JOURNAL OF LAW

TSU FACULTY OF LAW

№2, 2024

CONTENTS

Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№2, 2024

უნივერსიტეტის
გამომცემლობა

UDC(uak) 34(051.2)
s-216

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

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

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

Table of Contents

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8314

Łukasz Mirocha*

Crucial Changes in Polish Regulation of Parental Authority Over the Last 100 Years

The article discusses significant changes in Polish family law over the past century. It focuses on the concept of parental authority, explaining its meaning and position in Polish law in the first part of the article. The following section mentions and comments on legal documents related to parental authority during the last century. The final section investigates five legal changes in the institution under study which the author considers crucial for its development. These changes include the legal status of men and women in relation to parental authority, the legal status of out-of-wedlock children, the predominant values underpinning parental authority, the prohibition of corporal punishment, and the state's interference with parental authority. The article argues that despite the changes in legal, political, and economic systems experienced by Poland over the last century, there has been significant continuity and stability in the development of Polish family law.

Keywords: *family law, parental authority, changes in law, protection of the good of the child, disciplining children, out-of-wedlock children*

1. Introduction

The year 2024 marks the 60th anniversary of adopting the Polish Family and Guardianship Code (*Kodeks rodzinny i opiekuńczy*[1]). The fact that the Polish main legal act governing family law remained in force for almost 60 years might be confusing. It should be stressed that such a long period of its force does not mean the realm under study has been free of changes and shifts, and legal regulations have avoided amendments. Considering a period extended of about 40 years, i.e., the last century, which will allow us to examine the time after World War I until now, can demonstrate even greater dynamics in the development of Polish family law.

The last hundred years of Polish history can be divided into three distinct periods: the interwar period between World War I and World War II, the communist-socialist era from 1945 to 1989, and the current democratic era[2]. Each of these periods is strongly linked to a different socio-economic and

* Barrister, Doctor of Law, Assistant Professor at the Institute of Law and Administration, Pomeranian University in Slupsk, https://orcid.org/0000-0002-1498-2960.

1 Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy, Dz.U.2023.2809 consolidated text of 2023.12.29.

2 I omit the time of World War II, during which family law, like other branches, was affected by invading: Nazi Germany and the Soviet Union; on family law in this period see: *Truszkowski B.K.*, Karcenie dzieci na ziemiach polskich. Regulacje prawne od XIX wieku do dziś, Miscellanea Historico-Iuridica, tom XIX, z. 1, 2020, 66-69.

legal system, which has significantly influenced the dynamics of legal changes. This might provoke the impression that family law changes followed political shifts. However, while many legal changes in family law have been enacted over the last century, they were not necessarily linked with changes in socio-economic or political systems. Family law is a branch of law that is deeply rooted in the biological aspects of human life and, moreover, reflects society's moral convictions and customs. These traits contribute to its consistency and stability, making it resistant – to some extent – to political shifts.

The article discusses essential legal changes in Polish parental authority regulations over the past 100 years. Referring to the changes under study as "crucial" may introduce subjectivity. It should be explained that the article aims to analyze changes of "watershed" importance that have significantly impacted almost all citizens. The shifts discussed in the article have firm axiological grounds and are not of a purely technical nature. Still, the arbitrariness caveat can be raised against issues selected to examine in the article.

The first part of the article presents the concept of parental authority (*władza rodzicielska*) in Polish law and discusses controversies concerning it. The second section deals with the issue of sources of Polish law regarding parental authority over the last hundred years. The final section explores substantive legal changes in parental authority that occurred in the period under study.

2. The Concept of Parental Authority in Polish Family Law

The Family and Guardianship Code does not provide a direct legal definition of parental authority[3]. This situation is nothing new in the Polish legal system, as previous legal acts governing the issue also refrained from defining the concept of parental authority. Legal regulations enforced in states that participated in partitions and inherited by the newly reestablished Polish state in 1918 after the partitions period also lacked the definition of parental authority[4]. Polish scholars argue that construing the definition of parental authority is next to impossible because of the variety of situations this concept covers. Due to that, definitions proposed by lawyers are of descriptive and incomplete character[5].

Polish academic thought continues to discuss the legal character of parental authority. As early as 1983, Tomasz Sokołowski could enumerate at least five concepts of parental authority proposed by Polish legal academics and proposed his own. The overwhelming number of authors claim that parental authority should be described as an entitlement – a subjective right; however, this stance is being constantly questioned by advocates of the stance stressing the importance of parental duties[6].

---

3 *Stępień M.*, Istota władzy rodzicielskiej, Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne, 27, 2019, 62; *Smyczyński T.*, Prawo rodzinne i opiekuńcze, Warszawa, 2009, 212.

4 *Długoszewska I.*, Przesłanki ograniczenia władzy rodzicielskiej na ziemiach polskich, Zeszyty Prawnicze UKSW, 10.1, 2010, 155-156.

5 *Mostowik P.*, Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym, Kraków, 2014, 55.

6 *Sokołowski T.*, Charakter prawny władzy rodzicielskiej, Ruch Prawniczy, Ekonomiczny i Socjologiczny, Rok XLIV, zeszyt 3, 1982, 123-124; *Winiarz J.*, Prawo rodzinne, Warszawa, 1977, 214; *Smyczyński T.*, Prawo rodzinne i opiekuńcze, Warszawa 2009, 212; *Stępień M.*, Istota władzy rodzicielskiej, Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne, 27, 2019, 68.

The latter stance has a strong basis in Article 95 of the Family and Guardianship Code, which states: "Parental authority includes, in particular, the obligation and right of parents to take care of the child's person and property and to raise the child, respecting his or her dignity and rights." It is worth emphasizing that an earlier legal act governing parental authority – the Family Code of 1950[7], included Article 54, which used almost identical wording to describe parental authority but placed parents' rights first, whereas parental obligations followed them. The abovementioned influential concept of parental authority proposed by Tomasz Sokołowski asserts that it comprises three legal relations: the first between parents and children (family-law relation), the second between parents and other subjects of civil law relation (civil-law relation), and the third between parents and the state, e.g., family law court (administrative-law relation)[8]. Contemporarily, there is consensus in academic writing and legal doctrine that parental authority mainly relies on obligations burdening parents, who should use their rights to benefit their children. Consequently, parental authority is perceived as a sum of parental obligations and duties, with an apparent priority of the former and an instrumental function of the latter.

Scholars have discussed that the term "authority" (*władza*) does not reflect the emphasis on parental obligations. The term "authority" was traditionally used by Polish legislators, at least after World War II, but was also applied in legal acts before that period. It originates in ancient Roman *patria potestas* and might be suitable for legal regulations prioritizing parental and, particularly, men's rights towards children or other family members. However, nowadays, it is not compliant with the axiology of family law[9]. The ongoing terminological debate intensifies each time the Polish legislator proposes a significant family law amendment. This might be exemplified by Bronisław Dobrzański's considerations over replacing the term "authority" with a more appropriate one before enforcing the Family and Guardianship Code in 1964. The author noticed that Russian or Bulgarian regulations referred to "parental rights, whereas Hungarian law referred to "parental supervision." He also argued that the term "authority" is associated with public law rather than the private sphere[10].

Over the last three decades, the controversy concerning the term "parental authority" has been fueled by the influence of international and European law. The Convention on the Rights of the Child (1989)[11] relates to "responsibilities, rights and duties of parents" while the European Union and the Council of Europe legal acts mention "parental responsibility" which constitutes a concept broader than "parental authority," but result in erasing "parental authority" from the scope of legal terminology[12].

---

7 Ustawa z dnia 27 czerwca 1950 r. Kodeks rodzinny, Dz.U.1950.34.308 of 1950.08.22.

8 *Sokołowski T.*, Charakter prawny władzy rodzicielskiej, Ruch Prawniczy, Ekonomiczny i Socjologiczny, Rok XLIV, zeszyt 3, 1982, 133.

9 *Cywiński A.*, Stosunki pomiędzy rodzicami i dziećmi w perspektywie historyczno-prawnej, Probacja, 1, 2014, 161-163; *Winiarz J.*, Prawo rodzinne, Warszawa, 1977, 213; *Grzybowski S.*, Prawo rodzinne. Zarys wykładu, Warszawa, 1980, 187.

10 *Dobrzański B.*, *Władza rodzicielska w projekcie kodeksu rodzinnego i opiekuńczego*, Palestra, 7/4(64), 1963, 27-28.

11 United Nations General Assembly resolution 44/25 of 20 November 1989.

12 *Mostowik P.*, Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym, Kraków, 2014, 63-64, 71; *Stępień M.*, Istota władzy rodzicielskiej, Studenckie Prace Prawnicze,

Not all parental behaviors toward the child are covered by parental authority. Polish law distinguishes parental authority from the right to contact children or the duty to maintain them (alimony)[13]. There is a consensus among legal scholars that the concept of parental authority comprises three elements: care over the person of a child (*piecza nad osobą dziecka*), supervision of the property of a child (*piecza nad majątkiem dziecka*) and representation of a child (*przedstawicielstwo*).

3. Sources of Law

In 1918, the Polish state was restored as the Republic of Poland (*Rzeczpospolita Polska*) after 123 years of partitions. The state's authorities confronted the situation in which different legal systems governed various parts of its territory. Three different legal systems were inherited after states which participated in partitions. Another legal system was valid in the territory of the Kingdom of Poland (*Królestwo Polskie*), established in 1815, that was not incorporated into the Russian Empire but subordinated to it. Regarding the issue of private law, the situation looked as follows. Part of the territory regained from the German Empire remained under the binding force of *Bürgerliches Gesetzbuch* (BGB, 1896). In Galicia, the part under the influence of the Austro-Hungarian Empire, *Allgemeines Bürgerlisches Gesetzbuch* (ABGB, 1811) remained in force. Territories regained from the Russian Empire stayed under the force of *Swod Zakonow* (1835). The Civil Code, inspired by the Napoleonic Code (1804), was introduced in the Kingdom of Poland in 1825. As a result, during the first period under study – between 1918 and 1939 – the Republic of Poland had four different legal systems governing parental authority: Austrian, German, Russian, and the fourth, influenced by French, Russian, and Polish solutions (area of the Kingdom of Poland)[14].

On the one hand, Polish authorities took steps to facilitate current legal relations in such complex circumstances. This resulted in enforcing the Act on the law applicable to private internal relations (1926)[15]. On the other hand, a more demanding challenge of unifying Polish law was undertaken. The Codification Commission was established in 1919, but its works began much later. Considering private law, the Commission prepared the Code of Obligations and the Commercial Code, which entered into force in 1934. Its contribution to family law was preparing the parent-child relations bill, published for the first time in 1934. The second version of the bill was published in 1938. The person responsible for these achievements was Stanisław Gołąb. Another lawyer who

Administratywistyczne i Ekonomiczne, 27, 2019, 64; *Smyczyński T.*, Prawo rodzinne i opiekuńcze, Warszawa 2009, 213.

13 *Sokołowski T.*, Charakter prawny władzy rodzicielskiej, Ruch Prawniczy, Ekonomiczny i Socjologiczny, Rok XLIV, zeszyt 3, 1982, 127.

14 *Fiedorczyk P.*, Prawo rodzinne ziem wschodnich II Rzeczypospolitej, [in:] Wielokulturowość polskiego pogranicza. Ludzie-idee-praw, *Lityński A.*, *Fiedorczyk P. (eds.)*, Białystok, 2003, 509; *Cywiński A.*, Stosunki pomiędzy rodzicami i dziećmi w perspektywie historyczno-prawnej, Probacja, 1, 2014, 157-158; *Długoszewska I.*, Przesłanki ograniczenia władzy rodzicielskiej na ziemiach polskich, Zeszyty Prawnicze UKSW, 10.1, 2010, 154.

15 Ustawa z dnia 2 sierpnia 1926 r. o prawie właściwem dla stosunków prywatnych wewnętrznych, Dz.U.1926.101.580 of 1926.10.13.

contributed to the development of Polish family law in the period under study was Karol Lutostański, the author of the progressive bill concerning marriage law[16]. None of these bills entered into force, so family law in the Republic of Poland remained divided. Nevertheless, bills were utilized by the Codification Commission summoned after World War II by communist authorities[17].

Polish Constitutions of this period said little about family law issues. The March Constitution of 1921[18] stated in Article 103: "Children without sufficient parental care, neglected in terms of upbringing, have the right to care and assistance from the State to the extent specified by law." It also guaranteed that: "Parents may only be deprived of authority over their child by way of a court decision." The April Constitution of 1935[19] related exclusively to the matters of the governmental system; it lacked regulations concerning the family.

As mentioned above, communist authorities established the Codification Commission in 1945. The Commission prepared eight bills called "decrees." These were introduced by the Council of Ministers (government) and approved by the Presidium of the State National Council, which considered itself the Polish parliament but was, in fact, a part of the communist Polish Workers' Party. Four of these decrees concerned family law[20]; one particularly important considering parental authority is the Decree of 22 January 1946 Family Law[21]. Decrees were inspired by bills prepared by Stanisław Gołąb and Karol Lutostański. The decrees ultimately led to the unification of Polish private law. The result was not, however, satisfying for the state's authorities. In July 1948, the Polish-Czechoslovak Legal Cooperation Commission was settled and began work on a new legal act concerning family law. It aimed to introduce more progressive solutions in comparison to the Decree of 1946, particularly relating to the legal status of out-of-wedlock children[22]. Fast work resulted in enforcing the Family Code in 1950, which remained in force for almost one and a half decades, despite its flaws: it was too brief and too open to interpretation[23].

Work on the Family and Guardianship Code, which is still in force today, began in 1956. Except for substantive problems faced by its authors, the crucial question begging for a response was whether to treat family law as a part of a newly prepared civil code (following pre-World War II tradition) or to

---

16 See: *Zarzycki Z.*, Attempts to Codify Personal Matrimony Law in the Second Polish Republic. A Fiasco or Perhaps a Success?, Krakowskie Studia z Historii Państwa i Prawa, 15 (2), 2022, 261-273; *Leciak I.*, Polemika wokół kodyfikacji prawa rodzinnego i opiekuńczego w II Rzeczpospolitej, Studia Iuridica Toruniensia, vol. XIII, 2014, 81-83.

17 *Cywiński A.*, Stosunki pomiędzy rodzicami i dziećmi w perspektywie historyczno-prawnej, Probacja, 1, 2014, 159; *Długoszewska I.*, Przesłanki ograniczenia władzy rodzicielskiej na ziemiach polskich, Zeszyty Prawnicze UKSW, 10.1, 2010, 165-167; *Truszkowski B.K.*, Karcenie dzieci na ziemiach polskich. Regulacje prawne od XIX wieku do dziś, Miscellanea Historico-Iuridica, tom XIX, z. 1, 2020, 65-66.

18 Ustawa z dnia 17 marca 1921 r. Konstytucja Rzeczypospolitej Polskiej, Dz.U.1921.44.267 of 1921.06.01.

19 Ustawa Konstytucyjna z dnia 23 kwietnia 1935 r., Dz.U.1935.30.227 of 1935.04.24.

20 *Grzybowski S.*, Prawo rodzinne. Zarys wykładu, Warszawa, 1980, 26.

21 Dekret z dnia 22 stycznia 1946 r. Prawo rodzinne, Dz.U.1946.6.52 of 1946.03.04.

22 *Winiarz J.*, Prawo rodzinne, Warszawa, 1977, 21; *Długoszewska I.*, Przesłanki ograniczenia władzy rodzicielskiej na ziemiach polskich, Zeszyty Prawnicze UKSW, 10.1, 2010, 167-168; *Truszkowski B.K.*, Karcenie dzieci na ziemiach polskich. Regulacje prawne od XIX wieku do dziś, Miscellanea Historico-Iuridica, tom XIX, z. 1, 2020, 69-73.

23 *Dobrzański B.*, Władza rodzicielska w projekcie kodeksu rodzinnego i opiekuńczego, Palestra 7/4(64), 1963, 28.

continue post-World War II experiences and let family law be comprised in a separate act. Another ongoing controversy concerned the issue of family law's autonomy: some legal academics perceived it as a part of civil law, and others wanted to see it as a distinguished branch[24]. Ultimately, the Family and Guardianship Code was introduced as an act separate from the Civil Code. However, the status of family law as the branch of law independent of civil law is still a matter of discussion in Poland. The Family and Guardianship Code has been amended many times. Changes that affected its substance are discussed in the following section of the article.

The Constitution of the Polish People's Republic of 1952[25] referred to marriage and family in Article 67: "Marriage and family are under the care and protection of the Polish People's Republic. The state takes special care of families with numerous offspring." Further amendments to the Constitution mentioned family as a subject of care and protection guaranteed by the state.

The Constitution of the Republic of Poland of 1997, introduced in conditions of the democratic state, mentions family in a few provisions. Firstly, Article 18 states: "Marriage as a union between a man and a woman, family, motherhood, and parenthood are under the protection and care of the Republic of Poland." The document guarantees "the right to legal protection of private and family life" in Article 47. Furthermore, the Constitution warrants the state's support for families: "The state takes the good of the family into account in its social and economic policy. Families in a difficult financial and social situation, especially those with many children and single-parent families, have the right to special assistance from public authorities." (Article 71).

Poland, as a member state of the European Union, is nowadays bound by its law, which, in principle, should not affect substantial family law but actually influences it. It can be illustrated in the field of so-called surrogate motherhood[26]. Considering the shape of parent-child relations in Poland, it should be taken into account that the state is also bound by the Convention on the Rights of the Child or Convention for the Protection of Human Rights and Fundamental Freedoms[27], which refers to the family in its articles 8 and 12.

4. Selected Shifts Concerning Parental Authority in Poland Over the Last 100 Years

The following part of the article discusses selected changes in the regulation of parental authority across the three periods distinguished above. Five main issues are examined: the legal situation of men and women in the realm of parental authority, the legal status of out-of-wedlock children, the aims and justification of parental authority, the prohibition concerning corporal punishment, and the state's interference with parental authority.

---

[24] *Grzybowski S.*, Prawo rodzinne. Zarys wykładu, Warszawa, 1980, 26, 30-34; *Smyczyński T.*, Prawo rodzinne i opiekuńcze, Warszawa 2009, 14.

[25] Konstytucja Polskiej Rzeczypospolitej Ludowej uchwalona przez Sejm Ustawodawczy w dniu 22 lipca 1952 r., Dz.U.1952.33.232 of 1952.07.23.

[26] *Mostowik P.*, Resolving Administrative Cases Concerning Child Under the Foreign Custody of Same-Sex Persons Without Violating National Principles on Filiation as the Ratio Decidendi of the Supreme Administrative Court (NSA) Resolution of 2 December 2019, Prawo w Działaniu, vol. 46, 2021, 190.

[27] Konwencja o ochronie praw człowieka i podstawowych wolności sporządzona w Rzymie dnia 4 listopada 1950 r., Dz.U.1993.61.284 of 1993.07.10.

4.1. Differentiation of Legal Situations of Men and Women

As mentioned earlier, the term "authority" is still used to describe legal relations between parents and children in Poland. This concept originates from ancient Roman *patria potestas*. The ancient legal concept affected family relations for ages, influencing the Western legal system at least until the end of the XIX century[28]. What should be stressed is that *patria potestas* related not only to children but to all family members. Consequently, the actual and legal status of women in the family was subordinated to men.

Regulations that remained in force in the Republic of Poland described the legal status of men and women in the realm of parental authority in various ways. The Civil Code of the Kingdom of Poland formally acknowledged that both parents hold parental authority. According to Article 336 of the Code: "A child of any age owes honor and respect to its father and mother and stays under the authority of their parents until it comes of age or become independent." Article 337 admits that both parents hold parental authority. However, it recognizes the priority of the father's opinion in conflict with the child's mother[29]. Similar regulation was comprised in *Swod Zakonow*. Formally, both parents held parental authority, but the husband had authority over his wife, so, as a result, he had the "last word" in family matters. The Austrian ABGB, the oldest legal act that remained in force in the Republic of Poland after World War I, contained conservative regulations granting the father almost absolute authority over children. This authority could only be limited if the father neglected his duty to provide for or educate the children. According to ABGB, there was a distinction between paternal and parental authority. Parental authority was granted to both men and women, but women had limitations placed on their authority. Women were responsible for taking care of the child and providing education until the child reached eight years of age. Even in the unfortunate event of the child's father passing away, women did not gain full parental authority; instead, a male guardian was appointed. In the German Civil Code (BGB), distinctions were made between men's and women's rights regarding children. The father played a primary role and was responsible for the child's person and property, while the woman only had authority over issues related to the child's person. Unlike the ABGB, under the BGB, women gained full parental authority after the child's father's death[30]. To summarize, all legal regulations that remained in force in the restored Polish state were highly conservative and recognized the predominant role of men in the family.

The already mentioned bill prepared by Stanisław Gołąb proposed significant changes in the realm under study. The bill aimed to equalize the legal status of men and women as parents. The bill was not enacted because of the World War II outbreak. However, its contribution was utilized by the Decree of 1946. Article 20 par. 1 stated: "Spouses exercise parental authority jointly". In the event of

---

28 *Stępień M.*, Istota władzy rodzicielskiej, Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne, 27, 2019, 65.

29 *Walewski J.*, Kodeks cywilny Królestwa Polskiego (Prawo z r. 1825) objaśniony motywami do prawa i jurysprudencją, Warszawa, 1872, accessible: https://www.bibliotekacyfrowa.pl/Content/78267/PAd_16854.pdf (last accessed: 15.6.2024).

30 *Cywiński A.*, Stosunki pomiędzy rodzicami i dziećmi w perspektywie historyczno-prawnej, Probacja, 1, 2014, 157-158; *Długoszewska I.*, Przesłanki ograniczenia władzy rodzicielskiej na ziemiach polskich, Zeszyty Prawnicze UKSW, 10.1, 2010, 156-164.

an argument between them, the court would resolve the dispute, not the "last word" of a man. What is worth emphasizing, Article 20 par. 1 referred to "spouses," whereas the following sections related to "parents". It resulted from the Decree distinguishing between children born in wedlock and those born out of wedlock. The Family Code of 1950 petrified the equal status of a man and a woman in the realm of parental authority. Article 50 par. 1 stated that: "Parental authority serves both parents". The following paragraphs reinforced the equal status of parents, e.g. Article 57 par. 1, warranting that: "Each parent is the legal representative of the children who remain under their joint parental authority". The current regulation of the Family and Guardianship Code reiterates the provisions of the Code of 1950 in its Articles 93 and 97.

Although the equal legal status of men and women as parents was introduced scarcely after World War II, it should not be linked only with the activity of communist authorities. Lawyers preparing bills concerning family law before the war's outbreak were aware that the issue demanded new regulation. Still, it was not a matter of priority for the newly restored state. Works on the bill related to family law were also disrupted by the passing of Stanisław Gołąb in March 1939.

4.2. Legal Status of Out-of-Wedlock Children

Whether a child was born in wedlock or out of it for ages affected its legal status and the responsibilities of its parents. The most profound case concerning the issue, one of the European Court of Human Rights milestones, was the judgment of Marckx *versus* Belgium[31]. The facts of the case were simple: a Belgian woman gave birth to a daughter; the child was conceived out of wedlock. Legal regulations in force then in Belgium deprived the mother of legal relations with her daughter; to gain such, the applicant was requested to recognize maternity or adopt the child. The Court ruled that such regulations violate provisions protecting private and family life (Article 8 of the Convention) and also are against Article 14 of the Convention, which relates to the principle of equality.

Austrian, German, and Russian regulations that remained in force in the Republic of Poland after World War I distinguished the status of children born in and out of wedlock. According to the BGB, children born out-of-wedlock had legal relations with their mothers and their families equal to children born in wedlock. However, these mothers did not have parental authority over such children. Mothers of children born out of wedlock were responsible for the child's care, but a guardian's supervision restricted their authority. The father of such children was obligated to provide financial support until the child reached 17[32]. According to Article 1705: "An illegitimate child has a relationship to his mother and the mother's relatives, the legal position of the legitimate child." Article 1707 stated: "The mother is not entitled to parental authority over an illegitimate child. A mother has the right and obligation to care for the person of the child; is not entitled to represent the child."[33] In

[31] Application no. 6833/74, decided 13 June 1979.

[32] *Truszkowski B.K.*, Karcenie dzieci na ziemiach polskich. Regulacje prawne od XIX wieku do dziś, Miscellanea Historico-Iuridica, tom XIX, z. 1, 2020, 63.

[33] Niemiecki Kodeks Cywilny wraz z ustawą wprowadczą, część druga, transl. *Damm H.*, *Garschel K.*, Bydgoszcz, 1922, accessible: https://www.bibliotekacyfrowa.pl/dlibra/publication/22404/edition/34281?language=pl (last accessed: 16.6.2024).

Russian law, the mother of a child born out of wedlock was granted parental authority, and the child was given the mother's surname. The father was only responsible for providing financial support if the mother could not do so. Similar regulations were also implemented in the Kingdom of Poland[34].

It is worth mentioning that the bill prepared by Stanisław Gołąb assumed the unification of the legal status of all children. In his article of 1936, he convinces: "The project does not share the frequently expressed views that the interest of the family requires legal impairment of a child born outside of marriage. Who is allowed to shed blood in defense of the State and pay taxes to it on an equal footing with others – this cannot be denied equal public or private rights."[35] Indeed, the 1934 bill was progressive in that regard. However, the 1938 version represented a step back from ambitious assumptions; progressive solutions met with opposition from, for example, the Catholic church[36].

The situation of out-of-wedlock children did not change until the introduction of the Family Code of 1950, which erased differences in the legal status of children. The Decree of 1946 continued to distinguish between legal situations of out-of-wedlock children and those conceived by married parents. Article 51 of the Decree stated, "A child born out of wedlock has rights derived from kinship in relation to the mother and her family." Article 52 par. 1 expressed rule: "A child born out of wedlock bears the mother's maiden name". After her consent, the mother's husband was allowed to give his surname to her child. By Article 56 par. 1: "The obligation to bear the costs of maintaining and raising a child rest with both parents." Nonetheless, parental authority over illegitimate children was exercised by their mothers: "Parental authority over a child born out of wedlock is exercised by the mother." (Article 62 par. 1). The principles under study seem similar to those present in the regulations of the Russian Empire in that matter. Jan Winiarz, a Polish legal scholar, explains that after World War II, the legislator decided to adopt a compromise solution to the problem of illegitimate children, anticipating changes in social mentality. Liberal solutions were to be gradually introduced[37].

The Family Code of 1950 and the Family and Guardianship Code of 1964 do not differentiate the legal status of children. It is worth noting that the Polish legislature implemented measures promoting equality much earlier than some Western countries, as evidenced by the Marckx *versus* Belgium case.

4.3. Good of the Child

The Convention on the Rights of the Child introduces "the best interests of the child" as an international standard. Article 3 par. 1 of the Convention states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The

---

34 *Fiedorczyk P.*, Prawo rodzinne ziem wschodnich II Rzeczypospolitej, [in:] Wielokulturowość polskiego pogranicza. Ludzie-idee-praw, *Lityński A.*, *Fiedorczyk P. (eds.)*, Białystok, 2003, 515.

35 *Gołąb S.*, Prawo rodziny de lege ferenda, Ruch Prawniczy, Ekonomiczny i Socjologiczny, 16(4), 1936, 317-318.

36 *Leciak I.*, Polemika wokół kodyfikacji prawa rodzinnego i opiekuńczego w II Rzeczpospolitej, Studia Iuridica Toruniensia, vol. XIII, 2014, 89 and following.

37 *Winiarz J.*, Prawo rodzinne, Warszawa, 1977, 20.

Polish law recognized similar standards long before the Convention came into force. Article 95 par. 3 of the Family and Guardianship Code of 1964 proclaims: "Parental authority should be exercised as required by the good of the child and the interest of society." "Good of the child" (*dobro dziecka*) should be perceived as an equivalent of "the best interests of the child". The Family and Guardianship Code refers to *dobro dziecka* approximately 20 times, which means that the phrase appears in the Code once every nine articles. "Good of the child" constitutes the standard of conduct not only for parents but also for the court or public prosecutor deciding which stance to take in cases concerning children.

It should be noted that the legal regulations of BGB, ABGB, or *Swod Zakonow* do not relate to similar standards. Aleksander Cywiński argues that historical regulations of the matter relied on prioritizing collective interests over individual interests[38]. The mentioned legal acts do not refer directly to the issue of the general aims of parental authority or its moral basis. However, their content allows us to argue that they aimed to balance parents' interests, particularly the father's, with a child's basic needs.

Stanisław Gołąb's family law bill introduced the standard of the child's interest for the first time in Polish law. He asserted that "parental rights should be exercised solely in the best interests of the children."[39]. The bill was not enacted, but the communist legislature adopted its basic principles in the Decree of 1946. Article 20 par. 3 states: "Parents are responsible for exercising their parental authority in a way that is required for the good of children and the interest of society." Article 54 of the Family Code of 1950 proclaims that parental authority "should be exercised as required by the good of the child and the interest of society." The exact phrase was incorporated to the Family and Guardianship Code of 1964.

The "the good of the child" standard has been employed by courts since its inception and continues to be the primary criteria for decisions in cases involving children. For example, the Supreme Court, in its judgment of 7 April 1952, case no. C 487/52 distinguished "the good of the child" and "the good of parents", which cannot be identified. A similar conclusion was reached in many cases when the Court underlined that the good of the child should not be identified with the interests or sound of any of the child's parents (e.g., the judgment of Supreme Court of 25 August 1981, case no. III CRN 155/81).

The standard under study has a strong basis in Polish law, which, nowadays, encompasses constitutional rules. The 1997 Constitution states: "The Republic of Poland ensures the protection of children's rights. Everyone has the right to demand that public authorities protect children against violence, cruelty, exploitation, and demoralization."

"Good of the child" is not the only general clause affecting parental authority. The second, which presupposes their order of importance, is "the interest of society". It is worth noting that communist legislators did not propose the premise of "the interest of society" for the first time; it had

[38] *Cywiński A.*, Stosunki pomiędzy rodzicami i dziećmi w perspektywie historyczno-prawnej, Probacja, 1, 2014, 151.

[39] *Gołąb S.*, Prawo rodziny de lege ferenda, Ruch Prawniczy, Ekonomiczny i Socjologiczny, 16(4), 1936, 318.

already been discussed before World War II[40]. An analysis of Polish court case law reveals that the concept of "the interest of society" is less elaborated compared to "the best interest of the child." Although mentioned in the Family and Guardianship Code, courts do not often apply this standard to derive legal implications.

4.4. Disciplining Children and Corporal Punishment

One of the recent changes to the Family and Guardianship Code of 1964 involved the addition of Article 96^1. This article explicitly prohibits individuals with parental authority and acting as guardians over minors from using corporal punishment. The provision became effective in 2010. It's worth noting that even before the amendment, the use of corporal punishment was not widely accepted, and the change reflected the stance of Polish academic writers and courts on this issue. Considering legal changes that resulted in the introduction of Article 96^1, one should take into account the Act of 29 July 2005 on counteracting domestic violence[41], which was initially referred to as "family violence". The definition of domestic violence comprised in the Act assumes that it is: "a single or repeated intentional act or omission violating the rights or personal rights of the persons mentioned in point 1(family members), in particular exposing these persons to the risk of loss of life or health, violating their dignity, bodily inviolability, freedom, including sexual freedom, causing damage on their physical or mental health, as well as causing suffering and moral harm to people affected by violence." Another legal change that contributed to the later introduction of a direct prohibition on corporal punishment was the Family and Guardianship Code amendment of 2008 which enriched Article 95 "Parental authority includes, in particular, the obligation and right of parents to take care of the person and property of the child and to raise the child." by adding "with respect for its dignity and rights"[42]. Since then, raising a child must have been guided by the general principles of dignity and rights.

Changes enforced during the last two decades were relatively uncontroversial at that time; however, earlier, the stance of Polish legislature and scholars was not as unequivocal. Yet in 1977, Jan Winiarz wrote: "The admissibility of disciplining children by parents should not be excluded in advance. The admissibility of parental discipline is based on tolerance on the part of pedagogy, which assumes that in the family, the probability of harm to the child is relatively small and that it is balanced by the excess of love between parents and the child and on the autonomy of the family in the laws of its internal life, which include educational measures used by parents towards children."[43] The view was expressed in opposition to humanitarian pronouncements demanding a ban on corporal punishment utilized by parents. What should be emphasized is that until 2010, the Family and Guardianship Code did not refer directly to corporal punishment. Its admissibility was a matter of

---

40 *Leciak I.*, Polemika wokół kodyfikacji prawa rodzinnego i opiekuńczego w II Rzeczpospolitej, Studia Iuridica Toruniensia, vol. XIII, 2014, 86-87.

41 Dz.U.2024.424 consolidated text of 2024.03.21.

42 *Truszkowski B.K.*, Karcenie dzieci na ziemiach polskich. Regulacje prawne od XIX wieku do dziś, Miscellanea Historico-Iuridica, tom XIX, z. 1, 2020, 76.

43 *Winiarz J.*, Prawo rodzinne, Warszawa, 1977, 220.

discussion in academic writing and case law. Over time, the inclination for prohibition increased; "dignitarian" provisions of the Constitution of 1997 or the Convention on the Rights of the Child fostered that change. As evidenced by Winiarz's stance, during the communist period, legal views were more permissible toward disciplining children and corporal punishment. The Family Code of 1950 does not mention them, leaving the issue open for interpretation. Still, the Decree of 1946 stated: "Parents can discipline children under their authority without harming their health, physical or moral, and within limits indicated by the purpose of education." (Article 25 par. 2). The provision was inspired by the Bill prepared by Stanisław Gołąb before World War II[44]. Discipline and corporal punishment were perceived as measures of upbringing that should not be abused. Both the Family and Guardianship Code of 1964 and the Decree of 1946 explicitly state that a child owes obedience to his parents. The Family Code of 1950 does not include such a provision; however, its brief regulation prompted the communist legislature to initiate work on the following legal act quickly.

Generally speaking, legal acts remaining in force between 1918 and 1939 allowed disciplining and corporal punishment. The *Swod Zakonow* approved disciplining and placing children in care and educational facilities by parents. Children were not allowed to complain about their parents, except when the parents committed a crime against them. The prohibition on murdering a child constituted a restriction of parental authority[45]. Article 339 of the Civil Code of the Kingdom of Poland allowed parents to discipline misbehaving children; however, the methods applied by parents should not interfere with children's health and ability to educate. The court was in charge of suggesting softer methods if parents abused their power. BGB considered disciplining as a measure of a child's upbringing; except for discipline utilized by parents, they were entitled to ask the court to apply proper means of discipline (Article 1631).

To summarize, all legal acts enforced in the Polish state over the last 100 years burdened parents with the duty to raise a child. They all burdened a child with the duty of obedience toward its parents. The earlier regulations held a permissive stance concerning discipline and corporal punishment. However, they differed regarding the allowed extent of disciplining and the state's interference in this realm. Over the years, influenced by the concept of a child's dignity and its rights, disciplining and corporal punishment began to be perceived as harmful, which resulted in their prohibition. The significant shift in this field should be perceived as an argument in favor of terminological change concerning parental authority; the prohibition under study deprives parents of one of their imperative means.

4.5. State's Interference with Parental Authority

Considering the extent of the state's interference with parental authority, the most noticeable trend since the end of the 19th century is its increasing role[46]. The abovementioned remarks regarding

---

44 *Leciak I.*, Polemika wokół kodyfikacji prawa rodzinnego i opiekuńczego w II Rzeczpospolitej, Studia Iuridica Toruniensia, vol. XIII, 2014, 87.

45 *Fiedorczyk P.*, Prawo rodzinne ziem wschodnich II Rzeczypospolitej, [in:] Wielokulturowość polskiego pogranicza. Ludzie-idee-praw, *Lityński A.*, *Fiedorczyk P. (eds.)*, Białystok, 2003, 516.

46 *Sójka-Zielińska K.*, Historia prawa, Warszawa, 1995, 263

disciplining children provide evidence of that phenomenon. The following considerations also show that the state's interference in the field under study gradually increased.

Currently, Polish law distinguishes three central institutions associated with the state's involvement in parent-child relationships. First, there is the restriction of parental authority (*ograniczenie władzy rodzicielskiej*). Second, there is the suspension of parental authority (*zawieszenie władzy rodzicielskiej*). Finally, there is the deprivation of parental authority (*pozbawienie władzy rodzicielskiej*). It should be underlined that the term *ograniczenie władzy rodzicielskiej* has two meanings. Under the Family and Guardianship Code, *ograniczenie władzy rodzicielskiej* is applied when the child's parents live separately, and there is a need to regulate their competencies (Article 107 par. 2). In the legal discourse, however, the term *ograniczenie władzy rodzicielskiej* is utilized referring to the situation in which the court put certain restrictions on parents abusing or neglecting their authority toward children (Article 109). The following remarks refer to the second meaning of the term.

Regarding the issues under discussion, BGB distinguished the position of father and mother. Article 1666 referred to the situation in which a child's good, mental or bodily, was in danger due to the father's abuse of parental authority. In such a situation, and when the child was neglected or his father misbehaved in another way, the court was in charge of issuing orders preventing danger, particularly by placing a child in an educational institution or another family. When the father met obstacles that limited his abilities to exercise parental authority, the court was competent to state that his authority was suspended (*spoczywanie*). However, the father was entitled to use the child's property during this period. The institution was regulated by Articles 1676-1778. Fathers could be deprived of parental authority over their children when they committed a felony or intentional offense against them, but only if they were sentenced to at least six months of imprisonment (Article 1680). Maternal authority was limited to childcare if the mother was underage; she was not allowed to represent the child (*spoczywanie*). According to Article 1697, the mother lost her parental authority when she remarried; nevertheless, the right and childcare duty remained with her.

The Civil Code of the Kingdom of Poland associated the state's interference in parental authority with the parental right to discipline children. Article 339 states that if parents abuse their rights in a way that places children's health in danger, they should be instructed by the court. If the initial instruction is ineffective, parents could be deprived of authority. In this case, the children are to be placed in another family, but their parents are responsible for their maintenance. Closest relatives were advised to inform the Royal Prosecutor about abuses committed by parents (Article 340).

Legal acts enforced after World War II do not consider "danger to health" when regulating the state's interference with parental authority, significantly expanding its potential extent. Pursuant to Article 40 of the Decree of 1946: "If, in the exercise of parental authority, parents commit negligence or acts that seriously threaten the well-being of the child, the guardianship authority may issue orders necessary to remedy these deficiencies."[47] The institution reflects the contemporary restriction of parental authority. The Decree recognized the institution of suspension of parental authority – applied

[47] According to the Decree of 14 May 1946 Guardianship Law (Dekret z dnia 14 maja 1946 r. Prawo opiekuńcze, Dz.U.1946.20.135 of 1946.05.24): "The municipal court is the guardianship authority."

in case of temporal obstacles in exercising (Article 41). By virtue of Article 42, parents could be deprived of parental authority if they could no longer exercise it, abuse it, or neglect it in a way that does not allow them to maintain it. An interesting premise of depriving parental authority was remarrying, but it required the presence of another specific circumstance to foster such a decision.

The Family Code of 1950 provided brief regulations concerning issues under discussion (Articles 60-62). It recognized the institution of orders issued to parents exercising their authority in no proper way (*ograniczenie władzy rodzicielskiej*), but also suspension of parental authority and deprivation of it. The Family Code distinguished between temporal obstacles (*przeszkoda przemijająca*), which grounded suspension of parental authority, and permanent obstacles (*przeszkoda trwała*), which allowed the guardianship authority to deprive parents of their authority.

The current Polish regulations regarding the state's intervention in parental authority are the most comprehensive compared to the previously mentioned legal acts. They follow the patterns outlined by past legislators and further develop them. Article 109 par. 2 of the Family and Guardianship Code illustrates this. The provision outlines the orders that can be issued by the court to restrict parental authority. It lists five instruments that can be adopted by the court, with the possibility of additional measures. A crucial change in this matter entered into force in 1976[48]. However, the catalog is permanently "under construction" – after adding it in 1976 to the Code, it has been amended four times so far.

5. Conclusions

Family law, as a branch of law, has a specific character. It governs relations that, at first glance, need no legal regulations because of their deep association with intimate human nature. Indeed, the so-called "personal" part of family law, in contrast to issues linked with property relations, was for ages a matter of moral norms or, at best, a matter of customary law regulations rather than a matter of positive law regulation.

Considerations comprised in the article show how stable and indifferent family law is to other legal, political, and economic changes. The article outlines five significant changes in parental authority. Some changes, such as the recognition of equal legal status for men and women and the acknowledgment of equal status of out-of-wedlock children, are widely supported in today's society. However, other changes, such as increased state intervention in parental authority, may be more controversial and open to discussion. What should be underlined and mirrors the thesis concerning family law's stability is that most legal shifts under discussion were initiated before World War II but ultimately enforced after it. It evidences that despite the will to build a new communist society, the legislator was sensitive enough to understand society's inclinations, habits, and social norms, affecting family relations. Furthermore, changes were introduced gradually, which extended the period of time for people to get used to them.

[48] *Truszkowski B.K.*, Karcenie dzieci na ziemiach polskich. Regulacje prawne od XIX wieku do dziś, Miscellanea Historico-Iuridica, tom XIX, z. 1, 2020, 75.

It might be controversial that legal changes are portrayed as evidence of legal stability. However, there is indeed a mark of stability in the situation where legislators who share different social, political, and economic views, like these characteristics for three periods discussed in the article, decide to continue changes initiated by their ancestors.

The article focused on historical changes, but Polish family law nowadays faces other substantial controversies concerning parental authority. So-called surrogate motherhood awaits to be regulated or prohibited; legal parenthood of same-sex couples is a matter of dispute; the institution that gains popularity is joint physical custody, especially after divorce, but it is still unregulated.

Bibliography:

1. Dekret z dnia 14 maja 1946 r. Prawo opiekuńcze, Dz.U.1946.20.135 of 1946.05.24.
2. Dekret z dnia 22 stycznia 1946 r. Prawo rodzinne, Dz.U.1946.6.52 of 1946.03.04.
3. Konstytucja Polskiej Rzeczypospolitej Ludowej uchwalona przez Sejm Ustawodawczy w dniu 22 lipca 1952 r., Dz.U.1952.33.232 of 1952.07.23.
4. Konwencja o ochronie praw człowieka i podstawowych wolności sporządzona w Rzymie dnia 4 listopada 1950 r., Dz.U.1993.61.284 of 1993.07.10.
5. Konwencja o prawach dziecka przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r., Dz.U.1991.120.526 of 1991.12.23.
6. Ustawa Konstytucyjna z dnia 23 kwietnia 1935 r., Dz.U.1935.30.227 of 1935.04.24.
7. Ustawa z dnia 17 marca 1921 r. Konstytucja Rzeczypospolitej Polskiej, Dz.U.1921.44. 267 of 1921.06.01.
8. Ustawa z dnia 2 sierpnia 1926 r. o prawie właściwem dla stosunków prywatnych wewnętrznych, Dz.U.1926.101.580 of 1926.10.13.
9. Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy, Dz.U.2023.2809 consolidated text of 2023.12.29
10. Ustawa z dnia 27 czerwca 1950 r. Kodeks rodzinny, Dz.U.1950.34.308 of 1950.08.22.
11. Ustawa z dnia 29 lipca 2005 r. o przeciwdziałaniu przemocy domowej, Dz.U.2024.424 consolidated text of 2024.03.21.
12. *Cywiński A.*, Stosunki pomiędzy rodzicami i dziećmi w perspektywie historyczno-prawnej, Probacja, 1, 2014.
13. *Długoszewska I.*, Przesłanki ograniczenia władzy rodzicielskiej na ziemiach polskich, Zeszyty Prawnicze UKSW, 10.1, 2010.
14. *Dobrzański B.*, *Władza rodzicielska w projekcie kodeksu rodzinnego i opiekuńczego*, Palestra, 7/4(64), 1963.
15. *Fiedorczyk P.*, Prawo rodzinne ziem wschodnich II Rzeczypospolitej, [in:] Wielokulturowość polskiego pogranicza. Ludzie-idee-praw, *Lityński A.*, *Fiedorczyk P. (eds.)*, Białystok, 2003.
16. *Gołąb S.*, Prawo rodziny de lege ferenda, Ruch Prawniczy, Ekonomiczny i Socjologiczny, 16(4), 1936.
17. *Grzybowski S.*, Prawo rodzinne. Zarys wykładu, Warszawa, 1980.
18. *Leciak I.*, Polemika wokół kodyfikacji prawa rodzinnego i opiekuńczego w II Rzeczpospolitej, Studia Iuridica Toruniensia, vol. XIII, 2014.

19. *Mostowik P.*, Resolving Administrative Cases Concerning Child Under the Foreign Custody of Same-Sex Persons Without Violating National Principles on Filiation as the Ratio Decidendi of the Supreme Administrative Court (NSA) Resolution of 2 December 2019, Prawo w Działaniu, vol. 46, 2021.
20. *Mostowik P.*, Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym, Kraków, 2014.
21. *Mostowik P.*, Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym, Kraków, 2014.
22. Niemiecki Kodeks Cywilny wraz z ustawą wprowadczą, część druga, transl. *Damm H.*, *Garschel K.*, Bydgoszcz, 1922, accessible: https://www.bibliotekacyfrowa.pl/dlibra/publication/22404/edition/34281? language=pl (last accessed: 16.6.2024).
23. *Smyczyński T.*, Prawo rodzinne i opiekuńcze, Warszawa, 2009.
24. *Sokołowski T.*, Charakter prawny władzy rodzicielskiej, Ruch Prawniczy, Ekonomiczny i Socjologiczny, Rok XLIV, zeszyt 3, 1982.
25. *Sójka-Zielińska K.*, Historia prawa, Warszawa, 1995.
26. *Stępień M.*, Istota władzy rodzicielskiej, Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne, 27, 2019.
27. *Truszkowski B.K.*, Karcenie dzieci na ziemiach polskich. Regulacje prawne od XIX wieku do dziś, Miscellanea Historico-Iuridica, tom XIX, z. 1, 2020.
28. *Walewski J.*, Kodeks cywilny Królestwa Polskiego (Prawo z r. 1825) objaśniony motywami do prawa i jurysprudencją, Warszawa, 1872, accessible: https://www.bibliotekacyfrowa.pl/Content/78267/PAd_16854. pdf (last accessed: 15.6.2024).
29. *Winiarz J.*, Prawo rodzinne, Warszawa, 1977.
30. *Zarzycki Z.*, Attempts to Codify Personal Matrimony Law in the Second Polish Republic. A Fiasco or Perhaps a Success?, Krakowskie Studia z Historii Państwa i Prawa, 15 (2), 2022.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8315

Sulkhan Oniani*

The King as Guarantor of Law Enforcement, According to a Legal Formula in the Monuments of Georgian Law

The article is devoted to analyzing one legal formula in the monuments of Georgian law, from which it is evident the king is the first and foremost guarantor of law enforcement in ancient Georgia. Disobeying his order is tantamount to a crime against the king. The latter is punished most severely in the feudal state. The authority of the king as an institution ensures the activities of civil servants.

Keywords: *old Georgian law, king, catholicos, prince, queen, oath, guarantor*

1. Introduction

In Georgian scientific literature, the king's functions are divided into the following main directions: 1. military, 2. legislative, 3. judicial, 4. administrative, 5. financial, 6. International, and 7. ecclesiastical.[1]

Unlike modern times, in the feudal era, the king's military function was of prime importance. The King of Georgia held the role of supreme commander-in-chief, leading the most crucial structure in a patriarchal society – a military-aristocratic hierarchy composed of men capable of warfare.[2] This in no way detracted from the king's other functions, rather, their smooth operation depended greatly on the king's success and victories as a general.[3]

The purpose of this article is to discuss one such interesting side of the king's activity, which is partially understood in the functions mentioned above. Still, due to its special importance, it deserves attention, namely, the king as a guarantor of law enforcement.

2. Declaring the King as the Guarantor of Law Enforcement in Georgian Legal Documents

In the monuments of Georgian law, there is often a special wording that highlights this function of the king. In particular, in several cases, the king, at the end of the order or decision issued by him,

* Doctor of Law, Assistant Professor at the Faculty of Law of Ivane Javakhishvili Tbilisi State University.

1 See the citation: Javakhishvili Iv., Works in 12 volumes, Vol. 7, vol., 1984, 162-177; Also, Surguladze, Iv. for the History of the State and Law of Georgia, The State Structure of Kartli in the Late Feudal Period, vol. 1, vol., 1952, 136-140; (In Georgian.)

2 Note: The norm established in the society in the past, that the society has a leader, is echoed by modern legal concepts – the President of Georgia is the head of the state of Georgia, the guarantor of the country's unity and national independence, and the supreme commander of the Georgian Defense Forces. see Constitution of Georgia 24/08/1995, Article 49.1, 49.2 (in Georgian).

3 Note: this is what Vakhtang VI laments about in the 2nd article of his Book of Law – the kings of Georgia at times became so weak that only the name of the king remained, otherwise they held no real power, and their authority was completely discredited (in Georgian).

emphatically indicates that for non-compliance with his decree, subordinates (officials or ordinary citizens) will be punished in the same way as those who committed crimes directly against the king.[4]

For instance, in the Order on the Pirate-seeker (1590), Simon I separately warns the pirate-seekers not to exceed their powers and separately calls on the citizens to obey the pirate-seekers. Otherwise, he threatens both sides: "Alle that is ordained and governed by us shall be obeyed without blemish and whatsoever hath not been ordained by us shall not be surpassed, that no man suffereth injustice, otherwise, they shall wit that we will make them answer as though they have sinned against us. Each, if a man doth refuse to obey our commands as issued by a pirate-seeker or fail to disclose a matter, he shall answer as if he hath sinned against us."[5]

To properly comprehend this legal formula, it should be underscored that in ancient Georgian the word "sin" did not imply a sin of small importance (a misdemeanor in a moral and ethical content); rather, it was identical to the modern criminal law term – "crime."[6] That is, with these words, the king refers to crimes committed against him, which were perceived as a crime committed against the state according to the ideas of that time (the forms of which are apostasy, treason, insulting the king, killing him or attempting to kill him, organizing a coup d'état, etc.) and the highest sanction – death provides for punishment (or, compared to the latter, light punishments: mutilation of the body, dismemberment, imprisonment or expulsion from the country and confiscation of property).[7]

So, the king threatens the addressee of his order with the highest punishment imposed for the most serious crime: that one will answer for their disobedience as severely as the person who goes directly against the king, the perpetrator of a crime against the state. And how serious and unimaginable the crime against the king was in the era of feudalism[8] is obvious in "The Knight in the Panther's Skin," where it is voiced in the form of an extreme formula of an oath:

---

4 Note: it should be noted that as per the studied materials, according to the initial observation, the absolute majority of this formula, except for single cases, is related to the Bagrationi dynasty. The reason for this may be that, according to the legend, the Bagrationi were of divine origin, that is, they had a special role. However, the issue requires further research (in Georgian).

5 *Dolidze I.,* Monuments of Georgian Law, vol. 2, vol., 1965, 204 (in Georgian).

6 Note: The title of Beka-Agbugha's book of law, "The Book of All the Sins of Men" (in modern Georgian: "The Book of Every Crime Committed by Men"), is one example of this. see Citation: Javakhishvili Iv., Works in 12 volumes, Vol. 7, vol., 1984, 191 (in Georgian).

7 See citation: *Javakhishvili Iv.,* works in 12 volumes, Vol. 7, vol., 1984, 211-217; Also, Abashmadze, V., Types of State Crimes and Their Class Nature in Feudal Georgian Law, Journal, Bulletin of the Georgian Academy of Sciences, Series of History, Archeology, Ethnography and Art History, N2, 1986, 59-61 (in Georgian).

8 Note: For example, the Vakhtang's Book of Law, when determining the amount of the relative blood price for murder or other type of crime, i.e. the compensation to be paid to the injured party (or, in the case of murder, to be paid to the family of the slain), lists all social classes from the noble to the peasant (the blood price of a noble is 128 times higher than that of a peasant), says nothing about either the king, the prince, or the Catholicos, because it is implied that in case of murder of these three, the criminal will not be able to redeem himself by paying the blood price and they will be charged with the highest sanction. See Dolidze, I., Monuments of Georgian Law, vol. 1, vol., 1963, 489-490 (in Georgian).

"Upon it was written: "Here lies wondrous armor:
chain helmet, habergeon, steel-cutting sword.
If the Kadjis attack the Devis it will be a hard day.
Whoever openes at any other time is a slayer of kings!"[9]

The legal formula "we will make them answer as though they have sinned against us" – was not limited to the legal framework set by one monarch. It is rather a feature in different kings in disparate periods, which is illustrated with the examples brought below: a) The Order of King Alexander II of Kakhis (1591): "Should anyone exploit, or demand a mark/insignia, you shall know, we will make you answer as though you have sinned against us;"[10] b) The Order of Svimon II (1624) – "No man shall challenge, otherwise, you shall know, we will make you answer as though you have sinned against us;"[11] c) The Order of Teimuraz I (1630) – "Should a man dispute over the estate of this chapel, they shall know, we will make them answer as though they have sinned against us;"[12] d) The Order of King Rostom (1633) – "Should you men become disobedient, we will make you pay as though you have sinned against us, no man but yourself and your wife and your children will save you, you shall know, a solemn oath this is;"[13] The Book of Mercy (1636) – "The men who will not hear and follow these words, shall know, you will pay as though you have sinned against us."[14] The Book of Mercy (1650) – "One who disputes your land rights shall pay as though they have sinned against us."[15] Ruling (1655) – "The one who does not obey our order and rule shall pay as though they have sinned against us."[16] e) The Ruling of King Shahnavaz (Vakhtang V) (1666) – "The one who does not obey this order of ours will pay as though they have sinned against us."[17] f) The Ruling of George XI (1679) – "The one who does not obey this order of ours will pay as though they have sinned against us."[18] g) The Order of Erekle I (1688-1703) – "The one who disobeys, does not follow this order of ours, will pay as though they have sinned against us."[19] h) The Order of the Lord of Kakhis Imam Kuli Khan (David II) (1703-1716) – "Or else you shall know this, should we find out, this seizure of ours, we will make them pay

9 Rustaveli, Shota, The Knight in the Panther's Skin, Tbilisi, 2022, 311 (in Georgian).
10 *Dolidze, I.,* Monuments of Georgian Law, Appendix, Tbilisi, 2023, 70 (in Georgian).
11 *Kartvelishvili, T., Baindurashvili, K, Gelashvili, I., Gogoladze, T., Shaorshadze, M, Jojua, T., Surguladze, M. (Ed.)*, Documentary Sources about the Kings of Kartli and Kakheti of the first half of the 17th century, Vol. 1, Tbilisi, 2019, 180 (in Georgian).
12 Ibid, 247.
13 *Kartvelishvili, T., Baindurashvili, K, Gelashvili, I., Gogoladze, T., Shaorshadze, M, Jojua, T., Surguladze, M. (Ed.)*, Documentary Sources about the Kings of Kartli and Kakheti of the first half of the 17th century, Vol. 2, Tbilisi, 2021, 57 (in Georgian).
14 Ibid, 126.
15 *Dolidze, I.,* Monuments of Georgian Law, Appendix, Tbilisi, 2023, 95 (in Georgian).
16 *Kartvelishvili, T., Baindurashvili, K, Gelashvili, I., Gogoladze, T., Shaorshadze, M, Jojua, T., Surguladze, M. (Ed.)*, Documentary Sources about the Kings of Kartli and Kakheti of the first half of the 17th century, Vol. 2, Tbilisi, 2021, 422 (in Georgian).
17 *Dolidze I.,* Monuments of Georgian Law, vol. 4, Tbilisi, 1972, 122 (in Georgian).
18 Ibid, 144.
19 *Dolidze I.,* Monuments of Georgian Law, vol. 2, Tbilisi, 1965, 234.

as though they have sinned against us;"[20] i) The Ruling of King Bakar (1717-1719) – "One who disobeys this order and rule, shall pay as though they have sinned against us;"[21] The Book of Inviolability (1719) – "They shall not take out a horse. Otherwise, we will make them pay as though they have sinned against us;"[22] j) The reports of Erekle II (1765, 1773, 1774, 1778, 1793, 1794) – "Should Arghutashvili sin against these men, we shall make him pay as though he sinned against us;"[23] "Have you given them the less than what was theirs for them being orphaned, we will make you pay as though you have sinned against us;"[24] "Should they ruin it from now on, we will make them pay as though they sinned against us."[25] "Nobody shall have a matter with this. Otherwise, we will make you pay as though you have sinned against us" [26]; "You shall give to this widow and an orphan now. Otherwise, we will make you pay as though you have sinned against us" [27]; "From this day on, you shall not bother anyone. Otherwise we will make you pay as though you have sinned against us" [28]; k) Report of George XII (1800) – "From this report, the one who becomes the reason of unrest, will pay as though they have sinned against us" [29]; l) and finally, we have to distinguish the ruling of the Viceroy of King Vakhtang VI – "The one who oversteps this ruling, the King shall make them pay as if they have sinned to him"[30].

In the listed cases, a king appears as the guarantor of law enforcement. At the same time, the authority of a king strengthens the back of the state official, which, in addition to the mentioned example (about the pirate-seeker), is also clearly visible from the Vakhtang's Book of Law, in particular, Article 34 states: If a state official is killed or wounded, the "blood of the family" to be paid to the victim will be added to the "blood of the servant" (i.e., the price of blood is determined separately due to the position held); in addition, if "a servant or any other person who was killed while performing a duty assigned by the master, will add more to the liability whatever blood of the family and the servant is due, that shall suffice shall be decided whether the King is "upset."[31], i.e., it depended on the King's reaction whether the "price for blood" would increase or not. Article 267 is similar: If a "servant and judge" sent by the master conducts a court hearing or other legal action and in the process, one of the disputing parties beats the other, breaks his head, or hits him with a stick, in addition to paying the prescribed fine for the aforementioned actions, the offender will be additionally punished for the crime – "That they have dared it to the judge representing the King. The case shall be decided as follows: the master, as they see fit, shall summon him and have him pay, and by this law the offender, whatever the family judge may be of, shall pay the blood equivalent of half a barley grain

20 *Kutsia K.,* Guilds in Georgian Cities in XVII-XVIII Centuries, Tbilisi, 1984, 198 (in Georgian).
21 *Dolidze I.,* Monuments of Georgian Law, vol. 4, Tbilisi, 1972, 281 (in Georgian).
22 Ibid, Vol. 2, Tbilisi, 1965, 333.
23 Ibid, Vol. 7, Tbilisi, 1981, 96.
24 Ibid, 243.
25 Ibid, 248.
26 Ibid, 419.
27 Ibid, Vol. 8, Tbilisi, 1985, 245.
28 Ibid, 267.
29 Ibid, 681.
30 Ibid, Vol. 4, Tbilisi, 1972, 242.
31 Ibid, Vol. 1, Tbilisi, 1963, 490.

as a price for doing wrong to him."[32] As we see, the monarch decides independently ("as they see fit") how the perpetrator shall be held responsible, whereas the law only provides for the sanction when the King does not thereof.

Iv. Surguladze correctly notes: "The civil servant was authorized to perform their functions. The population should have known that the civil servant's actions were not based on arbitrariness but on the decree of the supreme government, which had established its attitude towards the civil servant by law and protected him as a servant of the state."[33] The above is directly confirmed by the letter of mercy from Shahnavaz (Vakhtang V) to Vakhtang Orbelashvili (1676): "Whoever is subject to our government and ruler, whether for blood or any other complaint, may be tried and adjudicated by you. And whoever violates the law agreed upon with you, we will condemn and make them greatly regret, and you will also bring justice to your heart according to the rules for great blood, inform us, and adjudicate accordingly."[34] The letter of mercy from Teimuraz II to the city governor Givi Amilakhvari (1752) is of similar content, in which the king calls on all his subjects to obey the governor – "Otherwise we will be greatly offended by this, and so we have ordered to him, similar to the previous governor, that he will make you pay as well."[35]

From these examples, it is clear that the official, in the performance of his functions, represents the king, and disobedience to him is tantamount to disobedience to the monarch. In his decrees, the king calls on everyone to obey the official as they would obey him. Otherwise, he will take measures himself.[36]

As we have already seen, in addition to the phrase "we shall make him pay as though he sinned against us," – this legal formula is also found in other variations ("resentment," "condemnation," etc.). For greater clarity, several examples confirming this are given below: a) The document of King Constantine (presumably Mahmud-Quli-Khan – c.d.) (1711) declares "resentment" on the part of the king: "If you break this Gujar, if not, we will be offended;"[37] b) This phrase is found in many different variations in the protocols of Erekle II: "otherwise we will be offended"[38]; "you shall know that we will be offended"[39]; "we will be greatly offended"[40]; "you shall know that we will be greatly

---

32 Ibid, 551.

33 *Surguladze, Iv.,* for the History of the State and Law of Georgia, The State Structure of Kartli in the Late Feudal Period, Vol. 1, Tbilisi, 1952, 165 (In Georgian).

34 *Dolidze I.,* Monuments of Georgian Law, vol. 2, Tbilisi, 1965, 226-227 (In Georgian).

35 Ibid, 402.

36 Remark: It is clear that a ruler can castigate their own officials as well. This was clearly shown in the decree of Simon I (1590) about the pirate-seeker, which we have already discussed above. Here, we can refer to Article 206 of the law book of Vakhtang: Where the decision approved by the king does not turn out to be fair, the king shall take displeasure and the person who took it and brought it to the king for approval shall pay for it. I.e., here, too, the king decides how to punish the law-breaking official. see Dolidze I., Monuments of Georgian Law, vol. 1, vol., 1963, 533-534.

37 *Zhordania T.,* Historical Documents of the Monasteries and Churches of Kartli-Kakheti, Poti, 1903, 47 (in Georgian).

38 *Dolidze I.,* Monuments of Georgian Law, vol. 7, Tbilisi, 1981, 176.

39 Ibid, 244.

40 Ibid, vol. 8, Tbilisi, 1985, 146.

offended"[41]; "we will be greatly offended you shall know"[42]; "otherwise we will be greatly offended"[43] [44]; "know that we will be greatly offended otherwise"[45]; "otherwise we will be upset at them"[46]; "otherwise we will be greatly upset at them" [47] [48]; "otherwise know that we will be greatly upset"[49]; "it will be upsetting for us"[50]; "otherwise it will be upsetting for us"[51] [52]; "otherwise know that it will be upsetting for us"[53]; "otherwise it will be greatly upsetting for us"[54]; "you will greatly upset us"[55]; "we will severely condemn you"[56]; c) The protocols of George XII repeat the formulas in the decrees of his father: "It will be upsetting for us"[57]; "It will be greatly upsetting for us"[58]; "Otherwise, it will be a upsetting for us you shall know";[59] "otherwise, it will be a greatly upsetting for us, you shall know"[60]; otherwise, we will be greatly upset at you, you shall know."[61]

In one of the decisions of Erekle II (1764), we read: "We will be greatly offended, and they shall get the punishment: the clergy according to the law of god and the laity according to the law. Every man should be careful about this."[62]

Along with "resentment," we come across "one shall pay" in Erekle II's documents – "you shall know we will be greatly upset and also will make you pay;"[63] "you shall know we will be greatly upset and will make you pay;[64] "Otherwise it will be upsetting for us. Should anyone refer to us against you, we shall make your servants pay;"[65] In some cases, "offense" and "shall make one pay" are used together – "Should you ask for more, we shall make you pay for it. Treat these ones fairly, otherwise, if they complain to us again, know that we will be offended;"[66] In some cases, "offense" is mentioned with "ill-treatment" – "otherwise, it will be upsetting to us. …and we will ill-treat them and thus, will

41 Ibid, vol. 7, Tbilisi, 1981, 304, 408, 675; Also, Ibid, vol. 8, Tbilisi., 1985, 286.
42 Ibid, vol. 7, Tbilisi, 1981, 410.
43 Ibid, vol. 7, Tbilisi, 1981, 332; Ibid, vol. 8, Tbilisi, 1985, 202.
44 Ibid, vol. 7, Tbilisi, 1981, 120.
45 Ibid, vol. 8, Tbilisi, 1985, 369.
46 Ibid, vol. 7, Tbilisi, 1981, 170.
47 Ibid, 224, 736, 820.
48 Ibid, vol. 8, Tbilisi, 1985, 135.
49 Ibid, vol. 7, Tbilisi, 1981, 704.
50 Ibid, vol. 8, Tbilisi, 1985, 259.
51 Ibid, vol. 7, Tbilisi, 1981, 398, 771; Ibid, vol. 8, Tbilisi, 1985, 196.
52 Ibid, vol. 7, Tbilisi, 1981, 271, 382; Ibid, vol. 5, Tbilisi, 1974, 217.
53 Ibid, vol. 8, Tbilisi, 1985, 296.
54 Ibid, 163; 408.
55 Ibid, 305.
56 Ibid, vol. 7, Tbilisi, 1981, 313.
57 Ibid, vol. 8, Tbilisi, 1985, 579.
58 Ibid, 465; 585;
59 Ibid, 497.
60 Ibid, 577.
61 Ibid, 514.
62 Ibid, vol. 2, Tbilisi, 1965, 416.
63 Ibid, vol. 7, Tbilisi, 1981, 669.
64 Ibid, 659.
65 Ibid, vol. 8, Tbilisi, 1985, 408.
66 Ibid, vol. 7, Tbilisi, 1981, 246.

take what's necessary;"[67] Also, with the "resentment" we can come across "cutting the ties" – "you shall know, should you not bring it, we will be greatly offended and cut all ties."[68]

The given examples show that the formula "we will be upset/offended" is identical to the "we shall make you pay as if you have sinned to us" formula. It implies not only insulting the king as a person (which is automatically inferred) but rather going against the king as an institution, as the highest governing body (the king is not only a physical person, but rather with his functions accumulate all the spheres of the high-level governance). The perfect illustration of this is a ruling of Erekle II – "Bezhan shall not bother this widow and orphans so unfairly, or else the law shall trouble him;"[69] The same is declared in the report of George XII (1798) – "How could they rip the ruling apart, did not they know that the law would trouble them?"[70]

In the orders and reports of Erekle II, we frequently encounter "one shall pay" and "hold responsible" (independently and together): "Nothing shall go wrong or else you will be held responsible. …you shall manage this matter, hence bad will be on you as well as you will have our gratitude for good;"[71] "If you have changed the borders, you shall greatly be held responsible;"[72] "They will be held responsible by us and will be made to pay;"[73] We have another combination: "We shall make them pay as if they have sinned to us and will hold responsible."[74]

In one of the reports of Erekle II (1796), we see the "we will not allow this to go unaddressed" formulation – "We will not allow going against our rules unaddressed, we will hold them liable and make them pay."[75] Even stricter is another report (1776) – "They shall leave that man alone, shall not make him endure more, or else they shall know, I will make them pay as though they have killed a man… They shall know we will greatly ill-treat them and will take the fine amount back."[76]

It must be noted that one of the documents (1800) addresses this type of report as the "Reports of the Wrath of the King" – "Julios from Urbnisi was claiming, Panteleimon the Monk has reported me to the Master and… brought me the report of his wrath, …the report declared a great wrath."[77]

Another strict formulation is "paying as for the blood of the King," i.e., punishing for the crime equated to killing the King, spilling his blood, which is formulated in article 222 of Vakhtang VI Law Book. Also this can be found in the Law of Alexander V in the case of Giorgi Orjonikidze (1720-1752) – "None of our serfs should deal with him. Whoever obeys our word and order shall not overpass this. Otherwise, I will make you pay for my blood."[78]

---

67 Ibid, vol. 8, Tbilisi, 1985, 196.
68 Ibid, vol. 7, Tbilisi, 1981, 209.
69 Ibid, vol. 5, Tbilisi, 1974, 645.
70 Ibid, vol. 8, Tbilisi, 1985, 500.
71 Ibid, vol. 2, Tbilisi, 1965, 417.
72 Ibid, vol. 7, Tbilisi, 1981, 85.
73 Ibid, vol. 2, Tbilisi, 1965, 418.
74 Ibid, vol. 5, Tbilisi, 1974, 511.
75 Ibid, vol. 8, Tbilisi, 1985, 384.
76 Ibid, vol. 7, Tbilisi, 1981, 358.
77 Ibid, vol. 6, Tbilisi, 1977, 183.
78 Ibid, vol. 4, Tbilisi, 1972, 417.

An interesting variation of "paying for blood" is mentioned in the ruling of Erekle I (1692) – "Whoever from one of ours – kings, bishops or nobles will have the desire to breach unity, …they shall pay to God first, they shall be deemed as a "khain" (traitor) and "namakbyaram" (ungrateful) to the Khan and hence, we shall make them pay for the blood of his family."[79] To understand this part, we shall know that "khain" means "traitor" in Persian and "namakbyaram" – means "ungrateful" (literally meaning the "one who rejects an invitation to the feast").[80] As we understand from the document, Nazar-Ali-Khan adopted this decree together with Alexander IV of Imereti. Even more, we even have a remark of the addressees of the order of the king: "We, bishops and nobles, will follow the order of the Kings. Should we break it, the wrath of God and the Khan and the King be upon us"[81] – however, we are not going to extend on the use of such formulations by the citizens, as it belongs in the relevant part of this work.

In one of the books of Solomon II, we encounter "paying for the insult" (1806) – "And should anyone dare this, we shall make them pay as though they insulted us."[82]

"Betrayal" is mentioned in the "Trades Rules" of Solomon II (1808) – "Whoever sells the goods for price more than set above, shall pay as a traitor to the King and the country, and shall pay the fine of 100 Marchili."[83]

We encounter another version of "betrayal" (მუხანათობა/"mukhanatoba"): The report of Erekle II (1772) – "You must know, should you not trust him to us, we will be greatly offended. God forbid that you commit such betrayal, we will fail this, should this man not be trusted to us."[84] What results the betrayal of the King brings is obvious in Arza (plea) to Queen Darejan (1791). In Arza, the author compares the actions of the defendant to the punishment expedition of the sovereign: They treated us the way King would treat the traitors – "As the one who betrays your army would pay, Kherkheulidzes made us pay the same way."[85] This phrase directly echoes Article 177 of the Book of Law of Vakhtang, where we learn that "The King can send his army in his domain for ravaging or stab a man"[86]. It has to be mentioned that if, during the performance of this duty, the King's servant would be met with resistance or be killed, then the price of the servant would increase, and if the servant killed a rebel, then they would not bear any consequences.

Article 220 of the same monument also sets forth a similar punishing measure, which entails "dispossession" (i.e., "proscription") as a punishment for treason, i.e., exiling from the country and confiscation of all possessions.[87] In one of the decrees of Erekle II (1768), we read: "Since he died in our disloyalty, his share of the estate... must be given to us... So that such a crime against the king and

---

79 Ibid, 159.
80 Note: We would like to thank Mr. Tornike Paniashvili for providing this information.
81 Dolidze, I., Monuments of Georgian Law, Vol. 4, Tbilisi, 1972, 160 (in Georgian).
82 Ibid, annex, Tbilisi, 2023, 279.
83 Ibid, vol. 8, Tbilisi, 1985, 941.
84 Ibid, vol. 7, Tbilisi, 1981, 209.
85 Ibid, vol. 8, Tbilisi, 1985, 440.
86 Ibid, vol. 1, Tbilisi, 1963, 525.
87 *Vacheishvili A.,* Essays from the History of Georgian Law, Vol. I, Tbilisi, 1946, 119 (in Georgian).

the country may not be punished while being dead, it is the rule that after death, the share of the estate must be punished. ... He has taken our share of the traitor."[88]

Finally, it must be said that although the monarch's wrath could have resulted in both the severest punishment and exile and confiscation of property, we should not forget that the king could not have the right to absolutely everything either – he could not go against the norms of natural law and the principles generally recognized in the society of that time.[89]

3. The Resonance of The Legal Formula of The King as The Guarantor of The Implementation of Law in the Documents of Other Officials and Citizens

The formulas contained in the decrees of kings also found resonance in the legal documents of their subjects, whether they were Catholicos, bishops, princes, queens, officials, or ordinary citizens. Let us discuss case by case:

3.1. Highest Clerical Hierarchs

Article 14 of the Code of Catholicos (1543-1549) states: "The King shall punish the opposition to a bishop or an archbishop as though it was sinned against him."[90] We read in Article 16 what the consequences of sinning against the king will be: "Whoever is found to have betrayed his master, the king, or a nobleman, or anyone else, ... shall be put to death."[91] As we can see, according to the monument, the king is the guarantor of the execution of justice, which is seen in Article 15: a bishop who opposes the Catholicos, whom the Catholicos punishes (excommunicates from the liturgy), must be "excommunicated from the seat" by the king."[92]

The above is also confirmed by the promise given by Teimuraz I to Archbishop Zebede Alaverdeli (1612): "Whoever from your parish, a commoner or noble, you shall investigate according to the Holy Law, here we will deem all price paid, we will stand by you, as is befitting of kings of righteous believers: unless you grant them forgiveness, we will not interfere, you shall get the price which is just and enough,"[93] On the other hand, we have a document of the opposite content, where the Catolicos is referring to the King's authority – in the order of Anton I (1749) we read: "Should you not obey, we will put the King's wrath on you and we will make you pay spiritually."[94]

---

88 *Dolidze I.,* Monuments of Georgian Law, Vol. 4, Tbilisi, 1972, 559 (In Georgian.)

89 Note: A good example of this is Article 218 of Vakhtang's Book of Law, which regulates the issues of burying the deceased: "If a person forcibly buries a dead person in a grave, which causes the interests of the owner of land where grave is , he shall pay a third price of the land owner's blood price, as even the sovereign can't order to remove the grave with anger. And if the burier himself exhumes his own dead, the owner of the land where the grave was, can not take enything, it is enough to exhume him without honor. " Here it is clear that the king also obeys the rules recognized in society, and even he avoids the exhumation of a deceased person, even if illegally, in someone else's land, but already buried. See *Dolidze I.,* Monuments of Georgian Law, Vol. 1, Tbilisi, 1963, 538 (in Georgian).

90 *Dolidze I.,* Monuments of Georgian Law, Vol. 1, Tbilisi, 1963, 538 (in Georgian).

91 Ibid.

92 Ibid.

93 Ibid, vol. 2, Tbilisi, 1965, 211.

94 Ibid, vol. 3, Tbilisi, 1970, 809.

Such a tight connection of the King with the church jurisdiction is not arbitrary and is described in the Life of Grigol Khandzteli. The legal monument The Law of Bagrat Kurapalati sets forth that "The second kind is the Bishop, and he is the one approving the law of the Christians."[95] The content of Articles 24, 25, 33, 79, 82, 96, and 151 of the Vakhtang's Book of Law is similar. They consider the king and the Catholicos in the same legal position. Therefore, it is natural that the formulas found in the kings' documents are also repeated in the documents of the highest church hierarchs. Moreover, high church positions were not infrequently held by royal family members. These are the phrases used in the legal documents of the three Bagrationi Catholicos: a) Domenti IV – "Should a man wear them out without any basis or our permission, we will make you pay as if you have sinned against us and ruined Svetitskhoveli, yes, we will be upset."[96] "Or else you should know, yes, we will get offended, and we will make you pay for it."[97] "Whoever ruins this, we shall make them pay as though they have sinned against us;"[98] "We will be greatly offended and will treat you ill, you shall know"[99]; b) Anton I – "Whoever goes against it and intentionally do not obey, you shall know, we will be greatly offended, we will make you pay with the work as per the spiritual law;"[100] "Whoever bothers him without any grounds, we will get greatly offended;"[101] "Or else, we will make you pay as though you have sinned against us;"[102] c) Anton II – "We will be greatly offended and you will be ruthlessly judged under the spiritual law;"[103] "Should you not follow this, we will be greatly offended."[104]

It is noteworthy that the formula of Domenti IV ("We will judge them as the destroyer of Svetitskhoveli") is identical to the phrase found in a donation book from 1804 – which belongs to Eptvimi Genateli (Eristav-Shervashidze): "May they be judged as though they have sinned against our Gelati, from myself and the Genateli after me."[105]

3.2. Princes (Batonishvilis)

The documents of Princes also contain a legal formula worth discussing, for example, a) Archil Batonishvili's ruling (1760) – "You shall give corvée to your servant man from your country. Otherwise, we will take it as an offense;"[106] b) Vakhtang Batonishvili's reports (1786, 1790, 1792, 1801.) – "You must know, we will be greatly offended, and we will make you pay through ill-treatment;"[107] "Or else, we will be greatly offended, you and them as well will be made to pay;"[108]

95 Ibid, vol. 1, Tbilisi, 1963, 464.
96 Ibid, vol. 3, Tbilisi, 1970, 758.
97 Ibid, 750.
98 Ibid, vol. 4, Tbilisi, 1972, 219.
99 Ibid, 265.
100 Ibid, vol. 3, Tbilisi, 1970, 825.
101 Ibid, vol. 7, Tbilisi, 1981, 508.
102 Ibid, vol. 3, Tbilisi, 1970, 890.
103 Ibid, 1003.
104 Ibid, 1020.
105 Ibid, 1094.
106 Ibid, vol. 4, Tbilisi, 1972, 476.
107 Ibid, vol. 7, Tbilisi, 1981, 694.
108 Ibid, vol. 8, Tbilisi, 1985, 72.

"Nobody shall sin. Otherwise, we will make you pay as though you have sinned against us;"[109] "Or else, it will be upsetting to me;"[110] Vakhtang Batonishvili's ruling (1792) – "Who sins first, we will be greatly offended;"[111] c) Giorgi Batonishvili's reports (1793, 1780) – "Should anyone bother or trouble you, yes, we will investigate your troubles;"[112] "Immediately give it to them, or else we will be greatly offended;"[113] On the latter, we see Erekle II's resolution: "Otherwise, we will be greatly offended. ... Otherwise, you will not be able to answer us;"[114] d) Levan Batonishvili's report (1780) – "Let them be, or else we will be offended."[115]

In the decree of Vakhtang Batonishvili (1793), a strict phrase is voiced: "Whoever is obedient to us will abide by this decree. And if anyone opposes us, we will hold him accountable for his blood, you know."[116] With this document, Prince Vakhtang regulates the issues of the safe movement of traders and the rent for the transportation of trade goods and also limits the capriciousness of officials and local feudal lords. A similar order from 1795, which has survived in the form of a copy and is likely to belong to Erekle II (or one of his sons), is of similar content: "Our order is, Aragvi officials, then Kaluashvili Bagdasara is going to Russia on his business and he has confirmation from us. Do not prevent him from leaving and see him safely on the roads, and let no one take offense at this."[117] Alexander Batonishvili's Book of Mercy is similar (1793) – "This book of mercy has been granted to you by us, Alexander Batonishvili, to you – Iko Abashvili. So that you may go around our country and no one may offend you. And whoever obeys our orders shall not offend this man. Otherwise, they will be greatly offended and even hold you accountable, as he has shown utter diligence in our cause."[118] In general, documents related to ensuring the safety of movement deserve a separate study, and we will not dwell on them at this time.

Finally, a very important monument for the research topic is the Decree of Vakhtang and Levan Batonishvili on the Lands of the Plains and Mountains (1782), which is distinguished by the abundance of interesting formulations for us: "We will ill-treat them" (Articles 1, 11, 12); "We will hold them accountable as though they have sinned against us. … we will ill-treat them" (Article 2); "We will hold them accountable as a traitor and will make them pay greatly" (Article 3); "We will hold them accountable as a traitor. …We will hold you accountable and as though you have sinned against us and you shall pay as a traitor" (Article 7); "We will be greatly offended" (Article 13); "We will hold them accountable as a traitor" (Article 14); "We shall make them pay equally to the traitor"

---

109 Ibid, 180.
110 Ibid, 710.
111 Ibid, vol. 5, Tbilisi, 1974, 587.
112 Ibid, vol. 8, Tbilisi, 1985, 241.
113 Ibid, vol. 7, Tbilisi, 1981, 468.
114 Ibid, 469.
115 Ibid, 471.
116 Ibid, vol. 8, Tbilisi, 1985, 923.
117 National Archives of Georgia, Historical Central Archive, Fund 1450, Vol. 1, Vol. 14, Doc. N85 (in Georgian).
118 *Gamrekeli V.,* Eastern Georgia's Intra-Caucasian Political and Trade Relations, Documents and Materials, Section 2, Tbilisi, 1991, 136-137.

(Article 16); "Whoever overpasses this order, those men shall know: we will hold them accountable similar to a murderer – with death and exile" (epilogue).[119]

3.3. The Queen

Naturally, this legal formula is also found in the documents of the king's co-regent. The queen, as a rule, threatens her subjects herself, but sometimes she also appeals to the authority of her husband.

Examples of the first are: a) Queen Mary's decree (second half of the 17th century) – "Whatever is lost or hidden by someone, you servants will be asked to pay back, you shall know;"[120] b) Queen Rusudan's letter to the Catholicos Doment on the prohibition of the slave trade (1712) – "Now we have such a covenant before you: wherever in the principality, or our domain and estate, a slave-buyer appears and either sells someone or brings someone for sell as a slave, you shall take the person away from them and put your wrath and investigate, question yourself and shall not allow anyone to do such business. We will not be offended by it but rather facilitate it. And whoever goes against you and does not obey you, we will hold them accountable and will be greatly offended."[121] c) Queen Darejan's report (1785, 1786) – "We will be greatly offended by this;"[122] "Those who do not obey this with your proper actions, we will be offended."[123]

A classic example of the second is Queen Darejan's report (1797) – "Let them be, do not bother them anymore. Otherwise, the master will be offended by you; everyone should know this. Why do you disobey the master's order?"[124]

3.4. Various Officials and Citizens

The documents of officials and ordinary citizens offer us many variations of this formula:

In one of the decrees of the officials of King Rostom (1653), we read: "Whoever violates this condition and book, the sovereign shall hold them accountable as though they have sinned to him;"[125] Similar phrases are found in the decrees of the officials of King Shahnavaz (1667, 1674): "Whoever violates this judgment, the sovereign shall hold them accountable as though they have sinned to him and shall impose a fine of twelve Tumans to pay to the master;"[126] "Whoever violates this in any way, the sovereign shall hold them accountable as though they have sinned to him."[127]

In one of the Books of Decisions (1666) it is said: "To put an end to this, we give God Himself and all His saints, the Svetitskhoveli – a promise, should we, in front of kings and lords, be found

---

119 *Dolidze I.,* Monuments of Georgian Law, vol. 2, Tbilisi, 1965, 450-454 (in Georgian).
120 Ibid, vol. 6, Tbilisi, 1977, 682.
121 Ibid, vol. 2, Tbilisi, 1965, 332.
122 Ibid, vol. 7, Tbilisi, 1981, 651.
123 Ibid, vol. 2, Tbilisi, 1965, 501.
124 Ibid, vol. 8, Tbilisi, 1985, 406.
125 Ibid, vol. 4, Tbilisi, 1972, 95.
126 Ibid, 124.
127 Ibid, 134.

wrong, we shall be held accountable with like the breaking of the cross-icons of Georgia… and King Shahnavaz shall hold us accountable as though we have shot arrows at his sons."[128]

The same content is found in one of the cases in the Book of Decisions during the same period (1672, 1674): "If I have wronged you in this, may the sovereign of Georgia, and my lord's son Giorgi, and my lord, shall hold me accountable as though I am a murderer and a sinner;"[129] "The sovereign of Georgia shall hold me accountable as though I have sinned against him, should I not do it as necessary; and Prince George and all the lords united and my lord as well."[130] These are two mutually exclusive oaths that the parties to the agreement take before each other. The sovereign refers to Vakhtang V, and the prince refers to George XI.

There is an interesting formulation in the Book of Devotion (1711) attached to the Book of Mercy of Imam-Quli-Khan: "If either we or someone behind us, or someone from Bodbe, i.e., Rustavi, breaks this book and opposes Alaverdeli in this matter, let him be accused of blasphemy against God and be punished by the authorities for desecrating the cemetery of the kings."[131]

In the settlement book approved by Solomon I (1752-1770), we read: "If this seal is broken, the master shall hold on accountable for treason;"[132] We also have another settlement book (1769-1776) "If I am guilty of this, may the sovereign and all his subordinates ask me for the betraying my king and killing his son Alexander, and also killing our prince, our Catholicos;"[133] Here, Catholicos – means Solomon I's elder brother, Joseph, and Alexander – the son of Solomon.

The mention of other individuals alongside the king as guarantors of justice is also found elsewhere. In one document (1721-1732), it is written: "If you accuse me of this, may King Alexander shall hold me responsible as though I have sinned against him, and may Zurab Abashidze hold you responsible for the price of his assassination;"[134] In another document (1722), we read: "May I be a sinner against God and a traitor to your throne, a bloodsucker of Prince Teimuraz, and a sinner against Queen Anna."[135]

In the Book of the Oath of Allegiance of Mamia Gurieli and Others to Solomon I (1771), it is stated: "If we are not loyal to you with a pure heart...first let that sovereign judge us for treason against the all-merciful sovereign, and then let us be judged by your wrath for the price of your death."[136]

We have several pleas, where authors use various variations: a) plea with the protocol of Erekle II (1780, 1783, 1788) – "We shall hold you responsible as though you have sinned against us."[137] "May they hold us accountable as though we went against you and may they take fines from us and

---

128 Ibid, vol. 8, Tbilisi, 1985, 846.
129 Ibid, vol. 6, Tbilisi, 1977, 596.
130 Ibid, vol. 4, Tbilisi, 1972, 135.
131 Ibid, vol. 2, Tbilisi, 1965, 332; Also, Ibid, vol. 3, Tbilisi, 1970, 667.
132 Ibid, vol. 6, Tbilisi, 1977, 641.
133 Ibid, 642.
134 Ibid, vol. 8, Tbilisi, 1985, 889.
135 Zhordania T., Historical Documents of the Monasteries and Churches of Kartli-Kakheti, Poti, 1903, 82 (in Georgian).
136 *Dolidze I.,* Monuments of Georgian Law, vol. 2, Tbilisi, 1965, 423 (in Georgian).
137 Ibid, vol. 7, Tbilisi, 1981, 489.

bring it to your treasuries;"[138] "May I be found as your traitor, absent from your feast, with the mercy of your kingdom may I be cursed;" [139] b) pleas with the protocols of Queen Darejan (1778, 1789) – "May I be a traitor to you;" [140] "May I be found as a traitor to my king;"[141] c) plea in a protocol of George XII (1798) – "I beg you, for the longitude of your life, grant us a strong decree… and whoever goes against your order, may they be held responsible as though they have sinned against you. Intimidate them this way so that they give us what we deserve."[142]

In one of the letters to the Queen (1782), the petitioner asks the Queen to intercede with the King and protect her family from slander: "This terrible one has spread the word accusing us of being traitors to the throne and the country. ... We beg you, make peace with the King, ... give us a sign of justice so that my children and grandchildren in Kartli and Kakheti shall not bear the name of traitors."[143]

In some versions, other persons are mentioned instead of the king, for example, in one decree (1692), it is written: "The Catholicos and Amilakhvari shall hold them accountable as though they sinned against them."[144] In another document (1729) – "if I fail in this, I will be guilty of a crime before the Vizier.[145] In a promissory note from the first half of the 18th century, we read: "I, Rekhel Goniar, have taken from you, Papua, seven and a half Marchili ... If I offend you about this, may I be a sinner against Amilakhvari."[146]

Grigol Dadiani's book to Solomon II (1792) contains a double formula in which, on the one hand, the author threatens his serfs. On the other hand, he affirms his loyalty to the king: "Should these serfs of mine not do it as necessary and not be diligent, may I hold them accountable as though they have betrayed me and cut them off from my serfdom. Should I be found wrong and stand on their side and violate this letter, may God make me pay all the price for this injustice, and may I not be worthy of your love."[147]

Finally, it should be noted that we have many cases related to the given topic that do not directly contain the formulas discussed but are still indirectly related to the subject of the study, so we will not discuss them in detail here. These are: a) Pleas (1766, 1775, 1778, 1783, 1796), where the author avoids the king's wrath: "My king, may you not put your wrath on us and not take away all we got;"[148] "I was intimidated to offend you, however, when I found these witnesses, this is why I am bothering you;"[149] "Please set me free from your wrath, I have no blame;"[150] "I have no powers to

138 Ibid, 583.
139 Ibid, 769.
140 Ibid, 419.
141 Ibid, 808.
142 Ibid, vol. 8, Tbilisi, 1985, 485.
143 Ibid, vol. 7, Tbilisi, 1981, 546.
144 Ibid, vol. 4, Tbilisi, 1972, 161.
145 Ibid, Vol. 8, Tbilisi, 1985, 887.
146 *Berdzenishvili N.,* Materials for the Economic History of Georgia, Book 2, Tbilisi, 1953, 34 (in Georgian).
147 *Dolidze I.,* Monuments of Georgian Law, vol. 2, Tbilisi, 1965, 528 (in Georgian).
148 Ibid, vol. 7, Tbilisi, 1981, 112.
149 Ibid, vol. 4, Tbilisi, 1972, 677.
150 Ibid, vol. 7, Tbilisi, 1981, 400.

offend you;"[151] "We are abstaining to offend your majesty or the God;"[152] b) the set of documents, where a feudal – e.g. Dadiani,[153] Gurieli[154] (XVII), or bishops[155] (XV-XVI) pledge the highest hierarch of the church that they will support his decisions.

4. Conclusion

Thus, the analysis of Georgian historical documents provides a basis for separately identifying a legal formula that directly declares the function of the King of Georgia as a guarantor of the implementation of the law.

This legal formula is found in various decrees of kings and is resonantly reflected in the legal documents of other officials and citizens. It clearly shows one of the interesting aspects of Georgian legal culture and provides us with important information about the legal concepts of that time.

Bibliography:

1. Constitution of Georgia 24/08/1995, Article 49.1, 49.2.
2. *Abashmadze V.,* Types of State Crimes and Their Class Nature in Feudal Georgian Law, Journal, Herald of the Georgian Academy of Sciences, History, Archaeology, Ethnography and Art History Series, N2, 1986, 59-61 (in Georgian).
3. *Berdzenishvili N.,* Materials for the Economic History of Georgia, Book 2, Tbilisi, 1953, 34 (in Georgian).
4. *Gamrekeli V.,* Eastern Georgia's Intra-Caucasian Political and Trade Relations, Documents and Materials, Section 2, Tbilisi, 1991, 136-137 (in Georgian).
5. *Dolidze I.,* Monuments of Georgian Law, Vol. 1, Tbilisi, 1963, 395, 464, 489-490, 490, 525, 533-534, 538, 551 (in Georgian).
6. *Dolidze I.,* Monuments of Georgian Law, Vol. 2, Tbilisi, 1965, 204, 211, 223, 225-226, 226-227, 332, 333, 234, 402, 416, 417, 418, 423, 450-454, 501, 528 (in Georgian).
7. *Dolidze I.,* Monuments of Georgian Law, Vol. 3, Tbilisi, 1970, 184, 185, 197, 219, 236, 252, 344, 667, 750, 758, 809, 825, 890, 1003, 1020, 1094 (in Georgian).
8. *Dolidze I.,* Monuments of Georgian Law, Vol. 4, Tbilisi, 1972, 95, 122, 124, 134, 135, 144, 159, 160, 161, 219, 242, 265, 281, 417, 476, 559, 677 (in Georgian).
9. *Dolidze I.,* Monuments of Georgian Law, Vol. 5, Tbilisi, 1974, 217, 511, 587, 645 (in Georgian).
10. *Dolidze I.,* Monuments of Georgian Law, Vol. 6, Tbilisi, 1977, 183, 596, 641, 642, 678, 682 (in Georgian).
11. *Dolidze I.,* Monuments of Georgian Law, Vol. 7, Tbilisi, 1981, 85, 96, 112, 120, 170, 176, 209, 224, 243, 244, 246, 248, 271, 304, 313, 332, 358, 382, 398, 400, 408, 410, 419, 468, 469, 471, 489, 508, 546, 579, 583, 651, 659, 669, 675, 694, 704, 736, 769, 771, 808, 820 (in Georgian).

[151] Ibid, 579.
[152] Ibid, vol. 8, Tbilisi, 1985, 379.
[153] Ibid, vol. 2, Tbilisi, 1965, 223; Also, Ibid, vol. 6, Tbilisi, 1977, 678.
[154] Ibid, vol. 2, Tbilisi, 1965, 225-226.
[155] Ibid, vol. 3, Tbilisi, 1970, 184, 185, 197, 219, 239, 252, 269, 344.

12. *Dolidze I.,* Monuments of Georgian Law, Vol. 8, Tbilisi, 1985, 72, 135, 146, 163, 180, 196, 202, 241, 245, 259, 267, 286, 296, 305, 369, 379, 384, 406, 408, 440, 465, 485, 497, 500, 514, 577, 579, 585, 681, 710, 846, 887, 889, 923, 941 (In Georgian.)
13. *Dolidze I.,* Monuments of Georgian Law, Annex, Tbilisi, 2023, 70, 95, 279 (in Georgian).
14. *Vacheishvili A.,* Essays from the History of Georgian Law, Vol. I, Tbilisi, 1946, 119 (in Georgian).
15. *Kutsia K.,* Amkars (Guilds) in the Georgian Cities of the 17th-18th Centuries, Tbilisi, 1984, 198 (in Georgian).
16. *Zhordania T.,* Historical Documents of the Monasteries and Churches of Kartli-Kakheti, Poti, 1903, 47, 82 (in Georgian).
17. Rustaveli Shota, The Knight in the Panther's Skin Tbilisi, 2022, 311 (in Georgian).
18. Surguladze Iv., For the History of the State and Law of Georgia, The State Structure of Kartli in the Late Feudal Period, Vol. 1, Tbilisi, 1952, 136-140, 165 (in Georgian).
19. *Kartvelishvili T., Baindurashvili Kh., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.),* Documentary Sources about the Kings of Kartli and Kakheti in the First Half of the 17th Century, Vol. 1, Tbilisi, 2019, 180, 247 (in Georgian).
20. *Kartvelishvili T., Baindurashvili Kh., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.),* Documentary Sources about the Kings of Kartli and Kakheti in the First Half of the 17th Century, Vol. 2, Tbilisi, 2021, 57, 126, 422 (in Georgian).
21. *Javakhishvili Iv.,* Works in 12 volumes, vol. 7, Tbilisi, 1984, 162-177, 191, 211-217.
22. National Archives of Georgia, Historical Central Archive, Fund 1450, Vol. 1, Vol. 14, Doc. N85 (in Georgian).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8316

Mikheil Bichia*

Dedicated to the 75th birthday anniversary of the outstanding representative of Georgian civil law – Professor ***Tevdore Ninidze***

Phenomenological Inquiries into Gerhart Husserl's Scientific Work "The Subject of Law and the Legal Person"

The scientific work presented by Gerhart Husserl is devoted to the concepts of the ontological nature of the subject of law and a legal person. The author analyzes their specific features using a phenomenological approach and offers original findings.

According to the study, the subject of law is regarded as part of the real sphere, while a legal person is seen as an abstract (legal) phenomenon. Gerhart Husserl believes that the subjectivity of law is determined by factors of self-consciousness and personal identity; the subject of law has an individual will, full autonomy, and moral responsibility. As for a legal person, it is considered an artificial construction; its will is determined by collective decisions, and its freedom of action is limited by certain rules. In addition, the responsibility of a legal person is solely legal in nature. The intentionality acting on the subjectivity of law is aimed at one's own consciousness, while a legal person has a functional load. Thus, according to Gerhart Husserl, the distinction between the concepts of the subject of law and a legal person is expressed in their ontological nature, the foundations of origin, specificity of will, scope of autonomy, nature of responsibility, various skills and circumstances.

Keywords*: Subjectivity of Law, Real Space, Legal Status of Person, Fiction, Authority, Legal System, Individual, Legal Possibility (posse-posse)*

1. Introduction

Gerhart Husserl's scientific article "The Subject of Law and the Legal Person" can be considered one of the outstanding works in the philosophy of law. The research is interesting from different points of view, but its significance for law is particularly noteworthy. The article highlights the multifaceted nature of the problem of distinguishing between the subject of law and the legal person. The author introduced a new term "legal person" into the legal space and compared it with the term "subject of law", thereby attempting to establish differences between the legal and real spheres.

* Doctor of Law, Professor at the European University, Professor at Free Academy of Tbilisi, Visiting Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law, Expert of Higher Education Programs, Lawyer, Mediator, https://orcid.org/0000-0003-2297-0326.

Taking into account the above discussion, the purpose of the research presented by Gerhart Husserl is to understand the concepts of the subject of law and the legal person in a new way, to distinguish them from each other, and to determine their place in the legal system. To achieve this goal, the author set the following tasks:

- To study the essence, real nature, and role of the subject of law in society;
- To define the concept of legal person and its place in the legal system;
- To analyze the interaction between the subject of law and legal person;
- To investigate the nature of subordinate and coordinate law, de facto authority, the rule of law and the essence of sovereignty;
- To clarify the interrelationship between the categories of subjective right, permission, and possibility;
- To reconsider the traditional understanding of such concepts of civil law as legal capacity, representation, and legal entity.

Methodologically, Gerhart Husserl employs a phenomenological-logical approach to the analysis of legal phenomena. Phenomenology allows for a new understanding of self-consciousness, intersubjectivity, intentionality, and other circumstances. He criticizes the limitations of scientific and objective approaches while emphasizing the need for rehabilitation of the lifeworld. In this context, a detailed description of human existence is interesting, where the subject acquires an embodied form and is organically connected to its social or cultural environment.[1]

Phenomenology is not a strictly structured system. It is considered a philosophical method of thinking. Phenomenology tries to free itself from traditional approaches and limitations, and to interpret various phenomena or concepts innovatively.[2] In essence, phenomenology not only establishes a new direction in legal research but also uses methods of reduction, description, and interpretation to understand the characteristics of legal phenomena or to solve subject problems when studying law.[3] In phenomenology, the meaning of various phenomena is determined not only verbally or empirically but also according to eidetic thinking,[4] i.e., according to the essence ("eidos") of phenomena. In general, with the help of eidetic thinking in phenomenology, the author tries to determine the essence of specific phenomena and their characteristics. It is aimed at achieving not just empirical, but a priori (pre-experiential) knowledge. The method of eidetic thinking allows us to go beyond our subjective experiences and achieve objective knowledge about various events (phenomena).

At the same time, the work focuses on the intentional nature of consciousness, specifically highlighting how our consciousness evaluates legal concepts. Intentionality implies that consciousness is always directed towards some object; our thoughts or feelings are always about something. It is through this intentional approach that the unique nature and significance of both the subject of law and

1 *Zahavi D.*, Phenomenology, Basics, 1st Edition, Routledge, 2018, 1-2.
2 *Moran D.*, Introduction to Phenomenology, Routledge, 2000, 4-5.
3 *Pantykina M. I.*, Phenomenological Methodology: Experience in Law Research, Yekaterinburg, 2008, 242 (in Russian).
4 *Husserl E.*, Articles on Renewal, "Questions of Philosophy", No. 4, 1997, 120 (in Russian).

the legal person in the legal system become possible. Accordingly, it demonstrates how legal concepts operate and what impact they have on everyday life. The work presented by G. Husserl also presents historical aspects of the issues discussed.

Moreover, one of the main merits of the research is that the scientific article addresses the concepts of the subject of law and legal person in an interdisciplinary context. Thanks to the interdisciplinary approach, many aspects of legal phenomena from the fields of legal theory, philosophy, and sociology are organically combined.

2. Law and Society

The author considered the subject of law as part of the real sphere. This is natural, as he believed that when law is viewed as a social institution, it becomes clear that historical rationality operates in human existence. In fact, the concept of the historical development of law and society (community), and their interconnection, resembles the ideas of Friedrich von Savigny and the historical school of jurisprudence.[5]

In general, society plays an important role in protecting justice. Gerhart Husserl expands the ethical principle of Immanuel Kant (categorical imperative) and transfers it from the individual to the social sphere. Thus, this idea gains universal significance at the social level. For G. Husserl, the concepts of society, justice, and law are intertwined; law emerges in society, and the legal community must ensure justice and its operation in the social world. The transcendental idea of justice is expressed in the fact that the constitution imposes legal restrictions on state activities; a person becomes a dictator if they simply refuse to acknowledge that legal restrictions exist. However, it can be said that if the law does not impose legal barriers and transcendental restrictions that G. Husserl sets for the law, these restrictions cannot have a legal nature.[6]

Thus, according to G. Husserl, the constitution is a bridge between the ideal (justice) and reality (law of society). By providing this validity to justice, G. Husserl notes that it is not just a social construct, but a universal principle that underlies and makes possible our understanding of right and wrong in society. For G. Husserl, law and justice are not abstract ideas, but they exist and develop in society. The task of legal professionals is not only to create or enforce laws but to ensure that these laws truly reflect and are implemented in accordance with the principle of justice.

Law, as a transcendental sphere, is abstract in nature. Law regulates factual relations. Law is an expression of the will of any society. Law is created by people for human life and action. It has a social function. In order to fulfill this goal, law must become timely. The timely nature is a process that is reflected in the act of law application. The creation of law is possible only through the creation of an act of permanent normative protection of the subjects of law. This process goes beyond ordinary, material reality and has a somewhat transcendental, metaphysical aspect.[7]

---

5 https://www.geni.com/people/Gerhart-Husserl/6000000011571359886 [02.11.2023].

6 https://www.geni.com/people/Gerhart-Husserl/6000000011571359886 [02.11.2023].

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

A subject can participate in the experience of the world to the extent that they are a member of a community, while the ego is considered only a part of the social sphere. For Husserl, transcendental subjectivity is at least partially dependent on transcendental intersubjectivity.[8] E. Husserl describes consciousness as always "directed toward something." Every conscious act has an object, regardless of whether this object actually exists. Husserl focuses on the interdependence between acts of consciousness and their corresponding objects, which is called the noetic-noematic structure. Phenomenology is directed towards overcoming the traditional division between subject and object, but this happens through a deeper understanding of subjectivity. Husserl tries to deepen Descartes' approach by focusing not only on the thinking subject but on the entire structure of consciousness. Phenomenology creates a new field in philosophy based on the structures of consciousness and their meanings. Husserl's approach contains a paradox: he attempts to overcome Cartesianism[9] by radically rethinking the Cartesian project.[10]

In addition, the article demonstrates how law is related to social reality or life. It emphasizes that the subjects of law are people who participate in social relations, have a certain social status, and possess rights and obligations defined by this status in society.[11] However, G. Husserl considers a legal person as a legal construction that has no direct connection with these social relations and becomes legally significant only after it is legally considered (recognized). Husserl criticizes this position and believes that law should more thoroughly account for the phenomenological aspects of social life. In his opinion, the purpose of law should not only be to create legal constructs, but also to regulate existing social relations, taking into account the real social context.[12]

In fact, law is localized in the area of ideal, a priori legal regularities (A. Reinach, G. Husserl). This dimension is not equivalent to the world that "ought-to-be". Law belongs to the "material a priori world" (E. Husserl), whose objects have a special ontological status. Law recognizes polysubjectivity in the phenomenological understanding. Classical natural law consists of monosubjective constructions based on the individual. However, the phenomenology of law proceeds from the fact that in law, which represents a correlative connection of rights and obligations (A. Reinach, N. N. Alekseev), the participation of at least two subjects is always implied. They are the bearers of these rights and obligations. In G. Husserl's philosophy of law, these two subjects are joined by another unconditional component – the legal society, which consists of "legal like-minded people". Their common will can give meaning to any right and obligation. The "material legal a priori", being the fundamental regularities of law, acquires real significance not in itself, but only as a result of a certain external event (fact). This "external" event can be a social act (according to A. Reinach), a normative fact (with N. Alekseev) or a special (unusual) case (in G. Husserl concept).[13]

---

8 *Zahavi D.,* Husserl's Phenomenology, Translator: *Gonashvili G.*, Tbilisi, 2016, 166 (in Georgian).

9 Cartesianism, as a philosophical movement, is associated with the concepts of the French scientist René Descartes. For him, the importance of mind and logic in acquiring knowledge, the only undoubted evidence in the form of the ability to think, and so on, are paramount. The name of this doctrine also comes from Descartes' Latin name.

10 *Moran D.*, Introduction to Phenomenology, Routledge, 2000, 16.

11 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 130.

12 Ibid., 193-194.

13 *Stovba O. V.*, Temporal Ontology of Law, Dissertation Abstract, Kharkov, 2017, 15 (in Russian).

3. Private Law and Personal Autonomy

According to Gerhard Husserl, every individual can have a personal, private sphere and a system of values based on their individual will[14], views, and own rules of existence. A legally organized society can treat a person's private sphere differently. Sometimes it fully recognizes and legally protects their personal sphere, and sometimes it does not.[15] The degree of legal recognition of the personal sphere is directly proportional to the essence of a legal person. The more an individual's sphere is recognized, the more fully the status of a legal person is expressed. The main function of society is to legally recognize the private sphere of the individual and express this in a legal concept. Thus, in G. Husserl's theory, the relationship between the individual and society is crucial for properly understanding the concept of a legal person.

The personal sphere[16] is considered to be a space that provides the individual with more freedom than the public or legally regulated sphere. Private autonomy of the parties is also a basic principle of private law and gives the subjects of private law relations the authority to perform any actions not prohibited by law, including those not directly provided for by law. This idea is noteworthy for private law, where property rights, privacy, and personal autonomy are recognized.[17] These rights exist only insofar as they belong to specific subjects. A right is not abstract in nature, as it cannot exist separately from the subject. In civil law, a right is always associated with a specific person. It is the attribution of a right to a specific subject that gives the right its legal character.[18] For example, property rights do not imply an abstract concept, but rather someone's right of property to a specific good.[19] If we cannot say whose right it is, then it loses its legal significance.

Therefore, instead of saying that in private law, an individual simply acts for their interests and the law only regulates their actions, the author notes that the individual is considered an active participant and executor of the law. For example, if an individual acquires or sells property, or acts in private law relations, they are not only using the law but also are themselves creating legal reality. Their actions are not simply part of the personal sphere; they have corresponding legal consequences. This concept determines the responsibility of the individual in the legal system. In fact, in private law relations, individuals are not just "consumers" of the law; they are considered its executors and conductors (functioners).[20]

---

14 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 159.

15 Ibid., 142-143.

16 See *Bichia M.*, Protection of Personal Life According to Georgian Civil Law, Tb., 2012, 121, 327; *Bichia M.*, The Danger of the Privacy "Disappearance" during a pandemic in the context of Globalization and the Grounds for its Legitimacy: an institutional analysis, Journal "Globalization and Business", №11, 2021, 44 (in Georgian).

17 See *Chanturia L.*, Introduction to the General Part of Georgian Civil Law, Tb., 2000, 57-58 (in Georgian).

18 On the essence and characteristics of rights, see *Brox H., Walker W.-D.*, Allgemeiner Teil des BGB, 30. Aufl, München, 2006, 318-319; *Bichia M.*, The Content of the Rights in the Civil Law, TSU "Law Journal", №2, 2023, 46; Bichia M., Legal Obligational relations, Handbook, 3rd edition, Tbilisi, 2020, 19 (in Georgian).

19 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 190.

20 Ibid., 186-187.

In this regard, the fields of permission (Dürfen) and capability (Können) are brought to the forefront. G. Husserl considers permission as the basis of legal authority, by virtue of which the subject has the right to act in a certain direction.[21] Permission determines what is allowed and what is not. Accordingly, it also sets the limits of freedom and is considered an important element of legal autonomy. As for capability (Können), this is the factual potential for a subject to perform certain actions. Capability is the basis of legal capacity and reflects what a person is actually able to do. When the law attributes a right to a specific person, this is not just an abstract permission. This process transforms a person's personal interests and values into legally recognized and protected property. As a result, this field becomes for the authorized subject not only what they are allowed to do but also what they can actually perform from a legal perspective. The author argues that the subject's right includes both abstract permission and real, legally recognized ability to act within the scope of this right.[22]

Legal capacity (posse-posse) implies the ability to exercise this capacity. It includes the ability of the subject to have rights and obligations, and the abstract possibility that precedes the emergence of specific rights and duties.[23] The subject of law differs from other subjects in this aspect. The idea of legal capacity creates a theoretical basis for determining legal capacity. It clarifies how a subject can have legal possibilities that have not yet been realized. However, the concept of legal capacity can explain how different categories of subjects (individuals, corporations, states) can become subjects of law.

Law recognizes the individual's freedom and their central role in defining the subject of law.[24] Gerhart Husserl separately distinguishes the individual, whose status in private law is determined not only by their material property but also on the basis of a broader concept that includes all kinds of socially valuable relationships. This idea expands the understanding of what is "valuable" in law. Private law concerns not only things but also relationships between persons and the rights and obligations arising from these relations.

Thus, law is a complex balance between abstraction and reality, and legal categories sometimes do not coincide with social reality. In this way, it recognizes that the legal status of an individual is determined not only by their material assets but also by social connections, reputation, skills, and other intangible aspects that have social value. This concept conveys a holistic (complex) approach to private law, where the individual is not just an economic agent but also a complex social being with multifaceted relationships. In this sense, the subject of private law is defined by two aspects: (1) they have the ability to have rights and (2) to take on obligations. The individual is understood as a free and valuable being. If we disregard this concept, it will lead to both the loss of individuality and the destruction of society itself, as society consists of free individuals. The purpose of law is considered not to subordinate the individual to society, but to protect and regulate individual freedom through norms. The rights of the individual and the possibilities of their implementation stem from two foundations: on the one hand, from their will and individual choice, and on the other hand, from the

21 Ibid., 169-170.

22 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 189.

23 Ibid., 180-181.

24 See *Bichia M.*, Methodological Problems of Civil Law, Tbilisi, 2023, 149 (in Georgian).

legal system that grants the subject legal status.[25] This concept is very important, since it emphasizes the relationship between individual freedom and legal regulation in private law.

Law respects the private sphere of an individual. If a person voluntarily exchanges or sells a good, only in this case does the law intervene in their individual sphere to ensure that this exchange is carried out legally. Accordingly, the law regulates the transfer of values when people voluntarily agree that these values become "public" by moving from the sphere of one person to the sphere of another.[26] The law must ensure that the transfer is voluntary and that the receiving party becomes the full owner of this value. Thus, the law balances the relationship between personal freedom and public order. Accordingly, the main purpose of law is to regulate disputes and provide people with legal means to protect their interests. Private law recognizes personal autonomy; a person is considered a free being and acts on their own responsibility.[27] Accordingly, coordinative law is focused on respecting and protecting the personal spheres of the individual. The legal system does not disregard the protection of personal spheres and does not imply the devaluation of this sphere at the normative level. Coordinative law is based on the principles of equality and mutual respect. The personal autonomy of each individual must be recognized and protected by law.[28] Private life is an essential part of autonomy, and vice versa, autonomy cannot exist without a private sphere. The loss of private life creates a threat to the violation of fundamental human values.[29] Law supports the protection of personal autonomy and the maintenance of each individual's free space. As for subordinate law, it invades its autonomous spheres and does not respect the individual's personal space; subordinate law tries to completely control the individual's personal sphere. Therefore, the author warns that the law can be transformed into an instrument that not only regulates public behavior but also tries to control the private sphere. However, according to G. Husserl, this is a fundamental change that contradicts the true purpose and essence of the law.[30]

Special attention is given to the idea of respecting the individual, which is based on their legal recognition. At the same time, this idea encompasses protecting dignity, recognizing autonomy, equality, considering it as the basis for legal responsibility, and more. The law perceives individuals as dignified and empowered subjects. Recognizing them as part of the law (as a legal partner) means respecting their personhood,[31] which is closely related to the idea of protecting the individual's dignity and respecting them.[32] In addition, recognizing autonomy relates to the ability of a person to make

---

25 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 166.

26 Ibid, 152-153.

27 See *Khubua G.*, Theory of Law, Tbilisi, 2004, 208 (in Georgian).

28 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 147.

29 *Demirsoy N., Kirimlioglu N.*, Protection of privacy and confidentiality as a patient right: physicians' and nurses' viewpoints, Biomedical Research- India, Vol. 27, Issue 4, 2016, 1437-1438; *Bichia M.*, The Idea of protecting Privacy from its Origin to the Present, Revaz Gogshelidze's 65th Anniversary Collection, ed. *Khrustali V., Meparishvili G.*, Tbilisi, 2022, 454 (in Georgian).

30 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 153-154.

31 Ibid, 176.

32 *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"

decisions and act independently. The personal sphere creates a foundation for people to develop their identity and be autonomous in their individual needs, demands, or life plans.[33] The idea of respecting the individual is considered as the basis for legal responsibility, which means that the individual is a responsible subject.

Individuals should have their own space, where they are completely free. Regulating everything leads to the transformation of the law into violence that interferes with everything. True justice requires individuals to be free agents who voluntarily agree to general rules because they understand their importance. This is possible when people have a space where they govern themselves. Therefore, personal autonomy cannot be opposed to law, but can be considered as its necessary foundation. Typically, a person is part of the law and is subject to its norms, but maintains certain autonomous areas in which the law does not interfere.

4. Subject of Law

Gerhart Husserl examines the social nature of law, through which he tries to define the real nature of the subject of law. It is characterized by the following features: the subject of law is distinguished by personal qualities, is a member of a legal society, has a personal legal precondition, and possesses subjectivity of a permanent nature. Let's characterize these qualities that highlight the real nature of the subject of law:

- The essence of the subject of law **is defined by personal qualities**, which include personal identity, the ability to make decisions and take responsibility for oneself.[34] Personal identity is characterized by unique characteristics that give the subject of law the ability to be responsible for their own actions, perform actions, and make decisions. The subjectivity of law is defined not only by legal but also by ethical norms. The fact is that an individual's moral values and ethical standards play a big role in determining their status. Also, the subject of law bears social responsibility towards society. This **includes the fulfillment of social duties**,[35] which ensures legal order and stability. Additionally, personal qualities also determine how the subject of law relates to other subjects in the legal system. These relations include entering into contracts, fulfilling obligations, and protecting rights. The law recognizes the subject of law, but this does not necessarily mean that they must have legal rights and obligations.
- The subject of law is considered a **member of the legal society**. This means that they have relationships with other members of society according to legal norms. An individual or other person that possesses personal qualities and is legally an active member of society is considered

bei Prof. Klaus Adomeit (Freie Universität Berlin), 2005/06, 5-7; *Bichia M.*, Scope of Civil Legal Concept of Dignity, TSU "Journal of Law", №2, 2014, 11.

33 *Rössler B.*, Der Wert des Privaten, Frankfurt am Main, 2001, 274; *Bichia M.*, The Idea of Protecting privacy from Its Origin to the Present, Revaz Gogshelidze's 65th Anniversary Collection, ed. *Khrustali V., Meparishvili G.*, Tbilisi, 2022, 455 (in Georgian).

34 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 183, 208-209.

35 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 143.

a subject of law.[36] Consequently, they act as part of this society and possess a legal status associated with this society. They have the ability to perform functions in the legal society. The subject of law protects and fulfills legal norms. This ensures the maintenance of legal stability and order. Subjectivity of law includes the **general status of a person**[37]**,** which is granted to an individual only when a legal society exists. The status of a subject of law is determined solely by the existence of the person.

- Subjectivity of law includes a **personal legal precondition.**[38] This is the personal prerequisite for transformation into a legal person, meaning the person is an active participant in the legal system and legally active.
- To grant the status of a subject of law[39], only the existence of a natural person (human) is necessary.[40] In fact, the subject of law is considered a necessary precondition for the permanence of legal relations. Thus, subjectivity of law is of **a permanent nature** and does not undergo change.

Civil legislation recognizes as subjects of law both capable persons and those natural persons who only have legal capacity. Therefore, even a person whose will is not valid for legal consequences, such as a minor,[41] is considered a subject of law, as they do not possess the full status of a legal person.[42] Consequently, a natural person cannot renounce their legal capacity.[43]

De facto authority is considered to possess real power, even though it may not be legally recognized. Accordingly, the concept of a subject of law is not limited to legal recognition but also includes the factual situation.[44] Moreover, the de facto government can be considered a legal entity due to its real power and influence, despite not being formally recognized. De facto authority confirms that legal capacity to act can exist based on the possibility of real action, even if this action is not formally recognized. Thus, legal capacity to act is not merely a matter of legal status but also encompasses real abilities and influence. Additionally, the de facto authority may use the institution of representation to achieve its own goals. This confirms that representation can exist in real governance, even if such governance is not formally recognized. De facto authority has an organized structure and exercises real power.[45] Therefore, it can be considered a legal entity, despite the absence of legal recognition. Hence, the concept of a legal entity includes not only formal but also factual aspects.

---

36 Ibid, 133-134.
37 Ibid, 185.
38 Ibid, 191.
39 See *Bichia M.*, Methodological Problems of Civil Law, Tbilisi, 2023, 151 (in Georgian).
40 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 131.
41 See *Khetsuriani J.*, Functions of Civil Law, Tbilisi, 1995, 92; *Bichia M.*, Methodological Problems of Civil Law, Tbilisi, 2023, 157 (in Georgian).
42 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 168.
43 See *Hübner H.*, Allgemeiner Teil des Bürgerlichen Gesetzbuches, 2. Auflage, 1996, 77.
44 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 138-139.
45 Ibid.

In addition, an intentional approach applies to the subject of law. Husserl extends Kant's categorical imperative to the practical sphere of action and evaluation and reworks it under the influence of Brentano.[46] Unlike Kant, Husserl no longer prioritizes the "I should" over the practical "I can." Husserl formulates a new a priori law based on concrete human capabilities: nothing can be demanded of a person that they cannot do. Husserl reduces the priority of "I should" and focuses more on real human possibilities when making demands.[47] In contrast to the "classical" subject, the phenomenological "I" represents a unity of complex and constantly changing multiple forms of self. This is the determining reason why the concept of subjectivity needs to enter the thematic area of the "I." Husserl understands subjectivity as a form of conscious life, thanks to which the whole world has its meaning and existential significance, while the "I" is considered an object, as a human existing in the world.[48] This is the primary source of thoughts that fills the gap between consciousness and reality.

E. Husserl, the founder of the phenomenological method, shares Kant's idea that every human being lives under the categorical imperative. A worthy life is a life in accordance with evidence, the best science, and one's conscience. The "categorical imperative of reason" requires that life be "the best possible from the standpoint of reason, as regards all possible personal acts."[49] The concept of freedom is discussed by the prominent medieval thinkers Anselm of Canterbury, Eckhart Hochheim, and Nicolaus Cusanus in relation to the unrestrained freedom of human will. In Hegel's philosophy, the idea of freedom is connected to the understanding of man as a subject and the will. "My freedom gains value in relation to others, through which I become aware of my own freedom."[50] Here, the idea of intentionality is highlighted, which is also reflected in Gerhart Husserl's work under consideration.

5. The Legal Person

The author specifically examines the legal person as a specific legal phenomenon. To characterize it, Gerhart Husserl uses the method of comparison with the subject of law. As a result, G. Husserl identifies the following peculiarities of the legal person:

- The legal person is one who has a **legal status**, i.e., legal rights and obligations.[51] The subject of law does not necessarily have specific rights and obligations. The legal person can be a natural person (a human) or a legal entity (an organization). That is, the law recognizes the legal person as a subject who can conclude contracts, own property, and perform other legal actions.

---

46 See *Varga A. P.*, Brentano's Influence on Husserl's early notion of Intentionality, Studia Universitatis Babes-Bolyai, Philosophia, 54, no. 1-2, 2008, 44-45.

47 *Crespo M.*, Husserl on Personal Aspects of Moral Normativity, Ethical Perspectives, 22, No. 4, 2015, 704.

48 *Husserl E.*, Paris Lectures // Husserl E. Selected Works, M., 2005, 349.

49 *Crespo M.*, Husserl on Personal Aspects of Moral Normativity, Ethical Perspectives, 22, No. 4, 2015, 707.

50 *Beriashvili M., Odishelidze G.*, The Idea of Freedom in Its Historical Development, in: Classics of the Philosophy of Freedom, from Plato to Heidegger, Editors: *Beriashvili M., Ieky U.R., Moizish B.*, Tbilisi, 2011, 11-12 (in Georgian).

51 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 133.

- In addition, **the legal person** is a member of society. Their membership means that they have specific **legal rights and obligations**,[52] which grant them a legal status. **Legal rights and obligations** may relate to property rights (ownership, management), fulfillment of obligations, conclusion of contracts, etc. However, in the author's opinion, the concept of a legal person should not be formed solely with the help of legal capacity; it is unacceptable to ignore sociological reality,[53] if only because the concept of a legal person is based on a sociological basis (subjectivity of law). This is understandable, since it operates in **sociological reality**.
- If a legal person **does not have certain qualities or significance, it loses its legal status**.[54] **The legal person is a more specific and stable status** that includes certain legal rights and obligations. It may lose its legal personality (legal status of person) under certain circumstances, but this does not mean that the subject of law ceases to function; subjectivity of law continues to exist.
- Subjectivity of Law is determined simply by the existence of a person and membership in the legal community. This is a necessary prerequisite for legal relations, but not sufficient. **For the acquisition of the status of a legal person, the existence of additional conditions is necessary**, in addition to the status of a person.[55] A legal person has the legal capacity to perform an action that produces a legal effect[56] and to establish legal relations with others. It is considered the bearer of rights and obligations. Its status goes beyond the ordinary quality of a person and includes additional legal capabilities, such as the ability to conclude transactions and perform actions (legal capacity), the ability to hold rights and obligations in legal relations (subjectivity of law), the ability to be liable for one's own actions (delict capacity), etc.

The legal person is one who has joined the legal community and, by the power of the order established by its own will, has the actual ability to perform something and the legal right to do so. One who is granted by the law only the sphere of social authority without legal authority is a subject of law (and not a legal person). The legal person has the capacity to subordinate the objects of law to its authority; such objects are subject to the legal power of another. The doctrine of the subject and will in civil law is fundamentally changing: first, as a result of the rejection of naturalistic psychologism, and second, on the basis of the specific concept of the legal person. The law-making action can be performed only by the legal person (and not by the subject of law), since only the legal person has the ability to influence the formation and development of the legal system. From this view,

---

52 On the person as a subject endowed with rights and obligations, see *Adriano E. A. Q.,* The Natural Person, Legal Entity or Juridical Person and Juridical Personality, Penn State Journal of Law & International Affairs, Vol. 4, Iss. 1, 2015, 372; *Bichia M.*, Methodological Problems of Civil Law, Tbilisi, 2023, 151 (in Georgian)

53 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 142-143.

54 Ibid., 134.

55 In addition to legal capacity, on the existence of certain prerequisites for the exercise of other capabilities, see *Kochashvili K.*, Civil Responsibility for the Actions by a Person without legally valid will, "Methods of Law", No. 7, 2023, 96-99 (in Georgian).

56 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 199.

the structure of such fundamental concepts as capacity, representative authority, and legal entity is changing. The personal structure of legally acting persons has led to the separation of two main types of legal action: 1) when the individual acts as a representative of the legal community (i.e., acts as part of the legal system and as its will-bearer); 2) when the individual acts independently, "endowed with individual legal sovereignty". The first idea contradicts the second. Depending on how people act in the legal system (based on the principle of equality and cooperation or hierarchy), this concerns either coordination or subordination law.[57] Accordingly, these provisions are important for civil law and show the influence of the phenomenological approach in this area.

Consequently, the subject of law exists in **real space.** This is the physical existence of the subject in a real environment, which is not fictional. The legal **person is created in an abstract form,** as it is formed in a formal environment and, accordingly, exists **only in the legal** space. In Gerhart Husserl's doctrine, it is considered an **artificial construction.**[58] Moreover, the subject of law has **emotional and intellectual abilities.** These include the abilities to experience feelings, think, or comprehend. **In the case of a legal person, we do not have such abilities.** The subject of law is equipped with **the ability to have social relationships with others,** that is, to establish personal relationships and maintain or protect them. As for the legal person, it can **establish formal relationships** with others.[59] In this case, formalities are based only on legal relationships.

6. Conclusion

Therefore, Gerhart Husserl believes that a subject of law and a legal person exist in different areas, and are consequently phenomena of different nature. The subjectivity of law is characterized by **its natural character**, namely by self-awareness or personal identity. A legal person belongs to the sphere of law and a fiction created by the legal system. Moreover, according to Gerhart Husserl, a subject of law can have **individual w**ill.[60] They have their own desires and goals. In the case of a legal person, individual will is replaced by **collective decisions**.[61] A person has their own values and interests which they can protect. The state recognizes these rights of an individual and grants them full legal status. Their essence stems from the personal freedom they had even before acquiring legal status.

Gerhart Husserl considers the subject of law to be autonomous,[62] meaning they have the ability to make decisions independently. The subject of law has full subjectivity and autonomy of consciousness. The **autonomy of a legal person is limited in nature**, as it makes decisions according to predetermined rules and restrictions (for example, a juridical person).[63]

---

57 See *Wolf E.*, Recht und Welt. Bemerkungen zu der gleichnamigen Schrift von Gerhart Husserl (Sonderdruck aus der Festschrift fur Edmund Husserl), Zeitschrift für die gesamte Staatswissenschft/ Journal of Institutional and theoretical Economics, Bd. 90, H. 2, 1931, 345.

58 See *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 194.

59 Ibid., 168.

60 Ibid, 157.

61 Ibid, 196.

62 Ibid, 178-179.

63 Ibid, 168.

It becomes clear that in Doctrine of Gerhart Husserl, the subject of law **bears moral responsibility**, which is expressed in their ability to comprehend the moral consequences of their actions. The **responsibility of a legal person is only legal in nature**. In fact, legal rights and obligations are metaphorically reflected in the concept of a "person".[64] Maunes also noted that a person can have powers and obligations.[65] A legal person does not have a sense of moral responsibility.

According to the research, **the subject of law is characterized by intentionality,** which **is directed towards oneself and one's consciousness.** The subject of law is based on who you are internally, as a person. **A legal person is distinguished by its functional load.** That is, a legal person performs only specific legal functions. **In the case of a legal person, intentionality is directed towards the external world,** therefore it concerns a person's external legal status in society. It is granted a legally defined status and rights and obligations.

According to Gerhart Husserl, if subordinate individuals have the status of subjects of law, this does not imply that they simultaneously have the status of legal persons. The fact is that a pure dictatorship would recognize only one legal person – the dictator, who is the sole executor and implementer (functionary) of the will of the legal society. The rest of the people are considered only as subjects of law, as they are not completely excluded from the legal connection, but remain in a state of being under power. Therefore, being a subject of law is more general and necessary, while the status of a legal person is more specific and limited under dictatorship conditions.

Ultimately, the law recognizes both the legal person and a subject of law, but they differ from each other in their legal status and function. In Gerhart Husserl's opinion, the law should consider the real, phenomenological nature of the subject of law, while a legal person should be considered as a legal instrument established to achieve specific goals. The point is that a subject of law can be a member of the legal society who possesses personal qualities, while a legal person is a member of the juridical society who has specific rights and obligations (legal status) granted by law. A subject of law remains a member of the legal society, even if they may lose their legal status as a person. A legal person may lose their legal status.

In fact, the difference between the subject of law and a legal person is that the **category of legal persons is narrower than just subjects of law**. This is due to the fact that in order to be considered a legal person, additional criteria are established beyond being a subject of law. **Subjectivity of Law is the primary and necessary status**, while being a legal person is a higher and more specific legal status, which, along with the legal personhood, entails specific **rights and obligations**.

Thus, this study of Gerhart Husserl, employing phenomenological-philosophical and interdisciplinary approaches, should be of interest to representatives of legal theory and philosophy of law, as well as to scholars in sociology and civil law.

---

64 See *Adriano E. A. Q.,* The Natural Person, Legal Entity or Juridical Person and Juridical Personality, Penn State Journal of Law & International Affairs, Vol. 4, Iss. 1, 2015, 370.

65 *Maunez E. G.*, Introduction to Law, 31st ed., 1980, 21; *Adriano E. A. Q.,* The Natural Person, Legal Entity or Juridical Person and Juridical Personality, Penn State Journal of Law & International Affairs, Vol. 4, Iss. 1, 2015, 370; *Bichia M.*, Methodological Problems of Civil Law, Tbilisi, 2023, 152 (in Georgian).

Bibliography:

1. *Adriano E. A. Q.,* The Natural Person, Legal Entity or Juridical Person and Juridical Personality, Penn State Journal of Law & International Affairs, Vol. 4, Iss. 1, 2015, 370, 372.
2. *Beriashvili M., Odishelidze G.*, The Idea of Freedom in Its Historical Development, in: Classics of the Philosophy of Freedom, from Plato to Heidegger, editors: *Beriashvili M., Jeck U.R., Moisisch B.*, Tbilisi, 2011, 11-12 (in Georgian).
3. *Bichia M.*, Protection of Pesronal Life According to Georgian Civil Law, Tbilisi, 2012, 121, 327 (in Georgian).
4. *Bichia M.*, The Content of the Right in the Civil Law, TSU "Law Journal", №2, 2023, 46 (Georgian).
5. *Bichia M.*, Methodological Problems of Civil Law, Tbilisi, 2023, 149, 151-152, 157 (in Georgian).
6. *Bichia M.*, The Idea of Protecting privacy from Its Origin to the Present, Revaz Gogshelidze's 65th Anniversary Collection, ed. *Khrustali V., Meparishvili G.*, Tbilisi, 2022, 454-455 (in Georgian).
7. *Bichia M.*, Legal Obligational relations, Handbook, 3rd edition, Tbilisi, 2020, 19 (in Georgian).
8. *Bichia M.*, Scope of Civil Legal Concept of Dignity, TSU "Journal of Law", №2, 2014, 11.
9. *Bichia M.*, The Danger of the Privacy "Disappearance" during a Pandemic in the Context of Globalization and the Grounds for its Legitimacy: an institutional analysis, Journal "Globalization and Business", №11, 2021, 44.
10. *Brox H., Walker W.-D.*, Allgemeiner Teil des BGB, 30. Aufl, München, 2006, 318-319.
11. *Chanturia L.*, Introduction to the General Part of Georgian Civil Law, Tbilisi, 2000, 57-58 (in Georgian).
12. *Crespo M.*, Husserl on Personal Aspects of Moral Normativity, Ethical Perspectives, 22, No. 4, 2015, 704, 707.
13. *Demirsoy N., Kirimlioglu N.*, Protection of privacy and confidentiality as a patient right: physicians' and nurses' viewpoints, Biomedical Research- India, Vol. 27, Issue 4, 2016, 1437-1438.
14. *Hübner H.*, Allgemeiner Teil des Bürgerlichen Gesetzbuches, 2. Auflage, 1996, 77.
15. *Husserl G.*, Rechtssubjekt und Rechtsperson, Archiv für die civilistische Praxis, 127. Bd., H. 2, 1927, 130-131, 133-134, 138-139, 142-143, 147, 152-154, 157, 159, 168-170, 176, 178-179, 180-181, 183, 186-187, 191, 193-194, 199, 208-209.
16. *Husserl E.*, Paris Lectures // *Husserl E.* Selected Works, Moscow, 2005, 349 (in Russian).
17. *Husserl E.*, Articles on Renewal, *Questions of Philosophy*, No. 4, 1997, 120 (in Russian).
18. *Khetsuriani J.*, Functions of Civil Law, Tbilisi, 1995, 92 (in Georgian).
19. *Kochashvili K.*, Civil Liability for the Actions of Persons Without Legally Valid Will, "Legal Methods", №7, 2023, 96-99 (in Georgian).
20. *Khubua G.*, Theory of Law, Tbilisi, 2004, 208 (in Georgian).
21. *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.
22. *Maunez E. G.,* Introduction to Law, 31st ed., 1980, 21.
23. *Moran D.*, Introduction to Phenomenology, Routledge, 2000, 4-5, 16.
24. *Pantykina M. I.*, Phenomenological Methodology: Experience in Legal Research, Yekaterinburg, 2008, 242 (in Russian).
25. *Rössler B.*, Der Wert des Privaten, Frankfurt am Main, 2001, 274.

26. *Stovba O. V.*, Temporal Ontology of Law, Dissertation Abstract, Kharkov, 2017, 15 (in Russian).
27. *Varga A. P.*, Brentano's Influence on Husserl's early notion of Intentionality, Studia Universitatis Babes-Bolyai, Philosophia, 54, no. 1-2, 2008, 44-45.
28. *Wolf E.*, Recht und Welt. Bemerkungen zu der gleichnamigen Schrift von Gerhart Husserl (Sonderdruck aus der Festschrift fur Edmund Husserl), Zeitschrift für die gesamte Staatswissenschaft/ Journal of Institutional and Theoretical Economics, Bd. 90, H. 2, 1931, 332-333, 345.
29. *Zahavi D.*, Husserl's Phenomenology, translator: *Gonashvili G.*, Tbilisi, 2016, 166 (in Georgian).
30. *Zahavi D.*, Phenomenology, Basics, 1st Edition, Routledge, 2018, 1-2.
31. <https://www.geni.com/people/Gerhart-Husserl/6000000011571359886> [02.011.2023].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8317

Zurab Dzlierishvili*

Unusual Standard Terms of Contract

The protection of contractual equality is of great importance within the private law framework, as its violation will lead to a breach of contractual fairness. To avoid such a result, civil legislation limits freedom of contract and sets a reasonable scope for participating parties, thus, taking a step towards the restoration of contractual equality and justice. As an example, we can cite a contract with standard terms.

The main prerequisite for limiting freedom of contract is content control when intervention (influence) occurs directly in the content of the contract. In case of standard terms, the intervention is aimed at limiting the content of multiple-use contracts. Therefore, the realization of freedom of contract in the same dose, as it is possible in other cases, does not take place under standard terms. The principle of private law – everything that is not prohibited by the law is allowed, is applied to standard terms in a limited manner, which reinforces the need to control the content and the scope of its existence.

The subject of the research is not the standard terms of the contract in general; rather the unusual provisions of the standard terms of the contract provided for in Article 344 of the Civil Code of Georgia (hereafter CCG), which is "negative control of inclusion in the contract" and, accordingly, the correction of the result according to which the term "by itself" would have been valid if it were not unusual.

Keywords: *standard terms of the contract; unusual provisions of the standard terms of the contract; Articles 342-344 of the Civil Code of Georgia*

I. Introduction

Article 342 of the CCG reinforces the definition of the standard terms of the contract,[1] according to which, the standard terms of the contract are pre-formed, reusable terms that one party (the offeror) sets for the other party and through which rules different from or supplementing the norms established by law must be made. Determine. [2]

* Doctor of Law, Professor of Law School at Grigol Robakidze University (affiliated), Professor of Law at the Faculty of Ivane Javakhishvili Tbilisi State University, Professor at Eastern European University, Judge of the Civil Affairs Chamber of the Supreme Court of Georgia.

1 Decision No. ას-237-2019 of May 17, 2019, of the Civil Affairs Chamber of the Supreme Court of Georgia, para. 58 (In Georgian).

2 *Sirdadze L.,* Reservation of Immediate Enforcement on the Entire Property of the Debtor in the Standard Terms of the Bank Credit Agreement, Journal of Comparative Law, 10/2022, 62; *Simonishvili N.,* Justice as a Standard for Limiting Contractual Freedom, "Journal of Law" of TSU, No. 1, Vol., 2018, 78; *Tsertsvadze L.*, in the book: *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contractual Law, Tbilisi, 2014, 203 (In Georgian).

Standard terms are mostly used by those[3] involved in civil relations, who enter into any contractual relations with contractors every day[4] and, therefore, use predefined contractual terms to facilitate this relationship.[5] This is why standard terms of contract are often referred to as contract accession terms.[6]

The standard terms of the contract are evolving daily. The proof of this is electronic contracts, which the business entities conclude with each other based on their business relationship. With such means, it is easier to conclude a contract, place an order, etc. The reservations in civil law should be used as the main regulator of a contract with a standard condition concluded by electronic means, within which the rights of the other party to the contract will be protected as much as possible.[7] The standard terms of the electronic contract are not regulated by separate articles in the Georgian legislation, and the rules of the standard terms of the CSC are used. [8]

When it comes to the determination of terms by one of the parties to the contract for the other, it is relevant to take into account the provisions of Article 325 of the Civil Code, because if the terms of the contract must be determined by the party, it is assumed that they must be determined based on justice.[9] Based on the above, to check the validity of the standard terms, it is necessary to evaluate them with the criterion of fairness.[10] Article 325 of the Civil Code prohibits dishonest and unfair contracting and establishes the rule of fair contractual relations as a whole.[11] According to the principles of European contract law, each party is obliged to act within the framework of good faith and fairness, which cannot be limited or excluded by the contract.[12]

II. Terms of Use

The scope of private autonomy, which is usually defined by law, is based on either the form of the transaction or the content of the transaction or other circumstances.[13] Within the framework of

---

3 *Zerres Th.,* Principles of the German Law on Standard Terms of Contract, <http//:www..jurawelt.com/sunise/media/mediafiles/14586/German_Standart_Terms_of_Contract> [25.07.2024].

4 *Paterson M,* Standardization of Standard – Form Contracts: Competetion and Contract Implications, William&Mary Law Review, 52, №2, (2010), 331.

5 *Kakoishvili D.,* Standard Terms of Contract, Georgian Business Law Review, Tbilisi., 2013, 68. (In Georgian)

6 *Chanturia L.* in*: Chanturia L., Zoidze T., Ninidze T., Khetsuriani J., Shengelia R. (eds.),* Commentary on the Civil Code of Georgia, Book Three, Article 342, Tbilisi, 2001, 181 (In Georgian).

7 *Kim N.S.* The Duty to Draft Reasonably and Online Contrachts, Commercial Contract Law, Transatlantic Perspectives, Cambridge University Press, 2013, 185-186; *Paal P.B.,* Internetrecht – Zivilrechtliche Grundlagen, JuS, Heft 11, Verlag C.H. Beck, München, 2010, 956.

8 Decision No. ას-812-2022 of October 5, 2022, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).

9 Decision No. ას-1-1-2016, of July 4, 2016, of the Civil Affairs Chamber of the Supreme Court of Georgia, para.43 (In Georgian).

10 *Kereselidze T.,* Control of the Content of Standard Terms in the Labor Contract, Labor Law (collection of articles) II, Tbilisi, 2013, 69 (In Georgian).

11 *Khunashvili N.,* Controlling and Limiting the Content of Standard Terms of Contract Based on Good Faith, TSU Law Journal No. 1, Tbilisi, 2013, 273 (In Georgian).

12 *Lando O.,* Is Good Faith an Over-Arching General Clause in The Principles of European Contract Law, Eoropean Review of Private Law, Kluwer law Internacional, 6-2007, 842.

13 *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 94. (In Georgian)

private law, the protection of contractual equality is of great importance, which should be expressed both in the case of individual contractual relations when resolving an issue, and in the aspect of legislative regulation. Contractual freedom is possible within the framework of the contractual order, and if it is lost from there, anarchy and lawlessness will set in civil turnover.[14] Justice binds the legislator,[15] for example, we can cite a contract drawn up with standard terms.[16]

Freedom and justice – these two principles create a logical chain, based on which, within the framework of free realization, it is possible to establish a legal relationship.[17] It serves the purpose of equality of persons.[18] Contractual justice, first of all, is based on the main essence of private autonomy: the specific private legal relationship between the parties shall be based on equality,[19] and the agreement between them shall be led by the principle of justice and reasonableness.[20] The absence of such a provision may lead to unfair consequences for the parties participating in the legal relationship,[21] since it will be inconsistent with the essence of private law – individuals participating in it have equal rights at the beginning of the private legal relationship.[22]

Standard terms have been determined[23] as one of the manifestations of limiting freedom of contract.[24] The whole essence of standard terms is their frequent use. [25] It is this practical purpose and need that constitutes the necessity of separate regulatory norms for freedom of contract in the Civil Code.[26] The standard terms of the contract in Georgia are the result of the reception of European private law. [27]

---

14 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 287 (In Georgian).

15 *Khubua G.,* Theory of Law, Tbilisi, 2004, 68 (In Georgian).

16 *Di Fabio U.,* Form und Freiheit, DNotZ, heft 5, Verlag C.H. Beck, München, 2006, 346.

17 *Jorbenadze S.,* Scope of Contractual Freedom in Civil Law, Tbilisi, 2016, 109 (In Georgian).

18 *Rödl F.,* Contractual Freedom, Contractual Justice, and Contract Law (Theory), Law&Contemporary Problems, Vol. 76 Issue 2.Sep., 2013, 59.

19 *Basedow J.,* Freedom of Contract in the European Union, European Review of Private Law, 6-2008, 906.

20 *Gelashvili I.,* Commentary on the Civil Code of Georgia, Book I, Chanturia (ed.), 2017, Article 319, Field 15 (In Georgian).

21 *Kerashvili S.,* Impact of Fundamental Rights on Contract Law, Tbilisi, 2018, 66 (In Georgian).

22 *Simonishvili N.,* Justice as a Standard for Limiting Contractual Freedom, TSU "Law Journal", No. 1, Vol., 2018, 60; *Rusiashvili G,* The Principle of Accessory on the Example of Mortgage and Surety, Journal of Comparative Law, 3/2019, 15 (In Georgian).

23 European Contracht Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules, Sellier, European Law Publishers, Munich, 2008, 527-531.

24 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 292 (In Georgian).

25 *Gruneberg Cr*., in Palandt BGB, 74. Aufl., 2015, §305, Rn.3; *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 34. Aufl, 2010, München, §4, Rn.32; *Köhler H.,* BGB Allgemainer Teil, 33. Ed. München, 2009, §16,Rn.1; *Grünewald B.,* Burgerliches Recht, 7.Aufl, 2006, München,§6, Rn.1. *Neumayer K-H.,* Contracting Subject to Standard Terms and Conditions, in International Encyclopedia of comparative Law, Volume VII, Contract in General, Chapter 12, Ed. K. Zweigert/ U. Drobing,1999, 12., BGHZ 104, 232, 236; BGHZ 98, 24, 28; BGHZ 2, 90.

26 *Chachanidze T.,* Contractual Freedom and Contractual Justice in Contemporary Contract Law, "Justice and Law", 3/2010, 26 (In Georgian).

27 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 287 (In Georgian).

The use of standard terms of the contract is one of the legal results of the development of the modern market.[28] It is used in a set of legal relationships.[29] Standard contract terms are one of the common examples of intervention in the nature of freedom of contract.[30]

In terms of consumer rights protection, in relation to standard terms, the European Union has developed[31] relevant directives for member states. [32] According to Directive 93/13/EEC (Directive on Unfair Terms in Consumer Contracts), for a standard term to not be considered invalid, it must be fair and made in good faith.[33]

Directive 93/13/EEC provides for three main mechanisms to protect consumers, a) when a term is not clearly unfair but is ambiguous/ambiguous and/or its content is suspicious, such term must always be interpreted in favor of the consumer (Article 5.1), b) unfair standard term is unconditionally invalid, it is not considered binding for the user from the moment of its conclusion. This does not apply to cases where the consumer does not request the invalidity of the condition (Article 6) and c) the consumer, who feels that he is a victim of an unfair condition, has the right to use an effective legal mechanism for protection against unfair terms.[34] "If the user requests the prohibition of further use of an unfair term, the term is considered invalid not only for this particular user but also for all other users who have concluded a contract with the supplier with the same content. "[35]

"In cases where the consumer participates, it is not the right, but rather the obligation of the court to check the validity of the standard terms on its initiative, otherwise, the main goal of the 93/13/EEC Directive – to protect the consumer as a less informed/weaker link participating in the contract – will remain unattainable. After the unfairness of a specific condition is determined, the court must assess on its initiative how much the contract can remain in force without the said condition." [36] "The burden of proof distribution standard is also noteworthy for consumer protection. According to the Directive, the supplier must prove that the disputed term is not an unfair standard term."[37]

---

28 *Rusiashvili G, Aladashvili A.,* Commentary on the Civil Code of Georgia, Book III, Chanturia (ed.), 2019, Article 342, Field 9 (In Georgian).

29 *Dzlierishvili, Z.,* Contract for Work (Theory and Practice), Tbilisi, 2016, 56 (In Georgian).

30 *Schmidt H.,* Einbeziehung von AGB im unternehmerischen Geschäftsverkehr, NJW, Heft 46, Verlag C.H. Beck, München, 2011, 3330.

31 *Maisuradze D., Sulkhanishvili E., Vashakidze G.,* European Union Private Law, Decisions and Materials, Part I, GIZ, Tbilisi, 2018, 30 (In Georgian).

32 Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, (1993) OJ L95/29; Directive 2011/83/EU Of The European Parliament and Of The Council of 25 October 2011 on consumer rights.

33 Court of Justice European Union (ECJ), Case C-415/11, Judgment of 14 March, 2013, §76; Commission of the European Communities v Kingdom of Sweden, Case C-478/99 (2002) ECLI:EU:C:2002:281, Judgment of 7 May 2002.

34 Court of Justice European Union (ECJ), Case C-137/08 (2010) ECLI:EU:C:2010:659, Judgment of 9 November, 2010, §49.

35 Court of Justice of the European Union (ECJ), Case C-472/10(2012) ECLI:EU:C:2012:242, Judgment of 26 April, 2012.

36 Court of Justice of the European Union (ECJ), Case C-397/11(2013) ECLI: EU:C:340, Judgment of 30 May, 2013, §38.

37 Court of Justice of the European Union,(ECJ), Case C-243/08, Judgment of 4 June, 2009, §28.

The supplier is not bound to the conclusion of the contract as much as a consumer[38], therefore, they can impose their own terms on the consumer.[39] This is where the supplier's economic advantage lies.[40] When offering a standard condition, fully informing the person as an indicator of good faith is also shared by the 2016 UNIDROIT PRINCIPLES, namely 2.1.20. According to the article (Surprising Terms), a condition that is of a standard type and has such a character that the other party did not reasonably expect it, has no force, unless the said condition was clearly accepted by the other party.[41]

III. Limits on Freedom of Standard Terms of the Contract

When discussing the standard terms of the contract and the limitation of freedom of the contract, we should highlight the main principles that regulate the legal institution at the legislative level: a) adherence to the principle of good faith and the legal prerequisite of nullity; b) content control; c) guarantor of consumer rights protection.

Typically, the terms specified in a standard contract are valid, though there are exceptions in particular cases. Each mechanism of protection is aimed at the realization of the rights of the contracting party, as well as at the proper conduct of practice and economic activity.[42]

When talking about the control of the content of the standard terms of the contract, we should touch upon (and at the same time, the standard terms of the contract) the three main characteristic issues: a) its purpose, b) the competition of norms concerning other legal institutions of the CCG, and c) the relationship between freedom of content and control of content.[43]

The main purpose of controlling the content of the standard terms of a contract is to protect the basic principles of private autonomy for the persons who buy services, products, etc. [44]

In case of standard terms, the intervention is aimed at limiting the content of multiple-use contracts. Therefore, the realization of freedom of contract in the same dose, as it is possible in other cases, is not found under standard terms.[45]

---

38 *Sir Markesins B., Unberath H, Jonston A.,* The German Law of Contract, Hart Publishing, Oxford and Portland, Oregon, 2006, 267; *Henrich D.,* Verbraucherschutz: Vertragsrecht im Wandel, in festschrift für Dieter Medicus zum 70. Geburstag, Köln, 1999, 200.

39 *Rühl G.,* Consumer Protection in Choice of Law, Cornell International Law Journal, Vol. 44, Issue 3, 2011, 571.

40 *Lakerbaia, T.,* European Standard of the Informed Consumer, TSU "Law Journal" No. 1, Tbilisi, 2015, 144; *Zaalishvili, V.,* Systemic Features of the Regulation of Consumer Private Legal Relations in Georgian Legislation, TSU "Law Journal", No. 1-2, issue, 2010, 56 (In Georgian).

41 UNIDROIT PRINCIPLES of International Commercial Contracts 2016, Published by the International Institute for the Unification of Private Law, (UNIDROIT), Rome, 69.

42 *Lakies T.,* AGB-Kontrolle von Vertragstrafenvereinbarungen, ArbR Akyuell, Heft 13, Verlag C.H. Beck, München 2014, Rn.313.

43 *Jorbenadze S.,* Scope of Freedom of Contract in Civil Law, Tbilisi, 2016, 189 (In Georgian).

44 *Hellwege P.,* Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre Verlag Mohr Siebeck, Tübingen, 2010, 138.

45 *Schade F.,* Wirtschaftsprivatrecht: Grundlagen des bürgerlichen Rechts sowie des Handels- und Wirtschaftsrechts, 2. Auflage, Verlag A. Kohlhammer GmbH, Stuttgart, 2009, Rn.178-181.

The definition of the standard terms of the contract has a great practical purpose. It establishes the scope of the parties' freedom of action, the purpose of which is to entail contractual terms based on the principle of good faith and autonomy of will in standard contracts.[46]

IV. Scope of application of Article 344 of the Civil Code

According to Article 344 of the CCG, provisions of the standard terms, which are so unusual in form that the other party could not have taken them into account, [47] do not become a part of the contract.[48] (A similar arrangement is provided by article §305c 1 of the German Civil Code.)[49]

According to the provisions of Article 344 of the CCG, a mechanism is created to protect the offeror's counterparty from unusual and unexpected terms – the so-called "prerequisite for negative inclusion" – the condition must not be unusual, otherwise it cannot form part of the contract. It appears as one of the demonstrations of the principle of clarity operating in the law of standard terms.[50] This rule applies equally to the standard terms imposed on both the consumer and the entrepreneur as the entrepreneur does not have an optional obligation to read the standard terms in full should the negotiation in this regard emerge.[51]

Checking the circumstances, whether the standard condition is present at all (Article 342 of the CCG) and, in case of confirmation, whether it becomes a constituent part of the contract (Article 343 of the CCG), systematically precedes checking the provision of Article 344 of the CCG. According to Article 344, control is a "negative control of inclusion in a contract" and therefore a correction of the result under which the condition would have been valid "in itself" had it not been unusual.[52]

---

46 Sir *Markensinis B., Unberath H., Jonston A.,* The German Law of Contract A Comparative Treatise, Hart Publishing, Oxford and Portland, Oregon, 2006, 170; *Krampe C.,* Auslegung und Inhaltskontrolle Inhaltskontrolle im nationalen und europäischen Privatrecht, Schriften zum europäischen und internationalen Privatrecht Schriften zum europäischen und internationalen Privat-, Bank- und Wirtschaftsrecht, Band 33, *Reisenhuber K., Karakostas I.K. (Hrsg.),* De Gruyter Rechtswissenschaften Verlags- GmbH, Berlin, 2009, 22.

47 *Sirdadze L.,* Reservation of Immediate Enforcement on the Entire Property of the Debtor in the Standard Terms of the Bank Credit Agreement, Journal of Comparative Law, 10/2022, 65. *Tsertsvadze L.*, in the book: Dzlierishvili, Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L., Contractual Law, Tbilisi, 2014, 208-209 (In Georgian).

48 Decision No. ას-712-682-2016, of February 8, 2017, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).

49 *Becker J,* in Beck OK BGB, 45. Aufl, 2016, §305c, Rn.2; *Bazedow J,* MüKo BGB, 7. Aufl., 2016, §305c, Rn.11; *Looscheldes D.,* Schuldrecht AT, 14. Aufl., 2016, §16Rn. 334; *Gruneberg Cr*., in Palandt BGB, 74. Aufl., 2015, §305, Rn.5; *Lindacher W., Hau W.*, in Wolf/Lindacher/Pfeiffer AGB – Recht, 6.Aufl, 2013, §305c, Rn.4; *Berger Kl.-P.*, in Prütting/Wegen/Weinreich, BGB Komm., 5.Aufl. 2010, §305c, Rn.18; BGHZ, Urteil vom 08.07.2020 – VIII ZR 163/18, MDR 2020, 1051; BGHZ, Urteil vom 05.10. 2016 –VIII ZR222/15, NJW 2017, 1596; BGH, NJW, 2003, S. 1237; BGH, NJW 2010, 1131., BGH, NJW 2001, S. 2165;

50 *Kakoishvili D.,* Standard Terms of Contract, Georgian Business Law Review, Tbilisi, 2013, 79 (In Georgian).

51 *Rusiashvili G, Aladashvili A.,* Commentary on the Civil Code of Georgia, Book III, Chanturia (ed.), 2019, Article 344, Field 2 (In Georgian).

52 Decision No. ას-812-2022 of October 5, 2022, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).

Those provisions of standard terms that unexpectedly impose additional obligations on the other party to the contract or substantially change the agreed performance and the party to the contract could not have taken them into account are deemed unusual.[53]

"Due to unfoundedness, the cassation chamber did not share the cassator's opinion about the invalidity of the clause of the contract, as an unusual standard provision provided for in Article 344 of the CCG, as, in this case, it is not a credit agreement, which, as a rule, depending on the specifics of the bank's activities, may provide for pre-established, multiple-use provisions, but there is a strictly individualized, negotiated provision of the rental agreement, which fully meets the general conditions for concluding the agreement (transaction).[54]

Determining what constitutes an unusual standard contract term requires a comparison with the "usual" regulation, which raises the question of whose perspective should be taken to determine what constitutes a "usual" rule. When determining the content of the expression of will, it is not the offeror's but the receiver's point of view that is decisive. [55] Importance is not granted to the subjective attitude of the specific other party but to the expectations formed based on the principle of good faith. For the implementation of Article 344 of the CCG, the unusual provision of the standard condition of the contract must be unexpected at the same time, that is, it must have the so-called "coming out of the blue" effect. The circumstances under which a separate contract entered into force shall also be considered, including the conduct of the offeror. [56] In addition, the circumstances under which these provisions were included in the contract, and the mutual interests of the parties and others should be taken into account.[57]

"In the case at hand, it was established that the plaintiff (bank) explained to the defendant (client) by e-mail that in order to "take care" of them, they were offering a three-month "grace period," which would come into effect if the defendant did not reject the offer by going to the relevant link. Based on the standard of the average person, it is logical that the content of the SMS, according to which the bank "in order to take care of the customer, offered the customer a grace period..." would have created a positive expectation regarding the grace period. Taking into account the mentioned circumstances, new terms of the contract, according to which the defendant extended the period of fulfillment of the obligation by more than three months, and at the same time significantly increased the amount of the obligation, should be evaluated as an unusual condition provided for by Article 344 of the CCG, which unexpectedly imposed an additional obligation on the defendant. Thus, the claimant's "loan product deferment terms", as an unusual standard provision offered by the bank to the defendant, according to Article 344 of the CCG, does not become a constituent part of the contract and is not valid, unless the offeror dispels the effect of surprise through a qualified reference. For the

---

53 *Chanturia L.,* in: Chanturia/Zoidze/Ninidze/Khetsuriani/Shengelia (ed.) Commentary on the Civil Code of Georgia, Book Three, Article 344, Tbilisi, 2001, 190 (In Georgian).

54 Decision No. ას-738-700-2015 of December 18, 2015, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).

55 *Becker J,* in Beck OK BGB, 45. Aufl, 2016, §305c, Rn.14.

56 *Rusiashvili G., Aladashvili A.,* Commentary on the Civil Code of Georgia, Book III, *Chanturia L. (ed.),* 2019, Article 344, Field 18 (In Georgian).

57 Decision No. ას-1585-2022, of June 12, 2023, of the Supreme Court of Georgia (In Georgian).

offeror to negate the surprise effect of the standard term, it is necessary to intelligibly indicate and inform the defendant about the unusual provision of the standard term of the contract. The court noted that the plaintiff's burden of proof was to prove the fact that they fully fulfilled their obligation to inform the defendant about the "terms of deferment of credit products" and that consent to the said condition was the borrower's informed will, however, he failed to submit such proof to the court. The plaintiff (bank) failed to confirm that the changes made in the contract and, accordingly, in the payment schedule, which increased the amount of the obligation and the period of obligation fulfillment, were available and/or explained to the defendant (client) in a special manner. In the absence of such proof, the "terms of deferment of credit products", on the basis of which the defendant's liability was increased, are invalid according to Articles 344 and 346 of the CCG. [58]

The offeror has the opportunity to negate the surprise effect of the standard condition. For this, first of all, it is necessary to explain the regulatory content of the condition or unequivocally describe the statutory or typical contractual alternative regulation. Only in this case, the counterparty can consciously decide whether the condition is worth including in the contract or not. The moment of surprise does not occur when the parties have discussed the unusual provision in detail prior to concluding the contract. The offeror and in no case the other party to the contract has the obligation of clear reference and explanation.

In one of the cases, the Supreme Court of Georgia made an important clarification on the unusual standard term in the suretyship agreement. The cassator's main cassation claim was related to the invalidity of the application of Article 344 of the CCG by the appellate court in the case at hand, in particular, the appellate chamber considered that in this case, the knowledge of the legal difference between "subsidiary surety" and "solidary surety" is beyond the knowledge of a non-lawyer, an average person. And within the scope of "reasonable judgment" and the ordinary reasonable consumer it is less likely to know the essential difference between these two legal relations. Accordingly, the articles of the suretyship contract, which establish the joint suretyship of the guarantor, are unusual terms of the standard contract, since on their basis the guarantor's responsibility is expanded in the sense that the bank is equipped with the authority to satisfy the demand directly from the guarantor without taking any enforcement measures against the main borrower, which is unexpected for the guarantor. Concurrently, the suretyship agreement is in fine print, and the provisions specified in those articles of the agreement, which stipulate the joint liability of the guarantors and the authority of the bank to meet the demand directly from the guarantors, even without attempting to enforce it against the borrower, are not bolded or presented differently in any way, which undoubtedly complicates its perception by the party to the contract and strengthens the position of the appellant surety that they were not informed about the joint suretyship. The cassation chamber explained that the problem of protection of fundamental rights and the protection of human beings as the most important value is relevant in those contractual relations that carry a special risk towards one of the parties to the contract. The most important thing in the contract of suretyship is the will expressed by the guarantor that they undertake an obligation to fulfill the borrower's obligation to the creditor. In the case of

[58] Decision No. ას-1029-2023 of October 13, 2023, of the Supreme Court of Georgia (In Georgian).

suretyship, it refers to the obligation of performance unilaterally assumed by the guarantor, separate from the main obligations. The guarantor fulfills the personal obligation, after which the main claim is transferred to him according to Article 905 of the Civil Code, therefore, the guarantor and the main debtor cannot be considered as joint and several debtors. The cassation chamber noted that, based on its content, the suretyship agreement is unlikely to bring any kind of material or immaterial benefit to the guarantor. It is related to such an important obligation in case of breach, as fulfillment on behalf of the debtor. The cassation chamber pointed out that for the emergence of any contractual relationship, it is necessary to show the relevant true will by a person. The Court explained that with respect to the limiting freedom of contract, standard terms were defined as one of the manifestations. The definition of the standard terms of the contract has a great practical purpose. Since the definition is always derived from a subjective view, its legal basis shall stem from an "objective definition". This is not the individual views and representations of the parties on the issue; rather the perception based on the objective circumstances established for the contractual relationship. The court shall build from the "objective definition" when considering the cases. This kind of definition contributes to the matter of defining standard terms in each specific case, and at the same time, it establishes the scope of freedom of contract for the parties, the purpose of which is to entail contractual terms based on the principles of good faith and autonomy of will in standard contracts. In the case at hand, the cassation chamber considered it appropriate to refer to the provisions of Article 344 of the CCG, which appears to us as one of the illustrations of the principle of clarity in the law of standard terms. The cassation chamber explained that under Article 344 of the CCG, control means a "negative control of inclusion in the contract" and therefore a correction of the result under which the condition would have been valid "in itself" if it had not been unusual. The Chamber of Cassation noted that the exercise of the right to a fair trial provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms largely depends on and implies the adoption of a reasoned decision by the court, based on the comparison of evidence. The role of the burden of proof is particularly evident in civil proceedings, where the autonomy of the will of the parties is of crucial importance. The party's request may be well-founded, but the party cannot make its favorable decision if it cannot prove favorable circumstances as per the procedure established by procedural law. Therefore, one of the important factors is the correct distribution of the burden of stating the facts and the burden of proving the facts between the disputing parties. The Chamber of Cassation pointed out that according to the first part of Article 134 of the CCG, documents, business, and personal letters containing information about the circumstances important to the case are written evidence. The Court highlighted the surety agreement placed in the case file, all five pages of which are signed by the guarantors, the subject of the agreement is clearly defined, as well as the requirement secured by the surety and the guarantor's liability (solidarity surety). Hence, the plaintiff's claim that there is no reason to invalidate the disputable clauses of the suretyship agreement as unusual standard terms of the suretyship agreement under Article 344 of the Civil Code was shared.[59]

[59] Decision No. ას-372-2023 of October 6, 2023 of the Supreme Court of Georgia (In Georgian).

V. Legal Consequences of Unusual Provisions of the Standard Terms

Where an unusual and unexpected standard term is not made a constituent part of the contract, the following legal consequence arises: the contract is considered concluded without this condition.[60] The regulatory vacuum caused by not including an unusual standard condition in the contract should be filled by the dispositional norms of the law. The rest of the agreement remains in force.[61]

The standard condition left outside the contract is replaced by the dispositional norms of the law. The negative control of the inclusion of the condition in the contract (Article 344 of the CCG) and the control of the content (Articles 346-348 of the Civil Code) aim to protect the contracting party from the unilateral determination of the content of the contract by the offeror. According to the unilaterally formulated term, only the offeror is responsible for the performance of the contract. They carry the risk that the condition formulated by them will not be able to withstand the scrutiny of the judge (as per Articles 344, 346-348 of the CCG), and the offeror should not be exempted from this risk. The offeror cannot go beyond the framework of the settlement of interests proposed by the legislator. However, on the other hand, the judge is not the "architect of the contract" who, under the pretext of the "unusuality" of the standard clause, should give it a new look that is in line with the requirements of the law. In this way, it is not allowed to reduce the validity of an unusual condition, i.e. to reduce the impermissible content of the condition to an acceptable level and keep it in this form.[62]

In one of the cases, the Chamber of Cassation made an important interpretation regarding the unusual provisions of the standard terms in the insurance contract, in particular, in the case at hand, it is not proven that information about the disputed provision of the contract and its legal consequences was available and/or explained to the counterparty. In the absence of such an assertion, the provisions of the general insurance policy, which establishes the no-fault liability of the defendant insurer, are unusual standard terms of the contract since, on its basis, the liability of the insured is expanded in the sense that the insurance company is equipped with the authority to demand reimbursement of the amount paid by it in favor of the beneficiary, against the third (culpable) person as per the subrogation rule (Article 832 of the Civil Code) without submitting a request, to be satisfied directly from the insured person regardless of their guilt, which is unexpected for the insured person, therefore, according to Article 344 of the CCG, this condition cannot be considered as a constituent part of the contract, which means that there is no factual composition giving rise to no-fault liability based on the contract. [63]

---

60 BGH, NJW 2001, S. 292; BGH, NJW, 2000, S. 1110; BGH, NJW, 1998, 2284;

61 *Chanturia L.,* Chanturia/Zoidze/Ninidze/Khetsuriani/Shengelia (ed.) Commentary on the Civil Code of Georgia, Book Three, Article 344, Tbilisi, 2001, 192 (In Georgian).

62 *Rusiashvili G., Aladashvili A.,* Commentary on the Civil Code of Georgia, Book III, Chanturia (ed.), 2019, Article 344, Field 31 (In Georgian).

63 Decision No. ას-812-2022 of October 5, 2022, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).

VI. Conclusion

Standard terms are predominantly used by those involved in civil relations, who enter into many contractual relations with contractors on a daily basis and, therefore, use predefined contractual terms to facilitate this relationship. Standard contract terms are one common example of intervention with the nature of freedom of contract.

With regards to the determination of terms by one of the parties to a contract for the other, it is relevant to take into account the provisions of Article 325 of the CCG as if the terms of the contract must be determined by the party, it is assumed that they must be determined based on fairness. Hence, to check the validity of the standard terms, it is necessary to evaluate them with the criterion of fairness. Article 325 of the Civil Code prohibits dishonest and unfair contracting and establishes the rule of fair contractual relations as a whole.

The reservations in civil law should be used as the primary regulator of a contract with a standard condition concluded by electronic means, within which the rights of the other party to the contract will be completely protected. The standard terms of the electronic contract are not regulated by separate provisions in Georgian legislation, and the rules for the standard terms of the CCG are applied.

When talking about the control of the content of the standard terms of the contract, we should touch upon three main characteristic issues: a) its purpose, b) the competition of norms with respect to other legal institutions of the CCG, and c) the correlation between freedom of content and control of content.

In the case of standard terms, the intervention is aimed at limiting the content of multiple-use contracts. Therefore, the realization of the freedom of contract in the same dose, as it is possible in other cases, does not take place under standard terms. Defining the standard terms of a contract has a great practical purpose. It establishes the scope of freedom of action of parties. Its purpose is to entail contractual terms based on the principle of good faith and autonomy of will in standard contracts.

According to the provisions of Article 344 of the CCG, a mechanism is created to protect the offeror's counterparty from unusual and unexpected terms – the so-called prerequisite for negative inclusion – the condition must not be unusual, otherwise it shall not become a part of the contract. It appears as one of the expressions of the principle of clarity operating in the law of standard terms. This rule applies equally to the standard terms imposed on both the consumer and the entrepreneur as an entrepreneur does not have an optional obligation to read the standard terms in full or to negotiate in this regard.

Checking the circumstances, whether the standard term is present at all (Article 342 of the Civil Code) and, in case of confirmation, whether it becomes a constituent part of the contract (Article 343 of the CCG), systematically precedes checking the provisions of Article 344 of the CCG. According to Article 344 of the CCG, control is a “negative control of inclusion in the contract” and, therefore, a correction of the result under which the condition would have been valid “in itself” had it not been unusual.

Determining what constitutes an unusual standard contract term requires a comparison with the “usual” regulation, which raises the question of whose perspective should be used to determine what

constitutes a "usual" rule. When determining the content of the expression of will, it is not the offeror's but the receiver's point of view that is decisive. Those provisions of the standard terms and conditions that suddenly impose additional obligations on the other party to the contract or substantially change the agreed performance and the party to the contract could not take them into account are considered unusual.

In the event that an unusual and unexpected standard term is not made a constituent part of the contract, the following legal consequence arises: the contract is deemed concluded without this condition. The regulatory vacuum caused by not including an unusual standard term in the contract should be filled by the dispositional norms of the law. The rest of the agreement remains in effect.

The standard term left outside the contract is replaced by the dispositional norms of the law. The negative control of the inclusion of the term in the contract (Article 344 of the CCG) and the control of the content (Articles 346-348 of the CCG) aim to protect the contracting party from the unilateral determination of the content of the contract by the offeror. According to the unilaterally formulated condition, only the offeror is responsible for the performance of the contract. He carries the risk that the condition formulated by him will not be able to withstand the scrutiny of the judge (as per Articles 344, 346-348 of the CCG), and the offeror should not be exempted from this risk.

Bibliography:

1. Civil Code of Georgia, 26/06/1997.
2. 2011/83/EU Of The European Parliament and of The Council of 25 October 2011 on consumer rigts.
3. *Basedow J.,* Freedom of Contract in the European Union, European Review of Private Law, 6-2008, 906.
4. *Bazedow J.,* MüKo BGB, 7. Aufl., 2016, §305c, Rn.11
5. Becker J, in Beck OK BGB, 45.Aufl, 2016, §305c, Rn.2.
6. *Berger Kl.-P.,* in Prütting/Wegen/Weinreich, BGB Komm., 5.Aufl. 2010, §305c, Rn.18.
7. *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 34. Aufl, 2010, München, §4, Rn.32.
8. *Chachanidze T.,* Contractual Freedom and Contractual Justice in Contemporary Contract Law, "Justice and Law", 3/2010, 26 (In Georgian).
9. *Chanturia L.,* Chanturia/Zoidze/Ninidze/Khetsuriani/Shengelia (ed.) Commentary on the Civil Code of Georgia, Book Three, Article 342, Tbilisi, 2001, 181 (In Georgian).
10. *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 94 (In Georgian).
11. *Di Fabio U.,* Form und Freiheit, DNotZ, heft 5, Verlag C.H. Beck, München, 2006, 346.
12. *Dzlierishvili, Z.,* Contract for Work (Theory and Practice), Tbilisi, 2016, 56 (In Georgian).
13. European Contracht Law, Materials for a Common Frame of Reference: Terminology, Cuiding Principles, Model Rules, Sellier, European Law Publishers, Munich, 2008, 527-531.
14. *Gelashvili I.,* Commentary on the Civil Code of Georgia, Book I, *Chanturia L. (ed.),* 2017, Article 319, Field 15 (In Georgian).
15. *Gruneberg Cr.,* in Palandt BGB, 74. Aufl., 2015, §305, Rn.3.
16. *Grünewald B.,* Burgerliches Recht, 7.Aufl, 2006, München, §6, Rn.1
17. *Hellwege P.,* Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre Verlag Mohr Siebeck, Tübingen, 2010, 138.

18. Henrich D., Verbraucherschutz: Vertragsrecht im Wandel, in festschrift für Dieter Medicus zum 70. Geburstag, Köln, 1999, 200.
19. *Jorbenadze S.,* Scope of Contractual Freedom in Civil Law, Tbilisi, 2016, 109 (In Georgian).
20. *Kakoishvili D.,* Standard Terms of Contract, Georgian Business Law Review, Tbilisi, 2013, 68 (In Georgian).
21. *Kerashvili S.,* Impact of Fundamental Rights on Contract Law, Tbilisi, 2018, 66 (In Georgian).
22. *Kereselidze T.,* Control of the Content of Standard Terms in the Labor Contract, Labor Law (collection of articles) II, Tbilisi, 2013, 69 (In Georgian).
23. Khubua G., Theory of Law, Tbilisi, 2004, 68 (In Georgian).
24. *Khunashvili N.,* Controlling and Limiting the Content of Standard Terms of Contract Based on Good Faith, TSU Law Journal No. 1, Tbilisi, 2013, 273 (In Georgian).
25. Kim S.N. The Duty to Draft Reasonably and Online Contracts, Commercial Contract Law: Transatlantic Perspectives, Cambridge University Press, 2013, 185-186.
26. *Köhler H.,* BGB Allgemainer Teil, 33. Ed. München, 2009, §16, Rn.1.
27. *Krampe C.,* Auslegung und Inhaltskontrolle Inhaltskontrolle im nationalen und europäischen Privatrecht, Schriften zum europäischen und internationalen Privatrecht Schriften zum europäischen und internationalen Privat-, Bank- und Wirtschaftsrecht, Band 33, *Reisenhuber K.,Karakostas I.K. (Hrsg.),* De Gruyter Rechtswissenschaften Verlags- GmbH, Berlin, 2009, 22.
28. *Lakerbaia T.,* European Standard of the Informed Consumer, TSU "Law Journal" No. 1, Tbilisi, 2015, 144.
29. *Lakies T.,* AGB-Kontrolle von Vertragstrafenvereinbarungen, ArbR Akyuell, Heft 13, Verlag C.H. Beck, München 2014, Rn.313.
30. *Lando O.,* Is Good Faith an Over-Arching General Clause in The Principles of European Contract Law, Eoropean Review of Private Law, Kluwer law Internacional, 6-2007, 842.
31. *Lindacher W., Hau W.* in Wolf/Lindacher/Pfeiffer AGB – Recht, 6.Aufl, 2013, §305c, Rn.4.
32. Looscheldes D., Schuldrecht AT, 14. Aufl., 2016, §16Rn. 334.
33. *Maisuradze D., Sulkhanishvili E., Vashakidze G.,* European Union Private Law, Decisions and Materials, Part I, GIZ, Tbilisi, 2018, 30 (In Georgian).
34. *Neumayer K-H.,* Contracting Subject to Standard Terms and Conditions, in International Encyclopedia of Comparative Law, Volume VII, Contract in General, Chapter 12, Ed. K. Zweigert/ U.Drobing,1999, 12.,
35. *Paal P.B.,* Internetrecht – Zivilrechtliche Grundlagen, JuS, Heft 11, Verlag C.H. Beck, München, 2010, 956.
36. Paterson M., Standardization of Standard – Form Contracts: Competition and Contract Implications, William&Mary Law Review, 52, №2, (2010)331.
37. *Rödl F.,* Contractual Freedom, Contractual Justice, and Contract Law (Theory), Law&Contemporary Problems, Vol. 76 Issue 2.Sep., 2013, 59
38. *Rühl G.,* Consumer Protection in Choice of Law, Cornell International Law Journal, Vol. 44, Issue 3, 2011, 571.
39. *Rusiashvili G., Aladashvili A.,* Commentary on the Civil Code of Georgia, Book III, Chanturia (ed.), 2019, Article 342, Field 9 (In Georgian).
40. *Rusiashvili G.,* The Principle of Accessory on the Example of Mortgage and Surety, Journal of Comparative Law, 3/2019, 15 (In Georgian).

41. *Schade F.,* Wirtschaftsprivatrecht: Grundlagen des bürgerlichen Rechts sowie des Handels- und Wirtschaftsrechts, 2. Auflage, Verlag A. Kohlhammer GmbH, Stuttgart, 2009, Rn. 178-181.
42. *Schmidt H.,* Einbeziehung von AGB im unternehmerischen Geschäftsverkehr, NJW, Heft 46, Verlag C.H. Beck, München, 2011, 3330.
43. *Simonishvili N.,* Justice as a Standard for Limiting Contractual Freedom, "Journal of Law" of TSU, No. 1, Vol., 2018, 78 (In Georgian).
44. *Sir Markesins B., Unberath H, Jonston A.,* The German Law of Contract, Hart Publishing, Oxford and Portland, Oregon, 2006, 267.
45. *Sirdadze L.,* Reservation of Immediate Enforcement on the Entire Property of the Debtor in the Standard Terms of the Bank Credit Agreement, Journal of Comparative Law, 10/2022, 62 (In Georgian).
46. *Tsertsvadze L.* in: *Dzlierishvili, Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contractual Law, Tbilisi, 2014, 203 (In Georgian).
47. UNIDROIT, PRINCIPLES of International Commercial Contracts 2016, Published by the Internacional Institute for the Unification of Private Law, (UNIDROIT), Rome, 69.
48. *Zaalishvili V.,* Systemic Features of the Regulation of Consumer Private Legal Relations in Georgian Legislation, TSU "Law Journal", No. 1-2, issue, 2010, 56 (In Georgian).
49. *Zerres Th.,* Principles of the German Law on Standard Terms of Contract, <http//: www..jurawelt.com/sunise/media/mediafiles/14586/German_Standart_ Terms_of_Contract> [25.08.2024].
50. *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 287 (In Georgian).
51. Decision No. ას-1029-2023 of October 13, 2023, of the Supreme Court of Georgia (In Georgian).
52. Decision No. ას-372-2023 of October 6, 2023 of the Supreme Court of Georgia (In Georgian).
53. Decision No. ას-1585-2022, of June 12, 2023, of the Supreme Court of Georgia (In Georgian).
54. Decision No. ას-812-2022 of October 5, 2022, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).
55. Decision No. ას-237-2019 of May 17, 2019, of the Civil Affairs Chamber of the Supreme Court of Georgia, para. 58 (In Georgian).
56. Decision No. ას-712-682-2016, of February 8, 2017, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).
57. Decision No. ას-1-1-2016, of July 4, 2016, of the Civil Affairs Chamber of the Supreme Court of Georgia, para.43 (In Georgian).
58. Decision No. ას-738-700-2015 of December 18, 2015, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).
59. Court of Justice European Union (ECJ), Case C-415/11, Judgment of 14 March, 2013, §76; Commission of the European Communities v Kingdom of Sweden, Case C-478/99 (2002) ECLI:EU:C:2002:281, Judgment of 7 May 2002.
60. Court of Justice European Union (ECJ), Case C-137/08 (2010) ECLI:EU:C:2010:659, Judgment of 9 November, 2010, §49.
61. Court of Justice European Union (ECJ), Case C-472/10 (2012) ECLI:EU:C:2012:242, Judgment of 26 April, 2012.

62. Court of Justice European Union (ECJ), Case C-397/11(2013) ECLI: EU:C:340, Judgment of 30 May, 2013, §38.
63. Court of Justice European Union,(ECJ), Case C-243/08, Judgment of 4 June, 2009, §28.
64. BGHZ, Urteil vom 08.07.2020 – VIII ZR 163/18, MDR 2020, 1051; BGHZ, Urteil vom 05.10. 2016 – VIII ZR222/15, NJW 2017, 1596; BGH, NJW, 2003, S. 1237; BGH, NJW 2010, 1131., BGH, NJW 2001, S. 2165;BGH, NJW 2001, S. 292; BGH, NJW, 2000, S. 1110; BGH, NJW, 1998, S. 2284;BGHZ 104, 232, 236; BGHZ 98, 24, 28; BGHZ 2, 90.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8318

Tamar Chitoshvili*

Grounds for Termination of the Apartment Rental Agreement (Comparative Study)

The paper delves into the intricacies of apartment rental agreements, the freedom to determine their form and content, and the practical issues related to it, which may arise within the context of freedom of contract. The paper also examines the rights and obligations of the parties to the agreement, which mainly entail the basis for determining, reducing, increasing, the amount of rent, and terminating the contract. Relevant judicial practice analysis is provided.

Based on a comparative study, opinions and recommendations are expressed on the role of the state in regulating and controlling the scope of apartment rental and changes in it, which will guarantee the protection of the rights of the parties, both landlords and tenants, and therefore the stability of apartment rental agreements. Conclusions were made on the need for state intervention, its form, and scope, which will help to resolve the relations and issues arising from the apartment rental. This objective can be met by perfecting the legislation, demonstrated through commentary on legal norms that align with practice, and by implementing specific amendments.

The comments and opinions expressed in the paper will be of use to both practicing and non-practicing lawyers, students, and all other stakeholders.

Keywords: *apartment rental, contract, rent, landlord, tenant*

1. Introduction

"Each country in the modern world is involved in the race called economic development in its way. Every country, including Georgia, fights in its way to win first place in this race, and everyone has their own methods of fighting. In order to advance in the said marathon, it seems that the Georgian legislator chose to protect such a component of economic development at the legislative level as civil circulation. Civil circulation, it can be said, is a set of transactions, by virtue of which the objects of civil circulation are circulated among the participants (subjects). Civil circulation includes both onerous (e.g., purchase) and gratuitous (e.g. a gift) transactions, under which this or that property can be transferred to a person, both with the right of ownership and ownership."[1] Civil circulation based on the proper legislation and practice is also a guarantee of a strong economy. That is why it is important to regulate the real estate and facts of apartment rental, especially active today, and the legal relations arising from them based on the correct legal framework.

---

* Professor at Iakob Gogebashvili Telavi State University; Ivane Javakhishvili Tbilisi State University (invited lecturer); Professor of SDASU; Professor of GIU.

1 *Kitia R.,* Stability, Simplicity, Inexpensiveness, and Conscientious Acquisition of Real Estate Ownership of Civil Circulation, "Private Law Review", 2021-2022, #3-4, 73 (In Georgian).

The social and economic events developed today, both inside and outside the country, have made the use of living space and the relations stemming from it an important and problematic issue. The problems that existed between apartment users (owners and non-owners) appeared even more acute for both lessors and lessees.

Problems arising in practice, which concern the regulation of legal relations, may become the basis for legislative changes. Legally sound legislation provides even more opportunities for the parties to correctly fulfill the obligations that they undertook under the contract.

It is the obligation of the state to create legislation equally adapted to the interests of the subjects, and the obligation of the subjects is to approach implementation in good faith. Finally, fairness in law is the main and necessary thing. Law is a "space" created by a set of norms, which establishes the rules of behavior, and fairness is an evaluative category, which in its general sense determines the "quality" of the law and of the behavior of its executors. Legislation should equally "take care" of the rights of both landlords and tenants and protect their interests.

People need to have housing conditions. "The state is not directly obligated to build residential apartments for the entire population, let alone provide them free of charge, however, at the theoretical and legal level, it is obligated to protect and supervise the protection and realization of the right to housing. The relationship and rights of the apartment owner and the resident are especially important[2]."

In the work, the relations of the temporary users of the apartment are discussed using the comparative-research method.

In legal relations, the rights and duties of one subject do not exist independently, and they are always considered in direct or indirect connection with the rights and duties of the other subject, which in itself is a guarantee of both limitation and protection of the legal rights and duties of the subjects.[3] Therefore, in the process of implementing the legislation adopted based on the principle of fairness, the protection of the principles of good faith and fairness is a special obligation for the subjects of private legal relations and directly for the parties to the contract.

Considering this, the rights and duties regulated by the dispositional norms, which are related to the grounds and consequences of the termination of the apartment rental agreement, will be discussed in detail by evaluating the circumstances and not by the literal meaning of the norm.

Thus, the work aims to outline the practical problems characteristic of existing relations based on the rental agreement, and the legal ways of solving them based on its analysis.

2. Legal Nature of the Rental Contract

A rental agreement is an opportunity to use someone else's property, which ensures the filling of the deficit in people's property opportunities and the satisfaction of demands. In this regard, there is

---

2 *Chitoshvili T.,* 2023, Legal Order of Some Issues in the Apartment Rental Agreement (Georgian-German study), published Besarion Zoidze Jubilee Collection 70, University Publishing, 2023, 225 (In Georgian).

3 *Chitoshvili T.,* Content and Types of Obligations Derived from the Relations in the Law of Obligations (General Characterization) Unjust Enrichment (Main Issues), Tbilisi, "Bona Kausa" Ave., 2015, 11 (In Georgian.)

much in common with lease, finance lease, and also contracts of lending, which are contracts for the use of someone else's property and at the same time onerous, except for the contract of lending. These agreements have a lot in common. Importantly, there is even more in common with a lease agreement. Rent norms also apply to lease relationships. Often, these two agreements are confused in practice. Despite the great similarities, it is not allowed to equate them, since the purpose of the rental agreement is only consumption, the use of the thing without receiving income, and the purpose of using leased movable-immovable property is production as a source of income and the main means of existence. [4] Also, a way to accumulate capital.

As per the opinion expressed in the doctrine based on the analysis of the German legislation, the content of the contract is preferred over the title. In the rental agreements, they give more importance to the apartment rental contract. "Article 535 of the German Civil Code applies to all types of rental agreements and also to sub-rental agreements. In addition to the lease agreement as a special form of rental. To determine the legal nature of the contract, the parties do not need to choose the name of the contract. This will mainly be determined from the content of the contract. However, the chosen name indicates what the parties wanted to achieve[5]."

Despite the essential similarity of the lease and rental agreements, I believe that there should be no confusion, and, in addition to the content, the title should specify the desired type of agreement that the parties have decided to conclude. This will prevent the ambiguity and ambiguous nature of the content, as well as the expected moments of controversy between the parties.

There is a certain relationship between the rental agreement and the usufruct as a right of sale. In this regard, the opinion in the doctrine is interesting, namely: "The main difference between usufruct and rent is that usufruct, as a right, is directly related to the thing, and the usufructuary has nothing to do with the owner who is left without the right to use." During the existence of the usufruct, there is no obligation between them, except for a negative obligation, according to which the owner without the right to use is obliged to respect the usufruct. In contrast, the lessee has no right directly related to the thing, although he has the right to ask the lessor for permission to use the thing properly. Thus, a tenancy is not independent like a right of sale, and the lessee is dependent on the other party to the contract.[6]

There is a lot of similarity between the tenancy agreement and other agreements, such as finance leasing, leasing, and a contract for performing work. A detailed discussion (depending on the format of the article) is not the purpose of this paper. [7]

---

4 *Chitoshvili T.,* Commentary on Article 581 of the Civil Code. Commentary on the Civil Code of Georgia, book four, volume one, Tbilisi, "Samartali" Publishing, 2001, 161 (In Georgian).

5 Bürgerliche gesetzbuch, Kommentar. Herausgegeben von Prof. Dr.Dr. h.c. Hanns Prütting; Prof. Dr Gerhard Wegen; Gerd Weinreich-Vorsitzender Richter am OLG Oldenburg a. D. 12 Auflage. Luchterhand verlag 2017, 992.

6 *Zarandia T., Bostoghanashvili D.,* Usufruct in Roman and Modern Georgian Law. Published Besarion Zoidze Jubilee Collection 70, scientific editors: Prof. Lado Chanturia, Prof. Tamar Zarandia, University Publishing, 2023, 94-95 (In Georgian).

7 On the similarity of the contract of rent to other types of agreements see: *Chitoshvili T.,* Legal Order of Some Issues in the Apartment Rental Agreement (Georgian-German study), published Besarion Zoidze Jubilee Collection 70, ed.: Prof. Lado Chanturia, University Publishing, 2023, 223 (In Georgian).

3. Consequences of Mutual Influence of the Form of the Apartment Rental Agreement and Contractual Freedom

The private legal relationship and the content of each contract consists of rights and obligations, which acquire binding force for the parties that made it. Which is somewhat coercive and affects the fulfillment of obligations. "Coercion follows a breach of obligation. Coercion is aimed at the consequences caused by the violation of the obligation and, obviously, from this point of view, it is connected with the obligation".[8]

In law, the principle of freedom, which is understood within the scope of the protection of the law, is of special importance. Private law, in contrast to public law, "is a law granting more freedom, and restrictions are also an exception."[9]

In private legal relations, freedom is more defined in the field of contractual law and is reflected in the form and content. "The freedom of content, freedom to conclude a contract, freedom to choose the form, freedom to choose the type of contract, and the permission of the state when concluding a contract can be considered as separate aspects (manifestations) of freedom of contract." [10]

Freedom of contract does not mean absolute freedom. Limitation of contractual freedom is only possible and even necessary if this freedom violates the principle of good faith and thereby violates the interests of third parties. Violation of legal good faith can mainly associated with the content of the contract, the drafting of which depends on the mutual agreement of the parties. Legal restriction of contractual freedom, in most cases, can associated with the choice of the type of contract.

The freedom to conclude a contract in its broadest sense entails the prohibition of concluding a contract and the obligation to conclude one, without which the freedom to conclude a contract cannot be discussed. Parties may express their will to conclude a specific contract, however, its conclusion may be prohibited by law. Also, the opposite can take place when the parties/parties do not wish to enter into a specific contract or with a specific entity and the law obliges them to do so. Both the prohibition and the obligation to conclude are derived from public interests. Namely: obligatory permission, dominated position, preferential right, etc.

Limiting the freedom of contract is not allowed, however, it cannot exist without borders either. That is why there are mandatory and dispositional norms established by law. Dispositional norms give preference to contractual freedom, which is distinguished by its excess compared with imperative norms.

"Hence, contractual freedom is a necessity, although the scope of its realization is different in each specific case and sometimes it is also associated with the problem of "contractual balance". Contractual equilibrium is the practical manifestation of equality. It indicates the fair distribution of rights and obligations between the parties and arises when the counterparties have equal rights and

---

8 *Zoidze B.,* An Attempt to Recognize the Practical Existence of Law Primarily from the Human Rights Perspective (essays), Tbilisi, University Publishing, 2013, 95 (In Georgian).

9 *Chanturia L.,* Introduction to the General Part of the Civil Law of Georgia, Tbilisi, "Samartali" Publishing, 1997, 357 (In Georgian).

10 *Jorbenadze S.,* Freedom of Contract in Civil Law, Davit Batonishvili Law Institute Publishing, 2017, 170 (In Georgian).

obligations. When there is a contractual equilibrium, contractual fairness is established. In other words, the pursuit of contractual fairness also implies the establishment of contractual equilibrium. As soon as the equivalence of rights and obligations is violated, the contractual equilibrium is threatened. It has to be mentioned, that it is difficult and sometimes even impossible to achieve contractual equilibrium in the market economy."[11]

Contractual freedom is mainly determined by dispositional norms, which allow the parties to freely define the content of the contract and its scope. "The principle of freedom of contract, together with the origins of private property, is the cornerstone of the entire civil order."[12]

"As per the general principle of freedom of contract, the Civil Code also fosters the principle of freedom of form,"[13] which is stipulated in Article 68 of the Civil Code: "For a transaction to be valid the form of the transaction prescribed by law shall be observed. If no such form is prescribed, the parties may determine it themselves." Taking account of this, the law provides for mandatory cases of the written form of the contract. In other cases, the parties themselves agree in what form to conclude the contract, in case of disagreement, no contract will be concluded.

"When talking about contracts, the starting point should be the reaching agreement between the parties based on the expression of will on the conditions that determine the rights and obligations of the parties (contractors), by which the parties are bound and what is stipulated in the general provisions of the Civil Code and the relevant contractual norms."[14]

In private legal (contractual) relations, the manifestation of the will of the parties is an important factor in achieving legal results. For this, it is necessary to reveal the will and prove it, which is directly related to the form. "The form is a guarantee of the veracity and confirmation of the manifestation of the will, and the form does not exist for the sake of the form, but it, as a proof of the authenticity of the manifestation of the will, is the basis of orderly, safe and guaranteed civil circulation." [15]

The freedom to select the form of expression of will is an opportunity to be used wisely by the parties. The written form of the infallibility of the expression of the will is not only a means of legal expression, but also an undeniable proof of the expression of the will. Which also provides a basis for the protection of the parties' demands.

The freedom to choose the form of the contract implies that the parties themselves are obliged to take into account the expected consequences and risks that may result from the contracts concluded in oral form, based on discretion and reasonable judgment. Naturally, the choice of the parties is based on absolute freedom, however, often due to inexperience or lack of legal knowledge, not considering the consequences, the party/parties may face problems.

---

11 *Chachanidze T.,* Contractual Freedom, and Contractual Fairness in Modern Contractual Law, published – Justice and Law, #3, 2010, 24 (In Georgian).

12 *Kochashvili K.,* Metalegal Understanding of Freedom, "Bona Causa" Publishing, 2018, 11 (In Georgian).

13 *Darjania T.,* Civil Code Art. 68 Commentary, Civil Code Commentary, Book I, Authors Collective, Ed.: Lado Chanturia, GIZ, USAID, EWMI, 2017, 386 (In Georgian).

14 *Nadibaidze L.,* 2002, Legal Basis of Property Acquisition. "Meridiani" Publishing, 18 (In Georgian).

15 *Kochashvili K.,* Metalegal Understanding of Freedom, "Bona Causa" Publishing, 2018, 101 (In Georgian).

The conclusion of contracts in oral form significantly simplifies the initiation of contractual relations. In such a case, the parties are free from extra formalities and bureaucracy, however, it becomes difficult to manage future relations, to protect the interests, the necessity of which may arise during the stages of the contract (implementation, termination, etc.). Such difficulties may outweigh the ease of entering into an oral contract.

Based on the analysis of the practical results, it is possible to make some form of contract mandatory in writing and thereby prevent many undesirable results and long-term disputes. Perhaps, this was the idea of the legislator when they established mandatory written forms for such agreements as, for example: three-day maintenance, partnership (joint activity), delivery of goods to a warehouse, as well as preliminary (promise of loan, promise of gifts) agreements. Some of the mentioned contracts provide for the results of the transfer of ownership of real estate, and some of them are of a service nature. Requiring the written form by law for this kind of agreement implies that the legislator considers it inadmissible to entrust the parties with the absolute freedom to choose the form. This is due to the complexity of certain features characteristic of specific legal institutions (eg: three-month maintenance contract, gift promise, loan promise, etc.).

Based on the analysis of judicial and real-life practice, we can think that the legal freedom to choose the form of the apartment rental agreement is often associated with undesirable consequences for the parties.

Long-term apartment tenancy agreements are associated with special difficulties. Here the "insufficient precision of the agreement"[16] and the "proper cooperation"[17] of the parties for the timely fulfillment of obligations become even more noteworthy. The guarantee of correct cooperation is always the specified content of the contract, that is when its existence does not depend on the evidence of the circumstances. It is possible to ensure this in the case of a written contract when the parties do not have to prove disputed facts, which may be related to the terms of termination, rent, quality of performance, permits for the production of improvements, utility bills, etc.

The norms of the Civil Code do not provide for the mandatory written form of the rental agreement. Accordingly, confirmation of the existence of an oral apartment rental agreement is made with the consent of the parties, otherwise based on the assessment of the actual situation.

It is noteworthy that the Code entails two mandatory cases of written agreement between the parties during the period of validity of the apartment rental agreement. **The first is the case** when it concerns the extension of the term of the contract. In particular: "If the lease contract for a residential space is concluded for a specified period, then the lessee can request the extension of the lease contract for an indefinite period with a written statement no later than two months before the termination of the tenancy relationship if the lessor gives their consent."[18] A fixed-term contract entails a specific term agreed upon by the parties, the expiration of which is the grounds for terminating the contract itself. After the expiration of the agreed term, the lessee must notify the lessor in writing about the

[16] *Zarandia T.,* Place and Terms of Performance of Contractual Obligations, GCI Publishing, 2005, 66 (In Georgian).

[17] Ibid, 67 (In Georgian).

[18] Civil Code with amendments and additions until January 20, 2016, published by Bona Causa Law Firm. Article: 560 (In Georgian).

continuation of the agreement, to which the lessor must confirm their consent or refusal, in writing. The code does not provide for a specific time frame in which the lessor must confirm the consent or refusal. In such a case, the response from the lessor must be received within the time requested by the lessee, or within a reasonable time.

The second case is provided by Article 563 of the Civil Code, according to which: "Termination of the rental agreement for a residential space shall be in writing." According to this norm, all residential rental agreements, regardless of the term, require a written form for termination. The purpose of it is to avoid the disputes that may arise between the parties regarding the facts and consequences of the termination of the contract.

I believe it would be better if the form of the residential apartment rental agreement were in writing. As well as certain (above-mentioned) forms of contract.

As per the German doctrine, contracts by which the parties change the subject of the contract, the amount of rent, the expiration of the rental period, the purpose of the rental, or the rental period are subject to written form. The same applies to the landlord's consent to improvements to the rental property. This emphasizes the importance of matters requiring written form. In this regard, it is noteworthy that if the changes made by the parties in relation to the above-mentioned issues of the contract require a written form, then we must undoubtedly consider the written form of the apartment rental contract mandatory.

We should share the views expressed in the doctrine that the freedom of the form of the contract "can be evaluated as a step forward, in terms of simplifying the form of the transaction and canceling the barrier imposed on the party and reducing the costs, however, on the other hand, it should be noted that a liberal approach may lead to the unjustified weakening of the standard of protection of a person (especially the consumer)". This has been reflected in the relations arising from the apartment rental agreements. This problem has been highlighted even more recently by the activation of apartment rental contracts and its undesirable practical consequences. It is often difficult and unachievable for the parties to assert contractual rights and obligations and their scope. Also, whose rights are violated more and to whom the contractual responsibility should be imposed.

The will is expressed through the oral form of the apartment rental agreement. The property is transferred, which is confirmed by the transfer of the keys to the tenant and their actual living in the apartment. However, difficulties may arise in the fulfillment of rights and obligations between the parties. Which is related to long and almost never-ending vindication disputes. This is confirmed by more facts revealed in real life. However, such disputes are fewer in court practice, which is due to various circumstances, in particular: long-term disputes and long waiting for results, court costs, etc.

The flawed results of the freedom of the form of the contract are indicated by the evaluations of international specialists, according to which: "Many countries have canceled the basic competencies of notaries in favor of other players in the legal services market. In many cases, the qualitative requirements for entering the profession have been reduced. This brought a double effect. Since then, notarial services have been partially taken over by law firms that compete with notaries in deregulated markets. At the same time, the radius of activity of the notary is becoming wider for law offices".[19]

[19] *Bock R.,* Some Opinions on the Future of Notary, Georgian-German Journal of Comparative Law, Institute of State and Law Publication, #2, 2022, 6 (In Georgian).

This emphasizes the role of notaries, as well as the fact that only written agreements will guarantee mutual protection of the parties' interests.

"Due to the absence of written forms, the cases of premature termination of commercial premises rental agreements are particularly common. The purpose of the written form prescribed by law is that the parties to the rental agreement can easily determine the contractual rights and obligations arising from the rental agreement. [20]

The written form of the contract also has a kind of coercive function for the parties, so that they fulfill their obligations under the contract in good faith and with high consideration.

The interest of a citizen (private person) to use their property freely and independently is often less of an interest for the state, and therefore it does not engage in the legal relationship of private persons. Yet, should this relationship concern the state's interest, the state intervention should take place here in a larger dose, if it is also in the interests of a private person. It may be better for the parties to enter into a written tenancy agreement, which will allow them to better protect their contractual rights and obligations, even by paying certain tax or fee costs. Accordingly, the state will also receive certain benefits by making such contracts mandatory in written form and receiving a fee based on it. Based on a solid tenancy agreement, neither the tenant can easily, without grounds, try to terminate the agreement, nor can the landlord affect the tenant's contractual rights.

Given this practical account, it is a fact that the situation of the parties to the apartment rental agreement is legally unfavorable and they are constantly in the mode of difficult protection of their rights, which is related to the termination of the agreement, vacating the apartment, payment of rent, restoration of damaged property, reimbursement of incurred expenses and other difficult to determine cases. It is in such a case that the state should intervene in private legal relations when their regulation is related to practical problems and increased difficulties. The involvement of the state implies legislative changes with norms of imperative content.

Legislative intervention, with the imperative norms (meaning the binding of the written form of the apartment rental agreement), should be done so that on the one hand the parties can easily protect their interests and on the other hand no cabal conditions will be imposed, which will be associated with taxes. Based on the written form of the contract, as an infallible document, and the rules stipulated by the corresponding changes in the executive legislation, not only the facts of eviction of illegally occupied apartments by the tenants will be simplified, but also the interests of the tenants themselves will be protected.

4. Changed Circumstances as Grounds for Termination of the Contract

4.1. Termination of the Apartment Rental Contract on the Grounds of Changed Circumstances

The obligation exists and it is necessarily subject to fulfillment, this is directly indicated in the legislative norm, namely, according to Article 361 of the Civil Code:

1. Each performance implies the existence of an obligation.

[20] *Cramer C.,* Mietrecht, Studium und Praxis, Eine systematische Einführung 2019, 30.

2. The obligation shall be performed duly, in good faith, and at the time and place predetermined.

With this, it can be said that if the legal requirement on the debtor's necessary and timely performance of the obligation is violated, it must be reversed or damages should be compensated. Willingly or unwillingly, these axioms prompt the legislator to do justice to the creditor's interests and to make all normative efforts for this purpose. The legislator does not forget the interests of the debtor either, but it can still lean towards the side of the one who has a claim."[21] However, this does not mean that only the creditor's interests are protected by the necessity of the obligation's immediate fulfillment.

Immediate performance means performance according to the law and reservations of the parties. Reservations by the parties are an opportunity to freely determine the content of the contract, however, this freedom must be within the framework of good faith and moral norms.

Good faith and in general performance of the obligations in good faith is subjective of the debtor, when the debtor does everything to fulfill the obligation. For this, they show a high degree of consideration. Non-fulfillment of the obligation without the mentioned leads to the liability of the debtor and the contract may be terminated.

"They who do not know and cannot be aware of the true state of legal facts which may prevent the fulfillment of an obligation is of good faith"[22]. Legal facts, when they affect the contractual conditions and make it impossible for the parties to fulfill their obligations in their original form, can become the grounds for terminating the contract. For instance, a change in market conditions can cause an increase in the rent of an apartment, and the tenant cannot pay the increased rent. Also, if the landlord needs a living space directly for themselves, or their close relatives, etc. These are the circumstances that the parties cannot be aware of in advance, and if they arise, the parties will be obliged to consider the changed circumstances. They create the impossibility of subjective performance when a specific person, as a lessee, cannot pay the increased rent, or on the contrary, the lessor themselves or their close relatives urgently need an apartment, or due to the change of circumstances, the lessor cannot restore the condition desired by the lessee, etc. These and similar circumstances become grounds for terminating a contract as a person is not obliged to do what is impossible for them due to changed circumstances. Coercion is impermissible even when there is no absolute inadmissibility of a change of circumstances, as "a change of circumstances in terms of admissibility is always expected." [23]

Thus, "the debtor, who does not fulfill his obligation in time, will not be able to enjoy the privileges related to responsibility. In this situation, the only "way to salvation" for the debtor is to prove that damage would have occurred even if the obligation was fulfilled on time. [24]

---

21 *Zoidze B.,* Correlation of Private and Public Law (mainly in the context of the theory of interest), Private Law Review, # 5, 2023, 11 (In Georgian)

22 *Zoidze T.,* The Influence of the Presumption of Completeness and Infallibility of Public Register Data on the Bona Fide Acquisition of Property, "Private Law Review" #3-4, 2021-2022, 32 (In Georgian).

23 *Vashakidze G.,* Commentary on Article 398, Commentary on the Civil Code, Book III, 2019, 620 (In Georgian).

24 *Kochashvili K.,* Culpa in Civil Law, "World of Lawyers", 2024, 232 (In Georgian).

It should be noted that the lessor should not abuse these legal opportunities and the interests of the lessee should not be harmed. That is why, "termination of the rental agreement by the owner should be well justified for their own needs. {...} The termination of the rental agreement shall be considered an abuse of the property right even if the owner can satisfy their needs with other similar free housing unless he brings logical and convincing arguments as to why he cannot use this alternative space. The alternative apartment should match the layout, size, and structure of the rental apartment owned by him and should fulfill the functions that will meet the owner's requirements. [25]

If justifiable arguments are presented, neither party should be forced to fulfill the obligations, or to adapt to the changed circumstances that will create a precarious situation for them, the protection of the tenant's interest will be unreasonably prioritized compared to the interest of the owner, etc. This will result in "a breach of contractual equity if, as a result of changed circumstances, there is a sudden and obvious imbalance between the interests of the debtor and the creditor." [26]

In practice, there have been facts of the violation of the principle of good faith by the parties due to the changed circumstances, which does not lead to the adaptation of the contract terms, but can also become the grounds for terminating the contract. One of the court's decisions will serve as an example of this, namely:

On August 1, 2011, a natural person – G.G. (owner, plaintiff) and N(N)LP "Tbilisi Development Fund" (hereinafter the defendant) entered into an agreement based on which the defendant undertook to demolish the plaintiff's house until December 31, 2012, and upon building a new premise, they would provide the plaintiff with the residential space of at least 59m^2 at the same address. The fund also assumed the obligation to pay monthly rent for the apartment – 350 GEL- before handing over the residential area to the owner under the contract. During construction, the foundation determined that it was impossible to build 59m^2 of living space as it turned out that as per the public register, the plaintiff only owned 56m^2 of land. The Foundation explained in writing to the claimant that there was a need to adapt to the changes. Without this, it would be impossible to fulfill the contract. The plaintiff refused all the offers from the fund. Due to this, the fund refused to pay the rent of the apartment stipulated in the contract. According to the third part of Article 398 of the Civil Code and also the third part of Article 8, the court explained that the participants of the legal relationship are obliged to exercise their rights and duties in good faith. The court considered the fact that the fund used all possibilities to convince the plaintiff of the need to adapt the contract to the objectively existing circumstances as confirmed. However, the latter did not agree to any proposal. The court evaluated the said action as an abuse of rights by the owner. In such a situation, the court considered justified the foundation's unilateral termination of the contract in the part of the obligation to pay the rent, with the mentioned argumentation, and the claim of the owner was not satisfied. This was shared by both the Court of Appeal and the Supreme Court.[27]

---

25 *Shatberashvili L.,* The Right to Property as a Basic Right and the Disclosure of Its Social Function on the Example of Ownership of a Residential Lot, "Private Law Review", #3-4, 2022, 235 (In Georgian).

26 *Vashakidze G.,* Commentary on Article 398, Commentary on the Civil Code, Book III, 2019, 621 (In Georgian).

27 Supreme Court of Georgia, ruling, case №ას-793-742-2017, January 17, 2018 (In Georgian).

Hence, the parties are obliged to observe the principles of good faith and consideration as much as possible, both contractually and in changed circumstances, which affect the quality of the performance of the obligation and the maintenance of the obligation relationship in general. However, "forcing the debtor to perform the obligation regardless of any changed circumstances would be unreasonable and fatal."[28]

4.2. Circumstances Changed by Mutual Agreement of the Parties and Their Consequences When Renting an Apartment

Circumstances existing during the contractual relationship, which are directly related to the fulfillment of obligations by the parties, may change not only independently of the will of the parties, but also by mutual agreement of the parties, which may lead to the change of certain contractual conditions. This may relate to timing, location, quality of performance, prices/rents, etc.

By mutual agreement of the parties to the apartment rental agreement, the circumstances may change (for example, the improvement of the rental property), which will lead to the adaptation of the terms of the agreements to these circumstances, for example, an increase in the rent. According to the first and second part of Article 548 of the Civil Code:

1. As a rule, the tenant shall carry out current repairs. He/she may not make alterations or reconstructions of the dwelling place without the consent of the landlord.

2. The tenant shall perform the works at his/her own expense.

3. The landlord may claim damages caused by the tenant's non-performance of the duty under paragraph 1 of this article.

As per the provision, the duties of the lessee are defined, the first is the obligation to carry out current repairs, the performance of which is the responsibility of the lessee at their own expense. Current repairs are not related to substantial improvement of the rented apartment. It may be caused by the reconstruction of the apartment. The second obligation is associated with the process of reconstruction of the apartment, which the tenant has the right to carry out only upon the agreement with the landlord, that is, he/she is obliged to get the consent of the landlord. The need for consent gives the tenant the opportunity of reimbursing the costs incurred by the landlord, or perhaps, by mutual agreement, offset against the rent. This is provided in Article 556 of the Civil Code: "If against the claim for payment of rent the tenant has the right to detain property or to set off other claims arising out of the tenancy relation, then the tenant may exercise such right even if otherwise provided for in the agreement, provided he/she gives advance notice to the landlord.".

The reconstruction of the apartment, which is carried out under mutual agreement of the parties, might be a new, mutually changed circumstance as a basis for increasing the rent, i.e., the improvement may not be caused by necessity and it may be the result of the mutual agreement of the parties, for example: by agreement of the parties, substantial improvement of the apartment by reconstruction, which may be done by the landlord at his own expense, or at the expense of the tenant,

[28] *Chitashvili N.,* Impact of Changed Circumstances on the Performance of Obligations and Possible Secondary Claims of the Parties (comparative analysis), "Bona Causa" Publishing, 2015, 80 (In Georgian).

subject to deduction of rent thereafter. In both cases, there will be an improvement in housing conditions, which will lead to an increase in the rent of the apartment from the period after the improvement. Otherwise, it would go beyond contractual relations and fall within the scope of unjust enrichment.

4.3. Distinction Between Expenses Incurred on the Improvement of the Apartment and Necessary Expenses

For the duration of the apartment rental agreement, it is important to distinguish the costs incurred for improvements from the necessary costs. As for the necessary expenses, it is related to the renovation works that serve to maintain the suitable condition of the rented apartment, so that the tenant can use the apartment properly. Such works may be necessary in the process of the signing of the contract and handing it over to the tenant. For example: the apartment had certain defects, which, according to the agreement, the tenant had to fix at their own expense and on the condition of compensation from the landlord. Also, some damage may have occurred later that is subject to repair by the lessor and it delays the performance. In order not to interfere with the use, the lessee has the right to repair this defect themselves and then be compensated by the lessor. Unlike the Civil Code of Georgia, the German Civil Code specifies the cases when necessary expenses must be incurred. In particular: 1. The lessor delays the correction of the defect; 2. Immediate elimination of the defect is necessary to maintain or restore the condition of the rental object; [29] The tenant will be compensated for other expenses as per the rules of the agency without specific authorization. There is no definition in the code of what is meant by other costs, which is a matter of assessing the specific actual circumstances. [30]

5. The Landlord's Obligation to Maintain the Perfect Use of the Apartment for the Tenant and the Consequences of Violation

During the entire period of rental, the landlord is obliged to take care and maintain such conditions, which is necessary for the tenant to be able to use the apartment fully. The basis and period of the interference are not important, that is, in what period the interference occurs and from whom, excluding the fault of the tenant.

The lessor is obliged to protect the interests of the lessee from third parties as well. If the lessor does not/cannot fix the defect within a reasonable time specified by the lessee, then the lessee has the right to unilaterally withdraw from the contract and (as stipulated in the German doctrine and legislation, non-standardly GCC Art. 543) terminate it with the right to demand damages. The lessee is not always required to specifically prove why the continuation of the lease agreement is unacceptable

[29] Prütting/Wegen, Weinreich, Bürgerliches Gesetzbuch, Kommentar, 12 Auflage, Luchterhand Verlag. 2017, 1038.

[30] See more about the necessary expenses: *Chitoshvili T.,* 2023, Legal Order of Some Issues in the Apartment Rental Agreement (Georgian-German study), published Besarion Zoidze Jubilee Collection 70, University Publishing, 2023, 223 (In Georgian).

for them, more precisely: if the defect is related to the state of emergency, the need to carry out capital repairs and this does not come from the fault of the lessee, as well as the implementation of necessary improvements, partial or completely arbitrary occupation of the space by third parties, etc.

Considering the above, it is interesting to see the judicial practice: G. A-shvili and A. N-dze filed a lawsuit against "Georgian Railways" LLC regarding the termination of the rental agreement and the return of prepaid rent on the following grounds: in 1992, a rental agreement was signed between the plaintiffs and the Trade and Production Union of the Supply of Georgian Railway Workers , by which the lessor, the defendant, undertook to provide benefits to the plaintiffs. The flats were transferred by right for a period of 10 years, allowing the plaintiffs to carry out both current and capital repairs to the flats, the cost of which would be included in the flat rent. The plaintiffs renovated the rooms and paid the contractual rent in advance. However, the plaintiffs were only allowed to use the rooms for two years, until the beginning of 1994. After that, the apartments were occupied by IDPs. Since the tenants, due to reasons beyond their control, could not use the apartments, the tenants requested the refund of the 8 years amount of rent.

The defendant did not recognize the claim on the following grounds: [...] that the plaintiffs used these rooms without restrictions until 1994, and in 1994, for reasons independent of the defendant, IDPs from Abkhazia broke into these apartments, for which the defendant is not to blame. Thus, the defendant has not violated the obligation under the rental agreement.

The court referred to the first and second parts of Article 541 and Article 352 of the Civil Code and considered that "Georgian Railways" LLC had an obligation to return the disputed amount. The Court of Appeals also agreed with this decision.

The Court of Cassation also shared the opinion of the appellate courts and explained that the appeals chamber correctly based the legal justification of the appealed decision on Article 541 of the Civil Code, according to which the lessor is obliged to hand over the leased object to the lessee at the time agreed by the parties and to ensure that the lessee exercises unlimited possession and utilization rights. In this case, it was determined that the immovable property stipulated in the agreement was not handed to plaintiffs, "Georgian Railways" LLC could not ensure the unhindered possession and use of the disputed premises by the tenants within the framework of the rental agreement, which is why the loss of interest from G.A-shvili and A.N-dze in the rental agreement is fully justified, and their demand for early termination of the deal and return of the prepaid rent – 5,184 GEL was legally satisfied by the decision of the Court of Appeal. Indeed, this is a case in which the lessee is not required to specifically prove the circumstances preventing the use. That's why the court considered the landlord's claim groundless.[31] We encounter the same ideas in the German doctrine. "The lessee has the right to terminate the rental agreement without warning if the use of the rented property is impossible in whole or in part, there is use contrary to the terms of the agreement. The defect may be caused by the transfer of legally and materially deficient property, partial or complete non-fulfillment of obligations, or other reasons – for example, the rental space is 10 percent less than specified in the contract, etc."[32]

---

[31] Supreme Court of Georgia, Decision # ას-344-663-09 of September 22, 2009 (In Georgian).

[32] *Prütting/Wegen,* Weinreich., Bürgerliches Gesetzbuch, Kommentar, Weinreich. 12 Auflage, Luchterhand Verlag, 2017, 1064.

6. The Scope of the Apartment Rent and Its Changes as a Basis for Terminating the Contract

"While discussing the transactions, based on which a person receives some benefit, the question arises: is it done gratuitously or in exchange (for a price)? A transaction in which the obligation assumed by one party is matched by the reciprocal performance equivalent of the other party is considered onerous. According to the types of contracts the Civil Code provides and used in practice, onerous transactions are more common. Precisely, such transactions represent the sphere of interest of the subjects, in contrast to gratuitous transactions. Bribery transactions are mainly the basis for improving the subjects' economic status and living conditions.

It is known that the rental agreement is an onerous transaction. Therefore, the essential condition of this contract is the rent and the rules for its determination.

According to Article 327 of the Civil Code: "1. The contract is considered concluded if the parties have agreed on all of its essential terms in the form provided for such agreement.

2. Essential terms of a contract shall be those on which an agreement is to be reached at the request of one of the parties, or those considered essential by law.

The first part of the norm associates the moment of concluding the contract with the establishment of essential conditions, while the second part indicates the types of essential conditions. Taking this into account, the content of the norm has a general character, as it emphasizes the conditions agreed upon by the parties and the essential conditions stipulated by the law, however, none of them is specified. In this regard, it is especially important to note the essential terms based on law, which the parties must take into account during the conclusion of the contract and which cannot be implied. Such essential terms include, for example: identification of the parties to the contract, i.e. subjects, subject of the contract, time of conclusion, price (if it is a contract onerous), etc.

In the apartment tenancy agreement, as well as for other purchase agreements, price determination is an essential term. The law allows free determination of the type of rent, that is, the rent can be determined both in cash and in kind. It is not possible to specify its amount, however, it must be indicated in the method of determining its amount at the time of payment, for example: the prices in the market at the time of the fulfillment of the monetary obligation. Regardless of the mentioned assumption, I believe that to avoid the results of disputes and vague expressions between the parties, it is better to specify the amount of rent. If the amount of rent payment is determined according to the market prices at the time of payment, this may become the basis of the dispute. This form of rent determination may not meet the expectations of the parties at the time of the agreement. Based on the analysis of the doctrine, it can be said that the subject of the contract is not only what the parties directly promise each other and promise to fulfill their obligations, but also whether they trust each other and what are their expectations from each other to fulfill their promises.[33]

Based on the rental agreement norms, neither the minimum nor the maximum limit of the amount of rent is established, I believe that this is an acceptable rule. As for the terms of rent payment, the dispositional norm of the Civil Code (Art. 553) indicates the rule of rent payment, according to

[33] *Staudinger,* BGB, Eckpfeiler der Zivilrechts, 2018, 817.

which: 1. Rent must be paid at the end of the term of the rental agreement. If the rent payment is determined by periods, then it must be paid after the expiration of these periods.

2. Payment of additional costs is mandatory only if there is an agreement between the parties.

The first sentence of the first part of the specified norm is imperative. This is revealed in the content of the second sentence. The second proposal allows the parties to freely agree on the terms of rent payment. I.e. if the parties do not agree on the term of rent payment, then the payment will be made at the end of the contract. However, I believe that the content of the second sentence is still vague and may become the basis of a dispute for the parties. The mentioned sentence has both dispositional and imperative character. according to which the parties can determine the periods of rent payment, although there is an imperative reservation that: "it must be paid after the expiration of these periods ", which deprives the parties of the opportunity to freely agree and makes the moment of payment unclear. On the basis of this, the rent must be paid not in the agreed period, but after the expiration of this period. It would be better if the first part of Article 553 of the Civil Code had a similar content: "1. The rent must be paid at the end of the term of the rental agreement if the terms of rent payment were not agreed between the parties." It would be better if this content is reflected in the new comments of the norm.[34]

The concept of "additional costs" is no less vague, which is also given in the redaction of part 2 of Article 553. It would be better if the scope of its connection with the first part of the same article was outlined.[35]

Changing (increasing or decreasing) the amount of apartment rent and its grounds are of essential importance.

According to Article 536 of the Civil Code: "If the rented item is found to have a defect, then the lessee's rent will be reduced by the amount by which the suitability of the item was reduced due to the defect. This right loses its validity when the defect is corrected. Minor defects are not taken into account."

The Code of Civil does not define "insignificant defect", however, a defect should be considered insignificant, in which case the tenant does not prevent the intended use and the desired result. The assessment should be made only based on the analysis of specific factual circumstances. The consequences caused by the tenant's fault should also be taken into account.

The second part of the specified norm is a special rule that directly refers to apartment rent. In particular: "A rental agreement that is harmful to the tenant of a residential lot is void." This is the case when the nullity of the contract may become questionable and the contract may be terminated. For example: if a flaw that is harmful to the tenant is revealed after a certain period has passed after

---

[34] This issue is also vaguely presented in the comments, Commentary on the Civil Code of Georgia, Book Four, Vol. 1, "Law" publishing house, 2001, 123

[35] In this regard, "expenses", which are mentioned in articles 537, 545 of the Civil Code, do not create uncertainty. The mentioned norms distinguish between necessary costs and additional costs in general, the basis of their origin, and the manner and scope of the restitution. The mentioned costs, including additional costs, have nothing to do with the rent and its volume. Unless the parties have agreed on the rule of mutual deduction of rent and expenses. A detailed discussion of the mentioned issue is impossible due to the format of the article.

the conclusion of the contract, then the tenant may terminate the apartment rental agreement unconditionally, without observing special terms. In such a case, he is not obliged to request a rent reduction and to extend the rental agreement. Also, the tenant should not lose the right to claim compensation for the rent already paid for the defective period of use.

The moment of invalidity of the apartment rental agreement will be when the harmful and dangerous circumstances were identified immediately after the conclusion of the agreement and the period of flawless use is not defined. In case of confirmation, the issue of damages may arise.

Article 538 of the Civil Code clarifies the requirement of Article 536 and limits the right of the lessee if the lessee was aware of the defect at the time of the conclusion of the contract, or could have known about it.

The restriction on terminating the contract does not apply to a case where the defect of the apartment poses a threat to human health, in particular: "If the apartment or other space intended for human habitation is in such a condition that its use poses a significant threat to their health, the tenant can terminate the rental agreement without observing the term. The employer has this right even if he knew about the danger when concluding the contract, but did not make a claim."[36] Thus, in the specified case, the tenant has the right to terminate the contract, however, the law does not consider such a case as a direct basis for the request for a rent reduction, and the tenant can terminate or extend the contract without any reservations or compensation.

Reconstruction of the apartment, or its substantial improvement, may become the grounds for increasing the rent of the apartment. For this, a joint agreement of the parties is necessary. Improvements which shall not be of necessity, or shall not be mutually agreed upon, shall not be made, or shall not affect the rent as said above.

A change in the economic situation in the market may become the basis for the rent increase. This directly follows from Article 562, paragraph "c" of the Civil Code: "If the tenant refuses to pay the increased rent offered by the landlord, which corresponds to the rent of the apartment in the market"; It should be noted that the non-compliance must be substantial. I consider it important that in this case the length of time that has passed since the conclusion of the contract should be taken into account. If a short period has passed since the conclusion of the contract (for example, up to 1 year), it should be inadmissible to meet the request for a rent increase. I think that based on the principles of equality, the rights of the parties will be protected and the stability of the contracts will be maintained.

In this regard, foreign legislation and practice are noteworthy, for example: "According to the prevailing view in German jurisprudence and theory, a transaction is immoral if 1. the disproportionality between the service and the price is "glaring" and 2. there is reprehensible behavior on the part of the beneficiary. A glaring and especially gross mismatch between service and price is when the service exceeds the price by 100%. The match between service and price may be compromised in smaller doses. Relations in the real estate field are regulated differently according to German case law, the disproportionality is noticeable even if the selling or renting price of the apartment is 50% higher than the market prices.[37]

---

[36] Civil Code, 1997, with amendments and additions until January 20, 2016, "Bona Causa" publishing house, Article: 542.

[37] *Khubua G.,* "Laesio enormis" as a Principle of Law, published in Besarion Zoidze Jubilee Collection 70, scientific editors: Prof. Lado Chanturia, Prof. Tamar Zarandia, University Publishing, 2023, 77-78.

"Private law cannot always balance the interests of the debtor and the creditor in such a way that the rights of both parties are fully protected. [...] the obligation must be performed, if it is not performed and is violated, it must be reversed or damages should be paid. Willingly or unwillingly, these axioms prompt the legislator to do justice to the creditor's interests and to make all normative efforts for this purpose. The legislator does not forget the interests of the debtor either, but still, he can turn to the side of the one who has a claim. In the mirror of fundamental rights, the creditor's one-sided or excessive legal power, because he is a creditor, seems crooked. In particular, it leads to the distortion of the principle of proportionality and the overshadowing of the debtor's constitutional right".[38]

That is why, according to the German doctrine based on practice: "In the absence of a solid economic basis, the rent ceiling can be adjusted taking into account the legislative scope. A further rent increase – without increasing the rent in the local market – is extremely unacceptable from a constitutional point of view." [39]

Accordingly, amendments introduced to the German Civil Code, according to which the amount of rent is limited, in particular: the amount of initial rent provided for in a newly concluded apartment rental agreement for apartments within the territories established by the state cannot exceed by a maximum of 10% the amount of rent established in the municipalities during the last four years.[40]

State governments have the power to designate distressed housing market areas for a 5-year period, where rental conditions for residents are at risk, and rents are rising rapidly above the national average when the number of renters increases without new construction and needed housing. In such areas, the marginal rent limits are established by legislation, the increase of which is not allowed except in exceptional cases, which are related to the improvement of the apartment and are stipulated by the contract (GCC 560). State bodies are obliged to study the circumstances and justify the reasons that complicate the conditions of renting an apartment in the market and lead to the creation of difficult housing market areas. In addition, the justification should indicate what measures the state will take to correct the situation.[41]

The fact that the increase in apartment rent is perceived as a particularly important and noteworthy issue is well illustrated by strict legislative intervention. The new legislative changes substantially limited the freedom of the parties and especially the landlords in determining the scope of the rent.

"At the time of entering into a new tenancy agreement, if the rent that belonged to the previous tenant (the previous rent) is higher than the new rent within the difficult housing market area established by the legislation (the rent permitted by Article 556d paragraph 1), then the parties may set a new rent up to the amount of previous rent. When determining the new rent, the increased or

---

38 *Zoidze B.,* Correlation Between Interest and Public Law (mainly in the context of interest theory), Review of Private Law, # 5, 2023, 27-28.

39 *Winkle L.,* Die Regulierung von Bestandsbauten in angespannten Wohnungsmärkten, 2023, 540.

40 Bürgerliches Gesetzbuch, bearbeitet von Ellenberger, Götz, Grüneberg, Herrler, von Pückler, Retzlaff, Siede, Sprau, Tohrn, Weidenkaff, Weidlich, Wicke. C.H.BECK, 81. 2022, 863.

41 Blank/Borstinghaus/Siegmund, Miete kommentar BGB, 7-Auflage, 2023, §556d-kommentar.

decreased rent, which changed the scope of the previous rent in agreement with the tenant, and this happened during the last year before the end of the rental agreement, is not taken into account.[42]

It is clear that with the changes made in the norms defining the scope of the apartment rent, including the added norms, the freedom to determine the amount of the rent is somewhat limited, which is strictly regulated and controlled by the state. The existing norms confirm that housing rent is a special area of regulation and the involvement of the state and its control mechanisms are necessary to ensure the protection of the interests of the parties and the provision of housing for citizens with fewer problems.

7. Conclusion

According to the results of the research, it was determined that the freedom of contract should be within certain legal limits so that the interests of both the parties and third parties are protected accordingly. Limitation of contractual freedom in the relations arising from apartment rent and bringing it into the legal space is particularly important in for determining the form of the contract and the amount of rent. The recently changed circumstances made these issues especially relevant.

The freedom of one person should not result in violation of the interests of another. Thus, along with dispositional norms, there are imperative norms. The state must protect the citizen, as a subject of legal relations, from falling into cabal conditions. For this, it is necessary to constantly update the legal framework based on the generalization of practice.

The right to use is essentially different from the right to ownership as a commodity. Therefore, I do not consider it necessary to register the apartment rental agreement in the public register. With a simple written contract, the parties will be able to easily protect their rights, both among themselves and third parties. If we say that when refusing to register a rental agreement in the public register, it is possible to involve public-legal interests, which can be connected to the state tax policy, then it will be interesting to analyze the economic research results from the state, based on which the state should ensure its tax-related, protection of interests.

Based on the rationale discussed in the paper, it would be preferable if certain restrictions were established regarding the change of the apartment rent amount, which would be determined by certain terms, that is, it would be determined in what period it should be possible to increase or decrease the apartment rent after the conclusion of the contract and the change of the apartment rent.

The mentioned legislative changes will contribute to the stability of apartment rental contracts and it will be possible to better protect the rights of the parties.

Bibliography:

1. *Blank/Börstinghaus/Siegmund,* Miete kommentar BGB, 7- Auflage. 2023, § 556d; § 556e.
2. *Bock R.,* Some Opinions on the Future of Notary, Georgian-German Journal of Comparative Law, Institute of State and Law Publication, #2, 2022, 6 (In Georgian).

[42] Ibid, § 556e.

3. Bürgerliche gesetzbuch, Kommentar. Herausgegeben von Prof. Dr.Dr. h.c. Hanns Prütting; Prof. Dr Gerhard Wegen; Gerd Weinreich-Vorsitzender Richter am OLG Oldenburg a. D. 12 Auflage. Luchterhand verlag 2017, 992.
4. Bürgerliches Gesetzbuch, 2022, bearbeitet von Ellenberger, Götz, Grüneberg, Herrler, von Pückler, Retzlaff, Siede, Sprau, Tohrn, Weidenkaff, Weidlich, Wicke. C.H.BECK, 81, 863
5. *Chachanidze T.,* Contractual Freedom, and Contractual Fairness in Modern Contractual Law, published – Justice and Law, #3, 2010, 24 (In Georgian).
6. *Chanturia L.,* Introduction to the General Part of the Civil Law of Georgia, Tbilisi, "Samartali" Publishing, 1997, 357, 314 (In Georgian).
7. *Chitashvili N.,* Impact of Changed Circumstances on the Performance of Obligations and Possible Secondary Claims of the Parties (comparative analysis), "Bona Causa" Publishing. 2015, 80 (In Georgian).
8. *Chitoshvili T.,* Commentary on Article 581 of the Civil Code. Commentary on the Civil Code of Georgia, book four, volume one, Tbilisi, "Samartali" Publishing, 2001, 161 (In Georgian).
9. *Chitoshvili T.,* Content and Types of Obligations Derived from the Relations in the Law of Obligations (General Characterization) Unjust Enrichment (Main Issues), Tbilisi, "Bona Kausa" Ave., 2015, 11 (In Georgian).
10. *Chitoshvili T.,* Legal Order of Some Issues in the Apartment Rental Agreement (Georgian-German study), published Besarion Zoidze Jubilee Collection 70, University Publishing, 2023, 225 (In Georgian).
11. Civil Code with amendments and additions until January 20, 2016, published by Bona Causa Law Firm. Article: 560 (In Georgian).
12. *Cramer C.,* Mietrecht. Eine systematische Einführung Studium und Praxis, 2019, 30, 34
13. *Darjania T.,* Civil Code Art. 68 Commentary, Civil Code Commentary, Book I, Authors Collective, Ed.: Lado Chanturia, GIZ, USAID, EWMI, 2017, 386, 387 (In Georgian).
14. *Jorbenadze S.,* Freedom of Contract in Civil Law, Davit Batonishvili Law Institute Publishing, 2017, 170 (In Georgian).
15. *Khubua G.,* "Laesio enormis" as a Principle of Law, published in Besarion Zoidze Jubilee Collection 70, scientific editors: Prof. Lado Chanturia, Prof. Tamar Zarandia, University Publishing, 2023, 77-78.
16. *Kitia R.,* Stability, Simplicity, Inexpensiveness, and Conscientious Acquisition of Real Estate Ownership of Civil Circulation, Journ. Private Law Review, 2021-2022, #3-4, 73 (In Georgian).
17. *Kochashvili K.,* Blame in Civil Law, "Lawyers' World", 2024, 232 (In Georgian).
18. *Kochashvili K.,* Metalegal Understanding of Freedom, "Bona Causa" Publishing, 2018, 11, 101 (In Georgian).
19. *Nadibaidze L.,* 2002, Legal Basis of Property Acquisition. "Meridiani" Publishing, 18 (In Georgian).
20. Prütting/Wegen, Bürgerliches Gesetzbuch, Kommentar, 12 Auflage, Luchterhand Verlag 2017, 1038, 1064.
21. *Shatberashvili L.,* The Right to Property as a Basic Right and the Disclosure of Its Social Function on the Example of Ownership of a Residential Lot, Journ. Private Law Review, #3-4, 2022, 235 (In Georgian).
22. Staudinger, BGB, Eckpfeiler der Zivilrechts, 2018, 817.
23. *Vashakidze G.,* Commentary on Article 398, Commentary on the Civil Code, Book III, 2019, 620, 621 (In Georgian).

24. *Winkle L.,* Die Regulierung von Bestandsbauten in angespannten Wohnungsmärkten, 2023, 540.
25. *Zarandia T., Bostoghanashvili D.,* Usufruct in Roman and Modern Georgian Law. Published Besarion Zoidze Jubilee Collection 70, scientific editors: Prof. Lado Chanturia, Prof. Tamar Zarandia, University Publishing, 2023, 94-95 (In Georgian).
26. *Zarandia T.,* Place and Terms of Performance of Contractual Obligations, GCI Publishing, 2005, 66, 67 (In Georgian).
27. *Zoidze B.,* 2023, Correlation of Private and Public Law (mainly in the context of the theory of interest), Private Law Review, # 5, 11, 27-28 (In Georgian).
28. *Zoidze B.,* An Attempt to Recognize the Practical Existence of Law Primarily from the Human Rights Perspective (essays), Tbilisi, University Publishing, 2013, 95 (In Georgian).
29. *Zoidze T.,* The Influence of the Presumption of Completeness and Infallibility of Public Register Data on the Bona Fide Acquisition of Property, "Private Law Review", #3-4, 2021-2022, 32 (In Georgian).
30. Supreme Court of Georgia, ruling, case №ას-793-742-2017, January 17, 2018 (In Georgian).
31. Supreme Court of Georgia, Decision №ას-344-663-09 of September 22, 2009 (In Georgian).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8319

Gvantsa Magradze*

Piercing the Corporate Veil and Its Variations (On the Example of German, American, and English Legal Practices)

The capital form of a corporate entity is currently the most prevalent form of conducting business worldwide, driven by its diverse, profitable, convenient, and investor-oriented structure. Specifically, the privilege of limited liability encourages interested parties to boldly diversify their business portfolios without the risk of losing personal assets. However, this fundamental principle of corporate law also has exceptions, known as piercing the corporate veil. Most developed countries agree that in certain cases, it is unavoidable and necessary to invoke this exceptional measure to maintain or restore justice. This pertains to the personal liability of partners in cases of "abuse of rights" within the corporate structure.

This paper examines the concept of piercing the corporate veil and the various approaches developed and established in different countries. Following the introduction, there is a brief historical overview of the formation of this doctrine, which thematically encompasses the essence of legal entities – legal fictions – and their independent, separate legal status, logically leading to the possibility of disregarding this separation through exceptional measures.

It is crucial to highlight the legal foundations that legitimize the application of traditional piercing of the veil in the judicial practices of different countries, making the essence of the sub-types of this doctrine comprehensible to the reader. Additionally, the research aims to showcase the similarities and differences with variations such as reverse veil piercing in American law and the doctrine of lifting the veil in English law. Furthermore, the paper presents the latest approaches of German courts regarding the application or restraint from piercing the veil, where the aforementioned American/English terminology is not used, yet the approaches are fundamentally closely related. The conclusion summarizes the results of the research conducted around the topics discussed in the article.

Keywords: *Piercing the corporate veil; reverse veil piercing; lifting the veil; annihilating interference*

1. Introduction

The personal liability of members (partners/shareholders) in a capital-type company has been a problematic, ambiguous, and unstructured doctrine since its inception in practice, sparking ongoing

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

debates among legal scholars and practitioners.[1] This ambiguity has led to the emergence of various theories, foundations, and sub-types surrounding the concept of piercing the corporate veil. This article will address piercing the corporate veil and its sub-types, such as standard (traditional) veil piercing, reverse veil piercing, and their analogs.

The aim of this article is to explore the phenomenon of personal liability of members within the framework of the separate legal personality of the corporation. To this end, the paper is structured to thoroughly examine the sub-types of piercing the corporate veil and their technical mechanisms for application, if such mechanisms exist. Following the introduction, the second chapter presents the essence of the doctrine of piercing the corporate veil, along with a brief historical overview of its origins and development. The third chapter follows with an analysis of its variations – reverse and standard veil piercing – through American doctrine and precedents, while the fourth chapter discusses the United Kingdom's approach to piercing the corporate veil and its variations, highlighting the methodological differences between these types. The concluding chapter will provide a summary of the institutions discussed in the article.

2. The Essence of Piercing the Corporate Veil and a Brief Historical Overview

2.1. Legal Person as a Legal Fiction

The concept of a corporation as a separate legal entity from its members is widely recognized in both common law and civil law countries. Furthermore, it is a fundamental principle of corporate law, which various courts across countries seek to uphold.[2] Indeed, a corporation, formed through a consensual agreement among physical persons, is today considered equal to a natural person in legal terms, albeit with certain exceptions. The legal recognition ties into the essence of legal fiction, through which a corporation gains legal personality and becomes a participant in relationships.[3] Thus, the law grants it the life – capacity to act and own and execute – separate from its founders. This means that a corporation recognized by law as a subject of legal transactions is treated as distinct from the individuals who established it. Consequently, the members of the corporation are individuals with distinct personalities, just as the corporation itself is.

The first precedent for recognizing the separation of a legal person,[4] which subsequently led to the development of the doctrine of piercing the corporate veil, was the UK court decision in the case

1 *Ventoruzzo M., Conac P.H., Goto G., Mock S., Notari M., Reisberg A.,* Comparative Company Law, American Casebook Series, West Academic Publishing, 2015, 151; *Robert B. Thompson,* Piercing the Corporate Veil: An Empirical Study, Cornell Law Review, 1991, *Peter B. Oh,* Veil Piercing, Legal Studies Research Paper Series, Working Paper No. 2010-06, Pittsburgh, Pennsylvania, 2010, 85.

2 *Tan C.H., Wang J., Hofmann Ch.,* Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives, Barkley Business Law Journal, volume 16, issue 1, 2019, 140.

3 *Lee P. W.,* The Enigma of Veil-Piercing, International Company and Commercial Law Review, vol. 26(1), 28-34, 2015.

4 *Pargendler M.,* Veil Peeking: The Corporation as a Nexus for Regulation, University of Pennsylvania Law Review, vol.169:717, 2021, 729.

of Salomon v. Salomon.[5] However, prior to this, various theories existed in the literature of civil law countries, such as Gierke's theory of "the separate personality of the corporation" and Savigny's "theory of fiction." Nevertheless, the issue of a corporation as a limited liability entity and its independent legal personality had not yet been firmly established. Clarity was brought to this matter by the 1896 decision in the Salomon case, which recognized the corporation as a separate individual with its own rights, desires, and capacity to act, facilitated through its governing bodies. These governing bodies and their members represent the brain, hands, and feet of the corporation, which collectively are granted artificial personality through legal fiction.[6]

2.2. Exceptional Measures for the Protection of Creditors

Thus, a capital-type company represents a legal entity that is separate from its members and possesses an independent personality. This is ensured, as noted, by the existence of the limited liability institution, which separates the company's founders and members from the corporation, thereby shielding them from claims by the corporation's creditors. In other words, in a capital-type company, the liability of a partner/shareholder is limited, and only the company itself is responsible for its debts.[7] This is the general definition of limited liability in both common and civil law countries, although it is not "absolute" in all cases.[8]

There are exceptions[9] to the limited liability institution, which are considered extreme measures.[10] This institution is referred to as "piercing the corporate veil,"[11] which implies the personal liability of partners to third parties, particularly creditors, aimed at maintaining justice or protecting creditors. The legal foundations for the application of piercing the corporate veil vary by country, and there may even be differences among court decisions within a single country. However, significant foundations and approaches have recently emerged that legitimize the disregard for limited liability and allow creditors access to the personal assets of members.

---

5 Salomon v Salomon & Co Ltd [1896] UKHL 1 (16 November 1896) https://www.bailii.org/uk/cases/UKHL/1896/1.html, [06.08.2024].

6 *Austin R.P., Ramsey I.M.,* Ford's Principles of Corporations Law, Butterworths, Australia, 2010, 115-116; *Bainbridge S., Henderson T. M.,* Limited Liability, A Legal and Economic Analysis, Edward Eldar publishing, UK, USA, 2016, 5; Wormser, I.M., Disregard of the Corporate Fiction and Allied Corporation Problems, Baker, Voorhis and Company, New York, 1929, 6 and following.

7 *Burduli I.,* "Equity Capital and Its Functions," in Theoretical and Practical Issues of Modern Corporate Law, Tbilisi, 2009, 268-269; *Burduli, I.,* Property Relations in Joint-Stock Companies (Especially During the Formation Process), (dissertation), 2008, 20-41; *Magradze G.,* The Issue of Personal Liability of a Business Entity's Director/Manager and Partner/Shareholder, Tbilisi State University Law Journal, No. 1, ed. Burduli, 2017, 144-166.

8 *Thompson R.B.,* Piercing the Corporate Veil: An Empirical Study, 76 Cornell Law Review, 1991, 1036.

9 *Allen N. B.,* Reverse Piercing of Corporate Veil: The Straightforward Path to Justice, St. Jones Law Review, Volume 85, Number 3, 2011, 1147.

10 *Wormser M.,* Disregard of the Corporate and Allied Corporation Problems, Baker, Voorhis & Co, New York, 1927, 10.

11 *Bainbridge S.M.,* Abolishing LLC Veil Piercing, University of Illinois Law Review, University Press, Illinois, 2005, 79-80.

2.3. Legal Foundations of the Doctrine of Piercing the Corporate Veil

As noted, the legal foundations for the application of the doctrine of piercing the corporate veil vary significantly by legal system. English courts consider the abuse of corporate form by controlling individuals or entities as sufficient grounds for piercing the veil.[12] In the well-known Prest case in 2013[13], Lord Sumption stated that the application of piercing the corporate veil should be restricted to specific breaches – namely, "abuse" – though the definition of this term remains unclear. This approach has been widely accepted by commentators across Commonwealth countries. All agree that veil piercing is only permissible in the presence of "abuse," particularly when it serves as a means of preventing a controlling partner from evading obligations.[14]

In the United States, there are instrumental and alter ego theories, which require clear evidence of control and domination in specific facts. This may be established through a significant commingling of individual and corporate assets, disregard for corporate formalities, absence of a separate working office, or the use of the corporation simply as an instrument without its own workforce and assets. All of this must confirm either the "unity" between the individual and the corporation or the occurrence of an unjust result if personal liability is not applied.[15]

In contrast to England and the United States, the application of piercing the corporate veil is even rarer in Germany. It is no longer sufficient to merely establish undercapitalization or asset commingling, which were once considered valid grounds based on general tort norms, specifically BGB §826.[16] The only sufficient ground for applying piercing the corporate veil was viewed as "annihilating interference,"[17] which was first articulated in the 2001 Bremen Vulcan case.[18] This refers to instances where a company is on the verge of insolvency or destruction. Consequently, the draining of company assets by a partner is no longer considered a basis for imposing personal liability and is not a sufficient basis for creditors to access the personal assets of partners, since recent German court practice views this as directly harming the corporation rather than the creditor. The legal basis is seen in the tort norm (BGB §826) along with §30-31 of the BGB (capital maintenance norms) rather than direct piercing of the corporate veil.

Today, this new approach established in German court practice, first articulated in the 2007 Trihotel[19] decision, differs from previous approaches both doctrinally and practically. Creditors can no longer base their claims on tort norms because the harm caused by the partner is directed at the

---

12 *Tan C.H., Wang J., Hofmann Ch.,* Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives, Barkley Business Law Journal, volume 16, issue 1, 2019, 158.

13 Prest v Petrodel Resources Ltd, [2013] 3 WLR 1.

14 *Lee P. W.,* The Enigma of Veil-Piercing, International Company and Commercial Law Review, vol. 26(1), 2015, 28-34.

15 *Klein W.A., Coffee Jr. J.C., Partnoy F.,* Business Organization and Finance: Legal and Economic Principles, Thomson Reuters/Foundation Press, 2010, 148.

16 KBV, BGH judgment 24 June, 2002, NeueJuristische Wochenschrift 2002, 3024.

17 "existenzvernichtender Eingriff".

18 Bremer Vulkan, The Federal Supreme Court of Germany, BGH, case, [2001], BGH NJW 2001, 3622 ("Bremer Vulkan").

19 Bundesgerichtshof [BGH] [Federal Court of Justice] II ZR 3/04, Jul. 16, 2007 (Trihotel), 2007 NeueJuristische Wochenschrift [NJW] 2689.

company itself rather than the creditor. Therefore, the company itself is directly harmed as a result of the depletion of its assets.[20] While it is possible to establish the status of the creditor as a secondary victim, this contradicts §13 of the GmbH law, which reinforces the separate subjectivity of the company.

In summary, a significant practical difference between the old and new approaches is that creditors can no longer utilize the doctrine of piercing the corporate veil in the strict sense, meaning they cannot directly access the assets of partners. They only retain the right to indirect claims, that is, against the company, which may ultimately be satisfied from the partner's personal assets as compensation for damage caused by actions owed to the company. Regarding the direct application of piercing the corporate veil, this is only possible in cases of abuse of legal form. In terms of abuse, the court has adopted Zollner's view, considering the existence of abuse only when the action conceals or evades something.[21]

3. Standard and Reverse Piercing

As noted, the legal foundations of the traditional doctrine of piercing the corporate veil differ not only between countries but also among states within the United States. Despite these differences, common elements can still be identified, as briefly discussed in the previous section. However, despite the vague and unsystematic nature of this doctrine, it remains firmly established in various legal systems and court practices. This cannot be said for one variation of piercing, namely reverse piercing.

It is important to highlight the differences between traditional and reverse piercing. Specifically, traditional piercing involves imposing liability on a member (partner) for the actions of the corporation, or in corporate groups, holding a parent company accountable for the actions of a subsidiary. In contrast, reverse piercing considers the corporation as the subject of liability for the actions of its partner[22] or a subsidiary for the actions of the parent company.[23]

There are internal and external reverse piercing categories, depending on the source of the claim.[24] For instance, in the case of internal reverse piercing, the claimant is a member of the corporation, while in external reverse piercing, the claim originates from a third-party creditor. In reality, standard and reverse piercing share identical foundations.[25] In both cases, establishing

---

20 *Ventoruzzo M., Conac P.H., Goto G., Mock S., Notari M., Reisberg A.,* Comparative Company Law, Amrican Casebook Series, West Academic Publishing, 2015, 183.

21 *Zhen Qu Ch., Bjorn A.,* Lowering of the Corporate Veil in Germany: A Case Note on BGH 16 July 2007 (Trihotel), Oxford University Comparative Law Forum, 2008, <Lowering the Corporate Veil in Germany: a case note on BGH 16 July 2007 (Trihotel) | Oxford University Comparative Law Forum>, [15.08.2024].

22 *Pargendler M.,* Veil Peeking: The Corporation as a Nexus for Regulation, University of Pennsylvania Law Review, vol.169:717, 2021, 738.

23 *Allen N. B.,* Reverse Piercing of Corporate Veil: The Straightforward Path to Justice, St. Jones Law Review, Volume 85, Number 3, 2011, 1153-54.

24 *Mujih E.,* Piercing the Corporate Veil: Where is the Reverse Gear?, London Metropolitan University, 2016, 15.

25 *Richardson M.,* The Helter-Skelter Application of the Reverse Piercing Doctrine, 79 University of Cincinnati Law Review, 2011, 1606.

dominance and control is crucial for the court to apply this doctrine. However, the difference lies in the status of the claimant and the recipient.

Furthermore, traditional piercing allows creditors of the corporation access to the personal assets of the partner, whereas reverse piercing is used when a personal creditor of a partner seeks access to the corporation's assets based on proof of dominance and control, or in the case of a corporate group, targets the assets of a subsidiary (external reverse piercing). In the case of internal reverse piercing, an insider (e.g., a partner) attempts to pierce the corporate veil from within to benefit from claims against third parties[26] or protect the corporation's assets from third-party claims.[27]

In any case, just as with traditional piercing, reverse piercing carries negative implications, posing risks both to the company's creditors and to innocent, faithful partners, who may jeopardize their ability to enforce claims or may see their personal assets become subjects of liability proportional to their share in the corporation. For this reason, in the United States, opinions are divided on the use of reverse piercing; however, considering that federal authorities see significant potential in external reverse piercing, particularly for the collection of state taxes, the future of this doctrine may not yet be settled. The issue is that the federal government's ability to collect state taxes through external reverse piercing could significantly ease enforcement.[28] However, at this stage, even federal courts that recognize the potential benefits of reverse piercing may not permit its application if the highest court of the state where the dispute originated does not share this concept.[29]

4. The Principles of Evasion and Concealment

Unlike the approaches taken by states, English courts often face the dilemma of applying the principles of concealment and evasion. Among these principles, only evasion can be considered within the context of piercing the corporate veil, as it specifically pertains to imposing personal liability on a partner for the obligations of the corporation. The concealment principle, as explained by Lord Sumpton[30] in the Prest case,[31] allows for lifting the veil rather than piercing it, enabling the court to ascertain the true facts and identify the individuals and actions behind the corporate facade. Thus, the so-called veil lifting is a justified mechanism that avoids the need for courts to apply a form of liability that is often under scrutiny, while also preserving the separate legal existence of the corporation.

In the aforementioned Prest case, Mrs. Prest, following her divorce, sought to claim funds specified in their marital agreement from Mr. Prest's company by invoking piercing the corporate veil.

---

26 *Richardson M.,* The Helter-Skelter Application of the Reverse Piercing Doctrine, 79 University of Cincinnati Law Review, 2011, 1605.

27 *Youabian E.,* Reverse Piercing of the Corporate Veil: The Implications of Bypassing "Ownership" Interest, 33 Sw. U. L. Rev. 2004, 77.

28 *Allen N. B.,* Reverse Piercing of Corporate Veil: The Straightforward Path to Justice, St. Jones Law Review, Volume 85, Number 3, 2011, 1156.

29 *Burke V.,* Reverse Corporate Veil Piercing: Is the Equitable Remedy Worth the Risk?, George Maison Law Review, vol. 30(4), 2023, 1079-1080.

30 *Adam L.,* Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in Prest v Petrodel Resources Ltd Leads us Nowhere, The King's Student Law Review, Vol. 5, No. 2, 2014, 70.

31 Prest v Petrodel [2013], UKSC 34) 2 A.C. 415.

Judge Lord Neuberger, in this instance, suggested using the concealment principle to look behind the corporate veil and identify the real facts.[32] However, this did not prompt the use of piercing the corporate veil, even though there were grounds to argue that Mr. Prest, as the controlling partner, used the company as a facade. Instead, the court applied trust norms regarding the management of assets, effectively directing the funds held in the company's name to what were, in reality, Mr. Prest's assets. Ultimately, while piercing was not applied, the reasoning and outcome closely resemble the development of reverse piercing in the United States, where a claim from an external third-party creditor – specifically, a personal creditor of the partner – is satisfied with the assets of the company.[33] In other words, Mrs. Prest was effectively a personal creditor of Mr. Prest, yet her claim was satisfied not from Mr. Prest's personal assets but rather from the company's assets, illustrating a classic example of external reverse piercing.

Thus, American traditional and reverse piercing can be viewed as analogous to English practices, namely, piercing the veil under the evasion principle and lifting the veil under the concealment principle. It is noteworthy that no court in either country agrees on the specific instances of their application, leading to a vague and unsystematic practice.[34] Despite this, their application remains active.[35] This ambiguity is further compounded by the fact that the potential for applying each of the aforementioned doctrines can be based on the same set of facts[36],[37] which was indeed confirmed by the differing and opposing opinions of the judges in the Prest case.[38]

5. Conclusion

In conclusion, the relevance of the issues addressed in this article stems from the immense significance of capital-type organizations within the business sector. It is no coincidence that the majority of registered legal forms are capital-based entities, both in Georgia and in the United States, as well as in other developed economies. This surge of interest, coupled with complex transactions and evolving business ethics, gives rise to numerous questions that the law struggles to address. Consequently, it falls upon the judiciary to adapt existing legislation to these intricate and transformed legal relationships. One such issue is the personal liability of partners within a company, which is

---

32 *Adam L.,* Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in Prest v Petrodel Resources Ltd Leads us Nowhere, The King's Student Law Review, Vol. 5, No. 2, 2014, 74.

33 *Dignam A., Canruh D.,* Into Reverse: Redesigning Veil Piercing, Queen Mary Law Research, Paper No. 401, 2023, 24.

34 *Hannigan B.,* Wedded to Solomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company, Irish Jurist, New Series, Vol. 50, 2013, 39.

35 VTB Capital Plc v Nutritek International Corp. [2013] UKSC 5, [2013] 2 AC 337) <https://www.bailii.org/uk/cases/UKSC/2013/5.html>, [15.08.2024].

36 *Richardson M.,* The Helter Skelter Application of the Reverse Piercing Doctrine, 79 University of Cincinnati Law Review, 2011, 1606.

37 *Burke V.,* Reverse Corporate Veil Piercing: Is the Equitable Remedy Worth the Risk?, George Maison Law Review, vol. 30(4), 2023, 1079-1080.

38 *Adam L.,* Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in Prest v Petrodel Resources Ltd Leads us Nowhere, The King's Student Law Review, Vol. 5, No. 2, 2014, 74.

arguably impossible to legislate comprehensively, given the ambiguous and metaphorical[39] justifications surrounding the doctrine of piercing the corporate veil.[40] Nevertheless, in common law jurisdictions, precedent is given priority, which diminishes the urgency for legislative clarity.

The types of personal liability forms are continually refined and developed in the legal frameworks of various countries. Therefore, enriching national legislation to keep pace with rapidly evolving processes would represent a valuable contribution to corporate law, especially in light of the scarcity of regulatory and judicial practice. This article has conducted a theoretical and practical examination of different forms of personal liability to aid national courts in addressing various dilemmas and improving existing, albeit limited, practices by considering established doctrines and practices from developed countries, while also taking into account the adequacy of their implementation in national legal systems.

Bibliography:

1. *Burduli I.,* Equity Capital and Its Functions, in Theoretical and Practical Issues of Modern Corporate Law, Tbilisi, 2009, 268-269.
2. *Burduli I.,* Property Relations in Joint-Stock Companies (Especially During the Formation Process), (dissertation), 2008, 20-41.
3. *Magradze G.,* The Issue of Personal Liability of a Business Entity's Director/Manager and Partner/Shareholder, Tbilisi State University Law Journal, No. 1, ed. Burduli, 2017, 144-166.
4. *Adam L.,* Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in Prest v Petrodel Resources Ltd Leads us Nowhere, The King's Student Law Review, Vol. 5, No. 2, 2014, 70, 74.
5. *Allen N. B.,* Reverse Piercing of Corporate Veil: The Straightforward Path to Justice, St. Jones Law Review, Vol. 85, No. 3, 2011, 1147, 1153-54, 1156.
6. *Austin R.P., Ramsey, I.M.,* Ford's Principles of Corporations Law, Butterworths, Australia, 2010, 115-116.
7. *Burke V.,* Reverse Corporate Veil Piercing: Is the Equitable Remedy Worth the Risk?, George Maison Law Review, Vol. 30(4), 2023, 1079-1080.
8. *Dignam A., Canruh D.,* Into Reverse: Redesigning Veil Piercing, Queen Mary Law Research, Paper No. 401, 2023, 24.
9. *Hannigan B.,* Wedded to Solomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company, Irish Jurist, New Series, Vol. 50, 2013, 39.
10. *Klein W.A., Coffee Jr., J.C., Partnoy F.,* Business Organization and Finance: Legal and Economic Principles, Thomson Reuters/Foundation Press, 2010, 148.
11. *Kleindiek D.,* Materielle Unterkapitalisierung, Existenzvernichtung und Deliktshaftung – GAMMA, 2008 Neue Juristische Wochenschrift [NZG], 687.
12. *Lee P. W.,* The Enigma of Veil-Piercing, International Company and Commercial Law Review, Vol. 26(1), 2015, 28-34.

[39] Justice Cardozo, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." See: Berkey v. Third Avenue Railway Co. [1926] 44 N.Y. 84, 155 N.E. 58).

[40] *Thompson R.B.,* Piercing the Corporate Veil: An Empirical Study, Cornell Law review, 1991, 1036.

13. *Mujih E.,* Piercing the Corporate Veil: Where is the Reverse Gear?, London Metropolitan University, 2016, 15.
14. *Pargendler M.,* Veil Peeking: The Corporation as a Nexus for Regulation, University of Pennsylvania Law Review, Vol. 169:717, 2021, 738.
15. *Richardson, M.,* The Helter-Skelter Application of the Reverse Piercing Doctrine, University of Cincinnati Law Review, 2011, 1606.
16. *Tan C.H., Wang J., Hofmann Ch.,* Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives, Barkley Business Law Journal, Vol. 16, Issue 1, 2019, 140, 158.
17. *Thompson R.B.,* Piercing the Corporate Veil: An Empirical Study, Cornell Law Review, 1991, 1036.
18. *Peter B. Oh, "*Veil Piercing," Legal Studies Research Paper Series, Working Paper No. 2010-06, Pittsburgh, Pennsylvania, 2010, 85.
19. *Ventoruzzo M., Conac P.H., Goto G., Mock S., Notari M., Reisberg, A.,* Comparative Company Law, American Casebook Series, West Academic Publishing, 2015, 151, 183.
20. *Wormser M.,* Disregard of the Corporate and Allied Corporation Problems, Baker, Voorhis & Co, New York, 1927, 6, 10.
21. *Youabian E.,* Reverse Piercing of the Corporate Veil: The Implications of Bypassing 'Ownership' Interest, 33 Sw. U. L. Rev. 2004, 77.
22. *Zhen Qu Ch., Bjorn A.,* Lowering of the Corporate Veil in Germany: A Case Note on BGH 16 July 2007 (Trihotel), Oxford University Comparative Law Forum, 2008, [15.08.2024].
23. Salomon v Salomon & Co Ltd [1896] UKHL 1 (16 November 1896) https://www.bailii.org/uk/cases/UKHL/1896/1.html, [06.08.2024].
24. Bremer Vulkan case, The Federal Supreme Court of Germany, BGH, case, [2001], BGH NJW 2001, 3622 ("Bremer Vulkan"); BGH ZIP 2002, 1578 ("KBV").
25. KBV, BGH judgment 24 June, 2002, Neue Juristische Wochenschrift 2002, 3024
26. Berkey v. Third Avenue Railway Co. [1926] 44 N.Y. 84, 155 N.E. 58.
27. Trihotel case, Bundesgerichtshof [BGH] [Federal Court of Justice] II ZR 3/04, Jul. 16, 2007 (Trihotel), 2007 NeueJuristische Wochenschrift [NJW] 2689.
28. VTB Capital Plc v Nutritek International Corp. [2013] UKSC 5, [2013] 2 AC 337; available at: <https://www.bailii.org/uk/cases/UKSC/2013/5.html>, [15.08.2024].
29. Prest v Petrodel Resources Ltd, [2013] 3 WLR 1.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8320

Giorgi Kiria*

Author's Rights in Musical Works within Contractual Relationships and International Legal Mechanisms for their Regulation (Comparative Legal Research Based on German Example)

The author's rights in author's rights within contractual relationships and international legal mechanisms for their regulation have proven to be quite problematic issues, which demonstrates their relevance. Increased Georgian-language literature on authors' rights in author's rights would enhance understanding and address local needs. while national legislation should be further harmonized with European, especially German legislation.

This scientific article aims to explore the complexities of authors' rights in musical works, particularly within contractual relationships. It examines international regulatory mechanisms and suggests potential solutions to current challenges.

The subject of this research is to study musical work author's rights in contractual relationships within the framework of comparative research and analyze doctrine and court practice based on international legal mechanisms for their regulation.

The article creation process is mainly doctrinal, using the following research methods: documentary; comparative legal; descriptive; historical-legal and systematic.

Keywords: *Musical work, author, right, employment contract, law, dispute*

1. Introduction

The author's rights in author's rights within contractual relationships and international legal mechanisms for their regulation are quite problematic issues, which demonstrates their relevance. I believe this topic chosen as a scientific research project addresses a current and problematic issue, processing which will provide significant assistance in creating my future dissertation.

In Georgia, where, on one hand, works in this direction are not so abundant, and on the other hand, we encounter quite many disputes in court practice, it is necessary to thoroughly process musical work author's rights in contractual relationships and international legal mechanisms for their regulation.

Humanity's intellectual development has created the necessity to protect creative fruits from misappropriation or undesirable use. Intellectual property is considered a legal good, a legally protected right whose subject is objects created through intellectual creativity or involved in economic relations.

* PhD Student of Ivane Javakhvili Tbilisi State University, invited lecturer of Educational Organization "Knowledge Seekers", invited lecturer of the Georgian Student Parliament.

Musical work author's rights in contractual relationships and international legal mechanisms for their regulation (comparative legal research based on German example) raise questions: What is a musical work? How are composer's rights protected? What is the place of musical work author's rights in contractual relationships in German law? What is the difference between a service contract and an employment contract? What is the court practice regarding the protection of musical work author's rights in contractual relationships? The paper attempts to answer these questions through processing foreign and Georgian literature, as well as systematic analysis of court practice.

The scientific article aims to study the currently relevant and problematic issue, specifically the nature and peculiarities of musical work author's rights in contractual relationships, as well as to process international legal regulatory mechanisms and outline the author's ways of solving problems.

The subject of this research is to study musical work author's rights in contractual relationships within the framework of comparative research and analyze doctrine and court practice based on international legal mechanisms for their regulation.

The work creation process is mainly doctrinal, using the following criminological research methods:

1. **Documentary** – when processing special legislation, literature, and analytical materials;
2. **Comparative legal** – when relating different legal systems and institutions;
3. **Descriptive** – when characterizing international legal mechanisms of musical work author's rights;
4. **Historical-legal** – when processing development stages of legal rules and norms;
5. **Systematic** – when processing court practice and theoretical principles of norms.

From a structural perspective, this article consists of thirteen sections. In turn, the 3rd section consists of six subsections. The conclusion and references are presented at the end of the topic.

2. The Concept, Essence, and Significance of Musical Works

A musical work is a collection of sounds that differs in arrangement and composition. A musical work is an expression of the minimum level of creative achievement.[1]Generally, the art of sound is new music.[2] Composition can be physically expressed, e.g., recorded on musical paper or phonogram. Improvisation is as much a part of a musical work as folk songs that create cultural heritage. Mobile phone ringtones can also be considered musical works. It should be noted that sounds depicting everyday life can also be used in author's rights, though as such, they are not subject to legal protection.[3] The concept of musical work should find broad interpretation.[4] When evaluating a musical work, it's important to consider the opinion of those who know music well and are not restricted from freely expressing their opinion.[5] It's interesting whether there is actual interference with the author's rights of the musical work in the case of arranged musical works. In such cases, it should be

1 BGH GRUR 2022, 1441,1443 – Der Idiot.
2 *Schunke* ZUM 2020, 447, 451.
3 *Schunke* ZUM 2020, 447, 451.
4 BGH GRUR 2015, 1189, 1192 – Goldrapper.
5 BGH GRUR 2015, 1189, 1194 – Goldrapper; BGH GRUR 1988, 811 – Fantasy; BGH GRUR 1981, 267.

determined whether there are new performer's personal intellectual-creative inputs in the arranged version of the work created by the original musical work's author.[6] Generally, it should be said that musical work is subject to legal protection.[7]

3. Processing, Editing, and Free Use of Author's rights

Like other forms of art, author's rights often require editing for broader use.[8] Currently, the German legislative body has created the possibility for editing already created musical works. Therefore, if the editing of a musical work does not aim to change the original version and serves its editing, accompanied by the consent of the musical work's author, such implementation is possible and will not be considered a violation of the musical work author's rights.[9] It should be noted that German legislation allows the publication of edited and processed works only with the author's consent.[10] The right to edit includes the rights to use the work in accordance with Sections 31 and subsequent parts of the German Copyright Act.[11] The performance of author's rights requires consent from the author (Section 23, Paragraph 2, Point 2 UrhG).[12]

In practice, there are many cases where musical works have been processed and edited. The beloved film "Keto and Kote,"[13] directed by Vakhtang Tabliashvili[14], is an adaptation of Victor Dolidze's opera "Keto and Kote,"[15] where composer Archil Kereselidze[16] processed[17], edited, and expanded the original musical work created by Victor Dolidze. This did not violate the rights of the opera musical work's author.[18] Notably, Archil Kereselidze's processed version of Victor Dolidze's opera "Keto and Kote" was re-processed by Jansugh Kakhidze[19] at the end of the 20th century, who changed its name to "Barbale Fantasy."[20] Everything didn't end there; probably everyone remembers in recent years, specifically in 2012, composer Nikoloz Memanishvili (Rachveli)'s[21] breathing new life into the multiply processed opera "Keto and Kote." In this latest case, a kind of "modernization" of the musical work was implemented, specifically the opera work became a "Broadway style" pop

6 BGH GRUR 2015, 1189, 1194 – Goldrapper.
7 BGH ZUM-RD 2019, 518 – Das Omen.
8 *Schack* GRUR 2021, 904, 906; LG Berlin GRUR-RR 2022, 216, 221.
9 BGH GRUR 2016, 1157, 1159 – auf fett getrimmt; BGH GRUR 2014, 65, 70.
10 EuGH GRUR 2020, 186, 187 – IT Development SAS/Free Mobile.
11 BGH GRUR 2013, 818, 819 – Die Realität.
12 BT-Drucks. 18/12329, 31.
13 https://www.youtube.com/watch?v=vr6Cfyq8kEE [10.06.2024].
14 *Ninikashvili K.,* Georgian Soviet Encyclopedia, vol. 9, Tbilisi, 1985, 636.
15 https://www.youtube.com/watch?v=2VZUdtSWMgI [10.06.2024].
16 *Toradze G.,* Georgian Soviet Encyclopedia, vol. 5, Tbilisi, 1980, 475 (in Georgian).
17 *Iashvili M.,* Archil Kereselidze, Tbilisi, 1977, 22 (in Georgian).
18 *Babunashvili Z., Nozadze T.,* Mamulishvilta Savane, Tbilisi, 1994, 212 (in Georgian).
19 Georgian Soviet Encyclopedia, vol. 5, Tbilisi, 1980, 452 (in Georgian).
20 https://www.youtube.com/results?search_query=%E1%83%9D%E1%83%9E%E1%83%94%E1%83%A0%E1%83%90+%E1%83%A4%E1%83%90%E1%83%9C%E1%83%A2%E1%83%90%E1%83%96%E1%83%98%E1%83%90+%E1%83%91%E1%83%90%E1%83%A0%E1%83%91%E1%83%90%E1%83%9A%E1%83%94 [10.06.2024].
21 Encyclopedic Dictionary of Georgian Music. – Tbilisi, 2015, 316 (in Georgian).

production[22], featuring both opera and pop singers such as Nani Bregvadze[23], Lado Ataneli[24], Paata Burchuladze[25], Nino Katamadze[26], Sopho Nizharadze[27], and others. This fact did not violate either composer Victor Dolidze's or Archil Kereselidze's copyrights, and his created brilliant opera "Keto and Kote" convinced us of the work's immortality.

As a second example, we should remember the famous Georgian film "What You've Seen You'll Never See Again!"[28] where composer Revaz Laghidze[29] processed the musical work[30] "If You Knew My Heart's Sorrows"[31] by Giorgi Chubinishvili[32], a very popular composer from the dawn of the 20th century. This fact also did not violate the musical work author's rights; on the contrary, it achieved greater perfection and popularity for both the forgotten composer and his work.[33]

When discussing the processing and editing of author's rights, I must touch upon cases where several author's rights, including works created by different composers, are united. A clear example of this is the overture created by Nikoloz Memanishvili (Rachveli) at the dawn of the 21st century for Nani Bregvadze's[34] star-opening evening, using musical works[35] created by Georgian composers, where he used melodies from songs by Revaz Laghidze[36], Bidzina Kvernadze[37], Jansugh Kakhidze[38], Guram Bzvaneli[39], and Marika Kvaliashvili[40] such as: "Spring Has Come, the Almond Has Bloomed,"[41] "The Past Took Everything Away,"[42] "Beautiful Vine,"[43] "Dawn,"[44] "Autumn

---

22 https://www.youtube.com/watch?v=PLKHSGK068I [10.06.2024].
23 http://www.nplg.gov.ge/bios/ka/00002538 [10.06.2024].
24 http://www.nplg.gov.ge/emigrants/ka/00000408 [10.06.2024].
25 https://ka.wikipedia.org/wiki/%E1%83%9E%E1%83%90%E1%83%90%E1%83%A2%E1%83%90_%E1%83%91%E1%83%A3%E1%83%A0%E1%83%AD%E1%83%A3%E1%83%9A%E1%83%90%E1%83%ABE1%83%94 [10.06.2024].
26 https://ka.wikipedia.org/wiki/%E1%83%9C%E1%83%98%E1%83%9C%E1%83%9D_%E1%83%A5%E1%83%90%E1%83%97%E1%83%90%E1%83%9B%E1%83%90%E1%83%AB%E1%83%94 [10.06.2024].
27 https://ka.wikipedia.org/wiki/%E1%83%A1%E1%83%9D%E1%83%A4%E1%83%9D_%E1%83%9C%E1%83%98%E1%83%9F%E1%83%90%E1%83%A0%E1%83%90%E1%83%AB%E1%83%94 [10.06.2024].
28 https://www.youtube.com/watch?v=DwC8IzMW6iw [10.06.2024].
29 Georgian Soviet Encyclopedia, Vol. 6, Tbilisi, 1983, 146-147 (in Georgian).
30 Georgian Soviet Encyclopedia, Vol. 11, Tbilisi, 1987, 165 (in Georgian).
31 https://www.youtube.com/watch?v=RB2cbzdZywk [10.06.2024].
32 Georgian Soviet Encyclopedia, Vol. 11, Tbilisi, 1987, 165 (in Georgian).
33 https://www.youtube.com/watch?v=VTgQZwhEufI [10.06.2024].
34 *Gelovani A.,* Georgian Soviet Encyclopedia, Vol. 2, Tbilisi, 1977, 512 (in Georgian).
35 https://www.youtube.com/watch?v=LmoGuDDGpHo [10.06.2024]
36 *Babunashvili Z., Nozadze T.,* Mamulishvili's Home, Tbilisi, 1994, 232 (in Georgian).
37 *Tserodze E.,* Bidzina Kvernadze. Tbilisi, 2021, 275 (in Georgian).
38 Georgian Soviet Encyclopedia, vol. 5, Tbilisi, 1980, 452 (in Georgian).
39 http://gurambzvaneli.blogspot.com/ [10.06.2024].
40 http://www.nplg.gov.ge/bios/ka/00007041 [10.06.2024].
41 https://www.youtube.com/watch?v=gex5P64vIfs [10.06.2024].
42 https://www.youtube.com/watch?v=CLd0m7az0e8 [10.06.2024].
43 https://www.youtube.com/results?search_query=%E1%83%95%E1%83%90%E1%83%96%E1%83%9D+%E1%83%9A%E1%83%90%E1%83%9B%E1%83%90%E1%83%96%E1%83%9D [10.06.2024].
44 https://www.youtube.com/watch?v=w9Bf5FLh7oY [10.06.2024].

Flowers,"[45] "I Extinguished the Candle,"[46] and "Wait a Little More, Heart."[47] This overture is currently one of the most popular, and its creation by Nikoloz (Memanishvili) Rachveli did not violate the composers' rights.

Therefore, when talking about editing and processing musical works, we should remember that what matters is the processor's and editor's attitude, their good faith, and not malicious intent to appropriate someone else's created work.

4. Author of a Musical Work in Employment Relationship

According to German practice, copyright is based on a model of maintaining a certain freedom for the author.[48] A musical work, like any other sample created in any field of art, is connected to the creative process, therefore, it is unacceptable to force a creator to create a musical work in an employment relationship, although there were many examples of this.

In everyone's favorite comic opera: "Keto and Kote," the most popular melody today, "Georgian Dance," was created under pressure on Victor Dolidze, which the composer created in one day while confined in a dark room, thereby once again proving his genius to the critically-minded musical society of that time.

Today, the absolute majority of creators are employed and are in employment relationships.[49] Article 43 of the Copyright Law is important for regulating employment contracts with authors of musical works in Germany. Along with Article 43, the provisions of Article 31 of the Copyright Law are noteworthy, which also extends to regulating relationships where the author of a musical work created the work arising from employment or service relationships that fell under their obligations, except in cases where the content or nature of the employment or service relationship indicates otherwise.[50]

According to some researchers, Article 43 of the German Copyright Law is considered inadequate. This regulation, which was introduced into law in 1965, had no predecessor, but even before the Copyright Law came into force on January 1, 1966, copyright was also granted to those who were creatively active arising from employment relationships.[51] After the creation of the Copyright Law in 1965, Article 43 of the Copyright Law has not changed, although there were certain alternatives.[52] The reform of the Law on Employment Contracts Regarding Copyright in 2016 and 2021 also did not cause changes to Article 43 of the Copyright Law.[53] The main question that needs to

45 https://www.youtube.com/watch?v=qmrlK7q9tx8 [10.06.2024].
46 https://www.youtube.com/watch?v=WnlZ3Dn6FsQ [10.06.2024].
47 https://www.youtube.com/watch?v=OPKl-zBBGhc [10.06.2024].
48 *Wandtke/Leidl* GRUR 2021, 447, 448; Wandtke GRUR 2015, 831; Schack Rn. 1113.
49 *Ausführlich* zum Stand des Arbeitnehmerurheberrechts: Klass GRUR 2019, 1103 ff.; Rehbinder/ Peukert, Urheberrecht, Rn. 923; v. Olenhusen ZUM 2010, 474, 476.
50 BHG GRUR 2022, 899, 902 – Porsche 911.
51 BHG GRUR 2022, 899, 902 – Porsche 911. [4] RGZ 110, 394; BGH GRUR 1952, 257, 258 – Krankenhauskartei; BAG GRUR 1961, 491, 492 – Nah- verkehrschronik.
52 *Wandtke* GRUR 2015, 831 ff.; Wandtke GRUR 1999, 390 ff.
53 *Wandtke/Leidl* GRUR 2021, 447; Schwab, Arbeitnehmererfindungsrecht, Anhang § 1,9 .

be answered regarding Article 43 of the Copyright Law is the following: to what extent should the rights of an author employed in an employment relationship be considered and whether certain restrictions can be imposed that arise from the content or nature of the employment or service relationship.

Historically, this question was always preceded by a lengthy dispute, which aimed and still aims to answer the question of how to establish the copyright of an "intellectual worker" without infringing their rights. The widespread theory that the entrepreneur or employer bears the risk and, accordingly, the author of a musical work may not accept restrictions at work is not convincing. This is because the risk of the employed author is completely ignored, particularly due to the risk of possible insolvency of the entrepreneur or employer.[54]

Despite the extensive copyright reform in Germany in 2021, the principle of equality between employer and employed author's rights still wasn't adequately protected.[55] The current copyright law in Germany does not provide any restrictions regarding the protection of employed authors' personal rights. Article 8 of the Human Rights Convention (right to respect for private life) is applied to protect employed authors' rights, including cases where they are subject to video surveillance and such control during their work process.[56]

In employment relationships, it is essential that the interests of both employer and employee are protected equally. The equality between employer and employee does not mean that the employed musical work author should be completely freed from all obligations while imposing all obligations on the employer, including the duty to wait for when the composer finds their muse. Finding a muse for a musical work author might take months, years, and sometimes even a lifetime, which would make employers lose interest in maintaining such employment relationships. An employment contract should ensure fair compensation for the employee while allowing the employer the flexibility to support artistic creation without rigid time constraints. In case of inability to complete the work within certain time offered by the employer, the employee should be obligated to inform the employer about this in advance.

Therefore, while it is very difficult to regulate the employment relationship between employers and employed authors, it is essential to maintain the principles of equality and good faith.

4.1. The Boundary Between Quasi-Employed Musical Work Authors in Employment Relationships and Subjects in Contractual Relationships

Entering into a contractual relationship with a musical work author raises questions about whether this relationship falls under civil law regulation as a private contractual relationship, or whether it constitutes an employment contract. To answer this question, within the framework of comparative research, we need to examine established practices abroad, for example in Germany.

According to German labor law, an employee is a person who, unlike a freelance worker, is obligated to perform work under the employer's instructions. Accordingly, an employment relationship

54 So auch Sorge,119.
55 *Wandtke/Bullinger/Wandtke,* Urheberrecht, § 43, 137.
56 EGMR NJW 2020, 141.

between employee and employer should be presumed if the employee's service provision for appropriate compensation represents a legal relationship established by an employment contract and is not of a one-time nature.[57] The employer's right to give instructions, which is an integral part of the employment relationship, may influence the content of the activity, its implementation, duration, and location determination.

When dealing with a one-time commission, this may fall within the scope of a contractual relationship called a service contract. Ultimately, the answer to which legal relationship exists between employer and employee depends, in each specific case, on the cumulative assessment and analysis of all relevant circumstances of the individual case.[58] In practice, the distinction between a "free worker" and an employee is often difficult. The risks for the employed person are broader than for the employee.[59]

The newly inserted Section 611a in the German Civil Code reflects these legal principles. Specifically, with the amendment to the German Civil Code in 2017, for the ECJ, the essential characteristic of the concept of employee under EU law is that the employee performs services under the direction of the employer for a certain period in exchange for remuneration[60]. For example, composers, directors, screenwriters, cameramen,[61] photographers, journalists, sculptors, designers, radio and television employees, editors, architects, and presenters. They can engage in employment relationships and work as authors. This also applies to performing artists, e.g., band musicians[62] who work based on employment contracts. However, in practice, it may happen that even after long-term collaboration, for example, between an orchestra and a violinist as a temporary worker, no employment relationship exists.[63] Therefore, it is very difficult to distinguish between employment and non-employment contracts, which speaks to the relevance of the issue.

For determining the legal relationship, what matters is not the designation of the employment relationship, but the determination of objective business content. It is interesting whether a small degree of creative freedom extends to all work or service relationships. For example, performing singers can be employed in theaters where creative freedom is essential for the success of a stage work. In the artistic process, the director's instructions allow for the protection of creative freedom. Although performing actors are not direct authors of the works, they contribute to the success of stage or television work.

It is widely known that Nani Bregvadze was the muse for all Georgian composers active in the second half of the 20th century, as her performance of a piece guaranteed its subsequent popularity. Nevertheless, the relationship between authors and performers was not always straightforward.

---

57 BAG NJW 2020, 3802, 3803 – Grafikdesignerin.

58 BAG NJW 2020, 3802, 3803 – Grafikdesignerin; BAG NJW 2018, 1194, 1195; BAG NJW 2015, 572, 574. BAG ZUM-RD 2014, 63, 65 – Cutterin; BAG NJW 2012, 2903, 2904, Rn. 13; BAG ZUM 2007, 507, 508; BAG AfP 2007, 285, 287; LSG Baden-Württenberg ZUM 2012, 612, 617 – Sprecher und Übersetzer.

59 Ausfühlich zu den Risiken für den "freien Mitarbeiter", siehe BAG NJW 2020, 170, 172.

60 EuGH EuZW 2010, 268, 269.

61 LSG Baden-Würtemberg ZUM-RD 2012, 425.

62 EuGH GRUR 2019, 1286, 1289 – Spedidam/INA.

63 LAG Baden-Würtemberg NZA-RR 2020, 124, 127.

Although authors had the right to provide instructions to performers, this relationship could not be classified as a labor law relationship.

The situation differs when the performer is a member of a company. For example, Zurab Anjafaridze[64], a dramatic tenor, was the leading soloist at the Zakaria Paliashvili[65] Tbilisi Opera and Ballet State Theatre, where operatic productions were specially brought in for him, allowing him to fully express his creative talent. Such a relationship is indeed a labor law relationship, as evidenced by the somewhat comical fact that for many years Zurab Anjafaridze was considered the theatre's leading soloist, even though he was officially employed as a firefighter due to insufficient positions in the opera company. However, this status did not hinder him from gaining international recognition.

It is essential that freedom of art, guaranteed by the constitution, is upheld in any contractual relationship.[66] The Federal Constitutional Court of Germany has explicitly stated that a temporary labor contract with an author can only be concluded when it ensures the author's employment and provides them with more comfortable conditions. Therefore, the conclusion of a fixed-term labor contract with an employed author is excluded without objective reasons.[67]

For instance, the ECJ has permitted the conclusion of fixed-term labor contracts only in exceptional cases, specifically for the cultural sector, in order to prevent the abuse of the employer's power in labor law relationships.[68] It is noteworthy that Article 32 of the Copyright Law also applies to groups of people, according to which repeated remuneration falls under the provisions of Article 32 of the Copyright Law in Germany.[69]

Most creators employed in the arts come very close to the status of "permanent freelance collaborators," which largely bypasses labor legislation and sometimes even conflicts with it. It is important to allow different approaches when dealing with the author of a musical work, as this facilitates the creation of artistic works. This does not mean granting any party the opportunity to misuse rights but should aim to promote their fair conduct.

According to Article 611 of the German Civil Code, the labor relationship includes the rights and obligations of the employee that arise from both individual and collective agreements as well as special laws. Accordingly, while this relationship resembles a service contract, it still differs from it.[70]

4.2. The Scope of Employment Contracts in the Context of Mandatory Work to be Performed by the Composer

An employment contract with the author of a musical work establishes a labor relationship and defines the agreed-upon work and its objectives. The agreed work with the author of a musical work should encompass its content and outline the boundaries of the work to be performed, which the

64 *Tsulukidze A.,* Georgian Soviet Encyclopedia, vol. 1, Tbilisi, 1975, 505 (in Georgian).
65 *Donadze L.,* Georgian Soviet Encyclopedia, vol. 10, Tbilisi, 1986, 214 (in Georgian).
66 BAG NJW 2018, 810 – Krimiserie.
67 BAG NJW 2021, 1114, 1115; BVerfG NJW 2018, 2542, 2543.
68 EuGH NJW 2019, 748 – Sciotto/Fondazione Teatro.
69 BAG ZUM 2009, 883 – Wiederholungsvergütung; AG München ZUM 2010, 545, 546.
70 *MünHandb/ArbR* Bayreuther § 91 Rn. 2; Leuze § 5, 1.

employee will be obliged to fulfill before the employer. Within the framework of the labor relationship, the employee receives compensation—a salary.

According to Section 84(1) of the German Commercial Code (HGB), a person is considered self-employed if they freely organize their work and determine their working hours in exchange for a certain fee.[71]

Since the agreed work between the employer and the employee involves the creation of a musical work, it is essential to consider the legislative peculiarities regarding copyright within the labor relationship. If the creation of the work is agreed upon in the employment contract and constitutes the employee's primary activity, this agreed work is referred to as mandatory work.[72] This is the primary obligation that the employee, in this case, the author of the musical work, must fulfill. Employment contracts may sometimes establish a precise agreement regarding the content and scope of the mandatory work.[73]

"Free works" created by the composer, which he has not created for anyone and have no connection to employment or service relationships, do not have to be made available to the employer. They are not even obliged to publish such works.[74]

It is little known that the Georgian composer Bidzina Kvernadze almost entirely destroyed the original version of his first opera, "It Was the Eighth Year," without showing the scores to anyone. Only thanks to his wife and the renowned musician NESTAN (Nughesa) Meshki[75], a single fragment from the original version of the opera survived, which is now known as the aria "The Lament of Shushanika."[76]

Regardless of whether the composer is funded by a specific employer, he cannot be compelled to disclose or present any works created throughout his creative life to the employer.[77] There are special so-called "intimate" moments between the creator and their work, the disclosure of which is utterly unacceptable.

4.3. Ownership Rights to Works Created by the Composer under an Employment Contract

To address the question of who owns the results of the work performed by the composer, significant differences in the doctrinal discussion of the issue must be considered. Although copyright law grants exclusive rights to the creator of a work or their legal heir, ownership rights are assessed based on the principles of property law outlined in the German Civil Code.[78] Under German property law, employees are not considered owners of the physical objects they produce. According to Section 950 of the German Civil Code, the employer acquires the completed work during the production

71 BAG NJW 2010, 2455, 2456.
72 *Wandtke/Bullinger/Wandtke* § 43, 18.
73 OLG Düsseldorf ZUM-RD 2009, 63, 65.
74 *Dreier/Schulze/Dreier* § 43 12; *Schricker/Loewenheim/Rojahn* § 43, 63.
75 Encyclopedic Dictionary of Georgian Music, Tbilisi, 2015, 319 (in Georgian).
76 https://www.youtube.com/watch?v=ojxgNAJZAuc [12.06.2024]
77 *Grundlegend* VGH Baden-Württemberg ZUM 2018, 211, 220.
78 BGHZ 112, 243, 247 – Grabungsmaterialien.

process.[79] If a private law contract is concluded between the author and the employer, whereby the author is not only the owner of the intellectual property but also the producer[80], then in this case, they will be considered the property owner.

Accordingly, when discussing the ownership rights to a work created by a composer, it is important to consider the agreement between the parties and the form of their relationship.

4.4. Advantages of Employment Contracts versus Service Contracts

To identify the advantages between service contracts and employment contracts, it is essential to consider the goals and characteristics of the agreements. In an employment contract, the employer's main interest is to be able to commercially exploit the completed work.[81] Due to this commercial objective, German law does not grant the employer full rights to the musical work. According to Section 69b of the German Copyright Act, the employer acquires all property rights to the completed work based on a statutory license.[82]

Any contract must clearly define the acquisition of ownership rights to the completed work[83], and in cases of ambiguity, the contract will be interpreted in favor of the composer as the individual party[84]. This principle also stems from the ancient Roman law principle of "CONTRA PROFERENTEM," which implies that since the employer is primarily a business entity with more experience in the market than the employed individual, any ambiguities should be resolved in favor of the less experienced party due to the imbalance of experience.

Therefore, if an author wishes to retain ownership rights to their work, it is advisable to conclude a one-time service contract. By entering into an employment contract, the author effectively relinquishes ownership rights to the work, as the employer acquires the completed work. However, it should be noted that in both cases, the composer retains copyright.

4.5. Specifics of Determining Salary, Compensation, and Remuneration for the Composer

According to the employment contract concluded with the composer, the completed work is compensated, referred to as salary.[85] In contrast, under a service contract, the benefits received by the composer are referred to as remuneration.

Under the German Copyright Act, it is essential that both the composer's remuneration and salary are proportional and reasonable, specifically in relation to the labor and results corresponding to what the author of the musical work actually provides.[86]

---

79 BGHZ 112, 243, 249 – Grabungsmaterialien; BGHZ 20, 159, 163; Klass, GRUR 2019, 1103, 1105.
80 BGHZ 112, 243, 250 – Grabungsmaterialien.
81 BGH GRUR 1974, 480, 483 – Hummelrechte; OLG Karlsruhe GRUR-RR 2013, 424, 425.
82 *Wandtke/Bullinger/Grützmacher* § 69b Rn. 1 m. w. N.; a. A. Schack Rn. 304, es soll eine cessio legis (§§ 398 ff. BGB) der vermögensrechtlichen Befugnisse vorliegen.
83 *Däubler/Hjort/Hummel/Wolmerath/Ulrici* § 43, 21.
84 OLG Düsseldorf ZUM-RD 2009, 63, 66.
85 *Leuze* § 5, 62.
86 *Konertz E.,* ZUM 2020, 929, 936.

When discussing reasonable compensation, it should be noted that this provision applies to both employment and any contractual relationships. Thus, private clients are also obligated to offer the composer a reasonable amount for creating a musical work. It is unacceptable for any private individual or employer to take advantage of the composer's financial difficulties, naivety, or any other factors that might compel the composer to accept any payment for their work. However, it is important to remember that there are cases where even the offering of any amount of honorarium does not guarantee the creation of a popular melody or the arrival of the muse, which true creators often seek and sometimes unwittingly find and capture on paper.

In relation to this discussion, it is worth mentioning the well-known Georgian composer Gia Kancheli[87], who created several musical melodies for Eldar Shengelaia's[88] film "Blue Mountains," but ultimately gained the most popularity from a waltz he created effortlessly.[89]

Under European Union legislation, the right to reasonable compensation applies not only to "specific work contracts" but is also considered a concurrent right of the composer.

It is noteworthy that the limits of reasonable compensation for computer-generated melodies are not clearly defined, and this remains a matter for negotiation between the parties. In terms of both remuneration and copyright protection, the rights of the author of a musical work created by a computer program are less protected.[90] This might be because the legislator associates the creation of a musical work produced by a computer program not with the composer's efforts, but with the computer program itself, thus providing less protection for the latter's rights.

It is essential that Sections 32 and 32a of the German Copyright Act be interpreted in accordance with EU directives and legislation, especially concerning the definitions of work and employment relationships.[91]

Interestingly, the right to claim remuneration established by copyright law exists independently of the employment relationship, as well as contractual agreements. The starting point for the author's right to request relevant and appropriate remuneration is Sections 32 and 32a of the German Copyright Act, which were amended according to Articles 18 and 20 of the DSM Directive.[92]

The theory of compensation does not establish a distinction between the nature of claims for remuneration or salary and copyright.[93] Although determining the time required for the work plays a decisive role in defining the employee's compensation, the process of determining the composer's salary under copyright law is related to granting copyright to the client and the direct possibility of exercising those rights.

---

87 https://ka.wikipedia.org/wiki/%E1%83%92%E1%83%98%E1%83%90_%E1%83%A7%E1%83%90%E1%83%9C%E1%83%A9%E1%83%94%E1%83%9A%E1%83%98 [13.06.2024].

88 *Dolidze N.,* Georgian Film Directors: Collection of Essays: Part I, Tbilisi, 2005, 240, 105-137 (in Georgian).

89 https://www.youtube.com/watch?v=F-vO3hKCCFg [13.06.2024].

90 *Konertz E.,* ZUM 2020. 929, 937.

91 BGH GRUR 2022, 899, 903 – Porsche 911; ebenso Peifer GRUR 2022, 967, 970.

92 BAG NJW 2020, 170, 171.

93 BAG NJW 2019, 3016, 3018 – MTV-Zeitschriften; Schwab Anhang § 1, 89; v. Olenhusen ZUM 2010, 474, 479.

On one hand, the employer is obligated to pay the salary in exchange for the completed work, and on the other hand, copyright remuneration is in exchange for the grant of rights. When the composer claims the appropriate remuneration established by copyright, which also implies the transfer or usage of copyright, this requires independent regulation, known as the theory of separation.[94] The Federal Constitutional Court and the Federal Labor Court of Germany have explicitly confirmed the distinction between paying remuneration to the composer and claiming copyright or usage rights from the composer.[95]

The ECJ states that any composer employed by a company has the right to claim appropriate remuneration for the use of their musical works, regardless of whether the composer consented to the performance of their work.[96] The claim for copyright remuneration exists irrespective of whether there was an employment or other contractual relationship between the user and the composer.

For instance, according to the old version of Section 32 of the German Copyright Act (UrhG), it was established that the payment made for the repeated use of a musical work created by the composer could not be compared to a salary.[97] The composer receives a salary for the creation of the work, while the fee established for its use is one manifestation of copyright protection and is not related to service or labor contracts.[98]

For example, in 2021, in one of the most famous television series in Georgia, "My Wife's Friends," a melody created by composer Nunu Gabunia[99] was used without permission. She contacted the series' producers and received appropriate remuneration, which she had not received because the series' producers claimed they had commissioned the melody, while this particular melody existed long before the series was filmed. Therefore, for Nunu Gabunia to use her melody again in the series and receive specific remuneration for it cannot be considered a salary, even if it is systematic, as it would be a manifestation of copyright protection.

According to Sections 32d and 32e of the German Copyright Act, for a composer-employee in a specific establishment to determine the income and benefits derived from the exploitation or unauthorized use of the work by the employer, the employed author has the right to receive complete and comprehensive information regarding this.

Translating this practice to Georgia would also be beneficial, as the copyright association, which protects copyright owners, is constantly questioned regarding the principles it uses to distribute specific remuneration among authors and performers.

4.6. The Author's Moral Rights in Civil Law Contracts and Employment Relationships

Since the potential exploitation process in employment relationships affects not only assets but also the moral rights of the author, the question arises as to whether the employer should consider restricting or not restricting the moral rights of the employed author in all cases.

---

94 *Schwab* Anhang § 1, 91.
95 BVerfG ZUM 2011, 396; BGH NJW 2019, 3016, 3018 – MTV-Zeitschriften.
96 EuGH GRUR 2019, 1286, 1289 – Spedidam/INA.
97 BAG ZUM 2009, 883, 887; Anm. von Olenhusen ZUM 2009, 889.
98 So aber Hertin GRUR 2011, 1065, 1067.
99 Композиторы и музыковеды грузии. – тб., 1984, 90.

It is unacceptable for the limitation of moral rights to occur within the framework of employment relationships, as this does not stem from the "nature and essence" of labor law relationships.[100] However, it is possible to establish certain conditions with the author of a musical work in advance regarding modifications to their created work, within which the employed employer is granted specific powers under a particular employment contract.[101]

Changes to the employed composer's work should not be made in such a way that they ultimately result in its distortion. While the employer should have the right to implement changes, it is essential to determine the limits of such modifications in accordance with the principle of good faith, as outlined in Section 39(2) of the German Copyright Act.

The scope of the employer's ability to implement changes depends on several factors. If the employer is granted editorial rights under Section 23 of the Copyright Act, the employer or public body does not have the right to make changes or corrections themselves. Under German legislation, the employer can indicate to the composer, but the final choice must remain with the author of the musical work.

It is noteworthy that according to Section 42 of the German Copyright Act, if the author of a musical work has an unexpunged conviction, the employer's interests may be significantly compromised, which makes the protection of their interests even more crucial. An employer who has invested in a sample created by the author of the musical work should be granted the right to continue its marketing and use freely.[102]

The author of the lyrics of some of the most famous Georgian songs, Petre Bagrationi-Gruzinski[103], was well known to be a victim of the Bolshevik regime at that time, which caused him to spend several years behind bars. However, his conviction did not hinder the realization of his creative works in musical compositions; rather, this fact even awakened a kind of muse in the creator longing for freedom. Thus, his lyrics resonate remarkably in various Georgian musical works, such as "Tbiliso,"[104] "The Woman from Darkvelo,"[105] "Spring has come, the almond tree has blossomed,"[106] "Yellow Leaves,"[107] "She is here,"[108] and others.

The new version of Section 41 of the German Copyright Act indicates that the employed author has the right to choose. They can entirely or partially terminate the exclusive use right granted to the employer for their created musical work. An employment contract, as a contractual agreement, is closely linked to the granting of exclusive rights to use.

According to Section 41 of the German Copyright Act, the issue of the author's copyright, as a matter of inheritance protection, may also arise if the specific author's employer offers a third party to

---

100 *Berger/Wündisch/Wündisch a, A.,* § 15, 38.
101 *Klass,* GRUR 2019, 1103, 1109.
102 *Rehbinder/Peukert,* 953.
103 Encyclopedia "Georgia", Vol. 2, Tbilisi, 2012, 167 (in Georgian).
104 https://www.youtube.com/watch?v=VqrPhJ6z3ZY [14.06.2024].
105 https://www.youtube.com/watch?v=SA7OInsbA3o [14.06.2024].
106 https://www.youtube.com/watch?v=ZVQcahJ_ovA [14.06.2024].
107 https://www.youtube.com/watch?v=Do17LTb0keQ [14.06.2024].
108 https://www.youtube.com/watch?v=ciFCUFRkLOA [14.06.2024].

participate in a licensing chain. In such cases, it is essential to note whether a specific condition was agreed upon in the employment contract during the composer's lifetime.

If the employer has granted third parties simple rights to use the license, those rights remain in force even if the employed author-composer ceases their employment relationship. However, if they did not have the right to do so at the time, then according to Section 41 of the German Copyright Act, the employer will not have the right to issue a license for the works of a deceased composer to third parties, even if the employer faces insolvency.[109]

The interests of the employee-author must be maximally considered. The personal rights and remuneration claims of the author of a musical work are separate issues and differ from one another. It is interesting that in Germany, there is a practice where an employer pays the employed composer a compensation of €100.00 to prevent the employee from using the legally acquired knowledge and skills gained within the framework of a specific work relationship. However, such compensation payments represent a temporary regulation of behavior and cannot be of a permanent nature.

5. Collective Agreements with Authors of Musical Works and Their Regulation Features

In German practice, alongside individual labor law, there exists collective labor law, which encompasses collective agreements. These play a significant role in protecting the material interests of employed composers. Such agreements often include, particularly in the theater and media sectors, the large-scale use of copyright, positively impacting both authors and performing artists. Provisions of collective agreements serve as legislative norms according to Sections 1 and 12a of the TVG (Collective Agreements Act).[110]

Collective agreements pertain to the constitutional transformation of the basic rights of authors and performers. The Federal Court of Justice of Germany has acknowledged that a collective agreement or collective negotiations can be used as a point of reference or guideline when it comes to reasonable remuneration for all employees.[111]

In practice, the parties to collective negotiations can only define contractual obligations and the content and scope of rights granted; however, determining remuneration remains quite problematic.[112] For the employee, defining the employer's right to benefit from the musical work they created represents one of the operations for disposing of the composer’s copyright. According to current German practice, such disposal of the right to benefit can only occur through an agreement within the employment contract.

It is essential that the employment contract with the author of a musical work includes the following conditions:

- Provisions regarding the right to additional remuneration under Section 32a of the Copyright Act.

- Conditions regarding the right to terminate the contract, specifying exceptions.

---

109 BGH GRUR 2009, 946, 947 – Reifen Progressiv.

110 *Rehbinder/Peukert,* 941.

111 BGH GRUR 2020, 1191, 1193 –Fotopool; BGH GRUR 2009, 1148, 1149 – Talking to Addison; BGH GRUR 2016, 360, 362 – GVR Tageszeitungen II; BGH GRUR 2020, 591, 598 – Das Boot II.

112 *Rehbinder/Peukert a. A.*, 941; *Schack*, 1119; *Schricker/Loewenheim/Rojahn* § 43, 47.

6. Features of Contract Formation in the Purchase of Musical Works in Digital Form

European legislators have consciously given member states the opportunity to utilize a typological classification of contracts concerning the provision of digital content and digital services (digital products). In this context, the application of the DID Directive has increasing importance for the internal markets of EU member states.

Millions of consumers in the EU sign contracts daily to access digital content and services in various forms, especially music, which they do directly through their smartphones or laptops.[113] The DID Directive establishes "sui generis" copyright licensing agreements, primarily concerning musical files and electronic publications.

First and foremost, it is necessary to differentiate whether the contracts relate to digital products when connected to movable physical "data carriers," such as DVDs, CDs, USB drives, and memory cards (Section 327 (5) BGB), or to intangible electronic files stored on the internet.

Physical objects like DVDs, CDs, and USBs can be subject to sales contracts. The specific characteristic of melodies recorded on DVDs, CDs, and USBs is that, according to Sections 433 (1) BGB and 475 (1) BGB, their sale is not linked to the consumer terms of digital content sales by the entrepreneur.[114]

The DID Directive primarily focuses on the availability of digital content and digital services. For a consumer to use copyright-protected material as digital content, the company must acquire the appropriate rights from the author of the musical work based on a licensing agreement. This resembles a triangular relationship: on one hand, there is the company's (publisher's) contract with the rights-holder author, and on the other hand, an oral agreement between the company and the consumer. Under German civil law, the license purchased by the employer from the author can be transferred to the consumer.

While consumers have the right to use a musical work purchased in physical form, they must not misuse this right. It is prohibited for a consumer to limit the rights of the copyright owner at their expense, which partially falls under the responsibilities of the copyright owner's employer, who has realized the recording in physical form.[115]

Hybrid works, such as video games that contain music[116], do not fall under the protection of computer programs.[117] It is necessary for the entrepreneur to make digital content available to consumers or entities in such a way that specific music can be downloaded.[118] When registering on social networks, a contract "sui generis" is formed between the consumer and the network provider, which must ensure the protection of the composer's rights.[119]

---

113 *Schulze* ZEuP 2019, 695, 701.
114 BT-Drs. 19/27653, 81.
115 Staudemayer ZEuP 2019, 663, 710.
116 *Gülker* CR 2021, 66, 67.
117 EuGH GRUR 2023, 577, 582 – Action Reply.
118 *Schulze* ZEuP 2019, 695, 705.
119 OLG München MMR 2021, 71, 73.

It should be noted that in Germany or other EU member states, if a consumer wishes to download a specific musical work, they cannot arbitrarily refuse to electronically contract. Social network providers may insist on the fulfillment of certain obligations by the consumer as a condition for providing the musical work.[120]

It is legitimate for the provider to agree in advance with the consumer to prohibit the dissemination of illegal content in the agreement. The possibilities and restrictions for using music must be outlined in the terms of use, as general terms and conditions according to Section 305 of the German Civil Code.[121]

It is essential to differentiate whether the permanent or limited use of electronic files is permitted. The ECJ's decision regarding electronic materials addresses the public reproduction of intangible digital content offered online. Offering downloads of electronic copyright works relates to storage on the user's technical device and, consequently, the possibility of reproduction.

The legal position of the consumer must be assessed objectively when purchasing a digital copy of a work in the online market. Everyone desires to download something cheaper or even for free. A physical recording – DVD, CD, USB – does not have the same quality as an electronic copy of the recording. This applies to all digital copies of works.

Uploading to YouTube requires a licensing agreement under Article 17 of the DSM Directive to permit the public reproduction of digital video files. If contracts on digital products are made without acquiring the relevant rights, there may be legal deficiencies according to Section 327 g of the German Civil Code.

The moral rights of the author should also not be overlooked. Even if there are no legal deficiencies, the author's moral rights may be violated by the consumer, for instance, if the work is distorted according to Section 14 of the German Copyright Act. In such cases, the consumer loses warranty rights.[122]

The sale of electronic goods is distinguished from the sale of physical goods by the inclusion of personal data in the use of digital content, as derived from the DID Directive. This represents a novelty in private law. It means that in using digital content, such as downloading music electronically, the consumer's personal data must be recorded, including name, email address, age, and gender. On the other hand, goods for which no payment is made in money but include personal data, do not fall under the Goods Sales Directive. This all relates not only to copyright law but also to GDPR data protection law and the validity of contracts violating GDPR.[123]

7. The Supervisory Authority in Germany and Its Scope of Activities

In Germany, the supervisory authority is the German Patent and Trademark Office (DPMA), whose tasks and powers are executed in the public interest. It ensures the protection of the rights of authors of musical works collected by collectors.

120 OLG München MMR 2021, 71, 73.
121 *Wandtke/Ostendorff* ZUM 2021, 26, 28.
122 *Spindler/Sein* MMR 2019, 488, 490.
123 *Staudemayer* ZEuP 2019, 663, 676.

The supervisory authority has the ability to review the remuneration rates offered to composers by clients. This includes examining whether authors are adequately protected.[124] The oversight by the DPMA aims to eliminate the risks of abuse of powers by employers, as employers, acting as representatives of copyright holders, hold a monopolistic position in the market. Abuse of powers by employers can occur when excessively high fees are imposed for the use of a specific author's repertoire (Article 102 TFEU).[125]

In a comparative study, it should be noted that, similar to Germany, the establishment of a regulatory body in Georgia would be advisable. This would address the demands of author-performers who are members of copyright associations and would provide answers to all questions related to transparency.

8. The Scope of Activities of the German Arbitration Council in Resolving Copyright Disputes and Its Georgian Alternatives

Germany has an Arbitration Council that can summon any party involved in a dispute, including both the employer and the composer. The core of the dispute may relate to the use of work and services, as well as the proper provision and remuneration for devices and means of storing author's rights, as well as making amendments to contracts as derived from Article 92 of the VGG.

The decision of the Arbitration Council is a prerequisite for the admissibility of a lawsuit, but the final decision can be appealed in the Federal Court of Justice according to Article 129 of the ZPO.

In Georgia, disputes based on copyright infringement are primarily considered by city courts. However, in any case where there is no basis for administrative or criminal liability, the dispute may be resolved through mediation, providing the parties involved the opportunity to save time and material resources.

9. Copyright Licensing Agreement

A copyright licensing agreement is formed based on the free will of the parties. However, it still has specific characteristics based on the copyright law in force in Germany: a) The composer's copyright must be secured, regardless of whether the musical work is published, illustrated, accompanied by a filmed clip, or made available online.

The copyright of the composer must be ensured by the purchase agreement for the musical work (§§ 433, 453 BGB) (§§ 581 ff. BGB). A breach of this primary obligation leads to the legal consequences of the relevant type of agreement. This also applies to copyright licensing agreements. These are synallagmatic contracts where the remuneration for the composer's copyright represents the consideration of the exploiter, regarding the content and limits of the right of use, as well as the protection of the composer's copyright.

---

124 BVerwG GRUR-Prax 2020, 517.

125 *Dreier/Peifer/Specht/Staats*, FS für Gernot Schulze, 331 ff.

The requirement for copyright protection is the main contractual obligation of the author. They must grant the buyer the right to use the musical work according to the contract. Various reasons may exist for which the author subjectively or objectively cannot fulfill this obligation. In such cases, they may be liable for damages caused by the initial impossibility under Article 311a, paragraph 2 of the German Civil Code, or liability for legal defects under Articles 437 and 453, paragraph 1 of the BGB.[126]

Example: Producer P, as the exclusive holder of television rights, transferred them to a third party, D, on January 1, 2010. Film and television production company V entered into a contract with P on June 20, 2010, wherein the television rights were to be transferred to V. However, since P had already transferred the television rights to D on January 1, 2010, V could not acquire exclusive television rights. V could claim compensation from P according to Article 311a, paragraph 2 of the German Civil Code, as P could not transfer the television rights to V in the first place.[127]

b) The author's obligation of restraint is a secondary contractual obligation.[128] The author cannot leave the same work in exploitation with another exploiter during the validity of an existing contract. This obligation is directly regulated by the provisions of the Publishers Act, Article 2, paragraphs 1 and 39.

In the absence of a clear agreement, the composer's obligation of restraint arises from the principle of good faith under Article 242 of the German Civil Code.[129] The issue of the restraint obligation is primarily significant only when granting exclusive rights of use. If the author has only granted simple usage rights, they can permit the transfer of those rights to several exploiters.

Sometimes the exploiter is also subject to obligations of restraint under Article 242 of the German Civil Code, although this is rare; specifically, the author can require that their work is not disregarded in favor of another work.[130]

10. Obligations of the User (Exploiter) of a Musical Work

The obligation of reasonable remuneration means that the acquirer of the right of use is generally required to pay the composer an appropriate fee in exchange for the granting and use of the work's rights.[131] The DSM Directive and Article 11 of the German Copyright Act guarantee the musical work's author the right to receive reasonable remuneration.

Transposing such practices into the Georgian context would be beneficial, as it would eliminate the claims of author-performers who are members of copyright associations. The right to reasonable remuneration for the author exists even if there has been no economic benefit derived. All of this serves to protect authors and their rights and acts as a guarantee against the devaluation of their copyrights.[132]

---

126 *Schack.,* 1072.

127 file:///C:/Users/user/Downloads/Urheberrecht-4.pdf [15.06.2024].

128 BGHZ 94, 276, 280 – Inkasso Programm.

129 *Schack.,* 1073; *Dreier/Schulze/Schulze* Vor § 31, 42; *Rehbinder/Peukert*, 928.

130 *Dreier/Schulze/Schulze* Vor § 31, 45.

131 EuGH GRUR 2021, 95, 97 – SABAM; BVerfG GRUR 2010, 332, 333 – Filmurheberrecht; BGH ZUM 2010, 255, 258 – Literarischer Übersetzer IV; BGH GRUR 2009, 1148, 1150 – Talking to Addison.

132 BGH GRUR 2013, 717, 719 – Covermount; BGHZ 17, 266, 282.

According to Article 32 of the German Copyright Act, the request for reasonable remuneration by the copyright holder does not serve the purpose of remuneration for work but represents compensation for the granting of the right of use.[133]

Interestingly, in the licensing business, total acquisition contracts are considered unfair and immoral if authors are not involved in the exploitation of the work within the licensing chain. Compensation for copyright is not based on social aspects; it does not stem from the principles of social law.[134]

The obligation to exploit means that since the exploiter acquires the rights of use by entering into a contract with the author, they are generally interested in the musical work that will subsequently generate economic profit. However, the obligation to exploit is regulated solely by publishing legislation.

According to Article 2 of the first part of the German Publishing Act, the publisher is obliged to reproduce and distribute the work. If the obligation to exploit is not directly agreed upon, the exploiter is subject to the obligation of exploitation under Article 242 of the German Civil Code. If the exploiter fails to fulfill this obligation, the author has the right to revoke the rights of use under Articles 41 and 42 of the Copyright Act.

11. Specifics of Contracts for Future Musical Works

The author of a musical work may also hold rights of use for works that have not yet been created but are intended for future creation. This involves the authority to grant rights for the use of future works, which is specially regulated by Section 40 of the German Copyright Act.

To protect the author from unreasonable restrictions on their economic freedom, the legislator requires that any such obligations be set out in writing in the contract (§ 126, Paragraph 1 of the German Civil Code) as per Section 40, Paragraph 1, Sentence 1 of the Copyright Act. This formal requirement applies to contracts regarding the granting of rights for the use of future works, where the composer's obligations are not explicitly defined (Section 40, Paragraph 1, Sentence 1 of the Copyright Act).

Future musical works may only be defined by genre unless they are specified by individual title, sketch, or description, and only have general characteristics, e.g., classical music. If the author does not meet their obligations and fails to deliver, it breaks the terms of the contract. Ultimately, it makes no sense for the contracting party if they have signed a written agreement considering all legal points but still cannot exploit the work. No one can force a composer to create music; they can only be compelled to return the fee received for the creation of the work.

Both parties to the contract have the right to terminate it five years after its conclusion (Section 40, Paragraph 1, Sentence 2 of the Copyright Act). The right to terminate imposes an obligation for prior notice, specifically six months (Section 40, Paragraph 2, Sentence 1 of the Copyright Act). Other legal grounds for termination remain unchanged (Section 40, Paragraph 2, Sentence 2 of the Copyright

133 BVerfG ZUM 2011, 396; BGH GRUR 2009, 1148, 1154 – Talking to Addison.
134 OLG München ZUM-RD 2007, 166, 177; OLG München ZUM-RD 2007, 182, 190.

Act). If the author has not delivered the future work at the time of termination, the right of use reverts to the author. If the author has delivered the work before termination, the rights to the work continue to be in effect, even though the obligation has ended. In this case, the author has the right to receive compensation for the use of the work.[135] Section 40(1) of the German Copyright Act also applies to employment contracts to maintain its precautionary function. It is also relevant in contractual relationships involving representative contracts.[136]

In general, the right for the author of a musical work to enter into a contract for works to be created in the future is undoubtedly necessary, as creative composers do not have a reserve fund of works for sale. However, this still poses risks for the client, as the creation of a musical work is not like building a house; it is a creative process that can sometimes be associated with inspiration.

12. Rights to Unpublished Works Created by a Composer After Their Death

Any author who leaves behind unpublished musical works after their death can have those works published in accordance with Section 71, Paragraph 1, Sentence 1 of the German Copyright Act.[137] Additionally, it is important that the musical work subject to this regulation should not have been published yet, as stipulated in Section 6, Paragraph 2 of the Copyright Act, meaning copies should not have been offered to the public either in Germany or abroad.[138]

In this context, it is interesting to examine a well-known case: in 2002, V discovered an incomplete score of composer Antonio Vivaldi's opera "Motezuma" in the manuscript archive of the Sing-Akademie zu Berlin, which was founded in 1791. K, as the owner of the archive, made facsimile copies and sold one copy. B performed the opera. K believed that the work had not been published, and therefore he could decide the fate of the opera. The court rejected K's claim, determining that the distribution of sheets in the opera theater and their transfer to performers violated the composer's rights, even though the interested public had the opportunity to hear a different version performed at the original premiere of the opera in 1733.[139]

13. International Jurisdiction Regarding Copyright Infringement

The international jurisdiction of German courts is determined by the German International Civil Procedure Law (IZVR), as German courts have international jurisdiction and can apply foreign copyright laws in cases of legal conflicts. The principle of territoriality does not restrict the German court from applying necessary legislation.

The legal basis for the international jurisdiction of German courts is the Brussels Regulation (Brussels Ia Regulation) enacted on January 10, 2015. It is always applicable if the defendant resides

---

135 *Wandtke/Bullinger/Wandtke* § 40, 4; *Schack.,* 630; a. A. *Rehbinder/Peukert,* 1015. *Schricker/ Loewenheim/Rojahn* § 43, 44.

136 *Schack,* 1108.

137 *Wandtke/Bullinger/Thum* § 71, 9.

138 BGH GRUR 2009, 942, 943 – Montezuma; OLG Düsseldorf GRUR 2006, 673, 775 – Montezuma II.

139 BGH GRUR 2009, 942, 943 – Montezuma.

in the European Union.[140] The interpretation of the Brussels Regulation must be done independently, considering the same system and objectives of the member state concerned, to ensure uniform application across all other EU member states.[141] In addition to general jurisdiction, the Brussels Regulation also regulates specific local jurisdictions applicable in cases of copyright infringement.[142] It exists in any place where copyright is violated; it is sufficient for the plaintiff to prove that their rights have indeed been infringed, with no other extenuating circumstances.[143]

Interestingly, in the case of claiming "fair compensation" for damages incurred from reproduction for private use, local jurisdiction of the court applies. In interpreting Article 7, Paragraph 2 of the Brussels Regulation, the ECJ suggests that individuals whose personal rights have been violated can claim damages from the courts of the EU member states where their interests have been infringed. Typically, the determination of an individual's center of interests is based on their residence. Other indicators may also exist, such as the conduct of professional activities in another state. For legal entities, the center of interests may lie beyond normative locations, particularly if their economic activities are conducted in another state.[144]

If the defendant is a resident of Switzerland, Norway, or Iceland, the Lugano Convention (LugÜ) applies.[145] If the defendant is not a resident of an EU member state and the Lugano Convention does not apply, jurisdiction is regulated by national civil procedural legislation.

Considering ECJ case law, in applying Section 32 of the Civil Procedure Code, the Federal Court of Justice no longer requires that access to the infringing website be available in Germany, as was previously the case. It is sufficient that the rights are protected in Germany and the website is publicly accessible there. According to the meaning of Section 32, the place of the tort must also be confirmed in Germany.[146]

It is noteworthy that the application of the Rome Regulation is excluded in cases of personal rights infringement. According to German law, claims related to personal rights infringement must arise from the introductory provisions of Section 40, Sentence 1 of the German Civil Code (EGBGB).[147]

This section has provided significant assistance in drawing procedural conclusions within the framework of the systematic research project.

---

140 BGH GRUR 2022, 1812, 1816 – DNS-Sperre; BGH GRUR 2016, 1048, 1049 – An Evening with Marlene Dietrich; Picht/Koop GRUR Int. 2016, 232.

141 EuGH NJW 2021, 144, 146 – Wikingerhof/Booking.com.

142 EuGH GRUR 2009, 753, 755 – Falco Privatstiftung u. a./Weller Lindhorst; OLG Köln GRUR Int. 2009, 1048 (Art. 5 Nr. 5 EuGVVO).

143 BGH GRUR 2007, 871, 872 – Wagenfeld-Leuchte; BGH GRUR 2005, 431 – Hotel Maritime.

144 EuGH NJW 2017, 3433, 3435 – Bolagsupplysningen; EuGH EuZW 2011, 962, 49 – eDate Advertising.

145 BGH GRUR 2022, 1327, 1328 – uploaded III.

146 BGH GRUR 2018, 642, 643 – Internetforum; BGH GRUR 2016, 1048 Rn. 18 – An Evening with Marlene Dietrich.

147 BGH NJW 2018, 2324, 2326 – Suchmaschine.

14. Compulsory Enforcement

Despite the court's ruling, if the defendant refuses to voluntarily comply with the court's decision, the plaintiff can initiate compulsory enforcement. Thus, the legal dispute between the defendant and the plaintiff continues in the context of matters related to compulsory enforcement.

The law on compulsory enforcement is governed by Sections 704 ff. of the German Civil Procedure Code (ZPO). At this stage of the procedure, the parties are no longer referred to as the plaintiff and the defendant; instead, they are referred to as the creditor and the debtor. The court can impose penalties, including imprisonment, in accordance with Section 888 of the German Civil Procedure Code, if there is reasonable suspicion.[148]

When enforcing rights protected by copyright law, the general provisions of compulsory enforcement derive from Section 704 of the German Civil Procedure Code, which fully applies unless otherwise specified in Sections 113 to 119 of the Copyright Act (Section 112). The first sentence of Section 113 of the German Copyright Act establishes a high standard for the compulsory enforcement of monetary claims related to copyright.[149]

It is important that the court's decision is enforceable, as this not only ensures the proper protection of the rights of the copyright holder but also serves as a preventive measure against violations of the composer's copyright.

15. Conclusion

The rights of the author of a musical work within contractual relationships and the international legal mechanisms governing these rights have proven to be quite problematic issues, affirming their relevance. This study has addressed a broad spectrum of issues surrounding the rights of musical work authors, focusing on the concept, nature, and significance of author's rights; the processing, editing, and free use of musical works; the author's position in employment relationships; the boundary between quasi-employed musical work authors and contracting entities; the mandatory work to be performed by composers within employment contracts; ownership rights concerning works created by composers under labor contracts; advantages of labor versus service contracts; peculiarities in determining salaries, compensation, and remuneration for composers; moral rights of authors in service and labor relations; collective agreements with musical work authors and their specific regulations; peculiarities of contracts when acquiring author's rights in digital form; the role of supervisory bodies in German practice and their scope of activities; the German Arbitration Council's jurisdiction in resolving copyright disputes and its Georgian alternatives; the uses of copyright in contracts; obligations of users (exploiters) of musical works; peculiarities of contracts for future author's rights; rights of composers regarding unpublished works discovered posthumously; international jurisdiction concerning copyright infringement; and issues of enforcement.

---

148 OLG Celle ZUM-RD 2013, 119, 121.

149 *Skauradszun,* 34.

The research methods employed in the creation of this paper have led to the following conclusions:

Historical-Legal: The application of this method revealed that under German property law, employees are not owners of the physical objects they produce. According to Section 950 of the German Civil Code, the employer acquires ownership of the work performed during the execution of the task. If a private law contract exists between the author and the employer, making the author not only the intellectual property owner but also the producer, then they would be considered the property owner.

Under the old version of the German Copyright Act (UrhG), Article 32 established that the remuneration paid to a composer for the repeated use of their musical work could not be equated to a salary. The composer receives a salary for creating the work, while the established fee for its use is one manifestation of copyright protection and is unrelated to service or labor contracts.

Documentary: The specialized legislation, literature, and analytical materials studied in the research indicated that it is essential to uphold the principles of equality and good faith between the employer and the employee in labor relations. Equality between the employer and employee should not exempt the composer from obligations, nor should it place undue burdens on the employer, including the author's expectation of when inspiration might strike. A labor contract based on equality should ensure the employee is compensated according to the work performed while freeing the employer from certain constraints, allowing for unlimited creativity in producing artistic works such as musical compositions. If the work cannot be completed within a specified timeframe set by the employer, the employee should be obligated to notify the employer in advance, stemming from the principle of good faith.

Comparative-Legal: Through this research method, readers learned that Germany has a supervisory body, the Patent and Trademark Office (DPMA), which operates in the public interest. It should be noted that, similar to Germany, the establishment of a regulatory body in Georgia would be beneficial, meeting the demands of author-performers within the copyright association and addressing questions regarding transparency.

It is also noteworthy that hybrid works, such as video games that include music, are not covered under the protection of computer programs.

Sales of electronic goods differ from the sale of physical goods by incorporating personal data during the use of digital content, as outlined by the DID Directive. This represents a novelty in private law. This means that when utilizing digital content, such as downloading music electronically, personal data of users must be recorded, including their name, email address, age, and gender.

Descriptive: Based on the research method, it was determined that a labor relationship should be assumed between the employee and employer if the provision of services by the employee in exchange for corresponding remuneration constitutes a legal relationship established by a labor contract and is not of a one-off nature. If a one-time order is present, it may fall under a service contract framework.

It is unacceptable for an employee composer to alter their work in a manner that ultimately distorts it. The employer should have the right to implement changes, but the scope of such changes must be determined by the principle of good faith, as derived from Section 39(2) of the German

Copyright Act. According to German legislation, while the employer may suggest modifications to the composer, the final decision remains with the author of the musical work.

Systemic: The application of this research method has significantly aided in establishing the position that authors have the right to reasonable compensation even in the absence of economic gain. This serves to protect authors and their rights and acts as a safeguard against the devaluation of their copyright.

"Free works" created by composers, which are not commissioned by anyone and have no connection to labor or other contractual relationships, are not required to be made available to the employer or any other client. They have no obligation even to publish such works.

Regardless of whether a composer is funded by a specific employer, they cannot be compelled to disclose or present any works created throughout their creative life to the employer. There are certain intimate moments between the creator and their creation, and persistent demands for disclosure are entirely unacceptable.

Bibliography:

1. Bern Convention on the Protection of Literary and Artistic Works, 16/05/1995.
2. European Convention on Human Rights, 4/11/1950.
3. Constitution of Georgia, 24/08/1995.
4. Civil Code of Georgia, 26/06/1997.
5. Civil Procedure Code of Georgia, 14/11/1997.
6. Law of Georgia on Copyright and Related Rights, 22/06/1999.
7. Law of Georgia on Freedom of Speech and Expression, 24/06/2004.
8. *Akhmeteli M.,* Revaz Laghidze, "Soviet Art," 1976, No. 7, 3 (in Georgian).
9. *Babunashvili Z., Nozadze T.,* The Tomb of the Mamulishvili Family, Tbilisi, 1994, 212 (in Georgian).
10. *Gabunia D., Takhtakishvili G.,* International Copyright Law, Vol. I, National Center for Intellectual Property of Georgia (Sakpatenti), 2016, 4-15 (in Georgian).
11. *Gelovani A.,* Georgian Soviet Encyclopedia,Vol. 2, Tbilisi, 1977, 512 (in Georgian).
12. *Donadze L.,* Georgian Soviet Encyclopedia,Vol. 10, Tbilisi, 1986, 214 (in Georgian).
13. Encyclopedia of Georgia, Vol. 2, Tbilisi, 2012, 167 (in Georgian).
14. *Iashvili M.,* Archil Kereselidze, Tbilisi, 1977, 22 (in Georgian).
15. *Ninikashvili K.,* Georgian Soviet Encyclopedia, Vol. 9, Tbilisi, 1985, 636 (in Georgian).
16. *Toradze G.,* Georgian Soviet Encyclopedia, Vol. 5, Tbilisi, 1980, p. 475.
17. Encyclopedic Lexicon of Georgian Music, Tbilisi, 2015, 316, 319 (in Georgian).
18. Georgian Soviet Encyclopedia, Vol. 11, Tbilisi, 1987, 165 (in Georgian).
19. Georgian Soviet Encyclopedia, Vol. 5, Tbilisi, 1980, 452 (in Georgian).
20. Georgian Soviet Encyclopedia, Vol. 6, Tbilisi, 1983, 146-147 (in Georgian).
21. *Dzhamukashvili D.,* Intellectual Property Law, 2nd Edition, Tbilisi, 2006 (in Georgian).
22. *Tserodze E.,* Bidzina Kvernadze, Tbilisi, 2021, 275 (in Georgian).
23. *Tsulukidze A.,* Georgian Soviet Encyclopedia, Vol. 1, Tbilisi, 1975 (in Georgian).
24. *Jorbenadze S.,* Ilia Chavchavadze and Literary Property, Tbilisi, 2017 (in Georgian).
25. AG München ZUM 2010, 545, 546.
26. Ausfühlich zu den Risiken für den "freien Mitarbeiter", siehe BAG NJW 2020, 170, 172.

27. Ausführlich zum Stand des Arbeitnehmerurheberrechts: Klass GRUR 2019, 1103.
28. BAG AfP 2007, 285, 287.
29. BAG GRUR 1961, 491, 492.
30. BAG NJW 2021, 1114, 1115.
31. BAG NJW 2020, 170, 171, 3802, 3803.
32. BAG NJW 2019, 3016, 3018.
33. BAG ZUM 2014, 63, 65.
34. BAG NJW 2012, 2903, 2904,13.
35. BAG NJW 2010, 2455, 2456.
36. BAG ZUM 2009, 883, 887.
37. BAG ZUM 2007, 507, 508.
38. Berger/Wündisch/Wündisch a, A., § 15, 38.
39. BGH GRUR 2022, 1327, 1328, 1441,1443, 1812, 1816, 899, 903.
40. BGH GRUR 2020, 1191, 1193, 591, 598.
41. BGH GRUR 2018, 642, 643, 234, 2326.
42. BGH GRUR 2016, 1048, 1049, 360, 362.
43. BGH GRUR 2015, 1189, 1194 .
44. BGH GRUR 2014, 65, 70.
45. BGH GRUR 2013, 717, 719, 818, 819.
46. BGH GRUR 2009, 1148, 1149-154, 942, 943, 946, 947.
47. BGH GRUR 2007, 871, 872.
48. BGH GRUR 2005, 431.
49. BGH GRUR 1988, 811
50. BGH GRUR 1981, 267.
51. BGH GRUR 1974, 480, 483.
52. BGH GRUR 1952, 257, 258.
53. BGH NJW 2019, 3016, 3018.
54. BGH ZUM 2019, 518.
55. BGH ZUM 2010, 255, 258.
56. BGHZ 112, 243, 247.
57. BGHZ 17, 266, 282.
58. BGHZ 20, 159, 163.
59. BGHZ 94, 276, 280.
60. BHG GRUR 2022, 899, 902.
61. BT-Drs. 19/27653, 81.
62. BT-Drucks. 18/12329, 31.
63. BVerfG GRUR 2010, 332, 333.
64. BVerfG NJW 2018, 2542, 2543.
65. BVerfG ZUM 2011, 396.
66. BVerwG GRUR-Prax 2020, 517.
67. Däubler/Hjort/Hummel/Wolmerath/Ulrici § 43, 21.
68. Dreier/Peifer/Specht/Staats, FS für Gernot Schulze, 331.
69. Dreier/Schulze/Dreier § 43, 12.

70. Dreier/Schulze/Schulze Vor § 31, 42, 45.
71. Ebenso Konertz ZUM 2020. 929, 937.
72. ebenso Peifer GRUR 2022, 967,970.
73. EGMR NJW 2020, 141.
74. EuGH EuZW 2011, 962, 49.
75. EuGH EuZW 2010, 268, 269.
76. EuGH GRUR 2023, 577, 582.
77. EuGH GRUR 2021, 95, 97.
78. EuGH GRUR 2020, 186, 187.
79. EuGH GRUR 2019, 1286, 1289.
80. EuGH GRUR 2009, 753, 755.
81. EuGH NJW 2021, 144, 146.
82. EuGH NJW 2019, 748.
83. EuGH NJW 2017, 3433, 3435.
84. Fromm/Nordemann/Norde- v. Olenhusen ZUM 2010, 474, 479.
85. Grundlegend VGH Baden-Württemberg ZUM 2018, 211, 220.
86. Gülker CR 2021, 66, 67.
87. Klass, GRUR 2019, 1103, 1105, 1109.
88. Konertz ZUM 2020, 929, 936.
89. LAG Baden-Würtemberg NZA-RR 2020, 124, 127.
90. Leuze § 5, 62.
91. LG Berlin GRUR-RR 2022, 216, 221.
92. LSG Baden-Würtemberg ZUM-RD 2012, 425.
93. LSG Baden-Württenberg ZUM 2012, 612, 617.
94. mann,A.,Urheberrecht, § 43, 58; widersprüchlich Rn. 59, 60.
95. MünHandb/ArbR Bayreuther § 91, 2.
96. OLG Celle ZUM-RD 2013, 119, 121.
97. OLG Düsseldorf GRUR 2006, 673, 775.
98. OLG Düsseldorf ZUM-RD 2009, 63, 65, 66.
99. OLG Karlsruhe GRUR-RR 2013, 424, 425.
100. OLG Köln GRUR Int. 2009, 1048 (Art. 5 Nr. 5 EuGVVO).
101. OLG München MMR 2021, 71, 73.
102. OLG München ZUM-RD 2007, 166, 177, 182, 190.
103. Peukert, Urheberrecht, Rn. 923; v. Olenhusen ZUM 2010, 474, 476.
104. Picht/Koop GRUR Int. 2016, 232.
105. Rehbinder/Peukert a. A., 941, 1015.
106. RGZ 110, 394.
107. Schack GRUR 2021, 904, 906;
108. Schricker/Loewenheim/Rojahn § 43, 44, 47, 63.
109. Schulze ZEuP 2019, 695, 701, 705.
110. Schunke ZUM 2020, 447, 451.
111. Schwab Anhang § 1, 89, 91.
112. So aber Hertin GRUR 2011, 1065, 1067.

113. So auch Sorge,119.
114. Spindler/Sein MMR 2019, 488, 490.
115. Staudemayer ZEuP 2019, 663, 676, 710.
116. Ulmer-Eifort/Obergfell/Ulmer-Eilfort, Verlagsrecht E1 429.
117. von Olenhusen ZUM 2009, 889.
118. Wandtke GRUR 1999, 390.
119. Wandtke GRUR 2015, 831.
120. Wandtke GRUR 2015, 831.
121. Wandtke/Bullinger/Grützmacher § 69b, 1 m. w. N.
122. Wandtke/Bullinger/Thum § 71, 9.
123. Wandtke/Bullinger/Wandtke § 40, 4.
124. Wandtke/Bullinger/Wandtke § 43, 18, 137.
125. Wandtke/Leidl GRUR 2021, 447, 448.
126. Wandtke/Ostendorff ZUM 2021, 26, 28.
127. Композиторы и музыковеды грузии. – тб., 1984, 90.
128. http://gurambzvaneli.blogspot.com/ [10.06.2024].
129. http://www.nplg.gov.ge/bios/ka/00002538 [10.06.2024].
130. http://www.nplg.gov.ge/bios/ka/00007041 [10.06.2024].
131. http://www.nplg.gov.ge/emigrants/ka/00000408 [10.06.2024].
132. https://ka.wikipedia.org/wiki/%E1%83%92%E1%83%98%E1%83%%E1%83%A7%E1%83%%E1%83%9C%E1%83%A9%E1%83%94%E1%83%9A%E1%83%98[13.06.2024].
133. https://ka.wikipedia.org/wiki/%E1%83%9C%E1%83%98%E1%83%9C%E1%83%9D_%E1%83%A5%E1%83%90%E1%83%97%E1%83%90%E1%83%9B%E1%83%90%E1%83%AB%E1%83%94 [10.06.2024].
134. https://ka.wikipedia.org/wiki/%E1%83%9E%E1%83%90%E1%83%90%E1%83%A2%E1%83%90_%E1%83%91%E1%83%A3%E1%83%A0%E1%83%AD%E1%83%A3%E1%83%9A%E1%83%90%E1%83%AB%E1%83%94 [10.06.2024].
135. https://ka.wikipedia.org/wiki/%E1%83%A1%E1%83%9D%E1%83%A4%E1%83%9D_%E1%83%9C%E1%83%98%E1%83%9F%E1%83%90%E1%83%A0%E1%83%90%E1%83%AB%E1%83%94 [10.06.2024].
136. https://www.youtube.com/results?search_query=%E1%83%95%E1%83%90%E1%83%96%E1%83%9D+%E1%83%9A%E1%83%90%E1%83%9B%E1%83%90%E1%83%96%E1%83%9D [10.06.2024].
137. https://www.youtube.com/results?search_query=%E1%83%9D%E1%83%9E%E1%83%94%E1%83%A0%E1%83%90+%E1%83%A4%E1%83%90%E1%83%9C%E1%83%A2%E1%83%90%E1%83%96%E1%83%98%E1%83%90+%E1%83%91%E1%83%90%E1%83%A0%E1%83%91%E1%83%90%E1%83%9A%E1%83%94 [10.06.2024].
138. https://www.youtube.com/watch?v=2VZUdtSWMgI [10.06.2024].
139. https://www.youtube.com/watch?v=ciFCUFRkLOA [14.06.2024].
140. https://www.youtube.com/watch?v=CLd0m7az0e8 [10.06.2024].
141. https://www.youtube.com/watch?v=Do17LTb0keQ [14.06.2024].
142. https://www.youtube.com/watch?v=DwC8IzMW6iw [10.06.2024].
143. https://www.youtube.com/watch?v=F-vO3hKCCFg [13.06.2024].

144. https://www.youtube.com/watch?v=gex5P64vIfs [10.06.2024]
145. https://www.youtube.com/watch?v=LmoGuDDGpHo [10.06.2024].
146. https://www.youtube.com/watch?v=ojxgNAJZAuc [12.06.2024]
147. https://www.youtube.com/watch?v=OPKl-zBBGhc [10.06.2024].
148. https://www.youtube.com/watch?v=PLKHSGK068I [10.06.2024].
149. https://www.youtube.com/watch?v=qmrlK7q9tx8 [10.06.2024]
150. https://www.youtube.com/watch?v=RB2cbzdZywk [10.06.2024].
151. https://www.youtube.com/watch?v=SA7OInsbA3o [14.06.2024].
152. https://www.youtube.com/watch?v=VqrPhJ6z3ZY [14.06.2024].
153. https://www.youtube.com/watch?v=vr6Cfyq8kEE [10.06.2024].
154. https://www.youtube.com/watch?v=VTgQZwhEufI [10.06.2024].
155. https://www.youtube.com/watch?v=w9Bf5FLh7oY [10.06.2024].
156. https://www.youtube.com/watch?v=WnlZ3Dn6FsQ [10.06.2024].
157. https://www.youtube.com/watch?v=ZVQcahJ_ovA> [14.06.2024].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8323

Tamar Gvaramadze*

Human Rights and Artificial Intelligence

The article discusses one of the most pressing issues of the last decade: artificial intelligence. Numerous issues associated with this topic have sparked scientific discussions and debates. Nevertheless, this article intends to explore the problem through the lens of human rights. The primary question addressed in this study is whether artificial intelligence poses a threat to human rights, particularly in the context of Georgia. The findings indicate that artificial intelligence, as a significant outcome of the fourth industrial revolution, not only raises concerns about the potential disclosure of individuals' personal data and the processing of excessive amounts of information for illegitimate purposes, but also negatively impacts the enjoyment of various other rights and freedoms.The use of digital technologies and artificial intelligence makes it easy to impose illegitimate decisions and disproportionate restrictions on rights such as freedom of expression and assembly, the right to association, the right to work, access to information, the right to vote, ensuring equality, etc. In addition to examining the negative impact on rights, the article reviews the minimum European standards that take into account the protection of human rights in the process of using artificial intelligence. The study also discusses examples of several countries and the positive steps they have taken to reduce the negative impact of artificial intelligence on human rights. The article examines the issues using the comparative research method. The study highlights the challenges of regulating artificial intelligence in Georgia, reaffirming the need for analysis-driven solutions and restrictive regulations to keep pace with rapid technological advancements. It emphasizes the importance of balancing the positive impacts and benefits of AI while also safeguarding against its potential to unlawfully, severely, and disproportionately infringe upon areas protected by human rights.

Keywords: *artificial intelligence, human rights, Convention on Artificial Intelligence*

1. Introduction

The 1950s are considered the birth of artificial intelligence as a term, when in 1955, John McCarthy, together with several colleagues, first used the term and discussed it at a scientific conference.[1] Thirty years later, in the 1980s, companies working on artificial intelligence achieved

* Doctor of Law, Associate Professor at the Faculty of Law, Ivane Javakhishvili Tbilisi State University; First Deputy Public Defender of Georgia.

1 *Gabisonia Z.,* Internet Law and Artificial Intelligence, Publishing House “Lawyers' World”, Tbilisi, 2022, 443, 453 (In Georgian).

their first commercial success.[2] Despite such a pace of development, it was probably difficult to imagine how quickly and widely artificial intelligence would invade people's everyday lives and routines. It has become a part of everyday life not just as a technical tool or an object or a software but to such an extent that in the scientific literature, legal researchers, including Georgian scholars, discuss and debate the issues of recognizing artificial intelligence as a subject of law and the emergence of the concept of the so-called "electronic person."[3]

Modern technologies have become essential components of human life. This encompasses a wide array of innovations, including chatbots, virtual assistants, translation systems, financial investment algorithms, self-driving automobiles, and flying vehicles.[4] Notably, we are witnessing the emergence of a new reality where the chatbot Mirai, developed in Japan, has been officially authorized to resident permit in Tokyo. Furthermore, the humanoid robot Sophia, created by Hanson Robotics, has recently been granted citizenship by Saudi Arabia.[5] Despite the above, it sounds peculiar, however, to this day, there is no agreement among experts and scholars from various fields on the concept of artificial intelligence itself, which would be decisive in establishing a legislative definition. [6] The issue of the concept is widely debated, with scholars analyzing it from strategic, ethical, and legal perspectives. This topic is actively discussed in various academic publications and forums.[7]

Despite of the extensive integration of artificial intelligence into public life and the ongoing, fervent debates – both scientific and non-scientific – surrounding this technology, particularly regarding its recognition[8] as a subject of law, the objective of this article is neither to engage in such

---

2 *Gabisonia Z.,* The Essence of Artificial Intelligence and the Problem of Its Recognition as a Subject of Law, Journal "Justice" Nº1, 2022, 129, <https://iustitia.gov.ge/uploads/1672146396.1full_en.pdf> [10.08.2024] (In Georgian).

3 Two positions are being discussed among scholars, some believe that artificial intelligence can be interpreted only as a technical means with the right of legal status of a thing. In the second case, artificial intelligence can be granted the status of a subject of legal relations, in the form of the so-called "electronic person", based on the fiction of law, like a legal entity. Researchers also continue to argue about whether artificial intelligence can become an independent subject of legal relations and be a person independently responsible for its actions or not. Compare, Gabisonia Z., The essence of artificial intelligence and the problem of its recognition as a subject of law, Journal "Justice" N1, 2022, 131, <https://iustitia.gov.ge/uploads/1672146396.1full_en.pdf> [10.08.2024]. *Gabisonia Z.,* Internet Law and Artificial Intelligence, Tbilisi, 2022, 509-511 (In Georgian).

4 *Gabisonia Z.,* Internet Law and Artificial Intelligence, Publishing House "Lawyers' World", Tbilisi, 2022, 463 (In Georgian).

5 *Burkadze K.,* Towards the Status of Considering Artificial Intelligence as a Subject of Law, Journal "Justice" N2 (5), 2023, 36 <https://iustitia.gov.ge/2023-N2(5)-32-44-%E1%83%91%E1%83%A3%E1%83%A0%E1%83%99%E1%83%90%E1%83%AB%E1%83%94.pdf> [10.08.2024] (In Georgian).

6 *Gabisonia Z.,* The Essence of Artificial Intelligence and the Problem of Its Recognition as a Subject of Law, Journal "Justice" Nº1, 2022, 129, <https://iustitia.gov.ge/uploads/1672146396.1full_en.pdf> [10.08.2024] (In Georgian).

7 *Burkadze K.,* Towards the Status of Considering Artificial Intelligence as a Subject of Law, Journal "Justice" N2 (5), 2023, 32, https://iustitia.gov.ge/2023-N2(5)-32-44-%E1%83%91%E1%83%A3%E1%83%A0%E1%83%99%E1%83%90%E1%83%AB%E1%83%94.pdf [10.08.2024] (In Georgian).

8 *Gabisonia Z.,* The essence of artificial intelligence and the problem of its recognition as a subject of law, Journal "Justice", Nº 1, 2022, 136-138, <https://iustitia.gov.ge/uploads/1672146396.1full_en.pdf> [10.08.2024] (In Georgian).

discussions nor to explore the history of artificial intelligence development. This article explores the question of whether artificial intelligence poses a threat to human rights, specifically examining the situation in Georgia. It investigates whether this threat is limited to a single right, such as the protection of personal data, or if it extends to a broader range of human rights and freedoms. To address these questions, the article reviews the current landscape of artificial intelligence regulation and considers experiences from other legal systems. By reading this article, readers will gain insight into how artificial intelligence impacts the protection of human rights and freedoms. It will also discuss whether there are minimum standards at the international or national level that should be considered when using artificial intelligence to meet the state's obligations—both positive and negative – to safeguard human rights.

Although scientific literature, including sources in Georgian and authored by local scholars, features some studies on various aspects of artificial intelligence, there is limited discussion surrounding the specific topic addressed in this article. Consequently, this research represents one of the first attempts in Georgia aimed at examining this subject. Alongside analyzing the issue, the article also seeks to spark interest within academic circles for further, more in-depth exploration of the topic.

As already noted, the article will not discuss the ongoing scientific debates surrounding the concept of artificial intelligence and the definitions proposed by various studies, scholars, or international organizations. Considering the importance of the prism of human rights, democracy, and the rule of law, the article applies the concept of artificial intelligence defined by the Council of Europe Convention[9], which is the latest, as the Convention was adopted in May 2024 and this definition represents an internationally recognized definition that will be binding for European and non-European states that are signatories to the Convention in the future.

According to Article 2 of the said Convention, "artificial intelligence system" means a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that may influence physical or virtual environments. Different artificial intelligence systems vary in their levels of autonomy and adaptiveness after deployment.[10]

The methodological basis of the research is based on general scientific as well as special research methods – normative, systemic, and comparative-legal.

2. The Impact of Artificial Intelligence on Everyday Life and the Challenges of Its Regulation in Georgia

Artificial intelligence dating back to the 1950s has often been only represented in fantacy literature and films. However, in today`s world artificial intelligence and modern technologies have become essential components of public life, as well as the operations of private enterprises and governmental institutions. Various sectors, including healthcare, agriculture, public safety, security,

[9] Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, <https://rm.coe.int/1680afae3c> [15.08.2024].

[10] Ibid.

culture, education, environmental protection, climate change, and defense, now rely heavily on technological advancements, with artificial intelligence playing a crucial role in their development and implementation.[11]

The application of artificial intelligence across various facets of public life is not only a matter of substantial interest and importance but also a significant area of scientific inquiry. Research in this field highlights that individual countries set their own priorities for application of artificial intelligence in key areas of governance and public affairs, determining the scope, phases, and methodologies of such application. To investigate these approaches, scholars concentrate on the strategies, policies, and vision documents put forth by different nations.[12] In various scholarly sources, researchers review both the content of such strategic documents and discuss and justify the necessity of having strategies. [13] In this regard, the study of the experience of other countries over the past ten years is also of interest to Georgian scholars.[14] Research on this issue is crucial because the fourth industrial revolution is transforming traditional policy formation processes. As a result, governing bodies often find themselves reacting to technological changes rather than leading the process.[15] This shift has led to the approval of various strategies by different countries being viewed positively in the scientific literature.[16]

Since 2020, scholars in Georgia have been emphasizing the necessity of developing and adopting a national strategic framework for utilizing artificial intelligence.[17] In 2023, acknowledging the vast potential of artificial intelligence, Georgian researchers and academics emphasized the urgency for a comprehensive strategy and proposed the "Guiding Principles of the Georgian National Strategy for Artificial Intelligence" to the government.[18] Unfortunately, as of July 2024, this document

---

11 The current global achievements and realities are well reflected in the information published on the official website of the World Economic Forum's "Center for the Fourth Industrial Revolution", in the form of reports, studies, videos and other forms. You can also see the Center's AI Governance Alliance initiative, which brings together industry leaders, governments, scientific research institutions and public organizations worldwide and works together to address issues of global AI design, transparency and inclusive programming. Information on technological progress and experience in the use of AI in various industries around the world is available on the same website, https://centres.weforum.org/centre-for-the-fourth-industrial-revolution/home [10.08.2024].

12 *Burkadze Kh.,* Towards the Status of Considering Artificial Intelligence as a subject of law, Journal "Justice", Nº2 (5), 2023, 35-36 <https://iustitia.gov.ge/2023-N2(5)-32-44-%E1%83%91%E1%83%A3%E1%83%A0%E1%83%99%E1%83%90%E1%83%AB%E1%83%94.pdf> [10.08.2024] (In Georgian).

13 Ibid.

14 *Gabisonia Z.,* Internet Law and Artificial Intelligence, Publishing House "Lawyers' World", Tbilisi, 2022, 525-542 (In Georgian).

15 Ibid, 513.

16 Ibid, 543.

17 The Need for a National Artificial Intelligence Strategy, Research Report, 2020, <https://btu.edu.ge/khelovnuri-inteleqtis-erovnuli-strategiis-satchiroeba/> [02.08.2024] (In Georgian).

18 Study: Guiding Principles of the Georgian National Strategy for Artificial Intelligence, University of Business and Technology, Tbilisi, 2023, <https://drive.google.com/file/d/1SRKp8Qe3jnJngO0W9OYNbhsnBigSb3tL/view> [09.08.2024]. (In Georgian)

has not yet been adopted in Georgia. Consequently, the country's unified national vision on this increasingly critical issue remains ambiguous.

Regardless of whether the state has an approved vision document, it is important to examine whether artificial intelligence programs are being used in Georgia to assess the scale of their impact on human rights.

As already noted, a strategic policy document or any vision that would outline the state's long-term or short-term goals and objectives regarding artificial intelligence, including an indication of the scale of its impact on human rights, has not been approved in Georgia for July 2024. At the same time, the concept of artificial intelligence has not been defined, nor is there any act that would define the general principles and requirements for the use of artificial intelligence in the public or private sphere. Only a few of the legal acts in force in Georgia mention artificial intelligence itself as a tool that is used or will be used in the future in a particular sector of activity. For example, the Ministry of Finance envisages the introduction of artificial intelligence software (so-called Machine Learning) for the implementation of several customs procedures in the coming years within the framework of integrated management of state borders.[19] The use of artificial intelligence is mentioned in Georgia's 2023-2025 National Tuberculosis Control Strategy and Action Plan,[20] and the use and potential of artificial intelligence are also indicated in the State Energy Policy Document approved by the Parliament of Georgia. [21]

The above-mentioned normative acts only refer to the use or possible use of artificial intelligence, however, unlike these legal acts, Order No. 151/04 of the President of the National Bank of Georgia dated August 17, 2020, "On the Approval of the Regulation on Risk Management of Data-Based Statistical, Artificial Intelligence and Machine Learning Models" develops a risk management framework for the use of this program for commercial banks, microbanks, non-bank depository institutions, microfinance organizations, credit information bureaus and lending entities in Georgia, which, among others, use artificial intelligence, and obliges the latter to develop such internal documents on risk management procedures.[22]

The reference to artificial intelligence in the above-mentioned small number of acts creates an expectation that artificial intelligence is used in the relevant fields and areas. In addition, the study of

---

19 "On the Approval of the Strategy for Integrated Management of the State Border of Georgia for 2023-2027 and its Action Plan" Resolution No. 92 of the Government of Georgia of March 9, 2023, <https://matsne.gov.ge/document/view/5746129?publication=1> [15.08.2024] (In Georgian).

20 "On the Approval of the National Tuberculosis Control Strategy and Action Plan of Georgia for 2023-2025" Order No. 54/n of the Minister of IDPs from the Occupied Territories, Labor, Health and Social Protection of Georgia of July 21, 2023 <https://matsne.gov.ge/document/view/5863955?publication=0> [10.08.2024] (In Georgian).

21 Resolution of the Parliament of Georgia №4349-XIVმს-Xმპ of June 27, 2024 on the approval of the "Energy Policy of the State of Georgia", <https://matsne.gov.ge/document/view/6212458?publication=0> [10.08.2024] (In Georgian).

22 "On Approval of the Regulation on Risk Management of Data-Based Statistical, Artificial Intelligence and Machine Learning Models" Order No. 151/04 of the President of the National Bank of Georgia of August 17, 2020, <https://matsne.gov.ge/document/view/4964423?publication=2> [29.07.2024] (In Georgian).

the practice of using digital technologies and artificial intelligence in the process of providing public services in Georgia is also of scientific interest. For example, Professor Zviad Gabisonia, in his 2023 scientific article "Digital Governance and Legal Technologies in the Justice System," reviews the trends in the development of digital governance in this system, which also includes issues of artificial intelligence.[23]

The scientist notes that digital technologies are related to the government offering various online resources to the public, such as online services for state registrations, online publication of public information, public online surveys, active two-way interaction between state structures and users, the existence of various online services, electronic voting format, etc. He also indicates that in the context of digital governance, the main institution of the country is the Ministry of Justice of Georgia. On the one hand, the LEPL – Digital Governance Agency is subordinate to it, and on the other hand, public and entrepreneurial registers, Public Service Halls, the State Services Development Agency, etc.[24]

Unfortunately, no academic research on the use of artificial intelligence or its effectiveness in other public institutions or agencies in Georgia can be found in public sources. As for non-academic studies, the only available report is the one[25] prepared in 2021 by the NGO "Institute for Development of Freedom of Information", which assesses the situation by that time. The document states that the implementation of artificial intelligence systems in the public sector of Georgia is at the initial stage of development; however, there are already many successful examples of the use of this technology in the private sector.[26] This report assessed the practice of using artificial intelligence in about 50 public institutions, which showed that the process in public institutions was chaotic and knowledge was scarce.[27] Given the growing and rapid trend of using artificial intelligence, the data, and assessments reflected in this NGO report may no longer reflect reality today; however, the research of this issue requires conducting an independent study, which goes beyond the objectives of the article.

As noted Georgia presently lacks a unified strategic vision—both short-term and long-term—concerning the principles and regulations for the use of artificial intelligence in public and private services. The existing legislation does not prohibit public and private entities from utilizing artificial intelligence; consequently, these entities are free to make their own decisions regarding its application based on their individual objectives. This autonomy allows them to determine their goals, establish rules, and define the parameters of the artificial intelligence programs they deploy. Numerous examples highlighted in this article suggest that such practices may pose significant risks to the realization of fundamental human rights and freedoms.

---

23 *Gabisonia Z.,* Digital Governance and Legal Technologies in the Justice System, Journal "Justice" 2023 1(4), <https://doi.org/10.59172/2667-9876/2023-1/28-44> [18.07.2024] (In Georgian).

24 Ibid.

25 NGO Institute for the Development of Freedom of Information, Use of Artificial Intelligence Systems in Georgia – Legislation and Practice, Tbilisi, 2021, <https://idfi.ge/public/upload/Article/AI%20ENG%20FULL.pdf> [14.08.2024] (In Georgian).

26 Ibid.

27 Ibid.

3. Negative Digital Impact

With the advancement of digital technologies and artificial intelligence and their growing influence on people's lives, it is increasingly vital to evaluate their impact effectively. The issue of the relationship between human rights and artificial intelligence has become a subject of discussion in international scientific circles and various discussions in recent years. Researchers are increasingly discussing this issue from different perspectives[28]; however, discussions within Georgian academic literature remain limited. Additionally, the potential risks and negative consequences of artificial intelligence, often regarded as a troubling form of progress, have been emphasized not only by scholars but also by several international organizations, including the United Nations[29], the European Union[30], the Council of Europe[31], etc.

The rapid advancement of artificial intelligence and its emerging capabilities render this discussion increasingly pertinent, particularly as the pace of scientific research often struggles to keep pace with technological development. For example, the artificial intelligence chatbot "TAY," which, engaged with users on the social platform "X" (formerly known as "Twitter") and received and processed a large amount of information, was taken offline just after 16 hours. The reason was that due to the failure to analyze and reassess the content it encountered and the program began to spread messages containing hate speech.[32] Understanding such swiftly evolving events presents considerable challenges for the scientific community. Nevertheless, the analysis of the evaluations and studies discussed below underscores the significant threat that artificial intelligence poses to the realization of various human rights:

According to the United Nations, using a particularly large amount of data, artificial intelligence programs can purposefully influence the expression of the will of voters, which in turn is an infringement on the realization of the right to vote. At the same time, artificial intelligence, by spreading disinformation, harms the process of democratic development of countries, as it can undermine public trust in democratic institutions and processes.[33]

The use of technology, along with significant positive effects, may also have negative effects and create a potential threat of human rights violations in labor relations. For example, the Georgian legal system provides for the possibility of employers, for various reasons or purposes,[34] to process a fairly large amount of personal data, including special categories of data.[35]

---

28 *Raso F., Hilligoss H., Krishnamurthy V., Bavitz Ch., Kimberly L.,* Artificial Intelligence and Human Rights: Opportunities and Risks, Berkman Klein Center for Internet and Society Research Publication, < http://nrs.harvard.edu/urn-3:HUL.InstRepos:38021439> [13.08.2024].

29 <https://press.un.org/en/2023/sgsm22017.doc.htm> [13.08.2024].

30 <https://joint-research-centre.ec.europa.eu/jrc-mission-statement-work-programme/facts4eufuture/artificial-intelligence-european-perspective/ai-opportunities-and-threats_en> [13.08.2024].

31 The Brain-Computer Interface: New Rights or New Threats to Fundamental Freedoms, COE Parliamentary Assembly, Recommendation 2184, (2020), <https://pace.coe.int/pdf/acace403a83aad11dc0a684067f2a6ae54a65ff2d70e7d1552e28e4b9ce8b05e?title=Rec.%202184.pdf> [14.08.2024].

32 <https://www.opinosis-analytics.com/blog/tay-twitter-bot/> [21.07.2024].

33 <https://unric.org/en/can-artificial-intelligence-ai-influence-elections/> [21.07.2024].

34 The Law of Georgia on Personal Data Protection grants employers the right to process special categories of data that are necessary for the purpose of employment obligations and the nature of the relationship,

At a glance, when discussing the issue of processing employee data by an employer, attention is often directed primarily toward the right to protect personal data, particularly in relation to potential human rights violations. However, the use of artificial intelligence may raise issues of harassment, other forms of discrimination, as well as persecution, and restrictions on freedom of expression as well. This issue is also the subject of academic research. According to the assessment of American scholars Balley and Stone, artificial intelligence not only revolutionizes the practices and capabilities of human resource management and influences labor law but also presents a significant risk of easily infringing upon employees' labor rights. Moreover, it can facilitate discrimination, compromise privacy rights, and restrict both trade union membership and participation, as well as freedom of expression.[36]

This threat is real, given that, according to scholars, employers have the opportunity to use programs to select new employees, evaluate work performed, check discipline, conduct electronic video and audio surveillance, record biological data, track employees' movements, the time they spend on work, including their remote work, and even more so, monitor them during non-working hours. The collection of this type of data over a long period and the voluminous information obtained by artificial intelligence algorithms may be translated into the preparation of information reports about employees when it is possible to programmatically evaluate not only their past behavior but also predict future behavior, assess their effectiveness in the future, predict future estimated costs on the part of the employer, and so on. According to scholars, sometimes completely invisible electronic networks can be the cause of not only direct discrimination but also covert and indirect discrimination, the dysfunction and ineffectiveness of trade unions, and the violation of many other rights.[37]

It is essential to conduct research and assessments regarding the potential risks posed by employers' use of artificial intelligence in labor relations. These concerns are not just speculative fears or excessive caution from scholars; they reflect a genuine reality that is already being observed. The following examples illustrate this issue clearly: One of the American companies of innovative technologies[38] processes records of communication with customers using a special algorithm, which

including for making a decision on employment or assessing the employee's work skills. Article 6, Part 1, Subparagraph "h" of the Law of Georgia on Personal Data Protection, <https://matsne.gov.ge/document/view/5827307?publication=1> [02.08.2024] (In Georgian).

35 The Law of Georgia on the Protection of Personal Data considers as special categories of data, among others: racial or ethnic origin, political opinions, religious, philosophical or other beliefs, membership in a trade union, health, sex life, status of an individual as accused, convicted, acquitted or victim in criminal proceedings, conviction, sentencing, recognition as a victim of human trafficking or crime in accordance with the Law of Georgia on the Prevention of Violence against Women and/or Domestic Violence, Protection and Assistance to Victims of Violence, imprisonment and execution of a sentence against him, as well as biometric and genetic data that are processed for the purpose of uniquely identifying an individual. Article 3, subparagraph "b" of the Law of Georgia on the Protection of Personal Data. <https://matsne.gov.ge/document/view/5827307?publication=1> [02.08.2024] (In Georgian).

36 *Bales R.A., Stone K.V.W.,* The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace, < https://ssrn.com/abstract=3410655> [07.07.2024].

37 *Bales R.A., Stone K.V.W.,* The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace, < https://ssrn.com/abstract=3410655> [07.07.2024].

38 For detailed information about the company, their products, and the opportunities created using artificial intelligence, see: <https://cogitocorp.com/about/> [08.07.2024].

evaluates the goodwill of the employee not only based on the content of the conversation, but also on the voice, intonation, and emotions of the interlocutors. Based on this, it makes positive or negative decisions regarding employees. Another similar program[39] allows employers to monitor the activities of employees, especially remote workers. For example, it is possible to process data on location (geolocation), on/off, social media activity, and types of activities. Another artificial intelligence program[40] allows employees to evaluate their mood and level of engagement in work by processing their written correspondence. In 2022, the Amsterdam District Court ruled that Uber's dismissal of five British and one Dutch couriers was unlawful, with the decision being made through software because the couriers had violated the rules for accessing their accounts. At the same time, the case materials revealed that the company had obtained information through software monitoring of couriers' activities using artificial intelligence.[41] Of course, there are many other artificial intelligence programs on the global market; however, the above few examples are enough to illustrate that, against the backdrop of rapid development and progress, their use in labor relations poses a threat of violation of numerous rights.

The use of sophisticated and complex algorithms in social security decision-making is common across Europe, but with the use of the programs comes growing concerns about the negative impact these algorithms have on poverty and whether they are leading to increased inequality. These questions also apply to child welfare and the payment of unemployment benefits.[42]

Artificial intelligence is used in certain cases to detect hate speech and, in various legal systems, may become a prerequisite for holding a person accountable, although a software error may also lead to unjustified restrictions on freedom of expression. [43]

There is considerable interest in leveraging artificial intelligence in healthcare services, as it has the potential to significantly improve the quality, timeliness, and accuracy of diagnoses. However, the sheer volume of data processed by these systems presents substantial risks, particularly the possibility of sensitive personal information being accessed by malicious actors. Furthermore, even minor errors during data entry can result in misdiagnoses or serious, irreversible mistakes in medical procedures.[44] The Parliamentary Assembly of the Council of Europe noted in a resolution adopted in 2020 that the development of neurotechnology offers the potential for great progress and change, especially in the medical field, but efforts should be directed toward conducting research that does not undermine the dignity, freedoms, and equality of individuals, which are fundamental values in a democratic society.[45]

---

39 For detailed information about the company, their products, and the opportunities created using artificial intelligence, see: <https://veriato.com/> [08.07.2024].

40 For detailed information about the company, their products, and the opportunities created using artificial intelligence, see: <https://keencorp.com/solutions/> [08.07.2024].

41 <https://www.theguardian.com/technology/2021/apr/14/court-tells-uber-to-reinstate-five-uk-drivers-sacked-by-automated-process> [18.07.2024].

42 Getting the Future Right – Artificial Intelligence and Fundamental rights, European Union Agency for Fundamental Rights, Publications Office of the European Union, 2020, <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-artificial-intelligence_en.pdf> <https://fra.europa.eu/sites/default/files/fra_uploads/ai_impact.pdf> [13.07.2024].

43 Ibid.

44 Ibid.

45 The Brain-Computer Interface: New Rights or New Threats to Fundamental Freedoms, COE Parliamentary Assembly, Recommendation 2184, (2020), <https://pace.coe.int/pdf/acace403a83aad11dc0a684067f2a6ae54a65ff2d70e7d1552e28e4b9ce8b05e?title=Rec.%202184.pdf> [14.08.2024].

The fundamental right to freedom of expression and access to information can be violated when information is sorted through artificial intelligence, and only the information that is determined by artificial intelligence is available to a person through social networks or other information channels. In addition, this practice is especially often resorted to by private companies due to commercial interests.[46] The systematic way in which artificial intelligence processes information could potentially interfere with the freedom of assembly. This is especially true when certain groups are unable to receive notifications about planned events. Restrictions on the right to free expression in online spaces may be unjustified, as algorithms can mistakenly categorize free speech as hate speech. Furthermore, artificial intelligence enables the monitoring of crowd movements, and the advanced predictions made by algorithms could realistically lead to interference with individuals' right to assemble, even resulting in preemptive detention.[47]

The issue of protecting and realizing human rights is obviously directly related to the obligations of those responsible for protecting these rights and effective means of restoring violated rights. Today, self-driving vehicles are no longer part of human fantasy; the initiative, which began as an experiment in 2009, became a reality in several cities around the world in 2024, and for example, in Dubai and Los Angeles, passengers are transported by so-called robotaxis.[48] When traveling by such a vehicle in the event of a traffic accident, many questions arise about both liability and compensation for the damage caused. Among them, the issue of preferential assistance among passengers from various vulnerable groups may also arise during a car accident, in which case artificial intelligence must decide whether to save, for example, the older person or the minor first. In such cases, the use of artificial intelligence may also be a cause of infringement of the right to life.

According to the Council of Europe Commissioner for Human Rights, the benefits brought by artificial intelligence may only be neutral in appearance. However, studying its foundations may reveal that the enormous public good brought about by mathematical calculations is a heavy burden for individuals.[49] It is clear that artificial intelligence is fueled by human bias, as simple or complex algorithms are created by humans. Accordingly, a program created with such bias can ultimately be discriminatory against individuals. The Commissioner notes that there is a lot of evidence that confirms the discriminatory treatment of individuals based of gender, ethnicity, or other grounds through the use of programs.[50]

---

46 Getting the Future Right – Artificial Intelligence and Fundamental rights, European Union Agency for Fundamental Rights, Publications Office of the European Union, 2020, <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-artificial-intelligence_en.pdf>; <https://fra.europa.eu/sites/default/files/fra_uploads/ai_impact.pdf> [13.07.2024].

47 Algorithms and Human Rights, <https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5> [19.07.2024], Safeguarding Human Rights in the Era of Artificial Intelligence, <https://www.coe.int/en/web/commissioner/-/safeguarding-human-rights-in-the-era-of-artificial-intelligence?redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fartificial-intelligence> [29.07.2024].

48 <https://waymo.com/about/> [29.07.2024].

49 Safeguarding Human Rights in the Era of Artificial Intelligence, <https://www.coe.int/en/web/commissioner/-/safeguarding-human-rights-in-the-era-of-artificial-intelligence?redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fartificial-intelligence> [29.07.2024].

50 Ibid.

In addition to the rights previously discussed, one of the most common violations within the spectrum of human rights is the right to the protection of personal data. Artificial intelligence primarily relies on large amounts of information, particularly personal data about individuals. As a result, this right is frequently at risk of being violated by technologies. Social media platforms and other online services collect vast quantities of personal data about users, often without their knowledge. This data can be used to predict individual behaviors and preferences. Such technologies enable the gathering of sensitive information regarding a person's health, political views, family life, and beliefs. Often, individuals are unaware of how this information is used and for what purposes.[51]

The examples provided of potential or actual violations of rights, drawn from various scientific and non-scientific sources, represent only a small and general overview of how artificial intelligence can affect the protection of human rights and freedoms. It is crucial to conduct a thorough study of this issue, including an analysis of the current situation in Georgia by researchers, to evaluate the extent of artificial intelligence's impact on human rights at the national level.

4. Minimum Standards for Protecting Rights

Academic sources suggest that improving the accessibility of public services and simplifying governance processes can be achieved through the development of artificial intelligence. However, it is also crucial to introduce appropriate tools and methodologies to mitigate the risks associated with high-risk artificial intelligence systems. As one researcher points out, these potentially hazardous mechanisms can significantly harm the interests of citizens, society, and the state, as well as infringe upon human rights. Therefore, addressing the challenges posed by artificial intelligence requires defining, implementing, and monitoring organizational and technical measures to protect both public and private interests.[52] In this regard, joint efforts of states are increasing at the international level to reduce this negative impact by enacting regulations and setting standards. Individual countries are also making relevant decisions at the national level and creating regulatory norms or oversight mechanisms. At the same time, given that the impact of technologies affects a wide range of human rights, effective mechanisms for protecting personal data alone are no longer enough.

Below are examples of several countries that have taken steps to regulate artificial intelligence and reduce its negative impact on rights, although these examples are a small list and indicate the need for in-depth comparative legal research in the future.

In Europe, the Kingdom of the Netherlands was the first country in 2022 to adopt a human rights impact assessment requirement for public institutions that intend to use algorithms in their decision-making processes.[53] Also, in January 2021, the same country's legislature called on the government to create an algorithm register, which would describe which algorithms the government uses, for what purpose, and based on what data.[54]

---

51 Ibid.

52 *Burkadze Kh.,* Towards the Status of Considering Artificial Intelligence as a Subject of Law, Journal "Justice", Nº 2 (5), 2023, 39, <https://iustitia.gov.ge/2023-N2(5)-32-44-%E1%83%91%E1%83%A3%E1%83%A0%E1%83%99%E1%83%90%E1%83%AB%E1%83%94.pdf> [10.08.2024].

53 <https://ecnl.org/news/netherlands-sets-precedent-human-rights-safeguards-use-ai> [27.07.2024].

54 <https://algoritmes.overheid.nl/nl> [27.07.2024].

In November 2021, the UK government approved an algorithmic transparency standard that requires the public sector to make more information available about algorithms, particularly those used by law enforcement agencies in decision-making processes.[55]

In addition to regulating the issue at the general state level, there are also examples of local regulation of when artificial intelligence systems are used to ensure transparency. For example, in 2020, Amsterdam and Helsinki began maintaining registers of artificial intelligence programs and making information public.[56]

In certain instances, there are examples of regulating and establishing standards, as well as creating supervisory bodies for the use of artificial intelligence. Spain is among the first countries in Europe to set up an agency responsible for overseeing the use of artificial intelligence. This agency is tasked with monitoring the development and application of artificial intelligence systems, particularly those that could impact the realization of fundamental rights.[57]

It is clear that it is very important for states to make appropriate efforts and find solutions to protect human rights, however, in the context of modern technologies and artificial intelligence, the territorial jurisdiction of states has a conditional meaning, and accordingly, international and collective efforts become even more valuable and important.

In May 2023, the Fourth Summit of the Heads of State of the Council of Europe was held in Reykjavik (Iceland), during which the Reykjavik Declaration[58] was adopted, in which the heads of state of the international organization's member states outlined the future and strategic tasks and goals of the Union. The document highlights, on the one hand, the positive impact and opportunities created by new and emerging digital technologies, while, on the other hand, it highlights the need to reduce the negative impacts of technology on human rights, democracy, and the rule of law. In the declaration, the Heads of State of the Council of Europe committed themselves to play a leading role in the development of standards in the digital age in the Council of Europe region to protect human rights in both physical and digital realities. The priority of finalizing the Council of Europe Framework Convention on Artificial Intelligence was underlined.[59]

In May 2024, a year after the adoption of the Declaration, the Council of Europe adopted the first legally binding convention, which aims to ensure that signatory states respect human rights, the rule of law, and legal standards of democracy in the use of artificial intelligence systems.[60]

The Convention[61] is open for signature by Council of Europe member states as well as non-European countries. The document establishes a legal framework and outlines principles that signatory states must implement at the national level for the entire life cycle of artificial intelligence systems.

---

55 <https://www.gov.uk/algorithmic-transparency-records> [27.07.2024].

56 <https://ai.hel.fi/en/ai-register/> <https://algoritmeregister.amsterdam.nl/> [27.07.2024].

57 <https://mpt.gob.es/en/politica-territorial/desconcentracion-sector-publico-institucional-estatal/determinacion-sede-AESIA.html> [27.07.2024].

58 Reykjavík Declaration, Council of Europe, Ref. 089123GBR, 2023, <https://edoc.coe.int/en/the-council-of-europe-in-brief/11619-united-around-our-values-reykjavik-declaration.html#> [06.08.2024].

59 Reykjavík Declaration, Council of Europe, Ref. 089123GBR, 2023, <https://edoc.coe.int/en/the-council-of-europe-in-brief/11619-united-around-our-values-reykjavik-declaration.html#> [06.08.2024].

60 <https://www.coe.int/en/web/portal/-/council-of-europe-adopts-first-international-treaty-on-artificial-intelligence> [06.08.2024].

The Convention applies to the use of artificial intelligence by both public institutions and private entities. For the Convention, the entire life cycle of artificial intelligence includes not only the period of use of programs but also the stages of design, creation, development, and use of artificial intelligence systems. The document creates a legal framework and defines the fundamental principles on which the use of artificial intelligence in the contracting states should be based.[62]

Given the objectives and scope of the article, as well as taking into account that the Convention will be opened for signature on September 5, 2024, and only then will its ratification by countries and the Convention enter into force, its in-depth analysis and assessment, as well as an assessment of the effectiveness of its implementation, are the subject of future research, however, at this stage it is important to highlight the principles that are defined by the Convention as guarantees for the protection of human rights. In particular, the Convention states that throughout the entire life cycle of artificial intelligence systems, states must respect human dignity and the principles of autonomy, states must establish mechanisms for transparency and accountability, as well as monitor the entire life cycle of artificial intelligence systems to ensure their observance of human rights, democracy and the rule of law. Mechanisms need to be established to ensure that programs uphold the principle of equality, particularly gender equality. States must protect personal data and implement measures to enhance the trustworthiness of artificial intelligence systems and the reliability of their outcomes. This may include setting requirements related to adequate quality and security. To prevent negative impacts on human rights, democracy, and the rule of law, while also promoting innovation, states should create a controlled environment for the development, experimentation, and testing of artificial intelligence systems, supervised by competent authorities.[63]

The Convention also indicates and requires states to take into account the interests of children, persons with disabilities and other groups at the implementation stage, as well as to ensure compliance with standards established by all other international mechanisms. [64]

The adoption of the Council of Europe Framework Convention is a major progressive step forward in neutralizing the possible negative consequences and risks of artificial intelligence, however, it is clear that approval alone is not enough and it is important that as many states as possible ensure its ratification and implementation in practice. This issue must certainly become a subject of evaluation and research in the future.

In addition to this special convention approved by the Council of Europe, it is important to mention the already well-established regulations that concern the processing of personal data and have been developed both at the international level and as part of the legal systems of many countries, including Georgia. For example, the General Data Protection Regulation of the European Union, which entered into force on 25 May 2018, sets out a number of standards for the protection of personal

---

61 Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, <https://rm.coe.int/1680afae3c> [15.08.2024].

62 Ibid.

63 Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, <https://rm.coe.int/1680afae3c> [15.08.2024]

64 Ibid.

data in the digital environment and defines the ways in which appropriate mechanisms can be put into practice in order to ensure the fundamental rights of individuals.[65] The relevant regulations are also provided for in the Law of Georgia on Personal Data Protection.[66]

5. Conclusion

Georgia is not recognized as a technologically advanced country, which means that the creation and development of artificial intelligence programs may not be a prominent focus. However, the adoption of digital technologies in both public and private sectors presents a significant opportunity for the integration of artificial intelligence into these processes. This underscores the necessity for a national-level strategy that articulates a common vision and policy framework. This document should address fundamental issues, including how to evaluate the impact of artificial intelligence on human rights and freedoms at various stages, particularly in the usage and acquisition of these programs. Research indicates that the risk of human rights violations increases with extensive data processing, analysis, and categorization. Artificial intelligence programs employing algorithms may inadvertently facilitate hate speech or generate content that is derogatory or humiliating to various vulnerable groups. Moreover, the diversity of artificial intelligence programs can give rise to human rights violations not just from processing discriminatory information but also due to the algorithms themselves. For instance, during big data analysis, algorithms may prioritize certain data elements without sufficient justification, ultimately leading to infringements on human rights. A pertinent example is the use of biased algorithms by financial institutions to make credit decisions, which can discriminate against specific vulnerable groups.The wide range of human rights that can be violated by the use of algorithms highlights that artificial intelligence poses not only a potential threat to personal data, but also a risk to human rights, democratic stability, and the rule of law. Given the rapid advancement of technology, it is essential for Georgia to establish analytical solutions and regulatory measures. This approach will help harness the positive effects and benefits of artificial intelligence while preventing these technologies from illegitimately and disproportionately infringing upon areas protected by human rights law.

Bibliography:

1. Law of Georgia "On Personal Data Protection", Legislative Herald of Georgia, 14.06.2023, <https://matsne.gov.ge/document/view/5827307?publication=1> [02.08.2024] (In Georgian).
2. Resolution of the Parliament of Georgia N4349-XIVმს-Xმპ of June 27, 2024 on the approval of the "Energy Policy of the State of Georgia", <https://matsne.gov.ge/document/view/6212458?publication=0> [10.08.2024] (In Georgian).

[65] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing (General Data Protection Regulation), Directive 95/46/EC, <https://eur-lex.europa.eu/eli/reg/2016/679/oj> [29.07.2024].

[66] Law of Georgia "On Personal Data Protection", <https://matsne.gov.ge/document/view/5827307?publication=1> [02.08.2024] (In Georgian).

3. "On Approval of the Strategy for Integrated Management of the State Border of Georgia for 2023-2027 and its Action Plan" Resolution of the Government of Georgia of March 9, 2023, No.92, <https://matsne.gov.ge/document/view/5746129?publication=1> [15.08.2024] (In Georgian).
4. Order No. 54/n of the Minister of IDPs from the Occupied Territories, Labor, Health and Social Protection of Georgia of July 21, 2023, "On Approval of the National Tuberculosis Control Strategy and Action Plan for 2023-2025 in Georgia", <https://matsne.gov.ge/document/view/5863955?publication=0> [10.08.2024] (In Georgian).
5. Order No. 151/04 of the President of the National Bank of Georgia of August 17, 2020, "On Approval of the Regulation on Risk Management of Data-Based Statistical, Artificial Intelligence and Machine Learning Models", <https://matsne.gov.ge/document/view/4964423?publication=2> [29.07.2024] (In Georgian).
6. Institute for the Development of Freedom of Information, Use of Artificial Intelligence Systems in Georgia – Legislation and Practice, Tbilisi, 2021, <https://idfi.ge/public/upload/Article/AI%20ENG%20FULL.pdf> [14.08.2024] (In Georgian).
7. Burkadze Kh., Towards the status of considering artificial intelligence as a subject of law, Journal "Justice" N2 (5), 2023, <https://iustitia.gov.ge/2023-N2(5)-32-44-%E1%83%91%E1%83%A3%E1%83%A0%E1%83%99%E1%83%90%E1%83%AB%E1%83%94.pdf> [10.08.2024], 32, 35, 36, 39 (In Georgian).
8. *Gabisonia Z.,* Internet Law and Artificial Intelligence, Publishing House "Lawyers' World", Tbilisi, 2022, 443, 453, 463, 525-542 (In Georgian).
9. *Gabisonia Z.,* The Essence of Artificial Intelligence and the Problem of Recognizing It as a Subject of Law, Journal "Justice" N1, 2022, 129, 131, 136-138, <https://iustitia.gov.ge/uploads/1672146396.1full_en.pdf> [10.08.2024] (In Georgian).
10. *Gabisonia Z.,* Digital Governance and Legal Technologies in the Justice System, Journal "Justice" 2023 1(4), <https://doi.org/10.59172/2667-9876/2023-1/28-44> [18.07.2024] (In Georgian).
11. The Need for a National Artificial Intelligence Strategy, Research Report, 2020, <https://btu.edu.ge/khelovnuri-inteleqtis-erovnuli-strategiis-satchiroeba/> [02.08.2024] (In Georgian).
12. Guiding Principles of the Georgian National Strategy for Artificial Intelligence, University of Business and Technology, Tbilisi, 2023, <https://drive.google.com/file/d/1SRKp8Qe3jnJngO0W9OYNbhsnBigSb3tL/view> [09.08.2024] (In Georgian).
13. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing (General Data Protection Regulation), Directive 95/46/EC, <https://eur-lex.europa.eu/eli/reg/2016/679/oj> [29.07.2024].
14. Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, <https://rm.coe.int/1680afae3c> [15.08.2024].
15. *Bales R.A., Stone K.V.W.,* The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace, <https://ssrn.com/abstract=3410655> [07.07.2024].
16. *Raso F., Hilligoss H., Krishnamurthy V., Bavitz Ch., Kimberly L.,* Artificial Intelligence and Human Rights: Opportunities and Risks, Berkman Klein Center for Internet and Society Research Publication, <http://nrs.harvard.edu/urn-3:HUL.InstRepos:38021439> [13.08.2024].

17. The Brain-Computer Interface: New Rights or New Threats to Fundamental Freedoms, COE Parliamentary Assembly, Recommendation 2184, (2020), <https://pace.coe.int/pdf/acace403a83aad11dc0a684067f2a6ae54a65ff2d70e7d1552e28e4b9ce8b05e?title=Rec.%202184.pdf> [14.08.2024].
18. Getting the Future Right – Artificial Intelligence and Fundamental rights, European Union Agency for Fundamental Rights, Publications Office of the European Union, 2020, <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-artificial-intelligence_en.pdf> <https://fra.europa.eu/sites/default/files/fra_uploads/ai_impact.pdf [13.07.2024].
19. Reykjavík Declaration, Council of Europe, Ref. 089123GBR, 2023, <https://edoc.coe.int/en/the-council-of-europe-in-brief/11619-united-around-our-values-reykjavik-declaration.html#> [06.08.2024].
20. Algorithms and Human Rights, <https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5> [19.07.2024], Safeguarding Human Rights in the Era of Artificial Intelligence, <https://www.coe.int/en/web/commissioner/-/safeguarding-human-rights-in-the-era-of-artificial-intelligence?redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fartificial-intelligence> [29.07.2024].
21. <https://www.coe.int/en/web/commissioner/-/safeguarding-human-rights-in-the-era-of-artificial-intelligence?redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fartificial-intelligence> [29.07.2024].
22. <https://centres.weforum.org/centre-for-the-fourth-industrial-revolution/home> [10.08.2024].
23. <https://press.un.org/en/2023/sgsm22017.doc.htm> [13.08.2024].
24. <https://joint-research-centre.ec.europa.eu/jrc-mission-statement-work-programme/facts4eufuture/artificial-intelligence-european-perspective/ai-opportunities-and-threats_en> [13.08.2024].
25. <https://www.opinosis-analytics.com/blog/tay-twitter-bot/> [21.07.2024]
26. <https://unric.org/en/can-artificial-intelligence-ai-influence-elections/> [21.07.2024].
27. <https://cogitocorp.com/about/> [08.07.2024].
28. <https://veriato.com/> [08.07.2024].
29. <https://keencorp.com/solutions/> [08.07.2024].
30. <https://www.theguardian.com/technology/2021/apr/14/court-tells-uber-to-reinstate-five-uk-drivers-sacked-by-automated-process> [18.07.2024].
31. <https://waymo.com/about/> [29.07.2024].
32. <https://ecnl.org/news/netherlands-sets-precedent-human-rights-safeguards-use-ai> [27.07.2024].
33. <https://algoritmes.overheid.nl/nl> [27.07.2024].
34. <https://www.gov.uk/algorithmic-transparency-records> [27.07.2024]
35. <https://ai.hel.fi/en/ai-register/>; <https://algoritmeregister.amsterdam.nl/> [27.07.2024].
36. <https://mpt.gob.es/en/politica-territorial/desconcentracion-sector-publico-institucional-estatal/determinacion-sede-AESIA.html> [27.07.2024].
37. <https://www.coe.int/en/web/portal/-/council-of-europe-adopts-first-international-treaty-on-artificial-intelligence> [06.08.2024].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8324

Ketevan Tskhadadze*

Fully Automating the Administrative Act and its Accompanying Risk

In recent decades, technological innovations have significantly changed the behavior of the state and society. Consequently, technological development has had a huge impact on public administration activities, since the development of technology and their integration are mostly related to the need for electronic governance[1]. Digitization of processes, switching to electronic forms, and sometimes automation have become necessary. Digitalization and automation must be discussed independently of each other as digitalization of the same digital governance is an important prerequisite for automating the public administration process[2].

The article analyzes the extent to which the automated decision meets the requirements of the administrative act and how the automated actions of the state affect the procedures and its basic principles. The article refers to the importance of automated production and the forms of applying an administrative act on its basis, definitions of electronic and automated acts, and the difference between them. The special focus is on the legal problems and challenges of a fully automated act issued by an administrative body in implementing public administration, and its constitutional-legal grounds.

Keywords: *Public Administration, Administrative Body, Administrative-Legal Act, Electronic Act, Automated Act, Artificial Intelligence*

1. Introduction

"Artificial intelligence" as a term in the field of public administration is associated with modern technological approaches when taking various actions. The particular importance of artificial intelligence is that the processes used to be implemented by humans can be fully switched to technical systems where decisions are made based on algorithms according to a pre-established and agreed formula[3].

---

* Doctor of Law, Professor at Alte University, Dean of Faculty of Law.

1 E-governance, or digital governance, is associated with the introduction of innovations and technologies in the field of public administration.

2 *Tskhadadze K.*, E-Government Implementation on the Example of Georgia, TalTech Journal of European Studies, 14(1), 2024, 254.

3 Emphasizing this issue in the legal literature dates back to 1950: *Ludwigs M., & Velling A.,* Vollautomatisierte Verwaltungsakte im deutschen Recht. In Digitalization as a challenge for justice and administration = La digitalizacion como reto para la justicia y la administracion= Digitization as a challenge for the judiciary and administration. Würzburg University Press, 2023, 37; The 1976 version of the German Administrative Proceedings Act 1976 provided for the possibility of imposing administrative acts with the help of "automatic devices".

The administrative body regulates relations arising in the field of public administration through administrative acts. An administrative act is an instrument of public administration bodies to ensure legal security[4].

According to the Georgian administrative legislation, legal forms of the activities of an administrative body are issued in the form of individual [5] and normative[6] administrative-legal acts differing from other forms of activities of the administrative body, in particular, administrative or private contracts and realacts. An individual administrative legal act is aimed at the occurrence, alteration, and reconnaissance of a legal outcome for a specific entity, or regulating a particular relationship, unlike a normative administrative act, which in turn implies a general rule of conduct and is reusable.

The issuance of administrative acts is usually based on the detection of human will by an administrative body. However, with the help of technology, it is possible to make decisions exclusively, through a machine. "Automation" primarily involves ensuring the decision of an administrative body in an automated manner, without the intervention of human resources, which means making decisions without detecting or processing human will. Automated individual solutions are based on automated processing. This means that the decision is made without a substantial evaluation of the factual circumstances and the legal assessment of the issue and the decision is made only by the algorithm, regardless of the intervention of the natural person, the detection of his/her will[7].

The main purpose of a fully automated act is to establish simple truths, such as offenses in the field of taxation, violation of traffic rules, etc. The more complex actual composition has less chance of being fully automated because "automatic orders" can rest on a "simple" rules-based algorithm that only checks the presence of certain requirements. These algorithms are built on correlations, which means that acts are based on similar, identical cases.[8] Accordingly, decisions connected to simple arithmetic operations, regulated by tax legislation, are naturally more permissible to make decisions through a machine than where the actual content component is high[9].

The full automation of administrative proceedings in practice creates problems because automated individual decisions that are made based on computation may seem objective and neutral but they can be false[10] or even contrary to fundamental principles such as legality, determination, and

---

4 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, Munich: CH Beck, 2006, 149.

5 see the General Administrative Code of Georgia, Article 2(1)(d), Agencies of the Parliament of Georgia, 32(39), 15/07/1999.

6 see the General Administrative Code of Georgia, Article 2(1)(e), Agencies of the Parliament of Georgia, 32(39): 15/07/1999.

7 Of course, the exception is the programming of the algorithm by an individual. Included: *Rechsteiner D.,* Der Algorithmus decreed. Constitutional and administrative law aspects of automated individual decisions, Jusletter vom. 2019 16 Nov. (8), 4.

8 *Rechsteiner D*., The algorithm has. Constitutional and administrative law aspects of automated individual decisions, Jusletter of 2019 16 Nov. (8), 2.

9 *Denk M., News on Digitization in Administrative (Procedural) Law*, the present written version corresponds to the lecture of 4.11.2021.

10 *Braun Binder N.,* Orders of the machines in individual cases are considered to be dispositions – Dystopia or future everyday administrative life? ZSR/RDS Vol. 139, Issue 1, 2020, 253.

fair production. Therefore, it is important to analyze whether the administrative body violates these principles when issuing automated or partially automated acts.

2. Definition of concepts: electronic act, complete and partial automated acts

First, we need to distinguish the following terms Automated Administrative Act and Electronic Administrative Act from each other. These terms are intertwined on the grounds of their preparation and issuance, order, and factual circumstances.

However, an electronic act is an electronic form of an act issued in the form of a material, or paper by an administrative body. It is provided in the same form as the usual written act using human resources, differently from the form of its publication. The automated act is issued automatically with the help of technical means without the intervention of human resources (e.g., issuance of an administrative act based on the excess of video eye speed). Human functions are transferred to artificial intelligence, in which case the purpose of automation is, first of all, to replace the relevant administrative procedures completely or partially without human intervention. Therefore, today citizens often receive digitalized services as a means offered by the modern administration.

Also, the difference between electronic and automated acts lies in the fact that electronic administrative acts primarily involve the digitization of existing processes, which may still require human decision-making and are aimed at improving the effectiveness of administrative tasks by digitizing traditional methods. Automated acts focus on automatically completing tasks, based on predetermined rules, or algorithms that eliminate the need for human processing and aspire to further simplify processes through automation by reducing manual intervention or eliminating it. In general, the issuance of an administrative act is directly related to the detection of the will of an administrative body, which, in the case of the issuance of an automated act, is directly replaced by a pre-programmed/computational procedure with technical means.

2.1. The Concept of Electronic Act

An electronically issued administrative act plays a central role in the digital public administration model. Accordingly, the term "electronic administrative act" has emerged alongside an act published in writing, oral, or other form in the legislation of some countries, which primarily implies an electronically issued act.

The amendments made to the General Administrative Code of Georgia in March 2021[11] regulated the issuance of an individual administrative act in electronic form and defined the terms of an electronic individual administrative act (Article 2(1) (d1) of the term).[12] According to the legal definition of the concept, an electronic individual administrative act is an act that is issued using

[11] On Amendments to the General Administrative Code of Georgia, March 30, 2020, # 419-IV MS-XMp.

[12] Electronic Individual Administrative Act – an individual administrative act issued in electronic form using automated management tools, which meet the requirements of the Law of Georgia on Electronic Documents and Electronic Trust Services, see the General Administrative Code of Georgia, Article $2(1^{)(d1}$), Agencies of the Parliament of Georgia, 32(39): 15/07/1999.

automated management tools. In addition, an administrative body is authorized to use software and unified automated management tools for proceedings and access to information[13].

This record primarily arranges the forms and grounds of electronic communications, based on which it is permissible to apply the form of an electronic document if otherwise stipulated by law. All legislative requirements for an established written administrative-legal act apply to an administrative act issued electronically by an administrative body[14]. It shall have the same legal force as a document issued in a material form[15]. The issuance of an electronic act shall be vested in an authorized body that imposes a written act signed with a qualified electronic signature/certificate of qualified electronic seal[16].

An administrative body can receive or provide any information and/or documents using unified automated management tools if the interested person has not selected another form of receipt[17]. However, the administrative legislation does not regulate issues related to the preparation, issuance, and enforcement procedures of the electronic act except for the definition of the term. In addition, conducting electronic production is not regulated. It is important to regulate the issuance of electronic administrative-legal acts in case of digitization of the powers of the administrative body. Besides, this issue is related to the fundamental values of democracy, the basic principles of the activities of the administrative body, and the right of a person to participate in administrative proceedings. This primarily requires a special legal basis, which implies the regulation of procedural guarantees[18].

2.2. Automated Administrative Legal Act

An automated administrative act is issued with fully automatic devices. Automation is limited to creating an administrative act[19]. Considering an automated administrative act, it is interesting to set an example of Germany where the issuance of an automated act was fully regulated as a result of the amendments in the legislation of administrative proceedings in 2017[20]. German Law on Administrative Proceedings grants the administrative body the authority to issue an administrative act[21] by fully automated means if it is provided by law and is not related to the exercise of discretionary powers.

---

13 see the General Administrative Code of Georgia, 35 [1], Agencies of the Parliament of Georgia, 32(39), 15/07/1999.

14 see the General Administrative Code of Georgia, 51 and 52 [1], Agencies of the Parliament of Georgia, 32(39), 15/07/1999.

15 Law of Georgia on Electronic Document and Electronic Trust Services, Article 4, Agencies of the Parliament of Georgia, 639-II, 10/05/2017.

16 Law of Georgia on Electronic Document and Electronic Trust Services, Article 3, Agencies of the Parliament of Georgia, 639-II, 10/05/2017.

17 see the General Administrative Code of Georgia, 351, Agencies of the Parliament of Georgia, 32(39), 15/07/1999.

18 *Rechsteiner D.,* The algorithm has. Constitutional and Administrative Law Aspects of Automated Individual Decisions, Jusletter of 2019 16 Nov. (8), 1.

19 *Siegel T*., Electronic Administrative Action – On the Effects of Digitization on Administrative Law. JURA-Juristische Ausbildung, 42(9), 2020, 927.

20 Administrative Procedure Act on 1 January 2017 by Article 20 of the StVfModG.

21 Administrative Procedure Act, art. 35a.

The issuance of fully automated administrative acts is allowed by law and its scope is limited by discretionary powers because an administrative body can't have a discretionary authority or the opportunity to assess as the acts are issued based on the algorithm without the determination of the factual circumstances. The algorithm fails to define legal content or terms. For example, the administrative protocols and decrees on imposing administrative penalties for violation of tax legislation issued by the tax authority are not based on the scope of discretionary powers. At this time, the number of fines is not defined but based on the algorithm, it is possible to issue a fine of the exact number predetermined in advance. This implies that when making a fully authorized decision, an administrative body does not have a scope of action.

It is also interesting the difference between fully automated and partially automated acts. A fully automated administrative act differs from a partially automated administrative act in a "fully" automated manner. A fully automated administrative act fully responds to an administrative-legal act in the sense of administrative law. Automation is limited to an administrative act while creating further notification may take place in a non-automated way, which does not undermine the characteristics of a fully automated administrative act[22].

3. Automated Administrative Act and Constitutional-Legal Issues

Constitutional-legal issues of an automated administrative act can appear on the agenda, which are related to electronic and automated administrative proceedings and the issuance of a legal act on their basis. The constitution does not indicate the mechanization of public administration, since the authors of the constitution (especially in countries where the basic law has operated for several hundred years) expand such a development. They could not be foreseen, but, based on the primary principles of the constitution, one of the main functions in administrative proceedings is to implement important principles such as the principles of a democratic, legal, and social state. In addition, its task is to further clarify the above principles in specific productions[23]. The application of electronic and technological means due to the expediency of the economy and efficiency of the procedures should not neglect constitutional provisions. Economics and efficiency are important principles of administrative law but using electronic means on their basis is only possible following the principles of the constitution[24]. Therefore, it is critical to discuss the connection of automated information and communication technologies with the principle of the legal state.

3.1. Principle of the Legal State

The principle of a legal state is related to all areas of activity of the state's bodies. It creates the main directions of state authorities. The principle of the legal state requires the administrative act

---

22 *Siegel T.,* Electronic Administrative Action – On the Effects of Digitization on Administrative Law, Legal Education, published by De Gruyter, 2020, 928.

23 *Relevance* of Constitutional-Legal Principles for Administrative Law, Journal of Administrative Law, No 2, 2016, 6.

24 *Glaser A.*, The electronically acting state, E-Legislation, E-Governance, E-Justice, Journal of Swiss Law, Volume 134, II, 2015, 319..

issued by the executive authority based on the legislation to be clarified in its contents, purpose, and extent that allows a citizen to foresee the actions to be carried out following the act at a certain level. [25]Accordingly, the principle of a legal state applies not only to the decision made in the usual manner but also to fully automated production[26]. This expression shall be found by an administrative body in the realization of the principles of law, legality, determination, and foreseeability, which are elements of the principle of a legal state.

Administrative legislation provides the obligation to justify an administrative act[27] in a written form, but it must apply to electronic and automated administrative acts. In addition, the addressee of the act must be informed in advance in which form the act will be issued, in written, electronic, or automated form. The legislation gives the administrative body several opportunities to choose the form of issuing the act but in this regard, it shall not be completely free because if an administrative body acts within the scope of discretionary powers, all the factual circumstances essential in issuing an administrative act shall be indicated in the written justification.

All of these requirements are essential to implement the principle of the rule of law because a person should be aware of the reason why the act may limit his right or interest.

3.2. Principle of Lawfulness

One of the most important requirements of the legal state is to regulate the legal relations between a citizen and a state following the legislation. Therefore, the principle of lawfulness is an important tool for the activities of public administration and the exercise of its powers. The activities of administrative bodies and the acts issued by them should be understandable for an addressee to foresee them easily. Hence, it is important to have a detailed regulation of automated production as well as acts or actions issued on its basis. Administrative legislation shall include a clear regulation of the procedure in which the act is issued. In addition, any decision made by an administrative body, regardless of its form, should be based solely on factual and legal prerequisites. The administrative body[28] is obliged to investigate all the circumstances important to the case and make decisions only as a result of the assessment of the circumstances. An automated, machine decision does not require officials to process the fact because it is independently adopted by a pre-determined algorithm, which may question the principle of legality.

---

25 Ibid.

26 *Polomski R.M.*, The Automated Administrative Act, The Administration on the Threshold of Automation to Information and Communication Technology, Duncker & Humboldt, Berlin, 1993, 92.

27 According to Article 53 of the General Administrative Code of Georgia, an individual administrative act issued in written form shall contain written substantiation. The justification precedes the resolution part of the administrative act. A legislative or subordinate normative act or its respective norm shall also indicate an administrative act based on which this administrative act has been issued. The administrative act may also indicate the norms of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its supplementary protocols, and the precedents of the European Court of Human Rights on similar legal issues that have been applied when making decisions. But the law also provides for an exception, in particular, in the case of issuing a written act without substantiation by urgent necessity, a written substantiation must be issued within a week after the issuance of an individual administrative act.

28 The General Administrative Code of Georgia, Article 96(1), Parliament of Georgia, LHG, 32(39), 15/07/1999.

3.3. Principle of Coherence

In addition to the above, the principle of a legal state in the context of administrative law also implies the existence of the coherence principle to implement the activities of government bodies[29]. Taking into account the proportionality of public and private interests, the administrative body should weigh these interests in each specific case and confront them, which is also important for electronic production, especially in terms of the protection of personal data during automated administrative proceedings[30]. In automated production, the principle of coherence is not followed, and decisions are not made based on the reconciliation of public and private interests.

3.4. Right to Hear Participants of Administrative Proceedings

Hearing of the parties in the administrative proceedings is of great importance. In automated administrative proceedings may be a danger of making decisions without passive or hearing from the participants. This is a prime component in conducting administrative proceedings to ensure the possibility of involvement and submission of an opinion of a party whose right or legal interest is restricted by an administrative act.[31]. The mentioned right to be "heard" shall also serve the interests of the administrative body. The participation of interested persons is not always mandatory, except when an individual administrative act that is to be issued may worsen the legal status of a person[32]. The legislation also considers the cases when the delay in issuing an individual administrative act may cause substantial damage to the public and private interest[33].

Fair administrative proceedings as a constitutional right provided by Article 18 of the Constitution of Georgia imply the right of a person to apply to an administrative body, participate in the proceedings, express opinions, and be heard by an administrative body. According to modern administrative proceedings, a citizen is assigned an active role. Simultaneously, the administrative proceedings obligate the administrative body to hear the parties involved in the case and investigate the circumstances of the case. This compels an administrative body to make a fair and objective decision[34].

4. Risk Factors for a Fully Automated Decision

The issuance of automated administrative acts is accompanied by significant risks primarily related to the absence of a will in the issuance of the Act. The forms of activity of an administrative

---

29 *Tskhadadze St.*, Relevance of Constitutional-Legal Principles for Administrative Law, Journal of Administrative Law, No. 2, 2016, 10.

30 *Polomski R.M.*, The Automated Administrative Act, The Administration on the Threshold of Automation to Information and Communication Technology, Duncker & Humboldt, Berlin, 1993, 103.

31 The General Administrative Code of Georgia, Article 13(1), Parlmanet of Georgia, LHG, 32(39), 15/07/1999.

32 The General Administrative Code of Georgia, Article 95(2), Parlmanet of Georgia, LHG, 32(39), 15/07/1999.

33 Ibid., Article 95(6).

34 *Tskhadadze St.,* Good Governance – Constitutional Guarantees of Basic Rights in the Framework of Constitutional Reform in Georgia, Journal of Constitutional Law Review, 2017, 50.

body are based on the detection of a will, unilaterally through the issuance of acts or in multilateral contractual relations. The issuance of fully automated acts is followed by an absence of a will. According to legitimate concepts, acts are issued conforming to the will of a person while programmed technical means do not consider it.

The issuance of a fully automated act should be provided within the scope of the reservation of the law rested on special legislative regulation. Further regulations are also problematic in determining the automated procedure, and the rule of its publication, which is beyond regulation at this stage.

Fully automated decisions can expose the rights of a person to the risk. Individuals only become a state processing facility when it is difficult to take an individual approach to a particular case.

It is also important to make a decision without studying and examining the actual circumstances. Fair administrative proceedings undertake a decision to be made only after the examination and verification of all factual circumstances. Therefore, following the legality of the acts and the constitutional law the participation of a person in the decision-making process is essential.

However, there is no legal standard for judicial control of automated administrative acts. It can be said that the principle of effective legal protection is not ensured. There is almost no judicial practice concerning administrative acts published in a fully automated manner.

In making a fully automated decision, it is also difficult to identify errors in the decision-making system, in particular, discrimination and other violations of the rights of a person. Automated production can always be a "black box", so people will always depend on the appropriate procedural guarantees designed to protect rights determined by law[35].

5. Conclusion

Based on the above, administrative proceedings may be either fully or partially automated. Full automation is the transfer of a complete process to artificial systems that do not require human intervention. This is the process in which systems make decisions based on algorithms that are pre-developed by programmers or the learning system known as AI. The algorithm, on the other hand, can be described as mechanical because it can solve only those that were pre-programmed. AI can solve problems and process experiences.

In the course of partial automation, decisions are made by persons special civil servants. Partial automation goes beyond simple electrification, to the extent that automation technology independently produces intermediate results and contributes significantly to the content level of the decision-making process. Thus, machine decision no longer requires fact-processing by humans, and officials, but is independently made by a pre-determined algorithm.

A fully automated decision is made when an administrative act is adopted without human intervention[36]. The term "full automation'' does not necessarily involve the automated conduct of administrative proceedings in general, but rather the possibility of issuing a specific act within a

[35] *M artini M., Nink D.,* When Machines Decide...-Fully Automated Administrative Procedures and the Protection of Personality, Neue Zeitschrift für Verwaltungsrecht-extra, 36(10), 10, 2017.

[36] Comp.: *brown binder N.*, Dispositions of the machines in individual cases ... – Dystopia or future everyday administrative life? ZSR/RDS Volume 139, I Heft, 2020, 253.

specific administrative procedure[37]. In contrast, partial automation implies the adoption of the act not completely, autonomously, but only as a result of the expression of the will of a natural person.[38] However, it is difficult to discern when the act is fully and partially automatized.

"Automated" means that "the individual did not evaluate the content and did not make a decision on its basis". The addressee of the act must have the opportunity to express his/her opinion if he/she requires it and can also request the revision of the decision by the individual. Automated administrative acts include the usage of algorithms and automated systems to perform tasks that traditionally require human intervention from the moment of processing the applications to the review and decision-making stage. In such cases, the legal status of individuals, and addressees raises questions referring to the transparency of the process, responsibility, and protection of personal data.

The acts issued in this form have their strengths and weaknesses. The strengths are the release of administrative staff from making routine decisions, automatic processing of cases, saving time and human resources, and increasing the effectiveness of administrative activities. Weaknesses are manifested in complex decisions without appropriate criteria for non-existent individual decisions, detailed regulations, and lack of judicial control**.**

Based on all of the above, the integration of automated administrative acts into administrative law is a significant benefit in the implementation of public administration but it has some challenges. Accordingly, it is essential to impose detailed legislative regulations for automated productions and create a legal framework in terms of adherence to the principles of foreseeability and legal reservation to determine the scope of powers.

As administrative law is the administrative procedure characterized by transparency and accountability the basis of the decisions should be clear to the addressee. It is also necessary to regulate the scope of authority in case of errors or disputes. The act issued in such form does not threaten the legitimate interests of the addressee.

Bibliography:

1. General Administrative Code of Georgia, 15/07/1999.
2. Law of Georgia on Electronic Document and Electronic Trust Services, 10/05/2017.
3. Relevance of Constitutional-Legal Principles for Administrative Law, Journal of Administrative Law, No. 2, 2016.
4. *Tskhadadze St.,* Good Governance – Constitutional Guarantees of Basic Rights in the Framework of Constitutional Reform in Georgia, Journal of Constitutional Law Review, 2017.
5. Administrative Procedure Act, 25/05/1976.
6. *Braun Binder N.,* Dispositions of the machines in individual cases – dystopia or future administrative everyday life? ZSR/RDS Volume 139, I Issue, 2020.
7. *Glaser A.,* Der elektronische handelnde Staat, E-Legistlation, E-Governance, E-Justice, Zeitschrift für Schweizerisches Recht, Volume 134, II, 2015.

[37] Comp.: *Herold V.,* Democratic Legitimation of Automated Administrative Acts, Dücker & Humboldt, Berlin, 2019, 32.

[38] Ibid.

8. *Denk M.,* News on Digitization in Administrative (Procedural) Law, The present written version basically corresponds to the lecture of 4.11.2021.
9. *Herold V.,* Democratic Legitimation of Automatically Issued Administrative Acts, Dücker & Humboldt, Berlin, 2019.
10. *Ludwigs M., Velling A.,* Fully automated administrative acts in German law. In Digitalization as a challenge for justice and administration= La digitalizacion como reto para la justicia y la administracion= Digitalization as a challenge for justice and administration. Würzburg University Press, 2023.
11. *Maurer H., Waldhoff C.,* General Administrative Law. Munich: CH Beck, 2006.
12. *Martini M., Nink D.,* When Machines Decide – Fully Automated Administrative Procedures and the Protection of Privacy, Neue Zeitschrift für Verwaltungsrecht-extra, 36(10), 10, 2017.
13. *Polomski R.M.,* The Automated Administrative Act, The Administration on the Threshold of Automation to Information and Communication Technology, Duncker & Humboldt, Berlin, 1993.
14. *Rechsteiner D.,* The algorithm has. Constitutional and administrative law aspects of automated individual decisions, Jusletter of 2019 16 Nov. (8).
15. *Siegel T.,* Electronic Administrative Action – On the Effects of Digitization on Administrative Law. JURA Legal Education, 42(9), 2020.
16. *Tskhadadze K.,* E-Government Implementation on the Example of Georgia, TalTech Journal of European Studies, 14(1), 2024.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8325

Mariam Berbichashvili*

Institute of Temporary Ruling in Administrative Court Proceedings, Practice of Common Courts and Comparative Legal Analysis with the Legislation of Other Countries

One of the fundamental goals of the legal state is the unwavering protection of basic human rights, among them, legal security and the guarantee of judicial protection of the rights. The preventive remedies of protection of a person's Right in administrative court proceedings, as well as in generally Administrative Law, it is to give a special importance as the result of which the legal relationship arising between the physical person and administrative body based on Administrative Legislation is regulated and in turn, it is a guarantee of the protection of the plaintiff's right for the implementation of an effective justice in the future.

The problem of Delayed justice, which has a negative impact in economic, political and social perspective, an "immediate react" need to be found in response.[1]

The first part of article 31 of the Constitution of Georgia provides a person with the right to apply to the court for the protection of his rights, as well as the right for the fair and timely adjudication of the case. [2]

The present paper examines the peculiarities of one of the measures of preventive protection of the right – The Institution of Temporary Ruling and the prerequisites for its use by the common court, as well as the current legal reality in terms of judicial practice.

The paper also presents the research of the Institute of Temporary Ruling from a comparative legal point of view on the examples of Germany, France, Estonia and the United States of America.

The paper analyzes mechanisms of legislative regulation in above mentioned countries and the approaches established in the theory regarding the Institution of Temporary Ruling.

Keywords: *Temporary Ruling, Preventive protection of the right, Suspensive Effect, Common courts, Administrative court Proceedings*

1. Introduction

"Effective justice implies itself not only repressive protection of a person's right, that means restoration of the violated person's right, but also temporary protection, which should ensure, that the

* Assistant to a Member of the High Council of Justice of Georgia.

1 *Sierra de la S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from The Right to Effective Court Protection. A Comparative Approach, European Law Journal, Vol 10, 1, 2004, 42.

2 The first part of article 31 of the Constitution of Georgia, The Legislative Herald of Georgia, 24.08.1995 (in Georgian).

public authorities do not put a person face to face with the real facts until the final decision will be made on the case. Temporary protection of the right also implies itself preventive protection of the right, that is, to prevent consequences of expected measures" .[3]

Preventive security measures of person's right represent an important mechanism for fulfillment the right to a fair trial, which should be carried out with due care, comprehension its essence and purpose and determining the legal bases in depth. [4]

A number of privileges and their use are gathered in the hands of Public Administration, one of the most important of them is so-called "executive character" of Administrative-Legal acts.[5]

Preventive security remedies of person's right are significantly different from other means of protection of the right and are distinguished by many specificities. Among them, the most significant is the conflict between public and private interests, at which point the drastic role should be played by the court and protect the balance taking into account the principle of proportionality. [6]

Article 31 of the Administrative Procedure Code[7] gives the party the possibility to apply to the court with the request about rendering Temporary Ruling before filling a lawsuit regarding the subject of the dispute, when there is a danger of hindering or significantly complicating the realization of the applicant's right which will be caused by a change in the current situation.

2. Institute of Temporary Ruling in Administrative Proceedings

The Administrative Procedure Code of Georgia provides a system of the temporary protection of person's right, which is related to the types of administrative lawsuits. If the admissible form of lawsuit it is a lawsuit for annulment of the administrative-legal act, then the temporary protection of person's right is implemented in accordance with the Article 29 of the Administrative Procedure Code of Georgia, and for the lawsuits defined by Articles 23 and 24 of the Administrative Procedure Code of Georgia, the remedy is given in Article 31 of above mentioned code. [8]

The right of the interested party, for requesting the rendering of Temporary Ruling derives from his own right to fill a lawsuit about issuance of an individual administrative – legal act or the implementation of an action. This is a case, when filling a lawsuit by itself does not cause temporary

---

3 See citation: *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P., (ed.)* Administrative procedural Law Guide, Tbilisi, 2008, 386 (in Georgian).

4 *Agapishvili M.,* The Issue About the Provision for Damage Inflicted by Preventive Security Measures upon Adjudication the Dispute over Legality of Enabling Individual Administrative-Legal Acts, "Journal of Law" , #2 (2022), Ivane Javakhishvili Tbilisi State University, 234 (in Georgian).

5 *Sierra de la S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from The Right to Effective Court Protection. A Comparative Approach, European Law Journal, Vol 10, 1, 2004, 42.

6 *Tsiklauri B.,* Preliminary Measures of Protection of the right in Administrative Law, "Student Law Journal" , ELSA – Georgia, 2011, 18 (in Georgian).

7 *Vachadze M., Todria I., Turava P., Tskepladze N.,* Commentary on the Administrative Procedure Code of Georgia, Tbilisi, 2005, 174 (in Georgian).

8 *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Ghvamichava T., Gvaramadze T.,* Administrative procedural Law Guide, Tbilisi, 2018, 335-336 (in Georgian).

protection of the plaintiff's rights and it becomes necessary to take an extra measures to protect legal status of the person.[9]

The definition of Temporary Ruling is given in Article 31 of Administrative Procedure code of Georgia, according to which, on the basis of the application, the court may be rendering temporary ruling on the subject of the dispute before filing a lawsuit, when there is a danger that the realization of the applicant's right may be hindered by changing the existing situation or the aforementioned will be significantly complicated. The use of temporary ruling by the court is also allowed for the preliminary settlement of the disputed legal relationship, if this settlement is necessary, first of all, in the case of a long-term legal relationship, due to significant damage, existing danger or other grounds.[10]

As we can see, the Institution of Temporary Ruling in administrative court proceedings has 2 basic function: the first – is to maintain the existing situation and the second is to pre-regulate the long-term legal relationship due to the existing danger or other urgent or necessary grounds.

Maintaining the person's "status quo" when using the temporary measure until the final decision will be made by the court, is widespread in the legal systems of many countries, as one of the important purposes of the temporary measure itself.[11]

Temporary Ruling is rendering by the common court with the purpose of preliminary regulation of the disputed legal relationship. However, both-in maintaining the current situation and in preliminary regulation of the legal relationship, the purpose of temporary ruling is the same – to maintain the situation until the final decision is made by the court on the subject of the dispute, that will make it possible to enforce it. [12]

In order to satisfy the interested party's request about the rendering Temporary Ruling in administrative court proceedings, it is necessary for existing the important prerequisites and the most importantly, a real and not an abstract danger. [13]

For the purposes of the paper, it is significant, the features, that are related to the court proceedings provided for in article 31 of the Administrative procedure code of Georgia[14] and which is implemented only on the basis of an application. From a procedural point of view, it represents an independent procedural action. When checking the admissibility of the lawsuit application, the procedural and legal means of protection of the admissible right on the disputed case are checked (the type of the lawsuit) because if the plaintiff can initiate a lawsuit for annulment the administrative-legal act or to declare about its invalidation, it is not allowed to implement the temporary remedies of

---

9 Ibid, 339-340 (in Georgian).

10 The first part of Article 31 of the Administrative Procedure Code of Georgia, 23.07.1999, The Legislative Herald of Georgia, <https://matsne.gov.ge/ka/document/view/16492?publication=98> [29.05.2024] (in Georgian).

11 *Roth M.,* Interim Measures, Journal of Dispute Resolution, [Vol. 2012] 426.

12 *Vachadze M., Todria I, Turava P., Tskepladze N.,* Commentary on the Administrative Procedure Code of Georgia, Tbilisi, 2005, 174 (in Georgian).

13 *Abuseridze G.,* Preventive Security Measures in Administrative Law, Journal "Justice and Law" №2(62)'19, 2019,13 (in Georgian).

14 *Vachadze M., Todria I, Turava P., Tskepladze N.,* Commentary on the Administrative Procedure Code of Georgia, Tbilisi, 2005, 176 (in Georgian).

protection the right, which is provided by article 31 of the administrative procedure code of Georgia.[15] In this sense, if we take a look at today's judicial practice, it is interesting the definition of the first instance court[16] about the rendering of temporary ruling, in case of apply to the court before the filling the lawsuit.

In the application regarding the request about rendering the temporary ruling regarding the subject of the dispute before filling the lawsuit, the danger must be clearly presented that by changing the exist situation realization of the applicant's right will be hindered or it will be significantly complicated and when the plaintiff's purpose is the preliminary regulation of the disputed legal relationship, he/she should clearly show that this regulation is necessary to avoid significant harm or present danger.[17]

The court, while consideration on the issue of rendering temporary ruling, must examine the plaintiff's right- defending interest regarding the temporary ruling, because temporary ruling should be the necessary remedy of temporary protection of the plaintiff's right. We are not dealing such a necessity, when the plaintiff can protect his/her rights in other easier way, or when the failure of the lawsuit or intentional non-targeted use is obvious.[18]

The circumstance that the rendering temporary ruling, first of all, serves the preventive protection of the person's rights, and when there is an expectable danger of violation of the right by the state, special attention is paid to implement an effective and swift justice by the court, this fact is well presented in Temporary Ruling of July 16, 2020, of Tbilisi City Court[19], where the applicants requested reschedule the unified nation exam in English language except Saturday, since they represented the members of one of the religious confession – the seventh-day Adventist Church, which forbidding any secular activities on Saturdays, including taking part in exams. Accordingly, the applicants appealed on fact that, their right fell within the protected sphere of freedom of religion and belief recognized by the Constitution of Georgia and the norms of International Law and there will be the violation of the right to education, as well as the freedom of religion and belief by the state, since they would not be able to use by taking the advantage opportunity passing the unified national exams.

---

15 *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Ghvamichava T., Gvaramadze T.,* Administrative procedural Law Guide, Tbilisi, 2018, 339 (in Georgian).

16 Temporary Ruling of march 16, 2017 on the case №3/1862-17, panel of administrative cases of Tbilisi City Court, (searched from the archive) (in Georgian). According to the court's definition, by the norm of the law it is established the practice of applying to the court before filling the lawsuit and this has a preventive purpose, since it takes into account the foreseeable danger, which can be expressed in changing the existing situation also in hindering or complicating the realization of the applicant's right. However, the temporary ruling is actually a temporary measure of protecting of the person's rights before making a final decision by the court. It is clear from the content of the norm of the law, that the court is authorized to render such a decision accordance with requirements of article 31 of the Administrative Procedure Code of Georgia, when the filling the lawsuit by itself does not lead to protection of the plaintiff's rights and it becomes necessary to implement an additional measure for protecting the legal status of the person.

17 *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Ghvamichava T., Gvaramadze T.,* Administrative procedural Law Guide, Tbilisi, 2018, 341 (in Georgian).

18 Ibid.

19 See Temporary Ruling of July16 2020, on the case №3781793, panel of administrative cases of Tbilisi City Court (searched from the archive) (in Georgian).

The common court satisfied the application about rendering temporary ruling. The court indicated, that since the interference of the state in the rights of belief, confession and education and the limitation of these rights, due to their distribution in the session appointed on Saturday of the English language test, is due to a legitimate purpose – since the schedule of unified national exams is established in accordance with the law, in a predetermined manner, nevertheless, the existence of the legitimate purpose does not justify interference by the state in the rights of belief, religion and education. In addition to the existence of the legitimate purpose, the interference must be necessary and proportional to the restriction, especially if the circumstances were also taken into account that the English test sessions were scheduled on Fridays and Sundays too, and the allotments of applicant on another session would not be result in the need for additional costs from the state.

Necessary prerequisites for the admissibility of an application for temporary ruling is not only the implementation of an action by the administrative body, but the request will be allowed in case of inaction also. However, in between time it is necessary to submit an application to the administrative body regarding the implementation of an action and after that the way to the court opens. It should Also be checked during the eligibility checking of the application existence of the person's right-defending interest, [20] and the plaintiff's right-defending interest does not exist when the disputed issue has not yet become the subject of discussion by the administrative body.

An interesting definition is also given by Supreme court of Georgia[21] regarding temporary ruling and the purposes of rendering it by the court, where the court of cassation clearly emphasized Temporary Ruling as one of the most important mechanisms of preventive protection of the right in administrative justice.

It should be mentioned that, based from the purposes of article 31 of the Administrative Procedure Code of Georgia, the rendering of temporary ruling by the common court, is its authority, but not an obligation, accordingly, rendering the temporary ruling is related to assessments of certain risks by the court. The main and necessary prerequisite is the existence of real danger of violation of the person's right. This is what makes a temporary ruling different from the so-called, "suspension effect" provided in article 29 of the Administrative Procedure Code of Georgia, when filling a lawsuit in the court automatically suspends the appealed Administrative-Legal Act. When rendering temporary ruling, we do not have any regulation by the Administrative-Legal act. However, in both cases, in terms of effective justice, the main purpose is to protect the person's rights from the consequences of public administrative measure.

---

20 *Vachadze M., Todria I, Turava P., Tskepladze N.,* Commentary on the Administrative Procedure Code of Georgia, Tbilisi, 2005, 177 (in Georgian).

21 Judgement of 09 January 2019 on the case №/BS -1562 (US- 18) chamber of administrative cases Supreme Court of Georgia of, (in Georgian), according to the definition of cassation court, the purpose of temporary ruling as s temporary remedy of protection of the rights is to maintain the existing situation until the final decision is made on the subject of the dispute. When it comes, to an expected administrative measure – the issuance of an Individual Administrative-Legal act, or the implementation of action by the administrative body or abstain from implementation and hence the expected limitation of the person's rights, temporary ruling is one of the most important mechanisms of preliminary protection of the right. In this case, it is important to use the mechanism of preventive protection of a person's right, defined in article 31 of the Administrative Procedure Code of Georgia.

As for the issue compensation of damages caused by the temporary ruling rendered by the court, there are interesting noteworthy finding in legal literature and case law. There is an opinion expressed in the legal literature, according to which in the event the temporary ruling rendered by the court turned out to be unjustified because the plaintiff's request will not be satisfied in relation to the subject of the dispute and it will be proven that the person did not have a legal basis for the request at the beginning, then the party, on the basis of whose request temporary ruling was rendered is obliged to compensate for the damage to the other party that is suffered as a result of the issuance of temporary ruling. [22] On the other hand, according to the definition of Supreme Court of Georgia, except for some exceptions, the court of cassation considers it inadmissible to implement the security measures for civil legal claims provided by the Civil Procedure Code of Georgia, and accordingly to apply its reversal mechanism, while adjudicating the administrative category dispute, [23] envisaged by article 199 of Civil Procedure Code of Georgia. However, the court of cassation has not extent its definition related to the inadmissibility of the use of compensation for damages caused by the claim security measures, neither the direct legislative regulation exists concerning this issue. It is also worth noting the fact, that Constitutional Court of Georgia is adjudicating the constitutional submission of Tbilisi Court of Appeal, by which the court requests to establish the constitutionality of inadmissibility of implementation of reversal mechanism of security measures while using the preventive protection measures in administrative court proceedings. The solution of the issue raised before it by the constitutional court, undoubtedly will significant clarify and bring the contribution in terms of preventive protection of the right.

Based on the pragmatic importance of the research topic, it is significant circumstance when studying the institution of Temporary Ruling from comparative-legal point of view, forms of implementation of temporary measures by the court in countries with different legal systems.[24] In particular, they can be rendered by the court in form of order (the so-called "interim order") which has an informal character, also in the form of temporary decision, which has the more formal character. In this regard, the courts are given wide discretion.

From the leading countries of continental law, it can be said, that German administrative legislation is the closest one to Georgian administrative legislation. Article 123 of the Law of the federal republic of Germany On the "Administrative Judicial Order" [25] regulates the issuance of interim order by the court regarding the subject of the dispute at the stage before filling a lawsuit, if there is a danger of violation of the plaintiff's right by changing the existing situation. The court issuing interim order for the purpose of preliminary regulation of the legal relationship also, when the subject of the dispute is not an administrative act.[26] The use of above mentioned regulation is necessary for avoiding the existing danger and the immanent force related to it.[27]

---

22 *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Ghvamichava T., Gvaramadze T.,* Administrative procedural Law Guide, Tbilisi, 2018, 343-344 (in Georgian).

23 Judgement of 09 January, 2019 on the case Nº/BS -1562 (US- 18), chamber of administrative cases of Supreme Court of Georgia (in Georgian).

24 *Roth M.,* Interim Measures, Journal of Dispute Resolution, [Vol. 2012] 429-430.

25 The Law of the Federal Republic of Germany on the ''Administrative Judicial Order" , 19.03.1991. art.123 (1), <https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html> [18.07.2024]

26 Ibid.

27 Ibid.

As we see, in Georgian and German Administrative Procedural Legislation and judicial practice, the normative regulation of the prerequisites for rendering temporary ruling (in the federal republic of Germany – an interim order) is the similar. However, due to the relevance of the research topic of this paper, it is noteworthy that, German Administrative Procedural Legislation, when rendering an interim order, excludes using the norms regulating the suspension the validity of administrative-legal act, so-called "suspensive effect",[28] and indicates about using the norms regarding the ruling on claim security provided by the same code, when rendering an interim order,[29] which points to the fact, that the normative regulation of rendering interim order is identical to the procedural norms that regulate the issuing ruling on claim security and this in turn indicates a close connection and common features between the purposes of an interim order and ruling of using claim security measure.

In France there are 2 instance of courts implemented administrative justice: Administrative Tribunals (which may be considered as a court of first instance) and Administrative Appeal Courts. The next one and highest and at the same, time we can say, the oldest instance – it is State Council (Conseil d'Etat) in which together with judges, includes the Vice President and the General Secretary of the State.[30]

In France, upon adjudicating administrative dispute, interim measures for the preventive protection of the person's right, includes, among them, the rendering of interim order by the judge issuing temporary ruling (Le Juge des référés), whose status is determined by the Code of Administrative Justice of the Republic of France.[31]

French Administrative procedural legislation is distinguished by certain peculiarities, the judge who has the power of rendering interim order, is limited to such interference, when the decision made by Administrative body clearly and seriously violated a person's basic rights and freedoms and there is serious doubt about the legality of the Administrative-Legal act.[32] As we see, in French administrative justice, for the purpose of preventive protection of the person's rights, there are two prerequisites, which apply cumulatively for rendering temporary ruling (an interim order): reasonable doubt about the legality of the Administrative-Legal act and the urgent necessity in a timely manner for protecting the right.

---

28 Ibid, The 5 th part of article 123.

29 Ibid, The 3rd part of article 123.

30 *Bell J., Liche're F.,* Contemporary French Administrative Law, Cambridge University Press, 2022, 83-84.

31 The Code of Administrative Justice of the Republic of France, Article L511-2, 01.07.2000, <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070933/LEGISCTA000006136455/#LEGISCTA000006136455> [17.07.2024], According to the second part of article 511 of the Code of Administrative Justice of the Republic of France, the Judges with the power of rendering interim order, are at the same time chairpersons of Administrative Courts (Tribunals) and Administrative Appeal Courts. As well as the Magistrate Judges, appointed with purpose of issuance an interim order, with 2 years of profession work experience and non-less then with first class counselor rank, and while solution the disputes within the jurisdiction of the State Council, the function of Judges issuing interim order is performed by the State Councilors, appointed for this purpose and the President of the court disputes department.

32 *Bell J., Liche're F.,* Contemporary French Administrative Law, Cambridge University Press, 2022, 104.

The Code of Administrative Justice of the Republic of France[33], regulates the authority to render interim order with collegial review – composition of three judges. In particular, if the circumstances of the case require it, the chairman of Administrative Court (Tribunal) or Administrative Appeal Court, and in the State Council – the President of the court disputes department may decide to determine the consideration of the issue in accordance with the norms established by this Code collegially – with the composition of three judges.

In this regard, dui to the seriousness of the case, the case of Mr. Lambert is noteworthy, who had tetraplegia as a result of a car accident and was in a vegetative state with little consciousness. In 2014 a hospital decided to stop treatment process for Vincent Lambert. The plaintiff (that was Mr. Lambert's wife) requested a review of the above mentioned decision and suspension of its validity and therefore, the continuation of Mr. Lambert's treatment. Despite of number of interim orders, finally the decision was rendered by the court, which established that, the hospital made an illegal decision about suspension treatment process, without properly studying the circumstances of the case. The consideration of this case continued in The European Court of Human Rights and then back through the National Courts of France. Mr. Lambert has passed away in 2019 due to discontinuation of treatment process.[34]

From Common Law Countries, it is interesting the Administrative court proceedings of United States of America. The authority of the court, to exercise control over the activities of administrative agencies is reinforced by the 3rd article of the Constitution the United States of America, in part 2 of which is stated, that "judicial authority shall be extent to all disputes, in which the United States of America is represented as a party" [35]

There are numerous of norms, in the form of sources of the law, regulating the powers and activities of the federal judicial system and administrative agencies of the United States of America, among them are the Constitution of the country, the federal law of Administrative Proceedings, which is – Administrative Procedure Act, the so-called APA, acts, which directly regulating the activities of the administrative agencies, other statutes, rules of judicial procedure and judicial precedents themselves.[36] The general regulation of the exercising the temporary (interim) measures of protection of the right by the courts, is provided by the federal law of administrative proceedings of the United States of America – that is Administrative Procedure Act.[37]

---

33 The Code of Administrative Justice of the Republic of France, Article L511-2, 01.07.2000,<https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070933/LEGISCTA000006136455/#LEGISCTA000006136455> [17.07.2024],

34 *Bell J., Liche're F.,* Contemporary French Administrative Law, Cambridge University Press, 2022, 108-109.

35 *Kharshiladze I., Ovsianikova N.,* Administrative Law of Foreign Countries, Tbilisi, 2014, 583 (in Georgian).

36 *Levinson L.H.,* Interim Relief at Administrative Procedure: Judicial Stay, Administrative Stay, And Other Interim Administrative Measures, The American Journal of Comparative Law, [Vol. 42, 1994] 639.

37 The federal Administrative Procedural Act of the United States of America was initiated by the Senate on June 11, 1946 (last amendment in July 2024) to improve administrative proceedings and procedural issues.

As long as the case is considered by the court[38], the act – order, rendered by the court ensures that any administrative agency (where the justice requires it) is obliged to suspend any action taken by it (including the adopted administrative-legal act), as well as to maintain the existing situation if necessary. [39]

In the event of appropriate conditions and the occurrence of need to prevent irreparable damage, as far as will be possible, the trial court (including the appeal court or upper instance court, where the appeal or any request of the party is considered) has the authority to render appropriate act, or implementation the procedural action in order to postpone the disputed action (suspension) of the administrative agency or for maintaining the status and current situation of the person until the end of the case review.[40]

The mechanism of rendering temporary ruling by the court in the Estonian Administrative Procedural legislation is more or less similar to the Georgian legislative regulation.

The measures of preventive protection of the right are regulated in the chapter 24 of the Administrative Procedure Code of Estonia[41]. The court may, at any stage of the court proceedings, on the basis of an application of the applicant which states its reasons, or of its own motion, issuing an order ordering a measure of interim relief to give provisional protection to the applicant's rights, if in the contrary case the protection of the applicant's rights by the judgment may be rendered significantly more difficult or impossible. As it seems when rendering Temporary ruling, the judge evaluates the perspective and validity of the lawsuit, that is similar to the Georgian administrative procedural legislation.

It is also significant, that the legislation considers it admissible to apply to court for a temporary ruling still during the administrative complaint proceeding process in administrative agency, as well as before or after filling a lawsuit in court.[42]

The mechanism of appealing temporary ruling is regulated in paragraph 252 of the Administrative Procedure Code of Estonia, according to which, temporary ruling can be appealed to the higher court, decision of which is no longer subject to appeal.[43]

As can be seen, when reviewing the research issue from a comparative-legal point of view, the procedural legislation of common and continental law counties, is characterized by more or less differences and peculiarities when rendering temporary ruling by the court. However, despite of this, the common feature of all of them is the effective protection of the person's right, taking into account the essence of the administrative procedural order, by enforcing the principle of a fair trial.

---

38 Comprehensive and detailed comments on the federal law about Administrative Procedure Act was presented in the Georgetown Legal Journal, in particular, the eighth subsection of the first chapter of the comments is devoted to a detailed description of the temporary (interim) measures for the protection of the right by the court.

39 *Blachly F.F. & Oatman E.M.,* Federal Administrative Procedure Act, Geo. L. J. [Vol.34: p.407, 1946] p.422.

40 Ibid.

41 The Administrative Procedure Code of Estonia, 01.01.2012, §249 <https://www.riigiteataja.ee/en/eli/512122017007/consolide> [01.01.2018]

42 Ibid, §249 (5).

43 Ibid, §249 (7).

2.1. The Issue of Obscurity of the Norm in Relation to Article 31 of the Administrative Procedure Code of Georgia

In terms of obscurity of the norm given in article 31 of the Administrative Procedure Code of Georgia, for the purpose of this paper today's judicial practice is interesting and also the definitions of the judges about the foreseeability of above-mentioned article.[44] By the judges it was announced, that since article 31 of the Administrative Procedure Code of Georgia does not contain a direct legislative regulation of the term and procedure for appealing of a temporary ruling, the judge by the current judicial practice, by principle of analogy of the law, he/she applies to the 9th part of article 29 of the same code and therefore, temporary ruling is appealed through the private complaint. Also significant is the case, when temporary ruling abolishing becomes necessary, in this case a court applies the same principle of analogy of the law and apply to article 29 of the Administrative Procedure Code of Georgia, as well as article 421 of the Civil Procedure Code of Georgia, the constituent norms of which regulate cases of resumption of proceedings and at the same time, explains the cancellation of temporary ruling on the grounds of general principles of the law.

In addition to the above, since article 31 of the Administrative Procedure Code of Georgia, does not contain a clear legal regulation of the term of rendering temporary ruling by the court, in the mentioned case too, the court is guided by principle of analogy of the law, in particular by the 6th part of article 29 and accordingly, is rendering temporary ruling within 3 days.

Based on all of the above, as a result, the judges expressed the position about article 31 of the Administrative Procedure Code of Georgia, regarding its procedurally better writing by the legislator, which will bring important clarity in the process of preventive protection of the person's right.

3. Common Features with Article 29 of the Administrative Procedure Code of Georgia – So-Called "Suspensive Effect" and Differences from it, Judicial Practice and Common Characteristics with the Institution of Claim Security Provided by the Civil Procedure Code of Georgia

Remedies of protection of the right provided for in article 29 and 31 of the Administrative Procedure Code of Georgia serve to ensure the implementation of effective justice. "The suspensive effect" provided for in article 29 of the Administrative Procedure Code of Georgia, the purpose of which is to protect the person from the consequences of government measure before the final decision is made on the subject of the dispute in administrative proceedings, serves the temporary protection of the right. However, this includes cases, where the subject of the dispute is an already issued Administrative-Legal act and when it comes to the expected governance measure, the issuance of an Individual Administrative-Legal act, or implementation of an action or restraining from it, and hence – the expected limitations of individual's right, in this case, it is important to use the mechanism of

[44] It should be noted that, for the purposes of this paper, regarding the foreseeability of article 31, a kind of a common position was fixed by the judges of court of first instance, which was reflected in the paper in the form of definitions of them and uniform practice.

preventive protection of the person's right, which is included in article 31 of the Administrative Procedure Code of Georgia.[45]

Based on the above, the norms, provided for in article 29 of the Administrative Procedure Code of Georgia, are used only on the lawsuits filed with the request for abolishing, declaration of invalidity (article 22 of the Administrative Procedure Code of Georgia) or invalid recognition of an individual administrative-legal act (article 25 of the Administrative Procedure Code of Georgia), in relation to other (such as mandatory lawsuit) types of lawsuits, article 31 of the Administrative Procedure Code of Georgia is used.

The institute of Temporary Ruling provided for in the administrative proceedings, has a wider scope, rather than the measure ensuring the suspension of the act. It is not issued by the court automatically, but only on the basis of the person's petition and for the purpose of maintaining the existing situation or preliminary, temporary regulation of the legal relationship.[46]

The issue of obscurity of the norm in relation to the first part of article 29 of the Administrative Procedure Code of Georgia is outlined, which refers to the moment of suspension of an individual administrative-legal act. In particular, the first part of the above- mentioned article is not enough foreseeable.[47]

For the purposes of this paper, taking into account the current judicial practice, according to the definitions of judges, the words given in the norm "acceptance of the lawsuit" clearly implies acceptance the lawsuit in administrative proceedings.

A common characteristics of the measures of temporary protection of the right, defined by article 29 and article 31 of the Administrative Procedure Code of Georgia, is to maintain the status quo, the purpose of which is to protect a person from the consequences of state administrative measures before making a decision in the process of administrative court proceedings.[48]

When acceptance a complaint or lawsuit about annulment of an individual-administrative-legal act automatically suspends validity of this act, the authority to render temporary ruling, legislator gives only to a court. Which it receives based on the application of the interested party in administrative proceedings.[49]

---

45 *Vachadze M., Todria I., Turava P., Tskepladze N.,* Commentary on the Administrative Procedure Code of Georgia, Tbilisi, 2005, 174 (in Georgian).

46 See citation: *Abuseridze G.,* Preventive Protection Measures in Administrative Law, Journal "Justice and Law" Nº2(62)'19, 2019,12-13 (in Georgian).

47 It is noteworthy, that according to the first part of article 29 of the Administrative Procedure Code of Georgia, acceptance of the lawsuit in court, suspends the action of the appealed individual administrative-legal act. It is not clear from the content of the norm what does it meant by the words: "acceptance of the lawsuit" acceptance of the lawsuit in the proceedings, apply with the relevant lawsuit directly in the court and registration it etc. Unlike the General Administrative Code of Georgia, where it is clearly stated according to the first part of article 184, that if nothing else is established by a law or by the statutory act issued on the basis, validity of the appealed act will be suspended from the moment of registration of the administrative complaint.

48 *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P., (ed.)* Administrative Procedural Law Guide, Tbilisi, 2008, 386 (in Georgian).

49 *Vachadze M., Todria I., Turava P., Tskepladze N.,* Commentary on the Administrative Procedure Code of Georgia, Tbilisi, 2005, 175 (in Georgian).

It is noteworthy another problematic issue, particular, while the judge adjudication the administrative case, to use the civil procedural claims security measures as a measures of temporary protection of the person's right. In this regard, the judicial practice of Supreme Court of Georgia is interesting, where the court of cassation clearly separated the preliminary remedies of protection of the right, provided for by the Civil and Administrative Procedural Legislation and gave kind of priority to the legal mechanisms of preliminary protection of the right, determined by the Administrative process, which are defined in articles 29 and 31 of the Administrative Procedure Code of Georgia.[50]

In terms of current judicial practice regarding the above-mentioned problematic issue, according to the Judges definitions, the main accent should be on the purpose of the claim provision, whether the request of the petition satisfies or not the requirements for rendering temporary ruling as provided in article 31 of the Administrative Procedure Code of Georgia. For example, if the person requests to use civil procedural claim security measure, such as, e.g. seizure lien, here, the court is forced to explicitly use the particular claim security measure defined by article 198 of the Civil Procedure Code of Georgia, at the same time referring to the 2nd part of first article of the Administrative Procedure Code of Georgia.[51]

As in rendering a ruling on a measure of security of claim in civil procedure law, also at the time of rendering temporary ruling by the court adjudicating administrative case, the judge evaluates the perspective of lawsuit and the risks of significant damages and existing danger in the case of a long-term legal relationship and after then issue a ruling.

Moreover, it can be said, that in administrative proceedings the court may examine the perspective of the lawsuit with a higher degree then in civil proceedings, where the use of claim security is based on the hypothetical assumption of lawsuit satisfaction, however, the examination of perspective of the lawsuit, should not turn in substantive investigation of validity of the claim.[52]

"The court, based on the purposes of rendering temporary ruling, must be convinced of a high probability of the person's success in order not to endanger the stability of justice. It is not allowed for the court to decide the main dispute by temporary ruling." [53] At the same time, the rendering the ruling should be the only remedy and the person should not have a real opportunity of protecting his/hers right in any other way.[54]

---

[50] See the resolution of 09 January, 2019 on the case №1562 (us-k-18) of chamber of Administrative Cases of Supreme court of Georgia, where the court of cassation defines that, regardless of that there is wide spectrum of claim security measures represented in Civil Procedure Code of Georgia, the Administrative Procedure Code of Georgia determines itself the mechanisms of preliminary protection of the right, in particular, articles of 29 and 31 of the above-mentioned Code, in which the legal remedies of temporary protection of the right in administrative proceedings are provided, according to the types of lawsuits defined by the same code.

[51] See the resolution of 12 July, 2017 on the case №3/4827-17 and the resolution of 19 February, 2021 on the case №3/769-21, of panel of administrative cases of Tbilisi city Court. (searched from archive.)

[52] *Agapishvili M.,* The Issue About the Provision for Damage Inflicted by Preventive Security Measures upon Adjudication the Dispute over Legality of Enabling Individual Administrative-Legal Acts, "Journal of Law" , №2 (2022), Ivane Javakhishvili Tbilisi State University, 234 (in Georgian).

[53] See citation: *Tsiklauri B.,* The Preliminary Measures of Protecting the Right in Administrative Law, Student Law Journal, ELSA- Georgia, 2011,18 (in Georgian).

[54] *Abuseridze G.,* Preventive Security Measures in Administrative Law, Jour. "Justice and Law" №2(62)'19, 2019,13 (in Georgian).

The rendering temporary ruling should usually be used for temporary regulating the relevant legal relationship and not for satisfying the main request of the lawsuit, however in order to satisfy the basic requirements of temporary ruling, as an extreme exception, there must be strong preconditions, there must be a probability that the lawsuit will be satisfied and the same time without the rendering temporary ruling the realization of the right protected by the court, will be impossible or it will be significantly complicated. [55]

Based on all of the above, it can be said, that the rendering temporary ruling contains a certain risks and that is why it is necessary undoubted existence of relevant prerequisites while render it, which does not characterize article 29 of the Administrative Procedure Code of Georgia, particular – suspensive effect, when the administrative-legal act automatically suspends, except for the exceptions regulated in the second part of same the article.

4. Conclusion

The right to effective judicial protection is one of the main principles of the development of temporary protection measures.[56]

Based on the review of characteristic peculiarities of the research issue of this paper and the current judicial practice, regulation of the legislative framework from a procedural point of view and increasing the degree of foreseeability by the legislator is on the agenda, which again and again serves that purpose, that the person should be better informed and guaranteed by the norm of predictable law, so that his/her right does not remain without protection and should not depend on the non-uniformly interpretation of the norm by the court, in each specific case.

The purpose of this paper to present those key issues and problems as much as possible, what characterizes the Institution of Temporary Ruling, taking into account the current judicial practice. This paper is also presented the results and positions of the definitions given by the judges of the common courts, regarding the foreseeability of article 31 of the Administrative Procedure Code of Georgia and the peculiarities of the Institution of Temporary ruling in general, which hopefully will be considered important in the future and it will be positively contribute to the development of Administrative Procedural Law in the field of preventive protection of the right.

Bibliography:

1. The Code of Administrative Justice of the Republic of France, 30/06/2000.
2. The Law of the Federal Republic of Germany on the ‘‘Administrative Judicial Order” , 19/03/1991.
3. The Administrative Procedure Code of Estonia, 01/01/2012.
4. Constitution of Georgia, 24/08/1995.
5. The Administrative Procedure Code of Georgia, 23/07/1999.

[55] See the Resolution of 27 June, 2024 on the case №9517158, panel of administrative cases of Tbilisi city Court. (searched from archive.) (in Georgian).

[56] *Sierra de la S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from The Right to Effective Court Protection. A Comparative Approach, European Law Journal, [Vol 10]1, 2004, 48.

6. The General Administrative Code of Georgia, 25/06/1999.
7. *Bell J., Liche're F.,* Contemporary French Administrative Law, Cambridge University Press, 2022, 83-84, 104, 108-109.
8. *Blachly F.F. & Oatman M.,* Federal Administrative Procedure Act, Geo. L. J. [Vol.34: p.407, 1946] p.422-423.
9. *Levinson L.H.,* Interim Relief at Administrative Procedure: Judicial Stay, Administrative Stay, And Other Interim Administrative Measures, The American Journal of Comparative Law, [Vol. 42, 1994] 639.
10. *Sierra de la S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from The Right to Effective Court Protection. A Comparative Approach, European Law Journal, [Vol 10]1, 2004, 42, 48.
11. *Roth M.,* Interim Measures, Journal of Dispute Resolution, [Vol. 2012] 426, 429-430.
12. *Abuseridze G.,* Preventive Security Measures in Administrative Law, Journal "Justice and Law", Nº 2(62)'19, 2019,12-13 (in Georgian).
13. *Agapishvili M.,* The Issue About the Provision for Damage Inflicted by Preventive Security Measures upon Adjudication the Dispute over Legality of Enabling Individual Administrative-Legal Acts, "Journal of Law" , N2 (2022), Ivane Javakhishvili Tbilisi State University, 226, 234 (in Georgian).
14. *Vachadze M., Todria I., Turava P., Tskepladze N.,* Commentary on the Administrative Procedure Code of Georgia, Tbilisi, 2005, 174-177 (in Georgian).
15. *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P. (ed.),* Administrative Procedural Law Guide, Tbilisi, 2008, 386 (in Georgian).
16. *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Ghvamichava T., Gvaramadze T.,* Administrative procedural Law Guide, Tbilisi, 2018, 339-341, 343-344 (in Georgian).
17. *Kharshiladze I., Ovsianikova N.,* Administrative Law of Foreign Countries, Tbilisi, 2014, 477, 583 (in Georgian).
18. *Tsiklauri B.,* The Preliminary Measures of Protecting the Right in Administrative Law, Student Law Journal, ELSA- Georgia, 2011,18 (in Georgian).
19. Resolution of 27 June, 2024 on the case Nº 9517158, panel of administrative cases of Tbilisi city Court (in Georgian).
20. Resolution of 19 February, 2021 on the case Nº 3/769-21, panel of administrative cases of Tbilisi city Court (in Georgian).
21. Temporary Ruling of July16, 2020, on the case Nº 3781793, panel of administrative cases of Tbilisi City Court (in Georgian).
22. Judgement of 09 January 2019 on the case N/BS -1562 (US- 18), chamber of administrative cases of Supreme Court of Georgia (in Georgian).
23. Resolution of 12 July, 2017 on the case Nº 3/4827-17, panel of administrative cases of Tbilisi City Court (in Georgian).
24. Temporary Ruling of march 16, 2017, on the case Nº3/1862-17, panel of administrative cases of Tbilisi City Court (in Georgian).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8326

Levan Tevzadze*

Problems of qualification of torture and humiliating or inhuman treatment in domestic violence cases according to the practice of the general courts of Georgia

In the practice of general courts of Georgia, the problem of qualification of crime is not a rare case. This especially reffers to crimes between which to draw a line is difficult. Among such cases are the crimes provided for by articles ***144[1] (torture)[1] and 144[3] (humiliation or inhuman treatment)[2]*** *of the Criminal Code of Georgia. It is important to separate them – from each other and from other crimes.*

The scientific article presents the criminal law cases of ***the domestic violence[3] category****, in which the above-mentioned problem appeared and which were considered by all three courts of Georgia.*

Key words: *torture, degrading treatment, inhuman treatment, qualification, domestic violence, judicial practice*

1. Introduction

The paper deals with the problems of qualification of torture and humiliating or inhumane treatment in domestic violence cases according to the practice of the general courts of Georgia.

Identifying the guilty persons, bringing them to criminal responsibility and sentencing is the primary duty of the state. Nevertheless, in judicial practice, due to the number and complexity of the

---

* Judge of the Criminal Chamber of the Supreme Court of Georgia, doctoral student of the Ivane Javakhishvili Tbilisi State University, Faculty of Law.

1 The first part of Article 144[1] of the Criminal Code of Georgia – "Torture, i.e. exposing a person, or a third person to such conditions or treating him/her in a manner that causes severe physical pain or psychological or moral anguish, and which aims to obtain information, evidence or confession, threaten or coerce, or punish the person for the act he/she or a third person has committed or has allegedly committed".

2 The first part of Article 144[3] of the Criminal Code of Georgia – "Humiliating or coercing a person, placing him/her in an inhuman, degrading and humiliating condition, which inflicts severe physical and psychological suffering on him/her".

3 Article 11[1] of the Criminal Code of Georgia – "A domestic crime shall mean a crime under Articles 109, 115, 117, 118, 120, 126, 133[1], 133[2], 137-141, 143, 144-144[3], 149-151[1], 160, 171, 187, 253-255[1], 381[1] and 381[2] of this Code, which is committed by one family member against another family member. Criminal liability for a domestic crime shall be determined according to an appropriate article of the Criminal Code of Georgia specified in this article, with reference to that article". With the first part of the note of the same article – "For the purposes of this Code, the following persons shall be considered family members: a mother, father, grandfather, grandmother, spouse, person in an unregistered marriage, child (stepchild), foster child, foster carer (foster mother, foster father), stepmother, stepfather, grandchild, sister, brother, parent of the spouse, parent of the person in an unregistered marriage, spouse of the child (including the one in an unregistered marriage), former spouse, person who previously was in an unregistered marriage, guardian, custodian, supporter, person under guardianship and custodianship, beneficiary of support, as well as other persons that maintain or maintained a common household".

cases, the problems of qualification of torture and inhuman or degrading treatment appeared,[4] which was reflected in the acquittal or the judgements changed by the superior instance.

Article 3 of the European Convention on Human Rights – the prohibition of torture is one of the few lists from which deviations are not allowed. No exceptional circumstances can be adduced by a state party to justify an act of torture within its jurisdiction.[5] Torture is an absolute right and cannot be justified by any public necessity or state interest.[6]

Despite the fact that the European Court of Human Rights has a large practice in relation to the presented issues, the research of the practice of the general courts of Georgia, along with its relevance, is a great news for the Georgian reality. In addition, it should be noted that one of the most relevant categories – **domestic violence** – is selected in the paper for discussing the practice of torture and humiliating or inhumane treatment.

The article provides a basic picture of the practice of the general courts of Georgia on the separation of torture and degrading or inhuman treatment from each other and from other crimes in cases of the domestic violence category.

2. Separation of torture and degrading or inhuman treatment in domestic violence cases according to the practice of the general courts of Georgia

Let's consider the judgement, in which G.G., along with another crime, was found guilty under the first part of Article 11^1,144^1 of the Criminal Code of Georgia. The actions committed by G.G. were expressed in the following: In his home, drunk G.G. asked his wife L.B. to prepare dinner. His wife did not prepare dinner on time and G.G., offended by this, decided to punish L.B., for which he intended to torture her, citing gender intolerance, as if cooking in the family is only a woman's duty. He first grabbed L.B. by the hair and beat her and when she tried to resist, in order to facilitate the criminal act, he decided to tie him up and imprison her. For this purpose, G.G. knocked L.B. to the floor and tied her hands with a plastic bandage, the so-called "Khamuti". When he tried to bind his legs as well, L.B. resisted and in order to subdue her, G.G. stuck a knife in his leg, causing physical pain. After tying her hands and feet, G.G. abused L.B. verbally and physically, in particular hitting his hands and feet on her body for several hours.[7]

Despite the defence's appeal (appellant asked for a judgement of acquittal), the judgment of the Court of Appeals upheld the judgement of the Court of First Instance.[8]

---

4 See Also, *Mamaladze E., Dateshidze N.,* Prohibition of Torture: Reflecting the Standards Under Articles 3 and 6 of the European Convention on Human Rights in National Judicial Practice, Tbilisi, 2019, 10 (in Georgia).

5 *Svanidze E.,* Effective Investigation of Mistreatment, European Standards Guidelines, Tbilisi, 133 (in Georgia).

6 *Lekveishvili M., Mamulashvili G., Todua N.,* Private Part of Criminal Law, Book I, Part One, Tbilisi, 2023, 394 (in Georgia).

7 Judgement of Bolnisi District Court of November 13, 2018 on case No. 1/112-18.

8 Judgement of the Criminal Chamber of the Tbilisi Court of Appeals of March 29, 2019 on case No. 1B/219-19.

According to the judgment of the Supreme Court of Georgia, the judgment of the Court of Appeals was amended: the action of the convicted G.G. was reclassified from the first part of Article 11^1,144^1 of the Criminal Code of Georgia to the first part of 11^1,144^3 of the same Code.[9] As it became clear by studying the materials, the Supreme Court did not agree with the legal assessment of the first instance and appeals courts, which they gave to the victim L.B. of the act committed by the convicted G.G. – in the part of torture. The lower courts considered that the convicted person committed the said act towards his wife in order to punish her for the act he had committed. The act of the victim, by which she provoked the anger of the violent husband and his punishment by the latter, consisted in the fact that she did not bring food in time to the violent man who returned home late in the evening and was drunk, because of this, the convict, citing gender intolerance, as if cooking in the family is only a woman's duty, decided to punish L.B., for which he intended to torture her. In this part, the legal conclusion of the courts completely coincided with the reasoning and conclusion given in the prosecutor's resolution about the person's accusation.

The court of cassation evaluated the conflicting statements given by the victim in the investigation with the beyond reasonable doubt standard and came to the conclusion that the reason for the action of the convicted G.G. was completely certain and determined by the answers given by L.B. – Aggression towards his wife caused by drunkenness (and not punishment) due to which there was no legal basis for the qualification of the act committed by the convict as torture, because the subjective sign necessary for the existence of the legal composition of torture was not established, in particular, the special purpose of punishing the victim. Although the lower courts did not critically evaluate the victim's conflicting testimony regarding the specific purpose of the punishment, but, the Supreme Court of Georgia correctly reclassified the action of the convicted G.G. from the first part of Article 11^1,144^1 of the Criminal Code of Georgia to the first part of Article 11^1,144^3 of the same Code. According to the conclusion of the Chamber of Cassation, the actions of the convicted G.G. in the part of verbal and physical abuse inflicted on the victim L.B., as well as other forms of violence committed against her, included such illegal actions as humiliating and inhuman treatment.

Despite the correct qualification of G.G.'s action by the cassation court, in terms of disposition, G.G.'s action should have been evaluated only as inhuman treatment, while G.G.'s action was also evaluated as humiliating treatment. All three courts of instance considered the factual circumstances described in the resolution to charge the person as established beyond a reasonable doubt, with the only difference being that the Court of Cassation excluded the special purpose of punishment, which ultimately led to a change in qualification and G.G.'s action was assessed as both degrading and inhumane treatment. If the court came to the above-mentioned conclusion, then by the same judgment, it should have determined which actions were humiliating and which were inhumane on the part of G.G. Moreover, in the above-mentioned decision of the Court of Cassation, the precedents of the European Court of Human Rights should have been considered[10] and analyzed them, which would

[9] Judgment of the Criminal Chamber of the Supreme Court of Georgia of November 1, 2019 on case No. 356AP-19.

[10] For example, "Treatment is considered inhuman when it is committed with premeditated intent, exceeds the minimum threshold of cruelty and causes actual bodily harm or severe physical or mental suffering, and when the treatment humiliates or degrades a person, shows a lack of respect or demeans his dignity, or

make the legally correct assessment of G.G.'s action more justified, taking into account the specifics of the crime and its elements.

Ill-treatment that does not amount to torture because it lacks sufficient intensity and purpose qualifies as inhuman or degrading treatment. As with all assessments related to Article 3 of the European Convention on Human Rights, this assessment is made on the basis of relativity.[11] The main difference between torture and inhumane treatment lies in the severity of the suffering inflicted. Inhuman treatment refers to inhumane treatment of less severity and intensity than torture.[12]

It's interesting another criminal case, which attracts special attention. G.R., along with other crimes, was charged with subsection "f" of part 2 of Article 11^1,144^3 of the Criminal Code of Georgia,[13] which was expressed as follows: G.R. forced his wife I.K. to admit that she had sexual relations with her own cousin by threatening to kill her with a knife, in particular, to cut her head. After I.K.'s denial of this fact, G.R. began to abuse his wife on the basis of her gender, he took out a baton, a large roll of adhesive tape from his parka and forcibly dragged the victim to the bathroom, as a result of which I.K. severe mental and physical pain and moral suffering.[14] G.R. slowly pulled pieces of the victim's dress, wrapped around his arm and hit him in the face, with the aim of forcing the victim to name the identity of her lover. I.K. was able to escape, open the door and call people for help, however, G.R. dragged his wife by force into the house and locked the door from the inside, after which he threw her on the bed and started suffocating her with a strong hand on her throat. At the same time, he threatened to kill, during which the victim experienced great fear and suffering. G.R.'s actions, physical violence, aggression, as well as his suspicions, caused the victim to feel insecure, psychological depression, humiliation and his moral suffering.[15]

G.R. was found guilty of all the presented charges by the court, among them, under subsection "f" of part 2 of Article 11^1,144^3 of the Criminal Code of Georgia, and the form and measure of punishment was determined – 7 years of imprisonment. In the opinion of the court, physical violence on the part of G.R. on the part of his wife in a locked apartment for several hours, threatening to take her life with a knife, beating her on the motive of naming her lover, humiliation, which was expressed in the request to I.K. to admit the fact of sexual contact with her own cousin in order to influence and suppress the psyche of the victim, together with the knife, the so-called demonstration of "scotch tape"

---

provokes A feeling of fear, suffering and inferiority in him to such a degree that it can break his moral or physical endurance shall be considered as degrading treatment", See: Pretty v. The United Kingdom, (Application no. 2346/02), 29 April 2002; See also, Ireland v. The United Kingdom, (Application no. 5310/71), 18 January 1978; Gäfgen v. Germany, ECHR, (Application no. 22978/05), 30 June 2008; Bouyid v. Belgium, ECHR, (Application no. 23380/09), 28 September 2015.

11 Prohibition of torture, implementation of Article 3 of the European Convention on Human Rights, Guide, Tbilisi, 2005, 64.

12 *Bokhashvili B.,* Case Law of the European Court of Human Rights, Tbilisi, 2004, 151 (In Georgian).

13 "…by violating the equality of persons, or due to their race, colour, language, sex, religion, belief, political or other views, national, ethnic, social belonging, origin, place of residence, material status or title…".

14 It should be noted that moral suffering is one of the manifestations of mental suffering, therefore, it is not correct to separate it separately. In addition, international conventions do not use this word – moral. See *Dvalidze I., Kharanauli L., Tumanishvili G., Tsikarishvili K.,* Crimes against human rights and freedoms according to the Criminal Code of Georgia, 2019, 151.

15 Judgment of the Tbilisi City Court's Criminal Affairs Board of March 9, 2020 on case No. 1/4381-19.

and a baton is a violation of the right protected by Article 3 of the European Convention on Human Rights. The purpose of carrying out the above-mentioned actions was to humiliate I.K. and diminish his dignity – in such a way that G.R. would confirm his superiority and power to the victims, so that the latter would have a feeling of helplessness and would not dare to resist him. The court found that the infliction of physical pain and mental suffering on I.K., which the victim spoke about during the interrogation, should be considered as humiliating the person, both in the eyes of others and in her own eyes, as putting the person in a state of insulting honor and dignity. [16]

It should be noted that, although the city court correctly discussed the commission of inhuman treatment by G.R., however, the fact that it is evident from the wording of the accusation itself, that G.R. committed inhuman treatment by demanding confession of infidelity from his wife.

Because of G.R.'s treatment of the victim by its nature, intensity and duration reached severe physical pain, mental and moral suffering, which was carried out in order to obtain a confession, the state prosecution had to qualify G.R.'s action as torture and the case proceeded in court. It is true that the court could not aggravate the presented charge (torture is a more serious crime than inhumane treatment), however, considering the committed action, the court should not have ordered[17] 7 years of imprisonment, while for the relevant article, part and clause of torture, imprisonment of nine to fifteen years is provided.

The findings of the City Court were fully shared by the Court of Appeals[18] and the Supreme Court. [19]

3. Separation of torture and degrading or inhuman treatment from domestic violence according to the practice of the general courts of Georgia

According to the decree to prosecute as the accused, G.K. Since September 2018, has been systematically verbally abusing his wife Jh.O. on the grounds of gender and intolerance. In particular, he told her that he, as a man, had the right to treat his wife as he wanted, and Jh.O. was obliged to obey his every request and act according to his instructions. In October 2018, G.K., because of jealousy, beat Jh.O. in the head, causing Jh.O. to suffer physical pain and suffering. In December of the same year, G.K. brought his wife to the area surrounding the village, from whom, by repeatedly hitting hir hands and feet on her body, he demanded to confess the alleged sexual intercourse and her partner's name. After receiving the refusal, G.K., due to the recognition of the mentioned relationship,

16 Judgment of the Tbilisi City Court's Criminal Affairs Board of March 9, 2020 on case No. 1/4381-19.

17 "Determining the sanction for persons exposed in improper treatment is the discretion of the national legislation and the courts. International standards do not provide any formal list of sanctions to be applied to perpetrators of torture, inhuman or degrading treatment or punishment"; 14th General Report on CTP Activities, CTP/Inf (2004) 28, para 44; See – Svanidze E., Mistreatment and the fight against impunity, 17-18; International standards require that punishment be proportionate to the severity of the mistreatment. See – Ali and Ayse Duran v. Turkey, ECHR, (Application no. 42942/02), 8 April 2008.

18 Judgment of the Criminal Chamber of the Tbilisi Court of Appeals of November 27, 2020 on case No. 1b/728-20.

19 Judgment of the Criminal Chamber of the Supreme Court of Georgia of June 25, 2021 on case No. 23AP-21.

in order to punish her, with an interval of about 10 minutes, for 3-5 minutes, he injured Jh.O. and she experienced severe physical pain and mental suffering. G.K. was charged with the first part of Article 126^1 of the Criminal Codeof Georgia[20] and the first part of Article 11^1,144^1 of the same Code.[21]

According to the court's decision, G.K. He was acquitted in the charge filed under the first part of Article 126^1 of the Criminal Code of Georgia (2018, September-October episode), and the charge filed under the first part of Article 11^1,144^1 of the same code was reclassified to the first part of Article 126^1 of the same code. Finally, G.K. was found guilty of committing a crime under the first part of Article 126^1 of the Criminal Code of Georgia.[22]

In the judgment, the court cited the victim's right not to testify[23] against a family member[24] as the main argument for acquittal and requalification, and other evidence was not sufficient to convict G.K. beyond a reasonable doubt. In this case, the court of first instance accepted the stated position of the victim as a fact and evaluated the action of G.K. in relation to other evidence, however, it left out of attention the approach of the Council of Europe Convention on "Measures for the Prevention and Suppression of Violence against Women", according to which criminal prosecution should not be be entirely dependent on the application or complaint filed by the victim.[25] Consequently, since the victim did not testify, the perpetrator's actions were incorrectly qualified.

In the analysis of the this judgment, special attention is drawn to the reclassification of the charges against G.K. under the first part of Article 11^1,144^1 to the first part of Article 126^1 of the Criminal Code of Georgia. The approach of the court of first instance is correct, when the victim was not interrogated in court, it became impossible to determine without a doubt whether such treatment of G.K. served a special purpose – recognition of infidelity on the part of the spouse or punishment, for which no special purpose has been identified that is mandatory for the composition of torture – obtaining information or confession, intimidating or coercing a person or punishing a person for an act committed or likely to be committed by him. Accordingly, in this case, the qualification of the crime as torture was excluded, however, the nature, intensity and serious consequences of the action committed by G.K. were not taken into account and G.K. was found guilty only for domestic violence.

The decision of the court of first instance was fully shared by the court of appeals.[26]

---

20 "Violence, regular insult, blackmail, humiliation by one family member against another family member, which has resulted in physical pain or anguish and which has not entailed the consequences provided for by Articles 117, 118 or 120 of this Code".

21 Judgment of Gurjaani District Court of July 16, 2019 on case No. 1/45-19.

22 Judgment of Gurjaani District Court of July 16, 2019 on case No. 1/45-19.

23 In general, what causes the non-testification of victims in family crime cases requires a separate study. The victims, who are repeatedly subjected to violent acts by their spouses, provide detailed information to the body conducting the process within the framework of the investigation, however, they refuse to testify in court proceedings. It is likely that these persons are still victims of psychological or other types of violence.

24 According to Article 49 of the Criminal Procedure Code of Georgia, Part 1, Sub-Clause "d" – "A witness shall have the right to: …d) avoid giving a testimony that discloses the commission of a crime by himself/herself or by his/her close relative".

25 "On Measures to Prevent and Suppress Violence against Women" Council of Europe Convention, 2011, Article 55.

26 Judgment of the Criminal Chamber of the Tbilisi Court of Appeals of December 10, 2019 on case No. 1b/1819-19.

The Supreme Court of Georgia in the above-mentioned case partially satisfied the cassation appeal of the state prosecutor (the prosecutor requested to declare G.K. guilty for torture), accurately assessed the evidence in the case and qualified G.K.'s action as inhuman treatment instead of domestic violence, and in the first episode (2018, the fact of September-October), as the previous instances, left it unchanged. The Cassation Chamber considered that the injuries inflicted by G.K. on Jh.O., which caused severe pain (physical and mental) and suffering to the victim, went beyond the scope of domestic violence and reached the level of cruelty that constitutes inhuman treatment, a crime, stipulated by the first part of Article 11^1,144^3 of the Criminal Code of Georgia.[27]

Probably, the conclusion of the Supreme Court was fully derived from the evidence gathered in the case, In particular: injuries inflicted on the victim, including numerous cigarette burns on the body, would cause severe physical and mental pain to a person with normal physical development and health. In addition, it was definitely established that Jh.O. had unbearable pain from the injuries. Also, it was proven that, the victim was under stress after the violence, had difficulty speaking, needed the help of a psychiatrist, suffered from post-traumatic restlessness, anxiety and a sense of doom, which clearly indicated the mental pain and moral suffering experienced by the victim, which is why the Supreme Court correctly made a legal evaluation of G.K.'s action.

The situation is different in another case under consideration, in which G.G. was charged with other crimes under the first part of Article 11^1,144^3. G.G.'s actions in terms of inhumane treatment were expressed in the following: In the last few years, G.G.'s wife F.Ch. was constantly insulted for no reason, spat in her face and humiliated her every day, as a result of which the victim experienced psychological suffering. He also often used physical abuse. In particular, he grabbed her by the throat and shook her, punched her on her right arm and face, as a result of which she fell down. He sat on the body of the fallen man and held his throat tightly with both hands. The victim was short of breath and blinded, however, he was able to bite in the chest, took advantage of the temporary hand release and managed to escape to the bedroom. G.G. followed her back and slapped her in the face with an outstretched hand. The victim fell on the bed. He held both of her hands with one hand, and with the other he placed a lit cigarette on the thigh of her right leg and laid it down. F.Ch. managed to escape again and ran to ask for help, however, G.G. tried to stop her again and punched her in the body. As a result of the above-mentioned violent actions, F.Ch. suffered severe physical pain.[28]

During the oral hearing of the case, F.Ch. refused to testify against her close relative – G.G. The court explained that the victim's refusal to testify did not imply the defendant's innocence a priori. Such an action on the part of the victim may have been due to a number of factors, including the emotional attitude of the victim not bring her family member to criminal liability and etc.

In this case, the court paid attention to the victim's behavior after committing the crime, which contributed to the objective investigation – she applied herself to the police with a report about the crime, gave a number of statements to the investigation, conducted a medical examination to detect traces of violence, submitted to the investigation possible whistle-blowing materials of the accused,

---

[27] Judgment of the Criminal Chamber of the Supreme Court of Georgia of April 10, 2020 on case No. 149AP-20.

[28] Judgment of the Tbilisi City Court's Criminal Affairs Board of March 31, 2021 on case No. 1/4615-20.

participated in the investigative experiment protocol, she pointed to the place where the accused physically abused her, lit a cigarette and threatened to kill her. F.Ch. voluntarily participated in the psychological examination, her behavior was certainly aimed at establishing the truth in the criminal case, however, her refusal to testify in court was indeed similar to the behavior of a victim of domestic violence who, given the time that had passed, forgave the abuser for such behavior towards her and by taking the stand and not testifying in court, she tried to avoid criminal liability for her spouse and/or to neutralize the future danger. Accordingly, the court G.G. pleaded guilty to all charges.[29]

It should be noted that the court's reasoning may indeed be based on the nature of the crime committed, but when the victim does not testify, it is important to evaluate other evidence to convict the person beyond a reasonable doubt standard.

The factual circumstances described in the judgment of the city court and the conclusions reached were fully shared by the appeal court and left the judgment against G.G. unchanged.[30]

According to the judgment of the Supreme Court of Georgia, the action of G.G. was reclassified from the first part of Article 11^1,144^3 of the Ciminal Code of Georgia to the first part of Article 126^1 of the same Code.[31]

The court of cassation analyzed in detail both the charges presented to G.G., which included both – psychological suffering and physical abuse and separately assessed the evidence of psychological suffering and physical abuse.

In relation to psychological suffering, the court did not consider the evidence presented by the prosecution to find the person guilty, since this part of the charge was confirmed only by the forensic psychological examination report, according to which the victim suffered psychological suffering. No other evidence was found in the case materials. During the testimony, the neighbors of the convict and the victim indicated that, except for the day of the accident, they did not hear such a noise from their house that they went up to them. As for other witnesses, the Court of Cassation noted that they did not directly witness the act of violence and only indirectly, based on the testimony of the victim, point to criminal actions. On the other hand, F.Ch., as mentioned, did not testify against her husband.[32]

As for physical abuse, the lawyer noted in the cassation appeal that the fact that G.G. committed domestic violence was not a matter of dispute for the defense, but categorically excluded the facts of intentionally burning him with a cigarette and humiliating, inhumane treatment. According to the conclusion of the medical examination, during the personal examination of F.Ch., there were injuries that belonged to the light degree of bodily injuries, not affecting health. As for the protocol of the investigative experiment, the victim recalled the facts and indicated the places where G.G. threatened to kill her and physically abused her. Although F.Ch. did not testify against her husband at the court session, the first instance and appeal courts shared the protocol of the investigative experiment and

---

29 Judgment of the Tbilisi City Court's Criminal Affairs Board of March 31, 2021 on case No. 1/4615-20.

30 Judgment of the Criminal Chamber of the Tbilisi Court of Appeals of June 21, 2021 on case No. 1b/705-21.

31 Judgment of the Criminal Chamber of the Supreme Court of Georgia of September 28, 2021 on case No. 682AP-21.

32 Judgment of the Criminal Chamber of the Supreme Court of Georgia of September 28, 2021 on case No. 682AP-21.

since the protocol of the investigative experiment contained only the testimony of the victim, it could not be considered as proof of guilt.

In this case, the Court of Cassation invoked the practice of the European Court of Human Rights, according to which, "*Ill-treatment must reach a minimum threshold to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, in particular, such as: the duration of the treatment, its physical and spiritual consequences, and in some cases the sex, age, health and condition of the victim".*[33] However, *"claims of ill-treatment must be supported by relevant evidences".*[34] The court, in order to evaluate the evidence presented, establishes the standard of proof – "beyond a reasonable doubt", but additionally notes that such proof can be derived from sufficiently strong, clear and interrelated inferences or perception of similar, indisputable facts.[35]

Based on all of the above, the evidence presented in the case could not satisfy the conditions stipulated by the disposition of the first part of Article 11^1,144^3 of the Criminal Code of Georgia. In order to qualify the action under this article (humiliation, coercion, putting in inhumane, degrading honor and dignity), it must cause severe physical, mental pain or moral suffering to the victim, which was not identified in this case, but was definitely confirmed by G.G. to F.Ch. only the fact of inflicting physical insults on (apart from intentionally burning him with a cigarette), which is why the Chamber of Cassation correctly reclassified the accusation provided for in the first part of Article 11^1,144^3 of the Criminal Code of Georgia to the first part of Article 126^1 of the same Code, all signs of the composition of the action were confirmed beyond a reasonable doubt.

Probably, conclusion of the Supreme Court was derived from the fact that the defense itself did not deny physical violence on the part of G.G.'s wife. In addition, the testimony of the neighbors confirmed the fact of a conflict and the presence of an agitated victim in the house, and according to the report of the medical examination, the injuries on the body of F.Ch. were of a light degree, not harmful to health. Therefore, when there was no testimony of the victim at the court session, G.G.'s action is a classic example of domestic violence.

As for the next case, according to the decree on the accusation of a person, Z.M. was accused of committing the following crimes: According to subsection "k" of part 2 of Article 11^1,126 of the Criminal Code of Georgia[36] and the first part of Article 11^1,144^3 of the same code. Z.M.'s action in the part of inhumane treatment was manifested in the following: during cohabitation, in a residential apartment, on the grounds of gender intolerance, Z.M. systematically verbally abused his wife – I.M., humiliated, spat on and forced her to kneel before him, as a result of which the latter experienced moral suffering and mental pain. As a result of mutual reconciliation and analysis of the evidence, the court found in the judgement that Z.M. During the period of cohabitation, he systematically humiliated and insulted his wife on the grounds of gender discrimination, however, the evidence presented did not

---

33 See Labita v. Italy, ECHR, (Application no. 26772/95), 6 April 2000.

34 See Labita v. Italy, ECHR, (Application no. 26772/95), 6 April 2000.

35 See Ireland v. The United Kingdom, (Application no. 5310/71), 18 January 1978.

36 "...Regular beating or another type of violence which caused physical or mental suf fering of a fected person but did not entail a consequence provided for by Article 117 or 118 of this Code… against a minor's family member in the presence of the minor".

prove the strength and quality of such actions by the accused, which would cause severe physical, mental pain or moral suffering to the victim.[37]

In the decision, the court drew a line between inhumane treatment and family violence and pointed out that the objective side of humiliating and inhumane treatment – humiliation, coercion, putting a person in an inhuman, dignity and honor-destroying condition, is manifested in the action, the result and the causal connection between the action and the result.[38]

The court also explained that the law has criminalized domestic violence, which involves the violation of the constitutional rights and freedoms of one family member to another by physical, psychological, economic, sexual violence or coercion. Insult is the humiliation of another person's honor and dignity, expressed in an inappropriate manner. In this case, the defendant systematically insulted and humiliated his wife, which was confirmed by the victim's report, in which she indicated that she suffered psychological suffering as a result of his actions, which lasted for years and had a systematic character. The above was found to be in complete agreement with the audio recordings, according to which, in some cases, on the basis of disagreements on household issues or for no reason, the accused systematically humiliated the victim, verbally insulted, cursed, addressed with obscene words, cursed, bullied. Also, he belittled the victim's family members, mocked and ironically referred to his ethnic origin, told about the details of his sexual relationship with another women. The contents of the audio recordings revealed that the accused indicated to the victim that he could not make decisions on her own and did not have the right to act freely. The court drew attention to the fact that that a child, who was 15 years old, had prepared food himself caused Z.M.'s anger, however, he considered this matter only the woman's responsibility. In addition, the witness L.G., who often heard the voice of conflict from the family of the accused and the victim, learned from the victim that her husband systematically humiliated and insulted her. The information of two witnesses contain valuable information for the court, that after the accused came home, the teacher (victim) returned to the room upset and could not continue the lesson. It is true that the conclusion of the forensic psychological examination established that I.M. did not experience psychological suffering, however, according to the same conclusion, the victim focused on Z.M.'s aggressive expressions and acts of violence, which is why they no longer live together, which confirms Z.M.'s systematic insult and humiliation towards his wife.[39]

Here, the court drew attention to the judgment of the Supreme Court of Georgia, according to which, in order to determine whether a person's illegal actions caused the suffering of the victim, it is not necessary to have a forensic psychological expert opinion, this issue is a subject of the court's assessment – based on the factual circumstances of the case and the analysis of the presented evidences.[40]

Finally, the court considered that during the substantive review of the case, the insulting accusation against Z.M. in the part of humiliating and inhumane treatment was not confirmed,

---

37 Judgement of the Tbilisi City Court's Criminal Affairs Board of September 6, 2019 on case No. 1/1564-19.

38 Judgment of the Tbilisi City Court's Criminal Affairs Board of September 6, 2019 on case No. 1/1564-19.

39 Judgment of the Tbilisi City Court's Criminal Affairs Board of September 6, 2019 on case No. 1/1564-19.

40 Judgment of the Criminal Chamber of the Supreme Court of Georgia of April 5, 2019 on case No. 617AP-18.

however, at the same time, based on the relevant, admissible and indisputable evidence in the case, the court considered it unequivocally confirmed that Z.M. He systematically insulted and humiliated his wife, which caused the suffering of the victim, which is why the court reclassified the insulting action against Z.M. from Articles 11^{1},144^{3} of the Criminal Code of Georgia to Article 126^{1} of the same Code, therefore, he was acquitted of the charges presented in Article 126 of the same Code.

It should be noted that Z.M.'s actions in the case of Z.M.'s accusation, expressed in verbal abuse, were not of the intensity and perceptibility that caused the victim to feel insurmountable suffering. As for the humiliating words in the records: "kneel", "you are a slave", etc., the court of first instance correctly considered it in the context of gender discrimination and, despite its similarity at first sight with the content of Article 144^{3} of the Criminal Code of Georgia, did not considered as humiliating and inhumane treatment, which intensity and degree of suffering could be close to torture. It should be noted that all the above-mentioned evidences indicated such forms of influence on the victim by the accused, such as – systematic humiliation. Because of that Article 144^{3} of the Criminal Code of Georgia differs from Article 126^{1} of the same Code in terms of the degree of impact and result, in this case, the impact inflicted by Z.M. on his wife for the purpose of humiliating and insulting could not really cause the degree of suffering of the victim, which is necessary for the action. For qualification under Article 144^{3} of the Ciriminal Code of Georgia, even more so, in the situation when the victim did not testify to the court about the mental pain and moral suffering experienced by him. Accordingly, the reasoning of the Tbilisi City Court in the qualification part is fully acceptable.

The conclusions reached in the judgment of the city court were rightly shared by the appeals[41] and Supreme Courts of Georgia. [42]

4. Conclusion

With this article, the reader got acquainted with the practice of the national courts and the European Court of Human Rights, their problems and definitions, which concern torture and degrading or inhuman treatment in cases of family violence category.

It is necessary to distinguish torture and inhuman or degrading treatment both – from each other and from other crimes. It is not controversial that the practice of the European Court of Human Rights should be shared in the decisions of the local courts. Otherwise, depending on the severity of the crimes, it is possible that a different action and its incorrect qualification will cause great harm both – to the accused/convict, as well as to the victim and to the interests of justice in general.

As a conclusion, it can be said that Georgian judicial practice, like the legislation, started not too long ago around the research topic, therefore, there is a difference of opinion, which was also clearly seen in the above-mentioned court decisions. However, it should be noted that the practice of the general courts of Georgia, in this regard, is on the path of development. However, along with practice, the issues require more theoretical research to present legal problems and minimize or eliminate them.

---

41 Judgment of the Criminal Chamber of the Tbilisi Court of Appeals of November 29, 2019 on case No. 1b/1617-19.

42 Judgment of the Criminal Chamber of the Supreme Court of Georgia of June 25, 2020 on case No. 107AP-20.

Bibliography:

1. "On Measures to Prevent and Suppress Violence against Women" Council of Europe Convention, 2011.
2. Criminal Code of Georgia.
3. Criminal Procedure Code of Georgia.
4. European Convention on Human Rights.
5. *Bokhashvili B.,* Case Law of the European Court of Human Rights, Tbilisi, 2004, 151 (in Georgian).
6. *Dvalidze I., Kharanauli L., Tumanishvili G., Tsikarishvili K.,* Crimes against human rights and freedoms according to the Criminal Code of Georgia, 2019, 151 (in Georgian).
7. *Lekveishvili M., Mamulashvili G., Todua N.,* Private Part of Criminal Law, Book I, Part One, Tbilisi, 2023, (in Georgian).
8. *Mamaladze E., Dateshidze N.,* Prohibition of Torture: Reflecting the Standards Under Articles 3 and 6 of the European Convention on Human Rights in National Judicial Practice, Tbilisi, 2019 (in Georgian).
9. *Svanidze E.,* Effective Investigation of Mistreatment, European Standards Guidelines, Tbilisi, 17-18, 133 (in Georgian).
10. Prohibition of torture, implementation of Article 3 of the European Convention on Human Rights, Guide, Tbilisi, 2005 (in Georgian).
11. Judgement of Bolnisi District Court of November 13, 2018 on case No. 1/112-18.
12. Judgment of Gurjaani District Court of July 16, 2019 on case No. 1/45-19.
13. Judgement of the Criminal Chamber of the Tbilisi Court of Appeals of March 29, 2019 on case No. 1B/219-19.
14. Judgment of the Criminal Chamber of the Tbilisi Court of Appeals of November 27, 2020 on case No. 1b/728-20.
15. Judgment of the Criminal Chamber of the Tbilisi Court of Appeals of December 10, 2019 on case No. 1b/1819-19.
16. Judgment of the Criminal Chamber of the Tbilisi Court of Appeals of June 21, 2021 on case No. 1b/705-21.
17. Judgment of the Criminal Chamber of the Tbilisi Court of Appeals of November 29, 2019 on case No. 1b/1617-19.
18. Judgment of the Tbilisi City Court's Criminal Affairs Board of March 9, 2020 on case No. 1/4381-19.
19. Judgment of the Tbilisi City Court's Criminal Affairs Board of March 31, 2021 on case No. 1/4615-20.
20. Judgment of the Tbilisi City Court's Criminal Affairs Board of September 6, 2019 on case No. 1/1564-19.
21. Judgment of the Criminal Chamber of the Supreme Court of Georgia of November 1, 2019 on case No. 356AP-19.
22. Judgment of the Criminal Chamber of the Supreme Court of Georgia of June 25, 2021 on case No. 23AP-21.
23. Judgment of the Criminal Chamber of the Supreme Court of Georgia of April 10, 2020 on case No. 149AP-20.
24. Judgment of the Criminal Chamber of the Supreme Court of Georgia of September 28, 2021 on case No. 682AP-21.

25. Judgment of the Criminal Chamber of the Supreme Court of Georgia of April 5, 2019 on case No. 617AP-18.
26. Judgment of the Criminal Chamber of the Supreme Court of Georgia of June 25, 2020 on case No. 107AP-20.
27. Ali and Ayse Duran v. Turkey, ECHR, (Application no. 42942/02), 8 April 2008.
28. Bouyid v. Belgium, ECHR, (Application no. 23380/09), 28 September 2015.
29. Gäfgen v. Germany, ECHR, (Application no. 22978/05), 30 June 2008.
30. Ireland v. The United Kingdom, ECHR, (Application no. 5310/71), 18 January 1978.
31. Labita v. Italy, ECHR, (Application no. 26772/95), 6 April 2000.
32. Pretty v. The United Kingdom, ECHR, (Application no. 2346/02), 29 April 2002.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8327

Nino Gobejishvili*

Referral Institute in Juvenile Justice

"Don't walk in front of me; I may not follow.
Don't walk behind me; I may not lead.
Walk beside me and be my friend"[1]

Albert Camus

Physiological transformation in juveniles from adolescence to adulthood[2]*,, namely, emotional, cognitive and physiological metamorphosis*[3] *leads to deviation, and quite often, criminality. Albeit, factors provoking an adolescent to become a delinquent are rarely of a general nature – is not the family as a primary source of socialization*[4] *playing a vital role in refining the adolescent as a decent society member? It is a question whether primary educational level*[5] *either friend bunch*[6] *give an example to juvenile and create inner self*[7] *which provides adolescent's compass direction in this or that way?*

Key words: *Deviation, delinquent, readdressing, juvenile, juvenile justice*

1. Introduction

December 1, 2017 – Confrontation between two juveniles on Khorava street, Tbilisi resulted in a tragic murder. One of these two passed away on the same day, and another – the day after due to 12

---

* PhD Student of Ivane Javakhishvili Tbilisi State University Faculty of Law.

1 *Camus A*., "*Don't walk in front of me; I may not follow. Don't walk behind me; I may not lead. Walk beside me and be my friend* "; see the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, 17 November 2010, 7 <https://rm.coe.int/16804b2cf3> [04.06.2024].

2 United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), General Assembly Resolution №45112, Adopted 14 December 1990, Article I.5 (e) <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-guidelines-prevention-juvenile-delinquency-riyadh> [04.06.2024].

3 *Richards K.,* What Makes Juvenile Offenders different from Adult Offernders? Trends & Issues in Crime and Criminal Justice no. 409., Canberra: Australian Institute of Criminology, 2011 <https://www.aic.gov.au/publications/tandi/tandi409>[04.06.2024].

4 United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), General Assembly Resolution №45112, Adopted 14 December 1990, Article IV.A (12) <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-guidelines-prevention-juvenile-delinquency-riyadh> [04.06.2024].

5 Ibid, B.

6 Juvenile Crime, Juvenile Justice, National Research Council, Institute of Medicine, National Academies Press, Washingtom DC., 2001, 80-83 <https://nap.nationalacademies.org/read/9747/chapter/5#67> [04.06.2024].

7 *Shalikashvili M.,* Criminology, 3rd Ed., Meridiani, Tbilisi, 2017, 34-35.

knife wounds.[8] Accusation charged by the Prosecotor Office of Georgia[9] has evetually determined the status of the juvenile performing a criminal act voluntarily or involuntarily – delinquent[10], being in conflict with law or even perpetrator.[11] 3 years after that severe events, on 18th June 2020 one more youngster[12] became a victim of criminal act reminding state convicted juvenile statistics once again. Alongside duly performance of EU positive and negative obligations[13] by the state the question – why – still remains unanswered. Accordingly, the artice is dedicated to mainly prepare full and complete answer uon the raised question by enacting so-called Readressing Institute which represents წინამდებარე novelty in Georgian legislative scope – the noted mechanism as stabilizator of juveniles' nature prone to criminality, will be analized and described by utilizing gramatical, historical, teleological, systematic or logical means of interpretation both at national as well as international level while acting as a preventive tool in regulating juveline criminality. Meanwhile, any interested person will be able to research some statistics making the noted issues analize and perceive in a way more simple manner.

2. Term – Juvenile – Person Acquired with Legislative Privileges

Diverse nature of society immanently implies existence of vulnerable subjects among the members – special attention is drafted to juvenile union[14] as a group of permanent needs which have to be taken into account not equally but primerily[15] while ruling over daily or special issues. The term juvenile in accordance with the national legistaliton means any person who has not attained the age of adolscence, in other words, from Georgian perspective, has not attained the age of 18[16] – in this

8 Temporary Investigative Parliamentary Commission on Studying the Case of Murdering Two Juvelines on Khorava Street, Tbilisi, 17th December, 2017, Conclusion and Recommendations, Tbilisi, 5th September, 2018, 2, 13, [04.06.2024].

9 Web-page of General Prosecutor Office of Georgia, News, 11 January, 2024, <https://pog.gov.ge/news/prokuraturis-mier-wardgenili-mtkicebulebebis-safuZvelze-daviT-saraliZis-ganzrax-damamZimebel-garem> [04.06.2024].

10 United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), General Assembly Resolution №45112, Adopted 14 December 1990, Article I.5 (f) <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-guidelines-prevention-juvenile-delinquency-riyadh> [04.06.2024].

11 Web-page of General Prosecutor Office of Georgia, News, 11 January, 2024, <https://pog.gov.ge/news/prokuraturis-mier-wardgenili-mtkicebulebebis-safuZvelze-daviT-saraliZis-ganzrax-damamZimebel-garem> [04.06.2024].

12 Web-page of General Prosecutor Office of Georgia, News, 16 March 2021, <https://pog.gov.ge/news/sasamarTlom-giorgi-shaqarashvilis-jgufur-mkvlelobashi-msjavrdebul-or-arasrulwlovans-sasjelis-saxiT-1> [04.06.2024].

13 Guide to Article 2 of the European Convention of Human Rights, Rigot to Life, Prepared by the Registry, 31 December 2021, 8-9, 11 <https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf> [04.06.2024].

14 Global Issues, Youth, United Nations <https://www.un.org/en/global-issues/youth> [04.06.2024].

15 Children's Rights in Juvenile Justice, General Comment №10, Committee on the Rights of the Child, 15 January-2 February 2007, United Nations, CRC, 5, §10 <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> [04.06.2024].

16 Georgial Law on Juvenile Justice Code, Article 3, Paragraph 1, Georgian Legislative Herald (12.06.2015) [29.05.2024];

regard, by concurring the general clause[17] of the Code on the Rights of the Child, terms "juvenile" and "child" have the same essence thanks to adopting and entering the Code on the Rights of the Child. Even more – the Code implements the term of adolescent implying all persons from 10 to 18 years old[18]. Alongside with aging it is natural for any person to refine thinking skills and acquire it with logical patterns[19] – neurobiological researches conducted by McArthur have proved several times that every average statistical person's brain is fully developed at the age of 25 whereas frontal lobe of the brain is still developing in early 20s.[20] Consequently, immature frontal lobe in the prefontal cortex triggers lackage of emotional control, impulses, cognitive and judgmental skills of the results stemming from the pressure under which the brain exists while passing the transitional period.[21]Juveniles to whom the law shall play educational role[22] specifically need social support based on diverse values to cope with life challenges and meet their interests, in which the state concurring with the idea of child-frinedly justice is implied. In support of the above-mentioned idea, the child-friendly justice wave[23] that started in Georgia back in 2009 led to the introduction of the diversion program in November 2010,[24] and later, on June 12, 2015, the adoption of the Code of Juvenile Justice in the field of criminal law, which fully justifies taking care of the special needs of children standing alone with the challenges of today's reality.

Divorce, adoption, migration and violence are inherent features of society in which children are often trapped and feel completely vulnerable.[25] "*At times like this, it is most important to have a loyal friend who can listen, understand and make the right judgment, who has the courage to say directly when the child is not right and help him find a solution*"[26] – the above-mentioned words represent the basic credo of child-friendly justice. Justice imbued with this spirit should walk beside the child (minor) and not in front or behind him, as much as he should give the minor a hearty help and find the best solution for him.

The main goal of the legal act initiated by the Ministry of Justice in 2015 in the Georgian legislative space and subsequently adopted was the improvement of the domestic standard in the

---

17 Convention on the Rights of the Child, General Assembly Resolution 44/25, adopted 20 November 1989, United Nations, Article 1, Part I [04.06.2024].

18 Law of Georgia the Code on the Rights of the Child, Paragraph "b", Article 3, Legislative Herald of Georgia (20.09.2019) [04.06.2024].

19 *Ramsey A.,* Cognitive Development, December 2020 <https://www.cincinnatichildrens.org/health/c/cognitive> [04.06.2024].

20 Adolscent Development & Competency, Juveniel Justice Guide Book for Legislators, National Conference of State Legislators, 4-5 <https://www.ncsl.org/documents/cj/jjguidebook-adolescent.pdf> [04.06.2024].

21 Ibid, 5.

22 *Bobokhidze M. (Ed.), Lursmanashvili L. (Transl.),* Handbook of European Law on the Rights of the Child, 2015, 165 (in Georgian).

23 Child-friendly Justice, Legislation Research, UN Children's Fund, 2017, 3 <https://www.unicef.org/georgia/media/1481/file/Legislative%20Analysis%20GEO.pdf> [04.06.2024].

24 *Vardanashvili U.,* Juvenile Justice, Diversion and Mediation Institute in Juvenile Justice, Tbilisi, 2018, 3-7 (in Georgian).

25 Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, 17 November 2010, 7 <https://rm.coe.int/16804b2cf3> [04.06.2024].

26 Ibid.

context of minors, which would contribute to the creation of a flexible environment for the child during the period of conflict with the law. In order to achieve the mentioned goal, the scope of the above-mentioned code was extended not only to criminal actions, but also to acts of an administrative offense nature.[27] In addition, due to the hard-to-find distinction between older child and young adult, the Georgian legislature decided to extend the Code in several aspects not only to persons under 18, but also to persons between 18 and 21[28] – A similar approach is observed in European countries such as Serbia and Croatia, namely, article 3 of the Serbian Law on Juvenile Offenders and Juvenile Protection differentiates between the statuses of persons aged 14 to 16, 16 to 18 and 18 to 21 and refers to them as younger juvenile, elder juvenile (older juvenile delinquent) and young adult.[29] Almost a similar concept is shared by the "Law on Juvenile Courts" of Croatia, Article 2 of which calls a person between the ages of 14 and 18 in conflict with the law a minor, and a person between the ages of 18 and 21 a young adult.[30]

However, as of 2015, the question of how state officials should act when the perpetrator of a criminal act was not 18 or 21 years old, but a minor under 14 years old, remained unanswered or to what extent does the state face the assumption of abuse of the liberal approach it has established? Is it possible for an adult, who is well aware of the preferential regime under Georgian legislation, to use a minor to commit specific criminal acts? [31] The issue becomes even more intense when such a minor is not a person who has reached the age of 14, but a person under the age of 14, who may be a so-called minor at the same time "Street child" without any documentation, which automatically indicates the activation of the criminal justice mechanism in his favor in terms of determining the age of responsibility or be 13 years and 11 months of age, beyond which the covered adult intended to engage in a one-time or multiple illegal activity through him/her -at such a time, first of all, the action remains unpunished, and the child gets the feeling that his age excludes the criminalization of the action, which adds more color and charm to the continuation of the activity.

3. Deviation – an Immanent Prerequisite for a Criminal Act

Man – a political animal,[32] as an important member of society[33], is a creature full of internal contradictions, which always strives for development, however, his mind, as a free biological being by

---

27 Explanatory note on the Project of the Law of Georgia the Code of Juvenile Justice, 57 <https://info.parliament.ge/file/1/BillReviewContent/68425> [04.06.2024].

28 Recommendation CM/Rec (2003)20 of the Committee of Ministers to member States concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, adopted by the Committee of Ministers (2003)), paragraph 11.

29 See Serbia: Law of 2005 on Juvenile Criminal Offenders and Criminal Protection of Juveniles [Serbia], 2005 <https://www.refworld.org/docid/4b56c9952.html< [04.06.2024].

30 Croatia the law on Juvenile Courts, Article 2 <http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Juvenile-Courts-Act.pdf< [04.06.2024].

31 *Gogua I.,* Juvenile Delinquency – Causes, Prevention, and the Ways of Rehabilitation, Penal Reform International, 23 June 2020 <https://www.penalreform.org/blog/juvenile-delinquency-causes-prevention-and-the-ways-of/> [04.06.2024].

32 *Metreveli V., Davitashvili G.,* Political and Legal Doctrine History (Lectures Course), Tbilisi, Meridiani, 1999, 41.

birth, never considers only a successful move on the path of development[34] – the choice of a person as an independent and at the same time dependent on society does not limit the nature of progress to an immanently positive character and gives him the freedom to act as he sees fit within his personal boundaries, among them – to develop himself for the worse[35], however, taking into account the principle sic utere tuo ut alienum non laedas. The issue is acute when a person begins to act in violation of the mentioned principle, especially if the subject of the problematic behavior is a minor.

When considering the question of obedience to the law, people are guided by internal, i.e. moral, and external, i.e. legitimacy measures[36] – A person obeys it without fear of punishment, as long as his personal view coincides with the justice considered beyond the grammatical wording of the law, And when obedience to the law is measured by the measure of legitimacy, obedience to it is based on the existing attitude towards the person who acts as the legislator and which has the moral right to direct people to right behavior in the form of accepted law.[37]

Based on the specificity of the minor's level of development, it is difficult to judge whether the issue of his obedience to the law is determined by internal or moral or external or legitimacy –before reaching the age of adulthood, human consciousness undergoes changes in both the socio-emotional and cognitive control systems,[38]which is directly proportional to the vulnerable variable of behavior as an outward reflection of inner emotion.

The family environment is the primary starting point in the way of learning social relations for the child, who, based on adaptation to the mentioned environment, tries to get used to the outside world and establish himself in it.[39] The internal relational and emotional stability of the family determines the prosperity and stability of every state. Adolescents, until their biological, emotional or cognitive maturity, are characterized by a tendency to take risk-based actions[40] in every decision, which is due to their desire to receive the desired reward[41] as soon as possible, and the lack of ability to foresee the long-term result does not only make him think about the unfortunate consequences, but even deprives him of the opportunity to consider it. At the mentioned time, a cardinally important restraining factor[42] is the institution of the family, as a unity of adults – parents, with unlimited

---

33 Aristotle, Policy, Part I, Tbilisi, 1995, 12-13.

34 Decision №1/13/732 of the Constitutional Court of Georgia on the Case "Georgian citizen Givi Shanidze against Parliament of Georgia" dated 30.11.2017.

35 Decision №1/4/592 of the Constitutional Court of Georgia on the Case "Georgian citizen Beka Tsikarishvili against Parliament of Georgia" dated 24.10.2015.

36 *Tyler T. R.,* Procedural Fairness and Compliance with the Law, Swiss Journal of Economics and Statistics, Vol. 133, (2/2), 1997, 219-220, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.322.4235&rep=rep1&type=pdf > [04.06.2024].

37 *Bjorgo T.,* Crime Prevention, Comprehensive Approach, Georgian-Norwegian Rule of Law Association, 2019, 46.

38 *Steinberg L.,* Adolescent Development and Juvenile Justice, Annual Review of Clinical Psychology, 2009, 5:459-85, 465-467.

39 *Shalikashvili M.,* Criminology, 3rd Ed., Meridiani, Tbilisi, 2017, 146.

40 *Steinberg L.,* Adolescent Development and Juvenile Justice, Annual Review of Clinical Psychology, 2009, 5:459-85, 469.

41 Ibid*,* 470.

42 *Shalikashvili M., Mikanadze G.,* Juvenile Justice, 2nd Ed., Tbilisi, Freiburg, Strasbourg, 2016, 56-58.

resources for sharing past experience and advice[43]which plays an essential role in analyzing the instant and impulsive decision taken by the minor, however, what happens when the principle "every child has the right to grow up in a family environment"[44] is violated?

Ignoring the deviant behavior of a child under the age of 14 living in an imperfect family or living on the street without proper response on the part of the state gives rise to a reasonable assumption that the behavior will become delinquent,[45] what has been confirmed by relevant studies, [46]however, raising a child without parental supervision, which reduces its upbringing to a greater or lesser degree, does not a priori indicate the child becoming a delinquent. [47]

The goal of the school, as the second most important step taken in the educational space, is to familiarize minors with the charm of the educational field, as well as to develop effective time management skills,[48] which is the basis for the perception of temporal feeling for a minor striving for a full-fledged membership in society, as the sooner a person in the process of development learns that "time is money", the faster he will master the technique of spending time resources wisely.

In addition, the school can even be considered as a micro-model of the society, in which the minor learns communication skills with members distinguished by their individual characteristics and understands the negative sides of cognitive dissonance, becoming a person who implements a policy of acceptance of difference and diversification.

The Ministry of Education and Science of Georgia recently launched the "State Program for Monitoring the Identification of Out-of-School Teenagers"[49] which was approved by the Government of Georgia on September 10, 2020. [50]A study supported by the United Nations Children's Fund revealed that 10,404 adolescents between the ages of 6 and 16 have no educational history and are not registered in the education management information system. Therefore, it is unclear how and for what purpose the time of the mentioned teenagers, which should be associated with the presence of the majority of the day in the school as an educational institution, is spent. [51]

Accordingly, if a teenager is not at school during the time allotted for school, there is a high probability that his time resources will be spent on such deviant actions as, for example, bullying, other anti-social actions – begging-vagrancy, in the worst case – even crime. [52]

---

43 *Kherkheulidze I.,* Juvenile Crime and its Provoking Factors in Juvenile Justice Systems, Journal of Law, №2, 2012, 305-309.

44 Explanatory note on the Project of the Law of Georgia the Code of Juvenile Justice, paragraph "a.a.a", <https://info.parliament.ge/file/1/BillReviewContent/214086?> [04.06.2024].

45 *Javakhishvili J., Makhashvili N.,* Juvenile Delinquency Prevention, Psycho-Social Service Experience, Tbilisi, 2011, 13-29.

46 Children Living and Working in the Streets of Georgia, UN Children's Fund, Tbilisi, 2018, 6<https://shorturl.at/lpEJN> [04.06.2024].

47 *Shalikashvili M.,* Criminology, 3rd Ed., Meridiani, Tbilisi, 2017, 147.

48 *Shalikashvili M., Mikanadze G.,* Juvenile Justice, 2nd Ed., Tbilisi, Freiburg, Strasbourg, 2016, 25-26.

49 The Ministry of Education and Science of Georgia,15.03.2021, <https://mes.gov.ge/content.php?id=11912 &lang=geo> [04.06.2024].

50 Resolution №573 of the Government of Georgia, Legislative Herald of Georgia, 10.09.2020 <https://matsne.gov.ge/ka/document/view/4992004?publication=0> [04.06.2024].

51 *Shalikashvili M.,* Criminology, 3rd Ed., Meridiani, Tbilisi, 2017, 147-148.

52 Temporary Investigative Parliamentary Commission on Studying the Case of Murdering Two Juvelines on Khorava Street, Tbilisi, 17th December, 2017, Conclusion and Recommendations, Tbilisi, 5th September, 2018.

Regarding the above issue, based on the analysis of all three levels of prevention, the Decree of the President of Georgia №235 "on the Approval of the Strategy for the Prevention of Juvenile Crime" expresses an interesting opinion, according to which the school, as an educational institution, takes an advanced place in terms of the implementation of the first and second level prevention measures.[53]

4. Result of Deviant Behavior – Liability in Criminal Law

The question of the minimum age of criminal responsibility is an integral part of human history and varies according to cultural or local beliefs in every time or era. [54]

The so-called Article 4 of the "Beijing Rules" advises countries with the institution of a minimum age of criminal responsibility to take into account a person's level of emotional, mental and intellectual development when setting the minimum threshold for juveniles.

The degree to which the child lives up to the moral and psychological aspects required of him is a valuable factor in determining his responsibility.

In addition, in each specific case, the level of insight and understanding of each individual must be taken into account, which is the basis for imposing responsibility for essentially anti-social actions.[55]

The concept of the minimum age of criminal responsibility is recognized by the legislation of both Georgia and many other countries, in particular, the Georgian Code of Juvenile Justice considers it to be 14 years[56] (for administrative violations – 16 years,[57] and for civil liability – 10 years[58]) While, for example, in Great Britain, namely in England, Wales[59] and Northern Ireland[60] 10 years is considered as such. Scotland has a different approach to this issue, namely, under sections 41 and 41A(1)-(2) of the Criminal Procedure (Scotland) Act, no child under the age of 8 can be held criminally responsible and no child under the age of 12 shall be prosecuted, and no child of the age of 12 or over shall be prosecuted if he committed the punishable act while under the age of 12.[61] Accordingly, on the example of Scotland, it can be said that the minimum age of criminal responsibility and the minimum age of criminal prosecution are different from each other, which gives

---

53 Decree №235 of the President of Georgia on Approving Juvenile Crime Prevention Strategy, Legislative Herald of Georgia, (22.03.2012) [24.06.2024].

54 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Article 4 Age of Criminal Responsibility and Commentary, <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/beijingrules.pdf> [04.06.2024].

55 Ibid.

56 Law of Georgia "Juvenile Justice Code", paragraph 1, Article 3, Legislative Herald of Georgia (12.06.2015) [04.06.2024].

57 Ibid.

58 Law of Georgia "Civil Code of Georgia", paragraph 1, Article 994, Legislative Herald of Georgia (26.06.1997) [04.06.2024].

59 Children and Young Persons' Act, 1933, Section 50 <https://www.legislation.gov.uk/ukpga/Geo5/23-24/12#commentary-c6086411> [04.06.2024].

60 The Criminal Justice (Children) (Northern Ireland) Order, Section 45, 1998 https://www.legislation.gov.uk/nisi/1998/1504/article/45 [04.06.2024].

61 Criminal Procedure (Scotland) Act, Section 41 and 41A(1)-(2), 1995 <https://www.legislation.gov.uk/ukpga/1995/46/contents> [04.06.2024].

the opportunity to record actions carried out between the ages of 8 and 12 in the child's personal data in the form of a criminal record.

The "Criminal Law Code" of Turkey is largely based on the doctrine of guilt, in particular, the minimum age of criminal responsibility is set at 12 years, however, from 12 to 15 years includes criminal responsibility and excludes it if the person did not have the ability to understand the legal nature and consequences of the act or to control his own action at the time of the alleged commission of the act. [62] In addition, for persons aged 15 and above, as well as for persons under 12 years of age, it is possible to use the so-called child-friendly "Separate Security Measures". According to Articles 1 and 3 of the Organic Law of Spain "On the Criminal Liability of Minors", a person over the age of 14 is considered a responsible subject for criminal law purposes, however, for a criminal act committed by a person under the age of 14, it is possible to apply measures for the protection of minors, which are provided by the Spanish Civil Code and other acts. [63]

The reservation of the Georgian Criminal Procedural Legislation related to the mandatory nature[64] of the initiation of the investigation applies, among other things, to minor members of society, whose age, in some cases, is below 14 years, however, the existence of Article 33 of the Criminal Code immanently excludes not only the implementation of the sanctioning mechanism and the occurrence of the extreme result – the reduction of the punishment, but also the continuation of criminal prosecution and accusations against them, in a way, from the point of view of so-called "age-crime curve theory",[65] age, as a measure of the path to adulthood, plays a major role, among other things, in modifying a person's propensity for crime. The main characteristics of the "age-crime curve" are the same for almost all crimes, although there are exceptions, for example, in the form of the 8-year-old boy who, on August 22, 2013, fascinated by the imitation of a violent game recorded on his cell phone, took the life of 78-year-old Marie Smuser. [66] The second argument against the above-mentioned theory is the story of the murder of James Patrick Bulger, which resulted in the accusation of two 10-year-old children and the adjustment of the status of the perpetrator. [67]

The conclusion of the temporary investigative commission prepared by the Parliament about the murder on Khorava Street also speaks about the propensity for violent actions among minors according to which, in 2015-2018, the facts of verbal and physical abuse among students of educational institutions increased significantly throughout the country.

---

62 Criminal Code, Turkey, Article 31 (26.09.2004) <https://www.legislationline.org/documents/action/popup/id/6872/preview > [04.06.2024].

63 Organic Law 5/2000, of January 12, regulating the criminal responsibility of minors, Article 1, Article 3, <https://noticias.juridicas.com/base_datos/Penal/lo5-2000.t1.html#a3> [04.06.2024].

64 Law of Georgia "Criminal Procedure Code of Georgia", Article 100, Legislative Herald of Georgia (09.10.2009) [04.06.2024].

65 *Rocque M., Posick C., Justin Hoyle J.,* Age and Crime, Major Reference Works, Wiley Online Library, 2 October 2015, 2-4 <https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781118519639.wbecpx275> [04.06.2024].

66 Ibid, 1

67 *Tapper J.,* James Bulger Murder, The Guardian, 7 March 2021, https://www.theguardian.com/uk-news/2021/mar/07/i-shouldnt-have-let-go-of-him-the-pain-of-james-bulgers-mother-28-years-on [04.06.2024].

5. Referral Mechanism as one of the Ways to Solve the Problem

In 2014, the institute established in foreign practice entered the Georgian reality when, for the first time, under the "2019-2020 action plan for the reform of the criminal justice system", [68] the inter-departmental coordination council[69] for the reform of the criminal justice system created by the resolution No. 316 of the Government of Georgia on May 1, 2014 set out to improve juvenile justice and tailor it to the best interests of the juvenile child, in particular, the government's 2019-2020 program determined the modernization of the juvenile system in terms of prevention by making changes to a number of legislative acts. [70] In this direction, quite active steps were taken and already in 2018 it was planned to make changes[71]to the law of Georgia "On Execution of Non-custodial Sentences and Probation", which was finally realized at the end of 2019 – not only the name change, the law took into account the existence of a body that would ensure the management and control of antisocial (criminal) behavior by persons under the age of 14 (Juvenile Referral Center). [72] In addition, the Law of Georgia "On General Education"[73] and "Administrative Procedural Code"[74] were saturated with a number of innovations, among the articles of which there were provisions on the Juvenile Referral Center.

The situation before the establishment of the Referral Institute created many difficulties for the representatives of law enforcement agencies, in particular, before 2019, in the case of committing a criminal act by a minor due to not having formally reached the criminal legal age, the entity conducting criminal prosecution was limited to issuing a resolution not to initiate criminal prosecution and to terminate the investigation[75]for a person under the age of 14, leaving a child in material conflic with the law without a number of hekp or benefits: in fact, the fundamental problems that led to the implementation of criminal actions by a subject under the age of 14 were not analyzed, which also excluded even thinking about the planning and implementation of individual preventive measures. [76]

Ultimately, the reform wave of the criminal justice system in 2020 was followed by the launch of the Juvenile Referral Center. Additionally, among the state institutions involved in the referral process, the Ministry of Internal Affairs, also the Prosecutor's Office of Georgia together with other

---

68 Governmental Programme, 2019-2020, September 2019, 13 [04.06.2024].

69 Resolution №316 of the Government of Georgia on "Composition and Approval of the Statute of the Inter-agency Coordination Council Implementing the Reform of the Criminal Justice System", Legislative Herald of Georgia (01.05.2014) [04.06.2024].

70 Explanatory note to law project on making changes to "the Procedure for Enforcing Non-Custodial Sentences and Probation", Parliament of Georgia, <https://info.parliament.ge/file/1/BillReviewContent/225896> [04.06.2024].

71 Ibid, 1.

72 Ibid, 4-6.

73 Law of Georgia on "General Education", X^2 Chapter, Legislative Herald of Georgia (08.04.2005).

74 Law of Georgia "Administrative Procedure Code", VII^9 Chapter, Legislative Herald of Georgia (23.07.1999) [04.06.2024].

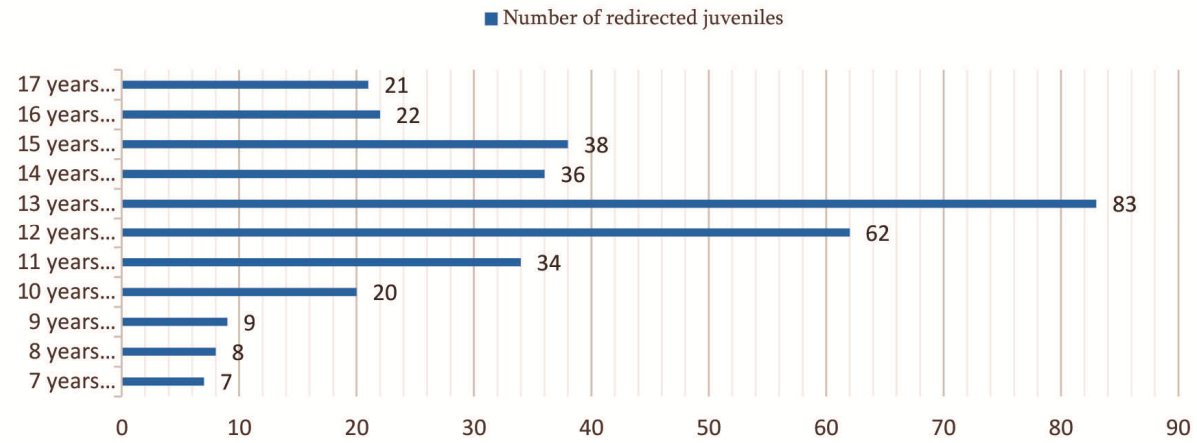
75 Law of Georgia "Criminal Pricedure Code", Article 105, Paragraph 2, Legislative Herald of Georgia (09.10.2009) [04.06.2024].

76 Juvenile Justice, Gerenal Prosecutor's Office of Georgia, 2020, 41-42.

bodies provided for by the resolution. [77] One of the law enforcement agencies, the Prosecutor's Office, developed the "Operational Instruction of the Prosecutor's Office of Georgia in Referral Procedures for Minors with Difficult Behavior", which was approved on May 6, 2020 by the order of the Prosecutor General of Georgia No. 52-G.

According to the resolution, it is difficult behavior that, first of all, may endanger the safety, well-being of the minor, his harmonious and social development, and subsequently – the safety, well-being and/or order of other people. The definition of the concept, for comparative purposes, reflects the content of the definition established by the National Health Service, according to which a person's behavior is difficult if it endangers himself or the people around him or worsens the quality of life. [78] According to the resolution, difficult behavior can be manifested in the consumption of narcotic drugs/alcohol by a minor, his involvement in anti-social, illegal activities, gambling, various types of violent actions.[79] The resolution itself refers to children between the ages of 7 and 18 as minors, of whom, according to the grammatical interpretation of the law, the referral mechanism is used in extreme cases, and minors between 10 and 18 years of age are subject to the mentioned institution without any problems.[80]

Sending a juvenile to a referral facility, which serves a limited group of people and includes children between the ages of 10 and 18, is considered a last resort for managing challenging behavior. Since the launch of the Juvenile Referral Center (January 1, 2020) to date (April 12, 2023), 340 cases have been referred to the center, of which 75 cases were referred due to challenging behavior. As for the subjects carrying out the actions contemplated by the redirected cases, their age pyramid looks as follows:



[77] Resolution №681 of the Government of Georgia on "Approving Rule of Readressing Juveniles", Article 3, Legislative Herald of Georgia (31.12.2019) [11.06.2024].

[78] How to Deal with Challengin Behaviuor in Adults? NHS <https://www.nhs.uk/conditions/social-care-and-support-guide/practical-tips-if-you-care-for-someone/how-to-deal-with-challenging-behaviour-in-adults/> (15.03.2021) [04.06.2024].

[79] Resolution №681 of the Government of Georgia on "Approving Rule of Readressing Juveniles", Article 2, Paragraph 2, Legislative Herald of Georgia (31.12.2019)

[80] Ibid, Article 1, Paragraph 4.

In addition, the number of minors between the ages of 7 and 18 whose actions contain signs of a crime considered by the private part of the Criminal Code is 233, complex behavior – 75, and both characteristics – 32. As statistical data show, most cases of referral to the referral center are related to actions taken by 12-13-year-olds, which is noteworthy to the extent that these persons have not yet reached the age of criminal liability. Therefore, the classical approach of criminal law cannot be applied to them, even using the benefit provided by the Juvenile Justice Code.

For comparative legal purposes, the Georgian version of the referral may be compared to the regulations applicable to persons under the age of criminal law in Great Britain, namely: in England and Wales, in case of criminal acts committed by persons under the age of 10, the so-called Institutions of Local Child Curfew and Child Safety Order: The first of these involves local police prohibiting a child from being in public places between 9pm and 6am, unless accompanied by a parent. This measure may last up to 90 days. As for the Child Safety Order, it is used if a minor commits a criminal act or violates the requirements of the Local Child Curfew.[81] In such cases, the child is placed under the supervision of the Youth Offending Team, which is part of the local council and is independent of the police and courts.[82] The main task of the Young Offenders Team is to stand by the minors when they are in conflict with the law. Also, they participate in the planning and implementation of various preventive measures.[83]

As of September 1, 2020, the function of the referral institution was performed by Public School №15 of Samtredia[84], the so-called Boarding school, however, it was closed soon and currently no institution fulfills the function of the institution anymore.

In the future, multi-sector work has been started to create a semi-open institution, so that the legal mechanism applicable to the persons transferred to the institution can be practically implemented.

6. Conclusion

Finally, as much as it is impossible for a society to exist without crime, [85] it is so impossible to aim to create an ideal world with a parallel consideration of human nature.

Crime and its associated institution – punishment will attract the attention of humanity many times in the future, which will not exclude the relevance of the research subject, but on the contrary, will add more clarity and truth to it.

---

81 Young People and the Law, the United Kingdom, Gov.UK., <https://www.gov.uk/child-under-10-breaks-law> [04.06.2024].

82 Youth Offending Teams, the United Kingdom, Gov.UK., <https://www.gov.uk/youth-offending-team> [04.06.2024].

83 Ibid. comp. Scotish Approach Young People and the Law, Scotland <https://www.mygov.scot/young-people-police> [04.06.2024]; Children's Hearing Scotland, <https://www.chscotland.gov.uk/about-us/> [04.06.2024];

84 Resolution №681 of the Government of Georgia on "Approving Rule of Readressing Juveniles", Article 15, Paragraog 1, Legislative Herald of Georgia (31.12.2019) [04.06.2024].

85 *Shalikashvili M.,* Criminology, 3rd Ed., Meridiani, Tbilisi, 2017, 93.

The main goal of the present paper was to walk the path to the above-mentioned truth when considering the interests of minors in the field of criminal law.

Taking into account the age, level of development and characteristics of a person, subjects under 18 years of age are considered in the vulnerable category of society, which makes it possible to anticipate and adapt with meticulous accuracy the actions of any person towards them or with their participation. Primary units of socialization in the outside world, such as family, school and friendship circle, have the greatest influence on the child as the so-called. On making the "object of special observation" a full-fledged member of the society and forming it as a person.

Taking into account all of the above, to the question posed in the paper, who can be considered a "faithful friend of a minor", one of the answers is the institution of referral, with its innovative spirit and still developing nature.

The consistent sharing of the best international experience demonstrates the goodness and positive impact of the multifaceted programs and tools operating within the framework of referral in the aspect of children's return to society.

In addition, the referral institute represents the responsible choice of every member of society (teachers, parents, bailiffs, etc.) to actively contribute to the peaceful and thoughtful resolution of naturally occurring disagreements in the living environment.

In a future perspective, referral may turn out to be the moral law that shapes each person's beliefs about what is good and what is bad, adding a touch of wonder and admiration to every step taken toward worthy membership in society – especially when its addressee is a small member of a large society, a minor.

Bibliography:

1. UN convention on Rights of a Child (20/11/1989);
2. Law of Georgia "Administrative Procedure Code" (23/07/1999);
3. Law of Georgia "Juvenile Justice Code" (12/06/2015);
4. Law of Georgia on "Rights of a Child" (20/09/2019);
5. Law of Georgia on "General Education" (08/04/2005);
6. Law of Georgia on "Police" (04/10/2013);
7. Law of Georgia "Civil Code" (26/06/1997);
8. Law of Georgia "Criminal Procedure Code" (09/10/2009);
9. Law of Georgia "Criminal Code" (22/07/1999);
10. Resolution №573 of the Government of Georgia, Legislative Herald of Georgia, September 10, 2020;
11. Resolution №316 of the Government of Georgia on "Composition and Approval of the Statute of the Inter-agency Coordination Council Implementing the Reform of the Criminal Justice System";
12. Resolution №681 of the Government of Georgia on "Approving Rule of Readressing Juveniles";
13. Decree №235 of the President of Georgia on Approving Juvenile Crime Prevention Strategy";
14. "Law on Juvenile Courts" of Croatia <http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Juvenile-Courts-Act.pdf> [04.06.2024].
15. Juvenile Justice, Gerenal Prosecutor's Office of Georgia, 2020, 41-42.
16. Explanatory note on the Project of the Law of Georgia the Code of Juvenile Justice, 57.

17. Explanatory note to law project on making changes to "the Procedure for Enforcing Non-Custodial Sentences and Probation".
18. Temporary Investigative Parliamentary Commission on Studying the Case of Murdering Two Juvelines on Khorava Street, Tbilisi, 17th December, 2017, Conclusion and Recommendations, Tbilisi, 5th September, 2018, 2, 13.
19. Children and Young Persons' Act, 1933, <https://www.legislation.gov.uk/ukpga/Geo5/23-24/12#commentary-c6086411> [04.06.2024].
20. Convention on the Rights of the Child, General Assembly Resolution 44/25, adopted 20 November 1989, United Nations.
21. Criminal Code of Ukraine, Vidomosti of the Verkhovna Rada of Ukraine (VRU), 2001, <https://www.legislationline.org/documents/action/popup/id/16257/preview> [04.06.2024].
22. Criminal Code, Turkey, (26/09/2004) <https://www.legislationline.org/documents/action/popup/id/6872/preview > [04.06.2024].
23. Criminal Procedure (Scotland) Act, 1995 <https://www.legislation.gov.uk/ukpga/1995/46/contents> [04.06.2024].
24. Serbia: Law of 2005 on Juvenile Criminal Offenders and Criminal Protection of Juveniles [Serbia], 2005 <https://www.refworld.org/docid/4b56c9952.html> [04.06.2024].
25. The Criminal Justice (Children) (Northern Ireland) Order, 1998 https://www.legislation.gov.uk/nisi/1998/1504/article/45> [04.06.2024].
26. The Penal Code, Poland, (06/06/1997) <https://www.imolin.org/doc/amlid/Poland_Penal_Code1. pdf> [04.06.2024].
27. Уголовный кодекс Российской Федерации, (24/05/1996) <http://pravo.gov.ru/proxy/ips/?docbody&nd=102041891> [04.06.2024].
28. Children's Rights in Juvenile Justice, General Comment №10, Committee on the Rights of the Child, 15 January-2 February 2007, United Nations, CRC.
29. Committee on the Rights of the Child, General Comment No. 14, 2013.
30. Committee on the Rights of the Child, General Comment No. 6 (2005).
31. Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16.V.2005.
32. Council of Europe Parliamentary Assembly, Unaccompanied Children in Europe: Issues of arrival, stay and return, Resolution 1810(2011), 15 April 2011.
33. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.
34. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
35. SCEP Statement of Good Practice, 2009.
36. UNHCR Guidelines on Child Asylum Claims.
37. UNHCR, Guidelines on Unaccompanied Children Seeking Asylum, 1997.
38. United Nations High Commissioner for Refugees, Conclusion on Children at Risk No. 107 (LVIII), 2007, 5 October 2007.
39. General Comment No. 24 (2019) on Children's Rights in the Child Justice System, Committee on the Rights of the Child, 18 September 2019, 6-7 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/275/57/PDF/G1927557.pdf?OpenElement> [04.06.2024].

40. United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), General Assembly Resolution №45112, Adopted 14 December 1990.
41. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Article 4 Age of Criminal Responsibility and Commentary.
42. 2011/95/EU Qualifications Directive, 13/12/ 2011.
43. The Ministry of Education and Science of Georgia, 15.03.2021, <https://mes.gov.ge/content.php?id=11912&lang=geo> [04.06.2024].
44. The Ministry of Education and Science of Georgia, 16.04.2021, <https://mes.gov.ge/content.php?id=12023&lang=geo> [04.06.2024].
45. Organic Law 5/2000, of January 12, regulating the criminal responsibility of minors, <https://noticias.juridicas.com/base_datos/Penal/lo5-2000.t1.html#a3> [04.06.2024].
46. Web-page of General Prosecutor Office of Georgia, News, 16 March 2021 <https://pog.gov.ge/news/sasamarTlom-giorgi-shaqarashvilis-jgufur-mkvlelobashi-msjavrdebul-or-arasrulwlovans-sasjelis-saxiT-1> [04.06.2024].
47. Web-page of General Prosecutor Office of Georgia, News, 11 January, 2022 <https://pog.gov.ge/news/prokuraturis-mier-wardgenili-mtkicebulebebis-safuZvelze-daviT-saraliZis-ganzrax-damamZimebel-garem> [04.06.2024].
48. Adolescence and Delinquency, 1, 4-7, <https://www.pearsonhighered.com/assets/samplechapter/0/1/3/7/0137074298.pdf> [04.06.2024].
49. Adolescent Development & Competency, Juvenile Justice Guide Book for Legislators, National Conference of State Legislatures, 2, 4-5 <https://www.ncsl.org/documents/cj/jjguidebook-adolescent.pdf> [04.06.2024].
50. Adolescent Education and Skills, Unicef <https://www.unicef.org/education/skills-development> [04.06.2024].
51. Aristotle, Policy, Part I, Tbilisi, 1995, 12-13.
52. *Balasundaram P., Avulakunta I.D.,* Human Growth and Development, National Library of Medicine, 14 January, 2022 <https://www.ncbi.nlm.nih.gov/books/NBK567767/> [04.06.2024].
53. *Bjorgo T.,* Crime Prevention, Comprehensive Approach, Georgian-Norwegian Rule of Law Association, 2019, 46.
54. *Bobokhidze M. (Ed.), Lursmanashvili L. (Transl.),* Handbook of European Law on the Rights of the Child, 2015, 165.
55. *Browne E., Millington K.A.,* Human Development and Age, Social Development and Human Development, 2015 <https://gsdrc.org/topic-guides/social-development-and-human-development/human-development-and-age/> [04.06.2024].
56. Child Rights International Network (CRIN) <https://archive.crin.org/en/home/ages/asia.html> [04.06.2024].
57. Child-friendly Justice, Legislation Research, UN Children's Fund, 2017, 3 <https://www.unicef.org/georgia/media/1481/file/Legislative%20Analysis%20GEO.pdf> [04.06.2024].
58. Children Living and Working in the Streets of Georgia, UN Children's Fund, Tbilisi, 2018, 6 <https://shorturl.at/lpEJN> [04.06.2024].
59. Children's Hearing Scotland, <https://www.chscotland.gov.uk/about-us/>.
60. Crime and Deviance, AQA GCSE Sociology Unit, 2 May 2013, 3-4, <http://www.bishopstopfords.enfield.sch.uk/wp-content/uploads/2014/11/Crime_and_deviance.pdf> [04.06.2024].

61. Georgia: Lowering the Age of Criminal Responsibility Flouts International Standards, News of the Human Rights Watch,10 June 2007, <https://www.hrw.org/news/2007/06/10/georgia-lowering-age-criminal-responsibility-flouts-international-standards> [04.06.2024].
62. Global Issues, Youth, United Nations <https://www.un.org/en/global-issues/youth> [04.06.2024].
63. *Gogua I.,* Juvenile Delinquency – Causes, Prevention, and the Ways of Rehabilitation, Penal Reform International, 23 June 2020 <https://www.penalreform.org/blog/juvenile-delinquency-causes-prevention-and-the-ways-of/> [04.06.2024].
64. *Gopnik A., Griffiths T.L., Lucas Ch.G.,* When Younger Learners Can Be Better (or at Least More Open-Minded) Than Older Ones, Current Directions in Psychological Science, 2015, Vol. 24(2), 87-92 <https://cocosci.princeton.edu/tom/papers/LabPublications/GopnicketalYoungLearners.pdf> [04.06.2024].
65. Governmental Programme, 2019-2020, September 2019, 13.
66. Guide to Article 2 of the European Convention of Human Rights, Rigot to Life, Prepared by the Registry, 31 December 2021, 8-9, 11.
67. Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, 17 November 2010, 7.
68. How to Deal with Challengin Behaviuor in Adults? NHS <https://www.nhs.uk/conditions/social-care-and-support-guide/practical-tips-if-you-care-for-someone/how-to-deal-with-challenging-behaviour-in-adults/> [04.06.2024].
69. *Javakhishvili J., Makhashvili N.,* Juvenile Delinquency Prevention, Psycho-Social Service Experience, Tbilisi, 2011, 1, 13-29.
70. Juvenile Crime, Juvenile Justice, National Research Council, Institute of Medicine, National Academies Press, Washington DC., 2001, 80-83 <https://nap.nationalacademies.org/read/9747/chapter/5#67> [04.06.2024].
71. *Kherkheulidze I.*, Juvenile Crime and its Provoking Factors in Juvenile Justice Systems, Journal of Law, №2, 2012, 305-309.
72. Legal Minimum Age and the Realization of Adolescents' Rights, UNICEF, <https://www.unicef.org/lac/media/2771/file/PDF%20Minimum%20age%20for%20criminal%20responsibility.pdf> [04.06.2024].
73. *McElrea F.,* Restorative Justice – the New Zealand Youth Court: A model for development in other courts?, (1994) 4 Journal of Judicial Administration, 33.
74. *Meier B.., Vasmatkar A.D.,* Juvenile Justice in Different Cultural Contexts: A Comparison of India and Germany, Zeitschrift für Internationale Strafrechtsdogmatik, Vol.6, 2011, 491 <https://zis-online.com/dat/artikel/2011_6_584.pdf > [04.06.2024].
75. *Metreveli V., Davitashvili G.,* Political and Legal Doctrine History (Lectures Course), Tbilisi, Meridiani, 1999, 41.
76. *Palmer D., Walters R.,* Crime Prevention Camps for Youth "at Risk": Blurring the Boundaries of Care and Control ob. *Simpson C., Hil R (eds.),* Ways of Resistance: Social Control and Young People in Australia Hale & Iremonger Sydney 1995, 16.
77. *Pidd H., Halliday J., Wolfe-Robinson M., Parveen N.,* Age of Criminal Responsibility Must be Raised, Experts Say, the Guardian, 4 November 2019, <https://www.theguardian.com/society/2019/nov/04/age-of-criminal-responsibility-must-be-raised-say-experts> [04.06.2024].

78. *Ramsey A.,* Cognitive Development, December 2020 <https://www.cincinnatichildrens.org/health/c/cognitive> [04.06.2024].
79. Recommendation CM/Rec (2003)20 of the Committee of Ministers to member States concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, adopted by the Committee of Ministers (2003));
80. *Richards K.,* What Makes Juvenile Offenders different from Adult Offenders? Trends & Issues in Crime and Criminal Justice no. 409., Canberra: Australian Institute of Criminology, 2011 <https://www.aic.gov.au/publications/tandi/tandi409> [04.06.2024].
81. Justice for Children, Manual, UNICEF, 35, <https://www.unicef.org/northmacedonia/media/2881/file/MK_JusticeChildrenManual_2010_EN.pdf> [04.06.2024].
82. *Rocque M., Posick C., Justin Hoyle J.,* Age and Crime, Major Reference Works, Wiley Online Library, 2 October 2015, 1, 2-4 <https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781118519639.wbecpx275> [04.06.2024].
83. *Shalikashvili M.,* Criminology, 3rd Ed., Meridiani, Tbilisi, 2017, 34-35, 93, 146-148.
84. *Shalikashvili M., Mikanadze G.,* Juvenile Justice, 2nd Ed., Tbilisi, Freiburg, Strasbourg, 2016, 4-6, 16-18, 25-26, 56-58, 120.
85. *Smith T., Brownless L.,* Age Assessment Practices: a Literature Review & Annotated Bibliograph, Discussion Paper, Unicef, April 2011, 1-4, 7-9, <https://www.unescap.org/sites/default/d8files/knowledge-products/UNICEF-Age-Assessment-Practices-2010.pdf> [04.06.2024].
86. *Steinberg L.,* Adolescent Development and Juvenile Justice, Annual Review of Clinical Psychology, 2009, 5:459-85, 465-467, 469-470, 474-477.
87. *Tapper J.,* James Bulger Murder, The Guardian, 7 March 2021, <https://www.theguardian.com/uk-news/2021/mar/07/i-shouldnt-have-let-go-of-him-the-pain-of-james-bulgers-mother-28-years-on> [04.06.2024].
88. The Minimum Age of Criminal Responsibility, Justice for Children Briefing №4, Penal Reform International, 1 <https://cdn.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf> [04.06.2024].
89. *Tyler T. R.,* Procedural Fairness and Compliance with the Law, Swiss Journal of Economics and Statistics, Vol. 133, (2/2), 1997, 219-220, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.322.4235&rep=rep1&type=pdf > [04.06.2024].
90. UNICEF, 15 Years of Juvenile Justice Reforms in Europe and Central Asia. Key Results Achieved for Children and Remaining Challenges <https://www.unicef.org/eca/sites/unicef.org.eca/files/2018-11/Key%20Results%20in%20Juvenile%20Justice%20in%20Europe%20and%20Central%20Asia_0.pdf> [04.06.2024].
91. United Nations Children's Fund, Age Assessment: A technical note, 2013, 13.
92. *Vardanashvili U.,* Juvenile Justice, Diversion and Mediation Institute in Juvenile Justice, Tbilisi, 2018, 3-7.
93. *Waters T., Waters D.,* Weber's Rationalism and Modern Society, chp.7, 2015, 9, <https://www.academia.edu/26954620/Politics_as_Vocation.pdf>. Juvenile Justice in Different Countries Age of Criminal responsibility and Treatment of Juvenile Offenders, Centre for Child Rights, <https://www.haqcrc.org/juvenile-justice/juvenile-justice-different-countries-age-criminal-responsibility-treatment-juvenile-offenders/> [04.06.2024].

94. *Wenke D.,* Age Assessment: Council of Europe Member State's Policies, Procedures and Practices Respectful of Childrens' Rights in the Contex of Migration, Council of Europe, Childrens' Rights Division, 11-14, <https://rm.coe.int/168074b723> [04.06.2024].
95. Young People and the Law, Scotland <https://www.mygov.scot/young-people-police> [04.06.2024].
96. Young People and the Law, the United Kingdom, Gov.UK., <https://www.gov.uk/child-under-10-breaks-law> [04.06.2024].
97. Youth Offending Teams, the United Kingdom, Gov.UK., <https://www.gov.uk/youth-offending-team> [04.06.2024].
98. Decision №1/13/732 of the Constitutional Court of Georgia on the Case "Georgian citizen Givi Shanidze against Parliament of Georgia" dated 30.11.2017.
99. Decision №1/4/592 of the Constitutional Court of Georgia on the Case "Georgian citizen Beka Tsikarishvili against Parliament of Georgia" dated 24.10.2015.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8328

Anzor Makharadze*

The Characteristics of the Institution of Crime Victims according to International Legal Acts

Criminal action against the victim is the basis for the universally recognized protection of human rights, strengthened by international instruments, and the neglect of all other rights and freedoms.

Criminal action against the victim (crime victim) leads to a violation of the honor and dignity of a citizen, damage to physical and mental health, and breach of fundamental human rights and freedoms.

To ensure the restoration of his/her violated rights, a legal mechanism shall be established to actively participate in justice and better protect his/her legitimate interests.

Protection of the interests and rights of natural and legal persons affected by crime is declared as one of the main objectives of the state legal system of Georgia.

The purpose of the study is to review and analyze international acts and the basic principles and recommendations, the consideration and implementation of which in the national legislation will contribute to the realization of the rights of the victim (victim of crime) and the full protection of his/her legal interests. The legal basis for prioritizing the interests of victims, rights, and freedoms is the acts of international law, including the Universal Declaration of Human Rights (1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Pact of Civil and Political Rights (1966), Declaration of the Fundamental Principles of Justice for Victims of Crime and Abuse of Authority (1985), EU Charter of Fundamental Rights (2000), Framework Decision of 15 March 2001 on the status of victims in criminal proceedings adopted by the Council of the European Union (other legal acts of the European Union and the Council of Europe), Decisions of the European Court of Human Rights.

Keywords: *International Legal Regulation of Participation of Victims in Criminal Proceedings, International Conventions, International Regional Sources (Council of Europe, EU), Regulation of Victim Rights in European Court Practice*

1. Introduction

On October 9, 2009, the Parliament of Georgia adopted the new Criminal Procedure Code, which came into force on October 1, 2010. The Code of Criminal Procedure belongs to the model of the Anglo-Saxon law system. The new procedural legislation has granted the victim the status

* PhD Student of Ivane Javakhishvili Tbilisi State University Faculty of Law, Assistant of Batumi Shota Rustaveli State University, Faculty of Law and Social Sciences.

provided by the legislation of the common law system. Following the applicable procedural legislation, he/she is no longer a party to the process and participates in it as a witness.

The purpose of the study is to review and analyze international acts and the basic principles and recommendations, the consideration and implementation of which in the national legislation will contribute to the realization of the rights of the victim (victim of crime) and the full protection of his/her legal interests. According to international standards, victims enjoy certain rights in criminal proceedings, which implies the right to express sympathy with the victim, including respecting their dignity and getting involved in the process of investigation in the aspects that are necessary to protect their legitimate interests[1].

They have the right to present their views and problems at the appropriate stages of criminal proceedings not to violate the rights of the accused and the criminal procedure system established by the national legislation.

2. International Legal Basis of Participating Victims in Criminal Proceedings

Beginning with the basic principles of implementing justice for victims of crime and abuse of power, which were adopted by the United Nations in 1985, and the recommendations of the Council of Europe, some documents have been ratified at the international and regional level in the last century. It recognizes the importance of taking into account the interests of victims[2] in the criminal justice process. International legal norms have acknowledged that the victim must be treated with compassion and dignity and has the right to correct his suffering regarding access to justice and reparations. Analyzing the practice of international human rights law has raised the question: should victims be given certain rights and powers, and, how should they be detailed in justice?

The issue of participating victims in national courts[3] traditionally remains at the discretion of the state. States take significantly different approaches to this issue. Only a small part of the international conventions directly indicates the right of the victim to participate in the criminal process. The supervision bodies interpret the rights of victims from other rights, including the right to effective legal protection. However, some non-traditional tools have recently emerged adopted by the United Nations on the rights of victims.

Only a limited number of international conventions apply to the rights of victims in criminal proceedings. In particular, the International Convention on the Protection of All Persons from Forced Disappearance[4], the Convention Against Transnational Organized Crime and the Protocol[5] on the Prevention and Punishment of Trafficking in Persons, especially Women and Children.[6]

---

1 *Hugh Jordan v the United Kingdom*, ECtHR judgment of 4 May 2001, appl. No. 24746/94, §109

2 According to Article 3, Part 22 of the Civil Code of Georgia, "the victim is the state, a natural or legal person who has physical, material, and moral damage directly as a result of an offense".

3 Regarding the concept of the victim, it should be noted that all international acts refer to the protection of the rights of the victim, however, for the victim to become a participant in the process, he needs the status of the victim. Otherwise, he will not be able to exercise his rights in criminal proceedings. The procedure for obtaining the mentioned status and the rights of the victim are regulated by the procedural code, the foundation of which is international acts, where the rights of the victim are discussed, in general.

4 International Convention for the Protection of All Persons from Enforced Disappearance, General Assembly of the United Nations in its resolution 47/133, 23 December 2010, <https://www.ohchr.

The Convention on Forced Disappearances establishes the right of victims to report any circumstances related to the forced disappearance and get informed of "the progress and consequences of the investigation"[7] Article 25(3) of the Convention on Transnational Organized Crime stipulates that each participating state must express views and concerns following its internal legislation; Victims must be present at all stages of the criminal process. Similarly, Article 6 of the Human Trafficking Protocol requires victims to be assisted in expressing their views and concerns at the relevant stages of the criminal process not to break the rights of protection.

The international treaty ratified by the vast majority of countries recognized the participation of the victims in the criminal process in the context of the international criminal proceedings in the ICC Rome. In addition to these acts, a large number of non-binding documents have granted the victim the right to participate in criminal proceedings. These include the general recommendations of the UN contracting bodies, resolutions, and declarations adopted by the General Assembly.

The general recommendations of the UN include:

– General Recommendations (No. 19) on Violence against Women, adopted by the Committee on the Elimination of Discrimination against Women in 1992,[8] called on states to effectively ensure the procedures and means of complaint for victims;[9]
– XXXI General Recommendation of the Committee on the Elimination of Racial Discrimination in the Administration and Functioning of the Criminal Justice System on the Prevention of Racial Discrimination, adopted in 2005, provides the rights to be granted to the victim during criminal proceedings.[10] Based on Article 6 of the International Convention on the Elimination of Racial Discrimination, the Committee indicates states to furnish adequate space for victims, their families, and witnesses. It also requires the victim to be allowed to attend investigative

org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced> [25.08.2024].

5 UN Convention against Transnational Organized Crime, Resolution adopted by the General Assembly 55/25, <https://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf> [25.08.2024].

6 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25, 15 November 2000.

7 Council of Europe, Committee of Ministers, Recommendation No. R (87) 21 of the Committee of Ministers to Member States on Assistance to Victims and the Prevention of Victimization, 17 September 1987.

8 General recommendations, made by the Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, 1992, <https://www.refworld.org/docid/52d920c54.html> [25.08.2024].

9 *Bitiyeva and x. v. Russia* (App. Nos 57953/00 and 37392/03), Judgment (Merits and Just Satisfaction), 21 June 2007, § 156, with references included therein. IACtHR: *Durand and Ugarte v. Peru*, Judgment (Merits), 16 August 2000, § 129; *El Caracazo v. Venezuela*, Judgment (Reparations and Costs), 29 August 2002, § 118; *Rochela Massacre v. Colombia,* Judgment (Merits, Reparations, and Costs), 11 May 2007, § 195.

10 General Recommendation No. XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, adopted by the Committee on the Elimination of Racial Discrimination ('CERD Committee) in 2005, < https://www.refworld.org/docid/48abd56dd.html> [25.08.2024].

proceedings and court hearings, have access to information, confront hostile witnesses, and appeal evidence.[11]

– The principles of effective investigation and evidence of torture and other cruel, inhuman, or degrading treatment or punishment of the General Assembly in 2000, establish that the victim has access to information related to any hearing or investigation, as well as the right to provide additional proofs including the law (Article 4); [12]

In a resolution on victims of crime and children who commit crimes, the UN states that following the national law procedural rules and the implementation of justice, children should be allowed to participate in criminal proceedings, including the investigation, trial, and subsequent actions to be informed about their status and consequential proceedings.[13]

Some documents have also been adopted that specifically address victims' rights of violating human rights. Although these documents are not legally binding, they have contributed to establishing international standards on this issue. Particularly, the Declaration of 1985 on the Basic Principles of Implementation of Justice for Victims of Crime and Abuse of Government,[14] "General Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" adopted by the General Assembly, Resolution 60/147 of, on December 16, 2005, [15]" Principles of Human Rights to Combat Impunity, 2005", etc.[16]

3. European Standards for the Protection of the Rights of Victims

Since the early 80s, the Council of Europe has defined the prospect of protecting victims' rights in the fight against crime. This has been even more relevant after the European Court of Human Rights (ECtHR) recognized the need to protect victims' rights and their proper positions in criminal

---

11 Question of the Impunity of Perpetrators of Human Rights Violations, supra note no. 14, § 27; Council of Europe, Committee of Ministers, Recommendation R. (2000) 19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, 6 October 2000, § 34.

12 The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly in 2000, <https://www.ohchr.org/en/ instruments-mechanisms/instruments/principles-effective-investigation-and-documentation-torture-and> [25.08.2024].

13 *Trechsel S.,* Human Rights in Criminal Proceedings (Oxford: Oxford University Press, 2005), at 37.

14 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 40/34. Resolution adopted by the General Assembly, 29 November 1985, < http://www.un-documents.net/a40r34.htm> [25.08.2024].

15 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution adopted by the General Assembly 60/147. 21 March 2006, <https://fanack.com/wp-content/uploads/2014/archive/user_upload/Documenten/Links/UN/Basic_Principles_and_Guidelines_Remedy_and_Reparation.pdf> [25.08.2024].

16 *Haldemann F., Unger T., (eds.),* The United Nations Principles to Combat Impunity: A Commentary. Oxford University Press, 2018, 47-59.

procedures", [17]especially an urgency to protect vulnerable victims. In 1985, the Committee of Ministers adopted'' Recommendation No. R(85)11 on the Position of Victims within Criminal Justice and Procedures'' to change the traditional approach to criminal justice, which previously focused on the relationship between the state and the perpetrator and ignored the interests of the victims.[18] The recommendation calls on states to consider the needs of victims at all stages of the criminal process[19] and includes guidelines that aim at protecting victims of crime and their interests at all stages of the trial. The document emphasizes the need to inform victims about the development of the case and, in particular, the final decision on criminal prosecution and the outcome of the case.[20] Moreover, the recommendation stipulates that the victim should have the right to request a revision of the refusal of criminal proceedings or to initiate a case.[21]

In accordance with the 85(11) recommendation, the Council of Europe indicates the need to support the rights of victims in criminal proceedings. In the recommendation 87(21),[22] the Committee of Ministers requested greater awareness of getting informed and assisting victims during the criminal trial.[23] Later in the recommendations, the committee offered the victim the opportunity to appeal the prosecutor's decision. Nevertheless, prosecutors should not pursue criminal prosecution by allowing judicial supervision or permission of the parties.[24] Thus, the committee seems to maintain the established international standard for persecution to allow a victim to make his/her claim.

In 2006, the Committee issued a detailed recommendation on the assistance of victims of crime[25] that obliges states to "respect victims' safety, dignity, privacy, and family life" and recognize the negative impact of crime on victims. Although the recommendation does not explicitly require providing specific rights for victims to join the criminal proceedings, following certain provisions of the recommendation the victim can protect his interests during the criminal proceedings. For example, Article 7(2) affirms that "states must institute procedures to allow victims to demand compensation from the offender in criminal proceedings."

---

17 *Mapiripán Massacre v. Colombia,* Judgment (Merits, Reparations, and Costs), 15 September 2005, § 304; *Almonicid-Arellano et al. v. Chile,* Judgment (Preliminary Objections, Merits, Reparations, and Costs), 26 September 2006, § 105; *La Cantuta v. Peru,* Judgment (Merits, Reparations, and Costs), 29 November 2006, § 168.

18 *Goiburú et al v. Paraguay,* Judgment (Merits, Reparations and Costs), 22 September 2006 §§ 84, 131; La *Cantuta v. Peru,* supra note no. 69, §157.

19 AfrComHPR, Malawi African Association, Amnesty International, Ms Sarr Diop, Inter-African Union for Human Rights and RADDHO, Collective of Widows and Beneficiaries, Mauritanian Association for Human Rights v. Mauritania (Comm. Nos. 54/91-61/91-96/93-98/93-164/97-196/97-210/98), 11 May 2000, § 83. 72 AfrComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance, 2001, Principle C (d).

20 *EComHR, Dujardin et al. v. France* (App. No. 16734/90), Decision, 2 September 1991.

21 Ibid., at 4.

22 *EComHR, Dujardin et al. v. France* (App. No. 16734/90), Decision, 2 September 1991.

23 *Frulli M.,* 'Amnesty,' in *Cassese A. (ed.),* The Oxford Companion to International Criminal Justice (Oxford: Oxford University Press), 243-244.

24 SCSL, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Kallon, Norman and Kamara (SCSL2004-15-16-17), Appeals Chamber ('AC'), 13 March 2004, § 71.

25 See: also, Decision on Ieng Sary's Rule 89 Preliminary Objection (Ne bis in idem and Amnesty and Pardon), Ieng Sary, Trial Chamber, 3 November 2011.

The EU has also made a significant contribution to strengthening the role of victims in European criminal justice systems. Through many legislative measures, the EU attempted to introduce common European standards by respecting national sovereignty through the principles of proportionality and subsidy. The need to harmonize the rights of victims derives from the concept of European citizenship, which requires union citizens to be free to exercise their rights without discrimination on the territory of member states. The most important legislative instrument of the European Union on Victims of Crime is the Framework Decision of 15 March 2001 on the Status of Victims in Criminal Proceedings, adopted by the Council of the European Union.[26] The decision, which is mandatory for all member states, compels states to ensure victims " have a real and relevant role" in criminal justice systems [27] The document calls on member states to "recognize the rights of victims and consider their interests in criminal proceedings."[28]It also requires the victims to have the opportunity to hear and present evidences. In addition, member states are encouraged to provide victims with an access to all relevant information, including the results of complaints and court decisions to protect their interests.[29]

On 25 October 2012, the European Parliament and the Council of the European Union approved a directive establishing the minimum standards on the rights to support and protect victims of crime, which altered the above framework decision. The document determined the general rules regarding the support and protection of victims of crime. In particular, as a "crime is wrong against society as well as a violation of the individual rights of victims," the directive requires states to ensure victims to be treated in a respectful manner and consideration of their immediate needs.[30] The directive significantly impairs the traditional punitive framework adopted by most criminal justice systems, especially in the common law system. The proposed directive recommends states to provide adequate support and information to victims, as well as their participation in the examination of materials. According to the mentioned above, justice cannot be effectively done unless the offender can properly explain the circumstances of the crime and provide evidence to the competent authorities in an understandable manner. Therefore, it is important that the victim is treated in a respectful manner and has access to his rights.[31]

As the Commission interpreted in the directive, victims have a legitimate interest in achieving justice. They should be given effective access to justice, which can be a main element in restoring their rights. Informing victims about their rights, basic dates, and decisions is an important aspect of their involvement in legal proceedings to make victims understand the essence of the case. Victims

---

26 Council of the European Union, Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (2001/220/JHA), 15 March 2001.

27 Council Framework Decision of 15 March 2001, supra note no. 80, Art. 2(1).

28 Ibid.

29 Ibid.

30 European Parliament and Council of the European Union, Directive 2012/29/EU of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support, and Protection of Victims of Crime, 25 October 2012, § 9.

31 Ibid., § 34.

should also have the opportunity to attend the trial and bring the case to an end,[32] even though the directive does not specifically require victims to play an active role in the criminal process (for example, as parties or participants). However, the adoption of this tool, which is legally binding for EU member states like other international documents, explicitly recognizes a direct impact of the prosecution of perpetrators on the victims of this crime. In other words, the document supports the idea that victims have legitimate interests in litigation, and they should be given procedural rights to protect their interests. It should be noted that the UK and Ireland, which traditionally do not recognize the victim as a party in the criminal proceedings, expressed their desires to take part in the adoption and implementation of the directive.[33]

4. Guarantees of Protecting the Rights of a Victim by the Case Law of the European Court of Human Rights

The European Court of Justice (ECJ) admits that the flaws in investigating or prosecuting crime complaints can be a factor that fails to protect the life or physical integrity of the victim.[34] The European Court emphasizes the need to get victims involved in witness protection schemes as such schemes may be necessary to protect human rights.[35]

Following Article 8 of the European Convention on Human Rights, the European Court emphasizes that criminal proceedings should be organized in such a manner that the life, freedom, safety, and interests of a participant are not endangered during the testimony in court. The European Court proposes some measures in this regard:

- Hearing the testimony of the victim during the absence of the accused;[36]
- Prohibition of meeting victims and their personnel and publishing or disclosing data (identity and address) during the testimony;[37]
- Exclusion of the general public from hearings when the victim testifies;[38]
- Preventing the defendant from discovering the identity of the victim; [39]
- Restriction of the defendant to ask a question to the victim and comment during cross-examination;[40]
- Making the defendant leave the hearing room when the victim testifies;[41]

---

32 European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Strengthening Victims' Rights in the EU, COM (2011) 274, 18 May 2011, § 3.4.

33 Directive 2012/29/EU, supra note no. 87, § 70.

34 See, e.g., *Opuz v. Turkey,* no. 33401/02, 9 June 2009, at paras. 141-146 and 173-174.

35 See *R R v. Hungary,* no. 19400/11, 4 December 2012, at paras. 26-32.

36 See *Gani v. Spain,* no. 61800/08, 19 February 2013.

37 See *Crook and National Union of Journalists v. United Kingdom* (dec.), no. 11552/85, 15 July 1988

38 See *B and P v. United Kingdom,* no. 36337/97, 24 April 2001, at para. 37.

39 See *Doorson v. Netherlands,* no. 20524/92, 26 March 1996.

40 See *Oyston v. United Kingdom* (dec.), no. 42011/98, 22 January 2002 and Y v. Slovenia, no. 41107/10,28 May 2015.

- Avoiding cross-examination of the victim by a lawyer due to potential conflicts of interest;[42]
- Restriction of access to court protocols.[43]

However, the court indicates that the mentioned measures should not be unfair to the defendant at trial.[44] Also, the victim should be protected during the investigation and prosecution of a criminal offense when there is a threat to his/her life or physical and mental integrity.

When establishing measures to protect the rights of victims, the European Court focuses on the delays in the length of the criminal proceedings from the time the applicant joins proceedings as a civil party constituting a breach of Article 6 (1) of the European Convention, a violation of the right of the victim to determine his/her civil rights within a reasonable time.[45] Thus, when conducting a criminal process the impact of the protracted proceedings should consider the victim's right, determine his/her civil rights within a reasonable period, and ensure that this right is not violated.

The European Court observes the procedure for sentencing in the belief that the court of a particular country should provide every opportunity for the victim to participate in the process. However, the court indicates the victim's role in determining the offender's punishment because imposing a sentence is its prerogative.

Compensation in the practice of the European Court is a particular issue. In some cases, the crime leads to civil consequences, which raises the problem of legal protection in civil proceedings.[46] However, in such cases, civil liability will be imposed on the perpetrator of the crime. State authorities shall be responsible for only an employee's inaction that causes the violation of the law.[47]

Relating to the regulation of compensation and the inability to conduct civil proceedings in case of termination of criminal prosecution, the European Court noted that the failure to solve this problem can lead to a violation of Article 6(1) of the European Convention.[48] The state is required to create compensation schemes for victims of criminal offenses, especially in the case of protection of children and adults from violent crimes.[49]

The European Court considers that based on Article 6(2) of the European Convention the acquitted defendant can demand that the victim be deprived of the right to require civil claims of compensation in connection with the facts that led to his baseless prosecution. This provision can only be applied if civil proceedings cannot be considered the result of a previous criminal offense. [50]

---

41 See *Accardi v. Italy* (dec.), no. 30598/02, 20 January 2005.
42 See *Y v. Slovenia,* no. 41107/10, 28 May 2015.
43 See, e.g., *Z v. Finland,* no. 22009/93, 25 February 1997.
44 See Al-Khawaja and Tahery v. the United Kingdom [GC], no. 26766/05, 15 December 2011 and *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015.
45 *Atanasova v. Bulgaria,* no. 72001/01, 2 October 2008 and L E v. Greece, no. 71545/12, 21 January 2016.
46 Ibid.
47 Ibid.
48 Ibid.
49 *August v. United Kingdom* (dec.), no. 36505/02, 21 January 2003.
50 *Ringvold v. Norway,* no. 34964/97, 11 February 2003.

Following the practice of the European Court of Human Rights, a close relative of the deceased should be allowed to get involved in an investigation to determine the cause of death to avoid violating Article 2 of the Convention. This type of participation protects the legitimate interests of a family and rejecting this requirement is a sufficient ground for the court to establish a violation of Article 2 of the Convention. In the case "Saliman v. France", the court found a violation of the procedural part of Article 2 because a close relative was not allowed to familiarize himself with the case materials and get informed about the termination of the proceedings. In addition, in the case "Oguri Turkey", the court considered the violation of Article 2 of the Convention because the mother of the deceased did not have access to the case materials. According to the European Court of Human Rights, in all cases resulting in death, a close relative of the victim must be engaged in the investigation process to protect his/her legitimate interests.

The European Court of Human Rights recognizes the importance of criminal prosecution for protecting the rights provided by Articles 2 and 3 of the Convention. According to the Court, based on the Convention, states are obliged to conduct an effective investigation and, if necessary, apply for criminal prosecution in suspicious circumstances due to the death or inhuman treatment of a person. In the case of Khadisov and Tsechoyev (Khadisov and Tsechoyev) The European Court of Human Rights considered the violation of Article 3 of the Convention because the complainants did not have access to the criminal case materials and were not properly informed about the investigation process. Simultaneously, they did not have the opportunity to effectively appeal the actions and omissions of the investigative bodies before the court.[51]

Therefore, the European Court can be seen as an important set of victims' rights concerning criminal proceedings, and the impact of these reforms on the rights of the victim in retrospect of the development of "civil rights" is important.

5. Conclusion

The article presents recommendations on international legal approaches to the rights of victims. In particular, the findings are analyzed by international conventions and other legal instruments, international regional sources on the rights of victims in criminal justice (Council of Europe, the European Union), and the practice of the European Court on the rights of victims.

Taking into account international recommendations, it is necessary to take effective steps in the national legislation and practice to ensure that the rights and legitimate interests of the victim are ensured in criminal proceedings. In particular, the legislator should make the criminal justice process accessible and understandable to the victim and give him a practical opportunity to enjoy the guaranteed rights recognized by the Constitution and international norms. With the amendments to the Criminal Procedure Code of Georgia in 2014, the legislator tried to regulate the rights of the victim, which was a step forward but both practical and legislative problems are still identified. One of the problems is the issue of restitution. It is necessary to introduce and refine the system of restitution.

[51] *Khatiashvili G.,* Victim's Rights in Criminal Proceedings. Georgian Young Lawyers' Association, Tbilisi, 2016, 26 (in Georgian).

International institutions see criminal proceedings as the best model for receiving compensation from offenders, which does not exclude applying other legal mechanisms. In addition, they admit the possibility of considering the court decision on the payment of compensation as a punishment but they do not force states to regard the above decision to be a punishment, however, studies confirm that the execution of a court decision on compensation provided to the victim arises some problems in practice which calls the effectiveness of the norm in question. Conversely, following the experience of countries (such as the UK), it is more effective to consider compensation as a punishment and make the state responsible for its enforcement, which results in the victim's satisfaction. The Parliament of Georgia refused to propose the addition of Article 58, Part 1, Subsection "e" of the Criminal Procedure Code of Georgia. Unfortunately, the applicable Code of Procedure does not provide this right of the victim. In this direction, it is important to implement the mentioned idea. The main challenge in the restitution process is the cost of property return and compensation, which needs to be resolved.

Bibliography:

1. Criminal Procedure Code of Georgia. 9/10/2009.
2. *Khatiashvili* G., Rights of the victim in criminal proceedings. Georgian Young Lawyers Association, 2016, Tbilisi, 26 (in Georgian).
3. International Convention for the Protection of All Persons from Enforced Disappearance, General Assembly of the United Nations in its resolution 47/133, 23 December 2010, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced> [25.08.2024].
4. UN Convention against Transnational Organized Crime, Resolution adopted by the General Assembly 55/25, <https://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf> [25.08.2024].
5. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25, 15 November 2000.
6. Council of Europe, Committee of Ministers, Recommendation No. R (87) 21 of the Committee of Ministers to Member States on Assistance to Victims and the Prevention of Victimization, 17 September 1987.
7. General recommendations made by the Committee on the Elimination of Discrimination against Women, Ganeral Recommendation No. General Recommendation No. 19, 1992, <https://www.refworld.org/docid/52d920c54.html> [25.08.2024].
8. *Bitiyeva and x. v. Russia* (App. Nos 57953/00 and 37392/03), Judgment (Merits and Just Satisfaction), 21 June 2007, § 156, with references included therein. IACtHR: Durand and Ugarte v. Peru, Judgment (Merits), 16 August 2000, § 129; *El Caracazo v. Venezuela*, Judgment (Reparations and Costs), 29 August 2002, § 118; *Rochela Massacre v. Colombia,* Judgment (Merits, Reparations and Costs), 11 May 2007, §195.
9. General Recommendation No. XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, adopted by the Committee on the Elimination of Racial Discrimination ('CERD Committee') in 2005, <https://www.refworld.org/docid/48abd56dd.html> [25.08.2024].
10. Question of the Impunity of Perpetrators of Human Rights Violations, §27.

11. Council of Europe, Committee of Ministers, Recommendation R. (2000) 19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, 6 October 2000, §34.
12. The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly in 2000, <https://www.ohchr.org/en/ instruments-mechanisms/instruments/principles- effective- investigation-and-documentation-torture-and> [25.08.2024].
13. *Trechsel S.,* Human Rights in Criminal Proceedings, Oxford: Oxford University Press, 2005, 37.
14. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 40/34. Resolution adopted by the General Assembly, 29 November 1985, <http://www.un-documents. net/a40r34.htm> [25.08.2024].
15. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution adopted by the General Assembly 60/147. 21 March 2006, <https://fanack.com/ wpcontent/uploads/2014/archive/user_upload/Documenten/Links/UN/Basic_Principles_and_Guidelines_Remedy_and_Reparation.pdf> [25.08.2024].
16. *Haldemann F., Unger T., (eds.),* The United Nations Principles to Combat Impunity: A Commentary, Oxford University Press, 2018, 47-59.
17. *Mapiripán Massacre v. Colombia,* Judgment (Merits, Reparations, and Costs), 15 September 2005, §304.
18. *Almonicid-Arellano et al. v. Chile,* Judgment (Preliminary Objections, Merits, Reparations, and Costs), 26 September 2006, §105.
19. *La Cantuta v. Peru*, Judgment (Merits, Reparations, and Costs), 29 November 2006, §168.
20. *Goiburú et al v. Paraguay,* Judgment (Merits, Reparations and Costs), 22 September 2006 §§ 84, 131.
21. *La Cantuta v. Peru*, §157.
22. AfrComHPR, Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, *Association mauritanienne des droits de l'Homme v. Mauritania* (Comm. Nos. 54/91-61/91-96/93-98/93-164/97-196/97-210/98), 11 May 2000, § 83. 72 AfrComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance, 2001, Principle C (d).
23. *EComHR, Dujardin et al. v. France* (App. No. 16734/90), Decision, 2 September 1991.
24. *Frulli M.,* 'Amnesty,' in *Cassese A. (ed.),* The Oxford Companion to International Criminal Justice (Oxford: Oxford University Press), 243-244.
25. SCSL, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Kallon, Norman and Kamara (SCSL2004-15-16-17), Appeals Chamber ('AC'), 13 March 2004, §71.
26. Decision on Ieng Sary's Rule 89 Preliminary Objection (Ne bis in idem and Amnesty and Pardon), Ieng Sary, Trial Chamber, 3 November 2011.
27. Council of the European Union, Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (2001/220/JHA), 15 March 2001.
28. Council Framework Decision of 15 March 2001, Art. 2(1).
29. European Parliament and Council of the European Union, Directive 2012/29/EU of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, 25 October 2012, §9.

30. European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Strengthening Victims' Rights in the EU, COM (2011) 274, 18 May, 2011, § 3.4.
31. Directive 2012/29/EU, §70.
32. *Opuz v. Turkey,* no. 33401/02, 9 June 2009, paras. 141-146 and 173-174.
33. *R R v. Hungary,* no. 19400/11, 4 December 2012, paras. 26-32.
34. *Gani v. Spain,* no. 61800/08, 19 February 2013.
35. *Crook and National Union of Journalists v. United Kingdom* (dec.), no. 11552/85, 15, July 1988.
36. *B and P v. United Kingdom,* no. 36337/97, 24 April 2001, para. 37.
37. *Doorson v. Netherlands,* no. 20524/92, 26 March 1996.
38. *Oyston v. United Kingdom* (dec.), no. 42011/98, 22 January 2002 and Y v. Slovenia, no. 41107/10, 28 May 2015.
39. *Accardi v. Italy* (dec.), no. 30598/02, 20 January 2005.
40. *Y v. Slovenia,* no. 41107/10, 28 May 2015.
41. *Z v. Finland*, no. 22009/93, 25 February 1997.
42. *Al-Khawaja and Tahery v. the United Kingdom* [GC].
43. *Atanasova v. Bulgaria,* no. 72001/01, 2 October 2008 and L E v. Greece, no. 71545/12, 21 January 2016.
44. *August v. United Kingdom* (dec.), no. 36505/02, 21 January 2003.
45. *Ringvold v. Norway,* no. 34964/97, 11 February 2003.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8329

Levan Dzneladze[•]

Confiscation as an Essential Criminal Mechanism for Countering Transnational Organized Crime

The paper addresses one of the challenging issues of modernity. Although many international and domestic tools[1] *have been developed in recent decades, including the fight against transnational organized crime, it is becoming increasingly extensive and global. "According to the International Monetary Fund, revenue from drug trafficking and money laundering accounts for six to eight percent of the global economy.*[2] *Thus, the fight against this phenomenon necessitates a continually updated approach.*

The increased use of digital technologies in the public and private sectors made criminals inclined to commit crimes causing immeasurably great economic harm to society. The leading driving factor for Transnational Organized Crime is to make the maximum profit in a short time. The effective fight against this complex criminal event is about recovering and confiscating assets acquired through committing crimes.[3]

The paper is based on an analysis of doctrine and judicial practice. It also discusses distinct aspects and modern challenges related to the return of criminal assets in the fight against transnational organized crime.

The study aims to identify gaps and measures taken to ensure their solution.

Keywords: *Organized Crime, Transnational Organized Crime, Crime Property, Return of Crime Property (Asset Recovery), Confiscation of Crime Property.*

1. Introduction

The groups committing organized crime have been known since the Middle Ages. The formation of nation-states, the development of capitalism, industrialization, and, finally, modern achievements of science and technology, together with tremendous excellence, opened the wide area for the emergence of a new generation of organized crimes. As a social phenomenon, it is characterized by a complex, criminal nature, including a wide range of interactions with corruption, and economic crimes. Striving to maximize profits, organized crime oppresses and exploits not only

• PhD Student of Ivane Javakhishvili Tbilisi State University Faculty of Law, the Head of Investigation Department in the Investigation Service of the Ministry of Finance of Georgia.

1 *Tumanishvili G., Jishkariani B., Shrami E. (Eds.),* Influence of European and International Law on Georgian Criminal Procedure, Tbilisi, 2019, 800-801 (in Georgian).

2 *Shelley, L.,* Transnational organized crime and seized assets: moral dilemmas concerning the disposition of the fruits of crime,7 Maastricht J. EUR. & Comp. L.35 (2000), [24.01.2023].

3 "Crime does not pay", – White paper on best practices in Asset Recovery, 1, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2024].

ordinary citizens, violates their legitimate interests, but also competes with the government in a global sense and primarily, law enforcement agencies in specific cases.

Although many national and international regulations have been imposed to overcome this challenge, organized crime is so disguised that the current legislative instruments often fail to provide tangible practical results, making it difficult to discover and deprive the criminal asset.

This complex socio-economic problem can only be solved through legal measures and criminal liabilities. The paper, using a comparative-legal method studies and analyzes the material which refers to the practice and theory of launching a global effort to overcome this problem.

Globalization offers opportunities to speed up the internationalization of criminal activities. The study aims to review the practices of the common courts confiscating criminal property.

2. Basic Provisions of Organized Crime

Organized crime has always arisen when the state becomes sovereign. Criminal forces create a criminal system with the mechanisms of tumor development spreading metastases in its body, feeding at the expense of the state and society, building structures, weakening and intimidating it, and even competing with it.

Organized crime has become more dangerous since the 19th century.

"Organized crime having a history (at least) of two centuries, has been the subject of scientific research for several decades."[4]

"Organized crime is the most dangerous type of crime committed by conspiratorial groups confederated for continuous criminal activities which encompass violence, intimidation of population, bribery to obtain gains from profitable illegal businesses, as well as unfair business practices striving for its legalization and penetration into the field of legal business and politics."[5]

"Organized crime is one of the complex and dangerous types of crime that primarily encroaches on the economic, political, legal and moral spheres of society."[6]

Organized crime is the most acute problem in the world attributed to the "delicacies of the global threat" with the effect of its devastating impact on society[7].

The history of organized crime should be considered in connection with the pace of developing the state, because "in the process of confrontation with the public, the criminal phenomenon has undergone an evolution and found a resistant form of existence to the anti-criminal impact of the state and society."[8]

"Organized crime is not only a problem of one or more countries, but it is transnational."[9]

---

4 *Shalikashvili M.,* Criminology, Tbilisi, 2011, 84 (in Georgian).
5 *Godziashvili I.,* Criminology, Tbilisi, 1998, 179 (in Georgian).
6 *Tsulaia Z.,* Criminology (General Part), Tbilisi, 2003, 224 (in Georgian).
7 *Ugrekhelidze M.,* Charged with Hazard Delicts, Tbilisi, 1982, 60 (in Georgian).
8 *Avanesov G.A. (ed.),* Criminology, Tbilisi, 2007, 570 (in Georgian).
9 *Nachkebia G. (ed.),* Problems of criminalization and legal relationships of modern manifestations of organized crime in Georgian Criminal Law, Tbilisi, 2012, 22 (in Georgian).

A typical example is the illegal movement of foreigners seeking "political asylum", which is driven by criminal organized groups. The U.S. Congress passed the Racketeer Influenced and Corrupt Organization Act (RICO). Since the 1950s, the U.S. Senate has regularly charged the committees to analyze organized crime and find ways to combat it. The conclusions of these committees were known by the names of the heads of the committees Kefauer (1950-1951); Katzenbach (1966-1967); Byrne (1975-1976); and Kaufman (1983-1986).

The term "Organized Crime" was first mentioned by the Kefauer Committee when the commitment to crimes went outside the scope of ordinary gangster crime. The term has defined the essence of this dangerous phenomenon.

European Union Strategy to tackle Organized Crime 2021-2025 states that "Hidden from public view due to the opaque nature of its activities, organized crime is a significant threat to European citizens, businesses, and state institutions, as well as the European economy as a whole."[10]

According to the National Strategy to Combat Organized Crime, the transnational nature of organized crime presents a significant challenge for Georgia and the entire world.

Organized crime violates fundamental values of society, hinders economic, social, cultural, and political development, contradicts the principles of the rule of law, and threatens national and international security."[11]

Following its transnational nature National Strategy considers the fight against organized crime as one of the main priorities of our country. After the collapse of the Soviet Union, the civil and separatist wars impelled human trafficking and drug transition in Georgia.[12]

3. General Characterization of Transnational Organized Crime

The origin and development scheme of organized crime without considering its criminal content, can be compared with an entrepreneurial activity, with its signs and characteristics:

1. The tendency to expand capital turnover and conquer new markets;
2. The areas of activity that generate large incomes for organized crime cross over the nations and increasingly adopt a transnational nature. Anything from human organs to nuclear, and atomic materials and poisonous industrial waste can become a means of trade.[13]

"Modern transnational organized crime takes advantage of the opportunities offered by globalization and free trade using new technologies to commit new types of crimes, including moving cash, services, and people. The diversification of crimes, criminal markets, and networks by transnational organized crime groups is gradually increasing.[14]

---

[10] The EU Strategy to tackle Organised Crime 2021-2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0170&qid=1632306192409> [03.08.2024].

[11] The National Strategy to Combat Organized Crime 2021-2024, 2, <https://matsne.gov.ge/ka/document/view/5256554?publication=0> [03.08.2024].

[12] *Ciklauri-Lammich E.,* Menschenraub, ein blühendes Gewerbe in der Kaukasusregion, Monatshefte für Osteuropäisches Recht, Hrsg. Dr. Günter Tontsch, Hamburg 2000, 2-9.

[13] *Ciklauri-Lammich E.,* The problem of crime between late migrants from ISC in Germany, Georgian Lawyers, Tiflis 2001, 45-51.

[14] *Zagaris B.,* U.S. International cooperation against Transnational organized crime, 44 Wayne L. Rev. 1402, 1998, [24.01.2023].

Modern technologies have created an amazing impetus for crime businesses making it easier to obtain information about demand and opportunities in different parts of the world. Applying cyber technologies has vastly increased the frameworks of organized crime and its revenues around the world. Drug and cybercrimes, money laundering, and huge construction projects are produced through corrupt systems at the expense of encroaching on the state and public interests.[15]

It was the global threat that the famous Italian judge Falcone mentioned in his book "Organized Crime – as a World Problem in the Early 90s. Italian Mafia as an example of world organized crime" (Falcone, Organisiente Kriminalitat-ein Weltproblem. Die Italienische Mafia als; Vorbild fur das internazional organizierte Verbechen in Bundeskmininalamt), where the author appealed and warned the public, especially police agencies, to focus on this dangerous crime and declare a joint fight against it. Falcone's sermon appeared to be prophetic. Over time, organized crime has taken a toll on other European countries, such as Switzerland, Germany, France, the Netherlands, and others. Combatting organized crime took the lives of hundreds of policemen in Italy. That is why in September 1992, in Brussels, the Interior and Justice Minister of Italy and his colleagues asked European and world law enforcement agencies for help to fight against organized crime. [16]

One of the main threats of transnational organized crime is its lucrative nature, which provides the criminal world with stable additional economic resources every year. The amorphousness of this calamity and the difficulty of structuring it as a particular criminal category is not a sufficient basis for refusing to fight against it with repressive measures in law, on the contrary, every new conclusion of international organizations highlights the growing threat of organized crime, which has been increasingly digging into the field of legal business for years and capturing it.[17]

According to the UN Drug and Crime Organization, transnational organized crime is big business. In 2009, its revenue amounted to USD 870 billion, which is 1.5% of the global domestic gross product.[18]

In 2017, the gain from transnational organized crime was valued at an average of $1.6 trillion to $2.2 trillion annually.[19]

The quality and practical advantages of implementing international and local instruments should also become the subject of an individual study. Organized crime is a crime industry[20], and management in any field of production serves to make profits with intensification and lower costs, which is a necessary condition for the progress and growth of certain businesses. According to annals,

---

15 *Ciklauri-Lammich E.,* Kapitel 2 Abschnitt 2. Der Kampf gegen die Korruption in den europäischen Ländern in der Monographie: Die Korruption in Georgien: Kriminologische Analysen und Kommentare der gerichtlichen Praxis, Hrsg. TSU & Tsereteli Inst., Tiflis 2010, 50-76 (Georgisch).

16 Pressnachvit Interior und Iustic Ministers Meeting, Brussel, 18 September, 1992.

17 International Organized Crime (Ed. Prof. Dr. Ulrich Sieber. Carl Heymanss Verlag KG), Cologne. Berlin. Bonn. Munich, 1996, 6-8.

18 UNODC about transnational organized crime <https://www.unodc.org/toc/en/crimes/organized-crime.html> [03.08.2024].

19 Global Financial Integrity about transnational organized crime <https://gfintegrity.org/issue/transnational-crime> [03.08.2024].

20 "Crime industry", *Ciklauri-Lammich E., Letizia P.,* Combating the Illicit Turnover and Use of Drugs in the Territory of the Russian Federation, in Prawo i Politika, St. Petersburg, 2002, 29-34.

some groups have always tried to obtain large quantities of property in criminal ways and influence the official government.

"Organized crime takes advantage of flaws in the law. Also, in individual cases, law enforcement agencies find it difficult to respond quickly to doing criminal business, as the sophisticated and renewable methodology used by the criminal world makes it hard to detect their criminal activities and revenues because it takes advantage of globalization and modern information technology.[21]

According to the European Union's Grave and Organized Crime Threat Assessment Report (2021 EU COCTA), serious and organized crime is a main threat to EU security. The organized crime landscape is characterized by a network environment where cooperation between criminals is fluid, systemic, and focused on making profits.[22]

Across the EU, criminal revenue from nine major criminal markets reached $139 billion in 2019[23], up 1% against the EU's gross domestic product.[24]

"In the past, organized crime was primarily a national issue. However, today it has become a dark side of globalization. It has transcended geographical boundaries, becoming a continental issue, and takes advantage of open border policies and modern technologies. Illicit revenue is now tied to global activities."[25]

It is impossible to list the types of transnational organized crime since it manifests itself in almost all areas where making high profits can take place, after which there is an illegal legalization of such revenue (money laundering).[26]

"Transnational and organized crimes are a particular threat to public order, national and global security. This is why international cooperation on this type of crime is one of the priorities for the Prosecutor's Office of Georgia."[27]

The National Strategy for Organized Crime focuses on three areas, such as the thieves in law and the criminal world, cybercrime, and drug trafficking, which is partly provided by the framework of fighting heavy and organized crime in Europe.[28]

---

21 White paper on transnational organized crime, 2015, 7, <https://edoc.coe.int/en/organised-crime/6837-white-paper-on-transnational-organised-crime.html> [24.01.2023].

22 EU SOCTA 2021 – serious and organized crime assessment report, <https://www.europol.europa.eu/cms/sites/default/files/documents/socta2021_1.pdf> [03.08.2024].

23 Mapping the risk of serious and organized crime infiltrating legitimate businesses, <https://op.europa.eu/en/publication-detail/-/publication/ab3534a2-87a0-11eb-ac4c-01aa75ed71a1/language-en> [24.01.2023].

24 The EU Strategy to tackle Organised Crime 2021-2025 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0170&qid=1632306192409> [03.08.2024].

25 *Ciopec F.,* compatibility of Romanian legislation with the UN convention against transnational organized crime, 39 Zbornik Radova, 2005, 213.

26 CRIMINAL CODE OF GEORGIA, Article 194, <https://matsne.gov.ge/document/view/16426?publication=262> [08.08.2024].

27 2022-2027 Strategy of the Prosecutor's Office of Georgia, 38 <https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebis-strategia.pdf> [05.08.2024].

28 EU SOCTA 2021 – Serious and organized crime assessment report, <https://www.europol.europa.eu/cms/sites/default/files/documents/socta2021_1.pdf> [03.08.2024].

The mentioned studies specify that the criminal world is acquiring access to more and more economic resources annually, which deprives the effectiveness of fighting against organized transnational crime.

This indicates that law enforcement agencies traditionally are still focused on the offender's conviction rather than on finding, returning, and confiscating the revenue, and property gained from the crime.

4. Crime Proceeds

The success of combating organized crime depends on the possibility for law enforcement agencies to fight effectively based on operative search, procedural, and other legal means. The main purpose of organized crime activities is to make profits and legalize them. In mid-March 2012, the European Commission asked the European Parliament to harmonize legislation to combat serious transnational crimes to facilitate the issues of corruption of organized crime or the confiscation of property gained through economic crimes. Because this form of criminal liability is now considered the most effective way to combat these offenses.[29]

Property is protected by a high constitutional standard, which implies that it is recognized and secured.[30]

According to the Civil Code of Georgia, assets are both, tangible and intangible, that can be possessed, used, and administered by natural and legal persons and which may be acquired without restriction unless this is prohibited by law or contravenes moral standards.[31]

According to the Criminal Code of Georgia, confiscation of property (assets) means gratuitous deprivation of the object and an instrument of a crime or the article intended for the commission of a crime and/or criminally obtained assets.[32]

This does not contradict the high standard of protecting the right to property provided by the Constitution and the law.

"Many states have introduced the confiscation of assets as one of the effective forms of combating crime. Although the scope of its distribution is different in various countries, the scope of use, and the approach to the regulation of criminal, administrative, customary, or civil norms of this institution is varied. However, this measure of responsibility is considered to be a relevant institution to democratic principles allowed by the constitutions of democratic countries."[33]

---

29 Vorschlag für eine RL des Europäischen Parlaments und des Rates über die Sicherstellung und Einziehung von Erträgen aus Straftaten in der Europäischen Union, COM(2012) 85 final v 12.3.2012, kurz: RL-Entwurf, abrufbar unter <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0085:FIN:DE:PDF [03.08.2024].

30 The Constitution of Georgia, Article 19, <https://matsne.gov.ge/ka/document/view/30346?publication=36> [03.08.2024].

31 Article 147 of the Civil Code of Georgia, <https://matsne.gov.ge/document/view/31702?publication=131> [03.08.2024].

32 Article 52 of the Criminal Code of Georgia, <https://matsne.gov.ge/document/view/16426?publication=262> [03.08.2024].

33 Decision No 1/2/384 of the Constitutional Court of Georgia of 02 July 2007, II-2, <https://constcourt.ge/ka/judicial-acts?legal=291> [3.8.2024].

The Constitution of Georgia protects "property obtained only by law."[34]

"The Constitutional Court of Georgia has developed a special approach, quite successful and interesting practice concerning the right to property and its definition. The guarantee of the acquisition of property protects the possibility of lawful acquisition of property.[35]

The Criminal Code provides a defendant, a convict to confiscate all kinds of property including the property obtained criminally if it is proved. Investigating transnational organized crime should be on recovering and returning criminally acquired property.

5. Return of Asset Recovery

Following the 2022-2027 strategy of the Prosecutor's Office of Georgia, "the main motivator of most serious and organized crime is financial benefits."[36] Strengthening international cooperation in the field of search and seizure of criminal assets is one of the priorities (CARIN, EU ARO PLATFORM).[37]

The Camden Asset Recovery Inter-Agency Network was established on September 22-23, 2004 in The Hague on the initiative of Austria, Belgium, Germany, Ireland, the Netherlands, and Great Britain. It is a global network of professionals and experts aimed at enhancing their knowledge of the methods and techniques of transnational identification, seizure, and confiscation concerning property and other crime-related assets.[38]

Carin is an informal network that includes cooperation in all aspects of the fight against criminal property. Its goal is to increase the effectiveness of member states and deprive the criminal world of criminal assets.[39]

Aro (Informal platform of Asset Recovery Offices of the EU) is an informal platform across Europe. During the periodic meetings, information on the implementation of European regulations on criminal assets, the activities of the member states, or the agencies that temporarily hold the function of Aro has been collected since 2009.[40]

Several countries, including the founding states of Carin, have accumulated decades of experience in confiscating criminal assets.

---

34 *Demetrashvili A.,* Commentary on the Constitution of Georgia (Chapter Two), Tbilisi, 2013, 203 (in Georgian).

35 *Loladze B., Pirtskhalashvili A.,* Basic Rights – Comment, Tbilisi, 2023, 497 (in Georgian).

36 2022-2027 Strategy of the Prosecutor's Office of Georgia, 37, <https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebis-strategia.pdf>[03.08.2024].

37 Ibid.

38 White paper on best practices in asset recovery, 11, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2024].

39 Camden Asset Recovery Inter-Agency Network (Carin Manual), 5, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf>[05.08.2024].

40 White paper on best practices in asset recovery, 12-13, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2024].

Ireland was one of the first countries to create the Bureau of Criminal Assets in 1996 to combat organized crime (this was led by the activation of organized crime and drug-related murders). Its key function was to find, seize, and confiscate a criminal asset. In Belgium, the Public Prosecutor's Office established a central service for seizure and confiscation in 2003. It was instructed in full coordination of the battle and the realization of criminal assets between them. To identify criminal property, an independent commission was created In Bulgaria, in 2005. In the UK, based on Proceeds of crime Act, passed in 2002, established an accredited system of financial investigation. The Department of Combating Severe and Organized Crime in Germany (BKA) has been providing analytical support against economic crime since the 1970s. The agency has expanded further and added to the direction of money laundering since 1994.[41]

Despite some current international regulations[42], an updated directive on the return and confiscation of criminal assets was adopted upon the recommendation of the European Commission on April 24, 2024[43].

According to Directive (2), the primary motivation for criminal organizations to operate transnationally, including high-risk criminal networks, is financial gain. To reduce the serious threat of organized crime, competent agencies should put more institutional efforts into finding effective ways to identify, and seize criminal activities and confiscate illegal assets.

An effective system of reclaiming a criminal asset involves the rapid tracing and identification of assets and objects of criminal origin. They must be seized and confiscated applying the criminal procedure to avoid concealment.

An effective criminal asset return system also includes effective management of seized assets (Asset management) to maintain their value as much as possible when reimbursing the damage to the state or other private victims[44].

In Georgia, the agency responsible for the return and management of criminal assets does not have a centralized form. The function of the asset recovery is implemented by the Prosecutor's Office of Georgia.[45] The Asset Management task is carried out by the relevant investigative divisions, which use some seizure measures applied by the court in criminal cases. Additionally, in 2023, the Investigation Service of the Ministry of Finance of Georgia, considering investigative purposes, created the department responsible for the management and disposal of assets seized from offenders in a pilot mode.[46]

---

41 White paper on best practices in asset recovery, 61-62, 85, 87, 91, 95, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2024].

42 *Orlovska, N., Stepanova J.,* confiscation of proceeds and Property related to crimes: International standards and the ECHR practice, 10 Juridical Trib, 2020, 499-502.

43 Directive (EU) 2024/1260 of the European Parliament and of the Council on asset recovery and confiscation, <https://eur-lex.europa.eu/eli/dir/2024/1260/oj> [05.08.2024].

44 Directive (EU) 2024/1260 of the European Parliament and the Council on asset recovery and confiscation (5).

45 Organic Law of Georgia on the Prosecutor's Office, <https://matsne.gov.ge/ka/document/view/4382740?publication=10> [05.08.2024].

46 Order N19 of the Minister of Finance of Georgia of 26 January 2023, <https://matsne.gov.ge/ka/document/view/87634?publication=17> [05.08.2024].

The Directive of the European Union and the Council of Europe of 24 April 2024 obliges member states to harmonize the internal legislative framework by 23 November 2026.

6. Confiscation of Property (assets) Gained from Criminal Activities

Since the 80s of the 20th century, legislation related to the confiscation of criminal assets has become an important tool for combating all types of crimes.[47]

Confiscation in Georgia has been applied since ancient times. The confiscation was also a lawful countermeasure in the Soviet Union for additional punishment[48].

The confiscation of assets in Georgia was widely used for various crimes involving illegal appropriation of property.

The confiscation of the assets was applied for the murder crime, – Iv. Javakhishvili cites an example from the life of Basil Zarzmeli about the temporary seizure of property.[49] According to Iv. Javakhishvili, the confiscation is referred to as "expropriation of the estate".[50]

Following Al. Vacheishvili, King Vakhtang uses the term "parish" (Article 177, the Law Book of Vakhtang VI)[51] and "impoverishment" (which is identical to "proscription") (Article 220, the Law Book of Vakhtang VI).[52]

The confiscation of assets in the form of a sanction on various types of murders (on desertion, Article 19) also envisages the confiscation of property following "Dzeglisdeba" (the laws issued by George V the Brilliant). It finds a use for the terms "taking the estate" (verses 1, 43rd), "to deprive the estate" (Articles 3rd, 5th, 9th, 11th, 17th, 19th), and "to confiscate the estate" (Article 6, 13).[53] The confiscation of the estate was temporary and permanent (Articles 1 and 3).

The deprivation of material benefits gained from criminal activities was also a widely applied sanction in ancient Georgian law. An obvious example of this is theft (with the term "parva" used in ancient Georgian).

A theft was punished by depriving stolen assets and several (triple, five-fold, seven-fold) taxes.

Following an agape charter by Shalva Kvenipneveli to the Largvisi monastery (1470) – "If he steals, he shall restore sevenfold."[54]

According to the Soviet Criminal Code of Georgia (Article 34), by confiscation of property, all the property or part of the personal property of a convicted person was gratuitously transferred to the state.[55]

---

47 *Borgers M.J., Moors J.A.,* Targeting the proceeds of crime: Bottlennecks in Iternational Cooperation, 15 Eur. J. Crime Crim. L. & Crim. Just., 2007, 1.

48 *Tumanishvili G., Jishkariani B., Shram E.,* Influence of European and International Law on Georgian Criminal Procedure Law, Tbilisi, 2019, 801 (in Georgian).

49 *Javakhishvili Iv.,* Writings in 12 Volumes, Vol. 7, Tbilisi, 1984, 225 (in Georgian).

50 *Javakhishvili Iv.,* Writings in 12 Volumes, Vol. 7, Tbilisi, 1984, 230-231 (in Georgian).

51 *Vacheishvili Al.,* Essays from the History of Georgian Law, vol. I, Tbilisi, 1946, 119 (in Georgian).

52 Ibid.

53 *Davitashvili G.,* Placing a Monument of Giorgi Brtskinvale (Comments), Tbilisi,2018, 69-70 (in Georgian).

54 *Dolidze I.,* Georgian Law Monuments, Vol. 2, Tbilisi, 1965, 142 (in Georgian).

55 Criminal Code of Georgia SSR, Tbilisi, 1977, 13, 28 (in Georgian).

Confiscation (deprivation of property) has originated in modern Georgian criminal law since 2000.[56] At first, it had a limited application. "Before December 28, 2005, until the amendments to the CRIMINAL CODE OF GEORGIA were made, the deprivation of the subject or means in a crime had not been a punishment and it had been applied only to two crimes.

These crimes are under Article 214 of the Criminal Code of Georgia (violation of customs rules) and Article 344 of the Criminal Code of Georgia (illegal crossing of the state border of Georgia)."[57]

"The law of December 28, 2005, changed Article 52 ("Property Confiscation") of the Criminal Code of Georgia and it became broader. It complies with the requirements of many international treaties regarding the confiscation of assets obtained through criminal activities or equal to its value."[58]

"The last amendment to Article 52 of the Criminal Code of Georgia was made on September 24, 2010. It was a terminological change to comply with the criminal procedure code of Georgia, in particular, the legislator removed the term 'suspect' [59] without changing the article.[60]

To examine the application of Article 52 of the Criminal Code of Georgia on organized transnational crime by common courts, all cases were analyzed.[61]

---

56 CRIMINAL CODE OF GEORGIA, Article 52, <https://matsne.gov.ge/ka/document/view/1720?publication=0> [06.08.2024].

57 *Tumanishvili G., Jishkariani B., Shrami E.,* Impact of European and International Law on Georgian Criminal Procedure Law, Tbilisi, 2019, 802 (in Georgian).

58 *Turava M.,* Criminal Law, General Part Review (8th Edition), Tbilisi, 2010, 293 (in Georgian).

59 *Tumanishvili G., Jishkariani B., Shrami E.,* Impact of European and International Law on Georgian Criminal Procedure Law, Tbilisi, 2019, 802 (in Georgian).

60 Criminal Code of Georgia, Article 52, <https://matsne.gov.ge/document/view/16426?publication=262> [06.08.2024].

61 Article 194 (Legalization of Illegal Income (money laundering) of the Criminal Code of Georgia 2021-2023 Verdicts: Verdict No1-1024/21 of September 08, 2021, of the Batumi City Court; Verdict No1-181/21 of November 01, 2021, of the Batumi City Court; Verdict No1-453/22 of 19 April 2022 of the Batumi City Court; Verdict No1-711/23 of the 30 May 2023 of the Batumi City Court; Verdict No1/328-23 of the Kutaisi City Court of 04 April 2023; Verdict No1/659-23 of July 06, 2023, of the Kutaisi City Court; Verdict No1/632-22 of 26 April 2023, of the Zugdidi District Court; Verdict No1/3934-21 of 29 October 2021, of the Tbilisi City Court; Verdict No1/1044-21 of November 10, 2021, of the Tbilisi City Court; Verdict No1/3944-20 of 11 March 2021, of the Tbilisi City Court; Verdict No1/4152-20 of the Tbilisi City Court of June 23, 2021; Verdict No1/996-21 of April 23, 2021; Verdict No1/4697-20 of the Tbilisi City Court of May 11, 2021; Verdict No1/4744-20 of 14 April 2021, of the Tbilisi City Court; Verdict No1/3611-21 of 23 August 2021, of the Tbilisi City Court; Verdict No1/4535-20 of 26 April 2021, of the Tbilisi City Court; Verdict No1/4280-21 of the Tbilisi City Court of October 11, 2021; Verdict No 1/4171-21 of October 01, 2021, of the Tbilisi City Court; Verdict No1/3434-21 of July 27, 2021, of the Tbilisi City Court; Verdict No1/4804-21 of May 02, 2022, of the Tbilisi City Court; Verdict No1/1434-22 of the Tbilisi City Court; Verdict No1/1233-22 of the Tbilisi City Court; Verdict No1/1233-22 of 20 June 2022, of the Tbilisi City Court; Verdict No1/696-21 of 26 April 2022, of the Tbilisi City Court, 1/5434-21 of 21 June 2022; Verdict No1/2181-21 of April 12, 2022, of the Tbilisi City Court; Verdict No1/1708-22 of 13 April 2022, of the Tbilisi City Court; Verdict No1/1832-22 of 20 July 2022, of the Tbilisi City Court; Verdict No1/4855-19 of 16 March 2022, of the Tbilisi City Court; Verdict No 1/3065-20 of September 08, 2022, of the Tbilisi City Court; Verdict No 1/3270-21 of February 14, 2022, of the Tbilisi City Court; Verdict No1/3631-22 of the Tbilisi City Court of July 11, 2022; Verdict No1/2638-22 of the Tbilisi City Court; Verdict No1/2638-22 of the Tbilisi City Court; Verdict No1/292-22 of 04 May 2022, of the Tbilisi City Court; Verdict No1/3845-21 of 25 March 2022, of the Tbilisi City Court; Verdict No1/2716-23 of

According to the verdict of the Tbilisi City Court of April 23, 2021, N.K. was convicted of fraud and money laundering of 17900 euros. The confiscation of property was not applied as an additional punishment.[62]

Following the verdict of the Tbilisi City Court of May 11, 2021, F.O.K. and others were convicted of fraud and money laundering of USD 134,208. The confiscation of property was not used as an additional punishment, but the accused was deprived of an apartment of 49.19 m² purchased for USD 10,200 in Tbilisi in a procedural confiscation.[63]

Based on the verdict of the Tbilisi City Court of July 27, 2021, F.O.K. and others were convicted of legalizing unsubstantiated revenue (money laundering) of GEL 619,839 and USD 669. Seven luxury cars purchased for $168,000 were deprived of additional sentences to disguise illegal revenue.[64]

Based on the verdict of the Tbilisi City Court of October 11, 2021, G.M. and others were convicted of fraud and money laundering of 700 300 euros and USD 40 802. Real estate of various values obtained through criminal activities was deprived as an additional punishment.[65]

As maintained by the verdict of the Tbilisi City Court of October 29, 2021, T.J. and others were convicted of fraud and money laundering of €48900. A vehicle as a proceeds of crime was deprived as an additional punishment.[66]

Following the verdict of the Tbilisi City Court on February 14, 2022, M.K. and others were convicted of fraud and money laundering of 73 995 euros and USD 13,100. No additional punishment was applied to deprive the property.[67]

According to the verdict of the Tbilisi City Court on March 16, 2022, N.G. was convicted of theft and money laundering of GEL 41,212. No additional punishment was used, but the court confiscated GEL 2118, GEL 72, and USD 277.90 in bank accounts.[68]

As claimed by the verdict of the Tbilisi City Court on March 25, 2022, F.N. and others were convicted of pseudo-entrepreneurship and GEL 1,268,036.6, USD 15,385,489.6, EUR 20,786,875, EUR 3,030 Swiss francs and 57 645 pounds of sterling. F.N. was deprived of various expensive real estate purchased through criminal activities.[69]

December 04, 2023, of the Tbilisi City Court; Verdict No1/2860-23 of the Tbilisi City Court; Verdict No1/2951-23 of 07 July 2023, of the Tbilisi City Court; Verdict No1/1578-23 of November 09, 2023, of the Tbilisi City Court; Verdict No1/1579-23 of 12 June 2023, of the Tbilisi City Court; Verdict No1/3114-23 of the Tbilisi City Court; Verdict No1/529-22 of December 27, 2023, of the Tbilisi City Court; 1/2476-22 of the Tbilisi City Court; Verdict No1b/2124-22 of the Tbilisi Court of Appeals of 16 March 2023; Verdict No1/3423-22 of February 13, 2023, of the Tbilisi City Court; Verdict No1/3555-22 of 14 September 2023, of the Tbilisi City Court; Verdict No1/3091-22 of October 06, 2023, of the Tbilisi City Court.

62 Verdict No 1/996-21 of April 23, 2021, of the Tbilisi City Court.

63 Verdict No 1/4697-20 of 11 May 2021, of the Tbilisi City Court.

64 Verdict No 1/3434-21 of July 27, 2021, of the Tbilisi City Court.

65 Verdict No 1/4280-21 of October 11, 2021, of the Tbilisi City Court.

66 Verdict No 1/3934-21 of October 29, 2021, of the Tbilisi City Court.

67 Verdict No 1/3270-21 of February 14, 2022, of the Tbilisi City Court.

68 Verdict No 1/4855-19 of 16 March 2022, of the Tbilisi City Court.

69 Verdict No 1/3845-21 of 25 March 2022, of the Tbilisi City Court.

Based on the verdict of the Tbilisi City Court of April 12, 2022, J.H. was convicted of fraud and money laundering of GEL 119,941.54, EUR 467 341,31, and USD 1528. J.H. was confiscated of various expensive cars purchased through criminal activities.[70]

Following the verdict of the Tbilisi City Court of May 04, 2022, M.O. and R.O. were convicted of fraud and money laundering of GEL 29 767.49. 7,700 GEL was deprived of GEL 7,700 obtained by some means contrary to law.[71]

According to the Tbilisi City Court verdict of May 23, 2022, J.A was convicted of money laundering of GEL 5,201.2, EUR 63 065 825.49, and EUR 88 132 376.82. The money generated by criminal activities was deprived of additional punishment for GEL 37,685.52, EUR 153,467.48, and USD 7,831,116.04.[72]

Based on the verdict of the Tbilisi City Court on May 31, 2022, N.A. and others were convicted of fraud for money laundering of USD 256,174. No additional punishment was applied to deprive the property. The amount of USD 60,000 and €29,450 was returned to the victims.[73]

According to the Tbilisi City Court verdict of July 20, 2022, M.G. was convicted of money laundering of 1 358 222,36. M.G. was deprived of various expensive cars purchased by criminal means.[74]

As claimed by the verdict of the Tbilisi City Court of September 08, 2022, V.L. was convicted of fraud and money laundering of USD 206,782.2. He was deprived of the real estate of various values acquired through criminal activities as an additional punishment.[75]

Following the verdict of the Tbilisi City Court of February 13, 2023, N.A. was convicted of fraud and money laundering of 5,460 Lari (GEL) and EUR 4041.14. Confiscation was not applied as an additional punishment.[76]

Following the March 16, 2023 verdict of the Tbilisi Court of Appeals, M.R. was convicted of fraud and money laundering of USD 4,005. The accused was not deprived of the property.[77]

According to the verdict of the Tbilisi City Court of June 12, 2023, A.K. and others were convicted for fraud and money laundering of GEL 314,173.45. Various expensive cars purchased by criminal means were also deprived of their sentences.[78]

Based on the verdict of the Tbilisi City Court of June 26, 2023, Sh.H. was convicted of money laundering of USD 3,610,434. Real estate of various value acquired through criminal means was confiscated as an additional punishment.[79]

---

70 Verdict No 1/2181-21 of 12 April 2022, of the Tbilisi City Court.
71 Verdict No 1/292-22 of May 04, 2022, of the Tbilisi City Court.
72 Verdict No 1/2638-22 of May 23, 2022, of the Tbilisi City Court.
73 Verdict No 1/1434-22 of the 31 May 2022, of the Tbilisi City Court.
74 Verdict No 1/1832-22 of the Tbilisi City Court, July 20, 2022.
75 Verdict No 1/3065-20 of the Tbilisi City Court, September 08, 2022.
76 Verdict No 1/3423-22 of the Tbilisi City Court, February 13, 2023.
77 Verdict No 1b/2124-22 of March 16, 2023, of the Tbilisi Court of Appeals.
78 Verdict No 1/1579-23 of 12 June 2023, of the Tbilisi City Court.
79 Verdict No 1/3114-23 of 26 June 2023, of the Tbilisi City Court.

As claimed by the verdict of the Tbilisi City Court of July 11, 2023, M.G. was convicted of fraud and money laundering of USD 12,500. No additional punishment was used to deprive the property.[80]

According to the Tbilisi City Court verdict of September 14, 2023, L.F. was convicted of fraud and money laundering of USD 24,180. The property was not confiscated as an additional punishment.[81]

Considering the verdict of the Tbilisi City Court of September 27, 2023, A. Kh and F.S. were convicted of fraud and money laundering of GEL 306,314. They were deprived of €5,080 and USD 68,195 as an additional sentence.[82]

Based on the verdict of the Tbilisi City Court of October 06, 2023, E.J. and EC were convicted of fraud and money laundering of GEL 1,898,880, EUR 39,550, and USD 9,000. They were confiscated money and real estate of various values as an additional punishment.[83]

According to the verdict of the Tbilisi City Court, December 04, 2023, Al.B. was convicted of money laundering of USD 102,000. Three real estates of different values purchased through criminal means were deprived as an additional punishment.[84]

7. Conclusion

The paper revealed that in the fight against crime, including transnational organized crime, the recovery, return, and confiscation of criminal assets is one of the most necessary and effective tools.

Only the traditional approach, limited to judging a person and even imposing a strict criminal sentence in the form of imprisonment for him/her, discourages the effectiveness of the fight against such a crime.

The criminal world should be sent a clear message that crime including organized transnational crime does not pay!

The study revealed that Article 52 of the Criminal Code of Georgia (confiscation of property) is a modern international experience and it is applied as an additional punishment by common courts, although judicial practice is scarce at this stage.

The institutional division in a centralized form, which periodically analyzes the effectiveness of the activities of the law enforcement agencies in the field of crime, including the scale of the property obtained through organized transnational crime, its discovery, return, and confiscation, does not exist at this stage and the Prosecutor's Office of Georgia shall perform this function.

The study found that the direction of return of criminal assets (Asset recovery) in international and individual states has already gained institutional experience.

There is a possibility of creating a unit equipped with the function of asset recovery in the system of the Prosecutor's Office of Georgia because the mentioned important legal mechanism is operatively compatible with it.

---

80 Verdict No 1/2476-22 of July 11, 2023, of the Tbilisi City Court.
81 Verdict No 1/3555-22 of September 14, 2023, of the Tbilisi City Court.
82 Verdict No 1/2860-23 of September 27, 2023, of the Tbilisi City Court.
83 Verdict No 1/3091-22 of October 06, 2023, of the Tbilisi City Court.
84 Verdict No 1/2716-23 of December 04, 2023, of the Tbilisi City Court.

It is essential to focus on the effective management of seized criminal assets (asset recovery). The institution should be established independently of law enforcement agencies where the seized criminal assets will be fully organized and made efforts to maintain the value of confiscated property to be used to compensate for the damage caused to the state, private sector, and citizens as a result of organized transnational crime.

Bibliography:

1. Constitution of Georgia, 24/08/1995.
2. Organic Law on Prosecutor's Office, 30/11/2018.
3. Criminal Code of Georgia, 24/08/1999.
4. Civil Code of Georgia, 26/06/1997.
5. Combating Organized Crime 2021-2024 National Strategy, 2, <https://matsne.gov.ge/ka/document/view/5256554?publication=0> [03.08.2024].
6. Prosecutor's Office of Georgia 2022-2027 Strategy, 37, <https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebis-strategia.pdf> [03.08.2024].
7. Order N19 of the Minister of Finance of Georgia of 26 January 2023; <https://matsne.gov.ge/ka/document/view/87634?publication=17> [05.08.2024]
8. *Vacheishvili Al.,* Essays from the History of Georgian Law, vol. I, Tbilisi, 1946, 119 (in Georgian).
9. *Dolidze I., (compiler.)* Georgian Law Monuments, vol. 2, Tbilisi, 1965, 142 (in Georgian).
10. *Ugrekhelidze M.,* Charged with Hazard Delicts, Tbilisi, 1982, 60 (in Georgian).
11. *Javakhishvili Iv.,* Writings in 12 Volumes, Vol. 7, Tbilisi, 1984, 225, 230-231 (in Georgian).
12. *Godziashvili I.,* Criminology, Tbilisi, 1998, 179 (in Georgian).
13. *Tsulaia Z.,* Criminology (General Part), Tbilisi, 2003, 224 (in Georgian).
14. *Avanesov G.A. (ed.),* Criminology, Tbilisi, 2007, 570 (in Georgian).
15. *Turava M.,* Criminal Law, General Part Review (8th ed.), Tbilisi, 2010, 293 (in Georgian).
16. *Shalikashvili M.,* Criminology, Tbilisi, 2011, 84 (in Georgian).
17. *Nachkebia G. (ed.),* Problems of Criminalization and Law Enforcement of Modern Manifestations of Organized Crime in Georgian Criminal Law, Tbilisi, 2012, 22.
18. *Demetrashvili A.,* Commentary: the Constitution of Georgia (Chapter Two), Tbilisi, 2013, 203 (in Georgian).
19. *Davitashvili G.,* Placing a Monument of Giorgi Brtskinvale (Comments), Tbilisi, 2018, 69-70 (in Georgian).
20. *Tumanishvili G., Jishkariani B., Shrami E. (eds.),* Influence of European and International Law on Georgian Criminal Procedure, Tbilisi, 2019, 800-801 (in Georgian).
21. *Loladze B., Pirtskhalashvili A.,* Basic Rights – Comment, Tbilisi, 2023, 497 (in Georgian).
22. *Shelley L.,* Transnational Organized Crime and Seized Assets: Moral Dilemmas Concerning the Disposition of the Fruits of Crime, 7 Maastricht J. Eur. & Comp. L., 2000, 35.
23. *Zagaris B.,* U.S. International cooperation against Transnational organized crime, 44 Wayne L. Rev., 1998, 1402.
24. *Ciopec F.,* Compatibility of Romanian legislation with the UN convention against transnational organized crime, 39 Zbornik Radova, 2005, 213.
25. *Orlovska N., Stepanova J.,* Confiscation of Proceeds and Property Related to Crimes: International standards and the ECHR practice, 10 Juridical Trib., 2020, 499-502.

26. *Borgers M.J., Moors J.A.,* Targeting the proceeds of crime: Bottlennecks in International Cooperation, 15 Eur. J. Crime Crim. L. & Crim. Just., 2007, 1.
27. *Ciklauri-Lammich E.,* Menschenraub, ein blühendes Gewerbe in der Kaukasusregion, Monatshefte für Osteuropäisches Recht, Hrsg. Dr. Günter Tontsch, Hamburg 2000, 2-9.
28. *Ciklauri-Lammich E.,* The Problem of Crime between Late Migrants from ISC in Germany, Georgian Lawyers, Tiflis 2001, 45-51.
29. *Ciklauri-Lammich E., Letizia P.,* Bekämpfung des ungesetzlichen Umsatzes und Konsums von Drogen auf dem Gebiet der russischen Föderation, in Prawo i Politika, St. Petersburg 2002, 29-34.
30. Internazionale Organisierte Kriminalitat (Hrsg. Prof. Dr. Ulrich Sieber. Carl Heymanss Verlag KG), Koln, Berlin, Bonn, Munchen, 1996, 6-8.
31. White paper on best practices in Asset Recovery, 1, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf > [05.08.2024].
32. The EU Strategy to tackle Organised Crime 2021-2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0170&qid=1632306192409> [03.08.2024].
33. UNODC about transnational organized crime <https://www.unodc.org/toc/en/crimes/organized-crime.html> [03.08.2024].
34. Global Financial Integrity about transnational organized crime <https://gfintegrity.org/issue/transnational-crime> [03.08.2024].
35. White paper on transnational organized crime (2015) 7, <https://edoc.coe.int/en/organised-crime/6837-white-paper-on-transnational-organised-crime.html > [24.01.2023].
36. EU SOCTA 2021 – Serious and Organized Crime Assessment Report, <https://www.europol.europa.eu/cms/sites/default/files/documents/socta2021_1.pdf>[03.08.2024].
37. Mapping the Risk of Serious and Organized Crime Infiltrating Legitimate Businesses, <https://op.europa.eu/en/publication-detail/-/publication/ab3534a2-87a0-11eb-ac4c-01aa75ed71a1/language-en> [24.01.2023].
38. The EU Strategy to tackle Organised Crime 2021-2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0170&qid=1632306192409> [03.08.2024].
39. EU SOCTA 2021 – serious and organized crime assessment report, <https://www.europol.europa.eu/cms/sites/default/files/documents/socta2021_1.pdf> [03.08.2024].
40. Camden Asset Recovery Inter-Agency Network (Carin Manual), 5, <https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/seguridad-ciudadana/White-paper-on-best-practices-in-asset-recovery-NIPO-126-12-071-X.pdf> [05.08.2024].
41. Directive (EU) 2024/1260 of the European Parliament and of the Council on asset recovery and confiscation <https://eur-lex.europa.eu/eli/dir/2024/1260/oj> [05.08.2024].
42. Decision No 1/2/384 of the Constitutional Court of Georgia of 02 July 2007, II-2, <https://constcourt.ge/ka/judicial-acts?legal=291> [03.8.2024].
43. Verdict No 1-1024/21 of the Batumi City Court of September 08, 2021.
44. Verdict No 1-181/21 of November 01, 2021, of the Batumi City Court.
45. Verdict No 1-453/22 of April 19, 2022, of the Batumi City Court.
46. Verdict No 1-711/23 of May 30, 2023, of the Batumi City Court.
47. Verdict No 1/328-23 of April 04, 2023, of the Kutaisi City Court.

48. Verdict No 1/659-23 of July 06, 2023, of the Kutaisi City Court,
49. Verdict No 1/632-22 of 26 April 2023 of the Zugdidi District Court.
50. Verdict No 1/3934-21 of October 29, 2021, of the Tbilisi City Court.
51. Verdict No 1/1044-21 of November 10, 2021, of the Tbilisi City Court.
52. Verdict No 1/3944-20 of 11 March 2021 of the Tbilisi City Court.
53. Verdict No 1/4152-20 of June 08, 2021, of the Tbilisi City Court.
54. Verdict No 1/996-21 of April 23, 2021, of the Tbilisi City Court.
55. Verdict No 1/4697-20 of 11 May 2021, of the Tbilisi City Court.
56. Verdict No 1/4744-20 of 14 April 2021, of the Tbilisi City Court.
57. Verdict No 1/3611-21 of August 23, 2021, of the Tbilisi City Court.
58. Verdict No 1/4535-20 of 26 April 2021, of the Tbilisi City Court.
59. Verdict No 1/4280-21 of October 11, 2021, of the Tbilisi City Court.
60. Verdict No 1/4171-21 of October 01, 2021, of the Tbilisi City Court.
61. Verdict No 1/3434-21 of July 27, 2021, of the Tbilisi City Court.
62. Verdict No 1/4804-21 of May 02, 2022, of the Tbilisi City Court.
63. Verdict No 1/1434-22 of the 31 May 2022, of the Tbilisi City Court.
64. Verdict No 1/1233-22 of 20 June 2022, of the Tbilisi City Court.
65. Verdict No 1/696-21 of 26 April 2022, of the Tbilisi City Court.
66. Verdict No 1/5434-21 of June 21, 2022, of the Tbilisi City Court.
67. Verdict No 1/2181-21 of 12 April 2022, of the Tbilisi City Court.
68. Verdict No 1/1708-22 of 13 April 2022, of the Tbilisi City Court.
69. Verdict No 1/1832-22 of July 20, 2022, of the Tbilisi City Court.
70. Verdict No 1/4855-19 of 16 March 2022, of the Tbilisi City Court.
71. Verdict No 1/3065-20 of September 08, 2022, of the Tbilisi City Court.
72. Verdict No 1/3270-21 of February 14, 2022, of the Tbilisi City Court.
73. Verdict No 1/3631-22 of July 11, 2022, of the Tbilisi City Court.
74. Verdict No 1/2638-22 of May 23, 2022, of the Tbilisi City Court.
75. Verdict No 1/292-22 of May 04, 2022, of the Tbilisi City Court.
76. Verdict No 1/3845-21 of 25 March 2022, of the Tbilisi City Court.
77. Verdict No 1/2716-23 of December 04, 2023, of the Tbilisi City Court.
78. Verdict No 1/2860-23 of September 27, 2023, of the Tbilisi City Court.
79. Verdict No 1/2951-23 of July 07, 2023, of the Tbilisi City Court.
80. Verdict No 1/1578-23 of November 09, 2023, of the Tbilisi City Court.
81. Verdict No 1/1579-23 of 12 June 2023, of the Tbilisi City Court.
82. Verdict No 1/3114-23 of 26 June 2023 of the Tbilisi City Court.
83. Verdict No 1/529-22 of December 27, 2023, of the Tbilisi City Court.
84. Verdict No 1/2476-22 of July 11, 2023, of the Tbilisi City Court.
85. Verdict No 1b/2124-22 of March 16, 2023, of the Tbilisi Court of Appeals.
86. Verdict No 1/3423-22 of February 13, 2023, of the Tbilisi City Court.
87. Verdict No 1/3555-22 of September 14, 2023, of the Tbilisi City Court.
88. Verdict No 1/3091-22 of October 06, 2023, of the Tbilisi City Court.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8330

Levan Alapishvili*

Actual Issues of Reform of Georgian National Security Sector's Accountability and Oversight System

By its nature and specific obligations, the security assurance system contradicts external control, oversight and accountability principles, because its significant part and decisions are related to secret activities and documents. Therefore, in the democratic governance of national security and oversight of the activities of security institutions, the role of the Parliament, as the highest standing political authority, acting for the interests of the people is extremely important. The Parliament, as the highest legislator sets scopes for the activity, accountability and control of security institutions.

Efficient parliamentary oversight increases the quality of accountability of security institutions and protects the society from arbitrary, inappropriate or repressive governance.

A democratic governance system requires efficient oversight of secret activities. This objective can be achieved, first of all, via independent, powerful institutions and the system that provides oversight of personal data collection. The oversight is not limited to parliamentary oversight only, the development of governmental, judicial and independent institutions is not less important.

This Paper presents experience and analysis of the development of the oversight system over the activities of the security institutions of Georgia and other democratic countries.

The Paper provides the comparative analysis of experiences of Georgian and foreign countries about the oversight of the activities of security institutions and personal data protection in secret activities. The Paper puts some issues for discussion concerning the actual matters of the reform of the control system over the activities of security institutions, providing the considerations about establishing new, independent oversight institutions.

Keywords: *security, personal data, secret activity, counter-intelligence activities, accountability parliamentary oversight*

1. Introduction

Effectively performing and accountable national security system which corresponds to democratic standards is extremely important for state governance. This ensures the protection of society from various threats and its stable and peaceful development.

* PhD student of Ivane Javakhishvili Tbilisi State University Faculty of Law, Associate Professor of East European University, Managing partner of Lexica, Attorney at law.

In their nature, the security system institutions, come into conflict with the freedoms of individuals and open society. This system, in its essence is against external control, oversight and accountability principles. Nonetheless, the Parliament, as the highest political authority, plays the most decisive role in the democratic governance of national security, law enforcement and oversight of security institutions and their activities. As the highest legislator, it sets frames for the activities, accountability, and control of security institutions[1].

Effective parliamentary oversight increases the quality of accountability of security institutions and protects society from arbitrar, inappropriate or repressive governance[2].

Over the last 20 years, the reform of national security system and institutions has become extremely important for Georgia. The security system reform and strengthening of accountability is one of the requirements for the integration of Georgia into Euro-Atlantic structures[3].

In Georgia, for a long time, all police, investigation and special service functions were under the roof of the Ministry of Internal Affairs of Georgia, which made it impossible to perform effective oversight of the Ministry. After the reform, even though the security service and counter-intelligence functions were split into different institutions, but the State Security Service still retains operative and investigative competencies. Having these functions under one institution, regardless of their distinguished objectives, made it impossible to perform effective control over the activities of the Service and to check the quality of their accountability.

For the protection of human rights, in particular, personal data whilst performing activities by the security services, a special legislative framework and State Inspector's Office was established. At a later stage, for political purposes, the Parliamentarian majority changed the law (on the State Inspector's Service) without giving justified and politically neutral arguments, annulled the State Inspector's Service and dismissed the State Inspector. As it was confirmed later by the Constitutional Court of Georgia, this decision contradicted the Constitution of Georgia[4]. This fact shows how problematic the decisions made with political expediency in the field of security in transitional democracies, can be for the establishment of national interests and democratic standards. It is important to create an oversight system that will minimize political party-driven decisions and the influence on the activities of security institutions, on their control and accountability.

---

1 *Wills A.,* Democratic and effective oversight of national security services, issue paper, Council of Europe, 2015, 7-9.

2 *Alapishvili L.,* Problems of parliamentary oversight on secret activities of institutes of national security accurance system of Georgia, Journal of Law, #1, 2023, 206 (in Georgian).

3 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*, COM(2022) 405 final, 17.6.2022., also, 2023 Communication on EU Enlargement Policy (extract about Georgia), 08.11.2023, <https://www.eeas.europa.eu/delegations/georgia/2023-communication-eu-enlargement-policy-extract-about-georgia_en?s=221> [02.12.2024].and 9 steps to moving the negotiations stage for EU membership: parliamentary control, International Transparency Georgia, 23.02.2024, <https://www.transparency.ge/ge/blog/9-nabiji-evrokavshiris-cevrobaze-molaparakebebis-etapze-gadasasvlelad-saparlamento-kontroli> [02.12.2024].

4 Decision No. 1/9/1673,1681 of the Constitutional Court of Georgia on November 17, 2022 in the case "Londa Toloraya and the Public Defender of Georgia against the Parliament of Georgia".

For developing the security sector oversight system of modern democratic standards, it is important to study the current system as well as to look at the international experience.

2. National Security Sector of Georgia, Systemic Challenges in Accountability and Oversight

The national security sector of Georgia composes the highest level institutions of national security governance: National Defense Council of Georgia, State Security and Crisis Management Council, and governmental level institutions: Ministry of Internal Affairs of Georgia, Ministry of Defense of Georgia, National Security Service of Georgia, Intelligence Service, Operative-Technical Agency, Special State Security Service and Special Penitentiary Service.

Highest-level institutions of national security governance mostly have an advisory function and their mandate includes coordination of the activities of the security system and high-level decision-making in times of crisis[5].

The mandate of governmental level institutions in charge of national security system is security assurance and to lead the activities of all these institutions with secret methods and means that are related to intervention in human rights.

Governmental level national security institutions are directly accountable to the Prime Minister and the Government of Georgia, as well as to the Parliament of Georgia. These institutions submit annual activity reports to the Prime Minister of Georgia and the Parliament of Georgia. In addition, the head of the relevant security institution presents the annual report of the activity to the parliamentary committee and answers the report-related questions at the plenary session.

The Parliamentary oversight over the national security system covers legislative, political and special control.[6]

The Parliament provides legislative control via its sectoral committees (defense and security committee, committee of legal affairs, human rights committee) and controls the security institutions' performances compliance to security and human rights legislation, requests necessary information and may initiate the legislative amendments on the basis of the analysis.

The political control over the security sector within the scope of parliamentary oversight is performed via the questions asked by MPs and the interpellation mechanism. Answering the question of the Member of the Parliament is mandatory for the security sector officials who are accountable to the Parliament. Interpellation is the obligation to answer the question asked by MPs to the security sector officials who are accountable to the Parliament, which means answering the questions asked at the plenary session of the Parliament.

Special control of parliamentary oversight is performed via the Trust Group of the Parliament of Georgia, which is composed of 5 members including the representatives of the parliamentary opposition. The Trust Group provides oversight of the secret activities and special programs in the area of national security and defense of Georgia.

---

5 Law of Georgia "On the Rules of Planning and Coordination of National Security Policy", Legislative Herald of Georgia, 03/04/2015, Article 1, Article 19[1].

6 Regulation of the Parliament of Georgia, Georgian Legislative Herald, 14/12/2018, article 156, 159

Independent, non-political oversight over the national security sector of Georgia and the activities and decisions of its institutions is performed by the institutions established by the Constitution (Constitutional Court, Common Courts, Public Defender, Public Audit Service, Prosecutor's Office) and the Parliament (Personal Data Protection Inspector, Special Investigation Service).

The constitutional Court of Georgia checks the compliance of normative decisions of the Georgian Parliament, Government and security sector with the Constitution and the Common Courts look at the compliance of normative acts, rulings and actions of these institutions with the Law. As for the control of security sector institutions in terms of their secret activities, personal data acquisition and use, it is the competence of Supreme Court of Georgia.

The control of financial and management issues of security institutions and their programs is within the competence of the State Audit Service, and control over the protection of human rights is the competence of the Public Defender.

The Prosecutor's Office is a constitutional institution that conducts investigations and oversees the legality of the decisions of security sector institutions in the course of operative-search activities. The intelligence and counter-intelligence activities of the security institutions and the decisions made are not subject to the supervision of the Prosecutor's office.[7]

The control of the collection and protection of personal data of individuals fall under the competence of the Personal Data Protection Inspector[8]. Oversight of personal data protection and processing as well as secret surveillance conducted by security institutions is also the competence of the Personal Data Protection Inspector.[9] The mandate of the Personal Data Protection Inspector does not include oversight of compliance of processing personal data by security sector institutions within the scope of intelligence activities.

The control of compliance of security sector institutions and the activities of staff is carried out by a Special Investigation Service, institution independent from the government.

Parliamentary oversight of the security system is weak and ineffective. [10] The special instrument of the Parliament – Trust Group, its creation and activities are managed by narrow political expediency of the political party and not by the interests of national security and parliamentary democracy. Pluralistic participation is not provided in the Trust Group and the opposition mostly has limited access to secret information.

Lack of effective mechanisms of oversight of non-investigative secret activities and operations of the security institutions is the essential weakness of the oversight of national security accurance system of Georgia.

---

7 Law of Georgia "On Counter-Intelligence Activities", Legislative Herald of Georgia, 11/11/2005, Chapter 5.

8 Law of Georgia "On Personal Data Protection", Legislative Herald of Georgia, 16/01/2012, Article 54, Criminal Procedure Code of Georgia, Legislative Gazette of Georgia, 09/10/2009, Article 1433, Law of Georgia "On Operative-Search Activities" , Legislative Herald of Georgia, 30/04/1999, Article 5.

9 Law of Georgia "On Personal Data Protection", Legislative Herald of Georgia, 16/01/2012, Article 54, Criminal Procedure Code of Georgia, Legislative Herald of Georgia, 09/10/2009, Article $143^{3,}$ Law of Georgia "On Operative-Search Activities", Legislative Herald of Georgia, 30/04/1999, Article 5

10 *Sajaia L., Verdzeuli S., M. Chikhladze G., Tatanashvili T., Topuria G.,* Security Service Reform in Georgia: Results and Challenges, Tbilisi, 2018, 48, 68 (in Georgian).

3. International Practice of National Security System Accountability and Oversight

The latest wave of reforms in the oversight system of security services was mainly due to systemic problems related to exaggeration of power in secret activities of security services, abuse of power, illegal secret surveillance and use of security services for political reasons. The experience of the countries provided below can also be helpful for the reforms in the Georgian security system oversight.

Canada

The reform of Canadian security system was prompted by overreaching decisions and intelligence activities of the powerful institution responsible for Canada's internal security – the Royal Canadian Mounted Police (RCMP) [11], which led to increased public concern and multiple investigations[12]. The prime direction of the reform was the systemic separation of the police and limitation of its powers to civilian police mandate and removal of intelligence and other special functions. The creation of a legal framework for internal and external oversight of the police and its activities was also one of the important directions of the reform[13].

Within the framework of the reform, the law on Security Intelligence Service of Canada led to establishing the Intelligence Service, which was granted authority of information collection/processing as part of intelligence activity. Oversight of the Service meant authorization of its decisions by the Chief Prosecutor.

Within the reform of the Canadian security sector, the scope of oversight over the security sector of Canada was extended and National Security and Intelligence Review Agency (NSIRA) was created.[14] The authority of the newly established agency covers governmental oversight of the activities of all institutions with security and intelligence functions. The Agency has an independent right to define which institution shall be subject to inspection. It also has the power to review intelligence activities without any limits and to participate in obtaining the court warrant for secret activities.

The Chief Operational Officer of national security and Intelligence Review Agency, in consultation with NSIRA members, identifies the need for an operation or special measure and refers to the court for a warrant. Before referring to the court, the final step of internal control is to discuss the need for operation or measure and the court warrant and to obtain the approval of the Minister of Public Security.

The members of the Agency are appointed by the Prime Minister of Canada in consultation with the leadership of the Parliament. As a result of the review, the agency submits reports and recommendations to the Prime Minister of Canada and to the ministers whose governance system includes the security institution, activities of which were subject to monitoring. The report sent by the

11 <https://www.rcmp-grc.gc.ca/en/about-rcmp> [02.12.2024].

12 *Barker C., Petrie C., Dawson J., Godec S., Porteous H., Purser P.,* Oversight of intelligence agencies: a comparison of the 'Five Eyes' nations, Research Paper, 2017, 23.

13 Ibid, 25.

14 <https://nsira-ossnr.gc.ca/en/about-nsira/> [02.12.2024].

Agency to the Prime Minister of Canada is subject to submission by the Prime Minister to the Parliament.

External oversight of the Security System of Canada is provided by National Security and Intelligence Committee of Parliamentarians (NSICOP)[15]. The Committee has the following authorities: identifying political, regulatory, administrative and financial scopes for the security sector and controlling their performance[16].

NSICOP Committee is mainly in charge of two types of oversight: oversight of the regulatory framework and oversight of the activities. Moreover, the Committee may review any issues related to national security and intelligence requested by the Minister of the Kingdom. This type of authority of the Committee is called referral oversight.

Oversight of the regulatory framework covers the review, supervision and changes of the legislative, regulatory and financial framework of national security and intelligence.

The mandate for the activity oversight involves the oversight by a committee of Parliament Members of any activities carried out by a national security or intelligence institution.

The Committee does not look at or investigate the individual complaints submitted against national security or intelligence institutions. However, within the competence of its own mandate, if the facts of human rights violation are detected, the Committee will refer the case to an authorized Minister and Prosecutor General for further action.

Germany

In Germany, the intelligence services have been provided by the Constitution Protection Service of Germany (Bundesamt fur Verfassungsschutz, BfV) and Military Counter-Intelligence Service (Militaerischer Abschirmdienst, MAD) since 1950. Security institutions, in their current form, took a start from 1956, when Federal Intelligence Service BND was established.

The key competence of BND is to manage the external intelligence activity. It is accountable to the Minister of Special Affairs. The competence of the Constitution Protection Service is a counter-intelligence activity internally, in the country and it reports to the Minister of Interior. The mandate of the Military Counter-Intelligence Service involves counter-intelligence function and provision of the internal security within the military powers. The latter is accountable to the Minister of Defense[17].

The coordination and governmental control function of the security institutions of Germany belongs to the head of the Federal Chancellery.

As an additional mechanism of control of the security sector activities, the Independent Control Council (Unabhängige Kontrollrat, UKRat)[18] was established in 2021. The Council consists of 6 members, selected by the Parliamentary (Bundestag) Oversight Committee and appointed by the President of Germany. The Council has two main competencies: legal and administrative. Legal

---

15 <https://nsicop-cpsnr.ca/about-a-propos-de-nous-en.html> [02.12.2024].

16 National Security and Intelligence Committee of Parliamentarians Act, S.C. 2017, c. 15, art.8 <https://laws-lois.justice.gc.ca/eng/acts/N-16.6/FullText.html> [02.12.2024].

17 *Ruckerbauer C.,* Legal and Oversight Gaps in Germany's Military Intelligence, June 26, 2024, <https://aboutintel.eu/germanys-military-intelligence/> [02.12.2024].

18 <https://ukrat.de/DE/Home/home_node.html> [02.12.2024].

competence refers to the advance control of secret measures and administrative competence to retrospective control. The Council shall submit a report to the German Parliament, particularly, to its Oversight Committee. The report shall describe the secret surveillance measures implemented by German security sector institutions in the past year, justifying their reasonability and legal compliance.

Parliamentary oversight over the German Security Sector is provided via a few sectoral and special committees and groups. The key parliamentary institutions carrying out parliamentary oversight over the German security sector are the Parliamentary Control Council (Parlamentarische Kontrollgremium, PKGr), G-10 Commission of Parliamentary Control (Parliamentary Control Commission, PKK) and Budgetary Secret Committee Trust Group.[19]

Parliamentary Oversight Council (PKGr) provides control over the activity of security services.[20] The Council has the right to request detailed information from the Federal Government about the general activities of intelligence services and special operations. At the beginning, to reduce the political influence, the Council did not have a permanent chairperson, but the Council members carried out this authority for 6-month periods.

G-10 Commission supervises the necessity for restricting confidentiality of communication, secret surveillance and control and permits in compliance with article 10 of the Main Law/Constitution of Germany (protection of the free democratic order, state security). The most important authority of the Commission is the decision on termination of the ongoing secret action or secret surveillance initiated by the security service. The Commission members are selected by the Parliamentary Oversight Council. [21]

The Trust Group is formed in the Budget Committee of the German Bundestag, from members of this committee, and its mandate involves budgetary control of programs and activities of security sector institutions, reviewing and approving the draft budget, and controlling the progress and spending of approved budgets and programs.[22]

Parliamentary oversight institutions over Germany's security sector have unlimited powers to receive secret information, inspect security institutions and interrogate personnel.

The Netherlands

The Netherlands is one of the first countries to reform its security and oversight system for the provision of human rights protection in secret activities of security services. [23] As a result of legislative changes, in 2002, the Committee of Oversight of Intelligence and Security Services (Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten, CTIVD)[24] was established.

CTIVD Committee, in terms of its independence is an unique and original system. The Committee is composed of 4 members out of which one member is the head of the Compliance

[19] <https://www.bundestag.de/en/committees/bodies/scrutiny/scrutiny-198586> [02.12.2024].

[20] <https://www.bundestag.de/webarchiv/Ausschuesse/ausschuesse18/gremien18/pkgr> [02.12.2024].

[21] <https://www.bundestag.de/webarchiv/Ausschuesse/ausschuesse18/gremien18/g10> [02.12.2024].

[22] <https://www.verfassungsschutz.de/EN/about-us/mission-and-working-methods/supervision-and-oversight/supervision-and-oversight_article.html?nn=1021058#Start> [02.12.2024].

[23] *Eijkman Q., Van Eijk N.,Van Schaik R.,* Dutch National Security Reform Under Review: Sufficient Checks and Balances in the Intelligence and Security Services Act 2017?, 2018, 11, 35-40.

[24] <https://english.ctivd.nl/about-ctivd> [02.12.2024].

Review Department and the remaining 3 members are the members of the Oversight Department. The Chair of CTIVD Committee is also the Chair of the Oversight Department. The Compliance Review Department of the Committee has three members.

CTIVD committee members are appointed by the King's decree, and the ministers are also involved in the process. The selection of the candidate for membership of the committee is carried out collegially: by the Vice President of the State Council, the Chairman of the Supreme Court and the Ombudsman. The selected candidates are called to the House of Representatives of the Dutch Parliament. After interviewing the nominated candidates, the Internal Affairs Committee of the House of Representatives selects and presents to the House of Representatives 3 candidates for committee membership. The House of Representatives shall decide the issue of candidates for membership by voting and forward the list of supported candidates to the Ministers of General Affairs, Royal and Home Affairs and Defense. Ministers have to choose the candidate for membership from a list supported by the House of Representatives and submit to the King for final appointment. [25] The term of office of CTIVD committee members is 6 years.

As it may seen, essentially, the Committee consists of 7 members, however, in order to separate the Committee and its departments and to provide independence, the Dutch legislators justified such legislative solution.

CTIVD Committee, in accordance with its functions, consists of two departments. They are: the Oversight Department and the Complaint Review Department.

The competence of the Oversight Department of CTIVD involves oversight of legal compliance of the activities of the Dutch security institutions, General Intelligence and Security Service (AIVD) and Military Intelligence and Security Service (MIVD) and the competence of the grievance department is to review the complaints and reports about the inadequate actions of General Intelligence and Security Service (AIVD) and Military Intelligence and Security Service. [26]

The Independent Authority providing oversight of secret and investigative activities of security institutions is the Oversight Committee of Power Abuse (Toetsingscommissie Inzet Bevoegdheden, TIB).[27] The committee consists of three members and the members have deputies. The Committee activity is supported by the Secretariat. By law, two members of the Committee shall be the judges. The committee is institutionally independent from all branches of the Dutch government, although the presence of judges in its structure makes this body a quasi-judicial institution.

To ensure the independence of TIB Committee, the recruitment procedure for members is similar to the recruitment procedure for CTIVD Committee members. TIB Committee members' term of office is 6 years. Same person can be appointed as a member for two terms.

The Committee is the body authorizing security institutions for computer extraction of data, DNA research, obtaining information from telecommunications companies, and targeted or general secret listening of telecommunications facilities. The security institution applies for initial authorization to the competent Minister (Minister of Home and Royal Affairs or Defence) and after

---

25 <https://english.ctivd.nl/about-ctivd/members-and-staff> [02.12.2024].

26 Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023, 46.

27 <https://www.tib-ivd.nl/> [02.12.2024].

obtaining the Minister's permission, the matter is reviewed by the TIB Committee[28]. The committee verifies the legal compliance of the minister's approvall from the point of view of necessity, proportionality, subsidiarity and purpose and makes a binding decision to be implemented. Only after the final positive decision of the Committee can the security institution carry out an authorized operation.

Further oversight of the activities or operations authorized by TIB Committee, during their proceeding or after their completion is provided by CTIVD Committee.

CTIVD Committee and TIB Committee draft and submit annual reports about the activities and results in the areas under their mandate.

There is a special Intelligence and Security Services Committee in the House of Representatives for parliamentary oversight of the activities of Dutch security institutions. The Committee consists of the leaders of 5 largest political groups represented in the House. In addition, the House of Representatives may appoint 2 additional members from the leaders of other parliamentary groups on the recommendation of the Committee. Committee meetings are closed and kept confidential because the members have access to secret information provided by security institutions and ministers. Apart from the general oversight of security institutions, the Committee has the right to review and respond to violations identified by the Grievance Department of the CTIVD Committee. The committee shall submit annual, public reports to the House of Representatives.

Denmark

The reform of the oversight system of the activities of Danish security institutions began in 2014. Along with judicial, parliamentary and governmental oversight, it was decided to create an independent institution – The Danish Intelligence Oversight Board, TET.[29] Authorization of the secret activities of Danish security institutions is the competence of the Court, however, the oversight of other issues is provided by the Board[30].

The Danish Intelligence Oversight Board is composed of five members who are appointed by the Minister of Justice following consultation with the Minister of Defence and the Parliamentary Committee of Intelligence Services. The chairman, who must be a High Court judge, is selected by the Presidents of the Danish Eastern and Western High Courts within their discrete right. The candidate selected by the Presidents of High Courts is appointed by the Minister of Justice to the position of the Board member and the chairperson.

The Board oversees the process of interception of communications, protection of personal data and data analysis, disclosure and deletion of information by security institutions. The Board's mandate includes oversight of the process of obtaining, storing and processing information about air flight passengers by security institutions.

---

28 Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023, 46.

29 <https://www.tet.dk/the-oversight-board/?lang=en> [02.12.2024].

30 Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023, 39.

The Intelligence Oversight Board of Denmark has an investigative competence too and may study the legal compliance of information collection and ownership matters by security institutions on the ground of application submitted by physical or legal entities.

The Intelligence Oversight Board of Denmark (TET) may require Security Sector institutions to delete information under their possession. The Board is also entitled to present its considerations to the security institutions about the problems detected in their activities and offer recommendations for their solution. The information about the Board's recommendations is also sent to the Ministers of Justice and Defense. Where the security institution disagrees with the Board, it has to provide arguments to the Board and respectively, to the Minister of Defense or Justice for the decision. If the Minister does not share the Board's views, the issue will be referred to the Committee of Intelligence Services of Danish Parliament.

Finland

The reform of security sector institutions of Finland led to establishing of the Intelligence Oversight Committee (Tiedusteluvalvontavaliokunta, TiV)[31] with special functions in the Parliament, on the one hand and to creating an independent Intelligence Ombudsman Institute (Tiedusteluvalvontavaltuutetun, TVV),[32] on the other hand.

The Intelligence Oversight Committee oversees the operations of civil and military intelligence, the progress of secret surveillance, ongoing secret activities and completed operations.

The committee supervises (a) the appropriate implementation and expediency of the intelligence activities, (b) controls and evaluates the priorities of the intelligence activities, (c) monitors and promotes the exercising of basic and human rights in the intelligence activities and (d) prepares the reports. The Committee prepares and accomplishes the conclusions and reports drafted by the Intelligence Ombudsman within the scope of its oversight function.

The Intelligence Oversight Committee is structured with the Members of the Finnish Parliament with 11 permanent and 2 substitute members.

When a Member of Parliament is proposed as a member or deputy member of the Intelligence Oversight Committee, he or she shall request the Data Protection Ombudsman to check if there is operative information and records in the operative database of the Finish Security Service on the MP in question. The Data Protection Ombudsman informs the requesting MP, the chair of the MP's parliamentary group and the Secretary-General of the Parliament about his or her findings regarding the existence of data concerning the MP in the information system. The decision about appointing the candidate is made only after receiving the information.

Warrant for secret surveillance of the security sector institutions is the competence of the Court, however, oversight of such ongoing operations and activities is also the competence of an independent institute – the Intelligence Ombudsman. The Intelligence Ombudsman, following the consultation with the Intelligence Oversight Committee of the Parliament is appointed by the Finnish Government for 5-

31 <https://www.eduskunta.fi/EN/valiokunnat/tiedusteluvalvontavaliokunta/Pages/default.aspx>[02.12.2024].

32 <https://tiedusteluvalvonta.fi/en/home> [02.12.2024].

year term of office. The Finnish Government also appoints the chief specialist in consultation with the Intelligence Oversight Committee who may replace the Intelligence Ombudsman when s/he is absent.

The Intelligence Ombudsman oversees the legal compliance of intelligence information collection methods and use of this information as well as the legality of other intelligence operations managed by security sector institutions of Finland.

France

France began the reformation of its oversight system of security institutions in 2007.[33]

In 2007, for the purposes of ensuring parliamentary oversight of the security sector activities, the French legislature passed a law and created the Parliamentary Delegation of Intelligence (Délégation Parlementaire au Renseignement, DPR).[34] The Delegation is composed of four representatives from both Houses of the Parliament, among whom are the chairs of the houses of internal security and Defense Committees. Other members of the Delegation are selected by the Presidents of Houses of French Parliament from MPs in consideration of the pluralist representation principle.

DPR provides parliamentary oversight over secret, secret and intelligence activities. Herewith, DPR exercises control over the ongoing security matters of security institutions, their activities and challenges related to secret activities. DPR mandate involves the authority to audit the intelligence and security institutions' budgets. DPR has unrestricted access to any information of the security institutions.

Oversight of French Security Institutions is provided by National Oversight Commission for Intelligence-Gathering Techniques, an institution that is independent from the Government and the Parliament (La Commission Nationale de Contrôle des Techniques de Renseignement, CNCTR).[35] In France, secret listening of security institutions is controlled by the court, however, the Commission has to justify the need and legality of oversight. The Commission control means ex-ante inspection and authorization of secret listening and issuing approval for the executive institute/Ministry. Only after that, the case is referred to the court. The latter cheks the legal compliance, justification and proportionality.

CNCTR verifies whether the intelligence-gathering techniques implemented within the operational chain for collecting and exploiting information are used in strict compliance with legislation. As a "reliable third party'', it provides democratic and neutral control of the intelligence activity. The Commission reports on its findings to **Parliament** and the **public**, except for the information related to intelligence methods.

The Commission is composed of 9 members. To ensure the independence of the Commission and to balance public governance, **two deputies** and **two senators** are selected from Parliament

---

33 Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023, 19.

34 <https://www.assemblee-nationale.fr/dyn/16/organes/delegations-comites-offices/delegation-renseignement> [02.12.2024].

35 <https://www.cnctr.fr/en>, [02.12.2024].

Chambers and appointed by the President of the respective chambers. Two members are selected from the State Board and appointed by the Vice-President. Two judges of the Cassation Court of France are appointed by the President and one member who has to be the Communications specialist is appointed by the President of the Republic on the proposal of the President of the French Telecommunications Regulatory Authority.

The term of office for members is **six years**. However, the term of office for CNCTR members presented by the Parliament is limited and MPs are solely appointed for the duration of their term of office within their relevant chamber (five years).

Where the relevant security institution disagrees with the negative conclusion of the Commission on the use of intelligence technique or operation, the matter will be referred to the Prime Minister of France and if the Prime Minister agrees with the institution's position, the Commission will transfer the issue to the State Council of France (High Authority authorized to provide for the law in governance) for final decision.

Belgium

In the process of reforming the oversight system for security sector institutions, Belgium created an interesting and efficient system.[36]

Parliamentary oversight of the security sector is carried out by the Intelligence Monitoring Committee of the Lower Chamber of the Parliament. The mandate of the Intelligence Monitoring Committee of the lower Chamber of the Belgian Parliament, together with the general oversight of the activities of the security sector institutions, includes the review of the reports of the Standing Committee for Oversight of Intelligence Institutions (Vast Comité van Toezicht op de inlichtingen-en veiligheidsdiensten), which has an independent, quasi-judicial and investigative function on the security sector and making decisions on policy or legislative issues. [37]

Key institution of oversight of the activities of the security sector institutions is the first permanent standing Committee which is independent in its activity. The Committee is composed of three members who are selected by the Parliament for 6-year term of office. It is important to note that the chairperson of the First Committee has to be a judge. The institutional part of the Committee is provided by the Secretariat, administration and investigation offices. The first Committee has a full and unlimited access to the activities of security institutions, operations and any related information. The Committee plays a function of the Appeals instance when the decisions on access to state secrets and inspection are appealed.[38]

In addition to overall oversight of the activities and operations of security institutions, the committee's authority includes the authorization of secret surveillance conducted by security institutions. In this area, the committee is equipped with the same powers as courts in other countries.

---

36 Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023, 25.

37 <https://www.comiteri.be/index.php/en/standing-committee-i/role> [02.12.2024].

38 Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU. Volume I: Member States' legal frameworks, 2017, 40-43.

In addition, the committee is authorized to suspend the operation or the methods of operation used by the security institute in case of non-compliance.

The investigative function of the First Committee involves two key areas: investigation of the activities and decisions of the security institution and criminal prosecution of the employee of the security institution by the court order. The investigation of the activities and decisions of the security institution can be initiated by the committee itself, the parliament, the minister, or the public institution or based on a citizen's complaint.

4. Analysis of the Efficiency of Current System of the Parliamentary Oversight of Security Institutions of Georgia and Justification of the Need for Reform

For the efficiency of the parliamentary oversight over the secret activities of the Government, it is critical to hold public discussions and debates between various groups represented in the Parliament. The debates at the Committee or plenary sessions are normally held on a public session followed by a Parliamentary resolution, recommendation or regulation/decree.[39]

Holding informed debates in the process of parliamentary oversight over secret activities of the Government is quite limited since MPs do not have access to classified information.[40] However, the representative of the executive government called to the Parliament has such access and s/he may talk about the issues containing secret information to the Members of the Parliament.

Therefore, even if the Parliamentary group, committee or plenary session is closed, the attendee MPs will still have no access to secret information, will not receive necessary information from the Government representative called to the session, which, on its part, makes it impossible to obtain the recommendation or the resolution of the Parliament, to review reports and to discuss the issue of the responsibility of the official who is accountable to the Parliament.

For the parliamentary oversight of secret activities of the government, it is of particular importance to grant and delegate to the government the authority of legal regulation of state secrecy. This issue is particularly important for real and effective parliamentary oversight of the government's secret activities. The government shall not have the possibility of making a decision about the access rights of the MP to state secrets without justification and, most importantly, not be accountable for it before the Parliament of Georgia or the court.

The Parliament of Georgia exercises oversight of the secret activities of the Government via a number of mechanisms: control of enforcement of normative acts, checking compliance of secondary legislation with primary law, political debates, interpellation, Minister’s hour and thematic inquiries.

The control over the enforcement of normative acts is the competence of relevant sectoral committees of the Parliament. The Parliamentary committee, in order to accomplish this mission, controls the status of legislative acts (secondary legislation, laws) and identifies the problems. The conclusion made by the Committee about the enforcement of the law adopted by the Parliament may

---

39 *Schierkolk N.Y.,* Parliamentary Access to Classified Information, Geneva, 2018, 19-25.

40 Law of Georgia “On State Secrecy”, Legislative Herald of Georgia, 12/03/2015, Article 20, Regulations of the Parliament of Georgia, Legislative Herald of Georgia, 14/12/2018, Article 157

lead to discussions at the plenary sessions and finally, to the Parliament's resolution. Herewith, depending on the scale of violation, the process of controlling the normative act enforcement may result in the questioning of the responsibility of the executive government officials.

Unlike the control of enforcement of the normative act, the mechanism of studying the compliance of secondary legislation with primary law authorizes the sectoral committee of the Parliament and there is no need to further discuss the issue on the plenary session of the parliament. This mechanism of parliamentary oversight over the government's activities is quite flexible and efficient compared to the control of enforcement of normative acts because the decision (in the form of a task or a recommendation) is made by the Committee.

Special mechanism for the parliamentary oversight over the Government's activities is interpellation, within which the MPs question the Government or its officials who are called to the Parliament hearing and held accountable to the Parliament. They are obliged to give answers to the questions in a written form too. Besides, an integral part of the interpellation mechanism is the discussion of the issue in the plenary session of the Parliament in the format of a debate, usually in an open session. The effectiveness of this mechanism of parliamentary oversight over the secret activities of the government depends on the access of MPs to secret information, on the one hand, and on the provision of secret information during parliamentary debates and the possibility of conducting informed debates, on the other hand.

In absolute majority of NATO member states, MPs have unlimited access to secret information and exercising of this right does not depend on the decision of some executive government institution which is subject to Parliamentary oversight. MPs can access secret information depending on their status, high legitimacy and official position. In 7 member states of NATO, MPs who are the members of special or sectoral committees or occupy some position in the Parliament, can access the secret information.[41]

In democratic countries, the fact that politicians and MPs, trusted by public, have access to secret information, ensures democratic management of the security system, efficient Parliamentary Oversight and Accountability of the Security Sector.

In consideration of all the aforementioned, the efficiency of the Parliamentary Oversight over the Government's security-related activities can be increased by a large-scale, consensus-based reform that involves the following:

i. Adoption of a legislative act by the Parliament that will be a framework for accountability and oversight of the security system;
ii. Changing the admission system of MPs to state secret and eliminating the dependence on the unsubstantiated will of special services,
iii. Defining the format of Parliamentary reports of security institutions and defining the content frame by the Parliament, annually or by a single standard of the law
iv. Submission of secret draft legal acts of security institutions to the Trust Group and making them effective only by issuing positive conclusions.

[41] *Schierkolk N.Y.,* Parliamentary Access to Classified Information, Geneva, 2018, 19-23.

v. Reducing party influence on the formation and activities of the parliamentary trust group. All interested political groups represented in the Parliament must have a representative in the Parliamentary Trust Group, who will undertake the obligation to protect state secrets. Moreover, exercising of the powers of the Trust Group members (requesting and receiving information, initiating and discussing issues) shall not depend on the decision of the majority.

vi. Creation of the institute of a special speaker of the Georgian Parliament whose competence will involve the oversight of security institutions and their activities, control of the performance of law on State Secrecy and the Parliamentary reports of security institutions and submission of alternative reports to the Parliament (committee, fraction, majority and minority). The mandate of the special speaker shall include the oversight of human rights protection and legal compliance in secret activities of security institutions. To ensure the independence of the Special Speaker, s/he shall be appointed by a broad consensus (a high quorum, with the mandatory condition of the support of a minimum number of the opposition), his term of office shall exceed the term of office of the Parliament, and the recommendations shall be mandatory for implementation by all institutions.

vii. Organizing/establishing the annual security conference by law. The conference will be a mechanism/format for ensuring oversight of the secret activities and the accountability of the security system. Within the scope of this mechanism, all constitutional institutions and the representatives of all sectoral governmental institutions, the Special Speaker, interested academic media or non-governmental institutions will submit reports about ongoing progress and challenges.

5. Analysis of Accountability of Governmental Institutions of national security System and Efficiency of the Current Control System of their Activities and Justification of the Need for Reform

The Mandate of national security institution involves investigative, operative-search, operative-technical, counter-intelligence or police functions which makes it impossible to ensure efficient oversight. These functions essentially differ from each other, in terms of their objectives and legitimate goals as well as by activity methods. This extremely complicates the separation of the functions performed by these institutions. On their part, the complexity of separating the activities makes it ineffective if not impossible to provide oversight over the activity and to ensure prosecution or judicial control.

Considering that there is a special Operative-technical Agency established by law for the technical support of a significant part of secret activities in Georgia, and all security institutions carrying out secret activities apply the services of this Agency, it is critical not only to have judicial control over the secret activities but also to ensure the agency's independence, neutrality and objectivity.

The head of the State Security Service can influence the activities of the Operative-Technical Agency and the decisions of the head of the Agency. However, the fact that the State Security Service

is an institution implementing investigative, operative-search and counter-intelligence activities shall be taken into account, which means that the control of the Operative-technical Agency by such an institution significantly reduces its independence[42]. At different times, the matters of the oversight system of secret activities were subject to Constitutional Court proceedings. One of the matters to which the standard set forth by the Constitutional Court of Georgia relates is the high standard of independence of institutes performing secret activities from the institutions providing security. According to the Constitutional Court judges, the independence of the Operative-Technical Agency is not sufficiently provided and the State Security Service has some mechanisms to control the Agency and its activities, foreseen in different legislative acts. [43]

Even the Prosecutor's Office cannot exercise efficient oversight over the secret activities of Georgian security institutions. The Prosecutor's office assigns a task and issues a protocol describing the results of secret activity, without having the competence or mechanisms for overseeing the process. This fact was confirmed by the representative of the Prosecutor's Office in the proceeding of the constitutional suit in the Constitutional Court of Georgia.[44] Interestingly, secret activities carried out within the counter-intelligence operations are different from the secret investigation activities and are characterized by lower quality of effective oversight.

There is a risk of human rights violations in the period between ex-ante and ex-post oversight of secret activities. The period from the beginning to the end of the authorized secret activity, i.e. the course of the secret action and the process of processing and using the data obtained after completion is the weakness, for the effective oversight of which, in addition to the external supervisory mechanisms, the development of effective internal control mechanisms is important, because the internal control structure guides the activities and inspections selectively and in parallel of the secret activity.

Due to these problems, the source for the risk of human rights violation in secret activities may become the public servant of the same institution that is involved or has relation or information about the secret activity, as well as the risks and facts of violation.

Secret activities performed by security institutions belong to the category of state secrets. An employee of a security institution who may have information about the facts of a violation or misconduct has some restriction and cannot provide information, fearing that the question of his responsibility for disclosing state secrets may arise. An example of the real ground of this risk is a direct provision in the law on "Operative-Investigatory Activities". Thus, there are no guarantees for whistleblower protection in the Security Institute.

---

42 Law of Georgia "On the State Security Service of Georgia", Legislative Herald of Georgia, 07/08/2015, Article 19, 29.

43 Decision #1/1/625,640 of the Constitutional Court of Georgia dated April 14, 2016 in the case "Public Defender of Georgia, Citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tughushi, Zviad Koridze, "Open Society Georgia Foundation" , "Transparency International – Georgia", "Young Lawyers Association of Georgia", "International Society for Fair Elections and Democracy" and "Human Rights Center" against the Parliament of Georgia", II-33, 41, 65, 96.

44 Lawsuit of the Public Defender of Georgia against the Parliament of Georgia, case #1630.

In view of the aforementioned, the efficiency of the accountability and the activities of the governmental institutions of national security System can be achieved via a reform that takes into account the following:

i. Separating the investigative function from the institutions performing secret activities and developing an investigation office subject to efficient prosecution and judicial control. In Georgia, there are three secret activities of different meanings and standard (investigation, operative-search activity and intelligence, and operative-technical activity) and out of them, only the investigative or operational-search activities are subject to the oversight of Court or Personal Data Protection Inspector
ii. Reforming the Operative-technical Agency into an independent and accountable institution that provides technical support. The Agency must have a supervisory board whose members are selected by a commission and which is independent from political institutions. The main function of the council shall be to supervise the legal compliance and human rights standards of the agency's decisions and activities, as well as to listen to periodic reports of the Agency's leaders, which may lead to raising the question of the responsibility of the Agency's leadership. In addition, where the violation is detected, the Council shall be able to suspend the activity/event and have the right to appeal to the court to check its legality.
iii. Increasing the effectiveness of the whistleblower's institute to ensure the prevention and suppression of human rights violations in secret actions. It is obligatory for the employees of institutes carrying out secret activities equipped with counter-intelligence or operational-search powers to protect state secrets. If they fail to protect state secrets, this may become the subject of various heavy responsibilities. There is a need to strengthen the whistleblower protection and responsibility system.

6. Analysis of the Efficiency of the Current Control System of National Security Institutions by Independent Institutions and Justification of the Need for the Reform

Independent, non-political oversight of the activities and decisions of national security institutions is provided by the institutions established under the constitutional law (constitutional court, common courts, public defender, audit service) and the Parliament (personal data protection inspector, special investigation services).

The ex-ante and post-ante control function of secret activities is under the judicial system. Herewith, the competence and the capacity of the court differ in the area of control of secret investigation activities and counter-intelligence secret activities.

Judicial control of secret investigation and operative-search activities belongs to the mandate of first-instance courts and the control of counter-intelligence secret activities is the competency of the Supreme Court of Georgia.

Besides, the objectives of secret investigative or operative-search activities also differ from the objectives of counter-intelligence activities. The key purpose of the first is to prevent crime, to respond and prosecute the person committing the crime and the key purpose of counter-intelligence

action is to detect and prevent the threats to the country arising from the intelligence work of foreign states. As we can see, most of the results of counter-intelligence activities may not result in criminal justice, which means that there will be little ex-post judicial control. However, there can be some information in the administration of the institute equipped with a counter-intelligence function, which is not subject to effective systemic control.

The rules for processing state secrets are formulated by the Government of Georgia and the authority to control the performance against these rules in public or private institutions belongs to the State Security Service. Personal data can be a state secret. Personal Data Protection Service does not participate in drafting the regulations for the information processing system of state secrets and does not have a mandate to issue recommendations, while the security institutions do participate in developing these regulations and standards. Moreover, the Personal Data Protection service cannot control how this information is processed which leaves this part of activities of security institutions without external oversight.

In view of all the aforementioned, strengthening of the efficiency of the independent control system of national security institutions can be achieved via reform that covers the following:

i. Creating a quasi-judicial, professional institute of ex-ante control of counterintelligence secret activities (e.g. independent committee of intelligence oversight) by legal act. The commission shall be authorized to issue warrants for secret activities and to control the protection of human rights in the process. The Commission will discuss the issue of granting a permit/warrant only on the ground of substantiated petition of the head of the security institution. In our opinion, the Commission shall consist of 5 members, 2 of whom should be judges. The selection and appointment of members shall be ensured by an independent commission created via a multi-stage procedure; the selection shall be based on a public competition. Judges who are members of the commission shall not participate in the process of authorization of secret activities, and their competence shall be to check, suspend or terminate ongoing secret activities based on the permission granted if the fact of violation of human rights or permit terms and conditions are detected. The selection process of Commission members may be based on the same provision that concerns the formation of the commission in the acting law,[45] which provides for the formation of the commission by engagement and participation of wider society. It is important for the Commission and the Court to publish statistical data on secret activities performed within the scope of investigative as well as counter-intelligence activities.
ii. The Court will retain the competence of oversight of secret activities (investigation, operative-search, operative-technical. With regard to intelligence operative-technical activities, the court will remain an ex-post oversight institute that will control the legal compliance of using results and protection of human rights. This mandate of the court will be valid for the whole period until the information exists. Institutionally, this competence can be granted to representatives of the Supreme Court of Georgia or Second Instance Courts, to whom the cases will be assigned

[45] The Law of Georgia "On Property Restitution and Compensation of Victims of the Conflict in the Former South Ossetia Autonomous District", Legislative Herald of Georgia, 29/12/2006, <https://matsne.gov.ge/document/view/23050?publication=4> [02.12.2024].

on a random selection principle. Besides, special office structured with professional, qualified specialists shall be established in the court. It will be obligatory for the security institution to submit periodic reports to the judge and the judge will have the authority to conduct unplanned inspections with the help of the office itself or personal data protection agency staff (specialist called for the task). If any violation is detected, the Judge shall be entitled to decide on the remedy and the responsibility of the violator. Besides, the court will publicize the statistical data of secret activities carried out within investigation or counter-intelligence activities.

iii. Institutional strengthening of personal data protection inspector. As a professional authority for introducing uniform standards and oversight, the personal data protection inspector shall be entitled to develop standards for assigning/processing the information with a status of a state secret and to provide oversight over the performance of these standards.

7. Resume

The stable development of the State and society greatly depends on the work of security institutions. The biggest part of their work is not public. Moreover, if the secret activities and personal data of these security institutions are compromised, it will jeopardize democracy and human rights protection. Nonetheless, it is extremely important to have a new vision about the accountability of the security institutions and the importance of the oversight system that looks at their activities. This requires reform.

The effectiveness of the democratic oversight of the security sector can be achieved by a common and joint valid mechanism. Herewith, for making unbiased decisions (politically or within the agency), it is very important to create new institutes and new formats of security sector oversight and control at the parliamentary and governmental levels, also strengthening independent institutions and creating new oversight mechanisms. According to the democratic standards, the security sector which is actionable and accountable can provide the stability and development of the society and will not undermine democracy.

Bibliography:

1. Law of Georgia “On Personal Data Protection”, Legislative Herald of Georgia, 16/01/2012.
2. Law of Georgia “On State Secrecy”, Legislative Herald of Georgia, 12/03/2015.
3. Regulations of the Parliament of Georgia, Legislative Herald of Georgia, 14/12/2018.
4. Law of Georgia “On Operative-Search activity”, Legislative Herald of Georgia, 30/04/1999.
5. Law of Georgia “On Counter-Intelligence Activities”, Legislative Herald of Georgia, 11/11/2005.
6. Law of Georgia “On Legal Entity of Public Law – Operative-Technical Agency of Georgia”, Legislative Herald of Georgia, 22/03/2017.
7. Criminal Procedures Code of Georgia, Legislative Herald of Georgia, 09/10/2009.
8. Law of Georgia “On State Security Service of Georgia”, Legislative Herald of Georgia, 07/08/2015.
9. Law of Georgia “On the Rules of Planning and Coordination of National Security Policy”, Legislative Herald of Georgia, 03/04/2015.

10. Law of Georgia "On Property Restitution and Compensation of Victims of the Conflict in the Former South Ossetia Autonomous Region", Legislative Herald of Georgia, 29/12/2006.
11. *Alapishvili L.,* Problems of parliamentary oversight on secret activities of institutes of national security accurance system of Georgia, Journal of Law, #1, 2023, 205–221.
12. *Sajaia L., Verdzeuli S., M. Chikhladze, G., Tatanashvili T., Topuria G.,* Security Service Reform in Georgia: Results and Challenges, 2018, 48, 68 (in Georgian).
13. 9 steps to move to the EU membership negotiation stage: parliamentary control, Transparency International Georgia, 23.02.2024, <https://www.transparency.ge/ge/blog/9-nabiji-evrokavshiris-cevrobaze-molaparakebebis-etapze-gadasasvlelad- saparlamento-kontroli> [02.12.2024].
14. Decision No. 1/9/1673,1681 of the Constitutional Court of Georgia dated November 17, 2022 in the case "Londa Toloraya and the Public Defender of Georgia against the Parliament of Georgia".
15. Decision #1/1/625, 640 of the Constitutional Court of Georgia of April 14, 2016 in the case "Public Defender of Georgia, Citizens of Georgia" – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tughushi, Zviad Koridze, "Open Society Foundation Georgia", "Transparency International – Georgia", AIP "Young Lawyers Association of Georgia", "International Society for Fair Elections and Democracy" and "Human Rights Center" against the Parliament of Georgia".
16. Lawsuit of the Public Defender of Georgia against the Parliament of Georgia, case #1630.
17. National Security and Intelligence Committee of Parliamentarians Act, S.C. 2017, c. 15, <https://laws-lois.justice.gc.ca/eng/acts/N-16.6/FullText.html> [02.12.2024].
18. *Barker C., Petrie C., Dawson J., Godec S., Porteous H., Purser P.,* Oversight of intelligence agencies: a comparison of the 'Five Eyes' nations, Research Paper, 2017, 23, 25.
19. *Eijkman Q., Van Eijk N.,Van Schaik R.,* Dutch National Security Reform Under Review: Sufficient Checks and Balances in the Intelligence and Security Services Act 2017?, 2018, 11, 35-40.
20. *Ruckerbauer C.,* Legal and Oversight Gaps in Germany's Military Intelligence, June 26, 2024, <https://aboutintel.eu/germanys-military-intelligence/> [02.12.2024].
21. *Schierkolk N.Y.,* Parliamentary Access to Classified Information, Geneva, 2018, 19-25.
22. *Wills A.,* Democratic and effective oversight of national security services, issue paper, Council of Europe, 2015, 7-9.
23. Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – update 2023, EU Agency for Fundamental Rights, 2023.
24. Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU. Volume I: Member States' legal frameworks, 2017.
25. 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, COM(2022) 405 final, 17.06.2022.
26. 2023 Communication on EU Enlargement Policy (extract about Georgia), 08.11.2023, <https://www.eeas.europa.eu/delegations/georgia/2023-communication-eu-enlargement-policy-extract-about-georgia_en?s=221> [02.12.2024].
27. <https://nsira-ossnr.gc.ca/en/about-nsira/who-we-are/> [02.12.2024].
28. <https://www.rcmp-grc.gc.ca/en/about-rcmp> [02.12.2024].
29. <https://nsicop-cpsnr.ca/about-a-propos-de-nous-en.html> [02.12.2024].
30. <https://ukrat.de/DE/Home/home_node.html> [02.12.2024].

31. <https://www.bundestag.de/en/committees/bodies/scrutiny/scrutiny-198586> [02.12.2024].
32. <https://www.bundestag.de/webarchiv/Ausschuesse/ausschuesse18/gremien18/pkgr> [02.12.2024].
33. <https://www.bundestag.de/webarchiv/Ausschuesse/ausschuesse18/gremien18/g10> [02.12.2024].
34. <https://www.verfassungsschutz.de/EN/about-us/mission-and-working-methods/supervision-and-oversight/supervision-and-oversight_article.html?nn=1021058#Start> [02.12.2024].
35. <https://english.ctivd.nl/about-ctivd/members-and-staff> [02.12.2024].
36. <https://www.tet.dk/the-oversight-board/?lang=en> [02.12.2024].
37. <https://www.eduskunta.fi/EN/valiokunnat/tiedusteluvalvontavaliokunta/Pages/default.aspx> [02.12.2024].
38. <https://tiedusteluvalvonta.fi/en/home> [02.12.2024].
39. <https://www.assemblee-nationale.fr/dyn/16/organes/delegations-comites-offices/delegation-renseignement> [02.12.2024].
40. <https://www.cnctr.fr/en> [02.12.2024].
41. <https://www.comiteri.be/index.php/en/standing-committee-i/role> [02.12.2024].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8331

Ketevani Kukava*

Privacy and Personal Data Protection v. the Protection of National Security and the Fight Against Crime: An Analysis of EU Law and Judicial Practice

Considering the risks that accompany technological progress, the need for personal data protection has significantly increased in today's world. While digital technology offers many benefits, it has also created unprecedented opportunities for surveillance, posing a threat to human rights and democratic values.

Fighting against crime and safeguarding national security are important legitimate aims, and processing data related to electronic communications is one of the means for their achievement. At the same time, the state's extensive power can create a sense of constant surveillance and give rise to a chilling effect. The wide discretion of state authorities and the covert nature of implemented measures generate a high risk of human rights violations. Therefore, one of the main challenges in human rights law is finding a balance between combating crime and protecting national security, on the one hand, and safeguarding human rights, on the other.

Over the past few years, the Court of Justice of the European Union has delivered significant judgments on the compliance of legal regimes governing the retention and transmission of electronic communications data with EU law. When ensuring a fair balance between different interests, the CJEU appropriately considers both the threats present in the modern world and the importance of human rights protection.

The present article discusses the processing of personal data in the electronic communications sector under EU law and analyses the development of the case law of the Court of Justice of the European Union.

Keywords: *Electronic Communications, Data Retention, National Security, Court of Justice of the European Union*

1. Introduction

The right to privacy enables individuals to freely develop their own personality, opinions, and relationships. At the same time, this right is a precondition for exercising other human rights and is one of the vital values of a democratic society.

Digital technology has created an unprecedented opportunity for surveillance, which poses a serious threat to privacy and the right to personal data protection. In today's world, vast amounts of personal information are collected and processed through increasingly sophisticated methods.

Modern technology is an integral part of people's daily lives. While individuals voluntarily disclose personal information in exchange for access to services and information, given the present

* Ph.D. student of Ivane Javakhishvili Tbilisi State University Faculty of Law.

state of technological dependency, refusing to use electronic means of communication would mean foregoing significant social interaction to such an extent that it can hardly be considered an option.[1] In a digitally interconnected society, it makes less sense to refuse the use of technologies and still fully participate in society.[2]

Considering the risks that accompany technological progress, the need for personal data protection has significantly increased. The Charter of Fundamental Rights of the European Union (hereinafter "Charter") guarantees the right to the protection of personal data[3] alongside the right to respect for private and family life.[4] Moreover, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law, respect the essence of those rights and freedoms, and comply with the principle of proportionality.[5]

The protection of national security and the fight against crime are important legitimate aims, and processing data related to electronic communications is one of the means for their achievement. At the same time, robust safeguards against state authorities' arbitrariness and abuse of power are essential for protecting democratic values.

The legal regime governing the retention of data related to electronic communications and state authorities' access to that data has often been the subject of broad discussion and debate. The standard developed in the case law of the Court of Justice of the European Union (hereinafter "CJEU") is of particular significance in this regard, as it aims to balance the objectives of combating crime and safeguarding national security, on the one hand, with the protection of human rights, on the other.

The present article aims to discuss the processing of personal data in the electronic communications sector under EU law and to analyse the development of the CJEU's case law.

2. Directive 2002/58/EC on Privacy and Electronic Communications

Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter "Directive 2002/58" or "Directive on privacy and electronic communications") aims to ensure the protection of fundamental rights and freedoms and in particular, the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and electronic communication equipment and services in the EU.[6]

---

1 *Ronen Y.,* Big Brother's Little Helpers: The Right to Privacy and the Responsibility of Internet Service Providers, Utrecht Journal of International and European Law, Vol. 31, Nº 80, 2015, 73.

2 *Karaboga M., Matzner T., Obersteller H., Ochs C.,* Is there a Right to Offline Alternatives in a Digital World? in Data Protection and Privacy: (In)visibilities and Infrastructures, *Leenes R., Brakel R.v., Gutwirth S., Hert P.D.,* (eds.), Springer International Publishing AG, 2017, 54.

3 Charter of Fundamental Rights of the European Union, 07/12/2000, Article 8.

4 Ibid, Article 7.

5 Ibid, Article 52 (1).

6 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), Article 1 (1).

Directive 2002/58 deals with the processing of the following three categories of data by the providers of electronic communications services: traffic data,[7] location data[8], and the content of the communication. This Directive enshrines the principle of confidentiality of both the electronic communications and the related traffic data.[9] By adopting the Directive on privacy and electronic communications, the EU legislature established important safeguards to respect private and family life and to protect personal data.

Article 15 of Directive 2002/58 enables Member States to determine the exceptions when the restriction of the scope of the rights and obligations constitutes a necessary, appropriate, and proportionate measure within a democratic society to safeguard national security, defence, public security, and the prevention, investigation, detection, and prosecution of criminal offences.[10] To this end, Member States may adopt legislation regarding the retention of data for a limited period.[11] That being said, the possibility to derogate from the rights and obligations provided for by Directive 2002/58 cannot permit the exception to become the rule.[12]

It is important to note that Directive 2002/58 does not apply to activities concerning public security, defence, state security, and the activities of the state in areas of criminal law.[13] In addition, according to the Treaty on European Union, national security remains the sole responsibility of each Member State.[14] Nevertheless, according to the CJEU's interpretation, national legislation enabling a state authority to require providers of electronic communications services to retain and transmit traffic and location data to the security and intelligence agencies falls within the scope of Directive 2002/58.[15]

It is also worth noting that the proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications, which is intended to replace the 2002/58 Directive, is still under consideration. As of today, this Regulations has not yet been adopted. Further information is available here: <https://eur-lex.europa.eu/procedure/EN/2017_3> [10.08.2024].

7 "Traffic data" means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof. Directive 2002/58, Article 2 (b).

8 "Location data" means any data processed in an electronic communications network or by an electronic communications service, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service. Directive 2002/58, Article 2 (c).

9 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), Article 5.

10 Ibid, Article 15 (1).

11 Ibid.

12 C-623/17, Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others, [2020], CJEU, § 59.

13 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), Article 1 (3).

14 Treaty on European Union, 07/02/1992, Article 4 (2).

15 Joined Cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net and Others v Premier Ministre and Others, [2020], CJEU, § 104. C-623/17, Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others, [2020], CJEU, § 49.

3. Invalidation of the Data Retention Directive 2006/24/EC

Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 (hereinafter "Data Retention Directive" or "Directive 2006/24") obliged the providers of publicly available electronic communications services and of public communications networks to retain certain data and ensure that those data are available to competent authorities for the investigation, detection, and prosecution of serious crime. The Data Retention Directive covered in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation, or exception.[16] Even though Directive 2006/24 did not permit the retention of the content of the communication, the retained data, taken as a whole, might allow drawing very precise conclusions concerning the individuals' private lives, such as the habits of everyday life, permanent or temporary residences, daily or other movements, social relationships they maintained and the social environments they frequented.[17]

In 2014, the Grand Chamber of the CJEU invalidated the Data Retention Directive. According to the Court, the fight against serious crime, in particular, organized crime and terrorism, is critical for ensuring public security, and its effectiveness may largely depend on the use of modern investigation techniques.[18] However, such an objective does not in itself justify a retention measure established by Directive 2006/24.[19]

The Data Retention Directive applied to everyone, who used electronic communications services. It applied even to persons for whom there was no evidence suggesting that their conduct might have a link, even an indirect or remote one, with serious crime.[20] Moreover, it did not lay down any objective criterion to limit the number of persons authorised to access and subsequently use the retained data strictly by necessity.[21] The access to the retained data by the competent national authorities was not dependent on a prior review by a court or an independent administrative body.[22] Directive 2006/24 set the retention period at a minimum of 6 months and a maximum of 24 months but did not specify that the determination of the retention period must be based on objective criteria.[23] Overall, according to the CJEU, the Data Retention Directive did not comply with the principle of proportionality.

4. The Rules for Retention and Transmission of Data Related to Electronic Communications Based on the Case Law of the CJEU

Following the invalidation of Directive 2006/24, the validity of national data retention regimes was called into question. Consequently, two references for a preliminary ruling were submitted to the

16 C-293/12, C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, [2014], CJEU, §§ 57-59.
17 Ibid, § 27.
18 Ibid, § 51.
19 Ibid.
20 Ibid, § 58.
21 Ibid, § 62.
22 Ibid.
23 Ibid, § 64.

CJEU, which served as the basis for assessing the compliance of Swedish and UK legislation with Directive 2002/58 and the Charter. In its 2016 judgment, the CJEU ruled that the national legislation allowing authorities, for the purpose of combating crime, to impose on the providers of electronic communications services the obligation of general and indiscriminate retention of traffic and location data did not comply with Directive 2002/58, read in the light of the Charter.[24]

At the same time, according to the CJEU, Member States may adopt legislation permitting the targeted retention of data for the purpose of fighting serious crime, provided that sufficient safeguards are in place to ensure the effective protection of personal data against the risk of misuse.[25] Access by the competent national authorities to retained data should, as a general rule, except in cases of duly justified urgency, be subject to a prior review carried out either by a court or by an independent administrative body,[26] and the data must be retained within the European Union.[27]

Following the 2016 judgment, legal discussions concerning the retention and transmission of data persisted. The CJEU's ruling of 6 October 2020 related to the processing of data for national security purposes is noteworthy in this regard. The CJEU assessed the UK legislation that permitted the Secretary of State to require providers of electronic communications services, in the interests of national security, to transmit traffic and location data to the security and intelligence agencies. According to the Court's assessment, such a regulation has the effect of making an exception to the principle of confidentiality the rule[28] and is likely to generate the feeling of constant surveillance.[29] The CJEU regarded the transmission of data to the security and intelligence agencies as a particularly serious interference with the right to privacy.[30]

The regime for the transmission of traffic and location data affected all persons using electronic communications services, regardless of whether they had a link, even an indirect one, with a threat to national security.[31] According to the CJEU's interpretation, EU law precludes national legislation enabling a State authority to require providers of electronic communications services to carry out the general and indiscriminate transmission of traffic and location data to the security and intelligence agencies for the purpose of safeguarding national security.[32]

On 6 October 2020, the CJEU delivered another important judgment determining the rules for the retention of traffic and location data, IP addresses, and data relating to the civil identity of users of electronic communications systems.[33] In this case, the CJEU assessed the compliance of the legislation

---

24 Joined Cases C-203/15 and C-698/15, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, [2016], CJEU.

25 Ibid, §§ 108-109.

26 Ibid, § 120.

27 Ibid, § 122.

28 C-623/17, Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others, [2020], CJEU, § 69.

29 Ibid, § 71

30 Ibid.

31 Ibid, § 80.

32 Ibid, § 82.

33 Joined Cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net and Others v Premier Ministre and Others, [2020], CJEU.

of France and Belgium with Article 15(1) of Directive 2002/58, as read in light of the Charter. The standards established by this judgment can be summarised as follows:

1) EU law does not preclude blanket retention of traffic and location data by providers of electronic communications services for national security purposes provided that the following conditions are met: a) This measure can be used when the state concerned is confronted with a serious threat to national security that is shown to be genuine and present or foreseeable;[34] b) The instruction for the preventive retention of data of all users must be limited in time to what is strictly necessary and be subject to robust safeguards to protect effectively the personal data against the risk of abuse. Therefore, data retention cannot be systematic in nature.[35] The instruction for data retention may be renewed if that threat persists.[36] c) Decisions instructing providers of electronic communications services to retain data must be subject to effective review by a court or an independent administrative body whose decisions are binding.[37] Such a review aims to verify the existence of a serious threat and to ensure that appropriate safeguards are in place.[38]
2) EU law precludes blanket retention of traffic and location data by providers of electronic communications services for the purposes of combating crime and safeguarding public security.[39]
3) EU law does not preclude targeted retention of traffic and location data by providers of electronic communications services for the purposes of combating serious crime, preventing serious attacks on public security and, a fortiori, safeguarding national security, provided that such retention is limited, with respect to the categories of data, the means of communication, the persons concerned and the retention period, to what is strictly necessary.[40]
4) EU law does not preclude blanket retention of IP addresses by providers of electronic communications services for the purposes of combating serious crime, preventing serious threats to public security, and safeguarding national security, provided that such retention complies with the substantive and procedural conditions regulating the use of that data.[41]
5) EU law does not preclude a legislative measure that requires providers of electronic communications services to retain data relating to the civil identity of all users of electronic communications systems for the purposes of preventing, investigating, detecting, and prosecuting criminal offences and safeguarding public and national security.[42]
6) EU law does not preclude expedited retention of traffic and location data by providers of electronic communications services for a specified period for the purposes of combating serious

34 Ibid, § 137.
35 Ibid, § 138.
36 Ibid, § 138.
37 Ibid, § 139.
38 Ibid.
39 Ibid, §§ 141-143.
40 Ibid, §§ 146-147.
41 Ibid, §§ 155-156.
42 Ibid, § 159.

crime and safeguarding national security.[43] A decision of the competent authority should be subject to effective judicial review.[44]

7) EU law permits automated analysis of the traffic and location data of all users of electronic communications systems, for a strictly limited period, for the purpose of safeguarding national security.[45] Such a measure is subject to the conditions related to the blanket retention of data for the purpose of safeguarding national security.[46]

8) EU law permits national legislation obliging providers of electronic communications services to ensure the real-time targeted collection of traffic and location data.[47] A decision authorising the real-time collection of data must be based on objective and non-discriminatory criteria provided for in national legislation, must be subject to a prior review by a court or an independent administrative body, and in case of duly justified urgency, its lawfulness must be examined within a short time.[48]

These judgments provide useful guidance with respect to achieving a balance between the right to privacy and personal data protection, on the one hand, and national security interests, on the other. The CJEU considers both the threats present in the modern world and the importance of human rights protection. At the same time, it is important to analyse the 2020 judgments in light of the standards established by previous rulings.

In contrast to the judgments delivered in 2014 and 2016, which dealt with relatively simple data retention regimes aimed at combating crime,[49] the 2020 ruling weighed national security interests against personal data protection.[50] Furthermore, the CJEU discussed broader categories of data: in addition to traffic and location data, IP addresses and data related to the civil identity of users were also considered. The categories of data, data processing operations, and their purposes made the 2020 judgment more complex than its predecessors.[51]

Where in its 2014 judgment, the CJEU invalidated the Data Retention Directive, and in 2016, it prohibited blanket and indiscriminate data retention for the purpose of combating crime, in its 2020 ruling, the Court examined the exceptional circumstances under which EU law permits blanket data retention. At the same time, the CJEU established strict conditions for such measures.[52]

It is worth noting that in its 2020 judgment, the CJEU emphasized the importance of a review by the court or an independent administrative body. However, such a review is not mentioned with

---

43 Ibid, §§ 163-164.
44 Ibid, § 163.
45 Ibid, § 178.
46 Ibid, §§ 176-179.
47 Ibid, § 188.
48 Ibid, § 189.
49 *Eskens S.,* The Ever-Growing Complexity of the Data Retention Discussion in the EU: An In-depth Review of La Quadrature du Net and Others and Privacy International, Vol. 8, Issue 1, 2022, 143.
50 Joined Cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net and Others v Premier Ministre and Others, [2020], CJEU.
51 *Eskens S.,* The Ever-Growing Complexity of the Data Retention Discussion in the EU: An In-depth Review of La Quadrature du Net and Others and Privacy International, Vol. 8, Issue 1, 2022, 143.
52 Ibid.

regard to targeted retention of data, retention of IP addresses, or identifying data.[53] This may be due to the CJEU viewing these forms of data retention as relatively mild interference with fundamental rights; however, it has been pointed out that this might give rise to some questions in the future.[54]

The judgments discussed above underscore the importance of protecting traffic and location data. According to the CJEU's assessment, such data may reveal a wide range of information about an individual's private life, including sensitive information.[55] These data may enable very precise conclusions about the private lives of individuals and provide a means to establish profiles of those concerned – information that is no less sensitive, with respect to the right to privacy, than the actual content of communications.[56] The CJEU's discussion is grounded in a proper understanding of the significant challenges present in the digital age. Considering the increasing capabilities of modern technologies, linking and extracting entirely new information has become easier.[57] Therefore, the protection of any type of personal data gains crucial importance.

It is worth noting that the retention of data related to electronic communications affects not only privacy and the right to personal data protection but also freedom of expression, as guaranteed by Article 11 of the Charter. Mass collection of such data can result in a chilling effect, as the mere feeling of surveillance prompts people to restrict their freedom of expression.[58] The CJEU explicitly highlights that the retention of traffic and location data can impact the use of means of electronic communication and, consequently, the exercise of freedom of expression, as such measures may lead individuals to feel that their private lives are under constant surveillance.[59]

The CJEU adopts a more lenient approach towards blanket data retention for the purpose of safeguarding national security, as opposed to its stance on combating serious crime and protecting public safety. To ensure a robust national security regime states employ sophisticated technologies and implement significant measures, and the CJEU largely supports this approach. The aforementioned judgments illustrate that the Court adopts a pragmatic approach when ensuring a fair balance between competing interests.

At the same time, the CJEU's discussion gave rise to criticism for different reasons. Several states deemed the proportionality test on data retention to be excessively stringent and the suggested

---

53 Ibid, 154.

54 Ibid.

55 Joined Cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net and Others v Premier Ministre and Others, [2020], CJEU, § 117.

56 Ibid.
Joined Cases C-203/15 and C-698/15, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, [2016], CJEU, § 99.
C-623/17, Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others, [2020], CJEU, § 71.

57 *Karaboga M., Matzner T., Obersteller H., Ochs C.,* Is there a Right to Offline Alternatives in a Digital World? in Data Protection and Privacy: (In)visibilities and Infrastructures, *Leenes R., Brakel R.v., Gutwirth S., Hert P.D.,* (eds), Springer International Publishing AG, 2017, 45.

58 *Buono I., & Taylor A.,* Mass Surveillance in the CJEU: Forging European Consensus, Cambridge Law Journal, Vol. 76, No. 2, 2017, 251.

59 Joined Cases C-203/15 and C-698/15, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, [2016], CJEU, §§ 100-101.

solutions, such as the targeted data retention, impractical or ineffective.[60] On the other hand, human rights defenders, who advocate for a total ban on mass surveillance instruments, view the CJEU's recent judgments "as a form of legalizing unlimited surveillance methods for national security purposes."[61]

5. Conclusion

Considering the threats present in the modern world, states process electronic communications data to prevent serious crimes and to safeguard national security, which may pose a risk to privacy and the right to personal data protection. Therefore, striking a fair balance between combating crime and protecting national security, on the one hand, and safeguarding human rights, on the other, is one of the main challenges in human rights law.

According to the Treaty on European Union, national security remains the sole responsibility of each Member State.[62] Nevertheless, the judgments of the CJEU clarify that national legislation obliging providers of electronic communications services to retain and transmit data for national security purposes falls within the scope of Directive 2002/58.

Notably, EU law prohibits the blanket transmission of traffic and location data to security and intelligence services for national security purposes, as such practices create a sense of constant surveillance and transform the exception to the principle of confidentiality into the rule.

Furthermore, the CJEU has clearly determined the rule for the retention of data related to electronic communications. In contrast to targeted data retention, blanket retention affects everyone, regardless of whether they have any connection to a specific threat or crime. The CJEU ruled that blanket retention of data cannot be justified by the interest of combating serious crime; however, this measure can be employed for the purpose of safeguarding national security. At the same, in this case, data retention cannot be systematic and this measure can only be applied when the state is confronted with a serious threat to national security that is shown to be genuine and present or foreseeable. Furthermore, one of the key safeguards for the protection of human rights is review by a court or an independent administrative body. Therefore, instead of fully prohibiting the blanket retention regime, the judges opted to establish clear limits and a strict proportionality test.

In summary, EU law and judicial practice appropriately consider both the threats present in the modern world and the importance of protecting human rights. At the same time, ensuring robust safeguards against abuse at the national level and their effectiveness is essential for protecting democratic values.

Bibliography:

1. Charter of Fundamental Rights of the European Union, 2000.
2. Treaty on European Union, 1992.

60 *Celeste E., Formici G.,* Constitutionalizing Mass Surveillance in the EU: Civil Society Demands, Judicial Activism, and Legislative Inertia, German Law Journal, 2024, 18.

61 Ibid.

62 Treaty on European Union, 07/02/1992, Article 4 (2).

3. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).
4. *Buono I., & Taylor A.,* Mass Surveillance in the CJEU: Forging European Consensus, Cambridge Law Journal, Vol. 76, No. 2, 2017, 251-253.
5. *Celeste E., Formici G.,* Constitutionalizing Mass Surveillance in the EU: Civil Society Demands, Judicial Activism, and Legislative Inertia, German Law Journal, 2024, 13, 18.
6. *Eskens S.,* The Ever-Growing Complexity of the Data Retention Discussion in the EU: An In-depth Review of La Quadrature du Net and Others and Privacy International, European Data Protection Law Review (EDPL), Vol. 8, No. 1, 143.
7. *Karaboga M., Matzner T., Obersteller H., Ochs C.,* Is there a Right to Offline Alternatives in a Digital World? in Data Protection and Privacy: (In)visibilities and Infrastructures, *Leenes R., Brakel R.v., Gutwirth S., Hert P.D.,* (eds), Springer International Publishing AG, 2017, 45, 54.
8. *Ronen Y.,* Big Brother's Little Helpers: The Right to Privacy and the Responsibility of Internet Service Providers, Utrecht Journal of International and European Law, Vol. 31, Nº80, 2015, 73.
9. Joined Cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net and Others v Premier Ministre and Others, [2020], CJEU.
10. C-623/17, Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others, [2020], CJEU.
11. Joined Cases C-203/15 and C-698/15, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, [2016], CJEU.
12. C-293/12, C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, [2014], CJEU.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.2.2024.8332

Tea Kavelidze *

The Role of the President of Georgia in the Appointment and Dismissal of the Ambassadors of Georgia and the Heads of the Diplomatic Representations

The field of foreign relations has been subject to dispute between the President and the Government of Georgia since 2013. Apart from the representation power and conclusion of the international treaties, the matter of appointment and dismissal of the ambassadors and heads of the diplomatic representations has been subject to controversies followed by the constitutional claims dated 16 August 2022 and 10 June 2022 submitted by the Government against the President of Georgia.[1] In particular, for the first time in the history of Georgia, the matter of the constitutionality of the President's inaction in appointment and dismissal of the ambassadors and the heads of the diplomatic representations has been made subject to the discussion of the Constitutional Court of Georgia.[2] However, the Government of Georgia revoked its constitutional claims on unknown grounds[3], therefore, the Court was deprived of the possibility to hear and consider the said constitutional claims.

Deriving from the above mentioned, the present work discusses the constitutional status of the President of Georgia and the role granted to the President in relation to the appointment and dismissal of the ambassadors and the heads of the diplomatic representations.

Keywords: *the field of foreign relations, ambassadors, dispute on the competence, the President of Georgia and the Government*

1. Introduction

Pursuant to Article 52 of the Constitution of Georgia, along with other powers, with the consent of the Government of Georgia the President of Georgia receives the accreditation of the ambassadors and other diplomatic representations of other states and international organizations and on the upon the nomination of the Government, appoints and dismisses the ambassadors and the heads of the diplomatic representations.

Pursuant to the Constitution of Georgia, irrespective of the fact that the Government of Georgia exercises the foreign policy on an exclusive basis, it is deprived of the full independence with regard

* Doctor of Law, invited lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law.

1 The constitutional claim of the Government of Georgia against the President of Georgia, dated 10 June 2022, №1711.

2 The constitutional claim of the Government of Georgia against the President of Georgia, dated 16 August 2022, № 1723.

3 See the Orders of the Constitutional Court dated 03 February 2022 №3/1/1711 and №3/2/1723.

to the appointment and dismissal of the ambassadors and the heads of other diplomatic representations, provided that the President of Georgia is also involved in this process. However, the matter of whether the role of the President in this process is to be construed as an obligation or discretionary power under the Constitution of Georgia shall be determined. In order to answer this question, not only the governance model existing in the country shall be assessed but the President's powers and the material essential part of such powers shall also be analyzed on a systemic basis.

Pursuant to Article 53 of the Constitution of Georgia, the legal acts of the President, save for the exemptions, shall be subject to the co-signing by the Prime Minister, whereunder the political liability is borne by the Government. However, this fact along with the nomination of the Government and the exercise of the foreign policy, is not sufficient to prove that the appointment of the ambassadors and the heads of the diplomatic representations fall solely under the competence of the Government and the President's participation in this process is achieved by the mere signature. It shall be discussed whether the President is entitled to object to the signing on the respective ground and/or substantiation, or whether the President is entitled to exercise such objection in relation to the appointment of the ambassador without such substantiation. It is evident that the said discussion will be of relevance only in the event wherein the President's role will be assessed as the discretionary power – if such role is to be discussed in terms of a formal power, in such a scenario the question whether the President breaches the Constitution by refusing to sign would become relevant.[4]

2. Dispute on the Competence to Appoint the Ambassadors

On the basis of the amendment introduced to the organic law of Georgia "On the Constitutional Court of Georgia" dated 14 April, 2022, the Constitutional Court of Georgia discusses the matters in relation to the disputes concerning the competence of the President, Parliament, Government of Georgia and other bodies on the basis of the constitutional claim or constitutional submission, if the aforementioned subjects/bodies consider that their constitutional entitlement has been infringed upon not only through the legal act, but through the action or inaction as well.[5] That means that commencement of the disputes concerning the competence is possible on the basis of a normative act, as well as on the basis of "action"/ "inaction". The Constitutional Court had to assess each action or inaction of the President of Georgia, including in the field of foreign affairs that also involved issuing approvals/objections on the appointment or dismissals of the ambassadors and heads of the diplomatic representations.[6]

In 2022, for the first time in the history of Georgia, the Government of Georgia has referred to the Constitutional Court of Georgia by filing a constitutional claim against the President aimed at the

---

4 The statement of the political union of the citizens "Georgian Dream – Democratic Georgia" <https://gd.ge/news> [07.07.2024].

5 Organic Law of Georgia "On the Constitutional Court of Georgia", Article 19, Parliamentary Gazette of the Parliament of Georgia, 001, 31/01/1996.

6 *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affars", 2023, 146.

assessment of the constitutionality of the inaction of the President with regard to the appointment and dismissal of the ambassadors and heads of diplomatic representations.[7] According to the constitutional claim, the Foreign Affairs Minister of Georgia has nominated Mr. Kakha Imnadze on the position of the office of the extraordinary and plenipotentiary ambassador of Georgia in Canada (meaning the early termination of his office as the permanent representative at the United Nations Organization) and nominated Mr. David Bakradze as the permanent representative at the United Nations Organization as well.[8] The nominations of the Government of Georgia had not been approved by the President of Georgia as she did not consider it reasonable to appoint the said candidates on these positions.[9]

According to the constitutional claim, the Government of Georgia had argued that due to the fact that the parliamentary governance model is established in the country, the President is unable to intervene in the process of exercising of the internal and foreign policy of the country, whereas the ambassador serves as one of the main mechanisms in this process – therefore, the appointment and dismissal of the ambassadors falls under the competence of the Government and by refusing to appoint the nominated candidates the president had intervened in the exclusive competence of the Government of Georgia.[10]

Exercise of the foreign policy does not necessarily mean taking exclusive actions only by the Government of Georgia and independently of all constitutional bodies involved in the foreign affairs – on the contrary, other constitutional bodies also participate in the field of foreign affairs, yet their participation is executed to various degrees, for instance, the Parliament of Georgia that defines the main directions of the foreign affairs – therefore, the Government of Georgia is not the only body in this respective field. The President, acting in its capacity as the head of state in the field of foreign affairs, does have certain powers that in the various countries of parliamentary systems, means conclusion of the interstate international agreements, appointment of the ambassadors and the heads of diplomatic representations, provided however that the President requires approval of the Government or the consent thereof – therefore, cooperation is essential in this field. It is essential to note that the Government is deprived of the power to act independently in terms of appointing the ambassadors even in the parliamentary governance model, since, irrespective of the fact that the President is not involved in the executive branch of the government and the political liability with regard to the appointment of the ambassadors is borne by the Government, the ambassador cannot be considered appointed without the signature of the President (see next chapters for detailed analysis).

---

7 The constitutional claim of the Government of Georgia against the President of Georgia, dated 10 June 2022, Nº 1711.

8 *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affars", 2023, 4.

9 The Constitution of Georgia, Article 52(1)("a"), Parliamentary Gazette of the Parliament of Georgia, 31-33, 24/08/1995.

10 The constitutional claim of the Government of Georgia against the President of Georgia, dated 10 June 2022, Nº1711.

3. Systemic Analysis of the Powers of the President of Georgia and her/his Role with regard to the Appointment/Dismissal of the Ambassadors[11]

Until 2013, the matter of appointment of the ambassadors was regulated differenly through the Constitution of Georgia, in particular, the President acting with the consent of the Parliament of Georgia (and not the Government of Georgia) was responsible for the appointment and dismissal of the ambassadors of Georgia and other diplomatic representatives. The said regulation, along with the change of the governance model, was changed and the appointment-dismissal of the ambassadors of Georgia and other diplomatic representatives was made subject to the nomination of the Government of Georgia – the said provision is an existing regulation.[12]

On the basis of the law of Georgia "on the Structure, Powers and Rules of Operation of the Government of Georgia", the President of Georgia exercises the powers set out in Article 52(1)(„a") of the Constitution of Georgia (exercise of the representation power, conducting negotiations with other states and international organizations, conclusion of international treaties, receving accreditations of the ambassadors and other diplomatic representatives of other states and international organizations; appointment and dismissal of the ambassadors and diplomatic representations of Georgia on the basis of the nomination of the Government of Georgia) with the consent of the Government of Georgia and for such purpose the President submits written proposals to the Government of Georgia – such proposals are considered by the Government of Georgia on the hearings of the Government, whereas the approvals of the Government are issued in the form of a decree.[13] Pursuant to Article 52(1)(„a") of the Constitution of Georgia, along with other entitlements in the field of foreign affairs, the President of Georgia *inter alia* appoints and dismisses the ambassadors of Georgia and the heads of diplomatic representations on the basis of the nomination of the Government of Georgia, meaning that the President's proposals may be related *inter alia* to the appointment of the ambassadors. Therefore, the Government of Georgia considers the proposals submitted by the President *inter alia* concerning the appointment of the ambassadors. Further, Article 5 of the Statute on the Foreign Affairs Ministry of Georgia entails an interesting provision whereunder the responsibilities of the Minister of Foreign Affairs of Georgia entail a responsibility to submit proposals on the appointment or dismissal of the extraordinary and plenipotentiary ambassadors, Georgia's permanent representations in the international organizations and the heads of diplomatic missions.[14] The legislation introduces the communication between the Minister of Foreign Affairs and the President of Georgia and the obligation of the Minister to submit proposals to the President that strengthens the assumption that the President's involvement in the process of appointment of the ambassadors shall not be solely limited to the merely formal signature.[15]

---

11 For detailed analysis See: *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023, 144-168.

12 Ibid, 76.

13 The Law of Georgia "on the Structure, Powers and the Rules of Operation of the Government of Georgia".

14 The Statute of the Ministry of Foreign Affairs of Georgia adopted on the basis of the Decree of the Government of Georgia Nº206 dated 16 November 2003, Article 5(1) ("m"), SSM, 134, 16/11/2005.

15 For detailed analysis see: *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023, 160. See the Statement of the President of Georgia <https://fb.watch/fxm4RIH-o8/> [07.07.2024].

Pursuant to the Order of the Minister of the Foreign Affairs of Georgia "on the Completion of the Diplomatic Office", the President participates in the dismissal proceedings of the ambassadors as well, in particular, upon the issuance of the President's decree on the appointment and dimissal of the head of the diplomatic representation, participation of such person in the business trip through rotation and revocation of such person shall be executed on the basis of an individual administrative-legal act of the Minister, whereas in the event of the dismissal of the head of the diplomatic representation by the President of Georgia the early revocation of such person shall be executed by the Minister.[16]

What is the intention of the legislator in this process? This is the question that is to be answered through the systemic analysis of the functions and powers of the President deriving from the Constitution of Georgia. Pursuant to Article 53 of the Constitution of Georgia, following legal acts of the President of Georgia are not subject to the co-signing procedure: appointment of the Prime Minister, appointing the parliamentary elections, signing of the law and publishing, returning the law with the justified remarks to the Parliament and etc.

For instance, the Constitution envisaged such entitlements of the President the mandatory prerequisite of which is the request of the responsible body/electorate, for example: the President is entitled to appoint the referendum on the matters determined under the Constitution and the Law on the basis of the request of the Parliament, Government or at least 200000 voters, within 30 days upon the receipt of the respective request in relation to such appointment.[17] In accordance with the same example, the President is entitled to (and not obligated to) appoint the referendum. The Constitution also entails such powers that require the approvals of certain bodies, for instance, the President of Georgia concludes international agreements with the consent of the Government of Georgia.[18]

When discussing the said powers of the President, the main question refers to her/his discretionary powers, in particular, whether pursuant to the Constitution, the President of Georgia is entitled to act independently – the legislator's answer to this question is positive. The legislator considers the events wherein the President has an obligation to act and the scenarios wherein the President may use the discretionary power. The matter of signing the constitutional law is a particularly interesting example – this matter is considered an obligation of the President since the legislator determines it directly that the President shall sign the law – the President signs the constitutional law adopted on the basis of the votes of no less than two thirds of the entire members and publishes the law within 5 days upon the receipt, without the right to return the law with justified remarks to the Parliament.[19]

As for the possibility to exercise the discretionary powers by the President, the best examples thereof is the possibility to publish the law, whereunder, if the Presient fails to sign the law within 2 weeks or fails to return the law with justified remarks to the Parliament, the law will be signed and

---

16 The Rules on the Completion of the Diplomatic Office adopted on the basis of the Order of the Minister of Foreign Affairs of Georgia N°01-74 dated 02 May 2019, Articles 22 and 22, 02/05/2019.

17 The Constitution of Georgia, Article 52, the Parliamentary Gazette of the Parliament of Georgia, 31-33, 24/08/1995.

18 Ibid.

19 The Constitution of Georgia, Article 46, the Parliamentary Gazette of the Parliament of Georgia, 31-33, 24/08/1995.

published by the Chairman of the Parliament within 5 days.[20] The President is entitled to choose, meaning that the President is able simply not to sign the law. The legislator has also considered the potential results and has determined that if the President fails to sign the law, the said procedure will be executed by the Chairman of the Parliament. Further, the next example refers to the appointment of the Prime Minister, wherein the President also benefits from the discretionary power, since if the President does not appoint the Prime Minister at his/her office within 2 weeks upon the declaration of trust to the Prime Minister, he/she will be considered appointed.[21] Therefore, the legislator also sets out the ability to exercise the discretionary power of the President of Georgia and considered the Prime Minister appointed so that the country is not left without the Prime Minister.[22]

If the President's powers are analyzed on the basis of material law, we will conclude that the legislation of the Georgia does not entail the consequence of a scenario wherein 1. the President does not appoint a certain person as the ambassador; 2. The President neither consents nor refuses to appoint an ambassador for indefinite period of time. Furthermore, the legislation does not entail the regulation on: 1. The term wherein the ambassadors shall be appointed by the President or the term wherein the President shall object to the appointment of such person; 2. The legal consequences of an event wherein the President refuses to appoint a person as an ambassador, therefore, the Constitution of Georgia does determine neither the term nor the legal consequence thereof.

When analyzing the powers granted to the President through the Constitution, the conclusion can be drawn that if, for instance, the President acting on the basis of her/his discretionary power, refuses to appoint an ambassador, the legislator considers such person as appointed. Hence, the legislator does envisage an alternative. The Constitution of Georgia does not even assume the probability that the appointment of the Prime Minister can be delayed, since the latter may result in the governmental crisis in the country and etc. Therefore, the legislator considers the Prime Minister to be appointed if the President acting within its discretionary powers, refuses to appoint the Prime Minister. On the other hand, the Constitution of Georgia offers a different approach pertaining to the appointment of the ambassadors, in particular, it entails a possibility to delay the appointment of the ambassador for an indefinite period of time and does not entitle the Government with the possibility to appoint the ambassador without the formal signature of the President. Furthermore, if the President refuses or delays the appointment of the ambassador for an indefinite period of time, the Constitution does not consider such person to be appointed, unlike the regulation in relation to the appointment of the Prime Minister.

On the basis of the abovementioned discussion, it can be concluded that the Government of Georgia is deprived of the ability to appoint an ambassador without the involvement of the President, therefore, if the President refuses to appoint the candidate as an ambassador, pursuant to the legislation of Georgia, the appointment procedure cannot be simply resumed that further highlights the role of the President in this process.[23]

---

20 Ibid.

21 Ibid, Article 56.

22 For detailed analysis see: *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023, 164.

23 For detailed analysis see: *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023, 171.

4. International Practice in relation to the Appointment/Dismissal of the Ambassadors in Parliamentary System

The regulation of the matter related to the appointment and dismissal of the ambassadors in the countries having the parliamentary system is particularly interesting. For instance, in the countries having the parliamentary governance system such as Hungary[24], Bulgaria[25], Estonia[26], Latvia[27], Italy[28], Lithuania[29] and various other countries applying parliamentary system, the president appoints and dismisses the ambassadors and the heads of the diplomatic representatives on the basis of the nomination of the Government and within the scope of the co-signing mechanism.[30]

If we analyze the legislation of various countries having parliamentary governance system in a more detailed manner, it will become evident that the president does necessarily participate in the process of appointing and dismissing the ambassadors. For instance, pursuant to the act Czech Foreign Service Act, diplomatic and consular titles are granted to the ambassadors, public servants and etc.[31] Under the same Act, the President appoints and dismisses the head of the representative office on the basis of the Government's respective nomination.[32]

Pursuant to the law of Latvia "on the Consular and Diplomatic Office", the President appoints and dismisses the extraordinary, plenipotentiary and permanent representatives, on the basis of the joint proposal of the Minister of Foreign Affairs and the Foreign Affairs Committee of the Parliament.[33]

Pursuant to the Estonian Foreign Service Act, the diplomatic title is granted by the President for an indefinite period of time, whereas the proposals pertaining to the granting and removing of such

---

[24] The Constitution of the Republic of Hungary, Art. 30/A <https://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex2.pdf>, [07.07.2024].

[25] The Constitution of Bulgaria, Art. 92, Art. 98, <http://www.parliament.bg/en/const≥ , [07.07.2024].

[26] The Constitution of the Republic of Estonia, Art. 78, <https://www.constituteproject.org/constitution/Estonia_2015.pdf?lang=en>, [07.07.2024].

[27] The Constitution of the Republic of Latvia, Art. 41, <https://www.satv.tiesa.gov.lv/en/2016/02/04/the-constitution-of-the-republic-of-latvia> , [07.07.2024].

[28] The Constitution of the Italian Republic, Art. 87, <https://www.senato.it/istituzione/la-costituzione> [07.07.2024].

[29] The Constitution of the Republic of Lithuania, Art. 84, <https://www.constituteproject.org/ constitution/Lithuania_2019>, [07.07.2024].

[30] For detailed analysis see: *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023.

[31] Czech Foreign Service Act, section 15, <https://www.mzv.cz/file/2566085/zakon_zahranicni_sluzba_EN_01032019.pdf> [07.07.2024].

[32] For detailed analysis see: *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023, 165.

[33] Latvian Diplomatic and Consular Service Law, section 10, <https://www.vvc.gov.lv/en/laws-and-regulations-republic-latvia-english/diplomatic-and-consular-service-law-amendments-30092021> [07.07.2024], For detailed analysis see: *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023, 165.

titles is submitted by the Government to the President.[34] The Government submits a nomination on the candidate of the ambassador for the President's respective approval, the President within 30 days upon receipt of such proposal, approves such nomination and appoints the ambassador, followed by the Ministry of Foreign Affairs informing the Foreign Affairs Committee of the Parliament on such approval.[35] The President appoints the extraordinary and plenipotentiary ambassador and signs the respective letter of credence within thirty calendar days upon receipt of such proposal.[36] Futher, the President acting on the basis of the proposal submitted by the Government, dismisses the extraordinary and plenipotentiary ambassador within thirty calendar days upon receipt of such proposal.[37]

Pursuant to the German Foreign Service Act, the ambassador serves as a personal representative of the Federal President before the head of state of the receiving country.[38]

The Italian example in relation to the above matter is also interesting to discuss. In particular, the President Sergio Mattarella refused to appoint the former Minister Paolo Savona on the position of the Finance Minister, since he was negatively assesing certain financial restrictions imposed by the legislation of the European Union.[39] The President's action was considered as the abuse of power and biased approach to the highly qualified person.[40] The President's veto has become subject to discussion in the scientific-political circles, particularly, the matter of whether the President had the right to object to the appointment of the Minister and whether such action was in violation with the Constitution was to be assessed.[41] Pursuant to Article 92 of the Constitution of Italy, the Government consists of the President of the Council and the Ministers forming the Council of Ministers, whereas the President of the Republic appoints the Head of the Council of Ministers and the Ministers on the basis of the nomination of the Head of the Council.[42] The powers of the President of Italy are subject to interpretation in the Italian constitutional law, provided however, in accordance with the existing opinion, the President is granted the discretionary power that is being exercised in accordance with the Constitution for the purposes of functioning of the state system – although, when the respective bodies of the government are acting in a coherent and orderly fasion, the President acting in his/her capacity as the neutral arbitrator tends to shift towards the background as envisaged within the flexible nature

---

34 Estonian Foreign Service Act, Arts. 22, 23 <https://www.riigiteataja.ee/en/eli/520122016002/consolide> [07.07.2024].

35 See Art. 27.

36 Ibid.

37 Ibid, Art. 41, see: *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023, 165-166.

38 Gesetz über den Auswärtigen Dienst (GAD), Art. 3, <https://www.gesetze-im-internet.de/gad/GAD.pdf>

39 *Kirchgaessner S.,* Italian president names interim prime minister until fresh elections, Mon 28, May 2018, <https://www.theguardian.com/world/2018/may/28/italy-president-sergio-mattarella-names-interim-prime-minister-carlo-cottarelli> [07.07.2024].

40 Ibid.

41 Presidente della Repubblica, <https://www.quirinale.it/elementi/1345> [07.07.2024].

42 The Constitution of the Italy, Art 92, <https://www.constituteproject.org/constitution/Italy_2012.pdf?lang=en> [07.07.2024], see: *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023, 153.

of the parliamentary system.[43] The actions of President Sergo Mattarella represents not the only example in the history of Italy, yet similar scenario is related to President Scalfarro who refused to appoint the attorney of Berlusconi as the Minister of Justice in 1994 – in 2004 President Napolitano also refused to appoint the Judge as the Minister of Justice since he believed that there would not be a distinct boundary between the executive and judiciary government.[44]

Crotian example is also interesting. It can be said that the relationship between President Zoran Milanovic and Prime Minister Andrei Plenkovic in the field of foreign affairs was characterized as tense. Pursuant to the opinion of the President, he could not see the perspective in cooperating with the Prime Minister, whereas in accordance with the statement made by the Prime Minister, the President had not even expressed his mere interest in resolving the relevant matters that could have been considered within the scope of the joint powers.[45] The President stated that pursuant to the Constitution of Croatia, his responsibility referred to the regular and coordinated functioning of the state government and stability, whereas the Government of Croatia was not acting in a coordinated manner with regard to the foreign policy – for example, Milanovic named unfilled job openings in the diplomatic office, including the opening for 4 ambassadors, that (in his view) was leading to the infringement of the Constitution – the Prime Minister, on the contrary, was stating that he would not meet the President.[46] It is important to note that, the Constitution of Croatia envisages the cooperation between the Government and President in relation to the formation of the foreign policy and the exercise thereof.[47] Since 2020, President Milanovic had only approved the appointment of Hidaet Bishkevic on the position of the ambassador of the Croatin Republic in Belgrade and that was based on the proposal submitted by Prime Minister Andrei Plenkovic whose intention was to have this person specifically appointed on such diplomatic position.[48] The said scenario is an evident example of the fact that not only this appointment, but any appointment on any position is possible on the condition that both parties are in agreement and willing to resolve such matters.[49]

Another evident example is the ambassador's act on behalf of the government, wherein the Croatian Ambassador voted against the resolution that referred to the ceasefire in Gaza.[50] The President's office stated that it had not been informed on the position of the ambassador and that the

---

43 *Diletta T., Michele M., Why the Italian President's Decision was Legitimate, VerfBlog,* 2018/5/28, <https://verfassungsblog.de/why-the-italian-presidents-decision-was-legitimate/ > [07.07.2024].

44 See *Kavelidze T*., Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023, 154.

45 *Tesija V.,* Croatia Faces Fallout from Personal Animosity between President, PM, <https://balkaninsight.com/2023/03/16/croatia-faces-fallout-from-personal-animosity-between-president-pm/> [07.07.2024].

46 Ibid.

47 The Constitution of the Republic of Croatia, Art. 99, <https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text> [07.07.2024].

48 *Tesija V.,* Croatia Faces Fallout from Personal Animosity between President, PM, <https://balkaninsight.com/2023/03/16/croatia-faces-fallout-from-personal-animosity-between-president-pm/> [07.07.2024].

49 Ibid.

50 2024 Office of the President of the Republic of Croatia, <*https://www.predsjednik.hr/en/news/the-president-of-the-republic-was-neither-consulted-nor-informed-of-how-croatia-would-vote-on-the-un-resolution-the-government-has-marked-croatia-as-an-opponent-of-peace/*> [07.07.2024].

Government had not conducted any consultations with the President in relation to the said decisions.[51] Pursuant to the international humanitarian law, the action of the Croatian ambassador was assessed as Croatia's action against the peace.[52]

5. Examples of the Disputes on Competence between the President and Prime Minister

The example of the dispute between the Prime Minister and President in relation to the competence, has been referred to as the "Media War". [53] In 1991, the Prime Minister nominated new candidates on the position of the Vice President of the State Media.[54] The President Árpád Göncz refused to sign the proposal of the Prime Minister, whereas the Prime Minister argued that the President was deprived of the entitlement to refuse to sign the nomination, therefore, the Prime Minister referred this matter to the Constitutional Court.[55] On 23 September, 1991, the Constitutional Court held that the President shall not be in disagreement with the proposal submitted by the Government if the appointment of the nominated candidates does not pose threat to the democratic functioning of the state institutions.[56] With respect to the question whether the President was bound with any term established in relation to the signing of the appointment proposals of state servants, the Constitutional Court held on 28 January, 1992, that the President shall sign the proposals submitted by the Government in a timely fashion, followed by the President Árpád Göncz signing the proposal after 1 month.[57]

In 1992, the Prime Minister Antali once again referred to the Constitutional Court to determine whether the President could refuse the appointment and dismissal of the state officials and whether the President was obligated to substantiate his/her decision – in particular, whether President Göncz had a constitutional right to object to the decision of the Prime Minister in relation to the dismissal of the heads of the broadcasting media and whether his proposal would infringe the fundamental democratic principles of the freedom of expression.[58] The legitimate constitutional right of the President and the "triggering" of such entitlement was dependent upon the President's consideration of the existing situation – in his public statement, President Göncz argued that his decision not to sign the nomination submitted by Antali was based on the existing state of the media and its potential consequences on democracy, since within the condition of non-existing new media law, Göncz had considered dismissal of the heads of broadcasting media, as the intervention in the right of the Göncz of expression that might have imposed threat to the transformation of Hungary as the democratic state.[59]

---

51 Ibid.
52 Ibid.
53 *Bajomi-Lázár P.,* Freedom of the Media in Hungary, 1990–2002, Budapest, 2003, 95.
54 *Kim d.,* A political biography of Hungary's First Post-Communist President, Árpád Göncz, Glasgow Theses Service, University of Glasgow, 2011, 141.
55 Ibid.
56 Ibid, 141.
57 Ibid.
58 *Kim d.,* A political biography of Hungary's First Post-Communist President, Árpád Göncz, Glasgow Theses Service, University of Glasgow, 2011, 147.
59 Ibid, 154.

The Court had actually rendered a decision in favor of the Government and against the so called weak President, whereas the decision itself was regarded as ambiguous and controversial.[60] The Constitutional Court explained that the head of state was entitled to refuse to the appointment of the nominated candidates as the heads of broadcasting media only in the event such nominations impose threat to the democratic functioning of the state institutes, provided however, the practical meaning of the latter phrase is leading to the controversies among opinions (including, among the judges).[61]

The above decision was accompanied by the dissenting opinion of three judges, Géza Kilényi, Péter Schmidt and Imre Vörös, arguing that there were two extremities: 1. The President's signature was of symbolic nature and that the President did not have discretionary power; and 2. The President could refuse to sign the proposal on the basis of a valid ground, even without the respective substantiation.[62] The judges had noted that both alternatives are considered as extremities, even more so that the existing text of the Constitution envisaged *proposal, decision making* and *signing*, meaning that the President's entitlement may be exercised on the basis of the nomination and within the scope of the co-signing.[63] The dissenting opinion states that the essence of the joint power entails that no participant involved in the decision-making is entitled to exclusively decide on the appointment of a person, but the latter is related to the intention of another person involved in the decision-making.[64] The judges have highlighted in the dissenting opinion that the Constitution did not specify the legal grounds that could be used as the basis of the President's approval or rejection to the Government's decision, further, the court had played an excessively active role when the court discussed the necessity to adopt a new law, since that falls under the competence of the legislative body and not of the judiciary system.[65] The justice Schmidt argued that the endless so-called "Constitutional Scrutiny" of the Presidential powers, posed threat to the "exhaustion" of the position of the head of state that could lead to serious consequences, that would weaken the balanced role of the President.[66]

6. Conclusion

Within the scope of analysis of the powers of the President of Georgia and the Government, the conclusion can be drawn that in the field of foreign affairs, in contrast to other entitlements, when appointing the ambassadors, in the event the President refuses to appoint an ambassador nominated on

---

60 *Kiss C.,* Constitution al Democracy in Eastern Europe The Role of Constitutional Courts in Democratie Consolidation in Post-Communist Hungary and Poland, A thesis submitted to McGill University in partial fulfilment of the requirements of the degree of Doctor of Philosophy, 2004, 209.

61 *Kim d.,* A political biography of Hungary's First Post-Communist President, Árpád Göncz, Glasgow Theses Service, University of Glasgow, 2011, 147.

62 Decision of September 26, 1991 (Power Distribution Case), Alkotmanybirosag [Constitutional Court], 148/1991 (IX.26) AB (Hungary), <https://njt.hu/jogszabaly/1991-48-30-75> [07.07.2024].

63 Ibid.

64 Decision of September 26, 1991 (Power Distribution Case), Alkotmanybirosag [Constitutional Court], 148/1991 (IX.26) AB (Hungary), <https://njt.hu/jogszabaly/1991-48-30-75> [07.07.2024].

65 Ibid.

66 *Kiss C.,* Constitution al Democracy in Eastern Europe The Role of Constitutional Courts in Democratie Consolidation in Post-Communist Hungary and Poland, A thesis submitted to McGill University in partial fulfilment of the requirements of the degree of Doctor of Philosophy, 2004, 209.

the basis of the Government's proposal, the Government is deprived of the exclusive entitlement to appoint the ambassador on the basis of the Government's decision. The same conclusion can be drawn on the basis of examples of various countries analyzed herein. When making the decision, the President is not limited to considering such factors as the candidate's qualification and experience for the certain diplomatic position, as well as potential conflict of interest that may become an argument to substantiate the refusal. Pursuant to the Constitution of Georgia, the systemic analysis of the powers of the President leads us to the conclusion that the legislator assumes the possibility of granting the President with the discretionary power in certain scenarios, the clear example of which is the appointment of the Prime Minister. In particular, if the President refuses to exercise the discretionary power and fails to appoint the Prime Minister within the designated term, the country will not be left without the Prime Minister, yet the Prime Minister will be considered as appointed. However, the legislator does not assume the possibility to consider the ambassador appointed by the Government in the event the President refuses to appoint an ambassador. The latter highlights the fact, including on the basis of the example led by various countries, that with regard to the appointment of ambassadors, the head of state, the President (acting on the basis of the proposal submitted by the Government) benefits from the so-called universal entitlement and the President's participation in the process of appointment of an ambassador is required.

Bibliography:

1. The Constitution of Georgia, the Legislative Herald of Georgia, 31-33, 24/08/1995.
2. Organic Law of Georgia "On the Constitutional Court of Georgia", Article 19, Parliamentary Gazette of the Parliament of Georgia, 001, 31/01/1996.
3. The Law of Georgia "on the Structure, Powers and the Rules of Operation of the Government of Georgia", 13/02/2004.
4. The Statute of the Ministry of Foreign Affairs of Georgia adopted on the basis of the Decree of the Government of Georgia №206 dated 16 November 2003, SSM, 134, 16/11/2005.
5. The Rules on the Completion of the Diplomatic Office adopted on the basis of the Order of the Minister of Foreign Affairs of Georgia №01-74 dated 02 May 2019, 02/05/2019.
6. *Kavelidze T.*, Dissertation on the "Powers of the President and Government of Georgia in the Field of Foreign Affairs", 2023.
7. The statement of the political union of the citizens "Georgian Dream – Democratic Georgia" <https://gd.ge/news> [07.07.2024].
8. The constitutional claim of the Government of Georgia against the President of Georgia, dated 10 June 2022, №1711.
9. The constitutional claim of the Government of Georgia against the President of Georgia, dated 16 August 2022, №1723.
10. The Orders of the Constitutional Court dated 03 February 2022 №3/1/1711 and №3/2/1723.
11. The Constitution of the Republic of Hungary, <https://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex2.pdf> [07.07.2024].
12. The Constitution of Bulgaria, <http://www.parliament.bg/en/const> [07.07.2024].

13. The Constitution of the Republic of Estonia, <https://www.constituteproject.org/constitution/Estonia_2015.pdf?lang=en> [07.07.2024].
14. The Constitution of the Republic of Latvia, <https://www.satv.tiesa.gov.lv/en/2016/02/04/the-constitution-of-the-republic-of-latvia> [07.07.2024].
15. The Constitution of the Italian Republic, <https://www.senato.it/istituzione/la-costituzione> [07.07.2024].
16. The Constitution of the Republic of Lithuania, <https://www.constituteproject.org/constitution/Lithuania_2019> [07.07.2024].
17. The Constitution of the Republic of Croatia, <https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text> [07.07.2024].
18. Estonian Foreign Service Act, <https://www.riigiteataja.ee/en/eli/520122016002/consolide> [07.07.2024].
19. Czech Foreign Service Act, <https://www.mzv.cz/file/2566085/zakon_zahranicni_sluzba_EN_01032019.pdf> [07.07.2024].
20. Latvian Diplomatic and Consular Service Law, <https://www.vvc.gov.lv/en/laws-and-regulations-republic-latvia-english/diplomatic-and-consular-service-law-amendments-30092021> [07.07.2024].
21. Gesetz über den Auswärtigen Dienst (GAD), <https://www.gesetze-im-internet.de/gad/GAD.pdf> [07.07.2024].
22. *Bajomi-Lázár P.,* "Freedom of the Media in Hungary, 1990–2002", Budapest, 2003.
23. Decision of September 26, 1991 (Power Distribution Case), Alkotmanybirosag [Constitutional Court], 148/1991 (IX.26) AB (Hungary), <https://njt.hu/jogszabaly/1991-48-30-75> [07.07.2024].
24. *Diletta T., Michele M., Why the Italian President's Decision was Legitimate, VerfBlog,* 2018/5/28, <https://verfassungsblog.de/why-the-italian-presidents-decision-was-legitimate/ > [07.07.2024].
25. *Kirchgaessner S.,* Italian president names interim prime minister until fresh elections, Mon 28, May 2018, <https://www.theguardian.com/world/2018/may/28/italy-president-sergio-mattarella-names-interim-prime-minister-carlo-cottarelli> [07.07.2024].
26. *Kim d.,* A political biography of Hungary's first Post-Communist President, Árpád Göncz, Glasgow Theses Service, University of Glasgow, 2011.
27. *Kiss C.,* Constitution al Democracy in Eastern Europe the Role of Constitutional Courts in Democratic Consolidation in Post-Communist Hungary and Poland, A thesis submitted to McGill University in partial fulfilment of the requirements of the degree of Doctor of Philosophy, 2004.
28. Presidente della Repubblica, <https://www.quirinale.it/elementi/1345> [07.07.2024].
29. 2024 Office of the President of the Republic of Croatia, <https://www.predsjednik.hr/en/news/the-president-of-the-republic-was-neither-consulted-nor-informed-of-how-croatia-would-vote-on-the-un-resolution-the-government-has-marked-croatia-as-an-opponent-of-peace/> [07.07.2024].
30. *Tesija V.,* Croatia Faces Fallout from Personal Animosity between President, PM, <https://balkaninsight.com/2023/03/16/croatia-faces-fallout-from-personal-animosity-between-president-pm/> [07.07.2024].

Cover Designer:

Mariam Ebralidze

Compositor:

Nino Vacheishvili

Technical Editorial Group:

Natia Chitashvili

Ana Mghvdeladze

Printed in Ivane Javakhishvili Tbilisi State University Press

---

1, Ilia Tchavtchavadze Ave., Tbilisi 0128

Tel 995(32) 225 04 84, 6284/6279

https://www.tsu.ge/ka/publishing-house