification is determined by "public perception." [40] It is not mandatory for the transaction to be made literally every day. For example, transactions of this type may include: purchasing everyday items such as food or products intended for immediate consumption that do not exceed the usual quantity, cosmetic items (e.g., toothpaste), press products (e.g., illustrated magazines), textiles, and simple services such as hair styling, sending letters, local public transportation services, [41] making donations[42], agreements related to telephone services. According to one view in German doctrine, gifting to a legally incapacitated person can also be considered an everyday transaction.[43]

Remote (§ 312c) and "street agreements" do not fall within the scope of §105a. [44] Similarly, in medical services, the issue of capacity to consent is not covered by §105a. General rules apply in this case. Capacity to consent is not codified as a general legislative consent but must independently exist for each specific medical service. [45]

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36 *Bitter G., Röder S.,* BGB, Allgemeiner Teil, 4., Aufl., Verlag Franz Vahlen, München, 2018, 117, Rn. 7.

37 BGH, 05.12.1995 – XI ZR 70/95; NJW 1970, 1680, 1681.

38 Deutscher Bundestag: BT-Drs. 14/9266, 43, *Spickhoff A.,* Münchener Kommentar zum Bürgerlichen Gesetzbuch, 9. Aufl. Verlag C.H.Beck, 2021, § 105a Rn. 6, cf.: *Löhnig M., Schärtl Ch.*, "Zur Dogmatik Des § 105a BGB." Archiv Für Die Civilistische Praxis 204, no. 1, 2004, 25.

39 Deutscher Bundestag: BT-Drs. 14/9266, 43, *Spickhoff A.,* Münchener Kommentar zum Bürgerlichen Gesetzbuch, 9. Aufl. Verlag C.H.Beck, 2021, § 105a Rn. 6.

40 Deutscher Bundestag: BT-Drs. 14/9266, 43, see also: *Spickhoff A.,* Münchener Kommentar zum Bürgerlichen Gesetzbuch, 9. Aufl. Verlag C.H.Beck, 2021, § 105a Rn. 6.

41 *Spickhoff A.,* Münchener Kommentar zum Bürgerlichen Gesetzbuch, 9. Aufl. Verlag C.H.Beck, 2021, §105a Rn. 6-8. See also: *Zweigert K., Kötz H.* An Introduction to Comparative Civil Law, Vol.II. (translated by: *Sumbatashvili E., Ninidze T.,* eds.) Publishing house "GCI" Tbilisi, 2001, 36 (in Georgian).

42 *Lipp F.,* Die neue Geschäftsfähigkeit Erwachsener in: Zeitschrift für das gesamte Familienrecht (FamRZ) 2003, (721 – 729), 727.

43 See: *Spickhoff A.,* Münchener Kommentar zum Bürgerlichen Gesetzbuch, 9. Aufl. Verlag C.H.Beck, 2021, § 105a Rn. 6. But cf. on gifting: *Löhnig M., Schärtl Chr.,* Zur Dogmatik Des §105a BGB" Archiv Für Die Civilistische Praxis 204, no. 1, 2004, 25.

44 *Spickhoff A.,* Münchener Kommentar zum Bürgerlichen Gesetzbuch, 9. Aufl. Verlag C.H.Beck, 2021, §105a, Rn. 6.

45 See: *Spickhoff A.* Medizinrecht, 4. Auflage, C.H.Beck, München, 2022, Rn. 8; See also: *Spickhoff*/Münchener Kommentar zum Bürgerlichen Gesetzbuch, 9. Aufl. 2021, BGB § 105a Rn. 6.

3.2.3. Amount Required for a Transaction

For the qualification of minor transactions, the transaction must be of "small value." The primary aspect of significance is this characteristic. [46] According to prevailing doctrine, this refers to minor transactions conducted in cash. [47] When determining the value, in cases involving the purchase of several items, the total value or overall price in case of installment payments should be assessed. [48] General price levels are also considered, and usually do not pertain to high-value items. [49] However, in assessing this, the general standard of income should also be taken into account. For example, the "small value" might be perceived differently by a millionaire compared to an average-income family.[50]

3.3. Legal Consequence

An exception to the general rule of transaction nullity provided by § 105 of the Civil Code (GCC) is the conclusion of everyday transactions. [51] The protective function of requiring the guardian's consent is not necessary for "minor matters of daily life" (§1825 III). [52] This approach remains unchanged in recent legislative updates. [53] Therefore, if the subject of the contract is a minor transaction, it cannot be invalidated on the grounds that one party was incapable of contracting, and the nullity consequence provided by §105 second part does not apply.

Since daily life transactions are typically those where performance and payment occur simultaneously (e.g., purchasing an item and paying for it immediately at the checkout; buying a ticket that is used immediately, etc.), concluding the contract and delivering the service/item usually takes a short time. [54]

Additionally, the risk to the assets of an incapable person is considered (§105a, second sentence). Specifically, the Civil Code considers cases of increased risk to this person's property. For example, when a person purchases several identical items that are objectively unnecessary, etc. [55] However, the qualification of something as a risk, in the context of free will, must be assessed on a case-by-case basis.

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46 See: *Adena S.*, Rechtsgeschäfte des täglichen Lebens in Deutschland und Österreich, 2009, 46 f.

47 Deutscher Bundestag: BT-Drs. 14/9266, 43.

48 Deutscher Bundestag: BT-Drs. 14/9266, 43; cf.: *Casper M*., "Geschäfte des täglichen Lebens – kritische Anmerkungen zum neuen § 105a BGB", NJW 2002, (3425-3430) 3425.

49 *Brosey D., Jürgens A.,* Betreuungsrecht Kommentar, 7., vollständig überarbeitete Auflage, C.H.Beck, München, 2023, § 105a Rn. 1-5.

50 *Spickhoff A.,* Münchener Kommentar zum Bürgerlichen Gesetzbuch, 9. Aufl. Verlag C.H.Beck, 2021, § 105a Rn. 9-11.

51 See:, *Kropholler, I., Commentary on the German Civil Code (translated by T. Darjania and Z. Chechelashvili), §104, 2014,* 2014 (in Georgian).

52 *Brosey D., Jürgens A.,* Betreuungsrecht Kommentar, 7., vollständig überarbeitete Auflage, C.H.Beck, München, 2023, § 105a Rn. 1

53 Compare the pre-2021 amendment version of §1903 III of the Civil Code.

54 *Brosey D., Jürgens A.,* Betreuungsrecht Kommentar, 7., vollständig überarbeitete Auflage, C.H.Beck, München, 2023, § 105a Rn. 4

55 *Brosey D.*, *Jürgens A.,* Betreuungsrecht Kommentar, 7., vollständig überarbeitete Auflage, C.H.Beck, München, 2023, § 105a, Rn. 5

It can be said that the legislator has safeguarded itself and retained the general provision of transaction nullity to protect this person's interests. The concept underlying §105 I gains significance in the context of legal policy. [56]

3.4. Relation Between §105a of the Civil Code and Guardianship Norms

With the amendments of 2021, which have been in force since 2023, the regulations governing legal guardianship have been changed. The first innovation introduced by these changes is the **principle of "necessity."** The new norm clearly stipulates that a guardian is appointed only when it is necessary (§1814 III). Necessity is not present if support can be received and is sufficient through other means. This includes factual assistance provided by family members, close friends, and social services. It is also clearly defined that a guardian should conduct their duties in such a manner that allows the person under guardianship to organize their own life according to their desires and will, as much as possible. This regulation was implemented to achieve compliance with the requirements of the convention.[57]

If an adult, due to mental condition, is unable to manage their affairs entirely or partially, then the guardianship court appoints a guardian for them (§ 1814) for the matters that necessitate guardianship. The primary goal is that the guardian helps the person in exercising private autonomy, during which §§ 104 and other norms of the Civil Code simultaneously apply. The German legislator intended to ensure minimal interference in the rights of the ward. [58]

To the extent necessary to prevent significant danger to the person or property of the individual under guardianship, the Guardianship Court determines that for any declaration of will concerning the scope of the guardian's duties, the consent of the guardian is required (**stipulation on the necessity of consent**). Consent is not required if the individual under guardianship derives legal benefits from the declaration of will. Unless the court decides otherwise, this also applies to declarations of will on less significant matters of everyday life.[59] In the doctrine, it is considered that since §105a is part of the transactions section, together with §104 and the following paragraphs, this contradicts those who claim[60] that §105a provides the legal basis for "pocket money."[61]

The legal connection between §104, the subsequent paragraphs, and the guardianship norms is clear if we analyze and observe that the regulation on guardianship, which was adopted prior to the amendment of §105a, does not already consider the incapacity to transact as a mandatory prerequisite

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56 *Casper M.*, Geschäfte des täglichen Lebens – kritische Anmerkung zum neuen § 105 a BGB, NJW 2002, 3429.

57 Deutscher Bundestag: BT-Drs. 19/27287.

58 *Martin L., Schärtl. Ch., "*Zur Dogmatik Des § 105a BGB." Archiv Für Die Civilistische Praxis 204, no. 1, 2004, 58.

59 §1825, Bürgerliches Gesetzbuch (BGB), 18.08.1896, BGBl. I S. 42, 2909; 2003 I S. 738, BGBl. 2023 I Nr. 411.

60 *Martin L., Schärtl. Ch.*, "Zur Dogmatik Des § 105a BGB." Archiv Für Die Civilistische Praxis 204, no. 1 2004, 30.

61 Cf.: §110, Bürgerliches Gesetzbuch (BGB), 18.08.1896, BGBl. I S. 42, 2909; 2003 I S. 738, BGBl. 2023 I Nr. 411

for guardianship. Regardless of the presence of guardianship, if a person is in the condition stipulated by §104 II, they are considered incapable of transacting. The recognition of a person's incapacity to transact depends on the expert's conclusion.[62] Thus, the implementation of legal guardianship with the necessity of the guardian's consent is consequently similar to the legal status of a minor with limited capacity.[63]

4. Critique

When evaluating the content of §105a, several questions naturally arise: Can an adult incapable of transacting enter into unilateral agreements? Is their expressed will considered genuine? Is the will of a person incapable of transacting genuine concerning the determination of additional terms, as well as their will when exiting a contract? Can a person incapable of transacting demand performance within the scope of a contract, set deadlines, or withdraw from the contract if the service does not meet the conditions specified in the agreement?

Associations advocating for the rights of persons with disabilities point out that the legislator's goal cannot be achieved merely by excluding the possibility of return and that despite the existence of an obligation, property rights still do not arise.[64]

When discussing "excessive" regulation in German civil legislation, §105a is often cited, as this norm does not fit into the overall legal system and also fails to meet the goals set during its adoption process. Despite the legislator's aim of integrating adults with mental health issues, this new rule does not fundamentally change reality. Specifically, according to §105a, an adult incapable of transacting enters into genuine everyday transactions only in terms of performance. This provision is seen as the legislator violating the previously clearly defined system. If initially, an adult incapable of transacting could not genuinely express their will to enter into a transaction, now this is possible for low-value items and services. This systemic disruption is justified by the following aspects: according to §105a, a transaction made by an adult incapable of transacting will be considered genuine upon performance or in other cases with the guardian's consent. In this respect, the primary significance of the regulation is that genuineness pertains only to performance and counter-performance. This is nothing but a partial fiction, on the basis of which the legislator has created a new legal possibility. §105a does not concern the contract itself. To confirm this, German doctrine considers the wording of the law ("performance and counter-performance") as relevant.[65]

It should not be considered unsubstantiated reasoning, which is concurrently developing in German doctrine, that the wording of §105a does not address either the capacity to contract or the genuineness of the declaration of intent. From a systematic perspective, this provision (regulated in such a manner) does not belong to the general part, transactions, or the capacity to contract. In fact,

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62 *Seichter J.,* Einführung in das Betreuungsrecht Ein Leitfaden für Praktiker des Betreuungsrechts, Heilberufe und Angehörige von Betreuten, Springer-Verlag, Berlin, Heidelberg, New York, 2001, 60.

63 *Palandt O., Ellenberger J.,* Bürgerliche Gesetzbuch Kommentare, 78. Auflage, C.H. Beck, München, 2019, §104, Rn. 2a.

64 See: Deutscher Bundestag: BT-Drs. 14/9531, 6.

65 See: *Joussen J.*, Uberregulierung im zivilrecht und der verlust gesetzlicher systematik. Rechtstheorie, 36(4), 2005, 513-528.

§105a has additionally established a legal basis in the German Civil Code for the right of "retention" in exchange for services rendered to a person incapable of transacting. This issue is also related to the matter of unjust enrichment.[66]

The primary agreement's continued invalidity is indicated by the first part of §105, which states that the will expressed by a person incapable of transacting is void. Therefore, the words "contract concluded by them" in the norm are considered paradoxical.[67] In fact, such an approach dogmatically creates a "contract beyond the contract."[68]

From the perspectives of legal policy and constitutional law, the broad interpretation of this norm is also criticized.[69]

5. Constitutional Court's Approach to the Issue of Entering into Everyday Minor Transactions by Persons Receiving Support

The Constitutional Court of Georgia discussed the issue of making small everyday transactions and noted that "the presence of mental problems does not always mean that a person is incapable of making informed decisions in all areas of social life and carrying out actions with legal consequences, in particular, small things aimed at satisfying personal reasonable needs Household transactions that do not infringe on the legal rights and interests of others. Also, the experts noted that people with mild diseases are fully capable of expressing their will in an informed and free manner when making simple transactions.[70]

The court considered that in the case of a dynamically/long-term developing/ongoing disease, the complete limitation of capacity can be aimed at the complete exclusion of difficult or completely unpredictable negative consequences. In such a case, when the limiting disease of mental abilities proceeds dynamically, the restriction of independent conclusion of high-risk transactions can be considered as a proportionate measure of interference with the right. However, the regulation, which applies unconditionally to all types of civil transactions, including minor ones, is a disproportionate way of interfering with the right.[71]

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66 See: *Löhnig M., Schärtl Chr.,* Zur Dogmatik Des § 105a BGB" Archiv Für Die Civilistische Praxis 204, no. 1, 2004, 25–58.

67 "Von ihm geschlossenen Vertrag".

68 "Vertragslosen Vertrages", see: *Joussen J.,* "Uberregulierung im Zivilrecht und der Verlust Gesetzlicher Systematik," Rechtstheorie 36, no. 4, 2005, 516.

69 According to this view, a broad interpretation should not allow the possibility for a person incapable of transacting to enter into any transaction, regardless of the existence of legal or economic benefits. Unlike §107 of the German Civil Code, a gift to an adult incapable of transacting is valid only with the conditions of §105a being met. See also: *Lipp, F.,* "Die neue Geschäftsfähigkeit Erwachsener" in Zeitschrift für das gesamte Familienrecht (FamRZ), 2003, (721–729), 727; *Spickhoff, A.,* Münchener Kommentar zum Bürgerlichen Gesetzbuch, 8th edition, Verlag C.H.Beck, 2019, § 105a Rn. 6-8; BGH NJW 1973, 1790; BGH NJW 1964, 1987 (1988 f.).

70 See: the decision of the Constitutional Court of Georgia on October 8, 2014, in the case of "Citizens of Georgia – *Irakli Kemoklidze* and *Davit Kharadze* v. Parliament of Georgia" (N2/4/532,533), II, 10, II, 26 (in Georgian).

71 See: the decision of the Constitutional Court of Georgia on October 8, 2014, in the case of "Citizens of Georgia – *Irakli Kemoklidze* and *Davit Kharadze* v. Parliament of Georgia" (N2/4/532,533), II, 10, II. 30 (in Georgian).

Individuals with mental problems and other adults who do not have such impairments equally need to enter into every day, minor civil transactions in their daily lives. In terms of the civil transactions whose content and awareness can be comprehended by persons with disabilities, these individuals are essentially equal subjects compared to other competent adults. [72]

Therefore, in the case of dynamically progressing diseases that limit mental abilities, the court's reasoning considered the unconditional restriction on independently entering into minor everyday transactions as a disproportionate means of interfering with rights.

6. Georgian Legislation on the Process of Appointing Support

6.1. Process of Appointing Support

Individuals with psychosocial needs can enter into transactions if the court has not appointed a supporter for them in this area. This process begins with the submission of an application, which must include evidence supporting the circumstances indicated by the applicant and the fact that the person has severe mental, intellectual, or cognitive impairments, the interaction with various barriers of which may hinder their full and effective participation in public life on an equal basis with others.

The Civil Procedure Code defines the areas in which a person can be appointed a supporter, including labor activities, minor transactions, entrepreneurial activities, management/disposal of real estate, determination of residence, expression of consent to treatment, prevention of harm to themselves, and other rights and duties as determined by the court based on individual assessment. [73]

Procedural law also provides for the institution of temporary support when the applicant believes that the person for whom support is being considered may suffer irreversible harm.[74]

During the court hearing on recognizing a person as a support recipient, the participation of this person and a representative of the guardianship and care agency is mandatory. If the person being considered for support cannot attend the court session due to health reasons, their participation must be ensured through electronic or other means of communication that allow direct contact with the judge. However, in practice, the implementation of this rule has been evaluated as challenging for persons with disabilities.[75]

As the current civil procedural legislation demonstrates, the legislative basis for appointing support for minor transactions is considered within a specific list. This raises questions regarding compliance with both the convention and the decisions of the Constitutional Court of Georgia.[76]

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72 Cf: the decision of the Constitutional Court of Georgia on October 8, 2014, in the case of "Citizens of Georgia – *Irakli Kemoklidze* and *Davit Kharadze* v. Parliament of Georgia" (N2/4/532,533), II, 10, (in Georgian).

73 The third part of Article 36315, Law of Georgia of March 20, 2015 on Amendments to the Civil Procedure Code of Georgia, No. 3340 – website, 31.03.2015.

74 Article 36317, Law of Georgia of March 20, 2015 on Amendments to the Civil Procedure Code of Georgia, No. 3340 – website, 31.03.2015.

75 See more *Gochiashvili N.,* The role of the body of guardianship and care in the process of implementation of capacity reform, Public Defender of Georgia, 2023, 27.

76 On the same issue, see: Legal Capacity – legislative reform without implementation, Public Defender of Georgia, 2016.

6.2. Judicial Practice

The analysis of judicial practice is interesting in terms of assessing how thoroughly the court investigates and analyzes an individual's condition in specific cases, whether it considers the possibility of expressing will through a comprehensive approach (not just medical), the quality of expert opinions, the involvement of participants in the process, and, of course, whether support for minor transactions is appointed in a blanket manner.

According to judicial practice, support is primarily appointed in the following areas: pension case management and receiving pensions/assistance, expression of consent to treatment, **concluding minor transactions**, determining the place of residence, as well as inheritance, representation in court, and investigation agencies. [77]

For example, the court has appointed support for minor transactions in cases where individuals had paranoid schizophrenia, intellectual disabilities, dementia, severe intellectual disabilities, and others. [78] The analysis of decisions raises the suspicion that the appointment of support for minor transactions is likely based on a blanket approach relying on medical diagnosis. For instance, a diagnosis of schizophrenia does not necessarily imply that a person cannot purchase food from a store. Unfortunately, these issues are not deeply justified in the decisions.

In the process of appointing support, the court must consider that **support means assisting in the process of expressing will, not substituting it. If there is no expression of will (neither objective nor subjective elements), then discussing any form of support is illogical.** In such cases, substituting the will requires an assessment of protecting the rights and interests of the person in question.

7. Conclusion

The approach of the Convention and the international standard is that individuals with psychosocial needs should be assisted in expressing their will and that legislation should not restrict their rights.

The analysis of minor transactions made by individuals with psychosocial needs in the examples of Georgia and Germany highlights the complexity of the problem. It is important to correctly balance the right to self-determination of the individual with the interests of civil circulation, ensuring that

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77 Decision of the Tbilisi Court of Appeal of September 19, 2016 on case No. 2b/370-16.

78 Decision of Mtskheti District Court of March 26, 2020 on case No. 2/421-19; Decision of Mtskheti District Court of March 26, 2020 on case No. 2/744-19; Decision of Mtskheti District Court of March 26, 2020 on case No. 2/378-19; Decision of Mtskheti District Court of March 26, 2020 on case No. 2/448-19; Decision of Mtskheti District Court of March 26, 2020 on case No. 2/05-19; Decision of the Batumi District Court of March 10, 2020 on case No. 2-3416/2019; Decision of the Batumi District Court of March 10, 2020 on case No. 2-4398/2019; Decision of Batumi District Court of March 10, 2020 on case No. 2-3892/2019; Decision of Batumi District Court on case No. 2-4306/2019; Decision of Batumi District Court of March 10, 2020 on case No. 2/3799-2019; Decision of Batumi District Court of March 4, 2020 on case No. 2/3853-2019; Decision of the Batumi District Court of February 26, 2020 on case No. 2/2946-2019; Decision of the Batumi District Court of February 26, 2020 on case No. 2/2981-2019; Decision of Sachkheri District Court of April 24, 2020 in case No. 2/40-2020.

both constitutional postulates are protected. *An overly paternalistic approach, aiming to prevent individuals from making mistakes, is not appropriate within the framework of private autonomy, as risk and the right to make mistakes are inherent to a free person. Moreover, no one is immune to making mistakes.*

It is a fact that this issue provides a significant basis for discussion. The problem lies not only in the blanket approach to appointing support for minor transactions but also in whether these issues have been properly implemented within the existing legal institutions. Existing views[79] on recognizing these individuals as having limited legal capacity should be rejected *a priori* based on international legal standards.

Since legislation should reflect the interests of society and contemporary approaches, it is a developing entity that sometimes requires rethinking dogmatic approaches. In cases of mental and intellectual issues, a person's medical diagnosis should not be a basis for limiting their rights. A diagnosis of schizophrenia does not mean that a person cannot, for example, purchase food from a store. Furthermore, research shows that individuals diagnosed with schizophrenia and bipolar disorder can be as competent in making everyday life decisions regarding treatment as those without psychiatric diagnoses. [80] In this regard, conclusions often lack depth and general approaches deserve criticism. When discussing these issues, we should also remember that **people with disabilities have been marginalized for years and have faced inhumane treatment. Reform means not just terminological change but a conceptual shift in approaches.** Modern achievements and research, including in the medical field, are driving the transformation of civil legal capacity.

When the possibility of expressing will is present, interpreting the law on minor transactions to allow the appointment of support is neither consistent with international approaches nor the result of logical reasoning. Judicial approaches in this regard should be based on a high standard of justification. For example, if a person is in a terminal condition[81] where there is no expression of will, neither objective nor subjective, discussing support for expressing will in transactions, including minor ones, is illogical. In such cases, it is effectively a substitution of will.

Thus, adults with psychosocial needs have the right to lead their lives independently and take on responsibilities, which cannot be achieved without amending and adapting the rules governing transactions for them.

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79 Deutscher Bundestag, BT-Drs. 14/9531, 3.

80 For more see: *Pons E. V., Salvador-Carulla L., Calcedo-Barba A., Paz S., Messer T., Pacciardi B., Zeller, S. L.* The capacity of schizophrenia and bipolar disorder individuals to make autonomous decisions about pharmacological treatments for their illness in real life: A scoping review. Health Science Reports, 3(3), 2020, e179.

81 The terminal stage of an incurable disease or condition, see: Law of Georgia on Health Care, Parliament Gazette, 47-48, 31/12/1997 (in Georgian).

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49. Decision of the Batumi District Court of February 26, 2020, in case №2/2981-2019.
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54. BVerfGE 99, 383 (389).
55. BGH, 05.12.1995 – XI ZR 70/95.
56. Neue Juristische Wochenshrift, 1973, 1790.
57. Neue Juristische Wochenshrift, 1964, 1987 (1988 f.).
58. Neue Juristische Wochenshrift, 1970, 1680, 1681.
59. Deutscher Bundestag, BT-Drs. 19/27287.
60. Deutscher Bundestag, BT- Drs. 14/9266, 43.
61. Deutscher Bundestag, BT-Drs. 11/4528, 137 f.
62. Deutscher Bundestag, BT-Drs. 14/9531, 3, 6.

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An "Inducer" Third Person in Contractual Relations – Grounds and the Scope of Liability

In parallel with the evolution of contractual relations, the pre-contractual stage acquires increasing significance, where, along with a future creditor and a debtor, partake third parties, who might influence the forming of the consent of the negotiating persons. The following article explores the issue of the engagement of said third parties in pre-contractual relations, the grounds for claiming damages from them and the scope of liability; More precisely, highlighted is the legal nature of the claims raised against "inducer" third persons, and how it differs from other claims in the law of obligations.

Despite the participation of third persons in a pre-contractual stage and the practical importance of asserting a claim against them, Georgian norms fail to adequately and extensively regulate the issue. Hence, through the comparative legal methodology, the paper analyses the topic through the Georgian and German normative order lens. Definitions presented in the German doctrine of "culpa in contrahendo", as well as, judicial practice.

Keywords: *pre-contractual relations, culpa in contrahendo doctrine, third persons in the pre-contractual stage, an "inducer" third person, reimbursement of the expenses incurred*

1. Introduction

The purpose of the article is to explore the grounds for liability of the persons who at the pre-contractual stage do not enter into a contract, however, their actions influence the formation of trust and consent of the parties to negotiation. Such persons can be referred to as "inducer" third persons.

The case studies are presented through the lens of the norms in Georgian and German legislation, more specifically, the doctrine of *culpa in contrahendo* (fault in pre-contractual relations). The primary goal is to determine the normative grounds and scope of liability of third persons partaking in pre-contractual relations, as per Georgian legislation. Taking a focus on German law is justified by the fact that the rules regulating the topic of research in the Civil Code of Georgia[1] (CC) have been implemented through the reception of the said law, hence, German doctrine or practice, in terms of system and content, is the most relevant model to draw the parallels.

The notions mentioned in the article – fault in pre-contractual relations entails rights and obligations determined under the *culpa in contrahendo* doctrine; the "inducer" third persons – are persons indirectly participating in pre-contractual relations, who due to the special trust and/or their

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1 Law №786 of 1997, <https://matsne.gov.ge/ka/document/view/31702> [13.03.2024]. (In Georgian).

own qualifications, significantly influence the course of pre-contractual relations and the content of the agreement.[2]

2. *Culpa in Contrahendo* Doctrine and Its Position in the Law of Obligations

In Georgian law, pre-contractual relations are governed by Articles 316.2, 317.2 and 317.3 of the Civil Code of Georgia, which lay down the principle of care and determine the possibilities for emerging obligations at the pre-contractual stage.[3]

Norms, governing pre-contractual relations were introduced in the Civil Code through the reception of German law. A German scholar – *Rudolf von Jhering,* developed *culpa in contrahendo* doctrine[4], which was only codified in German legislation in 2002, after the reform of the law of obligations.[5] Before acquiring its normative form, the doctrine immensely influenced judicial law. German literature before 2002, commonly described it as a result of judicial practice and evolution of law through the doctrine, hence, resembled a set of precedential rules.[6] It is noteworthy, that the evolution of the *culpa in contrahendo* institute in the German Civil Code ("BGB") mainly stemmed from the reality that the protection mechanism of the tort law in terms of reimbursing damages, was "weak" at the pre-contractual stage.[7] Legal relations entailed in *culpa in contrahendo* doctrine do not fall within the group of contractual relationships, for the obligations arise at the "negotiations stage" i.e. when the parties have not sealed an agreement.[8] In these circumstances, the issue at hand does not pertain to a contractual claim; rather, it concerns the expectations to be fulfilled, which, considering the circumstances, might be expressed in the provision of essential information and documents, as well as cooperation with the due diligence,[9] or reimbursing the damages for violating these obligations. The precondition for reimbursing the damages is that a liable person violates the due diligence towards the other negotiator at the pre-contractual stage. The initiation of the pre-contractual and preparation stage

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2 *Lowisch M.*, New Law of Obligations in Germany, Ritsumeikan Law Review No. 30, 147. <http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr20/Manfred141.pdf> [13.03.2024].

3 Law №786 of 1997, Civil Code of Georgia, Articles 316-317. <https://matsne.gov.ge/ka/document/view/31702> [13.03.2024] (In Georgian).

4 See *Rudolf von Jhering's* article published in 1861 – Culpa in contrahendo, Jahrbuch für Dogmatik <http://dlib-zs.mpier.mpg.de/pdf/2084719/04/1861/20847190418610005.pdf> [13.03.2024].

5 *Markesinis B., Unberath H., Johnson A*., The German Law of Contracts, 2006, 103.

6 *Zimmermann R.,* The Law of Obligations: Roman Foundations of the Civilian Tradition, Oxford, 1990, 422.

7 MüKoBGB/Gottwald, 9th edition 2022, BGB § 328 Rn. 167-169. <https://beck-online.beck.de.lez.tsu.edu.ge:2443/Dokument?vpath=bibdata%2Fkomm%2Fmuekobgb_9_band3%2Fbgb%2Fcont%2Fmuekobgb.bgb.p328.gliv.gl1.gla.htm&anchor=Y-400-W-MUEKOBGB-G-BGB-P-328-RN-167#FNID0ERDD6> [13.03.2024].

8 *Meskhishvili K.,* Pre-contractual Relations, a Preliminary Contract, Earnest Money (Comparative Legal Analysis), "Georgian Business Law Review," Issue VI, 2017, 33–34 (In Georgian).

9 *Zimmermann R., Whittaker S.,* Good Faith in European Contract Law, Cambridge University Press, 2000, 24.

for the contract entails any moment, where the parties obtain a certain influence on each other's property or other goods, which relates to the sealing of a contract.[10]

As previously mentioned, obligations arising at the pre-contractual stage fall within the category of non-contractual obligations, however, its position in the law of obligations leads to different viewpoints, especially in terms of tort law. Certain perspectives hold, that where the right or legitimate interest is violated, a tort claim (Article 992 of the Civil Code) completely covers all possible cases.[11] Approaches towards the correlation between the institute of torts and *culpa in contrahendo* differ country by country. For instance, pre-contractual relations in French and Spanish laws are fully governed by tort law schemes; In Germany, Austria and Switzerland this institute is separate from the tort; In Finland, both may be applied alternatively.[12]

Georgian judicial practice denotes one distinctive feature between the pre-contractual relations and torts. Any person can be a subject in torts, whereas pre-contractual obligation might be incumbent upon a negotiation participant. [13] One more notable difference can be found in the literature, which touches upon, the so-called, responsibility of reimbursement of "pure" material damages.[14] The objective of the tort law is for the damages caused by a violation[15] of law to be reimbursed when the unlawful action at the debtor's fault led to the reduction/destruction[16] of property/goods of a creditor, under the circumstances where the subjects were not bound by the law of obligations.[17] In *culpa in contrahendo* damages arise as a result of the initiation of negotiations, due to the failure to uphold trust,[18] within the scope of the law of obligations, on the ground of violating a specific protecting norm; additionally, damages may only be claimed from a negotiation participant. Hence, *culpa in contrahendo,* is an independent order normatively and characteristically; this inherently highlights the difference between *culpa in contrahendo* and a claim under the tort law, which sheds light on the aim of a legislator. A peculiarity of this relationship, in terms of components as well as legal consequences, is separate from a tort. Similar to the given definition, as per German scholars, *culpa in contrahendo* cases do not fall within the group of obligations arising on tort grounds, rather, due to

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10 *Vashakidze G.,* Civil Code Commentary, Tbilisi, 2019, Article 314, field 37, 46 (In Georgian).

11 *Meladze G.,* Compensation for "Pure" Property Damages Arising from Negligent Provision of False Information, "Comparative Law Journal" 2/2020, 41 (In Georgian).

12 *Wendehorst C.,* Precontractual Liability in European Private Law, 1 JETL 376, 2010, 381.

13 Ruling №ას-898-848-2015 of March 9, 2016, of the Grand Chamber of the Supreme Court of Georgia (in Georgian).

14 *Meladze G.,* Compensation for "Pure" Property Damages Arising from Negligent Provision of False Information, "Comparative Law Journal" 2/2020, 41 (In Georgian).

15 Encompasses any unlawful action.

16 The law entails the group of cases in tort law, when a person might be held liable even in the absence of fault.

17 Bichia M., Legal Obligational Relations, Handbook, Tbilisi, 2016, 241 (in Georgian).

18 Precontractual liability: reports to the XIIIth Congress, International Academy of Comparative Law, *H. Hondius Ewoud* ed., Montreal, Canada, 18 – 24 August 1990, Deventer 1991, 11. Reference from *Lapanashvili A.,* The Importance of the Principle of Good Faith and the Fault of a Negotiation Participant at the Pre-contractual Stage, Tbilisi, 2019, 37 (in Georgian).

their special features, they entail a separate normative order of arising of an obligation.[19] In the doctrine, in certain cases, features of the contract, as well as non-contract law, are revealed – it shows independent normative grounds for liability – so-called, the "third way" to solve the issue.[20]

3. "Inducer" Third Persons in Pre-contractual Relations

The notion of "inducer" third persons entails the persons who do not directly partake in the process of sealing a contract as decision-makers, however, they play a key role in forming a potential contractor's inner consent, and their actions significantly influence the expectations of the parties to a negotiation.[21] Their actions can be culpable or blameless, and while qualifying culpability, it is relevant to consider whether it is intentional or negligent. Liability under the *culpa in contrahendo* doctrine can only imposed on negligent actions.

In Georgian order, from the normative point of view, discussing the existence of an "inducer" is a complex issue, yet as per Article 317.2 of the Civil Code, thinking abstractively, the obligations under Article 316.2 may "… may also arise from the preparation of a contract." In this regard, "inducer" third persons may also be included. I.e. any obligation, including, the due diligence towards the property or rights of other persons, in line with the predictability criterion, may arise from the preparation of a contract.[22] While these norms do not entail the involvement of third persons in the pre-contractual relations, they can directly and indirectly influence the rights and duties of the parties, hence, they must be considered participants in the relations under the law of obligations and, therefore, they must adhere to the principle good faith and due diligence. Post-reform German regulation stipulates analogically, specifically, in Paragraph 311.2 of BGB, relationships under the law of obligations, as per the rules of Paragraph 241.2 (general rules on obligations), along with other cases, arise: 1. By initiating negotiations on the contract; 2. By drafting a contract, by the virtue of which one party grants the other the right to influence the former's rights, properties, interests, or confers their trust; or 3. By similar business contracts. As per part 3 of the same article, obligations may arise upon the persons, who are not to become the parties to the contract; More precisely, such obligations arise where a third person is vested with the utmost trust and thus, exerts significant influence over contract finalisation.[23]

Hence, as per BGB, within the scope of pre-contractual relations, the instances of the obligations arising are determined, where the addressee of an obligation is a third person. According to the doctrine, four groups of third persons in pre-contractual relations can be distinguished: A) Persons granted with special trust; B) Experts and specialists; C) Persons who have an economic interest in

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19 *Markesinis B., Unberath H., Johnson A*., The German Law of Contracts, 2006, 92.

20 *Markesinis B., Unberath H., Johnson A*., The German Law of Contracts, 2006, 92.

21 *Kropholler J.,* German Civil Code, Study Comment, 13th rev. ed., *translated by Chechelashvili Z., Darjania T., edited by Chachanidze E., Darjania T., Totladze L.,* Tbilisi, 2014, § 311, Field 1, 197 (in Georgian).

22 Law №786 of 1997, Civil Code of Georgia, Article 317 (in Georgian). <https://matsne.gov.ge/ka/document/view/31702> [13.03.2024] (in Georgian).

23 German Civil Code, translation of *Chechelashvili Z.,* 2nd edited issue, Tbilisi, 2019, 74-75 (in Georgian).

sealing a contract; D) Persons under special protection.[24] "Inducer" third persons act independently and cultivate trust in others toward themselves.

It is relevant to examine the interests worthy of protection at the pre-contractual stage. Due diligence entails the duties of the participants of a legal relationship to respect each other's rights and legitimate interests. This is a universal rule in the relations under the law of obligations, and hence, its manifestation in legal relationships cannot be normatively laid down and/or listed in the form of individual actions/omissions. As with numerous other norms, the rules on due diligence in Georgian legislation were introduced from Germany.[25] The cases of breaching the due diligence at the pre-contractual stage may encompass the following: 1. The participant of the contractual relationship violates the obligation of protection and security, which leads to damaging the interests of the participant of the legal relationship; 2. A participant in a pre-contractual relationship violates the duty to inform – does not provide information, or provides incorrect or insufficient information, which might have been substantial and important for the addressee during the contract drafting process. 3. A participant in a pre-contractual relationship hinders the process of sealing a contract, intentionally or negligently causes circumstances, or does not prevent them, which can hinder the sealing of the contract; 4. A participant in a pre-contractual relationship terminates the negotiations without a justifiable reason, which leads to the costs incurred by the other party prior to the sealing of the contract becoming futile (the duty of loyalty).[26]

4. Grounds for Liability

Damages stemming from pre-contractual relations can be claimed on the grounds laid down in Article 317.3, i.e. where there is a fault during contract formation and the creditor claims reimbursement of costs incurred for sealing the contract. Breaching of duties at the pre-contractual stage may involve the following: a debtor, due to "inducement" and betraying the trust of the contracting party, is in a "worse" legal condition, than they would have been should they had sealed the contract; or, a debtor, due to the "inducement" by a third person seals an undesirable contract.[27]

The rule stipulating the claiming of damages under *culpa in Contrahendo* (as per Georgian and German rules) consists of the following elements: 1. An action or omission of a debtor at the pre-contractual stage; 2. Gaining a creditor's substantial confidence in sealing a contract; 3. Based on this confidence, a creditor's action resulted in costs being incurred; 4. A reciprocal action of a debtor, which goes against the confidence. [28] Equally, where it is necessary to examine the imposition of liability on "inducer" third persons, the same elements shall be applied, however, they might require more precision. In order to assess the liability, it shall be determined that the "inducer" third person

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24 Mariamidze G., Law of Obligations, General Part, Part I, Issue I, Tbilisi, 2011, 45 (in Georgian).

25 *Vashakidze G.,* System of Complicated Obligations of the Civil Code, 2010, 88. Ref: The Civil Code Commentary, 2019, Article 314, Field 39, 47. (In Georgian).

26 *Vashakidze G.,* Civil Code Commentary, Tbilisi, 2019, Article 314, field 43, 49 (in Georgian).

27 *Markesinis B., Unberath H., Johnson A*., The German Law of Contracts, 2006, 97.

28 *Vashakidze G.,* Civil Code Commentary, Tbilisi, 2019, Article 314, field 43, 49 (in Georgian).

instilled substantial trust in the injured party (the one, who seals an undesirable agreement), which they betrayed by negligence, and eventually, this leads to the creditor suffering damages. Where an "inducer" misled a party to the negotiation intentionally, hence, directly and foreseeably violating the right of the creditor, should give rise to a tort claim for the restitution of the right, which in turn excludes the possibility of compensation for damages due to pre-contractual fault. Therefore, raising a claim on the said ground is allowed only in negligence cases. However, to impose liability, it is not necessary that the negotiating parties jointly have an expectation of a positive outcome of the pre-contractual relationship, yet it is sufficient that only the injured party had a unilateral trust before the injury.[29]

To determine liability at the pre-contractual stage, the action of the "inducer" third party must be causally related to the unlawful consequence – damage. In legal theory, the determination of the causal relation is based on the theory of equivalence. This entails determining facts through the *conditio sine qua non* formula, more precisely, there is no consequence without an action.[30] In the pre-contractual relationship, it is necessary that the action of the "inducer" third party induces consent that encourages them to seal the contract. To qualify for breach of trust, it is relevant to determine whether the initial potential debtor had a legitimate interest that would justify his action at the negotiation stage.[31] On its part, a separate assessment is required for the trust of a creditor. In the ruling[32] of July 10, 1970, of the Supreme Court of Germany, the following reasoning is developed, that the participant in the negotiations must clearly and within a reasonable time state that they also want to seal the contract. Trust, however justified it may be for a certain period, cannot be eternal.

On the topic of "blame", it must be mentioned that the Civil Code does not lay down the definition, whereas as per the doctrine, two forms of "fault" are identified: intent (*dolo*) and negligence (*culpa*), which are subjective elements.[33] As previously mentioned, the application of pre-contractual rules is only possible in cases of negligence. There were different theories defining the fault in civil law, however, considering the content of the research subject, the modern approaches of Georgian and German laws are noteworthy. In the doctrine, it is considered that the starting point for negligence is to assess the topic of care inherent in civil transactions. Therefore, it shall be assessed whether a participant has demonstrated "real" care,[34] which would have been demonstrated by any other reasonable and rational person. At hand must be an objective violation of the legal norm, which implies the existence of fault. By the stated reasoning, when the subject of assessment is the fault of the "inducer" third party, the emphasis should be placed on the standard of behaviour of an objective

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29 *Van Erp J. H. M.,* "Pre-contractual Stage." Translations of the European and Comparative Law Institute, Georgian Law Review," 2011-2012, 42 (in Georgian).

30 *Lutringhaus P.,* Tort Law Tbilisi, 2011, 19 (in Georgian).

31 *Van Erp J. H. M.,* "Pre-contractual Stage." Translations of the European and Comparative Law Institute, Georgian Law Review," 2011-2012, 42 (in Georgian).

32 Neue Juristische Wochenschrift (NJW) 1970, 1840-1841.

33 *Chitashvili N.,* The Importance of Fault for Determining the Liability, "Law Journal," №1, 2009, 149 (in Georgian).

34 *Kochashvili K.,* Fault, as a Prerequisite for Civil Liability (Comparative Legal Study), "Law Journal №1", 2009, 88 (in Georgian).

third person. On the one hand, the "inducer", due to their special pre-contractual role, is required to evaluate the issues relevant to the sealing of the contract in good faith, with due diligence and caution, and thus issue a conclusion and/or recommendation, and on the other hand, the possibility of damages to a participant of the negotiations must be expected and perceptible for them. Hence, imposing liability is only allowed in culpable actions,[35] where the damages are assumed.[36] How and to what extent did the "inducer" instil trust in the other party shall also be assessed.[37]

The liability of third persons, in German law, can also be based on the concept of a contract sealed for the benefit of third parties,[38] which, at the pre-contractual stage, has its peculiarities. The concept of "contract with the safeguarding effect for the third party", as per the principle of good faith, is based on the so-called "supplementary definition" of a contract. Prerequisites for the application of the contract with "safeguarding effect" for the third persons are: 1. "Closeness of the creditor" to the third person – the latter, like the creditor, should be concerned with the threats arising from the contract; 2. The creditor must have an interest in safeguarding the third person – the creditor must have an interest recognized by law; 3. "Awareness for the debtor" – the above-mentioned two elements must be known so that he can assess the risks accordingly; 4. There must be a need to protect the third person – the third person must not have the right to claim damages (contractual) on their own.[39] The third person can claim damages where, along with the said elements, other prerequisites for claiming damages are present. For instance: Where an expert, regarding the structural condition of the immovable object, provides a false report to the potential seller, which the future buyer trusts and incurs certain costs to conclude the desired purchase contract, they (the buyer) as a beneficiary[40] of the " safeguarding effect" of the expertise contract, may be entitled to claim damages. In such instances, an independent legal relationship under the law of obligations arises between the future buyer and the expert. The criterion of liability is the expert's knowledge of the person interested in the object of expertise and their legal interest. When examining the element of knowledge, the features of the expert's special knowledge and the subject of the work shall be taken into account, since, based on the specified circumstances, they "should have assumed" the application of the said standard.[41] Moreover, for raising a claim, it is required that the creditor does not have a contractual claim against the seller, which might be annulled by the contractor's innocence – their expectations, on their part, are based on

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35 *Vashakidze G.,* Civil Code Commentary, Tbilisi, 2019, Article 317, field 36, 45 (In Georgian).

36 *Vashakidze G.,* Civil Code Commentary, Tbilisi, 2019, Article 317, field 48,45 (In Georgian).

37 *Van Erp J. H. M.,* "Pre-contractual Stage." Translations of the European and Comparative Law Institute, Georgian Law Review," 2011-2012, 43 (in Georgian).

38 MüKoBGB/Emmerich, 9. Aufl. 2022, BGB § 311 Rn. 216-218.
<https://beck-online.beck.de.lez.tsu.edu.ge:2443/?vpath=bibdata%2Fkomm%2FMuekoBGB_9_Band3%2FBGB%2Fcont%2FMuekoBGB%2EBGB%2Ep311%2EglC%2EglV%2Ehtm> [13.03.2024].

39 *Rusiashcili G.,* Collection of Case Study, General Part of the Law of Obligations, Tbilisi, 2020, 229 (in Georgian).

40 *Volens U.,* Expert's Liability to a Third Person at the Point of Intersection of the Law of Contract and the Law of Delict, Juridica International, XVII, 2010, 187.

41 *Volens U.,* Expert's Liability to a Third Person at the Point of Intersection of the Law of Contract and the Law of Delict, Juridica International, XVII, 2010, 186.

the expert's opinion.[42] Therefore, the creditor and the seller are equally subject to the claim for contractual damages arising from the report's shortcomings.[43] The said approach may simplify – make it faster and more realistic for a potential buyer to seek compensation for damages rather than for them to present a claim to an innocent seller, and consequentially, for a seller to raise a claim based on the expert service contract.

According to German law, due to the pre-contractual fault, an "inducer" third person might be subject to liability on the grounds of breaching the duties under special law[44] – an auditor will be subject to liability due to the incorrect evaluation of the financial state of the company which caused damages to the investors. In the given case, the agreement between the company and the auditor was sealed for the benefit of third persons – investors, and a "safeguarding effect" operated in their favour.[45] The Federal Court of Germany, while assessing the issue of the "inducer's" responsibility, including the degree of fault, in addition to generating utmost trust and breaching it by a party to the negotiation, also mentions the personal economic interest of a third person – in the given case, personal economic interest of the representative.[46]

5. The Scope of Liability

The Civil Code order narrows down the scope of liability, specifically, Article 317.2 stipulates that the arising of an obligation may take place at the preparatory stage for the contract; as per the following part, the damage entails the costs incurred by a party for sealing the contract. On the other hand, the "inducer", who "induces" the party to the contract to show his consent, can be held liable only in the form and scope laid down by the law. Hence, at the pre-contractual stage, the party cannot require their potential contractor and/or third person to seal a contract.[47] Neither the creditor is entitled

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42 As per the general rule, the person who suffered damages caused by the action has the right to claim damages, however, in exceptional cases, German judicial practice allows a party to a service contract to claim damages for third persons. *Hagenloch U.,* The Liability of an Architect in Germany, "Georgian-German Journal of Comparative Law" 2/2024, 29 (in Georgian).

43 *Rusiashcili G.,* General Law of Obligations, Collection of Case Study, Tbilisi, 2020, 42 (in Georgian).

44 Law of Germany of 2021 on "Fostering the Financial Market Integration".
<https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s1534.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s1534.pdf%27%5D__1707139432545> [13.03.2024].

45 MüKoBGB/Emmerich, 9. Aufl. 2022, BGB § 311 Rn. 216-218.
<https://beck-online.beck.de.lez.tsu.edu.ge:2443/?vpath=bibdata%2Fkomm%2FMuekoBGB_9_Band3%2FBGB%2Fcont%2FMuekoBGB%2EBGB%2Ep311%2EglC%2EglV%2Ehtm> [13.03.2024]. Section 218

46 BGH , judgment of June 17, 1991 – II ZR 171/90.
<https://research.wolterskluwer-online.de/document/5bdac224-b34f-44f1-81e0-c0cdfddca809> [13.03.2024].

47 *Khunashvili N.,* The Principle of Good Faith in Contract Law, Tbilisi, 2014, 152 (in Georgian). The work presents the general rule as per the freedom of a contract and entails the group of cases of forcing contractors.

to claim the reimbursement of income from the "inducer" third person.[48] The doctrinal rationale for limiting damages in pre-contractual relations solely to the compensation of costs incurred by the creditor is based on the expansive interpretation of the principle of good faith. The order safeguards the debtor from unsubstantiated liability – not to be obliged to pay the amount due to a pre-contractual fault, which would be reimbursable in the event of the sealing of the contract, especially when the debtor, at such a time, cannot receive the benefits (performance of the contract); In addition, such approach would have violated the principle of freedom of a contract.

In German law, the issue of compensating "pure" property damage at the pre-contractual stage is trending. The notion of "pure" property damage entails the case, where, while the debtor's action causes the reduction of the creditor's property it is in a manner, that does not violate their absolute good, such as property, possession, body, health, etc. [49] German judicial law, where the safeguarding norm of the relevant right is violated and factual grounds exist, as an exception, allows for the possibility of compensation of "pure" property damage as per *culpa in contrahendo* principle.[50] For instance, the German court reckons that a person will be held liable, who states, that they will be a guarantor for a party to the contract, or will perform a similar action.[51] On the other hand, a third person will not be held liable, if they refer to their competence, or, simply, are a moderator in the negotiation process.[52] Moreover, the doctrine states, that the interest for trust arising in pre-contractual relations may also include unreceived payment from a failed alternative transaction.[53] Where a creditor, having substantial trust, refuses to seal another agreement, and hence, loses the opportunity to seal this agreement, they are entitled to claim the damages for the other contract sealed.[54]

According to the Georgian legislation, the debtor will not be held liable in the scope of the notion of "pure" property damage. Claims for compensation for "pure" property damage can only be based on tort law. It is noteworthy to mention, that there are different opinions on this issue in the doctrine.[55] Compensation of "pure" property damages with the grounds of Georgian tort law, is associated with the challenges in determining causal relation, as an obligatory element; To determine

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48 *Khunashvili N.,* The Principle of Good Faith in Contract Law, Tbilisi, 2014, 150 (in Georgian).

49 *Rusiashvili G.,* "Pure Property Damages" – Violation of Due Diligence or a Safeguarding Norm?, "Georgian-German Journal of Comparative Law," 4/2019, 1 (in Georgian).

50 *Rusiashvili G.,* "Pure Property Damages" – Violation of Due Diligence or a Safeguarding Norm?, "Georgian-German Journal of Comparative Law," 4/2019, 9 (in Georgian).

51 RegBegr BT-Drucks 14/6040, 163. Reference in Kropholler J., German Civil Code, Study Comment, Tbilisi, 2014, § 311, Field 8, 197, 200 (in Georgian).

52 *Kropholler J.,* German Civil Code, Study Comment, 13th rev. ed., *translated by Chechelashvili Z., Darjania T., edited by Chachanidze E., Darjania T., Totladze L.,* Tbilisi, 2014, § 311, Field 8, 200 (in Georgian).

53 *Van Erp J. H. M.,* "Pre-contractual Stage." Translations of the European and Comparative Law Institute, Georgian Law Review," 2011-2012, 42. Compare *Vashakidze G.,* Civil Code Commentary, Tbilisi, 2019, Article 314, field 44, 49 (in Georgian).

54 *Van Erp J. H. M.,* "Pre-contractual Stage." Translations of the European and Comparative Law Institute, Georgian Law Review," 2011-2012, 42 (in Georgian).

55 *Meladze G.,* Compensation for "Pure" Property Damages Arising from Negligent Provision of False Information, "Comparative Law Journal" 2/2020, 41 (In Georgian).

the liability, the possible damage must be foreseeable, and this, considering the peculiarities[56] of the "pure" property damage, makes it essentially impossible to raise a claim.

6. Statute of Limitation

On the topic of the statute of limitation, there is an opinion, that for the claims stemming from the pre-contractual relations, the same statute of limitation shall be applied as the one for the contract which was to be sealed by the parties. Thus, statutes of limitation laid down in Article 129.1 will be applied to them.[57] Hence, the opinion expressed in Georgian and German doctrines, that in cases of pre-contractual fault, rules of Paragraph 195 of BGB must be applied, shall be deemed justifiable. It states that a three-year statute of limitation applies to compensation for damages arising from pre-contractual fault where the contract to be sealed does not provide for a shorter statute of limitations. [58]

7. Conclusion

In conclusion, it can be stated, that Article 317.2 provides for an opportunity to impose liability at the pre-contractual stage, yet, it is not specified, who might be subject to this liability. It shall be taken into account that at the pre-contractual stage, a liability may be imposed not only on the party to the negotiations but on other players such as an "inducer" third person, as their influence might be crucial in the actions parties are to take. The forms and the scope of liability might be determined by defining the rules regulating pre-contractual relations, based on the principles of good faith and due diligence, which cover every participant of relations under private law.

Article 317.2 deems the possibility to impose liability on the "inducer" third person challenging. This is established by the provision of the third part of the same article, in terms of understanding the discussed elements, including possible damage to the creditor. An "inducer" third person, who influences the rights of the participants of pre-contractual relations, shall be subject to liability only in form and scope precisely prescribed by law. The current order only mandates the compensation for costs incurred based on trust shall be a form of liability, which excludes the possibility of imposing liability in cases of "pure" property damages. The norm regulating pre-contractual relations in the Civil Code requires further precision and detail. Recommended is the extension of the types of damages in pre-contractual relations, which will create grounds for a debtor to claim "pure" property

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[56] The doctrine examines several cases from judicial practice of Georgia and other countries: Loss, caused by the demise of a person, who was the sole breadwinner of the family; Loss of income of the hotels located on the coastline caused by the damaged oil rig; Damaged suffered by a sports club due to the death/injury of its key player in a traffic accident. Reference in *Svanadze I.,* General Tort Clause and Liability for Pure Property Damages, Tbilisi, 2019, 41-42 (in Georgian).

[57] *Meskhishvili K.,* Trending Issues of Private Law, Theory and Judicial Practice, Volume 1, Tb, 2020, 120. (In Georgian).

[58] *Kropholler J.,* German Civil Code, Study Comment, 13th rev. ed., *translated by Chechelashvili Z., Darjania T., edited by Chachanidze E., Darjania T., Totladze L.,* Tbilisi, 2014, § 311, Field 8, 197 (in Georgian). Also, a court judgement referenced in the work BGHZ 58, 123.

damages; Moreover, further regulation is essential, so as to enhance the precision of the group of persons who may be held liable and will entail the liability of third persons.

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Unpacking U.S. and German Individual Bankruptcy Systems: Insights and Recommendations for Georgia

The article addresses the absence of individual bankruptcy law in Georgia, despite the growing need arising from increased credit accessibility and subsequent default rates. The central research question revolves around an in-depth examination of individual bankruptcy frameworks in the United States (U.S.) and Germany. Drawing from these jurisdictions, this article offers recommendations to inform Georgian lawmakers on key policies, regulations, and features to consider when instituting provisions for individual bankruptcy.

Furthermore, insights gained from an interview with Emeritus Professor Reinhard Bork, a distinguished authority on German insolvency law, enrich the discourse on the practical issues of the German consumer insolvency system.

Keywords: *Bankruptcy Stigma, Consumer Insolvency, Discharge, "Fresh-start", Individual Bankruptcy, Liquidation, Second Chance.*

1. Introduction

Georgia has not implemented an individual bankruptcy system in the legislation. Individuals with financial distress cannot get discharged from their debts and therefore cannot receive a "fresh-start" either. They are registered in the Debtor Registry (Movaleta Reestri)[1] once they become the target of enforcement proceedings.[2] Individuals registered there cannot dispose of their property freely or even open a bank account.[3] So, indebted individuals do not have a second chance and often there is no single way out of their financial distress. Despite the fact, that every asset they own could be sold in the enforcement proceedings, there may still be debts left.

158,422 natural persons were registered in the Debtor Registry in Georgia by 2019.[4] It is even more dramatic that one-fifth of the workforce in Georgia is either registered in the debtors' registry or on the list of bad debts in the banking sector.[5] This shows that there is a critical problem that needs to

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1 Debtors' Registry web-page, <https://debt.reestri.gov.ge/> [15.06.2023] (in Georgian).

2 National Bureau of Enforcement <http://nbe.gov.ge/index.php?sec_id=367&lang_id=ENG> [15.04.2023].

3 Ibid.

4 <http://www.barristers.ge/ge/page/news_item/1388?fbclid=IwAR2moLlT0Y35U7VXBHJ6IjX_1X-Lw-GEjEWtY99HYbdSIFWbuJ95TK4GzGU> [15.06.2023] (in Georgian).

5 *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 71.

be regulated by the legislation and an optimal way should be found to return those indebted individuals to the active economy.

On the other hand, in the U.S.[6] and Germany,[7] there are individual bankruptcy laws and individuals with financial distress can get their debts discharged if they satisfy certain preconditions imposed by the legislation. These individuals receive a "fresh-start" and therefore get a second chance.

The article covers U.S., German and Georgian jurisdictions. Because the U.S. bankruptcy code is considered a model that works well in practice and from which other countries can take lessons.[8] On the other hand, Germany is one of the most impactful jurisdictions in civil law countries.[9] We will overview how individual bankruptcy is regulated under the abovementioned legislations and try to give recommendations to Georgian legislators about how individual bankruptcy provisions can be implemented in Georgian reality.

2. Philosophy of Individual Bankruptcy

2.1. Discharge and the "Fresh-Start"

Discharge[10] and its justification are widely discussed in the U.S. scholarly works, so we will overview the scope and justification of discharge mostly based on the U.S. perspective, but the theoretical analyses can be applied to any jurisdiction.

Discharge can be considered as the most important feature of Bankruptcy from the debtor's perspective.[11] Discharge of debts can be seen as a trade-off, a debtor in financial struggles is relieved from the **pre-petition debts** but at the price of giving away his assets.[12] However, we should keep in mind, that certain debts cannot be discharged in bankruptcy.[13]

After discharge, the debtor is not obliged to pay the discharged debts and creditors are unable to bring any actions to collect them.[14] Some view discharge "**as a form of limited liability for individuals".**[15]

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6 U.S. Code: Title 11, § 109 (b).

7 German Insolvency Code, Section 304.

8 *Tajti T*., Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, China-EU Law Journal, Vol. 6, Issue 1-2, 2018, 26.

9 *See generally Kischel U.,* Comparative Law, Oxford, 2019, 359-60.

10 "A bankruptcy discharge releases the debtor from personal liability for certain specified types of debts. In other words, the debtor is no longer legally required to pay any debts that are discharged.", United States Courts, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics> [20.10.2023].

11 *Czarnetzky J. M.*, The Individual and Failure: A Theory of the Bankruptcy Discharge, Arizona State Law Journal, Vol. 32, №2, 2000, 394.

12 *Sousa M.D*., The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge, University of Kansas Law Review, Vol. 58, №10, 2010, 562-63.

13 *Clarkson K. W. and others*, Business Law: Text and Cases, 11th ed, Maison (U.S.), 2009, 621.

14 Ibid.

15 *Czarnetzky J. M*., The Individual and Failure: A Theory of the Bankruptcy Discharge, Arizona State Law Journal, Vol. 32, №2, 2000, 396.

Discharge gives the debtor a **financial fresh start**.[16] U.S. Supreme Court has stated that one of the main goals of the Bankruptcy Act is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes".[17]

Fresh-start is provided to "**honest but unfortunate debtors".**[18] It gives debtors new opportunities in life, they can start from "a new page" without the burdens of past financial obligations.[19] So, discharge in individual bankruptcy, which results in a "fresh-start" for the "honest but unfortunate" debtor, is a central policy of the U.S. individual bankruptcy system.[20]

2.2. The Justification of Discharge

Let's try to see the justifications behind individual bankruptcy discharge and briefly discuss the theories justifying the need for individual bankruptcy. First of all, we should keep in mind that bankruptcy law is not just purely economic, but it is also **a social legislation**.[21]

The debtor cooperation theory explains that discharge was introduced because debtors knowing they can receive a discharge cooperate voluntarily, which is key to operating the bankruptcy system effectively.[22] So, discharge gives individuals incentives to participate in the bankruptcy process.

On the other hand, **the humanitarian theory of consumer discharge** is based on forgiveness, the demonstration of mercy towards individuals and the natural law theory of morality. [23] In this respect, we should agree that society has the duty to promote the values of human dignity and self-respect.[24] Moreover, the Bankruptcy process gives an indebted individual the chance to become a productive member of society again.[25] Therefore, the "fresh-start" can preserve social order and peace in the community.[26]

In line with the humanitarian theory of consumer discharge, we should also highlight the importance of individual bankruptcy during such unforeseen and uncontrollable circumstances as was outbreak of the Covid-19 pandemic.[27] It left a lot of debtors unemployed and unable to pay their

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16 *Jackson T.H*., The Logic and Limits of Bankruptcy Law, Washington D.C., 2001, 225.

17 Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

18 *Baird D. G*., The Elements of Bankruptcy, 5th ed., New-York, 2010, 30.

19 *Byington J. S*., The Fresh Start Canon, Florida Law Review, Vol. 69, №1, 2017, 116.

20 *See generally Tabb C. J.,* Law of Bankruptcy, 5th ed., St. Paul, 2020, 949-52.

21 *Zywicki T. J*., Bankruptcy Law as Social Legislation, Texas Review of Law & Politics, Vol. 5, №2, 2001, 394.

22 *Sousa M.D*., The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge, University of Kansas Law Review, Vol. 58, №10, 2010, 585.

23 Ibid, 587-88.

24 *Byington J. S*., The Fresh Start Canon, Florida Law Review, Vol. 69, №1, 2017, 120-21.

25 Sousa M.D., The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge, University of Kansas Law Review, Vol. 58, №10, 2010, 588.

26 *Byington J. S*., The Fresh Start Canon, Florida Law Review, Vol. 69, №1, 2017, 120.

27 *See generally* <https://www.justia.com/covid-19/debts-and-bankruptcy-during-the-covid-19-outbreak/> [15.06.2023].

creditors without any fault on their side. [28] We can presume, that such events also justify the existence of a discharge policy.

Furthermore, Thomas H. Jackson tried to justify bankruptcy discharge based on **the impulsive control of individuals**.[29] He thinks, that impulsive persons choose to consume today, rather than plan for the future.[30] Because of this impulsiveness individuals can experience regret over time and that is why legislators introduced nonwaivable[31] discharge.[32] Nonwaivable discharge protects impulsive debtors because it forces the creditors to monitor and control borrowing more thoroughly.[33]

Professor Jackson also thinks, that decision-makers often **overestimate chances of success** and underestimate risks.[34] Some completely disagree with Jackson and think that the differentiation of creditors as rational and debtors as irrational (not being able to control themselves or plan for the future) is not reasonable.[35]

Moreover, the "**entrepreneur hypothesis"** claims that bankruptcy discharge can be seen as a part of the institutional framework, which is necessary for **encouraging entrepreneurship in the market**.[36] The author of this hypothesis thinks that bankruptcy discharge fosters entrepreneurship and that is why legislation guarantees it.[37]

Additionally, Professor Jackson suggests that if the indebted individual is not discharged of his debts, he may have no stimulation to work more in the future and may devote more time to leisure, therefore making less contribution to society (do not pay taxes, depend on social welfare programs, etc.…).[38] Others also think that the main justification for the discharge is "to restore the debtor to participate in the open credit economy".[39] So, the "fresh-start" helps individual debtors to stay economically productive and contribute to society.[40]

Based on the above-discussed justifications we can say, that bankruptcy discharge is a really important legal mechanism. At least some arguments should convince the majority why it is necessary to have individual discharge as part of the bankruptcy legislation.

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28 *See generally Wang J. and others,* Bankruptcy and the COVID-19 Crisis, Harvard Business School, Working Paper 21-042, September 2020, 1-5.

29 *Jackson T.H.*, The Logic and Limits of Bankruptcy Law, Washington D.C., 2001, 234-36.

30 Ibid, 235.

31 Meaning individuals cannot waive their right of discharge by any contract.

32 Ibid, 233.

33 Ibid, 236.

34 Ibid, 239.

35 *Carlson D. G.*, Philosophy in Bankruptcy, Michigan Law Review, Vol. 85, Issue 5 & 6, 1987, 1365.

36 *Czarnetzky J. M.*, The Individual and Failure: A Theory of the Bankruptcy Discharge, Arizona State Law Journal, Vol. 32, №2, 2000, 399.

37 Ibid, 464.

38 *Jackson T.H.*, The Logic and Limits of Bankruptcy Law, Washington D.C, 2001, 245.

39 *Sousa M.D.*, The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge, University of Kansas Law Review, Vol. 58, №10, 2010, 589.

40 *Byington J. S.*, The Fresh Start Canon, Florida Law Review, Vol. 69, №1, 2017, 121.

2.3. Bankruptcy Stigma

Christianity, Islam, Judaism and Hinduism all highlight the importance of debt repayment and therefore promote the avoidance of bankruptcy.[41] In the past going bankrupt was almost the same as committing a crime.[42] In ancient Rome (according to the Twelve Tables) the creditor had the right to imprison the debtor who could not pay and treat him like a slave, even sell him to other country or cut a proportionate share of his body.[43]

In England, according to early bankruptcy laws, if the debtors did not participate in the bankruptcy process, they could get the death penalty.[44] Based on this short historical overview, it should be no surprise why filing for individual bankruptcy can have stigmatizing effects. A **social stigma** still attaches to debtors who do not pay their creditors even in the U.S. which is considered the most tolerant bankruptcy system.[45]

Bankruptcy stigma can be explained as an injury to reputation that a person can get as a result of filing for bankruptcy, some can even decide not to file because being afraid of this reputational loss.[46] Generally, it is accepted, that bankruptcy stigma is lower in *common law* jurisdictions than in *civil law* jurisdictions.[47] The U.S. should be considered a country with **the lowest intensity of stigma**.[48] The right to bankruptcy and a fresh start in the U.S. is sometimes even considered the right of the same importance as constitutional rights.[49] This is the reason why the U.S. bankruptcy system predominantly works properly in practice and it is considered as a model bankruptcy law by many.[50]

On the other hand, Germany is often used as a contrast to the U.S., with a **very high level of stigma**.[51] But according to Professor Reinhard Bork in Germany the intensity of bankruptcy stigma today is quite low when it comes to consumer insolvency and he justifies it by the huge number of individuals filing for consumer insolvency every year. [52]

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41 *Zywicki T. J.*, Bankruptcy Law as Social Legislation, Texas Review of Law & Politics, Vol. 5, №2, 2001, 398.

42 *Tajti T.*, Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, China-EU Law Journal, Vol. 6, Issue 1-2, 2018, 12.

43 *Tabb C. J.*, Brubaker R., Bankruptcy Law: Principles, Policies, Practice, 1st ed., U.S., 2003, 57.

44 Ibid, 57-58.

45 *Adler B.E., Baird D.G., Jackson T. H.*, Bankruptcy: Cases, Problems and Materials, 4th ed., New York, 2007, 560.

46 *Sullivan T. A., Warren E. & Westbrook J. L.*, Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings, Stanford Law Review, Vol. 59, Issue 2, 2006, 233.

47 *Tajti T.*, Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, China-EU Law Journal, Vol. 6, Issue 1-2, 2018, 26.

48 Ibid, 15.

49 Ibid, 16; see cit.: *Ferguson N.*, The Ascent of Money: A Financial History of the World, New York, 2009, 60.

50 Ibid.

51 *Tajti T.*, Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, China-EU Law Journal, Vol. 6, Issue 1-2, 2018, 15.

52 Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

Overall, it is quite hard to measure bankruptcy stigma with some kind of scale or index, as it is hardly quantifiable.[53] Legislators should keep in mind bankruptcy stigma when enacting bankruptcy laws. Also, we should keep in mind, that there is nothing wrong with "**a healthy bit of stigma",** which will make individuals not file for bankruptcy without a legitimate reason, as an easy way out of their obligations.[54]

2.4. Terminology Caveat

There are differences in different systems when it comes to legal terminology. In the U.S. bankruptcy proceedings refer to all kinds of insolvency-related proceedings.[55] In the German Insolvency Code, chapter 10 is named 'consumer insolvency proceedings'. In scholarly materials sometimes the terminology seems to be used interchangeably.[56] For the aims of this article, the term individual bankruptcy will be used to refer to U.S. and consumer insolvency to the German system. For Georgia U.S. nomenclature and the term "individual bankruptcy" will be used.

3. Individual Bankruptcy in the United States

3.1. Short Overview of the United States Bankruptcy System

The constitution of the U.S. gives the Congress right to enact **uniform federal laws** regarding bankruptcy.[57] **The Bankruptcy Act of 1898**, which is the first permanent federal bankruptcy legislation, is considered the foundation of modern bankruptcy law as we know it.[58] The 1898 Act was quite liberal compared to the earlier laws.[59] It strictly limited the number of grounds for denying discharge.[60] Overall, it was still viewed as a more **trader-friendly** act.[61]

In the 1920s and 1930s, the U.S. bankruptcy system was converted and became more **consumer-friendly** and "fresh-start" for individuals became a leading principle.[62] Following, **the Bankruptcy Reform Act of 1978** was the first complex reform of the federal bankruptcy law in decades, it replaced the 1898 Act.[63] The 1978 Act created the **Bankruptcy Code** that is in effect in the

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53 Tajti T., Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, China-EU Law Journal, Vol. 6, Issue 1-2, 2018, 26.

54 Ibid; see cit.: World Bank (2013) Insolvency and Creditor/Debtor Regimes Task Force, Report on the Treatment of the Insolvency of Natural Persons, para 118, page 42.

55 Ibid, 8.

56 *See Fossen F.M.,* Personal Bankruptcy Law, Wealth, and Entrepreneurship—Evidence from the Introduction of a "Fresh Start" Policy, American Law and Economics Review, Vol. 16, №1, 2014, 273 – the article refers to German personal bankruptcy law.

57 Constitution of the United States, Article I, Section 8.

58 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 39.

59 Ibid.

60 Ibid.

61 *Ramsay I.*, Personal Insolvency in the 21st Century, Oxford and Portland, 2017, 37.

62 Ibid, 41-42.

63 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 41.

U.S. today, with some amendments.[64] The Bankruptcy Code replaced the term "bankrupt" with "debtor", which is more neutral and less stigma is associated with it.[65]

The Bankruptcy Code has nine chapters.[66] Generally, the majority of individuals file bankruptcy petitions under Chapter 7 or Chapter 13.[67] Under **Chapter 7** the debtor's assets are liquidated and the creditors are paid on the pro-rata basis and the debtor is discharged.[68] On the other hand, in **Chapter 13** individual debtors pay to their creditors through court-confirmed prepayment plans and receive discharge only after completion of the plan.[69]

3.2. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)

BAPCPA was one of the most comprehensive amendments of the Bankruptcy Code since 1978.[70] Professor Charles J. Tabb states that much of BAPCPA was written by two lobbyists – **the credit industry** and **the auto industry**.[71] On the other hand, bankruptcy professionals, like judges, professors, and attorneys – who were actively involved in other bankruptcy law amendments, were ignored by Congress.[72] Professor Tabb also alleges that the interested industries spent millions of dollars on campaign contributions that funded President Bush and key members of Congress.[73] This resulted in some provisions, which **worsened the rights of debtors**.[74]

One of the primary goals of BAPCPA was to force debtors to stay away from **Chapter 7** (liquidation) and go towards **Chapter 13** (adjustment of debts for individual debtors), the reasoning was that they should pay as much as they could to receive discharge of the debts.[75] The justification behind BAPCPA was that many debtors were abusing bankruptcy laws and there were many serial filers.[76] They claimed that it was the result of **the reduced stigma**. [77] Despite much data suggesting

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64 Ibid.

65 *Tabb C. J.*, The Top Twenty Issues in the History of Consumer Bankruptcy, University of Illinois Law Review, Vol. 2007, №1, 2007, 29.

66 The chapters of the Bankruptcy Code are: Chapter 1 – General Provisions; Chapter 3 – Case Administration; Chapter 5 – Creditors, The Debtors and The Estate; Chapter 7 – Liquidation; Chapter 9 – Adjustment of the Debts of Municipality; Chapter 11 – Reorganization; Chapter 12 – Adjustment of Debts of A Family Farmer Or Fisherman With Regular Annual Income; Chapter 13 – Adjustment of Debts of An Individual With Regular Income; Chapter 15 – Ancillary and Other Cross-Border Cases.
Chapters 1, 5, and 5 apply to all kinds of bankruptcy cases, and the other chapters deal with specific types of debtors and reliefs.

67 *Aberasturi J.*, Trouble with BAPCPA: A Call for Statutory Reform regarding Retirement Contributions in Chapter 13 Bankruptcy Plans, American Bankruptcy Institute Law Review, Vol. 30, №2, 2022, 280.

68 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 88-92.

69 Ibid, 98-103.

70 *Ramsay I.*, U.S. Exceptionalism, Historical Institutionalism, and the Comparative Study of Consumer Bankruptcy Law, Temple Law Review, Vol. 87, №4, 2015, 969.

71 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 50.

72 Ibid.

73 Ibid.

74 Ibid, 47.

75 *Jones D. R.*, Savings: The Missing Element in Chapter 13 Bankruptcy Cases, American Bankruptcy Institute Law Review, Vol. 26, №2, 2018, 244.

76 *Greene S. S.*, The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers,

otherwise, the credit industry convinced Congress, that there was widespread abuse of the bankruptcy system from the side of individual debtors.[78] BAPCPA went into effect on 17 November 2005.[79] Among other changes, it added a **compulsory credit counseling** requirement for individual debtors.[80] The counseling would give recommendations to the debtors on what options they have in bankruptcy.[81]

Overall, the 2005 Act was not friendly to individual debtors and enacted changes in legislation that made it harder for individuals to get a "fresh start".[82] In order to force debtors into Chapter 13 proceedings (instead of Chapter 7), BAPCPA introduced the "**means test"** to determine their alternatives in bankruptcy.[83] "Means test's" aim is to stop so-called "**can-pay" debtors** from filing for bankruptcy under Chapter 7.[84]

3.3. Chapter 7- Liquidation

Chapter 7 cases are sometimes called "**straight liquidation"** cases.[85] A debtor under Chapter 7 can be an individual, partnership or corporation.[86] Individual debtors file under Chapter 7 to be discharged of their debts.[87] The debtors surrender their **nonexempt assets** to a trustee, which sells them and distributes the proceedings to the creditors.[88] On the other hand, the debtor keeps exempt assets and is discharged from pre-bankruptcy claims.[89]

Individual Chapter 7 cases can be **voluntary** – meaning filed by the debtor or **involuntary** – filed by the creditors.[90] In case of involuntary filing, the creditors must prove one of the statutorily determined grounds, from which, the most common is not paying debts when they become due.[91] Filing the case invokes **automatic stay**, which is one of the most important features of bankruptcy.[92]

American Bankruptcy Law Journal, Vol. 89, №2, 2015, 242.

77 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 47-48.

78 *Sousa M.D.*, The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge, University of Kansas Law Review, Vol. 58, №10, 2010, 594.

79 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 50.

80 Ibid, 128.

81 Ibid.

82 *McDonald G. K.*, Homelessness in the COVID Era: Utilizing the Bankruptcy Solution, Yale Law & Policy Review, Vol. 41, №1, 2022, 150.

83 *Jones D. R.*, Savings: The Missing Element in Chapter 13 Bankruptcy Cases, American Bankruptcy Institute Law Review, Vol. 26, №2, 2018, 244.

84 *Tabb C. J.*, The Death of Consumer Bankruptcy in the United States, Bankruptcy Developments Journal, Vol. 18, №1, 2001, 10.

85 *Michael T. L.*, There's a Storm a Brewin': The Ethics and Realities of Paying Debtors' Counsel in Consumer Chapter 7 Bankruptcy Cases and the Need for Reform, American Bankruptcy Law Journal, Vol. 94, №3, 2020, 389.

86 *Clarkson K. W. and others*, Business Law: Text and Cases, 11th ed, Maison (U.S.), 2009, 612.

87 *Tabb C. J.,* Law of Bankruptcy, 5th ed., St. Paul, 2020, 91.

88 Ibid, 88.

89 Ibid.

90 Ibid.

91 Ibid.

92 *Sepinuck S. L., Duhl G. M.*, Problems and Materials on Bankruptcy Law and Practice, 3rd ed., St. Paul,

The automatic stay has the effect equivalent to an injunction, it automatically restrains the creditors from taking any further actions to collect their debts or enforce their liens.[93] It is believed, that automatic stay preserves the status quo.[94]

Automatic stay terminates when the particular property is no longer property of the bankruptcy estate or when the bankruptcy case is closed.[95] The 2005 amendments added two new grounds for the termination of automatic stay: when the debtor has filed a bankruptcy case, which was dismissed within one year of filing the present case automatic stay terminates 30 days after the filing unless good faith of the debtor is shown.[96] The second ground is when the debtor had two or more bankruptcy cases filed in the past year.[97]

3.4. Property of the Estate and Exempt Property

After the filing of the case **bankruptcy estate** is formed, it includes all the debtor's property and forms the property of the estate.[98] The trustee should liquidate the property and pay from this money to the creditors.[99] It is important to highlight, that Chapter 7 bankruptcy estate does not include any future income of the debtor after the filing for bankruptcy.[100] We should keep in mind, that there are many instances of "no-asset" scenarios in individual Chapter 7 bankruptcy cases.[101]

By exemption, we mean property that is exempt (free) from the bankruptcy estate. The justification behind the statutorily protected **exempt property** is that the debtors need some property to stay active members of society, to continue their professional work, also some properties can have no value to creditors and finally, there are some exempt properties with value, but which can have a specific sentimental attachment to the debtor.[102]

Exemptions can be used by debtors in Chapter 7 and Chapter 13, each state has its own exemptions but there are also federal exemption rules.[103] In some states, debtors can choose between federal and state exemptions, but once they choose a set of exemptions they cannot apply some exemptions from the other set.[104] The most important for individuals is a "**homestead" exemption".**[105]

2017, 28.

93 Ibid, 45.

94 Ibid, 28.

95 *Epstein D. G*., Bankruptcy and Related Laws in a Nutshell, 9th ed., St. Paul, 2017, 49-50.

96 Ibid.

97 Ibid.

98 Tabb C. J., Law of Bankruptcy, 5th ed., St. Paul, 2020, 88.

99 Ibid, 89.

100 *Sepinuck S. L., Duhl G. M*., Problems and Materials on Bankruptcy Law and Practice, 3rd ed., St. Paul, 2017, 30.

101 "Only 7% (169) of the 2,500 individual Chapter 7 cases examined were asset cases.", *Jimenez D*., The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases, American Bankruptcy Law Journal, Vol. 83, №4, 2009, 800.

102 *Sepinuck S. L., Duhl G. M*., Problems and Materials on Bankruptcy Law and Practice, 3rd ed., St. Paul, 2017, 137.

103 <https://www.justia.com/bankruptcy/exemptions/> [3.06.2023].

104 Ibid.

105 Epstein D. G. and others, Bankruptcy: Dealing with Financial Failure for Individuals and Businesses, 4th

We can say, that the "homestead" exemption gives individuals the opportunity not to stay homeless and retain a "fresh start". Example of a federal exemption is: "homestead" – 27 900 $; jewelry – 1 875 $; household goods – 14 875 $ (per item up to 700 $); motor vehicle – 4 450 $.[106]

3.5. Dismissal of Chapter 7 Case and "Means Test"

A Chapter 7 liquidation case may be dismissed for "**cause"** as the Bankruptcy Code states.[107] The term "cause" is not defined by the code, but statutorily given examples show that a case can be dismissed because of the lack of debtor's cooperation to support the filing.[108] The 1978 Code intended to permit debtors to choose under which Chapter to proceed not looking at the future income and ability to pay the creditors out of it.[109]

Since 1984 the courts could dismiss Chapter 7 cases if they found "**substantial abuse",** but there was a presumption in favor of granting relief to the debtors.[110] In 2005, the test changed to simple "**abuse",** also the presumption in favor of the debtor was eliminated.[111] Individual debtors now have to go through the "**means test"** to decide whether their case should be dismissed as abusive or not.[112]

To establish abuse with the "means test", the debts should be **primarily consumer debts**.[113] There are 2 stages of the means test: firstly, the debtor's **monthly income is compared to the median monthly income** in the state, where the debtor resides depending on the household size (adjusted to it); if it is below the median the presumption of abuse does not arise and the debtor can proceed in Chapter 7.[114] If the debtor's income is more than the median income "the court calculates the debtor's **disposable income** by reducing the debtor's "current monthly income" by certain specified deductions for living expenses."[115]

If disposable income in the next 60 months is less than 6 000 $, the presumption of abuse does not arise, but if it is more than 10 000 $ the presumption arises.[116] And if the disposable income for the next 60 months is between 6 000 $ and 10 000 $ if it is sufficient to at least pay 25 % of the debtor's

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ed., St. Paul, 2015, 165.

106 "These values are current as of 2022. Federal bankruptcy exemption values adjust every three years.", <https://www.justia.com/bankruptcy/exemptions/federal-bankruptcy-exemptions/> [3.06.2023].

107 U.S. Bankruptcy Code, paragraph 707 (a).

108 *Tabb C. J.,* Law of Bankruptcy, 5th ed., St. Paul, 2020, 168.

109 Ibid, 169.

110 *Spurr S. J. & Ball K. M*., The Effects of a Statute (BAPCPA) Designed to Make It More Difficult for People to File for Bankruptcy, American Bankruptcy Law Journal, Vol. 87, №1, 2013, 30.

111 Ibid.

112 Ibid.

113 *Tabb C. J*., Law of Bankruptcy, 5th ed., St. Paul, 2020, 172.

114 *Spurr S. J. & Ball K. M*., The Effects of a Statute (BAPCPA) Designed to Make It More Difficult for People to File for Bankruptcy, American Bankruptcy Law Journal, Vol. 87, №1, 2013, 30.

115 Ibid, 30-31.

116 Numbers are adjusted based on the current Bankruptcy Code paragraph 707(b) (2)(A)(i), *Sepinuck S. L., Duhl G. M*., Problems and Materials on Bankruptcy Law and Practice, 3rd ed., St. Paul, 2017, 46.

nonpriority, unsecured claims, then there is a presumption of abuse.[117] In case of presumption of abuse, the case can be dismissed, or with the debtor's consent, it can be converted to Chapter 13 or Chapter 11 case.[118]

The presumption of abuse can be rebutted, the courts may consider the "**totality of the circumstances"** and the "**good faith"** of the debtor.[119] "Even if the presumption of abuse does not arise or is rebutted, the court may dismiss the chapter 7 case if the "totality of the circumstances" demonstrates abuse or the debtor filed the petition "in bad faith."[120]

3.6. Exceptions from Discharge

Even when the debtor receives the discharge, it does not free him from all the obligations.[121] Firstly, we should keep in mind that bankruptcy discharges obligations that fit in the code's definition of "debt", but this definition is quite broad and almost all obligations can fit in it.[122] Also, it is necessary that the debt should have arisen before the bankruptcy.[123]

Not all debts can be discharged, the Bankruptcy Code (paragraph 523) sets out detailed rules about obligations which are exceptions to discharge. It is no surprise, that **certain taxes** are non-dischargeable because of their public nature.[124] Even if a debtor incurs credit card debt to pay non-dischargeable taxes, the portion of the debt which was used to pay them will be excepted from discharge.[125] Also, **debts based on fraud** are excepted from discharge, in order to protect innocent parties.[126] The debtor has to schedule a debt for the court to inform the creditors, unscheduled debts are not discharged. [127]

Debts arising from **'willful or malicious injury'**, **governmental fines and penalties**, **criminal restitutions**, and **educational loans** are nondischargeable.[128] Congress keeps adding exceptions and now there are nineteen exceptions in paragraph 523 and several more exclusions in the other parts of the code.[129] We should also highlight, that discharge does not protect co-debtors and does not affect liens.[130]

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117 Ibid.
118 Bankruptcy Code, paragraph 707(b)(1).
119 *Sepinuck S. L., Duhl G. M*., Problems and Materials on Bankruptcy Law and Practice, 3rd ed., St. Paul, 2017, 45.
120 *Spurr S. J. & Ball K. M*., The Effects of a Statute (BAPCPA) Designed to Make It More Difficult for People to File for Bankruptcy, American Bankruptcy Law Journal, Vol. 87, №1, 2013, 31.
121 *Epstein D. G*., Bankruptcy and Related Laws in a Nutshell, 9th ed., St. Paul, 2017, 243.
122 Ibid.
123 *Tabb C. J*., Law of Bankruptcy, 5th ed., St. Paul, 2020, 946.
124 Ibid, 967.
125 *Epstein D. G.*, Bankruptcy and Related Laws in a Nutshell, 9th ed., St. Paul, 2017, 246.
126 *Tabb C. J*., Law of Bankruptcy, 5th ed., St. Paul, 2020, 970.
127 Ibid, 979.
128 Ibid, 985, 990-992.
129 Ibid, 999.
130 *Epstein D. G*., Bankruptcy and Related Laws in a Nutshell, 9th ed., St. Paul, 2017, 255-56.

3.7. Chapter 13 – Adjustment of Debts of an Individual with Regular Income

Chapter 13 is intended as a **rehabilitation for individual consumer debtors**.[131] It permits the debtor to retain the property and repay the creditors according to the plan approved by the court over three to five years.[132] Before the enactment of the "means test", it was generally used by those, who would lose assets in Chapter 7 liquidation proceedings.[133] Nevertheless, after the enactment of the "means test" many debtors are imposed to proceed under Chapter 13.[134] An individual is eligible for Chapter 13 if his combined total debts (secured and unsecured) are less than 2 750 000 $.[135]

Any individual with regular income can file for bankruptcy under Chapter 13.[136] It is important to highlight, that unlike Chapter 7, Chapter 13 can be **only voluntary**, but the debtor can be forced to go under the given chapter if his liquidation case is dismissed or if it is converted to Chapter 11 reorganization.[137]

The main feature of the given chapter is that the property remains in possession of the debtor.[138] Also, a trustee mainly has an administrative function – to pay the creditors the money paid by the debtors according to the court-approved plan.[139] The creditor voluntarily files for relief with the repayment plan and the court has the authority to confirm it.[140] The court examines the plan according to the "**best interests test",** which requires debtors to pay the creditors no less than what they would receive in Chapter 7.[141] While calculating this the court deducts all the costs that would be incurred in Chapter 7, like costs of administration and professionals the trustee will hire in case of liquidation.[142]

Unlike in Chapter 7, here debtor bears the cost of the statutory commission towards the trustee, which is limited to the maximum of 10% of the distributions to be made under the plan.[143] Also, **inflation** should be taken into account, because 100 $ now is not equal to 100 $ after three or five years.[144] The courts are very inconsistent with calculating interest over the amount that would have

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131 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 1208.
132 Ibid.
133 *Fisher J. D.*, Who Files for Personal Bankruptcy in the United States?, The Journal of Consumer Affairs, Vol. 53, №4, 2019, 2005.
134 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 99.
135 U.S. Bankruptcy Code § 109(e).
136 *Epstein D. G. and others*, Bankruptcy: Dealing with Financial Failure for Individuals and Businesses, 4th ed., St. Paul, 2015, 237.
137 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 1219.
138 Ibid, 100.
139 Ibid, 1221.
140 Ibid, 1228-29.
141 Epstein D. G. and others, Bankruptcy: Dealing with Financial Failure for Individuals and Businesses, 4th ed., St. Paul, 2015, 243.
142 Ibid.
143 *Jones D. R.*, Savings: The Missing Element in Chapter 13 Bankruptcy Cases, American Bankruptcy Institute Law Review, Vol. 26, №2, 2018, 250.
144 *Epstein D. G. and others*, Bankruptcy: Dealing with Financial Failure for Individuals and Businesses, 4th ed., St. Paul, 2015, 243.

been distributed under liquidation, some apply market rate, others contract rate or interest that applies to judgments.[145]

There is a risk that during the period of the plan the debtor's financial situation, particularly income may change or debtors may have some unexpected expenses, which may affect the whole plan.[146] The abovementioned is the reason why many plans fail.[147]

Discharge under Chapter 13 is granted after the debtor completes the payments according to the plan.[148] Almost all debts not dischargeable under Chapter 7 are also nondischargeable under Chapter 13, the only important difference is that in Chapter 13 a non-fraudulent tax claim is dischargeable.[149]

The debtor may receive a "**hardship" discharge** in case he cannot complete the payments under the plan and it is due to the circumstances he should not be held accountable for.[150] Also, the creditors should have received as much as they would under Chapter 7 liquidation.[151] Under the "hardship" discharge only the debts dischargeable under Chapter 7 are discharged.[152]

Generally, in a Chapter 13 plan debtor can propose modifications to the **secured claim**, but the holders of the claim should agree for the plan to be confirmed.[153] However, the court can confirm the plan, even without the creditor's approval, as long as the amount to be paid to him is equal to the collateral which is used as a security.[154] With the help of "**cram down"** the debtor does not have to obtain secured creditors' consent and the court can confirm the plan without their consent.[155]

The court can "**cram down"**[156] the amount 'to be paid to the holder of secured debt to the value of its collateral."[157] The court cannot do this if the collateral is the automobile of personal use or if there is a home mortgage.[158] Also, the debtor would have to pay interest on the value of the collateral, because of the inflation.[159]

3.8. Chapter 11 – Reorganization

Chapter 11 is generally referred to as **the business reorganization chapter**.[160] But Chapter 11 is not only limited to business debtors, the U.S. Supreme Court stated that individuals who are not

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145 Ibid.

146 *Jones D. R.*, Savings: The Missing Element in Chapter 13 Bankruptcy Cases, American Bankruptcy Institute Law Review, Vol. 26, №2, 2018, 250, 245-46.

147 Ibid, 253.

148 *Tabb C. J.,* Law of Bankruptcy, 5th ed., St. Paul, 2020, 102.

149 Ibid.

150 Ibid*,* 1027.

151 Ibid.

152 U.S. Bankruptcy Code, paragraph 1328(b)(2).

153 *Epstein D. G.*, Bankruptcy and Related Laws in a Nutshell, 9th ed., St. Paul, 2017, 273.

154 Ibid, 274-75.

155 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 1263.

156 Bankruptcy lawyers, judges and professors use this term to describe court approval of the plan that affects the changes in the claim without the approval of the claim holder.

157 *Epstein D. G.*, Bankruptcy and Related Laws in a Nutshell, 9th ed., St. Paul, 2017, 274-75.

158 Ibid, 277.

159 Ibid, 276.

160 *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 92.

engaged in business can file for bankruptcy under Chapter 11.[161] Generally, individual Chapter 11 case looks like Chapter 13, but there are some major differences in procedure.[162] In Chapter 11, unlike Chapter 13 creditors enjoy the right to vote for the plan, so influence the plan quite a lot.[163] Also, Chapter 11 can be voluntary and involuntary, unlike Chapter 13.

Almost half of the individual debtors in 2013 had liabilities below Chapter 13 limits, but still chose to file under Chapter 11.[164] Individuals in Chapter 11 seem more likely to operate businesses, have a higher debt-to-income ratio, and have much more household income, but on the other hand, also have much more expenses.[165] That shows that they have substantial real estate and home mortgages, so maybe they want to extend plans beyond five years.[166]

3.9. Student Loans

The 1978 Bankruptcy Code stated that educational loans[167] were nondischargeable unless "**undue hardship"** was proved.[168] Student loans are not dischargeable under any chapter up until today. Both private and federal student loans are protected with non-dischargeability.[169] The court of appeals set the requirements that are needed to establish "undue hardship" to discharge student loans.[170] *"*While this standard does not require the debtor to live in poverty, it subsequently does not allow for luxury expenses, and once the debtor had paid all necessary expenses, excess financial resources should be used to satisfy student loan debt."[171]

The court of appeals in *In Re Mosley*, stated, that to establish "**hardship discharge"** it should be shown that: 1. "The debtor cannot maintain, based on current income and expenses a "minimal" standard of living."; 2. "The additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans" and 3. "that the debtor has made good faith efforts to repay the loans."[172]

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161 Toibb v. Radloff, 501 U.S. 157 (1991).

162 *Epstein D. G*., Bankruptcy and Related Laws in a Nutshell, 9th ed., St. Paul, 2017, 348-49.

163 *Tabb C. J*., Law of Bankruptcy, 5th ed., St. Paul, 2020, 1216.

164 *Hynes R. M*., Lawton A. & Howard M., National Study of Individual Chapter 11 Bankruptcies, American Bankruptcy Institute Law Review, Vol. 25, №1, 2017, 164.

165 Ibid, 66.

166 Ibid, 164.

167 The terms "student loans" and "educational loans" are used interchangeably in legal literature, the code uses term "educational".

168 *Keith C. A*., A Forced Crisis: Why Student Loan Debt Should Be Separately Classified under Chapter 13 Bankruptcy Plans, Delaware Journal of Corporate Law, Vol. 44, №2-3, 2020, 253.

169 *Taylor A. N. & Sheffner D. J*., Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans, Stanford Law & Policy Review, Vol. 27, N2, 2016, 303.

170 Brunner v. N.Y. State Higher Educ. Servs. Corp. – 831 F.2d 395 (2d Cir. 1987).

171 *Keith C. A*., A Forced Crisis: Why Student Loan Debt Should Be Separately Classified under Chapter 13 Bankruptcy Plans, Delaware Journal of Corporate Law, Vol. 44, №2-3, 2020, 255.

172 In re Mosley, 494 F.3d 1320 (11th Cir. 2007).

3.10. Retirement Contributions

Retirement contribution plans, referred to as 401(k) plans are very popular in the U.S.[173] The problem that arises in bankruptcy is whether these voluntary retirement contributions should be excluded from disposable income.[174] The **disposable income** is used to calculate how much can you pay to your debtors in Chapter 13.[175]

There are 3 approaches the courts use: 1. All post-petition contributions are included in disposable income; 2. Only the amount contributed before filing the case is permitted to be contributed again and so not be considered in disposable income; and 3. Both post and pre-petition contributions are excluded from projected disposable income as long as the debtor's "good faith" is seen.[176] Overall, it is clear that statutory reform is needed to regulate the abovementioned issues.

Whether a debtor can exclude voluntary contributions to a retirement plan under Chapter 7 when calculating the income is also an actual question.[177] The code does not specify which expenses are considered reasonably necessary.[178] The court of appeals stated, that bankruptcy courts have the discretion in determining whether retirement contributions are reasonably necessary expenses and they should take into account: the age and income of the debtor; expected date of retirement; the amount of contributions; overall savings and any other relevant factors.[179] We should remember that the Code aims to give debtors a "fresh start", but not to let "can-pay" debtors use bankruptcy and not repay their creditors.

3.11. Future Developments

Bankruptcy is an **economic and social legislation**, so it is no surprise that it is often amended with the change in economic and social realities. Last year, **The Consumer Bankruptcy Reform Act of 2022** was introduced in Congress, which aims to make quite big changes in the individual bankruptcy system in the U.S.[180] We should highlight, that the bill is set to eliminate multiple forms of consumer bankruptcy and replace them with **new Chapter 10**.[181] The authors of the bill suggest that it will be easier for debtors to go to one chapter than to choose between several chapters.[182] Consumers

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173 *Aberasturi J.*, Trouble with BAPCPA: A Call for Statutory Reform regarding Retirement Contributions in Chapter 13 Bankruptcy Plans, American Bankruptcy Institute Law Review, Vol. 30, №2, 2022, 280.

174 Ibid, 282.

175 See definition of disposable income – U.S. Bankruptcy Code, paragraph 1325(2).

176 *Aberasturi J.*, Trouble with BAPCPA: A Call for Statutory Reform regarding Retirement Contributions in Chapter 13 Bankruptcy Plans, American Bankruptcy Institute Law Review, Vol. 30, №2, 2022, 282.

177 *Clarkson K. W.* and others, Business Law: Text and Cases, 11th ed, Maison (U.S.), 2009, 614.

178 Hebbring v. Trustee, 463 F.3d 902 (9th Cir. 2006).

179 Ibid.

180 Congress web-page <https://www.congress.gov/bill/117th-congress/senate-bill/4980?s=1&r=96> [9.06.2023].

181 Kelley Kaplan & Eller Law Firm web-page <https://www.kelleylawoffice.com/consumer-bankruptcy-reform-act-of-2022-what-to-know/> [9.06.2023].

182 Bloomberg Law <https://news.bloomberglaw.com/bankruptcy-law/consumer-bankruptcy-overhaul-envisioned-in-new-bill-explained-1> [9.06.2023].

with debts under 7.5 million US dollars will go into two paths under the new chapter, some will get discharged of their debts, and others – with above 135 % of the median income will have to repay partially their creditors.[183]

Overall, we can say, it will be a modification of Chapters 7 and 13 in one chapter. But there will also be some other changes, student loans and some other non-dischargeable debts will be discharged easier.[184] "The bill also would ease debtors' ability to keep their homes and cars."[185] The bill also removes the requirement of credit counseling and creates the Consumer Financial Protection Bureau which would operate like a special ombudsman, taking bankruptcy complaints.[186]

Let's see if the bill will be enacted by Congress and become effective legislation, but we should for sure look forward to some amendments in the individual bankruptcy legislation because economic and social situations change very fast and the legislation needs to answer the contemporary needs of the society.

4. Consumer Insolvency in Germany

4.1. Overview and Eligibility for Consumer Insolvency Proceedings in Germany

By the end of the 20th century, household debt was rising and it resulted in the enactment of personal bankruptcy laws in many European countries.[187] In Germany, they introduced consumer insolvency proceedings in 1999.[188] As we see, German consumer insolvency is quite a new phenomenon compared to U.S. individual bankruptcy, which has a history of more than a century.

Insolvency proceedings in Germany are regulated by the Insolvency Code (InsO). [189] There are two kinds of insolvency proceedings in InsO: regular insolvency proceedings and consumer insolvency proceedings.[190]

Consumer insolvency proceedings in Germany are divided into three stages: **out-of-court debt settlement proceedings**, **in-court debt settlement proceedings**, and **consumer insolvency proceedings**.[191]

Consumer insolvency proceedings can be opened only if a certificate by a suitable person or agency proves that the debtor attempted to reach an agreement with creditors but failed to do so.[192] After that, the debtor can file for insolvency proceedings, he should **include a plan for the settlement**

183 Ibid.
184 Ibid.
185 Ibid.
186 Ibid.
187 *Er M.*, The German Consumer Bankruptcy Law and Moral Hazard – The Case of Indebted Immigrants, Journal of Financial Regulation and Compliance, Vol.28, №2, 2020, 161.
188 Ibid, 162.
189 Official English Translation of InsO, <https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html> [9.06.2023].
190 *Braun S.*, German Insolvency Act: Special Provisions of Consumer Insolvency Proceedings and the Discharge of Residual Debts, German Law Journal, Vol. 7, №6, 2006, 61.
191 *Braun/Buck*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 793.
192 *Bork R.*, Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 207.

of debts with the application about opening insolvency proceedings.[193] Creditors have access to that plan and can object to it.[194] Here, the court tries to mediate, but the debtors generally offer nothing so cannot agree with creditors, because under insolvency proceedings the debtors would have to work for three years and try to pay the creditors that way.[195] The creditors afterward vote on the plan like it is in restructuring proceedings, but without having a formal meeting.[196]

The court opens insolvency proceedings only if both, out-of-court and in-court debt settlement proceedings have failed.[197] So, these consumer proceedings are aimed at making the parties reach an agreement.[198]

To qualify for consumer insolvency, the individual debtor should satisfy the code's requirements set out in InsO.[199] Consumer insolvency proceedings apply only to **natural persons** who do not pursue self-employed economic activity.[200] Also, the person should not have pursued self-employed economic activity in the past, meaning entrepreneurs who closed down their business shortly before filing for insolvency proceedings are not eligible.[201]

On the other hand, InsO lets the debtor who pursued self-employed economic activity file under consumer insolvency proceedings if the debtor has fewer than twenty creditors and there are no employment claims against him.[202] If you meet the requirements of being a consumer you qualify for consumer insolvency proceedings and it does not matter how much income you have.[203]

Consumer insolvency proceedings are **simplified proceedings**, they are generally in writing.[204] Usually, the request for starting the proceedings is filed by the consumers, it is hard to find a creditor who applies for insolvency proceedings against a consumer debtor, because they have no assets and it does not make sense for the creditor to initiate the proceedings.[205]

4.2. The Procedural Details of Consumer Insolvency

Once the debtor is declared bankrupt the **trustee** is appointed for three years, which supervises the financial affairs of the debtor.[206] Debtors' assets are sold by the trustee to satisfy the creditors.[207]

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193 Ibid.

194 Ibid.

195 Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

196 Ibid.

197 *Braun/Buck*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 793.

198 Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023), *See also* InsO, Section 287 (2).

199 InsO, Section 304.

200 *Braun/Buck*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 793.

201 *Bork R*., Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 204.

202 Ibid.

203 Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

204 *Braun/Buck*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 793.

205 Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

206 *Er M*., The German Consumer Bankruptcy Law and Moral Hazard – The Case of Indebted Immigrants,

The exempt property that cannot be liquidated is defined by InsO, which also refers to the Code of Civil Procedure.[208]

In Germany, natural persons who apply for discharge can also apply for the postponement to pay the costs of the proceeding until the discharge is awarded, if the debtor's assets are not sufficient to cover the costs.[209] Also, we should mention that the debtor faces some disadvantages after the insolvency proceedings, it will be hard for him to enter the general credit protection agency (SCHUFA) for three years.[210] He also will not be permitted to be an executive manager or managing director for some time.[211]

4.3. Discharge

In Germany, **discharge proceedings** are connected to **insolvency proceedings**, and only natural persons are entitled to discharge.[212] Unlike the U.S., in Germany, the debtor should **apply separately** for the discharge.[213] The debtor should apply for the discharge simultaneously with the application of insolvency proceedings.[214] If the creditors have applied for insolvency proceedings the debtor should apply for discharge within two weeks after being notified about the application of insolvency proceedings against him.[215]

All debtors can request the **discharge of residual debts**, even those whose creditors did not receive anything during the insolvency proceedings.[216] Residual debts are the unsatisfied part of the claims owed by the debtors after the termination of insolvency proceedings.[217] Discharge application is not permitted for the debtors if they have been granted a discharge in the past eleven years or if they have been denied a discharge in the past three or five years, depending on what the refusal was based on.[218]

After filing for insolvency, there is a **compliance period** that starts with the opening of insolvency proceedings and runs for three years.[219] During this period debtor must cooperate with the trustee and engage or at least try to get engaged in employment activities.[220] The part of the income (the legislation defines the sum below which cannot be taken from the debtor) is given to the trustee,

Journal of Financial Regulation and Compliance, Vol.28, №2, 2020, 166.

207 Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

208 *See* InsO, Section 36.

209 InsO, Section 4a(1).

210 *Er M*., The German Consumer Bankruptcy Law and Moral Hazard – The Case of Indebted Immigrants, Journal of Financial Regulation and Compliance, Vol.28, №2, 2020, 167.

211 Ibid.

212 *Bork R*., Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 194-95.

213 *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 779-80.

214 InsO, Section 287(1).

215 Ibid.

216 *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 779.

217 *Bork R*., Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 191.

218 Ibid, 196, *See also* InsO, section 278a (2).

219 Ibid, 197.

220 Ibid, 198.

which distributes the money among the creditors according to the schedule of the claims.[221] If the debtors do not comply with the abovementioned rules the discharge can be denied based on the ordinary creditor's application for a rejection.[222] The debtor should only be granted a discharge of residual debt if he fulfilled the requirement and made the necessary sacrifices.[223]

Discharge in Germany only affects the **pre-commencement claims**, as it is in the U.S.[224] InsO provides an exhaustive list of claims which are not dischargeable.[225] Examples of non-dischargeable claims are fines and damages arising from intentional tort.[226] Also, third parties are not affected by the discharge.[227]

The discharge proceedings in Germany can be seen as a **two-part process**: firstly, the court decides ex officio whether there is ground to refuse the debtor admissibility to the application of discharge and then the actual discharge proceedings begin, with the "**period of good conduct",** when the debtor is required to make effort to fulfill the liabilities.[228]

Dishonest individuals do not get discharged of their residual debts, they can go through insolvency proceedings and get their assets sold, but the creditors who were not paid from the liquidation of the assets will still have claims against the debtor.[229] So, we can say, that it does not make sense for dishonest individuals to file for consumer insolvency. InsO gives the detailed grounds for the refusal of discharge, which are generally situations where the debtor is not acting or has not acted in good faith.[230] The examples are if the debtor has received a final verdict from an insolvency-related criminal offense or has given false or incomplete information regarding their economic condition in writing to get a loan or grant from the public fund or to avoid payments to them.[231] InsO (section 295) also sets out debtors' obligations during the period of "good conduct" to get discharged, because the debtor's conduct matters a lot.[232]

4.4. General Remarks

Some scholars believe that consumer insolvency in Germany is not associated with substantial moral hazard or stigma.[233] Professor Reinhard Bork agrees with them and states, that it is perceived

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221 Ibid, 198.
222 Ibid.
223 *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 780.
224 *Bork R.,* Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 200.
225 *See* InsO, Section 302.
226 *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 780.
227 *Bork R*., Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 201.
228 *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 779-81.
229 Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).
230 *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 783.
231 *Bork R*., Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 196.
232 *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 785.
233 *Er M*., The German Consumer Bankruptcy Law and Moral Hazard – The Case of Indebted Immigrants, Journal of Financial Regulation and Compliance, Vol.28, №2, 2020, 177.

more as a relief for unfortunate indebted individuals, than a stigma.[234] The high number of consumer insolvency applications also show this trend.[235]

Overall, we can say that the specific characteristic of German individual insolvency is that it first tries to find an agreement between creditors and the debtor with out-of-court and in-court settlements. It also has **strict discharge rules** and a **3-year discharge period**.[236] Also, consumer insolvency and discharge are separate proceedings, which is quite different from the U.S. approach.

When compared to the U.S., we can say that German insolvency has a **one-window principle**, offering one set of procedures with different steps to everyone satisfying the definition of "consumer", while in the U.S. generally individual debtors apply to 2 different chapters with a completely different procedure. Also, unlike Germany, in the U.S., there is a homestead exemption so the debtor retains a place to live to have a "fresh start". With all these differences shown we should agree with Professor Reinhard Bork who thinks, that generally, U.S. legal system is more debtor-friendly and German – creditor-friendly.[237]

5. Recommendations for the Introduction of an Individual Bankruptcy System in Georgia

5.1. Overview of the Georgian Bankruptcy System[238]

The first piece of legislation on bankruptcy law in Georgia was the 1996 Law of Georgia on Bankruptcy Proceedings.[239] The 1996 law stated that bankruptcy proceedings could be opened on an individual person's property or part of his property.[240] Despite this, no cases or any scholarly material are discussing individual bankruptcy in Georgia, so we can consider it a "dead norm".

Then in 2007, it was replaced by the Law of Georgia On Insolvency Proceedings.[241] The 2007 law stated that it did not regulate insolvency issues of natural persons, except for individual entrepreneurs.[242] The law also required that these **individual entrepreneurs** should have been established under The Law of Georgia on Entrepreneurs.[243] Though, the representatives of the National Bureau of Enforcement (NBE) have stated that individuals whose obligations had not arisen

234 Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

235 *See Bork R.*, Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 201.

236 Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

237 Ibid.

238 For the purposes of this article U.S. nomenclature will be used, so the term bankruptcy will be used to describe and refer to Georgian system.

239 Law of Georgia on Bankruptcy Proceedings, Parliamentary Gazette, 19-20, 30/07/1996 (annulled 15.08.2007).

240 Ibid, Article 2(1).

241 Law of Georgia on Insolvency Proceedings, LHG, 9, 31/03/2007 (annulled 01.04.2021).

242 Ibid, Article 2(2)(a).

243 Ibid, Article 2(1).

from entrepreneurial activities have tried to register as individual entrepreneurs and to use insolvency proceedings of the individual entrepreneur in order to stop the enforcement process.[244] So, they were attempting to misuse the availability of insolvency proceedings for individual entrepreneurs.

On 18 September 2020 **Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims** was enacted by the Parliament of Georgia and it went into force on 1 April 2021.[245] According to current law, it does not regulate insolvencies of individual entrepreneurs and natural persons.[246] We should highlight, that even individual entrepreneurs were taken out of the scope of the new law.[247] Even though, the deputy minister of justice of Georgia confirmed in 2017 that they were considering regulating the insolvency process of natural persons to this day there is no such regulation.[248]

5.2. The Debtor Registry[249]

The Debtor Registry is a systemized electronic database.[250] It aims to secure the **enforcement of monetary claims**, natural and legal persons are registered in that registry right away after they become the target of enforcement proceedings.[251] Debtors against whom the enforcement began after 1 January 2010 are registered in that registry by the National Bureau of Enforcement (NBE) of Georgia, and those against whom the enforcement began before that date can be registered by the initiative of the NBE.[252] The Debtor Registry is administered by NBE.[253]

The debtor is restricted from disposing of the property that he has registered under his name after being registered in the Debtor Registry.[254] The debtor can only dispose the property with the approval of the creditor.[255] The debtor's bank accounts are also seized, so this causes a lot of problems, they practically cannot participate in everyday economic activities.[256]

The identity of the debtors in the register is public and everyone can access it.[257] The debtor can be registered there for 10 years.[258] If after 2 years the claim is not enforced because there is no asset

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244 *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 38.

245 Ibid, 13.

246 Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Article 4(1)(a), Article 4(2)(a), 25/09/2020.

247 *Meskhishvili K. and others*, Basics of Insolvency Proceedings According to the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi, 2021, 27 (in Georgian).

248 Business Media Georgia, <https://bm.ge/en/article/gadaxdisuunaroba-shesadzloa-fizikur-pirebzec-gavrceldes/15059> [13.06.2023] (in Georgian).

249 The webpage of the registry, <https://nbe.gov.ge/index.php?sec_id=367&lang_id=ENG> [13.06.2023].

250 Law of Georgia on Enforcement Proceedings, Article $19^1(1)$, LHG, 13(20), 01/05/1999.

251 Ibid.

252 Ibid, Articles $19^1(1)$ and $19^1(1^1)$.

253 Ibid, Article $19^1(2)$.

254 Ibid, Article 19^3.

255 Ibid, Article $19^4(3)$.

256 Ibid, Article $19^2(3)$.

257 Ibid, Article $19^1(4)$.

258 Ibid, Article 34(1).

from which it can be paid, enforcement will be stopped.[259] However, the creditor can pay every year 200 Georgian Lari and extend the timeframe of enforcement up to a maximum of 10 years.[260]

So, for 10 years, almost 1/7 of a person's life, the creditors can seek to enforce their claims, and the debtor can be deprived of the will to participate in economic activity or to be employed.[261] This causes a lot of problems for individuals, apart from the **stigma** associated with it. As a rule, the indebted individuals are supported by friends, relatives, and neighbors.[262] So, we can say, that a quite long enforcement period and debtors' lack of seeking employment cause burdens for the whole society.

5.3. Possible Justifications in Support of Introducing Individual Bankruptcy in Georgia

Today in Georgia there is a **crisis of credit**.[263] Natural persons take credits for different reasons and then to repay them take other credits on worse terms.[264] It is stated, that in 2019 there were 158,422 natural persons registered in the Debtor Registry.[265] It is more dramatic that one-fifth of the workforce in Georgia is either registered in the Debtors' Registry or on the list of bad debts in the banking sector.[266] It is clear that all this impacts the overall economic stability of the country and can have a drastically negative effect over time.

We should also consider that indebted individuals not having the possibility to get discharged of their debts and not willing to seek employment thinking that all their income will be used to satisfy the claims against them for a long time may **promote the migration** of them. The migration of young people is already a problem in Georgia.[267] I have an **initial hypothesis** that not having individual bankruptcy only promotes the migration of young individuals because they seek employment in foreign countries, trying to save their income from Georgian enforcement authorities.

The Constitution of Georgia states, that "Georgia is a **social state**".[268] It gives the state responsibility to strengthen social justice and take care that natural persons have "the subsistence minimum and decent housing".[269] There is no answer in the constitution on how to achieve the goal of

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259 Ibid, Article 35(1^1).

260 Ibid, Article 35(1^2).

261 According to World Health Organization the average life expectancy in 2019 in Georgia was 73,3 years, < https://data.who.int/countries/268> [13.06.2023].

262 *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 76.

263 *Meskhishvili K. and others*, Basics of Insolvency Proceedings According to the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi, 2021, 27, (in Georgian).

264 Ibid.

265 <http://www.barristers.ge/ge/page/news_item/1388?fbclid=IwAR2moLlT0Y35U7VXBHJ6IjX_1X-Lw-GEjEWtY99HYbdSIFWbuJ95TK4GzGU> [15.06.2023] (in Georgian).

266 *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 71.

267 National Statistics Office of Georgia, < https://www.geostat.ge/en/modules/categories/322/migration >, the positive migration rate in 2022 can be explained by Russian and Ukrainian emigrants after the war [15.06.2023].

268 Constitution of Georgia, Article 5, Departments of the Parliament, 31-33, 24/08/1995.

269 Ibid, Article 5 (2) and (4).

the declared social state, although the state has discretion on how to achieve the abovementioned goals and what to do.[270] The dissenting opinion of the Constitutional Court states that the state is obliged to declare social rights by legislation and in case of poverty, provide an individual with basic means of subsistence.[271] Not doing so means that the state does not comply with its declared obligation to be a social state.[272]

We should remember that Bankruptcy law is a form of social legislation as much as it is an economic one.[273] Having introduced individual bankruptcy in the legislation can be seen as a part of the country's duty taken by declaring in the constitution that it is a social state, and takes care of natural persons' social rights. We can also argue, that not having individual bankruptcy provisions can breach Article 9 of the Constitution, which guarantees the **protection of human dignity**.[274]

Moreover, according to the modern standards and experience of other countries, it is essential to have the insolvency of natural persons regulated by legislation.[275] It is believed that giving individuals a "fresh-start" incentivizes them to **remain economically productive** and therefore contribute to the whole society.[276] Introducing individual bankruptcy will have a positive effect on Georgia's economy as a whole if it is regulated properly according to the needs of Georgian social-economic reality.[277] All the above mentioned justifies why Georgia should introduce an individual bankruptcy system in the legislation.

5.4. Recommendations to the Georgian Legislator About Key Issues of Individual Bankruptcy

Professor Reinhard Bork states that countries that are about to introduce individual bankruptcy systems should not make it very complicated, on the contrary, they should make it as easy as possible.[278] He states that the individual insolvent debtor's affairs generally are not very complicated, the debtor does not have many assets, if anything at all.[279] Professor Bork recommends finding **an easy discharge solution**, which will be fair for the creditors too.[280]

In Georgia individuals' bankruptcy is left without any regulation. There are two options for how to regulate individual bankruptcies: it can be regulated with the **general insolvency regulations** – as it

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270 Decision of August 27, 2009, N1/2/434 of the Constitutional Court of Georgia, Dissenting opinion of Ketevan Eremadze and Besarion Zoidze (paragraph 9), (in Georgian).

271 Ibid.

272 Ibid.

273 *Zywicki T. J.*, Bankruptcy Law as Social Legislation, Texas Review of Law & Politics, Vol. 5, №2, 2001, 429.

274 Constitution of Georgia, Article 9, Departments of the Parliament, 31-33, 24/08/1995.

275 *Meskhishvili K. and others*, Basics of Insolvency Proceedings According to the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi, 2021, 27, (in Georgian).

276 *Byington J. S.*, The Fresh Start Canon, Florida Law Review, Vol. 69, №1, 2017, 121.

277 *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 55.

278 Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

279 Ibid.

280 Ibid.

is in the U.S. and Germany, or a **special legal act** should be enacted that would regulate individual bankruptcies – this approach is taken by Lithuania.[281] In Lithuania, individual entrepreneurs registered by the law are also regulated by the same act as legal entities.[282]

Georgian legislators can consider combining individual bankruptcy provisions in the current law on Rehabilitation and the Collective Satisfaction of Creditors' Claims or enacting a separate legislative act. According to the deputy minister of Justice of Georgia in 2017 they were considering introducing an individual bankruptcy system through separate legal act.[283]

We can say, that since individual bankruptcy is a new phenomenon in Georgian society, it would be better to be regulated by a **separate legal act**, but it should be strongly in line with the insolvency regime established by the 2020 law. Also, even if individual bankruptcy is regulated by a separate legal act individual entrepreneurs should be still regulated with general insolvency regulation. So the new special regulations subjects should be **consumer debtors**.

The Georgian legislator should also decide whether to introduce the "**one window" principle** as it is in Germany, where the same provisions apply to all consumer debtors or separate rules should apply to different types of debtors according to their income, as it is in the U.S. Feasibility Study on the Regulation of Personal Insolvency in Georgia states, that it is better to deal with bankruptcy by rehabilitation and liquidating assets and discharging debts should be the last resort.[284] We can say, that in principle both U.S. and German legislation try to incentivize parties to participate in repayment plans by different means.

As we have already stated, the system of individual insolvency should not be very complicated, the legislation can provide for some income threshold according to which the court will decide whether the debtor can repay creditors through a repayment plan, and the natural persons who are above that income threshold should be guided to the provisions that would regulate **repayment plan**, the others – below that threshold – should be guided to the provisions that would **liquidate** their assets and distribute the money to creditors on pro-rata basis. So, Georgian legislators can take the U.S. approach (see Subchapters 3.3 and 3.7.).

The debtor's **repayment plan should be denied**, if creditors do not get more than they would have gotten in case the debtor's assets were liquidated, as it is in U.S. Chapter 13. It would help to ab initio prevent some abuses by the debtors, which is crucial.

The legislation should provide for who is eligible for individual bankruptcy like in Germany InsO defines consumers (see Subchapter 4.1.). The new law should state that the debtor is eligible if he does not or did not pursue the self-employed activity. The law can make some exclusions for self-employed with low income (below some threshold).

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281 *See generally* Lithuanian model on individual insolvency, *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 15-20.

282 Ibid, 15.

283 Business Media Georgia, <https://bm.ge/en/article/gadaxdisuunaroba-shesadzloa-fizikur-pirebzec-gavrceldes/15059> [13.06.2023] (in Georgian).

284 *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 40.

Discharge of debts for natural persons should be introduced to give them a "fresh-start". The preamble of the new law can state the goal, that "**honest but unfortunate debtors"** should be given a second chance and the "fresh-start". Discharge should be given after individuals complete the repayment plan, like in the U.S. Chapter 13, or after the liquidation of their assets. Also, the legislation can give debtors a period of up to three years, like it is in Germany, during which debtors should seek employment to at least partially repay their debts. In the Georgian legal community, some believe that introducing an individual bankruptcy system can give irresponsible debtors incentives to take credit without much thinking and responsibility, thinking that they can use the bankruptcy system opportunistically afterward.[285] Such a "cooling off" period will ensure that such cases are eliminated to a minimum.

Also, the state should fund some kind of advertisements – TV and Radio commercials and other means of informational campaigns to educate the individual debtors about their rights under the new individual bankruptcy system. They should make sure to highlight that the new system is offered to "honest but unfortunate debtors" and it will not give dishonest individuals an easy way to not fulfill their obligations. Of course, Banks and microfinance organizations may start to check credit history and repayment chances more strictly, but the legislators should make sure that there is a balance between creditors' and debtors' interests and the bank's requirements are not overly strict, resulting in no individual being able to take the credit.

In Georgia the **courts should have the jurisdiction to grant discharge** and filing for the bankruptcy case should automatically turn into discharge proceedings when it is needed. The courts should have jurisdiction over whole individual bankruptcy proceedings. Enacting an individual bankruptcy system may result in a large number of cases, that already loaded first instance courts will have to hear. In the U.S. there are **special bankruptcy courts**, Georgian legislators can also consider establishing special first-instance courts for bankruptcy cases.

There is always some **exempt property** that is not subject to liquidation, Georgian Law on Enforcement Proceedings states such property too, and of course it should be taken into account when regulating exempt property of individuals in bankruptcy.[286] It states that necessary personal and household items; for individuals engaged in agriculture – equipment and tools; the amount of minimum subsistence among others are exempt property, which cannot be taken or liquidated. The **subsistence minimum** in April of 2023 in Georgia was 251,8 Georgian Lari.[287] We can say, that it is proof of the above-given hypotheses that insolvent individuals in Georgia have no incentives to seek employment, they would not want to work full-time and be left with a subsistence minimum, which will not cover their expenses.[288] We can also presume, that all the above-mentioned can also give incentives to individuals to seek employment in such jobs, where they can work unofficially, without

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[285] *Meskhishvili K. and others*, Basics of Insolvency Proceedings According to the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi, 2021 27, (in Georgian).

[286] *See* Georgian Law on Enforcement Proceedings, Article 45, LHG, 13(20), 01/05/1999.

[287] National Statistics Office of Georgia<https://www.geostat.ge/en/modules/categories/791/subsistence-minimum> [14.06.2023].

[288] *Gvelebiani J., Kochlashvili A., Amisulashvili N*., Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 46.

being registered with the tax authorities and paying taxes, so in the end the country's budget incurs a loss.

New individual bankruptcy legislation should create **a little more generous exempt property**, and individuals who will be able to participate in repayment plans should be given a chance to use a reasonable part of their income for expenses. The system should not leave individuals to live in poverty, but it should not necessarily give them the possibility to live in luxury.[289] In the U.S. there is also a **homestead exemption**[290] (see Subchapter 3.4.), which can also be considered by Georgian legislators not to leave insolvent debtors without a place to live.

The **proceedings costs** should be also reasonable and in case the debtor gets discharged the proceeding costs should also be discharged as it is in Germany. Also, the law may set **compulsory mediation** requirements for the debtors and creditors.

The legislators should come up with a regulation that will keep dishonest debtors from bankruptcy proceedings. The legislators can take that from German InsO and U.S. Bankruptcy Code, to keep debtors who have not acted with good faith out of bankruptcy proceedings.[291]

The legislators should also regulate **non-dischargeable debts** exhaustively. They can take into account paragraph 523 of the U.S. bankruptcy code or German InsO Section 302, which we have discussed above. Also, the legislator should take into account exempt property declared by the Georgian Law on Enforcement Proceedings.

Georgian legislators can also establish some **official authority** that will be responsible for administrating and managing individual bankruptcy proceedings as the official authorities do in the U.S. and Germany. This authorities main function among others should be the liquidation of the debtor's assets or paying the creditors based on the debtors' repayment plans. Some argue that private enforcers or private insolvency practitioners can be more effective and faster solution for administering individual bankruptcy cases, but we should keep in mind that many cases are no-asset cases and they will not have financial incentives to manage the cases.[292]

6. Conclusion

In the U.S. individual debtors can file for bankruptcy under **Chapters 7, 11, and 13**. Generally, individuals file under Chapter 7 – **Liquidation** (see Subchapter 3.3), where their assets are sold and creditors are paid from it, or under Chapter 13 – **Adjustment of Debt of an Individual with Regular Income** (see Subchapter 3.7.), where the debtor represents a repayment plan and the court assesses and confirms it, then the debtor pays to the creditors according to the plan for 3 or 5 years. In Chapter 7 the debtor goes through the "**means test"** (see Subchapter 3.5.) which examines, whether he is eligible for

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289 *Keith C. A*., A Forced Crisis: Why Student Loan Debt Should Be Separately Classified under Chapter 13 Bankruptcy Plans, Delaware Journal of Corporate Law, Vol. 44, №2-3, 2020, 255.

290 In the U.S. there is a federal homestead exemption of 27 900 $, it means that debtors house up to this value is exempted and even if it is liqudated the debtors will receive that amount. In case it was used as a collateral than first the secured creditor is payed and then the debtor.

291 German InsO, Section 290.

292 *See Gvelebiani J., Kochlashvili A., Amisulashvili N*., Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 41.

Chapter 7. The "Means test" examines debtors by the median monthly income, comparing their income to the state's median income and examining their disposable income.

In Germany, consumer debtors are offered the possibility to get a discharge of their residual debts (see Subchapters 4.1. and 4.3.). The debtors are forced to try to settle with the creditors during the **out-of-court** and **in-court settlement proceedings** before the court hears the case. Afterwards, the debtor is given a 3-year compliance period to seek employment and repay the creditors. Then if the debtor cannot repay the creditors during those three years his assets are liquidated and the creditors receive the money out of it. The debtor gets discharged but needs to apply for discharge.

As we have already stated, there is a crisis of credit in Georgia, with 158,422 natural persons registered in the Debtors Registry. In Georgia potentially the creditors can seek enforcement of their claims for 10 years, which is almost 1/7 of an average person's life. Therefore, it is essential to introduce an individual bankruptcy system that will give "**honest but unfortunate debtors"** a "fresh start". It will impact the overall economy of Georgia positively and give indebted individuals the incentives to seek employment and become economically active members of society again. It will help not only the indebted individuals but the whole country's economy. Also, we should highlight that the Constitution of Georgia guarantees the social rights of natural persons and social rights include that there is an individual bankruptcy system available (see Subchapter 5.3.).

Georgian legislators can create **a separate legal act** that will regulate the individual bankruptcy system close in line with the insolvency regime of legal entities. We discussed that the "two-window" principle can be implemented, meaning that debtors with income above some threshold can be imposed to participate in **repayment plans**, and other assets can be **liquidated** and distributed to creditors on a pro-rata basis. Georgian legislators should pay close attention to how this is regulated in the U.S. – because it's the most tested system and in Germany – because it's one of the most influential *civil law* jurisdictions.

The new law should provide an explicit definition of who is eligible for individual bankruptcy proceedings, it should also offer honest debtors the discharge of their debts, but keep dishonest debtors away from it. They should also declare non-dischargeable debts and exempt property and try to keep the balance between the satisfaction of creditors and the basic needs of debtors. The new law should also establish an authority that will administer and manage individual bankruptcy cases (see Subchapter 5.4.).

In addition, it is interesting to see when the individual bankruptcy system will be enacted in Georgia and how it will be regulated. Hopefully, the recommendations and discussions from this article will be useful for Georgian legislative practice and legal doctrine and not only for Georgian one.

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Impact of the Position of the Victim on the Adjudication of Justice (Domestic Violence Cases)

Adjudication of justice in cases of domestic violence still remains a major challenge for the criminal justice system despite the abundance of international acts, the harmonization of national legislation with international standards, a number of mechanisms for the protection of victims, the availability of crime prevention and resocialization programs for criminals, awareness-raising campaigns, and a substantial change in the public attitude to the issue, the widespread use of restraining orders, the appeal of victims to law enforcement agencies, and a significant increase in the number of convictions[1]. One of the major challenge is related to either the changed position of the victim during the trial or, depending on the nature of the crime, lack of evidence for the conviction despite the victim's incriminating testimony.

Keywords: *domestic violence, victim's testimony, refusal to testify, restraining order, investigative experiment, standard of proof.*

1. Introduction

"The obligation to conduct an effective investigation is an obligation which concerns the means to be employed, and not the results to be achieved"[2] yet, "deficiencies in the collection of evidence in response to a domestic violence incident may lead to an underestimation of the degree of violence taking place... adversely affecting the prospects for criminal investigation and discourage the victims of domestic violence (who are often already under pressure from the society) from reporting an abusive family member to the authorities in the future"[3].

Article 55 of the Council of Europe Convention on "Preventing and Combating Violence Against Women and Domestic Violence"[4] (hereinafter – the "Istanbul Convention") obliges Georgia to provide *ex officio* proceedings, which should not be "fully dependent" on a report or complaint by the victim and should continue even if the victim, later, rejects to testify or withdraws his/her

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1 During 2023, 2928 persons were convicted for family crimes, of which 1413 were convicted of domestic violence. Of these, 427 and 228 persons were acquitted, respectively; 988 and 438 persons (respectively) were sentenced to imprisonment. In 2022, 2375 people were sentenced for domestic violence and family crime, and 420 people were acquitted.

2 Tkhelidze v Georgia, no. 33056/17, [2021], ECHR, 50. See Mižigárová v. Slovakia, no. 74832/01, [2010], ECHR, 93.

3 Tkhelidze v Georgia, ibid, 54.

4 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence Istanbul, 11.V.2011, CETS 210.

complain. The Criminal Procedure Code of Georgia[5] (hereinafter – "CPCG") does not provide for private/private-public prosecution institutions. For all crimes, the criminal prosecution is public and does not depend on a victim's complain (whether victim reports to the investigative body) or on his/her reconciliation with the accused, the victim is not a party in the criminal proceedings and they cannot influence the investigation or the course of the court proceedings. Even if there is a document confirming the absence of the victim's claim against the accused in the case materials, the question of the accused's responsibility is decided on the basis of other evidence in the criminal case[6]. However, in some cases, the implementation of justice is still indirectly related to the position of the victim during the trial – will they testify in court against abusive family member , or either use the privilege granted under Article 49 of the CPCG or change the information provided at the investigation stage about the crime and the subject of the crime.

Since the interests of the victims and the accused/convicted are conflicted throughout the administration of justice, even though "in cases of domestic violence, the rights of the perpetrators cannot override the rights of the victim to life and physical and psychological integrity (see Talpis v. Italy, no. 41237/14, § 123, 2 March 2017, ECtHR),"[7] the European Convention for the Protection of Human Rights and Fundamental Freedoms[8] (hereinafter – the "European Convention") establishes the rights provided for in Article 6 for persons accused of any category of crime and, along with the protection of victims, requires ensuring a fair trial (fully/with all legal components) for accused/convicted.

2. The Importance of Victim Participation

The European Court of Human Rights and the Constitutional Court of Georgia[9] indicate that Georgia has created an "adequate legislative and administrative framework aimed at combating domestic violence against women in the country."[10] However, despite the increased referrals to law enforcement and the widespread use of restraining orders, the position of the victim in court is, in most cases, crucial to the administration of justice.

"Sufficient victim participation provides certain benefits to the justice system as a whole, as victim involvement can be an important supporting factor in the investigation and can be helpful in the process of establishing the truth. ..... they can, by participating in the trial/case hearing, in particular, by giving explanations to determine the circumstances relevant to the case, make a significant contribution to establishing the truth."[11]

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5 Criminal Procedure Code of Georgia, 09/10/2009, № 1771-IIს (In Georgian).

6 Judgement of the Chamber of Criminal Cases of the Supreme Court of Georgia (hereinafter – the "Supreme Court of Georgia") dated March 13, 2024 in case N959ას-23, par. 6; Decision No. 766ას-19 of the Supreme Court of Georgia of February 3, 2020; Ruling of the Supreme Court of Georgia of March 19, 2020, case №737ას-19, par. 11 (In Georgian).

7 Tkhelidze v Georgia, no. 33056/17,[2021], ECHR, 49.

8 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4/11/1950 CETS 5.

9 See Decision № 1/2/1257,1280 of April 30, 2020, of the Constitutional Court of Georgia "Citizens of Georgia – Sofio Garuchava and Nino Khosroshvili against the Parliament of Georgia" (In Georgian).

10 Tkhelidze v Georgia, ibid, 52.

11 Decision of the Constitutional Court of Georgia of September 30, 2016 "Citizen of Georgia Khatuna Shubitidze v. Parliament of Georgia", II-43 (In Georgian).

Considering the latent nature of domestic violence, since it is usually carried out in a private space, away from the eyes of strangers, and/or due to the eyewitness family members refusing to testify in court (based on Article 50 of the CPCG), or due to their age/physical or mental state as they cannot fully perceive and/or convey what they saw/heard, – the testimony of the victim is the key.

As a rule, at the investigation stage, witnesses and victims actively cooperate with the investigative authorities (on the basis of their report/statement, the investigation is started, within the scope of the medical examination/expertise – medical personnel/experts, as well as the patrol police officers/investigators at the scene of the incident) are provided with information about the injuries received and the underlying causes (about the subject), they describe the criminal case in detail during the inquiry, and express their readiness to testify in court, participate in the investigative experiment; when issuing a restraining order, they describe the incident in detail and confirm the correctness of the information specified in the restraining order/report (the fact/type of violence, the identity of the perpetrator, etc.) with a signature, etc.), however, during the hearing on the merits of the case in court, they refuse to testify or interpret the factual circumstances related to the case of the alleged crime differently (e.g., the injury was caused by the fall of the victim, and not by violence on the part of the accused; The investigator incorrectly reflected their testimony in the report of the inquiry, and they signed the report without reading it). With this, they aim to explain the cause of the damage indicated in the expert opinion on one hand, and on the other hand – exclude that the damage has been caused by the defendant.

Although the victim's changed position (different interpretation of the facts/refusal to testify) affects law enforcement, the most challenging issue for justice is the victim's use of the privillege provided for by Article 49.2 (d) of the CPCG.

3. Legal Consequences of Substantively Changed Testimony by a Victim in the Court for the Administration of Justice [12]

Regardless of Article 3, Section 24 of the CPCG, the court is not obliged to share the testimony of the victim. The court must evaluate all the evidence in the case (including the testimony of the victim) as per the requirements established by Article 82 of the CPCG and take into account, *inter alia*, the consistency and categorization of the witness's testimony with other evidence and factual circumstances, the witness's perception, narration skills and memory, vulnerability of victims of domestic violence. Therefore, when the victim substantially changes their position during the testimony in court and does not confirm the information specified in the report/inquiry report (for example, testifies that neither in this case nor in the past, they did not blame the mother for beating them[13]), they explain the reason for providing incorrect information (for example, the mother often gave negative remarks for being friends with certain individuals) and the purpose (for example, preventing the conflict escalation), the interview report of the victim was examined in court on the basis of Article 243 of the CPCG and the victim was given the opportunity to explain the difference

[12] For this article, we will not consider the issue of criminal liability of the victim.

[13] Ruling of the Supreme Court of Georgia of January 25, 2024, case №1072ბ3-23, para. 14 (In Georgian).

between the statements (for example, they indicated that they did not have glasses during the interview and signed without reading the survey report), the reliability of the information provided during the survey was assessed based on a detailed analysis[14] of all the factual circumstances and evidence in the case, the information specified in the survey report is consistent with other evidence (e.g., the restraining order/report, the statements of the patrols announced immediately at the scene of the incident about the psycho-emotional state of the victim, expert report, medical examination/investigative experiment/inspection reports, etc.), – the court shares the information provided by the victim during the inquiry, as the verdict must be based on a corresponding set of evidence.

For instance, the court changed the verdict of not guilty issued by the court of appeals and noted that although the victim did not confirm the factual circumstances indicated by them at the investigation stage, she stated that the injuries were caused by her health condition (epileptic attacks), noted that she signed the investigation report without even reading it, denied the circumstances indicated in the inquiry report and the violence (against her) by the accused, – the court considered that the veracity of the information provided during the inquiry should be assessed through detailed analysis of all the factual circumstances and evidence in case[15]. The court took into account, that the factual circumstances indicated in the victim's testimony essentially contradicted the set of evidence in the criminal case (the victim appeared at the police station with the witness and indicated physical violence against her by the convicted person; based on the information provided by her restraining order/report was issued, which was signed by both the victim and the convicted person, the restraining order/ report was not appealed by the abuser and no comment was made on it), the victim consistently and uniformly described the crime committed against her with the participants of the process (witnesses, within the framework of various investigative and procedural activities, medical personnel, etc.), there was no document presented that proved that the victim was suffering from epilepsy, it was not proved that the injuries were related to the aforementioned disease, vulnerability of the victims of the mentioned category of crime and the hearsays presented in the criminal case (to assess the reliability of the testimony of the victim)[16].

4. Victim's Refusal to Testify v. Administration of Justice

The victim's refusal to testify during the hearing can be due to many reasons. Therefore, first of all, attention should be paid to the motives behind the victim's position and to find out whether there is an illegal influence on the victim's freedom of will.[17] Concurrently, when the victim refuses to testify in court, the prosecution side tries to use other evidence presented in the criminal case to justify the

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14 See Judgment of the Supreme Court of Georgia of February 20, 2018 on case No. 527ბ3-17, II-8 (In Georgian).

15 Ibid., II-8.

16 Judgement of the Supreme Court of Georgia on March 11, 2024, case №1009ბ3-23, II-19.1-19.5 (In Georgian).

17 See *Kochlamazashvili B.,* Peculiarities of Domestic Violence Case Hearings in Court, Current Issues of Criminal Law, N2, 2017, 51 (In Georgian).

charges presented. However, depending on the nature of the crime, as a rule, most of the presented evidence is either indirect in nature or is based on the information provided by the victim to the authorities throughout the investigation, and/or is not related to the subject.

In the event of the violence being carried out unnoticed by others (witnesses), the victim's testimony and the forensic medical report[18]/medical examination report are the main incriminatory evidence. In the case of the victim's silence, the expert report/medical examination report, although it can confirm the presence of injury on the victim's body, is uninformative in finding out who is the perpetrator. Hence, "the existence of the injury will be confirmed, but the identity of the person who caused it will remain unknown to the court, which will ultimately lead to the acquittal of the accused.[19] "At the same time, the testimony of a witness and/or the existence of traces of physical damage *per se* does not always confirm experiencing physical pain by the victim, which is a necessary sign of the crime under Article 126[1] of the Criminal Code of Georgia.

Although it is true that the refusal by the victim, based on Article 31 of the Constitution of Georgia[20] and Article 49.1 (d) of the CPCG, "does not mean that they deny the factual circumstances indicated in their testimony at the investigation stage, nor does it confirm the absence of a criminal act,[21] yet, *a prior* shall not lead to ignoring the results of the investigative/procedural actions conducted with their participation and does not automatically invalidate the facts established by these actions, however, it affects the evidentiary force of the investigative/procedural actions conducted with their involvement, where the primary source of the actions is a victim, and/or in fact (in substance) checking the information provided by the witness (victim).[22]

Specifically, even though "the victim's refusal to testify does not exclude the examination of the reports of investigative/procedural actions carried out with their participation (the correctness of which is confirmed by the victim's signature) at the trial," [23] if this evidence (the primary source of which is the victim) are not recognized by the defense as unchallenged (does not apply to the investigative experiment report, which is not related to the on-site examination of the victim's testimony) – it is not be used in justifying the judgment of conviction.[24]

According to well-established judicial practice, when a victim refuses to testify in court, the use of the investigative experiment involving the victim, the report of the crime scene[25]/visual examination

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18 Which establishes the fact of physical injury/mental suffering.

19 *Kochlamazashvili B.,* ibid, 52 (In Georgian).

20 Constitution of Georgia, 24/08/1995, with amendments of 2018, №786-რს (In Georgian).

21 Ruling of the Supreme Court of Georgia dated October 11, 2022, case № 714ას-22 (In Georgian).

22 Ruling of the Supreme Court of Georgia on July 14, 2020, case № 97ას-20 (In Georgian).

23 Ruling of the Supreme Court of Georgia on February 21, 2020, case №721ას-19, para. 12 (In Georgian.)

24 Ruling of the Supreme Court of Georgia of December 28, 2022, case №909ას-22, para. 10; see also, the decision of the Supreme Court of Georgia of August 9, 2022, case №619ას-22; The ruling of the Supreme Court of Georgia of November 3, 2022, in case №845ას-22 (In Georgian).

25 Ruling of the Supreme Court of Georgia of October 26, 2023, case №856ას-23, par. 16. If the victim refuses to testify, the incident scene inspection report taken separately shall not constitute independent evidence (direct and/or circumstantial) of the crime under the first part of Article 126[1] of the Criminal Code of Georgia, and it shall not be used for conviction (if it is challenged evidence). If the report contains only

of the victim/medical examination, and the victim's statement/report of the crime is also not allowed for sentencing purposes, as although the victim signs the report and the investigators questioned as witnesses in court (who carried out the said investigative activities) confirm the correctness of circumstances, the primary source of the information specified in all documents is the victim (defendant has not been allowed to challenge their interrogation and the reliability (reliability of the information provided by the victim), as per the established standard under Article 6 of the European Convention[26]), therefore the mentioned procedural documents should not be considered as independent evidence either[27].

According to the procedural legislation of Georgia, the court is obliged to check the evidence presented in the criminal case from both formal-legal (observance of the rules of obtaining evidence) and content (reliability of the information indicated in them) perspectives, for which it is important to interrogate the primary source. The court has repeatedly noted that the mechanical and formal application of the requirements established by the CPCG cannot ensure the right to a fair trial. Accordingly, even though Article 78.1 of the CPCG relates to the admissibility of the document (the relevant procedural/investigative activity reports) as evidence, including the questioning of the person who obtained/created and/or with whom this document was kept before being presented to the court. To share the information established by the report of the investigative/procedural activity (if it is disputed evidence), which is fully based on the information provided by the victim (for example, the investigative experiment report, the notification/restraining order report), it is necessary to interrogate the primary source of the information, and not the investigator who compiled the relevant procedural document, as together with the purpose of Article 78 of the CPCG (establishing the authenticity of the document), Article 82 of the CPCG should also be taken into account, which, among other things, establishes the obligation to evaluate the veracity of the evidence (in this case, the victim), which includes the assessment of the credibility of the source of information – the victim. It should also be taken into account that, in contrast to interrogation, in the case of notification/application, the applicant is not warned about the expected liability for false testimony and false denunciation"[28].

Hence, the investigative experiment report cannot be used as a basis for a judgment of conviction, if during the investigative experiment, the information provided by the victim/witness in the investigation report was practically checked on the spot and the situation was restored. In such cases, the report/content of the investigative experiment is to check the information provided by the

information provided by the victim. See the ruling of the Supreme Court of Georgia of November 7, 2022, case №953ას-22, para. 2 (In Georgian.)

26 Ruling of the Supreme Court of Georgia of October 24, 2023, in case №765ას-23, Par. 15 (In Georgian.)

27 For example, during the investigative experiment, the victim indicated the places where the son physically and verbally abused her, threatened to kill her, and damaged household items. See the judgement of the Supreme Court of Georgia of March 1, 2024, case № 910ას-23; Ruling of the Supreme Court of Georgia of May 30, 2023, case N158ას-23; Ruling of the Supreme Court of Georgia of October 2, 2023, case № 496ას-23; Ruling of the Supreme Court of Georgia of May 30, 2023, case N158ას-23; Ruling of the Supreme Court of Georgia of October 2, 2023 in case № 496ას-23.

28 Judgment of the Zugdidi District Court of November 12, 2020 (No. 1/160-20) (if the applicant was not warned about the criminal responsibility for giving false testimony, the mentioned, in appropriate cases, does not exclude the possibility of imposing criminal responsibility for perjury) (In Georgian).

victim/witness during the interview. Therefore, although the testimony of the witness/victim and the investigative experiment report are two different pieces of evidence, it is clear that the source of the information in both cases is the same person. [29]

Similarly, the crime scene report, if it contains information provided by the victim, which they did not confirm in court,[30] taken independently/separately from the victim's testimony, does not constitute direct and/or circumstantial evidence, as it does not contain any information that would additionally corroborate the information on the crime taken place provided by the victim.[31]

The inspection report shall not be used for conviction either when it contains only the information provided by the witness/victim, which the witness/victim does not confirm in court (refuses to testify/denies the information provided by them during the investigation stage).[32] Among them – the use of photographs (which show the injuries, but not the fact of violence directly) as well as the inspection report with the victim (for example, the photographs submitted by the victim for the investigation were viewed, which, according to the victim's explanation, show him with the injuries inflicted by their spouse on August 9 and 13, 2019), as the report determines the presence, quantity, and localization of the damage, but with the mentioned report and photographs it is impossible to determine without fail the fact of who caused it, or when and under what circumstances the victim got the said injuries; Whether the experienced violence caused them pain or not; [33] The correctness of the description provided by the victim when viewing the photographs.

Equally, even when the forensic medical expert's report is found irrebuttable, the expert's report confirming the presence of injuries on the victim's body is not sufficient to issue a judgment of conviction, if it is not possible to determine who and under what circumstances caused the said injury to the victim[34] (no direct evidence is presented) exculpatory evidence). Since "even though the expert report confirms the presence of injuries on the victim's body, it is objectively impossible to determine the identity of the person causing the injury, if any, when the victim uses the right granted by Article 49 of the CPCG, and the case does not present any evidence that would confirm the occurrence of the injuries indicated in the examination report as a direct result of the action taken by the accused towards the victim[35].

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29 For example, see Ruling of the Supreme Court of Georgia of July 7, 2020, case № 315ას-20; Ruling of the Supreme Court of Georgia dated October 18, 2023, case № 679ას-20; Ruling of the Supreme Court of Georgia of January 16, 2024, case №948ას-23, para. 14; Ruling of the Supreme Court of Georgia of January 29, 2024, case №1005ას-23, par. 16; Ruling of the Supreme Court of Georgia of February 29, 2024, case №1303ას-23, para. 15. (In Georgian.)

30 Ruling of the Supreme Court of Georgia of March 20, 2024, case №1317ას-23, para. 16 (In Georgian.)

31 Ruling of the Supreme Court of Georgia of March 15, 2024, case № 1438ას-23, para. 17 (In Georgian.)

32 Ruling of the Supreme Court of Georgia of January 24, 2024, case №1071ას-23, para. 18. (The jacket presented by the victim was inspected, it had a twisted shoulder, which, according to the victim's explanation, was caused by the accused's hand-holding and shaking, which caused them physical pain) (In Georgian).

33 The judgment of the Tbilisi Court of Appeals on November 24, 2020, case №1ბ/1565-20 (In Georgian.)

34 Ruling of the Supreme Court of Georgia of February 21, 2020, case №721ას-19, para.15 (In Georgian.)

35 Ruling of the Supreme Court of Georgia dated October 26, 2023, case №856ას-23, para.18.1; Ruling of the Supreme Court of Georgia of February 21, 2020, case №746ას-19, para. 17; Ruling of the Supreme Court of Georgia on February 29, 2024, case N1303ას-23, para.16.1 (In Georgian).

5. Evidentiary Power of Restraining Order/Report

When proving domestic violence, the court increasingly uses the restraining order and its report as incriminatory evidence, although the use of said evidence for conviction is also related to certain prerequisites. In particular, when assessing the probative value of a restraining order/report for sentencing purposes, the court will first consider that the restraining order is usually based entirely on the information provided by the victim. Therefore, if the victim refuses to testify in court, and the restraining order/report is disputed evidence, the court is deprived of the possibility of using it for conviction[36], as during the hearing on merits the defense was not allowed to interrogate the primary source of information (in the case of a restraining order – the victim) and, accordingly, the opportunity to challenge the credibility of the information presented in the evidence and to investigate the credibility of the information provider.[37] Moreover, when considering the issue of using a restraining order/report for sentencing purposes, the court, along with the formal-legal aspects of the legality of the restraining order/report, pays attention to the detailing, concretization, and consistency of the restraining order/report, the accuracy of the description of the actual circumstances of the alleged incident of violence, whether the report is signed by the accused[38]; the presence of a remark in the text of the report, whether it was appealed as per the law, was recognized irrebuttable by the parties.

A restraining order/report is direct evidence if the information specified in it refers to the circumstances included in the subject of claim[39]. In addition, – it is independent incriminatory evidence when the source of information specified in the restraining order/report (victim) confirms the information specified in the report during the hearing on merits, gives incriminatory testimony at the hearing on merits and/or the restraining report is recognized irrebuttable by the parties[40]; The report was signed by the accused[41], the accused did not exercise the right to appeal the order, there is no reason to doubt the legality of the order/report and the authenticity of the facts reflected in them, and

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36 Ruling of the Supreme Court of Georgia of December 28, 2022, case N909ას-22, para. 11 (In Georgian).

37 Ruling of the Supreme Court of Georgia dated October 27, 2023, case №858ას-23, para. 16; see Also: the judgment of the Supreme Court of Georgia of March 13, 2024, case №959ას-23, II-8.4.; Ruling of the Supreme Court of Georgia on August 9, 2022, in the case №619 ას.-22; Ruling of the Supreme Court of Georgia of October 31, 2023, case N855AP-23; Judgment of the Supreme Court of Georgia of July 7, 2020, case №315ას-20; Judgment of June 1, 2020, case №49ას-20; Judgment of January 16, 2024, case №948ას-23; Judgment of the Supreme Court of Georgia dated October 31, 2023, case №855ას-23, para. 15.1; Judgement of the Supreme Court of Georgia on March 13, 2024, case №959ას-23. (In Georgian.)

38 The ruling of the Supreme Court of Georgia of November 3, 2022, case №845ას-22, para. 12; see Also: the ruling of the Supreme Court of Georgia on August 9, 2022, case N619ას-22 (In Georgian).

39 Judgement of the Supreme Court of Georgia on March 13, 2024, case N959ას-23, par. II-8.1.; see also the judgementt of the Supreme Court of Georgia of December 28, 2020, case №585ას-19; Ruling of the Supreme Court of Georgia of June 2, 2022, case №331ას-22; The judgment of the Supreme Court of Georgia of February 24, 2022, case №1051ას-21; Ruling of July 6, 2022, case №509ას-22 (In Georgian).

40 See for example, the ruling of the Supreme Court of Georgia of February 6, 2024, case N1107ას-23, para. 9 (In Georgian).

41 See Judgment of the Supreme Court of Georgia of June 7, 2022, case №257ას-21, II-19 (In Georgian).

the parties had the opportunity to examine them at the court hearing[42]. However, at the court hearing, with the participation of the parties, only the public reading (disclosure)[43] of the mentioned documents by the prosecution and the questioning of the investigating officer (with whom the document was kept before being presented to the court) does not create a basis for their use for conviction, as on the one hand, the defense party is not allowed to check the reliability of the source of information in the documents (in the order/report), and on the other hand, – questioning the investigator cannot ensure the purpose of the first part of Article 78 of the CPCG, since the investigator has no information related to the events described in this document, nor to the correctness/accuracy[44] of the description of the actual circumstances, nor regarding the legality of signing the document. Therefore, the determination of the person to be questioned for the purposes of Article 78 of the CPCG depends on the specific circumstances of the case (including the form of the document, the circumstances of obtaining the document, the testimony of the person/source presenting the document, etc.), to achieve the goals of the questioning – to determine the authenticity and origin of the evidence.[45] In this case, it could be either the author of the restraining order or the primary source (provider) of the information in the disputed document.[46]

In addition, it is important to detail the restraining order – it must describe in detail and specifically, the action taken (the actual circumstances of the violence)[47], the feeling of physical pain/suffering by the victim, the causes of it, the presence of bodily injuries, as in case of doubt, the record of the restraining order can be used as incriminatory evidence. It will be used only in relation to those episodes/circumstances where descriptions in the reports meet the above requirements.[48]

Thus, the use of a restraining order/report for conviction depends on one hand on the relevance and pertinence of the information specified in the order/report (to what extent it indicates the circumstances included in the subject of proof); Upon the defendant's recognition of the circumstances specified in the restraining order/report (by recognizing it as irrebuttable and/or by signing the correctness of the content and *de facto* refusal of the right to appeal) [49], the victim's giving an incriminatory testimony.

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42 See, for example, the judgment of the Supreme Court of Georgia of February 24, 2022, case №1051ას-21, II-11; Judgment of the Supreme Court of Georgia of December 28, 2020, case № 585ას-20, para. II-12-13; The judgment of the Supreme Court of Georgia of February 24, 2022, case №1051ას-21; The verdict of the Supreme Court of Georgia of June 7, 2022, in case №257ას-21; Ruling of the Supreme Court of Georgia of June 2, 2022, case №331ას-22 (In Georgian).

43 Judgement of the Supreme Court of Georgia on March 13, 2024, case № 959 ას-23 (In Georgian).

44 Judgment of the Supreme Court of Georgia of March 13, 2024, case № 959 ას-23, par. II- 8.2.4 (In Georgian).

45 For example: the Ruling of the Supreme Court of Georgia of July 7, 2020, case №99ას-20 (In Georgian).

46 Judgment of the Supreme Court of Georgia of March 13, 2024, case № 959ას-23, par. II- 8.2.3 (In Georgian).

47 Ruling of the Supreme Court of Georgia of January 9, 2023, case № 950ას-23 (In Georgian).

48 Ruling of the Supreme Court of Georgia of January 16, 2024, case № 948ას-23, Par. 15 (In Georgian).

49 See, for example, the ruling of the Supreme Court of Georgia of October 24, 2023, case № 793ას-23, par.15 (In Georgian).

6. Probative Weight of Report of Crime

The use of the notification for conviction shall be allowed when the notification was made by a neutral person who, during questioning in court, confirmed the circumstances indicated in the notification.[50] The notification/application of the victim, which is the basis for the initiation of the investigation, cannot be the basis for a judgment of conviction not only when the evidence presented in the criminal case does not prove that the said statement/message belongs to the victim, but also if the evidence presented in the criminal case establishes that notification/application has been made by the victim (e.g. testimonies of eyewitnesses, phonoscopic examination report, record review report with the victim), – since the notification/application is the basis for the initiation of the investigation and the existence of the criminal actions described in it must be verified and confirmed by investigative and procedural actions,[51] the victim's notification/application cannot replace the victim's testimony – The actual existence and correctness of the factual circumstances indicated in the notice must be confirmed by the criminal case materials.

After the legislative changes of May 24, 2022, the parties are given the right to request the audio recording of the message, but the use of said recording for conviction is still not allowed (even if the authenticity of the recording and the implementation of the call/oral or written notification directly by the victim are not disputed), when the reliability of the information specified in the message is disputed, and the defense did not have the opportunity to be questioned in the court of first instance. Based on the requirement of fairness of the proceedings and the obligation to ensure the right of defense, the defense party must have the opportunity to examine the credibility of the information specified in the notification and the reliability of the source (in this case, the victim) in court, which is why it is not allowed to use the victim's notification (oral/written form) for conviction.[52]

However, there are exceptions. If the existence of the circumstances specified in the report is established as irrebuttable by the combination of the evidence presented in the criminal case, despite the victim's refusal to testify, the court may still use the report for conviction. For example, the court took into account the victim's phone message *(according to the crying victim, if her spouse found out about the notification, he would kill her),* the testimony of the witness (it was confirmed that the victim called the police and ambulance), personal examination data of the victim (the presence of blood stains on the victim's body was determined), medical examination report (the bruises on the victim's body were caused by the action of some dense blunt object and both individually and

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50 See, for example, the judgement of the Supreme Court of Georgia of March 11, 2024, case №1009ას-23 (In Georgian).

51 The Ruling of the Supreme Court of Georgia of February 29, 2024, case №1303ას-23, para. 13; Ruling of the Supreme Court of Georgia of January 29, 2024, case №1005ას-23, par. 14; The Ruling of the Supreme Court of Georgia of March 5, 2024, case №1255ას-23, par. 14; Ruling of the Supreme Court of Georgia of March 20, 2024, case №1317ას-23, par. 14; Ruling of the Supreme Court of Georgia of October 24, 2023, case №793ას-23; Ruling of the Supreme Court of Georgia of November 7, 2022, case №953ას-22, para. 9 (In Georgian).

52 16. See, for example, the Ruling of the Supreme Court of Georgia of October 31, 2023, case №855ას-23, par. 16 (In Georgian).

combined belong to the light degree of physical injuries to the detriment of health (the period does not contradict the date indicated in the preliminary reports), the forensic psychological examination report (it was determined that the victim suffered psychological suffering due to the actions carried out by the spouse, and according to the expert's testimony, the victim had the highest level of anxiety, and their mental state was extremely severe) and practically immediately after the disputed incident and receiving the notification, the testimony of the investigator who appeared at the scene of the incident and inspected it confirmed the physical insulting of the victim beyond a reasonable doubt.[53]

7. Proving Physical Pain/Suffering by the Victim

Another challenge is related to the question of establishing physical pain/suffering caused to the victim by the disputed action in case the victim refuses to testify or changes the incriminatory testimony.

The crime provided for in Article 126[1] of the Criminal Code of Georgia is of a material nature and is related to domestic violence, including causing physical pain or suffering to the victim. Accordingly, in order to qualify the action under Article 126[1] of the Criminal Code, such damage must be proven by the evidence presented in the criminal case.[54]

To prove the infliction of suffering, the psychological examination report (determines both the fact of infliction of suffering and the cause of the suffering/person whose actions caused it) must be included in the materials of the criminal case. It is relatively problematic to determine the fact of inflicting physical pain when the victim is covered by the right provided for in subsection "d" of Article 49 of the CPCG, and in the criminal case there is no evidence that would objectively confirm the feeling of physical pain by the victim, independently of the testimonies of the victims[55], as despite the determination of the physical impact marks on the victim's body, the mechanism of the formation of the marks and the severity of the injury, according to the expert report/medical examination report, neither the identity of the person causing the injury nor the feeling of pain from the injuries received can be objectively determined.

To establish the fact of inflicting physical pain, subjective and objective tests are used (whether the person was objectively experiencing physical pain or suffering in the given case) [56].

"Feeling physical pain" depends not only on subjective but also on objective criteria – the intensity of the committed action and the injuries inflicted on the victim, based on the joint analysis of which it is determined whether the victim of violent actions experienced physical pain in a particular case[57]. The presence of an expert opinion in the criminal case file does not *per se* confirm the feeling

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53 The judgment of the Supreme Court of Georgia of March 13, 2024, case № 959ას-23 (In Georgian).

54 Ruling of the Supreme Court of Georgia on January 16, 2024, case № 948ას-23 (In Georgian).

55 Ruling of the Supreme Court of Georgia of January 22, 2024, case №1048ას-23 (In Georgian).

56 Ruling of the Supreme Court of Georgia on the case of February 4, 2020, case № 627ას-19, para.13; Ruling of the Supreme Court of Georgia on February 21, 2020, case №746ას-19, para. 18 (In Georgian).

57 For example, see the Ruling of the Supreme Court of Georgia of February 4, 2020, case № 627ას-19; Judgment of the Supreme Court of Georgia of October 29, 2020, case № 443ას-20; The judgment of the

of pain. Even if the expert's report establishes that the victim was injured during the alleged crime, the expert's report does not confirm the feeling of physical pain by the victim[58]. Therefore, in some cases (taking into account the nature of the injuries provided for in this article[59]), *inter alia,* the anamnesis/testimonies of eyewitnesses (what did the victim complain about after the violence/did she complain of pain) [60] are crucial, as the existence of an injury, without the feeling of pain, is not sufficient for action to qualify as per Article 126^1 of the Criminal Code of Georgia. At the same time, abuse may not leave visible traces and cannot be detected even by medical examination. Yet, this does not exclude the infliction of pain on the victim. Hence, along with the objective criterion, the court pays special attention to the subjective criterion. "The need for an objective assessment does not always exclude the need for a subjective assessment, and in some cases, without a subjective assessment of the victim, a correct assessment of the situation will be unthinkable. For example, during violence, which in some cases would cause physical pain, and in some cases – not, clarifying the position of the victim would be of crucial importance, e.g., twisting hands, grabbing an arm, etc., thus, without clarifying the position of the victim would make it impossible to make an objective decision."[61] At the same time, making a decision based only on subjective factors cannot ensure the purpose of the law, due to the reason that "facts of violence where, taking into account the victim's age[62], state of health or other objective factors, it is impossible to verbalize the pain experienced by the victim, would remain unpunished."[63] Hence, the victim's age, gender, state of health, duration of violence, type, intensity, placement, and method of committing the crime, means, whether injuries of the mentioned type and intensity objectively cause physical pain are considered.

Therefore, the victim's refusal to give a testimony practically invalidates the forensic medical examination report, which establishes the existence of various types of injuries on the victim's body, and deprives the court of the opportunity to establish a judgment of conviction, when the prosecution contests the sentence for inflicting physical pain by violence, while in the criminal case, neither objective nor subjective standard of physical pain/suffering by the victim is established by one evidence (for example, application by the victim to a medical facility/testimony of witnesses, restraining order/report).[64]

Supreme Court of Georgia of February 3, 2021, case N1003ას-20; Ruling of the Supreme Court of Georgia of January 31, 2022, case №714ას-21 (In Georgian).

58 An exception is the examination report, the descriptive part of which indicates that during the examination the victim complained of pain in a specific location.

59 According to Article 126^1.1 of the Criminal Code of Georgia, domestic violence includes such violence that did not result in the consequences provided for in Articles 117, 118, or 120 of the Criminal Code of Georgia.

60 Ruling of the Supreme Court of Georgia on the case of February 2, 2021, case № 1003ას-20, para.8 (In Georgian).

61 B. Kochlamazashvili, ibid, 55 (In Georgian).

62 For example, a minor victim

63 Judgment of the Supreme Court of Georgia of October 29, 2020, case № 443ას-20 (In Georgian.)

64 Similarly applies to the victim's perception of the reality of the threat; see Ruling of the Supreme Court of Georgia of March 15, 2024, case № 1438ას-23, para. 15 (In Georgian.)

8. The Use of Indirect Testimony for Sentencing

Another challenge is related to the decision of 22/01/2015 of the Constitutional Court of Georgia in "Citizen of Georgia Zurab Mikadze v. Parliament of Georgia", where the court deemed as unconstitutional, *inter alia,* the normative part of the second sentence of Article 13.2 of the CPCG that provided for the possibility of establishing a judgment of conviction based on circumstantial evidence. Although the court did not rule out the possibility of using circumstantial evidence in exceptional cases, it ensured the clear rule provided by the law and proper constitutional guarantees, and not the general rule defined by the current CPCG. Therefore, the use of indirect testimony is not allowed for sentencing, however may be used for the evaluation of the credibility of the evidence (for example, the testimony of the victim) in the case of the criminal case[65].

Therefore, for the purposes of sentencing[66], the testimonies (hearsay) of the investigators/policemen, the doctors at the scene of the incident (who had direct contact with the victim), the victim's family members, – who know about the violence from the victim and who did not directly witness the violence themselves, are not admissible. At the same time, "the court must evaluate all the evidence individually and distinguish which testimony, or part of the testimony, is indirect,[67] – the testimony of persons mentioned above (medical personnel/investigators/patrols, etc.) at the scene of the incident is direct in the part of psycho-emotional state of the victim, the presence of damage, the health condition of the victim[68], the feeling of physical pain by the victim and the situation seen directly, and their use for sentencing is permissible.

9. Standard of Proof

Despite the special vulnerability of victims of domestic violence and the difficulties associated with obtaining evidence of a crime committed in a "private" environment[69], Georgian procedural legislation establishes the same evidentiary standard for delivering a judgment of conviction regardless of the category of crime. It does not provide for a lower evidentiary standard in cases belonging to the domestic crime category. Hence, the imperative provision of Article 31.7 of the Constitution of Georgia; Taking into account Article 13.2 of the CPCG, as well as – Article 82.3 and Article 269.2 – the judgment of conviction must be based on such a set of authentic and concordant evidence that beyond a reasonable doubt confirms the person's guilt[70]. Even if the parties, under Article 73 of the

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65 Decision of the Constitutional Court of Georgia "Georgian citizen Zurab Mikadze v. the Parliament of Georgia" 22/01/2015, II-37, II-52 (In Georgian).

66 See Ruling of the Supreme Court of Georgia dated October 24, 2023, case № 793ას-23 (In Georgian).

67 See Judgment of the Supreme Court of Georgia on July 14, 2020, in the case № 97ას-20; Ruling of the Supreme Court of Georgia of December 28, 2022, case N909ას-22; Judgement of the Supreme Court of Georgia on March 11, 2024, case № 1009ას-23 (In Georgian).

68 Ibid.

69 Volodina v. Russia, N.41261/17, [2019], ECHR, 82.

70 Ruling of the Supreme Court of Georgia of January 9, 2024, case № 950ას-23; Ruling of the Supreme Court of Georgia of January 22, 2024, case N1048ას-23; Ruling of the Supreme Court of Georgia of January 26, 2024, case № 920ას-23, para. 9 (In Georgian).

CPCG, recognize the evidence in the criminal case as irrebuttable, the court is tasked with evaluating them in terms of relevance, admissibility, and authenticity separately and jointly; Also – their sufficiency for establishing a judgment of conviction.[71]

The current legislation does not establish that a judgment of conviction shall be based only on direct evidence[72], it does not determine what kind and amount of evidence is needed to establish a judgment of conviction, therefore the quantitative lack of evidence *per se* cannot be the basis for an acquittal. "Beyond a reasonable doubt standard should exclude the imposition of criminal liability on a person based on suspicions and assumptions"[73], "although such proof may be derived from an assumption based on fairly solid, accurate and congruent facts or from a presumption of similar indisputable facts"[74]. Hence, "when the evidence is solid and there are no risks to its reliability, the need for additional evidence is, therefore, small[75]." At the same time, access to the court for the victim in cases of the mentioned category of crimes is related, [76] *inter alia*, to the effectiveness of the protection of the victim under the criminal law, the rules of proof[77], giving special credibility and weight to the testimonies and arguments of female victims[78], easing the burden of proof in their favor (which is considered one of the prerequisites for access to the court) [79], and shifting the burden of proof to the victim is considered a denial of justice[80]. Georgian criminal procedure legislation and judicial practice, along with giving special evidentiary weight to the testimony of the victim, places the burden of proof on the prosecution – the prosecutor/investigator (the victim is not the party), yet at the same time, the evaluation of the testimony is guided by Article 82 of the CPCG, since the European Convention, Article 31 of the Constitution, Articles 6 and 8 of the CPCG oblige the state to ensure a fair trial for the accused (sentenced/convicted). Neither national nor international legislation, depending on the nature of the crime, provides for the possibility of essentially limiting the right to defense[81].

Despite the importance of victim testimony, when not corroborated by other evidence, is insufficient to establish a judgment of conviction. Similarly, when the testimony of the victim about

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71 See For example, the judgment of the Supreme Court of Georgia of March 1, 2024, case №910ბ-23 (In Georgian).

72 Rulingof the Supreme Court of Georgia of August 9, 2022, case N541ბ-21, para. 20 (In Georgian).

73 Decision of the Constitutional Court of Georgia of January 22, 2015, case №1/1/548 "Georgian citizen Zurab Mikadze v. the Parliament of Georgia", II-44 (In Georgian).

74 Dvalishvili v. Georgia, no. 19634/07, [2013], ECHR,39.

75 Tortladze v. Georgia, no. 42371/08,[2021], ECHR,69; see also Lisica v. Croatia, No. 20100/06, [2010], ECHR, 49; Gäfgen v. Germany, No. 22978/05, [GC],[2010], ECHR,162-165;Prade v. Germany, No. 7215/10, [2016], ECHR,33-34; Kobiashvili v. Georgia, No. 36416/06,[2019], ECHR,56-58.

76 See. Concept and Scope of Protection Against Domestic Violence as GBV under the CEDAW Convetion, GR 35 and CEDAW Optional Protocol, and in the Practice of the UN SR VAW – Main Issues Identified, Recommendations and Guidance to SPs, Good Practices, 01/08/2023, OHCHR.

77 GR 28, para 34; GR 35, paras 29(b); 31 (A)(iii); General recommendation No.33(2015) on Women's access to Justice, para 17(a), UN CEDAW/C/GC/33, 03/08/2015.

78 J.I. v. Finland, Communication No 103/2016, **CEDAW/C/69/D/103/2016.**

79 S.L. v. Bulgaria, Communication N099/2016, **CEDAW/C/73/D/99/2016.**

80 O.G. v. Russian Federation, No 091/2015, **CEDAW/C/68/D/91/2015.**

81 It does not entail the institution of a plea bargain, the use of which is allowed only by ensuring the right of defense and with the consent of the defense party.

the infliction of physical injury is not consistent with the medical paper/medical examination report presented in the criminal case (the existence of any objective signs of mechanical injury/suffering is not confirmed), in the absence of other direct and/or circumstantial evidence, it does not suffice the standard of proof to deliver a judgment of conviction.[82]

On the other hand, when the victim refuses to testify, the court, on one hand, is deprived of the opportunity to use all the evidence where the mentioned victim is the primary source, while the other evidence in the case was evaluated both from relevance and admissibility, as well as from the sufficiency perspectives for establishing a judgment of conviction. Thus, if no other direct incriminating evidence is obtained in the criminal case, the use of the constitutional right by the eyewitness/victim in most cases practically excludes the possibility of establishing a judgment of conviction, as "the constitutional principle of authenticity requires not only that the judgment of conviction is based on authentic (reliable, unfalsifiable) evidence, but also that the evidence presented in the case proves without a doubt the guilt of the person in committing the crime"[83]. Hence, the prosecution shall submit such a set of evidence to the court, which even if the victim/eyewitnesses refuse to testify, will establish a judgment of conviction, and will not lead to secondary victimization of the victims and mistrust of the effectiveness of the existing legal mechanisms, a feeling of impunity.[84]

10. Conclusion

Article 45 of the Istanbul Convention imposes on the parties the obligation to take all legislative and other measures to ensure that the crimes under the Convention are punishable by effective, proportionate, and dissuasive sanctions.[85] The state's obligation to protect victims of domestic violence, and to provide appropriate legal guarantees and administrative practices is established by a number of international instruments and decisions of the European Court[86]. However, the change of the victim's position, in some cases, has a significant impact on the rights of the victim, including security, life, and protection from humiliating and inhumane treatment or torture, and significantly endangers minors living with the perpetrator (creates a feeling of impunity and the danger of repeating the violence). Therefore, regardless of the acquittal due to insufficient evidence, the relevant state authorities (guardianship and care authorities) should be responsible for intensive monitoring to protect the best interests of minors and ensure the right of children to develop freely in a peaceful

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82 Ruling of the Supreme Court of Georgia of January 26, 2024, case № 920ბ3-23, para. 9 (In Georgian).

83 The decision of the Constitutional Court of Georgia of December 25, 2020, № 2/2/1276, "Giorgi Keburia v. Parliament of Georgia", II-77 (In Georgian).

84 See A. v. Croatia, no. 55164/08, [2010], ECHR, 7; Valiulienė v. Lithuania , no. 33234/07, [2013], ECHR, 71; Eremia v. the Republic of Moldova, no. 3564/11, [2013], ECHR, 57; Ž.B. v. CROATIA, no. 47666/13, [2017], ECHR, 50; Volodina v. Russia, ibid,78; X and Y v. Georgia, No. 24/2009, [2015], ECHR; U.N. Doc. CEDAW/C/61/D/24/2009, 2015, §§9.7; 9.6.

85 Judgement of the Supreme Court of Georgia on March 13, 2024, in case № 959ბ3-23 (In Georgian.)

86 See Z.B. v. Croatia, no. 47666/13, §50-51, ECtHR, 11/07/2017; Opuz v. Turkey, no. 33401/02, §§ 72-86, ECtHR, 09/09/2009; Hajduová v. Slovakia, no. 2660/03, § 46, ECtHR, 30/11/2010; Bevacqua and S. v. Bulgaria, no. 71127/01, §§ 64-65, ECtHR, 12/06/2008.

environment. At the same time, considering the importance of the testimony of the victims and their vulnerability, their active cooperation with the investigative bodies at the initial stage of the prosecution of the criminal case, an amendment should be made to Article 114 of the CPCG and the opportunity of questioning them before the magistrate judge should be provided at the beginning of the criminal case, which will ensure procedural frugality and contribute to the permanence of testimony and prevention of re-victimization (they will have to testify in court only once).

In the case of a substantial change in the victim's position during the court testimony – the opportunity provided by Article 243.1 of the CPCG will be widely used – the testimony given by them at the stage of the investigation will be published.

At the same time, in order to reduce cases of victims refusing to testify in court, and to help vulnerable victims, special importance shall be attached to the widespread use of witness and victim coordinator [87] (hereinafter – "coordinator") under Georgian criminal procedure legislation (especially in relation to adults, as the legislation does not determines the participation of a psychologist), which has been repeatedly indicated by the court[88], a clear separation of the functions of the coordinator from the duties of other subjects of the process (especially in relation to minor victims and witnesses, when the mandatory participation of a psychologist is provided), as well as a clear separation of the prerequisites for the participation of the coordinator of the Ministry of Internal Affairs and the coordinator of the prosecutor's office; The inclusion of the coordinator in the process *ex officio* taking into account the specificity of the said category of crimes (including the latent crime, which in many cases is still perceived as a "family problem", the specificity of the relationship between victims-witnesses-violators and the desire to avoid the responsibility of the state, victim syndrome and other factors). Although the involvement of the coordinator by the prosecutor can be carried out at any stage of the proceedings, taking into account the interests of the witness/victim[89], the CPCG associates the invitation of the coordinator with the discretionary authority of the prosecutor and their subjective perception of the circumstances of the case and the needs of the victim/witness, which leads to an improper assessment of the needs (at the investigation stage of the victim /witness cooperation) leaves the victim/witness in a vulnerable position in front of the perpetrator and society, in some cases it forces the victim/witness to change their position in court essentially.

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2. Criminal Procedure Code of Georgia, 09/10/2009, №1771-IIს (In Georgian).

[87] Although Article 58^1 of the CPCG grants the investigator/prosecutor the right to decide on the involvement of a coordinator in the case of a criminal offense, regardless of the wishes of the witness and the victim, – taking into account the interests of the witness/victim, the study of judicial practice indicates that the coordinator is rarely involved in the mentioned category of cases.

[88] See Ruling of the Supreme Court of Georgia of October 26, 2023, case №856ას-23, para. 21.1.; Ruling of the Supreme Court of Georgia of February 20, 2024, case 1123ას-23, para. 19.1; Ruling of the Supreme Court of Georgia of January 29, 2024, case 1005ას-23, para.21.1; Ruling of the Supreme Court of Georgia of January 25, 2024, case N1074ას-23, para.18.1 (In Georgian).

[89] Article 58^1 of CPCG.

3. Juvenile Justice Code, 12/06/2015, case № 3708-IIს.
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5. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4/11/1950, CETS 5.
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Age of Criminal Responsibility

This article is dedicated to the age of criminal responsibility. The relevance of this topic is defined by studying the physical and mental nature of a child and taking into account the socio-economic factors affecting him/her, it is possible to identify the problematic nature of the age of criminal responsibility.

The measure applied to a child committing a criminal act should be proportional to the severity and circumstances of the offense, as well as the conditions and requirements of the child considering his/her best interests.[1]

Introducing this study, a reader will be convinced that children in conflict with the law should not be treated as adults because of their limited emotional, psychological, moral, and social development.

Keywords: *Child, Juvenile Justice, Punishment, Physiological problems, Physiology, Social.*

1. Introduction

The question about the age at which a person's criminal responsibility should arise does not expect a response. Unfortunately, to solve this problem, legislative institutions all over the world cannot adopt a specific formula to determine a particular age.

Defining the minimum age of criminal responsibility from a doctrinal or practical perspective generates a variety of opinions, which results in the physiological and socio-economic conditions of a child developed in the process of upbringing. This, in turn, leads to the different age thresholds for criminal responsibility in each country.

The November 20, 1989 Convention on the Rights of the Child indicates that all persons under the age of 18 are considered to be children if following the legislation of any country, the child does not reach adulthood earlier. Therefore, the age of criminal liability, which begins from the age of 14 according to the Georgian legislation, is considered as a child. This period bears a resemblance to climbing a ladder, each step of which corresponds to a fuller, reorganized look of functioning.[2]

Introducing the discussion based on studying the scientific literature, the legislation of different countries, judicial practices, socio-economic conditions, and the psychological characteristics of the child, the reader will be allowed to assess the age of criminal responsibility established by the legislation of Georgia, which is considered to be the age of childhood in scientific terms.

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2. The Impact of Social Factors on Adolescent Age

The behavior of a person entirely depends on the environment, upbringing, and real living conditions.[3] The socialization and development of a teenager count on the family, school, and the social environment he/she grows in.[4] The level of socialization determines the consciousness and social experience of a human, which is directly related to the choice of behavior and manage this behavior.[5] When the level of socialization is higher a person chooses the right model of behavior that is acceptable to society and easily manages it.

The social conditions in which the child has to live, in particular, poverty, place of residence, and the social environment of parents, for example, unemployment, crime, etc. are significantly affected by the formation of personal development.[6] The process of molding a personality is a reflection of the social environment of a teenager. A severe social life results in detaining the process of personal development, which contributes to the distortion of the spiritual and psychological nature of a person in the future.

If the child is brought up in a social environment with a growing dynamic of unemployment, which raises complaints of the population about economic hardship, and a concern about various criminal offenses, he/she will not be able to grow in a healthy social environment. It shall be inadmissible for such a teenager to be required to strictly observe legislative regulations at an early age. The severity of the law may have more acute consequences for the child and the safety of the public in the future. In particular, if the law does not "forgive" a child growing up in unhealthy social conditions for the crime committed in childhood, after serving the sentence in jail he is likely to return to society as a vengeful person trying to fight against a strict regime by breaking the law again.

When making a decision on identifying the limit of criminal age, the social situation of the country must be taken into account. Also, in determining the age of criminal responsibility, the economic reality must be an unconditional and necessary component.[7] If the state is in a socio-economic crisis, reducing the criminal age cannot have an effective result because the rate of crime committed by children is especially higher during economic hardship. The sentence imposed on the child may make worse his/her psychological-mental state.

Accordingly, the legislator should approach the issue with a rational mindset, and considering the severe socio-economic conditions of the state, reduce the age of criminal responsibility to avoid an

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artificial contribution to the increase in committing a crime. A country should apply the alternatives to the correct methodical upbringing of the child, which will be focused on improving the psychological-mental state to ensure the proper development of the child.

2.1. The Role of the Family in the Stages of Adolescence

The family is the basic building block of society, the main task of which should be to raise legal education and awareness among adolescents.[8] In family relationships, people are introduced to the social, emotional, and communication components necessary for their further development.[9] That is why parents should apply a mechanism in the process of adolescence that will be focused on the correct physiological development of the child.

As the teenager grows older, he/she has a desire to dominate others and become more respectful. A child who experiences a rigorous, authoritarian upbringing can produce negative results.[10] However, a lack of control over the child can have a bad effect on forming the personality.[11] Thus, parents need to find a middle ground in the mentioned process. Excessive care or a paucity of attention can subsequently become an indicator of the wrong upbringing of children, which will aggravate their behaviors.

The lifestyle of parents is an external conditioning factor for determining the criminal status of the child.[12] In conflicting families, constant tension affects the relationship between parents and children. Forceful methods used for the upbringing of the child destroy the process of proper psychological and personal development.

To avoid violating the rights of the child, it is essential to apply the service established in the State Public Defender's Office, which works to protect the universally recognized rights and freedoms of the child and raise awareness. Everyone can apply to the mentioned agency where the provided services are free.[13] Such an approach encourages appeal and protects children's rights more appropriately.

To effectively solve the above problem, it is necessary to provide many multifunctional social welfare institutions in the state that defend the child from an unhealthy social environment, including protection from psychological and physical violence from family members. This strategy can avoid developing abusers fighting against crime, and maintaining public safety.

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13 <https://www.ombudsman.ge/geo/bavshvis-uflebebis-tsentris-shesakheb> [22.07.2023].

2.2. The Influence of School and the Circle of Friends

Each age of an individual's development is characterized by some features, which are variable in terms of pedagogical-nurturing impact and social relations.[14] If a teenager is alienated from school and a circle of friends, there is a chance of revealing an interest in illegal activities.[15] The instances, school, and friendship are important contributing factors in forming a person because the issue does not refer only to learning a program but also to the improvement of the moral side.[16] Simultaneously, it is necessary to take control of the circle of friends chosen by the teenager because if the violation of the law for the friends is a normal behavior, in the future he is likely to be keen on similar conduct.[17] However, such control should be taken with standard precautions without intense interference in the relationship for providing the child with sage pieces of advice and applying methodical upbringing.

It is inadmissible to remove a child from an unhealthy social environment by coercion in the process of personal formation. A similar approach used by the older generation can arouse hatred and convey an akin attitude toward the other members of society in the future. As a result, a person will be prone to violence, and this artificial transformation can lead to becoming a criminal.

3. The Challenges with Determining the Age of Criminal Responsibility by Georgian Legislation

International instruments, including the Beijing Rules, and the November 20, 1989 Convention on the Rights of the Child call for countries to establish the minimum age of criminal responsibility.[18] This recommendation is aimed at trying to protect the best interests of children. If following Beijing rules, the ‘’very low’’ age of criminal liability for a child is not allowed, the Committee on the Rights of the Child supports increasing a relatively low minimum age to 12 years (at least) in agreement with the average age of criminal responsibility accepted by the international community[19]. This recommendation is attributed to the features of the mental and physiological state of a child.

According to one of the decrees of the Russian Federation of 1918, the age of criminal responsibility was determined by 17 years as in Georgia.[20] Following the Criminal Code of the Soviet Socialist Republic of Georgia of 1960, the age of liability was 16 years. Then, based on the Criminal Code of Georgia of June 1, 2000, the age was resolute by 14 years. In addition, on June 12, 2015, the Juvenile Justice Code defined the characteristics of the liability of a child who committed a criminal.

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14 *Gobechia F.,* Psychological Peculiarities of the Development of the Social Prestige of Juvenile Offenders, in the Collection: Pedagogical-Psychological Issues of Juvenile Criminal Behavior, Tbilisi, 1983, 51 (in Georgian).

15 *Ivanidze M.,* Forensic Practice of Punishment against Minors, Collection: Problems of Juvenile Punishment and Forced Measures of Parenting, *Lekveishvili M., Shalikashvili M. (ed.),* Tbilisi, 2011, 159 (in Georgian).

16 *Mikanadze G., Shalikashvili M.,* Juvenile Justice, 2nd Edition, Tbilisi, 2016, 25 (in Georgian).

17 Ibid.

18 *Weidkun W.,* Punishment Goals, Age-Related Issues, Separation and Specialization, Tbilisi, 2013.

19 Ibid.

20 *Mikanadze G., Shalikashvili M.,* Juvenile Justice, 2nd Edition, Tbilisi, 2016, 120 (in Georgian).

The above amendment was in line with the standards for international criminal justice. However, there is doubt about the admissibility of a 14-year limit of criminal responsibility in the state where a teenager is brought up in severe socio-economic conditions.

When determining the age of criminal liability, a Georgian legislator must take into account the procedure recognized by international documents and shall not fall below the 12-year limit. Besides, the environmental factors affecting the life of a teenager ought to be considered to establish a reasonable limit of criminal responsibility. A more humane approach assists in decreasing the rate of crime and responds appropriately to the universally recognized principles of liberal legislation.

Whether the 14-year limit of criminal liability set by the Georgian legislator is reasonable, a reader can discern by introducing the discussion about the features of the cognitive and psychological state of a teenager along with age changes.

4. The Age of Criminal Responsibility Considering the Level of Physiological and Cognitive Development of a Child

The adolescent turning point determines the formation of a person physiologically and socially.[21] Adolescence is followed by emotional instability, the need for changes in relationships, demonstrativeness, and easy adjustment to various social roles.[22] Outward balance is achieved at the cost of greater tension, which can lead to the development of somatic dysfunction.[23] An exigency of leaving childhood and being at an older age acquires social content, which has a decisive impact on determining the direction of adolescent activity.[24]

It is a widely considered fact that a child under the age of 10 cannot become a subject of criminal liability.[25] The first traits of personality start forming in the early days of life and are manifested in adolescence and later periods.[26] A 10-year-old is characterized as "funny," and friendly.[27] However, this age is unambiguously low for criminal liability, since the brain is immature at this time, continues to make significant changes related to self-regulation, and it is hard to perceive the facts compared to people of older age.[28] Moreover, they consider the punishment applied by an authoritarian person even when the punishment is unfair.[29] Teenager's understanding of moral norms

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21 *Shalikashvili M., Giorgidze A.,* Criminological Features of Criminal Liability of Minors, Collection: Problems of Juvenile Punishment and Forced Measures of Care, *Lekveishvili M., Shalikashvili M. (ed.),* Tbilisi, 2011, 17 (in Georgian).

22 *Chigogidze St.,* Peculiarities of the Emotional-Affective Sphere of Juvenile Offenders, Zhurn. Herald, #1, 2003, 130.

23 Ibid.

24 *Shalikashvili M., Mikanadze G.,* Peculiarities of Juvenile Justice: Criminological, Criminal Legal, Penitentiary and International Law Foundations of Juvenile Justice, Tbilisi, 2011, 15 (in Georgian).

25 *Mcdiarmid C.,* An Age of Complexity: Children and Criminal Responsibility in Law, 2013, 148.

26 *Chanturia L.,* Family Factor for the Legal Education and Raising of Justice, "Current Criminal Justice Issues," #1, 2017, 147.

27 Ibid.

28 *Herring J.,* The Age of Criminal Responsibility and the Age of Consent: Should They Be Any Different, Northern Ireland Legal Quarterly, Vol.67, No.3, 2016, 346.

29 *Japaridze T.,* Causes of committing a crime by a teenager, his criminological aspects and preventive measures, "Law and World," #9, 2018, 119 (in Georgian).

and social agreements should be consistent with their level of cognitive development.[30] A ten-year-old mentally immature child who is not capable of fully assessing the events in the environment cannot be turned into an entity of criminal responsibility. In this case, the purpose of the prescribed punishment, which is related to the process of re-socialization and rehabilitation of the offender, cannot be fulfilled.

According to the mentioned above the legislator should not turn a ten-year-old mentally immature child into a legal entity. To become a criminal entity, it is necessary to know the legitimacy of the action,[31] otherwise, the best interests of the child will be infringed. Therefore, the legislative directive of some countries (Colorado and Louisiana) under which a 10-year-old is an entity of criminal personality needs to be criticized.[32] The arguments justifying the decision of the legislator to impose criminal liability for the psycho-emotionally unstable 10-year-old person are interesting to consider.

Imposing criminal liability for a 10-year-old child a legislator deliberately neglects the best interests of the child. The legislator does not properly understand the importance of the psycho-emotional instability of a teenager. He/she should always remember that harsh punishment cannot always be an unconditional guarantee of enforcing the law.

Young people begin to commit petty crimes and carry out anti-social actions in the period of 10-12 years.[33] However, this does not imply that a person of this age may become an entity of criminal liability by the Criminal Code. The institute to establish the age of criminal liability shall provide a person to be responsible for his/her commitment before the court and a suitable candidate for the execution of the sentence.[34] While determining the age limit of an entity with criminal responsibility, the following qualities must be taken into consideration: insufficient formation of a person, vulnerability, mindless behavior, carefree lifestyle, playful attitude to work, reliance upon others, dreaming, love of adventure, problems in relations with peers, etc.[35] Therefore, the legal systems recognizing the concept of the age of criminal liability should not set criminal responsibility at a very early age considering psychological, emotional, and intellectual maturity factors.[36] The variation of the body of a teenager and the metabolism greatly affects the mental state.[37] During this period, the child can experience frequent and sudden deterioration of mood, excessive emotionality, fantasies, unserious attitude to work, forgetfulness, difficulty, impulsivity of decision-making, and the inability to discern the consequences of their actions.[38]

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30 *Melikishvili M.,* Theory of Moral Development, Tbilisi, 2012, 5 (in Georgian).

31 *Mcdiarmid C.,* After the Age of Criminal Responsibility: A Defense for Children Who Offend, Northern Ireland Legal Quarterly, Vol. 67, No.3, 2016, 329.

32 *Ivanidze M.,* Forensic Practice of Punishment for Minors, Collection: Problems of Juvenile Punishment and Forced Measures of Parenting, *Lekveishvili M., Shalikashvili M. (ed.),* Tbilisi, 2011, 161 (in Georgian).

33 *Hamilton St.,* Juvenile Justice Legislative Reform Guidelines, *UNICEF (Translator),* Tbilisi, 2013, 21.

34 *Herring J.,* The Age of Criminal Responsibility and the Age of Consent: Should They Be Any Different, Northern Ireland Legal Quarterly, Vol.67, No.3, 2016, 345.

35 *Shalikashvili M.,* Types of Forced Measures of Juvenile Punishment and Foster Impact, Collection: Problems of Juvenile Punishment and Forced Measures of Parenting, *Lekveishvili M., Shalikashvili M. (eds.),* Tbilisi, 2011, 101 (in Georgian).

36 *Rice G.,* Thomas T., James Bulger A Matter of Public Interest, International Journal of Children's Rights, Vol.21, No.1, 2013, 7.

37 *Mikanadze G., Shalikashvili M.,* Juvenile Justice, 2nd edition, Tbilisi, 2016, 13 (in Georgian).

38 *Shalikashvili M., Giorgidze A.,* Criminological Features of Criminal Liability of Minors, Collection: Problems of Juvenile Punishment and Forced Measures of Care, *Lekveishvili M., Shalikashvili M. (ed.),* Tbilisi, 2011, 18 (in Georgian).

Accordingly, the criminal liability for a mentally, psychologically, and emotionally unbalanced 12-year-old can be considered justified with the special social environment created in the state. In addition, the means applied to achieve the goal (ensuring the enforcement of the law) should be the only necessary measure.

Based on the recent development of scientific research, adolescents and adults process emotions in different areas of the brain.[39] Taking into account these aspects, juvenile crime is perceived as a normal manifestation in society because everyone has ever violated the law during their teenage years.[40] Thus, the size of the sentence for the child who has committed a criminal act should be selected with the utmost caution to achieve the purpose of punishment and ensure the protection of the best interests of the child.

Scientifically, a new period of adolescence begins from about the age of 11-12 years, which is associated with cardinal changes in the body.[41] A person aged 12-16 already has a great interest in the human inner universe and an irresistible desire to be identified with another person.[42] Following psychologists, serious changes are made during the development of a person aged 14-16 years, in particular, progressing the functions of the intellectual spheres such as perception, attention, memory, thinking, and willpower, which, in turn, determine the ability of a person to be criminally responsible.[43]

A Georgian legislator should allow a child to partially complete biological processes and become an entity of criminal liability from the age of 16. The need to establish this recommendation at the legislative level is supported by the general social development of the country, according to which the legislator does not face a 14-year limit of criminal liability. Increasing the age of criminal liability, the best interests of the child are protected and simultaneously, it ensures unburden courts. If petty criminal acts are often detected at the age of 16, it is reasonable to create crime-fighting groups, which can develop targeted prevention programs for "risk" groups under the age of 16.[44]

In different countries of the world, there are alternative support systems that are focused on preventing adolescents from getting into a penitentiary facility as much as possible.[45] Paragraph 3 of

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39 Ibid.

40 *Mikkanadze G., Shalikashvili M.,* Juvenile Justice, 2nd Survey, Tbilisi, 2016, 16, see quote: Kaiser, g., 1985, 225-228.

41 *Shalikashvili M., Giorgidze A.,* Criminological Features of Criminal Liability of Minors, Collection: Problems of Juvenile Punishment and Forced Measures of Parenting, *Lekveishvili M., Shalikashvili M. (ed.),* Tbilisi, 2011, 16 (in Georgian).

42 *Chanturia L.,* Family Factor for the Legal Education and Raising of Justice, "Current Criminal Justice Issues," #1, 2017, 147 (in Georgian).

43 *Giorgidze A.,* Purpose of Juvenile Punishment (What is the purpose of the sentence?), in the collection: Problems of the imposition of forced measures on juvenile punishment and parenting, *Lekveishvili M., Shalikashvili M., (ed.),* Tbilisi, 2011, 79.

44 *Hamilton St.,* Juvenile Justice Legislative Reform Guidelines, *UNICEF (Translator),* Tbilisi, 2013, 21.

45 *Imerlishvili I.,* Juvenile Justice in Georgia and International Standards, Collection: Protection of Human Rights and the Democratic Transformation of the State, *Corkelia K. (ed.),* Tbilisi, 2020, 76, see citation: specialized juvenile courts, juvenile judges or similar institutions established in the following European countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, England/Wales, France, Germany, Greece, Hungary, Ireland, Italy, Kosovo, Netherlands, Northern Ireland, Poland, Portugal, Scotland, Serbia,

Article 40 of the Convention on the Rights of the Child shares the above opinion and indicates that the authorities should establish as many institutions as possible for children who have violated legal orders. The state ought to take control over the behaviors of young people which is justified by the intention of protecting them.[46]

In the Swiss state, before a teenager is sentenced to imprisonment, there are several types of alternative punishments: the appointment of a personal caregiver authorized to provide temporary care for a child which assists him/her in finding the solutions to problems of life; making children undergo therapies who are addicted to drugs or alcohol, etc.[47] Similar trends should be introduced in Georgia. Legal leverage abstains biologically and psychologically immature persons from taking criminal responsibility, protects their rights, and in turn, contributes to the preservation of legal order in the country. The state should create a healthy socio-legal environment for adolescents that will be focused on their moral development. The development will be perfect only if the action committed by the child at the initial stage is not evaluated as a case of crime. The issue should be assessed in a correct, rational manner along with the assistance of specialists who work extensively on problematic cases.

5. Conclusion

When the age of criminal liability is determined in the law, it should be considered in the context of protecting the rights of the child. It must be focused on the standards for an individual approach. A teenager should be enabled to properly prepare for the process of growing.[48] The legislator ought to facilitate this process by setting a reasonable limit on the age of criminal liability.

To select the logical age limit of criminal responsibility, the legislator must take into account the socio-economic conditions in which the adolescent has to be raised. In addition, all the physiological factors characteristic of the child should be taken into account, which subsequently leads to the development of the child as an adult.

Severe economic conditions in the country or a circle where a teenager is experiencing constant psychological violence by family members or friends are very high risk of becoming an adult prone to criminal activity in the future. Against the backdrop of harsh social conditions, the enforcement of the punishment for the child provided by the criminal law cannot be effective. A fair punishment for the

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Slovakia, Spain and Turkey: Gensing, A., Jurisdiction and characters of Juvenile criminal procedure in Europe: *Dunkel, F., Grzywa, J.,* Horsfield, P., Pruin l. (EDS.), Juvenile Justice Systems in Europe, Vol.4, 2nd ed, (Forum Verlag Godesberg: Monchenbladbach 2011),1614. Separate juvenile courts, juvenile judges, or similar institutions in the South Asian region is based in Afghanistan [Afghanistan Juvenile Code, 2005, Section 9], India [Indian Juvenile Justice (Care and Protection) Act, 2000, sections 4 and 29], a specialized juvenile court in Africa, juvenile judges or similar institutions, for example, based in Ghana [Juvenile Justice Act, 2003 (ACT 653), Part II], Kenya [Act on Children 2001, Part VI, South Africa [Child Justice Act, 2008], Chapter 9, Section 63-67.

46 *Mcdiarmid C.,* Don Cipriani, Children's Rights and the Minimum Age of Criminal Responsibility, Social & Legal Studies, Vol.21, No.1, 2012, 150.

47 *Mikanadze G., Shalikashvili M.,* Juvenile Justice, 2nd Examination, Tbilisi, 2016, 122 (in Georgian).

48 *Herring J.,* The Age of Criminal Responsibility and the Age of Consent: Should They Be Any Different, Northern Ireland Legal Quarterly, Vol.67, No.3, 2016, 344.

child must serve to educate him/her.[49] That is why there should be many institutions for socio-legal protection in the country to defend the best interests of a child and maintain public law. In this regard, the state is compelled to properly fulfill the positive obligation imposed on it.

The primary goal of the institutions for socio-legal protection shall ensure a rational assessment of the criminal commitment and eliminate the possibility of repeated acts. The threat will be reduced by providing the teenagers with future employment. The rehabilitation process can be considered successful when a teenager develops a sense of respect for the rights of other people and becomes a responsible person.

To determine a reasonable limit of the age of criminal liability, the legislator must take into account not only social factors but also the psychological features of the adolescent. As mentioned above, since emotionality, impulsivity, indifference, and imprudence are especially exacerbated against the background of cardinal changes in the body of teenagers under the age of 16, the legislator does not turn such children into criminally responsible entities.

After imposing criminal liability, a person is implied to be responsible for his/her commitment and a suitable candidate for the execution of the sentence. Considering psychological characteristics and the above reasoning factors, a child under the age of 16 cannot be regarded as an entity of criminal liability and a relevant candidate for the execution of the sentence. If a person of this age commits a criminal act, the state shall apply an alternative support system, and rehabilitation institutions that help the teenager to correctly appraise the actions performed by him/her. The law shall not artificially hinder this process by imposing criminal liability.

Thus, taking into account the physiological factors and socio-economic conditions of a teenager, the legislator must take into account the above recommendations, which means increasing the age of criminal liability to 16 years. Taking this step, the state will fully protect the positive obligation imposed on it, which is reflected in the proper implementation of the principles recognized by the international standards for protecting the rights of children.

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EU-Georgia Association Agreement in the Light of Direct Application of Law

As of today, the question regarding application of the Association Agreement remains unanswered. Does the Agreement apply directly in the legal systems of the EU and Georgia? Does it establish rights and obligations for individuals and legal entities? How does the Court of Justice of the European Union assess the application of international agreements, and how important is the direct application of law for the integrative communities? These questions are addressed and analyzed throughout the article.

Keywords: *European Union law, direct application, association agreement.*

1. Introduction

The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (hereinafter: Association Agreement) entered into force on July 1, 2016. Its largest and most important part, the agreement on the Deep and Comprehensive Free Trade Area (Title IV of the Association Agreement), had been provisionally applied since September 1, 2014.[1]

Due to its "comprehensive" nature and the country's constitutionally approved external orientation towards European integration,[2] the Association Agreement holds a significant role in Georgia's foreign policy, influencing its legal, social, and economic development. It serves as the primary legal framework for implementing the European integration agenda.

Unlike domestic legal norms, which typically take immediate effect upon enactment, international agreements, as per rule, do not automatically have such direct applicability. While the domestic norms in force directly generate rights and obligations for individuals and legal entities, international agreements require corresponding domestic implementation measures (such as the adoption of relevant laws and regulations).

To determine whether the Association Agreement applies directly within the territory of the parties, one must consider the methods of interpreting such agreements. As an international legal

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1 For details on provisional application and entry into force, see the introductory provisions of the Association Agreement, <https://matsne.gov.ge/ka/document/view/2496959?publication=0> [23.05.2024].

2 Constitution of Georgia, August 25, 1995, N786.
"Article 78. Integration into European and Euro-Atlantic Structures. The constitutional bodies should take all measures within their powers to ensure Georgia's full integration into the European Union and the North Atlantic Treaty Organization" (In Georgian).

document, the Association Agreement should be interpreted first based on international law[3] and then in accordance with domestic norms or judicial practices.

The second chapter of the presented article examines the direct effect of EU law as a pivotal element of EU internal integration. It highlights the significance of the direct applicability of the Association Agreement. The third chapter addresses direct applicability of the international agreements concluded by the European Union and the interpretations provided by the Court of Justice of the European Union on this matter. The fourth chapter analysis extensively the applicability of the Association Agreement. Finally, the fifth chapter presents the main findings of the article.

2. Direct Application of Law for Integration

The European Union is fundamentally an integrative union, aiming to achieve an "ever closer union among the peoples of Europe", as stated in the preamble of its founding treaties. Integration theories offer various explanations for the main drivers of EU integration, although this article does not delve into them extensively. Instead, this section focuses on the direct impact of law as one of the effective tools for integration.

2.1. The Importance of Direct Application of Law in the European Union as an Integrative Union

According to established practice of the Court of Justice of the European Union, unlike international treaties, the founding treaties of the European Union have created "their own legal order", which is directly applicable in the legal systems of member states and thus is mandatory for national courts.[4] Member states have limited their sovereign rights (even only in certain areas) and transferred these rights to a new legal entity – the European Union. The uniqueness of the European Union as an international organization lies in the combination of several factors: broad law-making competencies; the existence of a single currency and citizenship; the ability to make binding decisions by institutions independent of state governments, as well as decision-making by majority rule; and the direct applicability of EU law within member states and their national courts.[5] The peculiarity of EU law lies in its predominant force of the domestic law of member states[6] and its direct effect within national legal systems.

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3 For the interpretation of international agreements, the 1969 Vienna Convention on International Law of Treaties (hereinafter: the Vienna Convention) and international customary law are used. Although the Vienna Convention generally applies to agreements between states and neither the EU nor all its member states are members of it, the Court of Justice of the European Union has recognized the binding nature of "a number of its provisions" in the cases: Judgment of 25 February 2010, Brita, C- 386/08, EU:C:2010:91; Judgment of 2 March 1999, C-416/96, El-Yassini, EU:C:1999:107; Judgment of 20 November 2001, C-268/99 Jany and Others, EU:C:2001:616. The Court notes that "a number of provisions" of the Vienna Convention, especially the provisions on the manner of interpretation of international treaties, express norms of customary international law and are binding on the EU.

4 Judgement of 15 July 1964, 6/64, Costa/ENEL, EU:C:1964:66.

5 European Union Law, *Ed. Bernard C and Peers S.*, Second Edition, Oxford, 2017, 186.

6 It entails both primary EU law, such as the EU founding treaties, the European Charter of Human Rights and universal principles, as well as secondary law, which consists of acts adopted by EU bodies: regulations, directives, recommendations and opinions.

EU (primary) law[7] was granted direct effect in 1963 following the judgment in Van Gend en Loos by the European Court of Justice.[8] With this decision, the Court recognized the right of individuals and legal entities, under specific conditions (precise, clear and unconditional norm), to apply directly to national courts and protect their rights without the need for domestic transposition, relying directly on EU law.

Half of the founding member states argued in their submissions to the Court, that the treaty enforcement mechanism was outlined within the founding treaties themselves. According to these submissions, the European Commission and other member states were obliged to respond to violations of the agreements[9] (the so-called "public enforcement"). Accordingly, in their opinion, the treaties and their norms did not directly confer rights and obligations to individuals and legal entities. However, the Court did not accept this argument, reasoning that granting individuals the role of "enforcement" would not hinder effective enforcement of treaty provisions but rather facilitate it.

The rationale behind the Court's decision was based, *inter alia*, on the importance of "vigilance of individuals". The activism of individuals and their right to appeal to courts created and continue to maintain an effective system of EU law enforcement, which, along with the superior legal force of EU law, forms the basis of the idea of the EU and its integration.

Granting direct effect to EU law, thereby ensuring its *effet utile* (maximum efficiency), has become one of the most important prerequisites for effective enforcement, monitoring, legislative harmonization of EU law, its uniform interpretation, and further integration of the EU. Public enforcement alone could not achieve the results possible through private enforcement. Public enforcement has its limits and shortcomings, which are not unique to the enforcement of EU treaties but are common in other international treaties as well. In the case of the European Union, this primarily involves the limited resources of the European Commission: given the scope of the founding treaties, the Commission would not be able to identify every possible violation, process them, and defend its positions in the Court.[10] Additionally, enforcement oversight by other member states would not be effective, as states often refrain from initiating legal proceedings against one another.[11]

Beyond its role in effective enforcement, the direct effect of EU law also serves legislative and monitoring functions.[12] In several rulings recognizing the direct effect of norms, the Court of the European Union has prompted EU bodies to create a new legal framework. These indications by the Court have spurred legislative activities that promote greater legal harmonization across various areas and thereby enhance internal integration within the European Union.

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7 On the primary and secondary sources of law, see *Gabrichidze G.,* Law of the European Union, New Vision University, Second Edition, 2023, 86-122. (In Georgian)

8 Judgment of 5 February 1963, 26-62, van Gend & Loos, EU:C:1963:1.

9 Ibid.

10 See detailed review *Craig P.P.*, Once upon a Time in the West: Direct Effect and the Federalization of EEC Law, in: Oxford Journal of Legal Studies, Vol. 12, No. 4, Winter, 1992, 454-458.

11 Ibid.

12 Ibid., 458-479.

Monitoring involves overseeing the implementation of EU acts by member states. Direct effect enables individuals to defend their rights in national courts even when a state fails to enforce or incorrectly enforces an EU regulation or directive. [13]

Moreover, direct effect has promoted uniform interpretation of EU law and, consequently, its consistent application in all member states. Notably, the exercise of the right of appeal by individuals to national courts has raised issues concerning the interpretation of specific provisions of EU law. The Court of the European Union holds exclusive jurisdiction over such interpretations.[14] Consequently, through the preliminary ruling procedure, national courts have received clarifications from the Court on EU law norms, which have formed the basis for uniform application of the law.

In summary, recognition of the direct effect of EU law has contributed to effective enforcement, monitoring of enforcement, uniform application, and legislative harmonisation of EU law. Ultimately, this realization has embodied the European idea expressed in the preamble of the founding treaties: "ever closer union among the peoples of Europe", as an integrative union.

2.2. The Importance of Direct Effect of the Association Agreement for Georgia's Effective Integration into the European Union

When discussing the enforcement of an international agreement, the focus primarily revolves around the fulfilment of obligations by the parties involved. The commitments undertaken by Georgia under the Association Agreement are extensive and varied, ranging from the alignment of foreign policy to the adoption of specific technical standards for production. The agreement is conditional in nature, and the obligation such as the gradual opening of the internal market by the EU depend on Georgia's adherence to relevant EU standards – mainly on the approximation to the relevant *acquis*[15] of the European Union.[16] According to the agreement, both parties are responsible for fulfilling these obligations and achieving the agreed-upon objectives, requiring them to take "any general or specific measures" as necessary.[17] "Supervision and monitoring of the application and implementation" of the agreement is carried out by the Association Council, including periodic reviews and decision-making on disputes related to the agreement.[18] The Agreement on the Deep and Free Trade Area (Title IV)

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13 According to EU case law, directives that have not been implemented by states have a direct effect, allowing individuals to sue the state in national courts for violations of their rights under the directive. see e.g.: Judgment of 5 April 1979, 148/78, Tullio Ratti, EU:C:1979:110; Judgment of 4 December 1974, 41-74, van Duyn, EU:C:1974:133.

14 Treaty on the Functioning of the European Union (TFEU), Article 267.

15 The EU *acquis* is a set of common rights and obligations that constitute EU law and are integrated into the legal systems of EU member states. Glossary of Summaries, https://eur-lex.europa.eu/EN/legal-content/glossary/acquis.html#:~:text=The%20European%20Union%20(EU)%20acquis,systems%20of%20EU%20Member%20States.

16 Preamble of the Association Agreement, (h) "To achieve Georgia's gradual integration with the EU internal market..., which will ensure thorough access to the market on the basis of sustainable and comprehensive regulatory approximation...". Approximation of laws for further liberalization of trade in services, Articles 87, 103, 113, 122, 126, Public Procurement, 147 (In Georgian).

17 Association Agreement, Article 420 (In Georgian).

18 Association Agreement, Article 404 (In Georgian).

contains a specific rule on disputes concerning the interpretation and application of this part; consultation, mediation, and arbitration procedures are foreseen for this part.[19]

The system established by the Association Agreement falls under public enforcement. However, as discussed above, this system may not be as effective as desired for integrative agreements. Arguments about the limitations of public enforcement, such as incomplete information about agreement violations, imperfect processing of claims, and reluctance of states to challenge each other, hinder effective enforcement of the agreement.[20]

As mentioned earlier, the direct effect of law serves as a crucial mechanism for effective enforcement within the European Union, contributing significantly to its gradual integration as a converging union. It is worth exploring whether the Association Agreement qualifies as an integrative treaty and whether granting it direct effect in the legal systems of the parties would enhance its effectiveness.

In literature[21], integration agreements concluded by the European Union are characterized by four main criteria:

a. Commitment to apply, implement and incorporate predefined EU *acquis*;

b. Procedure for amending or updating the incorporated *acquis*;

c. Obligation to interpret the incorporated *acquis* in accordance with decisions of the European Court of Justice;

d. Legal mechanisms ensuring uniform interpretation and application of the incorporated *acquis*.

Of these criteria, the first (a) is mandatory for the treaty to be considered an integration treaty, while the remaining three conditions (b., c., d.) are optional.[22] The Association Agreement fully meets the first two criteria and partially meets the third. Specifically:

- Article 417 requires Georgia to gradually approximate to the predetermined *acquis* listed in the annexes of the Association Agreement. Article 419 establishes mechanisms for monitoring the application and enforcement of the incorporated law.

- Article 418 ensures dynamic approximation, incorporation changes from relevant EU legislation into Georgian law, thus reflecting in full the second criterion.

- As for the relevant interpretation of the EU court rulings of the incorporated legislation, the said obligation is not stipulated either by the association agreement or by Georgian legislation. However, in the process of approximation of legislation, it is necessary to take into account the interpretations received by the Court of the European Union.[23]

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19 Association Agreement, Chapter 14, Dispute Resolution, Articles 244-270 (In Georgian).

20 See above.

21 For a detailed review of the literature on integration agreement criteria and such agreements, see *Guillaume Van der Loo*, The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area, A New Legal Instrument for EU Integration without Membership, in: Studies in EU External Relations, Edited by Marc Maresceau, Brill Nijhoff, Leiden, Boston, 2015.

22 Ibid., 49.

23 Decree of the Government of Georgia #183 on the provision of "Guidelines for the approximation of Georgian legislation to the legislation of the European Union", January 30, 2020, Annex, 141 et seq.

The integrative nature of the Association Agreement is evident throughout its provisions. The preamble and Article 1 articulate the agreement's objectives, emphasizing its integrative nature. According to the very first paragraph of the preamble, "... the common desire of the parties [is] to further develop, strengthen and extend their relations in an ambitious and innovative way". Political association and economic integration are the leitmotifs of the preamble. Article 1 sets out its goals, emphasizing "Georgia's gradual economic integration into the EU internal market" and "*far-reaching market access*" (Paragraph 2, Sub-Paragraph "h").

Moreover, Articles 80 and 87 allow for revisions to further liberalize trade in services and establishment based on Georgia's successful fulfilment of obligations, primary legislative convergence. The spirit of the preamble, aiming to strengthen and deepen relations "in an ambitious and innovative way", underscores the parties' commitment to Georgia's political and economic integration with the European Union.

This general spirit of the Association Agreement is echoed by the decisions of the European Union granting Georgia a European perspective[24] and recognizing it as a candidate country for EU membership.[25]

Recognition of direct effect, particularly concerning regulations on trade in goods, establishments or services under the Association Agreement, could prove pivotal.[26] Beneficiaries of these provisions – both legal and natural persons of the parties – are able to engage in economic activities in accordance with the Agreement's provisions. Their direct involvement in enforcing these norms and their "vigilance" to protect these provisions would be crucial for Georgia's economic integration with the European Union.

For Georgia, now a candidate state for EU membership, direct application of the Association Agreement would enhance its effective enforcement. Similar to the examples discussed above, it would foster more effective legislative convergence, strengthen enforcement, monitoring, and ultimately ensure that "all citizens of Georgia" benefit as envisaged in the preamble of the Association Agreement.

3. Application of International Agreements in European Union Law

According to Article 216 (2) of the Treaty on the Functioning of the European Union, international agreements concluded by the European Union are binding on both the Union itself and its member states. However, the founding treaties do not explicitly outline how these international agreements apply within the European Union.

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[24] European Council Conclusions on Ukraine, Membership Applications of Ukraine, of the Republic of Moldova and Georgia, Western Balkanc and External Relations, 23 June 2022, point 10.

[25] European Council Conclusions, EUCO 20/23, Brussels, 15 December 2023, pont 16.

[26] Such general provisions of the Association Agreement as, for example, on the approximation of foreign policy or protection of the rule of law cannot be given direct effect due to their programmatic character or content load. According to the permanent practice of the Court of the European Union, one of the prerequisites for the direct effect of the norm is its accuracy and clarity.

Consistent judicial practice established that once an international agreement enters into force, it becomes a "integral part" of EU law.[27] European Union law is generally directly applicable. However, this does not automatically ensure direct applicability of international agreements concluded by the European Union with other states or international organisations, though they form an integral part of EU law. This distinction arises from the unique and special ("sui generis") legal order of the European Union law.[28] This exceptional status does not extend to international agreements that the European Union concludes with third states or international organisations, as the European Union Court has not recognised similar exceptionality for them so far.

International public law norms govern these agreements, similar to other international agreements. Therefore, EU jurisprudence on the applicability of international agreements concluded by the European Union needs separate consideration.

Discussing the applicability of international agreements concluded by the European Union is important to draw parallels with the applicability of the Association Agreement.[29]

The distinguishing characteristic of EU international agreements from other EU legal norms is their foundation in public international law. While normative acts of the European Union are crafted by its institutions – the Council, the Commission, and the Parliament – international treaties involve sovereign entities of public international law, such as states and international organizations. Therefore, these agreements are assessed within the framework of public international law.

The Court of the European Union consistently emphasizes in its jurisprudence that: "It is true that the effects within the Community [now: the European Union] of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question."[30] The hallmark of public international law is the primacy of the agreement between the contracting parties. Regarding the direct effect of such international agreements, the Court explains that "In conformity with the public international law Community [now: the European Union] institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisprudence in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community."[31] It is clear that the Court distinguishes the international treaties concluded by the European Union from EU law, and this distinction lies in their public international law origins. Accordingly, it leaves the scope of action to the competent institutions

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27 Judgment if 30 April 1974, 181/73, Haegeman, EU:C:1974:41.

28 See a footnote.

29 The legal bases of the Association Agreement for the European Union are: Article 37 of the Treaty on European Union (which gives the Union the power to conclude international agreements in the field of the common foreign and security policy), Article 217 of the Treaty on the Functioning of the European Union (which gives the Union the power to conclude association agreements that provide mutual rights and obligations, common activities and special procedures will be taken into account.)

30 Judgment of 26 October 1982, C-104/81, Kupferberg, EU:C:1982:362, 17.

31 Ibid.

(European Council, European Commission) to agree with the contracting parties on the application of such agreements, and only if this is not the case, the Court interprets, as in the case of other EU norms, the application of such agreement within EU.

In the same vein, the Court offers a significant clarification regarding unilateral determination of enforcement instruments of an international agreement by a party. It states that "According to the general rules of international law there must be *bona fides* [good faith] performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken, it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means."[32] Based on the content of the said provision, the Court acknowledges the limited authority of parties to unilaterally determine the applicability and operational means of the agreement. The parties can unilaterally determine the legal means of fulfilling the obligations under the agreement, i.e., the operation of this agreement only if (a) it is not agreed in this agreement or (b) the necessity of its direct application does not stem from the interpretation of its purpose and content.

Granting direct effect to an international agreement by the court of one party, when the other party does not reciprocate, does not contravene the principle of reciprocity in the agreement implementation.[33]

In summary, the parties to an international agreement, as subjects of public international law, may, in accordance with recognized rules by public international law:

a. Agree and take into account the issue of direct effect of the international agreement;

b. If no agreement exists on the applicability issue, the Court interprets and determines the applicability of the agreement based on its purpose and content.

These principles will be discussed further in the context of the Association Agreement.

4. Application of the Association Agreement

The wording of the document itself plays a crucial role in elucidating the agreements between the parties regarding the applicability of the Association Agreement. Agreement means both the text of the main agreement and its annexes and protocols.[34]

The ***main text*** of the Association Agreement (excluding annexes and protocols) does not explicitly address the applicability of the agreement. Only Article 414 addresses the prohibition of discrimination in the exercise of the right to appeal to courts.

Annexes to the Association Agreement concerning establishment and provision of services explicitly exclude the direct effect of these regulations.

In addition to the provisions agreed upon by the parties, ***a decision of the European Council*** (relevant for the EU and its member states) completely excludes the direct application of the agreement.

Each provision will be discussed in subsequent sections to clarify its legal implications.

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32 Ibid., 18.

33 Ibid.

34 As per Article 426 of the Association Agreement: "Annexes to this agreement are an integral part of it."

4.1. Article 414 of the Association Agreement

Article 414 of the Association Agreement prohibits discrimination against nationals of the other party to the agreement in their access to courts and administrative bodies within the framework of the agreement. It does not establish the direct right for individuals to invoke treaty provisions but rather ensures non-discriminatory treatment by each party towards the other's citizens seeking judicial remedies. In other words, if a party grants its own citizens (through direct action or an implementing act) the right to apply to the courts within the framework of the agreement, it is obliged to consider the same rights for the citizens of the other party. Thus, the issue of whether the treaty provisions have direct effect in domestic law remains open, without mutual agreement between the parties.

As mentioned above, the unilateral granting of direct effect by one party does not obligate the other party to reciprocate. Accordingly, Article 414 conditions that if Georgia gives direct effect to certain provisions of the agreement for its citizens, it must equally consider such rights for EU citizens, though the EU is not bound by reciprocity.

Under Article 6, Clause 3 of the Law of Georgia on International Agreements, provisions of international agreement that establish specific rights and obligations without requiring implementing measures are self-enforcing and have direct effect. This means that generally EU citizens can invoke their rights in Georgian courts if they are derived from the self-enforcing provisions of the Association Agreement. However, there are some exceptions where direct effect is excluded, such are provisions related to establishment and services (discussed below).

4.2. Exclusion of Direct Application in the Establishment and Service Sector

Provisions excluding direct application of some norms are found in the annexes to the Association Agreement, specifically addressing the establishment and provision of services under Chapter 6.[35] These annexes specify that "rights and obligations arising from the list below shall have no self-executing effect and thus confer no rights directly on natural or juridical persons".

Annexes are an integral part of the international agreement and hold equal legal weight as the main text.[36] Accordingly, the Annexes and their provisions as a whole constitute the agreement between the parties.

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[35] Annexes: XIV- A List of Reservations on Establishment (Union), point 3; XIV – B, List of Commitments on Cross-Border Supply of Services (Union), point 6, XIV – C, List of Reservations on Key Personnel, Graduate Trainees and Business Sellers (Union), point 9; XIV – D, List of Reservations on Contractual Services Suppliers and Independent Professionals (Union), point 10; XIV – E, List of Reservations on Establishment (Georgia), p. 3; XIV -F, List of Commitments on Cross-Border Supply of Services (Georgia), p. 6; XIV – G, List of Reservations on Key Personnel, Graduate Trainees and Business Sellers (Georgia), p. 9; XIV – H, List of Reservations on Contractual Services Suppliers and Independent Professionals (Georgia), p. 10. All mentioned annexes provide: "The rights and obligation from the list below shall have no self-executing effect and thus confer no rights directly on natural or juridical persons."/ <https://matsne.gov.ge/ka/document/view/2496959?publication=0> [23.05.2024].

[36] Association Agreement, Article 426.

These specific annexes detail the establishment and service sectors liberalized under the provisions of the Association Agreement. More specifically, Chapter 6 of the Association Agreement – Establishment, Trade in Services and Electronic Commerce, sets out the conditions under which legal and natural persons of the Parties are allowed (a) to initiate and carry out activities in the other Party through the establishment, or (b) to provide services to customers in the territory of the other party without establishment or provide such services to customers of the other party in their own territory.

Annexes, in turn, list the sectors of economic activity (and prerequisites) to which citizens and legal entities of the other party are entitled to have access. The direct application of these provisions and thus rights derived from the liberalized sectors are not directly invokable. In the establishment and service sectors, the exclusion of direct effect means that affected parties cannot directly enforce their rights through national courts in case of violations. For example, a Georgian legal entity seeking to establish a branch in Italy is required by the Italian authorities to have a minimum capital that is twice the minimum amount of capital that is required by residents of other EU member states. According to paragraph 2 of Article 79 of the Association Agreement, Georgian legal entities enjoy the same treatment as legal entities of the European Union in accordance with the terms of Annex XIV-A. According to Annex XIV-A, Italy has only one reservation, which presumes the existence of a residence permit. Such permission has been obtained by the legal entity. However, the existence of additional double capital, which the Italian legislation provides for in this case, is not established as a reservation in the annex. Based on Article 79 of the Association Agreement and Annex XIV-A, the Georgian legal entity cannot challenge the compatibility of the Italian regulation with this agreement, as far as paragraph 3 of Annex XIV-A states that "the rights and obligations arising from the annex below shall not have the effect of self-execution and therefore, directly shall not confer rights on natural and legal persons", implying that the possession of a residence permit does not in itself establish the right of these persons to appeal directly to the courts of EU Member States for the restoration of the violated right. Similarly, the provision of services under Article 85 of the Association Agreement is subject to the terms and conditions outlined in Annex XIV-B. According to subparagraph 'a' of point F of the Annex, there is no restriction on the provision of advertising services from Georgia on the part of the European Union and its member states. If a Georgian legal entity is subject to a restriction, which is not provided for EU legal entities, when providing such services, it will not be able to file a dispute in court to restore the right arising from the Association Agreement and specifically from this annex, as the annex excludes the direct effect of the rights stemming from it.

Disputes in such cases, obviously, are handled through the agreement's formal dispute settlement mechanisms outlines in Chapter 14, involving consultations, mediation and arbitration between the parties of the agreement. A natural or legal person is forced to contact his own state authorities and provide information about the obstacle that has arisen. The latter, in turn (within discretion), decides whether to raise this issue with the other party and to go through the formal procedures provided for in the agreement. For a private person while applying to the state authorities may pose challenges, such as the absence of an appropriate mechanism or competent institution,

procedural delays, unpredictability of the results, and ambiguity of compensation issues for private individuals.

It's important to note that the exclusion of direct effect applies bilaterally, affecting both the European Union and its member states, as well as Georgia.

It should also be noted that the provisions on the exclusion of direct effect are only found in the annexes on establishment and services. Accordingly, it is presumed that these provisions do not apply to other provisions of the agreement and do not exclude their direct effect in this way.

Significantly, the placement of provisions excluding direct effect in the annexes rather than the main text underscores their strategic inclusion in the context of market integration and liberalization objectives of the Association Agreement. According to paragraph 3 of Article 406 of the Association Agreement, the Association Council, as a body created for the implementation of the Agreement, has the authority to "update or amend the Annexes to the Agreement..." depending on the objectives of the Association Agreement. The mentioned regulation gives the possibility to assume that the provisions excluding direct effect were not accidentally included in the annexes and that as a result of integration and market liberalization, the possibility is left to give direct effect to the provisions for the sake of further market integration.

4.3. European Council Decision

In 2014, the European Council adopted a decision[37] concerning the signing and provisional application of the Association Agreement. According to the 7th paragraph of its preamble, "The agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or member State court and tribunals." This decision explicitly excludes the direct effect of any provision of the Association Agreement at the intra-European level.

As mentioned above, under international and EU jurisprudence, the application of a treaty is established through mutual agreement of the parties. If there is no such agreement, then the court bears the responsibility to define its applicability by interpreting the purpose and content of the agreement. Therefore, an act adopted unilaterally by one party, such as the European Council's decision, cannot alone constitute an agreement between the parties.

Firstly, it should be noted that the decisions of the European Council constitute secondary sources of EU law. Decisions of general application have binding force across the entire European Union and its member states (Article 288 of the Treaty on the Functioning of the European Union). From the perspective of public international law, the decision of the European Council, as an act internal to the European Union, does not directly affect third states like Georgia. Therefore, this decision, standing alone, does not constitute an agreement between the parties. However, to fully

[37] Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the 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 (2014/494/EU), preamble 7: 'The Agreement should not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals', <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014D0494&qid=1706105985064> [23.05.2024].

understand its significance this decision may have for the interpretation of the application of the Association Agreement, it is necessary to refer to the rules of treaty interpretation, which are determined by customary law and outlined in the Vienna Convention.

Article 31 of the Vienna Convention entails the rules of interpretation of international agreements, including the definition of their applicability.[38] According to paragraph 2 of the mentioned article, for the purposes of interpreting an agreement "b. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" shall suffice. This provision is characterized by two cumulative elements: a. The document is drawn up by the party related to the treaty and b. The other party accepts it as a document related to the treaty. In the presence of these two prerequisites, it is possible that even a document accepted by one party can be used to determine the purpose and content of an international agreement.

The decision of 2014 of the European Council was prepared in connection with the conclusion of the Association Agreement and pertains to issues such as the provisional application and signing of the agreement.

The 2014 decision of the European Council seems to have been communicated to and accepted by Georgia. This stems from the information on the Legislative Herald,[39] according to which the Georgian side received a notification from the General Secretariat of the Council of the European Union about the date of the start of the provisional application of the relevant parts of the agreement. The same is confirmed by another source,[40] which repeats a similar text and refers to the mentioned decision of the European Council. It suggests Georgia's acceptance of the decision of the European Council.

Therefore, since both conditions of Article 31 of the Vienna Convention appear to be met, the 2014 decision of the European Council can serve as a document related to the Association Agreement, clarifying aspects of its application. Consequently, the decision excludes the direct effect of the Association Agreement within the European Union.

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[38] See Footnote 3 on the opinion of the Court of the European Union regarding the binding nature of the court of Vienna Convention. Vienna Convention: "Article 31. The general rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

[39] Association Agreement, third paragraph of the preamble, <https://matsne.gov.ge/ka/document/view/2496959?publication=0> [23.05.2024].

[40] <https://www.asocireba.ge/show_article.php?id=30&id=30#ganmarteba> [23.05.2024].

It remains uncertain how the Court of Justice of the European Union will consider this argumentation and whether it will uphold the provisions set out in the 2014 decision of the European Council. Traditionally, the Court has recognized direct effect of provisions in association, partnership and cooperation Agreements.[41] However, in the presence of such an exceptional decision by the European Council in this case – unprecedented in relation to previous association and partnership agreements – leaves room for potential deviation from established judicial practices. Especially, considering the fact that the decision on the application of the international agreement is the discretion of the parties (the relevant institutions represented by the European Union: the European Council, the European Commission), it would not be unexpected from the Court to abandon its established practice. Such a departure would significantly impact the purpose and importance of the Association Agreement and Georgia's integration into the internal market.

5. Summary

Granting direct effect to EU law has been pivotal in driving internal integration processes within the EU. This principle ensures that EU law can be invoked directly by individuals and entities before the courts, thereby fostering uniformity and coherence in the application of EU rules.

Giving direct effect to the Association Agreement, as an integration agreement, is also essential for its effective implementation. EU case law has established that the parties to an international treaty, including integration agreements like the Association Agreement, can agree on its application. This agreement is provided for in the annexes related to the establishment and provision of services, where the parties have explicitly excluded direct effect.

Aside from the provisions in the annexes related to establishment and services, the Association Agreement does not explicitly address the direct effect of its other parts. The only specific provision regarding the exclusion of direct effect is found in the 2014 decision of the European Council, which applies within European Union. This decision can be considered a treaty document under the Vienne Convention, potentially influencing the interpretation of the Association Agreement's application.

On the other hand, in Georgia, the self-enforcing norms of the Association Agreement (except for the establishment and service provisions) apply directly. This means that Georgian citizens and entities can rely on these provisions in their national courts without the need for further

[41] See the cases within the framework of association agreements concluded with Eastern European countries (so-called European agreements):Judgment of 27 September 2001, C-63/99, GLoszczuk, EU:C:2001:488; Judgment of 27 September 2011, C-235/99, Kondova, EU:C:2001:489; Judgment of 27 September 2001, C-257/99, Barkoci and Malik, EU:C:2001:491; Judgment of 20 November 2001, C-268/99, Jany, EU:C:2001:616; Judgment 29 January 2002, C-162/00, Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer, EU:C:2002:57. Also, cases: Judgment of 31 January 1991, C-18/90, Onem v Kziber, EU:C:1991:36; Judgment of 11 November 1999, C-179/98, Belgium c Mesbah, EU:C:1999:549 (Cooperation Agreement with Morocco) Judgment of 5 April 1995, C-103/94, Krid v WAVTS, EU:C:1995:97; Judgment of 15 January 1998, C-113/97, Babahenini v Belgium, EU:C:1998:13 (Cooperation Agreement with Algeria); Judgment of 11 May 2000, C-37/98 Savas, EU:C:2000:224 (EU – Turkey Association Agreement) Judgment of 24 September 2013, C-221/11, Demirkan, 62011CA0221; Judgment of 11 September 2014, C-91/13, Essent Energie, 62013CA0091.

implementation measures. The same applies to European citizens, in accordance with the principle of non-discrimination.

In summary, the question of whether the Association Agreement directly applies (other than establishment and services) in the territory of the EU can only be determined by the Court of Justice of the EU. The judicial practice to date regarding association and partnership agreements concluded by the European Union recognises the direct effect of such agreements, considering their objectives and content. The extent to which the Court of Justice of the European Union will adhere to this precedent in recognizing the direct effect of the Association Agreement will depend on its interpretation of the Agreement, considering both EU law and international norms under the Vienna Convention.

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28. Judgment of 31 January 1991, C-18/90, Onem v Kziber, EU:C:1991:36;
29. Judgment of 26 October 1982, C-104/81, Kupferberg, EU:C:1982:362.
30. Judgment of 5 April 1979, 148/78, Tullio Ratti, EU:C:1979:110.
31. Judgment of 4 December 1974, 41-74, van Duyn, EU:C:1974:133.
32. Judgment of 30 April 1974, 181/73, Haegeman, EU:C:1974:41.
33. Judgement of 15 July 1964, 6/64, Costa/ENEL, EU:C:1964:66.
34. Judgment of 5 February 1963, 26-62, van Gend & Loos, EU:C:1963:1.

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Ways of Discovering Constitutional Identities in Different Jurisdictions[1]

In legal scholarship there are different approaches regarding the constitutional identities. The paper presents the views of Georgian and foreign professors, some of which are contradictory. The main topic of the article is to single out and classify the ways of discovering constitutional identities. The author, drawing from examples of different states, puts forward 4 ways of discovering constitutional identities. According to the first model, constitutional identity can be discovered outside the text of a constitution, namely in declarations of independence. The example of this model is the United States. The second model suggests looking at the preambles of the constitutions. Here the example would be Turkey. The third way of discovering constitutional identities is to resort to the master text of the constitution. Here two subtypes can be distinguished. On the one hand, general norms in the constitution can bear the function of constitutional identity. On the other hand, it can be unamendable provisions. For each case the examples are drawn from the respective jurisdictions. The fourth model of discovering constitutional identities is to look at judicial decisions.

The article analyzes critically the possibility of unamendable provisions to be the bearers of constitutional identity. The author argues that not in every case an unamendable provision reflects the constitutional identity. The article suggests a kind of formula which can be used to tell in which cases can an unamendable provision be constitutional identity. The appropriate examples are given to test the formula.

Key Words: *Constitutional identity, unamendable provisions, models of discovering constitutional identities, declaration of independence, preamble*

1. Introduction

Constitutional identity is often used in different jurisdictions as a limit to constituted power. Courts use different measurements to check the constitutionality of constitutional changes. Among those are constitutional identities. In Georgian legal domain this component of constitutional law is understudied. Of course, there are some exceptions.[2] Therefore, the aim of this article is to reopen discussions about this topic.

The article discusses different theories and respective examples from the practice. Words "constitutional identity" aren't fully clear. There are various opinions about it, which are discussed in

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1 This article is a part of a bigger project, my doctoral thesis. The topics discussed in the article are expanded in my doctoral thesis, which currently is a work-in-progress.

2 About constitutional identity see: *Gegenava D.,* For Understanding Constitutional Identities, in Sergo Jorbenadze 90, edited by Sergi Jorbenadze, Sulkhan-Saba University Press, 2019 (in Georgian).

the paper. The aim of the article is to contribute to the clarity of topic and also it aims to detect and classify the possible sources of discovering constitutional identities. Lately, some scholars also discuss the importance of constitutional identities in terms of union of the states.[3] However, bearing in mind the specificity of the article, this aspect won't be covered.

2. Particularities of Constitutional Identities

2.1. The Essence of Constitutional Identity

Every constitution consists of a set of basic principles and features, which determine the totality of the constitutional order and make up the 'spirit of the constitution' and its identity.[4] According to Professor Rosenfeld, constitutional identity is not national identity, and would cease having an identity of its own if it could simply be folded into the latter.[5] By the same token, however, a nationstate's constitution could hardly produce an identity of its own without incorporating some features derived from national identity.[6] This approach is also shared by Professor Vicky Jackson, who, when discussing functions of a constitution, says "constitutions … may express and symbolize national identity".[7] Georgian professor Dimitry Gegenava also follows this line of argumentation. He claims that before forming constitutional identities, state and national identities have to be formed first.[8] National identity itself nurtures constitutional identity.[9] Professor Jacobson, unlike the presented approach, believes that for establishing constitutional identities, "it obviously makes sense to study the text."[10] According to him, "this provides us with a documentary transcript of how a particular group of framers provided for the governance of their polity, and it often includes their aspirations for its subsequent development."[11] Therefore, the future of constitutional identity is inscribed in its past.[12]

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3 The EU law acknowledges the importance of constitutional identities of the member states. About this see: *Sajó A., Fabbrini F.,* The Dangers of Constitutional Identity, European Law Journal, Vol. 25, Iss. 4, 2019; *Scholtes J.,* Abusing Constitutional Identity, German Law Journal, Vol. 22, 2021; *Suteu S.,* Eternity Clauses in Democratic Constitutionalism, Oxford University Press, 2021, 113-121.

4 *Roznai Y.,* The Straw that Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments, Constitutionalism: Old Dilemmas, New Insights, edited by Alejandro Linares Cantillo, Oxford University Press, 2021, 149, footnote 7.

5 *Rosenfeld M.,* The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community, Routledge, 2010, 29.

6 Ibid.

7 *Jackson V.,* What's in a Name? Reflections on Timing, Naming, and Constitution-making, William & Mary Law Review, Vol. 49, Iss. 4, 2008, 1253.

8 *Gegenava D.,* For Understanding Constitutional Identities, in Sergo Jorbenadze 90, edited by Sergi Jorbenadze, Sulkhan-Saba University Press, 2019, 339 (in Georgian).

9 Ibid.

10 *Jacobson G. J.,* Rights and American Constitutional Identity, Polity, Vol. 43, N. 4, 2011, 414.

11 *Jacobson G.,* The Formation of Constitutional Identities, Comparative Constitutional Law, edited by Tom Ginsburg and Rosalind Dixon, Edward Edgars Publishing, 2011, 131.

12 *Jacobson G.,* Constitutional Identity, Harvard University Press, 2010, 349.

2.2. Ways of Identifying Constitutional Identities

Constitutional identity has been defined as 'the core of fundamental elements or values of a particular state's constitutional order as the expression of its individuality'.[13] In this regard, we should view constitutional identity as such a specific feature, which distinguishes a constitutional framework of a particular state from the ones existing in other states. But, where exactly can we read constitutional identity? How much tangible is it? Below 4 different ways are proposed to answer these questions. One can come across a constitutional identity 1) outside the text of the constitution – in the declaration of independence, 2) in the preamble of the constitution, or 3) directly in the text of the constitution, and also 4) in court decisions. Below I present relevant examples for each model.

One can read constitutional identity outside the text of the constitution, namely in the declaration of independence of a state. A good example for this would be the United States, where "the core of its constitutional identity [is] encapsulated in the phrase 'all men are created equal' [which is] included in the 1776 Declaration of Independence."[14] However, the 1787 Constitution stands in massive contradiction to the principles of the Declaration of Independence.[15] Indeed, there is language clearly complacent toward the existence of human bondage in America.[16] The language used in the Supreme Law indicates a level of internal disharmony consistent with the many contentious debates surrounding that issue during the framing of the Constitution.[17] Therefore, so long as slavery remained constitutionally tolerated, it was impossible to construct a coherent American constitutional identity. [18] [It] would take nearly eighty years and a civil war to abolish slavery and to finally make for a coherent American constitutional identity. [19]

A preamble of the constitution may reflect constitutional identity. Preambles are the "mission statements" of the constitution and can be powerful symbols of the constitutional order and identity. [20] An example of this would be Turkey. The preamble of the Constitution of Turkey establishes the principle of secularism, which represents its constitutional identity.[21]

One can read constitutional identity from the actual text of a constitution. However, in the text, it may be enshrined as an unamendable clause or maybe not. The former is discussed in more details below in this article. Therefore, specific examples aren't presented here. However, the latter is discussed in this section. The function of displaying constitutional identity maybe assumed by a

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13 *Krunke H.,* Constitutional Identity and Equality: the Challenge of the Nordic EU Member States, Comparative Constitutional Studies, Vol. 1 N. 1, Edward Elgar Publishing, 2023, 126.

14 *Rosenfeld M.,* The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community, Routledge, 2010, 131.

15 *Jacobson G. J.,* Rights and American Constitutional Identity, Polity, Vol. 43, N. 4, 2011, 428.

16 Ibid.

17 Ibid.

18 *Rosenfeld M.,* The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community, Routledge, 2010, 187.

19 Ibid.

20 *Ginsburt T., Bisaraya S.,* Introduction, Constitution Makers on Constitution Making, New Cases, Cambridge University Press, 2022, 25.

21 *Jacobson G.,* The Formation of Constitutional Identities, Comparative Constitutional Law, edited by Tom Ginsburg and Rosalind Dixon, Edward Edgars Publishing, 2011, 132.

normal, non-entrenched clause of the constitution. Think about the Constitution of Japan. Its article 9, so-called peace clause, in comparative constitutional law is acknowledged as representative of the constitutional identity. [22]

The last model of discovering a constitutional identity is through court decisions. According to this model, namely the court decisions allow discovering constitutional identities in some states. This is used in India. For the first time in 1973, the Supreme Court held that Parliament cannot amend the Constitution in a manner that alters its basic structure and changes its identity.[23] As the Court later indicated "the Constitution is a precious heritage; therefore, you cannot destroy its identity."[24] "[J]udges shape constitutional identity through their decisions, and judges' decisions are in turn shaped by their understanding of the identity of the constitutional project."[25] Therefore, in different decisions, the Court would identify different clauses as parts of identity. One reason for such variable approaches is that the Court has not articulated any consistent method for determining what amounts to the basic structure of the Constitution, and how courts should conduct basic structure review.[26] For this reason, Professors Sajó and Fabbrini criticize the use of constitutional identity. They believe, there are 2 fundamental problems. On the one hand, it is an indeterminate concept that does not offer clear and consistent criteria on what falls under the label.[27] On the other hand, its application becomes unforeseeably and easily arbitrary in the hands of constitutional judges.[28] This critique can be acceptable in a certain manner. Out of the 4 models of discovering the constitutional identities, the concerns of the authors are mainly on the model, which uses court decisions for discovering constitutional identity. However, by the use of other models discussed above constitutional identities can be identified more decisively.

2.3. Changing Constitutional Identities

Constitutional identity isn't an eternal feature. Professor Jacobson asks us to see its dynamic quality.[29] Therefore, some processes lead to the formation of constitutional identity. The formation of constitutional identity can't be pre-planned and easily reached process, unless it's accompanied by political processes, national unity and most importantly the spirit.[30] After the formation of

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22 *Albert R.,* Constitutional Amendments, Making, Breaking, and Changing Constitutions, Oxford University Press, 2019, 68.

23 *Chandra A.,* A Precious Heritage?: the Construction of Constitutional Identity by Indian Courts, Comparative Constitutional Studies, Vol. 1 N. 1, Edward Elgar Publishing, 2023, 140-141.

24 Ibid.,141.

25 Ibid.,142.

26 Ibid.,144.

27 *Sajó A., Fabbrini F.,* The Dangers of Constitutional Identity, European Law Journal, Vol. 25, Iss. 4, 2019, 471.

28 Ibid.

29 *Jacobson G.,* Constitutional Identity, Harvard University Press, 2010, 88.

30 *Gegenava D.,* For Understanding Constitutional Identities, in Sergo Jorbenadze 90, edited by Sergi Jorbenadze, Sulkhan-Saba University Press, 2019, 335 (in Georgian).

constitutional identity, of course it can be changed as well.[31] It would take the use of constituent power, which results in the adoption of a new constitution. [32] However, according to the theory of constitutional dismemberment of Professor Richard Albert, a dismemberment of a constitution's identity results either in the extinguishment of a core constitutional commitment or the simultaneous extinguishment of a core constitutional commitment and the adoption of a new one.[33] However, unlike the adoption of a new constitution, according to the theory of dismemberment, formally the old constitution continues to be in force.[34] In conclusion, there are two ways of changing constitutional identity: through adoption of a new constitution or through its dismemberment.

2.4. Relationship between Constitutional Identity and Unamendable Clauses

2.4.1. Unamendable Clauses as Representatives of Constitutional Identity

Constitutions are designed to reflect society's identity and delineate the highest principles shared by the State's citizens.[35] [U]namendability is the guardian of the constitution's identity.[36] The entrenchment of founding principles or other symbolic issues may help to build a sense of constitutional identity.[37] Therefore, often clauses protected by unamendablity represent constitutional identities. For example, in France republican form of governance is an unamendable provision and at the same time represents constitutional identity of the state.[38] The same can be said about the unamendable provisions of the Constitution of Turkey.[39] The Constitution of Norway is interesting in a sense, that it declares the spirit of the constitution unamendable.[40] In general, the "spirit of the constitution" means certain fundamental core values or principles.[41] These are constitutional provi-

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31 About this see: *Dixon R.,* Amending Constitutional Identity, Cardozo Law Review, Vol. 33, N. 5, 2012, 1847-1858.

32 *Kay R.,* Constituent Authority, The American Journal of Comparative Law, Vol. 59, 2011, 732.

33 *Albert R.,* Constitutional Amendment and Dismemberment, The Yale Journal of International Law, Vol. 43, 2018, 39.

34 *Albert R.,* Constitutional Amendments, Making, Breaking, and Changing Constitutions, Oxford University Press, 2019, 85.

35 *Roznai Y.,* Unconstitutional Constitutional Amendments: the Limits of Amendment Powers, Oxford University Press, 2017, 148.

36 *Michel S., Cofone I., N.,* Credible Commitment or Paternalism? The Case of Unamendability, An Unamendable Constitution? Unamendability in Constitutional Democracies, Springer International Publishing AG, 2018, 137.

37 *Landau D., Dixon R.,* Tiered Constitutional Design, The George Washington Law Review, Vol. 86, 2018, 486.

38 *Jacobson G.,* The Formation of Constitutional Identities, Comparative Constitutional Law, edited by Tom Ginsburg and Rosalind Dixon, Edward Edgars Publishing, 2011, 129.

39 *Jacobson G.,* Constitutional Identity, Harvard University Press, 2010, 329; Friedman, A., Dead Hand Constitutionalism: the Danger of Eternity Clauses in New Democracies, Mexican Law Review, Vol. 4, N1, 2011, 79. (In this case the author pays attention to the principle of secularism, which is an unamendable provision of the Constitution of Turkey and represents constitutional identity.)

40 Constitution of Norway, art. 121.

41 *Roznai Y.,* Unconstitutional Constitutional Amendments: the Limits of Amendment Powers, Oxford University Press, 2017, 142.

sions that very often comprise 'the genetic code of the constitution' and are core components of constitutional identity that should be resistant to change.[42] "Genetic code" represents constitutional provisions, that define the particularity of a specific constitutional order.[43]

2.4.2. When is It That an Unamendable Provision Doesn't Reflect Constitutional Identity?

It's important to note, that not every unamendable provision reflects constitutional identity. In order for an unamendable clause to bear the function of constitutional identity, it has to meet 2 requirements cumulatively. On the one hand, it's important that a substantial amount of time is passed after adoption of such clause, and on the other hand, this clause has to function under different political majorities. What substantial amount of time is difficult to tell in years and also is unpractical. Therefore, in each instance, we have to assess whether the time passed after the adoption of a clause is enough, provided that the other component is satisfied, for the clause to bear the function of constitutional identity. If these requirements aren't met cumulatively, then a particular constitutional clause can't bear the function of constitutional identity. To support this argument, two examples are discussed below.

2.4.2.1. Example of Honduras

In the first place, let's discuss the Latin American country – Honduras. The Constitution limited presidents to only one lifetime term in office, prevented any attempt to change the no-reelection rule by embedding it in eternity clause.[44] Besides, the Constitution prescribed a form of punishment for anyone attempting to change the term limit.[45] That person would "cease" to hold office and be barred from doing so for the subsequent ten years.[46] In 2009, President Zelaya proposed a non-binding referendum to gauge whether the population wished to amend this unamendable rule.[47] The Congress opposed to the President's initiative and the acts of the President were challenged in the Supreme Court.[48] The Supreme Court declared the proposed referendum to be unconstitutional and with a warrant for his arrest the military arrested Zelaya in his pajamas, spiriting him out of the country to Costa Rica.[49] The Organization of American States (OAS) quickly turned the constitutional issue into

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42 *Roznai Y., Okubasu D., M.,* Stability of Constitutional Structures and Identity Amidst 'Political Settlement': Lessons from Kenya and Israel, Comparative Constitutional Studies, Vol. 1 N. 1, Edward Elgar Publishing, 2023, 122.

43 To learn more about this, see: *Roznai Y.,* Unamendability and the Genetic Code of the Constitution, European Review of Public Law, Vol. 27, Iss. 2, 2015.

44 *Landau D., Roznai Y., Dixon R.,* Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America, The Politics of Presidential Term Limits, edited by Alexander Baturo and Robert Elgie, Oxford University Press, 2019, 63.

45 Ibid.

46 Ibid.

47 *Albert R.,* Constitutional Amendments, Making, Breaking, and Changing Constitutions, Oxford University Press, 2019, 139.

48 *Ginsburg T.,* Democracies and International Law, Cambridge University Press, 2021, 108.

49 Ibid.

an international one, calling for Zelaya's reinstatement and declaring the events to be a coup d'état.[50] Evidently, the Supreme Court of Honduras paid a lot of attention to the unamendability of the presidential term limit in the constitutional order.

Later, in 2014, the term limit clause was challenged in the Supreme Court, with the main arguments being that it violated right to vote and a politician's right to participate in elections.[51] The court validated these arguments by relying chiefly on international human rights law.[52] It noted that a number of human rights treaties, including the Inter-American Convention on Human Rights, had been ratified before the establishment of the 1982 Constitution, and that the drafters of the 1982 Constitution had a binding legal obligation to respect and protect the rights contained therein.[53] In the end, the Court held 3 provisions to be unconstitutional: 1) the term limit, 2) the provision making it unamendable, and 3) the provision punishing anyone seeking to change it with removal from office.[54] However, there's one detail that is alarming. The supporters of then-president Juan Orlando Hernandez for his reelection managed to change 4 out of 5 members of the Constitutional Chamber of the Supreme Court.[55] Therefore, there's an assumption that this decision raised significant questions of political pressure.[56]

The example of Honduras clearly demonstrates, that constitutional unamendable clause, on the one hand, was used by the Court to protect the Constitution, however, on the other hand, several years later the Court declared the same provision unconstitutional out of political expediency. Hence, in this case an unamedable clause of the constitution could neither live substantial amount of time, nor function under different political majorities. Therefore, this unamendable provision, which was in force for some time, can't be said to have been the bearer of constitutional identity.

2.4.2.2. Example of Germany

Basic Law of Germany is interesting for a number of reasons. Firstly, it is an imposed constitution, whose main provisions, such as federalism, democracy and human rights were defined by the external forces.[57] These were the United States, the Great Britain and France.[58] The main goal of

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50 Ibid.

51 *Versteeg M., Horley T., Meng A., Guim M., Guirguis M.,* The Law and Politics of Presidential Term Limit Evasion, Columbia Law Review, Vol. 120, 2020, 231-232.

52 Ibid.

53 Ibid.

54 *Landau D.,* Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine, Law & Ethics of Human Rights, Vol. 12, N. 2, 2018, 242.

55 *Landau D., Roznai Y., Dixon R.,* Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America, The Politics of Presidential Term Limits, edited by Alexander Baturo and Robert Elgie, Oxford University Press, 2019, 64.

56 Ibid.

57 *Roznai Y.,* Internally Imposed Constitutions, The Law and Legitimacy of Imposed Constitutions, edited by Richard Albert, Xenophon Contiades and Alkmene Fotiadou, Routledge, 2019, 61-62.

58 *Rosenfeld M.,* The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community, Routledge, 2010, 195.

both the occupying powers and the German citizenry was to avoid a return to the conditions that led to war, and were eager to guard as much as possible against the resurgence of a tyranic regime.[59] As a result, provisions such as 1) principles democratic and social state, 2) federalism, 3) human dignity, 4) people as a source of power and 5) the right of a citizen to resist any person seeking to abolish this constitutional order if no other remedy is available were declared unamendable.[60] These provision have indeed withstood the time and the change of political majorities.[61] German constitutional identity is anchored in the unamendable provisions of the Basic Law.[62] Hence, it can be said with confidence that in the states similar to Germany can unamendable clauses represent constitutional identities.

3. Conclusion

It's not easy to understand constitutional identities. As it has been discussed, different professors have distinct perceptions about them. The aim of the article was to contribute to the understanding of constitutional identities. The article presents 4 different models, which can be used to track constitutional identities in different jurisdictions. One can find constitutional identities 1) outside the text of the constitution – in declarations of independence, 2) in preambles of constitutions, 3) in the actual text of a constitution, and/or 4) in the decisions of a court, which exercises constitutional control.

As stated in the article, generally, unamendable clauses represent constitutional identities. However, this formula doesn't work in every case. Based on the cases discussed, it can be argued that the unamendable provision reflects constitutional identity only when substantial amount of time has been passed after its adoptions and it has lived under different political majorities. These 2 requirements have to be met cumulatively.

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59 Ibid.,196.
60 Basic Law of Germany, art. 79, sec. 3.
61 About the German governmental parties see: German Political Parties, <https://www.britannica.com/place/Germany/Political-process> [10.11.23.].
62 *Sajó A., Uitz R.,* The Constitution of Freedom: an Introduction to Legal Constitutionalism, Oxford University Press, 2017, 64-65.

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Requesting the Justification of a Constitutional Claim as a Guarantee of Effective Constitutional Control

Following an increased appeal the Constitutional Court of Georgia faces the challenge not to be overburdened with baseless constitutional claims and submissions. The court needs to take into consideration the issues that fall within the scope of powers determined by the Constitution and serve to restore the violated right and prevent an infringement of the right. Since the substantial consideration of each constitutional claim is related to limited human and material resources, only their rational application can ensure the implementation of the mandate of the Constitutional Court.

The article is dedicated to the complex and comparative analysis of the theoretical and practical problems arising while deciding on the issue of considering constitutional claims substantially, particularly in terms of requesting justification. The paper will also discuss specific recommendations to improve legislation in the mentioned discipline and provide judicial practices.

Keywords: *Constitutional Court, Constitutional Control, Effective Constitutional Justice, Fundamental Human Rights, Constitutional Claim, Acceptance of a Claim for Consideration on Merits, Justification of the Claim.*

1. Introduction

The decision to accept a constitutional claim for consideration has practical importance because this stage in constitutional proceedings has a direct and immediate effect on the implementation of constitutional justice.

The resources of the Constitutional Court are exhaustible. This issue has always been a subject of discussion in the example of different countries. Therefore, following the recommendation of the Venice Commission, the constitutional courts must provide the tools to accept unsubstantiated claims.[1]

To reduce the number of unsubstantiated constitutional claims in the Constitutional Court, the national legislation ensures procedural "filters"[2] that are laid out on the ground for declaring a constitutional claim inadmissible. European countries have developed different variations of the procedural "filters" for adopting the constitutional claim[3], depending on the national level of operating the constitutional control and the powers of the Constitutional Court Court.[4]

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1 *Venice Commission,* Revised Report On Individual Access To Constitutional Justice, CDL-AD(2021)001, Opinion No. 1004/2020, Strasbourg, 22 February 2021, 22.

2 *Venice Commission,* Revised Report On Individual Access To Constitutional Justice, CDL-AD(2021)001, Opinion No. 1004/2020, Strasbourg, 22 February 2021, 19.

3 *Dürr S. R.,* Comparative Review of European Systems of Constitutional Justice, "Law Journal", No. 2, issue, 2017, translator: Paata Javakhishvili, 347.

4 *Chakim Lutfi M.,* A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions, Constitutional Review, Vol. 5, 2019, 98.

The requirement for the justification of the claim, in turn, consists of several criteria. In light of the general legislative record on requesting the substantiation of the constitutional claim, the Constitutional Court of Georgia established criteria for meeting each constitutional claim to consider. Since this practice is not uniform, especially in the recent period of performing the Constitutional Court, it is necessary to scientifically analyze one of the most important requirements for the admissibility of a constitutional claim – the requirement for the justification of the constitutional claim, which is the starting point in constitutional proceedings.

The article will examine the current legislative records on the request for justification and peruse the norms that have been applied for constitutional proceedings in Georgia. Also, the paper will summarize the practice developed by the Constitutional Court of Georgia and scrutinize the criteria established following the practice. Similarly, the article will propose recommendations for the implementation of effective constitutional justice.

2. Analysis of the Legislative Grounds for Requesting the Justification of a Constitutional Claim

To study the grounds for the admissibility of a constitutional claim, it is expedient to analyze the legislative space created by the legislator. It is especially important to study, interpret and understand the provisions regulating the claim of reasoning. Accordingly, the following chapter of the article will be devoted to the analysis of the legislative grounds from the period of the establishment of the Constitutional Court to the present day.

The essential originality of the 1995 Constitution of independent Georgia was setting up a specialized body of constitutional control.[5] This was a European model of constitutional control[6] based on the experience of Germany and other Western European countries where the Institute for Constitutional Control successfully functioned at that time.[7]

The imperative-bearing requirement of the transitional provisions of the Supreme Law of Georgia was to regulate the performance of the Constitutional Court by 1 February 1996. Accordingly, the Parliament of Georgia accurately followed the requirements of the Constitution and on January 31, 1996, adopted the Organic Law on the Constitutional Court of Georgia. On March 21, 1996, the Parliament of Georgia voted in favor of the Constitutional Proceedings of Georgia Law.[8] Accordingly, the rules for the activities and proceedings of the Constitutional Court were determined and regulated by two legislative acts.

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5 *Kakhiani G.,* Institute of Constitutional Control and the Problems of Its Functioning in Georgia: An Analysis of Legislation and Practices, Tbilisi, 2008, 78; (in Georgian) *Demetrashvili A.,* Constitution of Georgia 1995 After 20 Years: Achievements, Challenges, Visions of the Future, in the book "Constitution of Georgia after 20 Years", *ed.: V. Natsvlishvili, D. Zedelashvili* , 2016, 32 (in Georgian).

6 *Kobakhidze I.,* Constitutional Law, Tbilisi, 2019, 231 (in Georgian).

7 *Schwartz H.,* Establishment of Constitutional Justice in Post-Communist Europe, Publishing House Ltd. "Sesan", Tbilisi, 2003, 63 (in Georgian).

8 *Khetsuriani J.,* Authority of the Constitutional Court of Georgia, Second Revised and Completed Edition, Tbilisi, 2020, 8 (in Georgian).

Regarding the issue of adopting the constitutional claim for consideration, before the 2018 legislative amendments[9], the Organic Law on the Constitutional Court of Georgia did not contain articles[10] that determine the formal and material grounds for the admissibility of the claim. The issue was regulated by the Law of Georgia on Constitutional Proceedings.[11] However, paragraph 2 of Article 31(2) of the Organic Law on the Justification of the Constitutional Claim has been making a reservation since the day of the establishment of the law. On the list of the basis of eligibility, the request for reasoning was directly indicated in the Law of Georgia on Constitutional Proceedings.

As a result of the 2017-2018 constitutional reform, the Law of Georgia on Constitutional Proceedings was declared invalid to bring the constitutional court into force with the provisions of the Constitution of Georgia [12], and its norms were reflected in the main organic law On the Constitutional Court of Georgia. A similar principle was applied to the issue of admission of the constitutional claim for consideration. The regulatory provisions were fully reflected in Articles 31^1 and 31^3 of the Organic Law of Georgia on the Constitutional Court. However, since 1996 the formal and material grounds for the admissibility of the constitutional claim have been regulated in the Law of Georgia on Constitutional Proceedings. After their transfer to the Organic Law on the Constitutional Court of Georgia, only minor changes were made in the context but the mentioned amendments did not apply to the premise of the justification of the claim.

According to paragraph 2 of Article 31 of the Organic Law of Georgia on the Constitutional Court of Georgia, "The constitutional claim or submission must include evidence that, in the opinion of the plaintiff or the author of the submission, justifies the grounds for the claim or submission."[13] Claus E of Article 31^1 of the Organic Law provides a similar obligation to the plaintiff: the constitutional claim shall include the evidence, which affirms the validity of the constitutional claim following the plaintiff.[14] If the legislation fails to comply with these requirements of the legislation, the Constitutional Court will refuse to accept the constitutional claim for consideration.[15]

The formation of the request for reasoning in a separate article is due to its great importance and burden in deciding on the issue of accepting the constitutional claim for consideration. It does not belong to the formal requirement of eligibility. This is evidenced by the fact that the substantiation of

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9 Organic Law of Georgia on Amendments to the Organic Law of Georgia on the Constitutional Court of Georgia, Website, 10/08/2018, <https://matsne.gov.ge/ka/document/view/4273078?publication=0> [14.02.2024].

10 In particular, Articles 31^1 and 31^3 of the Organic Law of Georgia on the Constitutional Court of Georgia, Parliamentary Gazette, 001, 27/02/1996 (in Georgian).

11 Articles 16 and 18 of the Law of Georgia on Constitutional Proceedings, Parliamentary Gazette, 5-6, 24/04/1996, invalid – 21.7.2018, No 3265 (in Georgian).

12 Explanatory card on the draft organic law of Georgia on the Constitutional Court of Georgia, <https://info.parliament.ge/file/1/BillReviewContent/186269> [14.02.2024].

13 Paragraph 2 of Article 31 of the Organic Law of Georgia on the Constitutional Court of Georgia, Parliamentary Gazette, 001, 27/02/1996 (in Georgian).

14 Paragraph 1(e) of Article 31^1 of the Organic Law of Georgia on the Constitutional Court of Georgia, Gazette of the Parliament, 001, 27/02/1996 (in Georgian).

15 Paragraph 1(a) of Article 31^3(1) of the Organic Law of Georgia on the Constitutional Court of Georgia, Gazette of the Parliament, 001, 27/02/1996 (in Georgian).

the claim is checked by the Collegium/Plenum of the Constitutional Court, determined by which of them will consider the claim.

In summary, the requirement for the admissibility of a constitutional claim/submission is of a general nature and the legislator is limited to a similar prevalent reference. In addition, the legislative regulation applies to all types of powers of the Constitutional Court of Georgia. Accordingly, the Constitutional Court within its discretion, shall define the guiding standard at the stage of deciding the admission for consideration of the constitutional claim within each competence while implementing constitutional justice.

3. Definition of a Request for Reasoning under the Practice of the Constitutional Court

Only the analysis of the legislative framework is not enough to establish the standard for requesting the justification of a constitutional claim. Certain issues of eligibility determined by the legislation, including the requirement for reasoning, are acquired in the practice of the court with their real essence interpreted in the legal acts of the Constitutional Court. In this case, the interim acts adopted by the Constitutional Court – records and rulings are applied to assess the standard of requesting substantiation[16] of the claim.

A constitutional claim shall be accepted for consideration if it meets the requirements established by the legislation of Georgia. The Constitutional Court has repeatedly stated[17] that one of the most important conditions imposed by the legislation against the constitutional claim is the requirement for reasoning.

As a result of almost 30 years of operating, beyond the legislative requirements, the Constitutional Court has established in practice the prerequisites that must essentially be met by the constitutional claim: a) the justification of the claim shall refer to the appealed norm in content[18]; b) substantiate the content relation between the appealed norm and the provision of the Constitution concerning which the unconstitutional recognition of the norm is requested[19].

Accordingly, based on the practice of the Constitutional Court, it is of great importance to determine a content relation between the disputed norm and the norm of the Constitution. Also, it is necessary to find out whether the author of the constitutional claim correctly understands the content

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16 The research provided in the article will mainly be aimed at the powers of the Constitutional Court, within which the Constitutional Court will review the constitutionality of a normative act for fundamental human rights recognized by Chapter 2 of the Constitution of Georgia according to paragraph 4(a) of Article 60 of the Constitution of Georgia.

17 Ruling No 2/6/475 of 19 October 2009 of the Constitutional Court of Georgia on the case "Citizen of Georgia Aleksandre Dzimistarishvili v. the Parliament of Georgia", II-1 (in Georgian).

18 Ruling No 2/3/412 of 5 April 2007 of the Constitutional Court of Georgia on the case "Citizens of Georgia – Shalva Natelashvili and Giorgi Gugava v. the Parliament of Georgia", II-9; (in Georgian) Ruling N2/4/420 of 5 October 2007 of the Constitutional Court of Georgia on the case "Citizens of Georgia Tsisana Kotaeva and others v. the Parliament of Georgia", II-7; (in Georgian) Information on constitutional legality in Georgia, Constitutional Court of Georgia 2019, 7 (in Georgian).

19 Ruling No 1/3/469 of 10 November 2009 of the Constitutional Court of Georgia on the case "Citizen of Georgia Kakhaber Koberidze v. the Parliament of Georgia and the Minister of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia", II-1 (in Georgian).

of the disputed norm and whether its argumentation is based on a false perception of the disputed norm.[20]

3.1. The Justification Given in the Claim Relates to the Disputed Norm

In general, the basis for initiating constitutional proceedings is to apply to the Constitutional Court with a constitutional claim/submission.[21] Individual constitutional claim is one of the forms of appeal to the Constitutional Court, which is envisaged by the legislation of many countries of the world (e.g., Czech Republic, Spain, Austria, Germany (the mechanism of German constitutional control is sometimes regarded as universal in the scientific literature)[22]).[23] The purpose of the introduction of the Institute for Direct Appeal by Individuals and Legal Entities to the Constitutional Courts was to cover the so-called "gray zones" in the area of protection of basic human rights.[24]

To formulate a constitutional claim, the main thing is the subject of a dispute, the proper formation of which depends on the correct selection of the disputed norm, which in turn is a complex issue. Whereas, the Constitutional Court of Georgia (as well as the courts of Hungary, Luxembourg, Montenegro[25], Poland[26], Switzerland) has no right to discuss the compliance of the law or other normative acts with the Constitution if the plaintiff or the author of the submission demands the law or any norm of the normative act to be declared unconstitutional.[27] The Constitutional Court of Georgia is bound by the claim request.

According to the legislation regulating the activities of the Constitutional Court and judicial practice, the author of the constitutional claim is obliged to identify the norm that restricts the fundamental rights guaranteed by the Constitution. To demonstrate the relevant relation to the specific provisions of the appealed norm to the Constitutional Court, the author of the constitutional claim is required to perceive the appealed regulation and its content correctly.

The problem concerning the justification of the constitutional claim[28] arises when the justification and the actual content of the disputed norm differ from each other. This means that the

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20 Ruling No 2/1/481 of 22 March 2010 of the Constitutional Court of Georgia on the case "Citizen of Georgia Nino Burjanadze v. the Parliament of Georgia", II-1 (in Georgian)..

21 Paragraph 1 of Article 31 of the Organic Law of Georgia on the Constitutional Court of Georgia, Parliamentary Gazette, 001, 27/02/1996.

22 *Singer M.,* The Constitutional Court of the German Federal Republic: Jurisdiction Over Individual Complaints, 1982, 332.

23 *Samkharadze S., Effectiveness* of Filing Individual Constitutional Claim in Common Courts When Considering Affairs, "Journal of Constitutional Law", Issue 1, 2019, 109 (in Georgian).

24 *Gentili G.,* A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court, Penn State International Law Review, University of Sussex, 2011, 708.

25 Article 54, The Law on the Constitutional Court of Montenegro (Official Gazette of Montenegro 11/15).

26 Article 67, The Act of 30 November 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal (Published in the Journal of Laws of the Republic of Poland on 19 December 2016, item 2072).

27 Paragraph 1 of Article 26 of the Organic Law of Georgia on the Constitutional Court of Georgia, Parliamentary Gazette, 001, 27/02/1996 (in Georgian).

28 Ruling No 2/1/481 of 22 March 2010 of the Constitutional Court of Georgia on the case "Citizen of Georgia Nino Burjanadze v. the Parliament of Georgia", II-2 (in Georgian).

position of the plaintiff is based on a false representation of the disputed norm. The Constitutional Court shall be authorized to discuss and evaluate only the actual content of normative acts. If the claimant misunderstands the content of the disputed provision[29], the Constitutional Court considers the claim unsubstantiated and confirms it by a ruling.

It is also interesting to discuss the case when the author in a constitutional claim requires the recognition of the appealed norm unconstitutional for any provision of the Constitution, and his argumentation concerns another provision of the Constitution or there is no such argument at all.[30] In this case, the constitutional claim cannot overcome the premise of the request for reasoning and it shall be deemed unsubstantiated. The claimant is obliged to prove that the restriction specified within the framework of the constitutional claim stems from the disputed norm, which determines the assessment of the appealed norm concerning the relevant provisions of the Constitution.[31]

Based on the above, it is essential for the author of the constitutional claim to correctly perceive the content of the disputed norm, the scope of its action, the entities the mentioned legislative regulation concerns, and the result of the validity of the norm. In this regard, the Constitutional Court has a firmly established practice.[32] Following the practice of foreign countries, the form of a constitutional claim plays an important role in clearly establishing the plaintiff's position and determining the justification of the claim.[33]

3.1.1. Standard Established by the Constitutional Court for Determining the Contents of the Appealed Norm

For the constitutional claim to satisfy the prerequisites for the admissibility of the claim established by the legislation, the Collegium/Plenum of the Constitutional Court must address the problem to which the Claimant is appealing in the norm.

According to the established practice, the norm to be interpreted in the content specified by the plaintiff, must either derive from the norm itself or be confirmed by the authoritative definition of the law enforcer.[34] The mentioned criterion is applied by the Constitutional Court to determine the content

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29 Ruling N1/10/1708 of 22 February 2023 of the Constitutional Court of Georgia on the case "Zviad Devdariani v. the Parliament of Georgia", II-7 (in Georgian).

30 Ruling No 2/3/412 of 5 April 2007 of the Constitutional Court of Georgia on the case "Citizens of Georgia – Shalva Natelashvili and Giorgi Gugava v. the Parliament of Georgia", II-8 (in Georgian).

31 Ruling N1/10/1708 of 22 February 2023 of the Constitutional Court of Georgia on the case "Zviad Devdariani v. the Parliament of Georgia", II-12 (in Georgian).

32 For example, Ruling No 2/20/1417 of 17 December 2019 of the Constitutional Court of Georgia on the case "Grigol Abuladze v. the Parliament of Georgia"; (in Georgian) Ruling No 2/14/1393 of 24 October 2019 of the Constitutional Court of Georgia on the case "Davit Toradze and "Toradze and Partners LLC" v. the Parliament of Georgia" (in Georgian).

33 *Javakhishvili P.,* Constitutional Control of Common Courts Decisions – Experience of Overseas Countries and Prospects for its Establishment in Georgia, Tbilisi, 2021, 136 (in Georgian).

34 Ruling No 3/4/858 of 19 October 2018 of the Constitutional Court of Georgia on the case "Citizens of Georgia – Lasha Chaladze and Givi Kapanadze and Marika Todua v. the Parliament of Georgia and the Minister of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia", II-4 (in Georgian).

of the disputed norm indicated by the claimant.[35] In practice, there are frequent cases of refusal to accept a claim for consideration on similar grounds.

Based on the practice, the Constitutional Court determining the content of the appealed norm takes into account the practice of its application. "Statutory rules of conduct become viable in the practice of the court. The judicial authority in the architecture of the bodies established by the Constitution of Georgia is the branch of the government that has the final say in the interpretation and application of legislation."[36]

The common courts are the branches of government that make a final decision referring to the normative content of the law (its application). This suggests that the definition made by the Constitutional Court is of great importance and it plays a pivotal role in determining the actual content of the law. "The Constitutional Court typically adopts and considers the legislative norm with the normative content that was applied by the common court."[37]

For this reason, in the authoritative interpretation of the legislator, the definition of a normative act is mainly taken into account by the common courts and applied in individual circumstances, and in some cases, they acquire content contrary to the Constitution. If there is no common practice relating to a particular norm, the authoritative definition may include the definition of the body that is tasked with applying and enforcing the norm in practice. Especially in cases where the appeal of a particular act is not made in the judicial system and the last instance is held by the executive branch, the Prosecutor's Office D. A. S.

The Constitutional Court usually adopts and considers the legislative norm precisely with the normative content that was used by the common court. However, there may be several exceptions to this general rule, including when the Constitutional Court makes sure that the definitions made by the court of the same instance are contradictory. At such times, it cannot be considered that the content of the norm appealed by the common court was ultimately determined. In addition, in exceptional cases, the Constitutional Court is entitled not to accept the definition proposed by the General Court if it is unreasonable.[38]

3.1.2. The Normative Content of the Norm

In the last decade of its activities, the Constitutional Court laid the foundation for different practices of constitutional control and began to determine the constitutionality of the content of normative acts. The decision on the constitutionality of the normative content of the appealed act was

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35 Ruling No 1/11/1452 of the Constitutional Court of Georgia of 15 March 2023 on the case "JSC Bank of Georgia" v. the Parliament of Georgia, II-5 (in Georgian).

36 Decision No 1/4/693,857 of 7 June 2019 of the Constitutional Court of Georgia on the case "N(N)LE Media Development Foundation and N(N)LE Institute for Development of Freedom of Information v. the Parliament of Georgia, II-49 (in Georgian).

37 Decision No 1/2/552 of 4 March 2015 of the Constitutional Court of Georgia on the case "JSC Liberty Bank" v. the Parliament of Georgia, II-16 (in Georgian).

38 Decision No 1/2/552 of 4 March 2015 of the Constitutional Court of Georgia on the case "JSC Liberty Bank" v. the Parliament of Georgia, II-16 (in Georgian).

first made in 2011.[39] The decision was preceded by the opinions expressed by the Georgian Legal Reality[40] and the European Court of Human Rights[41] on the shortcomings of the Georgian model of constitutional control in terms of protecting fundamental rights.[42] In this form, the Constitutional Court separated the appealed norm from its normative content[43] and determined the new direction of constitutional control in Georgia.[44]

Accordingly, the appealed provision simultaneously establishes multiple rules of conduct. If it is not problematic for the author but only one rule (normative content) determined by the appealed norm, the Constitutional Court recognizes the specific normative content of the norm[45] unconstitutional.

Thus, while identifying the contents of the appealed norm in a constitutional claim, the plaintiff must outline the problematic procedure established by the norm and request only the recognition of specific normative content as unconstitutional. If the claim is satisfied by the Constitutional Court, the norm will not be declared completely invalid, but reduced its application by specific normative content declared unconstitutional.[46]

Respectively, it is important to take into account the standard established by the Constitutional Court when determining the content of the appealed norm for the constitutional claim to satisfy the prerequisite for the admissibility of the claim established by the legislation – the request for reasoning, which implies the logical and contentious convergence of the justification given in the claim with the content of the appealed norm.

In practice, there was a case when, as a result of questioning the representative of the competent agency at the substantive review session, the court received information that the norm was not applied to the plaintiff in a restrictive nature of his basic right, and the record was only declarative in nature[47]. Also, at the substantive hearing, it was difficult for the plaintiff to present the evidence that would prove the similar application of the disputed norm in practice. Consequently, in each case, determining

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39 Decision N1/1/477 of 22 December 2011 of the Constitutional Court of Georgia on the case "The Public Defender of Georgia v. the Parliament of Georgia" (in Georgian).

40 *Erkvania T.,* Normative Constitutional Claim as an Imperfect Form of Specific Constitutional Control in Georgia, 2014, <https://socialjustice.org.ge/ka/products/normatiuli-sakonstitutsio-sarcheli-rogorts-konkretuli-sakonstitutsio-kontrolis-arasrulqofili-forma-sakartveloshi> [24.01.2024].

41 "Apostolic vs. Georgia", N40765/02, Strasbourg, 2006.

42 *Erkvania T.,* Shortcomings of Specific Constitutional Control in Georgia – On the Integration of the so-called "real" constitutional claim into the constitutional justice system, in the Collection, TSU, *eds. K. Corkelia,* 2018, 47 (in Georgian).

43 *Gegenava D.,* Constitutional Court of Georgia as a Positive Legislator, in the book: "Sergo Jorbenadze 90", Tbilisi, 2017 (in Georgian).

44 *Javakhishvili P.*, Constitutional Court of Georgia and Actual Real Control, Journal of Law, No. 1, T., 2017, 342; (in Georgian) *Gegenava D., Javakhishvili P.,* Constitutional Court of Georgia: Attempts and Challenges of Positive Legislation, "Lado Chanturia 55", *ed. D. Gegenava,* Tbilisi, 2018, 124 (in Georgian).

45 *Baramashvili T., Macharashvili L.,* Standards for Admissibility of Constitutional Claim, Practical Manual, *ed. Lomtatidze E.,* 2021, 32-33 (in Georgian).

46 For example, Decision N3/2/646 of 15 September 2015 of the Constitutional Court of Georgia on the case "Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia", III-2 (in Georgian).

47 Decision No 3/3/1635 of 14 December 2023 of the Constitutional Court of Georgia on the case "The Public Defender of Georgia v. the Parliament of Georgia" (in Georgian).

the normative content of the norm, the claimant party shall act with great care and rely on the evidence confirming the existence of a specific normative content of the norm.

3.2. Content Relation between the Disputed norm and the Relevant Provision of the Constitution

Another important prerequisite for admission of the constitutional claim is to substantiate the clear content relation between the appealed norm and the relevant constitutional right by the plaintiff. The basic rights guaranteed by the Constitution significantly differ from each other by the protected space, the interference with the right, and other characteristics. This mainly involves the correct identification of the right which, concerning the position of the plaintiff, violates the norm appealed by him.

Thus, following the cases often applied in practice, the author of a constitutional claim correctly identifies the disputed norm however, the relevant provision of the Constitution referring to the disputed norm is incorrectly indicated. This leads to the refusal to accept the constitutional claim for consideration. The Constitutional Court shall discuss the constitutionality of the disputed norm. For this, the plaintiff must present the argument in the constitutional claim that will manifest to the court the content relation between the disputed norm and the provisions of the Constitution indicated in the constitutional claim.[48]

"Accepting a constitutional claim for consideration, the court believes that there is a content relation, on the one hand, between the norms appealed by the claimant and the evidence presented on the constitutionality of these norms, and on the other hand, between the norms concerning the issue of constitutionality. This appeal enables the Constitutional Court to have an objective opportunity to discuss the constitutionality of the disputed norms during the consideration of the claim".[49]

The Constitutional Court of Georgia strictly protects the scope of the fundamental rights dealt with in Chapter II of the Constitution, negatively evaluates the issue of artificially expanding the scope, and considers that "deleting the line passed by the Constitution between the rights will neither serve to protect the right nor ensure the order established by the Constitution."[50]

One of the necessary prerequisites for deeming the claim reasonable and receiving it for consideration is to correctly determine which constitutional right is restricted by the disputed norm. In each specific case, addressing the disputed norm depends on the content of the norm, the scope of regulation, its result, and the protected area of the constitutional right.

However, based on practice, the determination of the scope of the basic right protected by Chapter 2 of the Constitution is a rather irresistible problem for the authors of constitutional claims. This is due to the lack of practice regarding certain basic rights. Throughout the functioning of the

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48 Recording note No 2/11/663 of 7 July 2017 of the Constitutional Court of Georgia on the case "Citizen of Georgia Tamar Tandashvili v. the Government of Georgia", II-7 (in Georgian).

49 Decision No. 2/2/389 of 26 October 2007 of the Constitutional Court of Georgia on the case" Citizen of Georgia Maia Natadze and others v. the Parliament of Georgia and the President of Georgia", II-2 (in Georgian).

50 Recording note No 1/7/561,568 of 20 December 2013 of the Constitutional Court of Georgia on the case "Citizen of Georgia Yuri Vazagashvili v. the Parliament of Georgia", II-11 (in Georgian).

Constitutional Court of Georgia, some provisions in the second chapter of the Constitution of Georgia have never been evaluated or interpreted. Also, as a result of the fundamental amendments to the Constitution of Georgia in 2017-2018, new provisions (some of them were specified) have emerged in the second chapter, which should also be clarified followed by practice. For example, recognition of the right to fair administrative proceedings[51], academic freedom, physical inviolability, and access to the Internet.[52] For more evidence, the Constitutional Court has recently received a court record[53], where the opinions of judges regarding the right to access the Internet were divided since the appeal of the provision was interpreted by most members of the court following paragraph 2 of Article 17 of the Constitution of Georgia, the right of every person is protected to freely receive and disseminate information. Extensive discussion was devoted to the issue attached to the court record[54], which emphasized the fact that such new provisions before making judicial practices and interpretations in Chapter 2 of the Constitution of Georgia would be an invincible problem for the authors of the constitutional claim.

3.2.1. Separation of Restriction of Right and its Side Effect

According to the practice of the Constitutional Court, the relation of the disputed norm to the fundamental right is verified by determining the direct and side effects of the restriction of the right.

Fundamental rights and freedoms are closely related to each other, and the restriction of one of them means affecting other rights. However, this does not imply that the disputed norm restricts different rights at the same time. To accept the claim for consideration, the plaintiff must indicate the violation of the basic right on which the disputed provision has a direct (and not lateral) effect.

According to the practice of the Constitutional Court of Georgia, "It is important to distinguish between the restriction of rights and the effects generated by the restriction of rights. The restriction of any rights protected by Chapter 2 of the Constitution of Georgia often has a certain effect on other constitutional rights, but this does not mean interference with the right and its restriction. The constitutional court should evaluate the disputed norm concerning the constitutional right to be restricted, and not the right, the restriction of which will appear to be a side effect".[55]

The court has repeatedly stated that "the exercise of a certain right may be related to the restriction of the full application of another right. In each similar case, to identify the restriction of any

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51 *Turava P.,* Fair Administrative Proceedings as a Basic Constitutional Right and Its Institutional Guarantee, in the Proceedings of "Modern Challenges of Human Rights Protection", *ed. K. Corkelia,* T., 2018, 246 (in Georgian).

52 *Kublashvili K.,* Shortcomings and Challenges of the New Constitution of Georgia, Jurn. "Review of Constitutional Law", XIV Edition, 2020, 85 (in Georgian).

53 Recording note No 3/7/1483 of 4 November 2022 of the Constitutional Court of Georgia on the case "Information Network Center Ltd. v. the Parliament of Georgia" (in Georgian).

54 The dissenting opinion of the judges of the Constitutional Court of Georgia – Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi regarding the recording note No 3/7/1483 of 4 November 2022 of the Constitutional Court of Georgia (in Georgian).

55 Ruling No 2/21/872 of 28 December 2017 of the Constitutional Court of Georgia on the case "Citizens of Georgia – Sophiko Verdzuli, Guram Imnadze and Giorgi Gvimradze v. the Parliament of Georgia", II-5 (in Georgian).

provision of the Constitution it is important to determine which right the disputed norm applies to."[56] Accordingly, first of all, the content and purpose of the disputed norm should be clarified.

For example, in one of the lawsuits,[57] the plaintiff appealed a provision that restricted the right of a parent to take the child abroad. Following the constitutional claim, based on the disputed norm, the child, a Canadian citizen was restricted from the right to travel to his own country. This was a violation of the right to the free development of a person and the right to human privacy protected by the Constitution.

According to the Constitutional Court, the constitutionality of this restriction should have been assessed for the right to free movement guaranteed by the Constitution of Georgia. The primary purpose of the disputed norm was to restrict the removal of a person only outside Georgia, and it did not regulate the right of this or that person to receive any benefits provided by the legislation of Georgia or another country, including the right to education.[58] The fact that a person was unable to exercise any right due to the prohibition established by the disputed norm was a side effect of restricting the freedom of movement provided by the disputed norm.

In summary, the practice of the Constitutional Court referring to the issue is consistent and accepted, because in the case of the failure of making this decision, the line between rights would be removed and the court would have to evaluate the disputed norm not specifically with one of the fundamental rights, but with several of them, which would not be under the Constitution and contribute to overburdening the court.

4. Obligation to Prove the Unconstitutionality of Restriction on the Right

The constitutional claim is a material prerequisite for constitutional control, which is diverse all over the world. However, for all forms of the claim, a mandatory requirement for mutual relation between the plaintiff and the disputed act has not been established. However, one of the main conditions in exercising specific constitutional control is the appeal of violation of the constitutional right of the plaintiff, which distinguishes it from an abstract constitutional claim.[59] Moreover, when exercising constitutional control, the appealed act must emphasize not only the violation of the basic rights of its author[60] but also present direct and instant damage.[61]

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56 Ruling No 2/5/1249 of 22 February 2018 of the Constitutional Court of Georgia on the case "Citizens of the Republic of Iraq – Shehab Ahmed Hamud and Ahmed Shehab Ahmed Ahmed v. the Parliament of Georgia", II-3 (in Georgian).

57 Constitutional Claim No. 1212.

58 Recording Record No 2/16/1212 of 28 December 2017 of the Constitutional Court of Georgia on the case "Citizen of Georgia Giorgi Spartak Nikoladze v. the Parliament of Georgia", II-4; (in Georgian) For comparison, see Ruling No 1/6/1608 of 20 May 2022 of the Constitutional Court of Georgia on the case "Matsatso Tepnadze v. the Government of Georgia", (in Georgian) Ruling No 2/21/872 of 28 December 2017 of the Constitutional Court of Georgia on the case "Citizens of Georgia – Sophiko Verdzeduli, Guram Imnadze and Giorgi Gvimradze v. the Parliament of Georgia" (in Georgian).

59 *Javakhishvili P.,* Constitutional Control of Common Courts Decisions – Experience of Foreign Countries and Prospects for its Establishment in Georgia, Tbilisi, 2021, 150 (in Georgian).

60 *Khubua G., Traut I.,* Constitutional Justice in Germany, Tbilisi, 2001, 25 (in Georgian).

61 *Barnet R. J.,* The Protection of Constitutional Rights in Germany, Virginia Law Review, Vol. 45, 1158.

Applying to the Constitutional Court of Georgia with a constitutional claim by a physical or a legal person, he/she must clearly and unambiguously demonstrate that he/she is likely to be an entity of legal relations determined by the disputed norm, which may lead to a violation of his/her constitutional rights. A person is not authorized to apply to the court for the protection of others' rights. Therefore, the plaintiff is required to justify that he is disputing the violation of his/her right (or possible violation of his right in the future). In the absence of the recently mentioned, the Constitutional Court of Georgia will not accept a constitutional claim for consideration.[62]

Otherwise, there will be a form of constitutional lawsuit Actio popularis, which, following the opinions expressed in the legal literature, Kelsen considered an effective mechanism for assessing unconstitutional norms[63] but due to the excessive possibility of appeal, it is seldom found in European constitutional justice.

In practice, the countries enabled to be the initiators of the constitutional claim, require the satisfaction of several mandatory conditions to protect the constitutional courts of their countries from overburdening (e.g., Liechtenstein, Malta[64] and Peru). The Venice Commission has always advised states to clarify that only a victim of a violation has the right to appeal to a court with a constitutional complaint.[65]

As an example, we refer to the case of Hungary[66] where in 2011 the National Assembly passed the Constitutional Court Act and a new basic law of the country, which resulted in the repeal of the current model of constitutional control, Actio Popularis was canceled in Hungary.[67] According to the Venice Commission, it caused the Constitutional Court to be overburdened.[68] The distinction between the Actio popularis and the constitutional claim can be theoretically clear, but in practice, it can be one of the problematic issues.[69]

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62 Ruling No 1/2-527 of 24 October 2012 of the Constitutional Court of Georgia on the case "Citizens of Georgia – Giorgi Tsakadze, Ilia Tsulukidze and Vakhtang Loria v. the Parliament of Georgia", II-7 (in Georgian).

63 *Javakhishvili P.,* Constitutional Control of Common Courts Decisions – Experience of Foreign Countries and Prospects for its Establishment in Georgia, Tbilisi, 2021, 26 (in Georgian).

64 *Venice Commission,* Report on "The Individual's Access to Constitutional Jurisdiction in the European Area", report for the CoCoSem seminar in Zakopane, CDL-JU(2001)22, Poland, October 2001, 35.

65 *Venice Commission*, Opinion on the Seven Amendments to the Constitution of "The former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones, CDL-AD(2014)026, Opinion No. 779/2014, Strasbourg, 13 October 2014, 10.

66 *Somody, B.* (2023). Constitutional complaints by state organs? changes in the standing requirements before the Hungarian constitutional court. ELTE Law Journal, 2023(1), 115.

67 *Somody, B., & Vissy, B.* (2012). Citizen's Role in Constitutional Adjudication in Hungary: From the Actio Popularis to the Constitutional Complaint. Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica, 53, 107.

68 *Venice Commission,* Opinion on Three Legal Questions Arising in The Process of Drafting the New Constitution of Hungary, CDL-AD (2011)001, Opinion No. 614/2011, CDL-AD (2011)001, Strasbourg, 28 March 2011,11.

69 *Kargaudienė A.,* Individual Constitutional Complaint In Lithuania: Conception And The Legal Issues, Baltic Journal of Law & Politics 4:1 (2011): 154-168, 164.

In the following chapter, we will highlight the standard of proof of the unconstitutionality of restricting the rights established by the Constitutional Court. However, in addition to presenting direct and instant damages to the court, in the wake of the development of the practice and the increase in the submitted claims, the Constitutional Court attempts to tighten the quality of the request for the justification of the constitutional claim at the stage of receipt for consideration.

According to the practice of the court, it is not enough to consider the constitutional claim substantiated not only to indicate the restriction of the basic right, the plaintiff must present an argument that indicates the unconstitutionality of the disputed norm.[70] When the disputed regulation is not self-evident, the plaintiff, beyond reference to the fact of restriction of the basic right, must cite an argument why he/she regards the disputed solution as a disproportionate and unconstitutional means of achieving the goal.[71]

For example, in one of the lawsuits,[72] the plaintiff appealed a provision[73] prohibiting the gathering of more than 3 individuals in public space. The Constitutional Court did not accept the mentioned constitutional claim for consideration and made an important explanation: "The legitimate aims of the introduction of the disputed regulation are obvious, as well as the impending threats to the life and health of the population by the spread of the coronavirus (COVID-19). In such circumstances, it is not enough to substantiate a constitutional claim and to indicate only the fact of restriction of rights. As already mentioned, the restriction of the provisions of the Constitution is unconstitutional. The claimant is obliged to cite the argument why he believes that the established restriction is a disproportionate means of achieving the goal and therefore unconstitutional regulation."[74]

In addition, the court clarified that "when a participant in constitutional proceedings provides factual circumstances to prove the unconstitutionality of the rule of normative conduct, the evidence

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70 See Ruling No 1/4/1416 of 30 April 2020 of the Constitutional Court of Georgia on the case "Sveti Development" Ltd, "Columni Group" Ltd, "Sveti Nutsubidze" Ltd, Givi Jibladze, Tornike Janelidze and Giorgi Kamladze v. the Government of Georgia and the Parliament of Georgia; (in Georgian) Ruling No 2/8/1496 of 29 April 2020 of the Constitutional Court of Georgia on the case "Tekla Davituliani v. the Government of Georgia", (in Georgian) Ruling No 1/3/1555 of 12 February 2021 of the Constitutional Court of Georgia on the case "Givi Luashvili v. the Government of Georgia"; (in Georgian) Recording note No 1/9/1800 of 14 December 2023 of the Constitutional Court of Georgia On the case of "Vasil Zhizhiashvili and Marine Kapanadze v. the Chairperson of the Parliament of Georgia" (in Georgian).

71 Ruling No 1/3/1555 of 12 February 2021 of the Constitutional Court of Georgia on the case "Givi Luashvili v. the Government of Georgia", II-7.

72 Constitutional Claim No. 1496.

73 Ordinance No 181 of 23 March 2020 of the Government of Georgia on the Approval of Measures to be Implemented in connection with the Prevention of the Spread of the Novel Coronavirus (COVID-19) in Georgia, Article 5(2), Website, 23/03/2020.

74 Ruling No 2/8/1496 of 29 April 2020 of the Constitutional Court of Georgia on the case "Tekla Davituliani v. the Government of Georgia", II-3; (in Georgian) For comparison, see Ruling No 1/26/1449 of 29 December 2020 of the Constitutional Court of Georgia on the case "Ahtsham Ulfat, Adil Usman and Hamza Ulfat v. the Parliament of Georgia"; (in Georgian) Ruling No 1/19/1779 of 1 June 2023 of the Constitutional Court of Georgia on the case "Giorgi Tsaadze v. the Parliament of Georgia" (in Georgian).

must meet a high degree of persuasion. In particular, such arguments must be supported by relevant documentary evidence."[75]

The fact that the standard of reasoning in the court is not firmly established and there is no consensus around this issue confirms the contrasting opinions of the members of the Constitutional Court attached to the ruling made by the court.[76] The main cause why a judge does not agree with considering the claim inadmissible and unsubstantiated is a different understanding of the standard of reasoning. Moreover, the authors of the dissenting opinion refer to some cases from the practice of the Constitutional Court, when the court inadmissibly accepted another constitutional claim for consideration within the argumentation of a similar justification of the familiar constitutional claim.[77]

The requirement for substantiation at the stage of admissibility of a constitutional claim is precisely the common characteristic that has specialized bodies exercising constitutional control over various powers under the European model. For example, under German law,[78] taking into account the wide area of responsibility and a huge burden, the German Constitutional Court has the opportunity to reject the claims with specially accelerated procedures, if the claim is inadmissible or baseless,[79] to restrain hopeless and unpromising proceedings.[80] The constitutional courts of Hungary,[81] the Czech Republic[82], Estonia[83] and Belgium are familiar with such prerequisites[84], as well as the European Court of Human Rights. The European Court of Human Rights is also familiar with a similar premise. Article 35 of the European Convention on Human Rights refers to the eligibility criteria for appeals. According to paragraph 3(a) of the same article, the court shall inadmissibly recognize any individual appeal inadmissible if it considers that the statement is unsubstantiated.[85] At the stage of admissibility of the complaint, the court requires the applicant to provide a justification that will convince the court of the violation of one or another article of the Convention.

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75 Decision No 2/5/700 of the Constitutional Court of Georgia of July 26, 2018 on the case "Coca-Cola Bottlers Georgia" Ltd, "Castel Georgia" Ltd and "JSC Healthy Water (Tskali Margebeli)" v. the Parliament of Georgia and the Minister of Finance of Georgia", II-86 (in Georgian).

76 The dissenting opinion of the Judge of the Constitutional Court of Georgia Teimuraz Tughushi regarding the ruling No 2/17/1629 of 25 July 2023 of the Constitutional Court of Georgia; The dissenting opinion of the judges of the Constitutional Court of Georgia – Irine Imerlishvili and Teimuraz Tughushi regarding the ruling N2/15/1453 of the Constitutional Court of Georgia on July 25, 2023 (in Georgian).

77 Dissenting opinion of the judges of the Constitutional Court of Georgia – Irine Imerlishvili and Teimuraz Tughushi regarding the ruling N2/15/1453 of the Constitutional Court of Georgia of July 25, 2023, II-13 (in Georgian).

78 Federal Constitutional Court Act in the version published on 11 August 1993 (Federal Law Gazette I p. 1473), which was last amended by Article 4 of the Act of 20 November 2019 (Federal Law Gazette I p. 1724), § 24.

79 *Schmidt-Bleibtreu/Klein/Bethge/Hömig,* 62nd EL January 2022, BVerfGG § 24.

80 *Lechner/Zuck,* Federal Constitutional BVerfGG Court Act, 6th ed., 2011, § 24 marginal no. 1.

81 Section 55, Act CLI of 2011 on the Constitutional Court of Hungary.

82 § 43, Act of 16 June 1993, No. 182/1993 Sb. on the Constitutional Court of Czech Republic.

83 §20[1], Constitutional Review Procedure Act of Estonia, March 13, 2002, RT I 2002, 29, 174. (as Amended to December 8, 2005).

84 Art. 70-71, Special act of 6 January 1989 on the Constitutional Court of Belgium.

85 European Court of Human Rights, Practical Guide on Admissibility Criteria, Updated on 28 February 2023, <https://www.echr.coe.int/documents/d/echr/COURtalks_Inad_Talk_ENG> [24.01.2024].

In Slovenia, the violation of basic rights must be directly related to the interest of the plaintiff and afflict his/her legal condition,[86] as well as the damage has to be sufficiently significant. "A constitutional complaint is not allowed unless the violation of human rights or fundamental freedoms has serious consequences for the complainant."[87]

In summary, by establishing a high standard of evidence, the Constitutional Court can avoid unpromising and unsubstantiated claims and apply the referred cases as a guide for further proceedings.

5. Direct Justification in the Claim

The Constitutional Court has considered the cases when the plaintiff indicated in the unsubstantiated constitutional claim about presenting the proper argumentation orally at the session. The Constitutional Court does not accept such claims for consideration (the legislation does not also provide such a procedural opportunity).

According to the general rule, the issue of receiving the case for consideration is considered without an oral hearing. Apart from exceptional cases, the Constitutional Court of Georgia rarely considers it necessary to hold the admissibility stage at an oral hearing to determine additional circumstances, which at first glance have a positive impact on the resources of the Constitutional Court. Holding an oral hearing unconditionally leads to an increase in the burden of the court.[88] However, the Constitutional Court should act discreetly when deciding on holding a preliminary hearing without an oral hearing. At this time the Constitutional Court introduces the participants of the proceedings and their interests.[89] This is a very important tool, but not indispensable.[90]

When the constitutional claim does not contain sufficient justification, the Organic Law of Georgia on the Constitutional Court of Georgia enables the Collegium/Plenum of the case to invite the parties to the admissibility stage and hold a preliminary. This is permissible if the circumstances related to the admission for consideration of the case cannot be determined."[91] However, there is a second alternative: the Constitutional Court neither holds an oral hearing nor accepts a constitutional claim for consideration due to a lack of proper justification.

Relating to one of these claims, the court explained that "the constitutional claim does not present a proper argumentation that emphasizes a content relation between the disputed norm and the right recognized by the specific provision of Chapter II of the Constitution. The claimant does not identify which right guaranteed by Chapter 2 of the Constitution is restricted by the disputed norm. In

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86 *Venice Commission*, Study on Individual Access to Constitutional Justice, European Commission For Democracy through Law, CDL-AD(2010)039rev., Study No. 538/2009 Strasburg, Strasbourg, 27 January 2011, 34.

87 Article 55a, The Constitutional Court Act of Slovenia (Official Gazette of the Republic of Slovenia, No. 64/07 – official consolidated text, 109/12, 23/20, and 92/21).

88 *Schmidt-Bleibtreu/Klein/Bethge/von Coelln*, 62nd EL January 2022, BVerfGG § 25 para. 4.

89 *Prütting, in: Prütting / Gehrlein*, ZPO, 4th ed. 2010, § 128 marginal no. 2.

90 *Schmidt-Bleibtreu/Klein/Bethge/von Coelln,* 62nd EL January 2022, BVerfGG § 25 para. 1.

91 Paragraph 2 of Article 271 of the Organic Law of Georgia on the Constitutional Court of Georgia, Gazette of the Parliament, 001, 27/02/1996.

addition, the acceptance of a constitutional claim for consideration cannot be determined by the plaintiff's instruction to present a detailed justification at the hearing as the constitutional claim must be substantiated with an appropriate argumentation directly in the claim, and not at the session of oral substantive consideration."[92]

Accordingly, the plaintiff should not hope that to extend his argumentation, he will be given the opportunity and invited to the preliminary session. It would be incorrect to interpret the legislative record because considering the circumstances of the case it enables the court to examine the basic argument, which should have been presented in the constitutional claim.

The practice of the Constitutional Court has provided some oral preliminary hearings to clarify the requirement and determine the scope. However, the acceptance of the claim as a part of the deficient justification with the expectation of presenting additional arguments at the session for emphasizing the unconstitutionality of the norm would be unequivocally incompatible with constitutional justice.

The legislation (which is confirmed by the practice) does not prohibit the plaintiff from making additional arguments confirming the unconstitutionality of the norm at the substantive hearing. The additional arguments cannot be provided in the constitutional norm but they are often addressed by the plaintiffs or their representatives following the procedural rules.

6. The Fragile Line between the Stages of Preliminary and Substantial Consideration

Constitutional proceedings in Georgia are divided into several stages of interconnection. Each legal proceedings stage is a combination of certain actions of the Constitutional Court and the participants of the proceedings.[93] Accordingly, each stage of constitutional proceedings serves to resolve a specific legal situation in a certain period and ultimately leads to the stages of legal proceedings before the Constitutional Court makes a final decision on a particular case.[94] The Constitutional Court emphasizes the purpose of the stages of litigation, noting that the division of constitutional proceedings into stages is not self-purposeful and has real content and firmly established goals.[95]

The Organic Law of Georgia on the Constitutional Court of Georgia establishes the line between the substantive and preliminary stages only in a few articles.[96] However, it does not provide a clear idea about the stages of the proceedings.

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92 Ruling No 1/12/1310 of 6 December 2018 of the Constitutional Court of Georgia on the case "Navtlughi" v. the Parliament of Georgia, II-3 (in Georgian).

93 *Gonashvili V., Tevdorashvili G., Kakhiani G., Kakhidze I., Kverenchkhiladze G., Chigladze N.,* Constitutional Law of Georgia, Tbilisi, 2020, 354 (in Georgian).

94 *Kakhiani G.,* Constitutional Control in Georgia, Theory and Analysis of Legislation, Tbilisi, 2011, 347-348 (in Georgian).

95 Ruling No 2/17/1629 of 25 July 2023 of the Constitutional Court of Georgia on the case "Public Defender of Georgia v. the Parliament of Georgia", II-14 (in Georgian).

96 For example, according to paragraph 2 of Article 315 of the mentioned Law, the constitutional claim is regarded as accepted by the Constitutional Court for consideration when the Collegium/Plenum of the Constitutional Court makes a decision at the preliminary session. According to Article 31^2, Paragraph 10 of

In this regard, following the practice of the Constitutional Court, the decision No 2/2-389 of 26 October 2007 is of precedent[97] when the Constitutional Court explained the reason for the acceptance of the constitutional claim for consideration and interpreted the task of the court in the substantial consideration of the claim. Performing this action the Court defined the scope of the preliminary session.

"Accepting a constitutional claim for consideration, the Court believes that there is a contentious appeal on the one hand, between the norms appealed by the plaintiff and the evidence presented on the constitutionality of these norms, and on the other hand, between the norms of the Constitution concerning which the issue of constitutionality is raised. This delegates the Constitutional Court to discuss the constitutionality of the disputed norms during the substantial consideration."[98]

Accordingly, the Court emphasized the fact that the determination of the content was the issue to be examined at the preliminary session, and interference with the basic right was the task of the substantive review session.

"The record of the Constitutional Court on the acceptance of the constitutional claim for consideration implies that the Constitutional Court is starting the process of checking the constitutionality of the disputed norms, and not that it has already completed the determination of interference with the fundamental rights of the disputed norms. The interference is obvious and the defendant must prove its constitutionality. Determining interference with the right is an integral part of the substantive consideration and the resolution of the constitutional claim, which requires a thorough analysis of the disputed norm and cannot be carried out within the preliminary session."[99]

However, despite these explanations, the constitutionality of normative acts related to the issues of Chapter II of the Constitution of Georgia, the scope of the validity of the Constitutional Court remains vague, in particular, determining which stage of the legal proceedings considers the content concerning the basic right and manifests the interference with the area protected by the right. In the practice of the Constitutional Court can be found such precedents that point out the deleted margin between the stages of constitutional proceedings. Particularly, the precedents[100] prove that in the

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the same law, the reporting judge, while examining the constitutional claims determine a reason defined by Article 31^3 of this law for refusing to accept the claim for consideration.

97 Decision No 2/2/389 of 26 October 2007 of the Constitutional Court of Georgia on the case "Citizen of Georgia Maia Natadze and others v. the Parliament of Georgia and the President of Georgia" (in Georgian).

98 Decision No 2/2/389 of 26 October 2007 of the Constitutional Court of Georgia on the case "Citizen of Georgia Maia Natadze and others v. the Parliament of Georgia and the President of Georgia", II-2 (in Georgian).

99 Ibit.

100 Decision N2/482,483,487,502 of 18 April 2011of the Constitutional Court of Georgia on the case "Political Union of Citizens "Movement for United Georgia", Political Union of Citizens "Conservative Party of Georgia", Georgian Citizens – Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, Citizens Dachi Tsaguria, and Jaba Jishkariani, Public Defender of Georgia v. the Parliament of Georgia", II-14; (in Georgian) Decision No 1/1/1404 of 4 June 2020 of the Constitutional Court of Georgia on the case "Nana Sepashvili and Ia Rekhviashvili v. the Parliament of Georgia and the Minister of Justice of Georgia"; (in Georgian) Decision No 1/9/1673,1681 of 17 November 2022 of the Constitutional Court of Georgia on the case "Londa Toloraia and the Public Defender of Georgia v. the Parliament of Georgia", II – 75-80; (in Georgian) Decision No 3/2/853 of 14 December 2023 of the Constitutional Court of Georgia on

motivational part of the decision the Constitutional Court considered the absence of a relation of the contested norm to the relevant provision of the Constitution.

Accordingly, the court must follow the practice established by the Constitutional Court and the standard that the court developed in making the above decision. If the court determined not only the relations but also the interventions of a physical person, legal entity, or public defender with the basic rights protected by Chapter 2 of the Constitution while assessing the disputed norms, at the preliminary session, there would be nothing to examine within the scope of the substantive session. Especially with the category of absolute basic rights because interference with the absolute right is a violation of the right.

Exceptions include cases where the Constitutional Court considers the issue of the so-called "overcoming norm" when a disputed normative act or part contains norms of the same content that the Constitutional Court has already declared unconstitutional.[101] At such time, a substantive hearing cannot be held, and the court shall issue a ruling on the non-acceptance of the case for consideration and the disputed act or part is declared invalid.[102] Accordingly, at the preliminary hearing, the Court merges these two stages and, based on the principle of thorough examination and economics of the case hears the legitimate aims of the restriction and the requirements of the proportionality from the parties.

7. Conclusion

Based on the practice of many years, the Constitutional Court has clearly stated preconditions regarding the justification of the constitutional claim. However, several issues need to develop a unified approach as the change in standards (before it turns into the prevailing practice) creates some inconvenience for the authors of constitutional claims, because the practice established by the Constitutional Court is a manual to formulate a claim.

For every citizen who wants his constitutional claim to successfully overcome the stage of admissibility and meet the standard of requesting justification, it is quite difficult to analyze the almost 30 years of practice of the Constitutional Court, read the standards, and draw up a constitutional claim against the background of these standards.

There are two ways to solve this problem:

1) The current legislation is lacking in regulations. Fully analyzing the task of the regulation and substantial sessions is only possible through the practice of the Constitutional Court. It is recommended to determine the scope of each stage of proceedings by the Organic Law of Georgia on the Constitutional Court of Georgia.

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the case "Political Union of Citizens "Alliance of Patriots of Georgia" v. the Parliament of Georgia." (in Georgian)

101 *Loladze B., Macharadze Z., Pirtskhalashvili A.,* Constitutional Justice, Tbilisi, 2021, 383 (in Georgian).

102 Paragraph 41 of Article 25 of the Organic Law of Georgia on the Constitutional Court of Georgia, Gazette of the Parliament, 001, 27/02/1996.

In particular, the legislative record is recommended to add the test consisting of two criteria developed by the Constitutional Court,[103] which is repeated and backed up by the court in each record and ruling. Also, the practice established and shared by the Constitutional Court for years is urged to be reflected directly in the legislative regulations of its activities.

2) It is recommended (independently of the legislative amendments, which is the prerogative of the legislature) for the Constitutional Court to take into account the practice initiated by it, according to which the court establishes a contentious appeal between the appealed norm and the relevant provision of the Constitution at the preliminary hearing. And the substantive session is proposed to find out the interference with the basic right. The Constitutional Court shouldn't allow exceptional cases in which the absence of relation to the fundamental human right is evident at the substantial session or the discussion on this issue is provided in the motivational part of the decision. Amendments must be made to the provisions of the Organic Law of Georgia on the Constitutional Court of Georgia, which establish the requirement for the justification of the constitutional claim and are of a reasonable nature.

After the Law of Georgia on Constitutional Proceedings had been declared invalid, the rules regulating the activities of the Constitutional Court were gathered in one act, which is more visible to the legislator from an organizational perspective. However, the requirements determined by the legislation on the admissibility of the constitutional claim shall apply to all types of powers of the Constitutional Court of Georgia and the legislator does not differentiate them taking into account the peculiarities of these powers. Just as the legislator does not make reservations while establishing a request for the justification of the constitutional claim and imposes the same standard for all cases to be considered, which unconditionally requires refinement.

For example, we can exemplify the constitutional claims of a physical person and the Public Defender regarding the fundamental rights protected by Chapter 2 of the Constitution. The Constitutional Court does not provide the answer to the question if the Public Defender should present the same justification as a physical person on the risk of violation of the right. Therefore, it is prudent to develop and improve the practice from this outlook and make legislative changes.

As a result of the reasoning developed in the chapters, it has been established that the request for the substantiation of the claim is verified by the Collegium/Plenum of the Constitutional Court and it is a material prerequisite for eligibility in content. In terms of the improvement of the legislative regulations, it is important to indicate the substantiation of the constitutional claim in the article that establishes the material (content) prerequisites for the admissibility of the constitutional claim. In addition, the equivalent requirement of paragraph 2 of Article 31 of the Organic Law of Georgia on the Constitutional Court of Georgia can be found in the list of formal criteria for the admissibility of a constitutional claim, which also requires amendments and perfection of legislative order.

Besides, the Constitutional Court must require a higher degree of justification from the authors of the constitutional claim, as the recently accepted records and rulings suggest. In particular, if the earlier restriction of the right and the constitutional provision of the disputed norm is presented for the

[103] a) the justification provided by it shall relate to the content of the disputed norm; b) the content relation between the appealed norm and the provision of the Constitution with respect to which the unconstitutional declaration of the norm is requested.

receipt of the claim for consideration, in the future, the court of the claimant must demonstrate the possible unconstitutionality of the disputed regulation. A similar approach would prevent the courts from unsubstantiated lawsuits.

It is recommended that the Constitutional Court maintain its practice and not be overburdened with conducting the preliminary hearings to expend (and not specify) the incomplete justification presented in the lawsuit. This will only encourage unscrupulous claimants and cannot be effective for the implementation of constitutional justice.

It is also important to save resources and implement functional constitutional justice, the Constitutional Court should focus on the standard of reasoning, especially in cases where the plaintiff determines the specific normative content of the disputed norm as the subject of dispute. In such a case, the Constitutional Court must require the claimant at the stage of admissibility (regardless of whether the session is held at an oral hearing or without it) to confirm the practice of applying the disputed norm by submitting the relevant documentation. Otherwise, we will get the following: the constitutional claim will be moved to the stage of substantive consideration, and if it is determined at this stage that there is no normative content of the appealed norm (cannot be confirmed by the documentation: by the practice of the court, the practice of the agencies), the Constitutional Court will no longer have the authority to consider the constitutional claim unsubstantiated and it will not return the case to the pre-trial stage.

To determine the scope of the basic right protected by Chapter 2 of the Constitution, the authors of the constitutional claim should apply the interpretations made by the Constitutional Court concerning the scope of the area protected by the basic right. Referring to constitutional records such as the right to fair administrative proceedings, the right to academic freedom, and the right to access the Internet, the interested person must wait for the practice to develop. Since 2018, the Constitutional Court has already made several important clarifications in this regard, or some cases are supposed to be made a decision.

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"Conservative Party of Georgia", Georgian Citizens – Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, Citizens Dachi Tsaguria, and Jaba Jishkariani, Public Defender of Georgia v. the Parliament of Georgia" (in Georgian).

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Problems with the Separation of Disciplinary Proceedings and Administrative Proceedings Related to Whistleblower Application

The norms regulating whistleblowing have been in Georgia since 2009[1] which have gone through numerous amendments. Nevertheless, its implementation still experiences some practical challenges. The main difficulty is the separation of administrative proceedings related to the disciplinary procedure and the whistleblower application. Procedural ambiguity establishes a sporadic administrative practice, which negatively affects the functioning and the execution of public administration, in general.

Keywords: *Whistleblowing, Whistleblower, Disciplinary Proceedings, Formal Administrative, Proceedings.*

1. Introduction

Following the 17 June 2022 application for the membership of Georgia in the European Union, the European Commission recommended strengthening the anti-corruption mechanisms.[2] Whistleblowing is one of the mechanisms to fight against corruption in the public sector facilitating the proper functioning as an important component of improving the anti-corruption system. The process of implementing the norms regulating whistleblowing identified some difficulties related to the determination of the procedures to examine the application of whistleblowing. Article 20^6 on the Fight against the Corruption (hereinafter referred to as the Law) establishes the procedure for examining a whistleblower application and determines that the body scrutinizing the application shall review it following the procedure established by the legislation of Georgia and its statute, and in the absence of relevant rules, under the formal administrative proceedings established by the Georgia General Administrative Code ("GGAC"). The practice of public institutions displays that the enforcement of this provision is carried out uniformly. In certain cases, it is complicated for a public institution to determine the proper type of production and initiate not formal administrative proceedings on whistleblower application, but disciplinary proceedings provided by the Law of

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1 Law of Georgia on Amendments and Additions to the Law of Georgia on Conflict of Interest and Corruption in Public Service, Legislative Herald of Georgia, 9, 13/04/2009, <https://www.matsne.gov.ge/ka/document/view/18034?publication=0> [28.02.2024].

2 European Commission, Communication from the Commission to the European Parliament, The European Council and the Council, Commission Opinion on Georgia's Application for Membership of the European Union, Brussels, 17.6.2022, COM(2022), 405, Final, 8, <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://eur-lex.europa.eu/resource.html?uri=cellar:32b82429-ee22-11ec-a534-01aa75ed71a1.0001.02/DOC_1&format=PDF> [28.02.2024].

Georgia on Public Service. With such uncertain demarcations and vague differences, the legal order is violated, and the trust in the system and the rate of whistleblowing are reduced.[3]

Based on the abovementioned, the work aims to outline the factors contributing to the complexity of the separation of administrative proceedings related to the whistleblower application from disciplinary proceedings and the ways to solve them. On the other hand, following a scientific analysis of the issue, the paper facilitates the establishment of administrative practices that are in line with the goals of the current legislation and international approaches.

2. Key Aspects of Administrative Proceedings Related to Disciplinary Proceedings and Whistleblowing

2.1. Whistleblowing and Related Administrative Proceedings

2.1.1. The Essence of Whistleblowing

Whistleblowing is a widespread institution, but there is still no international consensus on its exact definition.[4] In the scientific literature, whistleblowing is defined as the disclosure of information from public or private organizations, which avoids gross violations of citizens' rights, neglecting the accountability of the government, or corruption that may cause direct or potential harm to the public interest.[5] It does not involve providing information about any kind of illegal or unethical behavior. Only violations of a particular nature are treated within the definition of expose, which may affect the interests of a wide range of persons. This is indicated by the prehistory of the establishment of whistleblowing as one of the mechanisms to fight against corruption. It has become a means of combating large-scale violations. The interpretation of the Organisation for Economic Cooperation and Development (OECD) also emphasizes the public interest and indicates that whistleblowing is the provision of information about offenses that cause significant damage to the public interest.[6]

In addition, the European Court of Human Rights considers the public interest to be one of the criteria for whistleblowing[7] and assesses the facts that the complainant is not focused on.[8] In the part of the legal system, determining the public interest, not only the factual circumstances but also the vision of the whistleblower is important.[9] Thus, public interest is an integral part of whistleblowing,

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3 See OECD (2016), Committing to Effective Whistleblower Protection, OECD Publishing, Paris, 43, <http://dx.doi.org/10.1787/9789264252639-en>, [24.02.2024].

4 *Thüsing G., Forst G., (eds.),* Whistleblowing – A Comparative Study, Volume 16, 2016, 5.

5 *Santoro D., Kumar M.,* Speaking Truth to Power – A Theory of Whistleblowing, Volume 6, 2018, 1.

6 OECD (2016), Committing to Effective Whistleblower Protection, OECD Publishing, Paris, 18, <http://dx.doi.org/10.1787/9789264252639-en>, [24.02.2024].

7 See Guja v. Moldova, [2008] ECHR (para 74), <https://hudoc.echr.coe.int/#{%22itemid%22:[%22002-2265%22]}> [28.02.2024].

8 Heinisch v. Germany, [2011] ECHR, <https://hudoc.echr.coe.int/#{%22itemid%22:[%2, 2001-105777%22]}> [28.02.2024].

9 This way establishes the balance between freedom of expression and the effectiveness of the institution in the United States and is called the Pickering Test. see*Martic M*., Protection of the Rule of Law Through Whistleblowing, Regional Law Review, Vol. 2021, 68-69.

and any approach should serve it.[10] As for the definition of public interest, according to the 2014 recommendation of the Committee of Ministers of the Council of Europe, it is the privilege of states to determine the content and the areas of public interest.[11] This does not mean that the subject of prosecution can only be a criminal offense. The protection of whistleblowers must also be provided with information that may appear to be the basis for initiating administrative proceedings and relevant liability.[12] There are different models of detection.[13] Georgian legislation relies on a model that establishes a broad definition of whistleblowing and, in addition to legal violations, includes ethical violations.[14] According to Paragraph 'a' of Article 20^1, whistleblowing is to inform (by a whistleblower) the governing body, an investigator, the prosecutor, or the Public Defender of Georgia examining the application about the violation of the norms of the legislation of Georgia or the general rules of ethics by the wrongdoer which has caused damage or may harm the public interest or the reputation of the relevant public institution. It can also be considered as an exposure. The whistleblower must inform civil society or mass media about the above violation after the decision is made by the body reviewing the application, an investigator, the prosecutor, or the Public Defender of Georgia. This definition provides internal, external,[15] and public exposure.[16] Based on the abovementioned, the subject of whistleblowing is a violation of the general rules of legislation or ethics and conduct by the exposed person who has harmed or may damage the public interest or the reputation of a public institution. Both public interest and reputation belong to the category of indefinite concepts. Their contents have no normative reservations, accordingly, the body examining the application should assess a specific case of whether the public interest or reputation of a public institution is being violated and identify the exposure.

2.1.2. General Rule and Characteristics of Administrative Proceedings Related to an Application of Disclosure

The whistleblowing application is considered under the procedure established by the legislation of Georgia and the statute of the relevant institution, and in the absence of such rules, the regulations of formal administrative proceedings are established by the GGAC. The main legislative act regulating whistleblowing does not contain the norms guiding the procedures for reviewing an application of whistleblowing. The current legislation ensures the opportunity for each institution to individually establish the procedure for examining whistleblower applications, which provides them with broad

10 Comp. *Boot E. R.,* The Ethics of Whistleblowing, New York, 2019, 32-45.

11 Recommendation CM/Rec(2014)7 on the protection of whistleblowers and explanatory memorandum, The Committee of Ministers of the Council of Europe, 30.04.2014, 7, <http://rm.coe.int/doc/09000016807096c7> [24.02.2024].

12 See OECD (2016), Committing to Effective Whistleblower Protection, OECD Publishing, Paris, 45-46, <http://dx.doi.org/10.1787/9789264252639-en>, [24.02.2024].

13 *Thüsing G., Forst G.,* Whistleblowing – A Comparative Study, Springer, 2016, 21-22.

14 It should be borne in mind that the legislation of Georgia provides for a mechanism of disclosure only in the public sector.

15 *Kenny K.*, Whistleblowing Toward a New Theory, Harvard University Press, 2019, 19.

16 Ibid., 149.

discretion. Such regulation may be dangerous to protect the whistleblower or initiate appropriate procedures. It is recommended to regulate the main provisions scrutinizing the application to ensure compliance with internationally recognized principles and standards of whistleblowing. Since the majority of public institutions do not have internal regulations for whistleblowing, the only correct way to review applications is through formal administrative proceedings.

In 2013, Transparency International (TI) Georgia published 30 Principles,[17] which is a guideline for the adoption and improvement of whistleblower legislation and demonstrates its essence and the nature of the administrative proceedings related to it. An analysis of these principles elucidates that a whistleblower has special rights that are not usually met with other types of administrative proceedings. Thus, the feature of administrative proceedings is manifested in the special legal regime of the whistleblower[18] which implies taking some special measures to protect the whistleblower.[19]

Paragraph 6 of Article 20^4 creates important guarantees for the protection of whistleblowers in Georgia, which establishes a list of inadmissible acts against the whistleblower and simultaneously furnishes the possibility of applying a special measure of the protection ensured by the Criminal Procedure Code of Georgia not only for the whistleblower but also for his/her close relative or a witness of whistleblowing. privacy Based on the principle, the identity of the whistleblower cannot be disclosed without his sharply expressed will. The principle of anonymity provides the possibility of exposing without identifying a person.[20] Accordingly, during the administrative proceedings related to the application of whistleblowing, the principle of publicity is replaced by the principle of confidentiality.

The involvement of the whistleblower as an informed interested party is of particular importance in the production process. He/she should clarify the application, provide additional information or evidence, be informed of the results of the investigation,[21] which requires special regulation based on the purposes of the protection of the whistleblower. EU directive representing Lex Generalis[22] comprises certain reservations about the administrative proceedings related to whistle-blowing, including establishing the obligation to inform the whistleblower and the relevant timeframes.[23] There are no special norms for informing, getting engaged, and using various means of

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17 See International Principles for Whistleblower Legislation Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest, Transparency International, 2013, <https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf>, [24.02.2024].

18 The use of the so-called "whistlebots" system as a mechanism for detecting violations is actively discussed using artificial intelligence, which eliminates personal risks and somewhat replaces whistleblowers. See *Brand V.,* Corporate Whistleblowing, Smart Regulation, and RegTech: The Coming of the Whistlebot?, University of New South Wales Law Journal, Vol. 43, Issue 3, 2020.

19 International Principles for Whistleblower Legislation Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest, Transparency International, 2013, 5-6, <https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf>, [24.02.2024].

20 Ibid., 6-7.

21 Ibid., 9.

22 *Abazi V.,* The European Union Whistleblower Directive: A "Game Changer" for Whistleblowing Protection?, Industrial Law Journal, Vol. 49, No.4, 2020, Oxford University Press, 644.

23 See. The Directive – (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, Official Journal of the European Union, L

communication in Georgian legislation. Their determination falls within the discretion of a particular public institution.

2.2. The Essence and Peculiarities of Disciplinary Proceedings

Determining the grounds, essence, and features of initiating disciplinary proceedings is important to separate it from the administrative proceedings related to the application of whistleblowing. Chapter 10 of the Law of Georgia on Public Service regulates the procedures and rules of disciplinary proceedings, according to which a public institution must establish the fact of disciplinary misconduct and determine the appropriate disciplinary measure. Thus, the disciplinary misconduct, proceedings, and measures shall establish a disciplinary mechanism defined by the Law of Georgia on Public Service. With a detailed regulation of disciplinary liability, the legislation created one of the mechanisms for the legal protection of officers, which integrated the goals of prevention and the purpose of protection of human rights. The objectives of the disciplinary proceedings are expressly defined by law and imply the rapid and full detection of disciplinary misconduct and taking the appropriate measures to eliminate it.[24] It is determined by 5 basic principles:[25]legality, prohibition of imposing disciplinary liability for the same misconduct twice, impartiality (prohibition of conflicts of interest), the so-called "presumption of innocence" and confidentiality, which predominantly preserve the reputation of the officer and the public institution.

To formal content, particularity is characterized by the initiation of disciplinary proceedings. The legislation introduces three bases for initiating disciplinary proceedings, two of which are specific (an application of an officer or a former officer and the results of audit, inspection, and/or monitoring), and one with general content related to the substantiated suspicion of disciplinary misconduct.[26] However, disciplinary proceedings always begin with the issuance of an individual administrative act – a command.[27]

Disciplinary proceedings shall be performed by the unit initiating disciplinary proceedings[28] and it is not conducted directly by the head of the public institution, which is one of the contributing factors to the fairness, impartiality, and objectivity of the production. A final decision on imposing disciplinary liability shall be made by the head of the public institution. In addition, the head of the public institution has the legal leverage to return the conclusion with substantiated remarks and the authority to reduce disciplinary liability (in the case of minor disciplinary misconduct).[29]

305/17, 26.11.2019, Article 9, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L1937>, [24.02.2024]. In case of whistleblowing made through external channels, this term can be extended up to 6 months, see Ibid., Article 11.

24 Law of Georgia on Public Service, Article 86, The Legislative Herald of Georgia, 11/11/2015, <https://matsne.gov.ge/ka/document/view/3031098?publication=50>, [24.02.2024].

25 Ibid., Article 87.

26 Ibid., paragraph 1 of Article 88.

27 Ibid., paragraph 3 of Article 88.

28 A unit carrying out disciplinary proceedings may be a structural unit carrying out official inspections of the same or superior institution or an independent commission. See. Ibid., Article 89.

29 Ibid., Article 94(2).

In the process of disciplinary proceedings, a public servant has some legal rights that correspond to the nature of this kind of proceedings and include the standard rights of having a lawyer, introducing materials, participation in the process of proceedings, submission of evidence, appeal, etc. Based on these rights, a public institution shall have many obligations, including informing about the initiation of disciplinary proceedings, the definition of rights and commitments, the procedure for disciplinary proceedings, the familiarity with case materials, etc. In this regard, the Law of Georgia on Public Service contains much more detailed norms than the GGAC.

Although the legislation envisages the involvement of the party in the disciplinary proceedings and the submission of their opinions, it does not establish an unconditional obligation to hold an oral hearing and links it to a specific measure of disciplinary liability – dismissal.[30] The principle of hearing is of particular importance during proceedings since it can have a significant effect on the results of the proceedings. Such an order of the issue establishes a lower standard than is provided during formal or public administrative proceedings.

The legislation explicitly defines the legal consequences that disciplinary proceedings may cause, the imposition of disciplinary liability, dismissal (in case of minor disciplinary misconduct) or termination of disciplinary proceedings.

Thus, the peculiarity of the disciplinary proceedings is expressed in the purpose to which it is directed, in the legal basis of initiation, the procedural process, and the accompanying legal consequences.

3. The Difficulty of Separating Administrative Proceedings related to a Disciplinary Procedure and an Application of Whistleblowing and the Factors Contributing to It

Disciplinary proceedings predominantly provide internal organizational discipline and order, while the whistleblowing mechanism serves the common good and goes beyond the scope of a particular institution. However, they have some crossing points. Failure to fulfill official obligations, and violation of the general rules of ethics can become a subject of whistleblowing, citizens apply to public institutions with such notifications.[31] In such cases, the grounds for initiating formal administrative proceedings related to the application of whistleblowing emerge simultaneously. Since the grounds for initiating disciplinary proceedings are for arising reasonable doubts about alleged disciplinary misconduct, disciplinary proceedings may be initiated when a citizen's application creates a logical assumption of disciplinary misconduct. In addition, informing the relevant institution about the violation makes the basis for initiating formal administrative proceedings. Therefore, a public institution has to choose between the types of the above proceedings.

As the definition of whistleblowing is of fairly broad content, any disciplinary misconduct may be considered as a subject of whistleblowing. The law demonstrates the nature of the violations falling

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30 Ibid., Article 91(6).

31 See *Tkemaladze S., Chachava S.,* Public Service Service/Labor Dispute Management and Effective Resolution Situational Analysis and Needs Survey, 2018, 52, <https://www.undp.org/sites/g/files/zskgke326/files/migration/ge/UNDP_GE_DG_PAR_NVU_Effective-Resolution-of-Labour-Disputes_geo.pdf>, [28.02.2024].

within the whistleblowing but does not define the areas of public interest and the scope of reputational damages. This makes it difficult to accurately determine the content of whistleblowing.

In addition to the material norms, in the process of the determination of whistleblowing, procedural regulations, the rules for identifying and responding to the application of whistleblowing are not prescribed by law. The absence of these rules is of particular importance when a public institution does not have a qualified employee who can accurately and appropriately assess the content and nature of a particular information. The general content of the whistleblowing, the absence of detailed response procedures, and the lack of qualified human resources are the problems of separating these types of proceedings.

4. The Importance of Separation of Administrative Proceedings Related to the Disciplinary Proceedings and the Application of Disclosure and its Main Criteria

4.1. Appropriate Proceedings

Stricto sensu means the set of rules for performing administrative, however, in the modern sense it has acquired a much broader understanding.[32] Public administration as a function of the state must be carried out based on the decisions of the entity implementing public administration. These decisions are made in compliance with certain rules which are termed administrative proceedings. Thus, administrative proceedings are one of the elements of public administration and involve the decision-making process.[33]

The right to fair administrative proceedings is a fundamental human right enshrined in Article 18 of the Constitution of Georgia. It substantially follows Article 41 of the EU Charter of Fundamental Rights[34] imposes an obligation on public institutions to ensure administrative proceedings in agreement with the standard of justice. Thorough conduct of administrative proceedings based on an appropriate procedure determines its legality, reasoning, and expediency.[35]

In the scientific literature, administrative proceedings have two functions, instrumental and non-instrumental. The instrumental function implies the impact of proceedings on the final result, which means that the administrative proceedings ensure the correctness of the substantial result (final decision).[36]

The non-instrumental function is manifested in the importance of administrative procedures, not the final decision made as a result of it. Thus, administrative proceedings with this approach are self-sufficient and independent of the final decision.

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32 *Cane P., Hofmann H. C H, C Ip Eric, Lindseth P. L.,* The Oxford Handbook of Comparative Administrative Law, Oxford, 2021, 933.

33 *Turava P.,* General Administrative Law (Third Edition), Tbilisi, 2020, 28 (In Georgian).

34 Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 326/391, Article 41.1, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>, [24.02.2024].

35 Decision of the Supreme Court of Georgia of July 20, 2023, on the case Nobs-1510(K-22).

36 *Millet L.*, The Right to Good Administration in European Law, 47 Pub. L. 309, 310 (2002), See quote.: *Ponce J.,* Good Administration and Administrative Procedures, Indiana Journal of Global Legal Studies, Vol. 12, No. 2, (Summer 2005), 553.

Based on the above, it can be clearly stated that the determination of the proper type of proceedings in the process of public administration is of multifaceted consequence. Formal administrative and disciplinary proceedings are different from each other, their confusion affects the legality of making decisions, the principles of good administration, and the realization of human rights and freedoms. That is why a public institution should make a decision following the relevant procedures, which creates the correct primary identification of the application.

4.2. Identification of Whistleblowing

The problem of separation of administrative and disciplinary proceedings related to the application of whistleblowing essentially arises when a public institution cannot determine the nature of the whistleblowing. In this case, reviewing the application rests on disciplinary proceedings that raise the risk for the whistleblower to remain beyond the guarantees of protection provided by the legislation. Accordingly, the law must create solid legal grounds for the identification of whistleblowing, especially in terms of determining its material content. The existing definition of whistleblowing covers general provisions and does not design a solid orientation for a public institution, including not establishing the main areas and directions of public interest. The EU directive identifies 12 main areas of whistleblowing, including public procurement, prevention of money laundering and financing terrorism, safety of transport, environmental protection, radiation and nuclear safety, food security, public health, etc.[37] Applying such an approach, specifying the definition of whistleblowers has become a good practice.

In addition, the process of whistleblowing has excluded specific applications related to human resource management (HR grievance)[38] and personal complaints[39] that are contrary to the nature of whistleblowing. By the prima facie definition of whistleblowing, it is the protection of general social benefit, not personal interests.[40] Consequently, where there is public interest, there is whistleblowing.

Despite these efforts, an exhaustive definition of whistleblowing (without evaluative categories) and its unequivocal separation from other institutions is virtually impossible. Even a personal complaint dealing with favoritism, or sexual harassment, may indicate a general nature of the problem.[41] Therefore, the appropriate mechanism for whistleblowing should include a multilateral

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[37] The Directive – (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, Official Journal of the European Union, L 305/17, 26.11.2019, Article 2(1), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019 L1937>, [24.02.2024].

[38] *Terracol M.,* Internal Whistleblowing Systems Best Practice Principles for Public and Private Organisations, Transparency International, 2022, 15, <https://images.transparencycdn.org/images/2022_ Internal-Whistleblowing-Systems_English.pdf>, [28.02.2024].

[39] *Tsukhishvili N.,* Whistleblowing in Public Service Comparative Analysis of International Practice and Georgian Legislation, Tbilisi, 2020, 23-24 <http://csb.gov.ge/media/3138/%E1%83%9B%E1%83%AE% E1%83%98%E1%83%9A%E1%83%94%E1%83%91%E1%83%90-%E1%83%A1%E1%83%90%E1%83 %AF%E1%83%90%E1%83%A0%E1%83%9D-%E1%83%A1%E1%83%90%E1%83% 9B%E1%83%A1 %E1%83%90%E1%83%AE% E1%83%A3%E1%83%A0%E1%83%A8%E1%83%98_disclosure-in-public-service_external.pdf>, [28.02.2024].

[40] *Martic M.,* Protection of the Rule of Law through Whistleblowing, Regional Law Review, Vol. 2021, 68.

[41] *Brown A. J., Lewis D., Moberly R. E., Vandekerckhove W.,* International Handbook on Whistleblowing Research, 2014, 10.

process, from consultation to final decision. If there is no unequivocal regulation of the issue, it is important to inform a person properly (for example, in the form of an expository officer, or guideline),[42] which helps him/her select the appropriate mechanism for providing information and determine the expected legal consequences. Even for cases when the application is dualistic combining the bases for starting different types of proceedings by the persons with relevant knowledge and qualifications, an initial assessment and the proceedings should be carried out considering the clear criteria to determine the final results. [43]

4.3. The Logic of the Law

Administrative practice revealed another aspect of the separation of administrative proceedings and disciplinary proceedings related to the application of whistleblowing. Some public institutions identify the applications but they are reviewed not through formal administrative proceedings, but based on disciplinary proceedings. When the subject of the prosecution is alleged disciplinary misconduct, some of the institutions consider it unnecessary to perform formal administrative proceedings and start the process of disciplinary proceedings.[44] Analysis of the law shows that disciplinary proceedings cannot replace formal proceedings to review an application of whistleblowing. To determine the will of the legislator, according to Paragraph 2 of Article 20,[6] if after examining the application of whistleblowing it becomes clear that the violation may serve as the basis for imposing administrative, civil, or criminal liability on the exposed person, the body reviewing the application is obliged to apply to the relevant authorized bodies. This norm indicates that whistleblowing is the initial mechanism for responding to an application, within which a violation and its nature (criminal, civil, administrative, disciplinary) is assessed and determined by further procedures. Accordingly, if the action has some signs of a crime, studying the issue must ensure the standard of evidence of a substantiated assumption to transfer it to the investigative authorities. Similarly, if the application of whistleblowing contains a violation related to disciplinary misconduct, examining the issue should raise reasonable doubt about the issue of disciplinary misconduct to start disciplinary proceedings. Based on the abovementioned, the logic of the law is violated by the initiation of disciplinary proceedings following the application of whistleblowing.

5. Conclusion

Corruption can become a major obstacle to the development and advancement of the states. The states are trying to fight it through systemic approaches and various mechanisms. Over the past decade, whistleblowing has met almost all areas of law[45] and has become a part of the anti-corruption

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42 *Terracol M,* Internal Whistleblowing Systems Best Practice Principles for Public and Private Organisations, Transparency International, 2022, 15, 19, <https://images.transparencycdn.org/images/2022_Internal-Whistleblowing-Systems_English.pdf>, [28.02.2024].

43 *Terracol M,* Internal Whistleblowing Systems Best Practice Principles for Public and Private Organisations, Transparency International, 2022, 27, <https://images.transparencycdn.org/images/2022_Internal-Whistleblowing-Systems_English.pdf>, [28.02.2024].

44 This issue was highlighted during the workshop.

45 *Thüsing G., Forst G., (eds.),* Whistleblowing – A Comparative Study, Volume 16, 2016, 3.

system. Therefore, the constant development of the whistleblowing system is one of the concerns of the state. Articulation of whistleblowing and disciplinary proceedings, in some cases, is difficult as there are some overlapping points between these systems. Consequently, a non-uniform practice of reviewing whistleblower applications is formed based on disciplinary proceedings.

Disciplinary and formal administrative proceedings initiated on the application of whistle-blowing differ from each other. Most importantly, in the process of whistleblowing, the whistleblower has protection guarantees, determined by law, which cannot be realized in the process of disciplinary proceedings. The analysis of the legislation shows that the so-called two-step model of consideration of whistleblowers' applications connected to disciplinary misconduct is valid. The mentioned means scrutinizing the application of whistleblower based on formal administrative proceedings and then initiating disciplinary proceedings. The final of the formal administrative proceedings determines the type of violation the whistleblower indicates and what procedures should be enacted to deal with it.

The mentioned approach does not exclude the problem of separation of whistleblowing and other types of complaints, moreover, there is a natural connection between them, the main prerequisite for the solution of which is the detailed regulation of the material content of whistleblowing and the procedures for responding to it.

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