

JOURNAL OF LAW



TSU FACULTY OF LAW

№1, 2025

CONTENTS

Sulkhan Oniani

On a legal formula found in the Monuments of Georgian Law

Tamar Katsitadze

Legal Regulation of Interest in the Context of Private Autonomy According to Old Georgian Law

Nino Zhvania

Enticement and Encouragement as Forms of Incitement (Complicity) to Commit a Crime in Ancient Georgian Criminal Law

Eka Zarnadze

Challenges in the Enforcement of the Child's Right to Alimony in Legislation and Judicial Practice

Ekaterine Akhalkatsi

The Problem of Enforcement of Notarial Acts (Comparative Analysis)

Irakli Leonidze

Opening Inheritance on the Household Estate

Marika Turava

Preferential and Non-Preferential Rules for Determining Product Origin and Their Significance in International Trade Law

Nana Uznadze

The Problematic Aspects of Compensation for Damage Caused by a Doctor's Omission in Medical Law



Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№1, 2025



**უნივერსიტეტის
გამომცემლობა**

UDC(uak) 34(051.2)
s-216

Editor-in-Chief

Prof. Dr. Irakli Burduli (TSU)

Editorial Board

Prof. Dr. Giorgi Davitashvili (TSU)

Prof. Dr. Giorgi Khubua (TSU)

Prof. Dr. Besarion Zoidze (TSU)

Assoc. Prof. Dr. Tamar Zarandia (TSU)

Prof. Dr. Tevdore Ninidze (TSU)

Prof. Dr. Lado Chanturia (TSU)

Prof. Dr. Lasha Bregvadze (TSU, T. Tsereteli Institute of State and Law, Director)

Assoc. Prof. Dr. Lela Janashvili (TSU)

Prof. Dr. Nugzar Surguladze (TSU)

Prof. Dr. Paata Turava (TSU)

Assoc. Prof. Dr. Natia Chitashvili (TSU)

Prof. Dr. iur. Dr. h.c. (TSU Tiflis) Bernhard Kempen (University of Cologne)

Professor Dr. Dr. h.c. (TSU Tiflis) Christian von Coelln (University of Cologne)

Prof. Dr. Artak Mkrtichyan (University of A Coruña)

Prof. Dr. Dariusz Szpoper (Pomeranian University in Słupsk)

Prof. Dr. Jan Lieder (University of Freiburg)

Prof. Dr. Tiziana Chiusi (University of Saarland)

Prof. Dr. Josep Maria de Dios Marcer (Autonomous University of Barcelona)

Prof. Dr. Joan Lluís Pérez Francesch Autonomous University of Barcelona)

Managing Editor

Assoc. Prof. Dr. Natia Chitashvili

Technical Editors:

Irakli Leonidze (PhD Student, TSU)

Ana Mghvdeladze

Authors of the papers published in this journal are each solely responsible for the accuracy of the content and their respective opinions do not necessarily reflect the views of the Editorial Board Members.

The journal holds International license: CC BY-SA

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

© Ivane Javakhishvili Tbilisi State University Press, 2025

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

Sulkhan Oniani

On a legal formula found in the Monuments of Georgian Law	5

Tamar Katsitadze

Legal Regulation of Interest in the Context of Private Autonomy According to Old Georgian Law	22

Nino Zhvania

Enticement and Encouragement as Forms of Incitement (Complicity) to Commit a Crime in Ancient Georgian Criminal Law	33

Eka Zarnadze

Challenges in the Enforcement of the Child's Right to Alimony in Legislation and Judicial Practice	43

Ekaterine Akhalkatsi

The Problem of Enforcement of Notarial Acts (Comparative Analysis)	62

Irakli Leonidze

Opening Inheritance on the Household Estate	79

Marika Turava

Preferential and Non-Preferential Rules for Determining Product Origin and Their Significance in International Trade Law	87

Nana Uznadze

The Problematic Aspects of Compensation for Damage Caused by a Doctor's Omission in Medical Law	112

Giorgi Kiria

Defamation as an Illegitimate Source of Income	131

Gvantsa Khasia

The Entity Responsible for Ensuring Compliance with Safety Standards under the Package Travel Contract	178

Lavrenti Maglakelidze

The Application of the Principle of Prohibition of Double Jeopardy (<i>ne bis in idem</i>) in the Case-Law of the European Court of Human Rights and National Courts.....	192

Sophio Lasareishvili

The Duration for Conducting Covert Investigative Actions as a Criterion for Determining the Intensity of Interference with the Right to Personal Life	226

Anzor Makharadze

Problems of Victimization of the Injured Party at the Trial Stage	243

Levan Dzeladze

Organized Crime as a Transnational Threat in the Modern Period	257

Nino Monaselidze

The Dangerous Dissemination of Personal Data and Its Legal Consequences	287

Paata Turava, Gvantsa Varamashvili

The EU-Georgia Association Agreement as a Process of Harmonization of Georgian Environmental Law	295

Khatuna Loria, Tatia Barakadze

Annulment of an Individual Administrative-Legal Act without Resolving the Disputed Issue by the Court and Ordering the Issuance of a New Act – an Effective Means of Protecting the Rights of an Interested Person?	310

Shalva Kipshidze

Agricultural Land as a Resource of Special Importance and Practical Aspects of Privatization	325

Mariam Berbichashvili

The Problematic Issues About Compensation for Damages Caused by Suspension of Appealed Individual Beneficial Administrative-Legal act, key Aspects About Mutual Separation of Procedural Standards Established in Civil and Administrative Court Proceedings	339

Konstantin Korkelia

Prevention of Natural Disasters: Situation in Georgia and its Compliance with European Human Rights Standards	356

Lia Ablotia

Specific Aspects of Establishing Specialized Courts	377

Nana Ghvaladze

The Extradition Treaty between Georgia and the United States – A Legal Analysis and Perspectives for Implementation	392

Marina Londaridze

The Essence of Freedom of Expression in a Democratically Governed State	406

Sulkhan Oniani*

On a legal formula found in the Monuments of Georgian Law

The article is dedicated to one of the legal formulas found in Georgian legal monuments. We frequently come across with this formula in the orders of kings or persons of high hierarchies, and as per the perceptions held in those times, it was considered a strong social mechanism against the addressee of the formula, which also facilitated the enforcement of the will of the one who made orders.

Keywords: *Old Georgian law, to take someone else's sin upon oneself, king, oath.*

1. Introduction

Law is one of the instruments for social order. For this reason, the widely held perceptions of any period are reflected in it. It can be said that, in a certain manner, law also obeys the principle of “supply and demand”¹.

For instance, in today's Criminal Code, prescribing “shaving” as a form of punishment for any crime would be unimaginable. At best, it would elicit a smile from modern lawyers and Georgian society at large. However, in Article 2 of King George V's Book of Laws (Dzeglisdeba, 1334–1335), it appears as one of the possible punishments, something far from surprising, given that George the Brilliant acted as per the realities of his time. Naturally, had he lived in the modern era, such a law would have never crossed his mind.

A more recent example can be drawn from the Soviet period: the 1960 Georgian Criminal Code treated the kidnapping of a woman “for marriage” as a separate criminal offense.² This provision remained in force until 1999. From today's perspective, merely 25 years later, the existence of such a norm, with its inherently discriminatory content, in a modern legal system could be seen as an unthinkable act of legal vandalism.

Such examples could be recalled endlessly; however, they all point to one unchanging principle: “Times change, and so do we.”³ What may seem unusual or even absurd from today's vantage point was once regarded as a fully functional social mechanism, formally enshrined in legal documents.

It is precisely this type of formulation that became the focus of the article. It appears in the documents of kings from different eras, high-ranking secular officials, and senior clergy, and, from the

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

¹ Mankiw, G., *Principles of Economics* (Georgian edition edited by: A. Akhvlediani, A. Kakhnashvili, N. Manchkhvashvili, L. Kadagidze, A. Chabashvili), 2nd Georgian edition, Diogene Publishing, Tbilisi, 2008, 77 (In Georgian).

² Note: Article 134 of the 1960 Code (Abduction of a Woman for Marriage) states: ‘Abduction of a woman for the purpose of marriage shall be punishable by imprisonment for up to 3 years or by corrective labor for up to 1 year.’ See: Criminal Code of the Georgian SSR.” 30/12/1960, Art. 134 (In Georgian).

³ “Mutantur Tempora et Nos Mutamur in illis”. See: Chabashvili, M., Dictionary of Foreign Words, 3rd edition, Tbilisi, 1989, 585 (In Georgian).

perspective of that time, was perceived as a powerful mechanism for influencing the addressees of legal norms.

The principle in question is that of “taking the sins of others upon oneself,”⁴ which appears in Georgian legal monuments in the form of a curse (threat) formula. Specifically, the author of the document calls upon everyone not to violate the will expressed in the document. And should the addressee fail to comply with this request, then they shall bear the price at the Final Judgement for the sins of document’s author.⁵

It is not difficult to discern that the belief in one person taking the sins of another upon themselves reflects one of the central dogmas of Christianity. Namely, the idea that Jesus Christ took upon Himself the sins of humanity, as well as the doctrines of the Second Coming and the Judgement Day. This is most clearly evidenced by the texts of Georgia’s crowned monarchs – those very monarchs who traced the origins of their royal dynasty directly to the biblical David and referred to themselves as “Bagrationi of the line of Jesse, David, and Solomon.”

2. The Legal Formula in Question in Georgian Monarchs’ Legal Acts

It is not surprising that this type of legal formula (in various forms) appears abundantly in the legal documents of Georgian kings. For example:

1. Bagrat IV’s Opiza Charter (1057): “The holy apostles shall be judges of his soul on that Day of Judgment, and may God demand my sins from him.”⁶ And in his Book of Mercy (also from 1057): “You shall pay for my sins and transgressions before God.”⁷

2. King Tamar’s Donation Charter (1188): “He is the one who will hold accountable for my sins and transgressions on the Judgment Day. And his words will be appended: “His blood be upon us and our children.”⁸

3. Alexander I the Great’s Charter (1440): “May God’s relentless wrath fall upon him, and may he be judged for our sins and transgressions on Your Second Coming.”⁹ His Charter of Privilege (1441): “Whoever harms me, may you hold them accountable for our sins and transgressions before Your Son and our God. ...May you hold them accountable for my sins and transgressions on the

⁴ *Note:* The principle of ‘taking upon oneself the sins of others’ is, in turn, based on the so-called ‘concept of substitution’ and is discussed in detail in another article: see Oniani, S., *On the Significance of Bearing Sin*, T. Tsereteli Institute of State and Law, *Essays on the History of Legal and Political Thought*, Feradze, G. (ed.), Meridian Publishing, Vol. 3, Tbilisi, 2015, 346-381 (In Georgian).

⁵ *Note:* That section of a legal document (such as a royal decree or charter) in which this phrase was usually articulated was termed “braltgadamkhdeloba” (“bearing of guilt”) by Ivane Javakhishvili. It is noteworthy that Javakhishvili coined this term precisely based on the content of this formula. See Javakhishvili, I., *The Purpose, Sources, and Methods of History in the Past and Now*, Book 3, *Georgian Diplomats, i.e., the Study of Charters*, Part 2, Tbilisi, 1926, 109-112” (In Georgian).

⁶ *Dolidze I.*, *Monuments of Georgian Law*, Vol. 2, Tbilisi, 1965, 9 (hereinafter– MGL) (In Georgian).

⁷ *Ibid.*, 6.

⁸ *Ibid.*, 27.

⁹ *Ibid.*, 127.

Judgment Day.”¹⁰ His Book of Mercy (1441): “O Almighty God, may he be judged for our sins and transgressions before you on Your Second Coming.”¹¹

4. Charter of Giorgi VIII (1453): “If in the celebration of the Lord’s days the liturgy be diminished and not performed, then for us also shall you be the judged instead of me at His Second Coming.”¹² Book of Donation (1464): “Whosoever shall alter or annul [this gift], upon him shall be wrath of the Father, the Son, and the Holy Spirit, and your too the Mother of God of Gelati, and at the Second Coming He shall be Judge instead of me before your Son and our God.”¹³ Book of Privilege (1446-1476): “Whosoever man shall change or transgress from the unchanging rule of the Christians, upon him shall be wrath of the Father, the Son, and the Holy Spirit, and He is the one who shall bear payment for my sins before God.”¹⁴

Supposedly, it must be a note of Giorgi VIII on Kakha Toreli’s Book of Donation (1259): “You, O Mother of God of Rkoni, at the Second Coming, may you and your Son account this as my reward, and for the remission of my sins may this stand before the presence of your Son.”¹⁵

5. Luarsab I Book of Privilege (1540): “Whosoever shall annul or alter this our ordained and donated book, charter, and sign, at the Second Coming, he shall be the one to bear payment for our sins.”¹⁶

6. Charter of Mercy by Giorgi II, King of Imereti (1563-1564): “For the recompense of our sins, at the Second Coming, He shall call [for us] to account. ... For the recompense of our sins He shall call [for us] to account at the Second Coming.”¹⁷

7. Book of Donation by Simon I (1581): “Whosoever, whether any man, or any of the kings, or of the queens, or a prince, or a great man, or a lesser man, shall dare to annul or alter [this deed] ... he shall be the one to bear payment for our sins.”¹⁸

8. Book of Donation by Giorgi X (1591): “He is also the one who shall bear payment for our sins on that great Day of Judgment.”¹⁹

9. Book of Donation by Luarsab II (1606-1615): “For our sins, He shall be the Judged.”²⁰

10. Decree of Teimuraz I (1606-1632): “Whosoever shall annul this act, whether king or noble or commoner, or abbot, upon him shall be the wrath of the Trinity and the Unity. As for our sins, he

¹⁰ Ibid, 129.

¹¹ Ibid, Annex, Tbilisi, 2023, 28.

¹² Ibid, Vol. 2, Tbilisi, 1965, 132.

¹³ Ibid, Annex, Tbilisi, 2023, 31.

¹⁴ Ibid, 36.

¹⁵ Corpus of Georgian Historical Documents, Georgian Historical Documents IX-XII centuries, Vol. 1, *Enukidze T., Silogava V., Shoshiashvili N.* (Ed.), Vol. 1, “Metsniereba” Publishing, Tbilisi, 1984, 158 (In Georgian).

¹⁶ MGL, Annex, Tbilisi, 2023, 44 (In Georgian).

¹⁷ Ibid, Vol. 2, Tbilisi, 1965, 192, 193.

¹⁸ Ibid, Annex, Tbilisi, 2023, 64.

¹⁹ *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M.* (eds.), *Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century*, Vol. 1, Tbilisi, 2019, 50 (In Georgian).

²⁰ Ibid, 71.

shall answer.”²¹ Book of Donation (1612): “He is the one who shall give account for our sins on that great Day of Judgment.”²²

11. Book of Donation by Giorgi III, King of Imereti (1610): “Whosoever shall contest or annul this, let him be accursed forever and ever; and for our sins may He give account at His Second Coming.”²³

12. Book of Donation by King Rostom (1644): “For our sins they shall be judged on that Day of Judgment.”²⁴ Book of Renewal of Donation (1645): “In our stead he shall give account at Second Coming, and with the elect on His left hand shall be His portion and inheritance.”²⁵

13. Book of Donation by Alexander III, King of Imereti (1655): “Whosoever shall contest this, let him be reckoned instead of us and be accursed and anathematized by all patriarchs and bishops.”²⁶ Book of Privilege by Alexander III of Imereti (1660): “At the Second Coming, may he give account for our sins before the Lord Christ.”²⁷

14. Book of Donation by Giorgi IV, king of Imereti (1696–1698): “Now, whosoever, whether any man, king, queen, noble, or gentry, shall take from us this donated peasant and hold him unlawfully or treat him harshly, may you and your son incur wrath; and for our sins may he give account on that great Day of Judgment.”²⁸

15. Vakhtang VI’s Charter of Mercy (1717): “Whosoever shall lay hand to withdraw or dispossess this our donation and the serfs and estate bestowed upon the Garsevanashvilis, be thou anathematized before the Icon of the Crucifixion, and for our sins let him be judged on that Day of the Second Coming.”²⁹

16. Solomon I’s Charter (1778): “At the Second Coming, in place of our sins, he shall be judged.”³⁰

17. Charter of David II, King of Imereti (1786): “If God does not bestow His mercy upon us and another does not prevail over us, let this oath and pledge not be broken against you. And if you remain obedient to our command and yet we should wrong you, then when Christ sits as Judge at the Second Coming, for your sins we shall render account to God.”³¹

²¹ MGL, Vol. 4, Tbilisi, 1972, 66 (In Georgian).

²² *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.), Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century*, Vol. 1, Tbilisi, 2019, 113 (In Georgian).

²³ MGL, Annex, Tbilisi, 2023, 80 (In Georgian).

²⁴ *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.), Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century*, Vol. 2, Tbilisi, 2021, 268 (In Georgian).

²⁵ *Ibid*, 279.

²⁶ MGL, Annex, Tbilisi, 2023, 96 (In Georgian).

²⁷ *Kakabadze, S. Ecclesiastical Documents of Western Georgia*, Vol. 2. Tiflis University Press, Tiflis, 1921, 173 (In Georgian).

²⁸ MGL, Annex, Tbilisi, 2023, 180 (In Georgian).

²⁹ *Ibid*, 200.

³⁰ *Kakabadze, S. Ecclesiastical Documents of Western Georgia*, Vol. 2. Tiflis University Press, Tiflis, 1921, 67 (In Georgian).

³¹ MGL, Annex, Tbilisi, 2023, 259 (In Georgian).

18. Enactments of Erekle II (1791): “Moreover, should any of the great or small of Georgia interfere in any matter and disturb the order, at the Second Coming let him render account to the Lord in place of my sins, and let no good befall from God that body which becomes the cause. ... For my sins shall he be judged, should anyone disturb this.”³²

19. Solomon II’s Charter of Mercy (1801): “Before the dread judgment of Christ, the share of the sins of the aforementioned revered kings and my own shall be borne by those who speak this word.”³³

Evidently, the royal charters present us with a wide variety of legal formulae, and the very fact that the monarchs of Georgia actively employed this phrase already demonstrates their worldview and legal conceptions, views that were, naturally, shared by the clergy and the feudal class of the time. For this reason, this oath and threat formula is frequently echoed in the documents of Georgian hierarchs and senior ecclesiastical authorities. It also appears in the records of high-ranking state officials as well as in court rulings from various periods.

3. The Legal Formula under Discussion in the Acts of the Georgian Church Hierarchs and High-Ranking Ecclesiastical and Secular Officials.

Since the formula in question appears with the same remarkable frequency in documents issued by ecclesiastical figures and secular feudal lords, the following list illustrates (without citing the textual material itself) the individuals whose legal documents contain this threat, namely:

1. Catholicos – 1. Abraam³⁴ (XV century); 2. Dorotheos³⁵ (XVI century); 3. John,³⁶ Zachary,³⁷ Evdemon,³⁸ Zachary,³⁹ Nicholas⁴⁰ (XVII century); 4. John⁴¹, Domenti,⁴² Germane,⁴³ Bessarion⁴⁴ (XVIII century) – legal acts;

2. Bishops – 1. Anton of Tchkondidi,⁴⁵ (XIII century); 2. Melkisedek of Gelati,⁴⁶ Zachary of Gelati,⁴⁷ Gabriel of Tsageri,⁴⁸ Archbishop Nikoloz,⁴⁹ Evdemon Mangleli⁵⁰ (XVII century); 3. Joseph

³² Ibid, Vol. 2, Tbilisi, 1965, 516, 520.

³³ Materials of the N. Berdzenishvili Kutaisi Historical-Ethnographic Museum, edited by J. Nanukashvili. Tbilisi: Soviet Georgia Publishing House Vol. 3, Tbilisi, 1978, 183 (In Georgian).

³⁴ MGL, Vol. 3, Tbilisi, 1970, 212 (In Georgian).

³⁵ Ibid, 357.

³⁶ Ibid, 392.

³⁷ Ibid, 486.

³⁸ Ibid, 494.

³⁹ Ibid, 532.

⁴⁰ Ibid, 565, 602.

⁴¹ Ibid, 627.

⁴² Ibid, 706, 709, 749.

⁴³ Ibid, 789-790.

⁴⁴ Ibid, 842.

⁴⁵ Ibid, Vol. 2, Tbilisi, 1965, 34.

⁴⁶ Ibid, Vol. 3, Tbilisi, 1970, 261.

⁴⁷ Ibid, 513.

⁴⁸ Ibid, 520, 521, 522.

of Urnisi,⁵¹ Nikifore of Tsilkani,⁵² Arsen Mangeli,⁵³ Domenti of Tiflis,⁵⁴ Evedemon Kutateli,⁵⁵ Grigol of Tchondidi⁵⁶ (XVIII century); Dositeos Kutateli⁵⁷ (The end of XVIII, first forth of XIX) – legal documents:

Among the highest secular officials, we shall name:

1. Queens of Georgia – 1. Tamar – The spouse of David Narini⁵⁸ (XIII century); 2. Tamar – The Spouse of George X⁵⁹ and Khvarashan – The Spouse of George XI⁶⁰ (XVII century) – decrees;

2. High Pheudals – 1. Grigol, son of Bakuriani (XI century)⁶¹; 2. Chaberi Mandaturtukhutsesi⁶² (XII century); 3. Mkhargrdzeli Sargis' son,⁶³ Grigol Surameli,⁶⁴ Kakha Toreli,⁶⁵ Dzagan, son of Abulet⁶⁶ (XIII century); Shalva Qvenifneveli,⁶⁷ Mamisa Mejinibetukhutsesi⁶⁸ (XV century); 4. Rostom Gurieli⁶⁹ (XVI century); 5. Iese Eristavi,⁷⁰ Vameq Dadiani,⁷¹ Giorgi Gurieli⁷² (XVII century); 6. Katsia Dadiani,⁷³ Mamia Gurieli,⁷⁴ Giorgi Gurieli⁷⁵ (XVIII century); 7. Vakhtang Gurieli⁷⁶ (XIX century) – legal acts.

Undoubtedly, the monuments of Georgian law that employ these legal formulas are not limited to the list of persons mentioned, but for the purposes of the present study, the examples already

⁴⁹ *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M.* (eds.), *Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century*, Vol. 2, Tbilisi, 2021, 488 (In Georgian).

⁵⁰ MGL, Vol. 3, Tbilisi, 1970, 585 (In Georgian).

⁵¹ Ibid, 626.

⁵² Ibid, 629.

⁵³ Ibid, 694.

⁵⁴ Ibid, 712.

⁵⁵ Ibid, 711.

⁵⁶ Ibid, 816.

⁵⁷ Ibid, 996. 1029, 1034, 1106, 1120, 1124, 1127, 1133.

⁵⁸ Ibid, Vol. 2, Tbilisi, 1965, 76.

⁵⁹ *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M.* (eds.), *Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century*, Vol. 1, Tbilisi, 2019, 102 (In Georgian).

⁶⁰ MGL, Annex, Tbilisi, 2023, 175 (In Georgian).

⁶¹ Ibid, Vol. 3, Tbilisi, 1970, 92, 94.

⁶² Ibid, Vol. 2, Tbilisi, 1965, 29.

⁶³ Ibid, Vol. 3, Tbilisi, 1970, 152.

⁶⁴ Ibid, Vol. 2, Tbilisi, 1965, 39.

⁶⁵ Ibid, 60-61.

⁶⁶ Ibid, 71.

⁶⁷ Ibid, 141, 143.

⁶⁸ Ibid, Vol. 8, Tbilisi, 1985, 821.

⁶⁹ Ibid, Vol. 6, Tbilisi, 1977, 656.

⁷⁰ Ibid, Vol. 3, Tbilisi, 1970, 483.

⁷¹ Ibid, Vol. 6, Tbilisi, 1977, 672.

⁷² Ibid, 676.

⁷³ Ibid, Annex, Tbilisi, 2023, 220.

⁷⁴ Ibid, Vol. 6, Tbilisi, 1977, 719.

⁷⁵ Ibid, 723, 724.

⁷⁶ Ibid, 454.

provided are entirely sufficient. At this point, however, it is far more interesting to focus on the structure and variations of the given legal formula.

4. Structure, Content, and Variations of the Legal Formula in Question

The diversity of the legal formula under study makes it possible to view its content from different perspectives; therefore, what is of particular interest at this stage is the analysis of its structure and a sort of systematization, which requires answering a number of questions.

4.1. Who is Addressed with the Oath

In the overwhelming majority of cases, the legal formula, in the form of a sanction, is directed toward third parties – that is, the author of the document threatens anyone who violates his will with the consequence declared in the curse (“You shall be held accountable for my sins and transgressions before God;”⁷⁷ “May God judge you instead of me on that great Judgment Day,”⁷⁸ etc.).

There are also documents in which the author does not threaten or warn others, but rather swears an oath himself: “If I prove false in this matter or in what is written in this oath, may this oath break me, may the grace of the above-written, the sins of your father and your mother, and your sins on the Second Coming be laid upon me;”⁷⁹ “At the Second Coming, before Christ, may I be the one to answer for your sins;”⁸⁰ “When Christ is enthroned as Judge at His Second Coming, may we answer before God for your sins.”⁸¹

At times, in the very same document, the author both takes upon themselves the responsibility of answering and also threatens the other party with accountability: “May I bear the sins of that uncle of mine, if it should not be testified in this way before you and the notary... In place of that uncle, before Christ, may I bear his sins if what is said is not true... If this should not be the case, may I be accountable before Christ, if the judges act unjustly toward my brothers, may they answer to me before Christ... Whichever judge acts unjustly against me, when we stand before Christ, may they answer there... If I lie and something is written falsely, may it not be forgiven, as I have confessed my sins in confession? Whoever does not believe, when Christ sits in judgment at that terrible trial, on that Day of Judgment, let me and him render judgment to each other.”⁸²

4.2. Clarification on the Circle of Addressees of the Threat

In the overwhelming majority of cases, the addressees of the warning are an indeterminate circle of persons, and the threat is formulated generally, directed at anyone at all (with words such as

⁷⁷ Ibid, Vol. 2, Tbilisi, 1965, 6.

⁷⁸ Ibid, Vol. 6, Tbilisi, 1977, 724.

⁷⁹ Ibid, Vol. 4, Tbilisi, 1972, 141.

⁸⁰ Ibid, Vol. 3, Tbilisi, 1970, 842.

⁸¹ Ibid, Annex, Tbilisi, 2023, 259.

⁸² Ibid, Vol. 8, Tbilisi, 1985, 928, 929, 930.

“whoever,”⁸³ “whosoever,”⁸⁴ “if anyone,”⁸⁵ “whatever man,”⁸⁶ “whosoever of mankind,”⁸⁷ “whatever soul, descendant of Adam,”⁸⁸ etc.).

However, there are also cases where the formula contains a hierarchical list of social strata. Such lists may begin with the sovereign, mention viziers, the royal court, and the catholicos, and end with all other subjects. For example:

“Whosoever among the sons of men shall abolish this offering and endowment made by us – whether king, bishop, great, or small;”⁸⁹ “From among the future kings and queens of our lineage, or from any other lineage of the human race;”⁹⁰ “Whether it be by one of the kings or queens, or by a prince, or a great man, or a lesser man;”⁹¹ “Whosoever of mankind it be – whether king, queen, noble, or knight.”⁹²

Even more, there are also instances where the addressees are specified with even greater precision. E.g.: “If the one who annuls this should be: a son, a brother, or a relative... If they bring this document before the kings of the Abkhazians and they do not confirm it... If the viziers or the officials of the royal court should see it and not confirm it... If any of my lineage should be and does not confirm it... If the Catholicos should see it and not endorse it, may God lay my sins upon him;”⁹³ “And if the fathers, the holy priests, the stewards, or the celebrant appointed on my behalf should diminish or alter this offering and prayer instituted for me.”⁹⁴

Such specificity can also be found, for instance, in one of King Erekle II’s documents, where the title itself makes clear (“Statutes of King Irakli of Georgia to his sons concerning the kingdom of Georgia”⁹⁵) that the primary addressees are his own family members.

4.3. Whose Sins Are Directed Toward the Addressee

In the vast majority of documents, the author emphasizes their own sins (that is, the addressee is threatened with having to answer for the author’s sins). For example: “He shall bear my sins before God. ...And may he be charged before Christ with my faults and my sins;”⁹⁶ “Let hem be deemed guilty on account of all my sins.”⁹⁷

⁸³ Ibid, Annex, Tbilisi, 2023, 31.

⁸⁴ Ibid, Vol. 2, Tbilisi, 1965, 129.

⁸⁵ Ibid, 141.

⁸⁶ Ibid, Annex, Tbilisi, 2023, 36.

⁸⁷ Ibid, Vol. 3, Tbilisi, 1970, 565.

⁸⁸ Ibid, Vol. 8, Tbilisi, 1985, 934.

⁸⁹ Ibid, Vol. 3, Tbilisi, 1970, 520, 521.

⁹⁰ Ibid, Annex, Tbilisi, 2023, 28.

⁹¹ Ibid, 64.

⁹² Ibid, 180.

⁹³ Ibid, Vol. 2, Tbilisi, 1965, 60-61.

⁹⁴ Ibid, 71; See also MGL, Vol. 6, Tbilisi, 1977, 656.

⁹⁵ Ibid, Vol. 2, Tbilisi, 1965, 516, 520.

⁹⁶ Ibid, Vol. 3, Tbilisi, 1970, 92, 94.

⁹⁷ Ibid, Vol. 2, Tbilisi, 1965, 34.

However, there are also documents where the author specifically names other persons and threatens the potential violator with accountability not only for his own sins but also for those of others – his parents, children, or particular individuals. For instance: “And on the Day of Judgment may the sins and faults of me, the blessed Sargis’s son, together with my children and descendants, be laid upon him;”⁹⁸ “He shall answer for my sins and for the sins of my deceased and future kin;”⁹⁹ “He shall be judged for my sins, my father’s and mother’s sins, and those of my household and relatives;”¹⁰⁰ “May he be held accountable for my sins and for those of the senior justice;”¹⁰¹ “For the sins of the above-mentioned blessed kings and for my sins, may he stand guilty before Christ at the terrible Last Judgment.”¹⁰²

Logically, if the violator must answer before God’s supreme court for the sins of others, he will also be accountable for his own sins at that same tribunal. What is noteworthy, however, is that sometimes the author makes this point explicitly: “He shall be judged both for his own sins and for ours on that dreadful Day of Judgment.”¹⁰³

We also find an inclusive variation, where the author joins the addressees with himself and threatens any third party with bearing responsibility for both: “On the Day of His Second Coming, may he answer for both my sins and yours alike.”¹⁰⁴

Finally, it should be noted that in those documents which contain not threats but rather promises, one may also encounter oaths in which the author takes upon themselves only the sins of the addressee (“At the Second Coming before God, let us be the ones to answer for your sins;”¹⁰⁵), or oaths in which they accept responsibility for the sins of multiple persons (“If I prove false in this matter or in what is written in this oath, may this oath break me, and on the Day of the Second Coming may I be judged for your sins, the sins of your father and mother, and your own sins.”¹⁰⁶).

4.4. Whom Does the Violator Stand Accountable Before

In this regard, several guarantors of the enforcement of justice appear in the documents:

1. God – Frequently invoked, e.g., “He shall bear my sins and transgressions before God.”¹⁰⁷ In many texts, God is the primary judge.¹⁰⁸ Sometimes, He is explicitly referred to as “the Just Judge” (“...at the Second Coming he shall be judged for our sins by the Just Judge, God”¹⁰⁹).

⁹⁸ Ibid, Vol. 3, Tbilisi, 1970, 152.

⁹⁹ Ibid, Vol. 2, Tbilisi, 1965, 71.

¹⁰⁰ Ibid, Vol. 3, Tbilisi, 1970, 609.

¹⁰¹ Ibid, Vol. 8, Tbilisi, 1985, 934.

¹⁰² Materials of the N. Berdzenishvili Kutaisi Historical-Ethnographic Museum, edited by J. Nanukashvili. Tbilisi: Soviet Georgia Publishing House Vol. 3, Tbilisi, 1978, 183 (In Georgian).

¹⁰³ MGL, Vol. 3, Tbilisi, 1970, 749 (In Georgian).

¹⁰⁴ Ibid, 653.

¹⁰⁵ Ibid, 700.

¹⁰⁶ Ibid, Vol. 4, Tbilisi, 1972, 141.

¹⁰⁷ Ibid, Vol. 8, Tbilisi, 1985, 821.

¹⁰⁸ MGL, Vol. 2, Tbilisi, 1965, 6, 9, 45, 46, 60-61, 71, 76, 141, 143, 516, 520; Ibid, Vol. 3, Tbilisi, 1970, 92, 94; Ibid, Vol. 6, Tbilisi, 1977, 656; Ibid, Annex, Tbilisi, 2023, 36 (In Georgian).

¹⁰⁹ Ibid, Vol. 3, Tbilisi, 1970, 816.

2. Christ – Sometimes mentioned independently (“Be charged with my faults and sins before Christ”¹¹⁰), and sometimes in combination with a title, such as Christ the *Lord*¹¹¹ or Christ the Judge.¹¹²

3. The Virgin Mary – Invoked together with her Son (e.g., “You, O Virgin of Rkoni, at the Second Coming, together with your Son, question him as my recompense, and make him stand before your Son as bearer of my sins.”¹¹³);

4. The Judge (unspecified) – Occasionally, the formula avoids naming God or Christ directly and simply says: “He shall be judged for our sins before the Judge on that Day of Punishment.”¹¹⁴).

Interestingly, in many cases, the text does not specify at all before whom, or under what circumstances, the violator will answer. Instead, only general phrases are used, such as “He shall be the redeemer of our sins”¹¹⁵ or “He shall be held accountable for our sins.”¹¹⁶ Clearly, for contemporaries, it was already self-evident who, where, when, and before whom the violator would bear the author’s sins. Numerous examples confirm this practice.¹¹⁷

4.5. Circumstances, Where the Culprit Bears Responsibility

There are cases in which the author of the document specifies that the violator will be judged both in this world and at the other world: “Whosoever of mankind, whether great or small, shall act against this, let him bear punishment both here and in the other world.” However, in the overwhelming majority of documents, the threat does not concern earthly life. Instead, it appears in a variety of other formulations, including:

1. The Second Coming – which may be mentioned generally (“He shall answer at the Second Coming for my sins”¹¹⁸), or more specifically: Christ’s Second Coming (“For my sins he shall be

¹¹⁰ MGL, Vol. 3, 92, 94; See also: MGL, Vol. 3, Tbilisi, 1970, 842; Vol. 6, Tbilisi, 1977, 719; Vol. 8, Tbilisi, 1985, 901, 928, 929, 930; Corpus of Georgian Historical Documents, Georgian Historical Documents IX-XII centuries, Vol. 1, *Enukidze T., Silogava V., Shoshiashvili N. (Ed.)*, Vol. 1, “Metsniereba” Publishing, Tbilisi, 1984, 195 (In Georgian).

¹¹¹ *Kakabadze, S. Ecclesiastical Documents of Western Georgia*, Vol. 2. Tiflis University Press, Tiflis, 1921, 173 (In Georgian).

¹¹² MGL, Annex, Tbilisi, 2023, 259 (In Georgian).

¹¹³ Corpus of Georgian Historical Documents, Georgian Historical Documents IX-XII centuries, Vol. 1, *Enukidze T., Silogava V., Shoshiashvili N. (Ed.)*, Vol. 1, “Metsniereba” Publishing, Tbilisi, 1984, 153; See also *Ibid*, 158; See also MGL, Vol. 2, Tbilisi, 1965, 129; *Ibid*, Annex, Tbilisi, 2023, 31 (In Georgian).

¹¹⁴ MGL, Vol. 3, Tbilisi, 1970, 1120 (In Georgian).

¹¹⁵ *Ibid*, Annex, Tbilisi, 2023, 64.

¹¹⁶ *Ibid*, Vol. 3, Tbilisi, 1970, 483.

¹¹⁷ MGL, Vol. 2, Tbilisi, 1965, 29, 34; Vol. 3, Tbilisi, 1970, 212, 247, 423, 493, 494, 495, 513, 532, 585, 627, 1106; Vol. 6, Tbilisi, 1977, 454; Vol. 8, Tbilisi, 1985, 913; *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.)*, *Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century*, Vol. 1, Tbilisi, 2019, 71 (In Georgian).

¹¹⁸ MGL, Vol. 3, Tbilisi, 1970, 368; See also MGL, Vol. 2, Tbilisi, 1965, 132, 192, 193; Vol. 3, Tbilisi, 1970, 261, 369, 372, 496; Vol. 4, Tbilisi, 1972, 141, 265; Vol. 8, Tbilisi, 1985, 901; Annex, Tbilisi, 2023, 28, 44, 80, 97, 175, 200, 259; See also *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.)*, *Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century*, Vol. 2, Tbilisi, 2021, 279, 488; See also *Kakabadze, S. Ecclesiastical Documents of Western Georgia*, Vol. 2. Tiflis University Press, Tiflis, 1921, 67, 173 (In Georgian).

judged on that dreadful Day at Christ's Second Coming"¹¹⁹), God's Second Coming ("May God, whose wrath cannot be withstood, judge him at His Second Coming for your sins and faults"¹²⁰).

2. Day of Judgment – ("He shall bear responsibility for your sins and faults on the Day of Judgment"¹²¹). At times, the formula specifies a "bell-ringing Day of Judgment" ("He who answers for my sins and faults, let him be judged on that bell-ringing Day of Judgment"¹²²);

3. Day of Punishment / Great Day of Punishment – ("For our sins, he shall be judged on the Day of Punishment"¹²³; "For our sins, let him be judged on the Great Day of Punishment"¹²⁴).

4. Eternity / Day of Eternity – ("Let him be judged for your sins for eternity"¹²⁵), "On the Day of Eternity, let him bear responsibility for our sins"¹²⁶, ("For our sins, let him be judged in the eternal age").¹²⁷

5. Christ's Tribunal / Dreadful Judgment – e.g., "Before Christ's dreadful tribunal"¹²⁸, "When Christ shall sit in that dreadful judgment."¹²⁹

6. Combined formulations – some documents mention both the Second Coming and the Day of Punishment ("At the Second Coming, for our sins, he shall be judged on the Day of Punishment"¹³⁰), or the Second Coming and Christ's judgment ("He shall be judged for our sins at the Second Coming in Christ's tribunal"¹³¹).

4.6. Terms Expressing Substitution

The part of the legal formula under study that expresses substitution is notable for its richness of synonyms. The constructions mainly used are as follows:

¹¹⁹ MGL, Vol. 3, Tbilisi, 1970, 357; See also MGL, Vol. 3, Tbilisi, 1970, 789-790; Vol. 8, Tbilisi, 1985, 901; Annex, Tbilisi, 2023, 259; *Kakabadze, S. Ecclesiastical Documents of Western Georgia, Vol. 2. Tiflis University Press, Tiflis, 1921, 173* (In Georgian).

¹²⁰ MGL, Vol. 2, Tbilisi, 1965, 127 (In Georgian).

¹²¹ MGL, Vol. 2, Tbilisi, 1965, 45, 46; See also MGL, Vol. 2, Tbilisi, 1965, 27; Vol. 3, Tbilisi, 1970, 392, 486, 504, 567, 568, 609, 626, 629, 709, 711, 749; Vol. 4, Tbilisi, 1972, 216; Vol. 6, Tbilisi, 1977, 600, 672, 676, 724; Annex, Tbilisi, 2023, 180; See also *Kartvelishvili T., Baidurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.), Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century, Vol. 1, Tbilisi, 2019, 50, 102, 113; Ibid, Vol. 2, Tbilisi, 2021, 268* (In Georgian).

¹²² MGL, Vol. 2, Tbilisi, 1965, 129 (In Georgian).

¹²³ Ibid, Vol. 3, Tbilisi, 1970, 565.

¹²⁴ MGL, Vol. 3, Tbilisi, 1970, 1034; See also MGL, Vol. 3, Tbilisi, 1970, 152, 712, 996, 1029, 1120, 1124, 1127, 1133; Vol. 6, Tbilisi, 1977, 723 (In Georgian).

¹²⁵ MGL, Vol. 6, Tbilisi, 1977, 601 (In Georgian).

¹²⁶ Ibid, Vol. 3, Tbilisi, 1970, 370, 373.

¹²⁷ Ibid, 263, 526.

¹²⁸ Materials of the N. Berdzenishvili Kutaisi Historical-Ethnographic Museum, edited by J. Nanukashvili. Tbilisi: Soviet Georgia Publishing House Vol. 3, Tbilisi, 1978, 183 (In Georgian).

¹²⁹ MGL, Vol. 8, Tbilisi, 1985, 928, 929, 930 (In Georgian).

¹³⁰ Ibid, Annex, Tbilisi, 2023, 220.

¹³¹ Ibid, Vol. 4, Tbilisi, 1972, 265.

1. Judgment “in place of” someone – this can appear as the subject being substituted: (“Let them be judged in our place”¹³² “Let them be judged in my stead”¹³³ “Let them be judged in our place”¹³⁴), or judgment “in place of the subject’s sin” (“He shall be judged in place of our sin”¹³⁵, “Let him be judged for our sin instead”¹³⁶); Judgment/sentencing “in place of” (“They shall be punished in place of our sin”¹³⁷);

2. “Bearer” or “responsible for” sins/faults:– “He shall bear our sins,”¹³⁸ “He shall bear my faults,”¹³⁹ “He shall be the bearer of my sins and faults,”¹⁴⁰ “He is also the bearer of our sins.”¹⁴¹

3. “To be judged / condemned as Mukafi / Mukfi”– in different variations: He shall be judged as Mukafi”¹⁴² “to be judged as – Mukabi”¹⁴³; “Muqabi”¹⁴⁴; “Nukafi / nukfi” – ¹⁴⁵; “Nukmi”¹⁴⁶; “We also see – “Sanukfo”¹⁴⁷ (all these words also mean “someone’s place”).

4. In place of our sin (“He shall be judged in place of our sin”¹⁴⁸); In place of / instead of sin (“In place of my sin, ”¹⁴⁹ “In place of my sin”¹⁵⁰); Also in place of sin (“Also in place of our sin”¹⁵¹)

¹³² Ibid, Vol. 3, Tbilisi, 1970, 1106; See also Ibid, 1127.

¹³³ Ibid, 996.

¹³⁴ Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.), *Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century*, Vol. 2, Tbilisi, 2021, 279 (In Georgian).

¹³⁵ MGL, Vol. 3, Tbilisi, 1970, 263; See also Ibid, Annex, Tbilisi, 2023, 175 (In Georgian).

¹³⁶ Ibid, Vol. 3, Tbilisi, 1970, 1029.

¹³⁷ Ibid, Vol. 6, Tbilisi, 1977, 723.

¹³⁸ MGL, Annex, Tbilisi, 2023, 44; See also Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.), *Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century*, Vol. 1, Tbilisi, 2019, 113 (In Georgian).

¹³⁹ MGL, Annex, Tbilisi, 2023, 36; See also *Corpus of Georgian Historical Documents*, Georgian Historical Documents IX-XII centuries, Vol. 1, Enukidze T., Silogava V., Shoshiashvili N. (Ed.), Vol. 1, “Metsniereba” Publishing, Tbilisi, 1984, 195 (In Georgian).

¹⁴⁰ MGL, Vol. 2, Tbilisi, 1965, 27 (In Georgian).

¹⁴¹ Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.), *Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century*, Vol. 1, Tbilisi, 2019, 50 (In Georgian).

¹⁴² *Corpus of Georgian Historical Documents*, Georgian Historical Documents IX-XII centuries, Vol. 1, Enukidze T., Silogava V., Shoshiashvili N. (Ed.), Vol. 1, “Metsniereba” Publishing, Tbilisi, 1984, 153, 158; See also MGL, Vol. 3, Tbilisi, 1970, 247, 368, 372, 493, 520, 522, 526, 816; Ibid, Annex, Tbilisi, 2023, 96, 97 (In Georgian).

¹⁴³ MGL, Vol. 3, Tbilisi, 1970, 532 (In Georgian).

¹⁴⁴ Ibid, Vol. 6, Tbilisi, 1977, 454.

¹⁴⁵ Ibid, 672. Ibid, Vol. 3, Tbilisi, 1970, 369; Ibid, Annex, Tbilisi, 2023, 80. Ibid, Vol. 6, Tbilisi, 1977, 676. Ibid, Annex, Tbilisi, 2023, 180.

¹⁴⁶ Ibid, Vol. 2, Tbilisi, 1965, 192. Ibid, 193; See also Ibid, Vol. 3, Tbilisi, 1970, 261.

¹⁴⁷ Ibid, Vol. 3, Tbilisi, 1970, 609. Ibid, 692.

¹⁴⁸ Kakabadze, S. *Eccelesiastical Documents of Western Georgia*, Vol. 2. Tiflis University Press, Tiflis, 1921, 67; See also MGL, Vol. 8, Tbilisi, 1985, 928, 929, 930 (In Georgian).

¹⁴⁹ MGL, Vol. 6, Tbilisi, 1977, 719; See also Ibid, Vol. 3, Tbilisi, 1970, 706, 709 (In Georgian).

¹⁵⁰ Ibid, Vol. 6, Tbilisi, 1977, 724; See also Ibid, Vol. 3, Tbilisi, 1970, 711.

¹⁵¹ Ibid, Annex, Tbilisi, 2023, 220.

Answer in place of sin/substitute answer (“He shall answer in place of our sin,”¹⁵² “He shall answer in place of your sin”¹⁵³); There is also a variation in which sin is not mentioned – “He shall be judged in our place”¹⁵⁴;

Interestingly, in *The Knight in the Panther’s Skin*, there is one such stanza: “I cannot do it; may God judge in my place, and may He administer punishment for me as a substitute!”¹⁵⁵

5. Answer giving / answering (“Let me be the giver of the answer for your sin,”¹⁵⁶ “Let him answer for my sin”¹⁵⁷); There is also this – “be the giver of the answer” (“Before Christ the Lord let him be the giver of the answer”¹⁵⁸); another variation – “the one who answers” (“And let him be the one who answers for my sins and faults and let him deliver it”¹⁵⁹);

6. We also encounter – share (“Let him take a share of our sins on the day of punishment”¹⁶⁰);

7. Giving the Word (“For my sins, he will also become a spokesman for the terrible judgment of Christ”¹⁶¹, “For all my faults and sins, he will speak the word to God, on that day. At the great judgment”¹⁶²);

8. We also have such original variants as: to be a debtor (“be a debtor to Christ”¹⁶³); to pay the penalty (“be a debtor to God for my countless sins, on the day of judgment”¹⁶⁴); to pay the penalty (“He is the one who pays the penalty for all my sins and offenses”¹⁶⁵); to be blameless (“he also become blameless from all my sins”¹⁶⁶); to bearer (“He will also bear my sins and offenses”¹⁶⁷; “He is the one who bears my sins before God,”¹⁶⁸; “he bear my sins and offenses before Christ”¹⁶⁹); to pay the

¹⁵² Ibid, Vol. 3, Tbilisi, 1970, 513.

¹⁵³ Ibid, 789-790.

¹⁵⁴ Ibid, 1133.

¹⁵⁵ *Rustaveli Shota*, *The Knight in the Panther’s Skin*, Tbilisi, 1986, 425 (In Georgian).

¹⁵⁶ MGL, Vol. 3, Tbilisi, 1970, 842 See also Ibid, Vol. 6, Tbilisi, 1977, 656; Vol. 8, Tbilisi, 1985, 934 (In Georgian).

¹⁵⁷ MGL, Vol. 2, Tbilisi, 1965, 516; Ibid, 71; See also Ibid, Vol. 4, Tbilisi, 1972, 66; Vol. 8, Tbilisi, 1985, 901; Annex, Tbilisi, 2023, 259 (In Georgian).

¹⁵⁸ *Kakabadze, S. Ecclesiastical Documents of Western Georgia, Vol. 2. Tiflis University Press, Tiflis, 1921, 173 (In Georgian).*

¹⁵⁹ MGL, Vol. 2, Tbilisi, 1965, 129 (In Georgian).

¹⁶⁰ Ibid, Vol. 3, Tbilisi, 1970, 712; See also Materials of the N. Berdzenishvili Kutaisi Historical-Ethnographic Museum, edited by J. Nanukashvili. Tbilisi: Soviet Georgia Publishing House Vol. 3, Tbilisi, 1978, 183 (In Georgian).

¹⁶¹ Materials of the N. Berdzenishvili Kutaisi Historical-Ethnographic Museum, edited by J. Nanukashvili. Tbilisi: Soviet Georgia Publishing House Vol. 3, Tbilisi, 1978, 183 (In Georgian).

¹⁶² Corpus of Georgian Historical Documents, Georgian Historical Documents IX-XII centuries, Vol. 1, Enukidze T., Silogava V., Shoshiashvili N.(Ed.), Vol. 1, “Metsniereba” Publishing, Tbilisi, 1984, 162 (In Georgian).

¹⁶³ MGL, Vol. 8, Tbilisi, 1985, 928, 929, 930 (In Georgian).

¹⁶⁴ Ibid, Vol. 2, Tbilisi, 1965, 71.

¹⁶⁵ Ibid, 29.

¹⁶⁶ Ibid, 34.

¹⁶⁷ Ibid, Vol. 8, Tbilisi, 1985, 913.

¹⁶⁸ Ibid, Vol. 3, Tbilisi, 1970, 92; See also Ibid, Vol. 8, Tbilisi, 1985, 928.

¹⁶⁹ Ibid, Vol. 3, Tbilisi, 1970, 94.

penalty (“He is the one who pays the penalty for our sins”¹⁷⁰, “You are the payers for my sins and faults before God”¹⁷¹); To be presented as a payer (“May he presented as a payer for my sins before your Son”¹⁷²); Avenge (“Avenge my sins from him”¹⁷³);

9. There are also simple constructions such as the subject's judgment for sin / for sins / for sins and faults (“He will also be judged for our sins,”¹⁷⁴ “He will also be judged for our sins,”¹⁷⁵ “He will be judged for our sins and faults”¹⁷⁶); the subject's judgment by sin (“When He comes the second time, will judge by our sins”¹⁷⁷); punishment for sins (“He will also be punished for our sins”¹⁷⁸); even simpler variations are —“He also bore my sins”¹⁷⁹ and “He gave us on the day of judgment when he judged us.”¹⁸⁰

10. We encounter another phrase – God shall ask the faults / faults and sins (“Let God ask him my faults,”¹⁸¹ “Let God ask him your faults and sins”¹⁸²).

And finally, in addition to the terms expressing “substitution”, there is also a descriptive title of the document expressing substitution, specifically, the author explicitly notes that he gave the addressee a written pledge to be presented before Christ at the Second Coming, freeing from sins and giving an answer in his place: “This unchangeable, firm, immutable, infallible, unshakable, unreasonable pledge and book of sin and grace, acceptable before Jesus Christ at the Second Coming, and giving an answer in place of your sin and freeing you, we have bestowed upon you, by God exalted, by God established, Catholicos German ...if in this you are condemned, let us be the givers of such an answer to God at the Second Coming, you are simple.”¹⁸³

¹⁷⁰ Ibid, Annex, Tbilisi, 2023, 64.

¹⁷¹ Ibid, Vol. 2, Tbilisi, 1965, 6; See also Ibid, 129.

¹⁷² Corpus of Georgian Historical Documents, Georgian Historical Documents IX-XII centuries, Vol. 1, *Enukidze T., Silogava V., Shoshiashvili N.* (Ed.), Vol. 1, “Metsniereba” Publishing, Tbilisi, 1984, 153 (In Georgian).

¹⁷³ MGL, Vol. 2, Tbilisi, 1965, 9 (In Georgian).

¹⁷⁴ *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M.* (eds.), Documental Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century, Vol. 1, Tbilisi, 2019, 71; See also MGL, Annex, Tbilisi, 2023, 200 (In Georgian).

¹⁷⁵ *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M.* (eds.), Documental Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century, Vol. 1, Tbilisi, 2019, 102; See also Ibid, Vol. 2, Tbilisi, 2021, 268; See also MGL, Vol. 2, Tbilisi, 1965, 141, 143; Vol. 3, Tbilisi, 1970, 494, 495, 565, 602, 626, 627, 629, 694; Vol. 6, Tbilisi, 1977, 601; Vol. 8, Tbilisi, 1985, 833 (In Georgian).

¹⁷⁶ MGL, Annex, Tbilisi, 2023, 28; See also Corpus of Georgian Historical Documents, Georgian Historical Documents IX-XII centuries, Vol. 1, *Enukidze T., Silogava V., Shoshiashvili N.* (Ed.), Vol. 1, “Metsniereba” Publishing, Tbilisi, 1984, 162 (In Georgian).

¹⁷⁷ *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M.* (eds.), Documental Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century, Vol. 2, Tbilisi, 2021, 488; See also Ibid, Vol. 2, Tbilisi, 2021, 488; See also MGL, Vol. 2, Tbilisi, 1965, 520; Vol. 4, Tbilisi, 1972, 216, 265 (In Georgian).

¹⁷⁸ MGL, Vol. 6, Tbilisi, 1977, 600 (In Georgian).

¹⁷⁹ Ibid, Vol. 3, Tbilisi, 1970, 423.

¹⁸⁰ Ibid, 392; See also Ibid, Vol. 2, Tbilisi, 1965, 132; Ibid, Annex, Tbilisi, 2023, 31.

¹⁸¹ Ibid, Vol. 2, Tbilisi, 1965, 60-61.

¹⁸² Ibid, 45; See also Ibid, 141, 143.

¹⁸³ MGL, Vol. 3, Tbilisi, 1970, 790 (In Georgian).

Evidently, the legal formula under study is a real instrument, which was often used by the statesmen of old Georgia. However, it should be noted that it is not the only one, and in the legal monuments, besides this juridical formula, there also occurs a ritual oath of similar content.

5. The Ritual Oath of “Taking on Sin”

In the Law Code of Vakhtang VI¹⁸⁴, one of the recognized forms of judicial proof (a means of self-exoneration) is the practice known as “taking on sin” (“tsodvis mokideba”). In essence, it is a ritual oath whereby the accused lifts the accuser onto his back and declares that, if guilty, he himself shall answer at the Second Coming not only for his own transgressions but also for the sins of the accuser.¹⁸⁵

Georgian legal monuments also record other variations of this ritual, such as taking on sin at a grave (i.e., swearing the same oath while standing on a grave) and taking on sin by a handshake.¹⁸⁶

Examples of taking on sin at a grave can be found in: The judgment in the case of the Germanozashvilis’ separation (1688-1703);¹⁸⁷ the judgment in the case concerning Sekhnia Zubiashvili and Beri Davitishvili’s estate (1751);¹⁸⁸ The judgment in the dispute over the house of Thomas and Khapervan (1783).¹⁸⁹

In all three cases, the court instructs the accused to swear on a grave in order to prove his innocence. It is noteworthy that references to such an oath are not confined to judicial decisions alone; sometimes they appear already in the petitions themselves. For instance, in a petition submitted to King Erekle II (1766), the petitioner expressed readiness to prove his case by taking on sin at a grave: “Whatever judgment you command on this matter, I accept. If you order it, I will take sin at a grave, that my father’s word may stand so.”¹⁹⁰

As for taking on sin by handshake, it appears in: The judgment in the blood-feud case of Iese Otkhmizuri and Gogia Gorgoshidze (1818);¹⁹¹ The judgment in the case of Gogia Khukhunaishvili and Tokhadze (1818).¹⁹²

All three forms of this ritual oath – on the back, at a grave, and by handshake—are attested in Georgian customary law. Moreover, customary practice does not limit itself to these alone but offers additional variations as well, the detailed discussion of which, however, lies beyond the scope of the present article.¹⁹³

¹⁸⁴ *Note:* By the way, the concluding words of Vakhtang VI’s Book of Law also contain the formula under study: “Whoever does not hear this warning and violates our laws shall, instead of our sins, be duly punished.” See. MGL, Vol. 1, Tbilisi, 1963, 533.

¹⁸⁵ MGL, Vol. 1, Tbilisi, 1963, 481, 485 (In Georgian).

¹⁸⁶ *Note:* These rituals do not involve carrying a person on one’s back.

¹⁸⁷ MGL, Vol. 4, Tbilisi, 1972, 203 (In Georgian).

¹⁸⁸ *Ibid*, 402.

¹⁸⁹ *Ibid*, Vol. 5, Tbilisi, 1974, 233.

¹⁹⁰ *Ibid*, Vol. 7, Tbilisi, 1981, 113.

¹⁹¹ *Ibid*, Vol. 6, Tbilisi, 1977, 536.

¹⁹² *Ibid*, 553.

¹⁹³ *Note:* See footnote N4.

6. Conclusion

Thus, for a full millennium, the legal documents of Georgian crown kings and queens, high-ranking ecclesiastical hierarchs, and senior officials (edicts, charters of donation, grants, decrees, records, etc.) consistently contain this legal formula as part of an uninterrupted tradition, clearly demonstrating that it was a customary and characteristic feature of medieval Georgian legal thought.

Grounded in the central dogma of Christian teaching, the taking upon Himself of humanity's sins by Jesus Christ, this formula resonates in the Georgian worldview and finds expression in written documents as a concrete legal construct. From the perspective of its authors, and in line with the social conceptions of the time, it was regarded as a powerful instrument of influence upon the addressee of the decree.

All of the above once again underscores the extent to which prevailing social conceptions shape legal institutions, and how, over time, these institutions evolve in step with shifting social outlooks. In contemporary Georgian society, traces of such conceptions have almost entirely vanished, surviving only in the form of the colloquial expression "Genatsvale" (word by word: "may I take it upon myself" or "let me be on your place"), preserved in various usages as a vestige of that older worldview.

Bibliography:

1. Criminal Code of Georgian SSR 30/12/1960, Art. 134 (In Georgian).
2. *Dolidze I.*, Monuments of Georgian Law, Vol. 1, Tbilisi, 1963, 481, 484, 533 (In Georgian).
3. *Dolidze I.*, Monuments of Georgian Law, Vol. 2, Tbilisi, 1965, 6, 9, 27, 29, 34, 39, 45, 46, 60-61, 71, 76, 127, 129, 132, 141, 143, 192, 193, 516, 520 (In Georgian).
4. *Dolidze I.*, Monuments of Georgian Law, Vol. 3, Tbilisi, 1970, 92, 94, 152, 212, 247, 261, 263, 357, 368, 369, 370, 372, 392, 423, 483, 486, 493, 494, 495, 496, 504, 513, 520, 521, 522, 526, 532, 565, 567, 568, 585, 602, 609, 626, 627, 629, 694, 706, 709, 711, 712, 749, 789-790, 816, 842, 996, 1029, 1034, 1106, 1120, 1124, 1127, 1133 (In Georgian).
5. *Dolidze I.*, Monuments of Georgian Law, Vol. 4, Tbilisi, 1972, 66, 141, 203, 216, 265, 402 (In Georgian).
6. *Dolidze I.*, Monuments of Georgian Law, Vol. 5, Tbilisi, 1974, 233 (In Georgian).
7. *Dolidze I.*, Monuments of Georgian Law, Vol. 6, Tbilisi, 1977, 454, 536, 553, 600, 601, 656, 672, 676, 719, 723, 724 (In Georgian).
8. *Dolidze I.*, Monuments of Georgian Law, Vol. 7, Tbilisi, 1981, 113 (In Georgian).
9. *Dolidze I.*, Monuments of Georgian Law, Vol. 8, Tbilisi, 1985, 821, 901, 913, 928, 929, 930, 934 (In Georgian).
10. *Dolidze I.*, Monuments of Georgian Law, Annex, Tbilisi, 2023, 28, 31, 36, 44, 64, 80, 96, 97, 175, 180, 200, 220, 259 (In Georgian).
11. *Kakabadze S.*, Ecclesiastical Documents of Western Georgia, Vol. 2, Tbilisi University Press, Tbilisi, 1921, 67, 173 (In Georgian).
12. *Mankiw, G.*, Principles of Economics (Georgian edition edited by: *A. Akhvlediani, A. Kakhashvili, N. Manchkhashvili, L. Kadagidze, A. Chabashvili*), 2nd Georgian edition, Diogene Publishing, Tbilisi, 2008, 77 (In Georgian).

13. *Oniani, S.*, On the Significance of “Taking on Sin”, in T. Tsereteli, State and Legal Institutions, Essays on the History of Legal and Political Thought, ed. G. Feradze, Publisher “Meridiani,” Vol. 3, Tbilisi, 2015, 346-381 (In Georgian).
14. *Rustaveli Shota*, The Knight in the Panther’s Skin, Tbilisi, 1986, 425 (In Georgian).
15. *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.)*, Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century, Vol. 1, Tbilisi, 2019, 50, 71, 102, 113 (In Georgian).
16. *Kartvelishvili T., Baindurashvili K., Gelashvili I., Gogoladze T., Shaorshadze M., Jojua T., Surguladze M. (eds.)*, Documentary Sources on the Kings of Kartli and Kakheti in the First Half of the 17th Century, Vol. 2, Tbilisi, 2021, 268, 279, 488 (In Georgian).
17. Corpus of Georgian Historical Documents, Georgian Historical Documents IX-XII centuries, *Enukidze T., Silogava V., Shoshiashvili N. (Ed.)*, Vol. 1, “Metsniereba” Publishing, Tbilisi, 1984, 153, 158, 195 (In Georgian).
18. Materials of the N. Berdzenishvili Kutaisi Historical-Ethnographic Museum, edited by J. Nanukashvili. Tbilisi: Soviet Georgia Publishing House Vol. 3, Tbilisi, 1978, 183 (In Georgian).
19. *Chabashvili, M.*, Dictionary of Foreign Words, 3rd edition, Tbilisi, 1989, 585 (In Georgian).
20. *Javakhishvili, Iv.*, The Purpose, Sources, and Methods of History: Then and Now, Book 3, Knowledge of Georgian Charters, or Diplomats, Vol. 2, Tbilisi, 1926, 109-112 (In Georgian).

Tamar Katsitadze*

Legal Regulation of Interest in the Context of Private Autonomy According to Old Georgian Law

The article discusses the issue of the legal regulation of interest in Old Georgian law within the context of private autonomy. It examines what legal mechanisms were used to regulate the restriction of interest for the purpose of protecting the principles of justice and morality in the legal monuments of Old Georgian law. The article also analyzes the legislative challenges related to this process and its impact on defining the boundaries of private autonomy.

Keywords: *interest, restriction of interest, private autonomy, the role of justice in the regulation of interest, Old Georgian law.*

1. Introduction

Private autonomy is a fundamental principle of private law, yet its full realization is only possible within the framework of restrictions defined by a legal order grounded, at all times, in the principles of justice and morality.¹ In Old Georgian law, the regulation of interest was examined precisely in the context of private autonomy and from the perspective of the necessity of its limitation. The monuments of Georgian law – the Law of Vakhtang VI, the Law of Beka-Aghbugha, and the Law of George the Brilliant – regulate the issue of interest by taking into account economic necessity, justice, and moral values. These considerations affect the principle of private autonomy in different ways, altering its boundaries in accordance with the nature of these restrictions.

2. Private Autonomy and the Principle of Justice

Old Georgian law, which recognizes the principle of private autonomy, does not adhere to radical frameworks such as the absolute prohibition of interest. According to the Law of Vakhtang VI, the Law of Beka-Aghbugha, and the Laws of George the Brilliant, agreements on interest are permissible; however, the private autonomy of the parties to a loan contract is not entirely unrestricted in determining its amount. The interest agreed upon by the parties is lawful only up to the maximum limits established in these monuments of law. This limitation of private autonomy aims to uphold the idea of justice in the monuments of Old Georgian law. The significance of justice as the principal guiding criterion in the regulation of interest is clearly reflected in the introductory words preceding the provisions on interest in the Law of Vakhtang VI: “*How it is just to lend tetri, wine, or bread*”².

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

¹ Zoidze B., *Reception of European Private Law in Georgia*, Tbilisi, 2005, 287 (in Georgian).

² *Monuments of Georgian Law, Dolidze I. (ed.), vol. I, Tbilisi, 1963, 513 (in Georgian).*

The restriction of the parties' freedom of agreement through the establishment of maximum permissible interest rates in the monuments of Georgian law was a necessary legislative measure, without which the development of unfair practices would have been inevitable. Prior to the introduction of mandatory regulation on interest, in the absence of legislative limitations, Vakhtang VI drew attention to the presence of such unjust practices, writing in his book of law: *"Let me tell you of debt, for in Kartli, no proper inquiry had ever been made"*³. Following this introduction, he describes the prevailing practices under such unregulated and unexamined conditions, where loans were issued with drastically varying interest rates. This discrepancy is particularly evident in the case of loans issued in tetri: *"In recent times, a tumani has been lent for five abazi per month, four abazi, three abazi, ten shauri, two abazi, five shauri, one abazi, three shauri, two shauri – indeed, many different rates have occurred"*⁴. "Within the framework of an agreement on interest, under the conditions of the absolute freedom of contractual autonomy of the parties, one of the sources of injustice, in addition to agreeing on unreasonably large amounts of interest, was the practice of taking interest on interest, which contributed to the further increase of the amount of interest and, as a result, the spread of even more unjust practices. The existence of such practices is confirmed by Vakhtang VI in his book on law, where he writes about the taking of interest on any subject of debt: *"Thus, interest on interest also has been charged – for as many years as the payment had been delayed, an equivalent amount of interest was extracted"*⁵.

Thus, the regulation of interest in the monuments of Old Georgian law, which was carried out by establishing the maximum permissible amount of interest, represented a form of limitation on private autonomy. However, this limitation served to prevent unjust practices and was justified on the basis of the principle of justice. In the context of limiting private autonomy, it is important to understand by what means and within what framework Georgian legislators restricted the freedom to determine interest. How the maximum permissible amounts of interest were defined, to what extent the agreement on interest was subject to strict limitations, and how the legislator intervened in the private autonomy of the parties – these questions can be answered through the study of the legal norms in the monuments of law regarding interest.

In the Law of Vakhtang VI, the Law of Beka-Aghbugha, and the Laws of George the Brilliant, the legislators limit the contractual autonomy of the parties within the framework of agreeing on interest by establishing maximum permissible amounts. In all three legal monuments, the allowed amounts of interest are defined for the most common subject of loans and interest – tetri.

In the Law of Vakhtang VI (Article 116), the diverse practice of lending tetri in Kartli at that time is reflected, where the amount of interest for a loan of tumani ranged from a maximum of five abazai per month to a minimum of two shauri. After this, to align such practices with the principle of justice, the legislator defines the permissible amounts of interest for lending tetri in Article 125 as follows: *"If a man lends out tetri and does so out of greed, despising his soul, the interest on the tumani will be five shauri per month; if he values his soul a little, the interest will be one abazi; if he*

³ Ibid, 512.

⁴ Ibid.

⁵ Ibid.

values it more, the interest will be three shauri; and if he truly values his soul, the interest will be two shauri”⁶. According to this provision, the maximum permissible amount of interest, “tumani – two shauri per month” – which equals an annual 30%, was four times lower than the highest rate practiced at the time. This difference, on one hand, confirms the legislator’s intention to substantially limit unjust practices; however, on the other hand, it cannot be regarded as an excessive restriction of private autonomy. The maximum interest rate established in this legal book is quite high and leaves sufficient freedom for the contracting parties to agree on an acceptable amount of interest within this framework – whether it is five shauri per month, an abazi, three shauri, or two shauri, as specified in Article 125.

Compared to the Law of Vakhtang VI, where the legislator mentions not only the maximum amount of interest but also options for smaller amounts, in the Laws of Bekha-Aghbuga and George the Brilliant, only the maximum allowable amounts of interest are set. In the Law of Bekha-Aghbuga, the upper limit of permissible interest is defined in Article 94: *“If a man lends money to another with interest, let the annual interest amount to two hundred per one thousand. And the same rate should apply to both smaller and larger amounts”*⁷. According to the norm, the maximum allowable annual interest rate is 20%. Compared to the Law of Vakhtang VI, with its lower permissible upper limit on interest, the Law of Bekha-Aghbuga more strictly restricts private autonomy. However, despite this, the established maximum interest rate cannot be considered an excessively harsh legal restriction.

In the Laws of George the Brilliant, where the regulation of interest is only applied to the debt of tetri, its maximum allowable amount is defined in the last, 46th article of this book of law: *“And if, for some reason, the lender is such an evil man as to take interest, regardless of how much time has passed, let two tetri be given on ten tetri, – regardless of how long the time has elapsed, more than this should not be given, and there is no justice in giving more”*⁸. According to the article, similar to the Law of Bekha-Aghbuga, in the Law of George the Brilliant, the maximum allowable interest rate is 20%. However, in this legal monument specifically designed for the people living in the mountainous regions of Eastern Georgia, the interest rate is determined according to a different principle – here, the 20% maximum limit is set as a fixed, unchanging rate, regardless of the duration of the loan. Due to this firmly established nature of the interest rate, compared to the legal books of Vakhtang VI and Bekha-Aghbuga, the Law of George the Brilliant more strictly limits private autonomy. Nevertheless, the maximum interest defined in this legal monument is not insignificant, and despite the strict regulation, it can still be justified on the grounds of ensuring justice at the time.

Beyond establishing the maximum permissible interest rates in cases of loans issued in tetri, the Georgian legal monuments introduce an additional mechanism for restricting contractual freedom – namely, the prohibition of interest upon interest – thereby creating an even more stringent normative framework for the regulation of interest. This prohibition is explicitly stipulated in the legal codices of Vakhtang VI and Beka-Aghbugha.

⁶ Ibid, 513.

⁷ Ibid, 462.

⁸ Ibid, 421.

According to Article 125 of the Law of Vakhtang VI, interest on interest is permissible only in the case of a “*debt of nothing*”, meaning that it is unlawful in relation to any actual object of debt. The legislator’s strict formulation – “*it shall not arise, nor be claimed, nor be granted*”⁹ – unequivocally excludes the legality of interest on interest in all circumstances: the parties may not agree upon it (“*it shall not arise*”), such agreement does not give rise to a claim against the debtor (“*nor be claimed*”), and it may not be enforced by judicial means (“*nor be granted*”).

A similarly strict prohibition on interest on interest is found in the Law of Beka-Aghbugha. Specifically, Article 94 contains the provision: “*Let not usury be taken upon usury*”¹⁰ – where the word “*usury*” (“*vakhshi*”) is used in the sense of interest¹¹. According to this norm, the taking of interest on interest with respect to a *tetri* loan is deemed legally impermissible.

In addition to the prohibition of interest on interest, the Law Books of Vakhtang VI and of Beka-Aghbugha also envisage another mechanism for the restriction of interest – one that concerns the correlation between the amount of the loaned *tetri* and the permissible maximum amount of interest. Specifically, according to these legal texts, the amount of interest must not exceed the amount of the principal. This prohibition is articulated in Article 125 of the Law of Vakhtang VI as follows: “*When one [unit of interest] exceeds two [units of the principal], no further interest shall accrue*”¹². A parallel provision appears in Article 94 of the Law of Beka-Aghbugha: “*Let the sum increase only up to the principal, regardless of the time elapsed*”¹³.

Thus, in the Law Books of Vakhtang VI and of Beka-Aghbugha, private autonomy is further restricted through the prohibition of interest on interest and the inadmissibility of charging interest in excess of the principal. These mechanisms aim to prevent the accumulation of unjust amounts of interest and, accordingly, to ensure the effectiveness of the restriction established in the form of maximum interest thresholds.

Without the prohibition of interest on interest, even despite the inadmissibility of exceeding the permitted limit, the amount of interest could nevertheless increase unjustifiably – especially in the case of loans issued for an extended period. At the same time, the imposition of a maximum allowable interest rate alone could not preclude the accumulation of interest in excess of the principal, which would likewise be unjustified. Accordingly, in the Law Books of Vakhtang VI and Beka-Aghbugha, these additional restrictions on private autonomy are legally justified and necessary to ensure the attainment of the overarching goal of interest regulation already established therein. In contrast to these legal monuments, in the Law Code of George the Brilliant, the imposition of such additional restrictions was unnecessary, as the interest rate is fixed in the form of a strictly defined maximum amount – thereby precluding, even without further limitations, the possibility of interest accumulating beyond the prescribed threshold.

Ultimately, the monuments of old Georgian law recognize agreements on interest as permissible, but to prevent unjust practices, they limit private autonomy by establishing maximum

⁹ Ibid, 513.

¹⁰ Ibid, 462.

¹¹ Javakhishvili Iv., *Collected Works in Twelve Volumes*, Vol. VII, Tbilisi, 1984, 326 (in Georgian).

¹² Monuments of Georgian Law, *Dolidze I.* (ed.), vol. I, Tbilisi, 1963, 513 (in Georgian).

¹³ Ibid, 462.

interest thresholds. In the legal monuments of Vakhtang VI, Beka-Aghbugha, and George the Brilliant, the determination of the maximum allowable amounts of interest represented an effective and justified means of limiting private autonomy for the time. In the laws of Vakhtang VI and Beka-Aghbugha, interest on interest is likewise prohibited for the same purpose. The aforementioned restrictions on contractual autonomy related to interest found in Georgian legal texts served a common goal – the pursuit and safeguarding of justice.

3. Private Autonomy and Moral Values

In the monuments of old Georgian law, the Georgian lawmakers' preference for private autonomy is evidenced by their choice to limit interest rather than prohibit it altogether – a position that stood at odds with the prevailing moral values of the time, which viewed the taking of interest in a negative light. Nevertheless, moral and ethical attitudes toward interest, shaped by Christian values, are reflected in all three legal monuments.

In the Law Book of Vakhtang VI, the taking of excessive interest is perceived as a morally unacceptable act, being contrary to Christian values. This attitude is reflected in both the provisions describing the practice of taking interest and those determining the permissible rates of interest. The legislator regards the taking of an unjustifiably large amount of interest in the case of loans involving various objects not only as unjust, but also as an act against God. Such a practice is described as “*violence and injustice*”, “*offensive to God*” and “*a transgression of the Gospel*”. In the Law Book, the taking of interest is not merely an economic and legal matter – the amount of interest determines the spiritual condition of the one who takes it, as clearly shown in Article 125: “*If a man lends out tetri, and does so out of greed, despising his soul, the interest on the tumani will be five shauri per month; if he values his soul a little, the interest will be one abazi; if he values it more, the interest will be three shauri; and if he truly values his soul, the interest will be two shauri*”¹⁴. Similarly, the taking of high interest within the permissible limits is regarded as a rejection of God’s will, as evidenced by the provision in Article 126, which governs the lending of bread at interest: “*Bread is justly lent at ten to twelve, but if a man acts unrighteously, ten to fifteen is acceptable, but this should not be granted beyond that*”¹⁵. The same approach is reflected in Article 129, which regulates the repayment of interest in the form of bread for a debt given in tetri: “*If someone lends tetri for bread, one and a half kodis of bread per year is sufficient as interest; and if the lender prefers bread to his soul, two kodis are sufficient; but if he does not stop and further despises his soul, he may take three kodis*”¹⁶. Thus, although the Law of Vakhtang VI considers the taking of interest permissible within a defined limit, it still recognizes moral boundaries even in cases where this permitted threshold is not exceeded. Crossing these moral lines is regarded as an act of defiance against God. Ultimately, Vakhtang VI

¹⁴ Ibid, 513.

¹⁵ Ibid, 514.

¹⁶ Ibid. A “kodi” (Georgian: კოდი) was a customary Georgian unit of measurement, primarily used to quantify bread, but also occasionally applied to barley and millet in legal and economic transactions.

presents the complete renunciation of interest as the most virtuous path: *“The best of all is that no interest be taken at all”*¹⁷.

The moral and religious stance reflected in the interest-related provisions of the Law of Beka-Aghbugha is particularly evident in Article 93, which sets the maximum permissible interest for loans of bread: *“If a man borrows bread from another and, due to hardship, the lender demands excessive interest, this must not be allowed – three for two is sufficient. If, even after a council meeting, more is taken, it shall be returned. No written sign shall justify it – it shall be of no use. For such greed is written as sin by the holy teachers of the law”*¹⁸. The article establishes that in the case of a bread loan, the maximum permissible interest must be “three for two.” If the lender exceeded this threshold, they were obligated to “return the excess,” that is, to give back the undue interest. However, the most significant aspect of the norm lies in the religious and moral judgment it conveys regarding the collection of excessive interest — the legislator explicitly notes that such greed was “written as sin by the holy men, the teachers of the law.” An analogous attitude toward the taking of excessive interest is reflected in Article 94, which, alongside setting a maximum permissible interest rate for loans given in tetri, also prohibits pledging large plots of land as security for debts of minor value: *“Likewise, one shall not pledge large land for a small amount of goods”*¹⁹. Such an act is equated with the taking of excessive interest – *“for this will be great usury”* – which is described as *“provoking God’s wrath”*. Thus, in the Law of Beka-Aghbugha, the negative attitude toward interest stems from Christian principles. The negative judgments reflected in his provisions concern the exceeding of the permissible maximum interest and, consequently, the legally unjustifiable accumulation of interest.

Article 46 of the Law of George the Brilliant clearly expresses a moral condemnation of taking interest. The article opens with an explicit declaration that interest is considered religiously improper: *“Interest is not ordained in the religious doctrines of the Georgians, nor is it prescribed in the doctrines of others. Interest is unlawful”*²⁰. The legislator refers not only to the religious law of the Georgians – by which Christianity is meant – but also to that of “others,” presumably referring to Jewish and Islamic traditions²¹, thereby emphasizing the universal religious unacceptability of taking interest. The negative attitude toward the taking of interest is also evident in the article’s reference to the lender as an “evil man”: *“And if, for some reason, the lender is such an evil man as to take interest...”*²². Here, the term “evil”, as a characteristic of the person taking interest, is not a legal judgment, but rather an expression of moral disapproval toward the behavior of the lender.²³ At the end of the article, much like Vakhtang VI, George the Brilliant considers complete renunciation of

¹⁷ Ibid, 513.

¹⁸ Ibid, 461-462.

¹⁹ Ibid, 462.

²⁰ Ibid, 420.

²¹ Pkhovelishvili N., Omiaze G., Gvenetadze D., Dalakishvili G., Cheshmartishvili L., Kutubidze M., Koberidze Z., *The Law Code of George the Brilliant – Commentaries*, Davitashvili G., Zhvania N. (eds.), 2018, 260 (in Georgian).

²² Monuments of Georgian Law, Dolidze I. (ed.), vol. I, Tbilisi, 1963, 421.

²³ Pkhovelishvili N., Omiaze G., Gvenetadze D., Dalakishvili G., Cheshmartishvili L., Kutubidze M., Koberidze Z., *The Law Code of George the Brilliant – Commentaries*, Davitashvili G., Zhvania N. (eds.), 2018, 259.

interest as the most morally acceptable course of action: “*And if, indeed, the man is not evil, then even this much should not be taken*”²⁴.

Thus, in all three legal texts, the negative attitude towards the taking of interest, as reflected in the Christian tradition, stands in opposition to the decision to permit interest within defined limits, in accordance with the principle of private autonomy. However, the legislations expressing the morally negative stance toward interest are merely advisory in nature in these legal monuments. Through such assessments, the lawmakers aim to influence the moral perceptions of lenders and encourage them to lend with as little interest as possible. Thus, the issue of the legal permissibility of interest in the legal monuments is resolved based on the criterion of justice, in accordance with the limitation, rather than the exclusion, of private autonomy, which aligns with minimal moral requirements. More ethically and morally demanded by the lawmakers, beyond the legally established limits, represents the ideal standard of conduct – what would be “*best of all*, ” and what is most appropriate for one who “*is not an evil man*” (i.e., fully renouncing interest) – is considered in the legal monuments as an advisory, non-binding directive, whereby compliance with it might be a matter of private conscience rather than law.

4. Exceptions to the Principle of Private Autonomy

According to the principle of private autonomy, a legally concluded agreement between parties is binding and must be honored. This principle was also recognized in the legal monuments of Old Georgian law, particularly in cases involving agreements on interest – provided that the agreed-upon terms remained within the legally permissible limits. An explicit affirmation of this appears in the Law Book of Vakhtang VI. Specifically, Article 131 states that in the event of a dispute arising from a loan agreement, the debtor is obligated to “*repay the interest as it has been written*”²⁵. This principle was regarded as operative even without such explicit articulation in other legal texts as well – namely, in the Law of Beka-Aghbugha and the Law Code of George the Brilliant. However, unlike the Law of Beka-Aghbugha and the Law Code of George the Brilliant, the Law of Vakhtang, in the same Article 131, links the debtor’s obligation to certain preconditions. Specifically, the obligation to pay interest applies to the debtor only “*if he has [the means], or has strength and a path to earn [it]*”²⁶. Thus, the debtor’s material capacity, or physical ability along with the opportunity to acquire property, serve as additional preconditions for imposing the obligation to pay interest. These requirements represent a certain deviation from the principle of private autonomy, since in its classical understanding, this principle treats the agreement between the parties as a sufficient basis for obliging the debtor to fulfill their duty accordingly. Article 131 of Vakhtang’s Law, however, allows for the softening of this principle and the introduction of an exception, thereby enabling a mechanism for the protection of the debtor.

Articles 132–134 of Vakhtang VI’s Law Book also provide for several exceptional cases in which the principle of private autonomy is set aside in favor of protecting the debtor and their family.

²⁴ Monuments of Georgian Law, *Dolidze I.* (ed.), vol. I, Tbilisi, 1963, 421.

²⁵ *Ibid*, 514.

²⁶ *Ibid*.

These provisions clarify under what conditions and in what form the obligation to pay interest could be modified.

The first provision of these norms, Article 132, addresses a debtor who has fallen into a severe financial crisis and aims to alleviate the economic burden on them: *“If a man becomes impoverished and can no longer repay the debt, and falls into even greater distress, – the principal amount of the debt will also be reduced. And if there is even a little that he can pay, he must give it, and the interest will be waived”*²⁷. According to this provision, if the debtor’s financial situation has significantly worsened, it provides grounds for full exemption from the obligation to pay interest, as mentioned in the norm as *“the waiver of interest”*. Moreover, if the debtor’s financial situation worsens further, and he *“falls into even greater distress”*, the norm also allows for the reduction of the principal amount of the debt. Thus, Article 132 provides the most radical deviation from the principle of private autonomy – due to severe socio-economic conditions, the debtor is not only freed from the obligation to pay interest, but may also be partially relieved from the obligation to repay the principal debt. This relaxation of the principle of private autonomy can be justified on the grounds of the principle of social justice.

The exemption from the obligation to pay interest on the grounds of the debtor’s severe socio-economic condition is also confirmed in legal practice. One such case is reflected in a document dated November 22, 1785²⁸, in which Lelulashvili petitions King Erekle II for relief from the obligation to pay interest. The debtor’s request is justified both by physical incapacity – *“I no longer have one of my hands”* – and by the difficult financial situation of his family – *“I am burdened with small children and ten mouths to feed”, “I am broken down, I can’t do anything anymore”*. The king’s ruling – *“This man is wounded by the enemy and clearly impoverished. Whoever is his creditor, be content with the principal amount”* – clearly demonstrates that in legal practice, the debtor’s extreme destitution was considered sufficient grounds for exemption from the obligation to pay interest. Another decision made by King Erekle II in a similar case is reflected in a document dated 23 June 1791²⁹, in which the debtor states: *“I have no remedy except for your mercy”*. In his ruling, King Erekle II concludes: *“You know well that many such cases have occurred, and this one too is a debtor who cannot repay his debt, and therefore his creditors should forgive the interest and be satisfied with the principal”*. These words clearly show that such instances of interest forgiveness were common in judicial practice. The decisions made by the adjudicator served to balance the interests of both parties – the principal amount of the debt still had to be paid, while the impoverished debtor was to be released from the obligation to pay interest.

The following article, Article 133 of the Law Code of Vakhtang VI, established to protect the interests of the debtor, addresses not only the debtor but also the responsibility of his family – his wife and minor children – and includes provisions for the mitigation of the debt. The norm considers two cases. In the first case, the borrower is a man who has gone missing, and responsibility for the debt falls on his family – his wife and minor children: *“If a man goes missing and has small children, and*

²⁷ Ibid, 515.

²⁸ Monuments of Georgian Law, Dolidze I. (ed.), vol. VII, Tbilisi, 1981, 669-670 (in Georgian).

²⁹ Monuments of Georgian Law, Dolidze I. (ed.), vol. VIII, Tbilisi, 1985, 105-106.

*if the wife has any means, let her pay with due consideration for her means. And if not, the creditor shall wait until the man returns. If he has died, the creditor shall wait for the orphans to come of age – until they reach fourteen or fifteen years old. If he returns alive, he must answer [for the debt] himself*³⁰. According to the norm, the immediate demand for payment of the debt is prohibited, as the absence of the man from the family typically exacerbated the family's economic situation. Therefore, the creditor may only demand repayment based on the family's financial capacity, and the debt may be "paid with due consideration for the wife's means". If such capacity does not exist, the obligation is temporarily deferred until the man's return, with a "waiting period" until then. Additionally, the norm stipulates that in the case of the debtor's death, the payment of the debt is postponed until the children reach the age of economic responsibility, typically around fourteen or fifteen years old. The second part of the article also addresses a similar situation, in which the debtor is absent and responsibility falls on his wife and children: "But if the man is elsewhere, and his wife and children have anything here, and if the creditor has another creditor who is demanding repayment, and he has no other means, then the woman and her children shall repay according to their means. And if they have nothing, they should not be pursued"³¹. Here, too, the principle is upheld that the obligation of the debtor's wife and children to repay the debt must be determined based on their financial means, and they are required to repay only "according to their ability". However, in this case, an additional circumstance must be considered: the creditor himself may be under the obligation to repay a debt. Consequently, the norm considers the creditor's financial condition as a decisive factor. If the creditor is himself indebted to someone else and the debtor's wife and children have some means, then the repayment may be demanded from them in accordance with their ability. But if they have no means, the creditor is required not to impose any additional financial pressure on them.

Based on the foregoing, Article 133 of the *Law Code of Vakhtang VI* provides that not only the borrower himself but also his family members could bear responsibility for repaying the debt, depending on their financial means. Although the article does not explicitly mention interest, the debt relief mechanisms it envisions should also apply to interest-bearing loans. In such cases, these mechanisms would primarily affect the obligation to pay interest. Here too, the deviation from the principle of private autonomy – through "payment with due consideration", "recovery according to ability", and the deferral of obligations – serves to protect the economic condition of the family and is justified by public-law objectives rooted in social justice and the protection of family welfare.

The following article, Article 134 of Vakhtang VI's Law, establishes a special rule regarding the payment of interest, aimed at protecting widows and their minor children: "If a woman is widowed and has small orphans, and the creditor demands repayment of the debt, the debt shall not be collected until the orphans come of age. And if the widow and the orphans have any means, and the creditor himself is under pressure from another creditor, let him recover whatever is reasonably possible from them, but he must not aggravate their situation by demanding interest"³². This article reiterates the mechanisms of debt relief introduced in Article 133, but here, particular attention is paid

³⁰ Monuments of Georgian Law, *Dolidze I.* (ed.), vol. I, Tbilisi, 1963, 515.

³¹ Ibid.

³² Ibid.

to the issue of interest. According to the rule, the financial capacity of the widow and her children must be assessed before any obligation is enforced. If they lack sufficient means, they are fully exempt from the duty to pay interest. At the same time, if the creditor himself is under financial obligation to another creditor, the law allows him to collect a portion of the debt from the widow's household, provided it does not exceed their means. Still, the creditor is expressly prohibited from worsening their situation by demanding interest. Thus, this provision confirms that when the need to protect widows and orphans arises, the principle of private autonomy yields to the demands of social justice. This approach was significant not only during the time of Vakhtang VI, but also in later periods. This is evidenced by a decree issued by Davit Dadiani in 1845 to the judge of the district (*mdivanbegi*)³³, in which Article 134 of Vakhtang VI's Law is cited as the legal basis for resolving a debt-related case involving a widow and orphans³⁴. This fact demonstrates that the interest in ensuring the social protection of widows and orphans had become firmly rooted in the Georgian legal tradition and was recognized at the level of legislative regulation. Thus, this provision of Vakhtang VI's Law not only reflected a socially just approach at the time, but also served as a legal guarantee for the protection of widows and orphans in subsequent periods.

The mitigation of debt repayment obligations, as established in Articles 133-134 of the Law of Vakhtang VI, is further confirmed by actual legal practice. A number of case documents exist in which requests submitted by debtors or their family members for the postponement of debt repayment were granted. For example, in one such document, it is noted that the debtor was unable to repay the debt "until his son returned", as a result of which the creditor was instructed to postpone the claim.³⁵ In other cases, a woman requests the deferral of repayment until "her husband and children return", which was likewise granted.³⁶ A similar situation is described in another petition, where the petitioner asks to delay repayment until an orphan comes of age – an appeal that, according to the attached record, was also granted: "Those to whom this debt is owed must wait. When the orphan is able to pay, then you may collect".³⁷ Notably, none of these documents explicitly state that the debts were issued with interest; however, it cannot be ruled out that they may have concerned interest-bearing loans. What matters is that these records clearly confirm the existence of a practice of alleviating the burden of debt repayment – based on a principle that required creditors to take into account the social and economic condition of the debtor and their family.

Thus, the norms of Vakhtang VI's Law and the corresponding legal practice demonstrate that the principle of private autonomy was not regarded as absolutely inviolable—exceptions could be made in the form of alleviating the obligation to repay debt and interest, justified by the prevailing social and public-law objectives of the time.

³³ See, *Monuments of Georgian Law, Dolidze I. (ed.)*, vol. VIII, Tbilisi, 1985, 766-768 (in Georgian).

³⁴ Although Article 134 of Vakhtang VI's Law is quoted in the decree with a slight inaccuracy — instead of the original phrasing "[the creditor] must not aggravate [their] situation with interest", the decree uses "[the widow and orphans] must not be aggravated with interest" — this variation does not constitute a substantive legal alteration. In both cases, the provision serves the same essential purpose: to prohibit the imposition of interest on widows and orphans, so as to prevent them from falling into financial hardship.

³⁵ *Monuments of Georgian Law, Dolidze I. (ed.)*, vol. VIII, Tbilisi, 1985, 97 (in Georgian).

³⁶ *Ibid.*, 606.

³⁷ *Monuments of Georgian Law, Dolidze I. (ed.)*, vol. VII, Tbilisi, 1981, 259-260 (in Georgian).

5. Conclusion

The monuments of ancient Georgian law – particularly the Law of Vakhtang VI, the Law of Beka-Aghbugha, and the Law of George the Brilliant – approach the regulation of interest not merely as an economic necessity, but as a matter grounded in the principles of justice and morality. Private autonomy, though a foundational principle of private law, is not regarded in these legal texts as absolute. Rather, its scope is shaped by limitations imposed in accordance with the public interest. Through various forms of interest regulation, the Law of Vakhtang VI, the Law of Beka-Aghbugha, and the Law of George the Brilliant demonstrate that the exercise of private autonomy consistently occurred within boundaries set to harmonize contractual liberty with the imperatives of justice and the moral fabric of society.

Bibliography:

1. *The Law Code of George the Brilliant – Commentaries*, Davitashvili G., Zhvania N. (eds.), 2018.
2. Zoidze B., *Reception of European Private Law in Georgia*, Tbilisi, 2005.
3. *Javakhishvili Iv., Collected Works in Twelve Volumes*, Vol. VII, Tbilisi, 1984.
4. *Monuments of Georgian Law*, Dolidze I. (ed.), vol. VIII, Tbilisi, 1985 (in Georgian).
5. *Monuments of Georgian Law*, Dolidze I. (ed.), vol. VII, Tbilisi, 1981 (in Georgian).
6. *Monuments of Georgian Law*, Dolidze I. (ed.), vol. VIII, Tbilisi, 1985 (in Georgian).

Nino Zhvania*

Enticement and Encouragement as Forms of Incitement (Complicity) to Commit a Crime in Ancient Georgian Criminal Law

This article explores one of the most important institutions in criminal law complicity with a particular focus on forms of instigation in ancient Georgian legal tradition. Specifically, the study examines two distinct types of instigation, referred to as the “enticer” and the “instigator.”

Examining the issue, particular attention is given to the subjective aspect of the crime, as the punishment of the instigator is based on the principle of subjective prosecution. In various sections of the article, the issue of the instigator's criminal liability is analyzed through specific examples from judicial practice.

The article concludes that, at the time of the commission of the crime, accomplices were never exempt from criminal liability. On the contrary, their responsibility was often considered greater than that of the direct perpetrators who merely carried out the will of the instigators. This clearly reflects the application of the principle of subjective prosecution in the attribution of culpability because criminal liability applies not only to the direct perpetrator of the crime, but also to the person who, through words and advice, incites another person to commit the crime.

Keywords: *Complicity, Instigator, Subjective Attribution, Monuments of Georgian Law, Enticer.*

1. Introduction

An instigator is an individual who incites another person to commit a crime by initiating or encouraging the intent to engage in criminal conduct.¹ The instigator does not take part in either the execution or the preparation of the crime, but solely influences the will of the perpetrator. The perpetrator, who is affected by the instigator, cannot be regarded as a mere tool or instrument. The influence of the mental accomplice passes through the consciousness of the executor, becomes the motive for their previously unformed intent, and thus becomes part of the causal chain.² Therefore, the issue of punishing the instigator, who influences the mental state of another person and leads them to form the intent to commit a crime, is entirely based on the principle of subjective liability.

This article examines the concept of recruitment in ancient Georgian law, drawing upon the foundational texts and monuments of Georgian legal tradition. Particular emphasis is placed on the

* Visiting Lecturer, PhD Student at the Faculty of Law Ivane Javakhishvili Tbilisi State University, Prosecutor at the Old Tbilisi District Prosecutor's Office.

¹ Tsereteli T., Criminal Problems, vol. 2, Tbilisi, 2007, 8 (in Georgian).

² Ibid, 16-17.

subjective element of the crime, as the instigator's liability is rooted in the principle of subjective prosecution.

2. To Define the Term “Enticing”

When studying Georgian law monuments, there was a tendency that incitement is often expressed in the term – enticing. Therefore, the issue of punishing incitement will be discussed in this article around the term “gadabireba” (enticing). First, it is needed to explain the basic part of the mentioned lexicographic definition – “bireba” itself.

According to Sul Khan-Saba Orbeliani, the term “*bireba*” denotes an individual who assumes another into their service or command, entrusting them with personal matters or duties. This reflects the socio-legal understanding of hierarchical and delegated responsibility in early Georgian society.³ Following the Explanatory Dictionary of the Georgian language, the “bireba” implies arousing, persuading, encouraging, winning, convincing, recruiting, instilling, and advising.⁴ Instigation, in the form of enticing, occurs when an instigator actively encourages another person to commit a specific crime. General discussions about committing a crime do not constitute instigation unless they are explicitly directed toward a particular target or criminal act.⁵

3. The Concept of “Enticing” in the Monuments of Georgian Law

Let us examine specific cases of recruiting individuals to commit a crime, as reflected in the monuments of Georgian law.

In an 18th-century ruling concerning the case of Otara Kalandarishvili, Gogitara Chkhatariashvili, and Davit Jghenti, Jghenti filed a complaint against Kalandarishvili, stating: “This man enticed my servant, kept him in his house, turned him against me, and later advised the Batonishvili (a nobleman’s son) to seize him. The Batonishvili handed him over and sold him into slavery to the Ottomans.”⁶ The ruling indicates that, according to the prosecution, Kalandarishvili enticed a specific person to commit the crime, then counseled Batonishvili to arrest him as a culprit. This phenomenon closely resembles the concept of crime provocation, as there are numerous shared elements between a criminal instigator and a provocateur. In both cases, one individual influences another to commit a criminal act. However, the key distinction lies in their intent: the instigator’s primary objective is to genuinely encourage the commission of a crime, whereas the provocateur’s aim is not the realization of the offense itself, but rather to induce the target into committing a crime to expose them and subject them to criminal liability. *In this case, the substance of the accusation closely resembles criminal provocation, as Kalandarishvili initially enticed a specific individual to commit a crime, compelled him to engage in various unlawful acts, and ultimately exposed him before the Batonishvili, leading to his arrest.*

³ Orbeliani S., Dictionary Georgian, vol. 1, Tbilisi, 1991, 104 (in Georgian).

⁴ The United Dictionary of the Old Georgian Language, compiler. Grigol Rukhadze, Tbilisi, 2008, 6. (in Georgian).

⁵ Tsereteli T., Criminal Problems, vol. 2, T., 2007, 164 (in Georgian).

⁶ Georgian Law Monuments, ed. I. Dolidze, vol. 6, Tbilisi, 1977, 516 (in Georgian).

The ruling determined the fate of the accused as follows: he was required to swear an oath stating:

“Neither did I previously entice him, nor did I turn him against his master, nor was he sold upon my advice to my lord.”⁷

In this instance as well, we are presented with enticement through active conduct, and instigation through speech, evidenced by the sale of the individual into captivity upon the instigator’s counsel. If the accused failed to swear the required oath, he would be obliged to compensate the injured party by surrendering one captive.

Indeed, this particular ruling reflects a conflation of elements of both criminal instigation and provocation. It is plausible to assume that, initially, the act of enticing was aimed at engaging the individual in specific criminal activities (that is, a clear case of instigation). However, at a later stage, Kalandarishvili may have resolved to eliminate the individual, possibly due to a change in circumstances or personal motives, and consequently denounced him before the Batonishvili, thereby introducing elements characteristic of criminal provocation.

The term “*gadabireba*” (enticement) may not, in every instance, have denoted the inducement of an individual to commit a criminal offense; nevertheless, it was most frequently employed within a negative moral or social context. A notable example appears in a 19th-century judicial ruling concerning the criminal matter of Gabriel and Makharobel Chkhaidze. In his formal complaint, Makharobel accuses Gabriel as follows:

“I had a companion who entrusted his child to my care for upbringing, and in return, I was to receive half a cow as recompense. The child came under my guardianship, but you enticed him away. You caused me to lose both my companion and the cow that was due to me.”⁸ Here, the matter concerns the instigation of an individual, the implanting of harmful thoughts, which ultimately led to the deterioration of relations between the complainant and the enticed party, resulting in the dissolution of their kinship bond.

The 19th-century legal ruling concerning the case between Ioane Nakashidze and Onisime Menaphire over a serf addresses the methods of enticing or transferring allegiance. The key question is whether the serf was enticed through hostility and coercion, or whether he made the decision of his own free will. According to the ruling, Nakashidze filed a complaint against Onisime Menaphire, stating: “This man has lured away my serf, keeps him in his possession, and refuses to release him.”⁹ According to his account, the serf had been “recruited through quarrel and enmity.” Menaphire was required to take an oath in the following form: “If he came to us because you and your master had fallen out, then so be it; but neither I nor my brother lured away Jobashvili’s man out of spite or hostility toward you.” The wording of the oath clearly shows that the accused bore the burden of proof; he had to demonstrate that the serf had come to him voluntarily (that is, due to a quarrel between the former master and the serf), and not that he had been enticed or taken in out of malice or coercion. Accordingly, if the oath-taker failed to establish that the serf had transferred allegiance of his

⁷ *ibid*, 516.

⁸ *Ibid*, 525-526.

⁹ *Ibid*, 527.

own free will and not through force or intimidation, he was obliged to return the disputed individual to Nakashidze.”¹⁰

The term 'gadabireba' (enticing) may, in terms of its underlying meaning, be related to the term 'gabrikheba,' which signifies deception or the act of misleading someone. 'Gabrikheba' refers to the act of deceiving a person.”¹¹

Accordingly, the deceived individual is led astray and acts under the influence of another, namely, the instigator, as the exercise of his own will becomes partially subdued.

In the *Saeristavo* (duchy), there were also instances in which one man would manipulate another into committing an unlawful act, thereby engaging in a different form of deceit. A noteworthy example appears in a 19th-century legal ruling involving Paata Gogiberidze and Khakhuta Menabde concerning the dispute over a horse. Menabde brought a formal complaint against Gogiberidze, claiming the latter had unlawfully taken his horse. In response, Gogiberidze submitted the following account as part of his defense:

“I had a Kazakh [servant or companion]. I deceived the man, and he brought me into the Saeristavo, where he stole two horses. I lost a man in the process. I indeed sought justice, but none was given to me.” To defend himself against the accusation, Menabde was required to take the following oath:

*“I do not hold your man, nor have I obtained horses through the ruin of your man or that of the man of the land. He did not send them to me, nor have I withheld rightful justice from you.”*¹²

The act of luring or enticing a man to commit a crime is expressed by the term “to fool a man” (*gabrikheba*), implying deception as a legal concept. This same oath outlines various forms of complicity in the crime: the physical presence or assistance of a man during the act; participation through coercion or persuasion; the knowledge of location (i.e., local familiarity used to aid in theft); and finally, sending or dispatching a person with the intent to commit the crime.

If Menabde succeeded in taking the oath, then Paata Gogiberidze would be found guilty and obligated to return the stolen horse. A further provision stated: *“Even if the stolen horse cannot be retrieved, the one who took the horse shall be held responsible as the principal offender,”*¹³ states the author of the ruling. The primary responsibility for the crime is assigned to the organizer, the individual who made the decision, planned the act, and, in most cases, dispatched a specific person (typically his own serf) to carry it out. If the stolen horse could not be retrieved, then the person who directly executed the crime, the *khelthamkmeli* (principal perpetrator), was to be handed over to the injured party. Even in such cases, the responsibility was understood to lie with Paata Gogiberidze, not merely with the direct offender. In the legal logic of the time, transferring a serf to another party entailed harm not to the serf, but to the master, the lord whose authority and property rights were being violated. The serf’s interests were considered secondary.

A similar principle is illustrated in a 19th-century ruling in the case of Iese Ramishvili versus Ivana Chantladze. Ramishvili brought a complaint against Chantladze, stating: *“Your son Simon deceived my son, led him to Maxime, and I lost my child to the Tatars.”*

¹⁰ Ibid, 527.

¹¹ Georgian Synonym Dictionary, 3rd Edition, Tbilisi, 1978, 559 (in Georgian).

¹² Georgian Law Monuments, ed. I. Dolidze, vol. 6, Tbilisi, 1977, 545 (in Georgian).

¹³ Ibid, 545.

Chantladze denied responsibility and took the following oath: *"Regarding the accusation that I deceived your son, by my word, answer, or action, I did not fool your son, nor did I instruct him to go to Maxime."*¹⁴ A distinction is made between enticing or luring a person into committing a crime through words or actions; a practice also referred to as "fooling" or deceiving" a person (*gabrigheba*).

According to the same ruling, Chantladze also filed a complaint against Ramishvili, stating: *"At first, your son Gabriel tried to take a girl to the Tatars; he was luring her away from me, but failed to succeed. Later, he returned and did it again: this time, he took the girl from me."*¹⁵ Neither in the first instance nor in the second did my son desire or intend to take your daughter, nor did he take her. If the Batonishvili (the nobleman's son) was indeed accompanying her, it was in vain and of no consequence, for not by his word, counsel, or deed was your daughter taken; nor did he assist in any such taking. Neither by me, nor by my household, nor by my kin, nor by providing her shelter or sustenance, nor by any of the men of our locality, has your daughter been lost unto you."¹⁶ So, participation in the crime in any form is excluded here. In particular, the defendant swore not to kidnap the girl by deed, word, or advice. The phrase: "not to be taken away by someone" already means helping to commit a crime, and it is also possible to help the perpetrators to commit a crime in the form of hosting them.¹⁷ Accordingly, the author of the ruling goes quite far and implies complicity in committing a crime not only in speech, deed, or counsel, but also in the family acceptance of the perpetrators, sheltering, and even helping them with the crime. Following the ruling, if the defendant could not take the oath, he would have to pay the price of blood, and if he could not pay the price of blood, then "That who constitutes a crime, he was handed over as the principal offender."¹⁸ That is, the direct perpetrator of the crime referred to as *kheltamk'mneli* (the "hand-committer") was handed over to the injured party.

A similar case occurred in the 19th century, when Gogia Kekelidze filed a complaint against Otia Bibineishvili, accusing him of enticing away his serf. Bibineishvili was required to defend himself by swearing the following oath: *"As for the man you accuse me of having purchased, I neither enticed him away nor bought him."*¹⁹ If he failed to clear himself by oath, then, according to the ruling, *"Otia shall pay for it with the blood of his soul and body,"* which means he would be held liable as

¹⁴ Ibid, 569.

¹⁵ Ibid, 569.

¹⁶ Ibid, 569-570.

¹⁷ The family was accused of involvement in a crime in a 19th-century ruling concerning the case of Mamuka Bakanidze and Ioane Gobronidze. In this case, Mamuka brought a claim against Ioane, stating: *"You caused the loss of my son, and this occurred with the knowledge and actions of your wife and children."* Gobronidze was required to clear himself through the following oath: *"Neither I, nor my wife, nor any member of my household today, have – either by our trust or by our knowledge – taken your son or daughter, nor have we been involved in delivering her to a woman's abduction that was not carried out with her own will by Jumateli."* (See *Ibid*, 538-539.) This case demonstrates that, in accusations of complicity in a crime, both volitional consent (trust-based participation) and cognitive awareness (knowledge of the act) must be excluded for a co-participant to be considered innocent. Furthermore, participation in the criminal act was interpreted as not merely involvement in a forced marriage, but also required the absence of consent and knowledge of the woman's abduction.

¹⁸ Ibid, 570.

¹⁹ Ibid, 571-572.

though having committed the crime himself, and if he could not justify himself with this oath, then “give the blood of soul and flesh to Otia Kekelidze.”²⁰

4. The Term “Gadabireba” (*Enticing*) According to Prince David’s Book of Law

The meaning of the term *bireba* is also acknowledged in Prince David’s Book of Law. In Article 4, the legislator states that, in writing a will, one must take into account whether it was drawn up out of spite, or under coercion (*bireba*), or due to material interest concerning others.”²¹ Article 42 of the same Book of Law defines liability for the intentional or negligent burning of another person’s property.

In the case of intentional arson, the offender was punished as follows: “*Whatever he has burned, he shall restore to the owner the value thereof, and he shall be diminished in honor, unless no harm was suffered by anyone... And whenever one is enticed to perform a crime with a gun (organi), both the enticed and the instigator shall be judged according to the above-mentioned law.*”²² According to this provision, the direct perpetrator of the crime is the enticed man who effectively used a weapon to carry out the act²³ while the instigator is referred to as the *mombirebeli* (the instigator). Both the one who is instigated and the one who instigates are punished with equally severe penalties. A similar principle is expressed in Article 54 of the same law code: “*Whosoever sets fire to a bridge, fortress gate, or any such structure, shall, without any legal dispute, have his right hand cut off, and the instigator shall be punished in the same manner.*”²⁴ Here as well, the instigator is punished in the same manner as the perpetrator. According to Prince David’s Book of Law, the act of enticement or instigation was also expressed by the legal term “*mobireba*”.

In Article 12 of the code, we read: “*Let the judges investigate carefully, so that the case is not driven by hostility or by instigation (“mobireba”), in which case the summons shall be directed at those who are considered to be murderers.*”²⁵ It is emphasized that instigators are punished in the same way as the actual murderers.

5. Encouraging a Person to Commit a Crime as a Form of Incitement to Criminal Conduct

In the monuments of Georgian law, we frequently encounter the commission of a crime through the encouragement of another person. Encouragement refers to the act of instigating someone, inspiring or motivating them to carry out an unlawful act.²⁶

²¹ Ibid, 571-572.

²¹ The Law Code of Prince David. Text published and accompanied by a study by D. Furtzeladze. Tbilisi, 1964, 8-9.

²² Ibid, 30-31.

²³ Organ -a gun. See. *Orbeliani S.*, Georgian Dictionary, Vol. 1, Tbilisi, 1991, 607.

²⁴ The Law Code of Prince David. Text published and accompanied by a study by D. Furtzeladze. Tbilisi, 1964, 36 (in Georgian).

²⁵ Ibid, 15.

²⁶ Explanatory Dictionary of the Georgian Language, edited by Arn. Chikobava, single-volume edition, Tbilisi, 1986, 476. In the Georgian language, the term “*encouragement*” (*shegulianeba*) has the following synonyms: incitement, instigation, urging, provocation, impulsion, nudging, egging on, goading, stirring up,

Let us examine examples of committing a crime through encouragement, as reflected in the historical sources of Georgian law. It is also important to distinguish between encouragement (*sheguliანება*) and enticement. In an 18th-century legal ruling concerning the criminal case between King Erekle II and the Zaldastanishvili family. The Zaldastanishvilis complained:

“Khochiashvili, your servant Zua, was here in the city with you. He encouraged the sons of our purchased serfs Ninia Batsatsashvili and Glakha Datuashvili, to commit a crime.” Here, the verb “*encouraged*” (*sheeguliანებინა*) is used to express criminal incitement, specifically, Khochiashvili incited Ninia Batsatsashvili and Glakha Datuashvili to commit a violent act.

The Zaldastanishvilis claimed: “The three of us brothers were not at home; only our middle brother Ioseb, was. These individuals went to our residence at night, to our brother Ioseb, while he slept beside his wife. They attacked him and stabbed him with daggers in eight places.”

In court, the three accused gave the following testimonies: “Khochiashvili told us: ‘If you intend to go against your master Ioseb to kill him, I will not go in, and I have no part in the matter.’”

To this, Glakha and Ninia replied: “You came from the city and deceived us; you misled us and drew us into it. When we decided to kill Ioseb, we entered the house, and you stood at the door with a gun, and you told us: ‘Go inside and kill him, and I will guard the door with the gun. If anyone comes to help, I will shoot.’ Our agreement was mutual.”

Khochiashvili then responded: “It is true, we had an agreement, both in words and in counsel, but when you went in to kill Ioseb, I did not follow you inside.”

Glakha and Ivane replied again: “You were both the instigator (*sheguliანებელი*) and the adviser. You sent us inside, and you stood guard at the door with your rifle.”²⁷ As M. Kekelia notes in his analysis of this ruling, “the components of the ‘unanimity of mind’ of the co-participants are such as organization, coordination, and advice, which are bound together by one condition and one goal.”²⁸

In the given ruling, we observe elements of both criminal instigation and organization of the crime.²⁹

The terms expressing instigation include *encouragement*, *instigator*, and *adviser*.

The phrase “You were both the instigator and the adviser” clearly distinguishes between the roles of instigator and adviser, as each carries a distinct legal significance. The adviser is the individual who gives instructions or suggestions to the perpetrator regarding how the crime should be carried out, its method, form, or timing. The instigator actively exerts psychological influence on the perpetrator, emboldening or encouraging them to commit the offense.

This ruling is particularly interesting from another perspective: the accused instigator, Khochiashvili, attempts to defend himself by asserting that he did not directly participate in the

pouring oil on the fire, adding fuel to the flames, arousing, emboldening, persuasion, intentional provocation, igniting, enticing, and agitation. See also: *Georgian Synonyms Dictionary*, 3rd edition, Tbilisi, 1978, 559 (in Georgian).

²⁷ Monuments of Georgian Law, ed. I. Dolidze, vol. 5, Tbilisi, 1974, 692-694. 439-440 (in Georgian)

²⁸ Kekelia M., Crimes Against Life, Health, Honor, and Dignity in Ancient Georgian Law, Tbilisi, 2015, 66 (in Georgian).

²⁹ In the course of committing a crime, the organizer may simultaneously act as the direct perpetrator or instigator of the same crime; however, the role of the organizer prevails over the others. See: Turava M., *Criminal Law: Overview of the General Part*, 9th ed., Tbilisi, 2013, 331 (in Georgian).

objective elements of the crime. He claims he merely stood outside, playing the role of a passive observer, only to serve as a lookout to ensure that no one interfered with the main perpetrators and to give a signal if necessary. He emphasizes that he did not enter the house, nor did he stab the victim himself.

The opposing party, however, accuses Khochiashvili of being the true instigator, arguing that it was at his encouragement that the others entered the house intending to kill Ioseb. According to this view, it was Khochiashvili's malicious intent that drove the act, and the perpetrators were merely acting under his psychological and moral influence.

Under prevailing criminal law doctrine, a person who does not directly carry out the material elements of the crime (e.g., in the case of stabbing, does not wield the knife) but remains outside to ensure that the perpetrators are not obstructed and that the act is completed is legally considered a participant, specifically as an accomplice in the form of an aider.³⁰

However, some scholars believe that the outsider is an ordinary perpetrator; it is not complicity, but a group crime, where each member of the group is an independent offender, and the outsider is a functional co-perpetrator, since he is functionally connected to the direct performer of the crime.³¹

Within the scope of this work, it is not our objective to determine which theoretical position is ultimately correct; however, we support the first theory that the person standing outside during the crime is to be considered a participant in the form of an accomplice, and not a functional co-perpetrator. Under our criminal code, a person who did not take direct part in the objective elements of the act (e.g., did not personally carry out the stabbing) cannot be classified as the principal offender.

Accordingly, Khochiashvili, who remained outside during the crime, attempted to avoid liability by claiming he did not enter the house to stab Ioseb, and it is possible that he intentionally and premeditatedly refrained from entering, delegating the "dirty work" to others. Nevertheless, the law does not consider only the perpetrator's external actions, but also their subjective disposition, particularly the presence of malicious intent.

In this case, Khochiashvili appeared to have an even stronger desire to see Ioseb killed than the two who physically carried out the attack. His will was, therefore, more malicious than that of the direct perpetrators.

Furthermore, the ruling demonstrates that Khochiashvili was not merely a passive accomplice but functioned as the instigator and, more significantly, the organizer of the crime. It was he who planned the criminal act, recruited and encouraged the two perpetrators, gave them instructions, led them to the scene, ushered them inside, and stood outside with a firearm, ensuring that no one would interfere during the commission of the crime.

Khochiashvili was the organizer of the entire criminal event, making him the most dangerous figure involved, despite the fact that he did not directly participate in the physical execution of the act.

This legal reasoning is reflected in the court's decision: *"As we have heard from all three, they are equal accomplices, and equally guilty of the offense. In total, the blood-price was determined to be one hundred thirty-three tumani and two minaltuni (tumani, minaltuni was a unit of monetary value in*

³⁰ Tsereteli T., Problems of Criminal Law, Vol. 2, Tbilisi, 2007, vol. 2, Tbilisi, 2007, 135-137 (in Georgian).

³¹ Turava M., Criminal Law: Overview of the General Part, 9th ed., Tbilisi, 2013, 336-337 (in Georgian)

Georgia, particularly in the Kingdoms of Kartli and Kakheti.” *This sum must be paid equally by Khochiashvili Zua, Ninia Batsatsashvili, and Glakha Datuashvili.*”

It is evident from this ruling that the law treated all three individuals' actions equally, holding each of them equally liable for the death, and assigning each a payment of forty-five tumans and four minaltuns as their share of the blood-compensation.

We consider this judicial decision to be just, as it correctly recognized that, although Khochiashvili remained outside and appeared inactive, in truth, everything had been orchestrated by him. The subjective element of his behavior, his malicious intent to commit murder, was not overlooked by the court.

In the same ruling, the judges also observed that since Ninia Batsatsashvili and Glakha Datuashvili were serfs of the victim, their crime was aggravated by the fact that they had acted against their own lord. For this reason, they were declared to be “now blood-bound to Ioseb” (i.e., permanently dishonored and criminally bound to the victim).

Moreover, the court clarified that since the fathers and brothers of the offenders were unaware of the plan, they could not be held responsible as co-offenders. The court concluded: “*Since they were purchased serfs, they shall remain so under the same conditions.*”³²

It is emphasized that the serfs' brothers and fathers did not participate in the commission of the crime; they were not aware of it or had no intent to commit such an offense alongside them. Consequently, their complicity in the crime is entirely excluded. Moreover, the ruling clearly distinguishes between blood serfs (*nasikhli qma*) and purchased serfs (*nasqidi qma*), indicating that the legal status of a blood serf was significantly more burdensome than that of a purchased serf. Therefore, although the guilty serfs acquired the status of blood serfs due to their actions, their innocent relatives, fathers and brothers, retained the status of purchased serfs.

Ultimately, the decision is based on the principle of subjective attribution, whereby each individual is held liable for a criminal act only to the extent of their involvement and intent. The rights of family members of the offenders, who are innocent of the crime, are duly protected. The ruling also recognizes terms denoting the organizer, instigator, and accomplice, and the judges accurately assess not only the actions of each person involved in the crime but also their intent and mental state. This reinforces that the decision was made following the principle of subjective attribution.

At first glance, instigating a person to commit a crime appears similar to recruitment, as both can be considered forms of incitement. In both instances, the instigator persuades another individual to commit a specific unlawful act. However, enticing involves enlisting the person into the instigator's sphere of influence, effectively aligning them with the instigator's ongoing objectives. For example, a serf transferred from one master to another begins to act according to the will of the new master; this relationship tends to be continuous or long-term. In contrast, instigation is typically a singular, targeted act aimed at reinforcing or shaping the perpetrator's will, helping them to overcome internal hesitation and solidify their intent to commit the offense.

³² *Monuments of Georgian Law*, ed. I. Dolidze, Vol. 5, Tbilisi, 1974, 692-694, 440-441 (in Georgian).

6. Conclusion

From the above-discussed rulings, it is evident that instigators frequently employed recruitment as a means of persuading individuals to commit specific crimes. In essence, recruitment differs from mere encouragement in that the enticed individual often switches allegiance to the instigator's side or is drawn into the instigator's or even the enemy's camp. This marks a conceptual distinction between recruitment to commit a crime and verbal incitement in general. However, it should also be noted that such classifications of instigation types are ultimately conditional and doctrinal; in practice, these offenses are still subsumed under the general category of verbal incitement.

In the context of this article, the proposed differentiation serves the purpose of highlighting more clearly the distinctive features of instigation found in the monuments of Georgian legal tradition. Whether through recruitment or encouragement, accomplices to a crime were never exempt from criminal liability. On the contrary, their responsibility was often more pronounced than that of the direct perpetrators, who, at the scene of the crime, merely executed the will of the instigators.

This, of course, underlines the application of the principle of subjective attribution in determining culpability, as criminal liability extends not only to the direct perpetrator of the offense but also to the person who incites or advises another to commit the crime. Furthermore, the legal system's emphasis on punishing enticers and encouragers is largely based on the fact that such individuals are usually lords or masters who send their serfs to commit crimes on their behalf. From a preventive perspective, the law is more concerned with punishing the actions of the master than those of the serf, a stance that is justified, given that in such cases the master is the principal instigator of the offense.

Bibliography:

1. *Kekelia M.*, Crimes Against Life, Health, Honor, and Dignity in Ancient Georgian Law, Tbilisi, 2015, 66 (in Georgian).
2. *Orbeliani S.*, Georgian Lexicon, Vol. 1, Tbilisi, 1991, 104, 607 (in Georgian).
3. Law of Prince Batonishvili Davit, text edited and researched by *D. Furtseladze*, Tbilisi, 1964, 8-9, 15, 30-31, 36 (in Georgian).
4. *Turava M.*, Criminal Law: Overview of the General Part, 9th ed., Tbilisi, 2013, 331, 336-337 (in Georgian).
5. Explanatory Dictionary of the Georgian Language, edited by *A.Chikobava*, One-Volume Edition, Tbilisi, 1986, 476 (in Georgian).
6. Monuments of Georgian Law, ed. *I. Dolidze*, Vol. 5, Tbilisi, 1974, 692-694, 439-441 (in Georgian).
7. Monuments of Georgian Law, ed. *I. Dolidze*, Vol. 6, Tbilisi, 1977, 516, 525-527, 545, 569-572.
8. Georgian Synonyms Dictionary, 3rd ed., Tbilisi, 1978, 559 (in Georgian).
9. Combined Dictionary of the Old Georgian Language, comp. *Rukhadze G.*, Tbilisi, 2008, 6 (in Georgian).
10. *Tsereteli T.*, Problems of Criminal Law, Vol. 2, Tbilisi, 2007, 8, 16-17, 135-137, 164 (in Georgian).

Eka Zarnadze*

Challenges in the Enforcement of the Child's Right to Alimony in Legislation and Judicial Practice

The article addresses current issues related to the enforcement of a child's right to alimony within the framework of civil substantive and procedural law, as well as judicial practice. It offers recommendations for strengthening this legal institution and increasing its effectiveness.

Keywords: *alimony, alimony allowance, liable person, custodial parent, best interests of the child, subsistence minimum, interim measure.*

1. Introduction

The Convention on the Rights of the Child (CRC) recognizes the primary responsibility of parents (and other caregivers) to secure, within their abilities and financial capacities, the living conditions necessary for the child's development. It also reinforces the child's right to a standard of living adequate for their physical, mental, spiritual, moral, and social development, and places an obligation on States Parties to ensure the realization of this right. The Convention underscores the duty of the state to morally and legally support parents in fulfilling their financial obligations to the child, regardless of the parents' marital status or the child's actual place of residence.¹ This provision is grounded in the concept of the best interests of the child, a fundamental principle of international human rights law. This principal stresses that a child's well-being must be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies².

Georgian legislation aligns with the spirit of international instruments, recognizing the protection of children's rights as a constitutional value³. Accordingly, the state is obligated to establish an appropriate legislative and institutional framework to ensure the realization of children's rights, including the right to claim maintenance. One of the key instruments for implementing this right is the alimony obligation, as provided by the Civil Code of Georgia (hereinafter *CCG*)⁴, which imposes

* Doctor of Law, Associate Professor at the University of Georgia, Professor at New Vision University. Judge of the Civil Chamber of the Tbilisi Court of Appeals.

¹ UN Convention on the Rights of the Child, adopted on 20 November 1989, Article 27. Legislative Herald of Georgia, Ratified by Georgia in 1994; entered into force on 02/07/1994 (In Georgian).

² Art. 3. Ibid. See also General Comment No. 14 (2013) of the Committee on the Rights of the Child on the right of the child to have their best interests taken into account as a primary consideration <<https://digitallibrary.un.org/record/778523>> [15.03.2025].

³ Article 30.2.: The rights of mothers and children are protected by law. See the Constitution of Georgia, Georgian Legislative Herald, 31-33, 24/08/1995 (In Georgian), <<https://matsne.gov.ge/ka/document/view/30346?publication=36>> [15.03.2025].

⁴ It is noteworthy that the duty of parents to raise their children as conscientious citizens and to care for them until adulthood is recognized by the Constitution of the Republic of Lithuania. See Article 38. The

an alimony duty on family members towards a child. The child's right to receive maintenance was further strengthened by the adoption of the Code on the Rights of the Child in 2020 (hereinafter *CRC*)⁵. The term "alimony" originates from Latin and translates to "nourishment" or "food"⁶. In line with this, the Civil Code of Georgia defines alimony as the funds necessary for the care and upbringing of the recipient.⁷

Unlike many other countries, alimony law in Georgia has received relatively little attention, both in terms of legislative regulation and doctrinal research⁸. However, following the publication of the "Buki" (2020) and the resulting legislative amendments, as well as the growing trend of increased public awareness, the groundwork now appears to be in place for improving the legislative framework of alimony law and for advancing academic research in this area.

A pressing issue in this regard is the need to introduce greater objectivity and consistency in determining the amount of alimony, as well as ensuring the enforcement of alimony-related decisions. In several countries, the former is addressed through the use of alimony calculation formulas and official guidelines, while the latter involves the application of various sanctions for voluntary non-payment⁹.

Constitution of the Republic of Lithuania. Adopted by the citizens of the Republic of Lithuania in the Referendum of 25 October 1992. <<https://www.lrs.lt/home/Konstitucija/Constitution.htm>> [15.03.2025].

⁵ Art. 12, 46, 47. The Code also clarified the status of a child and a parent: "Child – a minor under the age of 18", "Parent – the mother and/or father of the child" – Art. 3. (In Georgian).

See the Law of Georgia "Code of the Rights of the Child", Georgian Legislative Gazette, 5004-I, 20/09/2019, (In Georgian), <<https://matsne.gov.ge/ka/document/view/4613854?publication=4>> [15.03.2025].

The 1989 Convention on the Rights of the Child also includes a person under the age of 18 in the concept of a child, although it leaves the choice of changing the age of majority to national legislation – Art. 1 (In Georgian).

See UN Convention on the Rights of the Child of 20 November 1989, Georgian Legislative Herald, <<https://matsne.gov.ge/ka/document/view/1399901?publication=0>> [15.03.2025], ratified by Georgia in 1994, entry into force date 02/07/1994 (In Georgian).

⁶ Alimony comes from the Latin *alere*, "nourishment", the use of the term "alimentum" dates back to the 15th century. Legally, it is a monetary obligation of a family law nature and its origin is related to age or incapacity/material needs. The basis may not always be related to age. See <<https://www.merriam-webster.com/dictionary/aliment>> [15.03.2025]. On the etymological and historical background of the term, see also *Shengelia R., Shengelia E. Family Law – Theory and Practice*, Tbilisi, 2011, 244-245 (In Georgian).

⁷ Art. 1214, Law of Georgia "Civil Code of Georgia", Georgian Legislative Herald, 786, 24/07/1997, <<https://matsne.gov.ge/ka/document/view/31702?publication=117>> [15.03.2025].

⁸ This is also indicated by the fact that no substantial research has been conducted in the doctrine of alimony for decades. It is worth noting the dissertation work completed in 2015 by *Japaridze K.*, "Personal and Property Relations of Parents and Children", Doctoral Thesis, TSU, 2015. One of the chapters of which is dedicated to the alimony relationship between parents and children. <https://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/qetevan_jafaridze.pdf> [15.03.2025].

It is worth noting the studies of 2022-2023: *Lomtadze E., Mamrikishvili E.*, "Comparative Legal Study – the Granting and Enforcement of Child Support", Tbilisi, 2022 (In Georgian).

Sichinava E., "Ilia House of Law, Implementation of Community-Oriented Justice in Divorce and Paternity Determination Cases", Tbilisi, 2023 (In Georgian).

⁹ *Lomtadze E., Mamrikishvili E.*, "Comparative Legal Study – the Granting and Enforcement of Child Support", Tbilisi, 2022. 39-75 (In Georgian). *Herring J.*, "Family Law", Eighth Edition. University of Oxford, 2017. <https://aghalibrary.com/storage/books/1609407553_AghaLibrary.pdf> [15.03.2025].

In 202-2023 Georgian legal scholarship, it is observed that: “Georgian courts determine the amount of alimony based on Article 1214 of the Civil Code, using general standards, and in judicial practice, not only is it difficult to achieve consistency, but the amounts of alimony appear in decisions entirely spontaneously, without any objective calculation.”¹⁰ This situation is largely attributed to the scarcity of doctrinal scholarship and the shortcomings in the legislation.

2. Alimony Obligor

The legal relationship regarding alimony between the alimony obligor and the person entitled to alimony arises on legal basis¹¹, and the *numerus clausus* principle (the Civil Code precisely defines the subjects of the relevant rights and obligations) applies to this type of family obligation. The primary alimony obligor for a child, according to Georgian legislation, is the parent¹². However, it is not specified who is the second-degree alimony obligor is, whether it is a sibling or a grandparent.¹³ However, Georgian legislation does not clearly define which parent is considered the alimony obligor. The parent whose place of residence is not recognized as the child's place of residence, either by court decision or by agreement between the parties, should be regarded as such.

It is also important to consider that in the absence of a court ruling determining the child's residence, the child may spend more or less equal time with both parents. This raises the question of whether we should, in fact, introduce terms such as “non-resident parent” (i.e., a parent whose residence is not considered the child's residence based on a court decision or mutual agreement, or

¹⁰ Ibid, 31-32.

¹¹ Art. 1182, 1212, 1219, 1223-1227, 1229. Law of Georgia “Civil Code of Georgia”, Georgian Legislative Herald, 786, 24/07/1997, <<https://matsne.gov.ge/ka/document/view/31702?publication=117>> [15.03.2025].

¹² Art.1197, 1198, 1212-1214. Ibid.

¹³ See art.1223, 1225. Ibid.

Article 1606 of the German Civil Code indicates the order of rights of persons obligated to pay maintenance and explains: 1. Descendants are obligated to pay maintenance in priority to relatives in the ascending line. 2. Among descendants and relatives in the ascending line, closer relatives are obligated in priority to more distant relatives. 3. Several equally close relatives are obligated in proportion to their income and property. A parent who exercises care for a minor unmarried child fulfills the obligation of co-participation in the maintenance of the child, as a rule, by caring for and raising the child.

Section 1609 – Order of rights of several persons entitled to maintenance – provides for the following rule: (1) If there are several persons entitled to maintenance and the person obliged to maintain cannot pay maintenance to all of them, the following order of rights shall apply: 1. Minor unmarried children and children within the meaning of Section 1603, Section 2, Sentence 2. 2. Parents who are entitled to maintenance due to care for the child or would be entitled to it in the event of divorce, as well as spouses and divorced spouses in the event of a long-term marriage; If it is established that the marriage was of long duration, the negative consequences within the meaning of §1578b, Section 1, Sentences 2 and 3 shall also be taken into account, 3. Spouses and divorced spouses who do not belong to the persons referred to in No. 2, 4. Children who do not belong to the persons referred to in No. 1, 5. Grandchildren and distant descendants, 6. Parents, 7. Distant relatives in the ascending line; among the latter, the closest relatives are obliged to take precedence over the more distant ones. See German Civil Code. in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Act of 10 August 2021 (Federal Law Gazette I, p.3515 <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p6331> [15.03.2025].

with whom the child spends a defined number of days per year and who is not recognized as the caregiving parent) and “caregiving parent.”

In some countries’ legislation, the obligation to pay alimony lies with the so-called non-resident parent. A non-resident parent is defined as a parent who: a) does not live in the same household as the child; and b) the child lives with a person who, in the relationship with the child, is recognized as the caregiving person. A parent is considered “non-resident” even when they spend 152 days or more per year with the child in practice. If a parent is not recognized as the “caregiving parent” for legal purposes, then they are obligated to pay alimony, provided the child spends approximately half or more of the year living with the caregiving parent. If both parents are recognized as “caregiving parents” and share childcare equally, which is legally permissible, then the issue of alimony does not arise, and no one pays alimony. However, if the parents share childcare, one parent can still be considered the “non-resident parent” if the other parent proves that they spend more time caring for the child (the “caregiving proportion” is demonstrated), which is decisive for alimony purposes and determines the status of either “non-resident parent” or “caregiving parent”¹⁴.

Currently, according to Georgian judicial practice, a person obligated to pay alimony is considered a parent whose place of residence is not considered the place of residence of the child¹⁵ – although this is not explicitly stated in the legislation. And if the parents have not agreed on the place of residence and it is disputed, the court cannot consider imposing alimony until the latter is resolved.

According to the Civil Code, a child’s right to alimony is, first and foremost, realized through the parent, who is also the subject responsible for covering additional expenses. Furthermore, Article 1215 of the Civil Code states that a parent who pays alimony to a minor child may also be required to contribute to additional expenses caused by exceptional circumstances (such as serious illness, disability, etc.).

However, the provision grants the right to claim additional expenses only against the parent, which should be regarded as a legislative gap. The obligation to cover such additional expenses should logically fall on any alimony obligor according to the relevant statutory order. While this gap could potentially be addressed through judicial interpretation, doing so is not, in itself, an optimal solution.

3. Study of the Material Situation of the Parties – A Prerequisite for Determining the Amount of Alimony

In countries where alimony is determined by the court, there is a clear tendency to introduce greater objectivity and consistency in setting the amount of alimony. This is achieved

¹⁴ UK legislation. Child Support Act 1991. Meaning of certain terms used in this Act <<https://www.legislation.gov.uk/ukpga/1991/48/enacted>> [15.03.2025]; The Child Support Maintenance Calculation Regulations 2012, Regulation 50, “Parents treated as non-resident parent in shared care cases”, <<https://www.legislation.gov.uk/uksi/2012/2677/contents/made>> [15.03.2025].

The importance of these concepts is also emphasized by the fact that the number of children born whose parents do not live together has almost tripled in recent decades. *Seltzzer J. A., Meyer D.R., Child Support and Children/s Well-Being*, 1, 2 <https://evidence2impact.psu.edu/wp-content/uploads/2023/05/s_wifis06c02.pdf> [15.03.2025].

¹⁵ E.g., the ruling of the Tbilisi Court of Appeal of October 11, 2024 in case No. 2b/5467-24 (In Georgian).

through formulas and guideline recommendations for calculating alimony. These guidelines typically rely on information about both parents' incomes in order to calculate the amount in a way that reflects the child's needs and is fair¹⁶.

Georgian legislation also requires the study of the material situation of the parents as a prerequisite for determining the amount of alimony. According to Article 1214 of the Civil Code, when determining the amount of alimony, the court shall take into account the actual material situation of both the parents and the child. This requirement must be treated as a mandatory procedural step during court proceedings, which implies the court's obligation to establish the relevant facts. The procedural instrument for this is found in Article 354¹ of the Civil Procedure Code¹⁷, which states: "The court may, on its initiative, determine the scope of circumstances to be established and, following the explanations of the parties, obtain evidence that the parties have not identified." This approach is applied in a more active form in certain other jurisdictions. Under the law of England and Wales, the Child Maintenance Service has an investigative branch authorized, where grounds exist, to examine a person's true income, including by entering premises owned by the person in question or by third parties (e.g., employers) and collecting information on site. A similar mechanism exists in some U.S. states, where specially designated investigators from the social services are entitled to conduct inquiries into the financial status of the obligated parent¹⁸.

The fundamental norm determining the amount of alimony – Article 1214 of the Civil Code – establishes: The court determines the amount of alimony based on a reasonable, fair assessment, within the limits of the requirements necessary for the normal maintenance and upbringing of the child.

Sometimes, Georgian judicial practice is criticised: in Georgia, there is a marked heterogeneity of the practice in the calculation of the amount of alimony, and at times, the rule that the court uses is conditional and vague¹⁹. To fill this gap, taking into account the given legislation, courts, together with the above-mentioned Article 1214 of the Civil Code, should be guided by Article 81 of the Civil Code. The latter establishes the standard of justification of a court decision in the context of protecting the principle of giving priority to the best interests.

Article 81 of the Code on the Rights of the Child applies to decisions on all types of civil disputes related to children, as does Article 354 of the Civil Procedure Code of Georgia. However,

¹⁶ *Herring J.*, Family Law, Eighth Edition. University of Oxford, 2017. 202-214. <https://aghalibrary.com/storage/books/1609407553_AghaLibrary.pdf> [15.03.2025]; Family Law Handbook, Canadian Judicial Council, 21-26, <<https://cjc-ccm.ca/sites/default/files/documents/2021/Family%20Handbook%20-%20ENGLISH%20MASTER%20FINAL%202021-03-30.pdf>> [15.03.2025]; *Lomtadze E.*, Determination and Enforcement of Alimony – Best Practices Study, Tbilisi, 2022, 5 (In Georgian).

¹⁷ Law of Georgia "Civil Procedure Code of Georgia", Georgian Legislative Herald, 1106, 14/11/1997, <<https://matsne.gov.ge/ka/document/view/29962?publication=149>> [15.03.2025].

¹⁸ *Herring J.*, Family Law, Eighth Edition. University of Oxford, 2017, 619-620, <https://aghalibrary.com/storage/books/1609407553_AghaLibrary.pdf> [15.03.2025]; *Lomtadze E.*, *Mamrikishvili E.*, Comparative Legal Study – the Granting and Enforcement of Child Support, Tbilisi, 2022, 5-7 (In Georgian); *Lomtadze E.*, Determining and Enforcing Child Support – Study of the Best Practice, Tbilisi, 2022, 4-7 (In Georgian);

¹⁹ *Lomtadze E.*, Determining and Enforcing Child Support – Study of the Best Practice, Tbilisi, 2022, 31-32 (In Georgian).

there are cases of alimony disputes where a court of first instance has not applied this norm, or has applied it only to determine the income of the defendant. In such cases, the Appellate Chamber, during the consideration of the appeal, on its initiative, requests information from the LEPL Revenue Service about the income of both the plaintiff and the defendant, and at the same time, both for the period after the filing of the lawsuit and before the filing of the lawsuit (reasonable past period), to see a complete picture of the financial potential and average material situation of the parties²⁰.

Therefore, it is advisable to establish a uniform practice where, in alimony cases, immediately after the submission of the statement of claim or upon the expiration of the deadline set for its submission, the court, either on its initiative and as per the requirements of Article 83 of the Civil Procedure Code of Georgia²¹, or either through an oral hearing or without one, issues a ruling to request information on the income of both parties from the Revenue Service, which operates under the Ministry of Finance of Georgia. Depending on the specific circumstances of the case, the court may also request information from other institutions regarding the parties' financial status (for example, information from the banking sector on the amounts in or transaction history of the parties' bank accounts). Such practice is fully grounded in the legislation and would contribute to the efficiency and flexibility of proceedings in this category of disputes.

The court has the authority to request evidence on its own initiative, but this does not mean that the parties are fully released from the burden of proof, nor should such a perception be created. An example from the Court of Appeals illustrates this point: instead of returning the case to the first instance court for reconsideration, the appellate chamber chose to render a final decision itself, based on the principles of procedural economy and expediency.

It should also be noted that relying solely on the mechanism provided by Article 354 of the Civil Procedure Code does not fully resolve the issue of establishing the income of the alimony obligor. Courts, when determining the amount of alimony, rely only on so-called official sources of income. In cases where the respondent is informally employed and this is indicated by the claimant, the court is unable to investigate the actual material circumstances of the respondent. In such cases, the party itself must take the initiative and appeal to the relevant state agencies responsible for investigating financial violations. Under current legislation, civil courts cannot take on investigative functions. Therefore, it is worth considering the introduction of a so-called investigative service, similar to those operating under social services in other countries, specifically for alimony-related disputes.

4. Relationship Between the Amount of Alimony and the Obligor's Financial Status

One of the key factors in determining the amount of alimony is the parent's financial capacity (Articles 1198, 1212, 1214, and 1221 of the Civil Code). This implies that the amount of alimony must be reasonably and fairly aligned with the financial situation of the parents. This financial situation

²⁰ Tbilisi Court of Appeals rulings: January 17, 2025, in case No. 28/2512-24, and January 27, 2022, in case No. 28/4704-21 (In Georgian).

²¹ Request for compliance with the rule of granting the parties prior notice and the right to present their opinions on the matter by the court on its own initiative.

includes considerations such as unemployment and the absence of stable income. “However, even in cases where a parent is unemployed and lacks a stable income, a minimum amount of alimony must still be determined, an amount necessary for the maintenance and upbringing of the minor child.”²² The preamble of the Convention on the Rights of the Child emphasizes that “because of his physical and mental immaturity, the child needs special safeguards and care, including appropriate legal protection, before as well as after birth.”²³ One essential component of such “special protection” is the child’s social right, which is safeguarded under the Convention’s broader principle of the “best interests of the child.” Under this principle, the state is obligated to provide the protection and care necessary to ensure the child’s well-being.²⁴ At the same time, the state must take into account the rights and responsibilities of the child’s parents, guardians, or others legally responsible, and for this purpose, must adopt all appropriate legislative and administrative measures. The implementation of international norms for the protection of minors, including their social protection, is reflected in various national legislative acts, one of which is the Civil Code. The Civil Code is referred to as “one of” such acts, as the state has not accounted for the second aspect of this obligation: to ensure the child’s right to maintenance *ex officio*, in cases where the parent lacks the resources or fails to fulfill this duty.

Article 1212 of the Civil Code reflects the social obligation of parents, and from a legal standpoint, alimony constitutes a minimum level of material support for a person in need of care.

In the context of determining alimony, the Chamber of Cassation clarified that under Article 1214 of the Civil Code, the court must, on the one hand, establish the material needs of the child that are reasonably necessary for their maintenance and upbringing, and on the other hand, ensure that the decision is enforceable, meaning the alimony obligor must realistically be able to pay the ordered amount. Although the law imposes an obligation on parents to support their children, including the duty to pay alimony, the legislator does not define a minimum threshold amount of alimony that must be awarded to a minor.²⁵ Therefore, when determining the amount of alimony, the court must act within its discretion and, based on an assessment of the specific circumstances of each case, must establish a reasonable and fair amount. Crucially, the court must give primary consideration to the needs necessary for the normal maintenance and upbringing of the child. In determining the alimony amount, the court must also assess: the parents’ actual financial capacities, the child’s age, health condition, needs, the number of dependents each parent supports, and other objective circumstances.

²² Ruling of the Supreme Court of Georgia of 09.11.2022. No.1072-2022 <<http://prg.supremecourt.ge/default.aspx>> [15.03.2025].

²³ UN Convention on the Rights of the Child of November 20, 1989, Georgian Legislative Herald, <<https://matsne.gov.ge/ka/document/view/1399901?publication=0>> [29.01.2024], ratified by Georgia in 1994, entry into force date 02/07/1994.

²⁴ Article 26. Ibid.

²⁵ The minimum threshold for the amount of alimony was provided for by Lithuanian legislation, according to which it should not be less than half of the annually determined subsistence minimum. See *Lomtadze E., Mamrikishvili E.*, ‘Comparative Legal Study – the Granting and Enforcement of Child Support’, Tbilisi, 2022, 80-81 (In Georgian);

As the court explained: The imposition of alimony must not be merely a formal measure; it must be an effective and practical mechanism that genuinely ensures the creation of conditions necessary for the child's development.²⁶

5. Informal Nature of Alimony

The imposition of alimony on a party must not be merely formal. It will not be merely formal when the majority of the components necessary for the child's upbringing are reflected. Accordingly, there must be support for the realization of the rights recognized in the CRC (Convention on the Rights of the Child). Specifically, there must be clarity in accounting for those expenses which ensure: nutrition, physical development (the right to participate in sports activities), cognitive development (participation in cultural and educational events), the right to rest, the right to education, and the medical supervision necessary for a child of this age.

It must also be noted that often the claimant, and in some cases even the court, fail to distinguish between alimony claims and claims for additional expenses. According to Article 1215 of the Civil Code, a parent paying alimony to minor children may be required to participate in additional expenses arising from special circumstances (such as the child's serious illness, disability, etc.). This article constitutes an exceptional rule, and additional expenses do not carry the continuous character of alimony. They differ from alimony as an unconditional obligation of the parent, which does not require proof of the child's special needs. In contrast, the obligation to participate in additional expenses arises only in exceptional cases. While participation in additional expenses is not directly related to alimony, the court must still take into account the amount of alimony already imposed. Although, as a general rule, participation in additional expenses is one-off, if necessary, the court may order the parent to participate in covering such expenses periodically, for a certain period. For example, if the child's health condition requires it, monthly additional expenses may be imposed, continuing until the child reaches majority or until the circumstances change.²⁷

In one case, the appellate court upheld the first-instance court's decision to order the respondent to pay a monthly amount of 750 GEL as child support. However, it altered the legal assessment of the claim and the underlying circumstances. Specifically, it differentiated between the minor's monthly needs, clarifying which of those needs fall under child support obligations and which constitute additional expenses. Within the same total amount, the court reclassified 500 GEL as child support and 250 GEL as additional expenses. In its reasoning, the appellate chamber explained that certain special needs stemming from the child's health, despite being continuous and monthly in nature, are, by their essence, not to be regarded as alimony but rather as additional expenses. This is especially true considering that some activities, such as dance, swimming, or gymnastics, although typically

²⁶ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of June 27, 2011 in case No. სბ-58-49-2011, Ruling of October 17, 2017 in case No. სბ-1141-1061-2017, Ruling of February 25, 2020 in case No. სბ-1355-2019, Ruling of March 13, 2020 in case No. სბ-1301-2019.

²⁷ Ruling of the Supreme Court of Georgia of July 11, 2018, in case No. სბ-733-733-2018 (In Georgian). Ruling of the Supreme Court of Georgia of October 10, 2023, in case No. სბ-907-2023 (In Georgian).

covered by alimony, in this specific case are medically recommended due to the child's health condition, and therefore should be considered as additional expenses. Based on this reasoning, the appellate court concluded that the total monthly amount ordered in favor of the minor under the appealed decision includes both child support and additional expenses²⁸. This legal interpretation was also upheld by the Supreme Court of Georgia.²⁹

6. The Relationship between the Child Support Obligation and the Obligor's other Financial Obligations

The obligation to support one's children is unconditional, and the fact that a parent of working age does not have a stable material income cannot serve as grounds for exempting them from the duty to support their child³⁰. The existence of credit obligations is not considered a mitigating circumstance. This serves to safeguard the non-formalizable nature of child support.

In disputes over alimony claims, respondents often invoke credit obligations and, by appealing to them, request relief from their alimony obligation.

In a civil case where the grandmother, appointed as guardian of two minors due to the mother's death and the father's parental rights being restricted, filed a claim for alimony against the father, the latter appealed to his credit obligations (specifically, a mortgage-backed loan tied to his immovable property). The Court of Cassation upheld the appellate court's finding that, although the respondent had no officially registered income, the fact that immovable property was registered in his name and mortgaged indicated that he had some level of income and thus must pay alimony.

The father's monthly credit payments could not affect the amount of alimony awarded. The respondent's credit obligations should not be given priority over his child support obligations toward the minor. Such credit obligations, being of a temporary nature, cannot influence the amount of alimony, especially since the very existence of bank obligations indicates a degree of solvency³¹.

7. Consideration of the Role of a Custodial Parent when Determining the Amount of Alimony

When determining the amount of alimony, among other relevant circumstances, the role of the cohabiting parent must also be taken into account. This entails a deviation from the principle of equal distribution of the child's financial support needs when imposing the alimony obligation. It must be recognized that the parent, often, in the Georgian context, the mother, with whom the child resides, typically bears a greater share of expenses and responsibilities, which go beyond mere financial

²⁸ Tbilisi Court of Appeal ruling of February 26, 2024, in case N 28/566-23 (In Georgian).

²⁹ Supreme Court of Georgia ruling of July 5, 2024 in case Nsb-449-2024 (In Georgian).

³⁰ See the decision of the Civil Cases Chamber of the Supreme Court of Georgia of June 27, 2011, No. sb-58-49-2011, October 17, 2017 No. sb-1141-1061-2017, February 25, 2020 No. sb-1355-2019 and March 13, 2020 No. sb-1301-2019).

³¹ Ruling of the Supreme Court of Georgia of November 9, 2022 in case Nsb-1072-2022 (In Georgian).

contributions. The cohabiting parents' intellectual, emotional, and time resources must be considered, as these significantly limit their ability to pursue self-development or generate additional income.

8. Maximum Amount of the Subsistence Minimum – Minimum Threshold of Alimony

Georgian legislation and legal literature do not recognize a specific formula for calculating alimony. While such formulas or guidelines exist in many other countries, this gap remains in the Georgian legal system³². To partially address this shortcoming, in recent years, courts have begun using the subsistence minimum as an auxiliary tool in determining the amount of alimony.

The subsistence minimum serves as the baseline threshold, a point from which the court should “begin its consideration” when assessing the appropriate alimony amount. This approach stems from both the concept and purpose of the subsistence minimum as a reflection of the minimum necessary for basic living.

According to Georgian legislation, the method for calculating the subsistence minimum defines it as the basis for developing social protection and social guarantees for Georgian citizens. It is precisely on the basis of the subsistence minimum that targeted social policy is implemented. Its main purposes are: to reflect changes in the population's standard of living; to identify the less well-off part of the population; and to determine the minimum amount of wages, pensions, scholarships, allowances, and other social benefits³³. The subsistence minimum serves as the foundation for the state's targeted social policy. It is used by the executive branch of Georgia as a guideline for planning economic policy aimed at creating social protection and guarantees for citizens. In terms of income, it provides an understanding of the general economic condition of the most vulnerable segments of the population. It is also often the subject of criticism³⁴. In this regard, it is worth noting that until 2021, the National Statistics Office of Georgia published the subsistence minimum for a working-age man, an average consumer, and, subsequently, for households based on the number of members. In the following years, data have only been published for the subsistence minimum of a working-age man and an average consumer³⁵. Including women and children in the “average consumer” concept is inaccurate. Moreover, according to the statistics office, the subsistence minimum for a man is higher than that of the average consumer (as of December 2024, the subsistence minimum for a man amounted to 260.3 GEL, and for the average consumer, 230.5 GEL³⁶). It is important to note that the subsistence minimum is calculated using a specific food basket and therefore reflects only the cost of food. It does not include the cost of utility tariffs, transportation, and many other expenses.

³² See. E.g., Family Law Handbook, Canadian Judicial Council, <<https://cjc-ccm.ca/sites/default/files/documents/2021/Family%20Handbook%20-%20ENGLISH%20MASTER%20FINAL%202021-03-30.pdf>> [15.03.2025].

³³ Law of Georgia on the Rules for Calculating the Minimum Living Wage, adopted 17/04/1997, Georgian Legislative Herald <<https://www.matsne.gov.ge/ka/document/view/29824?publication=7>> [15.03.2025].

³⁴ Barbakadze Z., Poverty and the Need for Changing the Subsistence Minimum, (In Georgian). <<https://socialjustice.org.ge/ka/products/sigharibe-da-saarsebo-minimumis-tsvlilebis-sachiroeba>> [15.03.2025].

³⁵ See <www.geostat.ge/ka/modules/categories/791/saarsebo-minimumi> [15.03.2025].

³⁶ See *ibid*.

Alimony is not identical to the subsistence minimum; it is a much broader concept. The purpose of ordering alimony payments is not only to ensure the minimum necessary for a child's survival but also, where possible, to maintain the standard of living the child would have had if the parents had a normal relationship. As far as possible, the child should be provided with the best conditions that will support their physical, mental, and emotional development and help them become a fully integrated member of society.

In the absence of an alimony calculation formula, the establishment of food basket norms and standards necessary for determining a child's subsistence minimum, based on which the Legal Entity of Public Law (LEPL) National Statistics Office could periodically calculate and publish the child's subsistence minimum, would help eliminate inconsistencies and increase predictability in court practice.

9. The Correlation of Alimony with the other Criteria of Child Protection

The primary substantive legal basis for a court decision regarding alimony, alongside Article 1214 of the Civil Code of Georgia, must be Article 81 of the Code on the Rights of the Child (CRC). As previously noted, the latter is directly applicable to cases of this category. It establishes the grounds for judicial reasoning, whereby the matter must be decided in accordance with the principle of giving priority to the best interests of the child, if the decision: a) Ensures the child's physical and psychological protection and safety; b) Guarantees the child's uninterrupted access to education, healthcare, social protection, psychosocial support, and rehabilitation; c) Prevents any form of violence, abuse, or danger toward the child; d) Supports the child's harmonious development and respects their personality, individual abilities, and interests; e) Considers the views of the child; f) Supports the relationship between the child and the parent or other person responsible for their upbringing; g) Maintains or restores the child's relationship with both parents; h) In cases where a decision is made contrary to the child's views, include concrete measures to avoid potential harm to the child during enforcement; i) And any other matters that directly or indirectly affect the child's rights and the resolution of the case in compliance with the principles of a fair trial.

Hence, if the subsistence minimum represents the baseline from which the court should begin its assessment (given that alimony is not merely to cover the minimum necessary for survival, but rather to ensure the child's proper maintenance and upbringing, which exceeds the threshold of mere survival), then alimony must also cover expenses that support the child's education, health, and harmonious development, as well as the respect for their personality, individual abilities, and interests. In practice, this can be realized by factoring into the alimony amount at least the average cost of one necessary or desirable activity for the child (based on prices typical for the region where the child resides). For example, this might include the average monthly cost of a sports activity (e.g., a swimming pool or a football club membership) or an educational/cultural activity (e.g., subscription to an amateur theatre group).

10. Certain Procedural Legal Specificities of Alimony Disputes

The legislator emphasizes the special civil procedural rules for hearing family law disputes. This is reflected both in the structure of the Civil Procedure Code of Georgia (CPC), where a separate

chapter, Chapter XLIII: “Specificities of Family Law Proceedings”, is dedicated to such cases, and in the substantive content of the relevant norms³⁷. A part of this chapter is Article 354 of the CPC, which provides that the court is authorized to establish the circumstances of the case on its own initiative.

10.1. Alimony and Other Types of Family Law Claims

Article 354 of the Civil Procedure Code (CPC) prohibits the joint consideration of family law disputes with other categories of cases. However, in practice, a party may wish to bring a counterclaim in an ongoing alimony case, introducing another family law demand, such as determining the child’s place of residence or regulating visitation rights.

In one case, the original claim concerned the imposition of alimony, while the counterclaim sought to determine the children's place of residence and the rules of contact with them. The Chamber found it inappropriate to admit the counterclaim for consideration in that particular case. It explained that while it partially agreed with the appellant’s argument regarding subparagraph “b” of Article 189(2) of the Civil Procedure Code (which allows the judge to accept a counterclaim if its satisfaction would fully or partially preclude satisfaction of the original claim), as the determination of a child's place of residence can usually affect the imposition of alimony, it still held the following: At the current stage of the proceedings, admitting the counterclaim would be unreasonable; The claim on alimony was already prepared for hearing, while the preparation of a claim concerning visitation and residence requires a different procedural approach; Importantly, alimony cases are subject to an expedited timeline of one month, and accepting the counterclaim would delay the alimony hearing; Alimony is owed from the date of filing the claim and remains due until a final decision on the child’s residence enters into legal force, therefore, the child is entitled to receive alimony in the interim; If the child’s residence is later determined to be with the father, that fact will be taken into account during the enforcement stage of the alimony decision. From the moment such a judgment enters into legal force, the father would no longer be obligated to pay alimony. Although a connection exists between the original and counterclaims, the cumulative condition required by law, that their joint consideration would ensure a more accurate and faster resolution of the dispute, was not met in this case. The correctness of determining visitation rights does not depend on whether the claims are heard jointly or separately, as the relevant facts differ. Likewise, when determining the amount of alimony, the court typically takes into account the child's right to maintain a relationship with both parents, but visitation arrangements should not be confused with residence determination. The child's residence being assigned to one parent creates the basis for the other parent’s alimony obligation, and any subsequent change in circumstances may serve as grounds for invoking Article 1221 of the Civil Code³⁸, which allows for the modification of alimony obligations.³⁹

³⁷ Law of Georgia “Civil Procedure Code of Georgia”, Georgian Legislative Herald, 1106, 14/11/1997, <<https://matsne.gov.ge/ka/document/view/29962?publication=149>> [15.03.2025].

³⁸ Article 1221 of the Civil Code: 1. A parent who pays alimony for the benefit of a minor child has the right to file a lawsuit to reduce the amount of alimony established by the court; 2. In the event of a change in the material and family situation of those parents who pay alimony in the form of a fixed amount, the court has the right, at the request of the interested person, to reduce or increase the amount of alimony.

³⁹ Tbilisi Court of Appeal's ruling of October 11, 2024, on the refusal to satisfy the private complaint. Case №28/5467-24 (№330210024008595273).

10.2. Securing an Alimony Claim

Articles 191-198 of the Civil Procedure Code regulate the issues of securing a claim and, naturally, apply to family disputes as well. To secure an alimony claim, the claimant often requests the imposition of a seizure (lien) on the respondent's property or the application of other restrictive measures on their rights. In some cases, such requests are fully granted by the court, somewhat in violation of the fair balance and proportionality between the parties' interests. In one case, where the first instance court restricted the alienation and encumbrance of immovable property owned by the respondent to secure the alimony claim, the Chamber explained: to avoid future complications or impossibility in the enforcement of the decision, it is advisable to apply a measure of claim security on immovable property registered in the name of the respondent. However, interference with property rights must correspond to the intended purpose and should restrict the property owner's rights only to the extent necessary to achieve that purpose. In the present case, the claimant's demand concerns not a one-time payment, but the imposition of a periodic (monthly, ongoing) payment obligation on the respondent, which is expected to continue until the alimony recipient reaches adulthood. It is unclear what specific period and which specific demand the applied measure of claim security is intended to secure. Even if the claimant refers to the entire period during which the alimony obligation will exist, the Chamber considers that, in this very case, the measure applied through the contested ruling cannot be justified under the principle of equality of the parties. As a rule, the alimony obligation must be fulfilled monthly, and payment can be enforced through garnishment of the respondent's salary or other current income. In the event of non-fulfillment of the alimony obligation, arrears will accrue, and to cover this debt, the enforcement bureau may seize the respondent's immovable property and subsequently use it to forcibly recover the owed amount. Imposing an indefinite restriction on property rights to secure a debt whose due date has not yet arrived results, on the one hand, in unjustified restriction of the respondent's property rights, and on the other hand, in an obligation for the claimant to compensate for any damage that the measure of claim security may cause the respondent. Although the procedural institution of securing a claim is indeed designed to protect the claim, the applied measure is a temporary court action, the purpose of which is to prevent possible obstacles to the enforcement of the court's decision. However, it must not be used as an unconditionally restrictive measure against the respondent's rights. Concerning the demand for imposing alimony, the applied measure of securing the claim should be limited in time and/or scope (in terms of the claim's extent) so as not to cause disproportionate harm to the property owner's rights. The ruling on securing the alimony claim should indicate which part of the alimony obligation the procedural measure secures. For example, until the decision enters into legal force, the security measure should apply only to the amount of alimony accrued up to that point, if applicable. Without such specification, a measure of claim security that remains in place until the respondent's minor children reach adulthood could disproportionately restrict the respondent. Moreover, it should be taken into account that the respondent may voluntarily fulfill the alimony obligation as determined by a final decision, including for the period following the decision's entry into force. Since the Civil Procedure Code is based on the principle of equality of the parties, the court is obliged to maintain a balance between the creditor's

lawful claim and the debtor's lawful interest and must not impose restrictions beyond what is necessary to satisfy the creditor's demand⁴⁰.

This interpretation was established in the practice of the Tbilisi City Court as early as 2019, when, in a specific case, the court refused the claimant's request to apply a measure prohibiting the alienation, gifting, or other legal encumbrance of the respondent's property to secure alimony arrears accrued after the court's decision entered into legal force. Instead, the court applied the measure solely to secure the amount of alimony accrued up to the date the decision entered into legal force⁴¹.

10.3. Interim Order

The institution of interim orders also reflects the procedural legal peculiarities of family disputes, regulated under Article 355 of the Civil Procedure Code (CPC) of Georgia. According to Article 355 of the CPC, the court may, based on a party's motion, issue a temporary order to regulate the following matters: a) parental care responsibilities toward the child; b) contact between one of the parents and the child; c) temporary custody of the child by one of the parents; d) the obligation to support a young child; e) provision of financial support by one spouse to the other; f) use and management of the family household and dwelling; g) advance payment of costs related to proceedings arising from family-law relationships. The court's ruling on these issues may be issued without an oral hearing. The court that issued the order may, based on a party's request, modify or revoke its order in full.

An interim order, like securing a claim, is an interim measure issued by a court ruling based on a motion from a party and remains in force during the proceedings, unless it is amended or revoked by the same court. However, a temporary order is not the same as a measure for securing a claim, its function and regulation (Articles 191-198 of the CPC) are different. A motion for securing a claim must be resolved by the court within one day of submission, without notifying the respondent (CPC Article 193). In contrast, a motion for a temporary order is considered under CPC Article 83, which establishes the right of all participants in the proceedings to present opinions on all issues raised during the trial, and to object to the opposing party's motions, conclusions, and views. The CPC does not set a specific deadline for reviewing a temporary order motion, its resolution is at the discretion of the court, provided it is done within a reasonable timeframe. Securing a claim requires the payment of a state duty, and a specific appeals procedure is provided (CPC Articles 39 and 197). These do not apply to temporary orders. A temporary order may be appealed along with the final judgment (CPC Article 377) or may be challenged before the same court by filing a request for revocation or modification (CPC Article 355.3).

Article 355 of the Civil Procedure Code (CPC) does not expressly stipulate the possibility of awarding interim alimony by way of a temporary (interim) order, but this does not constitute an obstacle to its application for the temporary regulation of alimony⁴². In practice, courts may determine

⁴⁰ Ruling of Tbilisi Court of Appeals of October 7, 2024, N28/5074-24.

⁴¹ Ruling of Tbilisi City Court of March 28, 2019, №2/6428-19.

⁴² For example, Article 355 of the CPC does not directly provide for the regulation of the restriction of parental rights by the procedure for adopting a temporary decree, but this does not constitute an obstacle to

interim alimony based on subparagraphs (a) and (d) of Article 355 of the CPC, i.e., parental care responsibilities and the obligation to support a young child, in conjunction with Articles 1198–1199 of the Civil Code, which regulate the substantive right to alimony. Very often, the amount of interim alimony is set within the limits of the subsistence minimum as defined and published by Geostat, the National Statistics Office of Georgia⁴³.

11. Enforcement of the Court Decisions

In Georgia, the enforcement of court decisions in alimony cases remains a challenge in the modern context. As noted in the legal literature, the current system for enforcing alimony judgments fails to meet the standard of effectiveness⁴⁴.

Georgian legislation provides the possibility of initiating criminal prosecution for evasion of alimony payments, and as a form of liability, it establishes a fine, community service for a period of 120 to 240 hours, or corrective labor for up to one year.⁴⁵ However, such measures are rarely applied in practice.

More effective would be a system of liability, as seen in other countries, which entails greater restrictions on the rights of the person obliged to pay alimony. For example, under Estonian enforcement legislation, if during the enforcement proceedings (over a three-month period), the liable person still does not fulfill their obligations and the enforcement officer's measures prove unsuccessful, it becomes possible to restrict or suspend certain rights such as the right to drive a vehicle; the right to possess or acquire firearms, the right to use recreational and personal watercraft, or fishing licenses. In addition to the above enforcement measures, Estonian law also provides for the suspension or revocation of specific documents or the denial of issuance for a defined period by court order. These may include: an Estonian citizen passport; a foreign national's passport; a refugee travel document; a temporary travel document; a seaman's book; a certificate of service on an Estonian vessel; or a diplomatic passport.

The court is authorized to simultaneously restrict or suspend multiple rights under Estonian law if the individual is deliberately evading payment of alimony ordered by the court. In such cases, criminal liability applies, and the person is subject to a fine or imprisonment for up to one year⁴⁶.

the regulation of this issue by a temporary decree. See the Decision of the Constitutional Court of Georgia of December 7, 2018, No. 2/10/2012, Citizen of Georgia and Canada Giorgi Spartak Nikoladze v. Parliament of Georgia. <<https://www.matsne.gov.ge/ka/document/view/4390502?publication=0>> [15.03.2025].

⁴³ Tbilisi Court of Appeal 01.03.2024 Ruling No. 28/6723-23 on Temporary Decree.

⁴⁴ In 2020, the National Bureau of Enforcement received 513 cases of the alimony category, and 117 were enforced; in 2021, 517 cases were received and 138 were enforced; in 2022, 572 cases were received and 159 were enforced; according to the data available at the end of January 2023, 8,949 cases of the alimony category were pending. See *Urukchishvili G.*, Non-payment of Alimony – Cultural and Legislative Challenges in Georgia, Sapari, Tbilisi, 2022. (In Georgian).

⁴⁵ Law of Georgia “Criminal Code of Georgia”, Georgian Legislative Herald, 2287 22/07/1999, Art.176, <<https://matsne.gov.ge/ka/document/view/16426%23%21?publication=11#!>> [15.03.2025].

⁴⁶ Code of Enforcement Procedure, passed 20.04.2005, entry into force 01.01.2006, <<https://wipo.lex-res.wipo.int/edocs/lexdocs/laws/en/ee/ee141en.html>> [15.03.2025].

The European Court of Human Rights views the enforcement of civil and administrative judgments as falling within the scope of the right to a fair trial under Article 6 of the ECHR. According to the Court, enforcement of a judgment is an integral part of the right to a fair hearing. This right would be illusory if a final and binding court decision remained unenforced. Accordingly, the state must establish an adequate enforcement system, and execution must be full and comprehensive, not partial⁴⁹.

The Convention on the Rights of the Child and the Universal Declaration of Human Rights regard a child's social right as an essential component of the child's need for special protection. As noted, this right is recognized under the umbrella of the child's "best interests", a guiding principle in both instruments. The state has a duty to ensure a child receives the protection and care necessary for their well-being⁵⁰. This responsibility is not limited to the rights and obligations of parents, guardians, or other legally responsible persons. The state is also required to fulfill the second aspect of its obligations under these conventions, to directly guarantee a child's right to subsistence where the parent either lacks the means or fails to meet this obligation.

It is worth noting that some countries have introduced special social support mechanisms for children, such as guaranteed alimony, alimony assistance schemes, and others, to ensure children's well-being in cases where parents are unable or unwilling to pay alimony. In some states, after providing such support, the state reserves the right to seek reimbursement from the parents, if a court later determines that the non-payment of alimony occurred without legitimate justification⁵¹.

⁵¹ For example, Estonia's Social Insurance Council provides two types of alimony allowance: one during the court proceedings and another during the enforcement stage. See [relevant source] for details. Family

Georgian legislation, both in terms of determining the amount of alimony and ensuring its enforcement, is characterized by an abstract nature and a lack of practical standards and mechanisms. If the state devotes more time and attention to the issue of child alimony, through the establishment of alimony funds and the development of calculation criteria (even based on the subsistence minimum method), and if the relevant institutions act more effectively to develop a uniform practice, the child's right to social protection will become more tangible and effectively realized.

Bibliography:

1. Constitution of Georgia, Legislative Herald of Georgia, 31-33, 24/08/1995 <<https://matsne.gov.ge/ka/document/view/30346?publication=36>> [15.03.2025].
2. Law of Georgia "Civil Code of Georgia", Legislative Herald of Georgia, 786, 24/07/1997, <<https://matsne.gov.ge/ka/document/view/31702?publication=117>> [15.03.2025].
3. Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, 1106, 14/11/1997, <<https://matsne.gov.ge/ka/document/view/29962?publication=149>> [15.03.2025].
4. Law of Georgia "Code on the Rights of the Child", Legislative Herald of Georgia, 5004-Il, 20/09/2019, <<https://matsne.gov.ge/ka/document/view/4613854?publication=4>> [15.03.2025].
5. Law of Georgia "Criminal Code of Georgia", Legislative Herald of Georgia, 2287, 22/07/1999, <<https://matsne.gov.ge/ka/document/view/16426%23%21?publication=11#>> [15.03.2025].
6. Law of Georgia on the "Rules for Calculating the Subsistence Minimum" adopted 17/04.1997, Legislative Herald of Georgia, <<https://www.matsne.gov.ge/ka/document/view/29824?publication=7>> [15.03.2025].
7. UN Convention on the Rights of the Child of 20 November 1989, Legislative Herald of Georgia, <<https://matsne.gov.ge/ka/document/view/1399901?publication=0>> [15.03.2025]. Ratified by Georgia in 1994, the entry into force date 02/07/1994.
8. European Convention on Human Rights and Fundamental Freedoms <<https://matsne.gov.ge/ka/document/view/1208370?publication=0>> [15.03.2025]. Ratified by Georgia on 20.05.1999.
9. Benefits for families with children Family benefits and assistance for families with sick children <https://www.expat-finland.com/pdf/kela/home_and_family.pdf> [15.03.2025].
10. Constitution of the Republic of Lithuania. Adopted by the citizens of the Republic of Lithuania in the Referendum of 25 October 1992. <<https://www.lrs.lt/home/Konstitucija/Constitution.htm>> [15.03.2025].

Benefits act. Passed 15.06.2016, entry into force 01.01.2017, <<https://www.riigiteataja.ee/en/eli/509022018001/consolide>> [15.03.2025].

According to Finnish legislation, in cases where child support (alimony) is not paid at all (full non-payment) or is paid in an insufficient amount (reduced alimony), a so-called guaranteed alimony or alimony allowance is provided. If the obligated parent is unable to pay alimony and therefore has a zero-child support obligation, the child receives the full amount of the alimony allowance from the state. In Finland, for example, a child is eligible for the guaranteed alimony allowance under the following conditions: the child has not received at least one month of alimony from the obligated parent; If the amount of alimony determined by a court or social welfare authority is lower than the guaranteed allowance amount; etc. See: <<https://www.kela.fi/families>> [15.03.2025]. Benefits for families with children Family benefits and assistance for families with sick children, <https://www.expat-finland.com/pdf/kela/home_and_family.pdf> [15.03.2025].

11. Child Support Act 1991. Meaning of certain terms used in this Act <<https://www.legislation.gov.uk/ukpga/1991/48/enacted>> [15.03.2025].
12. Code of Enforcement Procedure, passed 20.04.2005, entry into force 01.01.2006. < <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/ee/ee141en.html> > [15.03.2025].
13. German Civil Code. in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Act of 10 August 2021 (Federal Law Gazette I p. 3515. <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p6331> [15.03.2025],
14. Penal code, passed 06.06.2011, entry into force 01.09.2002 <<https://www.riigiteataja.ee/en/eli/522012015002/consolide>> [15.03.2025].
15. Family Benefits act. Passed 15.06.2016, entry into force 01.01.2017. <<https://www.riigiteataja.ee/en/eli/509022018001/consolide>> [15.03.2025].
16. The Child Support Maintenance Calculation Regulations 2012, Regulation 50, “Parents treated as non-resident parent in shared care cases”. <<https://www.legislation.gov.uk/uksi/2012/2677/contents/made>> [15.03.2025].
17. *Barbakadze Z.*, Poverty and the Necessity to Change the Subsistence Minimum <<https://socialjustice.org.ge/ka/products/sigharibe-da-saarsebo-minimumis-tsvlilebis-sachiroeba>> [15.03.2025].
18. *Lomtadize E., Mamrikishvili E.*, “Comparative Legal Study – the Granting and Enforcement of Child Support”, Tbilisi, 2022 (In Georgian).
19. *Lomtadize E.*, Determining and the Enforcement of the Alimony – Study of the Best Practice”, Tbilisi, 2022, 5 (In Georgian).
20. *Sitchinava E.*, Ilia Law House, Implementation of Community-Oriented Justice in Divorce and Paternity Determination Cases, Tbilisi, 2023 (In Georgian).
21. *Urukchishvili G.*, Non-payment of Alimony – Cultural and Legislative Challenges in Georgia, Sapari, Tbilisi, 2022(In Georgian).
22. *Shengelia R., Shengelia E.*, Family Law (Theory and Practice), Tbilisi, 2011, 244-245 (In Georgian).
23. *Japaridze K.*, Personal and Property Relations of Parents and Children”, Doctoral Thesis, TSU, 2015. <https://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/qetevan_jafaridze.pdf> [15.03.2025].
24. Decision of the Constitutional Court of Georgia of December 7, 2018, N2/10/2012, A Citizen of Georgia and Canada – Giorgi Spartak Nikoladze vs. the Parliament of Georgia. <<https://www.matsne.gov.ge/ka/document/view/4390502?publication=0>> [15.03.2025].
25. Family Law Handbook. Canadian Judicial Council, <<https://cjc-ccm.ca/sites/default/files/documents/2021/Family%20Handbook%20-%20ENGLISH%20MASTER%20FINAL%202021-03-30.pdf>> [15.03.2025].
26. *Herring J.*, Family Law, Eighth Edition. University of Oxford, 2017. <https://aghalibrary.com/storage/books/1609407553_AghaLibrary.pdf > [15.03.2025].
27. *Seltzer J. A., Meyer D.R.*, Child Support and Children's Well-Being. <https://evidence2impact.psu.edu/wp-content/uploads/2023/05/s_wifis06c02.pdf> [15.03.2025].
28. Ruling of the Supreme Court of Georgia of November 9, 2022, №სს-1072-2022, (In Georgian) <<http://prg.supremecourt.ge/default.aspx>> [15.03.2025].

29. Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of June 27, 2011, on the case №სბ-58-49-2011 (In Georgian).
30. Ruling of the Civil Chamber of the Supreme Court of Georgia of October 17, 2017, on the case №სბ-1141-1061-2017 (In Georgian).
31. Ruling of the Civil Chamber of the Supreme Court of Georgia of February 25, 2020, on the case №სბ-1355-2019 (In Georgian).
32. Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of March 13, 2020, on the case №სბ-1301-2019 (In Georgian).
33. Ruling of the Supreme Court of Georgia of July 11, 2018, on the case №სბ-733-733-2018 (In Georgian).
34. Ruling of the Supreme Court of Georgia of October 10, 2023, on the case №სბ-907-2023 (In Georgian).
35. Ruling of the Supreme Court of Georgia of July 5, 2024, on the case №სბ-449-2024 (In Georgian).
36. Decision of the Civil Cases Chamber of the Supreme Court of Georgia of June 27, 2011, №სბ-58-49-2011 (In Georgian).
37. Ruling of the Supreme Court of Georgia of October 17, 2017, №სბ-1141-1061-2017(In Georgian).
38. Ruling of the Supreme Court of Georgia of February 25, 2020, №სბ-1355-2019 (In Georgian).
39. Ruling of the Supreme Court of Georgia of March 13, 2020, №სბ-1301-2019 (In Georgian).
40. Tbilisi Court of Appeals ruling of February 26, 2024, on the case № 28/566-23 (In Georgian).
41. Tbilisi Court of Appeal's ruling of October 11, 2024, on the refusal to satisfy the private complaint №28/5467-24 (№330210024008595273) (In Georgian).
42. Tbilisi Court of Appeals ruling of January 17, 2025, on the case N28/2512-24 (In Georgian).
43. Tbilisi Court of Appeals ruling of January 27, 2020, on the case N28/4704-21 (In Georgian).
44. Tbilisi Court of Appeals ruling of October 7, 2024, on the case N28/5074-24 (In Georgian).
45. Tbilisi Court of Appeals 01.03.2024 Ruling No. 28/6723-23 on temporary injunction (In Georgian).
46. Decision of the European Court of Human Rights Case of Micallef v. Malta, Application no. 17056/06, 15 October 2009 <[https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-1270%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-1270%22]})> [15.03.2025].
47. Decision of the European Court of Human Rights Case of Amat-GLTD and Mebaghishvili v Georgia, Application no. 2507/03, <[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-70293%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-70293%22]})> [15.03.2025].
48. General Comment No. 14 (2013) of the Committee on the Rights of the Child “The right of the child to have their best interests taken into account as a primary consideration” <<https://digitallibrary.un.org/record/778523>> [15.03.2025].

Ekaterine Akhalkatsi*

The Problem of Enforcement of Notarial Acts (Comparative Analysis)

This paper explores the legal nature and enforcement of notarial acts, along with the challenges arising particularly in an international context. The aim of the research is to conduct a comprehensive analysis of the enforcement of notarial acts, to compare various legal systems, and to offer the author's recommendations for resolving existing issues.

The study focuses on legal doctrine, the role of the notary, the significance of notarial acts, and mechanisms for their enforcement. The author examines issues related to the recognition and enforcement of enforceable notarial acts, especially within the framework of the Minsk Convention.

Structurally, the article is divided into the following sections:

- The legal nature and importance of notarial acts – addressing the role of the notary, the concept of a notarial act, and enforcement mechanisms;*
- Comparative analysis of enforcement of notarial acts – examining the practices of Spain, the Netherlands, Germany, Ukraine, Croatia, and Hungary;*
- Issues related to the enforcement of notarial acts issued abroad within Georgia – reviewing the legal basis of the Minsk Convention, judicial practice in Georgia, and specific case examples.*

The research applies criminological methodology, including documentary analysis, comparative legal methods, historical-legal approaches, and systemic analysis.

In its concluding section, the paper provides the author's own recommendations aimed at improving the enforcement practice of notarial acts. The article offers significant support to both theoretical and practical legal fields in national and international contexts.

Keywords: *notarial act, enforcement, foreign country.*

1. Introduction

In Georgia, the recognition and enforcement of notarial acts issued by notaries is based on Article 51(a) of the Minsk Convention. However, Georgia currently lacks any established practice regarding the enforcement of enforceable notarial acts issued by foreign notaries. This legal vacuum renders the topic both relevant and problematic. Given that notarial acts may produce legal effects similar to court decisions, the process of recognizing and enforcing such acts should be governed by rules akin to those applicable to judicial or arbitral decisions.

The objective of this article is to provide a comparative analysis of the enforcement of notarial acts, identify existing problems, and propose authorial recommendations for addressing them. The

* Invited Lecturer at Ivane Javakhishvili Tbilisi State University, Georgian National University, and Sulkhan-Saba Orbeliani Teaching University.

study draws upon documentary, comparative-legal, historical-legal, and systemic analytical methods. Based on this foundation, the work critically assesses current practices and outlines possible improvements.

2. Enforcement of Notarial Acts

2.1. The Legal Nature and Significance of Notarial Acts

According to Article 2 of the Law of Georgia on Enforcement Proceedings, the types of enforceable acts are listed exhaustively. This list should not overlook those acts which are frequently encountered in today's legal reality.

The law differentiates between acts issued domestically and those issued abroad. It distinguishes, for instance, an arbitration award made within the country from a foreign or international arbitration decision, the latter being enforceable in Georgia only if such enforcement is provided by international treaties.¹

While notarial acts are included among enforceable acts², it remains unclear whether this provision applies to notarial enforcement documents issued abroad.

Per Article 25 of the same law, the National Bureau of Enforcement initiates enforcement proceedings based on a written request by the creditor and an enforcement document³. If a legal document was issued in a foreign country, it is essential that the legislator define the procedures applicable to its recognition and enforcement. For instance, Article 68 of the Law of Georgia on Private International Law sets out the procedural rules for enforcing foreign judgments.⁴

According to paragraph 1 of that article, Georgia recognizes foreign court decisions that have entered into legal force. Paragraph 2 lists exceptions where such recognition shall not occur – for example, where the case falls under Georgia's exclusive jurisdiction, where the defendant was not properly notified, or where a conflicting judgment already exists.

The same law, in Article 73¹, stipulates that foreign arbitral awards are to be enforced under the Law of Georgia on Arbitration.⁵ That law provides that regardless of the country in which an award is made, it is binding and shall be enforced upon submission to the court.⁶

According to Article 44 of the Law of Georgia on Arbitration, regardless of the country where the arbitration award was issued, it shall be binding and, in the event of a written petition being submitted to the court, shall be enforced taking into account the provisions of this Article and Article 45 of this Law.⁷ For the purposes of this Article and Article 45 of this Law, the courts of appeal shall be considered competent courts in relation to decisions rendered in Georgia, and the Supreme Court of Georgia in relation to decisions rendered outside Georgia.

¹ Subparagraph m) of Article 2 of the Law of Georgia “On Enforcement Proceedings”.

² Subparagraph n) of Article 2 of the Law of Georgia “On Enforcement Proceedings”.

³ Paragraph 1 of Article 25 of the Law of Georgia “On Enforcement Proceedings”.

⁴ Article 68, paragraph 1, of the Law of Georgia “On Private International Law”.

⁵ Article 73¹, paragraph 1, of the Law of Georgia “On Private International Law”.

⁶ Article 1, paragraph 1, of the Law of Georgia “On Arbitration”.

⁷ Paragraph 1 of Article 44 of the Law of Georgia “On Arbitration”.

In addition, the Law of Georgia on Arbitration directly indicates that the enforcement of an arbitration award shall be carried out on the basis of a court ruling, in accordance with the Law of Georgia on Enforcement Proceedings. Accordingly, while the legislator regulates in detail the rules for the recognition and enforcement of a court decision rendered in the territory of a foreign country and an arbitration award rendered in the territory of a foreign country, the issue of the recognition and enforcement of a notarial act issued by a notary of a foreign country should also be regulated, since a notarial act is also a document that may have legal consequences similar to a court decision. Although, theoretically, Georgia, as a contracting party to the Minsk Convention, enforces notarial acts issued in the territory of other contracting parties, due to the absence of a regulatory legislative provision, the procedural part of this remains questionable and, accordingly, indicates a legislative gap.

It is necessary to determine through legal research the possibility and procedure for the enforcement of a certificate of enforcement issued by a notary of a foreign country on the territory of Georgia. The research considered the practice of various countries and the explanations of the Supreme Court on this problematic issue.

The problem is relevant to the extent that enforcement proceedings play the role of a regulator of compulsory enforcement⁸, and the regulation of what is not initially included in the legislative framework represents a major challenge and obstacle for the judiciary.

2.2. The Role of the Notary Among Legal Professions

At the opening of the 1992 Notariats Assembly, the then President of the LNCA⁹, Gilles Demers, described the role of notaries in society¹⁰:

“Notaries perform an extremely valuable role in any modern state. Through their notarial activities, they ensure the continuity of transactions; as legal specialists, they explain the rights and obligations of the parties; their impartiality is a guarantee of balanced agreements. As representatives of public authority, they grant authenticity and enforceability to their acts.”

Since 1996, the legal status of the notary in Georgia has been definitively established under the Law of Georgia on Notaries, classifying the notary as a representative of a liberal profession. A notary is an impartial and trustworthy advisor to clients¹¹. One might call a notary a legal expert in the field of undisputed justice.¹²

For decades, notaries have been an integral part of society. The first notaries appear in ancient Egypt, known as “scribes.”¹³ A notary is a neutral and reliable advisor to the citizen. A document

⁸ *Kurdadze Sh., Kurdadze G., Khunashvili N., Chkonia Z.*, Commentary on the Law of Georgia “On Enforcement Proceedings”, Part One, Tbilisi, 2018, 19. (In Georgian)

⁹ Latin Notary Union.

¹⁰ Notary Activities for the Welfare of Civil Society, Notary Master Andre Schwachtgen, Honorary President of the Luxembourg LNSK.

¹¹ *Rostiashvili M.*, Specifics of the Execution of the Enforcement Paper Issued by a Notary, Tbilisi, 2019, 8 (In Georgian).

¹² Notary Activities for the Welfare of Civil Society, Notary Master Andre Schwachtgen, Honorary President of the Luxembourg LNSK.

¹³ Notary History, Clay Mason, see <<https://www.superiornotaryservices.com/blog/history-of-the-notary->

certified by a notary possesses indisputable evidentiary power. Additionally, a notary performs public authority functions through notarial and related legal acts, all while acting independently in professional activities.¹⁴

Some in modern society may still question whether notaries remain relevant. In a remote and digital world, one might think everything can be done online – including notarial acts, from mortgage signings to giving testimony in court.¹⁵ However, the pandemic revealed that notaries retained their importance by transitioning to remote services in line with the public's needs. Even in the electronic era, the notary remains as essential as they were millennia ago.

The notary is obliged to explain the content and legal consequences of a notarial act to any party requesting it. Moreover, the notary must protect the interests of those unfamiliar with Georgian law and in need of legal advice.¹⁶

The notariat represents an ideal synthesis of public authority and private initiative and is accessible to all social strata. Due to the lack of theoretical knowledge in Georgia about notariat, its potential remains underutilized. Nevertheless, recent legislative and technological reforms in Georgian notariat have demonstrated that it is a dynamic system with untapped possibilities for further development.¹⁷

2.3. The Concept and Essence of the Notarial Act

The classification of notarial acts is a subject of scholarly interpretation and is inherently conditional. Classification can be made based on several criteria – for instance, according to the stage of the legal relationship (its creation, implementation, securing/protection, and so forth) or according to the act's purpose (certification of undisputed rights, granting enforceability, verification of factual circumstances, etc.). Classification can also be based on content.¹⁸

However, it is noteworthy that Georgian legislation does not categorize notarial acts in such a way. Instead, it divides them into only two types: private and public acts. This division is also known as the distinction between “simple” and “authentic” notarial acts. Abroad, this same distinction often appears as “notarial certification” versus “notarial attestation.”¹⁹

The performance of notarial acts in Georgia is governed by several legal instruments: the Civil Code of Georgia, the Law of Georgia on Notaries, the 2010 Ministerial Order No. 71 titled *Instruction on the Procedure for Performing Notarial Acts*, and other related legal acts.

A notary issues an enforcement document (enforceable writ) in the form of a public act, provided that such a clause exists in the parties' agreement and the notary has clearly explained the

seal/> [25.05.2024].

¹⁴ Decision of the Constitutional Court of Georgia of February 22, 2023 in the case Medea Gvazava and Julieta Archvadze v. Parliament of Georgia. (In Georgian)

¹⁵ Notary Association of Pennsylvania, see <<https://www.notary.org/article-why-are-notaries-still-important>> [25.04.2025]. (In Georgian)

¹⁶ Article 49 of the Law of Georgia “On Notaries”.

¹⁷ LEPL Georgian Chamber of Notaries, Georgian Notary Development Strategy for 2014, 23. (In Georgian)

¹⁸ Sukhitashvili D., Notary Law, Tbilisi, 2012, 54 (In Georgian).

¹⁹ Kharitonashvili N. Notary Law 2021, Tbilisi, Bona Causa, 34 (In Georgian).

legal consequences of such issuance in the notarial act.²⁰ One of the fundamental purposes of notariat is to promote the stability of civil turnover and the conscientious fulfillment of contractual obligations.²¹ A notarial act has both evidentiary and enforceable legal force. It represents an out-of-court document with binding evidentiary value and executory power.

According to Article 38, Paragraph 5 of the Law of Georgia on Notaries, a notary may issue an enforcement writ based on a matured monetary claim, a demand to transfer property rights, or for compulsory enforcement against mortgaged property – if such a clause is agreed upon by the parties and the notary has explicitly stated the legal consequences of the enforcement writ in writing.

Article 72 of the *Instruction on the Procedure for Performing Notarial Acts* establishes the procedure for issuing enforcement writs. Key points include:

1. The notary issues the writ based on a notarial act that permits enforcement under Georgian legislation and where the statute of limitations has not expired.
2. The writ is issued upon the creditor's (or successor's) written request, which must include the legally required requisites.
3. The writ is preferably issued by the same notary who certified the enforceable notarial act – or their substitute, if applicable.

2.4. The Enforceability of the Notarial Act

A notarial act, when it is enforceable, carries the same legal power as a judicial decision and is not subject to appellate review. Its enforcement does not require prior recourse to a court – enforcement occurs automatically, by virtue of the act itself. A notarial act is a document executed by the free will of the parties.

By entering into such an act, the parties voluntarily accept the obligation to comply with its provisions and express their advance agreement to fulfill their responsibilities in a prompt and effective manner.

Even though the notarial act is enforced without court involvement, it does not strip the debtor of protective legal instruments. The debtor has the right to:

- Request observance of any statutory timeframes;
- Demand suspension of enforceability in the event of suspected forgery (e.g., if a complaint is filed alleging criminal falsification or the opposing party contests the document's authenticity in court);
- Invoke legislative provisions that allow for deferment of enforcement – such as cases involving notary selection disputes, employment-related obligations, contested sale terms, and others.

In Western European countries, parties may often choose the form of authentication for their legal documents. However, in several areas, the law mandates that the notarial form be used. This requirement typically rests on four primary considerations related to the idea of protection.

²⁰ Recommendation on the calculation of the fee established for issuing a duplicate of an enforcement document, adopted by the decision of the Board of the Notary Chamber of Georgia #21.1 of December 22, 2015.

²¹ LEPL Notary Chamber of Georgia Georgian Notary Development Strategy for 2014. (In Georgian)

First, in cases of social significance – for example, the formation of capital-based companies (limited liability companies, joint-stock companies, etc.), where public financial contributions are involved – even small legal errors can lead to major injustices. Thus, notarial authentication is required.

Second, it is used to protect vulnerable individuals – such as minors, persons with limited legal capacity, or heirs whose liability is limited to inherited property.

Third, the notarial form serves as an objective source of information for third parties interested in real estate transactions (e.g., regarding property transfer, registration, mortgages).

The new Law on Entrepreneurs in Georgia also aimed to strengthen the role of the notary in such contexts.

2.5. The Undisputed Jurisdiction of the Notarial Act

A notary may also act as a conciliatory intermediary, issuing documents that possess enforceable power. The notary's competence should not be limited to a specific field, but rather extended to all situations in which the parties request their involvement, except in matters reserved exclusively for representatives of other legal professions.

Accordingly, a notary who acts in the role of a “private judge”²² can go beyond merely drafting or certifying notarial acts; they may also serve as an arbitrator in the event of disputes between the parties. Given the notary's functional similarity to judicial authority in the domain of undisputed jurisdiction, it is possible – and often efficient – to delegate a significant portion of judicial authority to notaries.

The notary's activities serve to enhance legal security and efficiency. By exercising undisputed jurisdiction, notaries reduce the overall burden on the judiciary. Through notarial procedures: Deadlines are shortened; The submission of evidence becomes more efficient; Increased legal certainty reduces the need for court intervention.

Globally, only a fraction – approximately one in every thousand – of notarial acts become subject to litigation in court. The legal consequences of notarial acts include: Legal consensus between parties, helping avoid litigation; Evidentiary value that simplifies proof in court, if proceedings do arise; Enforceable power that expedites compulsory execution processes, relieving courts of this responsibility.

The strength of notarial acts in terms of evidentiary and enforceable power significantly simplifies legal proceedings and enforcement procedures. Thus, they play a crucial role in ensuring efficiency, certainty, and accessibility within the legal system.

2.6. The Issuance of Enforcement Writs by a Notary

The issuance of an enforcement writ by a notary is not mandatory by law and does not depend solely on the notary's discretion. Rather, it requires the parties' mutual agreement to delegate such

²² “Notary activity for the welfare of civil society” Notary André Schwachtgen, Honorary President of the Luxembourg LNK. (In Georgian)

authority to the notary. The validity of this agreement depends on the nature of the legal relationship between the parties and the specific type of contract concluded.

To initiate the procedure for issuing an enforcement writ, the requesting party must meet clearly defined legal conditions. These conditions vary among jurisdictions and also reflect the scope of authority granted to notaries in each legal system.

For instance in Italy²³, notarial authority to issue enforcement writs applies solely to claims arising from loan agreements. In Belgium, Japan, and France, notaries may issue writs for a broad range of matters. However, French law excludes specific types of claims – for example, actions related to unlawful occupation of residential property are reserved for court jurisdiction²⁴.

Under Georgian law²⁵, the notary's authority to issue an enforcement writ is directly linked to the will of the parties, explicitly expressed in their agreement²⁶. Specifically, the agreement must contain a clause stating that in the event of a breach, the notary is empowered to issue an enforcement writ.

The courts of Georgia have clarified that if the contract does not include such a clause in the body of the agreement (especially among its essential terms), then any enforcement writ issued by the notary is absolutely invalid²⁷.

The Law of Georgia on Notaries provides that a notary may issue an enforcement writ based on a written request by the creditor (or their legal successor). The request must comply with all statutory requirements, and its submission marks the formal beginning of the notarial enforcement procedure.

Once the request is submitted, the notary must verify all formal preconditions for issuing the writ. These include:

- Verifying the agreement between the parties and its legal validity;²⁸
- Reviewing the content of the obligation to be enforced;
- Examining the details of the claim, the legal relationship between the parties, the parties' identifying information, and the enforceability of the demand.²⁹

If any substantive legal requirements are not met, the notary must refuse to issue the writ. If a writ is issued in violation of these rules, it may be subsequently annulled by the court.³⁰

²³ “Procedural issues related to the issuance of a writ of execution by a notary”, Makhatadze N., Scientific Journal “Justice and Law” #3(71)'21, 58.

²⁴ Rouchaud A.M., Conclusions – Workshop No. 2: Writs of execution, The Execution of court decisions in civil cases, Council of Europa Publishing, 1998, 117.

²⁵ Civil Code of Georgia, Law of Georgia “On Enforcement Proceedings”, Law of Georgia “On Notary” and Order of the Minister of Justice of Georgia No. 71 of March 31, 2010 “On the Rules for Performing Notarial Acts”.

²⁶ “On Notary” Law of Georgia, Art. 38, Clause 5, Legislative Bulletin of Georgia, No. 46, 22.12.2009, Art. 346.

²⁷ Decision of the Supreme Court of Georgia of January 16, 2014 in case No. 689-655-2013.

²⁸ Law of Georgia “On Notary”, Art. 40, paragraph 1, Georgian Legislative Herald, No. 46, 22.12.2009, Art. 346. (In Georgian)

²⁹ “Procedural Issues Related to the Issuance of a Notary's Enforcement Order”, Makhatadze N., Scientific Journal “Justice and Law” #3(71)'21, 62.

³⁰ Preuss N., Zivilrechtspflege durch externe Funktionsträger, Mohr Siebeck, Tübingen, 2005, p. 41.

The authority of the notary to issue enforcement writs may be described as falling under a form of jurisdiction – one might call it the “adjudicatory power of the notary.”³¹ In essence, during this process, the notary acts similarly to the judiciary. Although notaries do not formally possess judicial authority, the enforcement writ they issue functions as a delegated act of judicial enforcement.

Therefore, when issuing an enforcement writ, the notary must comply with the same standards as a judge – particularly regarding the enforceability of the claim.³²

Another key precondition is the maturity of the obligation. In Georgia, the notary plays a passive role in this process: the procedure begins upon submission of the request and depends on the statute of limitations.

3. The Problematic Nature of the Enforcement of Notarial Acts (Comparative Legal Analysis)

3.1. Enforcement of Notarial Acts in Spain

In the Kingdom of Spain, the activities of notaries are supervised by the Ministry of Justice, with the Minister of Justice recognized as the senior-most notary in the country.³³

Under Spanish law, notarial acts³⁴ constitute grounds for the initiation of enforcement proceedings. Furthermore, the law stipulates that not only the original act but also its certified copies may be enforced – provided such copies are issued with the consent of both parties or certified by the court and include the identification of the person against whom the act is to be enforced.³⁵

According to legal scholarship in Spain, the enforceability of a notarial act is not influenced by the time of its issuance.

Unlike the Georgian legal system, Spanish law allows notaries to carry out certain enforcement actions themselves. A prime example is the auction-based sale of mortgaged property, provided there is an agreement between the parties. Secured monetary claims – especially those backed by mortgages – are common in Spain and require prompt action. Therefore, notaries are authorized to perform enforcement actions for such claims, which significantly accelerates the process.³⁶

In these cases, the entire auction process is managed by the notary. This fact – that the auction of mortgaged property is conducted directly by a notary without court intervention – highlights the extensive powers of Spanish notaries.³⁷

³¹ Code of Civil Procedure of Georgia, Art. 363 Code of Civil Procedure of Georgia, Art. 36332. (In Georgian)

³² Law of Georgia “On Notary”, Art. 38.5.

³³ Ley del Notariado de (Ministerio de Gracia y Justicia), num. 149, de 29/05/1862, BOE-A-1862-4073.

³⁴ Escrituras públicas – public acts drawn up/issued by a notary and containing the relevant requisites (including the indication that they were signed in the presence of a notary, the indication of the verification of the capacity of the parties, etc.) (see – <<https://www.notariado.org/portal/c%C3%B3mo-leer-la-escritura>> [Last viewed – 27.05.2024]. (In Georgian)

³⁵ Ley de Enjuiciamiento Civil, (Jefatura del Estado) núm. 7, de 08/01/2000, BOE-A-2000-323, art. 517.2. 4^o.

³⁶ MARTÍN FABA, J. M. (2017). Sobre la fuerza ejecutiva de la escritura pública y el nuevo sistema de expedición de copias: issues surgidas en la jurisprudencia actual. Revista CESCO De Derecho De Consumo, (20), 74-81 (see – <<https://revista.uclm.es/index.php/cesco/article/view/1247>> [21.09.2025].

³⁷ Reglamento Hipotecario, (Ministerio de Justicia) núm. 106, de 16/04/1947, BOE-A-1947-3843, art. 234. Ibid., Articles 234 et seq.

The notary evaluates the creditor's application, and if all preconditions are satisfied, initiates the auction procedure. The auction is conducted electronically under the notary's supervision. Information about the auction and the details of the presiding notary are published in the Official State Bulletin.³⁸

3.2. Enforcement of Notarial Acts in the Netherlands

In the Netherlands, notarial activity is recognized as a liberal profession. Notaries are appointed by the Queen (currently, the monarch), and under Dutch law, the execution and certification of agreements for the transfer of rights (including their formation and termination) may only be carried out through a notary.³⁹

Dutch legislation grants notaries broad powers. The notarial institution is designed not only to relieve the judiciary of certain responsibilities but also to reduce the burden on enforcement agencies. The parties may agree that the sale of property will be handled by a notary; however, the notary's authority in this regard is limited strictly to immovable (real) property.⁴⁰

Unlike Georgian law, Dutch legislation prohibits the transfer of ownership of a property directly to the creditor. Instead, the law mandates public auction as the only acceptable method for realizing property value. This approach is considered the most transparent and reliable means of determining the true market value of the property.

To avoid conflicts of interest, the auction cannot be conducted by the creditor. Furthermore, public notice of the auction is required – typically through publication in newspapers – to ensure not only the debtor but also other potential creditors are properly informed.⁴¹

3.3. Enforcement of Notarial Acts in Germany

The enforcement of claims through the sale of property to satisfy outstanding debts is also a well-established procedure under German law. An enforceable document may be issued by a notary based on a contract certified in notarial form, which becomes immediately executable without requiring further judicial review.

This method of realization is particularly attractive because it enables creditors to obtain swift satisfaction of their claims at a market price previously agreed upon by the parties. Once the enforceable notarial deed is in place, the notary issues the enforcement writ automatically, without any need for additional examination or approval.

This efficiency reflects the strong institutional trust placed in the notary system in Germany, where notarial certification serves as both an evidentiary mechanism and an enforcement tool.⁴²

³⁸ Ibid., Articles 234 et seq.

³⁹ Paul Van Der Molen, *Land registration and cadastre in selected European countries, Austria, Bulgaria, Croatia, Hungary, Netherlands, Serbia*, ed. By center of legal competence e(CLC), published by Intersentia, 2009, 194.

⁴⁰ The activities of the Dutch enforcement agent, Jos Uitdehaag, Oct 2014, Netherlands, 19.

⁴¹ The activities of the Dutch enforcement agent, Jos Uitdehaag, Oct 2014, Netherlands, 82.

⁴² *Wolf Ch.R.*, *Real-estate property Law Germany, Key Aspects of German business law, a practical manual*, Michael Wendler (ed) 4, ed., Berlin, Heidelberg, Springer 2008, 284.

3.4. Enforcement of Notarial Acts in Ukraine

Under Ukrainian legislation, the non-judicial sale of property is permitted in specific cases determined by law. This may be carried out on the basis of an enforcement writ issued by a notarial authority.

Ukrainian practice thus recognizes the authority of the notary to initiate enforcement proceedings for certain monetary claims, particularly when they are secured by collateral, such as a mortgage. These provisions aim to expedite creditor satisfaction without engaging the courts, in turn reducing the judiciary's caseload and streamlining civil enforcement.

3.5. Enforcement of Notarial Acts in Croatia

In Croatia, simplified enforcement proceedings adhere to relatively higher standards compared to some other jurisdictions. Notably, it is not required that the underlying contract explicitly contain a clause authorizing the notary to issue an enforcement writ.

According to Croatian law, a notary is authorized to issue such a writ even if the creditor simply presents a credible document proving the existence of the debt. In the event that the debtor disagrees with the issuance of the writ, they have the right to initiate legal proceedings by filing a lawsuit in court.

This system reflects a strong presumption of enforceability, where the burden shifts to the debtor to challenge the notarial act through the judiciary – thus allowing for efficient initial enforcement while preserving judicial recourse.⁴³

3.6. Enforcement of Notarial Acts in Hungary

Hungarian legislation imposes a monetary threshold on the notary's authority to issue enforcement writs. Specifically if the amount of the debt does not exceed 3 million Hungarian forints (approximately €9,500), the creditor may request a payment order directly from a notary. If the debt exceeds that amount but is less than 30 million forints (around €95,000), the creditor still has the option to seek enforcement from a notary but may also choose to go to court.

To obtain an enforcement writ, it is sufficient for the creditor to submit a simple application asserting the existence of the debt – without providing additional evidence. This mechanism closely resembles Georgia's simplified payment order procedure, where the debtor's silence is interpreted as consent unless they formally object.

If the respondent disputes the existence of the debt, a judicial proceeding is initiated, during which the creditor must substantiate the claim with proper evidence.

Furthermore, any enforcement writ issued by a notary must be communicated to the debtor, who retains the right to appeal the notary's decision. It is worth noting that Hungary has made significant

⁴³ <www.E-justice.europa.eu> procedures for enforcing a judgement – Croatia; <https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-hr-en.do?member=1> [01.05.2025].

strides in digital procedures – disputes and appeals can be submitted electronically via a registered email address.⁴⁴

4. Enforcement of Notarial Acts Issued Abroad Within the Territory of Georgia

According to Article 51(a) of the Minsk Convention, Georgia also recognizes and enforces notarial acts issued by foreign notaries, provided the issuing country is also a signatory to the Convention. However, practical experience in this area is currently lacking in Georgia. Presumably, such acts would be recognized and enforced under the same procedures applicable to foreign court judgments.

Under Article 25 of the Law of Georgia on Enforcement Proceedings, the National Bureau of Enforcement initiates enforcement based on a creditor's written application and an enforceable document.⁴⁵ When dealing with documents issued in foreign jurisdictions, it is crucial for the legislator to define the precise procedures for their recognition and enforcement.

For instance, Article 68 of the Law of Georgia on Private International Law provides the procedural rules for enforcing foreign judgments. According to Paragraph 1, Georgia recognizes judicial decisions of foreign states that have entered into legal force.⁴⁶

Paragraph 2 specifies the circumstances under which recognition is denied. These include: a) If the matter falls under Georgia's exclusive jurisdiction; b) If the party was not properly notified or procedural rights were violated; c) If a conflicting decision exists from a Georgian or recognized third-country court; d) If the foreign court lacked jurisdiction under Georgian law; e) If the foreign state does not reciprocally recognize Georgian judgments; f) If there is a pending case in Georgia between the same parties on the same matter; g) If the foreign decision contradicts Georgia's fundamental legal principles.

The same law (Article 73¹) also addresses the recognition and enforcement of foreign arbitral awards, which are governed by the Law of Georgia on Arbitration.⁴⁷ This law states that arbitral decisions, regardless of where they were rendered, are binding and enforceable by the court upon written application, in accordance with the Law on Enforcement Proceedings.⁴⁸

According to Article 44 of the Law of Georgia on Arbitration, regardless of the country where the arbitration award was made, it shall be binding and, in the event of a written petition being filed with the court, shall be enforced in accordance with the provisions of this Article and Article 45 of this Law. For the purposes of this Article and Article 45 of this Law, the courts of appeal shall be deemed to be competent courts in relation to decisions made in Georgia, and the Supreme Court of Georgia shall be deemed to be competent courts in relation to decisions made outside Georgia.⁴⁹ In addition,

⁴⁴ Debt Collection in Europe, Christian Steden etc., European Law Firm, 2019, 35 <<https://www.european-law-firm.com/guide/debt-collection-in-europe07022019.pdf>> [01.05.2025].

⁴⁵ Paragraph 1 of Article 25 of the Law of Georgia "On Enforcement Proceedings". (In Georgian)

⁴⁶ Paragraph 1 of Article 68 of the Law of Georgia "On Private International Law".

⁴⁷ Article 73¹ of the Law of Georgia "On Private International Law".

⁴⁸ Article 1, paragraph 1 of the Law of Georgia "On Arbitration".

⁴⁹ Article 44, paragraph 1 of the Law of Georgia "On Arbitration".

the Law of Georgia on Arbitration directly indicates that the enforcement of an arbitration award shall be carried out on the basis of a court ruling, in accordance with the Law of Georgia on Enforcement Proceedings.

Accordingly, while the legislator regulates in detail the rules for the recognition and enforcement of court decisions and arbitration awards made in the territory of a foreign country, the issue of the recognition and enforcement of a notarial act issued by a notary of a foreign country should also be regulated, since a notarial act is also a document that, like a court decision, can have legal consequences.

4.1. The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (The Minsk Convention)

According to Article 51 of the Minsk Convention, each contracting party shall recognize and enforce decisions issued by judicial bodies of other contracting parties in civil and family matters, in accordance with the provisions of the Convention.

Article 53 of the Convention further stipulates that the application for enforcement of such a decision must be submitted to the competent court of the contracting state where enforcement is sought.

Importantly, the Minsk Convention does not concern itself narrowly with legal assistance alone⁵⁰. Rather, it also addresses matters of legal protection of citizens, and as such, its scope covers both procedural cooperation and substantive legal rights. The Convention is grounded in the principle of equality – ensuring that citizens of one contracting party enjoy the same rights of access to justice in another contracting party.⁵¹

According to Article 1, Paragraph 2 of the Convention, citizens of any contracting state, as well as residents within its territory, may freely apply to the courts, prosecution services, and other relevant institutions of another contracting state in civil, family, and criminal matters. They may initiate proceedings, file claims, and carry out other procedural actions under the same conditions as citizens of that state.

The Minsk Convention consists of three main categories of legal norms:⁵²

1. Substantive legal norms – addressing rights and obligations under civil and family law;
2. Procedural legal norms – governing the mechanisms of cooperation and enforcement;
3. Conflict-of-law norms – resolving jurisdictional and applicable law issues between states.⁵³

⁵⁰ Preamble to the Minsk Convention: “... to ensure that citizens of the Contracting Parties and persons residing in their territories are granted in all Contracting Parties the same legal protection in respect of personal and property rights as is granted to their own nationals, attaching great importance to the development of cooperation in the field of legal assistance by justice institutions in civil, family and criminal matters...”.

⁵¹ “International Mutual Legal Assistance in Civil Matters” Practical Guide, Tbilisi, 2018.

⁵² “Международная правовая помощь по гражданским и уголовным делам: на примере стран СНГ” Евдокимовым-Михайленко, 2004, 43-49.

⁵³ Reference private international law norms.

4.2. Recognition and Enforcement of Acts Under the Minsk Convention

Article 53 of the Minsk Convention outlines the list of documents that must accompany a motion for recognition and enforcement of a decision issued in a foreign country. These include:

1. A formal petition, submitted by a competent authority or an individual/legal entity, addressed to the competent court of the requested state. The petition must clearly state the nature of the request.
2. The original decision or a certified copy thereof.
3. An official document – i.e., the enforcement writ – confirming that the decision has entered into legal force, including the date of entry, and that it is subject to enforcement. If the decision has not yet entered into force but is still enforceable, this must also be stated.
4. A certificate from the National Bureau of Enforcement of Georgia stating that the decision has not already been enforced in Georgia and that enforcement proceedings are not underway.
5. Documentation confirming that the party against whom enforcement is sought was either present during the original proceeding or was duly summoned and notified in accordance with procedural requirements.
6. If applicable, documentation of partial enforcement already completed.
7. Any agreement between the parties regarding submission of the dispute to the foreign court (prorogation of jurisdiction).

All petitions and accompanying documents must be submitted either in the official language of the requested state (in this case, Georgian), or in Russian, and must be duly certified.

4.3. Recognition and Enforcement of Enforcement Writs Issued by Foreign Notaries

Notarial acts issued by foreign notaries – particularly those concerning monetary obligations – fall within the scope of legally recognizable and enforceable documents under Article 51 of the Minsk Convention.⁵⁴

However, in each case, it must be individually assessed whether the foreign notarial act qualifies specifically as a notarial document “concerning a monetary obligation.” In such instances, it is important to review the act in the context of Article 38(5)⁵⁵ of the Law of Georgia on Notaries, which governs the requirements for enforceable notarial acts.

It is essential to determine whether the scope and content of the foreign notarial act align with the enforceability criteria under Georgian law. If the foreign notarial act fails to meet these requirements, it may still be enforceable under Article 72 of the Law⁵⁶ on Private International Law of

⁵⁴ “International Legal Assistance in Civil Matters” Practical Guide, Tbilisi, 2018.

⁵⁵ “A notary shall issue an enforcement order based on a demand for payment of a monetary debt, transfer of property rights, as well as a request for compulsory enforcement of pledged/mortgaged property, if there is an agreement between the parties and the notary shall explain in writing in the notarial act the legal consequences of issuing the enforcement order.”

⁵⁶ 1. The court shall enforce the settlements of the parties and public documents of a foreign country that are subject to enforcement upon petition in accordance with Articles 70 and 71 of this Law. 2. The petition may not be satisfied if enforcement contradicts the fundamental legal principles of Georgia.

Georgia – provided that the document is public in nature and legally equivalent to a domestic enforceable instrument.

In Georgia, documents issued not only by courts but also by civil jurisdiction bodies – such as arbitration panels and notaries – are subject to compulsory enforcement. This explains the functional importance of enforcement proceedings in Georgia’s legal system, which primarily regulate the enforcement of decisions in civil cases.⁵⁷

As a result, enforcement law in Georgia may be referred to as “civil enforcement law.” An enforcement writ issued by a notary, in accordance with notarial legislation, is an enforcement document subject to compulsory execution.

A notable legislative gap in Georgia is the absence of clear procedures for the recognition and enforcement of enforcement writs issued by foreign notaries. Addressing this gap requires careful legal analysis, including examination of the practice established by the Supreme Court of Georgia.

4.4. Specific Features of Enforcing Foreign Notarial Acts in Georgia

When addressing the recognition and enforcement of legal documents issued in foreign jurisdictions, it is advisable for the legislator to precisely define the procedures required for the recognition and enforcement of each type of document. For example, Article 68 of the Law of Georgia on Private International Law provides the procedural rules for the enforcement of foreign judgments.⁵⁸

According to Paragraph 1 of Article 68, Georgia recognizes foreign court decisions that have entered into legal force. Paragraph 2 sets forth the grounds on which such recognition may be denied, including:

- a) The case falls under Georgia’s exclusive jurisdiction;
- b) The party was not properly notified of the court proceedings in accordance with the legislation of the issuing state, or there were other procedural violations;
- c) A judgment has already been issued in Georgia or in a third country (recognized in Georgia) concerning the same dispute and the same parties;
- d) The court that rendered the decision is not deemed competent under Georgian legislation;
- e) The foreign state does not recognize judgments issued by Georgian courts;
- f) Proceedings between the same parties and on the same matter are currently pending in a Georgian court;
- g) The decision contradicts Georgia’s fundamental legal principles.

This provision provides a detailed framework for determining when a foreign court judgment may be recognized and enforced in Georgia, and it also designates the Supreme Court of Georgia as the competent authority for granting such recognition and enforcement.

Similarly, Article 73¹ of the same law refers to the recognition and enforcement of arbitral awards rendered outside Georgia.⁵⁹ According to Article 1 of the Law of Georgia on Arbitration, this

⁵⁷ Kurdadze Sh., Kurdadze G., Khunashvili N., Chkonia Z., Commentary on the Law of Georgia “On Enforcement Proceedings”, Part One, Tbilisi, 2018, 19 (In Georgian).

⁵⁸ Article 68, paragraph 1 of the Law of Georgia “On Private International Law” (In Georgian).

⁵⁹ Article 731 of the Law of Georgia “On Private International Law” (In Georgian).

law governs the establishment of arbitration institutions, arbitral proceedings, arbitral awards, and the procedure for the recognition and enforcement of foreign arbitral decisions.⁶⁰

Pursuant to Article 44 of the Law of Georgia on Arbitration, an arbitral award shall be binding and enforceable regardless of the country in which it was rendered. The award must be enforced by the court upon submission of a written application, in accordance with the provisions of Article 45 of the same law. For arbitral awards issued within Georgia, the competent authority is the relevant Court of Appeals; for foreign arbitral awards, the competent authority is the Supreme Court of Georgia.⁶¹

Furthermore, the Law on Arbitration explicitly states that enforcement of an arbitral award shall be carried out based on a court ruling, in accordance with the Law of Georgia on Enforcement Proceedings.

Given that the Georgian legislator has provided detailed regulation concerning the recognition and enforcement of both foreign court judgments and arbitral awards, it is imperative to similarly regulate the recognition and enforcement of notarial acts issued by foreign notaries. A notarial act, like a court judgment, is a legal document that may produce binding legal consequences. The absence of enforcement mechanisms for such acts represents a significant gap in Georgia's legal theory and practice. This challenge served as one of the primary motivations behind the creation of this doctoral seminar.

4.5. Court Practice

Rajesh Wadhwa v. Dr. Sushma Govil, AIR 1989 Delhi⁶². According to the ruling in this case, the Delhi High Court held that even in the absence of a mutual treaty or bilateral agreement between India and another country, courts may nonetheless recognize and enforce notarial acts issued by foreign notaries. The Court emphasized that it is not possible for Section 14 of the Notaries Act to have no bearing whatsoever on the interpretation of Section 85 of the Indian Evidence Act.

The relevant portion of the Court's reasoning is as follows:

"The Court also examined the provisions of Section 14 of the Notaries Act and initially inquired whether there was any recognized reciprocity between India and the United States regarding the validity of notarial acts. It found that India does, in fact, recognize and give legal effect to notarial acts issued by foreign notaries. Therefore, such documents are admissible and legally valid in India."

Furthermore, the Court recommended that it was time for the Central Government to issue appropriate notifications under Section 14 of the Notaries Act. It also referred to Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act of 1948, which provides the legal basis for performing notarial and oath-related acts abroad. The relevant section reads as follows:⁶³

"Powers in relation to notarial acts abroad. (1) Any diplomatic or consular officer shall have the authority, in any foreign country or place where they are stationed, to perform any notarial act required to be performed within the territory of a foreign state."

⁶⁰ Article 1, paragraph 1 of the Law of Georgia "On Arbitration".

⁶¹ Paragraph 1 of Article 44 of the Law of Georgia "On Arbitration".

⁶² Case No. S.A.O No. 378/87 & S.A.O No. 379/87.

⁶³ Diplomatic and Consular Officers (Oaths and Fees) Act, 1948.

This case demonstrates the judiciary's openness to the cross-border recognition of notarial acts and emphasizes the practical application of statutory provisions to give such documents evidentiary and legal force, even in the absence of formal international agreements.

5. Conclusion

The analysis of the study shows that in Georgia, the recognition and enforcement of enforcement acts issued by notaries are adequately regulated on the basis of the Minsk Convention. However, the recognition and enforcement of acts issued by foreign notaries face significant practical challenges.

The examination of international experience – including examples from Spain, Germany, the Netherlands, and other countries – revealed the need for corresponding legislative amendments. It is essential to introduce mechanisms that ensure the enforcement of foreign notarial acts in accordance with the legal principles of Georgia.

The research presents recommendations that include the adaptation of best international practices, the establishment of clear criteria for recognizing foreign notarial acts, and their comprehensive integration into the Georgian legal system. These steps will contribute to the improvement of legal processes and the strengthening of the notarial institution.

Bibliography:

1. Law of Georgia on Arbitration.
2. Law of Georgia on Notaries.
3. Law of Georgia on Private International Law.
4. Constitution of Georgia.
5. Civil Code of Georgia.
6. Civil Procedure Code of Georgia.
7. Practical Guide on International Legal Assistance in Civil Matters, Tbilisi, 2018.
8. Notary Association of Pennsylvania, <<https://www.notary.org/article-why-are-notaries-still-important>> [accessed 25.04.2025].
9. *Rostiashvili M.*, The Specifics of Enforcing the Writ of Execution Issued by a Notary, Tbilisi, 2019, 18, 22, 37.
10. *Kurdadze Sh., Kurdadze G., Khunashvili N., Chqonia Z.*, Commentary on the Law of Georgia on Enforcement Proceedings, Part I, Tbilisi, 2018, 9, 10, 19.
11. Decision of the Constitutional Court of Georgia, 22 February 2023, *Medea Gvazava and Julieta Archvadze v. Parliament of Georgia*.
12. *Sukhitashvili D.*, Notarial Law, Tbilisi, 37, 40, 43.
13. *Kharitonashvili N.*, Notarial Law, Tbilisi, Bona Causa, 2021, 16, 19, 31.
14. *Christian R.*, Wolf, Real-estate property Law Germany, Key Aspects of German business law, a practical manual, Michael Wendler (ed) 4, ed., Berlin, Heidelberg, Springer 2008.
15. Debt Collection in Europe, Christian Steden etc., European Law Firm, 2019, 35 <<https://www.european-law-firm.com/guide/debt-collection-in-europe07022019.pdf>> [01.05.2024].
16. Diplomatic and Consular Officers (Oaths and Fees) Act, 1948.

17. Ley de Enjuiciamiento Civil, (Jefatura del Estado) núm. 7, de 08/01/2000, BOE-A-2000-323, art. 517.2. 4^o
18. Ley del Notariado de (Ministerio de Gracia y Justicia), num. 149, de 29/05/1862, BOE-A-1862-4073.
19. *Faba J.M.*, Sobre la fuerza ejecutiva de la escritura pública y el nuevo sistema de expedición de copias: cuestiones surgidas en la jurisprudencia actual. *Revista CESCO De Derecho De Consumo*, (20), 2017, 74-81, <<https://revista.uclm.es/index.php/cesco/article/view/1247>> [25.04.2025].
20. Notary History, Clay Mason, ob. <<https://www.superiornotaryservices.com/blog/history-of-the-notary-seal/>> [25.04.2025].
21. Paul Van Der Molen, Land registration and cadaster in selected European countries, Austria, Bulgaria, Croatia, Hungary, Netherlands, Serbia, ed. By center of legal competence e(CLC), published by Intersentia, 2009.
22. Reglamento Hipotecario, (Ministerio de Justicia) núm. 106, de 16/04/1947, BOE-A-1947-3843.
23. *Rouchaud A.M.*, Conclusions – Workshop No. 2: Writs of execution, The Execution of court decisions in civil cases, Council of EuropaPublishing, 1998.
24. The activities of the Dutch enforcement agent, Jos Uitdehaag, Oct 2014, Netherlands.
25. „Международная правовая помощь по гражданским и уголовным делам: на примере стран СНГ“ Евдокимовым-Михайленко, 2004.
26. Case No. S.A.O No. 378/87 & S.A.O No. 379/87.
27. <www.E-justice.europa.eu> procedures for enforcing a judgement – Croatia; https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-hr-en.do?member=1> [25.04.2025].
28. <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008>> [25.04.2025].
29. <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1156&format=HTML&aged=0&language=EN&guiLanguage=fr>> [25.04.2025].
30. <<http://law.vanderbilt.edu/publications/journal-entertainment-technology-law/archive/download.aspx?id=1749>> [25.04.2025].
31. <<http://www.ascap.com/filmtv/movies-part1.html>> [25.04.2025].
32. <<http://www.ascap.com/playback/2005/winter/features/cuesheets.aspx>> [25.04.2025].
33. <<http://www.cippm.org.uk/downloads/Press%20Release%20Copyright>> [25.04.2025].
34. <<http://www.culture.gouv.fr/culture/actualites/dossiers/internet-creation08/6%20-%20Projet%20de%20loi.pdf>> [25.04.2025].
35. <<http://www.darkhorizons.com/interviews/736/woody-allen-for-melinda-melinda>> [25.04.2025].
36. <<http://www.filmmaking.net/FAQ/answers/faq96.asp>> [25.04.2025].
37. <<http://www.guardian.co.uk/technology/2009/mar/10/youtube-performing-rights-society-music>> [25.04.2025].
38. <http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus5_2008.pdf.e> [25.04.2025].
39. <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> [25.04.2025].
40. <<https://blogs.law.gwu.edu/mcir/case/bouffard-v-ministere-public/>> [25.04.2025].
41. <<https://core.ac.uk/download/pdf/144230555.pdf>> [25.04.2025].
42. <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-04/cp230062en.pdf>> [25.04.2025].
43. <<https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=9086912&fileId=9086982>> [25.04.2025].
44. <<https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=9086912&fileId=9086982>> [25.04.2025].

Irakli Leonidze*

Opening Inheritance on the Household Estate

Following the legislative changes related to the household estate in the Civil Code of Georgia, it is difficult to find a single article that provides any rules for the opening and receipt of inheritance. The term “household” has been substituted with “family farmstead”, although this amendment appears to have been made without adequate justification, with the exception of the selection and reduction of the rights of the heirs. Consequently, it is essential to use the term “household” in the title of the work to comprehensively raise awareness of the problem. The Public Registry must examine inheritance relations in the households in the process of registering property rights. The absence of comprehensive regulation calls into question the rights of the heirs of the household, the stability of civil turnover, and leads to an increase claims by citizens. The objective of the present study is to provide a legal analysis of the inheritance relations within a household, with a view to highlighting the potential mistakes that the public registry may found in the execution of its duties.

Keywords: Civil Code of Georgia, Household, Registration of Rights, Legal Heir, Testamentary Heir.

*Communis error facit jus***

1. Inroduction

The Household property is full of inconsistent, erroneous and incorrect registration practices. The present research will focus on the technical-terminological, substantive and judicial practice issues. Critical overview is necessary to understand architecture of the problem and develop an effective mechanism for protecting the rights of household heirs (members), so as not to diminish their rights, not to establish incorrect practice and inadequately increase numbers of claimants in the court. Firstly, it's important to study current rules for opening the estate in the household and after that, identify a way to solve those problems. To achieve the aim: normative, analytical and synthesis methods are used.

2. Main Problem of Opening Inheritance on the Household Estate and Drawing Solutions

Article 1323 of the Civil Code of Georgia, which was incomplete but foundational, was repealed in 2019.¹ Consequently, when interpreting Article 1513¹, it is necessary to consider the case

* PhD Candidate at the Faculty of Law of vane Javakhishvili Tbilisi State University; Researcher at the Institute for Business, Labor and Social Law, Albert Ludwig University of Freiburg; Mediator.

** (The Latin phrase) common error makes law.

law related to the repealed article; otherwise, the article will lack legal meaning. The new article has acquired the meaning of determining the time and place of death of a household member, which can be considered an disputed. The new article, titled “Opening inheritance on the shared property of a household”, contrasts with its predecessor, “Opening inheritance in a household”.²

Despite changes, the legislation remains unchanged in its intention to simplify the status of heirs of a household.³ The main content of the repealed article is reflected in the new article, while the first and second parts of Article 1513¹ of the civil code is not directly related to Article 1421 and requires the clarification of the data in the archive record of the household book, the fact of the death of a household member, the status of the last member and other notarial, registration and judicial procedure.

Household does not constitute an independent subject; it is not a legal entity or a partnership which acts with joint liability. The content of the property rights of a household and the development of effective mechanisms for protecting heirs have been determined to be outside the scope of legislative and registration processes.⁴ It was not until 2019 when the legislator acknowledged that the establishment of an inheritance on the shared property of a household in the event of the death of the last member was unconstitutional and restricted the rights of other members and heirs. This was a one-sided assessment. About the problem the Constitutional Court of Georgia had reported as early as 2005.⁵

The analysis reveals deficiencies in the consideration of the heir's claim, pertaining to both the substance of the right and the specifics of registration. If a legislative change reduces a notary's ability to exercise notarial authority⁶ that demands attention.⁷ Citizens have consistently endeavoured to solve the challenges inherent in household property within the context of the other relations.⁸ The legislator had not any initiative to determine mechanisms for protecting the rights of household heirs.

Legislation becomes not comparable the content of the right to property and inheritance, and its accessibility, become diminished. Professor Besarion Zoidze notes that “the diminish of the rights and

¹ See Law of Georgia “On Amendments to the Civil Code of Georgia”, 25/06/2019.

² See: *Shengelia R., Akhvlediani Z., Chanturia L.*, Commentary on the Civil Code of Georgia, Book V, Family and Inheritance Law, Tbilisi, 2000, 377-379; *Shengelia R., Shengelia E.*, Family and Inheritance Law (Theory and Practice), Tbilisi, 2019, 427-428; *Chitoshvili T.*, Main Legal Aspects of the Origin of Ownership Rights to Property, Tbilisi, 2006, 28-29, 80-85.

³ Explanatory Note on the Draft Law of Georgia “On Amendments to the Civil Code of Georgia” (№07-3/294/9).

⁴ *Shengelia R.*, The Necessity of Improving the Mechanisms for Protecting the Interests of Subjects of Inheritance Relations, “Life and Law”, №1-2(57-58), 2022, 95.

⁵ See: Decision of the Constitutional Court of Georgia “Citizen of Georgia Dina Popkhadze vs. the Parliament of Georgia”, №1/4/258, 22/02/2005, The Constitutional Court notes that during the session and preparation for the substantive consideration of the case, the need for improving the legislative regulation of the relations provided for by the disputed norm – Article 1323 of the Civil Code of Georgia was identified.

⁶ Order №71 of the Minister of Justice of Georgia, 31/03/2010 Articles 77 et seq.; Law of Georgia “On Notary”, Article 38, Paragraph 1, Subparagraphs “a”, “b”, “c”, “d” and “e”.

⁷ Comp. *Boki R.*, Notary’s Obligation to Protect the Weak Party of the Contract, “Georgian-German Journal of Comparative Law”, №11, 2020, 3.

⁸ *Bichia M.*, Legal Significance of De facto Family Relationship, “Law and World”, №5(1), 2019, 31-33.

the content of property, no matter how it is done, is unacceptable”.⁹ In his opinion, the registration system is characterised by an inappropriate situation where the benefits and responsibilities of ownership are mutually exclusive and require the owner, the future heir, to relinquish their right or refuse the inheritance.¹⁰

The position of the legislator is unclear, although it is evident that the legislator does not intend to develop the articles regulating the household and does not take into account the content of household property.¹¹ It is therefore recommended that efforts be directed towards the transformation of household property and the protection of the rights of heirs, rather than changing of concepts that are unattainable without the owner's consent and active involvement.

The challenge lies in adapting the articles of the Civil Code of Georgia on inheritance law to the household context.¹² It is also necessary to clarify whether the provisions of the Law of Georgia “On the Procedure for Systematic and Sporadic Registration of Rights to Land and Improvement of Cadastral Data” and the Order of the Minister of Justice of Georgia on Approval of the Instruction “On the Public Registry” are in accordance with constitutional norm. A notary and a public registry consider this issue differently within the scope of their activities, which makes it impossible to solve the problem at first stage.

The legislation does not provide a direct definition of the categories of heirs of a household. However, based on the judicial practice, the following concepts can be established: a) the last member of the household; b) the legal or testamentary heir who is household member; c) the legal or testamentary heir who is not a member of the household; d) a person without status or the state as heir to inherit heirless estate.

There is no mechanism to grant status to a person related to the household and determine the grounds for the request. Consequently, notaries attach importance not to the interpretation of several articles, but to the narrow interpretation of Article 1421 of the Civil Code. It is unreasonable to require to the heir to perform an action that is not actually required or to present a document confirming the right, in such a way as to exclude the right of this heir to the estate. When it is unacceptable to abolish the universal right to private property, the heir of the household cannot become a private owner since decades. A comparison of civil and administrative court disputes clearly demonstrates the difficulties encountered by citizens in registering their estate. There is a lack of clarity in the regulation of household property among the legislator, notary and public registry. However, it is imperative to recognise that the attainment of success, as evidenced by statistical data, is not a permanent. Errors

⁹ Zoidze B., *The Evolution of Property Rights in Georgian Law*, Proceedings of the Joint Conference: Property and Legal Stability: Transformation of the Concept of Property, Tbilisi, 2015, 117.

¹⁰ See: Zoidze B., *Reception of European Private Law in Georgia*, Tbilisi, 2005, 265-266; Zoidze B., “The Concept of Constitutionality of Normative Content” in the Decision of the Constitutional Court of Georgia in the “Nodar Dvali’s Case” Regarding the Good Faith Acquisition of Property, “Private Law Review”, №3-4, 2021-2022, 2022, 12-13.

¹¹ Meskhidze E., *Property Registration System in Georgia*, Proceedings of the Joint Conference: Property and Legal Stability: Transformation of the Concept of Property, Tbilisi, 2015, 293.

¹² Comp. Chitoshvili T., *Household in Georgian Law*, Tbilisi, 2004, 10. See: Basedow J., *Development of Property Law in the European Union*, Collection: Property and Legal Stability: Transformation of the Concept of Property, Tbilisi, 2015, 61-62.

committed within the registration of the property in the process of land reform serve as the genesis for contentious proceedings in courts.

The Civil Code of Georgia does not provide a definition of the “household”. However, the courts have developed a variety of interpretations¹³ and often disregarding the right or interest of the surviving heir in the household property.¹⁴ In different municipalities across Georgia, the property registered as a household varies depending on the local land fund and land use customs.¹⁵ In circumstances where the right of the heir to the household is contested, there is a risk that the agricultural land constituting the household, as a resource may, under certain factual circumstances, become the property of the state.¹⁶ Consequently, the legislator, the public registry and the courts are responsible to the heir, thereby introducing a new ways to solve problems.¹⁷

The court of first instance determined that following the abolition of the collective farm, the property of the farm belonged to the plaintiff and the defendant by right of co-ownership.¹⁸ The farm was defined by the agricultural land plot and the building previously existing on it. However, since the plaintiff was not indicated as the owner in the real estate record, the court did not examine his legal status over the disputed property and the claim was dismissed. Subsequently, the Appellate Chamber overturned the initial ruling on the household, determining that it was not a collective farm household but rather a household of workers and servants. The Appellate Chamber concluded that the property was co-owned by the plaintiff and the defendant. However, the Appellate Chamber explained that the building belonging to the household had ceased to exist on the land plot, and that ownership rights had not been registered in the public registry by the household members. The Appellate Chamber determined that agricultural land was the property of the state, as set out in Article 19, Paragraph 4 of the Constitution. It is evident that the Appellate Chamber's ruling infringes on the rights of the household owners. The reasoning of the Appellate Chamber suggests that unregistered agricultural household plots will unconditionally become state property. The Supreme Court of Georgia has adopted a different reasoning regarding the legal form of a household and the exclusion of heirs. The Supreme Court determined the necessity of correctly defining a household and its inseparability from the heirs of the household. This decision confirms the problem that the heirs of a household may face today. The registration authorities and notaries are not adequately attuned to the particular requirements of household owners, and the designation of household property and associated rights is frequently problematic. The issue of the court's capacity to evaluate the particular requirements of the proprietors, a responsibility that falls to the public registry, is one that is readily apparent. In another

¹³ Decision of the Supreme Court of Georgia №as-7-2019, 11/06/2020.

¹⁴ Comp. *Shengelia R., Shengelia E.*, Family and Inheritance Law, 2015, 410.

¹⁵ Comp. *Zoidze B.*, The Impact of Fundamental Rights on Private Autonomy: Expansion or Restriction of Private Autonomy (Review of the Practice of the Constitutional Court of Georgia), Collection: Private Autonomy as a Fundamental Principle of Private Law, 2020, 101.

¹⁶ *Khubua G., Kalichava K.*, Handbook of Administrative Sciences, 2018, 235-236.

¹⁷ See.: *Maxwell D.*, The Human Right to Property – A Practical Approach to Article 1 of Protocol No.1 to the ECHR, Bloomsbury Publishing, 2022, 200-202; *Ruggeri L., Kunda I., Winkler S. (eds.)*, Family Property and Succession in EU Member States National Reports on the Collected Data. University of Rijeka Faculty of Law Research Collection of Reports, 2019.

¹⁸ Decision of the Supreme Court of Georgia №as-7-2019, 11/06/2020.

case, the Court of Appeal declined to examine the circumstances that had been stipulated as the foundation for the claim. Instead of examining these circumstances, the Court of Appeal, at its own initiative, invoked new circumstances based on the inheritance certificate and considered the receipt of the inheritance of one of the defendants, who died in the dispute and his son was recognised as a co-owner of the entire area of the agricultural land plot and the residential house, together with other members of the household.¹⁹

Household property has acquired characteristic definitions: it is unspecified, unregistered, non-functional and disputed. The progress of the state reform of land registration and the achieved results are vital, but within the framework of this reform, the special needs of household owners should also be taken into account. It is unacceptable to register household property for persons who died years ago or are not related to the household, as this endangers the interests of the living heirs of the household. The public registry is obliged to exercise greater discernment in distinguishing between live and deceased citizens when registering property rights. Inconsistent proceedings are accompanied by erroneous theoretical views on the registration of household property, and it is unacceptable to deny the property interests of Georgian citizens.²⁰ The authorities are duty-bound to interpret the laws adopted for the benefit of society in a thorough manner.

The analysis of household book entries indicates that the ownership right of a land plot is registered on the basis of unmistakable confirmation of membership, exclusively for the household member whose membership is confirmed. Individuals who are indicated in the household book entries with special notes are not registered in the register of rights to immovable property.²¹ This deviates from the original purpose of the action and has evolved into a legislative instrument that curtails rights. The registration service has deviated from its primary function and has led to the establishment of a discriminatory, unjustified, and illegal boundary between household owners and their heirs, thereby denying the latter their property and the right to protect it.²² This predicament is particularly disconcerting as it precludes the heirs from acquiring a document that would confirm their ownership and enable them to dispose of their property during their lifetime.²³

The Supreme Court of Georgia explained the formulation of Article 1513¹ of the Civil Code of Georgia: With the dissolution of collective farms, the legal basis for the existence of the collective farm household was eliminated, resulting in its dissolution. Consequently, the property that was previously the possession of the household and concurrently the shared property of the household members no longer constitutes the property of the household, but rather becomes the shared property

¹⁹ Decision of the Supreme Court of Georgia №as-1257-1197-2014, 10/05/2016.

²⁰ See: *Alexander S. G., Peñalver M. E.*, An Introduction to Property Theory, Cambridge University Press, 2012; *Dutta A., Basedow J. and Others*, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in matters of Succession and the Creation of a European Certificate of Succession, Max Planck Private Law Research Paper, 2010.

²¹ Order №487 of Minister of Justice of Georgia, 31/12/2019, Art. 40.

²² Decision of the Constitutional Court of Georgia "Citizens of the Hellenic Republic – Prokopis Savvidis and Diana Shamanidi vs. the Parliament of Georgia", №3/10/1267,1268, 07/12/2018.

²³ *Shengelia E., Leonidze I.*, Estate Household vs. Family Household (Frustra Pugna), "Besarion Zoidze 70", Tbilisi, 2023, 364-375.

of the members of the household, apportioned equally amongst them.²⁴ This definition is of historical significance, as evidenced by Article 1513¹ following the abolition of Article 1323 of the Civil Code.²⁵ In the context of registering ownership rights in a household, the only recognised mechanism is the opening of an inheritance on the shared property.

The legislative change did not yield any positive results, as it resulted in a selective restriction of the rights of the heirs of the household. To illustrate this point, we may consider a case in which the court assessed the division of the household into several households, in the divide judgment of which the grandson remained a member of the original household. However, the court determined that this did not constitute a basis for confirming his right to the property of the original household, since he was not mentioned in the grandfather's household record. The court expounded that, while the grandson may have been raised by the grandfather and resided with him, this alone did not constitute membership of the household. The court emphasised that active participation in the management of the household's shared property and economy was a prerequisite for membership. The court's decision was predicated on contradictory evidence, and it was concluded that the grandfather had not expressed his intention for the grandson to become a full member of the household. This position is arguably erroneous, as in a disorderly registration system, the responsibility is on the heir or the deceased to act.²⁶ A grandson's entitlement to his grandfather's family property is extinguished, yet this reality changed by the 2019 legislative amendment, which stipulates the distribution of the family estate among the deceased members of the family.

The Supreme Court of Georgia has sought to address the prevalence of legal disputes pertaining to household plots by undertaking a re-interpretation of pertinent decisions, thereby establishing guidelines that recognise and protect the rights of household plot owners.²⁷ However, the court's substantial workload has hindered the effective resolution of these disputes. In such cases,²⁸ the necessity to ascertain specific requirements is implied; nevertheless, the court, operating within the framework of the Civil Procedure Code, is not empowered to spearhead large-scale registration initiatives.²⁹ The registration policy implemented by the state has, to date, resulted in the fragmentation of inheritance relations within households³⁰ and the alienation of household members from the freedom to own, use and manage household plots.³¹ Within the framework of the state land

²⁴ Decision of the Supreme Court of Georgia №as-186-2019, 24/02/2021.

²⁵ Zoidze B., *Reception of European Private Law in Georgia*, Tbilisi, 2005, 266-267.

²⁶ Decision of the Supreme Court of Georgia №bs-415(k-19), 26/09/2019.

²⁷ Comp. Decision of the Constitutional Court of Georgia "*Remzi Sharadze v. the Minister of Justice of Georgia*", №2/2/867, 28/05/2019, II-2.

²⁸ See: *Zalucki M.*, Impact of the EU Succession Regulation on Statutory Inheritance, *Comparative Law Review*, №23, 2017, 223-225; *Zalucki M.*, Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future, *Iowa Law Review*, Vol. 103, №5, 2018, 2337-2338.

²⁹ The reasoning and perspective of the practice of the Administrative Chamber differs from the Civil Chamber.

³⁰ *Leonidze I.*, Limitation of Freedom of Will in the Household – the Problem of Private Property of Georgian Citizens, "*Law and World*", №29, 2024, 177-179.

³¹ Comp. *Zarandia T.*, *Mchedlidze N.*, Protection of Property Rights by Georgian Legislation and the European Convention on Human Rights), "*Lado Chanturia 60*", Tbilisi, 2023, 192. Also see: *Sirdadze L.*,

registration reform, the aforementioned problems have been exacerbated by heterogeneous registration practices. It should be assessed whether the authorized person is performing their duties correctly, whether the 2019 legislative amendment has impacted the operational rules, and whether they are thoroughly investigating the subject matter.

3. Conclusion

The present study highlighted the challenges associated with establishing the right to inherit shared household property. One major issue is the household certificate, which heirs cannot amend by simply applying to a notary or registration authority. Due to the ambiguity of legal definitions surrounding “household” and related concepts, heirs often struggle to substantiate their claims effectively. The prevalence of poorly supported claims leads to contentious outcomes. When the provisions of the inheritance law under the Civil Code of Georgia are applied without considering the specific details of the household, it results in the violation of legitimate heirs' rights and the validation of claims from unauthorized individuals.

Bibliography:

1. Constitution of Georgia, 24/08/1995.
2. Civil Code of Georgia, 26/06/1997.
3. Civil Procedure Code of Georgia, 14/11/1997.
4. Law of Georgia “On Notary”, 04/12/2009.
5. Order №71 of the Minister of Justice of Georgia, 31/03/2010.
6. Order №487 of Minister of Justice of Georgia, 31/12/2019.
7. *Alexander S. G., Peñalver M. E.*, An Introduction to Property Theory, Cambridge University Press, 2012.
8. *Basedow J.*, Development of Property Law in the European Union, Collection: Property and Legal Stability: Transformation of the Concept of Property, Tbilisi, 2015, 61-62.
9. *Bichia M.*, Legal Significance of De facto Family Relationship, “Law and World”, №5(1), 2019, 31-33.
10. *Boki R.*, Notary’s Obligation to Protect the Weak Party of the Contract, “Georgian-German Journal of Comparative Law”, №11, 2020, 3.
11. *Chitoshvili T.*, Main Legal Aspects of the Origin of Ownership Rights to Property, Tbilisi, 2006, 28-29, 80-85.
12. *Dutta A., Basedow J. and others*, Comments on the European Commission’s Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in matters of Succession and the Creation of a European Certificate of Succession, Max Planck Private Law Research Paper, 2010.
13. *Maxwell D.*, The Human Right to Property – A Practical Approach to Article 1 of Protocol No.1 to the ECHR, Bloomsbury Publishing, 2022, 200-202.

14. *Ruggeri L., Kunda I., Winkler S. (eds.)*, Family Property and Succession in EU Member States National Reports on the Collected Data. University of Rijeka Faculty of Law Research Collection of Reports, 2019.
15. *Shengelia R., Akhvlediani Z., Chanturia L.*, Commentary on the Civil Code of Georgia, Book V, Family and Inheritance Law, Tbilisi, 2000, 377-379.
16. *Shengelia R., Shengelia E.*, Family and Inheritance Law (Theory and Practice), Tbilisi, 2019, 427-428.
17. *Shengelia R.*, The Necessity of Improving the Mechanisms for Protecting the Interests of Subjects of Inheritance Relations, "Life and Law", №1-2(57-58), 2022, 95.
18. *Shengelia E., Leonidze I.*, Estate Household vs. Family Household (*Frustra Pugna*), "Besarion Zoidze 70", Tbilisi, 2023, 364-375.
19. *Zalucki M.*, Impact of the EU Succession Regulation on Statutory Inheritance, *Comparative Law Review*, №23, 2017, 223-225.
20. *Zalucki M.*, Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future, *Iowa Law Review*, Vol. 103, №5, 2018, 2337-2338.
21. *Zarandia T., Mchedlidze N.*, Protection of Property Rights by Georgian Legislation and the European Convention on Human Rights), "Lado Chanturia 60", Tbilisi, 2023, 192. Also see: Sirdadze L., Acquisition of Ownership of Immovable Property from an Authorized and Unauthorized Individuals, *Georgian-German Journal of Comparative Law*, №2, 2019, 47-48.
22. *Zoidze B.*, Reception of European Private Law in Georgia, Tbilisi, 2005, 266-267.
23. *Zoidze B.*, The Evolution of Property Rights in Georgian Law, *Proceedings of the Joint Conference: Property and Legal Stability: Transformation of the Concept of Property*, Tbilisi, 2015, 117.
24. *Zoidze B.*, The Impact of Fundamental Rights on Private Autonomy: Expansion or Restriction of Private Autonomy (Review of the Practice of the Constitutional Court of Georgia), *Collection: Private Autonomy as a Fundamental Principle of Private Law*, 2020, 101.
25. *Zoidze B.*, "The Concept of Constitutionality of Normative Content" in the Decision of the Constitutional Court of Georgia in the "Nodar Dvali's Case" Regarding the Good Faith Acquisition of Property, "Private Law Review", №3-4, 2021-2022, 2022, 12-13.
26. Decision of the Constitutional Court of Georgia "Citizen of Georgia Dina Popkhadze vs. the Parliament of Georgia", №1/4/258, 22/02/2005
27. Decision of the Constitutional Court of Georgia "Citizens of the Hellenic Republic – Prokopis Savvidis and Diana Shamanidi vs. the Parliament of Georgia", №3/10/1267,1268, 07/12/2018.
28. Decision of the Constitutional Court of Georgia "Remzi Sharadze v. the Minister of Justice of Georgia", №2/2/867, 28/05/2019.
29. Decision of the Supreme Court of Georgia №as-1257-1197-2014, 10/05/2016.
30. Decision of the Supreme Court of Georgia №bs-415(k-19), 26/09/2019.
31. Decision of the Supreme Court of Georgia №as-7-2019, 11/06/2020.
32. Decision of the Supreme Court of Georgia №as-186-2019, 24/02/2021.

Marika Turava*

Preferential and Non-Preferential Rules for Determining Product Origin and Their Significance in International Trade Law

Rules of origin constitute a fundamental pillar of international trade law, serving to classify goods based on their origin (or “economic nationality”). These rules are crucial role to the functioning of free trade agreements, which grant significant tariff and non-tariff preferences to countries participating in a preferential trade regime (preferential rules of origin). Rules of origin are also essential for the implementation of various trade mechanisms, such as anti-dumping measures, quantitative restrictions (quotas), trade embargoes, labeling requirements, and safeguard measures (non-preferential rules of origin).

This article examines the legal framework of preferential and non-preferential rules of origin within the World Trade Organization (WTO). It explores the pivotal role that the rules of origin play in shaping the free trade dynamics and their impact on the trade policies of countries, in which these rules can act as a mechanism for protectionism, potentially becoming a "hidden weapon" that limits free trade and competition. The article also analyzes the practical challenges associated with the implementation of rules of origin in global trading regimes.

Keywords: *Free Trade, World Trade Organization (WTO), Economic Nationality, Protectionism, Substantial Transformation, Tariff Classification, Preferential Treatment.*

1. Introduction

In the modern interconnected global economy, characterized by intricate and constantly evolving economic relations, the mechanisms of international trade law are vital for ensuring the effective implementation of free trade and fostering the stable development of a market economies. Within the broad network of global free trade, where goods can move seamlessly across national borders and become integrated into international markets, the concept of rules of origin holds significant importance in establishing both bilateral and multilateral economic relations between countries. These rules are fundamental in shaping trade policies that reflect the sovereign interests of states at the national level.

Rules of origin serve as an essential mechanism for determining the origin (“nationality”) of a product within international trade relations. The relevant regulations allow the countries to distinguish clearly between the products produced on domestic markets and those imported from foreign markets, thereby allowing for the application of the appropriate legal regime at the national level. Rules of

* Master of Laws (LL.M. Chicago, USA), PhD Student and Academic Assistant in Private Law at Faculty of Law of Ivane Javakishvili Tbilisi State University, Visiting Researcher at the Faculty of Law of Heidelberg University.

origin are of paramount importance in Free Trade Agreements (FTAs), which grant substantial tariff and non-tariff preferences in the field of trade to participating countries. By establishing precise criteria for determining the origin of products, rules of origin ensure that only those parties involved in the agreement benefit from the privileges and preferences arising from the specific trade agreements.

The Rules of origin play a significant role in advancing and deepening the economic integration of states while ensuring an effective balance between fostering fair competition and preventing protectionist trade policies that are inconsistent with the principles of free trade. Such protectionist measures, which may be employed by countries to promote domestic production, can create an unfair advantage to local producers in the domestic market over imported goods. By establishing a framework for fair competition in international trade relations, promoting economic integration at both the global and regional levels and safeguarding national interests, rules of origin contribute to the stability, prosperity and economic development of states engaged in free trade.

With the rapid development of global markets and the ongoing transformation of economic relations, the complexity of the rules of origin and the challenges associated with them continue to increase. In the modern era, the production process of products frequently extends beyond the borders of a single state, involving multiple countries. The components required to assemble the final product are often produced in different countries. Therefore, determining the origin of the final product can be a difficult task. Furthermore, as a result of globalization, traditional models of product supply in the trade sector have also undergone a fundamental transformation. Modern supply chains have developed into complex systems, and the efficiency of these systems relies heavily on the effective application of the rules of origin.

In the second half of the twentieth century, alongside the development of the legal framework governing global trade relations and the establishment of the World Trade Organization (WTO) through multiple agreements between the states, the study of the rules of origin of goods became increasingly complex. This complexity arose from the continual expansion of free trade agreements at both the bilateral and multilateral levels, as these trade agreements often involve differing criteria for determining whether a particular product qualifies for preferential trade treatment. As a result, modern international trade law has evolved into a multifaceted legal system, wherein various trade regimes operate simultaneously between states at both the bilateral and multilateral levels. Moreover, due to the fragmented nature of current international trade law, there is a potential for conflicts between the obligations undertaken by states in bilateral and multilateral regional trade agreements (RTAs) and the global trade regime operating within the framework of the World Trade Organization, to which the vast majority of states, including Georgia, are member.

The primary focus of this article is the legal aspects of the rules of origin, analyzed within the context of international trade law. In addressing the rules of origin, which serve as the principal mechanism for determining the origin of products and have a significant impact on customs tariffs and trade preferences, particular attention will be given to the legal framework established by the World Trade Organization (WTO). The article will further explore the concept of rules of origin and provide a detailed analysis of their classification, as well as the criteria used to determine the origin of a product under the WTO Agreement on Rules of Origin. Additionally, this article will examine the current challenges associated with rules of origin in the context of global trade and explore their

practical significance in international trade law. The article will also analyze the standards pertaining to the rules of origin within the framework of WTO law, along with the legal criteria and assessment tests relevant to the determination of product origin under both international and national law, particularly in relation to the principle of substantial transformation, which allows for the evaluation of the impact of rules of origin on business entities and trade policies.

2. The Concept and Fundamental Essence of the Rules of Origin

The rules of origin play a pivotal role in contemporary international trade law. Through these rules, states establish the criteria for determining the origin of goods.¹ The presence of rules of origin is necessary for the implementation of differentiated trade policies by states. For instance, they allow for the imposition of higher tariffs on goods imported from developed countries as compared to those imported from the least developed countries, or enable states to apply reduced or zero tariffs on imports from partner countries participating in a preferential trading arrangement (PTA). Furthermore, the rules of origin are vital when trade remedies are required to protect against unfair trade practices.²

A universal concept of rules of origin has yet to be established in international trade law. However, it can be interpreted as a set of criteria that determine the origin of a product in the field of trade. It is worth noting that, within the context of rules of origin, the term “product origin” does not refer to the geographical location from which the product was imported. Instead, it signifies the “economic nationality” of a product,³ which is determined by the process of the creation of the product and its components. When a particular product is entirely manufactured within a single country, determining its place of origin is relatively easy. However, due to the internationalization of the production process in the modern economic landscape, such instances have become increasingly rare.⁴ As a result of the globalization of trade relations, determining the country of origin of a product has become significantly more difficult. In the current landscape, most exported products contain a large number of imported components and materials that are produced in various countries.⁵ The extensive use of free trade agreements in recent decades, coupled with the increasing trend toward regionalization constitutes a significant challenge to modern international trade law. Consequently, it is important to examine the standards developed to determine who is eligible to benefit from the advantages of a particular trade agreement.⁶

Rules of origin, as criteria for determining the origin of a product, enable a state to implement a preferential trade policy based on an existing preferential trade regime, where applicable.⁷ Rules of

¹ See Agreement on Rules of Origin (ARO), World Trade Organization, Article 1, para. 1.

² Matsushita M., Schoenbaum T.J., Mavroidis P.C., Hahn M., *The World Trade Organization Law, Practice, and Policy*, Third edition, 2017, 237.

³ Rules of Origin Handbook, The World Customs Organization (WCO), 6.

⁴ Harilal K.N., Beena P.L., *Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives*, *Economic and Political Weekly*, Vol. 40, No. 51 (2005), 5419.

⁵ Augier P., Gasiorek M., Lai Tong C., Martin P., Prat A., *The Impact of Rules of Origin on Trade Flows*, *Economic Policy*, Jul., 2005, Vol. 20, No. 43, 573.

⁶ Chase K. A., *Protecting Free Trade: The Political Economy of Rules of Origin*, *International Organization*, Vol. 62, No. 3 (Summer, 2008), 507.

⁷ Gourdon J., Gourdon K., De Melo J., *A (More) Systematic Exploration of the Trade Effect of Product-Specific Rules of Origin*, *World Trade Review* (2023), 22, 421.

origin of goods are essential, on the one hand, for distinguishing between domestic and foreign products and for applying the principle of national treatment to the latter. On the other hand, they are also crucial for differentiating between similar products (“like products”) from various countries and applying a preferential regime to goods imported from a trading partner country. This is particularly important since not all imported goods automatically fall under the Most Favored Nation (MFN) Clause.⁸

It is important to note that rules of origin, in isolation, do not produce any direct positive or negative effects, however, their existence is essential for the application of (other) trade mechanisms concerning specific products.⁹ The rules of origin play a fundamental role in the implementation of trade regulations, which, on the one hand, necessitate the distinction between domestic and foreign goods, and, on the other hand, require differentiation between similar products (“like products”) originating from different countries. Trade regulations, in which rules of origin constitute an important element, include measures such as quantitative restrictions (quotas) on imports, import prohibitions, trade embargoes, safeguard measures, countervailing duties and drawback of customs duties.¹⁰ In addition, by assigning a specific origin to a product, it may be entirely exempt from customs duties (referred to as “duty-free treatment”) or be subject to a reduced duty due to the fact that it is imported from a developing country eligible for preferential treatment, or is imported from a state that is a partner of the importing country in a free trade area or a customs union.¹¹

While the rules of origin serve as an important mechanism to facilitate the enforcement of trade mechanisms, their misuse can transform them into trade policy instruments that, in turn, hinder free trade in the market and promote protectionist trade policies.¹² Moreover, the inconsistent approaches adopted by the states in determining the origin of a product, along with the rules governing to the labeling of the origin of imported goods, may lead to significant discrepancies and could be considered an unlawful trade barrier.¹³

3. The Agreement on the Rules of Origin and its Core Principles

The determination of the origin of goods is of fundamental importance in international trade law. However, the establishment of clear criteria and the harmonization of rules of origin at the international level have not been properly implemented for years.

The General Agreement on Trade and Tariffs (GATT), which aimed to facilitate the reduction of barriers and tariffs in international trade, did not incorporate specific provisions governing the rules

⁸ *Falvey R., Reed G.*, Economic Effects of Rules of Origin, *Weltwirtschaftliches Archiv*, Bd. 134, H. 2, 1998, 209.

⁹ *Satapathy C.*, Rules of Origin: A Necessary Evil?, *Economic and Political Weekly*, 1998, Vol. 33, No. 35 (1998), 2270.

¹⁰ *Falvey R., Reed G.*, Economic Effects of Rules of Origin, *Weltwirtschaftliches Archiv*, Bd. 134, H.2, 1998, 209.

¹¹ *Satapathy C.*, Rules of Origin: A Necessary Evil?, *Economic and Political Weekly*, 1998, Vol. 33, No. 35, 1998, 2270.

¹² *Harilal K. N., Beena P. L.*, Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives, *Economic and Political Weekly*, Vol. 40, No. 51 (2005), 5419.

¹³ *Satapathy C.*, Rules of Origin: A Necessary Evil?, *Economic and Political Weekly*, 1998, Vol. 33, No. 35, 1998, 2270.

of origin, with the exception of Article 9 of GATT, which pertains to product marking requirements (“Marks of origin”).¹⁴ The General Agreement on Tariffs and Trade (GATT) establishes the foundational legal framework for the regulation of global trade and constitutes a cornerstone of international trade law. However, the GATT does not include specific provisions governing the criteria by which the country of origin of a product should be determined in international trade. Instead, each contracting state retains the authority to establish its own rules of origin and, depending on the objectives of a specific regulation,¹⁵ states may apply alternative methods for determining the origin of a product, reflecting the heterogeneous practices of that country.¹⁶

Rules of origin are addressed only indirectly through the general provisions of the General Agreement, such as Article I (Most-Favoured-Nation principle, MFN), which obliges member states to extend, upon request, the same trade privileges and preferences unconditionally to “like products” imported from different countries, and Article V, which stipulates that states participating in free trade areas or customs unions are prohibited, under the principle of non-discrimination, from increasing trade restrictions against GATT member states that are not part of the respective free trade area or customs union.¹⁷

In addition, it is worth noting that while Article XXIV of the General Agreement permits member countries to conclude preferential trade agreements (PTAs) under certain conditions, it does not directly address rules of origin, however, it does allow member states to negotiate alternative rules and requirements for determining the origin of goods, including within the framework of concluded preferential trade agreements.¹⁸ GATT permits members to establish their own rules for determining the origin and labeling of imported products, thereby safeguarding the interest of consumers by ensuring they are properly informed.¹⁹ At the same time, it is prohibited to use trade names and geographical indications in a way that could create misleading representations about the origin of the goods.²⁰ Rules governing the marking of the origin of a product must not be discriminatory or unjustifiably prejudicial.²¹ Origin marking requirements that impose different requirements on foreign products may violate the principle of equal treatment, in particular, the principle of national treatment.²²

Although the General Agreement on Trade and Tariffs (GATT) does not yet contain specific regulations on the identification of the country of origin of a product, the existence of this agreement and the series of negotiation rounds carried out within its framework from 1947 to 1995 paved the way

¹⁴ Das R.U., Ratna R.S., *Perspectives on Rules of Origin*, 2011, Palgrave Macmillan, 11.

¹⁵ Weiler J.H.H., Cho S., Feichtner I., Arato J., *International and Regional Trade Law: The Law of the World Trade Organization*, Unit II: Globalism v. Regionalism, 2016, 7.

¹⁶ Matsushita M., Schoenbaum T.J., Mavroidis P.C., Hahn M., *The World Trade Organization Law, Practice, and Policy*, Third edition, 2017, 238.

¹⁷ Das R.U., Ratna R.S., *Perspectives on Rules of Origin*, 2011, Palgrave Macmillan, 11.

¹⁸ See General Agreement on Trade and Tariffs (GATT), 1994, Article XXIV.

¹⁹ Matsushita M., Schoenbaum T.J., Mavroidis P.C., Hahn M., *The World Trade Organization Law, Practice, and Policy*, Third edition, 2017, 237.

²⁰ General Agreement on Trade and Tariffs (GATT), 1994, Article IX, para. 6.

²¹ Ibid., Article IX, paras. 1 and 4.

²² Ibid, Article III, para. 4; see *Territory of Hawaii v. Harry MY Ho.*, No. 3078, 41 Haw. 565, 571 (1957).

for discussions on the rules of origin of goods in international trade law and became the foundation for efforts to harmonize rules of origin. These discussions ultimately led to the establishment of the Agreement on Rules of Origin, which, together with the General Agreement on Tariffs and Trade (GATT), became an integral part of the World Trade Organization (WTO) system and set out minimum criteria for member countries on how to determine the origin of products.²³

The Agreement on Rules of Origin (ARO), established during the Uruguay Round of negotiations, outlines a work program for the harmonization of rules of origin in relation to the non-preferential trade policy mechanisms.²⁴ At the same time, the Agreement seeks to ensure that the rules of origin themselves do not create unnecessary barriers to international trade.²⁵ The Agreement on Rules of Origin should establish clear and predictable criteria for determining origin while simultaneously facilitating international trade flows in a manner that does not undermine the rights granted to member states under the General Agreement on Tariffs and Trade (GATT) of 1994.²⁶ The Agreement (ARO) requires member states to ensure the transparency of legislation, regulations and practices related to rules of origin, and to apply the rules of origin at the national level in a predictable, consistent, and neutral manner.²⁷ Additionally, the Agreement should ensure the establishment of a consultation mechanism for member states and provide the necessary procedures for the prompt, effective, and fair resolution of legal disputes arising from the Agreement.²⁸

The Agreement on Rules of Origin establishes a work program for the harmonization of rules of origin, to be implemented in cooperation with the World Customs Organization (WCO).²⁹ Until the harmonization work program is completed, member states are required to ensure the transparency of their rules of origin.³⁰ Member countries are obliged to implement rules of origin in a consistent, uniform, impartial and reasonable manner, using clearly defined standards to determine the conditions a product must meet to be considered as originating from a particular country or region (the so-called positive standard).³¹ Under the Agreement on Rules of Origin, member states have agreed not to use rules of origin to pursue trade policy objectives in a way that would hinder free trade.³² Moreover, WTO members have committed to informing other member states and the World Trade Organization, in accordance with the appropriate procedures, about the existence of preferential rules of origin that apply to them under a specific preferential trade agreement (PTA), and providing them with information on relevant administrative and judicial decisions regarding the general application of these rules.³³

²³ *Weiß W., Ohler C., Bungenberg M.*, Welthandelsrecht. 3. Auflage, 2022, Rn. 446, 177.

²⁴ *Van den Bossche P., Zdouc W.*, The Law and Policy of the World Trade Organization, 2021, 502.

²⁵ See Agreement on Rules of Origin (ARO), World Trade Organization, Preamble.

²⁶ Rules of Origin Handbook, The World Customs Organization (WCO), 12.

²⁷ See Agreement on Rules of Origin (ARO), World Trade Organization, Preamble.

²⁸ Rules of Origin Handbook, The World Customs Organization (WCO), 12.

²⁹ *Nell P.G.*, WTO Negotiations on the Harmonization of Rules of Origin, 33 J. World Trade (1999), 45.

³⁰ See Agreement on Rules of Origin (ARO), World Trade Organization, Preamble.

³¹ *Ibid*, Article 2, paras. “e” and “f”.

³² *Ibid*, Article 2, para. “c”.

³³ *Ibid*, Annex II, para. 4.

The Agreement on Rules of Origin outlines four fundamental principles: non-discrimination, predictability, transparency and neutrality, which imply that: (1) rules of origin must be applied uniformly for all purposes of non-preferential treatment; (2) rules of origin must be objective, understandable and predictable; (3) rules of origin must not be used directly or indirectly as instruments to achieve trade policy objectives; and (4) rules of origin must not themselves have a restrictive or distortive effect on international trade.³⁴

It is essential that the rules of origin established by states for goods do not impose overly strict requirements or conditions unrelated to production or manufacturing as prerequisites for determining the country of origin.³⁵ Furthermore, the rules of origin applied by the states to imports and exports should not be stricter than those used to determine whether a particular product is domestically produced, and it is also not permissible to apply an unequal approach to different member countries and producers participating in the Agreement.³⁶ The rules of origin of member states should be based on the so-called positive standard, although a negative definition – explaining cases in which a product does not originate from a particular country – may also be allowed as an exception, for example, in cases where the interpretation of a positive standard is necessary.³⁷

Rules of origin should be applied uniformly for all purposes related to non-preferential treatment in a manner that ensures objectivity, clarity, and predictability in their application, while also avoiding the use of rules of origin as instruments for achieving trade objectives and preventing unjustified restrictions on international trade.³⁸ While these general requirements are upheld, the origin criteria defined by the states may vary and reflect their heterogeneous practices.³⁹

Article 1 of the Agreement defines rules of origin as laws, regulations and administrative rulings of general application used to determine the country of origin of goods, excluding those related to the granting of tariff preferences. Therefore, the Agreement directly applies only to rules of origin used in mechanisms related to non-preferential trade policies, such as most-favoured nation treatment (MFN), anti-dumping and countervailing measures, safeguard measures, origin marking requirements, discriminatory quantitative restrictions or tariff quotas, as well as those rules applied to trade statistics and government procurement.⁴⁰

While the provisions of the Agreement on Rules of Origin (ARO) directly apply only to non-preferential rules of origin,⁴¹ Annex II of the same agreement provides multilateral principles for preferential rules of origin.⁴² The Agreement on Rules of Origin excludes from the scope of harmonization the rules of origin that apply to preferential tariffs, however, Annex II of the same

³⁴ *Das R.U., Ratna R.S., Perspectives on Rules of Origin*, 2011, Palgrave Macmillan, 13-14.

³⁵ Agreement on Rules of Origin (ARO), World Trade Organization, Article 2, para. “c”.

³⁶ *Ibid.*, Article 2, para. “d”.

³⁷ *Ibid.*, Article 2, para. “f”; see also *Matsushita M., Schoenbaum T.J., Mavroidis P.C., Hahn M.*, *The World Trade Organization Law, Practice, and Policy*, Third edition, 2017, 238.

³⁸ *Ibid.*, Article 2, paras. “a”, “b”, “c”.

³⁹ *Matsushita M., Schoenbaum T.J., Mavroidis P.C., Hahn M.*, *The World Trade Organization Law, Practice, and Policy*, Third edition, 2017, 238.

⁴⁰ Agreement on Rules of Origin (ARO), World Trade Organization, Article 1, para. 2.

⁴¹ *Ibid.*

⁴² *Van den Bossche P., Zdouc W.*, *The Law and Policy of the World Trade Organization*, 2021, 502, 504.

agreement establishes several principles that should apply to preferential regimes, in particular, it specifies that, within the framework of preferential rules of origin, the requirements for granting origin must be clearly defined, and the rules of origin should be based on the so-called positive standard.⁴³ Legislation relating to preferential rules of origin must be published in accordance with Article X of the General Agreement on Tariffs and Trade (GATT), and such legislation may not be applied retroactively.⁴⁴ Annex II of the Agreement also provides for the right to appeal, through judicial, arbitration or administrative procedures, against any administrative action related to the determination of origin, and further guarantees the confidentiality of classified information, as well as the obligation to notify the World Trade Organization of any legislative changes related to preferential rules.⁴⁵ It is important to note that the aforementioned general principles do not constitute international standards, as in practice, all countries have the ability to negotiate and establish their own preferential rules of origin tailored to their specific needs, which means that preferential rules of origin often vary depending on the types of products and the terms of the trade agreement.⁴⁶

It is stipulated in Article 9, para. 2 of the Agreement on Rules of Origin (ARO) that the harmonization work program should be completed within three years, i.e. by July 1998.⁴⁷ Although significant progress has been made in implementing the work program, it has not been possible to complete it due to the complexity of the issues involved.⁴⁸ Due to the complexity of the relevant issues in this process, the original deadline specified in the Agreement has been extended several times, and negotiations are still ongoing without any formal timetable or deadline.⁴⁹

It is noteworthy that once the harmonization work program is completed, all member states will use a single type of non-preferential rules of origin for all purposes.⁵⁰ Although the Work Programme for the Harmonization of Non-Preferential Rules of Origin has not yet resulted in any specific multilateral agreement on harmonized non-preferential rules, some progress has been made since December 2005 in harmonizing preferential rules of origin, in particular, with regard to preferential rules of origin applied by other states to imports from least-developed countries.⁵¹

4. Criteria and Assessment Tests of the Agreement on Rules of Origin

WTO member states frequently establish rules for determining the origin of imported goods that differ from those of other member states, and many of them, at the same time, employ a differentiated

⁴³ Agreement on Rules of Origin (ARO), World Trade Organization, Annex II, paras. “3a”, “3b” and “3c”.

⁴⁴ *Das R.U., Ratna R.S.*, Perspectives on Rules of Origin, 2011, Palgrave Macmillan, 14.

⁴⁵ Comparative Study on Preferential Rules of Origin, WCO, Version 2017, 22.

⁴⁶ Ibid.

⁴⁷ *Weiler J.H.H., Cho S., Feichtner I., Arato J.*, International and Regional Trade Law: The Law of The World Trade Organization, Unit III: Rules of Origin, 2016, 6.

⁴⁸ Ibid.

⁴⁹ Rules of Origin Handbook, The World Customs Organization (WCO), 15.

⁵⁰ *Van den Bossche P., Zdouc W.*, The Law and Policy of the World Trade Organization, 2021, 504.

⁵¹ Ibid, 504, 505; see also Decision on Measures in Favour of Least-Developed Countries, WTO, Uruguay Round Agreement, 1994, <https://www.wto.org/english/docs_e/legal_e/31-dlldc_e.htm> [10.01.2025].

approach depending on the specific purpose for which the rules of origin are to be applied.⁵² However, the two main standards used to determine origin are: the “wholly obtained/produced goods” criterion and the “substantial transformation” principle.⁵³

4.1. Criteria for Wholly Obtained (Produced) Goods

When a product is entirely obtained or produced in one country, it is relatively easy to determine its origin.⁵⁴ This category typically includes natural products and goods derived from them, as well as products manufactured in a single country without the inclusion of imported parts.⁵⁵ Goods that are wholly obtained in a particular country are considered to be “originating” in that country.⁵⁶

According to Georgian legislation, the following are considered to be wholly obtained in a particular country: minerals extracted from the subsoil, territorial waters, or seabed of the country; products of plant origin that are grown or collected within the country; animals that are born and raised in the country; products obtained from animals living in the country; products obtained as a result of hunting and fishing in the country; and waste, scrap and used goods arising from industrial operations, which were collected in the country and can only be used as raw materials for further processing, among other.⁵⁷

In order to grant the status of Georgian origin to a specific good for export to the European Union, it is necessary to meet the conditions outlined in the First Protocol to the Association Agreement, specifically, the good must be wholly produced in Georgia or, if the good is not wholly produced in Georgia, the materials used in its production must have undergone sufficient processing within the territory of Georgia.⁵⁸ Any product that is not wholly obtained in Georgia but meets the conditions set forth in Annex II to the First Protocol to the Association Agreement shall be considered sufficiently processed in Georgia.⁵⁹ In addition, the First Protocol to the Deep and Comprehensive Free Trade Area (DCFTA) Agreement with the European Union stipulates that,⁶⁰ which deals with the rules of origin and methods of administrative cooperation in this field, stipulates that, for the purposes of implementing the Agreement, the relevant provisions of the “Pan-Euro-Mediterranean Convention on preferential rules of origin (PEM)” shall apply.⁶¹

⁵² Ibid, 501.

⁵³ Rules of Origin Handbook, The World Customs Organization (WCO), 9.

⁵⁴ *De Wulf L., Sokol J.B.*, Customs Modernization Handbook, 2005, 184.

⁵⁵ Ibid.

⁵⁶ Resolution of the Government of Georgia of September 16, 2019 No. 453 “On Approval of the Criteria for Determining the Country of Origin of Goods, the Form of the Certificate of Origin, the Procedure for its Completion and Issuance” (2019), Article 6, para. 1.

⁵⁷ Ibid, Article 6, para. 2.

⁵⁸ See “Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part”, Protocol I, Article 4. <<https://matsne.gov.ge/ka/document/view/2496959?publication=0>> [10.01.2025].

⁵⁹ Ibid, Protocol I, Annex II, <<https://matsne.gov.ge/ka/document/view/2496959?publication=0>> [10.01.2025].

⁶⁰ See Agreement on a Deep and Comprehensive Free Trade Area between Georgia and the European Union (DCFTA), First Protocol.

⁶¹ See Pan-Euro-Mediterranean Regional Convention on Preferential Origin, 26 March 2012.

It is essential to highlight that operations carried out solely to preserve goods in optimal condition for the purpose of their transportation and storage, or to facilitate their handling and transportation, or to package and present them for sale, are classified as so-called minimal operations that cannot be taken into account in determining whether the goods qualify as wholly obtained in a single country.⁶²

Under Georgian legislation, the following operations are considered insignificant for the purposes of determining the origin of goods (i.e., a change of origin): operations that are necessary to ensure the transportation or storage of goods; operations that enhance the external appearance or commercial quality of goods, or prepare them for transportation, which include the division of a batch of goods, grouping of packages, sorting, marking, secondary packaging; simple assembly operations; and the mixing of goods from different origins, provided that the characteristics of the resultant product do not differ substantially from those of the products that are being mixed.⁶³

4.2. Substantial Transformation

In cases where imported goods do not meet the criteria of wholly obtained goods due to the fact that their production process was carried out in more than one country, the country of origin shall be considered to be the country where the goods underwent a substantial transformation, which refers to a process of extraction and production determining the fundamental essence and nature of the goods (whether in terms of material or the product).⁶⁴ In the traditional sense of the principle of substantial transformation,⁶⁵ a good is considered to originate in the last country where it was assigned a distinctive name, nature or intended use as a result of the production process.⁶⁶

A substantial transformation of goods requires more than a mere change in substance.⁶⁷ In the process of substantial transformation, the product must undergo a transformation into a new and different product that has a “distinctive name, character, and use”.⁶⁸ For a product to be considered as originating from a specific country, it must be substantially transformed in that country, and in order to prevent a product from having multiple countries of origin due to the specifics of production, the product is regarded as originating solely from the country where it underwent its last substantial

⁶² Inama S., Rules of Origin in International Trade, 2022, 123.

⁶³ Resolution of the Government of Georgia of September 16, 2019 No. 453 “On Approval of the Criteria for Determining the Country of Origin of Goods, the Form of the Certificate of Origin, the Procedure for its Completion and Issuance” (2019), Article 10, para. 1.

⁶⁴ De Wulf L., Sokol J.B., Customs Modernization Handbook, 2005, 185.

⁶⁵ Weiler J.H.H., Cho S., Feichtner I., Arato J., International and Regional Trade Law: The Law of The World Trade Organization, Unit III: Rules of Origin, 2016, 10.

⁶⁶ *Anheuser-Busch Ass'n v. United States*, 207 US 556, 562 (1908); *Hartranft v. Wiegman*, 121 US 609, 615 (1887).

⁶⁷ Weiler J.H.H., Cho S., Feichtner I., Arato J., International and Regional Trade Law: The Law of The World Trade Organization, Unit III: Rules of Origin, 2016, 10.

⁶⁸ See *Anheuser-Busch Ass'n v. United States*, 207 US 556, 562 (1908); see also *United States v. Gibson-Thomsen Co.*, 27 CCPA 267 (1940).

transformation.⁶⁹ The substantial transformation of materials establishes a new origin for a product; therefore, goods comprising materials from a foreign country should be considered products of the country in which they were substantially transformed.⁷⁰

Substantial Transformation can be implemented in three ways, namely, by changing the tariff classification, by increasing the added value, or by implementing a specific production process.⁷¹ These methods for determining the origin of goods may be used either individually or in combination with each other.⁷² While the principle of substantial transformation is widely recognized, there are varying approaches to its practical application, namely, some countries primarily rely on the criterion of change in tariff classification, others resort to the criterion of added value, and some adopt the criterion of specific processing (manufacturing).⁷³

Accordingly, three basic questions must be addressed in determining the origin of goods,⁷⁴ namely: (1) whether the tariff classification of the goods has been changed as a result of the manufacturing operations (this rule is predominantly applied in the European Union);⁷⁵ (2) whether the production process has led to a substantial transformation in the name, nature, or use of the product;⁷⁶ (3) whether the value of the product has increased by a specified percentage in the preferential country in terms of the labor and materials employed in the production process.⁷⁷ The criteria for these three tests may be consolidated into a single rule, and in some instances, different tests may also be applied based for different purposes.⁷⁸

4.2.1. Change in Tariff Classification

The first method for determining the substantial transformation of goods is the Change in Tariff Classification Method. According to this method, goods are considered to originate in a particular country if the tariff classification of the product changes as a result of production or manufacturing carried out in that country.⁷⁹ For the purposes origin determination, a change in tariff classification of

⁶⁹ *Weiler J.H.H., Cho S., Feichtner I., Arato J.*, International and Regional Trade Law: The Law of The World Trade Organization, Unit III: Rules of Origin, 2016, 11.

⁷⁰ *Simpson J.P.*, Rules of Origin in Transition: A Changing Environment and Prospects for Reform, Law and Policy in International Business 22, no. 4 (1991), 667.

⁷¹ Rules of Origin Handbook, The World Customs Organization (WCO), 9-10.

⁷² Rules of Origin and Origin Procedures Applicable to Exports from Least Developed Countries, UNCTAD series, 2011, United Nations Publication, 3.

⁷³ *Weiler J.H.H., Cho S., Feichtner I., Arato J.*, International and Regional Trade Law: The Law of The World Trade Organization, Unit III: Rules of Origin, 2016, 4.

⁷⁴ *Matsushita M., Schoenbaum T.J., Mavroidis P.C., Hahn M.*, The World Trade Organization Law, Practice, and Policy, Third edition, 2017, 238.

⁷⁵ *Forrester I.S.*, EEC Customs Law: Rules of Origin and Preferential Duty Treatment, Part I, 167.

⁷⁶ *SDI Technologies, Inc. v. United States*, 977 F. Supp. 1235 (Ct. Int'l Trade 1997), United States Court of International Trade, <<https://casetext.com/case/sdi-technologies-inc-v-us>> [10.01.2025].

⁷⁷ *Torrington Co. v. United States*, 764 F.2d 1563 (Fed. Cir. 1985), United States Court of Appeals, Federal Circuit, <<https://casetext.com/case/torrington-co-v-united-states>> [10.01.2025].

⁷⁸ *Matsushita M., Schoenbaum T.J., Mavroidis P.C., Hahn M.*, The World Trade Organization Law, Practice, and Policy, Third edition, 2017, 238

⁷⁹ *Van den Bossche P., Zdouc W.*, The Law and Policy of the World Trade Organization, 2021, 502.

a product is assessed in accordance with the Harmonized System of Tariff Nomenclature and the corresponding convention of the World Customs Organization (WCO),⁸⁰ which is adopted by 90% of the countries engaged in world trade and establishes a uniform, hierarchical nomenclature used to determine the origin of all products involved in international trade.⁸¹ Georgia acceded to this convention in 2008.⁸²

In accordance with Georgian legislation, the criterion of a change in the first four-digit level of the commodity heading in the National Commodity Nomenclature of Foreign Economic Activities signifies that goods to be processed have undergone processing in a given country to the extent that at least one character from the first four digits (commodity heading) of the commodity code is altered (for example, from 2204 to 2205), and in such cases, the goods are considered to originate in the country where this change occurred.⁸³ When determining the country of origin of goods under this criterion, the “National Commodity Nomenclature of Foreign Economic Activities”, approved by the Minister of Finance of Georgia, which was prepared on the basis of the aforementioned convention, is used.⁸⁴

The tariff classification change criterion is considered the optimal means of determining substantial transformation due to its simplicity, as this method requires only an assessment of the Bill of Materials (BOM) of the goods to determine whether the imported materials meet the tariff change criterion.⁸⁵ It is a clear and objective method that only requires the identification of materials imported from a foreign country and their corresponding tariff classification.⁸⁶ However, the negative aspects of the tariff classification change criterion are often considered to be its limited transparency, strictness, and, in some cases, the potential for arbitrary application, as well as the general challenges associated with tariff classification.⁸⁷

Since tariff classification was not originally designed for the purpose of determining origin, the criterion of a change in tariff classification does not always serve as an adequate and effective test for determining origin, and the regimes of rules of origin based on a change in tariff classification are often supplemented by a list of exceptions.⁸⁸ These exceptions identify cases where sufficient

⁸⁰ International Convention on the Harmonized Commodity Description and Coding System, 1988, WCO.

⁸¹ *Weiler J.H.H., Cho S., Feichtner I., Arato J.*, International and Regional Trade Law: The Law of The World Trade Organization, Unit III: Rules of Origin, 2016, 16.

⁸² Resolution of the Parliament of Georgia of December 23, 2008 No. 841 “On Accession to the International Convention on the Harmonized Commodity Description and Coding System”, <<https://matsne.gov.ge/ka/document/view/45730?publication=0>> [10.01.2025].

⁸³ Resolution of the Government of Georgia of September 16, 2019 No. 453 “On Approval of the Criteria for Determining the Country of Origin of Goods, the Form of the Certificate of Origin, the Procedure for its Completion and Issuance” (2019), Article 7, para. 1.

⁸⁴ Order of the Minister of Finance of Georgia No. 21 of January 26, 2024, “On Approval of the National Commodity Nomenclature of Foreign Economic Activities (NCNO)”, Annex, Article 1, para. 1.

⁸⁵ Rules of Origin and Origin Procedures Applicable to Exports from Least Developed Countries, UNCTAD series, 2011, United Nations Publication, 4.

⁸⁶ *De Wulf L., Sokol J.B.*, Customs Modernization Handbook, 2005, 186.

⁸⁷ Rules of Origin and Origin Procedures Applicable to Exports from Least Developed Countries, UNCTAD series, 2011, United Nations Publication, 4.

⁸⁸ *De Wulf L., Sokol J.B.*, Customs Modernization Handbook, 2005, 185.

transformation has occurred despite the absence of a change in tariff classification, or where a change in tariff classification alone is insufficient to confer origin, and also determine which production processes are not sufficient to confer a specific origin on a product, even though these processes result in a change in tariff classification.⁸⁹

4.2.2. Value-Added Criterion

An alternative method for determining the origin of goods is the Value Added Rule, under which substantial transformation is assessed according to the value added to the goods in a specific country, excluding imported materials.⁹⁰ The total amount of value added to a product in a given country must reach a specific percentage threshold in order for the product to be considered originating that country.⁹¹ The value added criterion can be expressed in two forms, namely, by setting a maximum permissible limit for foreign materials or by setting a minimum local content requirement in the product.⁹² Consequently, the value-added criterion determines the extent of transformation required to confer origin on goods, which is carried out either by the minimum share of value that must come from the country of origin, or by the maximum amount of value that can be generated using imported parts and materials.⁹³

Under Georgian law, when applying the ad valorem share criterion, goods are considered to originate in the country where the components and raw materials used in their manufacture originate, provided that the value of these components and raw materials constitutes at least 51% of the value of the final product; and in cases where the countries of origin of these components and raw materials differ, and their combined value exceeds 51% of the value of the final product, the final product shall be deemed to originate in the country where the components and raw materials with the largest percentage share of value originate.⁹⁴

The downside of the value added criterion is often seen in its challenges with predictability and consistency, as it is believed that even minor fluctuations in the value of the currency can have a detrimental effect on the application of this criterion.⁹⁵ In addition, in many cases it is difficult to determine the true value of goods.⁹⁶ The ad valorem criterion for determining the origin of goods also

⁸⁹ Weiler J.H.H., Cho S., Feichtner I., Arato J., *International and Regional Trade Law: The Law of The World Trade Organization*, Unit III: Rules of Origin, 2016, 16; see also Agreement on Rules of Origin, Article 9, para. 2, sub-paras. “c (i)” and “c (ii)”.

⁹⁰ Simpson J.P., *Rules of Origin in Transition: A Changing Environment and Prospects for Reform*, Law and Policy in International Business 22, no. 4 (1991), 669.

⁹¹ De Wulf L., Sokol J.B., *Customs Modernization Handbook*, 2005, 186.

⁹² *Rules of Origin Handbook*, The World Customs Organization (WCO), 10.

⁹³ Weiler JHH, Cho S., Feichtner I., Arato J., *International and Regional Trade Law: The Law of The World Trade Organization*, Unit III: Rules of Origin, 2016, 13.

⁹⁴ Resolution of the Government of Georgia of September 16, 2019 No. 453 “On Approval of the Criteria for Determining the Country of Origin of Goods, the Form of the Certificate of Origin, the Procedure for its Completion and Issuance” (2019), Article 8.

⁹⁵ Simpson J.P., *Rules of Origin in Transition: A Changing Environment and Prospects for Reform*, Law and Policy in International Business 22, no. 4 (1991), 669.

⁹⁶ *Rules of Origin Handbook*, The World Customs Organization (WCO), 10.

imposes significant additional costs on companies, which find it difficult and expensive to comply with the associated administrative regulations, especially when these regulations require the identification and valuation of specific parts and materials within the final product.⁹⁷

Furthermore, the application of the value added criterion may yield inconsistent results with respect to trading partners, in particular, when parts manufactured in a high-wage country (such as the United States) are sent to a country with a low average wage (for example, Mexico) to produce (assemble) a final product, the value added in Mexico for that product may not meet the required threshold; however, if these parts are manufactured in Mexico and the final product is assembled in the United States, the value threshold required for a change of origin may be satisfied.⁹⁸ This disparity arises from the greater inequality in labor costs compared to capital costs (as capital is more mobile and easily transferable than labor or raw materials); as a result, the value-added criterion discriminates against less developed countries, whose primary comparative advantage lies in inexpensive labor and materials.⁹⁹

4.2.3. Specific Manufacturing/Processing Operation Criteria

The third method of substantial transformation is the Specific Manufacturing/Processing Operations criterion, under which a good is considered to be substantially transformed when it has undergone specific manufacturing or processing operations in a particular country.¹⁰⁰

This criterion establishes specific manufacturing or processing methods for each product or group of products, which either determine the origin of the goods (positive test) or identify manufacturing or processing methods that do not confer origin on a product (negative test). Accordingly, these rules may require the use of products from certain origins or, conversely, prohibit the use of certain foreign products in the production of the final product.¹⁰¹

The main advantage of the specific processing criterion is that, once the relevant rules are established for it, this criterion is clear and unambiguous, and manufacturers can clearly determine from the outset whether their product originates from a specific country.¹⁰² However, since the production methods are constantly evolving along with technological advancements, the rules on production-based criteria must also be updated accordingly.¹⁰³

In accordance with Georgian legislation, considering the criteria of necessary conditions and manufacturing/technological operations, specific goods shall be considered to originate in the country

⁹⁷ Weiler J.H.H., Cho S., Feichtner I., Arato J., International and Regional Trade Law: The Law of The World Trade Organization, Unit III: Rules of Origin, 2016, 13.

⁹⁸ Simpson J.P., Rules of Origin in Transition: A Changing Environment and Prospects for Reform, Law and Policy in International Business 22, no. 4 (1991), 669.

⁹⁹ Weiler J.H.H., Cho S., Feichtner I., Arato J., International and Regional Trade Law: The Law of The World Trade Organization, Unit III: Rules of Origin, 2016, 14.

¹⁰⁰ Rules of Origin Handbook, The World Customs Organization (WCO), 10.

¹⁰¹ De Wulf L., Sokol J.B., Customs Modernization Handbook, 2005, 186.

¹⁰² There.

¹⁰³ Simpson J.P., Rules of Origin in Transition: A Changing Environment and Prospects for Reform, Law and Policy in International Business 22, no. 4 (1991), 669.

where they have undergone significant and economically justified processing, or where the goods have been worked on in a facility equipped for these purposes, resulting in the production of a new product or constituting an essential stage in the production process.¹⁰⁴

5. The Classification of Rules of Origin and their Scope of Application

In international trade law, there are two primary types of rules for determining the origin of a product, namely, preferential and non-preferential rules of origin.¹⁰⁵ Preferential rules of origin are associated with significant trade policy instruments, such as Free Trade agreements (FTAs) and the Generalized System of Preferences (GSP), which grant preferential market access (reduced or zero tariffs) to imports from countries that are either members of the FTA or developing countries (that are beneficiaries of the GSP system).¹⁰⁶ In contrast, the non-preferential rules of origin pertain to trade instruments of a broader, more general nature, addressing both neutral and politically sensitive objectives, without offering preferential market access.¹⁰⁷

5.1. Concept of Preferential Rules of Origin and their Relevance in International Trade

The preferential rules of origin constitute a regulatory framework established in trade agreements to provide preferential trade treatment to goods originating in member countries, which requires a differentiation between goods produced within these countries and those imported from non-member countries. Preferential rules of origin are defined as a set of laws, regulations and administrative decisions relevant to practical application that are used by member countries to determine whether goods are subject to preferential treatment specified under contractual or autonomous trade regimes,¹⁰⁸ thereby granting trade (tariff) preferences to trading partners, beyond the obligations arising from the most-favoured-nation regime.¹⁰⁹ It is important to note that more than 50% of global trade is conducted on a preferential basis.¹¹⁰

Preferential rules of origin are established by preferential trade agreements designed to facilitate trade with developing countries (under the Generalized System of Preferences (GSP)) and trade agreement partners (e.g. under a Free Trade Agreements (FTAs) or Regional Trade Agreements (RTAs)) by offering reduced or zero tariffs to GSP beneficiary countries or FTA partner countries on goods they export.¹¹¹ Accordingly, in order to benefit from these preferential trade regimes, exported goods must originate from either a GSP beneficiary country or a country that is a signatory to a free

¹⁰⁴ Resolution of the Government of Georgia of September 16, 2019 No. 453, “On Approval of the Criteria for Determining the Country of Origin of Goods, the Form of the Certificate of Origin, and the Procedure for Its Completion and Issuance” (2019), Article 9.

¹⁰⁵ *Weiß W., Ohler C., Bungenberg M.*, *Welthandelsrecht*. 3. Auflage, 2022, Rn. 445, 177.

¹⁰⁶ *Barcelo J.J.*, Harmonizing Preferential Rules of Origin in the WTO System (December 19, 2006), Cornell Legal Studies Research Paper no. 06-049, 3.

¹⁰⁷ *Ibid.*

¹⁰⁸ Agreement on Rules of Origin (ARO), World Trade Organization, Annex II, para. 2.

¹⁰⁹ *Van den Bossche P., Zdouc W.*, *The Law and Policy of the World Trade Organization*, 2021, 502.

¹¹⁰ *Weiß W., Ohler C., Bungenberg M.*, *Welthandelsrecht*, 2022, Rn. 445, 177.

¹¹¹ Rules of Origin Handbook, The World Customs Organization (WCO), 16.

trade agreement.¹¹² Preferential trade agreements encompass autonomous trade regimes (e.g. the Generalized System of Preferences, GSP) and contractual trade regimes (e.g., North American Free Trade Agreement – NAFTA).¹¹³

It is essential to note that both types of trade regimes contravene a fundamental principle of the World Trade Organization (WTO), specifically the prohibition of unequal treatment (discrimination).¹¹⁴ However, the establishment and functioning of free trade areas and regional trade agreements is permitted as an exception under WTO law, in accordance with the conditions set forth in Article XXIV of the General Agreement on Tariffs and Trade (GATT), and as for the Generalized System of preferences, the legal basis for its operation of the GSP systems is the “Enabling Clause”,¹¹⁵ which was adopted by GATT members in 1979 and allows developed countries to extend more favorable treatment to developing countries, thereby granting them preferential benefits over other countries.¹¹⁶

Preferential rules of origin generally include stricter requirements and are more difficult to implement than non-preferential rules of origin.¹¹⁷ As for the structure of preferential rules, in preferential trade agreements, their key elements typically include not only the criteria for determining origin (such as “wholly obtained goods criterion” and “substantial transformation” criterion), but also the requirement for direct transportation of goods between the relevant countries (Direct Consignment Rule) and the prohibition of refunding duties paid on imported goods used in production (Prohibition of Duty Drawback).¹¹⁸

An essential component of most preferential trade schemes is the Direct Consignment Rule, which stipulates that in order for a product to qualify for preferential treatment, it must be transported directly from its place of production to the destination where the preference is granted.¹¹⁹ The primary objective of this rule is to ensure that imported goods, particularly “bulk cargo”, which can be difficult to identify precisely, are identical to those that departed from the exporting country, and to reduce the risk of unwanted mixing of preferential goods with non-preferential goods.¹²⁰ The goods for which specific trade benefits are sought must be transported directly to the destination market, and if they pass through another country in transit, documentary evidence may be required to demonstrate that the goods remained under the supervision of the customs authorities of the transit country, did not enter the domestic market there, and underwent no operations beyond unloading and reloading procedures.¹²¹

¹¹² *De Wulf L., Sokol J.B.*, Customs Modernization Handbook, 2005, 191

¹¹³ Rules of Origin Handbook, The World Customs Organization (WCO), 16.

¹¹⁴ *Barcelo J.J.*, Harmonizing Preferential Rules of Origin in the WTO System (December 19, 2006), Cornell Legal Studies Research Paper no. 06-049, 12.

¹¹⁵ *Ibid.*, 11.

¹¹⁶ Decision (1/4903) of the Contracting Parties of GATT on “Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries”, adopted November 28, 1979. <https://www.wto.org/english/docs_e/legal_e/enabling_e.pdf> [10.01.2025].

¹¹⁷ *De Wulf L., Sokol J.B.*, Customs Modernization Handbook, 2005, 191.

¹¹⁸ Rules of Origin Handbook, The World Customs Organization (WCO), 16.

¹¹⁹ *De Wulf L., Sokol J.B.*, Customs Modernization Handbook, 2005, 205.

¹²⁰ Rules of Origin Handbook, The World Customs Organization (WCO), 17.

¹²¹ *De Wulf L., Sokol J.B.*, Customs Modernization Handbook, 2005, 205.

An important aspect of preferential rules pertains to the issue of duty drawback.¹²² When national legislation provides for the possibility of customs duty drawback, this refers to the refund of customs duties paid on foreign components used in the production of a final product, which is exported to the market of a partner country of a free trade agreement (FTA) or preferential trade agreement (PTA).¹²³ When trade agreements include explicit provisions prohibiting duty drawback, it affects companies exporting to the trade area and influences the sourcing decisions regarding their product inputs, which may alter their approach and lead to a shift from using materials imported from non-participating countries to those originating from countries that are participants in the trade agreement instead.¹²⁴

Beneficiary countries of preferential trade regimes are frequently subject to limitations that prevent them from exempting exporters from customs duties on raw materials and supplies originating outside the preferential system when these materials are incorporated in products that qualify for preferential trade treatment upon export of the final product.¹²⁵ Under the current trade regime between the European Union and Georgia, in accordance with the PEM Convention, it is not permitted to receive reimbursement for customs duties previously paid in a Convention member country on non-originating materials that are used in the production of a product exported under preferential tariffs.¹²⁶

While many preferential trade agreements prohibit the reimbursement (drawback) of customs duties paid on materials or components originating from a foreign (non-partner) country and subsequently used in the production of final products imported into the market of a preferential trade agreement partner, numerous developing countries leverage this mechanism to attract investment and encourage exports.¹²⁷

5.2. The Essence of Non-Preferential Rules of Origin and their Importance in Trade Law

In international trade law, non-preferential rules of origin serve to assign economic nationality to specific goods.¹²⁸ Unlike preferential rules of origin, non-preferential rules do not grant any tariff advantage to goods. According to the WTO Agreement on Rules of Origin (ARO), non-preferential rules of origin are defined as the set of laws, regulations and administrative decisions employed to determine the country of origin of goods in international trade relations.¹²⁹

Non-preferential rules of origin are not associated with contractual or autonomous trade regimes that form the basis for granting tariff preferences to trading partners.¹³⁰ However, this does not mean that they have an insignificant role in international trade law. These rules are used as instruments in non-preferential trade policy mechanisms, including Most-Favoured-Nation treatment (MFN), anti-

¹²² *Estevadeordal A., Suominen K., Rules of Origin in the World Trading System (2003), 7.*

¹²³ *De Wulf L., Sokol J.B., Customs Modernization Handbook, 2005, 196.*

¹²⁴ *Ibid.*

¹²⁵ *Rules of Origin Handbook, The World Customs Organization (WCO), 18.*

¹²⁶ *Pan-Euro-Mediterranean Regional Convention on Preferential Origin, 26 March 2012, Article 14.*

¹²⁷ *Estevadeordal A., Suominen K., Rules of Origin in the World Trading System (2003), 7.*

¹²⁸ *Rules of Origin Handbook, The World Customs Organization (WCO), 6.*

¹²⁹ *Agreement on Rules of Origin (ARO), World Trade Organization, Article 1, para. 1.*

¹³⁰ *Rules of Origin Handbook, The World Customs Organization (WCO), 12.*

dumping and countervailing measures, safeguard measures, origin marking requirements, discriminatory quantitative restrictions and tariff quotas, trade statistics and government procurement.¹³¹

Under the Most-Favoured Nation (MFN) regime, any advantage, promotion, privilege or immunity granted by any party to the Agreement (GATT) to any good originating in or destined for any other country must be immediately and unconditionally extended to like products originating in the territories of all other Member States or destined for the territories of all other parties to the Agreement.¹³² By defining clear and objective criteria for determining the origin of goods, non-preferential rules of origin help prevent discrimination between trading partners and ensure equal treatment of all members. However, it is important to take into account the significant exceptions that allow for unequal treatment, such as those arising within the framework of regional trade agreements.¹³³

Within the framework of the World Trade Organization, the practice of dumping, where goods are imported from one country into another at a price below their normal value, is considered unfair if it results in material injury to the industry of a GATT member country, threatens to cause such injury, or substantially hinders the development of the domestic industry of a member country.¹³⁴ In order to counter or eliminate dumping, a party to the agreement may impose an anti-dumping duty on dumped goods of any kind, the amount of which shall not exceed the dumping margin for these goods.¹³⁵ Non-preferential rules of origin play a crucial role in accurately determining the origin of dumped goods and are essential for enforcing anti-dumping measures to combat unfair trade practices. The proper determination of product origin helps maintain the integrity of markets and protects domestic industries from unfair competition.

With regard to indications of origin, each GATT Party shall accord to goods originating from the territory of another Party to the Agreement treatment no less favorable than that accorded to like products from any third country, specifically with respect to marking.¹³⁶ When the laws and regulations concerning appellations of origin are enacted, they should be implemented in a manner that minimizes any difficulties and obstacles they may cause for the trade and industry of the exporting country, while also paying attention to the need to protect consumers from false and misleading indications.¹³⁷ By accurately determining the origin of goods, rules of origin ensure that the relevant products are properly labeled, which provides the consumers with transparent information about the products they purchase. This, in turn, boosts consumer trust and enhances market transparency.

In addition, non-preferential rules of origin provide the foundation for the effective application of safeguard measures. By accurately determining the origin of goods, these rules help identify rising import flows into the market that could potentially harm domestic industries, allowing governments to

¹³¹ Agreement on Rules of Origin (ARO), World Trade Organization, Article 1, para. 2.

¹³² General Agreement on Trade and Tariffs (GATT), 1994, Article I para. 1.

¹³³ Ibid, Article XIV.

¹³⁴ Ibid, Article VI, para. 1.

¹³⁵ Ibid, Article VI, para. 2.

¹³⁶ Ibid, Article IX, para. 1.

¹³⁷ Ibid, Article IX, para. 2.

respond with appropriate safeguard actions, for example, by setting quotas.¹³⁸ Furthermore, non-preferential rules of origin help prevent the abuse of discriminatory practices, such as quantitative restrictions.¹³⁹

By establishing objective criteria for determining the origin of goods, rules of origin ensure that such measures are applied in a fair and transparent manner in practice, without the undue restriction of individual trading partners. Consequently, non-preferential rules of origin play an important role in fostering fair, transparent, and non-discriminatory trade practices across various areas of international trade regulation.

6. The Economic Implications of Rules of Origin in International Trade and the Associated Practical Challenges

The economic implications of preferential and non-preferential rules of origin are multifaceted and depend on various factors, including the stringency of these rules, the complexity of supply chains, and the level of economic development.

Rules of origin can serve as a trade barrier in two ways. Firstly, based on rules of origin administrative costs may be imposed on exporters in the market, secondly, companies may be forced to change their suppliers in order to comply with the requirements of the rules of origin in the specific country.¹⁴⁰ The existence of rules of origin is necessary to ensure that the scope of preferential tariffs is limited to members of a preferential trade agreement, while non-member countries are excluded from such a preferential treatment, for which it is useful to establish and enforce strict rules of origin.¹⁴¹ The inherent "discriminatory capacity" of rules of origin enables the parties to a free trade agreement or preference-granting countries to restrict the duty free entry of products exported by a particular party, as well as restrict their access to other preferential benefits.¹⁴²

When signing a free trade agreement, bilateral tariffs are reduced to zero, however, companies must prove the origin of their products in order to be qualified for duty-free treatment on the market, hence, the administrative burden of meeting these rules often "offsets" the positive impact of the reduced tariff, which can be mitigated by non-preferential tariffs, as companies may decide to pay them to avoid the administrative costs associated with proving the origin of goods, especially where non-preferential tariffs are low (e.g. in Europe).¹⁴³

When two countries sign a free trade agreement (FTA), they reduce tariffs on bilateral trade and also establish rules of origin for goods. As a result, an FTA causes a certain portion of supply to shift

¹³⁸ Ibid, Article XIX.

¹³⁹ Ibid, Article XI.

¹⁴⁰ Augier P., Gasiorek M., Lai Tong C., Martin P., Prat A., The Impact of Rules of Origin on Trade Flows, Economic Policy, Jul., 2005, Vol. 20, No. 43, 576.

¹⁴¹ Harilal K.N., Beena P.L., Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives, Economic and Political Weekly, Vol. 40, No. 51 (2005), 5420.

¹⁴² Rules of Origin and Origin Procedures Applicable to Exports from Least Developed Countries, UNCTAD series, 2011, United Nations Publication, 2.

¹⁴³ Augier P., Gasiorek M., Lai Tong C., Martin P., Prat A., The Impact of Rules of Origin on Trade Flows, Economic Policy, Jul., 2005, Vol. 20, No. 43, 576.

from a third country to FTA suppliers, while preferential tariffs change the relative prices of imports from partner countries compared to those from third countries.¹⁴⁴

It is noteworthy that the rules of origin have a greater impact on trade in intermediate goods than in final goods, they also affect small countries more than large countries (due to their greater dependence on imported intermediate goods), and their impact is also more significant on trade in countries where the so-called vertical specialization is prevalent.¹⁴⁵

The application of the rules of origin to determine the origin of a product significantly influences the trade policy of states, as they can be employed to safeguard specific domestic sectors or industries, potentially leading to the protection of domestic manufacturing industries and the substitution of imported materials with domestic alternatives, and an increase in the costs and prices of final goods.¹⁴⁶

Compliance with rules of origin can affect companies' supply and investment decisions, as these rules may require the use of domestic products rather than imported ones, thereby reducing the benefits of low-tariff exports and potentially increasing the cost and prices of final goods.¹⁴⁷ Additionally, the rules of origin can play a crucial role in shaping the investment decisions of multinational companies, as the nature and manner of application of rules of origin can increase uncertainty regarding the preferential market access, potentially leading to a reduction in investment.¹⁴⁸

Rules of origin can reduce the utilization of trade privileges granted by preferential agreements or the GSP, leading to the occurrence of “unused preferences”, as producers may opt to pay tariffs rather than navigate the administrative barriers associated with compliance, thereby favoring domestic products and increasing the costs and prices of final goods.¹⁴⁹ Moreover, the rules of origin can also lead to investment diversion, as producers of final goods may set up factories within the region governed by the rules of origin to meet the compliance requirements of the rules of origin, potentially resulting in higher costs and trade diversion, as well as the redirection of investment within the territory subject to the rules of origin.¹⁵⁰

While the rules of origin are necessary to maintain the existing external protection of countries under a preferential trade agreement (PTA), depending on how these rules are designed, they may also serve to increase that level of external protection, and the actual impact of rules of origin will ultimately depend on a number of factors, such as the nature of the relevant market structure, or the definition of “sufficient working or processing”.¹⁵¹

¹⁴⁴ Ibid, 578.

¹⁴⁵ Ibid, 581.

¹⁴⁶ Harilal K.N., Beena P.L., Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives, *Economic and Political Weekly*, Vol. 40, No. 51 (2005), 5421.

¹⁴⁷ De Wulf L., Sokol J.B., *Customs Modernization Handbook*, 2005, 200.

¹⁴⁸ Ibid.

¹⁴⁹ Estevadeordal A., Suominen K., *Rules of Origin in the World Trading System* (2003), 9.

¹⁵⁰ Ibid, 10.

¹⁵¹ Augier P., Gasiorek M., Lai Tong C., Martin P., Prat A., *The Impact of Rules of Origin on Trade Flows*, *Economic Policy*, Jul., 2005, Vol. 20, No. 43, 580.

It is important to note that the preferential rules of origin are more restrictive than non-preferential ones, with the theoretical rationale being to prevent trade “diversion”, which specifically refers to the practice of transporting goods through a country with a preferential regime so that the goods can obtain the preferential treatment available under a preferential trade agreement (PTA) upon import.¹⁵² The function of rules of origin is to prevent such trade “diversion”, where foreign (non-privileged) goods are supplied to a free trade agreement party with the lowest external tariffs and then re-exported to a country with higher tariffs,¹⁵³ thereby avoiding the payment of higher tariffs or enabling products originating from non-beneficiary countries of unilateral preferential schemes to be transported through beneficiary countries.¹⁵⁴

Preferential trade tariffs and rules of origin can lead to trade diversion, which negatively affects non-members, while rules of origin, especially those requiring local components in the product composition, can further exacerbate the situation of non-members of the agreement.¹⁵⁵ In free trade agreements, downstream producers are forced to purchase necessary inputs from regional producers of intermediate products at a higher price, which potentially increases costs and leads to trade disruptions. Thus, for non-member producers of intermediate products, the rules of origin resulting from an FTA can constitute a significant non-tariff trade barrier (NTB), the tariff equivalent of which may be higher than the general external tariff of the FTA.¹⁵⁶

In addition, there is a legitimate concern in international trade law that rules of origin may be used for protectionist purposes.¹⁵⁷ Originally intended as a neutral trade policy instrument to determine the country of origin of goods, rules of origin are increasingly being used in practice as a protectionist trade policy instrument, and the abuse of rules of origin for protectionist purposes is often observed in preferential trade agreements (PTAs) between developed countries, such as the European Union and NAFTA.¹⁵⁸

Rules of origin can be effectively used as a means of protectionism, implemented in the following ways: On one hand, an overly restrictive interpretation or application of preferential rules of origin may deny trade preferences to products that have undergone last substantial processing in a preferential country or trading area, arguing that the product in question does not originate in the preferential country.¹⁵⁹

¹⁵² Rules of Origin Handbook, The World Customs Organization (WCO), 16.

¹⁵³ *Krajewski M.*, *Wirtschaftsvölkerrecht*, 4. Auflage, 2017, Rn. 975.

¹⁵⁴ Rules of Origin and Origin Procedures Applicable to Exports from Least Developed Countries, UNCTAD series, 2011, United Nations Publication, 2.

¹⁵⁵ The Impact of Rules of Origin on Trade, Report, *Kommerskollegium* 2012:1, 14.

¹⁵⁶ *Harilal K.N., Beena P.L.*, Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives, *Economic and Political Weekly*, Vol. 40, No. 51 (2005), 5420.

¹⁵⁷ *LaNasa J.A. III.*, Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating Them, *The American Journal of International Law*, Oct., 1996, Vol. 90, No. 4, 631.

¹⁵⁸ *Harilal K.N., Beena P.L.*, Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives, *Economic and Political Weekly* 40, no. 51 (2005), 5426.

¹⁵⁹ *LaNasa J.A. III.*, An Evaluation of the Uses and Importance of Rules of Origin, and the Effectiveness of the Uruguay Round's Agreement on Rules of Origin in Harmonizing and Regulating Them (1995), Chapter I.

On the other hand, an overly liberal interpretation and application of non-preferential rules of origin may extend country-specific trade-restrictive measures to products that would otherwise be exempt from them, based on the argument that, despite having undergone last substantial processing in a third country, the product originated in a non-privileged country.¹⁶⁰

It is also worth noting that the ongoing “privatization” of trade policy, which is a significant aspect of protectionism based on rules of origin, is often influenced by industrial lobbyists who, due to their power and influence, play a decisive role in determining the level of protection granted to individual products.¹⁶¹

Due to the absence of standardized preferential rules of origin con, the more than 300 preferential trade agreements currently in force include different regulations on rules of origin, leading to substantial fragmentation in international trade law and the so-called “Spaghetti Bowl Effect”.¹⁶² Preferential trade agreements usually establish specific criteria for determining rules of origin, and these rules differ not only between agreements, but also across sector, which makes the system of rules of origin even more complex and further complicates the process of harmonizing preferential rules of origin.¹⁶³

7. Conclusion

In the dynamic and complex landscape of international trade law, rules of origin play an indispensable role in determining which goods are eligible for preferential treatment under various trade agreements. These rules significantly shape global trade, influence trade flows, and protect the interests of countries engaged in free trade.

Rules of origin serve as the principal criteria for establishing the national origin of a product. Their importance stems from the fact that trade duties and restrictions are often contingent upon the origin of the imported product. The rules of origin apply to a wide array of trade measures, including anti-dumping duties, quantitative restrictions, tariff quotas, origin designations, etc. Over time, the significance of rules of origin have become increasingly important in trade relations, as countries often treat similar imported goods differently depending on their origin.

Rules of origin are of paramount importance in international trade law, as they provide criteria for determining the origin of goods, ensure compliance with trade agreements and prevent trade restrictions. Where they exist, the rules of origin promote fair competition among trading partners, enhance trust and cooperation, and contribute to economic growth and development. They also play an important role in protecting domestic industries from unfair competition and in fostering economic stability.

Notwithstanding their fundamental importance, rules of origin also present a number of challenges. In particular, the lack of harmonisation between governments on the application rules of

¹⁶⁰ Ibid.

¹⁶¹ Harilal K.N., Beena P.L., Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives, *Economic and Political Weekly*, Vol. 40, No. 51 (2005), 5421.

¹⁶² The Impact of Rules of Origin on Trade, Report, *Kommerskollegium* 2012:1, 6, 14.

¹⁶³ Ibid, 15.

origin makes it difficult for businesses to comply with various rules. In addition, the misuse of rules of origin can turn them into a hidden weapon of protectionist trade policies that impede free trade. The challenges associated with rules of origin include the lack of harmonisation between countries, the potential for misuse and the coexistence of preferential trade agreements alongside national non-preferential rules of origin, leading to fragmentation. The Agreement on Rules of Origin (ARO) seeks to address these issues by harmonizing non-preferential rules of origin and establishing a more transparent, streamlined, and predictable implementation procedure for the assessment of origin. However, it is worth noting that harmonizing rules of origin alone is not enough, and as long as countries continue to distinguish between similar (“like”) products originating from different countries, rules of origin will remain a controversial but necessary tool in international trade relations.

In light of these challenges, the global system of rules of origin requires systematic improvement and reform. First, there is a need for broad harmonization and standardization of rules of origin across trade agreements, which can be achieved through multilateral efforts within the World Trade Organization or through regional initiatives aimed at approximating rules of origin criteria. Harmonization of rules of origin would allow companies to benefit from simplified procedures and reduced compliance costs, and would also contribute to increased transparency and predictability in trade relations. Furthermore, capacity building and technical assistance for customs authorities and companies would be a crucial factor for enhancing compliance and enforcement.

Moreover, it will be important to improve stakeholder engagement and consultation procedures to ensure that rules of origin align with business needs. By involving relevant stakeholders in the decision-making process, trade policymakers will be better equipped to understand the challenges faced by businesses and tailor rules of origin to address these needs.

In conclusion, the rules of origin play a fundamental role in international trade law, despite the challenges and complexities associated with them. By addressing these issues and implementing necessary reforms, trade policymakers and stakeholders can ensure that rules of origin continue to serve as a cornerstone of international trade law, fostering global economic growth and development. Improving and reforming the rules of origin for goods can enhance transparency, fairness, and efficiency in international trade, thereby strengthening the ability of the parties involved to adapt to the ever-evolving dynamics of global trade and facilitating their management of complex supply chains. The presence of effective and well-defined rules of origin ensures the development of a predictable and harmonized system for exporters and importers, making their analysis and implementation less complex and reducing the risk of trade disputes.

Thus, rules of origin of goods will continue to play an important role in the future in shaping a balanced and equitable global trade landscape that benefits all stakeholders and facilitates economic integration and cooperation at the global level.

Bibliography:

1. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 27/06/2014.

2. Agreement on a Deep and Comprehensive Free Trade Area (DCFTA) between Georgia and the European Union, 27/06/2014.
3. Resolution of the Parliament of Georgia No. 841 on accession to the International Convention on the Harmonized Commodity Description and Coding System, 23/12/2008.
4. Resolution of the Government of Georgia No. 453, “On Approval of the Criteria for Determining the Country of Origin of Goods, the Form of the Certificate of Origin, and the Procedure for Its Completion and Issuance”, 16/09/2019.
5. Order of the Minister of Finance of Georgia No. 21, “On Approval of the National Commodity Nomenclature of Foreign Economic Activities (NCNO)”, 26/01/2024.
6. Agreement on Rules of Origin (ARO), Marrakesh Agreement Establishing the World Trade Organization, 15/04/1994.
7. General Agreement on Tariffs and Trade (GATT), Marrakesh Agreement Establishing the World Trade Organization, 15/04/1994.
8. International Convention on the Harmonized Commodity Description and Coding System, World Customs Organization, 1/01/1988.
9. Pan-Euro-Mediterranean Regional Convention on Preferential Origin, 26/03/2012.
10. Tokyo Round Agreements, Decision of the Contracting Parties of GATT on “Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries”, 28/11/1979.
11. Uruguay Round Agreements, Decision on “Measures in Favor of Least-Developed Countries”, World Trade Organization, 15/04/1994.
12. Augier P., Gasiorek M., Lai Tong C., Martin P., Prat A., The Impact of Rules of Origin on Trade Flows, *Economic Policy*, Jul., 2005, Vol. 20, No. 43 (Jul., 2005), 567, 569-624.
13. Barcelo J.J., Harmonizing Preferential Rules of Origin in the WTO System (December 19, 2006), Cornell Legal Studies Research Paper no. 06-049.
14. Chase K. A., Protecting Free Trade: The Political Economy of Rules of Origin, *International Organization*, Summer, 2008, Vol. 62, No. 3 (Summer, 2008), 507-530.
15. Das R.U., Ratna R.S., *Perspectives on Rules of Origin*, 2011, First edition, Palgrave Macmillan.
16. De Wulf L., Sokol J.B., *Customs Modernization Handbook*, 2005.
17. Estevadeordal A., Suominen K., *Rules of Origin in the World Trading System* (2003).
18. Falvey R., Reed G., *Economic Effects of Rules of Origin*, *Weltwirtschaftliches Archiv*, Band 134, H. 2 (1998), 209-229, Published by: Springer.
19. Forrester I.S., *EEC Customs Law: Rules of Origin and Preferential Duty Treatment*, Part I, Reprinted from *European Law Review* Vol. 5, No. 3. June 1980.
20. Gourdon J., Gourdon K., De Melo J., A (More) Systematic Exploration of the Trade Effect of Product-Specific Rules of Origin, *World Trade Review* (2023), 22, 421–435.
21. Harilal K.N., Beena P.L., Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives, *Economic and Political Weekly* 40, no. 51 (2005): 5419–5427.
22. Inama S., *Rules of Origin in International Trade*, 2022.
23. Krajewski M., *Wirtschaftsvölkerrecht*, 4. Auflage, 2017.
24. LaNasa J.A. III., *An Evaluation of the Uses and Importance of Rules of Origin, and the Effectiveness of the Uruguay Round's Agreement on Rules of Origin in Harmonizing and Regulating Them* (1995), Jean Monnet Working Paper.

25. *LaNasa J.A. III.*, Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating Them, *The American Journal of International Law*, Oct., 1996, Vol. 90, No. 4 (Oct., 1996), 625-640.
26. *Matsushita M., Schoenbaum T.J., Mavroidis P.C., Hahn M.*, *The World Trade Organization Law, Practice, and Policy*, Third edition, 2017.
27. *Nell P.G.*, WTO Negotiations on the Harmonization of Rules of Origin, 33 (3) *Journal of World Trade* (1999), 45-71.
28. *Satapathy C.*, Rules of Origin: A Necessary Evil?, *Economic and Political Weekly*, 1998, Vol. 33, No. 35 (1998), 2270-2271.
29. *Simpson J.P.*, Rules of Origin in Transition: A Changing Environment and Prospects for Reform, *Law and Policy in International Business* 22, no. 4 (1991): 665-672.
30. *Van den Bossche P., Zdouc W.*, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*. 5th ed., Cambridge University Press, 2021.
31. *Weiler J.H.H., Cho S., Feichtner I., Arato J.*, *International and Regional Trade Law: The Law of the World Trade Organization*, 2016.
32. *Weiß W., Ohler C., Bungenberg M.*, *Welthandelsrecht*. 3. Auflage, 2022.
33. Kommerskollegium, Sweden, *The Impact of Rules of Origin on Trade*, 2012:1 – A Comparison of the EU's and the US's Rules for the Textile and Clothing Sector, National Board of Trade, March 2012.
34. United Nations Conference on Trade and Development (UNCTAD), *Rules of Origin and Origin Procedures Applicable to Exports from Least Developed Countries*, UNCTAD series, 2011, United Nations Publication.
35. World Customs Organization (WCO), *Comparative Study on Preferential Rules of Origin*, Version 2017, 20/06/2017.
36. World Customs Organization (WCO), *Rules of Origin Handbook*, 6/12/2012.
37. *SDI Technologies, Inc. v. United States*, 977 F.Supp. 1235 (Ct. Int'l Trade 1997), United States Court of International Trade.
38. *Torrington Co. v. United States*, 764 F.2d 1563 (Fed. Cir. 1985), United States Court of Appeals, Federal Circuit.
39. *Territory of Hawaii v. Harry MY Ho.*, No. 3078, 41 Haw. 565, 571 (1957).
40. *United States v. Gibson-Thomsen Co.*, 27 CCPA 267 (1940).
41. *Anheuser-Busch Ass'n v. United States*, 207 U.S. 556, 562 (1908).
42. *Hartranft v. Wiegman*, 121 U.S. 609, 615 (1887).

Nana Uznadze*

The Problematic Aspects of Compensation for Damage Caused by a Doctor's Omission in Medical Law

The resolution of disputes arising within the framework of medical law is often associated with significant difficulties, especially when the damage results not from an act but from a doctor's omission. Even in cases where unlawfulness and fault are clearly established, but a causal link cannot be proven, the physician may be released from liability. In such cases, the central question is whether the harmful outcome could have been avoided if the physician had taken a specific action. Answering this question becomes complicated by the inherent limitations of medicine to predict how a patient's health condition would have evolved had the appropriate standard of care and treatment been followed.

This paper analyzes the problematic aspects of compensation for damage caused by a doctor's omission and focuses on the following key issues: the scope of the duty to treat, the difficulties in establishing causality, the allocation of the burden of proof, and the challenges related to the assessment of damages. Through doctrinal and comparative analysis, the paper explores whether theories such as the loss of chance doctrine might offer a fairer approach to compensation.

Keywords: medical law, doctor's omission, compensation for damage, causal link, burden of proof, loss of chance.

1. Introduction

Medical law is a highly complex and constantly evolving field. In the Georgian legal system, it has a relatively short history as an independent discipline,¹ due to its interdisciplinary nature.² This field aims to regulate relationships arising in the field of medical services for the protection of supreme values such as human life and health.³ Accordingly, the regulation of these legal relationships, and, subsequently, the application of existing legal norms to practice, is associated with both legal and ethical challenges.

Establishing a causal link between a doctor's action or omission and the resulting harm is one of the most problematic issues on the agenda of medical law. Due to the diversity of medical cases, the

* PhD Student and Visiting Lecturer at the Faculty of Law of Ivane Javakhishvili State University.

¹ Kvantaliani N., Rusiashvili G., The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, Georgian-German Journal of Comparative Law, 1/2022, 1 (in Georgian).

² Bichia M., The Concept of Medical Law and Its Place in the Legal System, Law and the World, Vol. 9, № 28, 2023, 82 (In Georgian).

³ Todorovski N., Medical Law and Health Law – Is it the Same?, Medical Law and Ethics Journal, Vol. 18, № 2, 2018, 34

patient's health condition, patient's reactions to medications, and the presence of various contributing factors, it becomes difficult to prove with certainty that the damage would have been avoided had the physician administered the appropriate therapy.⁴ Moreover, expert opinions, which are particularly prevalent in medical disputes and serve as a basis for judicial evaluation, constitute opinions or assumptions rather than facts.⁵ The capabilities of medical science are inherently limited by the above-mentioned circumstances; accordingly, it generally cannot provide a definitive conclusion regarding the existence of a causal link. In cases of omission, proving such a link is associated with even greater difficulty.

When determining compensation for damage caused by a doctor's omission, a further challenge arises in the allocation of the burden of proof between the plaintiff and the defendant. An analysis of Georgian judicial practice reveals that, in this respect, the decisions adopted by the adjudicating bodies are inconsistent.⁶ Moreover, the interpretations concerning the presumption of fault on the part of the medical service provider also vary, which calls for further examination.⁷

Additionally, it should be noted that the fair assessment of the amount of damage is also a complex issue. Legal doctrine includes theories that define the amount of compensation and the scope of the doctor's liability differently, guided by the principle of evaluating which protected interest is at stake.

The purpose of the present paper is to assess, through doctrinal and comparative analysis, the problematic aspects related to compensation for damage caused by a doctor's omission, to examine the legal framework governing such liability, to analyze judicial practice, and to identify the main challenges that arise in theory and practice.

2. The Conceptual Framework of Omission in the Context of Medical Law

According to the standard definition, "a person is liable for damage caused by omission if the harm to a legal interest could have been avoided through the action that was not performed. This duty may arise from the law, a contract, or other sources."⁸ When applying this definition to medical law, the following circumstances must be taken into account in determining a doctor's liability:

Duty to Treat

An omission shall be deemed to have occurred when a duty of care (treatment) arose⁹ for a doctor either from a [medical service] contract or in the context of providing emergency assistance and

⁴ *Misic Radanovic N., Vukusic I., Causation in Medical Malpractice, EU and Comparative Law Issues and Challenges Series 4, 2020, 778.*

⁵ *Merry A., McCall Smith A., Errors, Medicine and the Law, Cambridge University Press, UK, 2001, 176-177.*

⁶ *Kvantaliani N., Rusiashvili G., The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, Georgian-German Journal of Comparative Law, 1/2022, 1 (in Georgian).*

⁷ *Pepanashvili N., The Presumption of Fault of the Medical Service Provider in the Civil Code of Georgia, Journal of Law, № 2, 2016, 121-122 (in Georgian).*

⁸ *Kropholler J., German Civil Law Code, Darjania T., TcheTchelashvili Z. (trans.), Chachanidze E., Darjania T., Tortladze L. (eds.), 13th ed., Tbilisi, 2014, § 823, abs 21 (in Georgian).*

⁹ *Fletcher M. T., Standard of Care in Legal Malpractice, Indiana Law Journal 43, №3, 1968, 773.*

the doctor had the objective ability to act¹⁰ but failed to take the appropriate action, whereby the damage could have been avoided.¹¹

Doctors are obligated to provide patients with care of an appropriate quality.¹² “The doctor–patient relationship is a consensual relationship within which the patient knowingly seeks the doctor’s assistance, and the doctor knowingly accepts the individual as a patient.”¹³

Once the doctor-patient relationship is established, the medical service provider is obligated to observe the appropriate standard of care and to carry the treatment through to completion or, if unable to do so, to ensure the patient’s referral to another suitable provider in order to avoid any disruption in the continuity of care.

Medical Error

An isolated adverse outcome does not give rise to liability. If an undesirable result occurs despite the proper conduct and organization of treatment, it does not constitute a medical error and must be distinguished from one.¹⁴

Both actions and omissions that result in harm constitute forms of medical error.¹⁵ It is essential to note that, for the purposes of establishing liability, the mere occurrence of an adverse outcome for the patient is not sufficient; rather, it is crucial that such an adverse outcome qualifies as a medical error.^{16/17}

Unlawful Omission

Only unlawful omission gives rise to liability. A distinction must be made between negligent and deliberate omission by a doctor. Specifically, if, in the doctor’s judgment, based on clinical indications, continuing treatment would not be beneficial for the patient and therapy is therefore discontinued, such conduct shall not be considered unjustified omission.¹⁸

¹⁰ *Gujabidze N.*, Compensation for Damage Caused by a Doctor’s Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

¹¹ *Makhatadze Sh.*, The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor’s Omission, *Medical Law and Management Journal*, № 1/2022, 42 (In Georgian).

¹² *Davies C. E., Shaul R.Z.*, Physicians’ Legal Duty of Care and Legal Right to Refuse to Work During Pandemics, *Canadian Medical Association Journal (CMAJ)*, Vol. 182, № 3, 2010, 320–321.

¹³ *Kim Baker*, United States: A Doctor’s Legal Duty – Erosion of the Curbside Consultant, *MONDAQ* (Nov. 5, 2003), See cit.: *Suri S.*, Action, Affiliation, and a Duty of Care: Physicians’ Duty of Care in Nontraditional Settings, *Fordham Law Review*, Vol. 89, № 2, 2020, 307.

¹⁴ *Misic Radanovic N., Vukusic I.*, Causation in Medical Malpractice, *EU and Comparative Law Issues and Challenges Series 4*, 2020, 778.

¹⁵ *Makhatadze Sh.*, The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor’s Omission, *Medical Law and Management Journal*, № 1/2022, 35 (In Georgian).

¹⁶ *Bichia M.*, Peculiarities of Medical Torts in Georgian Judicial Practice, *South Caucasus Law Journal*, 09/2018 – 2019, 226.

¹⁷ *Kvantaliani N., Rusiashvili G.*, The General Systematics of a Doctor’s Civil Liability and the Significance of the Doctor’s Fault, *Georgian-German Journal of Comparative Law*, 1/2022, 8 (in Georgian).

¹⁸ *Stauch M., Wheat K.*, Text, Cases and Materials on Medical Law and Ethics, fourth edition, Routledge, USA and Canada, 2012, 22.

The unlawfulness of an act is assessed differently depending on whether the duty of care toward the patient arises from a contract or in its absence. More specifically, when a contract exists, a doctor's act will be deemed unlawful if the obligations stipulated by the contract are not fulfilled. In the absence of such a contract, an act will be considered unlawful if it does not conform to the recognized standards of patient care and treatment and constitutes a deviation from those standards.^{19/20}

When the nature of the treatment provided does not reveal a medical error or a deviation from protocols recognized in the medical field, the adverse outcomes of such treatment do not give rise to the liability of medical personnel, as there is no indication of unlawfulness. Accordingly, "the basis for a doctor's liability is not the negative outcome of the treatment, but rather a deviation from the standards of medical science. Furthermore, a doctor's individual lack of knowledge or professional weakness does not constitute an exculpatory circumstance."²¹ An example of this may be a situation in which, based on the patient's diagnosis, there is a medical indication for surgical intervention, recognized by various clinical protocols or applicable guidelines, but the doctor refuses to perform the medical intervention.

Deviation from the Standard of Care

The "standard of care" refers to the level of care that a reasonably competent and experienced practitioner in the same field would provide to a patient under the same circumstances and conditions.²² In individual cases, the court must assess what the standard of care required from the doctor and whether a deviation from that standard constitutes a breach giving rise to liability. If it is established that, under the same circumstances, another doctor, acting in accordance with the applicable medical standards and guidelines, would have ordered additional examinations, prescribed medication, or undertaken surgical intervention, such conduct will be regarded as a violation of the standard of care.

The primary test for assessing the standard of care is the so-called "**Bolam test**," established in the case of *Bolam v Friern Hospital Management Committee*. In that case, the court held that a doctor does not breach the duty of care if their conduct is consistent with a practice accepted as proper by a responsible body of medical professionals skilled in the relevant field.²³ In assessing the standard of

¹⁹ Bichia M., Peculiarities of Medical Torts in Georgian Judicial Practice, South Caucasus Law Journal, 09/2018 – 2019, 227.

²⁰ According to the interpretation of the Supreme Court of Georgia, "a patient has the right to compensation for damage if: 1. the objective of the medical activity has not been achieved (restoration of health and preservation of life), and 2. the healthcare professional's conduct does not conform to medical standards." Decision of February 24, 2017 № სბ-1206-1166-2016 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian). In connection with the burden of proof, it should also be noted that the court indicated: "according to established judicial practice, the burden of alleging the facts and the burden of proving them lies with the party to the proceedings who seeks compensation for the damage suffered, namely, the injured party."

²¹ Decision of May 25, 2010 № სბ-1268-1526-09 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

²² Fletcher M. T., Standard of Care in Legal Malpractice, Indiana Law Journal 43, №3, 1968, 773.

²³ Bolam v Friern Hospital Management Committee [1957] 1 W.L.R 582.

care, it is important to note that liability does not arise automatically merely because another practitioner would have acted differently, as individual doctors' approaches and available treatment alternatives may vary. What is essential is that the doctor's conduct falls within the framework defined by professional standards. Later, in the case of *Bolitho v City and Hackney Health Authority*, the court clarified that a practice accepted by medical professionals must also be reasonable and logical, thereby excluding the assessment of the standard of care based solely on medical practice.²⁴

The *Bolam* test was revisited in cases concerning informed consent in *Montgomery v Lanarkshire Health Board*, where the court departed from the previously established test. Instead of a practitioner-focused standard, the court introduced a patient-centered test, prioritizing patient autonomy. It held that "the doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment."²⁵

Types of Omission

In practice, a doctor's omission may manifest in various forms,²⁶ including:²⁷

From the perspective of treatment planning: when the doctor fails to prescribe appropriate treatment or does not carry out a medical intervention despite its necessity.²⁸

Incorrect or delayed diagnosis: when the doctor fails to order appropriate examinations, the results of which would have enabled an accurate diagnosis and timely treatment,²⁹ or when the diagnosis is correctly established but delayed, resulting in the patient's death.³⁰

Related to obtaining informed consent:³¹ in such cases, omission is manifested in the inadequate provision or failure to provide the patient with information concerning the risks associated with the proposed treatment and/or procedure, which resulted in harm and to which the patient would not have consented under conditions of proper disclosure.³²

Medical monitoring and supervision: the doctor's failure to carry out subsequent monitoring and supervision also constitutes an omission.³³

²⁴ *Bolitho v City and Hackney Health Authority* [1998] A.C. 232.

²⁵ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

²⁶ *Kass J., Rose R. V., Medical Malpractice Reform: Historical Approaches, Alternative Models, and Communication and Resolution Programs*, AMA Journal of Ethics, Vol. 18, № 3, 299.

²⁷ *Bichia M., The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, Justice and Law*, №2 (70), 2021, 89-90 (in Georgian).

²⁸ *Hayward R., Asch S. M., Hogan M. M., Hofer T. P., Kerr E.A., Sins of Omission: Getting too Little Medical Care May be the Greatest Threat to Patient Safety*, Journal of General Internal Medicine, Vol. 20, № 1, 2005, 35.

²⁹ *Barnett v Chelsea & Kensington Hospital* [1969] 1 QB 428.

³⁰ *Liddell K., Skopek J. M., Gallez I., Fritz Z., Differentiating Negligent Standards of Care in Diagnosis*, Medical Law Review, 2022, Vol. 30, № 1, 34.

³¹ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

³² In contrast, the physician's liability is excluded despite the occurrence of an adverse outcome for the patient, if the patient was informed about the potential risks and nevertheless gave consent. *Bichia M., Peculiarities of Medical Torts in Georgian Judicial Practice*, South Caucasus Law Journal, 09/2018 – 2019, 226.

³³ *Kass J., Rose R. V., Medical Malpractice Reform: Historical Approaches, Alternative Models, and Communication and Resolution Programs*, AMA Journal of Ethics, Vol. 18, № 3, 299.

Administrative / organizational issues: although these do not directly relate to the doctor's personal liability, systemic problems may exist within the hospital – such as the absence of appropriate medical protocols, malfunctioning equipment,³⁴ and similar deficiencies. Omission is manifested in the failure to take measures to address or control such issues, which may ultimately result in harm.³⁵

All of the above examples fall under cases of omission that may give rise to a doctor's liability.

3. Challenges Related to Causation in Cases of a Doctor's Omission

Causation constitutes one of the most important elements to be assessed in the process of damage compensation, as both the establishment of liability and the determination of its extent depend on identifying causation and the approaches used for its assessment.

It is practically impossible to prove with absolute certainty that the undesired outcome would not have occurred if the appropriate action had been taken or the correct intervention had been made. This is, on the one hand, due to the peculiarities of the human body and the specific nature of the disease³⁶ (e.g., such as disease progression, a latent course of illness, etc.),³⁷ due to the impossibility of guaranteeing recovery because of treatment-related outcomes,³⁸ or other similar reasons, and, on the other hand, due to the nature of the opinions issued by medical professionals themselves, which do not confirm a definite outcome of recovery.³⁹ Moreover, expert opinions tend to reflect a reluctance among physicians to criticize their colleagues, due to concerns about damaging professional relationships, reputational harm, or fear of potentially finding themselves in the position of a defendant in the future.⁴⁰ In assessing causation and examining the evidence, another problematic aspect is the frequent violation of the rules governing the maintenance of medical documentation.⁴¹

In order to establish causation, it is essential to answer the following questions: What would have happened if the physician had acted in accordance with the relevant standards? Would the undesired outcome still have occurred? What is the degree of probability – can it be proven with certainty, or are the chances of both outcomes equal? Does the statistical likelihood of a positive outcome, had appropriate medical intervention been provided, have substantial significance?

³⁴ *Wienke A.*, Errors and Pitfalls: Briefing and Accusation of Medical Malpractice – the Second Victim, German Society of Oto-Rhino-Laryngology, Head and Neck Surgery, 2013.

³⁵ *Heywood R.*, Systemic Negligence and NHS Hospitals: An Underutilized Argument, King's Law Journal, 2021, 3.

³⁶ *Makhatadze Sh.*, The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, Medical Law and Management Journal, № 1/2022, 36, 42 (In Georgian).

³⁷ *Gelashvili I.*, The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 27 (in Georgian).

³⁸ *Kvantaliani N., Rusiashvili G.*, The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, Georgian-German Journal of Comparative Law, 1/2022, 9 (in Georgian).

³⁹ *Bichia M.*, *The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects*, Justice and Law, №2 (70), 2021, 90 (in Georgian).

⁴⁰ *Seidelson D. E.*, Medical Malpractice Cases and the Reluctant Expert, Catholic University Law Review, Vol. 16, issue 2, 1966, 158-160.

⁴¹ *Bichia M.*, Peculiarities of Medical Torts in Georgian Judicial Practice, South Caucasus Law Journal, 09/2018- 2019, 227.

An ethical-legal dilemma arises when all other conditions for imposing liability are present, for example, the physician's fault is evident, and the damage is unquestionable – yet a direct link between the act (or omission) and the resulting harm cannot be established.

Depending on which protected legal interest has been infringed and what standard of compensation for damage is applied, various theories of causation are distinguished. In this regard, the approach differs not only between common law and civil law legal systems but also among individual countries within a given legal tradition. For example, Germany sets a particularly high standard in this context, requiring proof of causation with a high degree of probability (90% or more).⁴² Paragraph 630h of the German Civil Code regulates the scope of the burden of proof in cases of medical malpractice and failure to provide adequate information.⁴³ Within this framework, if a physician's omission is identified, the injured party must prove that the harmful outcome would have been avoided had appropriate medical action been taken.⁴⁴ However, if causation cannot be established, “the burden of proof shifts to the physician, who must demonstrate that the outcome would have been the same regardless of any medical intervention undertaken. [...] The issue of the physician’s liability is determined based on the extent to which they acted with gross negligence and whether they can prove that the deterioration of the patient’s health or death would have occurred in any case.”⁴⁵

Georgian judicial practice follows the German approach and likewise requires the establishment of causation with a high degree of probability (90% or more)⁴⁶. According to the interpretation of the Supreme Court of Georgia, “Compensation for damage caused by treatment may be granted only if the harm suffered by the individual was directly caused by an erroneous medical action, that is, if a causal link between the unlawful act and the resulting harm is clearly established. The fact that the damage was caused by the conduct of medical personnel must be proven with certainty. Unsuccessful treatment or an adverse treatment outcome does not, by itself (automatically), give rise to the liability of medical personnel.”⁴⁷ Georgia adheres to the theory of direct causation,⁴⁸ which is enshrined in the Civil Code and provides that compensation is granted only for damage that is the direct result of the injurious act.⁴⁹ In addition, special legislation also defines medical malpractice as actions undertaken by a physician that directly caused the damage.⁵⁰

⁴² Kadner Graziano T., Loss of a Chance in European Private Law – “All or nothing” or partial liability in cases of uncertain causation, In: Causation in Law. Lubos Tichy (Ed.). Prague: Univerzita Carlova, 2007, 141.

⁴³ German Civil Code (BGB), 10/08/2021, § 630 (h) (1), <https://www.gesetze-im-internet.de/englisch_bgb/index.html> [28.07.2025].

⁴⁴ Gujabidze N., Compensation for Damage Caused by a Doctor’s Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

⁴⁵ Gelashvili I., The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 49 (in Georgian).

⁴⁶ Makhataдзе Sh., The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor’s Omission, Medical Law and Management Journal, № 1/2022, 46 (In Georgian).

⁴⁷ Decision of January 22, 2016 № 36-1102-1038-2015 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

⁴⁸ Gelashvili I., The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 60 (in Georgian).

⁴⁹ Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997, Article 412.

⁵⁰ Law of Georgia on Health Care, Parliamentary Gazette, 47–48, 31/12/1997, Article 3, Subparagraph “n”.

In summary, under this model, if direct causation is established with a high degree of probability, the physician will be held liable and required to fully compensate the damage. However, if such causation cannot be established, then – regardless of fault – the physician is fully released from liability for compensating the damage.

3.1. The Traditional Theory of Causation

Traditionally, the assessment of causation relies on the “*Conditio Sine Qua Non*” (“a condition without which not”) formula, which evaluates whether the physician’s omission was a necessary precondition for the occurrence of the damage.⁵¹ However, this test is not always effective, as its scope is quite broad, and in order to meet its criteria, it must be established that the physician’s omission directly caused the damage – yet establishing such a direct link is often quite difficult.⁵² This approach is applied in Germany, and its analogue in common law countries is the so-called “but for” test, as both assess whether the defendant’s culpable act (or omission) was a necessary condition for the occurrence of the damage.⁵³

A classic example of the “but for” test is the court’s assessment in the case of *Barnett v Chelsea & Kensington Hospital Management Committee*, in which the court held that although there was negligence on the part of the medical service providers, since the patients were not given appropriate examinations, the level of poisoning at the time the patients arrived at the hospital was so severe that, even if the examinations had been conducted promptly, the fatal outcome could not have been avoided.⁵⁴ According to the “but for” test, but for the negligence of the medical service provider, the harmful outcome would still have occurred; therefore, no liability was established.

In common law, the “more likely than not” standard is applied, which is associated with the 1971 decision of the Supreme Court of Ohio in the case of *Cooper v. Sisters of Charity of Cincinnati, Inc.*, and concerns the determination of the probability of a chance of survival.⁵⁵ Even though it was evident that the hospital’s medical staff had a duty to treat the patient and that they failed to fulfill this duty due to fault, the key point for the court in reaching its decision was the causal connection between the cause of death and the negligent act committed.⁵⁶ The court relied on the expert opinion presented in the case, which indicated that even with appropriate and timely medical intervention, there was only a 50% probability of survival.⁵⁷ Given that even under proper medical intervention the patient’s chance of survival remained merely speculative and did not exceed a probability of 50%, the court did not establish liability on the part of the medical institution or its personnel.⁵⁸

⁵¹ *Rusiashvili G., Commentary on the Civil Code*, Book III, General Part of the Law of Obligations, 2019, Article 412, abs 3 (in Georgian).

⁵² *Ibid.*, abs 4.

⁵³ Stauch, Marc S., *Medical Malpractice and Compensation in Germany*, *Chicago-Kent Law Review*, Vol. 86, № 3, 2011, 1152.

⁵⁴ *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428.

⁵⁵ *Gujabidze N.*, *Compensation for Damage Caused by a Doctor’s Omission*, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

⁵⁶ *Cooper v. Sisters of Charity of Cincinnati, Inc.* (1971) 27 Ohio St. 2d 242.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

This decision is interesting in that the court considered the patient's chances of survival, and although this decision is far from the loss of chance doctrine, had a probability of survival exceeding 50% been established, it would have constituted a basis for liability.⁵⁹

When applying the above-mentioned approach to the assessment of causation, a critical issue arises from the fact that a doctor's conduct may reveal clear and gross negligence, which entails a heightened risk not only for the individual patient but also for future medical relationships in general, should it not be followed by the determination of appropriate liability measures.⁶⁰ As a result, a situation emerges in which a doctor breaches the duty of care, engages in grossly negligent conduct, and yet no liability is established. "The qualitative gradation of medical error, particularly when it is gross (inexcusable), should entail heightened liability for its occurrence. If we fully exempt a doctor from liability merely because the patient's likelihood of a favorable outcome was below 50%, would that not suggest that we are treating human life or health as a relative value? A person is equally valuable whether they have a 100%, 50%, or even lower chance of recovery. Every individual has the right to continue fighting for life, even for the slightest chance, through access to adequate medical treatment."⁶¹

The above-mentioned approaches are characterized by a highly rigid and radical stance toward liability and the scope of compensation. First and foremost, it must be emphasized that damage inflicted upon a person's life or health cannot be subjected to simple arithmetic, as such cases concern supreme and universally recognized values. Beyond this, it is particularly problematic when no liability is imposed on medical personnel in cases of gross negligence. Furthermore, the unequivocal imposition or complete exclusion of liability, without considering any intervening or contributing factors, on the one hand places an excessive burden, and on the other, creates an unjustified basis for exemption from liability. Given that liability is either fully established or entirely excluded, this approach is also known as the "all-or-nothing" model.⁶²

3.2. Loss of Chance Theory

In contrast, "the loss of chance doctrine is applied in courts when the doctor's fault is established, but a definitive causal link between the doctor's conduct and the harm suffered by the patient cannot be proven, because the damage may have resulted either from the incorrect diagnosis or from another cause, such as the permissible progression of the illness. In such cases, the challenge lies not only in establishing causation but also in determining the amount of damage."⁶³ This doctrine broadly interprets the scope of life and health as protected interests, and it considers the right to life to

⁵⁹ *Gelashvili I.*, The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 48-50 (in Georgian).

⁶⁰ *Gujabidze N.*, Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

⁶¹ *Ibid.*

⁶² *Makhatadze Sh.*, The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, Medical Law and Management Journal, № 1/2022, 47 (In Georgian).

⁶³ *Gelashvili I.*, The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 47 (in Georgian).

include, among other things, the right to fight for life, the right to attempt to preserve life by any means and through all available opportunities.⁶⁴ Accordingly, if it is difficult to prove causation between the act and the harm suffered, establishing that the patient lost a chance of recovery and/or survival becomes comparatively easier, that is, qualifying the lost chance as damage simplifies the burden of proof. Moreover, a chance may be regarded as damage if the lost opportunity is real and specific.⁶⁵ In addition, the loss of chance doctrine is significant in that it provides for compensation in proportion to the lost chance, that is, partially rather than fully,⁶⁶ specifically, “unlike the *conditio sine qua non* theory, under which the establishment of causation results in full compensation for the damage, the loss of chance doctrine requires that compensation be awarded in proportion to the missed opportunity and, typically, only partially.”⁶⁷

The introduction of the standard for deliberating on lost chances by U.S. courts is associated with the 1983 decision of the Washington Supreme Court in *Herskovits v. Group Health Cooperative of Puget Sound*, in which the court departed from the traditional principles of causation and evaluated the reduction in the patient’s chances of recovery caused by the medical personnel’s negligence.⁶⁸ According to the factual circumstances of the case, the patient had lung cancer, which was not diagnosed in a timely manner, resulting in a decrease in his chances of survival from 39% to 25%.⁶⁹ Under the standard approach, such as the one applied in the *Cooper* case discussed above, this case too would have excluded the doctors’ liability, since, despite the diagnostic shortcomings, the chance of survival was below 50%. However, the Washington Supreme Court held that, regardless of the percentage, the reduction in the patient’s chances of survival constituted damage. Accordingly, the court established a causal link between the negligence and the harm. A clearer and more substantive implementation of the loss of chance doctrine can be found in the 1996 decision of the Ohio Supreme Court in *Roberts v. Ohio Permanente Medical Group, Inc.*, in which the court ruled that the amount of compensation should be calculated proportionally to the percentage of the lost chance of survival, in simpler terms, the monetary value of the damage should be multiplied by the percentage representing the lost chance.⁷⁰

Among the civil law countries, the loss of chance doctrine is effectively applied in France, where it allows for the possibility of compensating the plaintiff even in cases where establishing a causal link is not possible.⁷¹ The chance of survival is considered a protected interest, and instead of

⁶⁴ *Gujabidze N.*, Compensation for Damage Caused by a Doctor’s Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

⁶⁵ *Gelashvili I.*, The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 62-63 (in Georgian).

⁶⁶ *Makhatadze Sh.*, The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor’s Omission, Medical Law and Management Journal, № 1/2022, 47-48 (In Georgian).

⁶⁷ *Gelashvili I.*, The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 47 (in Georgian).

⁶⁸ *Herskovits v. Group Health Cooperative of Puget Sound* (1983) 99 Wash. 2d 609.

⁶⁹ *Ibid.*

⁷⁰ *Roberts v. Ohio Permanente Medical Group, Inc.* (1996) 76 Ohio St. 3d 483.

⁷¹ *G'Sell-Macrez, F.*, Medical Malpractice and Compensation in France: Part I: the French Rules of Medical Liability since the Patients' Rights Law of March 4, 2002, Chicago-Kent Law Review, Vol. 86, № 3, 2011, 1114.

compensating for actual harm, proportional compensation is awarded for the deprivation of that chance.⁷² It is noteworthy that the loss of chance doctrine is not limited to medical law; rather, it encompasses compensation for the loss of any opportunity that could not be realized due to the unlawful and culpable conduct of the injuring party, regardless of the field. For example, compensation may be awarded for the loss of a career opportunity, income, recovery, and similar prospects.⁷³ Georgia has virtually no experience with this doctrine. However, in light of the need for the development of medical law, as well as to better promote the protection of patients' rights and to enable the rational distribution of compensation, it would be desirable for Georgian judicial practice to also apply this doctrine in the resolution of medical (and potentially non-medical) cases.

It should be noted that the loss of chance doctrine represents a fairer approach to decision-making due to several advantages. First, it eases the burden of proof, and within the scope of the right to life, it also recognizes the right to fight for the preservation of life as a protected interest. It must be taken into account that the doctrine facilitates compensation for the injured party by not entirely excluding the possibility of redress; at the same time, since causation is not definitively established, it does not impose the full burden of compensation on the injuring party. This renders it the most rational and equitable approach, as "a fair resolution of the issue means not only protecting the injured party but also ensuring appropriate accountability for the injurer."⁷⁴

In some cases, the court no longer examines the prerequisites of causation if the defendant's conduct clearly increased the risk of harm and deprived the patient of a substantial chance of achieving a better outcome, regardless of the result that ultimately occurred.⁷⁵

4. Burden of Proof

In medical disputes, the burden of proof generally lies with the plaintiff, who must prove not only the occurrence of harm but also that the doctor acted negligently and that the harm resulted from that negligence. In addition to the inherent difficulty of establishing causation in such cases, the plaintiff's burden is further exacerbated by the fact that, unlike the medical service provider, the patient lacks the relevant professional knowledge.

In practice, there are doctrines that serve to ease the burden of proof:

In common law, there is a well-established doctrine known as *Res Ipsa Loquitur*, which shifts the burden of proof to the injuring party. Under this doctrine, the defendant's negligence is presumed unless they themselves prove otherwise.⁷⁶ This doctrine requires the cumulative presence of three elements: "1. The accident is such that it would not ordinarily occur unless someone were negligent; 2.

⁷² Gelashvili I., The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 54 (in Georgian).

⁷³ Gujabadze N., Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

⁷⁴ Gelashvili I., The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 63 (in Georgian).

⁷⁵ *Herskovits v. Group Health Cooperative of Puget Sound* (1983) 99 Wash. 2d 609.

⁷⁶ Pepanashvili N., *The Presumption of Fault of the Medical Service Provider in the Civil Code of Georgia*, *Journal of Law*, № 2, 2016, 126-128 (in Georgian).

The instrumentality which caused the accident was under the control of the defendant; and 3. The plaintiff in no way contributed to the accident.”⁷⁷

The presumption of the defendant's fault also serves to ease the burden of proof, and this will be examined below in the context of the Georgian legal framework.

For its part, the burden of proof for the medical service provider is significantly eased by the proper maintenance of medical documentation in accordance with established procedures, as the adequate performance of procedures may be confirmed through the submitted documentation.⁷⁸ Such documentation includes both material and electronic medical records, as well as any written information that forms part of the patient's medical history.

Within the framework of comparative analysis, it should be noted that Germany recognizes the possibility of shifting the burden of proof and acknowledges the concept of gross treatment error. This refers to an unjustifiable error that manifests in a clear violation of established treatment standards, and in such cases, the burden of proof shifts to the defendant.⁷⁹

5. Georgian Legal Framework and Judicial Practice

Under Georgian legislation, the norm that gives rise to a doctor's duty to treat a patient is found in the Law of Georgia on Healthcare, which links the obligation to provide medical assistance either to an agreement or to an emergency situation.⁸⁰ According to the same law, “liability for the deterioration of a patient's physical or mental condition, or for death, caused by the actions or omissions of healthcare personnel, as well as for moral or material damage inflicted on the patient, shall be determined in accordance with the legislation of Georgia.”⁸¹ The grounds for liability defined by legislation are established by the Civil Code of Georgia, which provides that “damage caused to a person's health during treatment in a medical institution (such as the outcome of a surgical operation or a result arising from an incorrect diagnosis, etc.) shall be compensated on general grounds. The injuring party shall be released from liability if they prove that they were not at fault for the occurrence of the damage.”⁸² Article 1007 of the Civil Code of Georgia constitutes a special provision governing compensation for damage caused by a medical institution. It is important to evaluate the several prerequisites established under this article:

a) The provision refers to damage caused during treatment in a medical institution. In this regard, an important question arises: does the article apply exclusively to treatment provided within a hospital setting, or does it also encompass any action or omission by medical personnel outside the hospital? Judicial practice indicates that the granting of compensation is not limited solely to damage inflicted during treatment within a medical institution. However, to avoid misinterpretation, legal

⁷⁷ Mackey W. R., Torts – Res Ipsa Loquitur in Malpractice Cases, the Superior Knowledge Factor, UC Law Journal, Vol. 9, issue 3, 1958, 322.

⁷⁸ Bichia M., *The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects*, Justice and Law, №2 (70), 2021, 91 (in Georgian).

⁷⁹ Wienke A., Errors and Pitfalls: Briefing and Accusation of Medical Malpractice – the Second Victim, German Society of Oto-Rhino-Laryngology, Head and Neck Surgery, 2013.

⁸⁰ Law of Georgia on Health Care, Parliamentary Gazette, 47–48, 31/12/1997, Article 38, paragraph 1.

⁸¹ Ibid, article 103.

⁸² Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997, Article 1007.

scholarship has suggested that the wording of the article be revised, replacing “treatment” with “medical assistance”, in order to eliminate this ambiguity. Such a revision would broaden the scope of the provision by focusing on the subject providing medical assistance, regardless of the location of the service, and would also render the non-exhaustive list in parentheses unnecessary.⁸³

b) Article 1007 of the Civil Code is also noteworthy from the perspective of the burden of proof, as it establishes a presumption of fault on the part of the medical service provider.⁸⁴ Specifically, it states that liability shall not arise only if the injuring party proves that they were not at fault for the occurrence of the damage.⁸⁵ In this regard, it is noteworthy that, despite the uniform content of the provision, judicial practice has developed in a rather inconsistent manner. Courts have, for the most part, not embraced the presumption of fault on the part of the medical service provider, and the burden of proof has often been shifted onto the injured party. However, in recent years, a shift in this approach has become evident. For example, in its 2010 decision, the Supreme Court of Georgia stated the following regarding the presumption of fault: “due to the specific nature of the relationship between the patient and the doctor, the doctor is liable only for an erroneous medical action, and a presumption of fault does not apply to their professional activity.”⁸⁶ In its recent practice, the Supreme Court deliberated on the purpose of the presumption and its relationship⁸⁷ to the allocation of the burden of proof as defined by the Civil Procedure Code,⁸⁸ stating: “The purpose of a presumption in law is to pre-determine which party to a legal relationship is in a better position to objectively prove a particular fact. By introducing a presumption, the legislator protects a party to a legal relationship from bearing an insurmountable burden of proof and, for this purpose, establishes a standard of proof. Accordingly, it is presumed that harm to the patient’s health was caused through the fault of the medical institution, and the burden of disproving this lies with the medical institution. [...] Therefore, the defendant’s fault is presumed until the defendant proves otherwise.”^{89/90} Legal scholarship has put forward the recommendation that it may be justified to incorporate a presumption of fault into Article 992 of the Civil Code and to reinforce it within the disposition of the general provision governing tort liability.⁹¹

⁸³ Bichia M., *The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects*, Justice and Law, №2 (70), 2021, 88-89 (in Georgian).

⁸⁴ Pepanashvili N., *The Presumption of Fault of the Medical Service Provider in the Civil Code of Georgia*, Journal of Law, № 2, 2016, 126-128 (in Georgian).

⁸⁵ However, this does not preclude the injured party’s ability to present evidence in order to establish the fault of the medical institution. Bichia M., *The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects*, Justice and Law, №2 (70), 2021, 91 (in Georgian).

⁸⁶ Decision of May 25, 2010 №სბ-1268-1526-09 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

⁸⁷ Pepanashvili N., *Compensation for Damage Caused by a Medical Institution*, Dissertation, Tbilisi, 2016, 160-161 (in Georgian).

⁸⁸ Civil Procedure Code of Georgia, Parliamentary Gazette, 47–48, 31/12/1997, Article 102, Paragraph 1.

⁸⁹ Decision of November 17, 2022 № სბ-1169-2022 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

⁹⁰ Decision of June 19, 2024 № სბ-45-2024 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

⁹¹ Pepanashvili N., *The Presumption of Fault of the Medical Service Provider in the Civil Code of Georgia*, Journal of Law, № 2, 2016, 129 (in Georgian).

c) It is also necessary to assess whether the disposition of the provision encompasses cases of omission. In this regard, it should be noted that the norm is general in nature and applies to cases of treatment. Moreover, the list of types of damage does not specifically distinguish between harm caused by action or omission, nor is it exhaustive. Therefore, Article 1007 of the Civil Code applies to damage caused by omission as well.⁹²

This provision, in turn, refers to the general elements of a tort⁹³ and, accordingly, to the emergence of the obligation to compensate for damage caused by an unlawful, intentional, or negligent act.⁹⁴ It is necessary to assess whether the prerequisites for compensation are the same in cases of damage caused by action and by omission, or whether differences exist between the two.⁹⁵

It should be noted that Georgian legislation does not provide a definition of omission. As for medical error, the Law of Georgia on Healthcare defines erroneous medical action as “the unintentional performance by a physician of diagnostic and/or therapeutic measures that are inappropriate for the patient’s condition and that directly⁹⁶ caused the inflicted harm.”⁹⁷ It is noteworthy that the provision does not explicitly refer to omission; such reference is merely implied. Therefore, for greater clarity, it would be desirable for the provision to be expanded to include an explicit reference to omission.⁹⁸

The patient is entitled to “apply to the court and request compensation for pecuniary or non-pecuniary damage caused by an erroneous medical action.”⁹⁹

In order for damage caused by a doctor’s omission to be compensable, the following cumulative conditions must be evident from the circumstances of the case: “1. the doctor must have a duty to treat; 2. that duty must have been breached (unlawfulness); 3. the breach must have resulted in harm (damage); 4. the harm would have been avoidable had the doctor acted (causal link in omission); and 5. the medical personnel must have had the ability to act and fulfill their obligation without delay (absence of exculpatory circumstances).”¹⁰⁰

Duty to Treat

As noted, under Georgian legislation, a doctor’s duty to treat arises if there is a contractual relationship or if the patient is in a life-threatening condition or a condition requiring emergency

⁹² *Gujabidze N.*, Compensation for Damage Caused by a Doctor’s Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

⁹³ *Bichia M.*, Peculiarities of Medical Torts in Georgian Judicial Practice, South Caucasus Law Journal, 09/2018 – 2019, 231.

⁹⁴ Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997, Article 992.

⁹⁵ *Makhatadze Sh.*, The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor’s Omission, Medical Law and Management Journal, № 1/2022, 36 (In Georgian).

⁹⁶ The special norm establishes direct causation and specifies that the direct cause of the damage must be the medical error. *Gelashvili I.*, The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 60 (in Georgian).

⁹⁷ Law of Georgia on Health Care, Parliamentary Gazette, 47–48, 31/12/1997, Article 3, subparagraph “n”.

⁹⁸ *Gujabidze N.*, Compensation for Damage Caused by a Doctor’s Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

⁹⁹ Law of Georgia on the Rights of Patients, LHG, № 19, 25/05/2000, Article 10.

¹⁰⁰ *Makhatadze Sh.*, The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor’s Omission, Medical Law and Management Journal, № 1/2022, 36 (In Georgian).

assistance. The doctor may refuse to provide such assistance only if it is established that the patient will continue to receive uninterrupted medical care, if the patient no longer requires emergency assistance, or if the doctor's own life is at risk.¹⁰¹

Fault

For damage to be compensable, it must be established that the harm resulted from the culpable action or omission of the medical service provider. It should be noted that intentional harm to a patient is not a common occurrence; in this regard, negligence must be assessed, which may be manifested by the doctor through a breach of either internal or external standards of attentiveness.¹⁰²

Damage

Damage is compensable only if the unlawful conduct of medical personnel, specifically, a medical error manifested in an omission, results in a deterioration of the patient's condition or in some specific harm,¹⁰³ which must be the direct consequence of the breach of duty.¹⁰⁴

Causality

Georgian law is characterized by the theory of adequate causation, the legislative standard for which is codified in Article 412 of the Civil Code of Georgia. According to this provision, "only such damage shall be subject to compensation that was foreseeable for the obligor in advance and constitutes the direct result of the act causing the damage"¹⁰⁵ and which is interpreted in Georgian judicial practice as follows:

"According to the theory of adequate causation, a single condition may be sufficient to qualify as the cause of the outcome, if it creates the objective possibility of that outcome occurring. That is, in establishing causation, decisive importance must be given to the existence of an objective connection between events, and to the fact that the link between cause and effect matters only in the specific case at hand. A person's unlawful act constitutes the cause of damage only when it is directly connected to the harm that occurred."¹⁰⁶ The practical application of this theory entails assessing whether the doctor could have prevented the harm through the provision of proper medical care.

Justifying the causal link, which is a fundamental element of a tort, lies with the plaintiff according to Georgian judicial practice.¹⁰⁷

¹⁰¹ *Ibid*, 38.

¹⁰² *Kvantaliani N., Rusiashvili G.*, The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, *Georgian-German Journal of Comparative Law*, 1/2022, 10 (in Georgian).

¹⁰³ Decision of July 26, 2019 № სბ-645-2019 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

¹⁰⁴ Decision of June 27, 2011 № სბ-260-244-11 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

¹⁰⁵ Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997, Article 412.

¹⁰⁶ Decision of October 13, 2021 № სბ-960-2020 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

¹⁰⁷ Decision of May 11, 2018 № სბ-111-111-2018 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

Exemptions from Liability

In order to determine a claim for compensation, it is also necessary to assess whether there are any circumstances that exclude the physician's liability. A distinction is made between subjective factors (related to the personality of the actor or the injured party) and objective factors (force majeure) that exempt from civil liability.¹⁰⁸ The Civil Code of Georgia takes into account the fault of the injured party in the occurrence of the damage, in which case "the obligation to compensate for the damage and the extent thereof depend on whose fault was more decisive in causing the damage."¹⁰⁹ An example of this may be a case where the patient fails to follow the prescribed treatment, resulting in the deterioration of their health condition.

Among the objective factors, special attention should be given to circumstances beyond the control of the healthcare provider that independently contributed to the occurrence of the damage.¹¹⁰ For example, an increase in demand for medical services due to a pandemic, which in turn leads to overcrowding in emergency departments and delays in the provision of medical care.

The low rate of medical dispute claims in Georgia may be explained by the complex burden of proof imposed on the injured party and the rigid policy regarding the determination of the amount of compensation.¹¹¹ Court proceedings are inherently associated with costs – especially in the field of medical law, where, due to the specific nature of the discipline, it becomes necessary to engage independent professionals and base judicial decisions on their expert opinions. It is crucial that legislation and judicial practice be revised in a way that facilitates the rational and fair resolution of medical disputes, so as to ensure the effective realization of the constitutionally guaranteed right to a fair trial.¹¹²

6. Conclusion

Medical law in Georgia is still in the process of development; therefore, it is not surprising that it is "characterized by unacceptable extremes and an uncertain outlook."¹¹³ An analysis of court practice related to medical disputes reveals that the approaches of the adjudicating bodies are inconsistent.

The legal norms and case law governing compensation for damage caused by a physician's omission have been analyzed in this paper.

As a result of the legal analysis, it has been revealed that the legislative provisions regulating medical torts in Georgia are deficient and require amendments to ensure greater clarity and practical applicability by the courts.

¹⁰⁸ *Bichia M.*, The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, Justice and Law, №2 (70), 2021, 94 (*in Georgian*).

¹⁰⁹ This also includes the patient's omission, where the patient could have avoided the damage through appropriate action. Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997, Article 415.

¹¹⁰ Art. 7.1.(7) UNIDROIT Principles 2016.

¹¹¹ *Makhatadze, Sh.*, Regulation of Physician's Liability for Medical Error under Georgian Legislation, Journal of Medical Law and Management, № 3(6), 2024, pp. 56–57 (*in Georgian*).

¹¹² Constitution of Georgia, Parliamentary Gazette, 31-33, 24/08/1995, Article 31.

¹¹³ *Kvantaliani N., Rusiashvili G.*, The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, Georgian-German Journal of Comparative Law, 1/2022, 1 (*in Georgian*).

It has also been identified that case law lacks consistency in determining the burden of proof – an issue that should itself be clarified through judicial practice. While recent trends indicate movement in this direction, a stable standard has not yet been established.

As for the determination of causation in the context of compensating damage resulting from a physician's omission, this represents one of the most significant challenges not only for Georgia, but globally. There is no clear guideline for addressing this issue, and the choice of approach largely depends on the internal standards of each state, which leads to differing outcomes. In this regard, it is important to note that the selection of the applicable theory of causation is primarily within the discretion of the courts, and it would be desirable for Georgian courts to adopt and implement the lost chance doctrine in practice.

Resolving the issues arising within the field of medical law is of paramount importance, as already noted at the beginning of this paper, it is a branch that governs relationships involving fundamental values such as human life and health. A citizen's right to accessible and high-quality health care is a value enshrined in the Constitution.¹¹⁴ On the other hand, it must not be overlooked how deficiencies in the regulation of medical liability can negatively impact the integrity of the medical profession.

The limited practice of medical dispute litigation in Georgian courts does not indicate a low incidence of medical errors, but rather suggests that injured parties are not turning to the judiciary to restore their violated rights. This may be explained by the fact that the existing legislation fails to provide adequate guarantees for their protection.¹¹⁵

It is essential for the state to establish a legal framework that safeguards patients' interests by reinforcing the highest standards of health care.

Bibliography:

1. Constitution of Georgia, Parliamentary Gazette, 31-33, 24/08/1995.
2. Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997.
3. Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 31/12/1997,
4. Law of Georgia on Health Care, Parliamentary Gazette, 47-48, 31/12/1997.
5. Law of Georgia on the Rights of Patients, LHG, № 19, 25/05/2000.
6. UNIDROIT Principles of International Commercial Contracts 2016.
7. German Civil Code (BGB), 10/08/2021.
8. Bichia M., The Concept of Medical Law and Its Place in the Legal System, Law and the World, Vol. 9, № 28, 2023, 82 (In Georgian).
9. Bichia M., The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, Justice and Law, №2 (70), 2021, 88-91, 94 (in Georgian).
10. Bichia M., Peculiarities of Medical Torts in Georgian Judicial Practice, South Caucasus Law Journal, 09/2018- 2019, 226, 227, 231.

¹¹⁴ Constitution of Georgia, Parliamentary Gazette, 31-33, 24/08/1995, Article 28.

¹¹⁵ *Makhatadze, Sh.*, Regulation of Physician's Liability for Medical Error under Georgian Legislation, Journal of Medical Law and Management, № 3(6), 2024, pp. 56-57 (in Georgian).

11. Davies C. E., Shaul R.Z., Physicians' Legal Duty of Care and Legal Right to Refuse to Work During Pandemics, *Canadian Medical Association Journal (CMAJ)*, Vol. 182, № 3, 2010, 320-321.
12. Fletcher M. T., Standard of Care in Legal Malpractice, *Indiana Law Journal* 43, №3, 1968, 773.
13. G'Sell-Macrez, F., Medical Malpractice and Compensation in France: Part I: the French Rules of Medical Liability since the Patients' Rights Law of March 4, 2002, *Chicago-Kent Law Review*, Vol. 86, № 3, 2011, 1114.
14. Gelashvili I., The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 27, 47-50, 54, 60, 63 (in Georgian).
15. Gujabidze N., Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).
16. Hayward R., Asch S. M., Hogan M. M., Hofer T. P., Kerr E.A., Sins of Omission: Getting too Little Medical Care May be the Greatest Threat to Patient Safety, *Journal of General Internal Medicine*, Vol. 20, № 1, 2005, 35.
17. Heywood R., Systemic Negligence and NHS Hospitals: An Underutilized Argument, *King's Law Journal*, 2021, 3.
18. Kadner Graziano T., Loss of a Chance in European Private Law – "All or nothing" or partial liability in cases of uncertain causation, In: *Causation in Law*. Lubos Tichy (Ed.). Prague: Univerzita Carlova, 2007, 141.
19. Kass J., Rose R. V., Medical Malpractice Reform: Historical Approaches, Alternative Models, and Communication and Resolution Programs, *AMA Journal of Ethics*, Vol. 18, № 3, 299.
20. Kvantaliani N., Rusiashvili G., The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, *Georgian-German Journal of Comparative Law*, 1/2022, 1, 8-10 (in Georgian).
21. Kropholler J., German Civil Law Code, Darjania T., TcheTchelashvili Z. (trans.), Chachanidze E., Darjania T., Tortladze L. (eds.), 13th ed., Tbilisi, 2014, § 823, abs 21 (in Georgian).
22. Liddell K., Skopek J. M., Gallez I., Fritz Z., Differentiating Negligent Standards of Care in Diagnosis, *Medical Law Review*, 2022, Vol. 30, № 1, 34.
23. Mackey W. R., Torts – Res Ipsa Loquitur in Malpractice Cases, the Superior Knowledge Factor, *UC Law Journal*, Vol. 9, issue 3, 1958, 322.
24. Makhatadze, Sh., Regulation of Physician's Liability for Medical Error under Georgian Legislation, *Journal of Medical Law and Management*, № 3(6), 2024, pp. 56–58 (in Georgian).
25. Makhatadze Sh., The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, *Medical Law and Management Journal*, № 1/2022, 36, 38, 41, 42, 45-48 (In Georgian).
26. Merry A., McCall Smith A., *Errors, Medicine and the Law*, Cambridge University Press, UK, 2001, 176-177.
27. Mistic Radanovic N., Vukusic I., Causation in Medical Malpractice, *EU and Comparative Law Issues and Challenges Series 4*, 2020, 778.
28. Pepanashvili N., The Presumption of Fault of the Medical Service Provider in the Civil Code of Georgia, *Journal of Law*, № 2, 2016, 121-122, 126-129 (in Georgian).
29. Pepanashvili N., Compensation for Damage Caused by a Medical Institution, Dissertation, Tbilisi, 2016, 160-161 (in Georgian).

30. Rusiashvili G., Commentary on the Civil Code, Book III, General Part of the Law of Obligations, 2019, Article 412, abs 3 (in Georgian).
31. Stauch M., Wheat K., Text, Cases and Materials on Medical Law and Ethics, fourth edition, Routhledge, USA and Canada, 2012, 22.
32. Stauch, Marc S., Medical Malpractice and Compensation in Germany, Chicago-Kent Law Review, Vol. 86, № 3, 2011, 1152.
33. Seidelson D. E., Medical Malpractice Cases and the Reluctant Expert, Catholic University Law Review, Vol. 16, issue 2, 1966, 158-160.
34. Suri S., Action, Affiliation, and a Duty of Care: Physicians' Duty of Care in Nontraditional Settings, Fordham Law Review, Vol. 89, № 2, 2020, 307.
35. Todorovski N., Medical Law and Health Law – Is it the Same?, Medical Law and Ethics Journal, Vol. 18, № 2, 2018, 34
36. Wienke A., Errors and Pitfalls: Briefing and Accusation of Medical Malpractice – the Second Victim, German Society of Oto-Rhino-Laryngology, Head and Neck Surgery, 2013.
37. Bolam v Friern Hospital Management Committee [1957] 1 W.L.R 582.
38. Bolitho v City and Hackney Health Authority [1998] A.C. 232.
39. Barnett v Chelsea & Kensington Hospital [1969] 1 QB 428.
40. Cooper v. Sisters of Charity of Cincinnati, Inc. (1971) 27 Ohio St. 2d 242.
41. Herskovits v. Group Health Cooperative of Puget Sound (1983) 99 Wash. 2d 609.
42. Roberts v. Ohio Permanente Medical Group, Inc. (1996) 76 Ohio St. 3d 483.
43. Montgomery v Lanarkshire Health Board [2015] UKSC 11.
44. Decision of June 19, 2024 № სბ-45-2024 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).
45. Decision of November 17, 2022 № სბ-1169-2022 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).
46. Decision of October 13, 2021 № სბ-960-2020 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).
47. Decision of July 26, 2019 № სბ-645-2019 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).
48. Decision of May 11, 2018 № სბ-111-111-2018 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).
49. Decision of February 24, 2017 № სბ-1206-1166-2016 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).
50. Decision of January 22, 2016 № სბ-1102-1038-2015 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).
51. Decision of June 27, 2011 № სბ-260-244-11 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).
52. Decision of May 25, 2010 № სბ-1268-1526-09 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

Giorgi Kiria*

Defamation as an Illegitimate Source of Income

Defamation as an illegitimate source of income has proven to be a highly problematic issue, highlighting its ongoing relevance. There is a notable lack of Georgian-language literature and academic articles addressing defamation. Drawing upon foreign legislation and analytical materials, it is evident that there is a substantial difference between defamation and slander. Notably, this distinction has largely been lost in Georgia following the decriminalization of slander, which has effectively equated the terms defamation and slander in common usage.

It is important to comprehend the significance of slander as a criminal offense. Although its decriminalization in Georgia has strengthened the right to freedom of speech and expression, the resulting disregard for restricting the dissemination of information that violates an individual's honor and dignity is unacceptable.

This academic article aims to explore the nature of defamation as a basis for considering income illegitimate and to offer the author's perspective on potential solutions. The subject of the research includes the legal nature of defamation as an illegitimate source of income, along with relevant doctrines and judicial practices.

The methodology of the paper is primarily doctrinal, employing the following criminological research methods: documentary analysis; comparative legal analysis; descriptive method; historical-legal approach; and a systematic method.

Keywords: *defamation, slander, illegitimate income, honor, dignity, professional reputation.*

1. Introduction

Defamation as an illegitimate source of income presents significant theoretical and practical challenges. The topic selected for this academic paper addresses an increasingly pressing issue. As is well known, the advancement of technology and the expansion of the internet in the 21st century have heightened the risks of violating individual honor and dignity. Appeals to the right to freedom of speech and expression are sometimes used to justify significant harm to a person's reputation, which may culminate in the classification of income as illegitimate.

In Georgia, where scholarly work in this area is limited but legal disputes are numerous, there is a clear need for thorough research on defamation as a basis for illegitimate income. Terminologically, since the decriminalization of slander, the distinction between defamation and slander has largely disappeared – unlike in countries such as France and Germany. This blurred distinction gives rise to continuous debate, underlining the issue's relevance.

* PhD student at the Faculty of Law of Ivane Javakhishvili Tbilisi State University, visiting lecturer at the educational organization "Seekers of Knowledge", and invited lecturer at the Student Parliament of Georgia.

When violations of an individual's honor and dignity occur, several key questions arise:

- What constitutes defamation?
- What is the difference between defamation and slander?
- What factors contribute to harm to honor and dignity?
- Can any legal interest outweigh a person's right to honor and dignity?
- To what extent can defamation be considered a basis for classifying income as illegitimate?
- Is there equal legal treatment of public and private persons in defamation cases?
- What are the criteria for qualifying an act as defamation?
- How is defamation treated in foreign jurisdictions?
- What is the stance of Georgian courts on defamation?

This article attempts to address these questions through a review of both foreign and limited Georgian academic literature, as well as a systematic analysis of substantial domestic and international case law.

The research seeks to analyze the nature of defamation as a legal basis for determining income as illegitimate and to propose original solutions to existing problems.

The study is doctrinal in nature and applies the following criminological research methods:

1. **Documentary Method** – for processing specialized legislation, literature, and analytical materials;
2. **Comparative Legal Method** – for examining the interplay between different legal systems and institutions;
3. **Descriptive Method** – for characterizing the legal mechanisms of defamation as a source of illegitimate income;
4. **Historical-Legal Method** – for tracing the development of legal norms and rules over time;
5. **Systematic Method** – for analyzing judicial practice and the theoretical principles of legal norms.

Additionally, the study utilizes field research methods, such as interviews.

Structurally, the paper is divided into five main sections and subsections. The first section introduces the topic. The second discusses the place of defamation within the legal system. The third presents foreign case law regarding the publication of information that harms an individual's honor and dignity. The fourth outlines the types of damage resulting from defamatory statements and the available legal remedies. The fifth examines the role of defamation in social media. The article concludes with a summary and a list of references.

2. The Role of Defamation in the Legal System

2.1. The Terminological Significance of Defamation from Antiquity to the Present Day

The term *defamation* originates from the Latin word *diffamare*, meaning “to spread rumors” or “to tarnish someone's name.”¹ In modern usage, the term *defamation* is commonly employed to

¹ Amerasinghe, A. Ranjit B., *Defamation in the Law of South Africa and Ceylon* (H.W. Cave, Colombo 1969) 43-44.

describe acts of slander. Such acts may be carried out through verbal abuse or various forms of insinuation. Methods of slander can be both physical and psychological in nature and are almost always aimed at silencing or even socially and politically destroying the targeted individual. The widely recognized phenomenon of “bullying” is often characterized by public defamation.²

Defamation played a notable role in Greek and Roman literature and frequently caused significant damage to individuals’ reputations. In Greek literature, defamation was summarized by Liberman, who, in his lexicographic entry “On Greek Invective,” examined defamatory content in texts such as iambic poetry, satire, Old Comedy, and courtroom speeches of Attic orators.³ Similarly, Koster explored other genres associated with defamation, including satire, epigrams, and epodes.⁴

In the history of Georgian law, defamation and its definition are reflected in the legal code of Bagrat Kurapalates, specifically Article 120 of the Beka-Aghbugha Code:

“Defamation and slander are as follows: if one falsely accuses an innocent man, and rumors spread as a result, and the accusation is made out of enmity, he must swear an oath – if he refuses, he must pay blood money.”

According to this norm, the legislator considered false accusation (slander) as part of the broader concept of defamation. The offender, in such cases, was punished by paying compensation equivalent to blood money. Hence, defamation essentially refers to falsely attributing wrongdoing to another person without substantiation.⁵

Using the historical-legal method, the paper examines the evolution of the concept of defamation from antiquity to modern times, analyzing both its origins and development stages. This includes consideration of early Georgian legal monuments that provide insight into how defamation was regulated and punished in historical legal systems.

2.2. The Nature and Importance of Defamation as the Dissemination of Statements Harmful to Honor and Dignity

Legislative regulation of defamation is found in subparagraph (e) of Article 1 of the Law of Georgia on Freedom of Speech and Expression, which defines defamation as a statement that contains a substantially false fact, is damaging to a person, and harms their reputation.⁶ The law clearly distinguishes between defamation against a private individual and that against a public figure.⁷

In the realm of social media, defamation may take various forms – either written or oral – and is commonly disseminated through posts or video content.⁸ In such cases, the first step is to determine

² *Siegfried J.*, Sprachliche Gewalt gegenüber Minderheiten: Formen der sprachlichen Diffamierung in den Medien und im politischen Diskurs. In: *Der Deutschunterricht.*, Bd. 59, H. 5, 2007, 11–21.

³ *Liebermann* 1998, 1050. *Nisbet*, 1961, 192.

⁴ *Koster* 1980.38. *Opelt* (1965) 13.

⁵ *Surguladze I.*, “History of Georgian Law” 2014, 112.

⁶ Paragraph “e” of Article 1 of the Law of Georgia “On Freedom of Speech and Expression”. (In Georgian)

⁷ *Brosius H., Dirk E.*, The Causes of Third-Person Effects: Unrealistic Optimism, Impersonal Impact, or Generalized Negative Attitudes Towards Media Influence?, 8(2) *International Journal of Public Opinion Research*, 1996, 142.

⁸ *Arend P.S.*, Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay be Defamatory? 18 *North Illinois University Law Review*, 1997, 99.

the legal status of the person targeted by the defamatory statement – namely, whether the information concerns a private or a public person.⁹

According to subparagraph (k) of Article 1 of the same law, a *private person* is defined as a natural or legal person who is not a public official or an administrative body. In contrast, subparagraph (i) defines a *public person* as someone who:¹⁰

- Holds a position defined by Article 2 of the Law of Georgia on the Fight Against Corruption;¹¹
- Whose decisions or opinions have a significant influence on public life; or
- Who, by virtue of certain actions, has drawn public attention to specific issues.¹²

In cases involving defamation of a private person, the defendant bears civil liability only if the plaintiff proves in court that the defendant's statement contained a substantially false fact about the plaintiff and that this statement caused them harm – such harm may include unjust or illegitimate income resulting from the dissemination.¹³

In cases involving defamation of a public figure, civil liability arises if the plaintiff proves that the defendant's statement involved a substantially false fact about them, caused them harm, and – crucially – that the defendant either knew the statement was false or exhibited gross negligence in verifying the information, thereby enabling the dissemination of a false and damaging statement.¹⁴

2.3. Similarities and Differences Between Defamation and Slander

The Latin term *diffamatio* is generally understood to mean the dissemination of a voice or the disclosure of a secret – more specifically,¹⁵ the public spread of fabricated or discriminatory information through the mass media targeting a specific individual or group of individuals.¹⁶ While defamation is closely related to slander, the two differ in two principal aspects:

1. Medium of Dissemination:

Defamation involves the disclosure of shameful or humiliating facts, specifically through the media. In contrast, slander may be committed not only via the media but also through verbal expressions, written communication, or other non-media-related forms.

⁹ Zimmermann R., Whittaker S., Good Faith in European Contract Law. Cambridge: Cambridge University, 2000, 87.

¹⁰ Paragraph “k” of Article 1 of the Law of Georgia “On Freedom of Speech and Expression”. (In Georgian)

¹¹ Paragraph “i” of Article 1 of the Law of Georgia “On Freedom of Speech and Expression”. (In Georgian)
¹² <<https://matsne.gov.ge/ka/document/view/33208?publication=7>> [15.06.2025].

¹³ Balkin R., Davis J., Law of Torts, 4th edn, LexisNexis 2008, Bezanson, Randall P. and Kathryn L. Ingle, Plato's Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law, 90(3) Dickinson Law Review, 1986, 585.

¹⁴ Arend P.S., Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay be Defamatory?, 18 North Illinois University Law Review, 1997, 99.

¹⁵ Rivard A., De l Calvert, Clay, Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique, 1995, 16 The Northern Illinois University Law Review 111. a liberté de la presse. Montréal: Garneau, 1923, 125, 67.

¹⁶ Calvert C., Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique, 16 The Northern Illinois University Law Review, 1995, 111.

2. Truthfulness of the Statement:

In defamation, the offense lies in the act of revealing humiliating facts – regardless of whether the disclosed information is true.¹⁷ Slander, by contrast, is generally characterized as the intentional dissemination of falsehoods and fabricated stories.¹⁸

In the context of defamation, the act may involve the spread of seemingly trivial gossip, which – unlike slander – may contain elements of truth. However, the decisive factor is that defamation damages a person's reputation through words, writings, or gestures in the media that provoke scorn, ridicule, hatred, or contempt.¹⁹

According to Professor J. Pinault²⁰, defamation can be classified into three categories:²¹

1. When one speaks or writes unpleasant or unfavorable things about another person with the awareness that the statement is false;
2. When one speaks or writes such things, although they *should* know they are false;
3. When one publicizes such statements about another without a legitimate or honorable reason.²²

In order for a communicated statement not to be classified as defamation, the information must be **truthful** and disclosed **for a legitimate reason**.²³

From a doctrinal legal research perspective, it can be argued that while defamation and slander are similar in that they both involve the dissemination of reputation-damaging information, they diverge in terms of their nature and legal elements. The distinction lies primarily in the *form of expression* and the *truth-value* of the statement involved.

An important and thought-provoking question remains: **Has this conceptual distinction between defamation and slander been properly internalized in Georgian judicial practice?**

2.4. Definition of Honor, Dignity, and Business Reputation

When addressing the issue of defamation – i.e., the public dissemination of reputation-damaging information²⁴ – it is essential to define the concepts of *honor*, *dignity*, and *business reputation*, in order to accurately determine whether a given statement constitutes defamatory content.²⁵

Article 9 of the Constitution of Georgia proclaims the *inviolability of human dignity*.

¹⁷ Pineau J., *Monique*, Théorie de la responsabilité civile. 2e éd. Montréal: Éd. Thémis, 1980. 237, 62.

¹⁸ Fricke G. L., The Criterion of Defamation, 32 Australian Law Journal, 1958, 7.

¹⁹ Vallières N., La presse et la diffamation: rapport soumis au ministère des Communications du Québec. Montréal: Wilson & Lafleur, 1985, 138, 6-8, 10, 49, 52, 58, 90.

²⁰ Nadeau A., Nadeau R., Traité pratique de la responsabilité civile délictuelle. Montréal: Wilson & Lafleur, 1971. 732, 248.

²¹ Jean Pinault (1934-2013) was a French-born professor of law at the University of Montreal. He is recognized as one of the main authors of the Civil Code of Quebec.

²² Pineau J., *Ouellette Monique*, Théorie de la responsabilité civile. 2e éd. Montréal: Éd. Thémis, 1980, 237, 63-64.

²³ <<https://www.laloi.ca/quest-ce-que-de-la-diffamation/>> [15.06.2025].

²⁴ Calvert C., Harm to Reputation: an Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations, 26 Pacific Law Journal, 1995, 933.

²⁵ Cohen Jeremy., Experimental Test of Some Notions of the Fact/ Opinion Distinction in Libel, 66 Journalism Quarterly, 1989, 11.

The **Preamble** and **Article 1** of the *Universal Declaration of Human Rights* affirm that:

“Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and “All human beings are born free and equal in dignity and rights.”²⁶

The **Constitutional Court of Georgia** has elaborated that human dignity must not be reduced to a purely civil law concept. Instead, its interpretation within constitutional law is fundamentally distinct:

The protection of human dignity is an unconditional entitlement granted to every individual by the state. Dignity entails a **social demand** for respect from the state toward the individual.²⁷ It is an inherent attribute of being human, independent of public opinion or personal self-assessment. Respect for human dignity presumes universal recognition of the individual’s personhood – something that may neither be restricted nor revoked.²⁸ The individual must be treated not as a means to an end, but as the very *end* – as the supreme value of the constitutional order.²⁹

For example, words such as “traitor,” “pathological,” or “godless” may qualify as violations of a person’s rights.³⁰

Dignity is not merely a subjective right; rather, it is a **fundamental constitutional principle** upon which all other basic rights are grounded. Any violation of dignity is inherently linked to the infringement of other fundamental rights. In this regard, along with Article 17 of the Constitution, the *Law of Georgia on Freedom of Speech and Expression* also provides a legal framework for protecting dignity and reputation.

One of the leading decisions on this matter is the **Supreme Court of Georgia’s Judgment No. 3k-337-02 of June 25, 2002**, concerning a claim for the **retraction of defamatory statements** that allegedly harmed a person's honor and dignity. The Court clarified the distinction between *dignity*, *honor*, and *business reputation*:

- **Business reputation** applies to individuals engaged in economic (commercial) activity. Political officials or public servants, by virtue of their positions, cannot claim a business reputation within the meaning of Article 18 of the Civil Code of Georgia.
- In this specific case, the claimant, being a public official, was not engaged in commercial activity – even if they held shares in a private company – since holding public office legally precludes such engagement.
- As such, while defamation (i.e., harm to dignity or honor) may occur in the context of a public servant’s official capacity, *damage to business reputation* does not arise in such cases.³¹

²⁶ Preamble to the Universal Declaration of Human Rights (In Georgian).

²⁷ *Calvert C.*, Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique, 16 The Northern Illinois University Law Review, 1995, 111.

²⁸ Combined Media Defamation Reform Group, ‘Submission in Response to “Outline of Possible National Defamation Law”’, Attorney-General’s Discussion Paper – March 2004’ (May 2004).

²⁹ *Calvert, Clay*, ‘The First Amendment and the Third Person: Perceptual Biases of Media Harms & Cries for Government Censorship’ (1998) 6 CommLaw Conspectus 165.

³⁰ *Culbertson, H.M.* and *G.H. Stempel* ‘Media Malaise: Explaining Personal Optimism and Societal Pessimism about Health Care’ (1985) 35(2) Journal of Communication 180.

The Court further clarified that under **Article 18(2)** of the Civil Code, the dissemination of information (a fact or claim) may qualify as an infringement of personal non-property rights – including dignity, honor, and privacy – if the statement contains defamatory content and the disseminator cannot prove the statement’s veracity.

In line with the **European Court of Human Rights’ case law** (e.g., *Castells v. Spain*), politicians and public officials are expected to tolerate a higher threshold of criticism in public debates and media coverage.³²

Freedom of expression and the right to information are guaranteed under **Article 24 of the Georgian Constitution** and **Article 10 of the European Convention on Human Rights (ECHR)**:

- Article 24(1) of the Georgian Constitution grants everyone the right to receive and disseminate information, and to express and share opinions orally, in writing, or by other means.
- However, Article 24(4) permits these rights to be restricted by law if such restrictions are necessary in a democratic society for reasons such as national security, territorial integrity, public safety, prevention of crime, protection of others' rights and dignity, confidentiality, or the independence and impartiality of the judiciary.

Similarly, Article 10(2) of the ECHR states that freedom of expression carries duties and responsibilities and may be subject to legal restrictions deemed necessary in a democratic society – particularly to safeguard national security, public order, health, morals, or the reputation or rights of others.³³

Hence, while individuals have the right to freely express their opinions, they simultaneously assume legal responsibilities and potential liability. Georgian legislation and international treaties alike recognize the dual guarantee of **freedom of expression** and **protection of honor and dignity**.³⁴

It is widely acknowledged that political discourse enjoys broader protection than private speech; however, such protection is not absolute. The state is authorized to impose proportionate restrictions, including sanctions, to safeguard the reputation of all persons, including public officials and political figures.³⁵

Article 17(1) of the Georgian Constitution guarantees the protection of human honor and dignity. Meanwhile, **Article 18 of the Civil Code** outlines the specific means of protection, allowing any person to seek judicial remedies to rebut or retract defamatory statements that infringe upon their dignity, honor, private life, personal inviolability, or business reputation – provided that the disseminator fails to prove the truth of the statement.³⁶

³¹ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of June 25, 2002 in case 3K-337-02 (In Georgian).

³² *David P., Johnson M.*, The Role of Self in Third-Person Effects about Body Image, 48(4) Journal of Communication, 1998, 37.

³³ *Dent Ch.*, Defamation Law’s Chilling Effect: a Comparative Content Analysis of Australian and US Newspapers, 9(2) Media & Arts Law Review, 2004, 89.

³⁴ *Davison W.*, The Third-Person Effect in Communication, 47 Public Opinion Quarterly, 1983, 1.

³⁵ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of June 25, 2002 in case 3K-337-02 (In Georgian).

³⁶ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of June 25, 2002 in case 3K-337-02 (In Georgian).

For proper application of Article 18, the **legal definitions of honor and dignity** must be clearly understood:

- *Honor* refers to the **objective public evaluation** of an individual's moral or personal qualities, reflecting society's overall attitude toward that person.³⁷
- *Dignity*, in contrast, relates to an individual's **subjective self-assessment** of their own moral worth and social significance.³⁸

The **violation of honor and dignity** may occur when false or harmful statements are made suggesting the individual has engaged in unlawful or immoral conduct. Publicly expressed opinions that assert such claims – e.g., calling someone “a thief,” “corrupt,” or “a member of the mafia” – cannot be considered protected expressions under the freedom of speech provisions if they serve to discredit or humiliate the person.³⁹

Personal non-property rights may also be infringed when criticism exceeds professional boundaries and instead targets an individual's dignity with malicious intent. Referring to someone in a derogatory or degrading manner before a third party – so as to incite contempt or hatred – may be grounds for legal protection.⁴⁰

Although public officials must tolerate broader criticism, that criticism must still remain within legally defined boundaries that protect others' rights and reputations.⁴¹

Importantly, **in civil defamation cases**, the *claimant* is not required to prove the falsehood of the disseminated statement.⁴² Rather, the *burden of proof* lies with the *defendant*, who must demonstrate that the information disseminated was true.⁴³

From a **systematic legal research perspective**, a structural analysis of this judgment provides a solid understanding of the legal meaning and practical significance of **honor, dignity, and business reputation** in Georgian law.

2.5. Georgian Judicial Practice on the Publication of Statements Infringing Honor and Dignity

Within the framework of this systematic research, it is necessary to examine Georgian judicial practice in order to provide the reader with an overall view of how courts perceive defamation cases, which will significantly aid in a deeper understanding of defamation.

³⁷ *De Visser, Richard et al.*, ‘Heterosexual experience and Recent Hetero- sexual Encounters Among a Representative Sample of Adults’ (2003) 27(2) Australian and New Zealand Journal of Public Health 146.

³⁸ *Patrick G.*, Damages Survey for Defamation, paper presented at Media Law and Defamation’ seminar, Centre for Continuing Legal Education course, Faculty of Law, University of New South Wales, 14 March 2003.

³⁹ *Sprankling J.* (2014). The International Law of Property. Oxford: Oxford University Press, 111.

⁴⁰ *Davison, W. Phillips*, ‘The Third-Person Effect Revisited’ (Summer 1996) 8(2) International Journal of Public Opinion Research 2.

⁴¹ *Donoghue D.*, England, their England: Commentaries on English Language and Literature, University of California Press, 1989, 56.

⁴² *Eisenberg J.*, Abbott, Kennett and Costello, 1999, 153 Communications Update 19 Eldridge, Laurence H., Law of Defamation Bobs-Merrill Co., Indianapolis 1978, 45.

⁴³ *Eveland Jr., William P., Douglas M.* The Effect of Social Desirability on Perceived Media Impact: Implications for Third-Person Perceptions, 11 International Journal of Public Opinion Research, 1999, 315.

In its ruling No. As-22-22-2014 of April 6, 2015, the Supreme Court of Georgia addressed a case concerning the denial of defamatory information. The claimant sought a court order requiring the respondent to retract information damaging to the claimant's honor, dignity, and professional reputation.⁴⁴

According to the court, Article 2 of the Law of Georgia on Freedom of Speech and Expression mandates that the law be interpreted in light of the Constitution of Georgia, Georgia's international legal obligations – including the European Convention on Human Rights – and the case law of the European Court of Human Rights.⁴⁵

Under Article 14 of the same law, a person bears civil liability for defamation of a public figure if the claimant proves in court that the respondent's statement contains a materially false fact about the claimant, that the statement caused harm, and that the respondent either knew the statement was false or acted with gross negligence, resulting in the dissemination of the false information.⁴⁶

Of particular interest is the court's stance when defamatory information is published about a well-known public figure. The Supreme Court's ruling No. As-1332-1258-2012 of April 23, 2014, involved moral damages and the publication of a court notice in a form prescribed by the court.⁴⁷

When determining the amount of moral damages, the court considers whether the claimant is a public figure, whether the statement is defamatory, and the newspaper's circulation – specifically, whether it is distributed nationwide and accessible to a wide Georgian readership.⁴⁸

The Supreme Court noted that, following amendments to Article 18 of the Civil Code of Georgia on June 24, 2004, a distinct legal framework was established for the protection of an individual's honor, dignity, privacy, inviolability, and business reputation. On the same date, the Law on Freedom of Speech and Expression was enacted, introducing concepts such as “opinion” and “defamation.”⁴⁹

When the claimant is a public figure, the legal standard for defamation of public figures applies.⁵⁰ According to Article 14 of the Law on Freedom of Speech and Expression, civil liability arises if the claimant proves that a materially false statement was made about them, that it caused harm, and that the respondent either knew it was false or acted with gross negligence. The burden of proof lies entirely with the claimant.⁵¹

⁴⁴ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of April 6, 2015 in case: No. AS-22-22-2014 (In Georgian).

⁴⁵ Article 14 of the Law of Georgia “On Freedom of Speech and Expression” (In Georgian).

⁴⁶ *Glynn C.J., Haynes A.F., Shanahan J.*, Perceived Support for One's Opinions and Willingness to Speak Out: A Meta-Analysis of Survey Studies on the “Spiral of Silence”, 61 *Public Opinion Quarterly*, 1997, 452.

⁴⁷ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of April 23, 2014 in case: No. AS-1332-1258-2012.

⁴⁸ *Gunther A.C.*, What We Think Others Think: Cause and Consequence in the Third-Person Effect, 18(3) *Communication Research*, 1991, 355.

⁴⁹ Article 14 of the Law of Georgia “On Freedom of Speech and Expression” (In Georgian).

⁵⁰ *Fleming J.G.*, *The Law of Torts*, 9th edn, Thomson Reuters, 1998.

⁵¹ *Glynn, C.J. and R.E. Ostman*, ‘Public Opinion about Public Opinion’ (1988) 65 *Journalism Quarterly* 299.

A crucial aspect in determining liability is distinguishing between an “opinion” and “defamation.” The law grants opinions absolute privilege, meaning full and unconditional immunity from liability.⁵²

According to subparagraph (b) of Article 1 of the same law, an “opinion” is defined as an evaluative judgment, viewpoint, or commentary – any expression that reflects an attitude toward a person, event, or object and does not contain a verifiable or falsifiable fact. Subparagraph (e) defines “defamation” as a materially false factual assertion that damages a person's reputation.⁵³

In one case, the Supreme Court clarified that the term “opinion” broadly includes subjective judgments and evaluations, the truth or falsity of which depends entirely on the individual's perspective. Facts, by contrast, stem from objective reality and can be verified. Because opinions often rely on or reference facts, and vice versa, distinguishing between the two can be challenging. Expressions typically combine both evaluative and factual elements. Isolating specific parts of a statement for qualification purposes is justified only when it does not distort the meaning or true intent of the expression. If isolation would distort the statement, then the whole statement should be considered an opinion, thus fully protected by fundamental rights.⁵⁴

In the case of *Lingens v. Austria* (June 8, 1986), the European Court of Human Rights ruled that requiring proof of the truthfulness of value judgments violates freedom of opinion, as opinions are inherently unverifiable.⁵⁵

In defamation-related disputes, it is essential to assess whether the disseminator made an effort to verify the truth of the information. While it is unreasonable to expect media representatives to verify every fact with absolute certainty, a standard of reasonable verification must be upheld to preserve democratic values. This standard aligns with the principle of exercising civil rights in good faith.⁵⁶

According to the case law of the European Court of Human Rights, freedom of the press entails journalists’ “duties and responsibilities,” including distancing themselves from potentially harmful views expressed by others and avoiding the unintentional spread of hate or violence-inciting speech.⁵⁷

The Supreme Court clarified that “dignity” refers to a person’s self-assessment of their moral and other qualities, while “honor” reflects how these qualities are perceived by society – how a person is seen in the public eye. The court further asserted that the presumption must be that any average person would experience harm to their honor and dignity from the dissemination of defamatory information.⁵⁸

⁵² Decision of the Supreme Court of Georgia of February 20, 2012 in case No. AS-1278-1298-2011 (In Georgian).

⁵³ *Gunther A.C., Mundy P.*, Biased Optimism and the Third-Person Effect, 1993, 70(1) Journalism Quarterly, 58.

⁵⁴ *Harkess J.*, A Linguistic Inspection of the Law of Defamation, Auckland University Law Review, 1998, 653.

⁵⁵ *Eveland Jr., William P., McLeod D.M.*, The Effect of Social Desirability on Perceived Media Impact: Implications for Third-Person Perceptions, 11 International Journal of Public Opinion Research, 1999, 315.

⁵⁶ *Hart J.D.*, Why Expert Testimony on the Meaning of Language has no Place in Libel Suits’ in David A. Schulz, Libel & Newsgathering Litigation – Getting & Reporting the News, Practising Law Institute, 1998, 517.

⁵⁷ *Kenyon A.T.*, Defamation: Comparative Law and Practice, OUP, 2006, 121.

⁵⁸ Decision of the Civil Chamber of the Supreme Court of Georgia of February 20, 2012 in case No. AS-1278-1298-2011 (In Georgian).

The Supreme Court also emphasized that the harm in such cases is non-pecuniary in nature – manifested through the violation of a person’s honor, dignity, and professional reputation. Since non-pecuniary rights lack economic value, proving the violation of a legally protected right is sufficient for establishing damage.⁵⁹

Under Article 24(4) of the Constitution of Georgia, freedom of expression may be restricted by law only when necessary in a democratic society to protect national security, territorial integrity, public safety, prevent crime, protect the rights and dignity of others, prevent disclosure of confidential information, or ensure judicial independence and impartiality.⁶⁰ These same principles are enshrined in Article 10 of the European Convention on Human Rights, which allows restrictions on expression that serve a legitimate aim.⁶¹

According to European standards, even offensive, shocking, or disturbing information is often protected by press freedom.⁶² In a democratic society based on pluralism and tolerance, individuals are sometimes expected to endure information they find disagreeable.⁶³ Public figures are subject to a broader range of permissible criticism than private individuals. Nonetheless, freedom of expression must not be so expansive as to infringe excessively on the rights of others.⁶⁴

When balancing freedom of expression with others’ rights and reputations, several factors must be considered: who was the target of the statement, how the information was disseminated, what harm was done to legitimate interests, whether the information pertained to the public interest, and whether journalistic “duties and responsibilities” were breached.⁶⁵

In *Karhuvaara and Iltalehti v. Finland*, the European Court of Human Rights ruled that excessive fines and compensation – imposed on the editor-in-chief for publishing private information about a member of parliament – were disproportionate given the minor infringement on the deputy’s right to privacy.⁶⁶

Assessing the extent of interference with freedom of expression is a matter of fact. Courts cannot evaluate proportionality in the abstract; they require factual evidence to make a meaningful value-based judgment.⁶⁷

⁵⁹ Decision of the Civil Chamber of the Supreme Court of Georgia of April 3, 2012 in case No. AS-1265-1291-2013 (In Georgian).

⁶⁰ 24, paragraph 4 of the Constitution of Georgia (In Georgian).

⁶¹ Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (In Georgian).

⁶² *Heine S.J., Lehman D.R.*, Cultural Variation in Unrealistic Optimism: Does the West Feel More Invulnerable than the East?, 68 *Journal of Personality and Social Psychology*, 1995, 595.

⁶³ Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements* (Commonwealth of Australia, Canberra 2007) 77.

⁶⁴ *Jones E.E., Nisbett R.E.*, The Actor and the Observer: Divergent Perceptions of the Causes of Behavior’ in *EE Jones et al (eds) Attribution: Perceiving the Causes of Behavior*, Lawrence Erlbaum 1987, 79.

⁶⁵ *Gashi H.*, Acquisition and Loss of Ownership Under the Law on Property and Other Real Rights (LPORR): The Influence of the BGB in Kosovo Law, 2013, 88-89.

⁶⁶ <<https://www.cilvektiesibugids.lv/en/case-law/karhuvaara-and-iltalehti-v-finland>> [15.06.2025].

⁶⁷ *Kim Y., Ahn J., Song J.*, Perceived Media Influence on Self and Others on a Controversial Issue’, paper presented at the meeting of the International Communication Association, Chicago, May 1991, unseen, cited in Dominic L. Lasorsa, ‘Policymakers and the Third-Person Effect’ in J. David Kenamer (ed.), *Public Opinion, The Press and Public Policy*, 1992, 163, 170.

The reviewed decisions offer an overview of how Georgian courts approach the dissemination of defamatory information. They also reveal that, in practice, courts do not clearly distinguish between defamation and libel.

2.6. Preconditions for Dissemination of Defamatory Information and Judicial Approaches Toward Public and Private Figures in Cases of Defamation

In order to establish the preconditions for the dissemination of defamatory information, attention must be directed to Chapter IV of the Law of Georgia on Freedom of Speech and Expression, which addresses defamation. Specifically, Article 13 regulates defamation against a private person:

“A person shall bear civil liability for defamation against a private individual if the plaintiff proves in court that the respondent's statement contains a substantially false fact directly concerning the plaintiff, and that this statement caused harm to the plaintiff.”⁶⁸

As for defamation concerning a public figure, this is governed by Article 14, which provides that:

“A person shall bear civil liability for defamation against a public figure if the plaintiff proves in court that the respondent's statement contains a substantially false fact directly concerning the plaintiff, the statement caused harm to the plaintiff, and that the respondent either knew in advance of the falsehood of the stated fact or acted with gross and reckless disregard that led to the dissemination of a statement containing a substantially false fact.”⁶⁹

As becomes evident from the disposition of the norms, the legislature applies a significantly stricter and more demanding standard for establishing the prerequisites of defamation in relation to public figures. In such cases, the following must be shown:

1. That the respondent knew in advance the stated fact was false; and/or
2. That the respondent acted with gross and reckless negligence when disseminating the false information.

In this regard, it is important to note that the burden of proof rests entirely on the plaintiff. This means that when filing a claim in court, the plaintiff must demonstrate:

- a) That the respondent disseminated the disputed statement about the plaintiff;
- b) That the statement is factually incorrect and contains false facts;
- c) That the respondent either knew in advance of the falsehood of the fact or acted with gross and reckless negligence;
- d) That the disputed statement caused harm to the plaintiff's honor, dignity, or business reputation.⁷⁰

⁶⁸ Article 13 of the Law of Georgia “On Speech and Expression” (In Georgian).

⁶⁹ Article 14 of the Law of Georgia “On Speech and Expression” (In Georgian).

⁷⁰ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of February 20, 2012 in case No. AS-1278-1298-2011 (In Georgian).

To illustrate the distinct judicial approaches toward public and private persons, the Ruling No. AS-1739-1720-2011 of the Supreme Court of Georgia dated August 3, 2012, concerning moral damages, is particularly relevant.

The court emphasized that Article 17 of the Constitution of Georgia protects human honor and dignity. In civil law, honor and dignity, as legally protected moral categories, reflect both society's attitude toward the individual and the individual's self-assessment, which must align with facts corresponding to reality.⁷¹ According to Article 24 of the Constitution, every person has the right to freely receive and disseminate opinions orally, in writing, or by other means. Paragraph 4 of the same article allows for the restriction of this right by law only under conditions necessary in a democratic society to ensure national security, territorial integrity, or public safety, to prevent crime, to protect the rights and dignity of others, to prevent the disclosure of information recognized as confidential, or to guarantee the independence and impartiality of the judiciary.⁷²

Article 10 of the European Convention on Human Rights affirms the right to freedom of expression. Everyone has the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This provision encompasses three elements:

1. The freedom to hold opinions;
2. The freedom to disseminate information and ideas;
3. The freedom to receive information and ideas.⁷³

According to Article 2 of the Law of Georgia on Freedom of Speech and Expression, the law must be interpreted in accordance with the Constitution of Georgia, the country's international legal obligations – including the European Convention on Human Rights – and the case law of the European Court of Human Rights. Subparagraph “e” of Article 1 of the same law defines defamation as a statement that contains a substantially false fact and causes harm to a person, damaging their reputation.⁷⁴

Under subparagraph “a” of Article 1, a “statement” is defined as information made public by the speaker or disclosed to a third party. Subparagraph “b” defines an “opinion” as an evaluative judgment, viewpoint, commentary, or any form of subjective expression reflecting the speaker's attitude toward a person, event, or object, and which does not contain verifiable or falsifiable facts.⁷⁵

The law specifically prescribes the standard and burden of proof. Article 7, paragraph 5 of the law mandates that any reasonable doubt regarding the classification of a statement as fact or opinion – which cannot be confirmed by the procedure prescribed by law – shall be resolved in favor of granting the status of opinion to the information in question.⁷⁶

⁷¹ Judgment of the Civil Chamber of the Supreme Court of Georgia of August 3, 2012 in case No. AS-1739-1720-2011 (In Georgian).

⁷² Judgment of the Civil Chamber of the Supreme Court of Georgia of February 20, 2012 in case No. AS-1278-1298-2011 (In Georgian).

⁷³ Article 10 of the European Convention on Human Rights. (In Georgian)

⁷⁴ Article 2, paragraph “e” of the Law of Georgia “On Freedom of Speech and Expression” (In Georgian).

⁷⁵ Paragraphs “a” and “b” of Article 1 of the Law of Georgia “On Freedom of Speech and Expression” (In Georgian).

⁷⁶ Paragraph 5 of Article 7 of the Law of Georgia “On Freedom of Speech and Expression” (In Georgian).

According to Article 413(1) of the Civil Code of Georgia, monetary compensation for non-pecuniary damage may be demanded only in cases specifically provided for by law. Under Article 18 of the same code, such compensation is possible in cases involving the dissemination of information that violates a person's honor, dignity, business reputation, personal privacy, or physical inviolability.

The obligation to compensate moral damage arises from the violation of non-pecuniary rights.⁷⁷ Moral damage refers to the infringement of legally protected non-material interests that lack a financial equivalent.⁷⁸ It is sufficient for the violation of such a right to have occurred; no further material manifestation is required.⁷⁹

Accordingly, liability for infringing honor, dignity, personal privacy, physical inviolability, or business reputation arises only if the respondent disseminated such information. The mere non-dissemination of information cannot serve as the basis for civil liability.⁸⁰

Under Article 10 of the European Convention on Human Rights, individuals exercising freedom of expression also bear certain duties and responsibilities.⁸¹ Georgian legislation provides guarantees for both the freedom of opinion and expression as well as the protection of personal dignity and honor.

The Court of Cassation clarified that, under the previous version of Article 18 of the Civil Code of Georgia, individuals had the right to demand, through the courts, the retraction of information that infringed their honor, dignity, personal privacy, physical inviolability, or business reputation, unless the disseminator of the information proved that it was accurate. A 2004 amendment to this article introduced the requirement that such rights be protected "in accordance with procedures prescribed by law."⁸²

On June 24, 2004, the Law of Georgia on Freedom of Speech and Expression was adopted. Subparagraphs "e" and "v" of Article 1 introduced the legal definitions of "defamation" and "obscenity." Under these provisions, defamation is defined as a substantially false and reputation-damaging statement, while obscenity refers to a statement that lacks political, cultural, educational, or scientific value and grossly violates generally accepted ethical norms.⁸³

When the plaintiff is a private individual, the standard for defamation against a private person must apply.⁸⁴ A central element in the legal construct of defamation is that the respondent disseminated a statement directly concerning the plaintiff. In the absence of such a statement,

⁷⁷ *Krasnostein S.*, Defamation Law and the Fairness of the Objective Test, 23(4) Communications Law Bulletin, 2004, 6.

⁷⁸ *Kundu A.*, Defamation, Reputation and the Community: an Analysis of the Doctrine of Presumed Harm in Defamation Law, 10(1) Media & Arts Law Review, 2005, 53.

⁷⁹ *Lasorsa D.L.*, Real and Perceived Effects of "Amerika", 66 Journalism Quarterly, 1989, 373.

⁸⁰ *Magnusson R.*, Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges, 9 Torts Law Journal, 2001, 269.

⁸¹ Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (In Georgian).

⁸² Judgment of the Civil Cases Chamber of the Supreme Court of Georgia of August 3, 2012 in case No. AS-1739-1720-2011 (In Georgian).

⁸³ Subparagraphs "e" and "f" of Article 1 of the Law of Georgia "On Freedom of Speech and Expression" (In Georgian).

⁸⁴ *Mason L.*, Newspaper as Repeater: An Experiment on Defamation and Third-Person Effect, Autumn 72(3) Journalism and Mass Communication Quarterly, 1995, 610.

defamation does not exist.⁸⁵ Thus, the plaintiff must first and foremost prove that the respondent made a disputed statement about them.⁸⁶

According to Article 7, paragraph 6 of the Law of Georgia on Freedom of Speech and Expression, the burden of proof in restricting freedom of speech rests with the party initiating the restriction.⁸⁷ Any doubts not proven in accordance with legal procedure must be resolved against restricting freedom of speech.⁸⁸

The above-discussed ruling provides a comprehensive response to questions regarding the preconditions for the dissemination of defamatory information and the judicial approach toward public and private figures in such cases.

2.7. Circumstances Excluding Defamatory Characterization of Name-Damaging Information

For information that damages a person's name to be considered defamatory, it is necessary that the latter has not been made:

1. under qualified privilege;
2. under absolute privilege.⁸⁹

Qualified privilege may appear in the following forms:

1. A statement aimed at protecting legitimate public interests, where the protected good outweighs the harm caused;⁹⁰
2. A statement for which reasonable steps were taken to verify the truth of the fact, but despite these, the mistake could not be avoided, and it is also necessary that the person took effective measures to restore the reputation of the person harmed by defamation;
3. A statement made with the consent of the person to whom it is addressed;⁹¹
4. When the statement constitutes a proportional response to a statement made against the complainant;
5. When the statement is a fair and accurate report related to an event of public interest.⁹²

The above cases involve situations where the law provides partial or conditional exemption from liability under qualified privilege.

⁸⁵ *Lexis N.*, Australian Defamation Law & Practice. Barnett L.L., Defamation, Reputation, and the Myth of Community, 71(1) Washington Law Review, 1996, 1.

⁸⁶ *Heider F.*, The Psychology of Interpersonal Relations, Routledge, 1958, 23.

⁸⁷ Article 7, paragraph 6 of the Law of Georgia "On Freedom of Speech and Expression" (In Georgian).

⁸⁸ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of August 3, 2012 in case No. AS-1739-1720-2011.

⁸⁹ *Mason L.*, Newspaper as Repeater: An Experiment on Defamation and Third-Person Effect, Autumn, 72(3) Journalism and Mass Communication Quarterly, 1995, 610.

⁹⁰ *McCraw D.*, How do Readers Read? Social Science and the Law of Libel, 41 Catholic University Law Review, 1991, 81.

⁹¹ *LexisNexis A.*, Australian Defamation Law & Practice, Barnett L.L., Defamation, Reputation, and the Myth of Community, 71(1) Washington Law Review, 1996, 1.

⁹² *Magnusson R.*, Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges, 9 Torts Law Journal, 2001, 269.

Regarding absolute privilege, it includes the expression of opinion, where it is necessary to protect the right to confidentiality of professional sources, for example by lawyers, clergy, doctors, or other persons. It should also be noted that expression of opinion means publicly expressing a type of view or attitude, where the rights of others must not be violated.⁹³

The theoretical discussion of these issues should be reinforced by practical examples. For this purpose, the Supreme Court of Georgia's ruling dated September 24, 2012, in case No. AS-677-638-2011, is considered. The dispute concerned denial of disseminated information and compensation for moral damage.

According to Article 7, Paragraph 5 of the Law of Georgia "On Freedom of Speech and Expression," any reasonable doubt that cannot be proven in accordance with the law should be resolved in favor of granting the statement the status of opinion.⁹⁴

The European Court directs that in contentious cases, the relevant idea or information should be regarded as a matter of public interest, and the related expressions should be considered "evaluative judgments" rather than "statements of fact."

The court referred to the European Court's practice, which identifies the greatest difficulty in defamation cases as distinguishing between "statements of fact" and "evaluative judgments." While "evaluative judgments" generally do not require proof, if they imply a specific accusation, sufficient grounds must exist to justify such "evaluative judgment" (*Jerusalem v. Austria*).⁹⁵

The European Court of Human Rights in the case *Alves Costa v. Portugal* also noted that when making specific accusations, the accuser must present at least a minimal factual basis for their claim. Even when statements constitute "evaluative judgments," the proportionality of interference may depend on whether there was sufficient factual basis for the statements in question. Evaluative judgments can be considered excessive if not supported by adequate factual grounds (*De Haes and Gijssels v. Belgium*).⁹⁶

The court emphasized that it is practically impossible to require a person to express opinions solely based on facts or to require proof of the accuracy of opinions expressed.⁹⁷ "The existence of facts can be demonstrated, whereas opinions do not require evidence," and "it is impossible to require proof of the truth of views, as this itself violates freedom of expression, which is a fundamental part of the right guaranteed by Article 10 of the Convention" (*Lingens v. Austria*).⁹⁸

Information disseminated by the respondent may be based on weak factual grounds; however, this still does not violate the freedom of expression under Article 10 of the Convention (*Dichand and Others v. Austria*).⁹⁹

⁹³ *Driscoll P.D., Salwen M.B.*, Self-Perceived Knowledge of the OJ Simpson Trial: Third-Person Perception and Perceptions of Guilt, 74 *Journalism & Mass Communication Quarterly*, 1997, 541.

⁹⁴ Article 7, paragraph 5 of the Law of Georgia "On Freedom of Speech and Expression" (In Georgian).

⁹⁵ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011.

⁹⁶ <<https://temida.ge/fullcase/2691/--.pbn>> [15.06.2025].

⁹⁷ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011.

⁹⁸ <<https://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>> [15.06.2025].

⁹⁹ <<https://www.supremecourt.ge/files/upload-file/pdf/dichand-and-others-v.-austria.pdf>> [15.06.2025].

It is noteworthy that the interest in protecting reputation cannot outweigh the corresponding public interest that existed towards the claimant.¹⁰⁰ The respondent's statement may have contributed positively to public debate on a specific matter. Moreover, the respondent had previously made statements related to the claimant, as evidenced by the evidence in the case. The respondent had full right to express their opinion and initiate public discussion on the relevant issue.¹⁰¹

As European Court practice shows, in public discussions aimed at revealing truth, the requirements to protect honor and dignity are considerably lower than the interest in open discussion of political matters.

It is important to note that before amendments to the Civil Code of June 24, 2004, Article 18, Paragraph 2, the law provided a mechanism through courts for protection of non-property personal rights by denying information violating honor and dignity. However, the Law of Georgia "On Amendments to the Civil Code of Georgia" dated June 24, 2004 (effective from July 16, 2004), defined personal non-property rights protection also through a special law, which, among other issues, established protection mechanisms and grounds for civil liability. In this regard, Article 17, Paragraph 1, Note of the Law of Georgia "On Freedom of Speech and Expression" is significant, which provides that in defamation cases, the respondent may be ordered by court to publish a notice of the court decision in a form determined by the court.¹⁰²

The Law of Georgia "On Freedom of Speech and Expression" explicitly defines the substance of claims in defamation cases; the court does not have the right by its decision to grant the parties more than what was requested. The cassation chamber holds that the lower court correctly applied Article 248 of the Civil Procedure Code of Georgia, which is consistent with the unified judicial practice established by the Supreme Court of Georgia.¹⁰³

The cassation chamber holds that before deciding issues of civil liability provided by the Law of Georgia "On Freedom of Speech and Expression," it is important to clarify whether the respondent's statements belong to facts or evaluative judgments. Their distinction is often difficult, but according to precedent decisions of the European Court of Human Rights and the Supreme Court of Georgia's unified judicial practice, it is possible to clarify these two concepts.¹⁰⁴

In *Lingens v. Austria*, the European Court clarified that it is impossible to prove opinions (evaluative judgments), and no one can be required to prove the truth of these opinions.¹⁰⁵

¹⁰⁰ *Yatar E.K.M.*, Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence, 12 *Law & Sexuality*, 2003, 119.

¹⁰¹ *Willnat L.*, Perceptions of Foreign Media Influence in Asia and Europe: The Third-Person Effect and Media Imperialism, 2002, 14(2).

¹⁰² Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011 (In Georgian).

¹⁰³ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of May 16, 2008 in case No. AS-810-1129-07/Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of October 8, 2009 in case No. AS-334-654-09 (In Georgian).

¹⁰⁴ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011 (In Georgian).

¹⁰⁵ <<https://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>> [20.05.2025].

In *Perna v. Italy*, the Court explained that facts can be proven, but evaluative judgments cannot. In *Jerusalem v. Austria*, the Court stated that proving the truth of evaluative judgments is impossible and that such a requirement limits freedom of expression.¹⁰⁶

In *Dichand and Others v. Austria*, the Court explained that while the existence of facts can be demonstrated, proving the truth of subjective evaluations is impossible. The requirement to prove subjective evaluations is unfeasible and violates freedom of expression. When a statement is equivalent to a subjective evaluation, proportionality of restriction may depend on whether there is sufficient factual basis for the statement, as even subjective evaluations without factual support may be excessive.¹⁰⁷

According to the Supreme Court of Georgia, opinion broadly means judgment, attitude, or evaluation, the truth or falsity of which depends entirely on the individual's subjective stance. Facts, on the other hand, are usually free from subjective attitudes and are derived from objective circumstances, i.e., they can be verified and checked whether they actually existed.¹⁰⁸

The Supreme Court of Georgia also stated that because of the close connection between opinion and fact, their distinction is rather complicated. Therefore, for correct qualification of a disputed statement, its content, form of expression, and context, as well as factual elements constituting the statement, must be examined.¹⁰⁹

Thus, by reconciling referenced decisions and legal norms, it is concluded that one of the main qualifying features of defamation is the claimant's indication of facts that are not far from reality, more concrete rather than general, more objective than subjective, and most importantly, possible to prove.¹¹⁰

The cassation chamber refers to Article 7, Paragraph 5 of the Law of Georgia "On Freedom of Speech and Expression," which provides that in cases where the status of opinion or fact is determined, any reasonable doubt that cannot be proven according to law must be resolved in favor of granting the statement the status of opinion.¹¹¹

In *Dichand and Others v. Austria*, the European Court of Human Rights explained that restrictions on political speech or debate on matters of public interest are allowed only to a limited extent. Moreover, the limits of acceptable criticism are broader for politicians than for private individuals.¹¹²

The cassation chamber refers to Article 7, Paragraph 6 of the Law of Georgia "On Freedom of Speech and Expression," which defines the standard of burden of proof, specifically that the burden of

¹⁰⁶ <<https://temida.ge/fullcase/2944/--.pbn>> [20.05.2025].

¹⁰⁷ <<https://temida.ge/fullcase/3826/--.pbn>> [20.05.2025].

¹⁰⁸ The ruling of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011 (In Georgian).

¹⁰⁹ The ruling of the Civil Cases Chamber of the Supreme Court of Georgia of the 20th session of 2012 in case # AS-1278-1298-2011 (In Georgian).

¹¹⁰ The ruling of the Civil Cases Chamber of the Supreme Court of Georgia of April 3, 2012 in case # AS-1477-1489-2011 (In Georgian).

¹¹¹ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011 (In Georgian).

¹¹² <<https://temida.ge/fullcase/3826/--.pbn>> [20.05.2025].

proof lies on the initiator of the restriction on freedom of speech. Any doubt that cannot be proven according to law must be resolved against restricting freedom of speech. This norm establishes general standards for allocation of the burden of proof and is fully consistent with Article 14 of the same law, which defines circumstances under which a public person must prove defamation.¹¹³

The discussed ruling further illustrates that courts often do not differentiate between the terms defamation and libel in terminology and equate them. Therefore, by reconciling referenced rulings and legal norms, it is concluded that one of the main qualifying features of defamation is the claimant's specification of facts that are close to reality, more concrete rather than general, more objective than subjective, and most importantly, capable of being proven.

2.8. Features of Freedom of Speech and Expression as a Non-Absolute Right

Freedom of speech and expression is not an absolute right and may be restricted.¹¹⁴ According to Article 17, Paragraph 5, permissible restrictions include: "in accordance with the law, necessary in a democratic society for ensuring national or public security or territorial integrity, protecting the rights of others, preventing disclosure of information recognized as confidential, or ensuring the independence and impartiality of the judiciary."¹¹⁵

Restrictions on freedom of speech and expression are also envisaged by the Law of Georgia "On Freedom of Speech and Expression," specifically Article 9, Paragraph 1 of the said law, which provides:

"The content regulation of speech and expression may be established by law if it concerns":

- a) Defamation;
- b) Obscenity;
- c) Personal insult;
- d) Incitement to commit a crime;
- e) Threats;
- f) Personal data, state, commercial or professional secrets;
- g) Advertising, teleshopping or sponsorship;
- h) Freedom of speech and expression of military personnel, administrative bodies, as well as their officials, members or employees;
- i) Freedom of speech and expression of persons deprived of liberty or whose liberty is restricted.¹¹⁶

To illustrate the non-absolute nature of freedom of speech and expression, the Supreme Court of Georgia's decision of July 21, 2004, in case No. AS-322-605-04 has been developed.

¹¹³ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011. (In Georgian)

¹¹⁴ Willnat L., *Perceptions of Foreign Media Influence in Asia and Europe: The Third-Person Effect and Media Imperialism*, 2002, 14(2).

¹¹⁵ Article 17, paragraph 5, of the Law of Georgia "On Freedom of Speech and Expression" (In Georgian).

¹¹⁶ Article 9, paragraph 1, of the Law of Georgia "On Freedom of Speech and Expression" (In Georgian).

According to Article 24, Paragraph 1 of the Constitution of Georgia, everyone has the right to freely receive and disseminate information, and to express and disseminate their opinion orally, in writing, or by other means.¹¹⁷ These rights constitute one of the fundamental pillars of a democratic society and are essential for its progress.¹¹⁸ These principles acquire particular importance for the press. In Georgia, the press and mass media are free. This freedom is guaranteed by the Constitution of Georgia (Article 24, Paragraph 2 of the Constitution).¹¹⁹

When providing information and criticism about private individuals, importance is attached to who these persons are and how necessary it is for society to receive information about and criticize them. The freedom of the press is one of the most important means for society to evaluate the ideas and activities of political leaders.¹²⁰

The press is entitled to publish information and data about politicians and public figures equated to them, which are important for the public evaluation of their personality, and free criticism of them is also permissible.¹²¹

The European Court of Human Rights, in the case “Lingens v. Austria,” explained that “the limits of permissible criticism directed at a politician are wider than those for a private individual.”¹²²

“A politician, unlike an ordinary individual, knowingly and necessarily subjects their actions and gestures to the scrutiny of the media and public control.”¹²³

This section convinced us of the non-absolute nature of freedom of speech and expression, which means that the mentioned right may be restricted in cases defined by law.

3. Foreign Practice Regarding the Publication of Information that Infringes on Honor and Dignity

3.1. Specifics of Defamation Law in France

Due to the relatively legal-research nature of this study, a comparison is drawn between the familiar French and Georgian legal systems. For this purpose, an interview was conducted with the Paris-based associate lawyer Maître Nejma LABIDI. She provided comprehensive answers to nearly all questions, which we will examine in detail in this work.

¹¹⁷ Article 24, paragraph 1, of the Constitution of Georgia (In Georgian).

¹¹⁸ *Zimmerman D.L.*, Curbing the High Price of Loose Talk, 18(2) UC Davis Law Review, 1985, 359.

¹¹⁹ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of July 21, 2004 in case AS-322-605-04 (In Georgian).

¹²⁰ *Ven-hwei Lo W.*, Third-Person Effect, Gender, and Pornography on the Internet, 46(1) Journal of Broadcasting & Electronic Media, 2002, 13.

¹²¹ *Standley T.C.*, Linking Third-Person Effect and Attribution Theory, unpublished Master’s thesis, Southern Methodist University, Dallas, Texas, cited in Bryant Paul, Michael S., Michel D., The Third-Person Effect: A Meta-Analysis of the Perceptual Hypothesis, 3(1) Mass Communication & Society, 2000, 57.

¹²² <<https://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>> [20.05.2025].

¹²³ *Rissel Ch.*, Attitudes Towards Sex in a Representative Sample of Adults, 27(2) Australian and New Zealand Journal of Public Health, 2003, 118.

According to Ms. Labidi, it is essential to distinguish between two forms of defamation:

1. **Public defamation (diffamation)**, when the comment made is heard or read by the victim as well as by the surrounding public. An example of this would be an accusation made by any individual on a blog or on any social network accessible to the public;
2. **Non-public or private defamation**, which is characterized as a defamatory statement or injurious remark not read or heard by the public. For example, if someone accuses another of committing a crime through a text message, this constitutes non-public defamation.¹²⁴

This distinction is quite similar to Articles 13 and 14 of the Georgian Law “On Freedom of Speech and Expression,” although in terms of disposition, the Georgian norms are stricter.

In France, it is necessary that all accusations and information infringing on honor and dignity produce a significant impact on the victim’s personal and professional life. Sometimes, this can cause immeasurably large material damages to the victim, often manifesting as loss of income.¹²⁵

Defamation differs from disparagement.¹²⁶ Defamation can be directed both against a company and an individual and must be distinguished from insult.¹²⁷ For instance, if defamatory remarks concern a company or one of its employees, defamation is present. Conversely, if the remarks concern the quality of the company’s service or product, it is considered disparagement.¹²⁸

It is widely known that if defamation occurs online and you are the victim, you may request the website host to remove the disputed content.¹²⁹

According to Ms. Labidi, Swiss research has shown that the number of honor attacks significantly increased following the expansion of social networks. Specifically:

- From 2009 to 2011, the rate of spreading defamatory information online increased by 89%, from 721 cases to 1359 cases;
- From 2011 to 2013, this rate increased by 83%, from 4105 cases to 7519 cases;
- From 2013 to 2014, the numbers rose by 123%, from 521 cases to 1164 cases.

Ms. Labidi pointed out that obviously these figures and the overall research do not reflect the exact number of defamation cases in the real world, as opposed to the virtual world.

According to the respondent, even if accusations against the victim are merely insinuations, suspicious comments that harm a person’s honor and dignity always constitute defamation.

¹²⁴ *Baudouin J.L.*, *La responsabilité civile délictuelle*. 3e éd. Cowansville: Y. Blais, 1990. 838, 162, 163, 163, 164.

¹²⁵ *Shah D.V.*, *Susceptibility and Severity: Perceptual Dimensions Underlying the Third-Person Effect*, 26(2) *Communication Research*, 1999, 240.

¹²⁶ *Treiger-Bar-Am, Leslie Kim*, ‘Defamation Law in a Changing Society: the Case of Youssouppoff v Metro-Goldwyn Mayer’ (2000) 20 *Legal Studies* 291.

¹²⁷ *Salwen M.B., Dupagne M.*, *The Third-Person Effect: Perceptions of the Media’s Influence and Immoral Consequences*, 26(5) *Communication Research*, 1999, 523.

¹²⁸ *Tewkesbury D.*, *The Role of Comparison Group Size in the Third-Person Effect*, 14(3) *International Journal of Public Opinion Research*, 2002, 247.

¹²⁹ <<https://www.justifit.fr/b/guides/droit-penal/diffamation/>> [15.06.2025].

When information harming honor and dignity is disseminated, it is possible to file a lawsuit against the person who made defamatory comments about you.¹³⁰

We asked Ms. Labidi about the procedure in such cases in France. She explained that there are two types of procedures for filing a complaint depending on whether the identity of the perpetrator is known to the victim:

1. If the author is known, a complaint can be filed directly against them;
2. If defamation was spread by media outlets, the publication's manager or producer is considered the primary author.

According to French legislation, it is not possible to sue a legal entity that has spread defamatory information, even if the publication was made under its name; if the perpetrator is unknown, the complaint must be filed against "X." If you are a victim of defamation in a daily or periodic newspaper, you have the right to a response under Article 13 of the Law of July 29, 1881. To exercise this right, you must contact the director of the respective print media in writing. This person is required to send a reply within 3 days of receiving the defamation complaint. Failure to comply results in a fine of 3750 euros. Once the identity of the defamation author is established, it becomes possible to summon them to court by direct subpoena within 20 days of this fact being established.

Presenting evidence in court is mandatory, specifically testimonies, screenshots, audio recordings, etc. It is noteworthy that such evidence is admissible if the material evidence clearly indicates the exact passages of defamatory remarks.

An interesting question is where in France one files a defamation complaint? According to the respondent, there are two options: going to the police station or applying to the gendarmerie brigade. It is essential to bear in mind that the statute of limitations – or the deadline for filing a defamation complaint – starts from the date the facts became known and lasts no more than 3 months (Article 65 of the 1881 law). If defamation is assimilated to racist, sexist, homophobic, or ableist statements, the statute of limitations extends up to 1 year.

It is noteworthy that Article 19 of the Georgian Law "On Freedom of Speech and Expression" establishes a statute of limitations, namely "a defamation lawsuit must be submitted to court within 100 days from the date the person became or could have become aware of the statement." As we can see, unlike in France, Georgia provides a longer period for court filing.¹³¹

What sanctions threaten a defamation author in France?

In cases of public defamation: the offender faces a fine of up to 12,000 euros. The fine increases up to 45,000 euros under aggravating circumstances such as defamation against a gendarme, policeman, judge, or elected official due to their duties. This fine is accompanied by imprisonment for up to 1 year if the defamation is sexist, homophobic, or racist in nature. Non-public defamation is punishable by a fine of up to 38 euros. The fine increases to 1500 euros if defamatory comments are racist, homophobic, or sexist.¹³² Unlike France, Georgia does not have imperative provisions concerning sanctions.¹³³

¹³⁰ *Rolph D., Vitins M., Bannister J.*, Media Law: Cases, Materials and Commentary, OUP, 2010, 56.

¹³¹ <<https://www.justifit.fr/b/guides/droit-penal/diffamation/>> [15.06.2025].

¹³² Article 19 of the Law of Georgia "On Freedom of Speech and Expression" (In Georgian).

¹³³ *McNamara L.*, Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame, 6(4) Media & Arts Law Review, 2001, 271.

According to the respondent, the following defenses exist against defamation:

1. Demonstration of the truthfulness of the facts;
2. Declaration of acting in good faith.

Two conditions from the following list must also be met:

1. The material considered defamatory was revealed with a legitimate purpose, i.e., the information is beneficial to the public;
2. There must be no conflict with the victim.¹³⁴

A person accused of defamation can defend themselves by proving the truth of the facts; the accused must also demonstrate their good faith.¹³⁵

Overall, both public and non-public defamation constitute an offense punishable by a fine that varies depending on the nature of the offense. In all cases, the statute of limitations is 3 months.¹³⁶

This interview successfully facilitated a comparative legal study between France and Georgia, demonstrating that it would be advisable to have similarly imperative provisions regarding sanctions in Georgia as in France. It should also be mentioned that this position prevailed in the Georgian reality until defamation was decriminalized, specifically when the Law on Freedom of Speech and Expression abolished Article 148 of the Criminal Code, which provided criminal liability for defamation. Defamation was punishable by a fine or community service for 100 to 200 hours or corrective labor for up to one year. Unfortunately, this rule no longer applies in the Georgian context today.

3.2. Rules Established by the Legislation of Germany Regarding the Dissemination of Defamatory Information

It is interesting to consider the differences between insult, defamation, and slander, and when slander is punishable.¹³⁷ Slander means “demeaning speech.”¹³⁸ There are three types of slander: insult, defamation, and slander.¹³⁹ Based on the facts, slander in Germany can be punishable by imprisonment for up to 5 years or by a fine. The umbrella term covering these three types is actually “slander.” Slander can be freely translated as “demeaning speech” or “dissemination of damaging information.”¹⁴⁰

Statements expressing disrespect or disregard for another person's honor and dignity are considered insults (§185 StGB). It is necessary that such insult is perceivable by other persons,

¹³⁴ Perloff R.M., Perceptions of “Amerika”, 19 Mass Communication Review, 1992, 42.

¹³⁵ McNamara L., Reputation and Defamation, OUP, 2007, 67.

¹³⁶ Interview respondent – Associate lawyer in Paris Maître Nejma LABIDI. (In Georgian)

¹³⁷ Von Vechten V., The History and Theory of the Law of Defamation II, 4 C OLU, 1904, 33, 33.

¹³⁸ Judith D., Signals in Social Supernet, 13 J. C COMPUTER-MEDIATED COMM, 2007, 12, 14.

¹³⁹ Müller 1913, 492-502 and Miniconi 1959, 159-175.

¹⁴⁰ Lik M., Notions of Reputation in Multi-Agents Systems: A Review, in PROCEEDINGS OF THE FIRST INTERNATIONAL JOINT CONFERENCE ON AUTONOMOUS AGENTS AND MULTIAGENT SYSTEMS: PART 1, Bologna, Italy, July 15-19, 2002, 78.

meaning it must have a public character. Insult can be expressed not only verbally but also by gestures (e.g., showing the middle finger) or by assault (e.g., hitting in the face). What exactly constitutes insult must always be clarified by the court.¹⁴¹

In German case law, since September 2021, a new criminally punishable act called “incitement to insult” (Section 192) has been recorded. Specifically, anyone who insults, mistreats, or slanders individuals or certain groups based on their national, religious, or ethnic origin, worldview, disability, or sexual orientation is punishable by imprisonment of up to 2 years or a fine.

Slander (§186 StGB) occurs when you state an untrue fact that could harm another person’s reputation. It does not matter whether you knowingly tell the truth or not. Even if you mistakenly believe the fact to be true, it may still be considered slander. Slander (§187 StGB) also covers the dissemination of false, defamatory accusations. Like with slander, the statement must be made to a third party. However, it is important that the slanderer knows the accusation is untrue.¹⁴²

- What does the word “slander” mean?
Slander is defined as the disparagement of another person in a way that harms their reputation.¹⁴³
- Is slander punishable by law?
A defamatory statement is punishable only if it constitutes the crime of insult, defamation, or slander.¹⁴⁴
- How can one protect oneself from defamatory statements?
According to German practice, you may notify the police about the slander or file a criminal complaint in the case of insult. In Georgia, criminal prosecution for slander is no longer possible, as it has been decriminalized.¹⁴⁵

Slandering someone means speaking badly about them and thus damaging their reputation.¹⁴⁶ In a certain sense, slander may also be a criminal offense under the criminal code, specifically as insult, defamation, or slander.¹⁴⁷

According to German law:

1. If an insult (§185) is committed against a person engaged in public political life and the act is likely to impede their public work, the penalty may be imprisonment up to three years or a fine.¹⁴⁸

¹⁴¹ *Kropholer I.*, (2014). German Civil Code, Educational Commentary. Tbilisi: German Society for International Cooperation (GIZ), p.112 (In Georgian).

¹⁴² <<https://www.dahag.de/c/ratgeber/strafrecht/diffamierung>> [15.06.2025].

¹⁴³ *Hrysanthos D.*, The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms, 49 M GMT. SCI, 1407, 1407, 2003, 36.

¹⁴⁴ *Robin D.U.*, Grooming, Gossip and the Evolution of Language, 1996, 37.

¹⁴⁵ *Kropholer I.*, (2014). German Civil Code, Educational Commentary. Tbilisi: German Society for International Cooperation (GIZ), p.113 (In Georgian).

¹⁴⁶ *Frederick G.B.*, Gifts and Poison, in *Gifts and Poison: The Politics of Reputation*, 1, 4, F.G. Bailey ed., 1971.

¹⁴⁷ *Siegfried J.*, Sprachliche Gewalt gegenüber Minderheiten: Formen der sprachlichen Diffamierung in den Medien und im politischen Diskurs. In: *Der Deutschunterricht*, 59, 5, 2007, 11, 21.

2. Slander against a private person (§186) is punishable by imprisonment from three months to five years or a fine.¹⁴⁹

The examination of the rules in force in Germany adds further richness to the comparative legal study, providing the reader with a deeper understanding of the subject.

4. Types of Damage Caused by the Dissemination of Defamatory Information and Mechanisms of Protection

4.1. Types of Damage Caused by Defamation

When defamatory information is disseminated, the damage caused can be both moral and material (actual damage or lost income).¹⁵⁰ It is necessary to discuss each type separately:

- **Material damage** is a provable category.¹⁵¹ In each specific case, the plaintiff must substantiate through evidence the real existence of material damage or lost income, as well as prove the causal link between the disseminated information and the damage suffered, specifying the exact amount of damage caused by the dissemination of defamatory information.¹⁵²
- **Moral damage** requires determining whether the information containing essentially false facts infringes on a person's honor, dignity, or professional reputation, and whether this infringement causes psychological and emotional suffering.¹⁵³ The judicial interpretation of "moral damage" is notable, defining it as harm caused in the realm of spiritual feelings and interpersonal relations.¹⁵⁴

4.2. Lost Income as a Form of Damage Caused by Defamation

The Supreme Court of Georgia, in Civil Case No. N 3b-459-438-2015, provided an important clarification regarding compensation for damage in the form of lost income.

¹⁴⁸ Christian H., Social Reputation: A Mechanism for Flexible Self-Regulation of Multiagent Systems, 10 Journal of Artificial Societies and Social Simulation, 3.1, 2007.

¹⁴⁹ <<https://www.anwalt.org/diffamierung/>> [15.06.2025].

¹⁵⁰ Price D., Nicole Cain and Korieh Duodu, Defamation Law, Procedure and Practice, 4 th edn, Sweet & Maxwell 2009, 67.

¹⁵¹ Mutz D.C., The Influence of Perceptions of Media Influence: Third Person Effects and the Public Expression of Opinions, 1989, 1.

¹⁵² Milmo P., Rogers W.V.H., Gatley on Libel and Slander, 11th edn, Sweet and Maxwell, More, Daniel, 'Informers Defamation and Public Policy' (1989) 19 Georgia Journal of International and Comparative Law, 2008, 502.

¹⁵³ Perloff R.M., Perceptions and Conceptions of Political Media Impact: The Third-Person Effect and Beyond in Ann N. Crigler (ed.), The Psychology of Political Communication, The University of Michigan Press, 1996, 197.

¹⁵⁴ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of April 22, 2013 in case No. AS-1586-1489-2012 (In Georgian).

- Lost income essentially means a “pure economic loss” that a party has suffered and which would not have occurred if the contractual or legal relationship had been properly fulfilled.¹⁵⁵
- For income to be considered lost, there must be a direct and immediate connection between the other party’s bad faith conduct and the lost income. “Direct connection” means the logical link between the event, action, and resulting damage that leaves no reasonable doubt about the impossibility of receiving that income.¹⁵⁶
- According to Article 411 of the Civil Code, damages must be compensated not only for actual material loss but also for lost income. Lost income is income that the injured party did not receive but would have received had the obligation been properly performed.¹⁵⁷
- In case of breach of obligation, compensation covers both actual damage and lost income.¹⁵⁸
- Analysis of Articles 403 and 411 of the Civil Code shows that it is logical to consider as lost income the benefit that a business entity could reasonably expect to receive under normal market functioning.¹⁵⁹ Therefore, for business entities, lost income should include the damage they would have certainly obtained had defamatory information not been disseminated.¹⁶⁰
- Lost income, in other words, is anticipated profit. However, it is prospective income, and court practice requires assessing how likely its receipt was, considering all relevant circumstances. A mere possibility suffices; it need not be a maximum probability.¹⁶¹
- According to the Supreme Court of Georgia, compensation for lost income must be determined solely on objective criteria so as to avoid unjust enrichment of the injured party. The burden of proof lies with the creditor, who must provide irrefutable evidence of lost income.¹⁶²
- Articles 408 and 411 of the Civil Code also regulate the scope and amount of compensation for lost income. Lost income includes all material benefits the injured party could have received if the damaging event had not occurred.¹⁶³ This broad category covers income from labor and profits from the realization of property.¹⁶⁴

¹⁵⁵ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of October 7, 2015 in case No. AS-459-438-2015 (In Georgian).

¹⁵⁶ *Price D., Cain N., Duodu K.*, Defamation Law, Procedure and Practice, 4 th edn, Sweet & Maxwell, 2009, 54.

¹⁵⁷ *Zoidze B.*, Commentary on the Civil Code of Georgia, Book Three, Tbilisi, Publishing House “Law”, 2001. 463-464 (In Georgian).

¹⁵⁸ Decision of the Civil Cases Chamber of the Tbilisi Court of Appeal of February 28, 2012 in case No. 2b/1938-11 (In Georgian).

¹⁵⁹ *Driscoll P.D., Salwen M.B.*, Self-Perceived Knowledge of the OJ Simpson Trial: Third-Person Perception and Perceptions of Guilt, 74 Journalism & Mass Communication Quarterly, 1997, 541.

¹⁶⁰ *Dlierishvili Z.*, et al., Contract Law, Tbilisi, Publisher: “Meridiani”, 2014. 653 (In Georgian).

¹⁶¹ Pound R., Interests of Personality, 28(4) Harvard Law Review, 1915, 343.

¹⁶² *Zoidze B.*, Commentary on the Civil Code of Georgia, Book Three, Tbilisi, Publishing House “Law”, 2001. 463-464 (In Georgian).

¹⁶³ *Dlierishvili Z.*, et al., Contract Law, Tbilisi, Publisher “Meridiani”, 2014. 654 (In Georgian).

¹⁶⁴ *Sukhitashvili D., Sukhitashvili T.*, Civil Liability, Tbilisi, Publisher “Meridiani”, 2016. 176-177 (In Georgian).

- The decisive moment for determining the amount of lost income is not when the damage occurred but when the source of damage is eliminated with its consequences.¹⁶⁵
- In German case law, it is generally noted that when determining damages, the court must consider the development of events from the damaging act until the last oral hearing.¹⁶⁶ However, from a material-legal perspective, only the moment of fulfilling the positive obligation to restore the damage matters, which may coincide with the last oral hearing.¹⁶⁷
- Only at the moment the source of damage is removed can it be determined whether the injured party lost income and for what period compensation should be paid.¹⁶⁸

4.3. Liability for Damage Resulting from the Publication of Information that Violates Honor and Dignity

According to the Law of Georgia “On Freedom of Speech and Expression,” if the denial or correction of defamatory facts is insufficient, the respondent may be required to compensate the injured party for material or non-material damage.

In this regard, it is necessary to examine the decision of the Supreme Court of Georgia dated July 26, 2017, in case № 1011-972-2016, where the dispute concerned the denial of information violating honor, dignity, and business reputation, and compensation for moral damages. According to the Supreme Court of Georgia, the correct qualification of the contested statement requires examining its content, the form of expression, and the context, as well as the factual elements that constitute the statement.¹⁶⁹

The European Court of Human Rights (ECtHR) explains that when a statement amounts to a subjective assessment, the proportionality of the restriction may depend on whether there is sufficient factual basis for the statement in question, since even a subjective opinion without any factual basis may be excessive (*Dichand and Others v. Austria*). The Court states that the essential element of defamation is the dissemination of false, essentially incorrect facts.¹⁷⁰

In the case № 1011-972-2016 dated September 24, 2012, the Supreme Court clarified that a key qualifier of defamation is the claimant’s reference to facts that are not far from reality, are more

¹⁶⁵ *Magnusson R.*, Freedom of Speech in Australian Defamation Law:Ridicule, Satire and Other Challenges, 9 Torts Law Journal, 2001, 269.

¹⁶⁶ *LexisNexis A.*, Australian Defamation Law & Practice. Lidsky L.B., Defamation, Reputation, and the Myth of Community, 71(1) Washington Law Review, 1996, 1.

¹⁶⁷ *Hart J.D.*, Why Expert Testimony on the Meaning of Language has no Place in Libel Suits’ in David A. Schulz, Libel & Newsgathering Litigation – Getting & Reporting the News, Practising Law Institute, 1998, 510.

¹⁶⁸ *Rusiashvili G.*, Online Commentary on the Civil Code, 411 m. <<http://www.gccc.ge/>> [15.06.2025] (In Georgian).

¹⁶⁹ Decision of the Civil Chamber of the Supreme Court of Georgia of April 3, 2012 in case #AS-1477-1489-2011 (In Georgian).

¹⁷⁰ Decision of the Civil Chamber of the Supreme Court of Georgia of July 26, 2017 in case No.AS-1011-972-2016 (In Georgian).

specific rather than general, have a more objective than subjective nature, and, importantly, are capable of being proven.¹⁷¹

The Court refers to the ECtHR's explanation that the more serious the accusation, the more serious the factual basis must be (*Abeberry v. France*). It is impossible, even in a civil case, to require a person to prove that they did not commit a crime and, therefore, the statement containing this information is defamatory. Such an interpretation contradicts the presumption of innocence.¹⁷²

Article 14 of the Law "On Freedom of Speech and Expression" provides that a person is liable in civil law for defamation of a public figure if the plaintiff proves in court that the defendant's statement contains a materially false fact directly concerning the plaintiff, that the plaintiff suffered damage from this statement, and that the falsity of the fact was known to the defendant beforehand or the defendant acted with gross negligence causing the dissemination of a materially false statement.¹⁷³

This provision places the burden of proof entirely on the plaintiff, meaning that upon filing the lawsuit, the plaintiff must prove the following:

- a) the defendant made the contested statement about them;
- b) the contested statement is false, i.e., contains incorrect facts;
- c) the defendant knew of the falsity of the fact beforehand or acted with gross negligence;
- d) the contested statement caused damage to the plaintiff's honor, dignity, and/or business reputation.¹⁷⁴

Regarding the burden of proof, the Court referred to the "McVicar" case, where the ECtHR considered it not fundamentally incompatible with Article 10 to impose on the defendant the burden of proving the truthfulness of defamatory statements in defamation cases.¹⁷⁵ The Court cited the decision in "Bladet Tromsø and Stensaas," which explained that verifying facts before publishing in a newspaper is a completely ordinary obligation.¹⁷⁶

The ECtHR's approach to the burden of proof does not always require the defendant to prove the truth of facts (for example, in complaints brought by public officials, the Court considers that imposing such a burden on the opinion holder violates Article 10), but the Court requires that the journalist demonstrate fulfillment of their "duties and responsibilities."¹⁷⁷

Media representatives should not be required to disseminate fully verified information, but it is necessary to maintain a standard of reasonable verification of information to avoid devaluing

¹⁷¹ Decision of the Civil Chamber of the Supreme Court of Georgia of September 24, 2012 in case No.AS-677-638-2011 (In Georgian).

¹⁷² *Gunther A.C.*, What We Think Others Think: Cause and Consequence in the Third-Person Effect, 18(3) Communication Research, 1991, 355.

¹⁷³ Article 14 of the Law of Georgia on "Freedom of Speech and Expression". (In Georgian)

¹⁷⁴ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011 (In Georgian).

¹⁷⁵ <<https://temida.ge/fullcase/2893/--.pbn>> [15.06.2025].

¹⁷⁶ <<https://globalfreedomofexpression.columbia.edu/cases/bladet-tromso-and-stensaas-v-norway/>> [15.06.2025].

¹⁷⁷ *Dent Ch.*, Defamation Law's Chilling Effect: a Comparative Content Analysis of Australian and US Newspapers, 9(2) Media & Arts Law Review, 2004, 89.

democratic values.¹⁷⁸ Imposing such a standard of conduct fully corresponds to the principle of good faith exercise of civil rights.¹⁷⁹ According to the ECtHR's case law, freedom of the press is inseparable from the journalist's "duties and responsibilities," including distancing themselves from respondents' expressed views when necessary and ensuring they do not knowingly or unknowingly become a source of hate speech.¹⁸⁰

When an article concerns facts, it is important to prove that the journalist fulfilled their obligations: verified facts and gave the subject of criticism the opportunity to respond via the press to the accusations against them. Failure to do so raises reasonable doubt about the journalist's intent – whether driven by a desire to inform society or by an aim to harm the physical or legal person through insult and reputation damage.¹⁸¹

The Cassation Chamber shares the ECtHR's position that when a journalist acts "in bad faith," their level of protection is significantly lower than in other cases. Article 10 of the Convention encompasses both rights and obligations that must be respected by a person exercising freedom of expression. These obligations also apply to the press and become particularly important when a person's reputation is at stake.¹⁸²

According to Article 10, journalists must act in good faith and provide accurate and reliable information based on journalistic ethics (*Bladet Tromsø and Stensaas v. Norway*).¹⁸³ When, on the one hand, there is a statement about a fact that does not correspond to reality, and on the other, the journalist covers an issue of genuine public interest, the assessment of the journalist's professional conduct and good faith becomes decisive (*Kasabova v. Bulgaria*, *Flux v. Moldova*).¹⁸⁴

Protection granted to journalists under Article 10 in covering matters of public interest presupposes that they act in good faith to ensure the transmission of accurate and reliable information.¹⁸⁵ While exaggeration and overstatement by journalists fall within the freedom of expression, the press must not cross certain boundaries, especially regarding the rights and reputation of others.¹⁸⁶

¹⁷⁸ *George P.*, Damages Survey for Defamation, paper presented at Media Law and Defamation, seminar, Centre for Continuing Legal Education course, Faculty of Law, University of New South Wales, 14 March, 2003.

¹⁷⁹ *David P., Johnson M.*, The Role of Self in Third-Person Effects about Body Image, 48(4) *Journal of Communication* 1998, 37.

¹⁸⁰ *Brosius H.B., Engel D.*, The Causes of Third-Person Effects: Unrealistic Optimism, Impersonal Impact, or Generalized Negative Attitudes Towards Media Influence?, 8(2) *International Journal of Public Opinion Research* 1996, 142.

¹⁸¹ *Arend P.S.*, Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay be Defamatory?, 18 *North Illinois University Law Review*, 1997, 99.

¹⁸² Decision of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011 (In Georgian).

¹⁸³ <<https://globalfreedomofexpression.columbia.edu/cases/bladet-tromso-and-stensaas-v-norway/>> [15.06.2025].

¹⁸⁴ <<https://globalfreedomofexpression.columbia.edu/cases/case-of-kasabova-v-bulgaria/>> [15.06.2025].

¹⁸⁵ *George P.*, 'Damages Survey for Defamation', paper presented at 'Media Law and Defamation' seminar, Centre for Continuing Legal Education course, Faculty of Law, University of New South Wales (14 March 2003) 56.

¹⁸⁶ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011 (In Georgian).

Freedom of expression combines several rights with different scopes of protection, notably differing in the approach to freedom of information dissemination by media, where courts must balance private and public interests fairly.¹⁸⁷ The protection standard also differs in relation to information dissemination about public officials, who, by virtue of their public or official status, have heightened obligations of tolerance. However, in the present case, the media's right to freely receive and disseminate information conflicts with the claimants' right to reputation, which is recognized and protected by Article 24(4)¹⁸⁸ of the Constitution of Georgia and Article 10 of the Convention.¹⁸⁹

The fundamental right of expression loses its essence if deprived of constitutional grounds for restriction. Therefore, the protection of others' rights and dignity constitutes a constitutional counterbalance to freedom of expression.¹⁹⁰

The issue of dignity and reputation is addressed by both the Constitution of Georgia and the European Convention as a legitimate aim for restricting the right to freedom of expression. Protecting a person's honor, dignity, and business reputation primarily means safeguarding their rights to ensure that information about their conduct or activities that influence public perception corresponds to reality. According to the ECtHR, an important element when assessing a statement is whether it contains insulting terms, as well as their content and impact on society (*Chauvy v. France*).¹⁹¹

Regarding public figures, the limits of "permissible criticism" are broader than for private individuals, but freedom of expression should not be expanded to the extent that it loses its essence by excessively infringing on the rights of others.¹⁹²

When a statement containing false facts is disseminated, harm to a natural person is manifested as non-material damage – violation of the person's honor and dignity.¹⁹³ According to the Supreme

¹⁸⁷ *George P.*, 'Damages Survey for Defamation', paper presented at 'Media Law and Defamation' seminar, Centre for Continuing Legal Education course, Faculty of Law, University of New South Wales (14 March 2003) 56.

¹⁸⁸ "Freedom of expression may be limited by law in such conditions as are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of crime, for the protection of the rights and dignity of others, for preventing the disclosure of information held in confidence, or for maintaining the independence and impartiality of the judiciary"; (In Georgian).

¹⁸⁹ "Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from regulating the broadcasting, television or cinematographic enterprises. The exercise of these freedoms, in so far as it is inseparable from the corresponding obligations and responsibilities, may be subject to such rules, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." (In Georgian).

¹⁹⁰ *McNamara L.*, Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame, 2001, 6(4) *Media & Arts Law Review*, 2001, 271.

¹⁹¹ <[https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-61861%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61861%22]})> [20.05.2025].

¹⁹² *Treiger-Bar-Am L.K.*, Defamation Law in a Changing Society: the Case of *Youssouppoff v Metro-Goldwyn Mayer*, 20 *Legal Studies*, 2000, 291.

¹⁹³ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of April 3, 2012 in case No. AS-1477-1489-2011 (In Georgian).

Court's explanation, non-material relations, lacking economic content, do not have value in themselves; for proving such damage, a violation of a special legal right is sufficient.¹⁹⁴

According to Article 413.1 of the Civil Code of Georgia, compensation for non-material damage may be claimed only in cases precisely defined by law. Although Article 18.6 of the Civil Code provides the right to claim moral damages upon certain conditions (guilty violation of honor, dignity, and business reputation), judicial practice establishes additional limitations regarding claims by legal entities.¹⁹⁵ A legal entity is equated with a natural person in all rights that are not qualitatively equivalent to human rights. Some personal rights may be held by legal entities only in a modified form. Legal entities do not have certain civil rights protected by Article 18 of the Civil Code, such as personal inviolability, privacy, and the right to claim moral damages for moral feelings.¹⁹⁶ According to the Cassation Court, moral damages cannot be inflicted on a legal entity because moral damage concerns the violation of a non-material interest that has no pecuniary equivalent (such as spiritual or physical pain, feelings, etc.).¹⁹⁷

Violation or infringement of personal non-material rights may be considered an act (dissemination of a statement or fact about disgraceful conduct or other information) that violates one or several of the rights listed in Article 18.¹⁹⁸

Article 18(1) of the Civil Code protects both the right to a name and the legal grounds to stop or refuse unauthorized use of one's name by others.¹⁹⁹

The discussed decision answers important questions such as how the court addresses claims for both moral and material damages, which standards should be observed when making such claims, and the court's general approach to resolving such disputes. The cited court decision is enriched not only by local but also international jurisprudence, making the issue even more interesting.

4.4. Legal Mechanisms for Protecting One's Rights in Georgia Against Dissemination of Defamatory Information

It is interesting to consider what legal mechanisms and preconditions exist in Georgia for defending oneself against the dissemination of defamatory (name-damaging) information. It should be noted that, in this context, the denial of statements containing clearly false facts is one of the most important elements in defamation litigation. Such a demand must be specific and must arise directly from the content of the defamatory disputed statement.

To illustrate this, reference is made to the Supreme Court of Georgia's ruling dated July 3, 2019, in case No. AS-1544-1464-2017, where the dispute concerned the denial of defamatory statements and the compensation for moral damages.

¹⁹⁴ <<https://www.zmogausteisiugidas.lt/en/case-law/tolstoy-miloslavsky-v-the-united-kingdom>> [20.05.2025].

¹⁹⁵ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of September 24, 2012 in case No. AS-677-638-2011 (In Georgian).

¹⁹⁶ *Pound R.*, *Interests of Personality*, 28(4) *Harvard Law Review*, 1915, 343.

¹⁹⁷ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of September 30, 2015 in case No. AS-1052-1007-2014 (In Georgian).

¹⁹⁸ *Rolph D., Vitins M., Bannister J.*, *Media Law: Cases, Materials and Commentary*, OUP, 2010, 87.

¹⁹⁹ Article 18, Part 1 of the Civil Code of Georgia (In Georgian).

The court referred to Article 15(b) of the Law of Georgia on Freedom of Speech and Expression and clarified that if the disseminated information is important to satisfy the legitimate interests of a democratic society, mere moral discomfort caused by the dissemination of such information is not sufficient to restrict the media's freedom of expression.²⁰⁰

According to Article 14 of the Law of Georgia on Freedom of Speech and Expression, to impose liability for defamation against a public figure, it is necessary that the disseminated information be false; that the person suffered harm as a result; and that the falsity of the information was either known to the defendant beforehand or, if unknown, it was due to obvious and gross negligence.²⁰¹

For the satisfaction of the claim, the following conditions must be met:

1. The violating information must have been published through a mass media outlet;
2. The disseminated information must not correspond to reality and must be aimed solely at discrediting the person;
3. The defendant must not have taken reasonable measures to verify the accuracy of the fact and must not have carried out effective actions to restore the reputation of the person harmed by defamation;
4. The defendant must not have intended to protect the legitimate interests of society; the sole purpose must be the discreditation of the person. It is also important to note that accusing a person of abuse or misuse of official powers without a court decision and stating this unconditionally constitutes a clear violation of the presumption of innocence and cannot serve the legitimate interests of society;
5. The defendant's statements must not represent a fair and accurate report of the event to which public attention is directed.²⁰²

Article 19 of the Law on Freedom of Speech and Expression sets a special limitation period. According to this article, a defamation claim must be filed in court within 100 days from the time the person became aware or could have become aware of the statement.²⁰³

The court also emphasized the limitation period, referring to Article 138 of the Civil Code of Georgia, which provides for the interruption of the limitation period if a party expresses the intention to protect its claim and undertakes certain actions to restore the violated right.²⁰⁴ The chosen means must be appropriate to achieve the intended result. The limitation period is interrupted only by a claim (application) submitted to the court. If addressed to another state body, that body must be competent,

²⁰⁰ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of July 3, 2019 in case No. AS-1544-1464-2017 (In Georgian).

²⁰¹ Article 14 of the Law of Georgia "On Freedom of Speech and Expression" (In Georgian).

²⁰² Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of July 3, 2019 in case No. AS-1544-1464-2017 (In Georgian).

²⁰³ Article 19 of the Law of Georgia "On Freedom of Speech and Expression" (In Georgian).

²⁰⁴ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of July 3, 2019 in case No. AS-1544-1464-2017 (In Georgian).

i.e., authorized to regulate the disputed legal relationship.²⁰⁵ Each party must choose the correct and effective means to satisfy their claim; failure to do so is at the party's own risk. Moreover, the interruption of the limitation period applies only if the limitation period has not expired; otherwise, talking about interruption after the limitation period has passed is groundless.²⁰⁶

This court decision shows that when defending one's rights, the claim must be formulated specifically, clearly, and supported by irrefutable evidence. The imperative requirements of the special law, including the 100-day limitation period, must also be observed.

It should be especially noted that merely formally denying disseminated defamatory information is not effective, particularly in resolving defamation on social media.²⁰⁷ The driving force behind the demand to deny defamatory information is that its aim is fulfilled by making the denial publicly perceivable by all.²⁰⁸ For example, a two-minute denial statement posted on one's social media wall clearly cannot achieve this goal.²⁰⁹

Therefore, the claim must specify three important things:

1. For how long the person must publish the denial statement;
2. In what form the denial statement must be made public;
3. How soon after the issuance of the decision the denial statement must be published.²¹⁰

5. The Place of Defamation in Social Media

5.1. Manifestations of Dissemination of Defamatory Information in Social Media

The development of social media, primarily explained by the proliferation of social networks, has given society greater opportunities for the dissemination of defamatory information. Practically, this may be expressed by posting on one's social network "wall" or "story."²¹¹ It is noteworthy that the category of disseminating defamatory information may also include comments made on someone else's post, which essentially contain false and reputation-damaging information.²¹²

It is interesting to consider what is meant by the "public dissemination" of defamatory facts. In this regard, the Supreme Court of Georgia's explanation should be taken into account, according to which "public dissemination" does not only mean information made public in the press or on

²⁰⁵ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of April 22, 2013 in case No. AS-1586-1489-2012 (In Georgian).

²⁰⁶ Decision of the Civil Chamber of the Supreme Court of Georgia of December 4, 2015 in case No. AS-960-909-2015 (In Georgian).

²⁰⁷ Decision of the Civil Chamber of the Supreme Court of Georgia of July 3, 2019 in case No. AS-1544-1464-2017 (In Georgian).

²⁰⁸ Decision of the Civil Chamber of the Supreme Court of Georgia of April 22, 2013 in case No. AS-1586-1489-2012 (In Georgian).

²⁰⁹ *Rolph D., Vitins M., Bannister J.*, Media Law: Cases, Materials and Commentary, OUP, 2010, 43.

²¹⁰ *Simon G., Herrmann B.*, Human Cooperation From an Economic Perspective, in COOPERATION IN PRIMATES AND HUMANS 279, P. Kappeler & C.P. van Schaik eds., 2006, 31.

²¹¹ *Jorbenadze S.*, "Defamation in Social Media and Legal Ways to Protect Rights", Journal: "My Lawyer", 2022 (In Georgian).

²¹² *Rolph, David, Matt Vitins and Judith Bannister*, Media Law: Cases, Materials and Commentary (OUP 2010) 42.

television; it must be directed at an indefinite circle of persons and must not be limited to a private conversation between only two persons, except in the case where such information is itself disclosed (via screenshots or other means) by the person spreading the defamatory facts.²¹³

It is important to note that media activities are primarily regulated by the Constitution and are also reflected in special laws regarding other legal institutions. A clear example of this is the interesting development in contemporary media law, presenting the German approach towards social media, which resulted in a new law adopted in 2017.

1. This new law aims to eliminate the dissemination of punishable information and
2. regulate the reduction of hate speech.

All of this relates to information spread on social networks, which represents a significant problem not only in Georgia but worldwide. Unlike France and Germany, regulating this field remains a major challenge for Georgia.²¹⁴

It is noteworthy that in its decision of March 5, 2021, case №3b-810-2019, the Supreme Court of Georgia considers the fact of publication essential for defamation.²¹⁵ Here arise many questions. Specifically, if I post something on my social media page that is not public and intended only for a limited circle, is that considered publication? It is also interesting whether private correspondence between two people is considered defamation? How will the qualification of defamation be decided if private correspondence screenshots are published?

To answer these questions, it is necessary, within the framework of systematic research, to study the Supreme Court's decision of March 5, 2021, case №3b-810-2019.

According to Article 9 of the Constitution of Georgia, human dignity is inviolable and protected by the state; according to Article 13 of the Law of Georgia on Freedom of Speech and Expression, a person is civilly liable for defamation of a private individual if the plaintiff proves in court that the defendant's statement contains essentially false facts directly about the plaintiff and that the statement harmed the plaintiff.²¹⁶ The first article, paragraph "a" of the same law defines a statement as information publicly disseminated by the declarant or communicated to a third party.²¹⁷ This norm imposes the burden of proof entirely on the plaintiff, meaning that when submitting a lawsuit to court, the plaintiff must prove the following:

- a) The defendant made the disputed statement about the plaintiff;
- b) The disputed statement is false, i.e., contains false facts;
- c) The disputed statement harms the plaintiff's honor, dignity, and professional reputation.²¹⁸

²¹³ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of February 20, 2012 in case #AS-1278-1298-2011 (In Georgian).

²¹⁴ *Jorbenadze S.*, "Defamation in Social Media and Legal Ways to Protect Rights", Journal: "My Lawyer", 2022 (In Georgian).

²¹⁵ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of March 5, 2021 in case No. AS-810-2019. (In Georgian)

²¹⁶ Article 13 of the Law of Georgia "On Freedom of Speech and Expression". (In Georgian)

²¹⁷ Subparagraph "a" of Article 1 of the Law of Georgia "On Freedom of Speech and Expression" (In Georgian).

²¹⁸ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of March 5, 2021 in case No. AS-810-2019 (In Georgian).

According to Article 18 of the Civil Code of Georgia, a private individual has the right to protect their honor, dignity, privacy, personal inviolability, or business reputation through the court by law. The infringement of personal non-property rights includes the dissemination of a statement or fact that violates one or more of the non-property rights listed in Article 18 and contains evidence of violation of law or morals, or disgraceful behavior. According to Article 413 of the Civil Procedure Code, monetary compensation for non-property damage may be claimed only in cases precisely defined by law as reasonable and fair compensation.²¹⁹

The special law distinguishes between defamation of public and private individuals and regulates these by different articles, which is significant because civil relations may involve moral suffering and emotional distress, but civil liability is permissible only in cases specified by law. The law directly defines the cases where the injured party can claim compensation for non-property damage (Article 413 of the Civil Procedure Code). The purpose of this legal provision is to reduce and limit unjustified expansion of this norm's effects to ensure the stability and order of civil circulation.²²⁰

Furthermore, Article 13 of the special law, which provides civil liability for defamation of private individuals, unlike defamation of public figures, does not consider the fact of spreading insulting statements as mandatory to establish. Therefore, a private individual has the right to address the court for the protection of honor and dignity even if defamation has not been disseminated, but in such cases, they must present stronger arguments to prove the assumption of damage to honor and dignity.²²¹ This is because widespread dissemination of insulting facts damages a person's reputation more than the same insult in a private sphere.²²²

For the activation of Article 13 of the special law, it is necessary to establish that the defendant's statement contains essentially false facts about the plaintiff and that the plaintiff suffered harm from this statement.

The Supreme Court of Georgia broadly defines the word "opinion" as a judgment, attitude, or evaluation whose correctness or falsehood depends entirely on the individual's subjective attitude. Facts, however, are generally devoid of subjective attitude.²²³

According to Article 1 of the Law on Freedom of Speech and Expression, one of the main qualifying signs of defamation is the mention by the declarant of facts that are not far from reality, more specific and objective rather than general or subjective in nature, and, importantly, are provable.²²⁴

The court noted that an opinion means any evaluative statement consisting of judgment, attitude, and evaluation elements, whose correctness depends on personal assessment. Opinions cannot

²¹⁹ Articles 18 and 413 of the Civil Code of Georgia (In Georgian).

²²⁰ Jorbenadze S., "Defamation in Social Media and Legal Ways to Protect Rights", Journal: "My Lawyer", 2022 (In Georgian).

²²¹ Article 13 of the Law of Georgia "On Freedom of Speech and Expression" (In Georgian).

²²² Jorbenadze S., "Defamation in Social Media and Legal Ways to Protect Rights", Journal: "My Lawyer", 2022 (In Georgian).

²²³ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of February 20, 2012 in the case No. 1278-1298-2011 (In Georgian).

²²⁴ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of October 1, 2014 in the case No. 179-172-2012 (In Georgian).

be proven true or false. According to the special law, opinions are protected by absolute privilege if their publication does not violate the rights of others.²²⁵

Expressing evaluative judgments, views, or other opinions, which represent the expression of a position or attitude towards a person, object, or event, is regarded as an expression of fundamental rights protected by law and is not considered defamation.²²⁶ Often an opinion is based on facts, and a fact forms the basis of an opinion to confirm or deny it.²²⁷

The purpose of the second part of Article 18 of the Civil Code is primarily to protect violated personal non-property rights within the framework of freedom of expression. The right to file a lawsuit lies with the person about whom the information was disseminated.²²⁸ The violation of personal non-property rights includes the dissemination of information (facts) that contain a violation of a legally protected good.²²⁹ Therefore, the legal qualification of violation of non-property rights requires only the violation of one or more goods protected by Article 18 of the Civil Code, which contains proof of violation of law or morals or disgraceful behavior.²³⁰

The forms of protection of non-property rights include recognition of non-property rights, cessation of infringing actions or renunciation of them, and compensation for non-property damage. The existence of at least one of these rights must be established.²³¹

It is noteworthy that moral damage includes legally protected non-material interests, which have no material equivalent (spiritual or physical pain, suffering, etc.).²³² A person is liable if there are grounds for liability for harm caused. The issue of compensation for moral damage arises when the harm is legally significant and must be considered.²³³ The basis for moral damage compensation is the spiritual and physical suffering caused by an act (or omission) that violates a citizen's legally protected non-material good. Moral damage is compensated independently from property damage, i.e., both separately and together with property damage compensation.²³⁴

²²⁵ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of February 20, 2012 in the case No. 1278-1298-2011 (In Georgian).

²²⁶ *Yatar E.K.M.*, Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence, 12 *Law & Sexuality*, 2003, 119.

²²⁷ *Cameron M.*, Rivkin Settles Defamation Case, *The Australian*, 8 July, 2004, 18.

²²⁸ Article 18 of the Civil Code of Georgia (In Georgian).

²²⁹ *Tewkesbury D.*, The Role of Comparison Group Size in the Third-Person Effect, 14(3) *International Journal of Public Opinion Research*, 2002, 247.

²³⁰ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of February 20, 2012 in case No. 1278-1298-2011 (In Georgian).

²³¹ *Shah D.V.*, Susceptibility and Severity: Perceptual Dimensions Underlying the Third-Person Effect, 26(2) *Communication Research*, 1999, 240.

²³² *Jones E.E., Nisbett R.E.*, The Actor and the Observer: Divergent Perceptions of the Causes of Behavior, in *EE Jones et al (eds) Attribution: Perceiving the Causes of Behavior*, Lawrence Erlbaum, 1987, 79.

²³³ *Hart J.D.*, Why Expert Testimony on the Meaning of Language has no Place in Libel Suits, in *David A. Schulz, Libel & Newsgathering Litigation – Getting & Reporting the News*, Practising Law Institute, 1998, 519.

²³⁴ *George P.*, Damages Survey for Defamation, paper presented at Media Law and Defamation seminar, Centre for Continuing Legal Education course, Faculty of Law, University of New South Wales, 14 March, 2003, 48.

The court notes that Article 6(1) of the European Convention on Human Rights obliges courts to substantiate their decisions, which is understood as giving detailed answers to every argument.²³⁵

According to the court, private correspondence containing obscene, insulting, unacceptable expressions may be unpleasant or even painfully perceived by the recipient but does not legally constitute a case that would justify satisfaction of a claim under Articles 18 and 413 of the Civil Procedure Code or impose monetary compensation for moral damage on the defendant.²³⁶

In the context of freedom of expression, “public dissemination” does not only mean publication in the press or on television, especially as social media, blogging, and microblogging play an increasingly important role in modern society.²³⁷ Any means suitable for providing information to an indefinite circle of persons should be regarded as a source of public dissemination.²³⁸

The cassation court emphasizes the essence and purpose of social networks. A social network is an online platform designed to create social connections among people with common interests, professions, hobbies, or real-life relationships (family, kinship, work, etc.). Each social network consists of user representations (“profiles”), their connections, and additional services. One of the largest and most popular social networks is Facebook, which unites millions of users worldwide. Information posted by a specific Facebook user is accessible to their friends or all users, depending on the author’s choice. Any user with access to the information can share it with their contacts or an indefinite circle of persons, and quote it in private conversations, press, or online publications. Considering these characteristics of social networks, a so-called status or comment published by a specific user should be considered public dissemination of information.²³⁹

The protection of non-property rights in private law relationships is of absolute nature.²⁴⁰ Protection of non-property rights is possible in cases of violation of legal as well as moral norms.²⁴¹ The purpose of Article 18 of the Civil Code is to protect personal non-property rights violated within freedom of expression, where only the person about whom the information was disseminated may initiate a claim, not someone who assumes that information was disseminated about them or that they were implied in disseminated information.²⁴²

The discussed court decision answers the questions posed at the beginning of the chapter, namely, when a post is published on social media, regardless of its limited audience, it is considered

²³⁵ Jgharkava v. Georgia, #7932/03; Van de Hurk v. Netherlands, par.61, Garcia Ruiz v. Spain [GC] par.26; Jahnke and Lenoble v France (dec.); Perez v France [GC], par. 81) (In Georgian).

²³⁶ Judgment of the Civil Chamber of the Supreme Court of Georgia of 20 February 2012 in case No. 1278-1298-2011 (In Georgian).

²³⁷ Glasser Ch.J., Jr (ed.), International Libel & Privacy Handbook, 2nd edn, Bloomberg Press, 2009, 76.

²³⁸ Magnusson R., Freedom of Speech in Australian Defamation Law:Ridicule, Satire and Other Challenges, 9 Torts Law Journal, 2001, 269.

²³⁹ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of January 9, 2014 in case No. AS-1559-1462-2012 (In Georgian).

²⁴⁰ McLeod D.M., Benjamin H Detenber, William P Eveland Jr, Behind the Third-Person Effect: Differentiating Perceptual Processes for Self and Other, 51(4) Journal of Communication, 2001, 679.

²⁴¹ Paul B., Salwen M., Dupagne M., The Third-Person Effect: A Meta-Analysis of the Perceptual Hypothesis, 3(1) Mass Communication & Society, 2000, 57.

²⁴² Commentary on the Civil Code of Georgia, Book I, Chanturia (ed.), 2017, Article 18, Fields 1, 7, 35 (In Georgian).

public dissemination. If such information is shared only in a private conversation, it is not considered dissemination of defamatory information between the defamer and the person concerned until the defamer publishes this conversation. It is also noteworthy that if the person about whom defamatory information was spread publishes the private conversation, this does not constitute dissemination by the defamer.

Thus, a key element of defamation is its public character. The above court decision was interesting in showing the court's approach to private individuals, ultimately concluding that the burden of proof lies entirely with the plaintiff, meaning that when filing a lawsuit, the plaintiff must prove the following:

- a) The defendant made the disputed statement about the plaintiff;
- b) The statement is false, i.e., contains false facts;
- c) The statement harms the plaintiff's honor, dignity, and professional reputation.²⁴³

5.2. Peculiarities of the Interim Measures for Securing a Claim Related to the Dissemination of Defamatory Facts on Social Networks as a Defense Mechanism

According to the first paragraph of Article 191 of the Civil Procedure Code (CPC), an interim measure for securing a claim is applied when failure to use it would complicate or make impossible the satisfaction of the plaintiff's legal claim. It is also applied when failure to use the interim measure would complicate or make impossible the enforcement of a decision and would cause irreparable and direct damage or such damage that cannot be compensated by imposing liability on the defendant for damages.²⁴⁴

The use of interim measures in defamation disputes may manifest with particular peculiarities, specifically regarding defamatory facts spread on social networks, which may be published either on a personal page or as a comment on someone else's page. In relation to a post published on a personal page, the interim measure might require restricting the public availability of the post.²⁴⁵ Interestingly, when such a request is granted by the court, the enforcement of this measure is entrusted to the defendant themselves. Unlike other interim measures, for example, attachment of property, which can be imposed on the defendant by the public registry without their consent, in this situation the defendant is the intermediate link. In other words, whether or not the defendant complies with the court order depends entirely on their will. Neither the court nor the plaintiff can compel the defendant to implement the interim measure and edit the post published on their own page.

In my opinion, in such cases it would be advisable for the court's decision regarding the interim measure to be sent not to the defendant but directly to the administration of the specific social network, who would then be responsible for addressing the issue of editing the defamatory post.

²⁴³ Decision of the Civil Cases Chamber of the Supreme Court of Georgia of January 9, 2014 in case No. AS-1559-1462-2012 (In Georgian).

²⁴⁴ Article 191 of the Civil Procedure Code of Georgia (In Georgian).

²⁴⁵ Jorbenadze S., "Defamation in Social Media and Legal Ways to Protect Rights", Journal: "My Lawyer", 2022 (In Georgian).

As for the enforcement of the final court decision, it may be carried out in two ways:

1. With the involvement of the National Enforcement Bureau;
2. With the involvement of the administration of the social media or social network.

Cooperation with the National Enforcement Bureau naturally involves handing over the enforcement writ, while enforcement with the involvement of the social media or social network administration requires fulfilling formal prerequisites, including sending the scanned version of the enforcement writ and, if translated into another language, a notarized certified translation along with the original document.²⁴⁶ A very interesting case in this regard is the Supreme Court of Georgia's ruling of December 24, 2021, case № 36-1192-2021, where the subject of the dispute was ensuring enforcement of a decision.

According to Article 271 of the Civil Procedure Code, the court may ensure the enforcement of a decision that has not been immediately enforceable under the rules established in Chapter XXIII. The institute of securing a claim envisaged in this chapter is a procedural and legal guarantee for the speedy and effective realisation of rights and legitimate interests protected by substantive law. The court's use of securing measures, in this case enforcement of the decision, is based on the presumption that the court's final decision may not be enforced or that enforcement may be significantly hindered.²⁴⁷

Procedural law places the parties in an equal position – the plaintiff and the defendant. Therefore, following the important principle of equality of the parties, the assessment of the enforcement of the decision must be made from the perspectives of both plaintiff and defendant.²⁴⁸ In such assessment, the principle of proportionality must be respected, specifically, that the measure used to secure one party's claim should be proportional (adequate) to that claim and should not show obvious inconsistency.²⁴⁹

Otherwise, the use of interim measures would not fulfill the purpose of securing enforcement of the decision. When deciding on the use of enforcement securing measures, the court must always evaluate whether the measure chosen corresponds to the claim it is intended to secure.²⁵⁰

When deciding on the issue of securing a decision and when restricting the rights of one party even within the legal framework, the court should be based on a well-grounded assumption that without the procedural measure in question, it would objectively be impossible or significantly complicated to enforce the legal outcome of the case – the court decision.²⁵¹

²⁴⁶ Jorbenadze S., "Defamation in Social Media and Legal Ways to Protect Rights", Journal: "My Lawyer", 2022 (In Georgian).

²⁴⁷ Ruling of the Civil Cases Chamber of the Supreme Court of Georgia of December 24, 2021 in case No. AS-1192-2021 (In Georgian).

²⁴⁸ Milmo P., Rogers W.V.H., (eds), *Gatley on Libel and Slander*, 11th edn, Sweet and Maxwell, 2008, 45.

²⁴⁹ Rolph D., *Reputation, Celebrity and Defamation Law*, Ashgate, 2008.

²⁵⁰ Salwen M.B., Dupagne M., *The Third-Person Effect: Perceptions of the Media's Influence and Immoral Consequences*, 26(5) *Communication Research*, 1999, 526.

²⁵¹ Case No. AS-939-2019 of the Civil Cases Chamber of the Supreme Court of Georgia of July 15, 2019 (In Georgian).

The European Court of Human Rights (ECHR), in many decisions, emphasizes the importance of enforcement of final decisions, stating that the right to a fair trial includes the right to enforcement of a final decision. According to the court, this right would be illusory if the national legal system of a member state allowed a final binding decision to remain ineffective to the detriment of one party. The court notes that enforcement of any judicial decision must be considered an integral part of the “court proceedings,” in light of the purposes of Article 6 of the Convention.²⁵²

Securing a claim/decision is an important institute of civil procedure and serves to ensure enforcement of court decisions.²⁵³ Considering that civil proceedings often involve lengthy procedures, there is a risk that before the final decision is reached, the subject of the dispute may be destroyed, alienated, legally burdened, or otherwise hindered in a way that complicates enforcement of the final decision.²⁵⁴ The interim measure serves precisely to prevent such risks.²⁵⁵

The effective administration of justice in civil cases represents an important public interest. At the same time, the effectiveness of justice depends significantly on enforcement of court decisions. Therefore, legal mechanisms intended to secure enforcement of civil court decisions serve a fundamental legitimate purpose – ensuring effective administration of justice.²⁵⁶

The use of interim measures is allowed against and/or in relation to the defendant to protect the plaintiff’s legitimate interests from the defendant’s bad-faith actions.²⁵⁷

According to the first paragraph of Article 198 of the Civil Procedure Code of Georgia, the court decides which interim measure to use upon the plaintiff’s application. According to subparagraph (b) of paragraph 2 of the same article, an interim measure may include forbidding the defendant from performing a certain action.²⁵⁸

The aforementioned court decisions and developed scholarly literature provide clear examples of how enforcement of court decisions concerning defamation claims is practically carried out and outline the formal preconditions set by courts for successful conduct of this procedure.

6. Conclusion

Defamation as an unlawful gain has proven to be a rather problematic issue, which once again confirmed its relevance. Any activity carried out in violation of the law must constitute grounds for liability. In this study, among the wide range of violations that can occur at any moment, attention was

²⁵² Decision of the European Court of Human Rights in the case of LLC “Iza” and Makrakhidze v. Georgia (In Georgian).

²⁵³ *Tiedge J.T.*, Discrepancy Between Perceived First-Person and Perceived Third-Person Mass Media Effects, 1991, 61.

²⁵⁴ *Shah D.V.*, Susceptibility and Severity: Perceptual Dimensions Underlying the Third-Person Effect, 26(2) Communication Research, 1999, 240.

²⁵⁵ Prosser and Keeton on the Law of Torts, 5th edn, West Publishing, 1984, 98.

²⁵⁶ Decision of the First Panel of the Constitutional Court of Georgia No. 1/5/675,681 of September 30, 2016 in the case “Broadcasting Company Rustavi 2 LLC” and “TV Company Georgia LLC” against the Parliament of Georgia, II-52 (In Georgian).

²⁵⁷ *McNamara L.*, Reputation and Defamation, OUP 2007, 87.

²⁵⁸ Article 198 of the Civil Procedure Code of Georgia (In Georgian).

focused on the issue of defamation as unlawful gain, specifically: the similarities and distinguishing criteria between defamation and slander; the definitions of honor, dignity, and business reputation and the existing Georgian judicial practice regarding them; the circumstances excluding the qualification of disparaging information as slander; the characteristics of freedom of speech and expression as a non-absolute right; issues related to defamation in France and Germany; the types of damages caused by defamation, particularly unlawful gain, and manifestations of disparaging information dissemination on social media, as well as measures for claim enforcement.

The research methods used in the preparation of this study allowed for the following conclusions:

- **Historical-legal method:** The use of this method revealed that the issue of defamation was regulated in ancient Greece and Rome. It is encouraging that this issue was also not unfamiliar to the Georgian legal space, as evidenced by the legal book of Beka-Aghbuga. It would be desirable for current legislation to also clarify defamation and distinguish it at the legislative level from slander, although the reason for the failure to implement this is discussed in the following paragraph.
- **Documentary method:** The study of specific legislation, literature, and analytical materials showed that it would be desirable to have more Georgian-language literature or at least articles on defamation. In this regard, court decisions are relatively abundant, and fundamental research on them could contribute to creating a good book. Regarding the conclusion from the documentary research, based on foreign legislation and analytical materials, it can be said that there is a significant difference between defamation and slander. It is also worth noting that this difference was probably eliminated due to the decriminalization of slander in Georgia, which ultimately equated slander and defamation terminologically. However, in this study, defamation and slander are argued separately based on documentary research, which unfortunately will not have practical effect until slander is criminalized.
- **Comparative legal method:** Based on this method, the reader was introduced to the legal systems and practices of Germany and France regarding defamation and slander, from which it follows that it would be good to reconsider the significance of slander as a criminal offense. Although the decriminalization of slander in Georgia has enhanced the right to freedom of speech and expression, ignoring the prohibition on disseminating information damaging to human honor and dignity is unacceptable. It is my view that, similar to France, there should be imperatively imposed sanctions against both public and natural persons, as well as legal entities possessing business reputations in the commercial market.
- **Systemic method:** The use of this method greatly assisted in understanding the significance and problems of defamation as unlawful gain. Within the systemic research framework, it was concluded that regarding defamation and slander, the Georgian Supreme Court issued a total of 16 decisions between 2014 and 2018 (as of October 18), six of which restricted freedom of expression. Although these statistics only reflect the Supreme Court's practice and cannot fully represent the overall picture, general tendencies can be observed: between 2014 and 2018, 37.5% of decisions on slander cases resulted in restrictions on freedom of expression, while

62.5% upheld freedom of opinion expression. Regarding the court's stance on compensation for both factual and material damages, including unlawful gain, it is very strict, requiring the plaintiff to precisely substantiate the causal link between the harm or unlawful gain and the act committed.

Bibliography:

1. Zoidze B., Commentary on the Civil Code of Georgia, Book Three, Tbilisi, Publisher "Samartali", 2001, 463-464.
2. Kropholler I., German Civil Code, Educational Commentary. Tbilisi: German International Cooperation Society (GIZ), 2014, 113.
3. Rusiashvili G., Online Commentary on the Civil Code, 2019, art. 411.
4. Surguladze I., "History of Georgian Law", 2014, 112.
5. Sukhitashvili D., Sukhitashvili T., Civil Liability, 2016, 176-177.
6. Dzlierishvili Z., et al., Contractual Law, Tbilisi, Publisher "Meridiani", 2014, 653, 653.
7. Jorbenadze S., "Defamation in Social Media and Legal Means of Protection," Journal: "My Advocate," 2022;
8. Amerasinghe A., Ranjit B., *Defamation in the Law of South Africa and Ceylon*, H.W. Cave, Colombo, 1969, 43-44.
9. Arend P.S., Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay be Defamatory?, 18 *North Illinois University Law Review*, 1997, 99.
10. Arend, Patrice S., Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay be Defamatory? 18 *North Illinois University Law Review*, 1997, 99.
11. Balkin, R., Davis J., *Law of Torts*, 4th edn, LexisNexis, 2008. Bezanson, Randall P. and Kathryn L. Ingle, Plato's Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law, 90(3) *Dickinson Law Review*, 1986, 585.
12. Baudouin J.L., *La responsabilité civile délictuelle*. 3e éd. Cowansville: Y. Blais, 1990. 838, 162-164.
13. Brosius H., Dirk E., The Causes of Third-Person Effects: Unrealistic Optimism, Impersonal Impact, or Generalized Negative Attitudes Towards Media Influence?, 8(2) *International Journal of Public Opinion Research*, 1996, 142.
14. Calvert C., Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique, 16 *The Northern Illinois University Law Review*, 1995, 111.
15. Calvert C., Harm to Reputation: an Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations, 26 *Pacific Law Journal*, 1995, 933.
16. Calvert C., The First Amendment and the Third Person: Perceptual Biases of Media Harms & Cries for Government Censorship, 6 *CommLaw Conspectus*, 1998, 165.
17. Cameron M., Rivkin Settles Defamation Case, *The Australian*, 8 July, 2004, 18.
18. Christian H., Social Reputation: A Mechanism for Flexible Self-Regulation of Multiagent Systems, 10 *Journal of Artificial Societies & Social Simulation*, 2007.
19. Cohen, Jeremy et al., Experimental Test of Some Notions of the Fact/Opinion Distinction in Libel, 66 *Journalism Quarterly*, 1989, 11.

20. *Combined Media Defamation Reform Group*, Submission in Response to “Outline of Possible National Defamation Law”, Attorney-General’s Discussion Paper – March 2004, May 2004.
21. *Culbertson H.M., Stempel G.H.*, ‘Media Malaise: Explaining Personal Optimism and Societal Pessimism about Health Care, 35(2) *Journal of Communication*, 1985, 180.
22. *David P., Johnson M.*, The Role of Self in Third-Person Effects about Body Image, 48(4) *Journal of Communication*, 1998, 37.
23. *Davison, W. Phillips*, The Third-Person Effect Revisited, Summer, 8(2) *International Journal of Public Opinion Research*, 1996, 2.
24. *Davison, W.*, The Third-Person Effect in Communication, 47 *Public Opinion Quarterly*, 1983, 1.
25. *De Visser R.*, Heterosexual Experience and Recent Heterosexual Encounters Among a Representative Sample of Adults, 27(2) *Australian and New Zealand Journal of Public Health*, 2003, 146.
26. *Dent Ch.*, Defamation Law’s Chilling Effect: a Comparative Content Analysis of Australian and US Newspapers, 9(2) *Media & Arts Law Review*, 2004, 89.
27. *Donoghue D.*, *England, their England: Commentaries on English Language and Literature*, University of California Press, 1989, 56.
28. *Driscoll P.D., Salwen M.B.*, Self-Perceived Knowledge of the OJ Simpson Trial: Third-Person Perception and Perceptions of Guilt, 74 *Journalism & Mass Communication Quarterly*, 1997, 541.
29. *Eisenberg J., Abbott, Kennett and Costello*, 1999, 153 *Communications Update* 19. *Eldridge, Laurence H.*, *Law of Defamation* Bobs-Merrill Co., Indianapolis, 1978, 45.
30. *Eveland Jr., William P., Douglas M.*, The Effect of Social Desirability on Perceived Media Impact: Implications for Third-Person Perceptions, 11 *International Journal of Public Opinion Research*, 1999, 315.
31. *Fleming J.G.*, *The Law of Torts*, 9th edn, Thomson Reuters, 1998.
32. *Frederick G.B.*, Gifts and Poison, in *Gifts and Poison: The Politics of Reoutation*, 1, 4, F.G. Bailey ed., 1971.
33. *Fricke G.L.*, The Criterion of Defamation, 32 *Australian Law Journal*, 1958, 7.
34. *Gashi H.*, Acquisition and Loss of Ownership Under the Law on Property and Other Real Rights (LPORR): The Influence of the BGB in Kosovo Law, 2013, 88-89.
35. *George P.*, Damages Survey for Defamation, paper presented at *Media Law and Defamation* seminar, Centre for Continuing Legal Education course, Faculty of Law, University of New South Wales, 14 March 2003, 48, 56.
36. *Glasser Ch.J. Jr.* (ed.), *International Libel & Privacy Handbook*, 2nd edn, Bloomberg Press, 2009, 76.
37. *Glynn C.J., Ostman R.E.*, Public Opinion about Public Opinion, 65 *Journalism Quarterly*, 1988, 299.
38. *Glynn C.J., Haynes A.F., Shanahan J.*, Perceived Support for One’s Opinions and Willingness to Speak Out: A Meta-Analysis of Survey Studies on the “Spiral of Silence”, 61 *Public Opinion Quarterly*, 1997, 452, 58.
39. *Gunther A.C.*, What We Think Others Think: Cause and Consequence in the Third-Person Effect, 18(3) *Communication Research*, 1991, 355.
40. *Harkess J.*, A Linguistic Inspection of the Law of Defamation, *Auckland University Law Review*, 1998, 653.

41. Hart J.D., Why Expert Testimony on the Meaning of Language has no Place in Libel Suits, in *David A. Schulz, Libel & Newsgathering Litigation – Getting & Reporting the News*, Practising Law Institute, 1998, 510, 517, 519.
42. Heider F., *The Psychology of Interpersonal Relations*, Routledge, 1958, 23.
43. Heine S.J., Lehman D.R., Cultural Variation in Unrealistic Optimism: Does the West Feel More Invulnerable than the East?, 68 *Journal of Personality and Social Psychology*, 1995, 595.
44. Hrysanthos D., The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms, 49 *Management Science*, 2003, 1407, 36.
45. *Human Rights and Equal Opportunity Commission, Same-Sex: Same Entitlements*, Commonwealth of Australia, Canberra, 2007, 77.
46. Jones E.E., Nisbett R.E., The Actor and the Observer: Divergent Perceptions of the Causes of Behavior, in E.E. Jones et al. (eds), *Attribution: Perceiving the Causes of Behavior*, Lawrence Erlbaum, 1987, 79.
47. Judith D., Signals in Social Supernet, 13 *Journal of Computer-Mediated Communication*, 2007, 12, 14.
48. Kenyon A.T., *Defamation: Comparative Law and Practice*, OUP, 2006, 121.
49. Kim Y., Ahn J., Song J., Perceived Media Influence on Self and Others on a Controversial Issue, paper presented at the meeting of the *International Communication Association*, Chicago, May 1991, unseen, cited in Dominic L. Lasorsa, Policymakers and the Third-Person Effect, in J. David Kennamer (ed.), *Public Opinion, The Press and Public Policy*, 1992, 163, 170.
50. Koster, 1980, 38. Opelt, 1965, 13.
51. Krasnostein S., Defamation Law and the Fairness of the Objective Test, 23(4) *Communications Law Bulletin*, 2004, 6.
52. Kundu A., Defamation, Reputation and the Community: an Analysis of the Doctrine of Presumed Harm in Defamation Law, 10(1) *Media & Arts Law Review*, 2005, 53.
53. Lasorsa D.L., Real and Perceived Effects of “Amerika”, 66 *Journalism Quarterly*, 1989, 373.
54. Lexis N., *Australian Defamation Law & Practice*. Barnett L.L., Defamation, Reputation, and the Myth of Community, 71(1) *Washington Law Review*, 1996, 1.
55. Liebermann, 1998, 1050. Nisbet, 1961, 192.
56. Lik M., Notions of Reputation in Multi-Agents Systems: A Review, in *Proceedings of the First International Joint Conference on Autonomous Agents and Multiagent Systems: Part I*, Bologna, Italy, July 15-19, 2002, 78.
57. Magnusson R., Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges, 9 *Torts Law Journal*, 2001, 269.
58. Mason L., Newspaper as Repeater: An Experiment on Defamation and Third-Person Effect, Autumn, 72(3) *Journalism and Mass Communication Quarterly*, 1995, 610.
59. Mason L., Newspaper as Repeater: An Experiment on Defamation and Third-Person Effect, Autumn, 72(3) *Journalism and Mass Communication Quarterly*, 1995, 610.
60. McCraw D., How do Readers Read? Social Science and the Law of Libel, 41 *Catholic University Law Review*, 1991, 81.

61. McLeod D.M., Detenber B.H., Eveland Jr. W.P., Behind the Third-Person Effect: Differentiating Perceptual Processes for Self and Other, 51(4) *Journal of Communication*, 2001, 679.
62. McNamara L., Bigotry, Community and the (In)visibility of Moral Exclusion: Homosexuality and the Capacity to Defame, 6(4) *Media & Arts Law Review*, 2001, 271.
63. McNamara L., *Reputation and Defamation*, OUP, 2007, 67, 87.
64. Milmo P., Rogers W.V.H. (eds), *Gatley on Libel and Slander*, 11th edn, Sweet and Maxwell, 2008, 45, 502.
65. Müller, 1913, 492-502; Miniconi, 1959, 159-175.
66. Mutz D.C., The Influence of Perceptions of Media Influence: Third Person Effects and the Public Expression of Opinions, 1989, 1.
67. Nadeau A., Nadeau R., *Traité pratique de la responsabilité civile délictuelle*. Montréal: Wilson & Lafleur, 1971. 732, 248.
68. Patrick G., Damages Survey for Defamation, paper presented at *Media Law and Defamation* seminar, Centre for Continuing Legal Education course, Faculty of Law, University of New South Wales, 14 March 2003.
69. Paul B., Salwen M., Dupagne M., The Third-Person Effect: A Meta-Analysis of the Perceptual Hypothesis, 3(1) *Mass Communication & Society*, 2000, 57.
70. Perloff R.M., Perceptions and Conceptions of Political Media Impact: The Third-Person Effect and Beyond, in Ann N. Crigler (ed.), *The Psychology of Political Communication*, The University of Michigan Press, 1996, 197.
71. Perloff R.M., Perceptions of “Amerika”, 19 *Mass Communication Review*, 1992, 42.
72. Pineau J., Ouellette M., *Théorie de la responsabilité civile*. 2e éd. Montréal: Éd. Thémis, 1980, 237, 62, 63, 64.
73. Pound R., Interests of Personality, 28(4) *Harvard Law Review*, 1915, 343.
74. Price D., Cain N., Duodu K., *Defamation Law, Procedure and Practice*, 4th edn, Sweet & Maxwell, 2009, 54.
75. Prosser W., Keeton W.P., *Prosser and Keeton on the Law of Torts*, 5th edn, West Publishing, 1984, 98.
76. Rissel Ch., Attitudes Towards Sex in a Representative Sample of Adults, 27(2) *Australian and New Zealand Journal of Public Health*, 2003, 118.
77. Rivard A., Calvert C., Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique, 16* *The Northern Illinois University Law Review*, 1995, 111. *De la liberté de la presse*, Montréal: Garneau, 1923, 125, 67.
78. Robin D.U., Grooming, Gossip and the Evolution of Language, 171-74, 1996, 37.
79. Rolph D., *Reputation, Celebrity and Defamation Law*, Ashgate, 2008.
80. Rolph D., Vitins M., Bannister J., *Media Law: Cases, Materials and Commentary*, OUP, 2010, 42, 43, 5, 87.
81. Salwen M.B., Dupagne M., The Third-Person Effect: Perceptions of the Media’s Influence and Immoral Consequences, 26(5) *Communication Research*, 1999, 526, 523.
82. Shah D.V., Susceptibility and Severity: Perceptual Dimensions Underlying the Third-Person Effect, 26(2) *Communication Research*, 1999, 240.

83. *Siegfried J.*, Sprachliche Gewalt gegenüber Minderheiten: Formen der sprachlichen Diffamierung in den Medien und im politischen Diskurs, in: *Der Deutschunterricht*, 59, 5, 2007, 11, 21.
84. *Simon G., Herrmann B.*, Human Cooperation From an Economic Perspective, in *P. Kappeler & C.P. van Schaik* (eds.), *Cooperation in Primates and Humans*, 2006, 279, 31.
85. *Sprankling J.*, *The International Law of Property*, Oxford University Press, 2014, 111.
86. *Standley T.C.*, Linking Third-Person Effect and Attribution Theory, unpublished Master's thesis, Southern Methodist University, Dallas, Texas, cited in *Paul B., Salwen M., Dupagne M.*, The Third-Person Effect: A Meta-Analysis of the Perceptual Hypothesis, 3(1) *Mass Communication & Society*, 2000, 57.
87. *Tewkesbury D.*, The Role of Comparison Group Size in the Third-Person Effect, 14(3) *International Journal of Public Opinion Research*, 2002, 247.
88. *Tiedge J.T.*, Discrepancy Between Perceived First-Person and Perceived Third-Person Mass Media Effects, 1991, 61.
89. *Treiger-Bar-Am L.K.*, Defamation Law in a Changing Society: the Case of *Yousoupoff v Metro-Goldwyn Mayer*, 20 *Legal Studies*, 2000, 291.
90. *Vallières N.*, *La presse et la diffamation: rapport soumis au ministère des Communications du Québec*, Montréal: Wilson & Lafleur, 1985, 138, 6-8, 10, 49, 52, 58, 90.
91. *Ven-hwei Lo W.*, Third-Person Effect, Gender, and Pornography on the Internet, 46(1) *Journal of Broadcasting & Electronic Media*, 2002, 13.
92. *Von Vechten V.*, The History and Theory of the Law of Defamation II, 4 *Columbia Law Review*, 1904, 33, 33.
93. *Willnat L.*, Perceptions of Foreign Media Influence in Asia and Europe: The Third-Person Effect and Media Imperialism, 2002, 14(2).
94. *Yatar E.K.M.*, Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence, 12 *Law & Sexuality*, 2003, 119.
95. *Zimmerman D.L.*, Curbing the High Price of Loose Talk, 18(2) *UC Davis Law Review*, 1985, 359.
96. *Zimmermann R., Whittaker S.*, *Good Faith in European Contract Law*, Cambridge: Cambridge University Press, 2000, 87.
97. <<https://www.anwalt.org/diffamierung/>> [20.05.2025].
98. <<https://www.dahag.de/c/ratgeber/strafrecht/diffamierung>> [20.05.2025].
99. <<https://www.justifit.fr/b/guides/droit-penal/diffamation/>> [20.05.2025].
100. <<https://www.laloi.ca/quest-ce-que-de-la-diffamation/>> [20.05.2025].
101. <<https://matsne.gov.ge/ka/document/view/33208?publication=7>> [20.05.2025].
102. <<https://globalfreedomofexpression.columbia.edu/cases/bladettromsoandstensaasv-norway/>> [20.05.2025].
103. <<http://www.gccc.ge>> [20.05.2025].
104. <<https://temida.ge/fullcase/2691/--.pbn>> [20.05.2025].
105. <<https://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>> [20.05.2025].
106. <<https://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>> [20.05.2025].
107. <<https://www.supremecourt.ge/files/upload-file/pdf/dichand-and-others-v.-austria.pdf>> [20.05.2025].
108. <<https://www.supremecourt.ge/files/upload-file/pdf/ganmarteba7.pdf>> [20.05.2025].

- 109. <<https://temida.ge/fullcase/2944/--.pbn>> [20.05.2025].
- 110. <<https://temida.ge/fullcase/3826/--.pbn>> [20.05.2025].
- 111. <<https://temida.ge/fullcase/2893/--.pbn>> [20.05.2025].
- 112. <<https://globalfreedomofexpression.columbia.edu/cases/blad-et-tromso-and-stensaas-v-norway/>> [20.05.2025].
- 113. <<https://globalfreedomofexpression.columbia.edu/cases/blad-et-tromso-and-stensaas-v-norway/>> [20.05.2025].
- 114. <<https://globalfreedomofexpression.columbia.edu/cases/case-of-kasabova-v-bulgaria/>> [20.05.2025].
- 115. <[https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-61861%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61861%22]})> [20.05.2025].
- 116. <<https://www.zmogausteisiugidas.lt/en/case-law/tolstoy-miloslavsky-v-the-united-kingdom>> [20.05.2025].

Gvantsa Khasia*

The Entity Responsible for Ensuring Compliance with Safety Standards under the Package Travel Contract

Neglecting safety standards in any field may pose a threat to human life, health, and property. However, the risks extend further, potentially affecting the overall quality of an individual's personal life. The observance of safety standards by the responsible party is particularly important in the implementation of a package travel. A package travel is a service composed of multiple components, the fulfilment of which involves various entities. Nevertheless, within the framework of contractual obligations towards the tourist, a single party assumes responsibility. The failure to adhere to safety standards during the provision of services stipulated under a package travel contract may result in the cancellation or substantial devaluation of the trip, often accompanied by incidents involving bodily harm or damage to health.

International practice shows that, due to the specific nature of such agreements, approaches to identifying the responsible party and defining the scope of liability in the event of safety breaches vary significantly. This paper, based on international practice, explores the challenges related to determining the extent of the tour operator's civil liability when a service provider breaches safety standards.

Keywords: Tour operator, safety standards, package travel contract, damage.

1. Introduction

A package travel contract combines two or more services tailored to the interests of the tourist.¹ The tourist is a subject entitled to special protection, travelling for health-related, educational, business, sporting, religious, or other purposes, and typically possesses a particular interest in and high expectations for the journey.² The entity delivering the services included in the package travel may be a third party with whom the tourist has no direct contractual relationship, even though the tourist is the end recipient of the services.³ The tourist engages with the trader⁴ and reasonably expects that a

* PhD Student and invited lecturer at the Faculty of Law of Ivane Javakhishvili Tbilisi State University.

¹ It is noteworthy that the Civil Code of Georgia recognises the concept of a “tourism contract,” while the Law of Georgia on Tourism refers to the term “package travel contract,” which is fully aligned with Directive 2015/2302 on Package Travel and Linked Travel Arrangements.

² Consumers of tourist services typically have the expectation that the host will demonstrate a heightened level of care towards them. Among other factors, this is reflected in the protection of their property, regarding which tourists tend to have higher-than-usual expectations – see *Cyril P.*, Tourists: Duty of Care, International Journal of Safety and Security in Tourism/Hospitality, No. 17, 2017, 1, 4.

³ Decision of the Supreme Court of Georgia of 22 November 2019 in case No. 36-1114-2019 (see the reasoning of the Tbilisi Court of Appeal).

⁴ Subparagraph “t” of Article 2 of the Law of Georgia on Tourism defines the concept of a trader, which may refer to a tour operator, a travel agency (travel agent), or a provider of linked travel services, www.matsne.gov.ge, 15/12/2023.

qualified entity will plan the package travel in accordance with the tourist's best interests, exercising due diligence in selecting the service providers. This inherently includes the obligation to offer safe services to the tourist.⁵

The growing popularity of the tourism industry and its rapid development have demonstrated that consumer behaviour plays a crucial role in shaping the conduct of business entities. Today's consumer is significantly more informed about their rights and places increasing emphasis on the quality of service in exchange for the price paid. Travel inherently involves certain risks, particularly as it typically occurs in unfamiliar destinations, distinct from one's permanent residence. These risks may be combined with limited knowledge of the local language, legal regulations, crime rates, and other relevant factors.

The obligation to provide detailed information to the tourist is one of the most effective mechanisms for ensuring tourist protection. It enables informed decision-making during the planning phase of a package travel. An analysis of international practice reveals that a variety of circumstances may arise during the utilisation of services under a package travel contract, potentially resulting in a diminished travel experience. As previously noted, the actual providers of services included in a package travel may be different entities, which complicates the issue of proper fulfilment of contractual obligations towards the tourist. Some circumstances that may lead to the cancellation or devaluation of a trip may fall outside the direct control or responsibility of the trader. In each case where the tourist suffers harm as a result of using a component of the package travel, the question arises: could the trader have reasonably foreseen the specific situation, and was there an obligation to assess the potential consequences and implement preventive measures?

It is worth noting that the Georgian courts have limited jurisprudence in evaluating the scope of a tour organiser's civil liability, in contrast to the extensive body of international legal doctrine, which includes numerous decisions concerning the obligation to adhere to safety standards. An analysis of international case law reveals that approaches to determining the liable party and the scope of liability for harm resulting from non-compliance with safety standards are often inconsistent. This divergence can be attributed to the specific circumstances of each case.

The aim of this paper is to assess the scope of the trader's civil liability in relation to the obligation to comply with safety standards, through the lens of international practice. The study seeks to offer relevant recommendations for the development of Georgian legal practice, grounded in a thorough analysis of international experience.

2. The Primacy of Providing Safe Tourist Services

Modern tourism is one of the largest industries in the world,⁶ with tourism enterprises playing a significant role in its promotion. The growing popularity of tourism has highlighted the necessity of

⁵ The liability of the organiser of a package tour is not limited solely to errors or shortcomings directly attributable to the tour operator or travel agent, but also extends to deficiencies in performance by other parties involved in delivering the services included in the package. These parties participate in the performance of specific stages of the contract on the basis of a multilateral agreement – see *Alawan A. S. A.*, Civil liability of the Tourism and Travel Agency arising from the breach of its obligations to the tourist in the tour contract: A study in Bahraini and Jordanian law, *Journal of Positive Psychology & Wellbeing*, Vol. 6, No. 1, 2022, 2050.

regulating the sector.⁷ A key feature of the tourism sector is the unequal distribution of power among participating parties – for example, it is a well-established practice to regard the consumer, including the tourist, as the “weaker” party.⁸ When entering into a contract, the consumer’s primary aim is the fulfilment of private, personal interests, rather than the pursuit of profit.⁹ For this reason, the consumer is considered a subject of special legal protection.¹⁰ The objective of the law is to establish appropriate legal mechanisms to safeguard the interests of the tourist as the “weaker party”.

In accordance with international practice, a standard of conduct has been established for tour organisers: they are expected to act within a fiduciary duty, taking into account the tourist’s best interests. This entails exercising due care and particular attentiveness in both the planning and implementation of the package travel.¹¹ Tour operators fulfil an intermediary function in identifying tourism needs and delivering tourist services. Accordingly, their primary objective is to assist the tourist in organising and carrying out the journey.¹² The success of the tourism sector largely depends on the quality of service provided to consumers not only by tour operators but also by other business entities involved in the delivery of tourist services. This inevitably includes the obligation to ensure a safe travel experience for the tourist.¹³

There is no legal definition of “tourism safety,” but it is undisputed that it encompasses the implementation of preventive measures for safety, as well as the protection of a person’s life and health in the event that hazardous circumstances arise.¹⁴ In the tourism sector, the activities of any service provider are associated with certain risks, and according to general principles, the party that creates the risk is obligated to compensate for it.¹⁵ The risk inherent in travel is not unusual, especially when the tourist moves to a destination different from their usual place of residence. The tour organiser is obliged, using their knowledge and experience, to plan the trip and undertake all preventive measures within their competence to minimise the potential risks associated with the

⁶ Tarlow E. P., *Tourism Security (Strategies for Effectively Managing Travel Risk and Safety)*, Elsevier, 2014, 1.

⁷ “On Package Travel and Linked Travel Arrangements” Directive (EU) 2015/2302 of 25 November 2015, Recital 1 and 2.

⁸ Decision of the Civil Chamber of the Supreme Court of Georgia of 30 May 2022 in case №სს-910-2020.

⁹ Lakerbaia, T., The Concept of the Consumer in the Case Law of the Court of Justice of the European Union, *Orbeliani Journal*, No. 4, 2021, 88 (in Georgian). Lakerbaia, T., Zaalishvili, V., Zoidze, T., *Law on Consumer Protection*, Tbilisi, 2018, 35 (in Georgian).

¹⁰ Zoidze, T., Subjects of Consumer Protection Law, in *Besarion Zoidze Jubilee Collection 70*, University Press, Tbilisi, 2023, 276 (in Georgian).

¹¹ Wasserman R., Recent Developments Travel Agency Liable to Travelers When its Failure to Confirm Reservations Ruins Vacation, *Columbia Law Review*, Vol. 74, N5, Jun 1974, 989.

¹² “On Package Travel and Linked Travel Arrangements” Directive (EU) 2015/2302 of 25 November 2015, Recital 46.

¹³ Ilic D., Deri L., Stamenkovic P., Milicevic S., Service Quality as Travel Agencies Business Improvement Factor, *Conference Paper*, 2016, 203.

¹⁴ Tarlow E. P., *Tourism Security (Strategies for Effectively Managing Travel Risk and Safety)*, Elsevier, 2014, 5.

¹⁵ Faure M., Weber F., Security Mechanisms for Insolvencies in the Package travel Sector: An Economic Analysis, *Journal of Consumer Policy*, 2013, 5.

journey. Risk is broadly defined as the likelihood of a negative outcome, characterised by a high probability of injury or loss.¹⁶

Travel involves the movement of people via transportation, accommodation for overnight stays, visits to various cultural and historical sites, and other activities.¹⁷ Tourists travel for health, educational, business, sporting, religious, or other purposes, during which there is a risk that they may become a “victim” or “injured” for various reasons. Each of these activities is characterised by increased risks, as they typically involve the gathering of a certain number of people in an unfamiliar environment. The most common risks associated with travel include the tourist’s expectations regarding the safety of the destination, a lack of information about the route, the consumption of low-quality products to address hunger, and others.¹⁸ It is reasonable to assume that there are risks inherent in travel, some of which are unforeseeable by the tour organiser in advance and thus fall outside the scope of their liability. For example, common risks in the tourism industry include infectious diseases, terrorism, and natural disasters.¹⁹

The difficulties encountered during the implementation of a package travel often have a significant impact on the quality of the journey, which negatively affects the level of tourist satisfaction. An informed tourist demands compensation for harm caused by the improper fulfilment of contractual obligations. In such cases, it becomes crucial to determine the responsible party and the scope of their liability.

Can a tour operator be considered the responsible party for compensating damages in the event of a trip becoming unsuitable due to a terrorist act? The answer to this question is not straightforward. Although the tour operator is not directly responsible for the occurrence of a terrorist incident, they have an increased obligation to inform the tourist about potential risks when travelling to a country with a higher incidence of such events.²⁰

In general, tour operators have broad responsibilities towards tourists, and the provision of services involves the regulation of various aspects. However, the primary duty during the planning phase of any package travel is for the tourism enterprise to consider the best interests of the tourist, with the primary focus being the provision of the safest possible services. The failure to adhere to safety standards during the implementation of a package travel is only recognised when the tourist

¹⁶ Mançi R. A., Determining Destination Risk Perceptions, Their Effects on Satisfaction, Revisit and Recommendation Intentions: Evidence from Sanliurfa/Turkey, *Journal of Multidisciplinary Academic Tourism*, 7 (1), 2022, 83. Cited in: Reisinger Y., Mavondo F. T., Cultural Differences in Travel Risk Perception, *Journal of Travel and Tourism Marketing*, 20(1), 2006, 13-31.

¹⁷ Landini S., *Travel and Tourism Contracts* (Design of Sustainable Tourism Systems), Antezza, 2013, 41-42. Binns A. C., Kempf J. R., *Safety and Security in Hotels and Home Sharing*, Springer, USA, 2021, 3-4.

¹⁸ Tarlow E. P., *Tourism Security* (Strategies for Effectively Managing Travel Risk and Safety), Elsevier, 2014, 6-7.

¹⁹ Karl M., Muskat B., Ritchie W. B., Which Travel Risks are More Salient for Destination Choice? An Examination of the Tourist’s Decision-making Process, *Journal of Destination Marketing & Management*, N. 18, 2020, 2. Cited in: Kozak M., Crofts J. C., Law R., The impact of the perception of risk on international travelers, *International Journal of Tourism Research*, 9(4), 2007, 233-242.

²⁰ World Tourism Organization, *Tourist Safety and Security*, Spain, 1996, 36-37. <https://sete.gr/files/Media/Ebook/110301_Tourist%20Safety%20and%20Security.pdf> [20.11.2024].

suffers harm due to non-compliance with the relevant standards, which, in turn, negatively affects the tourist's satisfaction and the quality of their holiday.

3. The specifics of breaching safety standards by the service provider and the responsible party

Consumer expectations regarding service quality are often contradictory, as they are shaped by subjective perceptions.²¹ From the outset of pre-contractual relations, the tourist has an expectation that the service provided by the obligated party will fully meet safety standards. Otherwise, the consumer would not agree to enter into the contract, particularly in the presence of significant risks to their life, health, or property.

The Directive on “On Package Travel and Linked Travel Arrangements” and the Georgian Law on Tourism establish that the tour operator is responsible for the provision of tourist services as outlined in the contract, even if such services are to be provided by another entity.²² The scope of the tour operator's liability is quite broad; they are considered the responsible party for the actions of all individuals involved in the implementation of services specified in the package travel.²³ The main argument for holding the tour operator liable for the breach of safety standards is the contractual relationship between the tourist and the service provider, which is based on a component of special trust.²⁴ Determining the scope of the tour operator's liability involves challenges due to the individuality of each case. Adherence to the standard of reasonable care is characteristic of fulfilling the obligations under the package travel contract. Therefore, when harm results from the violation of certain foresight norms, the tour operator must prove that they took the necessary measures and that the outcome was beyond their control, and that it was impossible for them to have foreseen such results.²⁵ If the court deems the imposition of liability on the tour operator for the breach of safety standards unjustified, the tourist may only seek compensation for damages from the service provider based on tort law, which complicates the process of satisfying their claim as the “weaker party.”

Ensuring the safety of the tourist is essential, and it is undoubted that this obligation primarily involves the provision of adequate information to the consumer, which serves to minimise risk factors. Additionally, it is crucial for the tour operator to control the implementation of the package travel and, if necessary, respond promptly to resolve any emerging issues. The obligation to inform the tourist in advance regarding safety standards is not explicitly outlined at the legislative level. This is logical under the conditions where compliance with safety standards is an unconditional responsibility for the

²¹ *Ilic D., Deri L., Stamenkovic P., Milicevic S., Service Quality as Travel Agencies Business Improvement Factor, Conference Paper, 2016, 204.*

²² “On Package Travel and Linked Travel Arrangements” Directive (EU) 2015/2302 of 25 November 2015, Article 13.1. Article 22, Paragraph 1 of the Law of Georgia on Tourism, www.matsne.gov.ge, 15/12/2023.

²³ *Barend Van L., European Standardisation of Services and its Impact on Private Law: Paradoxes of Convergence, Modern Studies in European Law, Bloomsbury, 2017, 124-125.*

²⁴ According to Article 24 of the Law of Georgia on Tourism, a notice sent to a travel agency (travel agent) is considered as having been sent to the tour operator, www.matsne.gov.ge, 15/12/2023.

²⁵ *McDonald M., Revisiting Organiser Liability under the Package travel Directive (Part Two), International Travel Law Journal, 2003, 214.*

business entity to carry out its entrepreneurial activities and the existence of these standards at the time of contract formation is not disputed.

Based on the analysis of international case law, instances of breaches of safety standards by the service providers involved in the package travel are identified, including issues related to slippery floors, malfunctioning lifts, inadequate lighting, faulty swimming equipment, non-compliance with hygiene and safety requirements concerning swimming pools, balcony safety, lighting, the use of glass doors in various spaces, and other similar concerns. These aforementioned deficiencies can be used to segment the primary risk factors, the protection of which may not directly fall under the tour operator's responsibility. However, in the event of damage, these risks may still fall within the scope of the tour operator's liability.²⁶

3.1. Violation of Fire Safety Standards

The regulation of fire safety standards is a matter of public law, aimed at protecting human life, health, and property from emergency situations. Consequently, high-risk entities are subject to fire safety supervision by the state. The responsibilities of the supervisory entity's management include, on the one hand, preventive measures (such as alarm systems), and on the other hand, the implementation of effective mechanisms for fire suppression (extinguishment) within the relevant spaces (e.g., hotels, airports, exhibition areas, and other spaces).²⁷

A breach of fire safety standards may result in harm to the service recipient, which could manifest as damage to health and/or property, as well as a disruption of the trip due to the loss of enjoyment. Logically, in the case of a hotel, the responsibility for ensuring compliance with fire safety standards lies with the management of the establishment. A violation of safety standards arises from the breach of objective regulations; otherwise, the existence of wrongful conduct cannot be established. To ensure the protection of tourist's interests, the EU Directive on Fire Safety in Existing Hotels is in effect, which includes several provisions aimed at reducing the risk of fire outbreaks in hotels.²⁸

It should be noted that the hotel management does not represent a party to the tourist package contract. Therefore, the question arises as to whether the tour operator is responsible for any defects resulting from actions attributable to the party responsible for ensuring compliance with safety requirements.

There is an interesting evaluation of a British court on a case regarding a tourist who sustained injuries due to a fire in a hotel where the fire door was locked. The tour operator claimed that they had recently inspected the fire safety regulations in the hotel and did not consider themselves responsible

²⁶ European Parliament Policy Department, Study of Safety and Liability Issues Regarding Package Travel, IP/A/IMCO/FWC/2006-058/LOT 4/C1/SC5, 30.
https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/999/999000/999000en.pdf [15.01.2025].

²⁷ Clifton D., Hospitality Security (Managing Security in Today's Hotel, Lodging, Entertainment, and Tourism Environment), CRC Press, London, 2012, 179.

²⁸ "On Fire Safety In Existing Hotels" Directive (EU) 86/666/EEC of 22 December 1986.

for the damage. However, the court did not accept this position and held the tour operator accountable for the breach of contractual obligations.²⁹ Considering the existing practice, the question arises as to what could be the legal remedy in such cases to exclude the responsibility of the tour operator. Moreover, it raises the question of why the tour operator should be held accountable when they systematically, or shortly before the incident, inspect the safety standards of the hotel, or whether the operator should be required to employ staff with appropriate qualifications who have the competence to assess safety regulations. To resolve this issue, it would be more reasonable to establish the obligation for the service provider to present a certificate or conclusion from the relevant supervisory authority, issued periodically, regarding the compliance with fire safety standards. This would serve as the basis for including their services in the tourist package and would subsequently exclude the operator's liability and the imposition of an unfair burden on them.

3.2. Violation of construction standards and other safety regulations

The tourist package contract may include services where compliance with construction standards is fundamentally linked to the proper execution of the services stipulated in the tourist package contract. In one case, the contract between the parties contained several services, including accommodation at "America Aruba". The claimant argued that the defendant had violated their duty of care, which was reflected in the choice of accommodation offered, which was unsafe for tourists. The claimant was injured while using the bathroom, as they slipped and fell. According to the claimant, the defendant had not adequately addressed the hazards, resulting in the bathroom not being equipped with anti-slip materials, which could have prevented the damage. The court did not accept the claimant's position and stated that the defendant was not aware of the issue, which could have come to light through complaints from other tourists, which had not occurred prior to this case. Furthermore, it was noted that the defendant was not obligated to investigate whether the bathroom contained anti-slip materials, as their duty did not involve such a specific investigation, as the claimant had wished to present during the case. Therefore, the court did not agree with the claimant's position, which suggested that the defendant's "carelessness in choosing" the service provider was the cause of the issue.³⁰

The New Jersey court's assessment on this issue is inconsistent. In one case, the claimant sought compensation for damages after slipping in a puddle of water in the hotel bathroom, which resulted in a broken leg caused by a defect in the shower. The claimant argued that the defendant was responsible for the trip booked and not proceeding as per the agreement, as their responsibility encompassed controlling the execution of the contract's components, ensuring cleanliness and maintenance, including the repair of the hotel's infrastructure, and other related matters. The court noted that the travel company was not an insurer or a guarantor, and it was unreasonable to expect that it would foresee and warn the tourist about all possible dangers that could accompany the trip. However, the fact that the travel company could not identify all risks did not exempt it from its fiduciary duty to

²⁹ *Alleweldt F., Tonner K., McDonald M. and others*, Study on Safety and Liability Issues Relating to Package Directive, Policy Department Economic and Scientific Policy, 7.

³⁰ *Sharon Plino and Anthony Plinio v. Americana Aruba Beach Resort Casino* [1999] 98-2745.

warn the tourist about the dangers it knew of or should have known about due to its activities, which fell within its responsibility. In this case, the court explained that the injury the claimant sustained, resulting in bodily harm, could not have been foreseen by the defendant.³¹ In another case, the court highlighted that a tourist could book a hotel on their own and, by chance, choose a hotel that carries certain risks. To mitigate this risk, the tourist turns to the relevant entity, expecting it to have the knowledge and experience required, thus trusting its recommendation regarding the hotel. The court determined that the travel organiser is responsible when the tourist trusts the travel organiser and, consequently, its recommendations, only to experience disappointment, including the discomfort of a hotel that turned out to be completely incompatible with safety standards. It was noted that a reasonable entity should have known about the problem and would not have given such a recommendation, which resulted in harm to the tourist's interests.³²

In the case of *Griffin v Mt Travel UK Ltd*, the court stated that the tour operator is obligated to periodically check the bed frame mechanism, the failure of which led to the tourist sustaining bodily harm at the hotel. The factual circumstances of the case revealed that checking this mechanism was not a common practice at the hotel, and the last check was conducted three years prior. According to the court, a diligent and reasonable tour operator, as well as a service provider, is required to periodically check the bed mechanism, for example, once a month.³³

It is clear that protecting the interests of the tourist, as the “weaker party,” justifies the imposition of an unreasonable and often unjustified burden on the tour operator. However, without such an imposition, the tourist would be left in a completely hopeless situation. Considering the low statistics of claims filed in court in Georgia, it is difficult to imagine a tourist initiating a lawsuit against a foreign entity in another country, especially given the value of the claim in question.

3.3. Violation of food safety standards

During a trip, one of the pleasures for tourists is discovering local cuisine, and for some, this component is the main interest of the journey. A tourist package may include meals as part of the services offered. The obligation to provide food products of adequate quality to the customer arises from consumer protection legislation.

In the case of *Antcliffe v Thomas Cook Tour Operations Ltd*, the court held the tour operator responsible for the damage caused by the use of substandard products. A married couple booked a two-week holiday, organised by the tour operator. In total, five tourists suffered health damage due to food poisoning, and they requested a reduction in the cost of the tour package and compensation for the loss of enjoyment. The claim was made on the grounds of poor performance of obligations arising from the package holiday, as well as from the “sale of goods and provision of services” concerning the delivery of “unsatisfactory quality” food. One of the tourists sustained an injury after vomiting and subsequently falling. The court did not agree with the claimants' position that there was an overall devaluation of the holiday, as the first week had been enjoyable, and when considering the price

³¹ Schwartz v. Hilton Hotels Corporation [2009] 639 F. Supp. 2d 467.

³² Josephs v. Fuller (Club Dominicus) [1982] 451 A.2d 203.

³³ Griffin v My Travel UK Ltd [2009] NIQB 98.

reduction, only the second week of the trip was taken into account. The court accepted the position of the defendant, the tour operator, and where the claimants sought compensation for bodily injury and loss of enjoyment, it was considered that the bodily injury claim also encompassed the loss of enjoyment.³⁴ This approach was not shared in later court decisions, which must be rightfully considered as correct.

In one case, the court stated that it is unreasonable for tour operators to become guarantors of the quality of food and beverages worldwide when meals are part of the tourist package and their contractual obligations. The court focused on the unjustifiability of such an extension of responsibility, but acknowledged that, depending on the circumstances, the imposition of liability on the tour operator could still be possible.³⁵

4. Warning Signs as a Means of Informing the Tourist

The presence of various warning signs along tourist routes and in accommodation facilities serves the obligation to provide information. In this regard, one notable precedent is the decision in the case of *Blades v Thomas Cook Tour Operations Limited* – the claimant purchased a tourist package that included accommodation in a hotel in Greece. At 9:30 AM, the hotel staff asked the tourist for permission to clean the room. To avoid interfering with the cleaning process, the claimant went out onto the balcony, and upon returning to the room, slipped and fell due to a wet floor. According to the claimant, there was no warning sign to inform them of the potential slip hazard. The court's decision partially upheld the claimant's request, explaining that both parties were at fault for the injury. Specifically, the claimant should have known and anticipated that there was a risk of slipping upon entering the room, while the hotel representatives should have ensured there was no slip hazard and, for this purpose, placed a warning sign. The dispute arose over the fact that although the hotel used a warning sign, it was not a legal obligation under local legislation, and as such, was not considered a violation of safety standards.³⁶

The court attributed a different significance to the presence of warning signs in another case – the claimant, along with their minor grandchild, was heading from the hotel pool to the beach when they crossed a tiled area and slipped, resulting in injury. It was revealed that the tiled area was frequently wet, and other guests had also expressed dissatisfaction due to similar experiences. The claimant approached the court against the tour operator and pointed out that under Turkish law, the presence of warning signs is mandatory, and that they were not warned that the area was wet and posed a slipping hazard. The claimant argued that had warning signs been present, they would have been more cautious and would have avoided the injury. The court agreed with the claimant's position and stated that it could “almost certainly” be said that the presence of a warning sign indicating the surface was wet and posed a slipping hazard would have prevented the accident from occurring.³⁷

³⁴ *Antcliffe v Thomas Cook Tour Operations Ltd [2012] 7 WLUK 97.*

³⁵ *Wood v TUI Travel PLC (2017).*

³⁶ *Blades v Thomas Cook Tour Operations Limited, Croydon County Court, 7th December 2015.*

³⁷ *Revill v TUI UK Limited, Sheffield County Court, 14th October 2016.*

In another case, a tourist slipped on a wet staircase and sustained health injuries. The court considered that such an outcome fell within the responsibility of the tour operator, as there was a failure to fulfil the contractual obligation, which resulted from a lack of proper care and skills, specifically manifesting in the disregard for local safety standards. However, the court also noted that assigning responsibility to the tour operator in cases where the damage was not a direct result of the breach of the contractual obligation would lead to an increase in the cost of package holidays.³⁸

The presence of warning signs serves to inform the tourist and prevent risks. Warning signs must be visible, clear, and placed in such a way that they allow for reasonable prior notification to the customer. It is logical that in the case of a breach of this obligation, the tourist has the right to claim compensation for the damage caused by the breach of the duty of care. Where there is no legal obligation for the presence of warning signs, it is important that the tourist is provided with appropriate information in an oral form or another perceivable manner.

5. The Issue of Establishing a Causal Link for the Purposes of Damage Compensation

For damage compensation, it is essential to determine the person's subjective attitude towards the action and the result, which is reflected in the person's fault. The action performed by the person must, in turn, be unlawful and must violate a rule defined by law. The action must be directly related to the negative result, and the fact of damage must objectively exist in order for all the prerequisites for damage compensation to be met.³⁹

In one case, the court focused on the consequences of not using anti-slip paint around a swimming pool. However, based on the circumstances of the case, the court could not determine that the damage was a direct result of the defendant's wrongful actions. It was undisputed that the relevant standard was not followed, specifically the use of a preventive measure around the swimming pool to prevent slipping. Despite the court establishing the defendant's fault, a causal connection between the action and the resulting damage was not proven. The facts of the case were as follows: the claimant purchased a tourist package from a tour operator. During the trip, the claimant sustained an injury because the surface around the pool was not treated with anti-slip paint, causing the claimant to slip and break their neck. The court noted that despite the breach of safety measures, which was reflected in the failure to treat the surface with anti-slip paint and increased the risk of harm, it was not proven that the damage would have been avoided even if the requirements had been followed.⁴⁰ Thus, it was noted that mere failure to meet the appropriate safety standard would not constitute grounds for holding the tour operator liable, as all necessary conditions for liability must cumulatively exist.

Compliance with safety standards is not a panacea and does not guarantee the prevention of negative outcomes; however, by similar logic, if adherence to safety standards cannot be considered a guarantee against the occurrence of damage, then non-compliance with these standards should be more likely seen as a contributing factor to the occurrence of harm. A tourist has an expectation regarding

³⁸ Loughheed v. On the Beach Limited [2014] EWCA 1538.

³⁹ Tsertsvadze, G., Dzlishvili, Z., et al., Contract Law, Meridian, Tbilisi, 2014, 677–678 (in Georgian). Vashakidze, G., et al., Commentary on the Civil Code (Book III), Tbilisi, 2019, 587–589 (in Georgian).

⁴⁰ Clough v First Choice Holidays and Flights Ltd [2006] EWCA Civ 15.

the adherence to safety standards, and accordingly, their behaviour aligns with this pre-formed expectation. It is important to note that a tourist lacks the knowledge and practical ability to verify in advance whether the safety standards meet the established requirements. It is precisely this trust-based relationship that creates an expectation that the service offered by a qualified entity will be safe for their life and health. Therefore, the existence of a causal link should only be relevant in cases where the connection between the action and the outcome is practically unclear. However, if the link cannot clearly be excluded, even a formal breach of safety standards should be considered a contributing factor to the occurrence of damage, and this should lead to the responsibility of the relevant party.

6. Predictability as a basis for compensation

The assessment of foreseeability is essential for establishing fault, since if a risk was not foreseeable in advance, a person cannot be held liable for breaching the relevant duty of care. Foreseeability is considered a matter based on knowledge and anticipation, in contrast to probability, which is a scientific concept.⁴¹ Therefore, foreseeability is a crucial factor in risk assessment and in identifying the responsible party. Foreseeability entails the assumption that if an incident has occurred once, there is a relatively higher likelihood (risk) of it occurring again. Each subject's prior experience serves as a useful indicator for evaluating foreseeable danger. Thus, it is entirely reasonable to consider that if a responsible party fails to take preventive measures to avoid foreseeable harm, the question of their liability becomes relevant if the harmful outcome materialises. Accordingly, if damage is caused as a result of a breach of safety regulations and the responsible party has taken no steps to avert the foreseeable damage, liability should likely be imposed.⁴² In light of the above, it is a matter of debate whether a tour operator is obliged to assess customer satisfaction. A negative response to this would render the tour operator's fiduciary duty meaningless. As such, a tour operator should indeed be considered obligated to monitor tourist satisfaction; otherwise, it would result in an unreasonable narrowing of the scope of the duty of care. Researching customer satisfaction is an effective mechanism that helps the tour operator to identify service-related deficiencies, ultimately serving to ensure tourist satisfaction.

In one case, the court took into account the fact that a tourist sustained physical injuries due to a failure to comply with safety standards at a hotel. It was revealed that other hotel guests had also expressed dissatisfaction regarding breaches of safety regulations by the service provider, with such concerns being publicly shared on various well-known travel websites. Consequently, in such a case, it is entirely reasonable to assume that the damage was foreseeable and predictable for the obligor, and that monitoring customer satisfaction falls within the scope of their duty.⁴³

Unlike the consumer, the business entity is expected to have detailed knowledge of the quality of the materials used, the outcomes of their use, and the associated potential risks, and should

⁴¹ *Andrew D., Cane P., Sheldon D., Macintosh I.*, Review of the Law of Negligence (Final Report), 2002, 102-103.

⁴² *Clifton D.*, Hospitality Security (Managing Security in Today's Hotel, Lodging, Entertainment, and Tourism Environment), CRC Press, London, 2012, 10-11.

⁴³ *Revill v TUI UK Limited*, Sheffield County Court, 14th October 2016.

therefore bear responsibility for the consequences. In a specific case, it is possible that the tour operator may not be directly at fault for the damage caused by a third party's breach of safety standards, nor may they have had the practical ability to verify compliance with those standards. However, as the provider of services, the tour operator should not be exempt from liability towards the weaker party on these grounds. If, for example, the service provider fails to use the appropriate quality paint, this at the very least constitutes negligence, which falls within the scope of the tour operator's responsibility. The tour operator would then retain the right to seek reimbursement of damages from the actual service provider (e.g., the hotel) through the principle of recourse. Accordingly, in cases where the availability of information about foreseeable risks to the tour operator is undisputed, the issue of excluding their liability should not even be considered.

7. Conclusion

A tourist's conclusion of a package travel contract is based on the expectation that a qualified business entity (the tour operator) will plan the package with the tourist's best interests in mind. Both international and domestic legal instruments establish the obligation of the organiser to provide the tourist with detailed information, which is intended to enable the tourist to make an informed decision. Moreover, the legislature seeks to prevent informational burnout on the part of the consumer and therefore separates the obligation to provide information into two distinct stages. The essential terms of the package travel contract are defined by law. In addition, due to the specific nature of such contracts, package travel agreements are characterised by the presence of "implied terms," the fulfilment of which is essential for the proper performance of the contractual obligations. Based on the analysis of international practice, it is clearly established that one of these implied terms is the strict observance of safety standards by the provider of travel services.

Within the scope of reasonable care, the tour operator has a duty to provide the tourist with relevant information concerning their safety – information which, as the stronger and more qualified contracting party, must be accessible to them. However, this does not imply an obligation to deliver detailed information to the tourist regarding every safety regulation, as such an interpretation could in fact be detrimental to the interests of the consumer. The tour organiser must process information related to compliance with safety standards and offer only services that meet those standards. Attention should be drawn to the fact that the tourist relies on the tour operator's expertise and expects that the services offered are in full compliance with applicable safety standards. Accordingly, it is entirely reasonable that a tourist is not provided with specific details – such as whether fire safety or food hygiene regulations are observed at the hotel – yet it remains the responsibility of the organiser, within the bounds of the reasonableness standard, to ensure that such matters are properly investigated.

Based on the analysis of international practice, it has been established that the tour operator is the party responsible for compliance with safety standards under the package travel contract. This paper discusses a case in which the court did not consider the tour operator to be the liable party in relation to the tourist, thereby contributing to the development of a divergent approach. It was noted that imposing such responsibility on the tour operator would represent an unjustified burden and would lead, unreasonably, to an increase in the cost of the package holiday.

In order for the tour operator to be considered a liable party for compensating damages, all prerequisites for imposing liability must cumulatively be present. The present study, based on an analysis of court practice, reveals that in some cases it may be difficult to establish a causal link – specifically, even when a breach of safety requirements is evident, the court may question the existence of causation, arguing that the avoidance of the harmful result (damage) cannot be confirmed even if the safety requirement had been met. Such an approach only complicates the consumer's ability to substantiate their claim for damages. Therefore, even a formal breach of safety standards should be regarded as a contributing factor to the occurrence of the damage and should result in the corresponding party being held liable.

Bibliography:

1. “On Package Travel and Linked Travel Arrangements” Directive (EU) 2015/2302 of 25 November 2015.
2. Law of Georgia “Civil Code of Georgia” (26/06/1997).
3. Law of Georgia on Tourism (15/12/2023).
4. “On Fire Safety In Existing Hotels“ Directive (EU) 86/666/EEC of 22 December 1986.
5. *Alawan A. S. A.*, Civil liability of the Tourism and Travel Agency arising from the breach of its obligations to the tourist in the tour contract, “Study in Bahraini and Jordanian law”, *Journal of Positive Psychology & Wellbeing*, Vol. 6, No. 1, 2022, 2050.
6. *Alleweldt F., Tonner K., McDonald M. and others*, Study on Safety and Liability Issues Relating to Package Directive, Policy Department Economic and Scientific Policy, 7.
7. *Andrew D., Cane P., Sheldon D., Macintosh I.*, Review of the Law of Negligence (Final Report), 2002, 102-103.
8. *Barend V. L.*, European Standardisation of Services and its Impact on Private Law: Paradoxes of Convergence, *Modern Studies in European Law*, Bloomsbury, 2017, 124-125.
9. *Binns A. C., Kempf J. R.*, *Safety and Security in Hotels and Home Sharing*, Springer, USA, 2021, 3-4.
10. *Clifton D.*, Hospitality Security (Managing Security in Today's Hotel, Lodging, Entertainment, and Tourism Environment), CRC Press, London, 2012, 10-11, 179.
11. *Cyril P.*, Tourists: Duty of Care, *International Journal of Safety and Security in Tourism/Hospitality*, №17, 2017, 1,4.
12. *Ilic D., Deri L., Stamenkovic P., Milicevic S.*, Service Quality as Travel Agencies Business Improvement Factor, Conference Paper, 2016, 203, 204.
13. *Faure M., Weber F.*, Security Mechanisms for Insolvencies in the Package travel Sector: An Economic Analysis, *Journal of Consumer Policy*, 2013, 5.
14. *Tarlow E. P.*, Tourism Security (Strategies for Effectively Managing Travel Risk and Safety), Elsevier, 2014, 1, 5, 6-7. https://treasury.gov.au/sites/default/files/2019-03/R2002-001_Foreseeability.pdf

15. Karl M., Muskat B., Ritchie W. B., Which Travel Risks are More Salient for Destination Choice? An Examination of the Tourist's Decision-making Process, *Journal of Destination Marketing & Management*, N18, 2020, 2.
16. Lakerbaia, T., The Concept of the Consumer in the Case Law of the Court of Justice of the European Union, *Orbeliani Journal*, No. 4, 2021, 88 (in Georgian).
17. Lakerbaia, T., Zaalishvili, V., Zoidze, T., *Law on Consumer Protection*, Tbilisi, 2018, 35 (in Georgian).
18. Landini S., *Travel and Tourism Contracts (Design of Sustainable Tourism Systems)*, Antezza, 2013, 41.
19. Mancini R. A., Determining Destination Risk Perceptions, Their Effects on Satisfaction, Revisit and Recommendation Intentions: Evidence from Sanliurfa/Turkey, *Journal of Multidisciplinary Academic Tourism*, 7 (1), 2022, 83.
20. McDonald M., Revisiting Organiser Liability under the Package travel Directive (Part Two), *International Travel Law Journal*, 2003, 214.
21. Tsertsvadze, G., Dzilishvili, Z., et al., *Contract Law*, Meridian, Tbilisi, 2014, 677–678.
22. Vashakidze, G., et al., *Commentary on the Civil Code (Book III)*, Tbilisi, 2019, 587–589 (in Georgian).
23. Wasserman R., Recent Developments Travel Agency Liable to Travelers When its Failure to Confirm Reservations Ruins Vacation, *Columbia Law Review*, Vol. 74, N5, Jun 1974, 989.
24. Zoidze, T., Subjects of Consumer Protection Law, in *Besarion Zoidze Jubilee Collection 70*, University Press, Tbilisi, 2023, 276 (in Georgian).
25. Decision of the Civil Chamber of the Supreme Court of Georgia of 30 May 2022 in case № სს-910-2020.
26. Decision of the Supreme Court of Georgia of 22 November 2019 in case № სს-1114-2019.
27. Wood v TUI Travel PLC (2017).
28. Revill v TUI UK Limited, Sheffield County Court [2016]
29. Blades v Thomas Cook Tour Operations Limited, Croydon County Court [2015].
30. Loughheed v. On the Beach Limited [2014] EWCA 1538.
31. Schwartz v. Hilton Hotels Corporation [2009] 639 F. Supp. 2d 467.
32. Griffin v My Travel UK Ltd [2009] NIQB 98.
33. Clough v First Choice Holidays and Flights Ltd [2006] EWCA Civ 15.
34. Sharon Plino and Anthony Plinio v. Americana Aruba Beach Resort Casino [1999] 98-2745.
35. Josephs v. Fuller (Club Dominicus) [1982] **451 A.2d 203**.
36. European Parliament Policy Department, Study of Safety and Liability Issues Regarding Package Travel, IP/A/IMCO/FWC/2006-058/LOT 4/C1/SC5. https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/999/999000/999000en.pdf [15.01.2025].
37. World Tourism Organization, Tourist Safety and Security, Spain, 1996. https://sete.gr/files/Media/Ebook/110301_Tourist%20Safety%20and%20Security.pdf [20.11.2024].

Lavrenti Maglakelidze*

The Application of the Principle of Prohibition of Double Jeopardy (*ne bis in idem*) in the Case-Law of the European Court of Human Rights and National Courts

The principle of prohibition of double jeopardy (ne bis in idem) is an international legal and constitutional obligation. This criminal procedure guarantee implies imposing a restriction on state authorities regarding re-prosecuting an individual for the same act based on their previously made decisions. The present paper discusses the main problematic issues of the principle of prohibition of double jeopardy as they exist in legal doctrine and judicial practice.

Keywords: double jeopardy, European Convention on Human Rights, Constitution of Georgia, Constitutional Court of Georgia, Strasbourg Court, Supreme Court, newly revealed circumstances.

1. Introduction

The prohibition of double jeopardy/punishment for the same offence is a manifestation of the principle of humanity in criminal law.¹ This rule is enshrined in both international and national legislation and entails the “binding” of state authorities by their own decisions in the criminal justice process to prevent the re-prosecution of an individual for the same act.

In legal literature, some authors indicate that the principle of *ne bis in idem* is a “general principle of entire international law.”² In contrast, others recognize it as a sectoral principle, specifically a general principle of international criminal law.³

A general principle of international law constitutes the third primary source of international law, as defined by the Statute of the International Court of Justice, a general principle of law recognized by civilized nations.⁴ General principles acknowledged in national legal systems are used to fill gaps in international law, provided they apply to the global context.⁵

Therefore, the principle of *ne bis in idem* is recognized as a principle of international criminal law by the Statute of Rome⁶, where Article 20 is entirely dedicated to the rule prohibiting double

* Doctor of Law, Associate Professor at Ivane Javakhishvili Tbilisi State University Faculty of Law, Judge of the Criminal Chamber of the Tbilisi Court of Appeals.

¹ Compare Pradel J., Comparative Criminal Law, 1999, 412 (In Georgian).

² Compare Pataraiia D., Public International Law, Book One, 2023, 91 (In Georgian).

³ See Conway G., *Ne Bis in Idem* and the International Criminal Tribunals, Criminal Law Forum 14, 2003, 351-383.

⁴ See Statute of the International Court of Justice, Article 38. 1. c).

⁵ See Orakhelashvili A., Akehurst's Modern Introduction to International Law, 9th ed., London/New York: Routledge, 2022, 49.

⁶ Statute of the International Criminal Court.

jeopardy. According to this provision, “Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court...”⁷

A similar right is guaranteed by Article 4 of Protocol No. 7 to the European Convention on Human Rights, which states that no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which they have already been finally acquitted or convicted in accordance with the law and penal procedure of that state.

This principle is also enshrined in Article 14. 7 of the 1966 International Covenant on Civil and Political Rights, which stipulates that no one shall be tried or punished again for an offence for which they have already been finally convicted or acquitted in accordance with the law and penal procedure of any country.

Under Article 31.8⁸ of the Constitution of Georgia, no one shall be convicted twice for the same offence.

It can be said that, compared to the texts of the European Convention and the Constitution of Georgia, a clearer guarantee of the right to protection is established by Article 18.2 of the Criminal Procedure Code of Georgia.⁹ This provision indicates that not only it is prohibited to convict a person for an offence for which they have already been acquitted or convicted, but it is also inadmissible to bring charges against that person in such a case.¹⁰ Under subparagraph “g” of Article 105 of the same Code, an investigation or criminal prosecution shall be terminated if there is a court judgment that has entered into legal force regarding the same charges or a court ruling on the termination of criminal prosecution for the same charges. Therefore, according to the Criminal Procedure Code, the rule prohibiting double jeopardy serves as a basis for both the termination of investigation and prosecution.¹¹

Although Article 4.1 of Protocol No. 7 of the European Convention refers to “being tried or punished,” the case-law of the European Court of Human Rights clarifies that Article 4 of Protocol No. 7 provides three specific guarantees against double jeopardy for the same offence: 1) no one shall be tried; 2) no one shall be convicted; and 3) no one shall be punished twice.¹² In the term “being tried,” the Strasbourg Court's case-law interprets it to include proceedings before the trial, i.e., criminal prosecution as well.¹³

⁷ For more information, see *Dgebuadze G.*, The Principle of Complementarity – Support for National Justice or “Discretionary Intervention”, Collection of Articles, in the collection; The Influence of European and International Law on Georgian Criminal Procedural Law, 2019, 723-725 (In Georgian).

⁸ The current version of the Constitution. The aforementioned rule was also specified in Article 42.4 of the old version of the Constitution (In Georgian).

⁹ Hereinafter CPCG.

¹⁰ This latter provision in the Criminal Procedure Code appeared after the legislative amendment of 14 June 2013 (In Georgian).

¹¹ Compare *Kharanauli L.*, General Part of Criminal Law, Commentary, Authors' Collective, Volume I, 2021, 49.

¹² See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in the case of *Zolotukhin v. Russia*, application no. 14939/03, paragraph 110.

¹³ See the judgment of the European Court of Human Rights of 4 September 2014 in the case of *Trabelsi v. Belgium*, application no. 140/10, paragraph 164.

Thus, the European Convention and the Constitution of Georgia, as well as Georgian legislation, unequivocally and explicitly prohibit both re-conviction and re-charging for the same offence. This provision reinforces the constitutional/conventional principle of the prohibition of double jeopardy. It is rightly noted by authors in legal literature that the prohibition of double jeopardy serves to ensure lawfulness and thereby protect human dignity.¹⁴

The Constitutional Court of Georgia considers the prohibition of double jeopardy to be an essential manifestation of the fundamental principle of a legal state, noting that this principle “on the one hand, protects individuals from repeated criminal prosecution and conviction for the same act and, on the other hand, serves to bind state authorities to the final decisions made in the process of criminal justice.”¹⁵

The principle of the prohibition of double jeopardy operates somewhat differently within the European Union framework. Specifically, in EU criminal law, the principle of *ne bis in idem* gained particular relevance from Article 54 of the Schengen Agreement, effective since 1995. According to this article, a person who has been finally judged by one of the contracting parties to the agreement cannot be prosecuted again for the same act by another contracting party, provided that the imposed sanction has already been enforced, is in the process of being enforced, or can no longer be enforced under the laws of the convicting state.¹⁶ This provision enables some scholars to develop the argument that *ne bis in idem* should be recognized as a principle of international law, with its scope extending to transnational relations as well.¹⁷

Thus, the principle of *ne bis in idem* constitutes a significant, imperative constitutional/conventional obligation in criminal law, meaning that the state is obliged to equip the law enforcer with guiding norms that prevent the re-conviction of an individual for the same act and ensure the practical implementation of this fundamental constitutional principle.¹⁸ However, despite this, the

¹⁴ See: *Turava M.*, Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 550; *M. Turava*, European Criminal Law, 2010, 137 (In Georgian).

¹⁵ See the Decision of the Constitutional Court of Georgia of 29 September 2015, No. 3/1/608,609, on the case: Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 306.4 of the Criminal Procedure Code of Georgia and Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Subparagraph “g” of Article 297 of the Criminal Procedure Code of Georgia, paragraph 35 (In Georgian).

¹⁶ Cf.: *Turava M.*, European Criminal Law, 2010, 137; *M. Turava*, Criminal Law, Doctrine of Crime, 2011, 140; *B. Jishkariani*, Prohibition of Double Punishment (*ne bis in idem*) within the European Union, in the Journal: Journal of International Law, 1/2009, 216; *Jishkariani B.*, European Criminal Law, 2nd Edition, 2018, 267-268; *Tandilashvili Kh.*, Problems of Applying the Principle of Prohibition of Double Jeopardy (*ne bis in idem*) in the Legal Space of the European Union, Justice, and Law, 2017, N4(56), from 110; *Kharanauli L.*, General Part of Criminal Law, Commentary, Authors' Collective, Volume I, 2021, 52-53. (In Georgian). Also cf.: *Satzger H.*, Internationales und Europäisches Strafrecht, 3. Auflage, 2009, 180; *Wessels J.*, *Beulke W.*, Strafrecht, Allgemeiner Teil, 38. Auflage, 2008, Rn. 75.

¹⁷ See *Conway G.*, *Ne Bis in Idem* in International Law, International Criminal Law Review, No. 3, 2003, 217-244; also see *Mirianashvili G.*, Dissertation on Conflicting Human Rights Standards in the Field of Extradition within the Council of Europe and the European Union, 2020, 79 (In Georgian).

¹⁸ Cf.: Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016, in Georgian citizen *Davit Tsintskiladze vs. Parliament of Georgia*, paragraph 22 (In Georgian).

principle of *ne bis in idem* has many contentious aspects, each associated with theoretical and practical difficulties. Given the scope and multitude of issues, the present paper will address only the main problems that have emerged in legal doctrine and judicial practice. Accordingly, the paper aims to clarify the following:

1. Does the principle of prohibition of double jeopardy protect a person only from repeated conviction and prosecution within the same state, or does it also have a transnational application?
2. What should be understood by the term “the same act,” and how should it be interpreted – formally or materially? Specifically, does “the same act” also include administrative and disciplinary¹⁹ responsibility?
3. In the context of the prohibition of double jeopardy, is it sufficient to have a verdict from a first-instance court on the same case, or is a so-called “final” decision by a third-instance court required?
4. Based on the content of this principle, does the simple suspension/termination of a criminal process constitute an obstacle to the renewal of prosecution?
5. Would the principle of *ne bis in idem* be violated if a new conviction occurs within the same criminal illegality, for instance, when the prosecutor brings a new charge for an act committed under aggravating circumstances?
6. How does the principle of *ne bis in idem* apply to a wanted accused person?

This article will examine how the principle of prohibition of double jeopardy is applied in the practice of national and international courts. Accordingly, a detailed analysis of court decisions will be conducted. The provisions of Georgian criminal procedure law that ensure the practical realization of this fundamental constitutional principle will also be reviewed.

2. The Scope of the Principle of *Ne Bis in Idem* in the Practice of the European Court Of Human Rights and National Courts

2.1. Judicial Practice of the European Court

The European Court extends the principle of *ne bis in idem* only within the jurisdiction of a single state and excludes it at the transnational level. The European Court of Human Rights has a consistent case-law. Several cases can be cited to illustrate this.²⁰ For example, *Krombach c. France*²¹ concerned a rape committed on German territory and the criminal prosecution of the applicant in both Germany and France.

¹⁹ This refers to the case where disciplinary proceedings are qualified as criminal proceedings and not as civil proceedings under Article 6 of the Convention.

²⁰ See the judgment of the European Court of Human Rights of 28 June 2001 in *Amrollahi v. Denmark*, application no. 56811/00; the judgment of the European Court of Human Rights of 18 December 2012 in *Sarria c. Pologne*, application no. 45618/09, paragraph 24.

²¹ See the judgment of 29 March 2018 of the European Court of Human Rights in *Krombach c. France*, application no. 67521/14, paragraphs 34-42.

The European Court clarified that since the criminal prosecution against the applicant was carried out by the judicial authorities of two different states, the requirements of Article 4 of Protocol No. 7 of the European Convention on Human Rights did not apply in this case.

The Court noted that accepting the applicant's argument would equate to interpreting Article 4 of Protocol No. 7 as a prohibition against a person who has been acquitted or convicted by one participating state's legal and judicial process from being subsequently prosecuted or punished for the same offence, not only within that state but also under the jurisdiction of the courts of any other participating state of the Convention.²²

The European Court did not accept the applicant's argument and pointed out that the phrase “by the courts of the same state” limits the application of this provision to the national level only.²³

Similarly, in *Böheim c. Italie*, the Strasbourg Court declared the application inadmissible. The applicant argued that he was tried for the same acts by both German and Italian courts, thereby violating the principle of *ne bis in idem*. In this case, as well, the European Court of Human Rights stated that the principle of *ne bis in idem* applies only within the jurisdiction of one country and does not restrict another country from prosecuting the person for the same act.²⁴

The Court reiterated the same approach in the case of *Trabelsi v. Belgium*, involving the extradition of a Tunisian citizen to the United States on charges of participating in terrorist acts. The Court stated that the principle of *ne bis in idem* does not protect a person from criminal prosecution and punishment for the same offence in different states.²⁵

Thus, through uniform practice, the European Court applies the principle of *ne bis in idem* only within the jurisdiction of a single state, excluding its application at a transnational level.

2.2. National Judicial Practice

In the Georgian judicial practice, the issue of the scope of the *ne bis in idem* principle has repeatedly come to the forefront. A notable example of this is the ruling by the Investigative Chamber of the Tbilisi Court of Appeals on 23 October 2024,²⁶ concerning the following case:

On 12 October 2023, M.H. was convicted by the Tbilisi City Court for crossing the Georgian border illegally, resulting in a guilty verdict under Article 344 of the Georgian Criminal Code²⁷ (illegal crossing of the state border of Georgia).

On October 11, 2024, M.H., who was wanted by the Republic of Armenia, was detained by the officers of the Georgian Ministry of Internal Affairs on the premises of the Special Penitentiary

²² See the judgment of 29 March 2018 of the European Court of Human Rights in *Krombach c. France*, application no. 67521/14, paragraphs 34-42.

²³ See the judgment of 29 March 2018 of the European Court of Human Rights in *Krombach c. France*, application no. 67521/14, paragraphs 34-42.

²⁴ See the judgment of 22 May 2007 of the European Court of Human Rights in *Böheim c. Italie*, application no. 35666/05.

²⁵ See the judgment of 4 September 2014 of the European Court of Human Rights in *Trabelsi v. Belgium*, application no. 140/10, paragraph 164.

²⁶ See the ruling of 23 October 2024 of the Investigative Panel of the Tbilisi Court of Appeals in criminal case No. 190802224010200521 (In Georgian).

²⁷ Hereinafter: CC

Service's Facility No. 16 in Rustavi for the purpose of extradition. M.H. was accused of illegally crossing the state border, an offence defined under Part 1 of Article 469 of the Armenian Criminal Code.

On 26 April 2024, the Yerevan Criminal Court of First Instance of the Republic of Armenia sentenced M.H. to imprisonment and declared him wanted. The initiating state of the search requested the detention and arrest of the wanted individual for the purpose of his subsequent extradition.

Since M.H. had already been convicted by the court of one country – Georgia – while another country, Armenia, was requesting his extradition for prosecution, the Rustavi City Court, in its ruling on 11 October 2024,²⁸ did not satisfy the prosecutor's motion to impose extradition detention. According to the ruling, the Rustavi Court noted that “it is prohibited to prosecute or try a person a second time for an offence arising from identical or substantially similar facts.”²⁹

The court clarified that a person cannot be tried twice for the same offence committed at the same time and place. To support this position, the Rustavi Court referred to the Constitution of Georgia and the Criminal Procedure Code, which prohibits punishing a person for the same fact under different grounds at different times. Regardless of whether the person was acquitted or convicted initially, they cannot be punished again.³⁰

Therefore, the Rustavi City Court found that the offence for which M.H.'s extradition was requested had already been adjudicated by a Georgian court. Additionally, the offence in question was entirely or partially committed on Georgian territory.³¹

However, this ruling was overturned by the Investigative Chamber of the Tbilisi Court of Appeals, which satisfied the prosecutor's motion for extradition detention. The appellate court reviewed both national legislation and the established practices of the European Court and correctly pointed out that Article 4 of Protocol No. 7 of the European Convention on Human Rights does not prevent the courts of a Convention member state from prosecuting or punishing a person for the same offence for which they were acquitted or convicted by a final judgment in another member state.³²

The Supreme Court of Georgia has also established a similar precedent. In its decision of 17 May 2018, concerning a defendant charged under Article 344 of the Georgian Criminal Code (illegal crossing of the state border of Georgia for entry into the Russian Federation), the court explained that there can be no violation of Article 4 of Protocol No. 7 when the person has been subjected to or is undergoing legal procedures by the appropriate authorities of a neighbouring state for the same act.³³

²⁸ See the ruling of 11 October 2024 of the Rustavi City Court in criminal case No. 190802224010200521 (In Georgian).

²⁹ See the ruling of 11 October 2024 of the Rustavi City Court in criminal case No. 190802224010200521 (In Georgian).

³⁰ See the ruling of 11 October 2024 of the Rustavi City Court in criminal case No. 190802224010200521 (In Georgian).

³¹ See the ruling of 11 October 2024 of the Rustavi City Court in criminal case No. 190802224010200521 (In Georgian).

³² See the ruling of 23 October 2024 of the Investigative Panel of the Tbilisi Court of Appeals in criminal case No. 190802224010200521 (In Georgian).

³³ See the Supreme Court's decision of 17 May 2018, in case No. 699AP-17.

Thus, as shown from the aforementioned discussions, both the European Court of Human Rights and national courts consider that Article 4 of Protocol No. 7 does not prevent different courts in Convention member states from prosecuting or punishing a person for the same offence for which they were acquitted or convicted by a final judgment in another member state. This perspective is also prevalent in legal literature, which holds that the principle of *ne bis in idem* applies only within the jurisdiction of a single state.³⁴

3. Criteria/Elements of the Principle of *Ne Bis in Idem* in the Case-Law of the European Court of Human Rights and National Courts

3.1. Brief Overview of the Question

In accordance with the consistent practice established by the European Court of Human Rights, three main criteria/elements can be identified under the principle of *ne bis in idem* when determining the issue of double jeopardy for the same offence. These criteria can be grouped as follows:

1. Nature of the Sanction/Procedures: The sanction or procedures must be of a criminal nature;
2. Identity of the Acts (*Idem*): The acts for which the applicant is being prosecuted must be the same, and the prosecution must be repeated (*bis*);³⁵
3. Final Judgment: There must be a final decision by the court.

Similarly, the Constitutional Court of Georgia, in the case of *Georgian citizen Davit Tsintsqiladze v. the Parliament of Georgia*³⁶, outlined three essential elements to determine the presence of constitutionally prohibited double jeopardy: a) Completed Criminal Procedure: There must be a completed criminal procedure concerning a specific offence; b) Risk of Repeated Prosecution (*Bis*): The individual must face the risk of repeated prosecution; c) Same Offence (*Idem*): The individual must be prosecuted for the same offence.³⁷

Particular emphasis should also be placed on the Supreme Court's decision of 12 October 2015,³⁸ where the court, reviewing a decision³⁹ by the European Court of Human Rights, identified four main criteria:

³⁴ See: *Turava M.*, European Criminal Law, 2010, 137-138; *Turava M.*, Criminal Law, Doctrine of Crime, 2011, 140-141; *Mirianashvili G.*, Dissertation: Conflicting Standards of Human Rights Protection within the Council of Europe and the European Union in the Field of Extradition, 2020, 78; *Papiashvili L.*, Commentary on Article 18 of the Criminal Procedure Code of Georgia in the work: Commentary on the Criminal Procedure Code of Georgia, 2015, 137; *Tskhomelidze O.*, Dissertation: The relationship between the complementary jurisdiction of the International Criminal Court and the *ne bis in idem* principle in cases of criminal prosecutions carried out by de facto authorities, 2020, 89-90.

³⁵ This criterion can, in turn, be divided into two parts: (a) whether the acts for which the complainant's criminal prosecution was initiated were the same, and (b) whether the legal proceedings are being repeated (*bis*). For example, see the European Court of Human Rights judgment of 10 February 2015, in *Österlund v. Finland*, application no. 53197/13. However, it can also be considered as a single element, as it encompasses the same substantive thesis.

³⁶ See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Georgian citizen Davit Tsintsqiladze vs. Parliament of Georgia (In Georgian).

³⁷ See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Georgian citizen Davit Tsintsqiladze vs. Parliament of Georgia, para. 9 (In Georgian).

³⁸ See the Supreme Court decision of 12 October 2015, in case No. 67AP-14 (In Georgian).

1. Whether the sanction/procedures were of a criminal nature.
2. Whether the acts for which the complainant's criminal prosecution was initiated were the same.
3. Whether there was a repetition of legal proceedings.
4. Whether there was a final decision.

These criteria, as defined by both European and national courts, will be discussed below. However, it should be noted that each of these elements/criteria has often been the subject of discussion in legal literature and court practice.⁴⁰ Furthermore, it is important to highlight that when analysing these criteria, there may be an overlap between individual elements, which points to their complex nature and essence.

3.2. Criminal Nature of the Sanction/Proceedings

3.2.1. Case-Law of the European Court

The European Court has pointed out that any legal proceedings and the confirmation of an offence through such proceedings do not automatically constitute a criminal charge.

From the outset, it should be noted that the European Court of Human Rights applies the so-called “Engel criteria”⁴¹ to determine whether a person has been charged with a “criminal offence” and, accordingly, whether the proceedings fall within the scope of Article 4 of Protocol No. 7. These criteria are: (1) the classification of the offence under domestic law; (2) the nature of the offence; and (3) the severity of the sanction imposed for the offence.⁴²

For example, in *Kurdov et Ivanov c. Bulgarie*⁴³, the applicants, who were employees of the Bulgarian railway company in 1995, performed various welding works on a railway wagon, which led to a fire inside the wagon. An administrative procedure was initiated against the first applicant for violating safety regulations and he was fined, while both applicants faced criminal proceedings for property damage. The first applicant argued that his *ne bis in idem* rights had been violated.

In this case, the European Court determined that the administrative proceedings, which resulted in a fine of 150 Bulgarian Levs for the first applicant, did not meet the criteria for the act to be considered a criminal charge. Consequently, the Court did not uphold the application.⁴⁴

In another case, both administrative and criminal responsibility were based on two provisions of the General Tax Code, which concerned entirely separate offences with different constituent elements.

³⁹ See the judgment of 10 February 2015 of the European Court of Human Rights in *Österlund v. Finland*, application no. 53197/13.

⁴⁰ Cf. *Turava M.*, Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 550 (In Georgian).

⁴¹ See the judgment of the European Court of Human Rights, Full Court, 8 June 1976, in *Engel and Others v. the Netherlands*, Applications no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, § 80 et seq.

⁴² See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in *Zolotukhin v. Russia*, application no. 14939/03, paragraph 53.

⁴³ See the judgment of the European Court of Human Rights of 31 May 2011 in *Kurdov et Ivanov c. Bulgarie*, application no. 16137/04, paragraph 45.

⁴⁴ See the judgment of the European Court of Human Rights of 31 May 2011 in *Kurdov et Ivanov c. Bulgarie*, application no. 16137/04, paragraph 45.

Specifically, the tax offence was intended to punish a person solely for **failing to declare their tax obligations within the prescribed timeframe**, while the criminal offence aimed to prosecute a person for the **intentional non-payment of taxes**. Since the two sets of proceedings imposed different types of responsibility for two distinct offences, the Court ruled that the prohibition of double punishment did not apply in this case and, therefore, the application was not admitted for substantive examination.⁴⁵

In *Smirnova v. Russia*, the applicant argued that the prohibition against being convicted twice for the same offence had been violated when previously discontinued proceedings were reopened. The Court dismissed the application as inadmissible, stating that “the termination of criminal proceedings by a prosecutor does not constitute either a conviction or an acquittal and, therefore, Article 4 of Protocol No. 7 does not apply.”⁴⁶

Similarly, the European Court of Human Rights ruled in another case that the failure of a jury to reach a unanimous verdict did not prevent the resumption of proceedings and, in this case, there was no violation of the *ne bis in idem* principle.⁴⁷

Thus, as it turns out, the European Court applies the following criteria to determine whether a “criminal charge” exists in a given case: 1. The classification of the proceedings and the measures applied to the individual under national law; 2. The nature of the act; and 3. The severity of the imposed or potential sanction.

Moreover, according to the Strasbourg Court's position, the termination or mere suspension of criminal proceedings, the failure of a jury to reach a unanimous verdict and subsequent decisions to resume proceedings in any of the above cases do not constitute legal barriers to prosecution.⁴⁸ Such decisions do not have the effect of a final judgment and, therefore, they do not amount to a violation of the *ne bis in idem* principle.

3.2.2. National Judicial Practice

At the national level, an illustrative example of this issue can be found in a decision by the Supreme Court of Georgia⁴⁹, which involved the following facts:

- On 26 December 2012, Giorgi⁵⁰ was found administratively responsible by the court for the unlawful use of narcotic substances without a doctor's prescription.
- On 8 September 2013, Giorgi again unlawfully consumed narcotic substances.
- On 3 November 2013, Giorgi once again used narcotic substances illegally.
- On 5 November 2013, Giorgi was convicted for the 8 September 2013 incident.
- On 2 December 2013, Giorgi was convicted for the 3 November 2013 incident.⁵¹

⁴⁵ See the judgment of the European Court of Human Rights of 14 September 1999 in *Ponsetti and Chesnel v. France*, applications no. 36855/97 and 41731/98, paragraph 5.

⁴⁶ See the judgment of the European Court of Human Rights of 3 October 2002 in the case of *Smirnova v. Russia*, applications no. 46133/99 and 48183/99.

⁴⁷ See *Trechsel S.*, *Human Rights in the Criminal Justice Process*, 2010, 434 (In Georgian).

⁴⁸ Cf. *Turava M.*, *Commentary on the Constitution of Georgia*, Chapter 2, *Citizenship of Georgia*, *Fundamental Human Rights and Freedoms*, 2013, 551 (In Georgian).

⁴⁹ Cf. Supreme Court's decision No. 67AP-14 of 12 October 2015. (In Georgian)

⁵⁰ The name is arbitrary.

However, on 10 February 2014, the Criminal Chamber of the Tbilisi Court of Appeals overturned the Tbilisi City Court's 2 December 2013 judgment and acquitted Giorgi. Specifically, he was found not guilty and acquitted of the charges under Article 273 of the Georgian Criminal Code.⁵²

The Court of Appeals reasoned that since both convictions were based on the same initial administrative sanction, this constituted a violation of the *ne bis in idem* principle, which prohibits double jeopardy. The Court argued that a single offence (the administrative violation) could not serve as the basis for two separate criminal convictions within one year.^{53&54}

The prosecution appealed this decision to the Supreme Court, seeking to overturn the acquittal and reinstate a guilty verdict.⁵⁵

The Cassation Chamber upheld the prosecution's appeal and overturned the Tbilisi Court of Appeals' acquittal.

According to the Supreme Court's position, the principle of prohibition of double jeopardy or punishment (*ne bis in idem*) is a constitutional and international legal standard aimed at preventing a person from being tried or punished twice for the same offence.⁵⁶

In this case, the Cassation Court had to assess whether the actions leading to both convictions constituted the same offence, meaning whether the convictions were based on identical or substantially similar facts.

According to the evidence in the case, Giorgi was administratively sanctioned for the unlawful use of narcotic substances without a doctor's prescription by a decision issued on 26 December 2012. After this, he again unlawfully used narcotic substances twice, as confirmed by drug tests conducted on 8 September 2013 and 3 November 2013.

Although both these offences (from 8 September and 3 November 2013) were linked to the initial 26 December 2012, administrative sanction, Giorgi's actions involved two separate acts – two distinct instances of drug use at different times. From the Cassation Court's perspective, this should not be considered the same offence.⁵⁷

The Supreme Court reasoned that these actions (two separate instances of illegal drug use) constituted two independent criminal episodes, while the previous administrative sanction was merely a separate legal element of the criminal offence. The court ruled that this could not be interpreted as punishing Giorgi twice for the same offence. Therefore, the Court of Cassation did not justifiably share the reasoning of the Tbilisi Court of Appeal, which allegedly threatened Giorgi with repeated conviction for the same crime.⁵⁸

⁵¹ Cf. Supreme Court's decision No. 67AP -14 of 12 October 2015. (In Georgian)

⁵² Cf. Supreme Court's decision No. 67AP -14 of 12 October 2015. (In Georgian)

⁵³ Cf. Supreme Court's decision No. 67AP -14 of 12 October 2015. (In Georgian)

⁵⁴ Under Article 39 of the Code of Administrative Offenses, if a person subjected to an administrative penalty does not commit a new administrative offense within one year from the date of penalty enforcement, they will be considered not to have been administratively penalized.

⁵⁵ Cf. Supreme Court's decision No. 67AP -14 of 12 October 2015 (In Georgian).

⁵⁶ Cf. Supreme Court's decision No. 67AP-14 of 12 October 2015 (In Georgian).

⁵⁷ Cf. Supreme Court's decision No. 67AP-14 of 12 October 2015 (In Georgian).

⁵⁸ Cf. Supreme Court's decision No. 67AP-14 of 12 October 2015 (In Georgian).

This ruling by the Supreme Court is entirely valid as Giorgi's conviction under Article 273 of the Criminal Code (for two separate episodes) did not stem from identical or substantially similar facts. Each conviction was based on two distinct and independent acts – the illegal use of narcotic substances at different times. However, a potential issue could have arisen if both administrative and criminal sanctions were based on the same act. This issue will be analysed further below.

3.3. Same Acts (*idem*) and Repetition of Proceedings (*bis*)

3.3.1. European Judicial Practice

Determining whether the actions for which a person is held criminally responsible twice constitute the same act (*idem*) is crucial. In such cases, it must be clarified whether the “act” is considered from a purely criminal or material perspective or a formal-normative viewpoint. The act is understood in its broadest sense, including administrative offences.⁵⁹

It is well known that the European Court of Human Rights (ECHR) does not intervene in domestic legislation on this matter.⁶⁰ A legal system in one country may regard certain factual circumstances as a single offence, whereas in another country, they might be considered two separate acts. For instance, in Germany, Austria and Switzerland, minor offences are addressed within the criminal code while similar actions are outlined in Georgia's Code of Administrative Offences.

In the legal systems of such countries, administrative offences law comprises “minor criminal law” (in German, *kleines Strafrecht*).⁶¹ In the Georgian legislative framework, both the Criminal Code and the Code of Administrative Offences function separately. The unlawful actions outlined in each of these codes are clearly differentiated and identifiable. For example, consider the offence of hooliganism, which is classified as a minor offence in the Code of Administrative Offences (Article 166) but regarded as a criminal offence in the Criminal Code (Article 239). The distinction lies not only in the specific elements of the offence, including the objective and subjective components but also in the penalties prescribed by the norms.

As a result, the Strasbourg Court takes into account all possible variations and considers the issue within the framework of the legislative system of the specific country.⁶² However, it is always disputed whether the same act, which is considered both an administrative offence on the one hand and a criminal offence on the other, constitutes one unified crime, i.e., whether it is regarded as a single offence.

It should be noted from the outset that this issue has been resolved in different ways over time by the European Court of Human Rights.⁶³ For example, in the case of *Gradinger v. Austria*,⁶⁴ the

⁵⁹ A simple disciplinary misconduct of a public servant is not included in this. On this, see the judgment of the European Court of Human Rights of 30 May 2000 in: *RT v. Switzerland*, application no. 31982/96, paragraph 3.

⁶⁰ Cf. *Trechsel S.*, *Human Rights in the Criminal Justice Process*, 2010, 439.

⁶¹ Cf.: *Rengier R.*, *Strafrecht, Allgemeiner Teil*, 2. Auflage, 2010, 7; M. Turava, *Criminal Law, Doctrine of Crime*, 2011, 13 (In Georgian).

⁶² Cf. *Trechsel S.*, *Human Rights in the Criminal Justice Process*, 2010, 439.

⁶³ Cf. *Trechsel S.*, *Human Rights in the Criminal Justice Process*, 2010, 437.

Court indicated that since the disputed decisions were based on the same act, there was a violation of the Convention.

Specifically, the applicant was fined for violating traffic regulations, which resulted in the unintentional killing of a person. If the fine was not paid, imprisonment was foreseen. Later, Gradinger was fined again for committing the same act under aggravating circumstances – based on another expert's opinion, it was determined that his blood alcohol content exceeded the permissible limit. Specifically, the applicant was fined 12,000 Austrian schillings and failure to pay it also resulted in imprisonment. In this case, both actions were considered administrative offences; however, since the consequence of not paying the fine was imprisonment, the European Court regarded the legal proceedings as criminal proceedings.⁶⁵ According to the Court, the identity of the acts (facts) was of decisive importance, which led the Court to conclude that there was a violation of the Convention.⁶⁶

However, in *Oliveira v. Switzerland*, the same Court distinguished this case from *Gradinger*. According to the Court, since one act constituted different offences, it found that the principle of *ne bis in idem* had not been violated even though the facts in the case also related to a traffic offence.⁶⁷ Specifically, the applicant failed to control the steering wheel and crashed into another car, injuring the driver severely. Initially, the applicant was fined 200 Swiss francs for speeding and later he was fined 2,000 Swiss francs for causing severe bodily harm to the second driver due to negligence. Despite this, the Court did not find sufficient grounds to establish a violation of the *ne bis in idem* principle.⁶⁸ The European Court considered that the two legal proceedings were not “cumulative” because when the final fine was imposed, the larger amount was reduced by the smaller amount, applying the principle of absorption of sentences.⁶⁹

It can be said that Oliveira's case was essentially the instance where the Strasbourg Court changed its previously established trend favouring the prohibition of double jeopardy. In this specific case, the Court distinguished the loss of control over the vehicle due to excessive speed from the bodily harm caused by negligence. The Court held that the prosecution of different offences sequentially or in parallel by different courts did not violate the *ne bis in idem* principle even when those offences might have been based on a single specific act relevant to criminal law.

Later, the European Court itself had to acknowledge that its approach in these two cases was “somewhat contradictory.”⁷⁰ The most controversial aspect turned out to be the criterion used to link

⁶⁴ See the judgment of the European Court of Human Rights of 23 October 1995 in *Gradinger v. Austria*, application no. 15963/90.

⁶⁵ See the judgment of the European Court of Human Rights of 23 October 1995 in *Gradinger v. Austria*, application no. 15963/90, paragraph 36.

⁶⁶ Ibid. Cf. also, *Trechsel S.*, Human Rights in the Criminal Justice Process, 2010, 438.

⁶⁷ See the judgment of the European Court of Human Rights of 30 July 1998 in *Oliveira v. Switzerland*, application no. 25711/94.

⁶⁸ Cf. *Trechsel S.*, Human Rights in the Criminal Justice Process, 2010, 440-441 (In Georgian).

⁶⁹ See the judgment of the European Court of Human Rights of 30 July 1998 in *Oliveira v. Switzerland*, application no. 25711/94, paragraph 27.

⁷⁰ See the judgment of the European Court of Human Rights of 29 May 2001 in the case of *Franz Fischer v. Austria*, application no. 37950/97, paragraph 23. Cf.: *Trechsel S.*, Human Rights in Criminal Proceedings, 2010, 441; *Turava M.*, Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 550 (In Georgian).

the first and second judicial proceedings, specifically whether or not the acts for which the applicant's criminal prosecution or conviction had taken place were the same.

In a short period of time following the above-mentioned decisions, the Strasbourg Court was again required to address a case of a similar nature, in which it found a violation of Article 7, Protocol No. 4 of the Convention. Specifically, in *Franz Fischer v. Austria*,⁷¹ the applicant, who was driving under the influence of alcohol, fatally injured a cyclist. Instead of assisting the victim, the driver fled the scene. The regional administrative authority imposed a fine of 22,000 Austrian schillings (with imprisonment for 20 days in case of non-payment) for violating traffic rules under the influence of alcohol. Later, the district court charged the applicant with manslaughter under aggravating circumstances and sentenced him to six months in prison.⁷²

According to the Court's position, there are cases where one action constitutes, seemingly, more than one offence, but a thorough examination of the case shows that only one offence should lead to the prosecution of the person as it encompasses all the negative consequences covered by the others.⁷³ Specifically, in the Court's view, when a person faces prosecution for various offences arising from one action, the Court must examine whether these offences share the same "essential elements."⁷⁴ In the case of *Franz Fischer*, since the applicant was first prosecuted administratively for driving under the influence of alcohol and then criminally for manslaughter through negligence, the Court held that Article 7, Protocol No. 4 of the Convention was violated as the two offences did not differ in their "essential elements."⁷⁵

The European Court of Human Rights' reasoning in *Zolotukhin v. Russia*⁷⁶ was assessed as a rejection of the "legal qualification of two offences" approach. Consequently, the "essential elements" criterion was also dismissed.⁷⁷ In this case, the Grand Chamber explained that double prosecution or conviction occurs when it is based on identical or essentially the same facts.⁷⁸ In the same case, the Court provided the following explanation for the action: "...a combination of specific circumstances relating to the same defendant, which are inextricably linked in time and space, and which need to be proved to enable prosecution or criminal proceedings."⁷⁹

⁷¹ See the judgment of the European Court of Human Rights of 29 May 2001 in *Franz Fischer v. Austria*, application no. 37950/97.

⁷² See the judgment of the European Court of Human Rights of 29 May 2001 in *Franz Fischer v. Austria*, application no. 37950/97, paragraphs 7-10.

⁷³ *Ibid.*, paragraph 25.

⁷⁴ See the judgment of the European Court of Human Rights of 29 May 2001 in *Franz Fischer v. Austria*, application no. 37950/97, paragraph 25.

⁷⁵ *Ibid.*, paragraph 29.

⁷⁶ See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in *Zolotukhin v. Russia*, application no. 14939/03.

⁷⁷ See *Harris D., O'Boyle M., Bates E., Buckley C. et al.*, *Law of the European Convention on Human Rights*, 4th ed., Oxford: Oxford University Press, 2018, 966.

⁷⁸ See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in *Zolotukhin v. Russia*, application no. 14939/03, paragraph 82.

⁷⁹ *Ibid.*, paragraph 84. Also cf. *Turava M.*, *Commentary on the Constitution of Georgia*, Chapter 2, *Citizenship of Georgia*, *Fundamental Human Rights and Freedoms*, 2013, 550-551 (In Georgian).

In this particular case, the applicant verbally insulted and assaulted a public official. The first legal proceeding at the national level, under Russian law, was administrative in nature, but the European Court classified it as a criminal proceeding. In the second national-level proceeding, which was a criminal proceeding under national law, the applicant was convicted for violating public order, which included verbal abuse, threats of violence against the public official and resisting them.⁸⁰ According to the European Court, it did not matter that the sanctions imposed were significantly different from one another as both proceedings were essentially conducted for the same action. Therefore, in this case, the Court found a violation of Article 4 of Protocol No. 7 of the European Convention.⁸¹

In all the cases mentioned above, one legal proceeding followed the other. However, it is also possible for legal proceedings to take place simultaneously as was the case in *A and B v. Norway*,⁸² which was heard by the Grand Chamber. Specifically, administrative fines were imposed on the applicants for failing to declare certain income and, in parallel, they were held criminally responsible for large-scale tax evasion in a criminal proceeding. In this case, the Court considered the administrative proceedings to be part of criminal proceedings for the purposes of Article 4 of Protocol No. 7 of the Convention.⁸³

In the mentioned case, the Grand Chamber explained that Article 4 of Protocol No. 7 does not exclude the possibility of parallel legal proceedings, provided certain conditions are met. In such cases, the respondent state must convincingly demonstrate that the parallel proceedings are sufficiently closely connected in terms of both content and timing. This means that not only should the objectives set out and the means used to achieve them be complementary (mutually reinforcing) and timely, but also that the effects of the response to the act should be proportional and foreseeable for the individual.

The material factors for determining whether parallel proceedings were sufficiently close in substance include the following elements: (a) Whether the different proceedings pursued complementary objectives and, accordingly, addressed different aspects of the public offence; (b) Whether the parallel proceedings had foreseeable results, both in legislation and practice; (c) Whether the parallel proceedings were conducted in a way that, as far as possible, avoided duplicating the process, in terms of obtaining and assessing evidence. Specifically, whether there was adequate communication between the competent authorities to ensure that, for example, the establishment of facts in one legal proceeding was also used in the other; and (d) Whether the sanction imposed as a result of the first concluded legal proceeding was taken into account in the second legal proceeding, which is concluded later chronologically.

The Court explained that “States should be able to legitimately choose additional legal responses to public wrongs (such as violations of traffic regulations, tax evasion) through different

⁸⁰ See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in *Zolotukhin v. Russia*, application no. 14939/03, paragraphs 12-25.

⁸¹ See the judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in *Zolotukhin v. Russia*, application no. 14939/03, paragraphs 120-122.

⁸² See the judgment of the Grand Chamber of the European Court of Human Rights of 15 November 2016 in *A. and B. v. Norway*, applications no. 24130/11 and 29758/11.

⁸³ *Ibid.*, paragraphs 112-116.

legal proceedings, which form a consistent, unified system in response to different aspects of public injustice, provided that, in its entirety, the response does not impose an excessive burden on the individual concerned.”⁸⁴

Thus, as it turned out, in the case of non-parallel legal proceedings, the European Court of Human Rights approach is not consistent and unified. However, it should also be noted that in its most recent decisions, the Court has continued to take a position favourable to the convicted person. Specifically, the Court has stated that the same act/crime is evident when the second prosecution or conviction is based on identical or essentially the same facts, meaning that the distinction between whether the “act” is purely criminal or formal-legal (including in the broader sense of administrative legal matters) no longer matters.

To illustrate this reasoning, an example can be provided: A military soldier refuses to carry out an order. The military commander punishes him with a disciplinary sanction (disciplinary punishment) and places him in detention for 5 days. After some time, the same soldier is tried for the same act (refusal to execute the superior's order⁸⁵) and is sentenced to 10 months of imprisonment. The question arises: would this situation be considered a violation of the *ne bis in idem* principle?

Some authors believe that in such a situation, the violation of the *ne bis in idem* principle is at hand⁸⁶, as the first and second actions are identical, continuously linked in time and space, and aim toward the same common goal – the strict punishment of the military service member, with the sanction being severe – imprisonment. On the other hand, a second group of authors believes that cases involving disciplinary measures, professional activity bans, revocation of permissions, post-conviction deportation or extradition, etc., are not covered by the scope of Article 4 of Protocol No. 7 of the European Convention.⁸⁷

The first group of authors' position is strengthened by the clarification that the punishment imposed by a military commander on a soldier in disciplinary terms (detaining them in prison – deprivation of liberty) can be considered a criminal proceeding for the purposes of Article 6 of the European Convention, based on the nature of the act and the severity of the sanction.⁸⁸ Therefore, the position of the first group of authors seems more accurate, while the second group of authors, in this context, may require more specificity and clarity.

⁸⁴ See the judgment of the Grand Chamber of the European Court of Human Rights of 15 November 2016 in the case of A. and B. v. Norway, applications no. 24130/11 and 29758/11, paragraph 121.

⁸⁵ In Georgia, such a crime is provided for under Article 383 of the Criminal Code of Georgia (failure to comply with a superior's order – in this case, it applies only to military personnel).

⁸⁶ Cf. *Kublashvili K.*, Fundamental Rights, 2003, 344 (In Georgian).

⁸⁷ Cf. *Loladze B., Pirtskhalashvili A.*, Fundamental Rights, Commentary, electronic version of the book, 2023, 817 (In Georgian). See also: European Court of Human Rights, 31 May 2011, judgment in the case of *Kurdov et Ivanov c. Bulgarie*, application no. 16137/04; European Court of Human Rights, 19 February 2013; judgment of the European Court of Human Rights of 19 February 2013 in *Müller-Hartburg v. Austria*, application no. 47195/06; Cf. also: BVerfGE 21, 391 (401).

⁸⁸ See: European Court of Human Rights Grand Chamber judgment of 8 June 1976, in the case of *Engel and Others v. the Netherlands*, applications no. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, paragraph 80 et seq.

It is known that, under the meaning of Article 6 of the European Convention, the *ne bis in idem* principle generally does not apply to cases of disciplinary proceedings, such as professional activity bans, revocation of licenses or disciplinary responsibility of judges,⁸⁹ as these cases are considered civil proceedings.⁹⁰ As for deportation/extradition proceedings, these do not concern the determination of civil rights and obligations or the establishment of criminal charges⁹¹ and thus fall outside the scope of Article 6. Therefore, the provisions of Article 7, Protocol No. 4, do not apply to them.

According to the recent position of the European Court, the principle of *ne bis in idem* primarily pertains to a fair trial, which falls under the scope of Article 6 of the Convention and is less related to substantive criminal law compared to Article 7. Therefore, the Court confirms its deliberate choice to apply the so-called “Engel criteria” to determine whether the proceedings are “criminal” for the purposes of Article 7, Protocol 4. However, the same European Court also clarifies that when administrative and criminal sanctions are applied together, a so-called calibrated, or individually tailored, approach is required for each case.⁹²

3.3.2. National Judicial Practice

Using the example of Georgia, the Constitutional Court, in one of its cases, stated⁹³ that the guarantee established by the Constitution of Georgia implies a prohibition on conviction in cases where a repeated charge against a person is based on the same or essentially the same factual circumstances for which a final and binding decision has already been rendered.⁹⁴

More specifically, according to the position of the Constitutional Court, to determine whether a person is being subjected to double jeopardy, it is essential to define what the Constitution means by the concept of “the same offence” (*idem*). Additionally, it is important to identify the circumstances that serve as the basis for establishing similarities between the elements of two or more offences that stem from the same act.⁹⁵

In the given case, the Constitutional Court interprets “conviction” and “offence” with an autonomous, constitutional meaning. While it considers “the legal classification of a specific act or

⁸⁹ See Judgment of the European Court of Human Rights of 5 February 2009 in *Olujić v. Croatia*, application no. 22330/05.

⁹⁰ See: European Court of Human Rights Grand Chamber judgment of 23 October 1985, in the case of *Bentham v. the Netherlands*, application no. 8848/80, paragraph 36; European Court of Human Rights judgment of 7 July 1989, in the case of *Tre Traktörer Aktiebolag v. Sweden*, application no. 10873/84, paragraph 43.

⁹¹ See: European Court of Human Rights Grand Chamber's judgment of 5 October 2000, in the case of *Maaouia v. France*, application no. 39652/98, paragraph 38; European Court of Human Rights' decision of 16 April 2000, in the case of *Peñafiel Salgado c. Espagne*, application no. 65964/01.

⁹² See the judgment of the Grand Chamber of the European Court of Human Rights of 15 November 2016 in *A. and B. v. Norway*, applications no. 24130/11 and 29758/11, paragraph 107.

⁹³ See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Georgian citizen *Davit Tsintsikiladze vs. Parliament of Georgia* (In Georgian).

⁹⁴ See Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen *Davit Tsintsikiladze v. Parliament of Georgia*, paragraph II, 5 (In Georgian).

⁹⁵ See Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen *Davit Tsintsikiladze v. Parliament of Georgia*, Section II, 5, Section II, Section 12 (In Georgian).

measure and its place in the legislation,” it assigns decisive importance to “the nature of the coercive measure, its actual essence and the degree of its severity.”⁹⁶

The Constitutional Court considers that, for the purposes of the prohibition of double jeopardy established by Article 42, Paragraph 4 of the Constitution (old edition), the decisive factor is not the legislative classification of different elements of an offence but rather whether the new charge against a person is based on the same or essentially the same factual circumstances for which a final and binding decision has already been issued. However, if there is a new fact or evidence that serves as the basis for reopening criminal prosecution, the situation may differ.⁹⁷

More specifically, the Court indicates that in order to determine the similarity between the elements of comparable offences (acts), it is crucial to clearly identify the essential factual circumstances, which must be inseparable in terms of their spatial and temporal aspects and must pertain to the same individual (the accused).⁹⁸ For example, if a person, with a common intent, commits two or more unlawful acts in different locations (spatial element) or at different points in time (temporal element), then, according to the Court, the constitutional guarantee against double jeopardy would not apply to them.⁹⁹

Specifically, the Court asserts that “if a person is subjected to repeated prosecution for an act (or acts) committed in the same place and within a specific timeframe, based on a different legal basis, but where the elements of the offence (including subjective (*mens rea*) and objective (*actus reus*) elements, the purpose of the crime, and the assessment of public and private interests) are essentially similar to those considered in the initial conviction and, if the repeated prosecution is based on essentially the same factual circumstances, such a case should fall within the scope of the right protected by Article 42, Paragraph 4 of the Constitution.”¹⁰⁰

This decision will be analysed in detail below but it should be noted that, according to both European and national courts, the determination of identity between the acts in the first and second proceedings must be based solely on facts and circumstances rather than their legal qualification.¹⁰¹

⁹⁶ See the Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, II, paragraphs 10-11. Also, cf. *Loladze B., Pirtskhalashvili A.*, Fundamental Rights, Commentary, electronic version of the book, 2023, 816-817 (In Georgian).

⁹⁷ See Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, paragraph II 13 (In Georgian).

⁹⁸ Ibid.

⁹⁹ See Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, paragraph II 13 (In Georgian).

¹⁰⁰ See Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia, paragraph II 13 (In Georgian).

¹⁰¹ Ibid., also cf.: European Court of Human Rights, *Ruotsalainen v. Finland*, No. 13079/03, paragraph 48, 16 June 2009; European Court of Human Rights, *Maresti v. Croatia*, Application No. 55759/07, paragraph 62, 25 June 2009; European Court of Human Rights, *Tsonyo Tsonev v. Bulgaria*, Application No. 2376/03, paragraph 51, 1 October 2009. Similar reasoning is developed by the Court of Justice of the European Union, which analyses the issue from a material perspective, namely, if the actions committed in different States constitute a set of facts that are continuously/inseparably linked to each other in terms of time, space

Therefore, in establishing whether an act is the same, the decisive factor is not its legal classification, subsumption or the protected legal interest, but rather the totality of facts continuously linked in time and space and directed toward a common objective.¹⁰²

3.4. A Final Decision

3.4.1. European Judicial Practice

The principle of *ne bis in idem* implies the existence of another criterion/element: whether the first court decision has acquired a final character, that is, whether such a decision has acquired formal legal force – *res judicata*.¹⁰³

This issue has also often been the subject of discussion in the decisions of the European Court of Justice. In particular, when a court decision enters into legal force – whether immediately after the decision is made by the court of first instance or after the decision is made by the court of last instance when the court decision acquires “finality”. The connection between the two points determines the definition of the concept of “finality”.

Hypothetically, in such a case, four possible scenarios could arise before the European Court:

1. Domestic legislation does not provide for the right to appeal.
2. All available appeal remedies must have been exhausted.
3. The applicant missed the appeal deadline by their own fault.
4. An initial complaint was submitted but the applicant later withdrew it voluntarily.¹⁰⁴

Each state has different legal regulations regarding when a judgment becomes final.¹⁰⁵ It is entirely possible that a procedural ruling is considered not final in one state but it may be deemed final under the laws of another state. This is because domestic legislations of Convention signatory states vary from one another. For example, in Switzerland, a court decision becomes final only after all legal remedies available at the cantonal level have been exhausted.¹⁰⁶

In the case of Georgia, under Article 279.1 of the Criminal Procedure Code of Georgia, a judgment enters into legal force and becomes enforceable upon its public announcement by the court. This provision does not specify which instance of the court it refers to, first, second or final instance.

and purpose, then the “same crime” has been committed. For more information, see *Jishkariani B.*, *European Criminal Law*, 2nd edition, 2018, 271.

¹⁰² Cf. *Tandilashvili Kh.*, *Problems of Applying the Principle of Prohibition of Double Jeopardy (ne bis in idem) in the legal space of the European Union*, Justice and Law, 2017, N4(56), 117 (In Georgian).

¹⁰³ Cf.: Judgment of the European Court of Human Rights of 20 July 2004 in *Nikitin v. Russia*, application no. 50178/99, paragraph 37; European Court of Human Rights, *Horciag v. Romania*, Application no. 70982/01, 15 March 2005; *Turava M.*, *Commentary on the Constitution of Georgia*, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 551; (In Georgian). *Trechsel S.*, *Human Rights in Criminal Proceedings*, 2010, 435 (In Georgian).

¹⁰⁴ See *Trechsel S.*, *Human Rights in the Criminal Justice Process*, 2010, 435.

¹⁰⁵ Cf. *Tandilashvili Kh.*, *Problems of Applying the Principle of Prohibition of Double Jeopardy (ne bis in idem) in the Legal Space of the European Union*, Justice and Law, 2017, N4(56), 122 (In Georgian).

¹⁰⁶ See *Trechsel S.*, *Human Rights in the Criminal Justice Process*, 2010, 435 (In Georgian).

This is also indicated by the court's decisions at the national level that are directly related to this issue and the analysis of which will be presented below.

3.4.2. National Judicial Practice

3.4.2.1. *Citizen of Georgia Davit Tsintsiladze v. Parliament of Georgia*

In the given case,¹⁰⁷ the claimant considered it problematic that, after the first-instance court's decision, the prosecutor had the right to appeal the decision and request either the conviction of an acquitted person or the imposition of a harsher sentence on a convicted individual. According to the applicant, the court's authority to review the lower-instance court's decision and, as a result, either convict an acquitted person or impose a harsher sentence on a convicted individual violated the constitutional principle of *ne bis in idem*.

According to the claimant's position, for a person to be considered as being convicted twice for the same crime, it is necessary to establish the existence of a final decision that has entered into legal force.¹⁰⁸ Therefore, the claimant argued that the disputed norms contradicted the principle of the presumption of innocence as recognized by Article 40, Paragraph 1 of the old version of the Constitution of Georgia.¹⁰⁹

The Constitutional Court, after a detailed examination of the *ne bis in idem* principle concerning the presumption of innocence, identified three key elements that must be present for constitutionally prohibited double jeopardy to occur:

- a) There must be a completed criminal procedure concerning a specific offence;
- b) The person must face “repeated” conviction (*bis*);
- c) The prosecution must be for the “same offence” (*idem*).¹¹⁰

The Constitutional Court held that in the case under review, each of these elements must be assessed individually, and if they exist cumulatively, it would constitute a violation of the prohibition against double jeopardy for the same act.

According to the Court, the constitutional guarantee against repeated conviction applies only to the repetition of a criminal procedure that has been concluded with a final decision that has entered into legal force.¹¹¹

Specifically, according to the Constitutional Court's opinion, the moment in time when a decision attains its final effect (*res judicata*) is when it becomes irreversible, and no reasonable

¹⁰⁷ See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in *Citizen of Georgia Davit Tsintsiladze vs. Parliament of Georgia* (In Georgian).

¹⁰⁸ Cf. Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in *Georgian Citizen Davit Tsintsiladze v. Parliament of Georgia*, I, paragraph 9 (In Georgian).

¹⁰⁹ *Ibid*, I, para. 12.

¹¹⁰ Cf. Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in the case: *Georgian citizen Davit Tsintsiladze v. Parliament of Georgia*, II, paragraph 9 (In Georgian).

¹¹¹ Cf. Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in the case: *Georgian citizen Davit Tsintsiladze v. Parliament of Georgia*, II, paragraph 16 (In Georgian).

mechanisms for appeal remain available under the law.¹¹² Such a situation arises when the decision has been made by the highest instance court or when the legally prescribed time limits for appeal have expired and the parties have voluntarily chosen not to exercise their right to appeal.¹¹³

Considering the above, the Constitutional Court concludes that:

“The *ne bis in idem* principle provides guarantees against the initiation of repeated prosecution for two or more actions arising from essentially similar factual circumstances, unified in time and space, when there already exists a final decision that has entered into legal force regarding the person’s conviction or acquittal, or when certain procedural circumstances exist that effectively signify the termination of legal proceedings (such as the prosecution dropping charges, the expiration of limitation periods, or amnesty).”¹¹⁴

Thus, based on the analysis of this decision, it can be concluded that the Constitutional Court links the finality of a decision to its entry into legal force either through a final ruling by the third-instance court or the existence of procedural circumstances that effectively equate to the termination of legal proceedings.

In our view, the Constitutional Court’s position should not be considered correct as it clearly contradicts both Article 279.1 of the Criminal Procedure Code of Georgia (CPCG) and Article 105(g) of the same Code.

More specifically, under Article 279.1 of the CPCG, as mentioned above, a verdict enters into legal force and becomes enforceable immediately upon its public announcement by the court. A public announcement is conducted by all three court instances. Additionally, Article 3.14 of the CPCG defines a verdict as a decision made by the first-instance, appellate or cassation court that either convicts or acquits the defendant. Consequently, all references in the Criminal Procedure Code to a court verdict inherently include the first-instance court since it publicly announces its verdict (whether convicting or acquitting) and thus the verdict immediately attains legal force upon announcement.

Regarding Article 105(g) of the CPCG, this provision states that an investigation or criminal prosecution must be terminated if there is a court verdict that has entered into legal force on the same charge or a court ruling terminating the criminal prosecution on the same charge.

In this provision, when the legislator refers to a court verdict that has entered into legal force, it also includes decisions made by the first-instance court. Otherwise, this provision would contradict both Article 279.1 and Article 18.2 of the CPCG, which explicitly and categorically states that a person cannot be convicted or charged for a crime for which they have already been acquitted or convicted.

However, another important aspect to consider is a subsequent decision by the Constitutional Court in the case of *Georgian Citizen Davit Tsintsqiladze v. The Parliament of Georgia*, which was issued shortly after the ruling discussed above.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid, II, para. 19.

3.4.2.2. Georgian Citizen Nikanor Melia v. Parliament of Georgia

According to the constitutional claim under review¹¹⁵, the claimant, Nikanor Melia, had his parliamentary mandate terminated prematurely on 12 December 2019, based on the verdict issued by the Tbilisi City Court on 2 December 2019. According to this verdict, Nikanor Melia was found guilty of committing the crime stipulated under Article 332.1 of the Georgian Criminal Code (Abuse of Official Authority). As a penalty, he was fined 25,000 GEL and, as an additional punishment, he was deprived of the right to hold office for three years.¹¹⁶

Nikanor Melia's premature termination from his parliamentary mandate was based on the first-instance court's guilty verdict, despite the fact that he had the right to appeal the decision to the appellate and Supreme Courts. Therefore, the claimant argued that, for the purposes of terminating a parliamentary mandate, a first-instance court decision should not have been considered as having entered into legal force.¹¹⁷

As mentioned earlier, the Constitutional Court had to address this issue again in the present case. Specifically, the key question before the Court was whether the Parliament of Georgia had made a constitutionally sound decision when it terminated Nikanor Melia's mandate prematurely. The Constitutional Court, within its competence, thoroughly examined whether the Parliament had correctly interpreted the term "court verdict that has entered into legal force" as used in Article 39.5(d) of the Constitution (current version).¹¹⁸

The Constitutional Court held that the Parliament's application of this constitutional provision in the same sense as Article 279.1 of the Criminal Procedure Code was entirely legitimate in prematurely terminating Nikanor Melia's authority on constitutional grounds.¹¹⁹

The Court noted that, while constitutional concepts and terms have an autonomous meaning, as it had previously stated in multiple decisions, this does not mean that the Court should never consider the interpretation of the same terms in other legislative provisions.¹²⁰

In this case, the Constitutional Court relied on Article 279.1 of the Criminal Procedure Code and held that the true meaning of the term "court verdict that has entered into legal force" in the Constitution aligns with the content of the norm in Article 279.1 of the Criminal Procedure Code. The Court found no need to interpret the constitutional provision differently as the Parliament, when adopting its resolution, was required to act based on the true meaning of the norm implied in the

¹¹⁵ Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in *Citizen of Georgia Nikanor Melia vs. Parliament of Georgia* (In Georgian).

¹¹⁶ Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in *Citizen of Georgia Nikanor Melia vs. Parliament of Georgia* (In Georgian).

¹¹⁷ Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in *Citizen of Georgia Nikanor Melia vs. Parliament of Georgia* (In Georgian).

¹¹⁸ Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in *Citizen of Georgia Nikanor Melia vs. Parliament of Georgia* (In Georgian).

¹¹⁹ Ibid.

¹²⁰ Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in *Citizen of Georgia Nikanor Melia vs. Parliament of Georgia* (In Georgian).

Constitution. Consequently, the Constitutional Court deemed the Parliament's contested resolution to be legitimate as it was based on the above-mentioned interpretation of constitutional terms.¹²¹

With a clear and unequivocal stance, the Constitutional Court stated that the public announcement of a verdict by a first-instance court signifies its entry into legal force and its immediate enforceability, which is not directly linked to the finality of the verdict.¹²²

Therefore, the Constitutional Court concluded that, for the purposes of prematurely terminating a Member of Parliament's mandate, the entry into legal force of a court verdict refers to a guilty verdict issued by the first-instance court. Accordingly, the Parliament of Georgia's resolution "On the premature termination of Nikanor Melia's parliamentary mandate" did not contradict the requirements of Article 39.5(d) of the Georgian Constitution and, as a result, the constitutional claim was not upheld.¹²³

In this final decision, where the Court once again had to deliberate on this issue, it reaffirmed that a first-instance court's decision attains legal force immediately upon its public announcement. In such cases, the decision formally possesses the effect of legal force – *res judicata*. As for its finality, this should not be linked to the acquisition of legal force but rather to the exhaustion of all appeal possibilities or the issuance of a final decision by the highest-instance court – material legal force.

Based on the above, in the context of the prohibition of double jeopardy, the existence of a first-instance court verdict in the same case is sufficient as it attains legal force immediately upon its public announcement.¹²⁴ Accordingly, the review of the case by higher-instance courts (in the event of an appeal) cannot and should not be regarded as a violation of the principle prohibiting double punishment.¹²⁵

4. *Ne bis in idem* Principle Under Newly Revealed Circumstances

4.1. A Short Review of the Issue

As is known, the revision of a judgment due to newly discovered circumstances does not constitute an independent stage of the criminal process.¹²⁶ In this case, the basis for revising the judgment is the party's motion, not an appeal. A judgment may be revised due to newly discovered circumstances even when all avenues for appealing the court's decision have been exhausted and it

¹²¹ Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in *Citizen of Georgia Nikanor Melia vs. Parliament of Georgia* (In Georgian).

¹²² Cf. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in *Citizen of Georgia Nikanor Melia vs. Parliament of Georgia* (In Georgian).

¹²³ The above decision is accompanied by a dissenting opinion of the judges of the Constitutional Court: I. Imerlishvili, G. Kverenchkhiladze, T. Tughushi and T. Tsabutashvili. In this reasoning, the judges indicate that "the judgment of the court of first instance, which is being appealed, naturally cannot be considered to have entered into legal force," paragraph 18 (In Georgian).

¹²⁴ Cf. *Akubardia I.*, Criminal Procedure Law of Georgia, Collection of Articles, 2017, 714-716 (In Georgian).

¹²⁵ Cf. Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in *Georgian citizen Davit Tsintsikladze v. Parliament of Georgia* (In Georgian).

¹²⁶ See *Tumanishvili G.*, Criminal Procedure, General Review, 2014, 47 (In Georgian).

can no longer be appealed.¹²⁷ Therefore, the law allows for the revision and correction of an erroneous judgment in any case and there are no procedural deadlines established for this.

Based on the principle of subsidiarity, which is affirmed in the preamble of the European Convention, it is pointed out that it is the obligation of national courts to thoroughly examine the protection of the rights guaranteed by the Convention. Accordingly, the court examines whether the reopening of proceedings against the convicted individual violates the minimum standards of a fair trial and their right not to be tried twice.

In this context, it is important to examine the relationship between Article 18.2 of the Criminal Procedure Code of Georgia (CPCG) and Article 310(g). Specifically, Article 18, Paragraph 2 of the Georgian (CPCG), as mentioned above, states that no one can be charged or convicted for the same crime for which they have already been acquitted or convicted. On the other hand, Article 310 of the Georgian CC, which concerns the revision of a judgment due to newly discovered circumstances, highlights new facts or evidence that were not known at the time of the original judgment and, together with other established circumstances, proves the commission of a more serious crime by the convicted individual.

This provision in the law may create practical or doctrinal problems. Specifically, it needs to be clarified what is meant by new facts or evidence that must prove the commission of a more serious crime by the convicted individual, without violating the *ne bis in idem* principle established in Article 18.2 of the CPCG. Additionally, it is important to separately consider cases where there is a reopening of proceedings against a convicted person. In this regard, the approach of the European Court of Human Rights and the national Constitutional Court is of particular interest.

4.2. The Approach of European and National Courts

The European Convention's Protocol No. 7, Article 4 protects individuals from both double punishment and retrial.¹²⁸ According to the consistent interpretation in the practice of the European Court of Human Rights, the reopening of a criminal case is generally in *prima facie* conformity with the Convention.¹²⁹

More specifically, Paragraph 2 of Article 4 of Protocol No. 7 explicitly permits the state to reopen proceedings *inter alia* due to newly discovered facts or a substantial procedural error in the previous proceedings, which could have had an impact on the outcome of the case.

Therefore, the application of the *ne bis in idem* principle is not violated when it concerns the reopening of proceedings due to new circumstances. However, the European Court, in applying Article 4.2 of Protocol No. 7, clearly indicates that such a reopening is possible when there is a newly

¹²⁷ Ibid.

¹²⁸ See Trechsel S., Human Rights in the Criminal Justice Process, 2010, 441 (In Georgian).

¹²⁹ See the judgment of the European Court of Human Rights of 20 July 2004 in the case of Nikitin v. Russia, application no. 50178/99, paragraph 57; Judgment of the Grand Chamber of the European Court of Human Rights of 11 July 2017 in Moreira Ferreira v. Portugal (no. 2), application no. 19867/12, paragraph 62. The above reasoning is also in line with the minimum standards of Article 6 of the European Convention, on this see the judgment of the European Court of Human Rights of 15 January 2013 in the case of Velichko v. Russia, application no. 19664/07, paragraph 69.

discovered fact (evidence) or when the previous proceedings were conducted with a substantial flaw that could have affected the outcome of the case.¹³⁰

This is also pointed out by the Constitutional Court of Georgia in one of its decisions. Specifically, the court notes that the essence of the right protected by Article 42.4 (old version) of the Constitution implies, as an exception, situations “where the proceedings may be reopened due to newly discovered or revealed evidence or when significant procedural flaws emerge that could have affected the outcome of the proceedings and serve as grounds for restarting the process based on clear, foreseeable and pre-established legislation. However, aside from these exceptions, the principle of prohibition of double jeopardy constitutes an absolute and imperative constitutional obligation.”¹³¹

In *Citizen of Georgia Davit Tsintsiladze v. the Parliament of Georgia*, the Constitutional Court notes that “the scope protected by Article 42.4 of the Constitution does not cover the exceptional cases established by law, which provide for the possibility of reopening proceedings due to newly discovered or revealed evidence or when significant procedural flaws emerge that could have affected the outcome of the proceedings and serve as grounds for restarting the process based on clear, foreseeable and pre-established legislation.”¹³²

Therefore, during the reopening of proceedings, the principle of *ne bis in idem* is generally not violated if, of course, the case involves newly discovered facts (evidence) or if the previous legal proceedings were conducted with significant procedural flaws that could have affected the outcome of the case.¹³³ However, as mentioned above, the issue arises regarding what should be understood by newly discovered facts/evidence.

4.3. Analysis of Some Norms of the Georgian Criminal Procedure Code

Part 2 of Article 18 of the Criminal Code of Georgia, as mentioned, explains that a person cannot be charged and/or convicted for a crime for which he/she has already been acquitted or convicted. Article 310(g) of the Criminal Procedure Code of Georgia, which is related to the revision of a sentence due to newly discovered circumstances, indicates a new fact or evidence that was not known at the time of the revised sentence and, together with other established circumstances, proves

¹³⁰ See the judgment of the European Court of Human Rights of 20 July 2004 in the case of *Nikitin v. Russia*, application no. 50178/99, paragraph 45, also cf.: *Turava M.*, Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 551-552; *Papiashvili L.*, Commentary on Article 18 of the Criminal Procedure Code of Georgia in the work: Commentary on the Criminal Procedure Code of Georgia, 2015, 136-137 (In Georgian).

¹³¹ See the Decision of the Constitutional Court of Georgia of 29 September 2015 No. 3/1/608,609 in Constitutional submission of the Supreme Court of Georgia on the constitutionality of Article 306.4 of the Criminal Procedure Code of Georgia and Constitutional submission of the Supreme Court of Georgia on the constitutionality of Article 297(g) of the Criminal Procedure Code of Georgia.

¹³² See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016 in Georgian citizen *Davit Tsintsiladze v. Parliament of Georgia*, paragraph 17.

¹³³ Cf.: *Turava M.*, Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013, 551-552; *Papiashvili L.*, Commentary on Article 18 of the Criminal Procedure Code of Georgia in the work: Commentary on the Criminal Procedure Code of Georgia, 2015, 136-138 (In Georgian).

the commission of a more serious crime by the convicted person. Accordingly, it is necessary to determine what is meant by the newly discovered fact/evidence so as not to duplicate the process and not violate the principle of *ne bis in idem*. For example, one such case can be cited:

Peter was convicted of concealing a particularly serious crime – premeditated murder – without prior promise (Article 375.3 of the Criminal Code) since Peter disposed of the body and buried it in the ground. After the guilty verdict entered into legal force, law enforcement agencies, within the framework of the investigation of a separate criminal case, suspected that Peter not only covered up the crime but also directly participated in the commission of the murder together with other persons (Article 109(i) of the Criminal Code – premeditated murder committed by a group). To confirm the above circumstances, the investigation identified a new eyewitness who was previously unknown to the investigation. On this basis, Peter's legal situation was aggravated by a new charge under Article 310(g) of the Criminal Code of Georgia even though he already had a guilty verdict for covering up a crime.

The concealment of a crime and participation in murder, in the narrow sense of criminal law, are different offences. However, the concealment of a crime, like failure to report a crime, is one form of criminal involvement. More specifically, legal literature recognises that, alongside the co-conspirators of a crime, criminal responsibility may also arise for actions that do not directly facilitate the commission of the crime, – meaning they do not constitute participation – yet are inherently linked to the offence.¹³⁴ Accordingly, the concealment of a crime is a “special case/form” of criminal participation, which is treated as an independent offence – *delictum sui generis*. This is why, when national courts reclassify an initial act as concealment of a crime or failure to report a crime, the so-called “principle of the immutability of charges” is generally not violated.¹³⁵ In such cases, the requalification of the act does not constitute the introduction of a new charge that qualitatively or substantively exceeds the originally filed accusation¹³⁶.

Based on the above, within the framework of the new conviction, the court must determine to what extent participation in the murder and the removal/concealment of the corpse constitute a set of facts that are inextricably linked in time and space.¹³⁷

More specifically, in order to establish similarity between the elements of comparable crimes (acts), the court must first clearly identify the essential factual circumstances, which must be

¹³⁴ For more details, see: *Surguladze L.*, Criminal Law, Crime, 2005, 388-412; *Mchedlishvili-Hedrich K.*, Criminal Law, General Part, Separate Forms of Crime Detection, 2011, 256-264, also, cf. the judgment of the Tbilisi Court of Appeal of 3 October 2024 in case No. 1B/682-24 (In Georgian).

¹³⁵ See the decision of the Tbilisi Court of Appeal of 3 October 2024 in the criminal case No. 1B/682-24, also cf.: the decision of the Supreme Court of Georgia of 10 April 2024 No. 1105AP-23; the decision of the Supreme Court of Georgia of 19 April 2023 No. 1120AP-22; decision; the decision of the Supreme Court of Georgia of 12 January 2024 in the case No. 777AP-23 (In Georgian).

¹³⁶ On this, see *Maglakelidze L.*, Understanding the Principle of Immutability of Charges According to the Practice of the Georgian and European Court of Human Rights, 2017, German-Georgian Electronic Journal of Criminal Law (<http://www.dgstz.de/>), 3rd Edition, 75-79 (In Georgian).

¹³⁷ Cf. *Tandilashvili Kh.*, Problems of Applying the Principle of Prohibition of Repeated Conviction (*ne bis in idem*) in the Legal Space of the European Union, Justice and Law, 2017, N4(56), 121-122 (In Georgian).

inseparable in terms of their action in space and time.¹³⁸ I.e., at the initial stage, the court is required to determine the elements of time and gravity. After that, if the court considers that participation in the murder and the removal/concealment of the body are continuously connected in time and space, then there will be a violation of the *ne bis in idem* principle. If the court considers that in this particular situation, the two circumstances mentioned are not connected, then it will be entirely possible to convict the person under a more severe article.

This issue is highly contentious and every such new fact or piece of evidence requires individual assessment. Each case must be decided based on its specific circumstances. Within the framework of existing legislation at the national level, we believe there should be no issue with retrying a person under a more severe charge. However, this reasoning should not be understood to mean that every new fact or circumstance automatically aligns with the *ne bis in idem* principle.

For instance, if the same person, Peter, was convicted of Paul's murder (Article 108 of the Criminal Code), but later a more severe charge was brought against him on the grounds that he killed Paul for financial gain or as part of a group (Article 109, subsections “i” and “m” of the Criminal Code), this would clearly not be in accordance with the *ne bis in idem* principle.¹³⁹ In this case, the aggravation of charges would occur within the scope of the same unlawful act – murder – which remains continuously linked in terms of time and space. Consequently, imposing an additional or harsher punishment on a person already convicted within the framework of the same criminal unlawfulness is impermissible.¹⁴⁰

On a similar issue, the Constitutional Court explains that the scope of constitutional protection should include cases where actions committed by a person at the same place and within a specific timeframe (referring to both the subjective element – *mens rea* – and the objective element – *actus reus* – of the offence) are essentially similar.¹⁴¹ The European Court of Human Rights (ECtHR) has clarified that the *ne bis in idem* principle distinguishes between a second prosecution and a second trial, both of which are prohibited by Article 4.1 of Protocol No. 7. However, in exceptional cases provided by law, the reopening of proceedings is permissible under Article 4.2 and such a reopening does not violate the *ne bis in idem* principle.¹⁴² More specifically, the Court's position is that reopening criminal proceedings for the same charge due to newly discovered facts or evidence or due

¹³⁸ See: Decision of the Constitutional Court of Georgia of 29 December 2016, No. 2/7636, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia; Decision of the European Court of Human Rights of 10 February 2009, in the case: Zolotukhin v. Russia, Application No. 14939/03, paragraph 84 (In Georgian).

¹³⁹ A situation where a person has already been convicted for a crime involving bodily harm, and the victim later dies, cannot be considered a newly discovered fact or circumstance justifying the reopening of the case and the defendant's retrial for this “new” offense. In such cases, the victim's death does not constitute a valid ground for reopening proceedings and imposing a second punishment. See: *Kublashvili K.*, Fundamental Rights, 2003, 343 (In Georgian).

¹⁴⁰ See.: *Kublashvili K.*, The Basic Rights, 2003, 343-344 (In Georgian).

¹⁴¹ See Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016, in Georgian citizen Davit Tsintskiladze v. Parliament of Georgia (In Georgian).

¹⁴² See the judgment of the European Court of Human Rights of 29 July 2008 in *Xheraj v. Albania*, application no. 37959/02, paragraph 2 (In Georgian).

to a fundamental procedural flaw in the initial proceedings does not contradict the *ne bis in idem* principle.¹⁴³

In cases where a national court grants the prosecution's motion to reopen proceedings without the existence of newly discovered facts, evidence, or a fundamental procedural violation in the previous trial, a violation of the *ne bis in idem* principle occurs.¹⁴⁴

Thus, the *ne bis in idem* principle may be violated when a person is convicted again within the same legal classification of the offence, even if new charges are brought under aggravating circumstances. However, if the aggravated charge falls under an entirely different category of criminal wrongdoing – one that was previously unknown to the investigation – meaning that new evidence or facts have emerged, then there is no violation of the *ne bis in idem* principle.

It is interesting as well, how the *ne bis in idem* principle applies in cases involving fugitive defendants.

4.4. *Ne bis in idem* Principle in Reopening Cases of Fugitive Defendants

In the case-law of the European Court of Human Rights, a violation of Article 4 of Protocol No. 7 is not established when criminal proceedings conducted *in absentia* against a fugitive defendant are reopened multiple times due to newly discovered factual circumstances or a fundamental procedural violation that could have affected the outcome of the case.

For example, in *Xheraj v. Albania*,¹⁴⁵ the applicant was convicted *in absentia*. The Court of Appeal upheld the conviction on 27 November 1996 and the Albanian Supreme Court refused to hear the fugitive defendant's lawyer's cassation appeal. However, several years later, on 14 December 1998, based on newly discovered evidence, the conviction of 27 November 1996 was overturned and an acquittal was issued in favour of the applicant. This acquittal became final on 24 December 1998.¹⁴⁶

On 8 October 1999, following an appeal by the prosecutor, which argued that a fundamental procedural violation had occurred in the previous proceedings, a request was made – based on a domestic legal provision – for the case to be reopened. This request was granted.¹⁴⁷

In the reopened proceedings, on 20 June 2001, the Criminal Chamber of the Supreme Court of Albania annulled the acquittal and issued a conviction against the fugitive defendant.¹⁴⁸

According to the European Court, such cases must be assessed by national courts based on the subsidiarity principle and should take into account the following factors:

¹⁴³ See the judgment of the European Court of Human Rights of 29 July 2008 in *Xheraj v. Albania*, application no. 37959/02, paragraph 2.

¹⁴⁴ See the judgment of the Grand Chamber of the European Court of Human Rights of 8 July 2019 in *Mihalache v. Romania*, application no. 54012/10.

¹⁴⁵ See the judgment of the European Court of Human Rights of 29 July 2008 in *Xheraj v. Albania*, application no. 37959/02, paragraphs 9, 15-25.

¹⁴⁶ See the judgment of the European Court of Human Rights of 29 July 2008 in *Xheraj v. Albania*, application no. 37959/02, paragraphs 9, 15-25.

¹⁴⁷ Ibid.

¹⁴⁸ See the judgment of the European Court of Human Rights of 29 July 2008 in *Xheraj v. Albania*, application no. 37959/02, paragraphs 9, 15-25.

- 1) The impact of the reopening of proceedings on the individual situation of the person concerned and whether the reopening was requested by the applicant.
- 2) The grounds on which the final judgment was annulled.
- 3) The compliance of the reopened proceedings with the requirements of domestic law.
- 4) The existence of appropriate procedural safeguards in the national legal system to prevent the arbitrary use of this mechanism by national authorities and their effective application to the circumstances of the case.

Additionally, there may be other relevant circumstances that the national court must consider.¹⁴⁹

In cases where new charges are brought or charges are reclassified in reopened proceedings against a fugitive based on newly discovered facts or evidence that were not known at the time of the first final judgment, the European Court case *Palazzolo v. Italy* is an important precedent.¹⁵⁰

In this case, the applicant was a fugitive. By the time of the ruling in 2013, he had been arrested in Bangkok, Thailand, in preparation for his extradition to Italy.¹⁵¹

The applicant before the European Court of Human Rights claimed a violation of Article 4 of Protocol No. 7 to the Convention, arguing that in the first trial, the judgment of acquittal by the Rome court on 28 March 1992, and in the second trial, the final judgment of conviction by the Court of Cassation on 29 April 2009, concerned the same facts.¹⁵²

The European Court of Human Rights did not consider the application for substantive examination as it was deemed clearly unfounded. This was because the evidence available in the second trial was not present in the first trial when the Rome court was examining the case and the Rome court could not have been aware of it.¹⁵³

The issue of fairness in legal proceedings may arise if, in the case of a fugitive's conviction, the arrested or declared person does not have the opportunity to appeal the final judgment.

According to Article 292.3 of the Criminal Procedure Code of Georgia, a convicted person against whom a court judgment of conviction has been made in their absence has the right to appeal the judgment within one month from: their arrest; or the moment of their voluntary appearance before the relevant authorities; or from the date of the first-instance court's decision, if the convicted person requests the appeal to be considered without their participation.

If the fugitive convict is arrested or voluntarily appears before the relevant authorities, they are fully entitled to have all the evidence in the criminal case re-examined in the appellate court with direct participation from the outset. This is indicated by Subparagraph “f” of Article 297 of the Criminal Procedure Code, which specifies that an appeal is considered by the first-instance court based on the substantive examination of the case only when the first-instance court's judgment was

¹⁴⁹ See the judgment of the European Court of Human Rights of 24 May 2007 in *Radchikov v. Russia*, application no. 65582/01, paragraph 44.

¹⁵⁰ See the judgment of the European Court of Human Rights of 24 September 2013 in *Palazzolo v. Italy*, application no. 32328/09.

¹⁵¹ *Ibid*, para. 1.

¹⁵² *Ibid*, para. 64.

¹⁵³ See the judgment of the European Court of Human Rights of 24 September 2013 in *Palazzolo v. Italy*, application no. 32328/09, para. 78.

made in the absence of the defendant and the appeal is considered in appellate procedure with their direct participation and request.

Therefore, even if the prosecution decides to re-qualify the charge under the same legal provision, despite the fact that the court has already made a decision on the same act, the defendant still has the right to examine the evidence in person and challenge/nullify such evidence in the substantial process before the judge.

Thus, the fact that Georgian legislation allows the possibility of appealing the judgment for a fugitive defendant/convict is fully consistent with European standards.

The national court recognises that the state's obligation to ensure the defendant's right to be present during the trial in the courtroom, whether in the initial trial or in the renewed trial (following an appeal of the judgment in their absence by a detained or declared convict), is considered one of the fundamental requirements under Article 6 of the European Convention.¹⁵⁴

The state's refusal to allow the renewal of legal proceedings, except when the convicted person explicitly waives their right, falls into the category of the most severe violations of Article 6 of the Convention and is classified as a “clear disregard of justice.”¹⁵⁵

5. Conclusion

In conclusion, the prohibition of double jeopardy (*ne bis in idem*) constitutes an imperative obligation under both international law and constitutional law. However, exceptions exist in cases where legal proceedings may be reopened due to newly discovered or revealed evidence, or when significant procedural errors are identified that could have influenced the outcome of the proceedings.

The *ne bis in idem* principle may be violated when a person is retried or re-convicted for the same criminal offence even if the new charges relate to the same act committed under aggravating circumstances. Consequently, the imposition of an additional or harsher punishment for the same criminal offence is inadmissible. However, if the aggravation of the charges occurs within a different legal framework due to newly discovered facts or evidence that was previously unknown to the investigation, or due to substantial procedural flaws, the *ne bis in idem* principle is not violated in such cases.

To determine whether a trial or conviction is “repeated,” it is crucial to assess whether the legal process is being duplicated. According to the position of the European Court, the principle of the prohibition of double jeopardy applies not only to cases where a person is punished twice but also when a second sanction is imposed or a similar proceeding is conducted against them. Consequently, the European Convention prohibits not only repeated convictions but also repeated prosecutions. This

¹⁵⁴ See: European Court of Human Rights, judgment of 24 March 2005 in the case of *Stoichkov v. Bulgaria*, application no. 9808/02, paragraph 56; European Court of Human Rights, judgment of 12 June 2018 in the case of *M.T.B. v. Turkey*, application no. 47081/06, paragraph 61.

¹⁵⁵ See: Judgment of the Grand Chamber of the European Court of Human Rights of 1 March 2006 in the case of *Sejdovic v. Italy*, application no. 56581/00, paragraph 84; Judgment of the European Court of Human Rights of 27 August 2019 in the case of *Magnitskiy and Others v. Russia*, applications no. 32631/09 and 53799/12, paragraph 280.

prohibition extends even to cases where the first legal proceeding resulted in an acquittal rather than a conviction.

Additionally, the key theses that emerged in the analysis of the *ne bis in idem* principle should be presented as separate points. Consequently, the conclusion can be formulated as follows:

- (a) The prohibition of double jeopardy protects an individual only from repeated prosecution and conviction within the same state and does not have transnational applicability.
- (b) The mere suspension of criminal proceedings does not constitute a legal barrier to the reopening of prosecution.
- (c) The termination of criminal prosecution by a prosecutor does not amount to either a conviction or an acquittal; therefore, Article 4 of Protocol No. 7 of the Convention does not apply in such cases.
- (d) The failure of the courts to reach a unanimous decision does not prevent the continuation of legal proceedings, and thus, in such instances, the *ne bis in idem* principle is not violated.
- (e) Article 4 of Protocol No. 7 of the Convention prohibits not only repeated conviction for the same act but also repeated prosecution.
- (f) Article 4 of Protocol No. 7 of the Convention, as a rule,¹⁵⁶ does not protect a person from additional disciplinary responsibility for the same act.
- (g) In the context of the prohibition of double jeopardy, the existence of a judgment by a first-instance court, which acquires legal force upon its public announcement (*res judicata* – formal legal power), is sufficient. The appeal of a first-instance court's decision in higher instances does not constitute a violation of the prohibition against repeated punishment.
- (h) According to the case-law of the European Court, in determining whether the same act has been prosecuted, the decisive factor is not its legal qualification, subsumption or the protected legal interest but rather the totality of facts that are continuously connected in time and space and directed toward a common goal.
- (i) The term “same act” should be understood not only in the criminal law (substantive) sense but also in relation to administrative offences and, in exceptional cases, disciplinary violations. If such violations, by their nature and the severity of the imposed sanction, fall within the scope of Article 6(1) of the European Convention on Human Rights, they may be considered criminal in nature. However, the European Court emphasises the necessity of a calibrated, case-specific **approach** in such situations. Consequently, this last thesis remains open to further analysis and debate.

Bibliography:

1. Constitution of Georgia, 24/08/1995.
2. Convention for the Protection of Human Rights and Fundamental Freedoms, 4/11/1950.
3. Statute of the International Court of Justice 24/10/1945.
4. Statute of the International Criminal Court 17/07/1998.

¹⁵⁶ For more details see para. “i”.

5. Criminal Code 22/07/1999.
6. Criminal Procedure Code 09/10/2009.
7. Code of Administrative Offenses 15/12/1984.
8. *Akubardia I.*, Criminal Procedure Law of Georgia, Collection of Articles, 2017, 714-716 (In Georgian).
9. *Dgebuadze G.*, The Principle of Complementarity – Support for National Justice or “Discretionary Intervention, Collection of Articles, in the collection; The Influence of European and International Law on Georgian Criminal Procedural Law, 2019, 723-725 (In Georgian).
10. *Conway G.*, Ne Bis in Idem and the International Criminal Tribunals, Criminal Law Forum 14, 2003, 351-383.
11. *Harris D., O’Boyle M., Bates E., Buckley C. et al.*, Law of the European Convention on Human Rights, 4th ed., Oxford: Oxford University Press, 2018, 966.
12. *Jishkariani B.*, Prohibition of Double Punishment (*ne bis in idem*) within the European Union, in the Journal: Journal of International Law, 1/2009, 216 (In Georgian).
13. *Jishkariani B.*, European Criminal Law, 2nd Edition, 2018, 267-268 (In Georgian).
14. *Kharanauli L.*, General Part of Criminal Law, Commentary, Authors' Collective, Volume I, 2021, 49 (In Georgian).
15. *Kublashvili K.*, Fundamental Rights, 2003, 344 (In Georgian).
16. *Loladze B., Pirtskhalashvili A.*, Fundamental Rights, Commentary, electronic version of the book, 2023, 817 (In Georgian).
17. *Maglakelidze L.*, Understanding the Principle of Immutability of Charges According to the Practice of the Georgian and European Court of Human Rights, German-Georgian Electronic Journal of Criminal Law (<http://www.dgstz.de/>), 3rd Edition, 2017, 75-79 (In Georgian).
18. *Mchedlishvili-Hedrich K.*, Criminal Law, General Part, Separate Forms of Crime Detection, 2011, 256-264 (In Georgian).
19. *Mirianashvili G.*, Dissertation: Conflicting Standards of Human Rights Protection within the Council of Europe and the European Union in the Field of Extradition, 2020, 79 (In Georgian).
20. *Orakhelashvili A.*, Akehurst's Modern Introduction to International Law, 9th ed., London/New York: Routledge, 2022, 49.
21. *Papiashvili L.*, Commentary on Article 18 of the Criminal Procedure Code of Georgia in the work: Commentary on the Criminal Procedure Code of Georgia, 2015, 137 (In Georgian).
22. *Pataria D.*, Public International Law, Book One, 2023, 91 (In Georgian).
23. *Pradel J.*, Comparative Criminal Law, 1999, 412 (In Georgian).
24. *Rengier R.*, Strafrecht, Allgemeiner Teil, 2. Auflage, 2010, 7.
25. *Satzger H.*, Internationales und Europäisches Strafrecht, 3. Auflage, 2009, 180.
26. *Surguladze L.*, Criminal Law, Crime, 2005, 388-412 (In Georgian).
27. *Tandilashvili Kh.*, Problems of Applying the Principle of Prohibition of Double Jeopardy (*ne bis in idem*) in the Legal Space of the European Union, Justice, and Law, 2017, N4(56) (In Georgian).
28. *Trechsel S.*, Human Rights in the Criminal Justice Process, 2010 (In Georgian).
29. *Tskhomelidze O.*, Dissertation: The relationship between the complementary jurisdiction of the International Criminal Court and the *ne bis in idem* principle in cases of criminal prosecutions carried out by de facto authorities, 2020, 89-90 (In Georgian).

30. *Tumanishvili G.*, Criminal Procedure, General Review, 2014, 47 (In Georgian).
31. *Turava M.*, European Criminal Law, 2010 (In Georgian).
32. *Turava M.*, Criminal Law, Doctrine of Crime, 2011 (In Georgian).
33. *Turava M.*, Commentary on the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Fundamental Human Rights and Freedoms, 2013. (In Georgian).
34. *Wessels J., Beulke W.*, Strafrecht, Allgemeiner Teil, 38. Auflage, 2008, Rn. 75.
35. Decision of the Supreme Court of Georgia of 12 October 2015, in case No. 67AP-14 (In Georgian).
36. Decision of the Supreme Court of Georgia of 17 May 2018, in case No. 699AP-17 (In Georgian).
37. Decision of the Supreme Court of Georgia of 10 April 2024 in case No. 1105AP-23 (In Georgian).
38. Decision of the Supreme Court of Georgia of 19 April 2023 in case No. 1120AP-22 (In Georgian).
39. Decision of the Supreme Court of Georgia of 12 January 2024 in the case No. 777AP-23 (In Georgian).
40. Judgment of the Tbilisi Court of Appeal of 3 October 2024 in case No. 1B/682-24 (In Georgian).
41. Decision of 23 October 2024 of the Investigative Panel of the Tbilisi Court of Appeals in criminal case No. 190802224010200521 (In Georgian).
42. Decision of 11 October 2024 of the Rustavi City Court in criminal case No. 190802224010200521 (In Georgian).
43. Decision No. 3/2/1473 of the Constitutional Court of Georgia of 25 September 2020 in Citizen of Georgia Nikanor Melia vs. Parliament of Georgia (In Georgian).
44. Decision No. 2/7636 of the Constitutional Court of Georgia of 29 December 2016, in Georgian citizen Davit Tsintsiskladze vs. Parliament of Georgia, paragraph 22 (In Georgian).
45. Decision of the Constitutional Court of Georgia of 29 September 2015, No. 3/1/608,609, on the case: Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 306.4 of the Criminal Procedure Code of Georgia and Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Subparagraph “g” of Article 297 of the Criminal Procedure Code of Georgia, paragraph 35 (In Georgian).
46. Judgment of the Grand Chamber of the European Court of Human Rights of 15 November 2016 in A. and B. v. Norway, applications no. 24130/11 and 29758/11.
47. Judgment of the European Court of Human Rights of 28 June 2001 in Amrollahi v. Denmark, application no. 56811/00.
48. Judgment of the Grand Chamber of the European Court of Human Rights of 23 October 1985 in Benthem v. the Netherlands, application no. 8848/80.
49. Judgment of the European Court of Human Rights of 22 May 2007 in Böheim c. Italie, application no. 35666/05.
50. Judgment of the Plenum of the European Court of Human Rights of 8 June 1976 in Engel and Others v. the Netherlands, applications no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.
51. Judgment of the European Court of Human Rights of 29 May 2001 in Franz Fischer v. Austria, application no. 37950/97.
52. Judgment of the European Court of Human Rights of 23 October 1995 in Gradingner v. Austria, application no. 15963/90.
53. Judgment of the European Court of Human Rights of 15 March 2005 in Horciag v. Romania, Application no. 70982/01.

54. Judgment of the European Court of Human Rights of 29 March 2018 in Krombach c. France, application no. 67521/14.
55. Judgment of the European Court of Human Rights of 31 May 2011 in Kurdov et Ivanov c. Bulgarie, application no. 16137/04.
56. Judgment of the Grand Chamber of the European Court of Human Rights of 5 October 2000 in Maaouia v. France, application no. 39652/98.
57. Judgment of the European Court of Human Rights of 27 August 2019 in Magnitskiy and Others v. Russia, applications no. 32631/09 and 53799/12.
58. Judgment of the European Court of Human Rights of 25 June 2009 in Maresti v. Croatia, application no. 55759/07.
59. Judgment of the Grand Chamber of the European Court of Human Rights of 8 July 2019 in Mihalache v. Romania, application no. 54012/10.
60. Judgment of the Grand Chamber of the European Court of Human Rights of 11 July 2017 in Moreira Ferreira v. Portugal (no. 2), application no. 19867/12.
61. Judgment of the European Court of Human Rights of 12 June 2018 in M.T.B. v. Turkey, application no. 47081/06.
62. Judgment of the European Court of Human Rights of 19 February 2013 in Müller-Hartburg v. Austria, application no. 47195/06.
63. Judgment of the European Court of Human Rights of 20 July 2004 in Nikitin v. Russia, application no. 50178/99.
64. Judgment of the European Court of Human Rights of 5 February 2009 in Olujić v. Croatia, application no. 22330/05.
65. Judgment of the European Court of Human Rights of 30 July 1998 in Oliveira v. Switzerland, application no. 25711/94.
66. Judgment of the European Court of Human Rights of 10 February 2015 in Österlund v. Finland, application no. 53197/13.
67. Judgment of the European Court of Human Rights of 24 September 2013 in Palazzolo v. Italy, application no. 32328/09.
68. Decision of the European Court of Human Rights of 16 April 2000 in Peñafiel Salgado c. Espagne, application no. 65964/01.
69. Judgment of the European Court of Human Rights of 14 September 1999 in Ponsetti and Chesnel v. France, applications no. 36855/97 and 41731/98.
70. Judgment of the European Court of Human Rights of 24 May 2007 in Radchikov v. Russia, application no. 65582/01.
71. Judgment of the European Court of Human Rights of 30 May 2000 in RT v. Switzerland, application no. 31982/96.
72. Judgment of the European Court of Human Rights of 16 June 2009 in Ruotsalainen v. Finland, application no. 13079/03.
73. Judgment of the European Court of Human Rights of 18 December 2012 in Sarria c. Pologne, application no. 45618/09.
74. Judgment of the Grand Chamber of the European Court of Human Rights of 1 March 2006 in Sejdivic v. Italy, application no. 56581/00.

75. Judgment of the European Court of Human Rights of 3 October 2002 in Smirnova v. Russia, applications no. 46133/99 and 48183/99.
76. Judgment of the European Court of Human Rights of 24 March 2005 in Stoichkov v. Bulgaria, application no. 9808/02.
77. Judgment of the European Court of Human Rights of 4 September 2014 in Trabelsi v. Belgium, application no. 140/10.
78. Judgment of the European Court of Human Rights of 7 July 1989 in Tre Traktörer Aktiebolag v. Sweden, application no. 10873/84.
79. Judgment of the European Court of Human Rights, Tsonyo Tsonev v. Bulgaria, application no. 2376/03, 1 October 2009.
80. Judgment of the European Court of Human Rights of 15 January 2013 in Velichko v. Russia, application no. 19664/07.
81. Judgment of the European Court of Human Rights of 29 July 2008 in Xheraj v. Albania, application no. 37959/02.
82. Judgment of the Grand Chamber of the European Court of Human Rights of 10 February 2009 in Zolotukhin v. Russia, application no. 14939/03.

Sophio Lasareishvili*

The Duration for Conducting Covert Investigative Actions as a Criterion for Determining the Intensity of Interference with the Right to Personal Life

The duration prescribed by the Criminal Procedure Code for conducting covert investigative actions is applicable in the context of fair balancing and harmonization of public and private interests. During covert investigative activities, intense interference occurs with the rights protected by the Constitution. The validity period is the criterion that determines the intensity of the intervention.

The paper aims to present alternative ways to change the content of criminal procedural numbers. On the one hand, it demonstrates the risks posing increased interference with the implementation of covert investigative action, and on the other hand, the work discusses the ways to solve the problem. Taking into account the time limits and the list of crimes that allow for the performance of these actions, the legislative requirement for the use of covert investigative actions as an extreme measure shall be observed.

In a legal state, the personal space of every person should be protected and inviolable. The legislative guarantees ensure that a legitimate goal in a democratic society is achieved not to violating the principle of a legal state.

Keywords: *Covert investigative actions; The inviolability of private life; Protected sphere; List of crimes.*

1. Introduction

The development of new mechanisms to carry out covert investigative activities also increases the risks of illegal interference in the protected sphere.¹ The advancement of electronic data processing systems has made it easier to gather high volumes of information and provide easy access. The latter generates a negative possibility of excessive and arbitrary intervention in rights such as freedom of expression, privacy, and inviolability of communication, which is contrary to the basic principle of a democratic society.²

Covert investigative actions follow the Criminal Procedure Code of Georgia ('the CPC') XVI¹ Chapter. Before the current edition, the chapter experienced some legislative changes. At each stage, the goal of a legislator was to approach international standards of procedural norms and strengthen

* PhD Student and Visiting Lecturer at the Faculty of Law of Ivane Javakhishvili Tbilisi State University.

¹ Report of the Special Rapporteur "On the Promotion and Protection of the Right to Freedom of Opinion and Expression", 17.04.2013, 2, <<https://shorturl.at/ek258>> [26.02.2025].

² General Assembly, United Nations, Resolution on "The Right to Privacy in The Digital Age", <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/449/47/PDF/N1344947.pdf?OpenElement>> [26.02.2025].

judicial control to achieve maximum protection of human rights.³ In the implementation of covert investigative measures, intensive intervention is introduced in the sphere protected by the Constitution of Human Rights. Thus, this area needs special attention.⁴

Taking measures to protect internal security within the borders of a sovereign state should be based on fair balancing and harmonization of public and private interests. In this context, the time limit prescribed by the Criminal Procedure Code for carrying out covert investigative actions following the list of crimes is subject to discussion. The European Court of Human Rights has developed the necessary legislative requirements to establish internal legislation to prevent abuse of power.⁵ The court shall determine the time limit for interference with the right and the nature of the crime.⁶ Based on the legal nature of the investigative action, the secrecy, it is essential to have a specified time limit referring to the duration of interference with the right.⁷ Also, the issue should be assessed considering the type of crimes to get covert investigative action permitted. Since the list of crimes protects a particular legal good from encroachment, the systematic consideration underlines how proportional the current term is to the protected good.

2. Right to privacy

2.1. The scope protected by Article 15 of the Constitution of Georgia

Article 15 of the Constitution of Georgia guarantees the rights to personal and family life, personal space, and inviolability of communication. The Constitutional Court converted the rights ensured by Article 15 into the right to privacy and interpreted it as an expression of human dignity. The inviolability of personal life is an integral part of the basic idea of freedom.⁸

Article 15 protects people's personal, private space and the right to communication, free from control by the state or other individuals.⁹ According to Article 8 of the European Convention on Human Rights and Fundamental Freedoms, “everyone has the right to respect his personal and family life, his residence and correspondence.” The protected sphere consists of several components: a. Right to personal and family life; b. Confidentiality of personal space and communication; c. Inviolability of residence and/or other property. Although it is possible to distinguish these rights, each component is adjusted to the protection of the basic right to privacy, and ensuring the freedom of personal life is the

³ Law No. 2634-RS of August 1, 2014 “On Amendments to the Criminal Procedure Code of Georgia”. See explanation note <<https://info.parliament.ge/file/1/BillReviewContent/198084?>> [26.02.2025].

⁴ *Nicholson M.*, Implementation of the National Strategy for Protection of Human Rights in Georgia 2014-2020, UNDP, 2019.

⁵ *Romanchenko and Kharazishvili v. Georgia*, [ECtHR], App. Nos. 33067/22 and 37832/22, February 18, 2025, para. 47.

⁶ *Ibid.*

⁷ *Khodeli M.*, Secret Eavesdropping of telephone conversations in criminal proceedings (according to Georgian and German law), Tbilisi, 2019, 232 (in Georgian).

⁸ Decision of the Constitutional Court of Georgia of October 24, 2012, No 1/2/519, in the case “Georgian Young Lawyers Association and Georgian Citizen Tamar Chugoshvili vs. Parliament of Georgia.” II, 2.

⁹ *Kublashvili K.*, Fundamental Human Rights and Freedoms, the fifth edition, published by “Lawyers' World”, Tbilisi, 2019, 144 (in Georgian).

common goal of all three.¹⁰ On the one hand, the state has a positive obligation to secure respect for personal life and the effective exercise of this right, which, in turn, envisages the suppression of circumstances hindering the free development of a person. On the other hand, the state undertakes a negative obligation not to interfere with the rights protected by the Constitution. The latter implies the protection of the personal space of any individual from arbitrary interference by the state authorities.¹¹

2.2. Key Aspects of the Right to Privacy

The constitutional right to personal life gives the individual the freedom to choose a form of communication with the outside world, their places, values, and attitudes. It is the basis of the independent development of each individual.¹² Having a personal life is a right of every person. According to Girk, all the rights ensure the domination of the entity in any part of its sphere.¹³

The right to personal life covers private, intimate, and social spheres.¹⁴ This right is often referred to as “The Right to Be Alone,” which means determining oneself feelings, emotions, and thoughts in relationships with others.¹⁵ Basically, this right ensures a feeling in a person that he is free.¹⁶ According to the “theory of spheres”, the intimate sphere is the main area of personal life, which is inviolable and protected. The private or personal sphere can be restricted, taking into consideration strictly defined prerequisites, while the social sphere is the least protected area that cannot be isolated from the environment.¹⁷ It seems to be within the range of full or partial publicity.¹⁸

The idea of personal life provides a person with the right to control information related to it, restrict access to this information, monitor the spreading of this information, and make a decision about circulating it.¹⁹ Only the individual can maintain the intimacy sphere.²⁰

The right to personal life, including each of its components, is related to the individual's ability to self-determine; He must consider the personal aspect of his life and avoid judgment by society. The law should facilitate the enforcement of this decision and protect it as much as possible.²¹

¹⁰ *Khodeli M.*, Secret listening to telephone conversations in criminal proceedings (according to Georgian and German law), Tbilisi, 2019, 191

¹¹ Constitutional Court Decision of December 26, 2007 in Case No. 1/3/407, “Georgian Young Lawyers Association and Citizen of Georgia Ekaterine Lomtadze vs. Parliament of Georgia”, II, 7.

¹² Ruling of the Constitutional Court of June 10, 2009, on the case N1/2/458 “Citizens of Georgia Davit Sartania and Aleksandre Macharashvili v. the Parliament of Georgia and the Ministry of Justice of Georgia, II. 1.

¹³ *Von Gierke O.*, Deutsches Privatrecht, Band 1, Allgemeiner Teil und Personenrecht, Vol. 1. Duncker & Humblot, 1895, 702.

¹⁴ *Bichia M.*, Personal Life Protection According to Georgian Civil Law, Tbilisi, 2012, 121 (in Georgian).

¹⁵ *Bichia M.*, the idea of protecting personal life from the origin to the present, Revaz Gogshelidze – 65th anniversary collection, examiner. Meridian,” 2022, 448.

¹⁶ *Craven Jr, J. B.*, “Personhood: The Right to Be Alone.”, Duke Law Journal, 1976, 6.

¹⁷ *Khodel M.*, Covert surveillance of a telephone conversation in the criminal process (According to Georgian and German Law), Tbilisi, 2019, 41.

¹⁸ *Ibid.*, 95-96.

¹⁹ *Bichia M.*, the idea of protecting personal life from the origin to the present, Revaz Gogshelidze – 65th anniversary collection, Meridian, 2022, 454-455.

²⁰ *Kublashvili K.*, Basic Rights, Tbilisi, GCI, 2003, 112 (in Georgian).

One creates their personal space and determines which issues should remain inviolable from people outside this space.²² A person needs to have the right to be an independent member of society and build relations with the people that he has chosen.²³

2.3. The Principle of Coherence as the Limit of Interference in the Spheres of Protection

Covert investigative actions conducted in the criminal process always trigger intervention in the private space. It should be inadmissible to encroach on a person's personal and family life, housing and communication issues, or dignity and reputation by arbitrary or illegal interference.²⁴ Any interference with the right to privacy shall be defined as a constitutional purpose when it is necessary to achieve the goal.²⁵ The Constitution and the Criminal Procedure Code establish the principle of coherence, which limits the use of covert investigative actions. According to the second part of Article 15 of the Constitution of Georgia, “rights may be restricted only under the law to ensure state or public safety in a democratic society, or to protect the rights of others.” The principle of coherence consists of 4 elements: 1. Legitimate public Purpose, 2. Usability, 3. necessity, and 4. Proportionality. The principle of coherence imposes the highest constitutional barrier on all actions of the state and excludes arbitrariness.²⁶ If all four elements of the principle of coherence are met, then interference with the basic right is justified.

2.3.1. Legitimate Public Purpose

If there is a purpose to protect constitutional legal goods, the right to privacy may be restricted.²⁷ Achieving a public goal should justify interference in the protected sphere. Article 15 of the Constitution lists some legitimate objectives: in a democratic society, it is necessary 1. State 2. Ensuring public safety, 3. Protection of the rights of other people. In turn, providing national or public security under Article 1432(2) of the GCPC, preventing disorder or committing crimes, certifying the economic well-being of the country, or protecting the rights and freedoms of other people are the legitimate goals for which a covert investigative action is justified.

A democratic and legal state is based on the fair determination of the private and public interest, balancing the interest of the state and a particular individual, which in turn involves establishing a reasonable and accurate scope for the sphere protected by each particular right at the legal level.²⁸ The

²¹ *Bichia M.*, the idea of protecting personal life from the origin to the present, Revaz Gogshelidze – 65th Anniversary Collection, Meridiani, 2022, 452 (in Georgian).

²² Decision of the Constitutional Court of December 26, 2007 on N1/3/407 case “Georgian Young Lawyers' Association and Citizen of Georgia – Ekaterine Lomtadze v. the Parliament of Georgia”, II, 3.

²³ Decision of the Constitutional Court of February 29, 2012, on the case N 2/1/484 in the case “Georgian Young Lawyers' Association~ and Citizen of Georgia Tamar Khidasheli v. the Parliament of Georgia.

²⁴ International Pact on Civil and Political Rights, Legislative Herald of Georgia, 16/12/1966, Article 17.

²⁵ Decision No 2/1/484 of 29 February 2012 of the Constitutional Court of Georgia on the case “Georgian Young Lawyers' Association” and Citizen of Georgia Tamar Khidasheli v. the Parliament of Georgia, II, 9.

²⁶ *Kublashvili K.*, Fundamental Human Rights and Freedoms, Fifth Edition, vol. 11, no. 1, 2019. “Lawyers' World”, Tbilisi, 2019, 65 (in Georgian).

²⁷ *Ibid.*, 151.

²⁸ Decision No 1/2/384 of the Constitutional Court of Georgia of 2 July 2007 on the case “Citizens of Georgia – Davit Jimsheishvili, Taniel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia”.

protection of the constitutional order of the country and national security, public order, and prevention of crime is the obligation of a democratic and legal state. To ensure the mentioned areas, interference with the right to privacy is permitted.²⁹ If a state intervenes in a protected sphere, the intervention must contribute to the achievement of any legitimate goal.³⁰ The state is obliged to take all possible measures to prevent the serious threat of destabilization of democratic institutions.³¹ To combat these threats, the state has the ability to secretly control, eavesdrop, and monitor those individuals from whom the aforementioned threat emanates.³² The effectiveness of the protection of public interest is due to the hidden nature of investigative measures, which exclude the inviolability of the rights of persons who violate the constitutional order of the country, the security of a democratic society, and the rights or freedoms of third parties.³³

2.3.2. The Effectiveness of the Selected Action

Interfering in a protected sphere should contribute to achieving a legitimate goal. If the goal can theoretically be achieved, its utility becomes obvious.³⁴ A measure that cannot ensure the achievement of a goal is not acceptable.³⁵ According to the Federal Constitutional Court of Germany, the measures provided by the legislation should not be groundless and useless at the very beginning; to get the desired result, there must be selected an effective, suitable measure.³⁶

Discussing the utility of the measure, there should be a logical connection between the legitimate purpose and the form of restriction of rights.³⁷ In other cases, interference with a right is not an appropriate means of achieving a legitimate goal, which means that the right has been restricted unjustifiably and arbitrarily.³⁸

2.3.3. The Necessity Criterion

“Necessary” means less than 'strictly necessary' and more than 'useful' or 'desirable'.³⁹ State bodies have a certain range of views, which depends on the nature of the legitimate goal and the type

²⁹ Decision N1/3/407 of 26 December 2007 of the Constitutional Court of Georgia on the case – “Georgian Young Lawyers' Association and Citizen of Georgia – Ekaterine Lomtadze v. the Parliament of Georgia”.
³⁰ Craven Jr, J. B., “Personhood: The Right to Be Let Alone.”, *Duke Law Journal*, 1976, 715.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Khodeli M.*, *Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law)*, Tbilisi, 2019, 187.

³⁵ *Ibid.*

³⁶ *Ibid.*, 68, see Citation: BVerfGE 67, 157, 175; Dorsch, *Effizienz der Überwachung der Telekommunikation*, 2005, 13.

³⁷ Decision No 3/3/600 of 17 May 2017 of the Constitutional Court of Georgia on the case “Citizen of Georgia Kakha Kukava v. the Parliament of Georgia”.

³⁸ Decision No 2/2/1428 of the Constitutional Court of Georgia of 15 July 2021 on the case “Koba Todua v. the Parliament of Georgia”

³⁹ *Trevel S.*, *Human Rights in Criminal Proceedings*, Oxford University Press, Tbilisi, 2009, 562. See. Quote: *Handyside v. The United Kingdom* [ECtHR], App. No. 5493/72, December 7, 1976 §48, 49; *Klass and*

of specific intervention that should ensure the achievement of the above goal.⁴⁰ If the executive body chooses another effective means, which does not restrict the basic right or restricts it less, this action cannot be necessary to achieve a legitimate goal.⁴¹ Relevant bodies must make accurate choices to realize the set goal.⁴²

The criterion of necessity is interpreted by Article 1432(4) of the CPC of Georgia as the principle of subsidiarity. According to the mentioned norm, a covert investigative action may only be applied if other alternative means cannot be used to obtain tangible evidence for the investigation, or the above-mentioned requires making a lot of unjustifiable effort.

If the part of the protected sphere is restricted, interference with the right appears to be irrelevant.⁴³ “The restriction should not result in a higher degree of restriction of a person's right, which is extremely necessary for the existence of a democratic society.”⁴⁴ Interfering in the protected sphere, the selected action is necessary if there are no other, less radical, and relatively flexible means that can produce the same results as the selected action.⁴⁵

2.3.4. The Proportionality of Restriction on the Right

The last, fourth element of verification of coherence is proportionality. The principle of proportionality admits that human rights are not absolute and, considering broad public interest, they can be restricted.⁴⁶ The test of proportionality requires checking the best interest of protection, the severity, and the need for interference in the right⁴⁷ as well as the compliance between the limited and the protected goods, etc.

Proportionality implies keeping a balance between an individual's rights and public interests.⁴⁸ It also means providing sufficient guarantees to avoid an arbitrary covert investigative action.⁴⁹ Proportionality is the best tool for determining the severity and intensity of the intervention, and the

others v. Germany [ECtHR], App. No 5029/71, September 6, 1978 § 42; Silver and others v. The United Kingdom [ECtHR], App. No. 5947/72, October 24, 1983, § 97.

⁴⁰ Ibid., Leander v Sweden [ECtHR], App. No. 9248/81, 26 March 1987, § 59.

⁴¹ Dorsch C., Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO, Freiburg, Schriftenreihe des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2005, 14.

⁴² Ibid.

⁴³ Decision No 2/2/516,542 of the Constitutional Court of Georgia of 14 May 2013 on the case “Citizens of Georgia – Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze, and Vakhtang Maisaia v. the Parliament of Georgia”.

⁴⁴ Ibid., II. 19.

⁴⁵ Kublashvili K., Fundamental Human Rights and Freedoms, Fifth Edition, “Lawyers' World”, Tbilisi, 2019, 64 (in Georgian).

⁴⁶ Meurmishvili B., Covert Investigative Actions, in the book – Criminal Procedure Law of Georgia, Private Part. Tbilisi, “Meridiani”, 2017, 519-520 (in Georgian).

⁴⁷ Mezvrishvili N. in: Commentary of the Criminal Procedure Code of Georgia, group of authors, examiner. “Meridiani”, Tbilisi, 2015, 435 (in Georgian).

⁴⁸ Albrecht H. J., Dorsch C., & Krüpe C. R., Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b stop und anderer verdeckter Ermittlungsmaßnahmen. Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, 2003, 435.

⁴⁹ Ibid.

selected action is relevant to the intensity of the intervention.⁵⁰ There are two opposing things of interference – a right that has been restricted, and a significant public interest.⁵¹ For example, by eavesdropping on covert telephone communication, the constitutional right is restricted – the inviolability of personal space and communication is compromised, and the limited good is sacrificed to improve public safety. It is necessary to weigh the legal goods in each case, whether the meaning of any of them is non-objective and disproportionately evaluated.⁵²

“The principle of coherence involves restrictive regulation of the right as a useful and necessary means of achieving a valuable public (legitimate) goal. At the same time, the intensity of restriction of the right must be proportional to the public purpose to be achieved. It is not permitted to attain a legitimate goal at the expense of increased restriction of human rights.”⁵³

Ultimately, all four of the above criteria justify that the principle of coherence was observed when interfering with the right. The latter imposes the highest constitutional barrier on all actions of the state and fully excludes the arbitrariness of the government when interfering with the sphere protected by the basic right.⁵⁴

3. Duration of Covert Investigative Actions

Carrying out a covert investigative action, depending on the legal nature of the investigative action, requires a specified period limiting the duration of interference with the right.⁵⁵ The European Court of Human Rights has developed the necessary legislative requirements to establish internal regulations to prevent abuse of power.⁵⁶ The court considers determining the time limit for interference with the right and the nature of the crime.⁵⁷

Before the legislative amendment of 2022, Section 1433(12) of the CPC stipulated that the ruling of the judge on holding a covert investigative action would be issued for not more than one month, and the extension of this period was permitted for no more than two months based on a prosecutor's motivated petition, and following a petition of the General Prosecutor of Georgia, for not more than three months. This entry has formed a mixed definition. In particular, by the precise definition, the one month for conducting a covert investigative action was added to the two months for the first time, and then the 3-month period, which would ultimately be read as no more than 6 months.

⁵⁰ *Kublashvili K.*, Fundamental Human Rights and Freedoms, Fifth Edition, Exam. “Lawyers' World”, Tbilisi, 2019, 64 (in Georgian).

⁵¹ *Ibid.*, 64-65.

⁵² *Ibid.*

⁵³ Decision No 3/1/512 of 26 June 2012 of the Constitutional Court of Georgia on the case “Danish citizen Heike Chronicle v. the Parliament of Georgia”.

⁵⁴ *Kublashvili K.*, Fundamental Human Rights and Freedoms, Fifth Edition, Exam. “Lawyers' World”, Tbilisi, 2019, 65 (in Georgian).

⁵⁵ *Khodeli M.*, Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 232 (in Georgian).

⁵⁶ *Romanchenko and Kharazishvili v. Georgia*, [ECtHR], App. Nos. 33067/22 and 37832/22, February 18, 2025, para. 47.

⁵⁷ *Ibid.*

However, in practice, the norm was defined as limited, and the maximum term for conducting this action was 3 months.⁵⁸ Following court practice, the norm was misinterpreted as limited. Based on the Venice Commission, the six-month duration is not seen as excessive.⁵⁹ According to the literature, such a norm shouldn't allow for mixed interpretation, especially when it comes to procedural deadlines.⁶⁰ Moreover, extending deadlines leads to an increase in the intensity of the interference in the right.

After the 2022 legislative amendment, the above-mentioned norm changed. Today, according to Article 1433(121,123) and 125 of the GPC, a covert investigative action is carried out for no more than 90 days. If the period has expired and the purpose for which a covert investigative action is intended to be achieved, the validity period may be extended by 90 days. This is the second stage of the implementation of the action. The law establishes the third stage of the investigative action, when the 90-day period for the second stage has expired and the above goal is still not fulfilled. At this time, the General Prosecutor of Georgia or his/her deputy is authorised to submit a petition. The period set for the third stage is 90 days. Thus, the CPC establishes two stages of the extension of the term, and the duration of validity may include 270 days. For comparison, the 4th sentence of the first paragraph of Article 100e of the German CPC establishes a maximum of 3 months, and the extension of this period is allowed for the next a more than three months, if there is a relevant material basis.⁶¹ Germany defines a shorter period of time to conduct investigative action and sets two steps to continue it. According to Article 100-2 of the French Criminal Procedure Code, a warrant for carrying out the above investigative action can be issued for a maximum of 4 months. The extension of this order is permitted only in compliance with material requirements and for the same duration. In consistent with this record, the term of covert surveillance in France is 4 months, which is supposed to continue. In Georgia, this term is 9 months, and there has been instituted only two steps of its extension.⁶²

The legislative amendment, as the legislator interpreted, serves to increase the effectiveness of covert investigative action and ensures state and public safety, effective investigation of crime, and proper protection of human rights.⁶³ The problem that resulted in starting to make amendments was an unjustifiable provision of judicial practice regarding setting a sufficient period for conducting covert investigative action for grave crimes such as terrorism, sabotage, war crimes, which set the maximum term of 3 months and not 6 months, which would exclude the effectiveness of the investigation.⁶⁴

⁵⁸ *Akubardia I.*, Control mechanisms on covert investigative activities, Revaz Gogshelidze – 65th Anniversary Collection, "Meridian", 2022, 225 (in Georgian).

⁵⁹ Venice Commission, Urgent opinion on the Draft Law on the Amendments to the Criminal Procedure Code adopted by the Parliament of Georgia on 7 June 2022, Opinion no. 1092/2022, §47

⁶⁰ *Khodeli M.*, Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 233 (in Georgian).

⁶¹ *Khodeli M.*, Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019., 279 (in Georgian).

⁶² Ibid.

⁶³ Explanatory card on the draft constitutional law of Georgia "On Amendments to the Criminal Procedure Code of Georgia", <<https://info.parliament.ge/file/1/BillReviewContent/298437?>> [26.02.2025].

⁶⁴ Ibid.

3.1. Term as a Determining Criterion for the Intensity of Interference in the Protected Area

It is necessary to determine the importance of the duration of the covert investigative action and the intensity of the intervention.

The Constitutional Court discussed the period as a determining criterion for the intensity of interference in the protected area by the right to privacy, applying the case “Georgian Young Lawyers' Association” and the Georgian citizen Tamar Khidasheli v. the Parliament of Georgia. The disputed norm was Article 8(2) of the Law of Georgia on Operative-Investigative Activities, which provided for the extension of operative-investigative activities to six months by the prosecutor. In this case, the court interpreted the time limit considering the scope of the public authorities' power. The intensity of interference in the right depends on the competence of the prosecutor, how conscientiously he/she accede to extend the term, taking into account the restriction of the inviolability of a person's communication, and personal life. The duration of a covert investigative measure is directly related to the severity of interference with the right to privacy. If the duration of validity increases, the intensity of intervention also escalates, which endangers the person's right to privacy.⁶⁵

After making the 2014 legislative changes, the norm in the CPC (Article 1433(12)) was interpreted in various ways. In addition to the principle of coherence, the state is obliged to intervene under the law, corresponding to the principle of determination.⁶⁶ The European Court of Human Rights has repeatedly indicated that covert investigative actions constitute serious interference in freedom of privacy, so “they should follow a law that ought to be particularly accurate in this section.”⁶⁷ The importance of this principle was discussed by the Constitutional Court of Georgia in Decision N1/3/407 of 26 December 2007. The disputed norm was the first sentence of Article 9(2) of the Law of Georgia on Operative-Investigative Activities, which dealt with interference with the right to inviolability of the telephone notification, or the information received through other technical means. The connection 'or' used in the norm generated ambiguity.⁶⁸ This case points to the importance of a clear interpretation of the norm, which restricts the right to privacy. The court noted that compliance with the Constitution, based on which there is interference with the right to inviolability of personal life, is assessed by a much stricter standard than any other norm.⁶⁹ This is caused by: a) the hidden nature of the interference in the right because people do not know when a covert investigative action is taking place against them; b) the object is not involved in the trial which is assessing the necessity of the measure to be taken against him, and he/she is not informed about its legality; also,

⁶⁵ Decision N2/1/484 of the Constitutional Court of Georgia of 29 February 2012 on the case – “Georgian Young Lawyers Association” and Citizen of Georgia Tamar Khidasheli v. the Parliament of Georgia (in Georgian).

⁶⁶ *Kublashvili K.*, Fundamental Human Rights and Freedoms, Fifth Edition, vol. 11, no. 1, 2019. “The World of Lawyers”, Tbilisi, 2019, 152 (in Georgian).

⁶⁷ *Kopp v. Switzerland*, [ECtHR], App. No. 23224/94, March 25, 1998, para. 72

⁶⁸ *Kublashvili K.*, Fundamental Human Rights and Freedoms, Fifth Edition, vol. 11, no. 1, 2019. “World of Lawyers”, Tbilisi, 2019, 153.

⁶⁹ Decision No 1/3/407 of 26 December 2007 of the Constitutional Court of Georgia, on the case “Georgian Young Lawyers' Association and Citizens of Georgia – Ekaterine Lomtadze v. the Parliament of Georgia,” II, 13.

he/she does not have the opportunity to protect their personal space from unlawful interference of the state; c) it is difficult to protect the legitimate interests of the so-called “third parties”.⁷⁰ That is why the specified degree of protection should be much higher when restricting the area of personal life, and the law “must interpret the specific purpose, objectives, and grounds of interference with the right. The rule of interference has to be univocal and accountable providing the clear idea of when and how their right can be restricted.”⁷¹ The law shall establish the scope of action to the public authorities, which is a prerequisite for the timely and effective exercise of judicial control. Thus, “a legislative regulation that raises the risk of making a mistake, contradicts the requirement for accuracy and transparency of the law.”⁷²

The significance of the covert investigative validity was highlighted in the case “Kennedy v. United Kingdom”. The European Court of Human Rights explains that the time limit, which should be imposed on the implementation of covert investigative action, is the minimum legislative guarantee that can prevent us from taking risks of power abuse. Without adequate and effective legislative guarantees, such as imposing a term of covert actions, interference is not “necessary in a democratic society” to achieve a legitimate goal. In each specific case, the context of ensuring national security and serious crime shall be taken into consideration. The scale and complexity of the crime in specific cases may take a relatively long period to carry out a covert action. However, there should be sufficient legislative guarantees for the powers granted to the internal authorities not to be abused/excessive. Such a legislative guarantee shall have a permanent control mechanism during the taking of covert measures and a continuous, substantiated discussion about the ruling on the deadline.⁷³

3.2. Current Timeline for the Expected Risk Management

The subject of discussion is the legislative amendment in relation to the timeline of covert investigative actions, and whether it improved the pre-amendment activities.

When it is inevitable to confront private and public interests that give rise to a conflict, there is always a need to make a fair balance. Accordingly, the state is obliged to create a system that can get the relationship between the government and the person into balance. The right to privacy is the basis of human freedom, and to develop a democratic society, the protection of this right must be promoted perfectly. Unequivocally, protecting public safety is a crucial task, but this should not lead to an increased violation of constitutional rights. The Constitution does not provide for the protection of legitimate interests in the way of violating the right. The state should be able to maintain a balance between interests in a way of perfectly conducts investigations, prevents it, and protects the right to privacy.⁷⁴

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid., 28.

⁷³ Kennedy v. United Kingdom, [ECtHR], App. No. 26839/05, 18 May, 2010, para. 143.

⁷⁴ Submission of the President of Georgia N07-1/14; 23.06.2022, <<https://info.parliament.ge/file/1/BillPackageContent/35447?>> [26.02.2025].

The Parliament of Georgia responded to these motivational remarks. The Committee of Legal Issues did not support the motivational remarks submitted by the President of Georgia on the amendment to the CPC and considered it justified to adopt the law through its original edit. The conclusion of the Committee was based on the reasoning that in order to achieve a legitimate goal, such as maintaining public order and an effective fight against crime, the period of covert investigative action may be extended as many times as needed.⁷⁵ One of the sources of this argument was the decision of the European Court of Human Rights – “Roman Zakharov v. Russia”. The court had a discussion not only about the discretion of intergovernmental bodies, but also underlined that the discretion should act to provide the “guarantees for adequate protection.”⁷⁶ This means taking internal or external control mechanisms over covert investigative actions. But the Venice Commission considered the issue controversial whether the court, parliament, and the Personal Data Protection Agency can provide effective control over covert investigative action.⁷⁷

The event-carried notification may be sent to the object of a covert investigation, since the notification obligation will be deferred as many times as needed for the interests of litigation. To provide a person with the inviolability of their personal space, the legislation must be convincing and clear. After the amendment is made, a person may not have information on the covert action carried out against him/her for a long time, which excludes the protection of the constitutional right by the person himself/herself.⁷⁸

Following the conclusion of the Venice Commission regarding the latest legislative amendment, the record suggests a total of 270 days. Additionally, in the context of international criminal cooperation, it is permitted to extend the term further. Also, according to Article 1433(127)(b) of the CPC, to investigate certain crimes, the period of covert measures may be extended as many times as needed. This list includes, for example, murder (Article 108 of the CPC) and hostage. In an attempt to correct the misinterpretation of the legal norm, a legislative regulation exceeded the six-month limit. The term allows for more expansion than it can be necessary for the investigation. According to the Venice Commission, the term is excessive. The record does not distinguish the crimes with an element of terrorism or hostile state interference from common crimes⁷⁹ that invite criticism. Such legislative regulation makes it difficult to comprehend the need for longevity, which leads to a significant and inadequate increase in the term of covert measures.⁸⁰

According to the article, the term can be extended as many times as the legitimate purpose allows. This approach raises risks of exceeding power and interfering with the right to privacy. A stricter standard than any other norm defines the explicitness and accuracy of procedural criminal

⁷⁵ Legal Issues Committee Conclusion “On Amendment to the Criminal Procedure Code of Georgia” On the Law of Georgia (2022 On 7 June, N1614-VIII0b-Xmp) On the Motivated Remarks of the President of Georgia (N07-1/14; 23.06.2022); <<https://info.parliament.ge/file/1/BillReviewContent/304789>> [26.02.2025].

⁷⁶ Roman Zakharov v. Russia, [ECtHR], App. No. 47143/06, December 4, 2015.

⁷⁷ Ibid.

⁷⁸ Submission of the President of Georgia N07-1/14; 23.06.2022, <<https://info.parliament.ge/file/1/BillPackageContent/35447?>> [26.02.2025].

⁷⁹ Ibid.

⁸⁰ Venice Commission, Urgent opinion on the Draft Law on the Amendments to the Criminal Procedure Code adopted by the Parliament of Georgia on 7 June 2022, Opinion no. 1092/2022, §47-50.

norms.⁸¹ The record should furnish the person with information about the state's invasion of his personal life to avoid undermining the individual's confidence in the state, which contradicts the principle of a legal state. "Each member of a society organized as a legal state anticipates that the goods are distributed in society fairly."⁸²

The norm crossing the boundaries of the protected sphere must pass the test for coherence. The appeal of a covert investigative action will always meet the criteria for a legitimate purpose and utility because it is usually found to serve a public purpose that requires carrying out the covert investigative action.

Considering the hidden nature of the action, it is always effective, however, it is disputed whether the current timeline can exceed the requirements of necessity and proportionality. Based on Article 1432(4) of the CPC, a covert investigative action may be applied only if tangible evidence of the investigation cannot be obtained by any other alternative means or requires a great deal of effort. This record indicates that if evidence of substantial importance can be gained by less intensive investigative action without encroachment on human rights⁸³, any covert investigative measure should not be taken. The latter is used in extreme cases when it is the only means of obtaining evidence – ultima ratio. There is a strong connection between the principle of the Ultima ratio and fundamental rights. Interfering with a fundamental right needs to seek the least intrusive means.⁸⁴ The above-mentioned is expressed in the positive aspects of the principle of subsidiarity,⁸⁵ which is determined by two criteria: 1. It should not be possible to obtain evidence of substantial significance by other, less intense means, or 2. It is possible, but it unjustifiably requires a lot of effort.⁸⁶ The latter may include large financial costs, unequal redistribution of resources, procrastination of the process using time-stretched investigative action, etc.⁸⁷

Concerning the criterion of proportionality, it is necessary to assess the composition of the crimes to which it is allowed to carry out a covert investigative action within the above timeframes. Whereas, taking into account the category and nature of the crimes, and the reality in the country, the 9-month period for conducting a secret investigative action can be considered reasonable. The list of crimes protects a particular legal good from encroachment, which requires assessing the proportionality of the applicable term.

⁸¹ Decision No 1/3/407 of 26 December 2007 of the Constitutional Court of Georgia, on the case "Georgian Young Lawyers' Association and Citizens of Georgia – Ekaterine Lomtadze v. the Parliament of Georgia," II, 13.

⁸² *Izoria L.*, Restriction of Human Rights and the Principle of Moderation, Protection of Human Rights in National and International Law, Proceedings Collection, Tbilisi, 2002, 46 (in Georgian).

⁸³ *Khodel M.*, Covert surveillance of telephone conversations in criminal proceedings (according to Georgian and German law), Tbilisi, 2019, 212.

⁸⁴ *Melander S.*, Ultima ratio in European criminal law, European Criminal Law Review, Vol. 3, #1, 2013, 49.

⁸⁵ *Van Kempen P.H.*, Criminal justice and the ultima ratio principle: Need for limitation, exploration and consideration. Overuse in the criminal justice system. On criminalization, prosecution and imprisonment/Le recours excessif au système de Justice pénale. Aux sanctions pénales, aux poursuites pénales et la détention, Cambridge/Antwerp/Chicago: Intersentia, 2019, 10.

⁸⁶ *Mezvrishvili N.* in: Commentary of the Criminal Procedure Code of Georgia, group of authors, examiner. "Meridiani", Tbilisi., 2015, 436 (in Georgian).

⁸⁷ Ibid.

3.3. List of Crimes

Taking covert investigative measures requires defining some formal and material prerequisites. Following the second part of Article 1433 of the CPC, the implementation of covert investigative measures is allowed only if an investigation has been launched or criminal prosecution is carried out due to an intentionally committed crime and particularly serious offences provided by specific articles and paragraphs of the Criminal Code of Georgia (CPC), which are listed under sub-paragraph (a) of the above norm.

The list of crimes includes both severe crimes and less serious crimes. Also, it covers not only intentional but also some criminal negligence.⁸⁸ In accordance with the literature, covert investigative actions are not allowed to look into criminal negligence. Defining an exhaustive list of the composition of a particular crime as a prerequisite for carrying out covert investigative activities is one of the guarantees of adherence to the principle of coherence when interfering with basic human rights.⁸⁹ This issue is regulated in different countries where covert telephone tapping can only be used in the case of a limited number of serious crimes.⁹⁰ For example, in Germany, this is regulated by the first paragraph of Article 100a of the CPC.⁹¹ Based on the above norm, to initiate a covert investigative action, there must be specific compositions of a serious crime, either its preparation or attempt.⁹² According to Article 100-2 of the French Code of Criminal Procedure, covert telephone tapping can be carried out for crimes with a prison sentence of two years or more.⁹³ This measure limits the number of crimes during which a covert investigative action may begin and serves to ensure the principle of proportionality.⁹⁴ Since the legislation of Georgia considers a much wider range of crimes, it is difficult to find its application as an extreme measure to conduct covert investigative action.⁹⁵ Hence, such legislation, due to the intensity of interference in the right, requires reducing the mentioned list of crimes.⁹⁶

⁸⁸ *Akubardia I.*, Control mechanisms on covert investigative activities, Revaz Gogshelidze – 65th Anniversary Collection, “Meridiani”, 2022, 220 (in Georgian).

⁸⁹ *Khodeli M.*, Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 80. see quote: Schmitt, in: Meyer-Goßner, StPO, 59. Aufl, 2016, § 100a, Rn. 15

⁹⁰ *Schwartz P.M.*, Evaluating Telecommunications Surveillance in Germany: The Lessons of the Max Planck Institute's Study. *George Washington Law Review*, 72 (2003), 1247.

⁹¹ Up there.

⁹² *Khodeli M.*, Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 79.

⁹³ Code de Procédure pénale, légifrance, 31.12.1957, 100.

⁹⁴ *Albrecht H. J., Dorsch C., Krüpe C. R.*, Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO und anderer verdeckter Ermittlungsmaßnahmen. Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, 2003, S. 20

⁹⁵ Democracy Research Institute (DRI), Operative-Technical Agency Mandate in Carrying out Covert Investigative Actions, Risks and Challenges, 2020, 12.

⁹⁶ *Akubardia I.*, Control Mechanisms on Covert Investigative Actions, Revaz Gogshelidze – 65th Anniversary Collection, “Meridiani”, 2022, 221 (in Georgian).

The issue is of special relevance as the legislative timeline is the same for all of them. To reduce the scope of the discretion of law enforcement agencies⁹⁷ the current timeline needs to be proportional to the composition of crimes, in addition to the changes on the list. Regarding this fact, some models may be considered: 1. reducing the list according to the category of crime that can be considered less serious crimes in disposition. However, this may raise some challenges. For example, less serious crimes can gain a much higher public interest, which requires introducing intrusive mechanisms. Thus, limiting it to a category would be a very superficial approach. 2. Some specific crimes should be removed from the list, as they fail to meet the context of serious crime. Based on interviews with prosecutors and the statistics of the Supreme Court, there are no motions for the application of covert investigative action against a number of them. If the goals established by the Code of Criminal Procedure are achieved by performing other investigative actions for specific crimes, there is no necessity for the legal record to be applied; It provides the relevant authorities to carry out intensive intervention in the protected area. The norm, if it is not effective, will never become necessary. 3. Timelines shall be modified according to the category of crimes: the imposition of one and the same 270-day period concerning less severe crimes, negligent and particularly serious crimes, shall not be considered as a concomitant and proportional legal record. The current term may be viewed as an inherently important and successful path related to particularly serious crimes in the country, which requires intense struggle. For example, following the legislative amendments of 2022, this “list” was added to the Parts 1 and 2 of Articles 142 and 1421 of the Criminal Code, which consider the violation of human equality and racial discrimination. According to the Venice Commission, these are not the categories of crimes that involve very extensive action.⁹⁸ Thus, providing law enforcement with a long-term opportunity to carry out intervention in a protected sphere will not pass the coherence test and cannot come into compliance with the principle of subsidiarity.

4. Conclusion

The time limit set for conducting a covert investigative action is a guarantee that unreasonable and arbitrary interference cannot occur with fundamental rights. The establishment of a specific timeframe consistent with the composition of the crimes shall ensure the reduction of the intensity of the use of such investigative measures that violate fundamental rights.⁹⁹ Each standard discussed above must be applied in the implementation of a covert action cumulatively and not alternatively¹⁰⁰, which generates a whole chain of control over the implementation of the action. The assumption of the principle of coherence admits the possibility of carrying out an intervention in a protected sphere;

⁹⁷ Venice Commission, Urgent opinion on the Draft Law on the Amendments to the Criminal Procedure Code adopted by the Parliament of Georgia on 7 June 2022, Opinion no. 1092/2022, §42

⁹⁸ Ibid.

⁹⁹ Albrecht H. J., Dorsch C., & Krüpe C. R., Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b stop und anderer verdeckter Ermittlungsmaßnahmen. Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, 2003, 20

¹⁰⁰ Khodeli M., Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 213 (in Georgian).

However, the norm should be remembered that “a man is also a right.”¹⁰¹ The law must be sufficiently accurate, unambiguous, clear, and perceptive. When it comes to the regulatory norm of covert investigative actions, the standard must be much higher. The principle of coherence requires a rational assessment of the opposing goods, which implies that the value of the protected legal good is greater than the opposing good.¹⁰² Therefore, it is necessary to have a tight timeline, consistent with the nature of the actions that infringe on specific legal goods; However, the list of crimes should be reduced in line with the intensity of the current timeline. “Every member of a society organized as a legal state expects that the distribution of goods in society will be fair.”¹⁰³

Bibliography:

1. Constitution of Georgia, Legislative Herald of Georgia, 24/08/1995.
2. International Pact on Civil and Political Rights, Legislative Herald of Georgia, 16/12/1966.
3. Criminal Procedure Code of Georgia, Legislative Herald of Georgia, 09/10/2009.
4. *Akubardia I.*, Control mechanisms on covert investigative activities, Revaz Gogshelidze – 65th Anniversary Collection, “Meridiani”, 2022.
5. *Bichia M.*, Protection of Personal Life in accordance with the Civil Law of Georgia, Tbilisi, 2012.
6. *Bichia is M.*, the idea of protecting personal life from the origin to the present, Revaz Gogshelidze – 65th Anniversary Collection, “Meridiani”, 2022.
7. *Zoidze B.*, “To understand the practical existence of law: primarily from the perspective of human rights”, Tbilisi, 2013.
8. *Izoria L.*, “Restriction of Human Rights and the Principle of Moderation, Protection of Human Rights in National and International Law”, Tbilisi, 2002.
9. *Kublashvili K.*, “Fundamental Human Rights and Freedoms”, Fifth Edition, ed. “World of Lawyers”, Tbilisi, 2019 (in Georgian).
10. *Loladze B., Pirtskhalaishvili A.*, Basic Rights, Comment, Tbilisi, 2023.
11. *Mezvrishvili N.*, in the book – Commentary of the Criminal Procedure Code of Georgia, Group of Authors, ed. “Meridiani”, Tbilisi, 2015 (in Georgian).
12. *Meurmishvili B.*, Covert Investigative Actions, in the book – Criminal Procedure Law of Georgia, Private Part. Tbilisi, ed. “Meridiani”, 2017 (in Georgian).
13. *Trechel S.*, Human Rights in Criminal Proceedings, Oxford University Press, Tbilisi, 2009.
14. *Khodel M.*, Covert Surveillance of Telephone Conversations in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019.
15. Decision No 2/2/1428 of the Constitutional Court of Georgia of 15 July 2021 on the case “Koba Todua v. the Parliament of Georgia”.
16. Decision No 3/3/600 of 17 May 2017 of the Constitutional Court of Georgia on the case “Citizen of Georgia Kakha Kukava v. the Parliament of Georgia”.
17. Decision No 2/2/516,542 of the Constitutional Court of Georgia of 14 May 2013 on the case “Citizens

¹⁰¹ *Zoidze B.*, The Trial of Knowledge of the Practical Presence of Law: Predominantly in Human Rights, Tbilisi, 2013, 15 (in Georgian).

¹⁰² *Loladze B., Pirtskhalaishvili A.*, Basic Rights, Comment, Tbilisi, 2023, 60 (in Georgian).

¹⁰³ *Izoria L.*, Restriction of Human Rights and the Principle of Moderation, Protection of Human Rights in National and International Law, Proceedings Collection, Tbilisi, 2002, 46 (in Georgian).

- of Georgia – Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze and Vakhtang Maisaia v. the Parliament of Georgia”.
18. Decision of the Constitutional Court of February 29, 2012, on the case N2/1/484 in the case “Georgian Young Lawyers' Association and Georgian Citizen Tamar Khidasheli v. the Parliament of Georgia”.
 19. Decision No 3/1/512 of 26 June 2012 of the Constitutional Court of Georgia on the case “Danish citizen Heike Chronicle v. the Parliament of Georgia”.
 20. Decision N1/2/519 of the Constitutional Court of Georgia of October 24, 2012, on the case “Georgian Young Lawyers' Association and Citizen of Georgia Tamar Chugoshvili v. the Parliament of Georgia”.
 21. Ruling of the Constitutional Court of June 10, 2009, on the case N1/2/458 “Citizens of Georgia – Davit Sartania and Aleksandre Macharashvili v. the Parliament of Georgia and the Ministry of Justice of Georgia”.
 22. Decision No 1/2/384 of the Constitutional Court of July 2, 2007 on the case “Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia”.
 23. Decision of the Constitutional Court of December 26, 2007 on N1/3/407 case “Georgian Young Lawyers' Association and Citizen of Georgia – Ekaterine Lomtadze v. the Parliament of Georgia”.
 24. Code de procédure pénale, légifrance, 31.12.1957.
 25. *Albrecht H. J., Dorsch C., & Krüpe C. R.*, Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO und anderer verdeckter Ermittlungsmaßnahmen. Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, 2003.
 26. *Craven Jr, J. B.*, “Personhood: The Right to Be Alone.”, Duke Law Journal, 1976.
 27. *Dorsch C.*, Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO, Freiburg, Schriftreihe des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2005.
 28. *Van Kempen P. H.*, Criminal justice and the ultima ratio principle: Need for limitation, exploration and consideration. Overuse in the criminal justice system. On criminalization, prosecution and imprisonment/Le recours excessif au système de justice pénale. Aux sanctions pénales, aux poursuites pénales et la détention, Cambridge/Antwerp/Chicago: Intersentia, 2019.
 29. *Von Gierke O.*, Deutsches Privatrecht, Band 1, Allgemeiner Teil und Personenrecht, Vol. 1. Duncker & Humblot, 1895.
 30. *Melander S.*, Ultima ratio in European criminal law, European Criminal Law Review, Vol. 3, N1, 2013.
 31. *Schwartz P. M.*, Evaluating Telecommunications Surveillance in Germany: The Lessons of the Max Planck Institute's Study. George Washington Law Review, 72, 2003.
 32. *Romanchenko and Kharazishvili v. Georgia*, [ECtHR], App. Nos. 33067/22 and 37832/22, February 18, 2025.
 33. *Roman Zakharov v. Russia*, [ECtHR], App. No 47143/06, December 4, 2015.
 34. *Kennedy v. United Kingdom*, [ECtHR], App. No. 26839/05, 18 May, 2010.
 35. *Kopp v. Switzerland*, [ECtHR], App. No. 23224/94, March 25, 1998.
 36. *Leander v Sweden* [ECtHR], App. No 9248/81, 26 March 1987.
 37. Democracy Research Institute (DRI), Operative-Technical Agency Mandate in Carrying out Covert Investigative Actions, Risks and Challenges, 2020.
 38. Explanatory card on the draft constitutional law of Georgia “On Amendments to the Criminal Procedure Code of Georgia”, <<https://info.parliament.ge/file/1/BillReviewContent/298437?>> [26.02.2025].

39. Submission of the President of Georgia N07-1/14; 23.06.2022, <<https://info.parliament.ge/file/1/BillPackageContent/35447?>> [26.02.2025].
40. Conclusion of the Legal Issues Committee on the Motivated Remarks of the President of Georgia on Amendments to the Criminal Procedure Code of Georgia (June 7, 2022, N1614-VIIIIm-XMP) on the Motivated Remarks of the President of Georgia (N07-1/14; 23.06.2022); <<https://info.parliament.ge/file/1/BillReviewContent/304789?>> [26.02.2025].
41. Venice Commission, Urgent opinion on the Draft Law on the Amendments to the Criminal Procedure Code adopted by the Parliament of Georgia on 7 June 2022, Opinion no. 1092/2022.
42. Report of the Special Rapporteur “On the Promotion and Protection of the Right to Freedom of Opinion and Expression”, 17.04.2013, 2, <<https://shorturl.at/ek258>> [26.02.2025].
43. General Assembly, United Nations, Resolution on “The Right to Privacy in The Digital Age”, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/449/47/PDF/N1344947.pdf?OpenElement>> 21.01.2014, [26.02.2025].

Anzor Makharadze*

Problems of Victimization of the Injured Party at the Trial Stage

To ensure the restoration of the victim's violated rights, a legal mechanism must be established that enables their active participation in the justice process and provides the protection of their legitimate interests.

Protecting the rights and interests of natural and legal persons affected by crime is one of the fundamental responsibilities of a legal state.

This paper examines the issue of victimization of the injured party during the judicial review stage. It analyzes the specific features of the implementation of victims' rights as defined by legislation, the strengthening of those rights, and approaches to addressing the imbalance of power between victims and law enforcement authorities. Particular attention is given to challenges arising from the provision of false information or false evidence by victims, as well as the comprehensive phenomenon of victimization. The article also addresses judicial errors and the evolving legal status of the victim in criminal proceedings.

Keywords: *Victimization of the injured party during the judicial review stage; Consequences of providing false information and false evidence; Admissibility of the victim's role and related important issues.*

1. Introduction

This research aims to examine and analyze the victimological problems faced by the injured party during the trial stage. The article provides an in-depth discussion of victimization as a challenge in both the pre-trial and trial phases of criminal proceedings. It explores the specific dynamics of how a victim enters the criminal justice system and the consequences of providing false information or giving false evidence.

The paper also considers the potential causal link between the victim's lifestyle and their victimization, analyzing the extent to which various lifestyle factors influence criminal vulnerability. Particular emphasis is placed on the significance of the victim's role during the evidentiary stage of court proceedings, as well as on the admissibility of evidence related to information provided by the victim.

Special attention is given to the procedural boundaries of the victim's legal status as a participant in the criminal process. In addition to these issues, the article addresses judicial errors and the legal standing of the victim within criminal proceedings.

* PhD Student at the Faculty of Law, Ivane Javakhishvili Tbilisi State University; Assistant at the Faculty of Law and Social Sciences, Shota Rustaveli State University of Batumi.

2. The Particularities of the Victim's Involvement in the Criminal Justice Process

The victim may become involved in the criminal justice process through several approaches: 1. The victim suffers harm or injury as a result of a crime and personally reports the offense to the relevant authorities, either immediately or at a later stage. 2. The victim has sustained harm, and the incident is reported to the authorities by a third party (such as a parent, relative, healthcare professional, teacher, witness, or other individual). 3. The victim has suffered harm, and the incident comes to the attention of the authorities through their own investigative or procedural actions. 4. The victim (or victims) report the crime themselves or through others to prevent future offenses, ensuring the apprehension and punishment of the offender, and facilitating the recovery of property or compensation.¹

The decision to report a crime is not always solely at the discretion of the victim. Notification may be carried out by the following categories of individuals: Professionals who maintain regular contact with criminal groups, such as sex offenders, drug users, and incarcerated individuals; Individuals released on parole or probation, children, the elderly, and victims of domestic violence; persons who are legally mandated to report evidence of crime, violence, or neglect, including parole officers, teachers, daycare workers, social workers, women's rights advocates, child protection advocates, police officers, physicians, nurses, and mental health providers; journalists, who are also obligated to inform the authorities when victims disclose crimes committed against them.², etc.

The role of law enforcement concerning violent crime is focused on public safety and crime prevention. The primary role of the police is to enforce the law. The first contact of victims with the police usually occurs when they ask for help or complain about it. Complaints or support calls usually result in reporting an incident. Police can interview the victim and witnesses to gain sufficient evidence for the charge.³

A lawyer, whom the victim may independently retain for legal consultation, serves as a liaison between the victim and/or the victim's family and law enforcement agencies. The lawyer facilitates the coordination of resources and the collection of information related to the victim. Acting as an intermediary, the lawyer assists in coordinating services provided by public authorities and private organizations that may be of benefit to the victim. Additionally, the lawyer explains the procedural aspects and specific characteristics of the criminal justice system to the victim.⁴ Lawyers serve the victim to provide them with psychological and other assistance in solving the problem of litigation.

The initial contact between the victim and the justice system typically occurs through interaction either between the victim and a witness or between the victim and the police.

Criminological studies show what can happen in the real world when the victim is ignored or not believed. A rape victim may knock on the stranger's door and ask to call the police; The victim of

¹ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 34.

² Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 37.

³ Ibid., 38.

⁴ Ibid., 39.

the attack may find half-consciousness in a passing alley; Or the teacher may be the first to notice the victim of a shooting at school. In such cases, the primary contact between the victim and the justice system occurs not through the police, but through fellow citizens who are in the right place to help at the right time.⁵

In some cases, a conflict of interest may arise between crime victims and representatives of law enforcement agencies responsible for conducting criminal investigations. The victim typically formulates their position from a personal and emotional perspective, seeking to fulfill needs related to the harm and losses they have suffered. By contrast, representatives of criminal justice institutions operate from an objective and professional standpoint, and in cases of non-compliance or disagreement, a degree of apathy toward the victim's behavior may emerge. According to prevailing legal opinion, the root of this conflict lies in issues of authority and procedural roles, which often arise across all categories of victims and at various stages of the criminal justice process. The rights of victims, as regulated by the relevant provisions of procedural legislation, aim to empower victims and improve communication and coordination between victims and law enforcement bodies. However, despite these legal frameworks, the relationship between victims and the authorities often remains unequal in practice.

Victimologists emphasize that police officers, prosecutors, and judges have repeatedly stated that maintaining an objective and impartial approach in criminal matters is essential to their professional duties. This approach often leads criminal justice officials to view themselves primarily as fact-finders or case resolvers, rather than as assistants or advocates for victims. As a result, this perspective may inadvertently limit the nature and extent of interaction with victims.

For instance, prosecutors handling rape cases tend to focus more on presenting evidence they believe will persuade judges or juries that the offense indeed occurred, rather than emotionally preparing the victim to provide testimony. Criminologists have found that investigators and prosecutors often interpret both their own roles and the victim's role within the criminal justice system from a standpoint that may conflict with the victim's interests, and in some cases, may even cause additional harm to the victim.⁶ At the same time, criminologists observe that the justice system often operates in a manner whereby prosecutors seek to close cases, frequently to avoid taking them to trial, particularly when they are managing heavy caseloads and fail to conduct a thorough investigation from the outset. This practice, which occurs in most cases with few exceptions, often directly contradicts the victim's wishes and may compromise their safety.⁷

Psychologists assert that a sense of personal control over events has a positive impact on the well-being of victims. Criminological research has identified a positive correlation between the effective and objective functioning of the criminal justice system in homicide cases and the psychological well-being of victims. The underlying premise is that victim participation in the criminal process may contribute to the restoration of a sense of control and the improvement of the

⁵ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 41.

⁶ *Ibid.*, 49.

⁷ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 50.

victim's psychological state. However, this is true only insofar as the victim's involvement aligns with their expectations and preferences throughout the process⁸. In addition, it has been established that police responsibility is interpreted in a narrowly defined manner. The public duty doctrine governs the legal relationship between the police, society, and individual citizens. Under this doctrine, law enforcement agencies are not obligated to respond to the specific demands of individual citizens. As the duty is considered to be owed to the public at large, rather than to any particular individual, no individual duty of care is imposed on the police toward private persons.⁹

3. Problems Arising from the Provision of False Information or False Testimony by the Victim

In contrast to genuine statements made by victims, practice reveals the existence of so-called false statements by victims. Victimology pays particular attention to this phenomenon. However, the body of professional literature on false reporting remains limited. For example, very few academic studies have been conducted to determine the frequency or percentage of false information provided by victims. Moreover, the published literature contains scarce research on the broader issue of false testimony.¹⁰ A typical example of providing false information is the case of a 20-year-old college student at the University of Wisconsin-Madison who falsified his kidnapping and reported it to the police. Police soon discovered that he had problems with his girlfriend and, to attract attention, arranged a kidnapping.¹¹ Unfortunately, police are often provided with false rape information.

All these factors affect the investigation and possible litigation. This area requires further examination to ensure the protection of all individuals affected by false allegations, irrespective of the availability or strength of evidence. Victimologists emphasize that, although individuals who make false accusations may attempt to justify their actions by citing mental health issues, such explanations do not negate the criminal nature of their conduct. It is also observed that perpetrators of rape and sexual assault typically do not feel the need to fabricate evidence or provide false testimony, as their offenses often rely on coercion rather than manipulation of legal processes. At the same time, many stakeholders express concern that addressing the issue of false accusations and defamation may be politicized or interpreted through a political lens, which could hinder objective discussion and legal clarity.¹² Both of these factors make it difficult to assess the fact of providing false information. The rape victimization researcher Michelle Anderson assessing the present state of science, notes that personality disorders can cause a man or woman to be deceived by providing a false message about anyone, including a crime. However, no specific empirical study has been conducted on the relationship between personality disorders and providing false testimony about rape to the police.

⁸ Ibid., 50.

⁹ Ibid., 51.

¹⁰ Ibid., 271-272.

¹¹ Ibid., 267.

¹² *Turvey B., Petherick W., Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts, Amsterdam – London, 2009, 272.*

There is no reliable empirical data either past or present regarding the act of giving false testimony in rape cases.¹³

Nevertheless, victimology emphasizes that when a sexual assault report is filed, investigators must often strike a careful balance between supporting the alleged victim and assessing the credibility of the report. Investigators specializing in sex crimes are aware that false reports do occur, though they are not necessarily frequent. False accusations present several complex challenges that must be addressed in a fair and measured manner.

It is also important to recognize that complainants may either tell the complete truth or withhold certain information for a variety of reasons. The discovery that a complainant was untruthful about one aspect of the case does not automatically mean they lied about everything, nor does it necessarily indicate that no assault occurred.

For example, a victim may report a rape, but forensic examination of the alleged crime scene might reveal inconsistencies or a lack of corroborating evidence. This could suggest the report is unfounded, or it might just mean that the victim is unwilling to disclose the actual location of the assault. Identifying and resolving such inconsistencies early in the investigation is crucial both to detect false reports and to ensure that real offenders are held accountable.

However, it is also possible that a victim refuses to revisit or disclose the actual crime scene due to trauma or other personal reasons.¹⁴

The victimology literature discusses the details of the false message, which the investigation should pay attention to. The subject of the investigation should be a case where, to obtain pseudo-victim support, sometimes serious or false injuries are inflicted. There are numerous empirical scenarios described in this context. Individuals may rely on false narratives derived from media reports, witness accounts, or other sources. It is often difficult to assess the reliability or usefulness of such information.

For example, a claim that five attackers assaulted the victim, resulting in multiple injuries, may be questioned if an analysis of the specific circumstances reveals the description to be vague or inconsistent. An incorrect identification of the attack location can also hinder the establishment of factual details. Ultimately, the ability to determine the truth depends on whether the circumstances described in the victim's complaint provide a coherent and verifiable basis for uncovering the actual events.¹⁵

According to American victimologist Jules Epstein, the criminal justice system must take into account the following scenarios: false reports of violent sexual contact when no sexual activity occurred; false claims of coercion in cases where the encounter was, in fact, consensual; and knowingly false accusations against a specific individual when the complainant is aware that someone else was the actual perpetrator.

¹³ Anderson M., *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, Boston University Law Review 84, 2004, 984–986.

¹⁴ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 277–278.

¹⁵ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 278–279.

The investigation must establish clear standards of admissibility. When questioning a complainant, the requirement of *good faith* is an essential standard. The guiding principle should be the use of reliable information applicable to all forms of evidence in the process. Investigative standards must aim to prevent the introduction of false information and protect against harm, following the law.

Timely identification of false accusation evidence by the prosecution ensures that only valid evidence is presented during the pretrial stage, enabling proper cross-examination and further inquiry at later phases of the proceedings.¹⁶

At the investigative stage, challenges may also arise due to police apathy toward the investigation. In many cases, investigators may attempt to justify investigative shortcomings by attributing them to factual inconsistencies in the alleged victim's narrative. However, inconsistencies that have not been properly examined must be regarded with suspicion. Regardless of the eventual outcome, all statements made by the alleged victim must be thoroughly analyzed and, where logical discrepancies are identified, adequately addressed and explained.¹⁷

It is important to note that there are additional factors that may discourage investigators, experts, and other participants in the justice system from identifying and examining false reports. Beyond apathy, the objectivity of an investigation may be influenced by the broader political climate. Fear of political retaliation often results in an unwillingness or inability to properly identify and investigate false allegations.¹⁸ The collection and evaluation of physical evidence presents a particular challenge. During an investigation, physical evidence is often overlooked, first, in terms of its identification and collection, and second, in terms of assessing its consistency with the description of the crime (e.g., as provided through the victim's statement) and the evidence discovered at the scene.¹⁹

4. Specific Characteristics of Victimhood at the Stage of Judicial Proceedings

At the stage of judicial proceedings, the issue of the victim's role becomes particularly relevant, as do questions regarding the admissibility of evidence related to information about the victim. A victimological analysis aimed at identifying victims, the harm and losses they have suffered, as well as establishing the nature of their present condition and their past, can play a decisive role in the decision-making process.²⁰ The role of the victim in the trial begins with the start of the criminal trial, which raises many pressing issues.²¹

¹⁶ Epstein J., True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions, *Quinnipiac Law Review* No. 24, 2006, 609–658.

¹⁷ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 281–282.

¹⁸ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 282.

¹⁹ McGrath M., False Allegations of Rape and the Criminal Profiler, *The Journal of Behavioral Profiling* 1, No. 3., 2000, 87.

²⁰ Pokorak J., Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships, *South Texas Law Review*, Spring, No. 48, 2007, 697–699.

²¹ Gruber A., Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights, *Temple Law Review*, No. 76, Winter, 2003, 654–657.

At the judicial stage, the admissibility of evidence is one of the most critical issues. In some jurisdictions, prosecutorial consultations with the victim are limited to the stage of plea bargaining. However, there is a contrasting viewpoint on this matter. It has been emphasized that it is even more important for the victim to be actively involved in the judicial proceedings at the trial stage and to participate directly as a key witness. This implies that procedural rules should not be applied in a way that hinders victims from actively participating in the trial process. The victim or the victim's family must have an unequivocal right to testify during the stages of indictment and examination of evidence, as well as during sentencing, even when their testimony holds minimal probative value and may be prejudicial to the defendant.”²² The role of victims is to assist in demonstrating how the events unfolded that resulted in harm. Furthermore, the victim and their representatives must prove that the victim was in the right and did not contribute to the infliction of the harm.²³

The next issue concerns the admissibility of evidence. The question of whether certain evidence or information should be deemed admissible is relevant in any court. However, this does not mean that every such issue is subject solely to the judge's discretion. As victimologists point out, there are specific rules that judges must follow when excluding certain pieces of evidence during the proceedings.²⁴ An important role here is played by the so-called 'rules of privilege' (in this case, the institution of witness immunity). These rules are intended to ensure that evidence considered relevant – such as information that may be obtained from individuals with immunity – does not mislead the court or divert attention from the core issues of the case. Under these rules, a victim may possess important victimological evidence that holds significant value for the case. However, such individuals may be exempt from testifying about certain facts, or from testifying altogether, based on a range of privileges. For example, the defendant's attorney may request access to all past treatment records of the victims to assess whether they may be making false statements due to various medical conditions.”²⁵

Victimologists also rely on the guidelines established by the United States Supreme Court, which shape the approach taken by courts. According to these guidelines, the judge must consider and determine:

- Whether the records are necessary to ensure a full response and protection.
- Whether the records possess evidentiary value;
- Whether the confidentiality of the records, along with the reasonable expectation and nature of privacy, is preserved;
- Whether the content of the records is based on any discriminatory beliefs or prejudices, and whether it affects the dignity and safety of the declarant.

²² Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam, London, 2009, 476

²³ Simmons R., *Private Criminal Justice*, Wake Forest Law Review No. 47, Winter, 2007, 315.

²⁴ Murphy P., *Murphy on Evidence*, 10th ed. New York: Oxford University Press, 2008, 109.

²⁵ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 477-478.

Only after carefully considering each of these factors may a judge authorize the disclosure of such records to the defendant.²⁶ The need for such rules is due to the fact that some judges rely on intuition, which is very dangerous. Unfortunately, such an approach does not always ensure that the case is conducted objectively because cognitive research has shown that judges can be biased and make mistakes, as do other participants in the process.²⁷ In some cases, an intuitive approach may work well, but in some cases can lead to false and unfair consequences.²⁸

In the administration of justice, the legislative regulation of victim protection is of critical importance. For example, under U.S. federal law, the introduction of any evidence regarding the victim's prior sexual behavior or sexual predisposition is strictly prohibited in court, except where such evidence falls within specifically enumerated exceptions. In all cases, information concerning victims must be collected, examined, and questioned in an objective manner.²⁹

Objective consideration of the application for impact on the victim (victim) is very important when carrying out justice. Live victims of crime indicate post-traumatic stress disorder, depression, sleep disturbance, alienation, fear, and other symptoms. These consequences of the crime are not always clear during the trial for various reasons, or may not be clearly expressed during the trial. Subsequently, some courts recognize the obvious necessity that the judge is aware of this impact.³⁰ As correctly noted in victimological literature, the role of the victim in the adjudication practices within criminal proceedings is undergoing an evolution. Therefore, advocates for victims' rights are calling for more active participation of victims in the criminal justice process.³¹

Victimology emphasizes the admissibility of information provided by victims and their relatives. In this regard, an illustrative case is the United States Supreme Court's invalidation of a Maryland statute that required consideration of the victim's statement during the imposition of a death sentence.

The Court found that in 1983, John Booth and his accomplice committed a robbery. Fearing identification by neighbors, Booth also murdered them. During the trial, relatives of the victims testified about the emotions they experienced following the crime. However, the Supreme Court ruled such testimony inadmissible. The court found that the detailed portrayal of the family's grief served solely to arouse the jury's emotions concerning the offence.

The Court concluded that permitting such emotionally charged statements is contrary to the reasoned and impartial decision-making required in sentencing. It held that victim impact evidence reflecting the family's emotional trauma and the personal characteristics of the victims was inappropriate in the context of capital sentencing. The Court explained that such evidence may bear no

²⁶ Ibid., 478.

²⁷ Guthrie C., Rachlinski J., Wistrich A., *Blinking on the Bench: How Judges Decide Cases*, Cornell Law Review No. 93, 2007, 43.

²⁸ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 190.

²⁹ Ibid., 482.

³⁰ Ibid., 483.

³¹ Myers B., Green E., *The Prejudicial Nature of Victim Impact Statements*, Psychology, Public Policy, and Law, Vol. 10, 2004, 492–511.

relevance to the defendant's culpability and could result in a sentence based on information unknown to the defendant at the time of the offense.³²

5. Determining the Relevant Circumstances Concerning the Victim

Determining the pre-crime circumstances and their interactions that create relationships between the victim and the perpetrator is often a difficult task. The victim may be chosen specifically or situationally by the offender. In all cases, the function of opportunity is associated with characteristics of place, time, and the offender. Forensic victimologists recognize that analyzing the dynamics of interpersonal relationships can serve as a foundation for various investigative actions and for responding to judicial inquiries. To this end, it is essential to examine the true and precise role that the victim played in the events leading to the outcome in question. In each case, multiple circumstances may arise that require examination or exclusion, and the final evidentiary picture may not always be immediately apparent.”³³

The behavior of the victim can be not only wrong, but also immoral. The victim's immorality is the key to clarifying the problem of the causes of a particular crime and the mechanism of criminal behavior. In such cases, the more significant or provocative the victim's role in the commission of the crime, the more carefully the conduct of the offender must be assessed. Under criminal law, this circumstance may justify mitigation of the sentence or, in certain instances, exemption from punishment. "The conduct of the victim may be improper and immoral. The victim's immorality can serve as a key to understanding the causative factors of a specific crime and the mechanism of the criminal behavior. In such cases, the more significant or provocative the victim's role in the crime, the more carefully the perpetrator's actions must be assessed. In criminal law, this circumstance may lead to mitigation of punishment or, in some cases, exemption from criminal liability.”³⁴

Victimological theory identifies the determination of the 'victim's contribution to blame' in the commission of a crime as a significant factor whereby the individual becomes a victim as a result of their own conduct. In such cases, reference to the 'victim's blame' is made only in a conditional or qualified sense. 'Blame' and 'victim's blame' are related but not identical concepts. The use of this term refers to a specific form of behavior exhibited by the victim as one of the participants in the incident, rather than to their liability in the criminal law sense.³⁵

When evaluating a specific case, particular emphasis is placed on analyzing the relationship between the victim and the offender. Of special relevance in this context are lifestyle-related factors, which may influence the victim's exposure to harm and shape the dynamics of victimization. As noted by American scholars, the causal link between a victim's lifestyle and their subsequent victimization is not always straightforward. This is largely due to the difficulty in determining the extent to which

³² Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 485-486.

³³ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 165.

³⁴ Tsulaia Z., *Criminology, General and Private Part*, Tbilisi, 2005, 127. (in Georgian)

³⁵ Ibid., 126-127.

particular lifestyle factors contribute to the emergence of a criminal situation. Generally, lifestyle factors may affect the victim in three key ways: by provoking conflict with the offender; by placing the victim in frequent proximity to offenders or individuals predisposed to criminal behavior; or by signaling the victim's vulnerability to the offender. To gain a deeper understanding of lifestyle's influence on victimization, it is beneficial to examine the theoretical foundations that inform victim lifestyle models."³⁶ According to the 'lifestyle' theory, an individual's victimization stems from their lifestyle; In other words, the behavior or way of life of the victim is linked to the criminal or immoral actions of others. For example, a person employed at a night bar who frequently interacts with intoxicated patrons may become a victim of physical violence following a contentious exchange. Similarly, an individual walking alone at night in an unfamiliar or high-risk urban area may be subjected to robbery, assault, bodily harm, or sexual violence.

Victimological literature reflects differences in lifestyle factors through patterns of social habits, such as work routines, place of residence, leisure activities, and institutional affiliations. The likelihood of victimization increases when individuals engage in high-risk behavior, such as traveling to conflict zones. Accordingly, certain lifestyles may elevate the risk of victimization, such as those involving alcoholism, drug abuse, prostitution, or frequent presence in dangerous environments at night.³⁷

The main argument for this approach is the position that the dynamics of criminal action cannot be fully understood by taking only into account the characteristics of the defendant, but should also include checking the role of the victim.³⁸ As noted, in the assessment of the victim, consideration must be given to any provocative, accommodating, or causative factors in the victim's interaction with the perpetrator, meaning that the concept of 'functional responsibility for the offense' must be taken into account.³⁹ As is known, the interpretation of the perpetrator is based on the classical accessory theory. In contrast, German legal doctrine has developed a new functional theory, which is supported by M. Turava. According to this theory, an 'assistant' is not merely a helper, but qualifies as a functional co-perpetrator.⁴⁰ In this context, if this behavior encourages to commit a crime, he turns out to be a functional co-perpetrator.

Considering the lifestyle of the victim, it is important to define the victim's relationship with the perpetrator. Such behaviors typically manifest in cases involving sexual harassment by strangers, domestic homicides, workplace-related conflicts, and incidents connected to political or religious tensions. The relationship between the victim and the offender is especially pronounced in everyday

³⁶ *Turvey B., Petherick W.*, Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts, Amsterdam – London, 2009, 169.

³⁷ *Shalikashvili M.*, Criminology, Third Edition, Tbilisi, 2017, 194-199, see broadly. *Shalikashvili M., Tandilashvili Kh, Bakhtadze U.*, Victimization Science, Science on Crime Victims, Second Filled and Recycled Edition, Sulkhan-Saba Orbeliani University Publishing, Tbilisi, 2023, 48-61. (in Georgian).

³⁸ *Rock P.*, Theoretical Perspectives on Victimization, In Handbook on Victims and Victimology, edited by *Walklate S.*, Portland, OR: Willian Publishing, 2007, 42.

³⁹ *Schafer S.*, The Victim and His Criminal: A Study in Functional Responsibility, New York: Random House, 1968, 55.

⁴⁰ *Turava M.*, Criminal Law, General Part Overview, Ninth Edition, Tbilisi, 2013, 337-339 (in Georgian).

situations.⁴¹ As B. Turvey and V. Petherick rightly point out, a victim's history of interaction or involvement with the offender may increase both the impact of certain forms of harm and the likelihood of such harm occurring. For the forensic victimologist, identifying and examining this history is an essential part of any assessment, as it can provide both investigative leads and potential suspects.”⁴²

Motivation may arise from a variety of factors, each contingent upon the surrounding circumstances. A particular victim may serve as the reason for the commission of a crime, or the victim can be selected based on other criteria as the object chosen within the offender's fantasy to fit a verbal or behavioral script. It is the responsibility of the criminal profiling expert to determine which criterion was applied in choosing the victim in a specific case. This is most effectively established by comparing the offender's motives and identifying who the victim truly was in the offender's cognitive and emotional framework. This line of inquiry raises several key questions: Was the act premeditated at the time of its commission? Why was the victim killed or, conversely, why were they left alive?⁴³, etc. To accurately determine the impact of the lifestyle of a particular victim, it is necessary to assess the harm inflicted on him/her in the context of the victim's lifestyle and personality traits. To say that the lifestyle has influenced the dynamics of the victim-offender, it must be potentially dangerous in the sense that its existence can affect the possibility of harm.⁴⁴

The direction of the investigation largely depends on the impact of the lifestyle of the victim based on the relations between the victims, as well as the victims and the perpetrators. This classification allows us to get information about the victim and his/her personality.⁴⁵ According to the classification proposed by scholars, low-impact victims are those who are rarely exposed to the risk of harm or loss. Low-risk victims are individuals who have no real reason to become victims of violent crime. They are particularly cautious about their safety, are well-acquainted with their surroundings, and are generally inaccessible to violent offenders.

Medium-impact victims are those who are occasionally exposed to the risk of harm or loss. Some individuals may have a low inherent level of risk, but their circumstances increase the presence of risk factors. High-impact victims are those who are regularly exposed to the risk of harm or loss. They are especially vulnerable and accessible to offenders⁴⁶. Following this definition, it is important to independently assess the impact of lifestyle and incidental (accidental) factors. A forensic victimologist should avoid constructing risk profiles that combine the assessment of these two

⁴¹ Turvey B., *Criminal Profiling: An Introduction to Behavioral Evidence Analysis*, 3rd ed. San Diego: Elsevier Science, 2008, 285.

⁴² Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 172.

⁴³ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 176.

⁴⁴ Ibid., 184.

⁴⁵ Ibid., 196.

⁴⁶ Burgess A., Hazelwood R., *The Victim's Perspective*, In *Practical Aspects of Rape Investigation: A Multidisciplinary Approach*, 3rd ed., edited by Hazelwood R. and Burgess A., Boca Raton, FL: CRC Press, 2001, 29-46.

elements without clear differentiation. Such a practice leads to distorted conclusions, both in evaluating the victim and in interpreting their testimony.

As rightly noted by B. Tervey and V. Peterik, studying the dynamics of the relationship between a particular victim and offender is key to addressing a number of crucial investigative and forensic questions. This includes examining the role that the victim may have played in their own victimization. One way to analyze this is by assessing the level of vulnerability of the victim, which refers to the extent of protective barriers that the offender had to overcome to commit harm.

As previously mentioned, lifestyle factors may influence victimization in three general ways: by creating direct conflict with the offender; by increasing the victim's constant proximity to offenders or crime-prone individuals; and by enabling the offender to become aware of the victim's vulnerability.⁴⁷

The situational impact on the victim is of practical significance. B. Turvey and V. Petherick focus on victim characteristics that emerge and manifest within specific situations. In this regard, several questions arise that are important to consider in the context of a particular criminal case: 1. What are the specific features of situational harm, and do the actions of the victim stem from the influence of individuals or circumstances related to the specific crime? 2. What is the distinction between so-called sequential and simultaneous victims? 3. What key aspects should be taken into account when determining the situational influence on the victim? 4. Is there any other relevant information about the victim beyond what is provided by forensic victimology? 5. Does the extent of harm depend on the degree of violence inflicted?⁴⁸

6. Judicial errors and the victim's status

In the modern procedural literature, the issue of the influence of judicial errors is widely discussed. In particular, biased review of evidence can affect the system of allegations that resulting in the defendant becoming a victim of the system. Scientists analyze their argument in two ways. First and foremost, the objectives of restorative justice take precedence over formal dogmatic analysis. As previously noted, subjecting a knowingly innocent person to criminal liability or unlawfully initiating a criminal case constitutes a distinct form of miscarriage of justice, one in which a judge or jury finds an individual guilty despite their actual innocence. The issue is not merely whether these defendants are victims of the system, but rather the extent of harm they have suffered, whether the error has been acknowledged, and whether it has been rectified.⁴⁹ Second, the theory of the relevance of court decisions is being developed. As previously noted, we distinguish between a scientific fact and a legal truth. As we have learned, legal truth is determined through court decisions, which may later be revised or overturned – this reflects the dynamic nature of the law. In contrast, a scientific fact is established through the scientific method and exists independently of the judiciary. No legal

⁴⁷ Turvey B., Petherick W., *Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 200.

⁴⁸ Turvey B., Petherick W., *Forensic Victimology. Examining Violent Crime Victims in Investigative and Legal Contexts*, Amsterdam – London, 2009, 226.

⁴⁹ *Ibid.*, 510.

conclusion can alter a scientific fact; it can only determine its admissibility or relevance within a legal context.

However, the opposite often occurs in practice.⁵⁰ Evidence is seen by law and science in a slightly different way, as well as the application of logic and perception of social values.

Among the factors that lead to wrongful convictions are: 1. Incorrect identification by eyewitnesses, 2. Misrepresentation of evidence. 3. Misinterpretation of evidence. 4. False confessions. 5. False testimony by jailhouse” informants. 6. Ineffective or incompetent defense. 7. Prosecutorial misconduct.⁵¹

Two factors are particularly emphasized: the misidentification of a witness and the role of a forensic expert in making unjustified judgments.

It is believed that the improper identification of a witness is because jurors pay more attention to eyewitness testimonies than other types of evidence. However, they focus on the fact that eyewitnesses are often mistaken. Here must be observed: 1. Accuracy of memories over time, 2. Stress, violence, and concentration on gun use, 3. Witness Trust, 4. Inaccuracy of the witness's attention, 5. Racial identification. It is also noted that the jury does not know that the eyewitness's testimony is inaccurate. Victimists also focus on the role of forensic experts in making unjustified judgments. In this regard, special attention is paid to the objectivity of the examination. The form of the answer may be the cancellation of the judgment related to the testimony of the expert and the increase in the resource expense of the party involved.⁵²

7. Conclusion

Finally, it can be concluded that the victim's active participation in the trial is very important, as it helps to protect their legitimate interests and ensures an objective decision by the court. Also, the paper focuses on the consequences caused by false information and testimonies. To gain support, the pseudo-victim sometimes inflicts serious and false injuries on themselves. The article highlights the relevance of issues arising when criminal justice professionals perceive themselves more as crime-solvers than as supporters of victims, which consequently limits their interaction with victims.

It emphasizes the importance of addressing the admissibility of evidence related to information about the victim. Particular attention is paid to the victim's participation during the trial stage, underlining the significance of their involvement as a key witness in the proceedings.

It is noted that there may be a causal link between the victim's lifestyle and their victimization, though this connection is not always clear. This uncertainty stems from the difficulty in determining which lifestyle factors influence the criminal situation. The article underscores the importance of examining the nature of the relationship between the victim and the accused before the crime.

Finally, the article discusses factors that may hinder the administration of justice and the delivery of a fair verdict.

⁵⁰ Ibid., 533.

⁵¹ Ibid., 524.

⁵² Ibid., 535.

Bibliography:

1. *Turava M.*, Criminal Law, General Part Overview, Ninth Edition, Tbilisi, 2013, 337-339. (in Georgian).
2. *Shalikashvili M.* Criminology, Third Edition, Tbilisi, 2017, 194-199. (in Georgian).
3. *Shalikashvili M., Tandilashvili Kh., Bakhtadze U.*, Victimization Science, Science on Crime Victims, Second Filled and Recycled Edition, Sul Khan-Saba Orbeliani University Publishing, Tbilisi, 2023, 48-61. (in Georgian).
4. *Tsulaia Z.*, Criminology, General and Private Part, Tbilisi, 2005, 127. (in Georgian).
5. *Anderson M.*, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault, Boston University Law Review 84, 2004, 984-986.
6. *Burgess A., Hazelwood R.*, The Victim's Perspective, In Practical Aspects of Rape Investigation: A Multidisciplinary Approach, 3rd ed., edited by Hazelwood R. and Burgess A., Boca Raton, FL: CRC Press, 2001, 29-46.
7. *Epstein J.*, True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions, Quinnipiac Law Review No. 24, 2006, 609-658.
8. *Gruber A.*, Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights, Temple Law Review, No. 76, Winter, 2003, 654-657.
9. *Guthrie C., Rachlinski J., Wistrich A.*, Blinking on the Bench: How Judges Decide Cases, Cornell Law Review No. 93, 2007, 43.
10. *McGrath M.*, False Allegations of Rape and the Criminal Profiler, The Journal of Behavioral Profiling 1, No. 3., 2000, 87.
11. *Murphy P.*, Murphy on Evidence, 10th ed. New York: Oxford University Press, 2008, 109.
12. *Myers B., Green E.*, The Prejudicial Nature of Victim Impact Statements, Psychology, Public Policy, and Law, Vol. 10, 2004, 492-511.
13. *Pokorak J.*, Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships, South Texas Law Review, Spring, No. 48, 2007, 697-699.
14. *Rock P.*, Theoretical Perspectives on Victimization, In Handbook on Victims and Victimology, edited by S. Walklate, Portland, OR: Willian Publishing, 2007, 42.
15. *Schafer S.*, The Victim and His Criminal: A Study in Functional Responsibility, New York: Random House, 1968, 55.
16. *Simmons R.*, Private Criminal Justice, Wake Forest Law Review No. 47, Winter, 2007, 315.
17. *Turvey B.*, Criminal Profiling, An Introduction to Behavioral Evidence Analysis, 3rd ed, San Diego: Elsevier Science, 2008, 285.
18. *Turvey B., Petherick W.*, Forensic Victimology, Examining Violent Crime Victims in Investigative and Legal Contexts, Amsterdam – London, 2009, 34, 37, 38, 39, 49, 50, 51, 271-272, 267, 272, 277-278, 278-279, 281-282, 282, 476, 477-478, 478, 190, 482, 483, 485-486, 165, 169, 172, 176, 184, 196, 200, 226, 510, 533, 524, 535.

Levan Dzeladze*

Organized Crime as a Transnational Threat in the Modern Period

The paper addresses one of the primary challenges of the modern era: both nationally and internationally organized crime and the threats it poses. Effectively combating crimes of this nature is the primary legal obligation of any democratic state, and at this juncture, it remains an unresolved issue, which undoubtedly highlights the significance of the research.

The article is based on an analysis of doctrine, legislation, and judicial practice. It reviews the main provisions of organized and transnational organized crime, as well as the existing challenges.

This study aims to identify effective measures for combating organized crime and transnational organized crime, as well as to address relevant issues.

Keywords: *Organized Crime, Transnational Organized Crime, Transnational Threat, Complicity in Crime.*

1. Introduction

“Organized crime is a complex criminal phenomenon that requires special empirical and analytical research. Creating the legal framework for this problem is related to many theoretical, social, and practical problems, especially since organized crime became transnational, it has threatened humanity with its devastating impact.”¹ “Although some international and domestic instruments”² are applied to fight against organized and transnational crime, it is becoming increasingly large-scale and global. According to the International Monetary Fund, the “income from drug trafficking and the legalization of illegal income equals six to eight percent of the world economy.”³ Thus, the fight against this phenomenon requires a constantly updated thought.

The rise of nation-states, the development of capitalism, industrialization, and, ultimately, modern advancements in science and technology have all contributed to the emergence of new forms of organized crime. This social phenomenon is marked by a complex and criminal nature, closely linked to widespread corruption and various economic crimes. In pursuit of maximum profit, organized crime groups not only exploit and oppress ordinary citizens – violating their legitimate

* PhD Student in Criminal Law at the Faculty of Law, Ivane Javakhishvili Tbilisi State University; Head of the Investigative Department at the Investigation Service of the Ministry of Finance.

¹ Mumladze D., Dzeladze L., Fight Against Organized Crime (Mafia): Comparative Legal Analysis, *Jurn “Justice”*, No. 2, 2008, 35.

² Tumanishvili G., Jishkariani B., Shram E., (Eds.), *Impact of European and International Law on Georgian Criminal Procedure*, T., 2019, 800-801.

³ Shelley, L., *Transnational Organized Crime and Seized Assets: Moral Dilemmas Concerning the Disposition of the Crime of Crime*, 7 *Maastricht J. Eur. & Comp.* (2000), 35 [24.08.2025].

rights – but also pose a serious challenge to the state itself, particularly to law enforcement agencies, and, in some cases, at a global level.

Beyond some international or local regulations, crimes are often disguised in such a way that legislative instruments and the activities of law enforcement agencies fail to yield tangible, practical results, which makes it difficult to find and deprive the criminal of assets accumulated as a result of committing such crimes.

It would be unreasonable to contend that this complex socio-economic problem can only be solved by legal measures and criminal punishments. The purpose of this paper is to analyze the relevant material related to the practice and theory of combating this problem worldwide, using a comparative-legal method.

Globalization creates favorable conditions for the rapid transnational expansion of organized crime. This study also seeks to examine the threats posed by transnational organized crime and to analyze recent practices adopted by national courts in addressing both transnational and domestic forms of organized crime.

2. General Provisions of Organized Crime

In the modern sense, organized crime emerges alongside the establishment of state sovereignty. Criminal networks form a systemic structure that spreads through society like a metastatic tumor, feeding off the resources of both the state and its citizens. These networks infiltrate institutions, undermine societal structures, instill fear, and, at a certain point, begin to directly compete with the state itself.

Since the 19th century, organized crime has become increasingly powerful and has taken dangerous forms.

“Organized crime, which (at least) has a history of two centuries, has been the subject of scientific research for several decades.”⁴

“Organized crime is the most dangerous type of group crime committed by organized groups with a reliably conspiratorial, solid, long-standing criminal activity, which is widely used for violence, population intimidation, bribery to obtain overprofit from illegal lucrative businesses. And it penetrates the field of business and politics through converting the legal business conducted through illegal means into a legal one.”⁵

“Organized crime is one of the complex and dangerous types of crime, which primarily encroaches on the economic, political, legal, and moral spheres of society.”⁶

“Organized crime is one of the most acute problems of today's world. It should be attributed to the delict of the global threat to society by the effect of its devastating impact.”⁷

⁴ M., *Criminology*, Tbilisi, 2011, 84 (in Georgian).

⁵ I., *Criminology*, Tbilisi, 1998, 179. (in Georgian)

⁶ Tsulaia Z., *Criminology (General Part)*, Tbilisi, 2003, 224 (in Georgian).

⁷ Ugrehelidze M., *Charged in Hazard Delicts*, Tbilisi, 1982, 60 (in Georgian).

The history of organized crime should probably be discussed with the history of the development of the state, because “Confronting society, the criminal phenomenon has undergone evolution and become resistant to the anti-crime impact of the state and society.”⁸

As already mentioned, “organized crime is not only a problem in most countries, but it has a transnational nature.”⁹ A typical example is the illegal movement of foreigners seeking “political asylum”, which is driven by organized criminal groups. Since the 1950s, the United States Senate has regularly charged appropriate commissions to analyze this crime and find ways to combat it. The conclusions of the committees were known by the names of the heads of the committees: Rico, Kefauver (1950-1951); Katzenbach (1966-1967); Byrne (1975-1976); and Kaufman (1983-1986).

The Kefauver Commission first mentioned the term “Organized Crime”, which went beyond the scope of ordinary gangster crime. The term has possibly expressed the essence of a very dangerous criminal phenomenon.

The 2021-2025 strategy of the European Union against Organized Crime states that “organized crime, which is hidden from public view due to its opaque nature, 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 fight against organized crime, “based on its transnational nature, it is one of the important challenges not only for Georgia but for the whole 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 combat 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 the drug transition process in Georgia.”¹²

3. Georgian Legislation on Organized Crime

According to the Law of Georgia on the National Security Policy Planning and Coordination, fighting organized crime is one of the key tasks of our country.

“The scope of the law, among other important issues, includes the fight against transnational and organized crimes.”¹³

⁸ *Avanesov G.A.* (ed.), *Criminology*, T., 2007, 570 (in Georgian).

⁹ *Pieces c.* (ed.), *Problems of Criminalization and Law Enforcement of Modern Manifestations of Organized Crime in Georgian Criminal Law*, T., 2012, 22.

¹⁰ The EU Strategy to Tackle Organised Crime 2021-2025, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0170&qid=1632306192409>>, [03.08.2025].

¹¹ Fighting Organized Crime 2021-2024 National Strategy, 2, <<https://matsne.gov.ge/ka/document/view/5256554?publication=0>> [03.08.2025].

¹² *Ciklauri-Lammich Eliko*, *Menschenraub, ein Blühendes Gewerbe in der Kaukasusregion*, Monatshefte für Osteuropäisches Recht, Hrsg. Dr. Günter Tontsch, Hamburg 2000, 2-9.

¹³ Article 12 of the Law of Georgia on the Procedure for Planning and Coordination of National Security Policy, <<https://matsne.gov.ge/document/view/2764463?publication=14>> [24.11.2025].

According to Article 27(3) of the Criminal Code of Georgia, “a crime shall be considered to have been committed by an organized group if it was committed by structured group formed and acting structured jointly within a specific period and the member of which united in advance to commit one or several crimes the purpose of which is unlawfully obtain direct or indirect financial or other material benefits.” Based on part 3 of the article, a structured group shall be the group that has not been casually set up for immediate commission of a crime and that does not require formal distribution of roles among its members, or continuous membership, or a developed structure.

“It is clear that an organized group ready to commit one or more serious or particularly serious crimes is dangerous. Especially if the organized group has already committed a pre-planned crime.”¹⁴

“Numerous provisions within the General Part of the Criminal Code of Georgia recognize the commission of a crime by an organized group as a qualifying or aggravating circumstance. In addition, the Code establishes specific offenses directly associated with organized criminal activity, such as banditry. However, banditry (Article 224 of the Criminal Code) and the commission of a crime by an organized group (Article 27(3)) are not identical legal constructs.

Unlike a gang, an organized group may not be armed. For example, under Article 180, paragraph 4, subparagraph (a) of the Criminal Code, fraud committed by an organized group does not require the group to be armed. The stability and structure of such a group are sufficient for qualification. Similar to a gang, an organized group may be formed for committing one or multiple crimes.”¹⁵

“In the context of combating organized crime, one of the key strategic directions is the systemic intensification of efforts against so-called 'thieves in law' and members of the criminal underworld, including their supporters.”¹⁶ “The term 'thief in law' refers to a phenomenon rooted in the Soviet penal system, originating in the early 1930s.”¹⁷

“In the Soviet Union, “thieves in law” exercised control over the lives of inmates in prisons and labor camps (“lagers”). Beginning in the 1960s and 1970s, their influence extended beyond the penitentiary system to encompass oversight of “speculators” and “Tsekhaviks” (self-made hustlers) – figures operating within the shadow economy (Gurov, 1995; Varese, 1998; Volkov, 1998, 2002). 2002).”¹⁸

“A significant role in the resurgence of the 'thief in law' institution was played by the political and voluntaristic hypothesis that emerged in the 1960s-1980s, namely the belief in the 'possibility of the complete eradication of crime in the Soviet Union.’ This ideological construct contributed to the illusion that professional and organized crime had been eliminated, thereby creating conditions conducive to the quiet revival and entrenchment of criminal subcultures.”¹⁹

¹⁴ *Tkesheladze G.* (ed.), *General Part of Criminal Law*, Tbilisi, 2004, 220.

¹⁵ *Turava M.*, *Criminal Law, General Part Review (Eighth Edition)*, Tbilisi, 2010, 279 (in Georgian).

¹⁶ *Combating Organized Crime 2021-2024 National Strategy*, 4, <<https://matsne.gov.ge/document/view/5256554?publication=0>> [25.09.2025].

¹⁷ *Lobzhanidze G., Ghlonti G.*, *Thieves in Law: History and Reality (Monogr.)*, Tbilisi, 2004, 46.

¹⁸ *Kekoshvili v.*, *The Impact of the Subculture of Thieves on the Socialization of Adolescents in Post-Soviet Georgia (dissertation)*, Tbilisi, 2019, 29.

¹⁹ *Lobzhanidze G., Ghlonti G.*, *Thieves in Law: History and Reality (Monogr.)*, Tbilisi, 2004, 55 (in Georgian).

Over several decades, the criminal subculture and mentality have evolved in such a manner that the operations of the so-called “criminal underworld” have become increasingly structured and institutionalized, encompassing even transnational organized crime activities.

The intensified fight against organized crime in Georgia began in 2005 with the adoption of the Law of Georgia on Organized Crime and Racketeering, which underwent substantial amendments on April 18, 2018.²⁰

This law defines and regulates key concepts such as the “criminal underworld,” “criminal underworld activities,” “member of the criminal underworld,” “thief in law,” “criminal showdown,” and “underworld meeting”.

Article 223¹ of the Criminal Code of Georgia, which criminalizes membership in the criminal underworld and the status of ‘thief in law’, was introduced in 2005.

“Georgia became the first country in the post-Soviet space to adopt anti-theft legislation, which may be regarded as a progressive step in the fight against organized crime.”²¹

According to the amendments adopted on April 18, 2018, in addition to criminalizing “membership in the criminal underworld” and holding the status of a “thief in law,” the law also established criminal liability for participating in an “underworld meeting”, supporting the “criminal underworld activities,” appealing to a member of the criminal underworld or a thief in law, and receiving material benefit or advantage as a result of such an appeal.”²²

These legislative amendments largely solve the challenges in combating this complex phenomenon, which we will consider in detail by analyzing judicial practice.

4. Organized Crime in International Legal Instruments and Conventions

In the context of combating organized crime and confiscating proceeds derived from criminal activities, numerous international (UN) and regional (European) legal instruments have been adopted over the past few decades. These instruments have, at various stages, been incorporated into the national legislation of Georgia.

“Among the most significant and illustrative examples for transitional countries are the following: – the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990),– the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), – the Council of Europe Criminal Law Convention on Corruption (1999),– the United Nations Convention Against Transnational Organized Crime (UNTOC) (2000),– the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005),– and the EU

²⁰ Law of Georgia on Organized Crime and Racketeering of 20 December 2005, <<https://matsne.gov.ge/document/view/27814?publication=1>> [25.09.2025].

²¹ *Pieces c.* (ed.), Problems of Criminalization and Law Enforcement of Modern Manifestations of Organized Crime in Georgian Criminal Law, Tbilisi, 2012, 528.

²² Articles 2231-2234 of the Criminal Code of Georgia, <<https://matsne.gov.ge/document/view/16426?publication=264>> [25.09.2025].

Directive 2014/42/EU on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, (2014).”²³

The United Nations Convention against Transnational Organized Crime, adopted on November 15, 2000, represents one of the cornerstone international instruments in the global fight against organized crime.²⁴ “It was the first international treaty of the century to be signed for countries at the Millennium High-Level Conference held in Palermo, Italy, from December 12 to December 15, 2000.”²⁵

“The Palermo Convention was established as a comprehensive legal instrument to combat cross-border criminal activity. Its key provisions address participation in an organized criminal group, money laundering, corruption, and obstruction of justice. (1) Additionally, the Convention establishes mechanisms for international cooperation, including extradition, mutual legal assistance, and cooperation among law enforcement agencies. (2) It also emphasizes the importance of enhancing the qualifications and technical capacity of public institutions at the national level (3).”²⁶

Article 2 of the Convention contains a set of important definitions that serve as the conceptual foundation for the Convention's application. These include:

a) Organized criminal group – a structured group of three or more persons, existing over a period and committing one or more serious crimes to obtain direct or indirect financial or other material benefits.

b) Serious crime – an offence punishable by a maximum deprivation of liberty of liberty of at least four years or a more severe sanction.

c) Structured group – a group that is not randomly formed for the immediate commission of an offence and in which it is not necessary to formally define roles for its members, maintain continuity, or possess a fully developed hierarchical structure.

d) Property – any type of asset, whether tangible or intangible, movable or immovable, including legal documents or instruments evidencing title to, or interest in, such assets.

e) Proceeds of crime – any property derived or obtained, directly or indirectly, through the commission of a criminal offence.

f) Freezing or seizure – the temporary prohibition of the transfer, conversion, disposition, or movement of property, or the temporary assumption of custody or control by a court or competent authority.

g) Confiscation – the permanent deprivation of property by order of a court or other competent authority.

²³ Orlovska, N., & Stepanova, J., Confiscation of Proceeds and Property Related to Crimes: International Standards and the ECHR Practice, 10 *Juridical Trib.* 499-500 (2020) [24.08.2025].

²⁴ United Nations Convention on Transnational Organized Crime, <<https://matsne.gov.ge/document/view/1485286?publication=0>> [27.09.2025].

²⁵ *Ciopec F.*, Compatibility of Romanian Legislation with the UN Convention Against Transnational Organized Crime, 39 *Zbornik Radova* (2005), 213 [24.08.2025].

²⁶ *Borgstede G.*, Cultural Property, the Palermo Convention and Transnational Organized Crime, 21 *IJCP* (2014), 283 [24.08.2025].

The Convention also provides a definition of “transnational crime” for its application. “A crime is considered transnational if: a) It is committed in more than one state. b) it is committed in one state but a substantial part of its planning, preparation, direction, or control takes place in another state; c) it is committed in one state but involves an organized criminal group that engages in criminal activity in more than one state; or d) it is committed in one state but has substantial effects in another state.”²⁷

On 24 April 2024, upon the recommendation of the European Commission, a new directive on the recovery and confiscation of criminal assets was adopted, strengthening the legal framework for recovery across EU member states.²⁸

According to the Directive (2), the primary motive of transnational criminal organizations, including high-risk criminal networks, is the pursuit of financial gain. In order to mitigate the serious threat posed by organized crime, competent authorities must dedicate greater institutional focus and resources to the effective tracing, identification, freezing, confiscation, and management of assets related to criminal property and activities.

5. Organized Crime and Criminal Complicity

Given the intrinsic connection between organized crime and the phenomenon of complicity, as well as the evolving forms and methods of organized criminal activity in recent decades, particularly its increasing transnational character, it becomes essential to examine the concept of complicity in greater depth.

“Complicity in a crime refers to the intentional and joint participation of two or more individuals in the commission of a premeditated criminal crime.”²⁹

“In cases involving the joint commission of intentional unlawful acts by two or more individuals, Georgian criminal law applies the so-called dualistic system for distinguishing the roles of participants. Under this system, each participant is classified either as a principal (executor) or as an accomplice, based on the specific role they played in the commission of the crime.”³⁰

The executor is the individual who, as the *central figure* in the commission of a crime, exercises control over the act through planned direction or shared intent (co-awareness). This person holds the power to shape the course of the criminal act, with the ability to initiate, continue, or terminate it at will.

“In contrast, the accomplice is someone who, lacking such control, contributes to the criminal act as a *secondary figure* in the event, either by instigating, facilitating, or otherwise promoting its commission without personally dominating the execution of the act.”³¹

²⁷ Clark R. S., The United Nations Convention Against Transnational Organized Crime, 50 WAYNE L. REV. (2004), 167 [24.08.2025].

²⁸ 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].

²⁹ Article 23 of the Criminal Code of Georgia, <<https://matsne.gov.ge/document/view/16426?publication=267>> [18.01.2025].

³⁰ Turava M., Criminal Law, General Part Review (Eighth Edition), Tbilisi, 2010, 265 (in Georgian).

³¹ Wessels I., Boyle V., General Criminal Justice, Tbilisi, 2010, 290-291.

“Complicity in the commission of a crime may arise not only through direct action but also through omission, where the individual has a legal duty to act. Moreover, an accomplice does not necessarily have to agree with the principal's motives or objectives; However, the accomplice must intentionally contribute to the commission of the crime, as complicity requires a deliberate and actionable form of participation.”³²

“The term *accessorius* (from Latin) means 'additional' or 'one who is joined.’ In the context of complicity, it refers to the legal concept that an accomplice's responsibility is derivative of, or connected to, the principal offender's actions. In other words, the liability of the accomplice is tied to their contribution to the commission of the crime by the principal.”³³

“The concept of complicity emerged from the recognition that the criminal liability of co-participants possesses certain distinctive features. These features become particularly evident in the form of complicity known as complicity in the narrow sense. This type of complicity arises when the accomplice does not personally fulfill the elements of the offense as defined in the Special Part of the Criminal Code, yet still contributes to its commission through intentional assistance, incitement, or other supportive conduct.”³⁴

The author refers to complicity involving the distribution of roles among multiple perpetrators, specifically the organizer, the instigator, and the aider. The fact that the organizer, instigator, or aider does not personally perform the objective elements of the offense (the *actus reus*) may raise doubts about the basis for their punishment. However, the legality of holding such participants criminally liable is well established and beyond dispute. The actions of the organizer, instigator, and aider are intrinsically linked to those of the principal (executor). In many instances, without the involvement of these accomplices, the act might not have occurred at all, and the crime would have remained unrealized.

T. Tsereteli observed that the responsibility of participants must rest on a single legal foundation. “In the context of complicity, the offense remains one unified criminal act, committed by several individuals, and characterized by a single materially and socially dangerous conduct.”³⁵

This approach to the issue persisted until the German scholar E. Metzger ultimately addressed the problem of the subjective elements of unlawfulness. The core idea of the doctrine he developed was that, in certain categories of offenses, unlawfulness (*Unrecht*) is not solely defined by objective elements, but is also constituted by a subjective element – specifically, the offender's purpose. In such cases, the absence of this subjective element renders the act legally non-wrongful, regardless of its objective characteristics.

In Georgia, E. Metzger's theory was further developed by O. Gamkrelidze, who formulated the doctrine of unified unlawfulness (*einheitliches Unrecht*) as a unified foundation for holding co-perpetrators criminally liable. By analyzing the subjective elements of unlawfulness in connection with the punishability of complicity, Gamkrelidze concluded that co-perpetrators commit a single act

³² Turava M., Criminal Law, General Part Review (Eighth Edition), Tbilisi, 2010, 272 (in Georgian).

³³ Surguladze L., Criminal Law, Tbilisi, 1997, 354 (in Georgian).

³⁴ Tsereteli T., Complicity in Crime, Tbilisi, 1965, 7-8 (in Georgian).

³⁵ Tsereteli T., Complicity in Crime, T., 1965, 55 (in Georgian).

of unlawfulness, and this unity is formed through a shared purpose that links the perpetrators, regardless of the individual motives each may have.³⁶

“Therefore, both the principal (executor) and the accomplice commit the same act of unlawfulness. Furthermore, complicity necessarily implies awareness of the principal's criminal conduct. It is sufficient that the accomplices are aware of the executor's actions; However, for the accomplices to be held criminally liable, the executor doesn't need to be aware of their actions.”³⁷

Accordingly, both the principal (executor) and the accomplice engage in the same act of unlawfulness. Complicity inherently requires that the accomplice be aware of the principal's criminal conduct. It is sufficient that the accomplice knows the executor's actions; However, the principal's awareness of the accomplice's involvement is not a prerequisite for establishing the accomplice's criminal liability.”³⁸

In the fight against transnational organized crime, it is particularly important to establish the liability of accomplices, especially the leaders and coordinators of organized criminal groups. Analyzing the forms and types of complicity is essential for a deeper understanding of the structure and functioning of organized crime.

Complicity can be manifested in three general forms: complex complicity is a participation through the distribution of roles (e.g., organizer, instigator, aider); simple complicity – joint commission of a crime without differentiated roles; participation within an organized criminal group. However, since criminal complicity always requires a subjective connection between participants (i.e., shared intent or common purpose), complicity can further be categorized based on the existence of prior agreement: with prior agreement, and without prior agreement. Therefore, complicity in criminal law may be classified into five distinct forms based on the structure of participation and the subjective relationship between the parties.”³⁹

According to Article 24 of the Criminal Code of Georgia, “an organizer is a person who organizes the commission of a crime or supervises its execution, as well as a person who creates or leads an organized group. An instigator is someone who intentionally incites another person to commit a deliberate crime. Aiders are those who assist in the preparation or commission of a crime. The organizer is considered a central figure among the participants and co-offenders, playing a crucial role in planning and directing the criminal act.”⁴⁰ However, the instigator and helper in the activities of organized and communicated crime groups are of no less importance.

Organized crime groups are naturally characterized by a large number of individuals and a continuous need to recruit new members. Due to the nature of their activities, such groups frequently require various forms of support, both active and passive. Functionally, it is often the case that individual members must assume different roles at different times and in the commission of various

³⁶ Gamkrelidze O., *Problem of Criminal Unrighteousness and Grounds for Punishability of Participation*, Tbilisi, 1989.

³⁷ Turava M., *Criminal Law, General Part Review (Eighth Edition)*, Tbilisi, 2010, 275-276 (in Georgian).

³⁸ Wessels I., Boyle v., *General Criminal Justice*, Tbilisi, 2010, 299.

³⁹ *Proceedings G.*, *General Criminal Justice*, Tbilisi, 2007, 203-204 (in Georgian).

⁴⁰ *Proceedings G.*, *General Criminal Justice*, Tbilisi, 2007, 211.

types of crimes. As a result, a clear and rigid separation between participants based on their roles is practically impossible.

M. Turava considers outdated the interpretation of the norm that defines the executor as solely the person who directly carries out the objective elements of the crime, while treating others involved in functionally essential parts of the crime as mere helpers.

According to Turava, *“A person who assists the principal offender during the actual execution of the crime and facilitates the completion of its objective elements is not merely an aider. Such a person is a functional co-executor, fully participating in the commission of the offense.”*

“A person who assists the principal offender during the actual commission of the crime and facilitates the realization of the elements of the offense is also considered to be involved in the crime. Such an individual cannot be classified as a mere aider; rather, they are a functional co-executor.”⁴¹

Organized crime is also qualitatively characterized by the commission of new crimes. Thus, in addition to complicity, it is associated with criminal institutions such as uniform crime and a plethora of crimes. It should also be noted that in a continuing crime, the moment of repetition of the crime does not create a plethora of crimes. “Viewing action as a continuing crime is usually a matter of fact, not a matter of legislative construction.”⁴²

It is also important to note that an organized crime group is not necessarily created for the commission of a single, specific crime. Both the 2000 Palermo Convention and the Criminal Code of Georgia (Article 27(3), as amended in 2006) recognize that such a group may be established to commit one or multiple criminal offenses.

What matters is the presence of the fundamental elements that define coordinated participation, as characteristic of organized criminal activity. In this regard, a noteworthy parallel can be drawn with the jurisprudence of international criminal law.

To introduce a unified standard of liability for joint perpetrators and to reinforce the objective elements of collective responsibility, the International Criminal Tribunal for the former Yugoslavia (ICTY), in the landmark case of *Prosecutor v. Tadić*, identified three essential objective elements of the doctrine of Joint Criminal Enterprise (JCE), applicable across all categories. These elements are: “A plurality of persons, the existence of a common plan, purpose, or design, and the accused's participation in the common plan.”⁴³ The strategic objective of organized crime is the continuous expansion of its criminal operations. In the modern era, it has evolved into a form of *criminal industry*, necessitating a deliberate, consistent, and rigorous criminal justice policy in response.

6. Georgia's Experience in Combating Organized Crime

“Although more than two decades have passed since the adoption of the United Nations Convention against Transnational Organized Crime, it remains evident that organized crime continues

⁴¹ Turava M., *Criminal Law, General Part Review* (Eighth Edition), Tbilisi, 2010, 272 (in Georgian).

⁴² Tkesheim G., *Responsibility for the Unity of Crimes*, Tbilisi, 1985, 32.

⁴³ Dgebuadze G., *The Doctrine of Individual Crime, Crime and Precedent Law in International Criminal Law*, Tbilisi, 2021, 115-116 (in Georgian).

to be a complex and evolving phenomenon, one that no single state can effectively address in isolation.”⁴⁴

The transnational threat posed by organized crime, along with the evolving nature of criminal methods (*modus operandi*) characterized by both covert and overt operational patterns, necessitates a strategic and continuously adaptive response.”⁴⁵

National agencies tasked with leading the fight against organized crime must ensure effective cooperation and information exchange at both the European Union and global levels. Achieving this goal requires integration into a unified criminal justice framework, along with access to adequate material and technical resources. “The main motivator of most serious and organized crime is financial benefits.”⁴⁶

The National Strategy to Combat Organized Crime focuses on three key areas: the criminal subculture of so-called “thieves-in-law,” cybercrime, and drug-related crime.”⁴⁷

The strategy also emphasizes that combating crime and organized crime in particular is a continuous process, especially in the context of modern technological advancement, where “both law enforcement agencies and criminal networks are constantly developing new capabilities.”⁴⁸

In connection with organized crime and in order to examine the Georgian experience, this study analyzes the case law of the common courts related to “thieves-in-law” and the “criminal underworld.”

“According to the verdict of the Tbilisi City Court dated February 18, 2021, M.G. and others were convicted of acts of violence, illegal deprivation of liberty, membership in the criminal underworld, supporting the criminal underworld activities, and appealing to a member of the criminal underworld / ‘thief in law’. Additionally, G.G. was acquitted in absentia on the charge of holding the status of a “thief in law”. No confiscation of property was imposed as an additional penalty.”⁴⁹

“Following the judgment of the Zugdidi District Court dated March 5, 2021, T.G. (in absentia) and others were convicted of extortion, holding the status of a “thief in law”, membership in the criminal underworld, and sowing/importing narcotic drugs. No confiscation of property was imposed as an additional penalty.”⁵⁰

“Based on the verdict of the Tbilisi City Court dated March 17, 2021, I.C. and others were convicted of membership in the criminal underworld, holding the status of a “thief in law” (in absentia), supporting the criminal underworld activities, and appealing to a member of the criminal underworld / “thief in law”. No confiscation of property was imposed as an additional penalty.”⁵¹

⁴⁴ UNODC, -Organized Crime Strategy Toolkit for Developing High-Impact Strategies, 1, <https://sherloc.unodc.org/cld/uploads/pdf/Strategies/OC_Strategy_Toolkit_Ebook.pdf> [07.09.2025].

⁴⁵ 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].

⁴⁶ Prosecutor's Office of Georgia 2022-2027 Strategy, 37, <<https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebisstrategia.pdf>> [03.08.2024].

⁴⁷ Combating Organized Crime 2021-2024 National Strategy, 4, <<https://matsne.gov.ge/ka/document/view/5256554?publication=0>> [03.08.2024].

⁴⁸ Ibid, 7.

⁴⁹ Verdict No 1/3309-22 of February 18, 2021 of Tbilisi City Court.

⁵⁰ Verdict No 1/465-20 of March 05, 2021 of Zugdidi District Court.

⁵¹ Verdict No 1/3252-20 of 17 March 2021 of the Tbilisi City Court.

“According to the verdict of the Kutaisi City Court dated April 7, 2021, M. G. was found guilty of supporting the activities of the 'criminal underworld.' No deprivation of property has been used as an additional punishment.”⁵²

“Under the judgment of the Tbilisi City Court of September 23, 2021, K. K. and R.G. (in absentia) were convicted of membership of the “criminal underworld” and “theft of law”. No deprivation of property has been used as an additional punishment.”⁵³

“According to the judgment of the Rustavi City Court of December 10, 2021, Kh. P. and E. A. were convicted of extortion, membership of the “criminal underworld”, and support of the activities of the “criminal underworld”. No deprivation of property has been used as an additional punishment.”⁵⁴

“Following the judgment of the Tbilisi City Court of December 27, 2021, B. A. and others were convicted of supporting the activities of the “criminal underworld” and appealing to a member of the “criminal underworld” / “thief in law”. No deprivation of property has been used as an additional punishment.”⁵⁵

“By the judgment of the Tbilisi City Court of March 15, 2022, G. R. was judged for supporting the activities of the “criminal underworld”. No deprivation of property has been used as an additional punishment.”⁵⁶

“Based on the verdict of the Tbilisi City Court of March 17, 2022, D. K. and others were convicted of membership in the “criminal underworld” and supporting the activities of the “criminal underworld”. No deprivation of property has been used as an additional punishment.”⁵⁷

“According to the verdict of the Tbilisi City Court of April 01, 2022, A. A. and others were convicted of membership of the “criminal underworld” and supporting the activities of the “criminal underworld”. No deprivation of property has been used as an additional punishment.”⁵⁸

“By the verdict of the Bolnisi District Court of April 05, 2022, T. N. and others were convicted of violence, membership of the “criminal underworld”, and support for the activities of the “criminal underworld”. No deprivation of property has been used as an additional punishment.”⁵⁹

“Following the verdict of the Rustavi City Court of April 01, 2022, S. T. and others were convicted of supporting the activities of the “criminal underworld”. No deprivation of property has been used as an additional punishment.”⁶⁰

“Under the verdict of the Bolnisi District Court of April 06, 2022, A. J. and others were convicted for extortion, membership of the “criminal underworld”, support for the activities of the “criminal underworld”, and for seeding/importing narcotic drugs. No deprivation of property has been used as an additional punishment.”⁶¹

⁵² Verdict No 1/664-20 of the Kutaisi City Court of April 07, 2021.

⁵³ Verdict No 1/468-21 of September 23, 2021 of the Tbilisi City Court.

⁵⁴ Verdict No 1-334-21 of December 10, 2021 of the Rustavi City Court.

⁵⁵ Judgment No 1/5491-21 of December 27, 2021 of Tbilisi City Court.

⁵⁶ Verdict No 1/947-22 of 15 March 2022 of Tbilisi City Court.

⁵⁷ Judgment No 1/1349-21 of 17 March 2022 of the Tbilisi City Court.

⁵⁸ Verdict No 1/4408-21 of April 01, 2022 of Tbilisi City Court.

⁵⁹ Verdict No 1/226-21 of April 05, 2022 of Bolnisi District Court.

⁶⁰ Verdict No 1-514-21 of April 05, 2022 of Rustavi City Court.

⁶¹ Verdict No 1/237-21 of April 06, 2022 of the Bolnisi District Court.

“According to the verdict of the Tbilisi City Court of April 15, 2022, G. D. and others were convicted of supporting the activities of the “criminal underworld” and appealing to a member of the “criminal underworld” / “thief in law”. No deprivation of property has been used as an additional punishment.”⁶²

“Based on the judgment of the Tbilisi City Court of April 20, 2022, Sh. K. was convicted of appealing to a member of the “criminal underworld” / “thief in law”. No deprivation of property has been used as an additional punishment.”⁶³

“Following the judgment of the Tbilisi City Court of June 13, 2022, Sh. M. and others were convicted of membership of the “criminal underworld” and support for the activities of the “criminal underworld”. No deprivation of property has been used as an additional punishment.”⁶⁴

“Under the judgment of the Tbilisi City Court of December 27, 2021, N. C. and others were convicted of supporting the activities of the “criminal underworld” and appealing to a member of the “criminal underworld” / “thief in law”. No deprivation of property has been used as an additional punishment.”⁶⁵

“According to the judgment of the Tbilisi City Court of September 13, 2022, Z. M. and others were convicted of membership of the “criminal underworld”, support for the activities of the “criminal underworld”, and appeal to a member of the “criminal underworld” / “thief in law”. No deprivation of property has been used as an additional punishment.”⁶⁶

“Based on the judgment of the Tbilisi City Court dated June 13, 2022, G.L. and others were convicted of membership in the 'criminal underworld' and of supporting its activities. No property confiscation was imposed as additional punishment.”⁶⁷

“Following the judgment of the Tbilisi City Court of September 16, 2022, I. M. and others were convicted of membership of the “criminal underworld” and for appealing to a member of the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁶⁸

“Under the judgment of the Akhaltsikhe District Court of September 20, 2022, L. J. and others were convicted of membership in the “criminal underworld”, support for the activities of the “criminal underworld”, and failure to comply with the judgment that entered into legal force. No property confiscation was imposed as an additional punishment.”⁶⁹

“Based on the judgment of the Tbilisi City Court of October 12, 2022, I. M. and others were convicted of appealing to a member of the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁷⁰

“According to the judgment of the Tbilisi City Court of December 16, 2022, L. T. and V.T. were convicted of membership in the “criminal underworld” and for appealing to a member of the

⁶² Judgment No 1/3333-21 of 15 April 2022 of Tbilisi City Court.

⁶³ Verdict No 1/1947-22 of April 20, 2022 of Tbilisi City Court.

⁶⁴ Verdict No 1/4642-21 of 13 June 2022 of Tbilisi City Court.

⁶⁵ Verdict No 1/385-22 of 16 June 2022 of Tbilisi City Court.

⁶⁶ Verdict No 1/5937-19 of September 13, 2022 of Tbilisi City Court.

⁶⁷ Verdict No 1/968-22 of the Tbilisi City Court of September 13, 2022.

⁶⁸ Verdict No 1/374-22 of the Tbilisi City Court of September 16, 2022.

⁶⁹ Verdict No 1/107-22 of September 20, 2022 of Akhaltsikhe District Court.

⁷⁰ Verdict No 1/3450-22 of October 12, 2022 of the Tbilisi City Court.

“criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁷¹

“Following the verdict of the Tbilisi City Court of December 26, 2022, Z. Kh. and others were convicted of membership in the “criminal underworld”, support for the activities of the “criminal underworld”, and appeal to a member of the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁷²

“By the judgment of the Tbilisi City Court of January 06, 2023, A. Ts. and others were convicted of membership in the “criminal underworld”, support for the activities of the “criminal underworld” and appeal to a member of the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁷³

“Under the verdict of the Tbilisi City Court of March 17, 2021, M. M. and others were convicted of membership in the “criminal underworld”, “theft in law” (in absentia), support for the activities of the “criminal underworld” and appeal to a member of the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁷⁴

“Based on the judgment of the Tbilisi City Court of February 16, 2023, T. G. (in absentia) and others were convicted of coercion, inhuman treatment, “theft in law”, membership in the “criminal underworld”, support for the activities of the “underworld” and appeal to a member of the “criminal underworld”/“thief in law”. No property confiscation was imposed as an additional punishment.”⁷⁵

“Following the verdict of the Tbilisi City Court of March 14, 2023, R. G. and others were convicted of appealing to a member in the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁷⁶

“According to the verdict of the Tbilisi City Court of March 14, 2023, L. D. and others were convicted of membership in the “criminal underworld”, support for the activities of the “criminal underworld”, appeal to a member of the “criminal underworld” / “thief in law”, for the purchase and possession of firearms and narcotic drugs. No property confiscation was imposed as an additional punishment.”⁷⁷

“Following the verdict of March 30, 2023, M. KH. and M. D. were convicted of appealing to a member in the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁷⁸

“Under the verdict of the Tbilisi City Court of April 05, 2023, T. F. and others were convicted of membership in the “criminal underworld” and supporting the activities of the “criminal underworld”. No property confiscation was imposed as an additional punishment.”⁷⁹

⁷¹ Verdict No 1/6471-22 of December 16, 2022 of Tbilisi City Court.

⁷² Verdict No 1/2641-22 of December 26, 2022 of Tbilisi City Court.

⁷³ Verdict No 1/2742-22 of the Tbilisi City Court of January 06, 2023.

⁷⁴ Verdict No 1/2777-22 of the Tbilisi City Court of January 16, 2023.

⁷⁵ Verdict No 1/3444-22 of February 16, 2023 of Tbilisi City Court.

⁷⁶ Verdict No 1/4582-22 of 14 March 2023 of Tbilisi City Court.

⁷⁷ Verdict No 1/4212-22 of 14 March 2023 of Tbilisi City Court.

⁷⁸ Verdict No 1/7177-22 of 30 March 2023 of Tbilisi City Court.

⁷⁹ Verdict No 1/4583-22 of April 05, 2023 of Tbilisi City Court.

“Based on the judgment of the Tbilisi City Court on May 02, 2023, G.Z. and others were convicted of membership in the “criminal underworld”, support for the activities of the “criminal underworld”, and appeal to a member of the “criminal underworld” / “thief in law”. No property as an additional punishment.”⁸⁰

“By the judgment of the Tbilisi City Court of June 21, 2023, N. J. and others were convicted of violence, membership in the “criminal underworld”, and support for the activities of the “criminal underworld”. No property confiscation was imposed as an additional punishment.”⁸¹

“According to the judgment of the Tbilisi City Court of July 25, 2023, K. C. and others were convicted of membership in the “Thieves World”. No property confiscation was imposed as an additional punishment.”⁸²

“Following the judgment of the Tbilisi City Court of October 17, 2023, K. V. and others were convicted of supporting the activities in the “criminal underworld” and appealing to a member of the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁸³

“Under the judgment of the Tbilisi City Court of October 19, 2023, K. S. and others were convicted of membership in the “criminal underworld”, support for the activities of the “criminal underworld”, and appeal to a member of the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁸⁴

“Based on the verdict of the Tbilisi City Court of November 10, 2023, D. Ch. and others were convicted of supporting the activities of the “criminal underworld” and appealing to a member of the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁸⁵

“By the verdict of the Telavi District Court of November 14, 2023, B. J. was convicted of supporting the activities in the “criminal underworld”, for the purchase and possession of firearms and narcotic substances. A firearm was deprived of additional punishment.”⁸⁶

“According to the verdict of the Tbilisi City Court of November 20, 2023, M. G. and others were convicted of membership in the “criminal underworld” and supporting the activities of the “criminal underworld”. No property confiscation was imposed as an additional punishment.”⁸⁷

“Following the February 16, 2023, verdict of the Tbilisi City Court, J. K. (in absentia) and others were convicted of “theft in law”, support for the activities of the “criminal underworld”, and appeal to a member of the “criminal underworld” / “thief in law”. No property confiscation was imposed as an additional punishment.”⁸⁸

⁸⁰ Verdict No 1/4977-22 of May 02, 2023 of Tbilisi City Court.

⁸¹ Verdict No 1/6282-22 of 21 June 2023 of Tbilisi City Court.

⁸² Verdict No 1/7178-22 of July 25, 2023 of Tbilisi City Court.

⁸³ Verdict No 1/4731-23 of 17 October 2023 of Tbilisi City Court.

⁸⁴ Verdict No 1/4242-23 of October 19, 2023 of Tbilisi City Court.

⁸⁵ Verdict No 1/5861-23 of November 10, 2023 of Tbilisi City Court.

⁸⁶ Verdict No 1/164-23 of November 14, 2023 of Telavi District Court.

⁸⁷ Verdict No 1/2540-23 of November 20, 2023 of Tbilisi City Court.

⁸⁸ Verdict No 1/2046-23 of November 22, 2023 of Tbilisi City Court.

“As a result, the proactive and effective actions of Georgia's law enforcement agencies, the vast majority of 'thieves-in-law' are currently outside the country.”⁸⁹

Court practice shows that “thieves in law” have a systematic connection with Georgia. In cases where the prosecution manages to present evidence meeting the relevant legal standards, the courts convict such individuals in absentia for being “thieves in law”. This has been facilitated by the 2018 amendments to the Criminal Code, which introduced that: “A citizen of Georgia or a stateless person with legal status in Georgia who commits an act abroad under Articles 223¹, 223², 223³, or 223⁴ of this Code shall be held criminally liable under Georgian law, even if the act is not considered a crime under the laws of the state in which it was committed.”⁹⁰

Under the Law of Georgia on Organized Crime and Racketeering, the “criminal underworld activities”, including those of a member of the “criminal underworld” or a “thief-in-law” are directed toward the commission or incitement of crimes, the exercise of criminal influence, or other unlawful actions to obtain benefits or privileges for themselves or others, and of acquiring power and/or influence.

An analysis of judicial practice indicates that the 2018 amendments to the Criminal Code have strengthened the courts' ability to impose individual criminal liability, especially given the inherent challenges associated with evidence collection in such cases. In several instances, during the substantive hearing of a case, courts have reclassified charges based on the facts to ensure that the individual is held appropriately accountable for the committed act.

Judicial practice also shows that the motivation of “thieves-in-law”, members of the criminal underworld, and their supporters lies in the pursuit and maintenance of influence over broader segments of society. This is primarily driven by the illicit economic power they wield, especially through the collection of the so-called “thieves' common fund” (*obshchak*).

Accordingly, it is necessary to strengthen international cooperation and to focus on identifying income or property obtained through criminal activities and ensuring its subsequent confiscation.

7. General Characterization of Transnational Organized Crime

“Each state determines the types of crimes and the means to combat them independently. However, certain crimes, by their very nature, transcend national borders and attract the attention of the international community.”⁹¹

“Numerous national and international instruments, particularly the United Nations Convention against Transnational Organized Crime (UNTOC), demonstrate that transnational organized crime has developed into a highly structured and sophisticated global phenomenon.”⁹²

⁸⁹ Combating Organized Crime 2021-2024 National Strategy, 17, <<https://matsne.gov.ge/ka/document/view/5256554?publication=0>> [14.09.2025].

⁹⁰ Article 5 of the Criminal Code of Georgia, <<https://matsne.gov.ge/document/view/16426?publication=264>> [14.09.2025].

⁹¹ *Aleksidze L.*, Modern International Law, Tbilisi, 2001, 228 (in Georgian).

⁹² *Hauck P., Peterke S.*, Organized Crime and Gang Violence in National and International Law, 92 INT'L REV. RED. Cross (2010), 408 [24.08.2025].

The origin and development of organized crime, when disregarding its criminal content, can be compared to entrepreneurial activity, as it follows many of the same fundamental principles and characteristics:

1. A tendency to expand capital turnover and capture new markets;
2. The most profitable areas of organized crime activity often exceed the boundaries of a single nation-state, increasingly taking on a transnational character.

Almost anything can become an object of illicit trade, from human beings and human organs to nuclear and atomic materials, as well as toxic industrial waste.⁹³

“Modern technologies have also provided a significant boost to criminal enterprises. It has become much easier to access information about demand and opportunities across different parts of the world. The use of cyber technologies has dramatically expanded the scope of organized crime and enabled these networks to increase their revenues on a global scale. Moreover, large-scale construction projects financed through proceeds from drug trafficking, cybercrime, money laundering, and corruption are often carried out at the expense of public and state interests.”⁹⁴

It was this global threat that the renowned Italian judge Giovanni Falcone highlighted in the early 1990s in his work “*Organized Crime – A Global Problem: The Italian Mafia as a Model for International Organized Crime*” (Falcone, *Organisierte Kriminalität – ein Weltproblem. Die italienische Mafia als Vorbild für das international organisierte Verbrechen*, Bundeskriminalamt). In his book, Falcone appealed to the general public, particularly to law enforcement agencies, to recognize the seriousness of this threat and to engage in a united fight against it as a shared danger.

Falcone's warning proved prophetic. Over time, this threat spread across other European countries, including Switzerland, Germany, France, the Netherlands, and beyond. The fight against organized crime in Italy alone has cost the lives of hundreds of justice officials. For this reason, in September 1992 in Brussels, the Italian Minister of the Interior, along with his counterparts, formally appealed to European and global law enforcement agencies for assistance in combating organized crime.⁹⁵

As of 2017, “revenue from transnational organized crime ranged from USD 1.6 billion to USD 2.2 trillion annually.”⁹⁶

“Also, the quality and practical usefulness of the implementation of both international and local instruments should become the subject of a separate study. It is widely known that organized crime is a kind of crime industry.”⁹⁷ Meanwhile, organization as a method of management in any field of

⁹³ *Ciklauri-Lammich Eliko*, The Problem of Crime Between Late Migrants From ISC in Germany, Georgian Lawyers, Tiflis, 2001, 45-51.

⁹⁴ *Ciklauri-Lammich Eliko*, Kapitel 2 Abschnitt 2. Der Kampf gegen die Korruption in den europäischen Ländern in der Monographie: Die Korruption in Georgien: Kriminologische Analysen und Kommentare der gerichtlichen Praxis, Hrsg. TSU & Tsereteli Inst., Tiflis 2010, 50-76.

⁹⁵ Pressnachricht Interior Justice Ministers Meeting, Brussels, September 18, 1992.

⁹⁶ Global Financial Integrity About Transnational Organized Crime <<https://gfin integrity.org/issue/transnational-crime>> [03.08.2024].

⁹⁷ “Crime Industry”, *Ciklauri-Lammich Eliko und Paoli Letizia*, Bekämpfung des ungesetzlichen Umsatzes und Konsums von Drogen auf dem Gebiet der russischen Föderation, in *Prawo i Politika*, St. Petersburg 2002, 29-34. (Russisch).

production serves to intensify processes and maximize profits with lower expenditures, which constitutes a necessary condition for the progress and growth of any given phenomenon. In the history of every nation, alongside the official government, there have existed forces, in the form of groups, that sought to acquire large amounts of property through criminal means and to exert influence over the official authorities.

“Organized crime takes advantage of legal loopholes. In many cases, law enforcement agencies struggle to respond swiftly to criminal enterprises, as the criminal world continuously evolves its methods, making illicit activities and revenue streams increasingly difficult to detect. Moreover, organized crime effectively exploits the benefits of globalization and modern information technologies to expand and strengthen its operations.”⁹⁸

According to the European Union's Grave and Organised Crime Threat Assessment Report (2021 EU COCTA), grave and organized crime is a key problem for EU security. “Organized crime has a networking character, where cooperation between criminals is current, systemic, and focused on making profits.”⁹⁹

One of the main characteristics of transnational organized crime is its high profitability, which provides the criminal world with stable and substantial economic resources year after year. The amorphous nature of this phenomenon and the difficulty of categorizing it within a specific type of criminal offense do not constitute sufficient grounds for refraining from combating it through criminal and repressive measures. “On the contrary, each new report by international organizations underscores the growing threat of organized crime, particularly its increasing infiltration into the legal business sector and its gradual takeover of legitimate enterprises.”¹⁰⁰ This is how the essence of organized crime is interpreted.

“Enterprise Theory (Smith, 1975) posits that organized crime groups (hereinafter referred to as OCGs) primarily act as providers of goods and services that are either illegal or heavily regulated (e.g., drugs, firearms, tobacco products, gambling). Following the widespread adoption of this theory, numerous studies have explored the involvement of OCGs in illicit markets (Reuter, 1985; Paoli, 2002; Bouchard & Wilkins, 2010; Transcrime, 2013; Calderoni, 2014). In addition to their role as suppliers in illegal markets, some researchers have also highlighted the presence of OCGs in legal markets (Cressey, 1969; Catanzaro, 1988; Ianni & Reuss-Ianni, 1993; Arlacchi, 2007).”¹⁰¹

8. Key Sectors of Modern Transnational Organized Crime

“International organized crime poses a serious threat to the global order and, in this sense, can be compared to acts of aggression that traditionally fall under the jurisdiction of international bodies

⁹⁸ White Paper on Transnational Organized Crime (2015), 7, <<https://edoc.coe.int/en/organised-crime/6837-white-paper-on-transnational-organised-crime.html>> [24.08.2025].

⁹⁹ EU SOCTA 2021 – Serious and Organized Crime Assessment Report, <https://www.europol.europa.eu/cms/sites/default/files/documents/soccta2021_1.pdf> [03.08.2024].

¹⁰⁰ Internazionale Organisierte Kriminalitat (Hrsg. Prof. Dr. Ulrich Sieber. Carl Heymanns Verlag KG), Koln. Berlin. Bonn. Munchen, 1996, 6-8.

¹⁰¹ *Dugato M., Favarin S., & Giommoni L., Risks and Rewards of Organized Crime Investments in Real Estate*, 55 BRIT. J.Criminology (2015), 944 [24.08.2025].

such as the United Nations. It undermines three fundamental pillars of a nation's sovereign independence: border control, the state's monopoly on the legitimate use of force, and the authority to regulate and tax cross-border economic activity. International criminal organizations establish alternatives to legitimate state governance, thereby destabilizing national institutions and threatening state sovereignty.”¹⁰²

According to the United Nations Office on Drugs and Crime (UNODC), “transnational organized crime is the hidden price paid by society.”

Transnational organized crime encompasses virtually all economically motivated criminal acts that involve more than one country and have an international dimension. These include drug trafficking, the smuggling of migrants, human trafficking, money laundering, illegal arms trafficking, trade in counterfeit goods, crimes related to wildlife and cultural heritage, as well as certain forms of cybercrime.

Transnational organized crime is not a static phenomenon; rather, it is a growing global industry that constantly adapts, expands into new markets, and evolves into increasingly complex forms. It is an illicit enterprise that transcends cultural, social, linguistic, and geographic boundaries, disregarding laws and norms.

“Drug-related crime remains one of the most profitable sectors of organized criminal activity, generating an estimated \$320 billion annually. Human trafficking – including the exploitation of children – is also highly lucrative, with annual revenues of approximately \$32 billion. The illicit arms trade, though smaller in scale, produces an estimated \$170 million to \$320 million per year. Meanwhile, cybercrime, particularly offenses involving the theft and misuse of personal data, is estimated to generate around \$1 billion annually.”¹⁰³

“The most severe forms of organized crime have a transnational dimension due to several circumstances, in particular, crime is committed in different countries, or criminals have international connections and support or legalization of income resulting from crime is carried out in different countries; by investing in foreign companies or real estate or fiscal oases.”¹⁰⁴

“Those involved in organized crime, driven by the pursuit of profit, engage in coordinated or violent criminal activities, as these methods are considered more effective for generating financial gain.”¹⁰⁵

“Organized crime was once a clear national issue, but today it represents one of the darker sides of globalization. It has transcended geographic boundaries, become continental in scope, and now exploits open border policies and modern technologies. Its illicit profits are on par with the scale of its global operations.”¹⁰⁶

¹⁰² Guymon C., International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention, 18 BERKELEY J. INT'L (2000), 61-62 [24.08.2025].

¹⁰³ UNODC About Transnational Organized Crime <<https://www.unodc.org/toc/en/crimes/organized-crime.html>> [03.09.2025].

¹⁰⁴ White Paper on Transnational Organized Crime (2015) 12, <<https://edoc.coe.int/en/organised-crime/6837-white-paper-on-transnational-organised-crime.html>> [30.09.2025].

¹⁰⁵ Bassiouni M., Effective National and International Action Against Organized Crime and Terrorist Criminal Activities, 4 Emory Int'l L. Rev. 12 (1990) [24.08.2025].

¹⁰⁶ Ciopec, F., compatibility of Romanian legislation with the UN Convention against Transnational Organized Crime, 39 Zbornik Radova 213 (2005) [24.08.2025].

“The diversified global illegal economy encompasses a wide range of illicit activities, including arms trafficking, human trafficking, the smuggling of stolen works of art across borders, the illegal trade in endangered species, money laundering, and the relatively new domain of cybercrime. These well-known activities are further supplemented by traditional forms of organized crime such as prostitution, extortion, and racketeering.”¹⁰⁷

According to the Director of Europol, the European Union is becoming increasingly vulnerable to organized crime, which poses a significant threat to the security of many member states. Criminals from around the world are choosing Europe as a base for carrying out illegal operations. “Organized crime groups are well aware of the advantages offered by the EU's free movement of goods, labor, and services, as enabled by EU treaties. Their criminal activities include money laundering, drug trafficking, economic crimes, and human trafficking. These groups are highly flexible, build networks both within and beyond the EU, and actively seek to influence law enforcement and judicial systems.”¹⁰⁸

Across the EU, criminal revenue from nine major crime markets reached USD 139 billion in 2019, accounting for 0.1% of the EU's gross domestic product.”¹⁰⁹

This includes drug-related crimes, the smuggling of migrants, human trafficking, fraud, environmental crimes, illegal arms trafficking, illicit tobacco trade, cybercrime, and organized property crimes.”¹¹⁰

“Modern transnational organized crime benefits significantly from globalization and free trade, and it actively leverages new technologies to facilitate the movement of various forms of crime, money, services, and people. Organized crime groups operate in a world without borders. The diversification of crimes, criminal markets, and networks by transnational organized crime groups is steadily increasing.”¹¹¹

According to the Global Organized Crime Index (2023), analysis indicates that organized criminal markets are expected to continue expanding in the future. Among the criminal markets such as human trafficking, migrant smuggling, extortion and racketeering, illegal arms trafficking, trade in counterfeit goods, trade in untaxed products, environmental crimes, trafficking in non-renewable resources, drug-related crimes, cybercrime, and financial crimes), one of the newest financial crime has emerged as the most widespread. Financial crime has been identified as the most prevalent form of criminal activity across all continents, except for the Americas, where it still ranks among the top five criminal markets.”¹¹²

¹⁰⁷ *Shelley, L.*, Transnational Organized Crime and Seized Assets: Moral Dilemmas Concerning the Disposition of the Proceedings of Crime, 7 Maastricht J. EUR. & Comp. L.38 (2000) [24.08.2025].

¹⁰⁸ *Brazier, M. L.*, The European Union's Hot Pursuit of Organized Crime Groups, 7 New Eng. Int'l & Comp. L. Ann. (2001), 262 [24.08.2025].

¹⁰⁹ 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].

¹¹⁰ 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>> [24.08.2025].

¹¹¹ *Zagaris, B.*, U.S. International Cooperation Against Transnational Organized Crime, 44 Wayne L. Rev. (1998), 1402 [24.08.2025].

¹¹² Global Organized Crime Index 2023, 51-52, <<https://globalinitiative.net/wp-content/uploads/2023/09/Global-organized-crime-index-2023-web-compressed-compressed.pdf>>[08.09.2025].

“Organized economic crime undermines one of the core powers of the state, its authority over taxation. When criminal groups retain illicit funds, they effectively bypass taxes, fueling the growth of the shadow economy and elevating the perceived influence of the criminal sector, which in some cases is seen as more powerful than the state itself. Money laundering allows organized criminals to channel proceeds from illegal activities into legitimate businesses, thereby amplifying the destructive impact of organized crime. Drug traffickers alone are estimated to launder around \$250 billion annually. In this area, the internationalization of finance and electronic access to global financial markets have enabled criminal groups to exploit the system, making money one of the easiest assets to convert. It can be moved instantly, its origin concealed, and detecting it often requires extensive effort.”¹¹³

This means that organized crime necessitates a comprehensive and inclusive response, addressing both the driving factors and the enabling conditions that underpin the global criminal economy. The transnational nature of organized crime and the need for strengthened international cooperation must be acknowledged, as emphasized in the Convention against Transnational Organized Crime.”¹¹⁴

9. Individual International and Regional Organizations Combating Transnational Organized Crime

For decades, numerous international and regional organizations have been engaged in the fight against transnational organized crime. After the end of World War II, the International Criminal Police Organization (Interpol) was established.

“Modern crime is increasingly international. Therefore, coordination among all actors responsible for maintaining global security is essential. As a global organization, Interpol facilitates cooperation even between countries that do not have diplomatic relations with one another.”¹¹⁵

“Interpol has significantly enhanced international law enforcement cooperation in three key areas:

1. By connecting national and local police forces through a reliable and rapid communication network.
2. By providing member countries with information on emerging law enforcement methods through its international professional association.
3. By increasing the level of harmonization among law enforcement agencies worldwide.”¹¹⁶

“Europeans have been discussing the creation of a unified police and prosecutorial system for years¹¹⁷ to enhance the effectiveness of combating transnational organized crime. In 1992, Europol was established, followed by the creation of Eurojust in 1999.

¹¹³ Guymon C., *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT'L (2000), 65 [24.08.2025].

¹¹⁴ UNODC, *Organized Crime Strategy Toolkit for Developing High-Impact Strategies*, 1 <https://sherloc.unodc.org/cld/uploads/pdf/Strategies/OC_Strategy_Toolkit_Ebook.pdf> [07.09.2025].

¹¹⁵ Interpol <<https://www.interpol.int/en/Who-we-are/What-is-INTERPOL>> [08.09.2025].

¹¹⁶ Guymon C., *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 Berkley J. Int L (2000), 73 [24.08.2025].

“Europol assists member states in various ways. It facilitates the exchange of information, within the bounds of national legislation, through Europol Liaison Officers (ELOs) who represent their respective national law enforcement agencies. Europol produces operational analyses and strategic reports based on intelligence and operational data provided by member states. Additionally, when needed, it offers technical and expert support during operational and investigative activities conducted by individual countries. Europol also plays a key role in raising awareness and promoting the harmonization of investigative techniques in the fight against organized crime across the EU.”¹¹⁸

“At its meeting in Tampere, Finland, in October 1999, the Council of Europe concluded that Eurojust should be established to combat serious, organized, and cross-border crime. Eurojust is composed of prosecutors, magistrates, or police officers seconded by the member states, depending on the relevant competencies of their national authorities. Each national government determines the type and scope of the mandate it grants to its representative. The purpose of the Eurojust Convention is to strengthen cooperation between competent national authorities by providing additional legal mechanisms. According to the Convention, Europol must establish close cooperation with the relevant divisions of Eurojust and may request legal support and advice. Europol is also required to provide Eurojust with information on all investigations and prosecutions involving more than one member state. Eurojust plays a leading role in coordinating investigations and prosecutions of crimes such as human trafficking, terrorism, counterfeiting of currency, offenses affecting the EU's economic and financial interests, money laundering, and cybercrime.”¹¹⁹

Since 2019, a cooperation agreement between Georgia and EUROJUST has entered into force. Although Georgia has actively utilized EUROJUST's international facilitation capabilities, it has yet to take advantage of services such as cooperation within joint investigation teams and participation in expert forums.¹²⁰

10. Georgian Experience in Combating Transnational Organized Crime

The success of combating transnational organized crime depends on the ability of law enforcement agencies to effectively operate using investigative, procedural, and other legal tools provided by legislation. The primary objective of organized criminal activity is to generate profit and to maximize and legitimize the illicitly obtained wealth.

“Transnational and organized crimes pose a particular threat to public order and security, both at the national and global levels,” the Prosecutor’s Office of Georgia emphasized in its 2022-2027 strategy.¹²¹

¹¹⁷ Ibid.

¹¹⁸ *Brazier, M. L.*, The European Union's Hot Pursuit of Organized Crime Groups, 7 New Eng. Int 'I & Comp. L. Ann. (2001), 263 [24.08.2025].

¹¹⁹ *Brazier, M. L.*, The European Union's hot pursuit of organized crime groups, 7 NEW ENG. INT 'I & COMP. L. Ann. (2001), 264-265 [24.08.2025].

¹²⁰ Prosecution Service of Georgia Strategy 2022–2027, 38, <<https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebis-strategia.pdf>> [05.08.2024].

¹²¹ Prosecutor's Office of Georgia 2022-2027 Strategy, 38, <<https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebis-strategia.pdf>> [05.08.2024].

“It is impossible to provide an exhaustive list of the types of transnational organized crime, as it can manifest in virtually every sector where high profits are possible, often followed by the illegal legalization of such income through money laundering.”¹²²

To assess the scale of Georgia's experience and the damage inflicted, the existing practice regarding transnational organized crimes (including money laundering), as reflected in 46 conviction judgments delivered by the common courts, was analyzed.¹²³ From these, we will focus on cases that to a greater or lesser extent exhibit a transnational character.

“According to the verdict of the Tbilisi City Court dated April 23, 2021, N.K. was convicted of fraud and the legalization of illicit income amounting to €17,900. No confiscation of property was applied as an additional penalty.”¹²⁴

“By the judgment of the Tbilisi City Court dated May 11, 2021, F.O.K. and others were convicted of fraud and the legalization of illicit income for \$134,208. Although property confiscation was not imposed as an additional punishment, the court ordered procedural confiscation of an apartment in Tbilisi, 49.19% of which had been purchased for \$10,200 using criminal proceeds.”¹²⁵

“Following the judgment of the Tbilisi City Court dated July 27, 2021, F.O.K. and others were convicted of laundering illicit income amounting to GEL 619,839. As an additional penalty aimed at concealing the origin of the illegal proceeds, seven luxury vehicles purchased for \$168,000 were confiscated.”¹²⁶

“Based on the judgment of the Tbilisi City Court dated October 11, 2021, G.M. and others were convicted of fraud and the legalization of illicit income amounting to €700,300 and \$40,802. As an additional penalty, various real estate properties acquired through criminal means were confiscated.”¹²⁷

“According to the judgment of the Tbilisi City Court dated October 29, 2021, T. and others were convicted of fraud and the legalization of illicit income amounting to €48,900. As an additional penalty, a car acquired through criminal means was confiscated.”¹²⁸

“By the judgment of the Tbilisi City Court dated February 14, 2022, M.K. and others were convicted of fraud and the legalization of illicit income amounting to €73,995 and \$13,100. No property confiscation was imposed as an additional penalty.”¹²⁹

“Following the judgment of the Tbilisi City Court dated March 16, 2022, N.G. was convicted of theft and the legalization of illicit income amounting to GEL 41,212. Although no additional penalty was imposed, the court ordered plea-based confiscation of GEL 2,118.72 and USD 277.90 from bank accounts.”¹³⁰

¹²² *Dzneladze L.*, confiscation as a necessary criminal mechanism for combating transnational organized crime, *Journ. Journal of Law*, No. 2, 2024, 236-237 (in Georgian).

¹²³ *Ibid.*, 242.

¹²⁴ Verdict No 1/996-21 of April 23, 2021 of Tbilisi City Court.

¹²⁵ Verdict No 1/4697-20 of 11 May 2021 of the Tbilisi City Court.

¹²⁶ Verdict No 1/3434-21 of July 27, 2021 of the Tbilisi City Court.

¹²⁷ Verdict No 1/4280-21 of October 11, 2021 of the Tbilisi City Court.

¹²⁸ Verdict No 1/3934-21 of October 29, 2021 of the Tbilisi City Court.

¹²⁹ Verdict No 1/3270-21 of February 14, 2022 of Tbilisi City Court.

¹³⁰ Verdict No 1/4855-19 of 16 March 2022 of Tbilisi City Court.

“Under the judgment of the Tbilisi City Court dated March 25, 2022, F.N. and others were convicted of legalizing false proprietorship and illicit income totaling GEL 1,268,036.60; USD 15,385,489.60; EUR 20,786,875; CHF 3,030; and GBP 57,645. F.N. was deprived of various high-value real estate properties acquired through criminal means.”¹³¹

“According to the judgment of the Tbilisi City Court dated April 12, 2022, J.H. was convicted of fraud and the legalization of illicit income amounting to GEL 119,941.54, EUR 467,341.31, and USD 1,528. “As an additional penalty, J.H. was deprived of various high-value vehicles acquired through criminal means.”¹³²

“Following the judgment of the Tbilisi City Court dated May 4, 2022, M.S. and R.O. were convicted of fraud and the legalization of illicit income amounting to GEL 29,767.49. M.S. was deprived of GEL 7,700 obtained through criminal means.”¹³³

“By the judgment of the Tbilisi City Court dated May 23, 2022, J.A. was convicted of the legalization of illicit income totaling GEL 5,201.20, EUR 63,065,825.49, and EUR 88,132,376.82. As an additional penalty, funds obtained through criminal means were confiscated for GEL 37,685.52, EUR 153,467.48, and USD 7,831,116.04.”¹³⁴

“Based on the judgment of the Tbilisi City Court dated May 31, 2022, N.A. and others were convicted of fraud and the legalization of illicit income amounting to \$256,174. No property confiscation was imposed as an additional penalty. However, recovered funds totaling \$60,000 and €29,450 were returned to the victims.”¹³⁵

“According to the judgment of the Tbilisi City Court dated July 20, 2022, M.G. was convicted of the legalization of illicit income amounting to GEL 135,822.36. As an additional penalty, M.G. was deprived of various high-value vehicles acquired through criminal means.”¹³⁶

“Following the judgment of the Tbilisi City Court dated September 8, 2022, V.L. was convicted of fraud and the legalization of illicit income amounting to USD 206,782.20. As an additional penalty, various real estate properties acquired through criminal means were confiscated.”¹³⁷

“Under the judgment of the Tbilisi City Court dated February 13, 2023, N.A. was convicted of fraud and the legalization of illicit income amounting to EUR 4,041.14 (USD 5,460). No property confiscation was imposed as an additional penalty.”¹³⁸

“By the judgment of the Tbilisi Court of Appeals of March 16, 2023, M. R. was convicted of fraud and legalization of illegal income of \$4,005. No property confiscation was imposed as an additional punishment.”¹³⁹

¹³¹ Verdict No 1/3845-21 of 25 March 2022 of the Tbilisi City Court.

¹³² Verdict No 1/2181-21 of 12 April 2022 of Tbilisi City Court.

¹³³ Verdict No 1/292-22 of May 04, 2022 of Tbilisi City Court.

¹³⁴ Verdict No 1/2638-22 of May 23, 2022 of the Tbilisi City Court.

¹³⁵ Verdict No 1/1434-22 of 31 May 2022 of the Tbilisi City Court.

¹³⁶ Judgment No 1/1832-22 of July 20, 2022 of the Tbilisi City Court.

¹³⁷ Verdict No 1/3065-20 of September 08, 2022 of Tbilisi City Court.

¹³⁸ Verdict No 1/3423-22 of February 13, 2023 of Tbilisi City Court.

¹³⁹ Verdict No 1b/2124-22 of March 16, 2023 of the Tbilisi Court of Appeals.

“Following the judgment of the Tbilisi City Court of June 12, 2023, A. K. and others were convicted of fraud and legalization of illicit income of GEL 314,173.45. Various expensive cars purchased by criminal means were also confiscated of their sentences.”¹⁴⁰

“According to the judgment of the Tbilisi City Court of June 26, 2023, Sh. H. was convicted of the legalization of illicit income of USD 3,610,434. As an additional penalty, various real estate properties acquired through criminal means were confiscated.”¹⁴¹

“Based on the judgment of the Tbilisi City Court of July 11, 2023, M. G. was convicted of fraud for legalizing illicit income of \$12,500. No property confiscation has been imposed as an additional punishment.”¹⁴²

“By the judgment of the Tbilisi City Court of September 14, 2023, L. F. was convicted of fraud and legalization of illicit income of \$24,180. No property confiscation has been imposed as an additional punishment.”¹⁴³

“Under the judgment of the Tbilisi City Court of September 27, 2023, A. Kh. and F. S. were convicted of fraud and legalization of illicit income of GEL 306,314. €5,080 and USD 68,195 were deprived of additional sentences.”¹⁴⁴

“By the judgment of the Tbilisi City Court of October 6, 2023, E. J. and E. J. were convicted of fraud and legalization of illicit income of GEL 1,898,880, EUR 39,550, and \$9,000. As an additional penalty, monetary funds and various movable and immovable assets were confiscated.”¹⁴⁵

“In the judgment of the Tbilisi City Court of December 04, 2023, Al. b. was convicted of legalizing illegal income of \$102,000. Three real estate properties of different values purchased through criminal means were deprived of additional punishment.”¹⁴⁶

Court practice shows that by taking into account the global scale of this type of crime, the activities of law enforcement agencies are to be activated concerning transnational organized crime.

11. Conclusion

The study reveals that organized crime in modern times is a transnational challenge and a global threat.

Transnational organized crime has evolved into a form of criminal industry.

Each year, organized crime groups gain access to increasing financial resources, which undermines the effectiveness of efforts to combat transnational organized crime.

Modern technological tools, the digitalization of businesses, and the growing use of virtual assets have transformed illegal proceeds, not only in their form and appearance but also in their geographic distribution. These changes are further enabled by new methods of money laundering.

¹⁴⁰ Verdict No 1/1579-23 of 12 June 2023 of Tbilisi City Court.

¹⁴¹ Verdict No 1/3114-23 of 26 June 2023 of the Tbilisi City Court.

¹⁴² Verdict No 1/2476-22 of July 11, 2023 of Tbilisi City Court.

¹⁴³ Judgment No 1/3555-22 of September 14, 2023 of Tbilisi City Court.

¹⁴⁴ Judgment No 1/2860-23 of September 27, 2023 of Tbilisi City Court.

¹⁴⁵ Verdict No 1/3091-22 of October 06, 2023 of Tbilisi City Court.

¹⁴⁶ Verdict No 1/2716-23 of December 04, 2023 of Tbilisi City Court.

Invasion of illegal incomes in the legal economy can be devastating, even for the economy of a successful state.

Research reveals that organized crime, due to its transnational nature, the constantly evolving forms of modern crime, and the increasing use of advanced technologies, is becoming progressively more concealed from society.

Billions in illegal income are accumulated annually, infiltrating the legal economy to such an extent that, over time, it becomes nearly impossible to distinguish between lawful and unlawful revenues.

This suggests that law enforcement has traditionally focused more on convicting offenders than on identifying, recovering, and confiscating the proceeds and property derived from criminal activities.¹⁴⁷

The study also indicates that there are sufficient and effective legal tools available at both international and national levels.

“Of course, we cannot eliminate crime, as it is part of the human condition. However, we can reduce its prevalence and mitigate its negative consequences.”¹⁴⁸

Therefore, it is necessary for law enforcement agencies – including foreign partner institutions and international organizations – to take coordinated and purposeful action, and to activate all available legal mechanisms for the confiscation of criminal assets accumulated through transnational organized activity.

Bibliography:

1. Criminal Code of Georgia, 24/08/1999.
2. United Nations Convention Against Transnational Organized Crime, 15/11/2000.
3. Council of Europe Convention on Criminal Laundering, Finding, Removal and Confiscation and Terrorism Financing, 16/05/2005.
4. Convention on Finding, Removing and Confiscating Revenues Resulting from Money Laundering, Criminal Activities, 8/11/1990.
5. Convention Against Bribery by Foreign Civil Servants in International Business Transactions, 21/11/1997.
6. Convention on Combating Corruption, 11/11/1997.
7. 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].
8. *Aleksidze L.*, Modern International Law, Tbilisi, 2001, 228.
9. *Avanesov G. A.* (ed.), Criminology, Tbilisi, 2007, 570 (in Georgian).
10. *Akyunal T.*, On the Global Reception of Swiss Civil Law in Turkey, *Bulletin of the Academy of Sciences of Georgia*, 1992, No. 2.
11. *Bassiouni M.*, Effective National and International Action Against Organized Crime and Terrorist Criminal Activities, *4 Emory Int'l L. Rev.* (1990) [24.08.2025].

¹⁴⁷ *Dzneladze L.*, *Confiscation as an Essential Criminal Law Mechanism in the Fight Against Transnational Organized Crime*, *Journal of Law*, No. 2, 2024, 237 (in Georgian).

¹⁴⁸ *Biorgo T.*, *Crime Prevention*, Tbilisi, 2016, 24 (in Georgian).

12. Bjorgo T., Crime Prevention, Tbilisi, 2016, 24.
13. Borgstede G., Cultural Property, the Palermo Convention and Transnational Organized Crime, 21 *IJCP* (2014), 283 [24.08.2025].
14. Brazier M. L., The European Union's Hot Pursuit of Organized Crime Groups, 7 *New Eng. Int'l & Comp. L. Ann.* (2001), 262-265 [24.08.2025].
15. Clark R. S., The United Nations Convention Against Transnational Organized Crime, 50 *Wayne L. Rev.* (2004), 167 [24.08.2025].
16. Ciklauri-Lammich E., Menschenraub, ein blühendes Gewerbe in der Kaukasusregion, *Monatshefte für Osteuropäisches Recht*, Hrsg. Dr. Günter Tontsch, Hamburg, 2000, 2–9.
17. Ciklauri-Lammich E., The Problem of Crime Between Late Migrants from ISC in Germany, *Georgian Lawyers*, Tiflis, 2001, 4-51 (Georgian, English).
18. Ciklauri-Lammich E., Kapitel 2 Abschnitt 2. Der Kampf gegen die Korruption in den europäischen Ländern, in *Die Korruption in Georgien: Kriminologische Analysen und Kommentare der gerichtlichen Praxis*, Hrsg. TSU & Tsereteli Inst., Tiflis, 2010, 50–76 (Georgian).
19. Ciopec F., Compatibility of Romanian Legislation with the UN Convention Against Transnational Organized Crime, 39 *Zbornik Radova* (2005), 213 [24.08.2025].
20. Ciklauri-Lammich E. und Paoli L., Crime Industry: Bekämpfung des ungesetzlichen Umsatzes und Konsums von Drogen auf dem Gebiet der russischen Föderation, *Prawo i Politika*, St. Petersburg, 2002, 29-34 (in Russian).
21. Combating Organized Crime 2021-2024 National Strategy, <https://matsne.gov.ge/ka/document/view/5256554?publication=0> [03.08.2024].
22. Dgebuadze G., Doctrine of Individual Crime and Precedent Law in International Criminal Law, Tbilisi, 2021, 115–116 (in Georgian).
23. Dugato M., Favarin S., & Giommoni L., Risks and Rewards of Organized Crime Investments in Real Estate, 55 *Brit. J. Criminology* (2015), 944 [24.08.2025].
24. Dzeladze L., Confiscation as a Necessary Criminal Mechanism for Combating Transnational Organized Crime, *Journal of Law*, No. 2, 2024, 23-242.
25. 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].
26. The EU Strategy to Tackle Organised Crime 2021-2025, <https://eurlex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A52021DC0170&qid=1632306192409> [03.08.2024].
27. Feradze G., On the History of the Prosecution Service in Georgia, *Essays I, VI–XVIII Centuries*, Tbilisi, 2017.
28. Gamkrelidze O., The Problem of Criminal Unrighteousness and the Grounds for Punishability of Participation, Tbilisi, 1989.
29. Global Financial Integrity, *About Transnational Organized Crime*, <https://gfintegrity.org/issue/transnational-crime> [03.08.2024].
30. Global Organized Crime Index 2023, <https://globalinitiative.net/wp-content/uploads/2023/09/Global-organized-crime-index-2023-web-compressed-compressed.pdf> [08.09.2025].
31. Godziashvili I., Criminology, Tbilisi, 1998, 179 (in Georgian).
32. Guymon C., International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention, 18 *Berkeley J. Int'l* (2000), 61-73 [24.08.2025].
33. Hauck P. & Peterke S., Organized Crime and Gang Violence in National and International Law, 92 *Int'l Rev. Red Cross* (2010), 408 [24.08.2025].

34. Internationale Organisierte Kriminalität, Hrsg. Prof. Dr. Ulrich Sieber, Carl Heymanns Verlag KG, Köln–Berlin–Bonn–München, 1996, 6–8.
35. *Kekoshvili V.*, The Impact of the Subculture of Thieves on the Socialization of Adolescents in Post-Soviet Georgia (dissertation), Tbilisi, 2019, 29 (in Georgian).
36. Law of Georgia on Organized Crime and Racketeering (20 December 2005), <https://matsne.gov.ge/document/view/27814?publication=1> [25.09.2025].
37. *Lobzhanidze G. & Ghlonti G.*, Thieves in Law: History and Reality (Monograph), Tbilisi, 2004, 46, 55 (in Georgian).
38. 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> [24.08.2025].
39. *Mumladze D. & Dzenladze L.*, Fight Against Organized Crime (Mafia): Comparative Legal Analysis, *Justice*, No. 2, 2008, 35.
40. *Orlovska N. & Stepanova J.*, Confiscation of Proceeds and Property Related to Crimes: International Standards and the ECHR Practice, *10 Juridical Trib.* (2020), 499–500 [24.08.2025].
41. *Proceedings G.*, General Criminal Justice, Tbilisi, 2007, 189.
42. *Proceedings G.* (ed.), Problems of Criminalization and Law Enforcement of Modern Manifestations of Organized Crime in Georgian Criminal Law, Tbilisi, 2012, 22, 528.
43. Prosecutor's Office of Georgia 2022-2027 Strategy, <https://pog.gov.ge/uploads/7f5da215-saqarTvelos-prokuraturis-2022-2027-wlebisstrategia.pdf> [03.08.2024].
44. *Shelley L.*, Transnational Organized Crime and Seized Assets: Moral Dilemmas Concerning the Disposition of the Fruits of Crime, *7 Maastricht J. Eur. & Comp.* (2000), 35–38 [24.08.2025].
45. *Shalikashvili M.*, Criminology, Tbilisi, 2011, 84 (in Georgian).
46. *Tkesheladze G.* (ed.), General Part of Criminal Law, Tbilisi, 2004, 55, 195, 220.
47. *Tkesheladze G.*, Responsibility for the Unity of Crimes, Tbilisi, 1985, 32.
48. *Tsulaia Z.*, Criminology (General Part), Tbilisi, 2003, 224 (in Georgian).
49. *Tsereteli T.*, Complicity in Crime, Tbilisi, 1965, 7-8 (in Georgian).
50. *Tumanishvili G., Jishkariani B., & Shrami E.* (eds.), Influence of European and International Law on Georgian Criminal Procedure Law, Tbilisi, 2019, 800-801.
51. *Turava M.*, Criminal Law, General Part Review (Eighth Edition), Tbilisi, 2010, 272–279 (in Georgian).
52. UNODC, *About Transnational Organized Crime*, <https://www.unodc.org/toc/en/crimes/organized-crime.html> [03.08.2024].
53. UNODC, *Organized Crime Strategy Toolkit for Developing High-Impact Strategies*, https://sherloc.unodc.org/cld/uploads/pdf/Strategies/OC_Strategy_Toolkit_Ebook.pdf [07.09.2025].
54. United Nations Convention on Transnational Organized Crime, <https://matsne.gov.ge/document/view/1485286?publication=0> [27.09.2025].
55. *Ugrekheldidze M.*, Charged in Hazard Delicts, Tbilisi, 1982, 60 (in Georgian).
56. *Von Lingenthal K. E. Z.*, Geschichte des Griechisch-Römischen Rechts, Aalen in Württemberg, 1955.
57. *Wessels I. & Boyle V.*, General Criminal Justice, Tbilisi, 2010, 290-299.
58. White Paper on Transnational Organized Crime (2015), <https://edoc.coe.int/en/organised-crime/6837-white-paper-on-transnational-organised-crime.html> [24.08.2025].

59. *Zagaris B.*, U.S. International Cooperation Against Transnational Organized Crime, 44 *Wayne L. Rev.* (1998), 1402 [24.08.2025].
60. Interpol <<https://www.interpol.int/en/Who-we-are/What-is-INTERPOL>>[08.09.2025].
61. Verdict No 1/2716-23 of December 04, 2023 of Tbilisi City Court.
62. Verdict No 1/2046-23 of November 22, 2023 of Tbilisi City Court.
63. Verdict No 1/2540-23 of November 20, 2023 of Tbilisi City Court.
64. Verdict No 1/164-23 of November 14, 2023 of Telavi District Court.
65. Verdict No 1/5861-23 of November 10, 2023 of Tbilisi City Court.
66. Verdict No 1/4242-23 of October 19, 2023 of Tbilisi City Court.
67. Verdict No 1/4731-23 of 17 October 2023 of Tbilisi City Court.
68. Verdict No 1/3091-22 of October 06, 2023 of Tbilisi City Court.
69. Judgment No 1/2860-23 of September 27, 2023 of Tbilisi City Court.
70. Judgment No 1/3555-22 of September 14, 2023 of Tbilisi City Court.
71. Verdict No 1/7178-22 of July 25, 2023 of Tbilisi City Court.
72. Verdict No 1/2476-22 of July 11, 2023 of Tbilisi City Court.
73. Verdict No 1/3114-23 of 26 June 2023 of the Tbilisi City Court.
74. Verdict No 1/6282-22 of 21 June 2023 of Tbilisi City Court.
75. Verdict No 1/1579-23 of 12 June 2023 of Tbilisi City Court.
76. Verdict No 1/4977-22 of May 02, 2023 of Tbilisi City Court.
77. Verdict No 1/4583-22 of April 05, 2023 of Tbilisi City Court.
78. Verdict No 1/7177-22 of 30 March 2023 of Tbilisi City Court.
79. Verdict No 1b/2124-22 of March 16, 2023 of the Tbilisi Court of Appeals.
80. Verdict No 1/3444-22 of February 16, 2023 of Tbilisi City Court.
81. Verdict No 1/4582-22 of 14 March 2023 of Tbilisi City Court.
82. Verdict No 1/4212-22 of 14 March 2023 of Tbilisi City Court.
83. Verdict No 1/3423-22 of February 13, 2023 of Tbilisi City Court.
84. Verdict No 1/2777-22 of the Tbilisi City Court of January 16, 2023.
85. Verdict No 1/2742-22 of the Tbilisi City Court of January 06, 2023.
86. Verdict No 1/2641-22 of December 26, 2022 of Tbilisi City Court.
87. Verdict No 1/6471-22 of December 16, 2022 of Tbilisi City Court.
88. Verdict No 1/3450-22 of October 12, 2022 of the Tbilisi City Court.
89. Verdict No 1/107-22 of September 20, 2022 of Akhaltsikhe District Court.
90. Verdict No 1/374-22 of the Tbilisi City Court of September 16, 2022.
91. Verdict No 1/968-22 of the Tbilisi City Court of September 13, 2022.
92. Verdict No 1/5937-19 of September 13, 2022 of Tbilisi City Court.
93. Verdict No 1/3065-20 of September 08, 2022 of Tbilisi City Court.
94. Judgment No 1/1832-22 of July 20, 2022 of the Tbilisi City Court.
95. Verdict No 1/385-22 of 16 June 2022 of Tbilisi City Court.
96. Verdict No 1/4642-21 of 13 June 2022 of Tbilisi City Court.
97. Verdict No 1/1434-22 of the 31 May 2022 of the Tbilisi City Court.
98. Verdict No 1/2638-22 of May 23, 2022 of the Tbilisi City Court.
99. Verdict No 1/292-22 of May 04, 2022 of Tbilisi City Court.

100. Verdict No 1/1947-22 of April 20, 2022 of Tbilisi City Court.
101. Judgment No 1/3333-21 of 15 April 2022 of Tbilisi City Court.
102. Verdict No 1/2181-21 of 12 April 2022 of Tbilisi City Court.
103. Verdict No 1/237-21 of April 06, 2022 of the Bolnisi District Court.
104. Verdict No 1-514-21 of April 05, 2022 of Rustavi City Court.
105. Verdict No 1/226-21 of April 05, 2022 of Bolnisi District Court.
106. Verdict No 1/4408-21 of April 01, 2022 of Tbilisi City Court.
107. Verdict No 1/3845-21 of 25 March 2022 of the Tbilisi City Court.
108. Judgment No 1/1349-21 of 17 March 2022 of the Tbilisi City Court.
109. Verdict No 1/4855-19 of 16 March 2022 of Tbilisi City Court.
110. Verdict No 1/947-22 of 15 March 2022 of Tbilisi City Court.
111. Verdict No 1/3270-21 of February 14, 2022 of Tbilisi City Court.
112. Judgment No 1/5491-21 of December 27, 2021 of Tbilisi City Court.
113. Verdict No 1-334-21 of December 10, 2021 of the Rustavi City Court.
114. Verdict No 1/3934-21 of October 29, 2021 of the Tbilisi City Court.
115. Verdict No 1/468-21 of September 23, 2021 of the Tbilisi City Court.
116. Verdict No 1/4280-21 of October 11, 2021 of the Tbilisi City Court.
117. Verdict No 1/3434-21 of July 27, 2021 of the Tbilisi City Court.
118. Verdict No 1/4697-20 of 11 May 2021 of the Tbilisi City Court.
119. Verdict No 1/996-21 of April 23, 2021 of Tbilisi City Court.
120. Verdict No 1/664-20 of the Kutaisi City Court of April 07, 2021.
121. Verdict No 1/3252-20 of 17 March 2021 of the Tbilisi City Court.
122. Verdict No 1/465-20 of March 05, 2021 of Zugdidi District Court.
123. Verdict No 1/3309-22 of February 18, 2021 of Tbilisi City Court.

Nino Monaselidze*

The Dangerous Dissemination of Personal Data and Its Legal Consequences

In recent years, hate speech and aggression on social media have increased worldwide. These developments are often accompanied by the publication of personal data and have led to a disturbing phenomenon within peaceful societies. During the protests in Georgia in 2024-2025, both law enforcement authorities and civil society activists circulated photos, names, and home addresses of individuals with dissenting opinions in open and closed chats, often with the intent to intimidate or harass them.¹ This contributed to both physical attacks and online harassment against the targeted individuals. Because much of the disseminated information involved publicly available data, such actions were not punishable under Georgian law and law enforcement authorities did not intervene. This legal gap in Georgian legislation could be addressed by drawing on Section 126a of the German Criminal Code (StGB), which was introduced in 2021 specifically to combat this type of behavior.

Keywords: Public order, personal data, data dissemination, enemy lists, hate speech.

1. Introduction

In 2021, a new provision entered into force in the German Criminal Code (StGB) – Section 126a StGB, concerning the dangerous dissemination of personal data. This provision criminalizes the sharing of both public and non-public personal information if done with the intent to place the affected person or someone closely associated with them in potential danger.² It provides for imprisonment of up to two years for public information and up to three years for non-public information.³ The provision was introduced as part of a law amending the Criminal Code to enhance criminal protection against so-called “enemy lists.” The aim of this regulation is to safeguard public order, general legal security, peaceful coexistence among citizens, and the public's sense of safety against potential disruptions caused by the dangerous dissemination of personal data.⁴ This legal change responds to the growing spread of enemy lists on social media, the increasing number of related criminal offenses, and the unrest it causes within the population. These developments pose not only risks to individual security but also negatively affect social cohesion.⁵

* Master of Laws (LL.M), University of Potsdam.

¹ <<https://mtavari.tv/news/171574-aktsiis-darbevashi-monacile-modzalade>> [25.09.2025].

² Fischer T., Strafgesetzbuch, 71. Aufl. 2024, § 126a Rn. 4.

³ Rackow P., in Heintschel-Heinegg/Kudlich, BeckOK StGB 61. Aufl. 2024, §126a Rn.11.

⁴ BT-Drs 19/28768, S. 8.

⁵ Patz J., KriPoZ 4 | 2021, 223; Hestermann T./Hoven E./Autenrieth M., KriPoZ 4 | 2021, 204.

2. Legal Interpretation of §126a StGB

The offense outlined in Section 126a of the German Criminal Code (StGB) primarily concerns the dissemination of publicly accessible personal data and encompasses any form of such dissemination, even if it involves the data of just one individual.⁶ Accordingly, the scope of this provision includes not only the spread of so-called “enemy lists,” but also the act of doxxing.⁷

The compilation of enemy lists is a strategy frequently employed by politically motivated groups,⁸ whose anti-democratic agendas involve intimidating and inciting crimes against unwanted individuals, such as “opponents” or “traitors” from the political sphere, civil society, or journalism.⁹ These threats are often made in indirect or veiled terms, such as suggesting that “a visitor should pay this person a visit” or that “it might be appropriate to do something about this person or teach them a lesson.”¹⁰

Such indirect threats pose real dangers both online and offline, ranging from threatening messages to life-threatening attacks.¹¹ Victims are particularly frightened by the possibility that perpetrators might appear at their private homes,¹² which can lead them to restrict their own movements out of fear. At the same time, other members of society begin to self-censor alongside the victims, refraining from expressing their opinions openly to avoid becoming the next target. This dynamic significantly hinders the development of democratic processes in a country.¹³

In the English-speaking world, this phenomenon is commonly referred to as *doxxing*, the deliberate collection and publication of personal information with the intent to shame, threaten, harm,¹⁴ harass, or publicly humiliate the targeted individual.¹⁵ Offenders often focus on former partners, colleagues, or people they have encountered on social media platforms.¹⁶

2.1. Legally Protected Interest – Public Peace

The term “public peace” encompasses not only general legal security and the peaceful coexistence of citizens, but also the public's trust in the permanence of this condition and their sense of safety, both of which are undermined by the dissemination of so-called “enemy lists.”¹⁷ A secondary legal interest protected by this provision is the individual security of the victims, including their family

⁶ Eisele J., in Klass/Momsen/Wybitul, Datenschutzsanktionenrecht, Aufl. 2023, § 9 Rn. 6.

⁷ Kubiciel M./Großmann S. NJW 2019, S.1050; Vassilaki I., K&R 12/2021, S. 764.

⁸ Patz J., KriPoZ 4 | 2021, 223.

⁹ Referentenentwurf des BMJV, S. 4; Gerhold S., in Schumann/Mosbacher/König, NK-Medienstrafrecht, Aufl. 2023, §126a Rn. 3; BT-Drs. 19/28678, S. 2.

¹⁰ BT-Drs. 19/28678, S. 1; Heckmann D., in Stern/Sodan/Möstl, Staatsrecht II, Aufl. 2022, §102 Rn. 90, 91.

¹¹ Korenke C./Kühne M., NK 2022, 457, 462; Kubiciel M., Stellugnahme S. 3.

¹² BT-Drs 19/28768, S. 8.

¹³ VBRG, Stellungnahme, S. 1; Deutscher Bundestag Feindeslisten nach §126a.

¹⁴ Woerlein A., H, MMR-Aktuell 2024, 1437.

¹⁵ Kubiciel M./Großmann S., NJW 2019, 1050.

¹⁶ Kubiciel M., Stellugnahme, S. 3.

¹⁷ Eisele J., in Klass/Momsen/Wybitul, Datenschutzsanktionenrecht, Aufl. 2023, § 9 Rn. 4.

members and close associates, as well as their protection from the risk of becoming victims of criminal offenses.¹⁸

2.2 Objective Elements of the Offense

The basic offense requires that personal data of a third party, which is capable of revealing their identity, be disseminated publicly either in a gathering or by distributing content in a manner intended to expose the affected person or someone close to them to a potential danger of a crime directed against them or another unlawful act targeting their sexual self-determination, physical integrity, personal freedom, or an item of significant value.¹⁹ From an **ex-ante** perspective (i.e., prior risk assessment), it is sufficient that the manner of publication is objectively capable of endangering the targeted individual or their close associates. The offense does not require actual harm to occur. Rather, the potential for harm is sufficient to constitute a punishable act.²⁰

2.2.1 Object of the Offense

According to Section 126a (1) of the German Criminal Code, the object of the offense is publicly accessible personal data that can be easily obtained by any person without significant effort. Examples include names, dates of birth, residential addresses, or email addresses.²¹

In the second paragraph of § 126a StGB, the object of the offense is non-public personal data. This refers to information that is protected by access restrictions, internal departmental confidentiality, or passwords. Data remains classified as non-public even if such protections have been breached and the offender or third parties have gained unlawful access.²²

2.2.2 The Criminal Act

The criminal act consists in the dissemination of personal data. The term “dissemination” refers to the transmission of data in any form to a broad, undefined group of people,²³ in a way that the disseminator loses control over the information. This includes, for example, sharing via live streams, messages, fax, SMS, or email.²⁴ Dissemination of data within a private setting or a closed group of a small number of recipients does not constitute a criminal offense under this provision,²⁵ so long as the originator retains control over the information.²⁶

¹⁸ *Fischer T.*, Strafgesetzbuch, 71. Aufl. 2024, § 126a Rn. 3; *Heger M.*, in Lackner/Kühl/Heger, StGB 30. Aufl. 2023, § 126a Rn. 1-9; BT-Drs. 19/28678, S. 8.

¹⁹ *Fischer T.*, Strafgesetzbuch, 71. Aufl. 2024, § 126a Rn. 4.

²⁰ *Werner, R.*, in Weber Rechtswörterbuch, Gefährdungsdeldikt, Gefährdendes Verbreiten personenbezogener Daten, 32. Ed. 2024.

²¹ *Korenke C./Kühne M.*, NK 2022, 457, 460.

²² *Fischer T.*, Strafgesetzbuch 71. Aufl. 2024, § 126a Rn. 17.

²³ *Gerhold S.*, in Schumann/Mosbacher/König, NK-Medienstrafrecht, Aufl. 2023, § 126a Rn. 8-11; *Eisele J.*, in *Klass/Momsen/Wybitul*, Datenschutzsanktionenrecht, Aufl. 2023, § 9 Rn. 10.

²⁴ *Eisele J.*, in *Klass/Momsen/Wybitul*, Datenschutzsanktionenrecht, Aufl. 2023, § 9 Rn. 12.

²⁵ *Fischer T.*, Strafgesetzbuch, 71. Aufl. 2024, § 126a Rn. 6.

²⁶ *Heger M.*, in Lackner/Kühl/Heger, 30. Aufl. 2023, StGB § 126a Rn. 3.

2.2.3 Objective Indicators for Determining Danger

The objective indicators for establishing a potential danger are “suitability” and “reality”. This means that only the objective circumstances present at the time of dissemination are to be taken into account when assessing the danger.²⁷ Any subsequent developments, such as the actual use of the data by third parties for criminal acts, must be evaluated separately and do not retroactively affect the original assessment.²⁸ When evaluating objective indicators, special attention must be paid to contexts and circumstances that reveal a high potential for danger. These include, for example, demonstrations, websites with extremist content, links to unconstitutional organizations, the anonymity of the author, and other high-risk environments.²⁹

2.3. Subjective Elements of the Offense

To fulfill the subjective requirements of § 126a, conditional intent (*dolus eventualis*) is sufficient. This means that the perpetrator does not need to have a concrete idea of who might commit which specific crime using the disseminated personal data. It is enough that the offender seriously considers the possibility that such a crime might occur and accepts it as a potential consequence.³⁰ The potential crime must be directed against the individual rights of the data subject or someone closely connected to them.³¹ An exception applies to cases where the resulting danger was entirely beyond what the perpetrator could have foreseen.³²

Proving intent in cases involving the dissemination of public information poses significant challenges.³³ In particular, the difficulty lies in determining whether the dissemination of such information was suitable for creating a danger, something that is assessed *ex post* (after the fact).³⁴ This creates a tension with the legal principle that *dolus eventualis*, a form of indirect intent, must already exist at the moment the act is committed. The challenge lies in excluding subsequent developments that are beyond the offender’s control but nonetheless significantly influence the legal assessment of their actions.³⁵ To resolve this dilemma, courts are required to ensure that the intent is proven based on the circumstances at the time of the act, regardless of events that occur later and lie beyond the offender’s control, such as political developments that may influence the level of threat.³⁶

²⁷ Eschelbac, R., in Kindhäuser/Neumann/Paeffgen, NK-StGB, Aufl. 2023, § 126a Rn. 18-22; BT Drs. 19/3115.

²⁸ Eisele J., in Klass/Momsen/Wybitul, Datenschutzsanktionenrecht, Aufl. 2023, § 9 Rn. 15.

²⁹ BT-Drs. 19/28678, 11; Gerhold S., in Schumann/Mosbacher/König, NK- Medienstrafrecht, Aufl. 2023, § 126a Rn. 18.

³⁰ Basar E., Stellungnahme, S. 7.

³¹ Zimmerman F., in Satzger/Schluckebier/Werner, StGB-Kommentar, 3. Aufl. 2023, § 126a, Rn. 19.

³² Fischer T., Strafgesetzbuch, 71. Aufl. 2024, § 126a Rn. 12.

³³ Lohse K., Stellungnahme, S. 4.

³⁴ Grözingen A., in Müller/Schlothauer/Knauer, MAH, 3. Aufl. 2022, § 50 Rn. 111-113.

³⁵ Golla S., Stellungnahme, S. 2.

³⁶ Lohse K., Stellungnahme, S. 4.

2.4. Exclusion of Criminal Liability

The provisions of § 126a do not apply when the dissemination of information serves purposes such as informing the public, exposing anti-constitutional activities, or contributing to art or science, research or teaching, reporting on current or historical events, or other similar objectives.³⁷ This exception is particularly important for journalistic work, as it enables investigative reporting, such as uncovering extremist groups and their agendas,³⁸ including the disclosure of their identities, without fear of criminal prosecution.³⁹

2.5. Illegality

In general, the issue of illegality is mostly clearly defined as unlawful even if the offender commits the act with the intention of protecting security, since no immediate threat arises from the listed persons that would justify an immediate response. Nevertheless, the act remains punishable despite the person's consent to the dissemination of personal information if it weakens the sense of public security.⁴⁰ This is especially the case when it contains elements of threats or indirect incitement.⁴¹

3. Legal Challenges of § 126a StGB

3.1. Restriction of Freedom of Expression and Freedom of the Press

The purpose of this law is to protect political opponents from intimidation and crimes directed against them. However, this intention may have an undesirable impact on the climate of political discussion and the formation of free opinion.⁴² The main difficulty lies in defining the boundaries between the freedom of expression protected by Article 5 of the German Basic Law and Article 10 of the European Convention on Human Rights, and the restrictions imposed by § 126a StGB. Therefore, when assessing individual cases, a careful balancing of legal interests is required.⁴³ It must be emphasized that the content of an opinion itself cannot be prohibited; rather, restrictions may apply to the form and means of its expression if they exhibit elements of a criminal offense. In such cases, the expression crosses the threshold that infringes upon legally protected interests.⁴⁴

Moreover, despite the clause that excludes certain acts from punishment, the potential consequences of the law could lead to self-censorship among journalists and activists. Such “chilling effects” are likely to hinder the dissemination of important publications and journalistic investigations that are essential for the formation of public opinion.⁴⁵

³⁷ Gerhold S., in Schumann/Mosbacher/König, NK-Medienstrafrecht, Aufl. 2023, §126a Rn. 23.

³⁸ Eisele J., in Klass/Momsen/Wybitul, Datenschutzsanktionenrecht, Aufl. 2023, § 9 Rn. 24.

³⁹ BT-Drs 19/29638, 12; DRB, Stellungnahme, S.1.

⁴⁰ Eisele J., in Klass/Momsen/Wybitul, Datenschutzsanktionenrecht, Aufl. 2023, § 9 Rn. 4.

⁴¹ Zimmerman F., in Satzger/Schluckebier/Werner, StGB-Kommentar, 3. Aufl.2023, § 126a, Rn. 20.

⁴² Golla S., Stellungnahme, S. 2; DRB, Stellungnahme, S.2.

⁴³ Lohse K., Stellungnahme, S. 5; DRB, Stellungnahme, S. 2.

⁴⁴ BT Drs. 19/30943 S.2; Lohse K., Stellungnahme, S. 5.

⁴⁵ Golla S., Stellungnahme, S. 2; Aus der Zivilgesellschaft, Stellungnahme, S. 5.

3.2. Challenges of § 126a StGB during Investigations

Through so-called “online patrols,” permanent investigative units of the federal states independently search the internet for content subject to investigation.⁴⁶ Despite their efforts to investigate criminal content, a large number of crimes remain unsolved.⁴⁷ The main difficulty in investigations is the anonymity of perpetrators, the use of fake accounts, and complex server structures such as TOR, gray zone hosting, and VPNs.⁴⁸ These technologies allow users to regularly change IP addresses within a short period, conceal their identities, and hide their physical locations.⁴⁹

These techniques complicate not only the identification and prosecution of offenders and the collection of relevant evidence but also the recording and evaluation of information.⁵⁰ Considering these challenges, the Federal Criminal Police Office (BKA) demands legislative regulations that would make it possible, in exceptional cases, to deanonymize users of the TOR platform.⁵¹

Another problem is the dissemination of information from foreign servers, as the scope of European authorities’ actions is limited on an international level.⁵² An example of this is a racist organization from the USA whose data was disseminated via a server located in China and used by neo-Nazis in Germany.⁵³

3.3. Insufficient Information

The Federal Criminal Police Office (BKA) does not have a unified strategy regarding when and in what form individuals named in the so-called “enemy lists” should be informed.⁵⁴ Some federal states, such as Hesse and Thuringia, act proactively and provide information to the affected individuals, while other states leave this decision to the local police authorities. As a result, individuals often receive no information at all or receive it only belatedly. Consequently, they lose the opportunity to take timely protective measures and frequently remain unprotected.⁵⁵

4. Conclusion

The Georgian legislation, especially in the years 2024-2025, in the context of increasing dissemination of personal data and the resulting rise in intimidation, harassment, and physical violence, requires the establishment of appropriate legal frameworks. In this context, § 126a of the German Criminal Code (StGB) represents a significant step forward in combating the dangers posed by the public dissemination of personal data and contributes to the protection of public peace.

⁴⁶ Patz J., KriPoZ 4 | 2021, S. 223, 229.

⁴⁷ Polizeiliche Kriminalstatistik Straftatenkatalog 2023, S. 53.

⁴⁸ Wuttke S., Stellungnahme, S. 5.

⁴⁹ Ceffinato T., JuS 2020, S. 495

⁵⁰ Wuttke S., Stellungnahme, S. 5.

⁵¹ Thiesen M., MMR 2014, S. 803, 808.

⁵² Deusch F./Eggendorfer T., in Taeger/Pohle, ComputerR-HdB, 50.1 IT-Sicherheit, Rn. 272, 279, 280a.

⁵³ DJG, Stellungnahme, S. 2; Patz J., KriPoZ 4 | 2021, S. 223, 226.

⁵⁴ BT-Drs. 19/3628, S. 4.

⁵⁵ VBRG, Stellungnahme, S. 3

Nevertheless, it is necessary to define the boundary between freedom of expression and punishable actions, so that the potential impact on journalistic activities and freedom of expression is minimized. At the same time, in order to achieve the set goals, security agencies must ensure the effective application of data protection regulations and timely provide detailed information to the affected individuals about potential threats, enabling them to assess risks and take protective measures.

Bibliography:

1. Aus der Zivilgesellschaft, Stellungnahme, zu dem Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Verbesserung des strafrechtlichen Schutzes gegen sogenannte Feindeslisten.
2. Deutscher Bundestag Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Verbesserung des strafrechtlichen Schutzes gegen sogenannte Feindeslisten.
3. Deutscher Bundestag Stellungnahme des Bundesrates und Gegenäußerung der Bundesregierung.
4. Deutscher Bundestag Aktueller Begriff, Der strafrechtliche Schutz gegen sog. Feindeslisten nach § 126a StGB.
5. Deutscher Bundestag Antrag 19/28768.
6. Deutscher Bundestag Antwort der Bundesregierung 19/3628.
7. Deutscher Bundestag Beschlussempfehlung 19/30943.
8. Deutscher Bundestag Kleine Anfrage 19/3115.
9. Deutscher Richterbund (DRB) Stellungnahme zu einer Formulierungshilfe des BMJV für den Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Verbesserung des strafrechtlichen Schutzes gegen sogenannte Feindeslisten.
10. Deutsche Justizgewerkschaft (DJG) Stellungnahme Formulierungshilfe des Bundesministeriums der Justiz und für Verbraucherschutz, Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Verbesserung des strafrechtlichen Schutzes gegen sogenannte Feindeslisten.
11. *Basar E.*, Stellungnahme zum Gesetzesentwurf der Bundesregierung: Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Verbesserung des strafrechtlichen Schutzes gegen sogenannte Feindeslisten, Drucksache 19/28678.
12. *Ceffinato T.*, Hate Speech zwischen Ehrverletzungsdelikten und Meinungsfreiheit JuS 2020, Heft 6, 495.
13. *Deusch F., Eggendorfer T.*, 50.1 IT-Sicherheit in Taeger, Jürgen/Pohle, Jan *Computerrechts-Handbuch*, 39. EL April 2024, Verlag C.H.Beck oHG, München.
14. *Eisele J.*, § 9 Gefährdendes Verbreiten des personenbezogener Daten (§ 126a StGB) in Klass, Arne/Momsen, Carsten/Wybitul, Tim *Datenschutzsanktionenrecht, Handbuch für Unternehmens- und Anwaltspraxis*, 1. Auflage 2023. C.H.Beck oHG, München.
15. *Eschelbach R.*, § 126a in Kindhäuser, Urs/Neumann, Ulfrid/Paeffgen, Hans-Ulrich/Saliger, Frank: *Strafgesetzbuch*, 6. Auflage 2023, Nomos Verlagsgesellschaft, Baden-Baden.
16. *Fischer T.*, *Strafgesetzbuch mit Nebengesetzen*, § 126a, 71. Auflage 2024, Verlag C.H.Beck, München.
17. *Gerhold S.*, § 126a in Schumann, Heribert/Mosbacher, Andreas/König, Stefan *NomosKommentar Medienstrafrecht*, 1. Auflage 2023, © Nomos Verlagsgesellschaft, Baden-Baden.
18. *Golla S.*, Stellungnahme zu dem Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Verbesserung des strafrechtlichen Schutzes gegen sogenannte Feindeslisten, BT-Drs. 19/28678.

19. Grözinger A., § 50 in Müller, Eckhart/Schlothauer, Reinhold/Knauer, Christoph: *Münchener Anwaltshandbuch Strafverteidigung*, 3. Auflage 2022, Verlag C.H.Beck oHG, München.
20. Heckmann D., § 102 in Stern, Klaus/Sodan, Helge/Möstl, Markus: *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund*, 2. Auflage 2022, Verlag C.H.Beck oHG, München.
21. Heger M., § 126a in Lackner, Karl/Kühl, Kristian/Heger, Martin: *Strafgesetzbuch*, 30. Auflage 2023, Verlag C.H.Beck oHG, München.
22. Hestermann T., Hoven E., Autenrieth M., “Eine Bombe, und alles ist wieder in Ordnung”: Eine Analyse von Hasskommentaren auf Facebook-Seiten reichweitenstarker deutscher Medien. *KriPoZ* 4 | 2021, S. 204.
23. Korenke C., Kühne M., Die Verbreitung von Feindeslisten, *NK* 2022, Heft 4, 457–475.
24. Kubiciel M., Schriftliche Fassung der Stellungnahme in der Öffentlichen Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages zu dem: a) BT-Drs. 19/28678, b) Änderungsantrag der Fraktion der AfD vom 14.5.2021, c) BT-Drs. 19/28777.
25. Kubiciel M., Großmann S., Doxing als Testfall für das Datenschutzstrafrecht, *NJW* 2019, Heft 15, 1050, Schriftleiter: Tobias Freudenberg, Beethovenstraße 7b, 60325 Frankfurt a. M., veröffentlicht 04.04.2019.
26. Lohse K., Stellungnahme zu dem Thema Verbesserung des strafrechtlichen Schutzes gegen sogenannte Feindeslisten.
27. Patz J., (K)eine Verbesserung des strafrechtlichen Schutzes gegen Feindeslisten? – Leerstellen und ungenutzte Handlungspotenziale anlässlich des neu geschaffenen Straftatbestandes, *KriPoZ* 4 | 2021, S. 223.
28. Rackow P., § 126a in Heintschel-Heinegg, Bernd von / Kudlich, Hans: *BeckOK StGB*, 61. Edition, 2024, Verlag C.H.Beck oHG, München.
29. *Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz (BMJV)*, Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Verbesserung des strafrechtlichen Schutzes gegen sogenannte Feindeslisten.
30. Thiesen M., Wie hoch ist der Preis der Anonymität? – Haftungsrisiken beim Betrieb eines TOR-Servers, *MMR* 2014, Heft 12, 803.
31. *Verband der Beratungsstellen für Betroffene rechter, rassistischer und antisemitischer Gewalt (VBRG)*, Stellungnahme zum “Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Verbesserung des strafrechtlichen Schutzes gegen sogenannte Feindeslisten”.
32. Werner R., Gefährdendes Verbreiten personenbezogener Daten; Gefährdungsdelikt. In Weber, Klaus *Rechtswörterbuch*, 32. Edition 2024. Verlag C.H.Beck oHG, München.
33. Woerlein A. H., Digitale Gewalt durch Doxing – praktische Relevanz und unzureichende rechtliche Sanktionsmöglichkeiten, *MMR-Aktuell* 2024, Heft 15, IRI – Panorama zum Recht der Digitalisierung, Datenwirtschaft und IT, 1437.
34. Wutke S., Stellungnahme zur Vorbereitung der Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages am 19. Mai 2021.
35. Zimmermann F., § 126a StGB in Satzger, Helmut/Schluckebier, Wilhelm/Werner, Reik: *StGB-Kommentar*, 6. Aufl. 2024, Verlag: Carl Heymanns, Hürth.
36. <<https://mtavari.tv/news/171574-aktsiis-darbevashi-monacile-modzalade>> [25.06.2025].

Paata Turava*

Gvantsa Varamashvili**

The EU-Georgia Association Agreement as a Process of Harmonization of Georgian Environmental Law

“The Association Agreement between, on the one hand, Georgia, and on the other hand, the European Union and the European Atomic Energy Community and their member states” (hereinafter the “Association Agreement”) was initialed¹ on 28–29 November 2013 within the framework of the “Eastern Partnership” Vilnius Summit. The Agreement was signed on 27 June 2014 in Brussels and ratified by the Parliament of Georgia on 18 July of the same year.

By ratifying the Association Agreement, the Georgian authorities assumed various commitments, including the approximation of its national legislation to EU environmental protection and climate change regulatory directives.²

The ratification of the Association Agreement created a long-term perspective for the development of national policies in various fields, including environmental protection and climate change. The EU-Georgia Association Agreement established a solid legal basis for future legislative drafting and law enforcement processes.

It is widely recognized that the planet faces serious environmental challenges, which can only be addressed through international cooperation and the creation of an appropriate legislative framework aligned with EU law and reflecting European best practices. Accordingly, since the signing of the Association Agreement in 2014, environmental law in Georgia has been moving closer to European environmental legislation, which, as noted, represents a commitment under the Association Agreement. However, along the path of legislative approximation, beyond legislative progress, significant challenges have emerged, the identification and overcoming of which constitute a prerequisite for successful environmental legislation and national policy.

Within the framework of this article, the transformation of Georgian environmental law following the entry into force of the Association Agreement will be analyzed. The article will identify the challenges present in the process of legislative approximation in the environmental field and present the authors’ recommendations for overcoming these challenges.

Keywords: Association Agreement, legal approximation/harmonization, Europeanization, transformation of Georgian environmental law.

* Professor at Ivane Javakhishvili Tbilisi State University.

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

¹ Confirmation of the negotiated text by the heads of the parties’ delegations, with initials placed on each page of the Agreement.

² The Association Agreement between, on the one hand, Georgia, and on the other hand, the European Union and the European Atomic Energy Community and their member states,” Articles 306, 312.

1. Introduction

The transformation of Georgian Law which was based on the dissolution of the Soviet Union and the process of creation of an independent Georgian state, took the course of Europeanisation from the very beginning. This is confirmed by the Georgian Parliament Resolution of 1997 on Harmonisation of Georgian Legislation with the legislation of the European Union, which required that every normative act had to be in compliance with the EU standards.

If we consider the harmonisation of laws as both – the process of adoption of legislative acts and the practice of their enforcement and interpretation³, the ambitious goal of the nineties of the last century did not correspond with reality. At that time, Georgia did not have the necessary experience for the creation of legislation of European standard, especially, it was impossible to apply such laws into practice. Creation of a new national state, transformation of the existing communist regime into democratic system and transition of planned economy to the principle of free market were the stated goal, achievement of which was met with certain scepticism at that time. Nevertheless, the existence of political will opened the door for radical changes and the positive practice of international cooperation soon made the suspicion of impossibility to do that disappear, which made it possible to share Western experience and transpose it into Georgian reality.⁴

Whereas for member states of the EU approximation of legal systems is one of the mechanisms for the functioning of internal market, for Georgia, it is an opportunity to create a modern democratic, legal, social and ecological state. In the nineties of the last century, under the large wave of reform, the law reform often had spontaneous character and ill-considered transposition of legal institutes occurred. Within the framework of international cooperation modern laws of European standard were drafted, though the practice of their enforcement was different. The enactment of new laws was followed by a large wave of their amendments, considering the problems of their enforcement practice. In the legal literature, this phase of legal harmonisation was called “Random Europeanisation”.⁵

The Association Agreement between the European Union and Georgia signed in Brussels on June 27, 2014 gave new power to the process of Europeanisation of Georgian Administrative Law.⁶ This phase is called “Associated Europeanisation”⁷. The Association Agreement is important not because it has started the process of Europeanisation of Georgian Law, but because it has given organised and legal nature to this process.

³ Lohse J.E., *Rechtsangleichungsprozesse in der Europäischen Union*, Mohr Siebeck, 2017, 71.

⁴ Winter G., Kalichava K., *Rechtstransfer und Eigendynamik in Transformationsländern: Das Beispiel der Verwaltungsrechtsentwicklung in Georgien*, ZaöRV 2019, 273.

⁵ Kalichava K., *Environmental Law*, Tbilisi, 2018, 32.

⁶ Association Agreement between Georgia, of the one part and the European Atomic Energy Community and their member states, of the other part, was initialled on November 28-29, within the framework of the Vilnius Summit of the Eastern Partnership. The Agreement was signed on June 27, 2014 in Brussels, and ratified by Georgian Parliament on July 18 of the same year. With the Association Agreement Georgian authorities undertook the obligation of approximation to various directives, including those regulating environmental protection and climate change.

⁷ Kalichava K., *Europäisierung des georgischen Verwaltungsrechts*, DÖV, 2018, 92f.

Europeanisation of Law in terms of European integration implies the process of approximation of national and supranational legal systems, which is not unilateral, but rests upon bilateral ties. Unlike horizontal Europeanisation, where the modern European administrative law was formed by the mutual impact of national and European legal orders, the Association Agreement does not have a bilateral nature in terms of the obligation of legislative approximation, but it implies the unilateral obligation of Georgia⁸. Therefore, a legitimate question arises, that is, whether it contains the elements which will enable conducting the process by taking into consideration the historical, cultural, economic and political context of the country.

In the context of approximation of legal systems, it is a noteworthy fact that the approach towards the transfer of legal norm is diverse in scientific literature. One author thinks that a legal norm, as an autonomously functioning phenomenon, is easily transplantable and does not depend on social context, it is easily assimilated by a new body. On the contrary, a second author claims that it is impossible to transfer a norm, as at this time, the content of the transformed norm, its social function and its culture-based identity is changed. In a new environment a norm starts to exist in a completely different form and meaning, or fails to exist at all⁹. This paper is not based on these contradicting opinions, but on the approach that a legal norm cannot bring identical outcome in a foreign legal system, as it does in its domestic environment. A norm always faces changes in the light of the local context. The transformation of a legal norm of another country implies the creation of the national one based on universal values, which is partially compatible with local culture and to some extent, becomes the basis for the formation of new cultural values itself. Any other kind of understanding of the Europeanisation of Law would make it impossible to achieve the goals of the Association Agreement.

Choosing the Environmental Law for the analysis of the Europeanisation process of Georgian Law results from the fact that it is the field where the need and opportunity of interstate cooperation is high. The paper is based on the thesis that comparative law research is a necessary instrument for the proper flow of the Europeanisation process of Environmental legislation. The problem existing in this field is related to the fact that approximation of Environmental Law and Comparative Law, as well as full implementation of the methods and instruments of Comparative Law in the process of development of Environmental Law still have not been managed. This is due to objective reasons; first of all, comparative law requires such development that will clearly form those major elements, based on which it will be possible to perform the systematic analysis of the issue. On the other hand, Environmental Law is a complex and dynamic field and its certain subfields are of utterly technical character. It requires great effort and knowledge to process the dynamic and complex legal problem of environmental protection using also the difficult and complex scheme of comparative law.

2. Clarification of the Terminology

In this paper, the term Europeanisation of Georgian Law means the goal of reforming the Georgian legal system, and harmonisation is the instrument for achieving this goal.

⁸ Kalichava K., *Environmental Law*, Tbilisi, 2018, 27.

⁹ Lohse J.E., *Rechtsangleichungsprozesse in der Europäischen Union*, Mohr Siebeck, 2017, 95, notes 8-9. Also, Kalichava K., *Environmental Law*, 2018, 40.

In the sources of the primary law of the European Union, the term harmonisation appears for the first time in the Treaty of Paris “On Coal and Steel Union” (1951)¹⁰. The 1957 Treaty of Rome “On European Economic Union” established the term “approximation” in the legal space¹¹. Nowadays, both terms are used simultaneously and in parallel in the law of the European Union. Often, harmonisation and approximation are used as synonyms.

There is gradual approximation and dynamic approximation in EU law. The EU-Georgia Association Agreement defines gradual approximation as follows: “Georgia shall carry out gradual approximation of its legislation to EU law as referred to in the Annexes to this Agreement, based on commitments identified in this Agreement, and in accordance with the provisions of those Annexes. This provision shall be without prejudice to any specific principles and obligations on approximation under Title IV (Trade and Trade-related Matters) of this Agreement.”¹²

Dynamic approximation is defined as follows: “In line with the goal of gradual approximation by Georgia to EU law, the Association Council shall periodically revise and update Annexes to this Agreement, including in order to reflect the evolution of EU law and applicable standards set out in international instruments deemed relevant by the Parties, and following the completion of the respective internal procedures of the Parties, as appropriate. This provision shall be without prejudice to any specific provisions under Title IV (Trade and Trade-related Matters) of this Agreement.”¹³

Despite the terminological confusion, “harmonisation” can be understood as a general concept, which ensures the equality of national norms both by creating similar norms and by cancelling different regulations. Approximation is a means of harmonising the legal norms of particular states and includes an active process of replacing national norms with secondary legal instruments¹⁴.

Approximation does not mean “identity” of norms, since the purpose of approximation can be achieved by different legal instruments. The content of the approximation of law forms the main common features that make approximation possible. Copying legal norms does not mean unconditionally achieving the goal of approximation. Only the interpretation of the norm and knowledge of its foundations allow to determine whether two identical terms in different languages carry a common content or not. Just as the literal concordance of the norms is not a guarantee that the substantive convergence has been achieved, the different wording does not provide a basis for the conclusion that the goal of convergence has not been achieved. For the convergence of legal norms, the main prerequisite is that the norm established in the national legislation provides the possibility of an appropriate definition of the goal and has the potential to create the possibility of identity of its use, that is, to provide the possibility of identical decisions for identical cases¹⁵.

¹⁰ Treaty Establishing the European Coal and Steel Community, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF>> [30.05.2025].

¹¹ Approximation of Laws. Treaty Establishing the European Economic Community and Related Instruments (EEC treaty), Part three, title I, chapter 3: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997E/TXT>> [30.05.2025].

¹² “The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part”, Article 417.

¹³ “The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part”, Article 418.

¹⁴ See *Lohse J.E.*, *Rechtsangleichungsprozesse in der Europäischen Union*, Mohr Siebeck, 2017, 28.

¹⁵ *Ibid*, 33.

Based on the mentioned definitions, we can conclude that the legal approximation with the European Union implies not only the transposition/reflection of European standards in the national legislation, but also their enforcement and constant updating as a result of the relevant legislative changes in the European Union law. National Legislation shall define the minimum standards set by a Directive. EU countries are empowered to set and establish a higher and stronger standard than a Directive requires. This gives the states the opportunity to take into account their own national practices and peculiarities in the process of legal approximation, to develop individual means and mechanisms of enforcement or responsibility, meeting the minimum standards of EU directives, which is a prerequisite for the new legislation to be more effective and efficient for a particular state. These approaches are directly spelled out/defined in binding Directives.

3. Environmental Part of the Association Agreement

European environmental policy includes four fundamental objectives, namely: protection of the environment and improvement of its quality, protection of human health, rational use of natural resources, taking measures at the international level to solve regional or global environmental problems and combat climate change¹⁶. In accordance with these goals, for the purpose of legislative approximation, provided by the EU-Georgia Association Agreement, there is significant progress in Georgian environmental legislation, in particular, in the direction of environmental management, air quality, water resources management, waste management, nature protection, industrial pollution and combating climate change.

From the 27 EU Directive/Regulation, stipulated by the Association Agreement, legislative approximation has been already fully/partially implemented of 20 acts mentioned therein, and in order to approximate 7 EU legal acts, drafts of normative acts have been delivered and active work is underway. Fulfillment of aforementioned obligations and effective legislative approximation promotes maintaining, protecting and rehabilitating the quality of the environment in the country, protecting people's health, making sustainable use of natural resources and promoting efforts at the international level to deal with regional or global problems of environmental protection, including the United Nations 2030 Sustainable Development Goals which are to achieve.

In the direction of environmental governance, the Parliament of Georgia adopted such important legislative acts as the Environmental Assessment Code, which subjected to environmental impact assessment all those activities (by scale and category) that have a significant impact on the state of the environment and human life and/or health¹⁷. The Code introduces principles of the EU Environmental

¹⁶ The Treaty on the Functioning of the European Union, Part Three – Union Policies and Internal Actions, Title XX, Environment, art. Article 191.

¹⁷ The Environmental Assessment Code is fully in line with the requirements of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes, Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC, and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain

Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) directives, as well as the approaches of the Convention on Environmental Impact Assessment in Transboundary Context (Espoo Convention) and its protocol on SEA and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). In particular, the Code broadened the list of activities subject to EIA. The Code also ensures a higher degree of public participation at all stages of the EIA procedure (screening and scoping, as well as during the procedure for issuing Environmental Decision). Namely, the mechanism of public involvement has become clearer and more effective at the earliest possible stage of the environmental impact assessment process, ensuring that the views of all stakeholders are taken into account in the decision-making process. The SEA procedure which was introduced by the Code, contributes to the integration of environmental and human health-related aspects in strategic planning.

The Environmental Assessment Code provides the establishment/ introduction of a completely new transboundary environmental impact assessment procedure, which implies the involvement of a foreign state in the environmental decision-making process, when an activity or strategic document affects the environment of the foreign country. According to the Environmental Assessment Code the mentioned procedure will be implemented as soon as the Convention “On Environmental Impact Assessment in a Transboundary Context” and its Protocol “On Strategic Environmental Assessment” will come into force in Georgia.

The Law of Georgia on “Environmental Liability” needs to be mentioned¹⁸ which aims to develop a system of environmental liability based on the “polluter pays principle” and serving the elimination/ mitigation of environmental harm. The Law introduced a completely new mechanism of environmental liability in Georgia, according to which a person causing significant damage to the environment will be obliged not to pay the monetary compensation, but to take necessary remedial measures to restore the environment in accordance with a pre-defined plan/schedule. The polluter pays principle is one of the binding principles of the EU environmental policy, along with the precautionary and prevention principles.¹⁹

Improving the quality of ambient air is one of the main priorities in order to improve the living environmental conditions of the population. Accordingly, Annex XXVI of the Association Agreement, of course, provides, among other things, the obligation of legal approximation in this direction. As a result of the amendments made in 2020 to the Law of Georgia “On Ambient Air Protection” and the adoption of subordinate normative acts/bylaws, the national legislation has been fully in line with the framework legislation and standards of the European Union in the field of atmospheric air quality management. In order to reduce air pollution from the industrial sector in the whole country a

public and private projects on the environment and Espoo Convention on Environmental Impact Assessment in a Transboundary Context and the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context.

¹⁸ The law on environmental liability is fully in line with Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

¹⁹ The Treaty on the Functioning of the European Union, Part Three Union Policies and Internal Actions, Title XX – Environment, Article 191.

legislative package was adopted in March 2021, that tightened liability of industrial plants for exceeding emission limit values and absence of abatement equipment. It introduced obligatory conditions for industrial plants having a significant negative impact on the environment to install automatic self-monitoring systems for emissions²⁰. In order to renew and recover the existing vehicle fleet and reduce air pollution from transport, Georgia has recently implemented and initiated numerous important activities. Sanctions were tightened for not carrying out mandatory periodic technical inspections of vehicles. In June 2023 the Government of Georgia approved a technical regulation determining the emission standards for vehicles. In addition, in order to reduce air pollution from the transport sector, an emission standard (Euro 5) has been established for cars imported into the country, which will come into effect gradually in 2024 and 2025. On September 4, 2023, the control of vehicle emissions on the road began²¹. Georgian environmental legislation setting quality standards for heavy fuel oil, gas oil and marine fuel is in line with Directive 2016/802 of the EU²².

The main legislative act regulating the field of water protection and use in Georgia until 2023 was the Law of Georgia “On Water”, which was adopted in 1997. Despite the fact that, after its adoption, a number of changes were made to the aforementioned law, it was not based on modern standards of water resources management and, therefore, could not ensure sustainable management of water resources. Along with this, the existing legal system of water resources management is fragmented (dispersed in various legislative or sub-legal normative acts) and ineffective. Due to the mentioned inefficient legal system, there was no rational use and sustainable management of water resources in the country. In 2023, the Parliament of Georgia adopted the Law of Georgia “On Water Resources”, on the basis of which an integrated water resources management system will be established, which means that the appropriate legal/institutional foundations will be created. The draft Law is based on the principles of integrated water resources management and meets the requirements of the EU water legislation²³.

²⁰ The Law of Georgia “On Ambient Air Protection” regarding amendments to the Law of Georgia, (Matsne, 28/05/2020), <https://matsne.gov.ge/ka/document/view/4821836?publication=0>; The Law of Georgia “On Ambient Air Protection” regarding amendments to the Law of Georgia, (Matsne, 28/07/2020), <https://matsne.gov.ge/ka/document/view/4918031?publication=0>.

²¹ Resolution of the Government of Georgia “On the implementation of the technical regulation on the implementation of the marginally permissible norms of emission (emissions) from various types of transport and other mobile-mechanical means polluting the air with harmful substances, provided for by the European Union legislation, in the territory of Georgia” N238, 28.06.2023. <<https://matsne.gov.ge/ka/document/view/5845990?publication=0>> [25.09.2025].

²² Technical regulation on determining the limit values for sulfur content in certain liquid fuels has been approved by Resolution No. 256 of the Government of Georgia on May 25, 2017.

²³ The law was prepared within the legal approximation of 5 legal acts of the European Union: Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy as amended by Decision No 2455/2001/EC; Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks; Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment as amended by Directive 98/15/EC and Regulation (EC) No 1882/2003; Directive 98/83/EC of 3 November 1998 on quality of water intended for human consumption as amended by Regulation (EC) No 1882/2003; Directive 91/676/EC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources as amended by Regulation (EC) No 1882/2003.

In accordance with EU legislation, in order to fulfill the obligations of the Association Agreement, a waste management system based on European approaches was established in Georgia, which provides the legal conditions for the implementation of measures aiming at the prevention of generation of waste, increased re-use, and environmentally sound treatment of waste. The first piece of legislation that was approximated with the EU legislation, was the Waste Management Code of Georgia, adopted by the Parliament in 2014. The Code defines waste management hierarchy as follows: prevention, re-use, recycling, recovery (including energy recovery), and disposal. It also introduces some major principles, such as Precaution, Polluter Pays, Proximity and Self-Sufficiency.

In 2023, the Parliament of Georgia adopted the Law “On Industrial Emissions”. As a result of the adoption of the Law, an integrated permit system will be introduced in the country, the purpose of which is the prevention, reduction and control of emissions into the air, water and soil as a result of industrial activities, as well as the prevention of waste generation. This approach implies fundamental changes in the permitting system including the development of a relevant legal, institutional, administrative, and procedural scheme and the application of modern environmental management principles, such as Best Available Techniques (BAT) and Emission Limit Values (ELV) as required by the Association Agreement. On December 12, 2022, the government discussed and approved the draft law on Industrial Emissions, which was then sent to the Parliament for adoption.

In 2020, the Parliament adopted the Forest Code prepared in accordance with the mandatory principles of the European Union. The new Code provides the legal framework for sustainable forest management that will support the ecological stability of forest ecosystems, enhance the socio-economic benefits for the public and reduce the pressure on forests. The purpose of the Code is to protect the biological diversity of forests in Georgia, to maintain and improve the quantitative and qualitative characteristics of forest properties and resources in order to fulfill their ecological, social and economic functions. To achieve the mentioned goal, the Code defines the main principles of forest management, which should be the basis for sustainable forest management.

4. Comparative Environmental Law

Considering the transnational character of the Environmental Law, a comparative research method holds significant position. As environmental problems are not limited to the boundaries of the Georgian state, environmental protection does not only operate in the context of European and International Law, but also has a comparative legal function. The comparative approach to Environmental Law serves to reveal and analyse the common and the different factors and their causes based on the comparison of environmental systems of different states. It must also be noted here that the comparison must not be limited to only the comparison of legislative texts, but it must also consider the actual environmental situation and existing political, economic, legal and administrative factors, as well as law enforcement standards.²⁴

Legal comparison, first of all, gives us a descriptive outline of existing norms, which also provides the opportunity for a better understanding of own legal norms. Its important function is

²⁴ *Kloepfer M.*, Umweltrecht, CHBECK, 2004, 721.

revealed by the fact that it shares with national legislation the experience which has been accumulated in terms of the effective and ineffective ways of solution of a problem. Comparison of Environmental Law as an international comparison offers us a large amount of material with regard to the usefulness of already applied instruments. It stimulates the creativity of the law-maker in taking political decisions and controls it at the same time²⁵.

The harmonisation of legal norms as a part of the Association Agreement is the major objective of comparative law. In its turn, this establishes an important instrument of international cooperation in the environmental field. Using Comparative Law for the purposes of transformation of Environmental Law requires the development of a systemic and methodical approach. It is necessary to determine the basic elements of Comparative Law, based on which the law-making process in the country will be implemented. We may share the input provided in legal literature, which names the following composite elements for the process of comparative analysis²⁶:

a) Understanding the Outcome to be Achieved

A certain legal problem creates the necessity to apply the Comparative Law method. Establishment of its existence is based on the prior normative understanding of the one who applies it. The necessity of normative solution of the problem depends on its purpose. It has different functions in the scientific, research, justice and law-making process.

b) Specification of the Factual and Legal Problems to be Studied

The ascertaining and specification of the legal problem to be studied is the second element of the comparative analysis of Environmental Law. It is necessary to mark out and describe the factual or legal problem of the disputed issue clearly and comprehensively and it must be processed using the comparative method. The problem may be demonstrated as a non-legal social problem or it may have the content of a legal problem.

c) Selection of the Legal Norms to be Compared

Upon formulating national environmental norms, it is important to correctly select the normative acts to be compared. We should realize that the revealed legal problem and the norm selected for its solution cannot be found in an identical form in legal systems of other countries, but it can rather be a similar case. We should also consider the context of the problems of certain countries, which means that within the framework of comparison, not only different regulations are compared, which serves the solution of a similar problem, but the similarity between the problems to be solved is also examined. As long as structural similarity is revealed, comparative research makes sense. Often, in this regard, introducing the transformation process of PostSoviet Union countries is more relevant for Georgian reality, as the basic factual circumstances of the reform are identical. The experience of these countries provides meaningful information for comparative analysis in terms of the usefulness of certain institutes of Environmental Law in real life.

²⁵ Ibid.

²⁶ Markus T., Zur Rechtsvergleichung im nationalen und internationalen Umweltrecht, ZaöRV, 2020, 649.

d) Description and Analysis of the Norms to be Compared

In-depth analysis of the norms and non-legal grounds to be compared is an important element of comparative analysis. Here again, we have to take into account that the factual circumstances and legal problems in the systems to be compared are always different. Therefore, it is important to describe factual circumstances and also compare legal norms. If a non-legal situation is described in a sufficiently clear manner, it is possible to link the problem with the legal regulation in a proper manner.

We should give due consideration to the circumstance that the analysis of a foreign legislation is conducted on the basis of one's own dogmatic, socio-economic and lingual knowledge. In terms of the productiveness of comparative analysis, it is necessary to perform the analysis of a foreign country independently from one's own dogmatic and lingual context and from a neutral perspective. Here it is also necessary to introduce the practice of application of these norms, as well as consider the informal instruments for the solution of social norms and problems.

e) Comparative Legal Analysis

The essence of Comparative Law lies in the comparison of the comparable norms, which serve the solution of equivalent problems on the grounds of their common and distinguishing characteristics. The analysis must be based on common and distinguishing characteristics, which are revealed in:

- Social, economic, cultural, historical and ecological grounds;
- Legal grounds;
- Structure, content and sources of Ecological Law;
- Institutional grounds;
- Law application and enforcement practice.

In the process of comparative analysis, it is necessary to apply not only legal instruments, but also the instruments of social and natural sciences.

f) Evaluation

The results of the comparative analysis must be evaluated on the basis of systematic and foreseeable criteria. The evaluation must provide the answer to the question regarding the impact of the norm and the possibility of its integration from the issuing legal system into the receiving legal system. The main focus is put on the capacity of the norm to achieve the same outcome in the changed environment existing within the receiving state, as it had in the issuing state.

Within the framework of comparative analysis, the distinguishing impact of an identical legal norm in a different social context is examined. In its turn, the capacity and impact of integration depends on many factors, which can be divided into legal and non-legal factors.

In legal terms, the degree of compatibility of a norm is revealed in relation to the following factors:

- Governance tradition;
- Legal culture practice;

- Hierarchically superior legal norms;
- System of the form of government and distribution of competences;
- Law principles;
- Administrative proceedings and legal proceedings.

Among non-legal factors, the following are named:

- Political will of legal reception;
- Relations between the receiving and issuing states;
- Political attitude towards the environmental policy in the receiving state and distribution of powers;
- Structure and process of transformation process.

5. The Challenges of the Approximation of Environmental Legislation

At this stage of development, a large part of environmental legislation is approximated to the EU legislation. The following issues represent an important challenge in the way of implementing the effective enforcement mechanism of new legislative acts:

a) Compliance of Georgian Legislation with EU Legislation and the Best Practices of EU Countries

The best practices to be shared in the process of Europeanisation of Law cannot be universal in the case of all states. There are many important factors to consider in order to successfully apply best practices. Appropriate techniques must be adapted to individual situations and practices in specific contexts, for example, specific cultural needs or changes that will be necessary to take into consideration during the procedure²⁷. Therefore, in order to successfully implement the law enforcement process and to identify the gaps in the existing legislation, it is necessary to study international best practices and guidelines and adapt to own challenges. This process should be supported by the strengthening of the role of comparative law, which in turn requires the creation of strong comparative legal research institutes within the framework of international scientific cooperation, which, despite the important academic cooperation, especially with German scientific institutions, is not as extensive as one would wish. During the transformation of the law, it is important not only to choose the correct system of the issuing law, but also the readiness of the recipient to actually ensure the reflection of the transformed law in legislation and practice is significant. This cooperation is multifaceted. Here we would like to highlight the inner shell, which includes cooperation between Georgian and foreign consultants. It is necessary to establish a dialogue type²⁸ of cooperation in the reform process, which implies the cooperation of local experts with equal

²⁷ Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters prepared under the Aarhus Convention, United Nations Publication, Sales No.: E.15.II.E.7 (Maastricht Recommendations), p. 13, line 9.

²⁸ Winter G., Kalichava K., Law Transfer and Internal Dynamics in Transitional Countries: The Case of Georgian Administrative Law, *Journal of Public Law*, 1/2023, 63.

qualifications and external advisors. Without strengthening internal resources, the role of external experts who have minimal knowledge of the legal system, culture and needs of the host state and bring ready-made draft laws is futile.

b) Lack of the Human and Material Resources and Relevant Knowledge

Another important challenge for establishing an effective law enforcement mechanism is the lack of human and material resources and relevant knowledge in the public sector. In many cases, new legislation for both the public and private sectors defines such obligations, the fulfillment of which is related to the knowledge of relevant theory/techniques and/or the need to have material resources, which we do not have at this stage of development. Accordingly, the effective law enforcement process should also include equipping the public sector and the interested private sector with appropriate knowledge and material resources.

The formation of a modern public administration culture requires a lot of effort, without which the modern European legislation does not provide the result that lies in the goal of its transformation.

c) Economic Development Interests

The progress of environmental law and its effective enforcement is closely related to economic development. In the short term, legislation passed can impose potentially significant economic costs on the private sector.

Economics is not the only factor influencing the establishment of an effective enforcement mechanism for environmental legislation. In recent years, social/community awareness has been greatly increased in relation to environmental issues, therefore the social factor has no less influence in the process of making environmental decisions. As we have already mentioned, environmental aspects intersect with almost all areas of economic or social development. Balancing environmental activities and economic growth is a challenge for the governments of all countries, and Georgia is no exception. In order to meet these challenges, it is also necessary to integrate environmental issues into relevant political directions and national policy documents.

During the implementation of the environmental legislation enforcement mechanism, it should be taken into account that environmental protection and economic development should be considered in a complementary and not controversial manner. Economic development should not occur at the expense of environmental protection. It is crucial that a balance be maintained between the development of the country and the use of natural resources, and that the well-being of society is ensured only when environmental and social aspects are given equal importance as economic growth.

d) Environmental Education

Environmental education is also important, in order to achieve proper public participation in the decision-making process related to environmental issues and to promote the formation of a responsible attitude towards the environment in society.

Integration of environmental issues into other sectoral policies and activities is another important precondition for the establishment of an effective law enforcement system. This approach

requires commitments and contribution of ministries and, in general, the government as a whole. In this regard, the most important prerequisite is the involvement of state authorities, which are involved in the planning of development of the socio-economic sectors, that exerts the greatest pressure on the environment or plays an important role in preventing and responding to environmental challenges.

The importance of cooperation between central and local authorities and citizens in raising public awareness is demonstrated by the reticent attitude of the public towards the draft law, made for the creation of biosphere reserves. A biosphere reserve is a modal tool that shows how to achieve the coexistence of environmental protection (ecological) and profit (economic) interests, based on appropriate criteria, as an example of selected area. A biosphere reserve should establish a set of rules for the conduct of people, which should ensure the protection of biological diversity taking into account the interests of future generations and create a basis for the protection of the social and economic interests of the present generation²⁹. Society and governance were not prepared for the concept developed within the framework of international cooperation. This is the case when law should acquire the function of transformation, creation of a new cultural value. This is achieved when law transformation is accompanied by public awareness measures.

6. Conclusion

Georgian environmental protection law is one of the visible examples of Europeanisation of Law. The Association Agreement gave the process an organised character and put it in a certain framework in terms of content and results.

The perspective of becoming part of the European Union creates a fertile ground for the Europeanisation of Law. However, the results of the legal approximation do not depend only on the political will of the receiving state; appropriate support must be provided by the internal (state and public) structures of the country as well.

The process of legal approximation is interesting in that it is partly the result of approximation of legal cultures, and partly becomes the basis for the establishment of a new culture (values) in the country.

In the process of fulfilling the obligations assumed by the Association Agreement, it is necessary to provide cooperative mechanisms that will contribute to the creation of local human and institutional resources in public and scientific-research institutions, which will become a guiding force in this process.

Legal approximation is not only the creation of European standard laws, but also includes the process of its enforcement. The use of comparative research methods in the law-making process will make it possible to assess the impact of the law in terms of the predictability of its implementation in practice.

Although the Association Agreement has the character of determining unilateral obligations and does not imply a bilateral harmonisation process, it can create experience for the purposes of the development of European countries and EU law. From this point of view, the Europeanisation process

²⁹ Turava P., Establishment of Biosphere Reserve in Georgia, 2017, 3.

of the current law based on the Association Agreement can be described as a process of harmonisation of legal systems.

Bibliography:

1. “Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part” (27/06/2014), <https://matsne.gov.ge/ka/document/view/2496959?publication=4> [30.05.2025].
2. Law of Georgia on Environmental Assessment Code, 890-III, <https://matsne.gov.ge/document/view/3691981?publication=12> [30.05.2025].
3. Law of Georgia on Water Resources, 3423-XIოლ-Xოჰ, <https://matsne.gov.ge/document/view/5846594?publication=0> [30.05.2025].
4. Law of Georgia on Environmental Liability, 244-IVოლ-Xოჰ, <https://matsne.gov.ge/document/view/5109151?publication=1> [30.05.2025].
5. Law of Georgia on Industrial Emissions, 3381-XIოლ-Xოჰ, <https://matsne.gov.ge/document/view/5845429?publication=1> [30.05.2025].
6. Law of Georgia on Making Amendments to the Law on Protection of Atmospheric Air (Legislative Herald, N5948-ss, 28/05/2020), <https://matsne.gov.ge/ka/document/view/4821836?publication=0> [30.05.2025].
7. Law of Georgia on Making Amendments to the Law on Protection of Atmospheric Air (Legislative Herald, N6903-rs, 28/07/2020), <https://matsne.gov.ge/ka/document/view/4918031?publication=0> [30.05.2025].
8. Decree of the Government of Georgia on Approval of the Technical Regulation on the Introduction of EU-Legislated Emission Limit Values for Harmful Substances Emitted by Various Types of Transport and Other Mobile Mechanical Means into the Air within the Territory of Georgia, No. 238, 28.06.2023, <https://matsne.gov.ge/ka/document/view/5845990?publication=0> [30.05.2025].
9. Treaty Establishing the European Coal and Steel Community, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF> [30.05.2025].
10. Approximation of Laws. Treaty Establishing the European Economic Community and Related Instruments (EEC Treaty), Part Three, Title I, Chapter 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997E/TXT> [30.05.2025].
11. Treaty on the Functioning of the European Union, Part Three – Union Policies and Internal Actions, Title XX, Environment.
12. Directive 2011/92/EU of 13 December 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, <https://eur-lex.europa.eu/eli/dir/2011/92/oj> [30.05.2025].
13. Directive 2001/42/EC of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment, <https://eur-lex.europa.eu/eli/dir/2001/42/oj> [30.05.2025].
14. Directive 2003/35/EC of 26 May 2003 Providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes Relating to the Environment, <https://eur-lex.europa.eu/eli/dir/2003/35/oj> [30.05.2025].
15. Directive 2004/35/EC of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, <https://eur-lex.europa.eu/eli/dir/2004/35/oj> [30.05.2025].

16. Directive 2000/60/EC of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, <https://eur-lex.europa.eu/eli/dir/2000/60/oj> [30.05.2025].
17. Directive 2007/60/EC of 23 October 2007 on the Assessment and Management of Flood Risks, <https://eur-lex.europa.eu/eli/dir/2007/60/oj> [30.05.2025].
18. Council Directive 91/271/EEC of 21 May 1991 Concerning Urban Waste-Water Treatment, <https://eur-lex.europa.eu/eli/dir/1991/271/oj> [30.05.2025].
19. Council Directive 91/676/EEC of 12 December 1991 Concerning the Protection of Waters Against Pollution Caused by Nitrates from Agricultural Sources, <https://eur-lex.europa.eu/eli/dir/1991/676/oj> [30.05.2025].
20. Kalichava K., Environmental Law, Tbilisi, 2018, 27, 32, 40.
21. Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, prepared under the Aarhus Convention, United Nations Publication, Sales No.: E.15.II.E.7, https://unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf [30.05.2025].
22. Kalichava K., Europäisierung des georgischen Verwaltungsrechts, DÖV, 2018, 92 f.
23. Kloepfer M., Umweltrecht, C.H.Beck, 2004, 721.
24. Lohse E. J., Rechtsangleichungsprozesse in der Europäischen Union, 2017, 28, 33, 71, 95.
25. Markus T., Zur Rechtsvergleichung im nationalen und internationalen Umweltrecht, ZaöRV, 2020, 649.
26. Turava P., Establishment of Biosphere Reserve in Georgia, 2017, 3.
27. Winter G., Kalichava K., Rechtstransfer und Eigendynamik in Transformationsländern: Das Beispiel der Verwaltungsrechtsentwicklung in Georgien, ZaöRV, 2019, 273.

Khatuna Loria*

Tatia Barakadze**

Annulment of an Individual Administrative-Legal Act without Resolving the Disputed Issue by the Court and Ordering the Issuance of a New Act – an Effective Means of Protecting the Rights of an Interested Person?

In a modern democratic legal state, the development of effective mechanisms for the protection of human rights and their practical implementation remains a challenge, which is unimaginable without the active intervention of the court as a controlling body. Such intervention is particularly important when the legality of administrative measures is reviewed through administrative bodies, and a person requests the protection of their rights and the restoration of justice.

As the dispute takes place between two unequal subjects and balance is the cornerstone of making a true and fair decision, this article discusses the role of the court in administrative proceedings, the expression of the inquisitorial principle, and when an individual administrative-legal act is annulled without resolving the disputed issue. The validity and effectiveness of using this mechanism are also discussed. The mechanism offered by administrative procedural legislation is evaluated in terms of its sufficiency and as the only primary means of a fully justified guarantee for the subsequent protection of a person's legitimate interests and rights.

Keywords: *inquisitorial nature, adversarial principle, administrative proceedings, discretionary authority, annulment of an act.*

1. Introduction

In a democratic state, the protection of fundamental human rights is both the goal and a challenge for all legal systems and instruments. Accordingly, when researching the branches of law, it is usually an essential and, in most cases, a primary problem to find ways to eliminate obstacles to the protection of human rights and to create fundamental scientific foundations and theories for their effective protection and implementation in real life.

An effective mechanism for protecting human rights is closely related to the supremacy of law, which in turn implies judicial control over the interference of state authorities in a person's rights. Typically, such control should be exercised by the judicial authority, as judicial control provides the best guarantees of independence, impartiality, and adherence to due procedures.¹

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

** Doctoral Candidate in Law at the Faculty of Law, Ivane Javakhishvili Tbilisi State University

¹ Turava, P., Firtskhalashvili, A., Kardava, E., Administrative Proceedings in Public Service, Tbilisi, 2020, 81 (In Georgian).

Hence, it is important to discuss the role of the court in administrative proceedings, the expression of the inquisitorial principle, and when an individual administrative-legal act is annulled without resolving the disputed issue. It is also important to consider the validity and effectiveness of using this mechanism, and to review it within the framework of the main principles characteristic of administrative law, to ascertain how protected the right to a fair and timely review is in such cases, whether the mechanism offered by administrative procedural legislation is effective in terms of protecting legitimate interest, and also if it is a sufficient and the only primary means for absolutely justified assurance of subsequent protection of a person's legitimate interest and rights.

Given the above, it will also be important to review what reasoning and arguments the court uses and how sufficient such reasoning is for the interested person's case to move/return from the court to administrative proceedings (to the relevant administrative body).

2. The Importance of Administrative Procedural Law, as a Branch of Legal Protection and Control of Administrative Bodies, and the Content of Article 32.4 of the Administrative Procedural Code

In addition to regulating relations between citizens, the law also regulates their relations with administrative bodies. A person has the right to receive certain information, express their opinion, have the opportunity to protect their rights in court, etc.

Administrative justice bodies must check the compliance of administrative bodies' managerial functions with the law, which stems from their function of legal protection. Any form of activity of administrative bodies is subject to judicial control. Accordingly, a citizen has the right to file a lawsuit with the administrative court if their rights are violated by an administrative body.²

The most important principles and procedural guarantees of administrative proceedings have been defined by the General Administrative Code³ since 2000, but since 2017, the principle of fair administrative proceedings has acquired the significance of a constitutional legal principle.⁴

The current state of administrative procedural law was preceded by numerous reforms, since its importance has become a significant basis for controlling state activities and implementing actions over the years. The function of legal protection obliged administrative justice bodies to check the compliance of the managerial function with the law.⁵

One of the mechanisms for protecting rights, stemming from the function of legal protection, was enshrined in Article 32, Part 4 of the Administrative Procedural Code of Georgia⁶ (hereinafter referred to as APC), which represents a repressive right protection mechanism and allows the court to intervene in the process with immediate response through the administration of justice. The aforementioned norm establishes two factual circumstances when the court begins to discuss the

² Loria V., *Administrative Law of Georgia*, Meridian Publishing House, Tbilisi, 2002, 13 (In Georgian).

³ Law of Georgia, *General Administrative Code of Georgia*, 1999 (In Georgian).

⁴ Gvaramadze T., *Fair Administrative Proceedings and European Standards*, Collection of Articles, Law Journal N2, Tbilisi, 2023, 236 (In Georgian).

⁵ Ibid, 13.

⁶ Law of Georgia, *Administrative Procedure Code of Georgia*, 1999 (In Georgian).

annulment of an act without resolving the issue: 1. Important circumstances for the case have not been investigated, or have been partially investigated. 2. The important circumstances for the case have not been evaluated. Hence, in the opinion of the court, based on this norm, we have an incomplete proceeding. In addition, there must be an urgent legitimate interest of the party in the annulment.

It should be noted that a decision made based on APC Article 32.4 is similar in nature to a decision made based on APC Article 33 (ordering the issuance of an administrative-legal act).⁷ In both cases, the party's interest is to order the issuance of an act or a new act. However, the basis of the latter is the party's lawsuit based on the APC Article 23, where the party appeals the refusal to issue an act or there is a violation of the legal deadline for issuing an act. In this case, the court does not substantively discuss the issue and decides to order the issuance of the act or refuses to satisfy the claim, only in this part. When deciding based on APC Article 33, the court is more constrained by the substantive authority of the administrative body and discusses only the legality of refusing to issue the act, without interfering with what decision the administrative body will make when issuing the act. Whereas on the basis of Article 32.4, the court assesses the legality of an already issued act and, hence, its reasoning and evaluations that should accompany the annulment of the act and the issuance of a new act, to some extent guide the administrative body on what issues it should discuss additionally.

It should be noted that the use of the above-mentioned norm requires considerable caution and a high standard of justification, as its correct application is directly related to the constitutionally guaranteed right to a fair trial. As a result of constitutional changes, by creating this norm, the right to so-called “good governance” and “fair administrative proceedings” was enshrined as a fundamental right.⁸ Good governance, as the codification of a fundamental right in the country's main law, will contribute to the protection of individual rights and, at the same time, to the effectiveness of public administration.⁹

3. Principles Characteristic of Administrative Procedural Law in Terms of Controlling and Restraining Administrative Bodies

The Constitution of Georgia defines the basic principles of all branches of law, which individual sub-branches strengthen and extend in such a way that the essence of the basic principles is not violated. Constitutionally enshrined principles, it can be said, are exceptionally dominant in administrative law¹⁰.

⁷ *Kopaleishili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T.*, Administrative Procedural Law Handbook, Tbilisi, Lawyers' World, 2018, 255 (In Georgian).

⁸ The Association Agreement “between Georgia, on the one part, and the European Union and the European Atomic Energy Community and their Member States, on the other part” was signed on 27 June 2014. It was ratified by the Parliament of Georgia on 18 July 2014. It entered into full force on 1 July 2016 (In Georgian).

⁹ *Turava P., Pirtskalaishvili A., Kardava E.*, “Administrative Procedure in the Public Service”, Tbilisi, 2020, 9 (In Georgian).

¹⁰ *Tskhadadze K.*, “Relevance of Constitutional-Legal Principles for Administrative Law”, Administrative Law, Scientific Popular Journal, Tbilisi, 2016, 5 (In Georgian).

Administrative procedural law, which creates the most important lever for protecting rights within the framework of relations between administrative bodies and citizens, is based on such important principles as the principle of disposition, the principle of inquisitoriality, the principle of adversariality, and the principle of equality before the law. The principles of administrative decision-making, namely, the principle of proportionality and commensurability, and the principle of discretionary authority, etc., are also important.¹¹

Each of the above-mentioned principles accompanies the entire administrative process and is the determining and fundamental direction in legal proceedings. Accordingly, within the framework of this article, we will first review the main principles in administrative proceedings, the peculiarities of their manifestation, and also discuss their importance in terms of effectively protecting the rights of persons participating in the administrative process.

3.1. The Role and Scope of the Adversarial Principle when the Court Annuls an Individual Administrative-Legal Act without Resolving the Disputed Issue

One of the most important principles that creates an effective lever for protecting and exercising rights for participants in administrative proceedings is the adversarial principle. This principle equally equips the parties. They enjoy equal rights and opportunities to substantiate their claims, define the scope and grounds of the claim, refute or invalidate claims, evidence, or justifications put forward by the other party.¹²

The legislator makes a reservation that the court is authorized to decide on its initiative to submit additional information or evidence. Given the importance of this reservation, it is advisable to discuss only the principle of adversariality and its essence in this subsection, while the court's investigation of the circumstances of the case, a basis established in scientific literature as the inquisitorial principle, will be discussed separately.

The right to an adversarial process must be exercised under satisfactory conditions: a party to the proceedings must have the opportunity to review the evidence before the court, as well as the means to comment on its content and authenticity in an appropriate form and within a reasonable time, if necessary, by postponing the hearing.¹³

It is important to note that despite the broad authority of the judge in administrative proceedings – to participate, *inter alia*, in investigating or clarifying circumstances important to the case – the parties enjoy equal rights to decide on the submission of evidence themselves. Thus, in administrative procedural law, we have an absolute autonomy of will along with an equally authoritative mechanism for protecting rights or decisions.

It is precisely with the limitation of the absolute autonomy of will and the use of equal authorities that we are dealing when the court returns the issue for consideration to the administrative

¹¹ Kopaleishvili M., Skhirtladze N., Kardava E., Turava P., Handbook of Administrative Procedural Law, Tbilisi, 2008, 8 (In Georgian).

¹² Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T., Handbook of Administrative Procedural Law, Tbilisi, 2018, 23 (In Georgian).

¹³ Guidelines on Article 6 of the European Convention on Human Rights, 17.

body, whereas the whole “charm” of administrative proceedings is expressed precisely in adversariality and, at the same time, in the active role of the court.

When an act is annulled without resolving the issue, the case moves to administrative proceedings, where the dispute continues between two unequal subjects, on the one hand, an organ with governing power, and on the other hand, interested persons, where the standard of ensuring adversariality and its control mechanism are outside the court and, consequently, ineffective.

The effective realization of the adversarial principle implies that the court plays an active role in ensuring balance. If the judge considers that the issue has not been sufficiently investigated and additional evidence and circumstances need to be clarified and discussed, within the framework of broad powers, they can postpone the session, instruct the administrative body to submit relevant documents/materials, and conduct additional research within the process with equal participation of the parties, and only then make a decision. It is precisely within the framework of such a solution that this principle will be effective.

3.2. Investigation of Case Circumstances by the Court – Degree of Inquisitoriality – When the Court Annuls an Individual Administrative-legal act Without Resolving the Disputed Issue

The inquisitorial principle, as mentioned above, is established in scientific literature with such terminology and implies the active role of the court exercising administrative justice in investigating the circumstances of the case during legal proceedings.

The administrative process is characterized by an inquisitorial nature, because it is focused on protecting public norms. If the evidence presented by the parties during the dispute does not satisfy the court and it considers that it is insufficient for objectively investigating the circumstances of the case and establishing objective truth, it will, on its initiative, ensure the search and investigation of evidence. It is also possible for the court to focus on circumstances that the parties did not present to the court during the proceedings.¹⁴

The inquisitorial nature of administrative disputes does not inherently imply unlimited powers of the court system to interfere in the activities of administrative bodies and make decisions instead of them. Accordingly, a “golden mean” is necessary so that the court does not become a subject exercising governance, which in itself would violate the essence of the constitutional principle of separation of powers. “Although the court can collect additional evidence to fully investigate factual circumstances, this ensures the elimination of deficiencies allowed within the administrative proceedings and not the replacement of the proceedings to be carried out in the body,” explained the Supreme Court.¹⁵

"The scope of control over managerial measures by the court and a higher administrative body is differentiated from each other, since a higher administrative body reviews a decision made based on discretionary authority and subsequently appealed, both in terms of legality and expediency, whereas

¹⁴ *Ghvamichava T.*, Admissibility of Cassation Appeal in Administrative Proceedings (Comparative Analysis), Dissertation, Tbilisi, 2017, 52 (In Georgian).

¹⁵ Decision of the Supreme Court of Georgia of July 24, 2024, case #86-260(3-24) (In Georgian).

the court's control over such acts is limited and it is limited only to checking the legality of the decision.”¹⁶

When applying the inquisitorial principle, it is important to note that, based on Article 2.5 of the APC, the initiation of a request to annul an individual administrative-legal act in court is preceded by the obligation of a one-time appeal of this act (except for cases provided by law). Accordingly, the administrative body is granted a kind of additional mechanism and opportunity by law to review and additionally study the issue, both in terms of legality and expediency. Consequently, in cases of using such a mechanism, the court's decision to give the administrative body another opportunity for additional research becomes even more ambiguous.

It is precisely the inquisitorial principle that makes the administrative justice process special and gives it a special role in helping the interested person in a dispute with an administrative body that is at a higher level compared to them. Assistance can be expressed both in formulating/clarifying the request and in presenting additional evidence, documents, and materials at the request of the court. Of course, such assistance does not at all imply the court's declared support for the party in advance and the creation of an expectation of a decision in its favor. Accordingly, the role of the court in the administration of justice is decisive for making an objective decision in the case.

Refusal of the inquisitorial principle can be considered the annulment of an appealed act without resolving the issue and returning it to the administrative body for reconsideration without proper justification, even when the court has both the authority granted by law and sufficient resources to conduct additional research on the issue with the participation of the parties. Annulment of an act without resolving the issue cannot be considered a suitable means on the grounds of protecting a person's legitimate interest, because the interested person's goal is not only to annul the act, but also to make a necessary and fair decision, to reach an outcome.

3.3. The Balance of the Principle of Equality Before the Law When a Court Annuls an Individual Administrative-Legal Act without Resolving the Disputed Issue.

The principle of equality before the law is one of the fundamental principles that is manifested uniquely in administrative proceedings. It implies the equal legal standing of all parties involved in the administrative process. This principle is particularly important in the context of administrative disputes and during both administrative proceedings and adjudication, where the parties typically include two actors on unequal footing. In such cases, it is essential to uphold equality in a manner that ensures, on the one hand, the protection of the public interest, and on the other, a reasonable balance between public and private interests.¹⁷

Administrative litigation and justice are the powerful institutions through which equality of rights must be guaranteed, especially during the implementation of public administrative measures. Administrative bodies often possess significantly more power and resources compared to the addressees of such measures. This applies equally to both empowering and restrictive administrative actions, where the realization of the rights of interested parties requires strong support, first and

¹⁶ Decision of the Supreme Court of Georgia of November 8, 2018, case #8b-602-602(23-18) (In Georgian).

¹⁷ *Kopaleishili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T., Administrative Procedural Law Handbook*, Tbilisi, 2018, 29 (In Georgian).

foremost through a well-structured legislative framework, to ensure equality in the execution of public administrative activities.

Granting administrative bodies an additional opportunity to re-examine a case, when a court annuls an act without resolving the underlying issue, under conditions where the administrative authority may simply reissue the same decision after a merely formal, rather than substantive, review, undermines the principle of equality. In such cases, equality is violated when the court is capable of securing the presentation of evidence through instructions within the proceeding itself, and to adjudicate the matter with the parties placed on an equal footing.

Moreover, the ambiguity of the current legal norm creates a risk of inconsistent decisions, which is further discussed in detail in the section on judicial practice below.

3.4. The Effectiveness and Significance of the Right to a Fair Trial in Cases Where a Court Annuls an Individual Administrative-Legal Act Without Resolving the Disputed Matter

The *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly on 10 December 1948, was the first document in human history to enshrine fundamental human rights grounded in the principle of universality and applicable to individuals in their unique contexts.¹⁸ Among other essential rights, the Declaration established, under Article 8, that everyone whose fundamental rights are granted by the constitution or by law are violated must have access to an effective remedy before competent national courts.¹⁹

It can be said that this fundamental right, enshrined in the Universal Declaration of Human Rights, is reflected with utmost precision and the highest standard of protection in the supreme law of the country. Both international legal instruments and domestic legal systems emphasize not only the right to a fair hearing but also the requirement that cases be examined and decided within a reasonable time frame.

The importance of this constitutionally guaranteed fundamental procedural right is further underscored by the European Convention on Human Rights, which proclaims that every person, in the determination of their civil rights and obligations or of any criminal charge against them, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.²⁰

The Constitutional Court of Georgia considers this right, as in the Constitution, to be an “instrumental right,” noting that it ensures the enforceability and protection of rights and legitimate interests through the courts.²¹

¹⁸ Universal Declaration of Human Rights, 60th Anniversary (Special Edition 1948-2008) United Nations Department of Public Information, Georgia Office, Office of the United Nations High Commissioner for Human Rights, Georgia, Tbilisi, May, 2008, <<https://www.supremecourt.ge/files/upload-file/pdf/aqtebi3.pdf>> (In Georgian).

¹⁹ Universal Declaration of Human Rights, United Nations General Assembly, December 10, 1948.

²⁰ Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950. Ratified by Georgia in 1994, and entered into force in 1999. Convention for the Protection of Human Rights and Fundamental Freedoms | LEPL “Georgian Legislative Herald” (matsne.gov.ge) [14.04.2024] (In Georgian.)

²¹ Decision of the Constitutional Court of Georgia of August 27, 2009 N1/2/434, in the case – Public Defender of Georgia v. Parliament of Georgia (In Georgian).

There has never been, and likely never will be, a more effective means of protecting rights than judicial remedy.²²

The right to a fair trial is a key element of the rule of law and democratic governance. It serves as the most vital mechanism for regulating disputes between the individual and the state, ensuring the effective realization of constitutional rights, and protecting individuals from unjustified interference.²³

The right to a fair trial includes a set of key procedural guarantees that contribute to ensuring the fairness of judicial proceedings. The following guarantees apply to all types of legal proceedings:

- Public hearing;
- Examination within a reasonable time;
- Access to a lawyer or the ability to represent oneself;
- A reasoned decision.²⁴

Therefore, in a democratic state, the right to a fair trial is considered a cornerstone of democracy. It includes not only the individual's right to access the court but also encompasses the entire process and requires fair procedural guarantees throughout.

The realization of the right to a fair trial should be discussed with the legal remedy mechanism provided under Article 32.4 of the Administrative Procedure Code. Of course, the use of this mechanism, by its nature, is also a judicial proceeding, and all reasoning developed in the previous subsections applies here. However, when the court considers a claim to annul an act, the use of the mentioned mechanism requires particular attention in terms of the realization of the right to a fair trial.

The parties involved in legal proceedings must have the right not only to submit collected materials, evidence, and conclusions, but also for their case to be reviewed by the court. This is what the effective protection of this right entails. The weakness in the protection of the right, the right to have one's case reviewed by a court, is revealed precisely when the court annuls an act without resolving the matter. The court has an "obligation" to thoroughly examine the submitted evidence, arguments, and documents, their completeness and sufficiency, and if it determines that further information, materials, or evidence are needed to reach a decision, it must request them, instruct the administrative body to submit them, and only then continue the review.

The combination of this right with the inquisitorial principle in administrative judicial proceedings gives us the framework in which the court's role in the effective realization of rights is especially important. The judge hearing the case has both the right and the duty not only to rely on the submitted evidence and documents, but also to participate actively, to request additional evidence and documents to ensure equality between the parties, to achieve a fair balance, and to determine the objective truth in the case. The active role and positive intervention of the court should not be expressed in annulling the act without resolving the matter and returning it to the administrative

²² Kurdadze Sh., The Essence of Simplified Proceedings in Civil Procedure, Journal, "Law", N7-8, 2002,29 (In Georgian.)

²³ Decision of the Constitutional Court of Georgia of December 19, 2008 #1/1/403,427 Canadian citizen Hussein Ali and Georgian citizen Elene Kirakosyan against the Parliament of Georgia (In Georgian).

²⁴ <https://www.humanrightsguide.ge/rights/samartliani-sasamartlos-upleba>, [17.04.2025] (In Georgian.)

authority for further investigation, but rather in the active exercise of its oversight power within the proceedings.

The mechanism offered by administrative procedural legislation, whereby the court returns the case to the administrative authority for investigation, in its current form and content, cannot ensure the effective protection of the right to a fair trial. The examination of the matter and the decision-making process are unreasonably delayed in time, and multiple essential principles, including adversarial proceedings and inquisitorial elements, cannot be fully realized. These principles are directly linked to the effective protection of the right to a fair trial.

4. Judicial Practice

According to its content and judicial practice, Article 32.4 of the Administrative Procedure Code (APC) is applied in cases where specific circumstances cannot be established through judicial procedure and the party has an urgent legitimate interest.²⁵

In its decision №ბ-681-681(3-18) of 13 December 2018, the Supreme Court held that the ruling of the Court of Appeals, which upheld the City Court's decision to annul the contested act, having determined that the circumstances essential to the case were not properly examined by the respondent (administrative authority), and instructing the said authority to issue a new act after investigating the relevant facts was unsubstantiated. The Cassation Court concluded that instead of providing a proper legal assessment of the factual circumstances established in the case and making an appropriate decision, the Court of Appeals, along with the court of first instance, approached the disputed issue in a merely formal manner.²⁶

In the reasoning part of the decision in the present case, the Cassation Court stated that invoking Article 32.4 of the APC lacks any legal basis when the materials in the case are sufficient for drawing appropriate conclusions and resolving the dispute. The Court also emphasized that the administrative body had established all the essential facts relevant to the case and that the decision was based on those findings. Moreover, the resolution of the case did not require the establishment of facts that could only be determined by the administrative authority through powers granted to it by law, nor was there a discretionary element present that would justify returning the case to the administrative authority for further investigation.

What is important in this decision is the Cassation Court's perspective on the effective protection of the rights and legitimate interests of the interested party. The Cassation Court was able to reach a decision based on the analysis and examination of the materials submitted by the parties. It may be said that the lower courts misunderstood the components of Article 32.4 of the APC due to the following reasons: the component of the interested party's legitimate interest is not reflected in the decision, given that they aimed to have the act annulled and to obtain an outcome within a reasonable time. This, however, was not achieved, neither in terms of timeliness nor interest satisfaction. The process was prolonged, and the resolution of the person's interest was deferred. Moreover, there was

²⁵ Supreme Court Decision of December 13, 2018, Case #ბ-681-681(3-18). (In Georgian).

²⁶ Ibid.

no guarantee that the party would ultimately be satisfied. Accordingly, in this case, had it not been for the Cassation Court's reasonable and legally justified "intervention," the interested party would have faced uncertainty: on the one hand, they may have expected the administrative body to satisfy their claim through a new act, while on the other, they might have lost interest in the dispute altogether, as the matter became associated with unreasonable delays and additional efforts due to being returned for reconsideration by the same administrative body.

The Cassation Court made an important clarification regarding the principle of inquisitorial proceedings in the administrative process, emphasizing that the court is not only authorized but also obligated to fully examine and investigate all circumstances relevant to the case. This includes, when necessary, the court's initiative to identify the need to establish certain facts and to seek evidence confirming or refuting those facts.²⁷

In its reasoning, the Cassation Court also stressed the importance of observing procedural prerequisites when applying Article 32.4 of the Administrative Procedure Code. It noted that returning a case to the administrative authority without resolving the disputed issue and instructing it to issue a new act must be substantiated and must include an indication of the specific circumstances that the administrative body is required to examine. Additionally, in the cited decision, the court explained that the circumstances identified as unexplored by the court must be essential and capable of influencing the administrative authority's decision.²⁸

"Conducting administrative proceedings includes the fundamental procedural obligation of the administrative authority to investigate all circumstances relevant to the case and to make a decision based on the assessment and reconciliation of these circumstances. The legislation establishes procedural safeguards for issuing an act, as the legitimacy and reasoned nature of an individual administrative-legal act issued impartially and based on a comprehensive and objective investigation of the case's circumstances is significantly higher. Compliance with the procedural rules established for issuing an administrative-legal act is of decisive importance for the legality of the act itself. This imperative provision of the General Administrative Code of Georgia serves the principle of legality in public administration, as every administrative decision must be based on the objective study and examination of the circumstances and facts of the matter under consideration, from which a conclusion for decision-making should be derived."²⁹

When returning a case to the administrative authority for additional examination, the court's decision must be based on the fact(s) that the court itself lacks the resources and capacity to conduct further investigation, thereby justifying the court's inability to take an active role. The Cassation Court, in one of its decisions, noted that returning the disputed act to the administrative as archival records need to be retrieved or that an expert opinion or conclusion is necessary is not substantiated, and the cited circumstances do not provide a firm basis for such a decision.³⁰

²⁷ Ruling of the Supreme Court of Georgia of April 17, 2024, case #8b-546(3-23) (In Georgian).

²⁸ Ruling of the Supreme Court of Georgia of September 18, 2023, Case # 8b-466(3-22) (In Georgian).

²⁹ Decision of the Supreme Court of Georgia of September 23, 2014, case #8b-246-243(3-14) (In Georgian).

³⁰ Decision of the Supreme Court of Georgia of June 22, 2023, Case #8b-883(23-20) (In Georgian).

Moreover, a court decision to return a case to an administrative authority for further consideration may be conditioned by the discretionary nature of the authority's powers. In such cases, the court allows the administrative body to reconsider its previously adopted decision within the bounds of its discretion and to issue a new act. An analysis of the decisions and rulings reviewed in the course of this research reveals that when a decision made by an administrative authority within its discretionary powers is not based on a proper and thorough evaluation, annulling the disputed act and permitting the issuance of a new act serves as a means for the issuing authority to revisit its decision. In our view, this contributes to the court's exercise of long-term and effective oversight, encouraging administrative bodies to analyze their decisions, the scope and content of their discretion, and only thereafter to adopt a new decision, thus refining their practice and approaches.

However, the Cassation Court has clearly stated that the discretionary nature of administrative authority's powers alone does not automatically justify the annulment of an act and the return of the case for additional consideration. According to the court's explanation: "Judicial interference with the discretionary powers of an administrative body becomes necessary when there is a clear violation of a constitutionally protected right or when there exists a substantiated presumption, under Article 60¹.2 of the General Administrative Code of Georgia, that a different decision could be made." Therefore, the discretionary nature of a power, in itself, does not create a legitimate basis for issuing an unsubstantiated decision. The court must evaluate the necessity of its intervention in each case, and only then decide whether to return the case to the administrative authority for further examination or to issue a decision itself.

The Cassation Court has emphasized that, under the inquisitorial/officiality principle, the initiative of the court reviewing an administrative case to further investigate the facts, collect and analyze evidence on its own, is a necessary condition in the current legal culture of the country. The Court stated that a lawful decision and the effective exercise of judicial oversight may not be achievable without the effective application of this principle.³¹

The Court's authority to obtain evidence or information on its initiative means that the court must identify instances where a core principle of justice, equality of the parties, is at risk. This refers to ensuring equal opportunities for the parties to defend their rights, particularly considering the subordinate position of participants in public law disputes, the Cassation Court explained.³²

5. Preventive Means of Rights Protection and the Comparison of Article 32.4 in Terms of Effectiveness

The Constitution of Georgia³³ guarantees every individual the full enjoyment of the right to a fair trial. This right must also ensure comprehensive and fair protection of the individual. Effective justice implies not only the restoration of a violated right but also its temporary protection, which aims to ensure the preventive safeguarding of a right before the final resolution of the case.³⁴

³¹ Decision of the Administrative Cases Chamber of the Supreme Court of Georgia of December 2, 2024, Case #8b-303-299(3-14) (In Georgian).

³² Ibid.

³³ Constitution of Georgia, Article 31, Paragraph 1, 1995 (In Georgian).

³⁴ Ruling of the Supreme Court of Georgia of February 26, 2020, #8b-1389(3b-19) (In Georgian).

Administrative procedural law provides not only repressive means for the protection of rights but also establishes and reinforces preventive measures, which in some cases prove to be more effective than repressive ones, both in terms of the timeliness of protection and in preventing or mitigating actual or potential harm.

Unlike civil procedure, administrative law is characterized by the existence of the suspensive effect as a preventive measure of rights protection. Through this mechanism, the legal force of an administrative act is temporarily suspended. Specifically, this occurs after an appeal is filed and remains in effect until the conclusion of administrative proceedings on the complaint, or until the court renders a final decision on the request to annul the administrative-legal act.

Temporary means of right protection aim to preserve the existing situation before a final decision is made in the case, or to modify it in a way that ensures the enforceability of the final decision.³⁵

The types of temporary legal protection are directly linked to the types of administrative claims defined in procedural legislation. In cases where the claim seeks annulment of an act, the temporary protection measure under Article 29 is applied. In contrast, for claims defined under Articles 23 and 24 of the APC, Article 31 of the APC provides for the instrument of a temporary ruling concerning the issuance or implementation of an individual administrative-legal act.

Within the Administrative Procedural Code, the suspensive effect as a mechanism for rights protection is regulated by Article 29. According to the first paragraph of this article, the filing of a claim with the court suspends the effect of the contested individual administrative-legal act. However, the second paragraph of the same article specifies exceptions where, despite the appeal, the act remains in force.

As for the temporary legal protection measure provided under administrative legislation and reinforced by Article 31, it can be used by a party before filing a claim, specifically, by submitting a petition to the court. It is not an automatic consequence of the main legal protection mechanism; instead, legal proceedings under this article are initiated based on a party's request.³⁶

Therefore, the temporary protection measures offered by procedural law create a solid foundation and opportunity to safeguard or preserve the existing situation, based on the party's interests, until a final decision is made.

In the context of this research, it is important to compare the application of the temporary measure under Article 29 with the court's annulment of an act without resolving the substantive issue under Article 32(4) of the APC, and the subsequent instruction to the administrative authority to issue a new act following further factual investigation, especially from the perspective of effectiveness.

First and foremost, it must be noted that the procedural relationships governed by these norms are different and represent substantively distinct legal institutions. Nevertheless, the comparison is relevant for research purposes due to a shared aspect: the protection and enforcement of a party's

³⁵ *Kopaleishili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T., Handbook of Administrative Procedural Law, Tbilisi, 2018, 335 (In Georgian).*

³⁶ *Kopaleishili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T., Handbook of Administrative Procedural Law, Tbilisi, 2018, 339-340 (In Georgian).*

urgent legitimate interest. As previously noted, one of the components for invoking Article 32(4) is precisely the existence of such an interest. We must examine the *real meaning* of the party's urgent legitimate interest, which, by its best interpretation, should be understood in favor of the party. This is because the application of this mechanism must be justified by demonstrating that it truly serves the party's interests, and that protection of that interest is driven by urgent necessity.

Temporary protection measures used before the final decision serve essentially the same purpose. Therefore, discontinuing substantive proceedings under Article 32(4) without appropriate reasoning raises the question of whether the same benefit could have been achieved by applying temporary protection measures instead and continuing with substantive review. In such cases, the dispute is no longer considered by the court but is transferred back to the administrative body for re-examination. Notably, the administrative authority is not given a specific timeframe to issue a new decision, and the party may once again be required to return to court over the same issue, including unresolved facts that the authority may still fail to investigate. This is, although the party's urgent interest could have been satisfied by suspending the contested act under Article 29, or by issuing a temporary ruling under Article 31.

Therefore, Article 32.4 should only be applied in the presence of the cumulative conditions specified therein in part 1: Essential circumstances must be insufficiently or not at all examined; and the party must have an urgent legitimate interest.

This urgent legitimate interest is directly addressed by Article 29, under which the contested act is suspended automatically, without the need for a specific request, except in exceptional cases where a party must file a request. Thus, when these two norms are properly harmonized and correctly applied, the effectiveness of protecting the individual's legitimate interests is not at risk.

6. Conclusion

According to Article 31.1 of the Constitution of Georgia, the right to a fair trial falls within the scope of constitutional protection. It establishes a strong guarantee that an individual's right to access a court is protected at the constitutional level. This article also ensures the right to a fair and timely hearing. Accordingly, it is essential not only for fairness but also for the functioning of a democratic state. If there is no possibility of preventing a violation or restoring a violated right, the legal mechanism and the very exercise of the right come into question. Therefore, prohibiting or disproportionately restricting access to the courts to protect rights and freedoms violates not only the right to a fair trial but also poses a risk of disregarding the very rights for the protection of which court access has been prohibited or restricted.³⁷

It is thus necessary to assess not only the general advisability of applying Article 32.4, but also, based on established judicial practice, how rigorously its application is justified by the courts, how effective it is, and whether it serves a legitimate aim in protecting the lawful interests of the concerned party.

³⁷ Decision of the Constitutional Court of Georgia of June 28, 2010, No. 1/466 in the case "Public Defender of Georgia vs. Parliament of Georgia".

The court decisions reviewed in this article, based on which cases were returned to administrative bodies for further consideration, fail, in most instances, to meet essential components of the right to a fair trial. Specifically, they do not ensure the examination of the case within a reasonable time, the issuance of a well-reasoned decision, or the hearing of significant factual circumstances during the proceedings. The cited rulings of the Cassation Court indicate that the primary issue in the application of Article 32.4 is the low standard of justification, in particular, the insufficient explanation as to why the relevant instance court could not examine the essential facts itself, actively participate in the process, and render a final decision. This is especially problematic given that the inquisitorial principle grants broad powers to the presiding judge.

Another major challenge is the justification of the existence of a party's legitimate interest, as Article 32.4 cannot be applied without it. Courts often assume, as a general principle, that annulment of an act inherently serves the interest of the complainant. However, there is a substantive difference between annulment of an act and partial satisfaction of a claim under Article 32.4, where the outcome still depends on how and when the administrative authority will act under renewed procedural conditions.

In the context of legitimate interest, Article 32.4 may allow for broader interpretation and afford the court more flexibility when temporary protection measures can, in principle, clearly preserve or protect an individual's legitimate interest before the final decision is made.

Therefore, it is crucial to refine the scope and content of Article 32.4 so that its use is strictly limited to situations where the temporary protection measure under Article 29 cannot safeguard the party's legitimate interest and where the discretion of the administrative authority necessitates further examination within the administrative body.

In conclusion, refining and clarifying this legal mechanism within the legislative framework would, on the one hand, simplify decision-making for courts and contribute to the development of consistent judicial practice; on the other hand, it would make the mechanisms for protecting the rights of interested parties more effective and flexible, ensuring realization of all principles underpinning the right to fair trial. Ultimately, this would lead to strengthened public trust in the judiciary.

Bibliography:

1. Constitution of Georgia 24/08/1995.
2. Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
3. Universal Declaration of Human Rights, United Nations General Assembly, December 10, 1948.
4. Law of Georgia, Administrative Procedure Code of Georgia, 23/07/1999.
5. Law of Georgia, General Administrative Code of Georgia, 25/06/1999.
6. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part signed on 27 June 2014. Ratified by the Parliament of Georgia on 18 July 2014. Entered into full force on 1 July 2016.
7. *Gvaramadze T.*, "Fair Administrative Proceedings and European Standards", Collection of Articles, Law Journal N2, Tbilisi, 2023 (In Georgian).
8. *Kopaleishili M., Turava P., Kharshiladze I., Loria Kh., Gvaramadze T., Ghvamichava T.*, Handbook of Administrative Procedural Law, Tbilisi, 2018 (In Georgian).

9. *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P.*, Handbook of Administrative Procedural Law, Tbilisi, 2008 (In Georgian).
10. *Loria V.*, Administrative Law of Georgia, Tbilisi, 2002 (In Georgian).
11. *Turava P., Pirtskhalashvili A., Kardava E.*, Administrative Procedure in the Public Service”, Tbilisi, 2020 (In Georgian).
12. *Kurdadze Sh.*, The Essence of Simplified Proceedings in Civil Procedure, Journal, “Law”, No. 7-8, 2002 (In Georgian).
13. *Ghvamichava T.*, Admissibility of cassation appeal in administrative proceedings (comparative analysis), dissertation, Tbilisi, 2017 (In Georgian).
14. *Tskhadadze K.*, “Relevance of Constitutional-Legal Principles for Administrative Law”, Administrative Law, Scientific Popular Journal, Tbilisi, 2016 (In Georgian).
15. Guidelines on Article 6 of the European Convention on Human Rights, samartliani-sasamartloganxilvis-upleba(samoqalaqo).pdf (supremecourt.ge) (In Georgian).
16. Decision of the Supreme Court of Georgia of July 24, 2024, case #ბს-260(3-24) (In Georgian).
17. Ruling of the Supreme Court of Georgia of April 17, 2024, case #ბს-546(3-23) (In Georgian).
18. Ruling of the Supreme Court of Georgia of March 18, 2024, case #ბს-1240(3-23); (In Georgian.)
19. Decision of the Administrative Cases Chamber of the Supreme Court of Georgia of December 2, 2024 case #ბს-303-299(3-14) (In Georgian).
20. Ruling of the Supreme Court of Georgia of September 18, 2023, case #ბს-466(3-22); (In Georgian).
21. Ruling of the Supreme Court of Georgia of June 22, 2023, case #ბს-883(23-20) (In Georgian).
22. Judgment of the Supreme Court of Georgia of February 26, 2020, case #ბს-1389(36-19) (In Georgian).
23. Decision of the Supreme Court of Georgia of November 8, 2018, case #ბს-602-602(23-18) (In Georgian).
24. Ruling of the Supreme Court of Georgia of October 2, 2018, case #ბს-1182-1176(23-17) (In Georgian).
25. Decision of the Supreme Court of Georgia of December 13, 2018, case #ბს-681-681(3-18) (In Georgian).
26. Decision of the Supreme Court of Georgia of September 23, 2014, case #ბს-246-243(3-14) (In Georgian).
27. Decision of the Constitutional Court of Georgia of August 27, 2009, No. 1/2/434, in the case – Public Defender of Georgia vs. Parliament of Georgia (In Georgian).
28. Decision of the Constitutional Court of Georgia of June 28, 2010, No. 1/466 in the case “Public Defender of Georgia vs. Parliament of Georgia” (In Georgian).
29. Decision of the Constitutional Court of Georgia of December 19, 2008 #1/1/403,427 Canadian citizen Hussein Ali and Georgian citizen Elene Kirakosyan against the Parliament of Georgia. (In Georgian).
30. <<https://www.humanrightsguide.ge/rights/samartliani-sasamartlos-upleba>> [25.03.2025] (In Georgian).
31. <<https://www.supremecourt.ge/files/upload-file/pdf/aqtebi3.pdf>> [25.03.2025] (In Georgian).

Shalva Kipshidze*

Agricultural Land as a Resource of Special Importance and Practical Aspects of Privatization

Article 19 of the Constitution of Georgia affirms and strengthens the universal right to ownership, including the rights to acquire, transfer, and inherit property. According to the Constitution, agricultural land is considered a resource of special importance. It may be owned only by the state, a self-governing unit, a citizen of Georgia, or an association of Georgian citizens. Exceptional cases can be defined by organic law.

The issue of foreign ownership of agricultural land remains a challenge in Georgia to this day. It has been the subject of multiple deliberations by the Constitutional Court, ultimately leading to constitutional amendments.

The purpose of this article is to examine the practical aspects of privatizing agricultural land as a resource of special importance. The study employs logical analysis and presents both informational and cognitive perspectives on the issue. It also discusses relevant legislation and comparative international experience.

Keywords: *Ownership, Privatization, State property, Agricultural land, Electronic Auction, Privatization, Direct sale privatization.*

1. Introduction

After the collapse of the Soviet Union, the transfer of state property into private ownership through the process of privatization was considered a central aspect of the transition from the socialist system of agriculture to a modern market economy.¹ Accordingly, following a state land reform, agricultural land that had been used during the Soviet period was transferred into the ownership of Georgian citizens.²

The privatization of agricultural land is aimed at improving the economic condition of the country and providing a function for uncultivated land s. Only Georgian citizens have the right to own

* Lecturer at the Faculty of Law, Sulkhan-Saba Orbeliani University, specializing in Administrative Law, Entrepreneurial Regulation, and Privatization Law; Visiting Lecturer at the Faculty of Law, Ivane Javakhishvili Tbilisi State University; Doctoral Candidate; Guest Trainer in Legal Studies at the LEPL – Training Center of Justice; Associate Researcher in Administrative Law at the Davit Batonishvili Institute of Law; Lead Specialist in the Privatization Department at the LEPL, National Agency of State Property, Ministry of Economy and Sustainable Development of Georgia, Lawyer.

¹ *Kipshidze Sh.*, Privatization as a fundamental element of public administration, Zhurn. “Orbeliani”, No. 4, 2021, 103 (in Georgian).

² Post-Soviet countries have a similar history, in which the experience of Germany, the Czech Republic, and Poland in the privatization process, where privatization reform was carried out with an accelerated and organic privatization strategy. See: *Sack D.*, Vom Staat zum Markt, Privatisierung aus politikwissenschaftlicher Perspektive, 2019, 4-5.

agricultural land, with certain exceptions defined by law that also allow foreign nationals and legal entities established by them to hold ownership.

This paper discusses the importance of agricultural land as an asset, particularly valuable to the country and its forms of privatization. However, a separate chapter is devoted to the right of ownership of an alien on agricultural land.

It should also be noted that the issue of privatization of agricultural land is regulated differently based on the legislation of European countries. According to the European Commission's Directive 2017/C 350,³ all EU countries have the right to regulate this issue by internal regulation. Therefore, this article primarily focuses on Georgian practices due to the specific nature of the topic; However, it also incorporates the experience of a foreign country for comparative analysis.

2. Agricultural Land as a Resource of Special Importance

2.1. Concept and Classification of Agricultural Land

Ownership of the land has always been of great importance. In Georgia, regulating private property began in the 90s of the last century, after the collapse of the Soviet Union. The collapse of the socialist system and the desire to transition to a market economy brought to the forefront the task of privatizing state-owned entities of the so-called “people's economy”.⁴

Agricultural land reform was launched in Georgia based on Resolution N48 of the Cabinet of Ministers of the Republic of Georgia of January 18, 1992. According to the resolution, the purpose of the reform was “The increase of the norm for household plots, the transfer of land into private ownership, the establishment of market relations in agriculture, the expansion of food production, and the overcoming of the economic crisis.”⁵ As a result of the reform, the public was provided with the documents confirming the right to land in its possession, which was a significant achievement at that time. The land was divided into targeted categories; This still plays an important role in the development of the state's economy and the provision of food independence.

The definition and classification of agricultural land are determined by the Organic Law of Georgia “On the Ownership of Agricultural Land” (hereinafter, ownership of Agricultural Land).

According to Article 3, subparagraph “a”, *agricultural land* is defined as: “Land classified as pasture, hayfield, arable land (including land occupied by perennial crops), or household plot, which is used or may be used for agricultural purposes, with or without existing structures.”

According to the decision of the Constitutional Court of Georgia, “The objective use of agricultural land plays an important role in the development of the state's economy and in ensuring food security. Considering the necessity of developing the farming structure and the indirect positive

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A2017%3A350%3AFULL#ntr5-C_2017350EN.01000501-E0005> [08.03.2025].

⁴ Sack D., Vom Staat zum Markt, Privatisierung aus politikwissenschaftlicher Perspektive, 2019, 6.

⁵ “On Agricultural Land Reform in the Republic of Georgia”, Resolution of the Cabinet of Ministers of the Republic of Georgia, N48, 18/01/1992 (Invalid 26/06/1997, No 786) (in Georgian).

effects of restrictions imposed on land classified as agricultural, the legislator has the discretion to define state agricultural policy through land categorization and other instruments.⁶

During the land reform, one of the most important categories was arable land, which was allocated to peasants residing in rural areas. According to current legislation, arable land (including land occupied by perennial crops) is defined as a plot of agricultural land used for cultivating crops, with or without existing agricultural or auxiliary facilities, or as a plot of land that, considering its soil and climatic conditions and natural-geographic location, can potentially be used for such purposes.⁷ Arable land constitutes the highest-intensity category of land use, and its privatization has had a decisive importance for the development of the private sector. It serves as the primary source of income for the rural population and also contributes to the advancement of agriculture.

Legislation defines *hayfield* as an agricultural land covered with grass or shrub vegetation used for producing hay, silage, ensilage, grass meal, or other types of forage for livestock, including land with or without agricultural and auxiliary facilities; also, a land considering its soil and climatic conditions and natural-geographic location, is suitable for such use.⁸

The transfer of the hayfield to private ownership was a prerequisite for the development of farming. By privatizing this category of land, the state was able to cope with the challenges for rural families that hindered the development of farming. The Government of Georgia's Resolution No. 265 of 2017, "On the Approval of the State Program for the Rational Use of State-Owned Hayfields and Pastures in Mountainous Regions," defines the scope of the program, under which hayfield land parcels located in mountainous regions may be transferred for use to agricultural cooperatives through leasehold rights.⁹

Pasture is land of the lowest intensity.¹⁰ According to the law, pasture land is an agricultural land covered with herbaceous plants and shrubs (natural or cultivated), which is used for grazing (feeding), with or without the agricultural or auxiliary facilities, taking into account its soil and climatic conditions and natural-geographical location.¹¹

As Georgia faces a shortage of pasture land, following subparagraph "z.a" of paragraph 1 of Article 4 of the Law of Georgia "On State Property", pastures are not subject to privatization, except for those that were leased before July 30, 2005.

⁶ Decision No 1/6/666 of 22 June 2017 of the Constitutional Court of Georgia on the case "Citizen of Georgia Shota Jibladze v. the Parliament of Georgia", II, 13.

⁷ Law of Georgia on Determining the Purpose of Land and Sustainable Management of Agricultural Land, Article 3(d), 25.06.2019 (in Georgian).

⁸ Ibid., Article 3(c).

⁹ Resolution N265 of 29 May 2017 of the Government of Georgia "On the Approval of the State Program for the Rational Use of State-Owned Hayfields in High Regions" (in Georgian).

¹⁰ Although the law does not define what constitutes "intensity" and clarify what is meant by its degree or level, it allows for the reclassification of land from one category to another, specifically, from a lower to a higher intensity category of agricultural land. For details, see Article 8, paragraphs 3 and 4 of the Law of Georgia on Determining the Designated Use of Land and Sustainable Management of Agricultural Land.

¹¹ Law of Georgia on Determining the Purpose of Land and Sustainable Management of Agricultural Land, Article 3(b), 25.06.2019 (in Georgian).

2.2. Legalized Status of Agricultural Land

According to paragraph 4 of Article 19 of the Constitution of Georgia, agricultural land as a resource of special importance shall be owned only by the state, a self-governing unit, a citizen of Georgia, or an association of citizens of Georgia. Exceptional cases may be determined by organic law.¹² The need to regulate the issue at the constitutional level, which arose after the decisions adopted by the Constitutional Court of Georgia in 2012,¹³ 2014¹⁴ and 2018¹⁵ will be considered in detail below.

The preamble of the law of land ownership recognizes the land in the territory of Georgia as the national wealth of the state, which has special political, social, economic, ecological and cultural value for the performance of state tasks and the realization of basic human rights, considers the rational use of agricultural land as an exhaustible resource of special importance and follows the principles of protecting public and private interests; The law establishes ownership rights over agricultural land, supports the implementation of the state policy on sustainable land management, ensures national security, and promotes the development of the local economy. Accordingly, the law is based on four key principles:

- Establishment of ownership rights over agricultural land concerning public and private interests;
- Promotion of the state policy on sustainable land management;
- Protection of national security policy;
- Development of the local economy.¹⁶

Land holds special significance for the state.¹⁷ As the Federal Constitutional Court of Germany stated in one of its decisions: “As land cannot be reproduced and is irreplaceable, its use must not be entirely left to the unrestricted forces of the free market or the discretion of individual interests. A just legal and social order requires that public interests be given greater consideration and expression about land than with other forms of property.”¹⁸

Thus, the purpose of the state is to preserve agricultural land as an exhaustible resource for as long as possible and to promote the development of local farming, which ensures the country's food security. In order to achieve these legitimate goals and the necessary societal/state needs, it remains one of the real and effective levers of the state to restrict the right of ownership of agricultural land and its use at the same time, within reasonable limits.¹⁹

¹² On June 25, 2019, the Organic Law of Georgia on Agricultural Land Ownership was adopted by the Parliament of Georgia.

¹³ Decision N3/1/512 of 26 June 2012 of the Constitutional Court of Georgia on the case “Danish citizen Heike Chronicle v. the Parliament of Georgia”.

¹⁴ Ruling N1/2/563 of 24 June 2014 of the Constitutional Court of Georgia on the case “Austrian citizen Matthias Hutter v. the Parliament of Georgia”.

¹⁵ Ruling N3/10/1267,1268 of the Plenum of the Constitutional Court of Georgia of 7 December 2018 on the case “Greek citizen Prokopi Savvid and Diana Shamanidi v. the Parliament of Georgia”.

¹⁶ See, the detailed explanatory note to the Law on the Ownership of Agricultural Land <https://info.parliament.ge/file/1/BillReviewContent/214999> [06.03.2025].

¹⁷ *Dixon M.*, *Modern Land Law*, 7th Ed., Routledge, 2010, 30.

¹⁸ *VerfGE* 21, 37 [82], See, A. Firtskhalashvili, *The Legal Dimension of the Social Function of Property*, *Journal of Constitutional Law*, Issue No. 2/2022, 24.

¹⁹ *Jennings R.*, *Oppenheim’s International Law*. London, 1992, 121.

3. Privatization of Agricultural Land

Privatization of the state-owned land is realized by the Law of Georgia “Type of State Property” (hereinafter-Property Law), according to which the forms of privatization of agricultural land are: auction, direct sale, direct sale based on competitive selection and direct sale of leased agricultural land, transfer of ownership free of charge.²⁰

Agricultural land shall be privatized by electronic auction or public auction²¹ by the National Agency of State Property (“the property administrator”).²² Privatization of state-owned agricultural land that has not been leased is carried out through direct sale, in the form of direct sale or based on a competitive selection process, following a decision by the Government of Georgia. In contrast, the privatization of leased agricultural land through direct sale is carried out by the property management authority.

3.1. Privatization of agricultural land through an electronic auction

According to Article 3 of the Property Act, “The purchaser of state property (except for the cases of privatization of state-owned agricultural land and state-owned movable property) may be a citizen of Georgia or a foreign country or a legal entity under private law or an association of persons in which the participation share of a state body or a municipality/municipalities is less than 25%, as well A non-entrepreneurial (non-commercial) legal entity established by the state, another entity or jointly by the state and another entity; the National Bank of Georgia, A National Regulatory Authority,

Proceedings on privatization in the form of an electronic auction shall start with the application of an interested person or on the initiative of the property administrator.

The application of an interested person must meet the requirements established by Article 78 of the General Administrative Code. Based on the application, the property administrator prepares the land for privatisation and, in case of making a positive decision, issues an order on the privatization of the “immovable item” by electronic auction.²³

Information on the privatization of the “immovable property” through auction shall be published on the website of the electronic auction system (www.eauction.ge) or the official website of the National Agency of Property (www.privatization.ge). The time limit for the auction shall be determined by the property administrator.

²⁰ Law of Georgia on State Property, Article 7, 21.7.2010. Based on the relevance of the issue, this article will discuss the privatization of “real estate” in the form of an electronic auction and direct sale (in Georgian).

²¹ In practice, a public auction is almost no longer used, and state property is privatized through an electronic auction.

²² According to Article 2(H¹) of the Law of Georgia on State Property, the manager of state-owned property is The National Agency of State Property (in Georgian).

²³ The order on privatization issued by the LEPL National Agency of State Property constitutes an individual administrative-legal act and may be appealed either to the Ministry of Economy and Sustainable Development of Georgia or to the common courts. See Article 1, paragraph 8 of the Law on State Property.

To participate in the auction, an interested party is required to submit an unconditional and irrevocable bank guarantee (BG). The amount of the bank guarantee shall be determined by the privatization authority in each specific case. The bank guarantee is calculated based on the initial privatization value of the “immovable property”.²⁴

An electronic auction can be conditional or unconditional. During the electronic auction of the conditions, when the investment is defined as an obligation, a person interested in purchasing “an immovable item” must submit a bank guarantee to the property administrator before signing the relevant purchase agreement; IT must comprise less than 10% of the investment exceeding the term for fulfilling the investment obligations (including the payment of penalties imposed under the relevant agreement for failure to comply with such obligations) by at least 4 months.

If the privatization of the immovable property is not completed at the initial auction, the property administrator shall be authorized to offer it at a repeated auction and may reduce the starting privatization price by up to 50%. Should the property remain unsold at the repeated auction, the initial privatization price may be subject to further reduction.

The purchaser of “an immovable item” must ensure the payment of the privatisation amount within 30 calendar days after the auction. A legal entity registered in Georgia shall submit documentation to the property administrator no later than 30 calendar days after the auction (including the legal entity's charter and, in the case of a joint-stock company, the extract from the National Agency of Public Registry issued by the authorized register) which determines the dominant partner(s). If the business partner(s) of the legal entity who won the auction are not legal entity/entities registered in Georgia, the information about each subsequent business partner is required. In addition, the auction results shall be rendered void, and the winning side shall not be entitled to the return of the submitted bank guarantee if the bidder fails to submit the required information/documentation within the prescribed timeframe or if the winning bidder is not eligible to acquire agricultural land through an auction process.²⁵

3.2. Privatization of Agricultural Land Through a Direct Sale

Article 10 of the Law of Georgia on State Property governs the privatization of an “immovable item” through a direct sale. A direct sale refers to the transfer of state property to an interested party through negotiations. The decision to privatize through a direct sale is made by the Government of Georgia, while the privatization process is initiated by the property management agent.²⁶ The initiation is made in the form of a draft ordinance.

²⁴ See, Resolution No. 15 (13.01.2011) of the Government of Georgia on the approval of the privatization income through a direct sale of state-owned agricultural land under lease; the initial privatization price for non-leased agricultural land to be sold via auction by administrative-territorial units, and the determination of the initial annual usage fee for the auction-based transfer of non-privatized state-owned agricultural land for use.

²⁵ Law of Georgia on State Property, Articles 6 and 9, 21.07.2010 (in Georgian).

²⁶ Initiation – placing an issue on the agenda on one’s own initiative. <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=6&t=18100> [07.03.2025].

Privatization through a direct sale may be carried out either with conditions or unconditionally. In the case of conditional privatization, the draft ordinance must include information on the privatization terms and the bank guarantee required to secure the fulfillment of the conditions. The draft ordinance consists of the ordinance itself and an explanatory note.

The ordinance of the government of Georgia on the privatization of an “immovable item” must include the following requisite information:

- the type of ordinance;
- its title;
- the date and place of issuance;
- the legal basis;
- the privatization conditions (if conditional privatization is applied);
- information on the bank guarantee;
- information on the person responsible for enforcing the ordinance;
- details of the authorized official.²⁷

The explanatory note must include the following²⁸:

- General information about the legal act (including the rationale and purpose of the draft);
- financial and economic impact assessment (including the quantity of financial resources required for implementation, impact on the revenue and expenditures of the budget, and any new financial obligations for the state, if applicable);
- information on relevant EU legal acts (an overarching reference to the EU legal framework targeted for alignment under the provisions of the Association Agreement);
- anticipated outcomes of the draft (information on the legal relations and persons likely to be affected);
- timelines;
- The author and the submitting body of the draft.²⁹

The Ordinance of the Government of Georgia is considered an individual administrative-legal act.³⁰

3.3. Lease-Purchase as a State Program for “Ensuring Access to Agricultural Land Resources”

In 2020, the Government of Georgia adopted the State Program on Access to Agricultural Land Resources (hereinafter, the *State Program*).³¹ The objective of the State Program is to facilitate the

²⁷ The Prime Minister signs the decree of the Government of Georgia.

²⁸ See Resolution No. 77 of the Government of Georgia of February 14, 2018, “On Approval of the Regulations of the Government of Georgia” (in Georgian).

²⁹ The LEPL National Agency of State Property prepares a draft resolution of the Government of Georgia, which is submitted to the Ministry of Economy and Sustainable Development. The latter then presents it to the Government of Georgia for consideration.

³⁰ Law of Georgia *On the Structure, Authority, and Rules of Procedure of the Government of Georgia*, 11 February 2004 (in Georgian).

transfer of ownership of state-owned arable and haymaking land, leased to natural and legal persons, through a direct sale to the current lessees. To achieve this goal, the program sets forth specific requirements that must be met by lessees interested in the privatization of such land. It also outlines the administrative procedures for competent authorities to make decisions on the privatization of arable or haymaking land held in state ownership.

Under the State Program, a person interested in the privatization of agricultural land must apply to the National Agency of State Property (Legal Entity of Public Law – LEPL). The application must cumulatively meet the following criteria:

- a) The land must not be subject to any pending litigation or legal proceedings.
- b) As of the date of application, the leased land must be registered in the National Agency of State Property with accurate cadastral data; c) There must be no pending procedures regarding inheritance or substitution of the lessee; d) In the case of arable land, a confirmation letter from the relevant municipality or the LEPL National Agency for Sustainable Land Management and Land Use Monitoring verifying the actual use of the land for agricultural purposes shall be required; e) In the case of haymaking land, a letter from the respective municipality confirming the actual agricultural use of the land.³²

Based on the submitted application, the National Agency of State Property conducts a simplified administrative procedure and, if a favorable decision³³ is made, ensures the valuation of the immovable property at its own expense.

The privatization price shall be set at 75% of the market value of the land (excluding the value of any plantings and infrastructure established by the lessee), plus the market value of any buildings and structures existing on the land at the time of making the lease agreement. The lessee shall pay the privatization amount within two years from the date of execution of the sale and purchase agreement.

Once the value is determined, the Agency provides the interested person with information regarding the privatization amount and allows 15 calendar days for their consent. The State Program does not allow the interested individual to challenge the determined amount or to submit an alternative valuation. If the interested party does not submit their consent within the specified period, it is considered a rejection of participation in the program. However, such refusal does not prevent the person from submitting a new application for the privatization of the same land at any point during the validity period of the program.

If the lessee consents to the price proposed by the property administrator, the administrator prepares a draft resolution of the Government of Georgia and submits it for consideration. The Government then makes an individual decision, taking into account the relevant circumstances.

³¹ The state program was adopted by Resolution N464 of the Government of Georgia of July 23, 2020.

³² Regardless of the consents submitted by the tenant, the National Agency for State Property may, on its own initiative, request relevant state agencies to express their position regarding the privatization of the land.

³³ In the case specified in Article 5, Paragraph 8 of the State Program, the property manager may decide to refuse to initiate the privatization issue before the Government of Georgia.

4. Ownership Rights of Foreign Nationals to Agricultural Land

At the outset of the land reform, agricultural lands were transferred only to the citizens of the Republic of Georgia into private ownership, possession, and use. Foreign nationals or non-citizens were given the land only for temporary use. The same provision was designed by the Law of Georgia on the Ownership of Agricultural Land, adopted by the Parliament of Georgia in 1996.³⁴ (further – the law of land ownership).

With the amendments made to the Law of Georgia in 2000, the right to purchase agricultural land was given to a legal entity registered in Georgia that carried out agricultural activities. Thus, foreigners who would establish a legal entity in Georgia also had the right to buy agricultural land.

Under the amendments enacted in 2007, foreign nationals and legal entities registered abroad were permitted to acquire ownership of agricultural land only through inheritance. Following the law, within six months from the date of acquisition of ownership, such individuals or entities were required to alienate the land in favor of a Georgian citizen, a household, or a legal entity registered in Georgia. These restrictions did not apply to foreign nationals acquiring land through a legal entity settled in Georgia.

If a foreign national or a legal entity registered abroad failed to alienate the land plot within the six months, the land was subject to expropriation, based on a court decision, following the provisions of the Law of Georgia on the rules for the expropriation of property for urgent public necessity, and with appropriate compensation.”

In order to determine the compliance of the land ownership law with the Constitution of Georgia, in 2011, the Danish citizen Heike Kronquist filed a constitutional claim to the Constitutional Court. The plaintiff believed that by the disputed norms, the abolition of the universal right to purchase and inherit his property was abolished, since he was prohibited from purchasing agricultural land, and in the case of inheritance, he was obliged to alienate it.

According to the respondent, the constitutional claim should not have been upheld, as agricultural land holds particular significance for small-scale agrarian countries. The primary purpose of prohibiting its alienation to foreign nationals is to prevent the large-scale acquisition of inexpensive land by citizens of wealthier states, which may negatively affect the country’s economic resilience, environmental protection, and national security. The restriction of the right to property in this context pursues the public interest of the state to ensure the rational use of land, support the development of organized agricultural practices, and improve the agrarian structure. The strategic importance of agricultural land must be taken into account, particularly concerning national security, environmental protection, economic stability, and public health.”³⁵

The Constitutional Court did not uphold the respondent’s position and explained that, while improving the agrarian structure falls within the discretion of the legislative authority, however, if legislative action restricts a fundamental right, the legislature is obliged to demonstrate a rational

³⁴ Law of Georgia “On Ownership of Agricultural Land” 22/03/1996 (Invalid 25/06/2019, No 4848) (in Georgian).

³⁵ Decision N3/1/512 of 26 June 2012 of the Plenum of the Constitutional Court of Georgia on the case “Danish citizen Heike Chronicle v. the Parliament of Georgia”, I, 12.

connection between the restrictive regulation and the legitimate public aim it seeks to achieve. In the present case, the respondent failed to provide any argument establishing a connection between the prohibition on foreign nationals owning agricultural land and the improvement of the agrarian structure. The Court noted that the state has the same opportunity to support the improvement of the agrarian structure regardless of whether agricultural land is owned by a foreign farmer residing in Georgia or by a Georgian citizen. The economic nature and quality of the agricultural products produced within the framework of agrarian activity do not depend on the citizenship status of the landowner. Furthermore, the Court emphasized that the entry of new actors into the market may not only fail to undermine economic growth and technological or scientific advancement in agriculture, but could in fact contribute positively to such development.

Accordingly, the court concluded that there is no rational connection between the prohibition on foreign nationals owning agricultural land and the public interest of improving the agrarian structure. Therefore, the disputed norm cannot be considered a suitable means for achieving the aim.”³⁶ The court further explained that the acquisition, possession, and disposal of property by an individual constitutes an expression of personal autonomy and bears no relation to state sovereignty. A specific land, due to its strategic significance, may fall within the scope of national security concerns, but agricultural land cannot be considered as such.”³⁷ The Plenum of the Constitutional Court declared the norm that prohibited foreigners from becoming owners of agricultural land.

As a result of amendments made to the Law on the Ownership of Agricultural Land in 2013, a so-called moratorium was introduced, effective until 31 December 2014. The moratorium suspended the acquisition of ownership rights to agricultural land by foreign nationals and the legal entities registered abroad.

The constitutionality of the moratorium was challenged by Austrian citizen Mathias Hutter. Based on his constitutional complaint, the Constitutional Court, by its Ruling No. 1/2/563 of 24 June 2014, declared the moratorium unconstitutional and repealed the disputed provision. The Court noted that the substance of the moratorium replicated a provision that had already been annulled in 2012 and pursued the same legislative objective. A second moratorium followed in 2017; however, this was declared unconstitutional by the Constitutional Court in its ruling of 7 December 2018.³⁸

a) Agricultural land may be owned by a foreign national if acquired through inheritance.

b) It may also be owned by a private legal entity registered in Georgia if its dominant partner is a foreigner or a legal entity registered abroad, or if the dominant partner cannot be identified based on an investment plan³⁹ following the decision of the government of Georgia. In case of non-fulfilment of

³⁶ Decision #3/1/512 of 26 June 2012 of the Plenum of the Constitutional Court of Georgia on the case “Danish citizen Heike Chronicle v. the Parliament of Georgia”, II, 65.

³⁷ Ibid., 69.

³⁸ N3/10/1267,1268 Ruling on the case “Citizens of the Republic of Greece – Prokopi Savvid and Diana Shamanidi v. the Parliament of Georgia”.

³⁹ Investment Plan, documentation reflecting the intended use of an agricultural land plot, which provides for the implementation of an investment aimed at the production of agricultural and/or other products, the introduction of innovative activities, the development of tourism infrastructure, or the execution of projects of international, national, and/or local significance. The purpose of such investment is to contribute to the socio-economic development of the state. The protection of national security and the creation of new jobs.

the obligations ensured by the investment plan, within one year after the authorised body makes a decision, the owner shall provide the land plot alienation. Restrictions on foreign ownership of land are characteristic of many developing countries.⁴⁰ In discussing the development of ownership rights to agricultural land, the experience of European countries is instructive.

In France, since August 5, 1960, the privatization of agricultural land plots has been regulated by the Society for Land Development and Rural Settlements (*Société d'aménagement foncier et d'établissement rural*)⁴¹. The Society's primary functions include regulating land prices and participating in negotiations between buyers and sellers. It also establishes privatization plans for agricultural land intended for citizens of EU member states. These plans are submitted to governmental commissions for implementation, which ensures consistency of SAFER's decisions with the regional planning policies established by the national authorities.⁴²

The privatization process in Eastern Germany is particularly distinctive and unique.⁴³ Following German reunification, the Treuhandanstalt, an agency subordinated to the Federal Ministry of Finance (BMF), was established to oversee privatization. Its mandate was to integrate the economy of East Germany into that of West Germany, to create a corresponding legal framework, and to conduct the privatization process efficiently.⁴⁴ In 1992, the BVVG (*Bodenverwertungs- und -Verwaltungs GmbH*), a federal state agency, was established⁴⁵ to manage and privatize agricultural and forest lands. The agency remains responsible for this function to date.^{46,47} In contrast to Georgia, Germany pursued an accelerated privatization strategy, aimed at market-oriented privatization⁴⁸ with a sense of social responsibility. As a result, the state identified which property would remain in private ownership and which assets could be mobilized into economic circulation.⁴⁹

(See Subparagraph "e", Article 3 of the Law of Georgia on the Designated Use and Sustainable Management of Agricultural Land).

⁴⁰ World Bank, *Innovations in Land Rights Recognition, Administration and Governance*, 2013, 195.

⁴¹ <<https://www.safer.fr/les-safer/quest-ce-quune-safer/>> [08.03.2025].

⁴² *Ciaian P., Kancs D'A., Swinnen J., Van Herck K., Vranken L.*, Sales Market Regulations for Agricultural Land in EU Member States and Candidate Countries, Factor Markets, Working Paper, No. 14, February 2012, 15.

⁴³ *Kloepfer M.*, *Verträge als Instrumente der Privatisierung, Liberalisierung und Regulierung in der Wasserwirtschaft*, 2009, 31.

⁴⁴ *Kornai J.*, *Making the Transition to Private Ownership*, F&D, 2000, 12-13.

⁴⁵ <https://www.bvvg.de/wp-content/uploads/2024/06/Zahlen_und_Fakten_2023.pdf> [08.03.2025].

⁴⁶ *Christoph Rieger H.*, *Die Privatisierung der Staatsunternehmen: Das Disinvestment-Desaster*, 2001, 19.

⁴⁷ *Dells, K.*, *Management and Privatization of State-Owned Agricultural Land – Case Studies from Eastern Germany and Ukraine*. Conference paper for FIG/FAO/CNG Seminar in Verona, Italy, September 2008. 1-7.

⁴⁸ This entailed the balanced development of rural areas through close cooperation with federal and local institutions, resulting in a reform process that lasted a very short period, from 1990 to 1994. As a result of the reform, state-owned property was rapidly transferred into private ownership by its holders. See, *Himmelmann G.*, *Politische Bestimmungsmerkmale der Privatisierungsdiskussion in der Bundesrepublik Deutschland*. In *Privatisierung und die Zukunft der öffentlichen Wirtschaft*, Baden-Baden: Nomos, 1988, 107-176.

⁴⁹ *Merkel W.*, *Verstaatlichung, Privatisierung und Sozialdemokratie: ein westeuropäischer Vergleich*, 1992, 252.

BVVG has chosen a cautious approach to the issue of privatization of agricultural lands by a citizen or a non-citizen. A person interested in the acquisition of agricultural land shall submit a specific land processing plan, which shall be relevant to the political and social interests of Germany. However, such a permit cannot be obtained without the consent of a special commission.⁵⁰

On October 18, 2017, the European Commission published an official reference document 2017/C 350, following which the Commission recognizes the specific nature of agricultural land, believing that land is a rare and exhaustible resource that requires special protection. The European Commission notes that “the need to regulate the agricultural land market is especially relevant in countries where universal land reform has been implemented in recent years and the privatization of state land is presently being conducted. In addition, it leaves member states with the right to impose restrictions based on clearly defined goals that should serve to maintain the viability of farms in a particular country, prevent speculation at excessive prices, and promote and develop sustainable and efficient agriculture.”⁵¹

As we can see, the sale of agricultural land to a foreign citizen/foreign-based legal entity is limited by the EU directive and the legislation of different countries. However, the EU directive provides an opportunity to privatize agricultural land for foreigners, considering appropriate justification and legal basis.

5. Conclusion

This paper discusses the issues of the privatization of agricultural land. As a result of the study, after the first attempt at land reform in Georgia, the fundamentals and standards of reform were constantly changing. Despite the success or failure of the reform, these efforts have always been of great importance for Georgia, since the privatization of agricultural land plots is the basis of agricultural development.

Agricultural land is a special asset for the state and is most heavily burdened with social functions, which justifies the imposition of certain restrictions upon it. Following Article 19 of the Constitution, under the Law on the Ownership of Agricultural Land, foreigners may acquire agricultural land only through inheritance, while foreign legal entities may obtain land pursuant to an investment plan.

However, in light of the Constitutional Court’s decisions, questions remain as to whether the new regulations comply with the proportionality test, as well as the principles of equality and legal certainty.

In order to address these issues, it is important to continue the discourse aimed at refining the existing legislation, so as to foster the development of the agricultural sector, an outcome that would have a positive impact on the country’s overall economic condition.

⁵⁰ Bromley J. and Bromley D., *Looking East: Reclaiming land and legacy in the former GDR*, 2012, 63.

⁵¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A2017%3A350%3AFULL#ntr5-C_2017350EN.01000501-E0005> [08.03.2025].

Bibliography:

1. Constitution of Georgia, 24/08/1995.
2. “On Agricultural Land Reform in the Republic of Georgia”, Resolution of the Cabinet of Ministers of the Republic of Georgia, N48, 18/01/1992 (Invalid 26/06/1997, No 786) (in Georgian).
3. Law of Georgia *On the Structure, Authority, and Rules of Procedure of the Government of Georgia*, 11 February 2004 (in Georgian).
4. Law of Georgia on State Property, 21/07/2010 (in Georgian).
5. Law of Georgia “On Ownership of Agricultural Land”, 25/06/2019 (in Georgian).
6. the Organic Law of Georgia on Agricultural Land Ownership, 25/05/2019 (in Georgian).
7. Law of Georgia on Determining the Purpose of Land and Sustainable Management of Agricultural Land, 25.06.2019 (in Georgian).
8. Resolution N265 of 29 May 2017 of the Government of Georgia “On the Approval of the State Program for the Rational Use of State-Owned Hayfields in High Regions” (in Georgian).
9. Resolution No. 77 of the Government of Georgia of February 14, 2018, “On Approval of the Regulations of the Government of Georgia” (in Georgian).
10. Bromley J. and Bromley D., Looking East: Reclaiming land and legacy in the former GDR, 2012, 63.
11. *Ciaian P., Kancs D’A., Swinnen J., Van Herck K., Vranken L.*, Sales Market Regulations for Agricultural Land in EU Member States and Candidate Countries, Factor Markets, Working Paper, No. 14, February 2012, 15.
12. *Christoph Rieger H.*, Die Privatisierung der Staatsunternehmen: Das Disinvestment-Desaster, 2001, 19.
13. *Dells, K.*, Management and Privatization of State-Owned Agricultural Land – Case Studies from Eastern Germany and Ukraine. Conference paper for FIG/FAO/CNG Seminar in Verona, Italy, September 2008. 1-7.
14. *Dixon M.*, Modern Land Law, 7th Ed., Routledge, 2010, 31.
15. *Firtskhalashvili A.*, *The Legal Dimension of the Social Function of Property*, Journal of Constitutional Law, Issue No. 2/2022, 24. (in Georgian).
16. *Goo SH.*, Sourcebook on Land Law, 3rd Ed., Cavendish Publishing, 2002, 42.
17. *Himmelmann G.*, Politische Bestimmungsmerkmale der Privatisierungsdiskussion in der Bundesrepublik Deutschland. In *Privatisierung und die Zukunft der öffentlichen Wirtschaft*, Baden-Baden: Nomos, 1988, 107-176.
18. *Kipshidze Sh.*, Privatization as a fundamental element of public administration, Zhurn. “Orbeliani”, No. 4, 2021, 103 (in Georgian).
19. *Kloepfer M.*, Verträge als Instrumente der Privatisierung, Liberalisierung und Regulierung in der Wasserwirtschaft, 2009, 31, 42.
20. *Kornai J.*, Making the Transition to Private Ownership, F&D, 2000, 12-13.
21. *Merkel W.*, Verstaatlichung, Privatisierung und Sozialdemokratie: ein westeuropäischer Vergleich, 1992, 252
22. *Sack D.*, Vom Staat zum Markt, Privatisierung aus politikwissenschaftlicher Perspektive, 2019, 4-5.
23. *Jennings R.*, *Oppenheim’s International Law*. London, 1992, 121.
24. World Bank, *Innovations in Land Rights Recognition, Administration and Governance*, 2013, 195.

25. Decision N3/1/512 of 26 June 2012 of the Constitutional Court of Georgia on the case “Danish citizen Heike Chronicle v. the Parliament of Georgia”.
26. Ruling N1/2/563 of 24 June 2014 of the Constitutional Court of Georgia on the case “Austrian citizen Matthias Hutter v. the Parliament of Georgia”.
27. Decision No 1/6/666 of 22 June 2017 of the Constitutional Court of Georgia on the case “Citizen of Georgia Shota Jibladze v. the Parliament of Georgia”, II, 13.
28. Ruling N3/10/1267,1268 of the Plenum of the Constitutional Court of Georgia of 7 December 2018 on the case “Greek citizen Prokopi Savvid and Diana Shamanidi v. the Parliament of Georgia”.
29. the detailed explanatory note to the Law on the Ownership of Agricultural Land “<https://info.parliament.ge/file/1/BillReviewContent/214999> [06.03.2025].
30. <https://www.bvvg.de/wp-content/uploads/2024/06/Zahlen_und_Fakten_2023.pdf> [08.03.2025].
31. <<https://www.safer.fr/les-safer/quest-ce-quune-safer/>> [08.03.2025].
32. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A2017%3A350%3AFULL#ntr5-C_2017350EN.01000501-E0005> [08.03.2025].
33. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A2017%3A350%3AFULL#ntr5-C_2017350EN.01000501-E0005> [08.03.2025].

Mariam Berbichashvili*

The Problematic Issues About Compensation for Damages Caused by Suspension of Appealed Individual Beneficial Administrative-Legal act, key Aspects About Mutual Separation of Procedural Standards Established in Civil and Administrative Court Proceedings

The present paper reviews the principal aspects of mutual separation of Civil and Administrative court proceedings, as well as the current legal reality in terms of analysis of the judicial practice. The relevance of the issue about the question of feasibility of compensation the damages caused by suspension of individual administrative-legal acts, while adjudicating the cases by the common courts, became the source the of inspiration for this paper.

The present research was analyzed on the basis of both – comparative-legal method and generalization of the judicial practice of the common courts and Constitutional Court of Georgia. The considerable part of this paper is dedicated to problematic aspects about admissibility of compensation for damages caused by suspension of the administrative-legal act in form of the claim security measure in Administrative court proceedings when there is a conflict of interests of subjects of private law in administrative dispute.

From comparative-legal point of view the paper examines the normative regulation of the issue about compensation for damages in the event of suspension of administrative-legal acts while implementation the Administrative Justice and also the approaches established in the doctrine on the examples of Germany, France, Latvia, Estonia and the United States of America.

The efficiency of justice is manifested in the independent, impartial, fair and timely judicial procedure.¹

Keywords: *Suspensive Effect, Administrative court proceedings, Civil court proceedings, Preventive Security Measures, Provision for the Damage.*

1. Introduction

According to the 2nd article of the Civil Procedural Code of Georgia, every person is guaranteed to right to judicial protection.² The right of access to the court, is an instrumental right, which represents the means of protection of other rights and interests.³

* Assistant to a Member of the High Council of Justice of Georgia.

¹ See citation: *Schmitt S., Richter H.*, The Procedure of Making a Decision by a Judge in Civil law, German Society for International Cooperation (GIZ), 2013, 3 (in Georgian).

² The first part of the Article 2-nd of the Civil Procedural Code of Georgia, 14.11.1997, The Legislative Herald of Georgia, <<https://matsne.gov.ge/ka/document/view/29962?publication=169>> [24.01.2025] (in Georgian).

The right on effective court protection, is the main principle for the development of preventive measures for the protection of person's rights.⁴

The efficiency of judicial system is the fundamental precondition of reinforcement of legal order and provision of legal security.⁵ According to the opinion in the legal doctrine, the Administrative Law best expresses the character of the state and the people.⁶

The temporary-legal remedies of protection of a person's right in Administrative proceedings serves to ensure the effective implementation of justice and provides temporary protection of the plaintiff's rights and interests until the dispute between parties is resolved and also ensure to avoid the obstructing circumstances of enforcement of final decision on the case.⁷

One of the legal remedies of temporary protection of a person's right in Administrative Justice is suspension the validity of the administrative-legal act. The issue about ensuring the compensation for damages caused by suspension the validity of administrative-legal act, that's will be the subject of present research.

In present paper there is reviewing the current legal reality and the legislative regulation from a comparative-legal point of view on the examples of Germany, France, Latvia, Estonia and United States of America.

2. About Suspension of the Validity of an Administrative-Legal Act as The Procedural-Legal Mechanism of Preventive protection of a person's right

The Administrative Procedural Legislation of Georgia⁸ provide for suspension of the validity of the appealed individual administrative-legal act automatically in case of acceptance of a claim by the court, however the second part of the article 29 of Administrative Procedural Code of Georgia indicates the cases, when the appealed administrative-legal act is protected from the "suspension effect". One of them is the circumstance, when there is appealed beneficial administrative-legal act⁹ and suspension of validity will cause significant harm to the legal interests of another person.

The fact, that according to the sub-section "E", second part of the article 29, the mechanism for suspend the validity of an act, does not apply on an individual beneficial administrative-legal act, it clearly indicates that issuing the above mentioned act, the legal interests of the addressee of the act

³ The Judgement of 10-th November, 2009 on the case N1/3/421.422, Constitutional Court of Georgia (in Georgian).

⁴ *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.

⁵ *Schmitt S., Richter H.*, The Procedure of Making a Decision by a Judge in Civil law, German Society for International Cooperation (GIZ), 2013, 3 (in Georgian).

⁶ *Loria kh.* Assurance of Administrative Body – the Basis of Legal Reliance, *Journal of Law*, N2, 2022, 201, see citation: *Nalte G.*, General Principles of German and European Administrative Law- A Comparison in Historical Perspective, the Modern Law Review, 1994, 212 (in Georgian).

⁷ Judgement on the case №BS-551 (KS-23), the chamber of administrative cases of Supreme Court of Georgia, (in Georgian).

⁸ The Article 29 (1), of the Administrative Procedural Code of Georgia, 23.07.1999, The Legislative Herald of Georgia, <<https://matsne.gov.ge/ka/document/view/16492?publication=98>> [16.04.2025] (in Georgian).

⁹ *Ibid*, Article 29 (2), (in Georgian).

prevail over the plaintiff's interests and therefore, that is why the beneficial act is "protected" from the action of the suspensive effect. However, this "protection" can be crossed over in two circumstances¹⁰: when there is reasonable doubt about legality of the administrative-legal act and also in the case when enforcement causes so much harm to the plaintiff, that it makes impossible to protect his legal rights and interests in the future.

The "suspensive effect" ¹¹ in administrative court proceedings preciously serves temporary protect a person's rights from the consequences of the public administration measures until the final decision will be taken by the court, the purpose of which is to maintain the status quo for the plaintiff, which was prior to the issuance of the contested act.¹²

For the purposes of this paper it is interesting, to research the issue from comparative-legal point of view and in this sense, to share the practice of foreign countries. In particular, in Germany appealing and rescission¹³ of an administrative-legal act has a suspension effect¹⁴, The Law on the "Administrative Judicial Order" also includes the cases, when the "suspensive effect" does not apply, among them there are cases when "suspensive effect" is not wide spreading¹⁵ on the administrative-legal acts of such nature, which grant to a third person with a certain rights. Above-mentioned regulations are more or less similar to the normative regulations established in the Administrative Procedural Code of Georgia.

One of the peculiarities of the German Administrative Process which distinguishes it from the Civil Process, is the principle of investigation¹⁶, when German Judge adjudicating the suspension of the validity of an administrative-legal act, do not comprehensively inspection the legality of the administrative-legal act, but evaluates, what is more valuable: public interests to the implementation of the administrative-legal act, or plaintiff's private interest of its non-enforcement. It is naturally, that in this case, supposed illegality of an administrative-legal act comes across as a qualified argument in favor of a private interest.¹⁷

The legislative framework proposed by the French Administrative Law is interesting in terms of constitutional rights to effective judicial protection, which is similar to the European Convention of Human Rights.¹⁸

¹⁰ Ibid, Article 29 (2) (in Georgian).

¹¹ Vachadze M., Todria I., Turava P., Tskepladze N., Commentary on the Administrative Procedural Code of Georgia, Tbilisi, 2005, 174 (in Georgian).

¹² Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Ghvamichava T., Gvaramadze T., Administrative procedural Law Guide, Tbilisi, 2018, 336 (in Georgian).

¹³ When adjudication the lawsuits related the legality of an administrative-legal act, including the norms on the measures to be taken by the court, in order to suspend the validity of an acts, is established in articles 80-80 (b) of the law about "Administrative Judicial Order" of the federal republic of Germany.

¹⁴ The Law of the Federal Republic of Germany on the "Administrative Judicial Order", 19.03.1991. art.80 (1), <https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html> [20.01.2025].

¹⁵ The Law of the Federal Republic of Germany on the "Administrative Judicial Order", 19.03.1991. art.80 (2), <https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html> [20.01.2025].

¹⁶ Kharshiladze I., Ovsianikova N., Administrative Law of Foreign Countries, Tbilisi, 2014, 469 (in Georgian).

¹⁷ Ibid, 479 (in Georgian).

¹⁸ 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, 50.

In France, Applying of a lawsuit on the legality of a decision taken by an administrative body, does not suspend the validity of an act automatically¹⁹, in this case the situation is more complicated from a doctrinal point of view, since the preventive protection of a person's rights is not directly recognized by the constitution of the country²⁰ but however, in some cases, when the enforcement of the appealed decision may have serious and unrepairable consequences, in this case, the Law gives an authority to the Administrative judge, to request "suspension of an action" of an Administrative Body.²¹

It is determined in the articles 521(1)-521 (4) of the Code of Administrative Justice of the Republic of France²² about implementation some urgent authorities by the judge issuing an interim order (*Le Juge des Référé*s) upon adjudicating the dispute over legality of an administrative-legal acts. In particular, when the subject of a dispute is related to cancellation or changing an administrative-legal act, the judge issuing an interim order (*Le Juge des Référé*s) is authorized issue a decree (order) about the suspension of validity of an act, or to apply an alternative effect²³ of suspension, when an urgent response is justified and the investigation provides the reasonable grounds for suspicion, on the legality/illegality of an administrative-legal act. This authority is an important tool for the judge to take an urgent action before the substantive discussion of the case, until the matter will become adjudicable by the administrative courts (tribunals).²⁴

It is also noteworthy, that in case of suspension of the validity of an acts, the final decision about abolishing or changing an administrative-legal act is rendering by the court in the shortest possible time, and the effect of the suspension effect is completed no later than the date of the final decision on the abolishing or changing of the administrative-legal act.²⁵

The judge issuing an interim order (*Le Juge des Référé*s) takes all necessary measures upon exercising its authorities in the terms of suspension the validity of an act for protecting the

¹⁹ Kharshiladze I., Ovsianikova N., Administrative Law of Foreign Countries, Tbilisi, 2014, 469 (in Georgian).

²⁰ 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, 49.

²¹ Kharshiladze I., Ovsianikova N., Administrative Law of Foreign Countries, Tbilisi, 2014, 420 (in Georgian).

²² The Code of Administrative Justice of the Republic of France, Article L521-1-521-4, 01.07.2000, <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070933/LEGISCTA000006136456?dateVersion=20%2F01%2F2025&isAdvancedResult=&nomCode=zm7z5g%3D%3D&page=2&pageSize=10&query=&searchField=ALL&searchProximity=&searchType=ALL&tab_selection=code&typePagination=ARTICLE&typeRecherche=date&anchor=LEGISCTA000006136456#LEGISCTA000006136456> [23.05.2025].

²³ Bell J., Liche're F., Contemporary French Administrative Law, Cambridge University Press, 2022, 104.

²⁴ Ibid.

²⁵ The Code of Administrative Justice of the Republic of France, Article L521, 01.07.2000, <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070933/LEGISCTA000006136456?dateVersion=20%2F01%2F2025&isAdvancedResult=&nomCode=zm7z5g%3D%3D&page=2&pageSize=10&query=&searchField=ALL&searchProximity=&searchType=ALL&tab_selection=code&typePagination=ARTICLE&typeRecherche=date&anchor=LEGISCTA000006136456#LEGISCTA000006136456>, [23.05.2025].

fundamental rights of a person, which has been grossly and unfairly violated by an Administrative Body, a Legal Entity under Public Law or Legal Entity under Private Law while exercising the public authority.²⁶

As for Latvia²⁷, since the Latvian Act of Administrative Justice²⁸ entered into force on February 1, 2004, which contains the norms of both – administrative proceedings in Administrative Bodies, also administrative court proceedings, according to the article 185²⁹ filling a claim about abolishing or invalidation of an administrative – legal act, suspend the validity of the disputed act from the day of applying of the relevant application.

Second part of the same article³⁰ indicates the circumstances, when filling a claim does not suspend the validity of the disputed administrative-legal act, which is more or less similar to the circumstances indicated in the second part of the article 29 of the Administrative Procedural Code of Georgia.

In the chapter 24 of the Administrative Procedure Code of Estonia³¹, where there are regulations about measures of preventive protection of the person's rights, one of the measures taken as a result of rendering an interim order is precisely the suspension of the disputed administrative-legal act.³²

As for a such common law country, like the United States of America, here the Administrative law regulates the powers and rules of activities of the Administrative bodies (**Administrative Agencies**), also control of the courts over the Administrative bodies³³. In United States of America relevant officials³⁴ of the Administrative Agencies carry out quasi-judicial activities, which is known as – so called **Administrative Adjudication**³⁵.

²⁶ Ibid, L521-2, The judge issuing an interim order (*Le Juge des Référés*) takes the appropriate decision within 48 hours.

²⁷ As a result of significant legislative reforms, implementing in Latvia, Administrative justice, as well as, Civil and Criminal justice, is implemented through the three instances: District Administrative Court (first instance), Regional Administrative Courts and the highest instance – the department of administrative cases of senate of the Supreme Court.

²⁸ Thill J., The Grand Duchy of Luxemburg, Ed. by Jörg Gerkrath, Besselink L., Bovend 'Eert P., Broeksteeg H., de Lange R., Voermans W., Constitutional Law of The EU Member States, University of Amsterdam 2014, 1005-1006, <https://pure.uva.nl/ws/files/136136881/Constitutional_Law_of_28_EU_BW.pdf> [03.12.2024].

²⁹ Article 185 (1), of The Act of the Republic of Latvia on the Administrative Procedure Law, 20.10.2001, entered into force from 01.02.2004, <https://constitutionnet.org/sites/default/files/Admin_Pro_Law_Latvia.pdf> [22.05.2025].

³⁰ Ibid, 185 (2).

³¹ The Administrative Procedure Code of Estonia, 01.01.2012, art.249, <<https://www.riigiteataja.ee/en/eli/512122017007/consolide>> [23.05.2025].

³² Ibid, 251 (1).

³³ Kharshiladze I., Ovsianikova N., Administrative Law of Foreign Countries, Tbilisi, 2014, 583 (in Georgian).

³⁴ They were originally called as – “Hearing Examiners” and later became known as Administrative Judges, who carry out quasi-judicial activities and possess with broad powers similar to what a judge has in a Civil Trial, in addition, they have authorities to seek necessary evidence for the adjudication of the case on their own initiative. The above-mentioned officials exercise their powers locally in Administrative Agencies.

³⁵ Kharshiladze I., Ovsianikova N., Administrative Law of Foreign Countries, Tbilisi, 2014, 583 (in Georgian).

The power of the judicial system of United States of America³⁶ to implement the justice and among them, to exercise control over the activities of the Administrative Agencies,³⁷ is regulated by the article 3rd of the Constitution of United States of America. While hearing a complaint on the decision made by an Administrative Agency, including reviewing the complaint not only from legality point of view, but also from the point of view of factual examination, is hearing with an administrative judge, which carries out quasi-judicial activities in Administrative Agencies.³⁸ The norms, regulating the implementation of justice by the federal and state courts³⁹, are established in the federal law of Administrative Proceedings, which is – Administrative Procedure Act, the so-called **APA**⁴⁰ (hereinafter the **Federal APA**) and also in the normative acts directly regulating the activities of an Administrative Bodies.

According to **APA** (The Federal APA) The court is authorized⁴¹ to render the appropriate decision in the form of an order (the so called – **Injunction**) on the suspension the validity of the administrative-legal act (including not only of the administrative-legal Act, but also about the suspension of an action of the Administrative Body), the enforcement of which is mandatory for the Administrative Body, in order to maintain the status quo in terms of protecting a person's legal rights and interests until the dispute is resolved.⁴² It can be said, that by the abovementioned order (**Injunction**) is being implemented preventively a kind of postponement of the date of enter into the force of an administrative-legal act or an action of an Administrative Body (**Administrative Agency**).

2.1. The Issue of Compensation for Damages in The Event of Abolishment of a Beneficial Administrative-Legal Act, Issued as a Result of Administrative Proceedings

When examining the issue for compensation for damages caused by the suspension the validity of an administrative-legal act by the court, the issue of the existence of a legal reliance of the addressee of an act, is gaining relevance, accordingly, when considering present research, we will logically address the issue of legal reliance and issue of the compensation for the damages resulting from the abolishment of an individual administrative-legal act at the stage of administrative proceedings.

³⁶ Ibid, 579, (in Georgian).

³⁷ Apply to the federal and state courts of United States of America are made through petitions or lawsuits, the petition is made to the courts of appeal, and with the lawsuit – in the district courts.

³⁸ *Cane P.*, Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals, Comparative Administrative Law, Vol: 10.4337/97, 441, <<https://articles.sk/book/99485222/505591/comparative-administrative-law-judicial-review-and-merits-review-comparing-administrative-adjudi.html>> [21.05.2025].

³⁹ *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.

⁴⁰ The federal Administrative Procedural Act of the United States of America was initiated by the Senate on June 11, 1946.

⁴¹ *Blachly F.F. & Oatman E.M.*, Federal Administrative Procedure Act, Geo. L. J. [Vol.34: 407, 1946] 422.

⁴² Ibid.

The General Administrative Code of Georgia gives a definition the principle of the legal reliance⁴³ and it assumes an unwavering faith of the addressee of the beneficial individual administrative-legal act about implementation of certain action by an Administrative Bodies.⁴⁴

The very origin of the issue of legal reliance⁴⁵ means that, there is abolishment of a beneficial individual administrative- legal Act, what is the basis of the “Principle of Legality” the purpose of restore of which is precisely the abolishment of an illegal individual administrative-legal act. The mentioned principle is opposed by the principle of “Legal Reliance” of the addressee of an act, established by the legislator. Both of these principles are of constitutional rank and derive from the principle of the rule of law. The purpose of both, administrative proceedings and administrative court proceedings is, when solving a specific problem, to made a balanced decision by confrontation these two principles.⁴⁶ Precisely because, the plaintiff’s claim based on the existence or non-existence of Legal Reliance⁴⁷ may be related to the issuance of the act, the implementation of an action, as well as the maintenance of the existence of the beneficial act.

In the event of abolishment of an illegal beneficial administrative- legal act at the stage of administrative proceedings, the compensation for damages to the addressee of the act is implemented precisely in view of his/her factor of legal reliance⁴⁸ and at the request of the addressee himself, the property damage caused by the void of an individual administrative- legal act must be compensated to him/her. Accordingly, the Legal Reliance of an act, at the stage of administrative proceedings, is worthy of protection,⁴⁹ while it requires much more qualified argumentation, upon administrative court proceedings at the stage of preventive security measures, imposing the compensation by the court for damages caused by suspension of an administrative-legal act on the plaintiff.

The circumstances, that precludes the Legal Reliance the General Administrative Code of Georgia considers the illegal action of the addressee of an act, however, the fact -what is considered an “illegal action” – it is an evaluative category. An interesting definition is made by the Court of Justice of European Union in its decision,⁵⁰ where the following case is discussed, when the party of the case, the addressee of an administrative-legal act is an entrepreneur. In this dispute, the court defined a kind of a criteria of Legal Reliance – as the activities, carried out by a prudent and conscientious economic operator.

⁴³ Article 9 (1), of The General Administrative Code of Georgia, 25/06/1999 (in Georgian).

⁴⁴ Loria KH., Assurance of an Administrative Body – the Basis of Legal Reliance, Ivane Javakhishvili Tbilisi State University, “Journal of Law”, №2, 2022, 214 (in Georgian).

⁴⁵ Ibid, (in Georgian).

⁴⁶ Turava p., The General Administration Law, Tbilisi, 2024, 243 (in Georgian).

⁴⁷ Loria KH., Assurance of an Administrative Body – the Basis of Legal Reliance, Ivane Javakhishvili Tbilisi State University, “Journal of Law”, №2, 2022, 214 (in Georgian).

⁴⁸ Turava p., The General Administration Law, Tbilisi, 2024, 250 (in Georgian).

⁴⁹ Ibid, 244 (in Georgian).

⁵⁰ The Court of Justice of the European Union, Arrêt du 30 novembre 2017, Red Bull/EUIPO–Optimum Mark, <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=216554&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4685038>> [21.01.2025].

3. The Issue About Compensation for Damages Caused by Suspension of a Beneficial Individual Administrative-Legal Act in Terms of the Practice of Common Courts of Georgia

When considering the problematic issue about compensation/provision as for damages caused by suspension of the validity of a beneficial individual administrative-legal act at the stage of administrative court proceedings, we cannot fail not to touch on the constitutional submission of Tbilisi Court of Appeals⁵¹ with respect to the article 19 and the article 31 of the Constitution of Georgia the Constitutional Court was requested to establish the constitutionality of the normative content of the 3rd part of the article 29 (only upon applying “E” sub-paragraph of the second part of article 29 in the section of beneficial act) and article 31 (only upon the conflict of interests of subjects of private law) of the Administrative Procedural Code of Georgia, when the provision of security, established by the Civil Procedural Code of Georgia, also the rule on the compensation of damages caused by the provisional measures, are not applied upon using the above-mentioned norms.

The constitutional submission is mainly focuses on transferring the institution of claim security and the rule on the compensation of damages, also the institution the provision of security established by the Civil Procedural Code of Georgia, to the administrative court proceedings when there is a conflict of interests between subjects of private law. The author of the submission proceeds from the unconditional protection of the principle of adversarial of parties and by reinforcing this thesis, it attempts to reinforce the necessity of transferring the civil court proceeding standard to administrative justice.⁵²

The problematic issue about compensation for damages caused by suspension of an administrative-legal act, which is implemented by the court as a preventive measure of temporary protection of a person’s right, is particularly sensitive, when considering the disputes over the acts of a beneficial nature – such as construction permits, since in this mentioned dispute, the plaintiff’s legitimate interests (basically, the interest of a population, living in the construction area) are opposed to the interests of the building developers.

The issue about the legality of a construction permits are often subject of a dispute in common courts. It should be noted, that construction permit⁵³, is a legal document, reflecting a specific case of the right to construction guaranteed by the Constitution of Georgia and the necessity of issuing a permit by an administrative body is not intended to restrict this right, but rather to place the process of realizing the right within a legal framework.⁵⁴

⁵¹ Constitutional submission of Tbilisi Court of Appeals of 07.04.2021, <<https://www.constcourt.ge/ka/judicial-acts?legal=11044>> [20.01.2025], (in Georgian).

⁵² Ibid, (in Georgian).

⁵³ Churghulia D., Construction Permit Administrative Proceedings as a Mechanism for Implementing Construction Safety, Ivane Javakhishvili Tbilisi State University, “Journal of Law”, №2, 2020, 193, (in Georgian).

⁵⁴ Kopaleishvili M., Skhirtladze N., Kardava E., Turava P., (ed.) Administrative Procedural Law Guide, Tbilisi, 2008, 345, (in Georgian).

The issuance of a construction permit should eliminate any conflict of interest, since the balance between the private interests of the construction permit seekers and the public interests is maintained during administrative proceedings.

In terms of content public interests in turn includes individual interests also, more specifically, it either serves the realization of private interests or comes into conflict with them.⁵⁵

Before applying with the constitutional submission to the Constitutional court, among them, the current judicial practice demonstrates, that according to the definition of Supreme Court of Georgia⁵⁶, administrative court proceedings do not recognize the institution of a guarantee for securing damages. The judgment clearly separates preventive security measures for the protection of the person's rights in civil and administrative court proceedings, however it must also be mentioned, that the definition of the Supreme Court, regarding the inadmissibility of civil procedural standards in administrative court proceedings, is not sufficiently detailed, in particular, there is not mentioned about the rights of the third person.

There is a reference in the constitutional submission⁵⁷, that the basically grounds of the conflict of interests between the persons of the private law, are provided in the "E" sub-paragraph of the second part of article 29, as well as in the article 31 of the Administrative Procedural Code of Georgia, which is a misconception at the beginning, because, in this case, in administrative dispute, the party, requesting a compensation/ensuring the compensation for damages caused by using a preventive measures, does not represent the defendant – in terms of content, but a third person. The defendant, in this case is the Administrative Body, issuing the administrative-legal act, although a certain illusion arises upon adjudicating the disputes about construction issues, that there is a conflict of interests only between the private individuals, while the act issuing authority is outside the abovementioned process. Accordingly, according to the constitutional submission, there is a conflict, between the interests of plaintiff and the third person.

The constitutional Court published an amicus curiae⁵⁸ – opinion regarding the constitutional submission, where there are interesting findings regarding the constitutionality of the norms of "E" sub-paragraph of the second part of article 29 and the article 31 of the Administrative Procedural Code of Georgia. The difference between the preventive measures of protection of the person's right, effects itself on the rights of the third person, to demand compensation for damages caused by the use of

⁵⁵ Beridzishvili T., Bohne E., Deppe J., Svanishvili S., Labadze M., Turava P., Fuckner G., Kardava E., Kalichava K., Khishtovani G., Khubua G., (ed.), Law Guide of Administrative Science, Book IV, Institute of Administrative Science, TSU, Tbilisi, 2018, 69 (in Georgian).

⁵⁶ See the Judgement of 09 January 2019, on the case N/BS -1562 (US- 18) chamber of administrative cases Supreme Court of Georgia, where according to the definition of cassation court, it is not allowed in administrative court proceedings, to use the mechanism of provisional measures established by the civil procedural code, also related to it – the compensation for damages (also cross-undertaking as to damages). (in Georgian).

⁵⁷ Constitutional submission of Tbilisi Court of Appeals of 07.04.2021, <<https://www.constcourt.ge/ka/judicial-acts?legal=11044>> [20.01.2025], (in Georgian).

⁵⁸ Amicus Curiae, author – Turava Paata, regarding the constitutional submission, 29.12.2021, <<https://www.constcourt.ge/ka/judicial-acts?legal=13002>> [05.02.2025] (in Georgian).

temporary protection measures and accordingly, a security guarantee.⁵⁹ An interesting position is expressed, regarding the legal reliance of addressee of the act, in the opinion of the amicus curiae, according to which, the addressee of the act shall have a legal reliance of the issued act, after, the deadline for appeal has expired, but not within the appeal deadlines. As for demand the compensation for damages, suspension the validity of the act, does not cause the harm, insofar as the action taken on the bases of the act, within the appeal period, creates a risk of harm which remains within its scope of responsibility and cannot create a constitutional right to property rights.

According to the same, amicus curiae position, there is a different result regarding to the article 31 of Administrative Procedural Code of Georgia. In this case, since the abovementioned article does not serve to verify an administrative-legal act adopted by an Administrative Body, but rather the preliminary settlement of Administrative-Legal relationship, the third person is authorized to demand compensation for damages caused by the unjustified use of the procedural remedy of preliminary settlement of the rights exercised by the plaintiff. Which is appropriate with the approach established in theory, about compensation for damages in case of unjustified use of preventive measures provided for in article 31 of Administrative Procedural Code of Georgia for the protection of a person's rights in administrative court proceedings⁶⁰.

Due to the relevance of the article's research issue, according to the practice of common courts nowadays, it should be noted, that definitions, given in the Judgement of January 9, 2019, of Supreme Court of Georgia, are considered a kind of a guide for common courts and the doctrinal definition of the norm itself, about the priority of using temporary measures of protection of rights, provided for by the Administrative Procedural Code of Georgia in administrative court proceedings. As it is clear from research of the judicial practice of common courts⁶¹ in the case of conflicting of interests of purely between the private individuals, for example such as invalidation of a registry entry, seizure lien on the property of private person, etc. The court has the authority, to use the security measures of a civil legal claim and if necessary, to issue the resolution about apply reversal provisional measures. For example, it may be the resolution of first instance court about securing the civil legal claim, where in administrative dispute the plaintiff – an Administrative Body, requests to seizure lien on defendant's property (i.e. on a vehicle). When considering the above issue, the court defines, that based on the legal analysis, since the purpose of the use of a provisional measure by the court, is to facilitate the enforcement of the decision, based on the assessment of specific circumstances, the presumption of the necessity of using a claim security measure was considered justified, also defined that, the institute of temporary measures represents a swift and effective procedural and legal guarantee for the actual implementation of the rights and legal interests protected by the substantive legislation and

⁵⁹ Ibid (in Georgian).

⁶⁰ *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P. (ed.) Administrative Procedural Law Guide*, Tbilisi, 2008, 386 (in Georgian).

⁶¹ See the Resolution of 19 February, 2021 on the case №3/769-21; the Resolution of 07 July, 2020 on the case №3/3757-24; the Resolution of 16 May, 2024 on the case №3/3410; the Resolution of 12 July, 2017, on the case №3/4827-17, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).

accordingly, considered it appropriate to seizure lien on the defendant's property as a temporary measure, requested by the plaintiff.⁶²

In the case of using of article 29 of Administrative Procedural Code of Georgia⁶³, according to the court's definition, through the realization the right, granted by the above mentioned article, the law restores a person to the legal and factual situation in which he/she was before the issuance the disputed act. Despite the circumstances, that when deciding the issue about the validity of an act, the court does not examine the legitimacy of the plaintiff's claim⁶⁴, according to the 3rd part of article 29 of Administrative Procedural Code of Georgia, the court suspends the validity of an act, if there is a reasonable doubt about an act's legality⁶⁵, that further execution of an act will cause substantial harm to the party of that quality, that would make it impossible to further protect of person's legal right or interests. Except as mentioned, in each particular case, when suspending the validity of an administrative-legal Act, the court must consider and decide the issue⁶⁶ of whether the plaintiff's interests outweighs the interests of public order and safety, also the interests of third person, served by the validity of a contested act.

Based in the research of judicial practice of the common courts, it can be concluded that, at the stage of preventive protection of a person's right in administrative court proceedings, the court shall apply the security of civil claim and the reversal measures of the security, provided for in the Civil Procedural Code of Georgia on an individual basis. It is based on the circumstances of the particular case and the assessments of the risks, accordingly it is a matter of discretion for the court. And in case if, as a result of final review of the case, the decision of the court will establish the illegality of the disputed administrative-legal act, the addressee of the act, who has a legal reliance in the act, has authority to demand the compensation for damages independently from the Administrative Body, which issued the illegal act, by separate lawsuit, based on filling a civil claim.

As for comparative-legal research on ensuring compensation for damages in Administrative Justice, according to the amendment to the Urban Planning Code of France, administrative lawsuit regarding the legality of a construction permit subject, to quite detailed criteria for admissibility as a plaintiff's legitimate interest point of view.⁶⁷ According to 7th part of article 600 of Urban Planning Code of France, in the event of an administrative lawsuit for exceeding the authority provided for in the construction permit, by suspending the validity of an act, which harms he addressee of the act,

⁶² See the Resolution of 19 February, 2021 on the case №3/769-21, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).

⁶³ Resolution of 07 December, 2015 on the case №3/9368-15, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).

⁶⁴ Resolution of 11 August, 2021, on the case №3/4770-21, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).

⁶⁵ Resolution of 13 May, 2024, on the case №3/1736-24, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).

⁶⁶ Resolution of 14 September, 2017, on the case №3/154-17, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).

⁶⁷ Kalichava K., Agapishvili M., Dual nature of Plaintiff's Legitimate Interest and Criticism of Its Use in Georgian Administrative Justice, Ivane Javakhishvili Tbilisi State University, 24, Journal of Public Law, №2, 2023, 24 (in Georgian).

compensation for the damages is provided not in the form of ensuring compensation for damages (reversal measures), but separately, based on a lawsuit about compensation for damages, which is submitted by the addressee of an act to the administrative judge through a separate complaint.⁶⁸

As for Germany, in German Administrative Justice, in general, it is permissible, to use the reversal measures of ensuring compensation for damages, however not when considering the disputes regarding the legality of an act. The Law of the Federal Republic of Germany on the “Administrative Judicial Order” explicitly excludes the application of procedural norms on securing civil claim within the framework of the legal norms of 80-80(a) of the above mentioned federal law, in particular, when considering a dispute about the legality of administrative-legal Act, during the suspension of an act.⁶⁹

According to the 3rd part⁷⁰ of article 85 of Administrative Procedure Law of Republic of Latvia, in case of cancellation of an administrative-legal act which grants its addressee any right, an Administrative Body and accordingly, Legal Entities of Public Law has an obligation to compensate the addressee for the damage caused by the cancellation of an act through basis on a separate lawsuit.

4. Key Aspects of Mutual Separation of Civil and Administration Court Proceedings

The difference between Administrative and Civil procedural law order is precisely in basic principles characterizing these two court proceedings.

It is important, to pay attention to the circumstances, that principle of adversarial proceedings in administrative court proceedings⁷¹, which is strictly followed in civil court proceedings and represents a main constitutional-legal principle, at the same time the principle of a comprehensive and objective examination of the circumstances of the case by the court applies. The administrative court process is distinguished by its inquisitorial nature. The essence of the inquisitorial principle derives significantly from the public interests, which always accompanies administrative disputes and come into conflict with private interests.⁷²

Fundamental distinguishing feature of Administrative Justice is to control of public administration, which is aimed to protect the subjective rights of citizens and other persons of private law and it must be implemented in full compliance with the principle of separation of state powers.⁷³ It

⁶⁸ Urban Planning Code of France, art.600-7, last amendment, 23.11.2018, <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006074075/LEGISCTA000006107992/#LEGISCTA000006107992> [22.05.2025].

⁶⁹ The Law of the Federal Republic of Germany on the “Administrative Judicial Order”, 19.03.1991. art.123 (5), <https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html> [22.05.2025].

⁷⁰ Administrative Procedure Law of Republic of Latvia, 25.10.2001, article 85(3), <https://constitutionnet.org/sites/default/files/Admin_Pro_Law.Latvia.pdf> [22.05.2025].

⁷¹ Ghvamichava T., The Admissibility of a Cassation Appeal in an Administrative Process, (Comparative Analysis), dissertation, Tbilisi, 2017, 52 (in Georgian).

⁷² Ibid, 54 (in Georgian).

⁷³ Beridzishvili T., Bohne E., Deppe J., Svanishvili S., Labadze M., Turava P., Fuckner G., Kardava E., Kalichava K., Khishtovani G., Khubua G., (ed.), Law Guide of Administrative Science, Book IV, Institute of Administrative Science, TSU, Tbilisi, 2018, 362-363 (in Georgian).

represents a form of external control⁷⁴ and its goal is to protect a public order, human rights and freedoms.

The recognition of subjective public-legal rights gives a person the authority, to apply to the court for protection his/her right. Within the framework of the rights protection system an individual and an Administrative Bodies are presented at the same level of subjects with equal rights.⁷⁵

There is a presumption, that in the event of issuance of an administrative-legal act by an Administrative Bodies, the act issued as a result of administrative proceedings, itself contains a balance of a public and private interests, and in the case of dispute over the act, this presumption is violated and the court examines the legality of the act.⁷⁶ The validity of an act is suspended at the stage of preventive protection, when the court has reasonable doubts about legality of an act. As a result of reviewing the key issues highlighted in this research, also studying the current legal reality, as well as judicial practice, it can be said in conclusion, that the damage, caused by the suspension of an act as a preventive measure, it is largely caused by the Administrative Bodies, disregard for the basic principles during administrative proceedings.

It must be mentioned again, that the main feature of Administrative Justice is to control over the legality of public administrative activities and in civil court proceeding, the essence of the institution of security claim, lies in the enforceability of the court ruling, which in turn serves the goal of ensuring the stability of civil circulation,⁷⁷ in order to create legal guarantees for the actual exercise of the plaintiff's rights and legitimate interests protected by the substantive legislation.⁷⁸

The European Court of Human Right has noted in a number of its judgments the importance of enforcing the court decisions,⁷⁹ precisely because of the circumstances, that the applying to the court is not merely a hypotheticalal right in nature, but also includes the legitimate expectation, that the decision will be enforced.

In terms of the separation of administrative and civil proceedings, in conclusion it can be said that, if the purpose of securing a claim in a civil proceeding – this is the enforceability of the court decision, which depends on the interest of a private individuals and on the stability of civil circulation, unlike the above, use of a preventive measure in administrative court proceedings, is made for enforceability of the final decision of a court, however, the purpose of mentioned is not to prevail interests of private individuals, but the elimination of the illegal activities of state governance based on balancing the private and public interests, accordingly, by transferring of the civil court procedural

⁷⁴ *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Ghvamichava T., Gvaramadze T., Administrative procedural Law Guide, Tbilisi, 2018, 13 (in Georgian).*

⁷⁵ *Beridzishvili T., Bohne E., Deppe J., Svanishvili S., Labadze M., Turava P., Fuckner G., Kardava E., Kalichava K., Khishtovani G., Khubua G., (ed.), Law Guide of Administrative Science, Book IV, Institute of Administrative Science, TSU, Tbilisi, 2018, 373 (in Georgian).*

⁷⁶ *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, Ivane Javakhishvili Tbilisi State University, "Journal of Law", №2, 2022, 229 (in Georgian).*

⁷⁷ *Dzlierishvili Z., Cross-undertaking as to Damages Resulting from a Provisional Remedy, Ivane Javakhishvili Tbilisi State University, "Journal of Law", №1, 2018, 7 (in Georgian).*

⁷⁸ *Kurdadze Sh., Adjudication of the Civil Cases in First Instance Court, Tbilisi, 2006, 520 (in Georgian).*

⁷⁹ See ECHR Judgements: "Apostol v. Georgia" application N40765/02, 28.11.2006, *Hornsby v. Greece*, Judgement of 19 march 1997, *Mutishev and Others v. Bulgaria*, Judgement of 03 December 2009.

standards in administrative justice, will completely violated a kind of “order” of administrative justice, which distinguishes it from the purely private-legal conflict of interests in a civil process.

5. conclusion

The judicial protection is effective, when it responds to demands swift/timely, fair and effective justice.⁸⁰

As a result of researching the main problematic issue of this paper, in conclusion, attention should be drawn to the fact, that upon adjudicating the dispute about legality the beneficial administrative-legal act, through the prism of conflict the interests of the persons of private law, the unconditional transfer the standards of the Civil Procedural law in Administrative court proceedings in terms of ensuring the compensation for damages, this will be take us into a reality that is inappropriate with the principles of Administrative Justice, unlike the implementation preventive protection mechanism, provided for in article 31 of Administrative Procedural Code of Georgia, which serves not to control the legality of decision of Administrative body, but to obtain the beneficial result in advance of future decision, where the third person is authorized to request the compensation for damages caused by preventive settlements of a person’s right, which can also be achieved by using a guarantee of compensatory damage. The first instance court in its temporary ruling defined that, in case of preliminary regulation of administrative-legal relations it must create a faith and reasonable assumption to the court, based on a high degree of probability, that without using the security measures with a temporary ruling enforcement of the decision may be rendered significantly more difficult or impossible, Since the purpose of the temporary ruling is to maintain the status quo, accordingly when rendering temporary ruling on a particular case, the court came to the conclusion, that in the present case preventive settlement of the disputed legal relationship, is the necessary means ensuring protection of an applicant’s rights.⁸¹

The fact that, the necessity of separation of administrative and civil court proceedings arises from the very beginning, this particular issue is clearly presented in this paper on the examples of countries, given in research in comparative-legal point of view.

Due to the need for independent development of Administrative Justice and for the necessity of relevant reforms, when there is a conflict of interests of subjects of private law, due to the complexity of the research issue, the best alternative for protecting the person’s right, again and again, is the better development of the judicial practice, which has not only theoretical but also the greatest practical importance for the development of Administrative law.

Bibliography:

1. The Code of Administrative Justice of the Republic of France, 30/06/2000.
2. The Code of Urbanization of the Republic of France, 26/07/1994.

⁸⁰ Decision of the Constitutional Court of Georgia in case №1/8/594, dated 30 September, 2016 (in Georgian).

⁸¹ Temporary Ruling of June 30, 2020, on the case N3/975539, panel of administrative cases of Tbilisi City Court (accessed from the archive) (in Georgian).

3. The Law of the Federal Republic of Germany on the “Administrative Judicial Order”, 19/03/1991.
4. The Administrative Procedure Code of Estonia, 01/01/2012.
5. The Act of the Republic of Latvia on the Administrative Procedure Law, 25/10/2001.
6. The Administrative Procedural Code of Georgia, 23/07/1999.
7. The Civil Procedural Code of Georgia, 14/11/1997.
8. *Bell J., Liche're F.*, Contemporary French Administrative Law, Cambridge University Press, 2022, 104.
9. *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, 48-50.
10. *Nalte G.*, General Principles of German and European Administrative Law- A comparison in Historical Perspective, *the Modern Law Review*, 1994, 212.
11. *Thill J.*, The Grand Duchy of Luxemburg, Ed. by *Jörg Gerkrath, Besselink L., Bovend 'Eert P., Broeksteeg H., de Lange R., Voermans W.*, Constitutional Law of The EU Member States, University of Amsterdam, 2014, 1005-1006.
12. *Cane P.*, Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals, *Comparative Administrative Law*, Vol: 10.4337/97, 441.
13. *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.
14. *Blachly F.F. & Oatman M.*, Federal Administrative Procedure Act, *Geo. L. J.* [Vol.34: 407, 1946], 422.
15. *Vachadze M., Todria I., Turava P., Tskepladze N.*, Commentary on the Administrative Procedural Code of Georgia, Tbilisi, 2005, 174 (in Georgian).
16. *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P., (ed.)* Administrative Procedural Law Guide, Tbilisi, 2008, 345,386 (in Georgian).
17. *Kopaleishvili M., Turava P., Kharshiladze I., Loria Kh., Ghvamichava T., Gvaramadze T.*, Administrative procedural Law Guide, Tbilisi, 2018, 13, 336 (in Georgian).
18. *Schmitt S., Richter H.*, The Procedure of Making a Decision by a Judge in Civil law, German Society for International Cooperation (GIZ), 2013, 3 (in Georgian).
19. *Loria Kh.*, Assurance of an Administrative Body – the Basis of Legal Reliance, Ivane Javakhishvili Tbilisi State University, “Journal of Law”, №2, 2022, 201, 214 (in Georgian).
20. *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, Ivane Javakhishvili Tbilisi State University, “Journal of Law”, №2, 2022, 229 (in Georgian).
21. *Churghulia D.*, Construction Permit Administrative Proceedings as a Mechanism for Implementing Construction Safety, Ivane Javakhishvili Tbilisi State University, “Journal of Law” №2, 2020, 193 (in Georgian).
22. *Kharshiladze I., Ovsianikova N.*, Administrative Law of Foreign Countries, Tbilisi, 2014, 420, 469, 538, 579, 583 (in Georgian).
23. *Turava P.*, The General Administration Law, Tbilisi, 2024, 243-244, 250 (in Georgian).
24. *Kurdadze Sh.*, Adjudication of the Civil Cases in First Instance Court, Tbilisi, 2006, 520 (in Georgian).

25. *Kalichava K., Agapishvili M.*, Dual nature of Plaintiff's Legitimate Interest and Criticism of Its Use in Georgian Administrative Justice, Ivane Javakhishvili Tbilisi State University, "Journal of Public Law, №2, 2023, 24 (in Georgian).
26. *Ghvamichava T.*, The Admissibility of a Cassation Appeal in an Administrative Process, (Comparative Analysis), dissertation, Tbilisi, 2017, 52 (in Georgian).
27. *Dzlierishvili Z.*, Cross-undertaking as to Damages Resulting from a Provisional Remedy, Ivane Javakhishvili Tbilisi State University, "Journal of Law", №1, 2018, 7 (in Georgian).
28. *Beridzishvili T., Bohne E., Deppe J., Svanishvili S., Labadze M., Turava P., Fuckner G., Kardava E., Kalichava K., Khishtovani G., Khubua G., (ed.)*, Law Guide of Administrative Science, Book IV, Institute of Administrative Science, TSU, Tbilisi, 2018, 69, 362-363, 373 (in Georgian).
29. ECHR Judgements: „*Apostol v. Georgia*” application №40765/02, 28.11.2006, *Hornsby v. Greece*, Judgement of 19 march 1997, *Mutishev and Others v. Bulgaria*, Judgement of 03 December 2009.
30. The Court of Justice of the European Union, Arrêt du 30 novembre 2017, Red Bull/EUIPO–Optimum Mark.
31. Resolution of 13 May, 2024, on the case №3/1736-24, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).
32. Resolution of 16 May, 2024, on the case №3/3410-24, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).
33. Resolution of 19 February, 2021, on the case №3/769-21, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).
34. Resolution of 07 July, 2020, on the case №3/3757-24, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).
35. Temporary Ruling of June 30, 2020, on the case №3/975539, panel of administrative cases of Tbilisi City Court (accessed from the archive) (in Georgian).
36. Resolution of 14 September, 2017, on the case №3/6154-17, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).
37. Resolution of 12 July, 2017, on the case №3/4827-17, panel of administrative cases of Tbilisi city Court. (accessed from archive) (in Georgian).
38. Resolution of 07 December, 2015, on the case №3/9368-15, panel of administrative cases of Tbilisi city Court. (accessed from archive), (in Georgian).
39. Judgement of 09 January 2019, on the case №/BS-1562 (US- 18) chamber of administrative cases Supreme Court of Georgia (in Georgian).
40. Decision of the Constitutional Court of Georgia, in case №1/3/421.422, dated 10 November, 2009 (in Georgian).
41. Decision of the Constitutional Court of Georgia in case №1/8/594, dated 30 September, 2016 (in Georgian).
42. Judgement of 10 April, 2023, on the case №/BS -551 (KS- 23) chamber of administrative cases Supreme Court of Georgia (in Georgian).
43. Resolution of 11 August, 2021, on the case №3/4770-21, panel of administrative cases of Tbilisi city Court. (accessed from archive), (in Georgian).
44. Constitutional submission of Tbilisi Court of Appeals of 07.04.2021 (in Georgian).
45. Amicus Curiae, author – Turava Paata, regarding the constitutional submission, 29.12.2021 (in Georgian).

46. <<https://matsne.gov.ge/document/view/16492?publication=100>> [16.04.2025].
47. <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006074075/LEGISCTA000006107992/#LEGISCTA000006107992> [22.05.2025].
48. <https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html> [20.01.2025]
49. <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070933/LEGISCTA000006136456?dateVersion=20%2F01%2F2025&isAdvancedResult=&nomCode=zm7z5g%3D%3D&page=2&pageSize=10&query=&searchField=ALL&searchProximity=&searchType=ALL&tab_selection=code&typePaging=ARTICLE&typeRecherche=date&anchor=LEGISCTA000006136456#LEGISCTA000006136456> [23.05.2025].
50. <https://constitutionnet.org/sites/default/files/Admin_Pro_Law.Latvia.pdf> [22.05.2025]
51. <<https://www.riigiteataja.ee/en/eli/512122017007/consolide>> [23.05.2025].
52. <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=216554&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4685038>> [21/01.2025].
53. <<https://www.constcourt.ge/ka/judicial-acts?legal=11044>> [20.01.2025].
54. <<https://www.constcourt.ge/ka/judicial-acts?legal=13002>> [05.02.2025].
55. <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/4817E7D30FB21B384C1C987917DDA08F/9781316511169AR.pdf/Contemporary_French_Administrative_Law.pdf?event-type=FTLA> [23.05.2025].
56. <<https://core.ac.uk/download/pdf/11860047.pdf>> [23.05.2025].
57. <<https://articles.sk/book/99485222/505591/comparative-administrative-law-judicial-review-and-merits-review-comparing-administrative-adjudi.html>> [21.05.2025].
58. <<https://www.deepdyve.com/lp/oxford-university-press/interim-relief-in-administrative-procedure-judicial-stay-X2Fv9EV3bM?key=OUP>> [22.05.2025].

Konstantin Korkelia*

Prevention of Natural Disasters: Situation in Georgia and its Compliance with European Human Rights Standards

Article 2 of the European Convention on Human Rights (Right to Life) imposes an obligation on the state to take measures aimed at preventing threats to human life caused by natural disasters. In order to fulfill this obligation, the state must establish regulatory legislation aimed at preventing violations of the right to life due to natural disasters and take practical measures to protect life in such situations.

This paper aims to analyze the compliance of Georgia's regulatory framework and practices on the prevention of natural disasters with European human rights standards. To achieve this goal, the paper examines the European Court of Human Rights case law, which serves as a foundation for analyzing the scope and content of state obligations. Subsequently, the paper reviews Georgia's legislation regulating natural disaster management, followed by an analysis of the country's practical approach. In particular, it focuses on two recent events that resulted in particularly high casualties – the 2015 Tbilisi flood and the 2023 disaster in Racha. Based on this analysis, the paper offers recommendations for improving the situation in Georgia and preventing future loss of life caused by natural disasters.

Keywords: *natural disasters; right to life; European Convention; Flood in Tbilisi, Disaster in Shovi.*

1. Introduction

The positive obligation to protect the right to life under Article 2 of the European Convention on Human Rights applies to natural disasters. Beyond establishing regulatory legislation aimed at preventing or minimizing the risk of natural disasters that could lead to violations of the right to life, the state must also take preventive operational measures to protect the right to life in the event of natural disasters.

The purpose of this paper is to analyze the compliance of regulatory legislation and practice on the prevention of natural disasters with European human rights standards. Based on this analysis, conclusions will be drawn and recommendations will be made for the further improvement of Georgian legislation and practice.

2. European Human Rights Standards

The European Court of Human Rights has examined the state's positive obligations concerning natural disasters in several cases. One notable case in which the Court addressed the state's

* Professor of International Human Rights Law, Faculty of Law, Tbilisi State University; Member of the UN Human Rights Committee. The opinions expressed in this paper are those of the author and do not reflect the position of the UN Human Rights Committee.

responsibility in relation to natural disasters is *Budayeva and Others v. Russia*.¹ This case concerned the authorities' inadequate response to the risk of a landslide. Landslides had been occurring almost annually in one of the regions of Russia since 1937.² While landslides were a frequent natural phenomenon in that region, the one that occurred in July 2000 in the town of Tyrnauz had devastating consequences. Specifically, the landslide caused the deaths of at least eight people, including the husband of one of the applicants. He was unable to escape from a building that collapsed due to the landslide, resulting in his death. Despite the regular occurrence of landslides, the state failed to take appropriate preventive measures to mitigate the risk of recurrence. Before the European Court, the applicants argued that in June 2000, the Russian authorities failed to warn the local population about the impending and large-scale landslide, which ultimately destroyed the town of Tyrnauz. They also claimed that the authorities failed to conduct rescue operations and did not take adequate measures in response to the emergency.³

In this case, the European Court of Human Rights found that the state had failed to fulfill its positive obligation to protect the right to life. The authorities did not take adequate measures against the risk of a large-scale landslide, failed to warn the local population about the impending danger, and had neither developed nor implemented an evacuation and emergency response plan. Accordingly, the Court found a violation of Article 2 of the Convention in its substantive limb.⁴

Kolyadenko v. Russia concerned a flood that occurred on 7 August 2001 in the city of Vladivostok.⁵ The applicants argued that the authorities bore responsibility for the flooding, which was caused by the sudden and unannounced release of a large volume of water from a state-owned reservoir into a nearby river. This action was taken despite the foreseeable risk it posed to residents living in the surrounding areas. The applicants, who hardly escaped death, claimed that the flood severely damaged their homes and property.

The European Court of Human Rights assessed whether the respondent state had fulfilled its obligations under Article 2 of the Convention. Taking account of the specific circumstances of the case, the Court held the state responsible for several reasons: First, the state failed to establish a clear legislative and administrative framework that would have allowed for an effective assessment of the risks associated with the operation of the reservoir and to ensure that urban planning in the reservoir's vicinity adhered to appropriate technical standards. Second, there was no consistent supervisory system in place to ensure that responsible officials took steps to adequately protect the population living nearby. This included the failure to ensure that the river channel adjacent to the reservoir was cleaned and capable of handling the sudden release of large volumes of water, the absence of a functioning alarm (early warning) system, and the lack of timely public information regarding potential risks related to the reservoir's operation. Finally, the Court stressed the lack of sufficient

¹ March 20, 2008.

² Para. 14.

³ *Kravchenko S., Bonine J. E.*, Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights, *Pacific McGeorge Global Business Development Law Journal*, 25, No.1, 2012, 277-280.

⁴ Paragraph 160. At the same time, the European Court found a violation of Article 2 in the procedural part. See paragraph 165.

⁵ February 28, 2012.

coordination and cooperation between various administrative bodies, which could have prevented an expected hazard from escalating to a level that endangered human life. Moreover, the authorities failed to take any meaningful action even after the flooding occurred, leaving the lives of those living near the reservoir at continued risk.⁶

Eventually, the European Court of Human Rights concluded that the respondent state had failed to fulfill its positive obligation to protect the right to life. Therefore, the Court found a violation of Article 2 of the Convention in its substantive aspect.⁷

Murillos Saldias v. Spain concerned the deaths of 87 people caused by flooding of a campsite following heavy rainfall.⁸ The applicants claimed that the state had failed to fulfill its positive obligation to take preventive measures that could have avoided the mass loss of life. The European Court of Human Rights found that the deaths resulting from the flooding fell within the scope of Article 2 of the Convention (right to life). However, taking account of the specific circumstances of the case, the Court declared the application inadmissible. This decision was not based on the inapplicability of Article 2 to the state's obligations in the context of natural disasters. Rather on procedural grounds: one of the applicants had already received just satisfaction at the national level, while the others had not exhausted domestic remedies.

The European Court of Human Rights also examined *Viviani and Others v. Italy*, which concerned the state's positive obligations with the potential eruption of Mount Vesuvius – a risk that could have catastrophic consequences.⁹ The applicants, who lived in municipalities surrounding the volcano, argued that the state had failed to establish an adequate legislative and administrative framework to address the existing risks. As a result, they claimed that the state did not ensure protection of the right to life under Article 2 of the Convention. They also argued that the lack of proper information about the risks violated their right to respect for private and family life under Article 8. Specifically, the applicants contended that no detailed safety plan had been adopted, no clear evacuation routes in the event of an eruption or earthquake, no functioning alert system was in place, and no evacuation drills had been conducted.

In response, the government of Italy submitted detailed evidence showing that an emergency plan had been adopted and updated and that various measures had been taken at the national and local levels to manage the risks. These included the implementation of a volcano monitoring system, a study and simulation conducted in 2005, and urban management measures to control development in high-risk zones.

The European Court of Human Rights declared the case *Viviani and Others v. Italy* inadmissible on the grounds that the applicants had not exhausted all available domestic remedies. Although the case was not examined on its merits, the Court's reasoning makes it clear that the positive obligation

⁶ Para. 185.

⁷ Paragraph 187. In this case, a violation of Article 2 of the Convention was also found in the procedural part. See paragraph 203.

⁸ Decision, November 28, 2006.

⁹ April 16, 2015. Vesuvius is the only volcano in Europe that has been active for the past hundred years. It is now dormant (the last eruption was in 1944), although the threat of an eruption exists at any moment.

to protect the right to life under Article 2 of the Convention does extend to the state's duty to prevent and mitigate risks arising from natural phenomena such as volcanic eruptions.

Similarly, *M. Özel and Others v. Turkey* about the catastrophic consequences of the 1999 earthquake in Turkey.¹⁰ The applicants' relatives died under the rubble of the buildings in which they had been living.

Before the European Court of Human Rights, the applicants argued that the right to life of their relatives – protected under Article 2 of the Convention – had been violated. Specifically, they contended that local authorities had issued construction permits for five- and six-story buildings in a seismically high-risk area, failed to carry out the necessary inspections, and did not prevent the construction of unsafe buildings.¹¹

The European Court held that, under the substantive obligations of Article 2 of the Convention, the state's duty to prevent damage caused by earthquakes primarily involves taking measures aimed at reducing the scale of the disaster, particularly through urban planning and ensuring the control of development.

The Court found that the authorities were aware of the seismic risks in the affected region. Despite this, the earthquake had a catastrophic impact on human life due to the vulnerability of safety standards and building construction, which led to the collapse of buildings in the affected areas. The local authorities, whose responsibility was to monitor and inspect these buildings, failed to fulfill their obligations in this regard.

Nevertheless, the European Court held that this part of the application had been submitted to the Court after the prescribed time limit, as more than six months had passed since the final decision at the national level. Therefore, it deemed this part of the case inadmissible.¹²

In this case, the European Court clarified that the obligation under Article 2 of the Convention includes the implementation of measures aimed at protecting the right to life in the event of an earthquake. Although Article 2 of the European Convention on Human Rights, and the Convention in general, does not contain provisions regulating environmental issues, the Court explained that Article 2 applies to such matters. It established that the state must fulfill its positive obligation to protect human rights in the context of the environment, including natural disasters.¹³ This interpretation of Article 2 of the Convention should be considered correct, since regardless of the source of the threat to life, the state must take appropriate measures aimed at protecting the right to life.

The interpretation of Article 2 of the Convention with regard to the environment is driven by the significant impact of the environment on human life. The fact that environmental pollution has a

¹⁰ November 17, 2015. According to official data, 17,480 people died and 43,953 were injured as a result of the earthquake.

¹¹ The applicants also alleged violations of Articles 6 and 13 of the Convention, as well as Article 1 of Protocol No. 1.

¹² Para. 178.

¹³ *Fredin v. Sweden (No. 1)*, 18 February 1991, para. 48. See also O. W. Pedersen, *The European Court of Human Rights and International Environmental Law*, in: *The Human Right to a Healthy Environment*, J. H. Knox and R. Pejan (eds), 2018, 86. According to the case law of the European Court, not only Article 2, but also Article 8 of the Convention applies to environmental issues.

profound effect on people, which is confirmed by the report of the *Lancet Commission on Pollution and Health*, that states: “[d]iseases caused by pollution led to approximately 9 million premature deaths worldwide in 2015-2016 – three times more than those caused by AIDS, tuberculosis, and malaria combined, and 15 times more than all wars and other forms of violence.”¹⁴ According to the same report, “Without aggressive intervention, deaths due to air pollution levels exceeding safe limits are projected to increase by 50% by 2050.”¹⁵

3. Natural Disaster Prevention in Georgia

a) Legislation

To fulfill the state’s positive obligation under Article 2 of the European Convention on Human Rights, the state must, primarily, establish a legal framework aimed at protecting life from threats caused by natural disasters.

In Georgia, the legal regulation of natural disasters (catastrophes) is governed by both legislative and subordinate acts. First and foremost, Article 29(1) of the Georgian Constitution, which, among other matters, stipulates: “Everyone has the right to timely receive full information about the state of the environment.” The Constitution also establishes the authority and procedure for declaring a state of emergency in the event of a natural disaster¹⁶ and defines that the decision to use the defence forces during a natural disaster is made by the Prime Minister.¹⁷

In Georgia, the field of natural disasters is regulated by several laws. One of the most important legislative acts is the Law on Civil Safety.¹⁸ It sets rules for the organization of the national civil safety system in Georgia, the measures for civil safety, the powers of the executive branch and other bodies in the field of civil safety, as well as the rights and obligations of individuals and legal entities.¹⁹

The Law establishes a series of legal provisions aimed at protecting human life and health from incidents or emergencies caused by natural and/or human factors. Specifically, Article 14.1 of the law provides that, due to the nature of the incident, one type of incident/emergency is a natural incident/emergency. As per the Law, the civil safety system is a unified network of institutions and other bodies of the executive branch of Georgia, which, at the strategic (political), operational, and tactical levels, implements relevant comprehensive measures to protect human life and health, the environment, and/or property from incidents/emergencies caused by natural and/or human factors.²⁰

The Law designates the Emergency Management Agency as the main body of the national system during peacetime, with its Fire and Rescue Forces Department acting as the central operational

¹⁴ Executive Summary, Lancet Report, 1. See: [[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(17\)32345-0/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(17)32345-0/fulltext)].

¹⁵ Ibid, Lancet Report, p. 4. See Also E. Imparato, The Right to Life Passes Through the Right to a Healthy Environment: Jurisprudence in Comparison, *Widener Law Review* 22, No.1, 2016 133.

¹⁶ Article 71.2 of the Constitution of Georgia.

¹⁷ Ibid.

¹⁸ June 27, 2018.

¹⁹ Article 1.1.

²⁰ Article 4.1.

force of the system.²¹ Additionally, the involvement of other agencies is foreseen when responding to specific threats. The legislation provides a detailed list of the agencies that, according to their sectoral competence and subordination, must be involved in the implementation of various measures.

The Law also stipulates that the state is responsible for the prevention of emergencies.²² Specifically, the state takes steps to protect people (as well as the environment and property) through a combination of legal, organizational, economic, educational, engineering, technical, sanitary-hygienic, sanitary-epidemiological, scientific, research, and other measures aimed at identifying and assessing emergency risks, reducing or preventing the negative impacts associated with these risks. This includes, *inter alia*, actions aimed at systematically reducing the destructive potential of hazardous natural events and processes, as well as corresponding engineering-technical measures.

Article 5.1 of the Law outlines the responsibilities of the entities within the national civil safety system:

- a) Emergency risk management – identifying threats, analyzing the risks and impacts of emergencies, and, based on this, developing an emergency risk management plan;
- b) Planning and implementing emergency prevention measures, including planning and implementing measures to reduce emergency risks;
- c) Developing an emergency management plan.²³

Article 5.1 of the Law provides that the responsibilities of the entities within the national civil safety system include:

- a) The development of a notification system for incidents/emergencies, including an early warning system, and the timely transmission of notifications on the incident/emergency, as well as informing on the rules of conduct during such incidents/emergencies.²⁴

The Law imposes the obligation to inform Georgian citizens and other individuals present on the territory of Georgia on civil safety.²⁵ Specifically, during an emergency that poses or may pose a threat to human life and/or health, the electronic communications company providing mobile communication networks and services and/or the public broadcaster, at the request of the Emergency Management Agency, shall ensure the transmission of notifications and other information about the emergency to Georgian citizens and other individuals present on the territory of Georgia.²⁶ As per the law, the notifications and other information to be transmitted regarding an emergency include:

- a) Information on the anticipated or ongoing emergency and its boundaries of impact;
- b) Information on the potential consequences of the anticipated or ongoing emergency;
- c) Rules of conduct during the emergency; and
- d) Information about the measures taken to protect individuals.²⁷

²¹ Article 4.3.

²² Article 10.1.

²³ See sub-paragraphs a), b), and m).

²⁴ See sub-paragraphs f) and g).

²⁵ მე-12 მუხლი. Article 12.

²⁶ Article 12.3.

²⁷ Article 12.4.

The Law on Civil Safety also stipulates that the primary measures for protecting Georgian citizens and other individuals present on the territory of Georgia in an emergency include: their evacuation and/or accommodation in shelters, fire, engineering, chemical, radiation, medical, and biological protection measures, as well as other civil safety measures aimed at providing psychological support to them.²⁸

The field of natural disasters is also regulated by the Law on the Procedure for Planning and Coordinating National Safety Policy, which defines the areas of national safety policy, the process of planning and coordinating this policy, and the powers of the coordinating body for its planning, the Advisory Body of the Prime Minister of Georgia – the National Security Council.²⁹ Civil Safety is part of the national safety sector, one of the directions of which is ecological safety. According to Article 10.2 of the Law, the field of civil safety includes, among others, the following areas:

- a) Identification, assessment, and forecasting of ecological threats, risks, and challenges;
- b) Development of appropriate mechanisms to protect the country's population and territory from emergencies caused by natural and human factors;
- c) Reduction of damage caused by wartime, natural, and human-induced disasters, and other crisis situations that threaten national interests, ensuring the country's resilience;
- d) Development and coordination of the capabilities of emergency response forces.

Moreover, the field of natural disasters is regulated by the Law of Georgia on Environmental Protection, which stipulates that a citizen is obliged to promptly notify the relevant competent state authorities or publicly announce information about an anticipated or occurred natural (and man-made) disaster and other ecological catastrophes.³⁰

The law imposes an obligation on the subject of activity to have operational and systematic measures, agreed upon with the relevant state authorities, to prevent and mitigate the consequences of natural disasters, as well as action plans for emergencies and disasters. The subject must also establish and maintain an emergency response service equipped with technical means for disaster liquidation. The entity is required to promptly inform the relevant state authorities and the population about any anticipated or occurred natural disaster.³¹

The field of natural disasters is also regulated by the Law of Georgia on Water Resources Management, which aims to create the legal framework for water resources management, ensuring, among other things, the creation of a safe environment for human health and life.³²

The Law establishes that its objective is to create a sustainable, integrated water resource management system that, among others, contributes to the creation of a system for assessing and managing flood risks.³³ The law defines both floods and flood risks. According to its definition, the

²⁸ Article 21.1.

²⁹ March 4, 2015.

³⁰ December 10, 1996. Article 7.

³¹ Article 39(2). Articles 42-44 of the Law regulate issues related to emergency ecological situations.

³² June 30, 2023. Article 1.1.

³³ Subsection c) of Article 1.2 of the Law.

latter refers to the potential consequences of a flood within a specific period, which may be associated with threats to human life and health, economic and/or social harm, or damage.³⁴

The Law establishes a state water resources monitoring system. Specifically, according to Article 32 of the Law, the state water resources monitoring system is a unified system for regular observation and data analysis regarding the hydrological, hydromorphological, hydrogeological, chemical, and ecological conditions of surface water and groundwater bodies, as well as their quantitative and qualitative characteristics. Its purpose is to gather information about the condition of water bodies, their interaction with the environment (both natural and anthropogenic), ongoing natural and anthropogenic processes in river basins, and hazardous and catastrophic events, as well as to analyze, assess, and forecast risk factors.

Article 34 of the Law outlines the mechanisms for managing flood hazards, the procedures for developing flood hazard- and flood risk maps, and defines their content, duration of validity, and the competencies of various authorities involved in the process. This article also sets out the rules for flood hazard management. Specifically, according to this article, the National Environmental Agency conducts a preliminary assessment of flood risk every six years for all river basin districts and identifies areas with significant potential flood risk.³⁵ The article stipulates that the National Environmental Agency prepares flood hazard maps, while the Emergency Management Agency prepares flood risk maps for all areas identified as having significant potential flood risks. These maps define zones with medium flood probability (at least one event every 100 years), as well as areas with low and high probabilities. In the river basin zones marked as flood risk areas, the maps should also indicate the population at risk and the potential risk to economic activities and the environment.³⁶

The Law requires that a flood risk management plan be prepared, which should address flood prevention, protection and readiness, including flood forecasting and early warning systems. Flood risk management plans should be reflected in the river basin/basin district management plan.³⁷

Therefore, Georgian legislation establishes flood risk management mechanisms, rules for the development of flood hazard maps and flood risk maps, determines their contents, validity period, and the competence of various agencies in this process. The field of natural disasters is also regulated by other legislative acts, including the Law on the State of Emergency,³⁸ the Forest Code³⁹ and the Law on Personal Data Protection.⁴⁰

³⁴ Subparagraphs Z¹⁰ and Z¹¹ of Article 4 of the Law.

³⁵ Paragraph 1.

³⁶ Paragraph 2.

³⁷ Article 34.3.

³⁸ The first paragraph of the strategy involves the declaration of a state of emergency in the event of a natural disaster, as per the regulations set forth on October 17, 1997.

³⁹ The Code establishes the competence of the autonomous republic and municipalities to participate in the restoration and cultivation of forests damaged by ecological disasters, as well as the participation of the management body in organizing the restoration and cultivation of forests damaged by ecological disasters, see Article 19, paragraph d), Article 20, paragraph d), and Article 21, paragraph k) of the Law.

⁴⁰ Article 5 of the Law provides the basis for data processing. In particular, according to subparagraph “f” of Article 5.1 of the Law, data processing is permitted when it is necessary for the management of natural and man-made disasters.

The most important document regulating the field of natural disasters is the National Strategy for Disaster Risk Reduction of Georgia for 2017-2020 and its Action Plan.⁴¹ The document identifies existing threats, and provides for specific preventive measures and the agencies responsible for these measures. The National Strategy for Disaster Risk Reduction aims to establish a unified system for disaster risk reduction, improve disaster preparedness and response capabilities at the national and local levels, and also increase the effectiveness of response to potential threats, and define measures to reduce the threats, risks, and challenges facing the country caused by natural (and human factors) factors and establishes the main directions of the disaster risk reduction policy. An action plan has been prepared based on the National Strategy for Disaster Risk Reduction, which provides for the measures to be taken to achieve the goals of the strategy and the agencies responsible for their implementation.

The strategy emphasizes that to minimize the negative consequences of various types of disasters, it is crucial to identify, assess, and plan mitigating measures.⁴² To reduce disaster risks, it is necessary to establish a response system at the national level. According to the strategy, Georgia's priority in disaster risk reduction policy is the existence of a unified, flexible, continuously functioning, and efficient crisis management system. This system will ensure the coordinated work of the agencies defined by Georgian legislation, enabling the identification, assessment, prevention, management, and rapid mitigation of the negative impacts of disasters caused by natural and human factors.⁴³

The strategy emphasizes that "Georgia is a transcontinental country, and due to its complex geographical location, it is highly vulnerable to various types of natural disasters. Georgia's terrain, meteorological conditions, and significant anthropogenic pressure on the environment create favorable conditions for the development of natural disasters such as landslides, mudslides, riverbank erosion, flooding, droughts, hailstorms, erosion, strong winds, wildfires, earthquakes, and other."⁴⁴ According to the strategy, data from recent years indicates that the number of hydrometeorological disasters has increased by an average of 15%, while the number of geological disasters has increased by an average of 58%.

The strategy provides for the integration of early warning and alert systems into the national disaster risk reduction system. Specifically, the strategy states that "to implement effective prevention and response measures within the disaster risk reduction system – and, above all, to ensure the safety of the population – it is essential to establish early warning and alert systems." The strategy further stipulates the need to develop standards and a unified approach for the alert system, enabling the delivery of appropriate information/signals to the population during crises.⁴⁵

With regard to subordinate legislation regulating the area of natural disasters, the Government of Georgia has adopted several key decrees, including:

⁴¹ Resolution of the Government of Georgia No. 4, January 11, 2017. See: [<https://matsne.gov.ge/ka/document/view/3547798?publication=1>].

⁴² Para. 3 of the Strategy.

⁴³ Para. 3(2) of the Strategy.

⁴⁴ Ibid.

⁴⁵ Paragraph 3.5.

a) Technical Regulation No. 51 of 14 January 2014 on the Approval of Civil Safety Engineering and Technical Measures, which is aimed at protecting the population by reducing potential losses and destruction under the impact of hazardous factors during emergencies. It also seeks to create favorable conditions in disaster zones and areas of damage for conducting rescue operations and urgent emergency recovery work. Among other provisions, the regulation establishes that the placement of buildings and structures in areas prone to mudflows, avalanches, and landslides is strictly prohibited.⁴⁶

b) Government Decree No. 508 of 24 September 2015 on the Approval of the National Civil Safety Plan, the article 5 of which provides for the implementation of preventive measures during emergency management, including a) prevention of incidents, hazardous natural events, and processes for the protection of the population and property, through the systematic reduction of accumulated damaging potential and the implementation of engineering and technical measures; b) monitoring and forecasting of emergency threats; c) preparation of emergency risk maps; d) environmental supervision and licensing; e) enhanced readiness of the unified emergency management system and evacuation of the population from potential emergency zones during emergency regimes; f) timely identification of emergency risks, development and implementation of corresponding preventive measures and risk management plans.

The Decree also establishes the procedure for the evacuation of the population from emergency zones and defines the responsibilities of the relevant agencies. In addition, it provides for the existence of an alert system in zones exposed to hazards. Specifically, the Decree stipulates that, in the event of a large-scale emergency threat or its development, the Interagency Operational Center for Emergency Management under the Emergency Management Agency of the Ministry of Internal Affairs shall convene the center based on a pre-developed notification scheme and initiate emergency response measures. These include issuing alerts and informing the relevant agencies and individuals about the situation.⁴⁷ Under the same article, based on the information available at the Interagency Operational Center and the Field Operations Center, emergency response and recovery measures are to be planned, including the identification of necessary emergency and rescue resources.⁴⁸ One of the key measures for ensuring emergency response management is the declaration of an alert and the dissemination of notifications.

c) Government Decree No. 452 of 6 October 2017 on the Development of Rules for Preparing an Emergency Management Plan stipulates that, when drafting the plan, consideration must be given to the forecast of the real threat of an emergency arising as a result of accidents, disasters, and natural calamities.⁴⁹

d) Government Decree No. 590 of 23 September 2020 on the Approval of the Rules for the Classification of Incidents and Emergencies addresses hydrotechnical accidents, specifically the failure of dams (including embankments, barriers, and similar structures), which can result in destructive waves and catastrophic flooding.

⁴⁶ Article 4.11(b).

⁴⁷ Article 9.6 (a).

⁴⁸ Sub-paragraph (c).

⁴⁹ Article 3.1(a).

As for the reflection of the obligation to protect life from natural disaster-related hazards – stipulated in Article 2 of the European Convention – it is worth noting the following:

In line with the standard established in *Budayeva and Others v. Russia*, Georgian legislation – specifically, the Law on Civil Safety – provides for a wide range of measures aimed at protecting human life and health in the event of a natural disaster.⁵⁰ The Law establishes a civil safety system that operates at strategic (political), operational, and tactical levels to implement comprehensive measures for the protection of life and health against incidents or emergencies caused by natural (as well as man-made) factors.⁵¹ To this end, the Law ensures emergency prevention, taking proactive steps to protect the population by identifying and assessing emergency risks. This includes measures aimed at the systematic reduction of the damaging potential of hazardous natural events and processes, as well as the implementation of corresponding engineering and technical interventions. Based on the Law, the state is responsible for managing emergency risks and for the planning and implementation of prevention measures, including those specifically aimed at risk reduction. The Law also mandates the development of emergency management plans.

The Law on Environmental Protection establishes the obligation of the entity carrying out an activity to have, in coordination with the relevant state authorities, operational and systematic measures for the prevention and mitigation of natural disaster consequences, as well as action plans for responding to accidents and disasters. Furthermore, the Law requires the creation and maintenance of a response service equipped with the necessary technical means for emergency elimination, which must be kept in a constant state of readiness.

The Law of Georgia on Water Resource Management provides for the establishment of a flood risk assessment and management system.⁵² The Law defines the mechanisms for flood risk management, the procedures for developing flood hazard and risk maps, as well as their content, period of validity, and the competencies of various agencies involved. The Law stipulates the development of a flood risk management plan, which must address flood prevention, protection, and preparedness measures, including flood forecasting and early warning systems. Additionally, these flood risk management plans must be integrated into the river basin and sub-basin management plans.⁵³

In line with the spirit of the European Court of Human Rights judgment, Article 5 of Government Decree No. 508 of 24 September 2015 on the Approval of the National Civil Safety Plan provides comprehensive preventive measures during emergency management.

As also derived from the aforementioned ECtHR case, the Law on Civil Safety establishes the obligation of entities within the national civil safety system to develop incident/emergency notification systems, including early warning systems, to ensure the timely transmission of alerts regarding incidents/emergencies, and inform the population about the appropriate behavior and response measures during such events.⁵⁴

⁵⁰ June 27, 2018

⁵¹ Article 4.1.

⁵² Article 1.2(c).

⁵³ Paragraph 3.

⁵⁴ See sub-paragraphs (f) and (g);

The Law on Environmental Protection also establishes that the entity carrying out an activity must promptly notify the relevant state authorities and the population of any anticipated or actual natural disaster.⁵⁵

Government Decree No. 508 of 24 September 2015 on the Approval of the National Civil Safety Plan also identifies the declaration of an alert and the issuance of notifications as essential components of emergency response management.

In line with the standard set by the European Court of Human Rights in the *Budayeva* case, Government Decree No. 508 also establishes the procedures for the evacuation of the population from emergency zones. It defines the responsibilities of the competent authorities.

Concerning the obligations arising from the case of *Kolyadenko v. Russia*, these issues are regulated by the Law of Georgia on Water Resource Management, which sets out that one of its objectives is to establish a sustainable and integrated water resource management system that, among other goals, promotes the development of a flood risk assessment and management system.⁵⁶ The Law provides for the establishment of a state water resource monitoring system, including mechanisms for flood risk management, procedures for developing flood hazard maps and flood risk maps, and defines their content, validity period, and the responsibilities of the institutions involved in the process. To this end, under the Law, the National Environmental Agency is required to conduct a preliminary flood risk assessment for all river basin districts every six years, identifying areas where there is a potentially significant risk of flooding.⁵⁷ Based on this assessment, the National Environmental Agency is responsible for preparing flood hazard maps, while the Emergency Management Service prepares flood risk maps for all areas identified as having potentially significant flood risk.⁵⁸

The Law also stipulates the development of a flood risk management plan, which must address issues of flood prevention, protection, and preparedness, including flood forecasting and early warning systems.

The obligation established in *M. Özel and Others v. Turkey* is reflected in the Code on Spatial Planning, Architectural and Construction Activities of Georgia, which aims, among other objectives, to define fundamental requirements related to the seismic resistance of buildings and structures.⁵⁹ According to the Code, spatial and urban planning is based on the principles of sustainable development, which ensure the harmonization of the economic and social preconditions for the use and development of a given territory with disaster risk reduction and environmental protection requirements. To this end, spatial and urban planning in Georgia is carried out with consideration of the country's seismic conditions as part of the spatial and urban planning process.⁶⁰

⁵⁵ Article 39.2.

⁵⁶ Article 1.2, subparagraph g.

⁵⁷ Paragraph 1.

⁵⁸ Para.2. These maps define zones of average probability of flooding (at least one event every 100 years), as well as zones of low and high probability. In the areas of river basins identified as flood risk zones, the number of people potentially at risk, along with the potential risk of damage to economic activities and the environment, must also be indicated.

⁵⁹ Article 2.2, subparagraph f.

⁶⁰ Article 8.1(p) of the Code.

According to the Code, a building or structure must be designed and constructed in such a way that, during its operation and under the maximum load, its load-bearing structures and engineering systems remain reliable and, throughout its operational lifespan – particularly under seismic impact – comply with the requirements established by the relevant technical regulations.⁶¹

Under Articles 141³ and 141⁷ of the Code – concerning the temporary procedures for the acceptance into operation of constructions carried out in violation of permitting conditions within the administrative boundaries of Tbilisi and Batumi municipalities, respectively – Paragraph 5 stipulates that an interested party must apply to the public construction supervision authority to have the building accepted for use. This application must be accompanied by an expert opinion issued by an accredited inspection body, confirming the stability and seismic resistance of the building's load-bearing structures.

Georgia also applies the Order of the Minister of Economic Development of Georgia on Construction Norms and Rules – “Seismic-Resistant Construction”. Since the entire territory of Georgia is located in a seismically active zone, the Order establishes construction norms and rules applicable throughout the country, covering the design of newly constructed, reconstructed, reinforced and restored residential, public, and industrial buildings.⁶² According to the document, the primary objective of the seismic-resistant construction norms and rules is to ensure the safety of human life.⁶³

With regard to the obligations established by the European Court in *Viviani and Others v. Italy*, Georgian legislation – particularly the Law on Civil Safety – provides that emergency risk management must include: the identification of hazards, analysis of emergency risks and their impacts, development of emergency risk management plans based on this analysis, and the planning and implementation of emergency prevention measures, including risk reduction strategies and the preparation of emergency management plans.⁶⁴

In conclusion, it can be noted that Georgian legislation reflects European human rights standards for the protection of human life from risks posed by natural disasters. At the same time, it is important to highlight the adoption of Georgia's National Disaster Risk Reduction Strategy and Action Plan for 2017-2020 as a significant development. However, no such document has been adopted since 2020. Considering the high level of natural disaster risk in the country, the adoption and thorough implementation of an updated strategy and action plan is of critical importance.

b) Practice

The State bears a positive obligation not only to adopt regulatory legislation aimed at preventing threats caused by natural disasters and safeguarding the right to life, but also to ensure the implementation of practical measures to effectively enforce such legislation.

Due to Georgia's topography, geological structure, and climatic conditions, the country has experienced numerous natural disasters in recent years, some of which have resulted in the loss of

⁶¹ Article 81.

⁶² October 7, 2009. Order N1-1/2284.

⁶³ 3.4(a).

⁶⁴ See sub-paragraphs (a), (b), and (m).

human life. Among them, the 2015 Tbilisi flood and the 2023 disaster in the Racha region stand out due to the particularly high number of casualties.⁶⁵ Accordingly, these two cases are analyzed in detail in this paper.

1. The Flood in Tbilisi in 2015

One of the most devastating natural disasters in Georgia in recent years was the flood that occurred in Tbilisi on 13 June 2015. The primary cause of the disaster was the landslide of slopes connecting Tskneti and Betania, combined with intense rainfall, which triggered a flood wave that traveled down to Heroes' Square, destroying everything along its path. The flood resulted in the deaths of 19 individuals, while two remain missing to this day. The disaster destroyed the Tbilisi Zoo and caused substantial material damage to the local population.

According to official reports, the flood was exacerbated by the insufficient water-carrying capacity of the riverbed, which failed to accommodate the rapid flow of stormwater. This, in turn, led to the flooding of adjacent areas. The diminished capacity of the riverbed was attributed to long-term, improperly regulated economic activities along the banks of the Vere River, which partially paralyzed its natural drainage function.⁶⁶

If assessed in light of the standards established by the European Court of Human Rights, the following questions must be posed: Did the State know or ought to have known about the risk of such a natural disaster in this area? And if so, what measures were taken to prevent the loss of human life?

According to publicly available information, a catastrophic flood of similar intensity occurred in the same area in 1961, which also destroyed the zoo.⁶⁷ If this is the case, as confirmed by concrete facts, then it is necessary to answer the question: what steps did the state take to prevent the recurrence of such a devastating flood? For example, did the state take into account the danger of a natural disaster when planning the area, including the decision to channel the Vere River through tunnels beneath the Vake-Saburtalo highway and in issuing permits for mass residential construction in this area? Did it ensure the operation of early warning and monitoring systems in this territory? And, in

⁶⁵ “Imereti Governor Confirms That a Father and His 3 Children Were Buried in a Landslide”, February 7, 2024, see: [<https://www.interpressnews.ge/ka/article/786654-imeretis-gubernatori-adasturebs-rom-mecqershi-mama-da-misi-3-shvilia-moqolili>]; “A Man’s Body Found Buried in a Landslide in Kharagauli”, July 3, 2023, see: [<https://www.interpressnews.ge/ka/article/762366-xaragaulshi-micis-masashi-moqolili-kacis-cxedari-ipoves>]; “Flood and landslide in Guria – searching for 2 minors and 1 adult,” September 8, 2023, see: [<https://netgazeti.ge/life/686823/>]; “Rescuers found the body of a tourist in the disaster zone in Pshavi – Emergency Management Service,” June 27, 2022, see: [https://www.radiotavisupleba.ge/a/31918143.html?fbclid=IwZXh0bgNhZW0CMTEAAR3fD4Dqydkr0j_QDSV9Z-03VJaSaAWrD_d9074IC9pmi5PcHfx5fB5hMzE_aem_GXbrlZAl464MCPSaSmoeGw]; “What caused the disaster in the Dariali Gorge”, May 17, 2014, see: [<https://netgazeti.ge/news/31818/>].

⁶⁶ “CENN Publishes Report on Causes of Catastrophic Flooding of the Vere River”, June 19, 2015. See: [<https://www.interpressnews.ge/ka/article/335474-cenn-i-mdinare-veres-katastropuli-cqalddidobis-mizezebis-shesaxe-b-angarishs-akveqnebs>].

⁶⁷ “CENN Publishes Report on Causes of Catastrophic Flooding of the Vere River”, June 19, 2015. See: [<https://www.interpressnews.ge/ka/article/335474-cenn-i-mdinare-veres-katastropuli-cqalddidobis-mizezebis-shesaxe-b-angarishs-akveqnebs>].

general, what measures did the state take to prevent or at least minimize the threat to human life in this area?

In the process of drafting this paper, no information was found that would confirm that: the state took any steps to prevent the devastating consequences of the flood; the state considered the threat of a natural disaster during the planning of the area, including the channeling of the Vere River into tunnels beneath the Vake-Saburtalo highway and the issuance of permits for mass residential construction; the state ensured the operation of early warning and monitoring systems in this area; or that the state implemented measures to prevent or minimize the threat to human life in this territory.

Based on the answers to the above questions, the European Court will assess whether the state fulfilled its positive obligation, especially considering that a complaint has already been submitted to the European Court concerning the June 13, 2015 flood on behalf of an affected individual.⁶⁸

2. Racha (Shovi) Disaster in 2023

A large-scale natural disaster occurred in Racha on August 3, 2023. Specifically, a landslide struck the area of the Shovi resort, taking the lives of 33 people, while one minor is considered missing without a trace.⁶⁹

Regarding this natural event, Georgia's National Environmental Agency prepared a report stating: [w]ithin the territory of Georgia, the Bubistskali River valley on the southern slope of the Caucasus had been considered one of the rare exceptions before the August 3, 2023 disaster, where no significant mudflow activity had been recorded over the previous 100 years, except for isolated flash floods within the riverbed."⁷⁰ According to the report, "[t]he sudden and simultaneous formation of the complex natural disaster on August 3, 2023, was influenced by multiple factors. It is practically impossible to accurately predict the timing of the initiation and activation of such events worldwide."⁷¹ The report by the National Environmental Agency also states that "[t]he average velocity of the mudflow mass movement was 18-24 m/s. It would have taken the mudflow 7.5–10 minutes to reach the so-called cottage area of Shovi from the disaster initiation zone."⁷² Furthermore, "[c]onsidering the rapid development of the disaster and the short distance between the initiation zone and the settlement, the installation of an early warning system for such a large-scale, complex-genesis disaster could not have been effective in preventing the resulting consequences."⁷³ The report also notes that, given the natural hazards, "within the Bubistskali River valley, in the area affected by the disaster (26 ha), the development of any new infrastructure and the functioning of existing buildings is inadmissible."⁷⁴

⁶⁸ On June 13, 2015, GYLA appealed to the European Court of Human Rights regarding the case of Davit Gabitashvili, who died in the Vere Gorge, June 13, 2024, see: [<https://www.interpressnews.ge/ka/article/803120-saia-m-2015-clis-13-ivniss-veres-xeobashi-dagupuli-davit-gabitashvilis-sakmeze-adamianis-uplebata-cvropul-sasamartlos-mimarta>].

⁶⁹ "Lasha Sukhishvili summoned to the investigative service after publication of new materials on the Shovi disaster", August 9, 2024, see: [<https://netgazeti.ge/news/735769/>].

⁷⁰ "The warning system in Shovi would not have been effective – the agency's final conclusion", February 16, 2024, see: [<https://netgazeti.ge/news/709748/>].

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

What conclusions can be drawn from the document prepared by Georgia's National Environmental Agency?

The first conclusion is that, although such a mudflow had not occurred in the past 100 years, the agency did not rule out the possibility of such an event. According to its position, this was not a hypothetical probability – something that happened a century ago and could never happen again – since the agency mentioned “isolated flash floods within the riverbed.”

The second conclusion is that the natural disaster of August 3, 2023, developed instantaneously and resulted from the convergence of multiple factors – in other words, the event did not evolve gradually or in stages, but rather was triggered by several simultaneous conditions. Since the agency noted that predicting the development of such events is impossible not only in Georgia but also in other countries around the world, one can conclude that, in its view, neither in Georgia nor elsewhere could the exact timing of such a disaster have been foreseen – and the people who found themselves in the path of the mudflow were, from the outset, doomed to die due to the convergence of these factors.

The third conclusion is that, since the movement of the mudflow mass was extremely fast and the mudflow would have reached the so-called cottage area in Shovi from the activation zone within 7.5–10 minutes, the installation of an alert system would not have prevented the resulting consequences. In other words, even if such an alert system had been in place, it would not have saved the people present there. Notably, the National Environmental Agency's conclusion refers only to the alert system and does not mention the usefulness of early warning and pre-alert systems in such situations for preventing danger to life. The importance of pre-alert and early warning systems is emphasized in a report by the Institute of Earth Sciences and the National Center for Seismic Monitoring of Ilia State University, which stated: “[i]f pre-alert and early warning systems had existed, information would have been available two hours in advance, and it would have been possible to issue an alert.”⁷⁵ This means that, according to the Institute, if early warning systems had been in place and an alert issued two hours in advance, it would have been possible to save the people who were there.

If this natural disaster is assessed based on the standards established in the case law of the European Court of Human Rights, as was done above in the case of the 2015 Tbilisi flood, the following questions must be asked: Did the state know or should it have known about the risk of a disaster in the Shovi resort area, and if it did, what did it do to prevent its devastating consequences? Based on the answers to these questions, the European Court will assess whether the state fulfilled its positive obligation to protect the right to life.

As for the question of whether the state knew or should have known about the risk of a natural disaster in the Shovi resort area – according to the conclusion prepared by Georgia's National

⁷⁵ New materials on the study of the Shovi 2023 natural disaster, see: [<https://ies.iliauni.edu.ge/>], [Accessed: August 22, 2024]. A similar position is held by Swiss specialists who were invited to study the Shovi natural disasters: “By installing a monitoring system, a negative development (destabilization of the rock formation) can be detected at an early stage. In this way, early warning of an impending event can be given and people can be evacuated.” “What the Government is Concealing in Final Report on Shovi Tragedy”, 15 March, 2024, [<https://sakartvelosambebi.ge/en/news/what-the-government-is-concealing-in-final-report-on-shovi-tragedy>]. [Accessed: August 22, 2024].

Environment Agency, it did – in other words, the state was aware of the probability of a natural disaster in this area. In addition to the mudflow that occurred a hundred years ago, there had been flash floods within the riverbed, which are also indicative of danger.

There is no doubt that the state was aware of the landslide risk in the Shovi resort zone, as confirmed by the document prepared by the National Environmental Agency in 2021 – “Geological Bulletin: Results of the Development of Hazardous Geological Processes in Georgia in 2021 and Forecast for 2022.”⁷⁶ This document explicitly states that there is a high risk of landslides and that landslide activity poses a threat to the central highway and the infrastructure of the Shovi resort. According to the same report, landslide flows occur on average 2–3 times per year. Regarding necessary actions, the report states that the Dgviora River requires periodic cleaning, deepening, and reinforcement of its banks.⁷⁷

If the state was aware of the natural disaster risk in Shovi (as confirmed above), then the question must be asked: what steps did the state take to protect human lives from this risk? For instance, did the state take the threat into account in the planning of the area? Did it ensure the operation of early warning and monitoring systems in this location? Was the public – and specifically the visitors to the Shovi resort zone – informed of the landslide risk? And more generally, what measures did the state take to prevent or at least minimize the danger to human life in this area?

As for the question of whether the state took the natural disaster risk into account when planning the area, it is noteworthy that the Oni Municipal Council adopted a resolution on 22 December 2022 “On the Approval of the Land Use Regulation Plan for the Shovi Resort of Oni Municipality.”⁷⁸ The Council did not refrain from deciding on development in the Shovi resort zone despite the potential threat of a natural disaster to human life. By adopting such a decision, it created a potential risk to human life.

The fact that the operation of buildings and structures in the Shovi resort area was inadmissible was confirmed by the National Environmental Agency of Georgia in its report, which states that “it is inadmissible to establish any new infrastructure or to allow the operation of existing buildings and structures.”⁷⁹

As for the question of whether the state ensured the functioning of an early warning and monitoring system in the Shovi resort area, such a system was not in operation, despite the fact that establishing it was not merely a matter of goodwill but a legal obligation of the state. Specifically, the creation of an early warning and alarm system is envisaged by Georgia’s National Strategy for

⁷⁶ See.: [https://greenalt.org/app/uploads/2024/02/geologiuri-biuleteni-2021_2022.pdf].

⁷⁷ Ibid. That the state knew about the danger of mudslides in the Shovi resort zone, confirms the scientist, geologist and former Minister of Environmental Protection (1992-1995) Shota Adamia. Negligence is an understatement, this is a crime. Already 19 dead – Geologist Shota Adamia, August 9, 2023, see: [<https://mtisambebi.ge/news/item/1648?fbclid=IwAR2av3RAJWA1Z-BQopDasDaz33ksE7tw1n2MdxU5X0csN4RzWVBpcujgL8>].

⁷⁸ Decree N33, see.: [<https://matsne.gov.ge/ka/document/view/5648376?publication=0>].

⁷⁹ “The Shovi Alarm System Could Not Have Been Effective – The Agency’s Final Conclusion”, February 16, 2024, see: [<https://netgazeti.ge/news/709748/>]. Cf., “Kobakhidze Announces Construction of Church at Shovi Tragedy Site and Meeting with Families of Victims”, August 3, 2024, see: [<https://netgazeti.ge/news/734127/>].

Disaster Risk Reduction 2017-2020.⁸⁰ According to the Strategy, it is essential to develop alarm system standards and a unified approach that would enable the delivery of relevant information or signals to the population in times of crisis.⁸¹

Furthermore, under the Statute of the Emergency Management Service, one of the functions of the Emergency Management Service is to “organize the creation and development of an early warning system about potential or actual emergencies within its scope of competence.”⁸²

A question arises: Would the early warning system have ensured the survival of the people present there?

As indicated in the conclusion of the Georgia’s Environmental National Agency, “[t]he debris flow should have reached the so-called cottage area of Shovi within 7.5-10 minutes from the zone of formation and activation of the disaster.” Based on this, the question must be addressed: If the state had taken measures to prevent or minimize the threat to human life in the area, would it have been possible to save people within the 7.5-10 minute window, if an early warning system had been in place? The Minister of Environment responded to this question, stating that “The disaster in Shovi developed so quickly that even if an early warning system had been installed, the outcome may not have been different.”⁸³ A differing opinion was expressed by the Deputy Director of the Institute of Earth Sciences at Ilia State University, who argued that “[i]f the public had been informed in advance, people could have saved themselves within that time frame. A short text message or signal could have been used to warn people in the high-risk zone.”⁸⁴ However, regardless of these differing viewpoints, the fact remains that the system was not operational. As a result, the people present in the disaster zone did not receive the warning.

As for whether the public, including vacationers in the Shovi resort area, was aware of the risk of debris flow, there is enough grounds to argue that the public was not informed about the potential danger.⁸⁵ It is reasonable to assume that the vacationers in the Shovi resort area were unaware of the theoretical possibility of such a disaster. Therefore, it can be concluded that the state failed to provide public information about the threat.

Regarding the general question of what measures the state took to prevent or minimize the risk to human life in this area, based on information disseminated by the media, the Deputy Head of the Hydrometeorology Department of the Environmental National Agency stated, “[a] very large-scale disaster occurred, a typical glacial debris flow; we are dealing with a fairly large volume. The

⁸⁰ Resolution of the Government of Georgia No. 4, January 11, 2017. See: [<https://matsne.gov.ge/ka/document/view/3547798?publication=1>].

⁸¹ Paragraph 3(5).

⁸² Order of the Minister of Internal Affairs of Georgia No. 24 “On Approval of the Regulations of the State Sub-Departmental Institution within the Sphere of Governance of the Ministry of Internal Affairs of Georgia – Emergency Management Service”, March 29, 2019, see: [<https://matsne.gov.ge/ka/document/view/4522158?publication=4>]. Article 5, paragraph 1, subparagraph “n”.

⁸³ “What will happen in 8-10 minutes when a flood comes?”, August 7, 2023, see: [<https://www.radiotavisupleba.ge>].

⁸⁴ Ibid.

⁸⁵ According to media reports, some local residents were aware of such a threat and tried to draw the attention of local authorities to the problem.

processes can be assessed in advance, but predicting when and at what time it will happen is practically impossible, and no one can say this.”⁸⁶ If, as the responsible official from the Environmental National Agency asserts, “the processes can be assessed in advance,” the question arises: why were appropriate measures not taken based on this assessment, measures that would have prevented the loss of life or minimized its impact? Among such measures could have been a ban on entry to the Shovi resort area or, at the very least, public warnings about the potential danger to life in the area.

Regarding the measures that the state should have taken to prevent or minimize the threat to human life, it is important to note that the National Disaster Risk Reduction Strategy for 2017-2020 stipulates that to minimize the negative consequences of various types of disasters, disaster risk identification, assessment, and planning of mitigation measures must be carried out in advance.⁸⁷ Additionally, the law outlines that one of the functions of the Emergency Management Service is to continuously identify, analyze, and assess risks, and to plan preventive measures and projects to reduce those risks.⁸⁸ As a result, the legislation requires the implementation of preventive measures; however, information about the measures taken by the state to prevent such threats to human life is not accessible.

It is true that the Racha disaster could not be prevented, but according to media reports, by the end of 2024, the state will ensure the operation of 245 hydrometeorological observation stations across the country. Additionally, early warning systems will be set up in areas particularly vulnerable to flooding,⁸⁹ and there are plans to assess glacial and landslide zones throughout the country.⁹⁰

4. Conclusion

Based on the analysis of the regulatory legislation aimed at preventing natural disasters in Georgia, it can be concluded that Georgian legislation adequately reflects European human rights

⁸⁶ “Deputy Head of the Hydrometeorology Department – A large-scale disaster occurred in Shovi. Such events are caused not only in Georgia, but also worldwide by global warming”, August 4, 2023, see: [<https://1tv.ge/news/hidrometeorologiis-departamentis-ufrosis-moadgile-shovshi-masshtaburi-stiqia-mokhda-msgavsi-tipis-movlenebi-ara-marto-saqartveloshi-aramed-msoflios-masshtabit-globaluri-datbobis-shedegad-gamowveu/>].

⁸⁷ Resolution of the Government of Georgia No. 4, January 11, 2017. See: [<https://matsne.gov.ge/ka/document/view/3547798?publication=1>], para. 3 of the strategy

⁸⁸ Order of the Minister of Internal Affairs of Georgia No. 24 “On Approval of the Regulations of the State Sub-Departmental Institution within the Sphere of Governance of the Ministry of Internal Affairs of Georgia – Emergency Management Service”, March 29, 2019, see: [<https://matsne.gov.ge/ka/document/view/4522158?publication=4>]. Article 39(j).

⁸⁹ “Otar Shamugia – By the end of the year, 245 hydrometeorological observation stations will be operational across the country – early warning systems will be established in communities particularly vulnerable to floods”, February 6, 2024, see: [<https://www.interpressnews.ge/ka/article/786555-otar-shamugia-clis-bolos-kveqnis-masshtabit-imushavebs-245-dakvirvebis-hidrometeo-sadguri-cqaldidobebis-mimart-gansakutrebimocqvlad-temebshi-moecqoba-adreuli-gaprtxilebis-sistemebi>].

⁹⁰ “Otar Shamugia – We are planning to assess glacial valleys and landslide areas throughout the country”, February 16, 2024, see: [<https://www.interpressnews.ge/ka/article/787986-otar-shamugia-vgegmavtmqinvaruli-xeobebisa-da-mecqruli-ubnebis-shepasebas-mteli-kveqnis-masshtabit>].

standards concerning the protection of human life from dangers posed by natural disasters. In addition to legislation, an important development in the country was the adoption of the National Disaster Risk Reduction Strategy and Action Plan for 2017-2020, which aimed to support the implementation of the legal framework. Considering the high risks of natural disasters in Georgia, it was necessary to adopt a similar document for the following period; however, no such document was adopted. Therefore, it is important to adopt and rigorously implement a new strategy and action plan.

As for the practice of natural disaster prevention in Georgia, the paper assesses the practical measures taken by the state in response to the most significant natural disasters of recent years: the 2015 Tbilisi flood and the 2023 Racha (Shovi) disaster. In line with the case law of the European Court of Human Rights, these two events raise several important questions. The answers to these questions will determine whether the state fulfilled its positive obligation to protect the right to life in relation to these events.

Regarding the 2015 flood, the paper raises the question: did the state know, or should it have known, about the danger in the area where the disaster occurred? Based on the available information, the paper answers this question in the affirmative. Consequently, additional questions arise: what steps did the state take to prevent the devastating outcome of the flood? Did the state consider the risk of natural disasters in the urban planning of this area, particularly the placement of the Vere River in underground tunnels beneath the Vake-Saburtalo highway and the issuance of permits for mass residential construction in this location? Did the state ensure the operation of early warning and monitoring systems in the area? More generally, what measures did the state take to prevent or minimize threats to human life in this area?

During the preparation of this paper, no evidence was found to indicate that: the state took any steps to prevent the devastating outcome of the flood; the state took into account the risk of natural disaster in the urban planning of this area, including the location of the Vere River in tunnels under the Vake-Saburtalo highway or in issuing permits for mass residential construction; the state ensured the functioning of early warning and monitoring systems in this area; or, more broadly, that the state implemented measures to prevent or minimize threats to human life in this area.

As for the 2023 disaster in Racha (Shovi), similar questions are raised: did the state know, or should it have known, about the risk of disaster in the Shovi resort area? Based on specific evidence, the paper asserts that the state did know about the risk of landslides in the Shovi resort zone. If this is the case, further questions arise: what steps did the state take to protect human life from this threat? Did the state consider the risk of disaster in the planning of the area? Did it ensure the operation of early warning and monitoring systems? Was the public – and, more specifically, the vacationers in Shovi – aware of the risk of landslides? And more generally, what measures did the state take to prevent or minimize the danger to human life in this area?

Based on the analysis of available information, the paper draws several conclusions: the state did not take appropriate steps to protect human life from the risk of disaster; the state did not take the disaster risk into account in the planning of the area; the state did not ensure the functioning of early warning and monitoring systems in the affected area; the public – and, in particular, vacationers in the Shovi resort – were not aware of the risk of landslides; and, in general, the state did not implement effective measures to prevent or minimize threats to human life in the area.

Although the study concludes that the state failed to fulfill its positive obligation to protect the right to life in substantive terms, the questions raised regarding both natural disasters should ultimately be answered by the investigation. However, regardless of the investigation's findings, it is highly likely that, in the end, the European Court of Human Rights will assess whether the state fulfilled its positive obligation to protect the right to life in relation to these natural disasters.

Bibliography:

1. Constitution of Georgia, Article 29.1.
2. The Law of Georgia on Civil Safety, June 27, 2018.
3. The Law of Georgia on the Rules for Planning and Coordination of National Security Policy, March 4, 2015.
4. The Law of Georgia on Environmental Protection, December 10, 1996.
5. "Georgia's National Strategy for Disaster Risk Reduction 2017-2020 and Its Action Plan," Government Decree No. 4, 11 January 2017.
6. *Kravchenko S., Bonine J. E.*, Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights, *Pacific McGeorge Global Business Development Law Journal*, 25, No.1, 2012.
7. *Pedersen O. W.*, The European Court of Human Rights and International Environmental Law, in: *The Human Right to a Healthy Environment*, J. H. Knox and R. Pejan (eds.), 2018.
8. *Imparato E.*, The Right to Life Passes Through the Right to a Healthy Environment: Jurisprudence in Comparison, *Widener Law Review* 22, No.1, 2016.
9. *Dickson B.*, Positive Obligations and the European Court of Human Rights, *Northern Ireland Legal Quarterly*, 61, No. 3, 2010.
10. *Budayeva and Others v. Russia*, March 20, 2008.
11. *Kolyadenko v. Russia*, February 28, 2012.
12. *Murilos Saldias v. Spain*, ruling, November 28, 2006.
13. *M. Özel and Others v. Turkey*, November 17, 2015.
14. *Viviani and Others v. Italy*, April 16, 2015.

Lia Ablotia*

Specific Aspects of Establishing Specialized Courts

Specialized courts represent the highest form of judicial specialization. The establishment of such courts is the subject of considerable debate, with a variety of perspectives and approaches reflected in the legal literature. Nonetheless, the majority of scholars, along with the European Court of Human Rights, advocate for the creation of specialized courts. This endorsement stems from the fact that such mechanisms for the protection of human rights contribute to a higher standard of justice and enhance the overall efficiency of the judicial system. The core focus of this article is the analysis of the standards and particularities associated with the establishment of specialized courts. Each state determines the need to establish such courts based on its individual requirements and in accordance with specific criteria. In particular, the branch of law in which the court is to specialize must be complex, specific, and/or sensitive in nature. Furthermore, there must be significant national challenges in the relevant legal field, along with a high volume of cases brought before the courts. The author examines various international models, including those of Germany, the United States, and France. Based on the best international practices, the article proposes a potential model for the establishment of specialized courts in Georgia and provides an analysis of the necessary legislative, staffing, systemic, and other reforms required for its implementation. The article also explores, in light of Georgia's unique national context, the potential types of specialized courts that may be established.

Keywords: *specialized courts, specialization, specialized judges, judicial system efficiency.*

1. Introduction

In many countries, specialized courts have been established as effective mechanisms for safeguarding human rights and enhancing the efficiency of the judiciary. These courts engage in sectoral adjudication, thereby rendering the protection of specific rights more tangible and accessible to the relevant subjects. States make decisions regarding the establishment of particular types of specialization or specialized courts based on their individual legal and societal needs. Within the Georgian legal context, this critically important aspect of judicial governance remains largely underexplored, with only a few minor exceptions. The relevance of the topic is underscored, on the one hand, by the scarcity of available information and the absence of pertinent academic literature, and on the other hand, by the novelty of the concept of specialized courts in Georgia. Their potential establishment may prove to be a crucial step toward improving the administration of justice.

* Ph.D Student, Visiting Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law.

This article examines the theoretical foundations, advantages, and criteria associated with the establishment of specialized courts. It also presents relevant examples from international practice. Accordingly, the aim of this paper is to assess the prospects for institutionalizing specialized courts in Georgia, based on a comprehensive analysis of best practices from foreign jurisdictions, and to evaluate the necessary reforms and measures required for their effective implementation.

2. Peculiarities of Specialized Courts

2.1. The Nature of Specialized Courts

Generally, specialization refers to a specific subject area that is coupled with expert-level knowledge in that domain¹. Judicial specialization implies that judges possess advanced knowledge and practical experience in a particular branch of law.² More specifically, certain categories of cases demand a distinctive and specialized approach – often necessitating their separation from general case categories and adjudication in isolation. Specialization is a gradual process and may manifest in several forms. The lowest level of specialization is the appointment of individually specialized judges within the general court system; a more advanced stage involves the establishment of specialized chambers within the general courts. The highest level of specialization is represented by the creation of an independent system of specialized courts.³ Specialized courts are typically established with limited but exclusive jurisdiction over a specific area or a cluster of closely related legal fields.⁴ They are characterized by proceedings conducted by judges who are highly qualified in the relevant domain, with procedural rules and courtroom practices adapted to the subject matter's complexity and specificity. As a rule, such courts or tribunals are created to handle complex, sensitive, or otherwise distinct legal matters requiring not only specialized legal knowledge but sometimes expertise in other disciplines, along with practical experience or a tailored judicial approach.

The rationale for establishing specialized courts varies from state to state, depending on national legal needs. Generally, such courts are created in response to specific challenges faced by a country. The decision to establish a specialized court is driven by individual state requirements, often identified through empirical studies or through analysis of problems and deficiencies within the existing judicial system. Consequently, a specialized court may be established:

- (a) to improve the quality of justice in a particularly problematic or complex legal area;
- (b) to alleviate the workload of general courts and promote decentralization – allowing general jurisdiction judges to focus on other matters;
- (c) to improve the overall functionality and credibility of the judiciary, thereby enhancing public trust in the justice system.⁵

¹ Legomsky S.H., *Specialized Justice, Courts, Administrative Tribunals, and a Cross-National Theory of Specialization*, Oxford Academic Books, 1990, 3.

² Baum. L., *A First Look at Judicial Specialization*, The University of Chicago Press, 2011, 3.

³ Gramckow H., Walsh B., *Developing Specialized Court Services: International Experiences and Lessons Learned*, Justice & Development Working Paper Series, The World Bank, 2013, 16.

⁴ Zimmer M.B., *Overview of Specialized Courts*, International Journal for Court Administration, 2009, 1.

⁵ Ibid.

The more specialized a court is, the greater the likelihood that it will issue well-reasoned, legally sound judgments in its field of expertise – thereby fostering public confidence in the judiciary.

Nevertheless, even when such challenges exist, a state may fail to recognize the need for specialization or for the establishment of specialized courts. In several instances, the European Court of Human Rights (ECtHR) has issued judgments that influenced or even necessitated the creation of specialized courts within domestic legal systems. A seminal case in this context is *Sramek v. Austria* (1984), which laid the groundwork for the development of independent administrative courts in Austria.⁶ The case concerned the presence, on a regional administrative commission, of a civil servant who simultaneously represented one of the parties to the proceedings. The ECtHR found this to be a violation of Article 6 of the European Convention on Human Rights.⁷ As a result, Austria was compelled to reform its administrative procedures, eventually leading to the establishment of independent administrative courts.

2.2. Types of Specialized Courts

Specialized courts can vary significantly depending on the reasons for their establishment. This diversity may be reflected in their duration of operation or the subject-matter of their jurisdiction.

From the perspective of **duration**, specialized courts may be established as either temporary tribunals or permanent institutions. If a specialized court is created to address short-term challenges or issues that are expected to be resolved within a limited timeframe, a state may choose to establish a temporary tribunal. Such a tribunal is designed to fulfill a specific function, address the relevant legal problems, and cease to operate once its purpose has been achieved. Conversely, where the underlying legal issues are enduring and systemic, the establishment of a permanent specialized court is required. Naturally, if a court is established on a temporary basis, the appointment of judges and the criteria applied to their selection may be less stringent, since their tenure is not permanent and they are not entitled to the full range of institutional guarantees provided to permanently appointed judges.

An illustrative example is the creation of a specialized appellate body in the United States following the enactment of the Emergency Price Controls Act in 1942. This so-called “Emergency Court of Appeals” was established to adjudicate legal disputes concerning government-imposed economic stabilization regulations during World War II.⁸ Another example of a temporary specialized court in the U.S. is the Special Court of Appeals created in 1971, pursuant to the Economic Stabilization Act of 1970. Although this court still exists in Washington, D.C., it operates with limited jurisdiction and its judges are appointed on a rotating basis from among sitting state court judges.⁹

In addition to classification by duration, specialized courts may also be distinguished based on their **subject-matter jurisdiction**. Over the past two to three decades, many such courts have been established in various countries, tailored to the specific legal and social needs of each jurisdiction. Among the most common types of specialized courts globally are the following:

⁶ *SRAMEK v. AUSTRIA* [1984] ECHR, [26.02.2025].

⁷ *Ibid*, para. 42.

⁸ *Zimmer M.B.*, Overview of Specialized Courts, *International Journal for Court Administration*, 2009, 1.

⁹ *Ibid*.

- (a) Commercial, Financial, Tax, or Business Courts: These courts deal with economic and financial matters, which are highly specialized areas of law. Adjudication in such cases often requires that judges possess not only legal expertise but also substantial knowledge in commercial or financial fields. Given the urgency and complexity of such disputes, the procedures of these courts are typically adapted for expedited resolution.
- (b) Social and Family Law Courts: These include family courts, labor courts, or social security tribunals. The issues addressed in such courts often pertain to the rights and welfare of individuals within familial or employment relationships and require sensitivity as well as a nuanced understanding of human dynamics.
- (c) Criminal Courts with Specialized Jurisdiction: Notably, courts dealing with juvenile justice or mental health issues. Since these courts serve vulnerable populations, judges must combine legal qualifications with psychological competence and possess specialized skills in handling such cases. Judicial procedures must be fully adapted to the specific needs and best interests of minors or other vulnerable groups.
- (d) Administrative or Related Courts: These include, for example, courts specializing in construction law, environmental protection, or public regulation. Such courts address matters that are technical in nature and often intersect with administrative governance.

This subject-matter-based classification highlights the adaptability of specialized courts to national priorities and the necessity of tailoring judicial mechanisms to the substantive needs of society.

One of the most widespread types of specialized courts is the **labor court**. Labor courts adjudicate disputes arising from employment relationships, primarily between employees and employers. The resolution of such disputes typically occurs within a short, reasonable timeframe, which is of crucial importance in labor relations. In some cases, labor disputes are resolved at a single instance without the possibility of appeal; however, in most countries, appeal mechanisms are available. There are also models in which the first instance of a labor dispute is handled by a general court, and the appeal is heard by a labor court whose decision is final. Alternatively, labor courts may have their own three-instance structure.

A prominent example of a well-developed system of labor courts is found in Germany, which has a three-tier structure:

- (a) the Labor Court (Arbeitsgericht) at the Länder level;
- (b) the Regional Labor Court (Landesarbeitsgericht) as the appellate instance;
- (c) the Federal Labor Court (Bundesarbeitsgericht) as the final instance.¹⁰

Labor courts are also widely established in countries such as Belgium¹¹, Finland¹², Ireland¹³, Israel¹⁴, Norway¹⁵, Sweden¹⁶, Switzerland¹⁷, and others.

¹⁰ National Specialized Courts: Germany, European E-Justice, <https://e-justice.europa.eu/19/EN/national_specialised_courts?GERMANY&member=1> [26.02.2025].

¹¹ *Rauws R.*, *The Labour Court System in Belgium*, *Labour Courts in Europe*, International Institute for Labour Studies, Geneva, 1986, 11.

Another widespread category comprises courts dealing with financial matters, including **commercial/business courts, tax courts, and fiscal tribunals**. For example, Germany has a system of fiscal courts, which includes first-instance fiscal courts and a Federal Fiscal Court (Bundesfinanzhof) as the court of last resort. These courts exercise jurisdiction over disputes involving taxation, customs, and other financial issues.¹⁸ The United States is also known for its specialized Tax Courts, which play a significant role in resolving federal tax disputes. In Austria, the Vienna Commercial Court has exclusive jurisdiction over disputes concerning intellectual property, including copyright and patent law.¹⁹ Another historic example is found in England, where the Commercial Court of the Queen's Bench Division (now the King's Bench Division) in London handles both domestic and international commercial, trade, banking, and arbitration-related disputes. It is considered one of the oldest and most prestigious commercial courts in the world.²⁰

Juvenile courts, meanwhile, fall within the category of so-called “problem-solving courts.” Due to the sensitive nature of juvenile justice, some countries have established specialized juvenile courts to hear cases involving minors who have committed criminal offenses. These courts typically employ a more lenient and rehabilitative approach, prioritizing resocialization and the best interests of the child rather than punitive measures. The United States has one of the most developed systems of juvenile justice courts.

The European Court of Human Rights (ECtHR) has repeatedly emphasized – both directly and indirectly – the importance of establishing specialized courts for juvenile justice. In its 1999 judgment in *T. and V. v. the United Kingdom*²¹, the Court stressed that it is essential for a child accused of a crime to be tried in a manner that takes into account their age, maturity, intellectual and emotional capacity, and level of development. Furthermore, the proceedings must be comprehensible to the child, enabling them to understand and actively participate in the trial.²² In *S.C. v. the United Kingdom*²³ (2004), the ECtHR held that the right to effective participation is best ensured when a

¹² *Pelkonen J., Tiitinen K.P.*, The Labour Court System in Finland, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986, 14.

¹³ *Cosgrave M.P.*, The Labour Court System in Ireland, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986, 30.

¹⁴ *Bar-Niv Z.*, The Labour Court System in Israel, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986, 41.

¹⁵ *Enju S.*, The Labour Court System in Norway, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986, 44.

¹⁶ *Bouvin A.*, The Labour Court System in Sweden, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986, 52.

¹⁷ *Berenstein A.*, The Labour Court System in Switzerland, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986, 57.

¹⁸ *Zimmer M.B.*, Overview of Specialized Courts, International Journal for Court Administration, 2009, 14.

¹⁹ *Ibid.*

²⁰ National Specialized Courts: Germany, European E-Justice, <https://e-justice.europa.eu/19/EN/national_specialised_courts?GERMANY&member=1> [26.02.2025].

²¹ *T. and V. against United Kingdom*, [1999] ECtHR, [26.02.2025].

²² *Ibid.*, para. 84.

²³ *S.C. against the United Kingdom*, [2004] ECtHR, [26.02.2025].

juvenile defendant is tried in a specialized court, with procedural guarantees fully adapted to their intellectual maturity and developmental needs.²⁴

Drug Courts also fall under the category of problem-solving courts within the field of criminal justice. The main objective of these specialized tribunals is to address the root causes of criminal behavior when it stems from drug addiction. Instead of focusing solely on punishment, drug courts aim to support individuals struggling with substance abuse through rehabilitation, resocialization, and treatment programs. The ultimate goal is to reduce recidivism and facilitate the reintegration of drug-dependent offenders into society. Drug courts are widely established in the United States, where they exist in both adult and juvenile formats²⁵, and are also present in countries such as Ireland.²⁶

Land and Environmental Courts have become increasingly prevalent in recent years due to the growing complexity and importance of environmental protection and land-use governance. For example, Sweden has established Land and Environmental Courts, which adjudicate a wide range of issues, including water usage permits, operations involving ecological risk, public health matters, environmental protection, hazardous waste management, building permits, land-use rights, and expropriation. These courts provide expertise in resolving technically complex disputes in a manner aligned with environmental sustainability.²⁷ Similar models can also be found in the United States and other jurisdictions that prioritize environmental law.

One of the most widespread and foundational types of specialized courts is the **Administrative Court**. These courts handle appeals against decisions made by administrative authorities and local self-governing bodies. Among the most notable examples is France, which maintains a comprehensive system of administrative justice. The French administrative court system includes a variety of specialized courts, such as financial courts, social security courts, and disciplinary tribunals for public professionals. These courts are distinguished by their focus on public law and their structural independence from the ordinary judicial system.²⁸

In summary, the diversification of specialized courts reflects a broader trend toward functional specialization and procedural adaptation in contemporary judicial systems. Whether dealing with addiction, environmental regulation, or the legality of administrative acts, these courts are designed to ensure expertise-driven, efficient, and context-sensitive adjudication processes tailored to the specific nature of the disputes they handle.

²⁴ Ibid.

²⁵ Butts J., Roman J., Lynn-Whaley J., *Varieties of Juvenile Court: Nonspecialized Courts, Teen Courts, Drug Courts, and Mental Health Courts*, *The Oxford Handbook of Juvenile Crime and Juvenile Justice*, 2012, chapter 25, 615.

²⁶ National Specialized Courts: Ireland, European E-Justice, <https://e-justice.europa.eu/19/EN/national_specialised_courts?IRELAND&member=1> [26.02.2025].

²⁷ National Specialized Courts: Sweden, European E-Justice, <https://e-justice.europa.eu/19/EN/national_specialised_courts?SWEDEN&member=1> [26.02.2025].

²⁸ National Specialized Courts: France, European E-Justice, <https://e-justice.europa.eu/19/EN/national_specialised_courts?FRANCE&member=1> [26.02.2025].

3. Specialized Courts: Advantages and Establishment Criteria

3.1. The Benefits of Establishing Specialized Courts

The establishment of specialized courts is a fundamental component of broader judicial reform. It entails significant financial investments, administrative restructuring, and the recruitment of highly qualified personnel. Accordingly, before undertaking the creation of such courts, the state must carefully weigh the advantages and disadvantages and make an informed, evidence-based decision.

Legal scholarship typically identifies three principal benefits of specialized courts:

1. Increased Judicial Efficiency²⁹ – Specialized judges, who possess in-depth knowledge and expertise in a narrowly defined field of law, are better equipped to render timely, legally sound, and well-reasoned decisions. For example, in commercial disputes, the capacity of a judge to facilitate settlements is crucial, and specialized judges are more likely to have the requisite negotiation and subject-matter skills. Moreover, procedural frameworks in specialized courts are often tailored to the specific nature of the disputes they adjudicate, which contributes to expedited proceedings and helps prevent case backlog. By redirecting complex and technical cases to specialized courts, the caseload of general courts is reduced, enhancing the overall efficiency of the judiciary.

2. Enhanced Quality of Justice within Exclusive Jurisdiction³⁰ – Because specialized courts adjudicate disputes in complex, sensitive, or technically demanding areas of law, their judges must possess advanced, domain-specific qualifications. The higher the level of expertise and practical experience, the greater the quality, accuracy, and consistency of judicial decisions. This is particularly vital in areas such as commercial, tax, administrative, or juvenile justice.

3. Development of Uniform and Predictable Jurisprudence – When certain categories of cases fall under the exclusive jurisdiction of specialized courts, it helps to standardize judicial interpretation and foster a consistent body of case law.³¹ This reduces legal uncertainty, discourages the filing of frivolous or speculative claims, and can lead to a decline in the number of appeals. A stable and coherent jurisprudence contributes to the overall credibility and trust in the legal system, while also providing clearer expectations for litigants and legal practitioners.

3.2. Criteria for the Establishment of Specialized Courts

In the 1980s, the United States Congress established the Federal Courts Study Committee, one of whose primary tasks was to assess the performance and effectiveness of specialized courts. In its 1990 report, the committee formulated a set of criteria deemed essential for the creation of a specialized court:³²

²⁹ Gramckow H., Walsh B., *Developing Specialized Court Services: International Experiences and Lessons Learned*, Justice & Development Working Paper Series, The World Bank, 2013, 6.

³⁰ Ibid.

³¹ Gramckow H., Walsh B., *Developing Specialized Court Services: International Experiences and Lessons Learned*, Justice & Development Working Paper Series, The World Bank, 2013, 6.

³² Ibid, 14.

1. Narrow Legal Domain: The court must operate within a distinct and narrowly defined area of law, which can be clearly separated from the jurisdiction of general courts.
2. High Volume of Cases: There must be a substantial number of cases within the relevant legal field, such that diverting them to a specialized court would relieve the caseload of the general judiciary.
3. Requirement for Technical Expertise: The legal domain in question must necessitate specialized knowledge or competencies – such as scientific, technical, psychological, or economic expertise – beyond the general legal training of judges.
4. Need for Uniform Administration: There must be a demonstrable need for uniformity in adjudication and legal administration within the area concerned.

In addition to these criteria, the committee emphasized that specialized courts or tribunals should be established only in response to specific national needs. The newly formed body must be capable of managing the nature, complexity, volume, and specificity of the incoming cases effectively.

Further insight into the issue of specialization comes from the work of Edward Cazalet, who studied the English legal system and proposed additional criteria for determining the necessity of judicial specialization.³³ Although initially aimed at broader specialization trends, his framework is equally applicable to the creation of specialized courts. These criteria include:³⁴

- a) Time Frame of the Specialization: Determining whether the specialized court is intended as a temporary measure or a long-term institutional solution.
- b) Pilot Programs and Preliminary Studies: Conducting preliminary research or pilot initiatives to empirically assess whether specialization is necessary and viable.
- c) Caseload Management: Evaluating whether specialization will alleviate high caseloads in overburdened areas of the judicial system.
- d) Quality of Adjudication in Complex Fields: Assessing the adequacy and quality of decisions rendered in complex or highly specific legal fields by generalist judges, in order to determine whether a more specialized approach is warranted.
- e) Public Confidence and Satisfaction: Measuring public trust in the judiciary and user satisfaction with judicial outcomes, particularly in fields where specialized expertise may improve perceptions of fairness and competence.

4. International Standards of Specialized Courts

The necessity of specialized courts is best understood through the analysis of individual national practices. When developing a potential model for the institutionalization of specialized courts in Georgia, it is essential to take into account the best foreign experiences.

³³ Cazalet E., *Specialised Courts: Are They a ‘Quick Fix’ or a Long-Term Improvement in the Quality of Justice?*, Washington, DC, World Bank, 2001, [26.02.2025].

³⁴ Gramckow H., Walsh B., *Developing Specialized Court Services: International Experiences and Lessons Learned*, justice & development Working Paper Series, The World Bank, 2013, 15.

4.1. The Example of Germany

Germany is one of the leading countries in Europe with regard to specialized courts. There are five main types of specialized courts in the German judicial system: administrative, social, fiscal, labor, and constitutional courts.³⁵ The administrative courts encompass general administrative, social, and fiscal jurisdictions. Both general administrative and social courts operate within a three-instance structure, while fiscal courts are organized in two instances. Labor courts, for their part, are entirely separate from the general judiciary. Germany's fiscal (tax) courts represent one of the most advanced models globally. Currently, there are 18 fiscal courts functioning in the country, handling approximately 37,000 to 38,000 tax-related cases annually.³⁶ Judges may be appointed for life starting at the age of 35.³⁷ Germany's fiscal courts are characterized by a particularly interesting organizational structure. The courts are divided into eleven senates, each dealing with specific categories of tax disputes, thereby achieving a further degree of specialization within the field.³⁸

4.2. The Example of the United States of America

The United States has a wide array of specialized courts. At the federal level, it has established one of the most effective tax court systems in the world. The U.S. federal government has created specialized courts in domains considered to be of strategic national importance, particularly in the areas of economy/taxation and national security.³⁹ As a result, specialized courts have been established for bankruptcy, the armed forces, and international trade. In addition, at the state level, various specialized courts operate, including:

- a) Family Courts, whose jurisdiction varies from state to state, typically adjudicating matters involving domestic violence, minors, adoption, divorce, alimony, child custody, and other family-related issues;
- b) Environmental Courts;
- c) Probation Courts;
- d) Workers' Compensation Courts;
- e) Water Courts;
- f) Land Courts;
- g) Administrative Courts;

³⁵ National Specialized Courts: Germany, European E-Justice, <https://e-justice.europa.eu/19/EN/national_specialised_courts?GERMANY&member=1> [26.02.2025].

³⁶ Cordewener A., Hendricks M., *The Disputes and Litigation Review: Germany*, Chapter 11, Seventh Edition, London, 2019, 102.

³⁷ Fiscal Court Code of Germany, article 14, 01.10.2022, <https://www.gesetze-im-internet.de/fgo/_14.html> [26.02.2025].

³⁸ Effective Institutions for Resolving Tax Disputes: Tax Courts and Alternative Mechanisms, USAID & Eurasia Partnership Foundation, Research Report, 2012, p. 29 (in Georgian).

³⁹ Howard M. R., Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions, *The JUSTICE SYSTEM JOURNAL*, VOL. 26, NUMBER 2 (2005), 136.

- h) Small Claims Courts, which resolve property disputes with a value not exceeding a specified threshold;
- i) Juvenile Justice Courts;
- j) Drug Courts and Mental Health (Therapeutic or Problem-Solving) Courts;⁴⁰
- k) Business or Commercial Courts, which handle corporate, commercial, and other business-related disputes.⁴¹

4.3. The Example of France

France is particularly noteworthy for having one of the most developed, successful, and decentralized models of administrative courts.⁴² Within the system of administrative justice, France has established specialized courts dealing with financial and audit-related matters, disciplinary issues, and asylum claims.⁴³ Due to France's uniquely complex and intricate system of decentralization, administrative courts play a key role in balancing this structure.⁴⁴ In addition, France has established tribunals within the jurisdiction of the general courts, such as juvenile courts, social security tribunals, employment tribunals, labor courts, and commercial courts.⁴⁵

5. The Justification and Potential Model for the Establishment of Specialized Courts in Georgia

Judicial specialization has existed in Georgia since the early 2000s; however, it has not acquired a universal or systemic character. At present, limited specialization is in place within the Tbilisi City Court and the Tbilisi Court of Appeals. The Civil Law Chamber of the Tbilisi City Court is divided into six specialized units, the Administrative Law Chamber into five, and the Criminal Law Chamber – covering investigative, pre-trial, and trial stages – is also divided into six specialized divisions.⁴⁶ These include, inter alia, tax, administrative offenses, juvenile justice, and other areas. In principle, judicial specialization implies that cases are adjudicated by judges possessing specific knowledge and expertise in a given legal domain. However, paradoxically, this principle does not operate effectively in Georgia. Instead, court chairpersons distribute cases among judges based on specialization

⁴⁰ Butts, J.A., Roman J.K., Lynn-Whaley J., *Teen Courts, Drug Courts, and Mental Health Courts, Varieties of Juvenile Court: Nonspecialized Courts*, Oxford, 2011, Chapter 25, 627.

⁴¹ Zimmer M.B., *Overview of Specialized Courts*, International Journal for Court Administration, 2009, p. 7-13.

⁴² Schwartz B., *The Administrative Courts in France*, 1951 29-4 Canadian Bar Review 381, 1951 CanLIIDocs 59, 381.

⁴³ National Specialized Courts: France, European E-Justice, <https://e-justice.europa.eu/19/EN/national_specialised_courts?FRANCE&member=1> [26.02.2025].

⁴⁴ Flavier H., Froger C., *Administrative Justice in France: Between Singularity and Classicism*. BRICS Law Journal, 2016, 3 (2), 82.

⁴⁵ National Specialized Courts: France, European E-Justice, <https://e-justice.europa.eu/19/EN/national_specialised_courts?FRANCE&member=1> [26.02.2025].

⁴⁶ The Form of Narrow Specializations within the Common Court System, Transparency International Georgia, Research Report, Tbilisi, 2020, p. 25 (in Georgian).

categories at their own discretion, and, most importantly, these cases are often adjudicated by generalist judges without any formal or narrow specialization. Moreover, one of the purported objectives behind the introduction of specialization was to reduce the workload of the courts, yet no increase in the number of judges occurred at the time. Given these conditions, several questions arise: what is the purpose of specialization if cases assigned to specialized categories are not heard by truly specialized judges? Is the current model functional and effective?

To address these challenges, one of the most effective mechanisms may be the institutionalization of truly specialized courts. In legal scholarship, specialization – particularly in the form of specialized courts – is frequently recognized as one of the most effective instruments for protecting human rights.

Should Georgia move toward the establishment of specialized courts, it is essential that this development target legal domains where there is demonstrable and pressing need. If we take into account the criteria formulated by the U.S. Congressional Committee, several such areas emerge. One example is tax law – globally one of the most common areas of judicial specialization. It is a particularly technical and complex field with a high volume of cases;⁴⁷ however, in Georgia, judges lack specialization in this domain, resulting in judgments of inconsistent or lower quality.⁴⁸

Another area that warrants attention is juvenile justice – a highly sensitive field requiring a distinct approach toward minors. Specialization in this case should extend beyond judges to include prosecutors and defense attorneys, and the process as a whole must be adapted to serve the best interests of the child, with a focus on their rehabilitation and reintegration. In the near future, it may also be worth considering the establishment of family/social courts or environmental courts.

Regardless of the domain in which specialized courts might be introduced, their establishment in Georgia would necessitate resolving a number of legal and institutional issues. The first step would involve legislative reform. According to Article 59(3) of the Constitution of Georgia, justice is administered by the common courts, and specialized courts may only be established within the framework of the common court system.⁴⁹ This implies that any attempt to create specialized courts outside the common court structure would require a constitutional amendment. Additionally, it would be necessary to adopt organic laws for each type of specialized court, setting forth their organizational structures and procedural norms tailored to the specific characteristics of each legal field.

It is preferable that specialized courts in Georgia be established from the outset with their own autonomous structure and hierarchy. Judicial systems are generally organized in two or three tiers. For instance, due to the nature of tax and commercial disputes – which demand swift resolution – a two-tier structure may be optimal; by contrast, in the context of juvenile justice, a three-tier system is typically more appropriate.

⁴⁷ Data from the official website of IDFI (Institute for Development of Freedom of Information), court statistics, <https://idfi.ge/ge/courtstat/?lang=ge&type=1&case=administrative_cases&j_case=179&year=2022&f_stat=1&quarter=2022_0> [26.02.2025].

⁴⁸ Ibid.

⁴⁹ The Constitution of Georgia, Article 59(3), Legislative Herald of Georgia, 24 August 1995, <<https://matsne.gov.ge/ka/document/view/30346?publication=36>> [26.02.2025].

A separate institutional system would entail dedicated court buildings, specialized judges, an independent administrative staff, procedures tailored to the particular legal domain, a distinct appellate structure, and even differences in how claims are submitted – similar to the Constitutional Court model. If such a structure cannot be fully implemented at the outset, specialized courts may initially be introduced through pilot programs during a transitional phase. Under this model, they could be incorporated within the existing common court system. Moreover, during the initial stage, only the first instance might be specialized, while appeals and cassation would continue to be handled by generalist judges.

One of the most critical prerequisites for the effective functioning of specialized courts is the appointment of narrowly specialized judges, who possess high-level expertise, experience, and specific skillsets in their respective fields. Naturally, this would require an increase in the number of judges. Highly qualified specialists in relevant areas would need to be identified and appointed as judges. In parallel, it would also be possible to retrain interested generalist judges.

Significant changes would manifest as early as the claim submission and admissibility stages. It may be necessary to establish distinct procedural deadlines for lodging claims, rendering decisions, and submitting appeals or cassation complaints. For instance, in commercial and tax disputes, there must be expedited deadlines for decisions (within the bounds of reasonableness), as prolonged litigation often results in parties losing their legal interest or suffering increased material harm. Procedural rules would also need to be adapted to the nature of the legal domain. Specifically, for commercial disputes, a reduction in formalities and bureaucracy is essential, along with shorter decision timelines and greater opportunities for settlement. Furthermore, exhaustion of legal remedies should not be a strict prerequisite (or should be subject to exceptions) where such remedies are clearly futile due to the prevailing legal framework or established court practice.⁵⁰ In contrast, juvenile justice courts would require procedures fully adapted to the best interests of the child, including child-friendly courtrooms and sentencing practices focused on rehabilitation and reintegration rather than punishment. The European Court of Human Rights has explicitly recommended that states establish specialized juvenile courts as independent bodies that are structurally, procedurally, and substantively adapted to the needs and interests of minors.⁵¹

With respect to specialized judges, it will also be necessary to revise their appointment procedures and establish distinct qualification standards for selection. Common criteria for specialized judges include:

- “1. Expert-level knowledge in a specific field of law;
2. Technical or non-legal skills relevant to the area of specialization;
3. Awareness and understanding of key contextual factors such as public policy, social, economic, and environmental considerations;
4. Strong communication skills;
5. Possession of specific competencies required by the legal domain in question.”⁵²

⁵⁰ Loladze, B., Macharadze, Z., Firtskhalashvili, A., Constitutional Justice, Tbilisi, 2021, p.117 (328), Maunz, GG, Art. 93, Rn 71 (in Georgian).

⁵¹ Rap S., The Participation of Juvenile Defendants in the Youth Court: A Comparative Study of Juvenile Justice Procedures in Europe, 2013, chapter 2, par. 5.1., 67.

⁵² Gramckow H., Walsh B., Developing Specialized Court Services: International Experiences and Lessons Learned, Justice & Development Working Paper Series, The World Bank, 2013, 21.

The Consultative Council of European Judges (CCJE) also recommends that specialization may arise from a judge's professional background (e.g., as a practicing lawyer) or from experience acquired post-appointment. Additionally, judges should pass relevant examinations and complete specialized training.⁵³ Continuous professional development is considered essential. Similar requirements should be introduced in Georgia as well. Legislation should define the minimum years of experience in the relevant field required for appointment. Since the Georgian Constitution currently mandates at least five years of professional experience in the legal field for judges of common courts, it may be advisable to apply the same requirement initially to specialized judges.

As for the number of specialized judges, the Council of Europe recommends that each specialized court should have at least ten judges.⁵⁴ Nonetheless, there is no internationally accepted standard regarding the optimal number of judges in specialized courts. States are free to make such decisions based on their specific needs and contexts.

Finally, appointments of specialized judges may be either for a fixed term or indefinite. In Georgia, it would be possible – especially during a pilot phase – to appoint specialized judges for a defined period (e.g., three or five years), after which, based on evaluation, they could be confirmed for an indefinite term.

6. Conclusion

Understanding the particularities associated with the establishment of specialized courts – and adapting them to the specific needs of a given country – is by no means a simple task. The aim of this article has been to offer clarity on the matter by analyzing these peculiarities alongside international standards. The discussion has highlighted the various goals and needs that may compel a state to establish specialized courts. It has also examined the key criteria by which states determine which types of specialized courts to introduce.

Although the academic literature reflects divergent approaches, this article identifies four core, relevant criteria for the creation of specialized courts: A specialized court may be warranted in areas of law that are complex, sensitive, or highly specific, requiring narrowly focused expertise, experience, and/or skills; Where the quality of justice in a given legal field is unsatisfactory – i.e., where courts are unable to effectively fulfill their adjudicative function – the lack of well-reasoned and legally sound decisions necessitates the introduction of specialized courts; A high case volume in a particular legal domain may also justify specialization. Conversely, if case volume is low, alternative forms of specialization may be more appropriate. As discussed in this article, if specialized courts are to be introduced in Georgia, a range of legislative, staffing, structural, and institutional reforms will be required. Nevertheless, based on the specific needs of the country, the author argues that Georgia should, at the very least, initially implement pilot projects, with a view toward the eventual

⁵³ Consultative Council of European Judges (CCJE), Opinion (2012) NO 15 of the Consultative Council of European Judges on the Specialization of Judges, Paris, November 2012, C.1.II, 45.

⁵⁴ European Network of Councils for the Judiciary (ENCJ), "Development of Minimum Judicial Standards. Report 2010–2011" (Brussels: ENCJ, n.d.), <http://www.encj.eu/images/stories/pdf/workinggroups/encj_report_project_team_minimum_standards.pdf> [26.02.2025].

establishment of permanent specialized courts in legal areas such as commercial/tax law, juvenile justice, environmental protection, and others. Moreover, some legal scholars suggest that administrative courts should be separated into an independent judicial branch. Ultimately, the creation of specialized courts would promote higher-quality adjudication, increase the efficiency of the judicial system, and raise the standard of human rights protection in the country.

Bibliography:

1. *The Constitution of Georgia*, Parliamentary Gazette of Georgia, Issues 31-33, 24/08/1995.
2. *Fiscal Court Code of Germany*, 01.10.2022, https://www.gesetze-im-internet.de/fgo/_14.html [26.02.2025].
3. *Effective Institutions for Resolving Tax Disputes: Tax Courts and Alternative Mechanisms*, Research by USAID and Eurasia Partnership Foundation, 2012 (in Georgian).
4. *The Form of Narrow Specializations within the Common Court System*, Transparency International Georgia, Research Report, Tbilisi, 2020 (in Georgian).
5. *Baum L.*, A First Look at Judicial Specialization, The University of Chicago Press, 2011.
6. *Bar-Niv Z.*, The Labour Court System in Israel, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986.
7. *Berenstein A.*, The Labour Court System in Switzerland, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986.
8. *Bouvin A.*, The Labour Court System in Sweden, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986.
9. *Butts J.A., Roman J.K., Lynn-Whaley J.*, Teen Courts, Drug Courts, and Mental Health Courts, Varieties of Juvenile Court: Nonspecialized Courts, Oxford, 2011.
10. *Cazalet E.*, “Specialized Courts: Are They a ‘Quick Fix’ or a Long-Term Improvement in the Quality of Justice?” (Washington, DC: World Bank, 2001).
11. *Consultative Council of European Judges (CCJE)*, Opinion (2012) NO 15 of the Consultative Council of European Judges on the Specialization of Judges, Paris, November 2012.
12. *Cordewener A., Hendricks M.*, The Disputes and Litigation Review: Germany, Chapter 11, Seventh Edition, London, 2019.
13. *Cosgrave M.P.*, The Labour Court System in Ireland, Labour courts in Europe, International Institute for Labour Studies, Geneva, 1986.
14. *European Network of Councils for the Judiciary (ENCJ)*, “Development of Minimum Judicial Standards, Report 2010-2011” (Brussels: ENCJ, n.d.), http://www.encj.eu/images/stories/pdf/workinggroups/encj_report_project_team_minimum_standards.pdf [26.02.2025].
15. *Flavier H., Froger C.*, Administrative Justice in France: Between Singularity and Classicism. BRICS Law Journal, 2016, 3 (2).
16. *Gramckow H., Walsh B.*, Developing Specialized Court Services: International Experiences and Lessons Learned, Justice & Development Working Paper Series, The World Bank, 2013.
17. *Howard M.R.*, Comparing the Decision Making of Specialized Courts and General Courts: AN Exploration of Tax Decisions, THE JUSTICE SYSTEM JOURNAL, VOL. 26, NUMBER 2 (2005).
18. *Legomsky S.H.*, Specialized Justice, Courts, Administrative Tribunals, and a Cross-National Theory of Specialization, Oxford Academic Books, 1990.

19. *Loladze B., Macharadze Z., Firtskhalashvili A.*, Constitutional Justice, Tbilisi, 2021 (in Georgian).
20. *National Specialized Courts: Germany*, European E-Justice, https://e-justice.europa.eu/19/EN/national_specialised_courts?GERMANY&member=1 [26.02.2025].
21. *National Specialized Courts: Ireland*, European E-Justice, https://e-justice.europa.eu/19/EN/national_specialised_courts?IRELAND&member=1 [26.02.2025].
22. *National Specialized Courts: France*, European E-Justice, https://e-justice.europa.eu/19/EN/national_specialised_courts?FRANCE&member=1 [26.02.2025].
23. *National Specialized Courts: Sweden*, European E-Justice, https://e-justice.europa.eu/19/EN/national_specialised_courts?SWEDEN&member=1 [26.02.2025].
24. *Pelkonen J., Tiitinen K.P.*, The Labour Court System in Finland, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986.
25. *Rap S.*, The participation of Juvenile Defendants in the Youth Court: A Comparative Study of Juvenile Justice Procedures in Europe, 2013.
26. *Rauws R.*, The Labour Court System in Belgium, Labour Courts in Europe, International Institute for Labour Studies, Geneva, 1986.
27. *Schwartz B.*, The Administrative Courts in France, 1951 29-4 Canadian Bar Review 381, 1951 CanLIIDocs 59.
28. *Zimmer M.B.*, Overview of Specialized Courts, International Journal for Court Administration, 2009.
29. *Sramek v. Austria* [1984] ECHR, <[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57581%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57581%22]})> [26.02.2025].
30. *S.C. against the United Kingdom*, [2004] ECtHR, <[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-23434%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-23434%22]})> [26.02.2025].
31. *T. and V. against United Kingdom*, [1999] ECtHR, <[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-83696%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-83696%22]})> [26.02.2025].

Nana Ghvaladze*

The Extradition Treaty between Georgia and the United States – A Legal Analysis and Perspectives for Implementation

The Extradition Treaty between Georgia and the United States of America (hereinafter - “the Treaty”)¹ constitutes a pivotal legal instrument designed to regulate the extradition process and foster deeper legal cooperation between the two states. This article offers a critical analysis of the Treaty’s core provisions, with particular focus on the permissibility of extraditing nationals, the safeguards for the protection of human rights, and the role of judicial institutions within the extradition framework.

By examining the Treaty through the lens of international criminal cooperation, the article underscores Georgia’s enhanced capacity to engage effectively in cross-border legal processes, especially with respect to the transfer of individuals from the United States. It further investigates the legal and procedural challenges associated with harmonising the Treaty’s obligations with Georgia’s existing legislative framework and its binding international commitments.

A key focus of the analysis is the Treaty’s departure from previous legal norms by permitting the extradition of a party’s own nationals. This represents a significant shift in the legal landscape and has far-reaching implications for constitutional and human rights considerations in Georgian legislation.

Another notable innovation addressed in the article concerns the extradition of individuals charged with crimes punishable by the death penalty. The Treaty permits such extradition only upon assurances that the death sentence will not be carried out, thus aligning the practice with international human rights standards.

Additionally, the article discusses the evidentiary thresholds applicable in extradition proceedings and explores the institutional role of domestic courts in assessing compliance with the Treaty’s procedural and substantive guarantees. The analysis concludes by identifying potential friction points arising from the interplay of differing legal systems and offers recommendations for effective implementation within Georgia’s legal order.

Key words: *Extradition, Extradition of Georgian citizens, Extradition and human rights.*

1. Introduction

Since the restoration of its independence in the early 1990s, Georgia has cultivated a longstanding and multifaceted partnership with the United States of America.² This bilateral

* Ph.D Student at Ivane Javakishvili Tbilisi State University Faculty of Law.

¹ Extradition Treaty between Georgia and the United States of America, see the joint statement: <<https://ge.usembassy.gov/u-s-georgia-joint-statement-on-extradition-treaty-negotiations/>> [02.05.2025].

² First bilateral international agreements between the Government of Republic of Georgia and the United States of America on Economic, Humanitarian and Investment Cooperation and Assistance, 48, 31/07/1992 (in Georgian).

relationship, underpinned by strategic cooperation and shared democratic values, extends to various areas of governance, including criminal justice and legal assistance. Despite over three decades of collaboration, however, the extradition relationship between the two states has, until recently, lacked a formal legal framework. In the absence of a bilateral international treaty, extradition between Georgia and the United States has been governed on an *ad hoc* basis, relying predominantly on unilateral undertakings and individual agreements.³ This arrangement has resulted in a significant asymmetry in legal rights and procedural guarantees, particularly for Georgia, given the United States' statutory requirement that extradition be conducted only according to a treaty.⁴

The formalisation of extradition arrangements through the conclusion of the Treaty constitutes a significant legal and diplomatic milestone, particularly in light of negotiations that have been ongoing since 2019. Although the Treaty has not yet entered into force,⁵ all of its provisions have been finalised, agreed upon, and initialled by both parties.⁶ Upon ratification, it will establish a binding legal basis for extradition between the two states and will, for the first time, enable Georgia to request the extradition of individuals from the United States – a right previously unavailable in the absence of an international treaty-based mechanism.

The Treaty introduces several significant legal innovations within Georgia's domestic legal system. These include: (i) the possibility of extraditing Georgian nationals; (ii) the admissibility of extradition requests in cases where the offence is punishable by the death penalty under U.S. law, provided that assurances are given regarding non-enforcement; and (iii) the application of a distinct evidentiary threshold, reflective of U.S. legal standards, in judicial review of extradition requests. These provisions represent a departure from established domestic practice and raise important questions regarding the compatibility of the Treaty with Georgia's constitutional order and its international human rights obligations.

This article seeks to critically examine the legal and institutional implications of the Treaty from the perspective of Georgian legislation. It aims, in particular, to assess the compatibility of the Treaty's core provisions with Georgia's constitutional framework, statutory extradition procedures, and obligations arising under international human rights law. Drawing on doctrinal legal methodology,⁷ the article further identifies the legislative reforms necessary to facilitate the Treaty's effective implementation and evaluates the procedural and institutional challenges likely to arise during its enforcement.

The central research question guiding this inquiry is whether the existing Georgian legal system is adequately prepared – both normatively and institutionally – to ensure the effective and rights-

³ Law of Georgia on International Cooperation on Legal Matters, Article 2, Part 2, 09/08/2010 (in Georgian).

⁴ 18 USC §§ 3181–3196. see: *Factor v. Laubenheimer*, (1933), 290 US 276, 287; *United States v. Rauscher*, (1886), 119 US 407, 414.

⁵ According to the Organic Law of Georgia on Normative Acts and the Law of Georgia on International Treaties, the entry into force of the Treaty requires its submission to the Parliament of Georgia for ratification, along with an accompanying package of legislative amendments.

⁶ A corresponding decree of the Government of Georgia (No. 2205; 8 December 2023) has also been issued regarding the signing of the Treaty.

⁷ *Hutchinson T., Duncan N.*, Defining and Describing What We Do: Doctrinal Legal Research, (2012) 17 *Deakin Law Review*, Vol. 17, №1, 2012, 83.

compliant implementation of the Treaty. The article is structured into an introduction, three main chapters, and a concluding section. Each chapter presents a legal analysis that shows the key innovations introduced into the Georgian legal framework by the Treaty. The concluding section offers recommendations for aligning Georgia's domestic legal framework with the obligations introduced by the Treaty, while preserving constitutional safeguards and adherence to international standards.

2. Extradition of Citizens under the Treaty

This section examines the regulation of the extradition of nationals by the contracting parties within the context of the Treaty,⁸ with a focus on the specific legal and constitutional framework of Georgia. The extradition of nationals remains a complex and often contentious issue in international law, as its permissibility is typically determined by a state's constitutional principles, legal traditions, and international commitments. Accordingly, this section evaluates the compatibility of this provision with Georgia's domestic legal order.

In the context of the United States, the extradition of nationals is a common feature of the majority of its bilateral treaties.⁹ According to the U.S. Department of State, the United States retains the discretion to extradite its own citizens when it deems such action necessary, in the interest of justice.¹⁰ By contrast, Georgia's position is more constrained. Article 32(5) of the Constitution of Georgia prohibits the extradition of a Georgian citizen to a foreign state, except where otherwise provided by an international treaty.¹¹ This constitutional clause does not constitute an absolute bar, but rather makes extradition contingent upon the existence of a treaty obligation.

While the extradition of nationals is standard practice in the United States, reflecting its common law tradition,¹² it represents a significant legal innovation for Georgia. Extradition treaties may include provisions that exempt states from the obligation to extradite their own nationals.¹³ Such

⁸ Pursuant to Article 3 of the Treaty, "Extradition shall not be refused based on the nationality of the person sought."

⁹ The U.S. uses a similar record in most bilateral agreements, compare.: Protocol on the application of the Agreement on Extradition between the United States of America and the European Union to the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Lithuania, signed 15 June 2005, Article 3; <<https://www.state.gov/wp-content/uploads/2019/02/10-201.14-Lithuania-EU-Extradition-Treaty.pdf>> [28.02.2025]. Extradition Treaty Between The Government of the United States of America and The Government of the Republic of Latvia, signed 7 December 2005, Article 3; <<https://2021-2025.state.gov/wp-content/uploads/2019/02/09-415-Latvia-Extradition-Treaty.pdf>> [28.02.2025]. Extradition Treaty Between The Government of the United States of America and The Government of the Republic of Estonia, signed 8 February 2006, Article 3. <<https://www.state.gov/wp-content/uploads/2019/02/09-407-Estonia-Extradition-Treaty.pdf>> [28.02.2025].

¹⁰ *Plachta M.*, (Non-)Extradition of Nationals: A Neverending Story?, *Emory International Law Review*, Vol. 13, №1 1999, 77, 97-98.

¹¹ Constitution of Georgia, Article 32, Paragraph 5, *The Legislative Herald of Georgia*, 31-33, 24.08.1995 (in Georgian).

¹² *Kester J.G.*, Some Myths of United States Extradition Law, *Georgetown Law Journal* Vol. 76, №4, 1998, 1441, 1443.

¹³ *Bassiouni M. C.*, *International Extradition United States Law and Practice*, 6th ed., Oxford, 2014, 744-45.

exemptions can be either absolute, prohibiting extradition categorically, or discretionary, allowing the requested state to decide on a case-by-case basis.¹⁴ In the latter case, states retain full discretion to deny or grant extradition of their nationals without breaching treaty obligations.¹⁵

International law offers further guidance on this matter. Article 6(1)(a) of the European Convention on Extradition¹⁶ grants parties the discretion to refuse extradition of their own nationals.¹⁷ Georgia, by way of declaration under Article 6(1)(b), has reserved the right to determine, at its own discretion, whether or not to extradite its citizens to foreign states.¹⁸ This reservation operates on the principle of reciprocity,¹⁹ thereby allowing Georgia to consider the extradition of its nationals where similar treatment is extended by the requesting state.

It is important to note that, notwithstanding the constitutional limitation, Georgian law permits the transfer of Georgian nationals to the International Criminal Court (ICC).²⁰ This indicates a broader interpretive space within Georgian law for the conditional surrender of nationals under international legal obligations.

Declarations attached to Conventions form an integral part of their legal framework. Pursuant to the Constitution of Georgia, an international treaty, if it does not contravene the Constitution or constitutional agreement, has primacy over domestic normative acts.²¹ Accordingly, such a declaration, theoretically, could serve as a legal basis for the extradition of nationals. However, extradition requests require close and careful examination at the national level to prevent violations of fundamental rights or political misuse of the process.²² The discretionary authority provided by the declaration is rooted in this concern.

Nonetheless, under the Law of Georgia on International Cooperation in Criminal Matters, if a person detained for extradition is found to be a Georgian citizen, they must be released immediately.²³

¹⁴ იქვე.

¹⁵ Chhabra S., Nationality and Extradition, RGNUL Law Review, Vol. 4, №2, 2016, 1, 3.

¹⁶ Georgia participatory state since 22 March 2000, see the list of signatory and participatory states: <<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=024>> [28.02.2025].

¹⁷ Staker C., Jurisdiction, in Evans M.D. (ed.), International Law, 5th ed., Oxford, 2014, 299-01.

¹⁸ In the declaration submitted alongside the instrument of ratification and deposited on 15 June 2001, it is stated that, for the purposes of the Convention, „the Government of Georgia reserves the right to decide on the extradition of its nationals on the basis of reciprocity and to refuse their extradition on the grounds of public morality, public policy and State security.” see.: <<https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=024&codeNature=10&codePays=GEO>> [02.05.2025].

¹⁹ Parisi F., Ghei N., The Role of Reciprocity in International Law, Cornell International Law Journal, Vol 36, №1, 2003, 93, 119-21.

²⁰ Law of Georgia on Cooperation of Georgia with the International Criminal Court, Article 20, Paragraph 3, 20/08/2003 (in Georgian).

²¹ Constitution of Georgia, Article 4, Paragraph 5, The Legislative Herald of Georgia, 31-33, 24.08.1995 (in Georgian). On the superior legal force of international treaties, see also: Cassese A., International Law, 2nd ed., Oxford, 2005, 213-22.

²² Blekxtoon R., Zsuzsanna D.R., The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-)Surrender of Nationals and Dual Criminality under the European Arrest Warrant, European Journal of Crime, Criminal Law and Criminal Justice, Vol. 13, №3, 2005, 317, 318-20.

²³ Law of Georgia on International Cooperation in Criminal Matters, Article 30, Paragraph 13, 48, 09/08/2010 (in Georgian).

Furthermore, nationality is treated as a legal ground that precludes surrender to a foreign state, excluding the prosecutor from filing a motion for extradition with the competent court.²⁴ This position has been reinforced by domestic judicial practice.

Despite the constitutional interpretation and Georgia's declaration under the European Convention on Extradition, there is currently no operational legal or procedural mechanism for executing the extradition of Georgian nationals. Thus, for the Treaty to be effectively implemented, the relevant provisions of domestic law must be amended to bring them in line with the principle of extradition of nationals established by the Treaty.²⁵

This development also underscores the need to develop supplementary legal mechanisms to manage potential constitutional or human rights challenges. Such mechanisms may include the elaboration of detailed procedural guidelines for handling cases where the extradition of nationals may conflict with constitutional protections or international human rights obligations.²⁶ These safeguards are essential for ensuring the Treaty's effective and balanced implementation and for adapting it to the evolving legal, political, and practical landscape.²⁷ Ultimately, such efforts will strengthen the internal coherence and operational viability of Georgia's extradition regime.

Provided that the necessary legal framework is established, the extradition of Georgian citizens would not, in principle, violate Georgia's constitutional provisions or its international legal obligations.

3. Protection of Human Rights under the Treaty

The possibility of extraditing individuals for crimes punishable by the death penalty under U.S. law, provided that appropriate assurances are given, constitutes a second significant and precedent-setting development within Georgia's legal system. The protection of human rights remains among the most critical considerations in extradition proceedings. To mitigate the risk of potential violations, core rights such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the right to a fair trial, and the right to respect for private and family life must be rigorously assessed to ensure that extradition does not result in the infringement of fundamental rights.²⁸

This section evaluates the risks of human rights violations associated with the implementation of the Treaty and proposes mechanisms for their prevention and mitigation. While the Treaty does not, in itself, contain a dedicated section on human rights, the preamble acknowledges the need to afford

²⁴ Ibid, Article 34, Paragraph 3.

²⁵ Law of Georgia on Georgian International Treaties, Article 14, Paragraph 2, Sub-paragraph "e" and Article 15, Paragraph 4, The Legislative Herald of Georgia, 44, 11/11/1997 (in Georgian).

²⁶ Cassese A., International Law, 2nd ed., Oxford, 2005, 222-23.

²⁷ Sorensen, J. S., The Interplay Between the Executive and Judicial Branches in Extradition, Litigation, Vol. 40, №4, 2014, 60, 61.

²⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 2, 3, 5, 6 and 8, also *inter alia* following cases: *Soering v. United Kingdom* [1989] ECHR (Ser. A.), 161.; *Mamatkulov and Askarov v. Turkey* [2005] ECHR; *Othman (Abu Qatada) v. the United Kingdom* [2012] ECHR; *Kirkwood v. United Kingdom* [1984] ECHR; *Chahal v. the United Kingdom* [1996] ECHR.

appropriate attention to the rights of individuals as guaranteed under the respective legal systems of the contracting parties.²⁹

Notably, this Treaty will be the first international agreement through which Georgia does not explicitly exclude cooperation in criminal matters with a state where the offence for which extradition is requested may carry the death penalty.³⁰ The Treaty stipulates that, where the requesting state imposes the death penalty for the relevant offence, the requested state's executive authority may refuse extradition unless the requesting state provides adequate assurances that the death penalty will not be imposed, or, if imposed, will not be carried out.³¹

This provision raises several legal and ethical concerns. First, the power to refuse extradition in such cases lies within the discretion, but not the obligation, of the executive authority of the requested state. Second, Georgia is a party to the European Convention on Human Rights and its additional protocols abolishing the death penalty under all circumstances.³² In fact, Georgia abolished the death penalty under its domestic law as early as 1997,³³ prior to its formal assumption of international obligations in this area.

While the European Convention on Extradition allows for treaty language similar to that adopted in the Georgia–U.S. agreement,³⁴ Georgia has made no reservations or declarations clarifying the extent of such cooperation. Furthermore, current Georgian legislation explicitly prohibits extradition in cases where the offence in question is punishable by the death penalty in the requesting

²⁹ In various bilateral extradition treaties, the standard of human rights protection is regulated in different ways. see: Protocol on the application of the Agreement on Extradition between the United States of America and the European Union to the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Lithuania, signed 15 June 2005; <<https://www.state.gov/wp-content/uploads/2019/02/10-201.14-Lithuania-EU-Extradition-Treaty.pdf>> [02.05.2025] Extradition Treaty Between The Government of the United States of America and The Government of the Republic of Latvia, signed 7 December 2005; <<https://2021-2025.state.gov/wp-content/uploads/2019/02/09-415-Latvia-Extradition-Treaty.pdf>> [02.05.2025]. Extradition Treaty Between The Government of the United States of America and The Government of the Republic of Estonia, signed 8 February 2006. <<https://www.state.gov/wp-content/uploads/2019/02/09-407-Estonia-Extradition-Treaty.pdf>> [02.05.2025].

³⁰ Article 7 of the Treaty reads as follows: When the offence for which the extradition is sought is punishable by death under the laws in the requesting state and is not punishable by death under the laws in the requesting state, the executive authority of the requested state may refuse extradition unless the requesting state provides the executive authority of the requested state with an assurance that the death penalty shall not be imposed or, if for procedural reasons such an assurance cannot be provided by the requesting state, with an assurance that the death penalty, if imposed, shall not be carried out. If the requesting state provides an assurance pursuant to this article, the requested state shall grant the extradition and the requesting state shall comply with the assurance.

³¹ Ibid.

³² Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, European Treaty Series, 1983, 114, (Georgia signed in 1999 and is participatory state since 2000); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, European Treaty Series, 2002, 187, (Georgia signed in 2002 and is participatory state since 2003).

³³ Law of Georgia on the Complete Abolition of the Special Measure of Punishment – Death Penalty, The Legislative Herald of Georgia, 45, 21/11/1997 (in Georgian).

³⁴ European Convention on Extradition, European Treaty Series, 1957, 24 (for Georgia entered into force 13 September 2001).

state.³⁵ This statutory prohibition would necessarily require amendment during the Treaty's ratification process.³⁶ However, it remains unclear whether such amendments will be narrowly tailored to apply solely to the extradition relationship with the United States, or whether they could extend to other states where capital punishment remains in effect.

It is also crucial to acknowledge that the death penalty is still actively carried out in certain U.S. states.³⁷ Therefore, careful scrutiny is required not only in relation to the legal guarantees presented by the requesting state, but also in assessing the broader human rights implications of such extraditions.³⁸ This includes evaluating whether the guarantees are legally binding, specific in content, and practically enforceable.

The responsibility of the requested state to ensure compliance with its human rights obligations – including its prohibition of the death penalty – is paramount, particularly where it has constitutionally or legislatively abolished such punishment.³⁹ The evaluation of assurances must go beyond mere formality and reflect a comprehensive understanding of the interplay between international legal norms, bilateral treaty obligations, and fundamental rights protections.⁴⁰ This involves balancing the principles of justice and accountability with the imperatives of human dignity and the absolute nature of certain rights, such as the right to life and the prohibition of cruel or inhuman punishment.⁴¹

Such assurances must therefore be specific, legally enforceable, and capable of practical implementation, to ensure that individuals are not exposed to the risk of serious human rights violations.⁴² This is essential for preserving the integrity of the requested state's legal obligations and fostering mutual trust and cooperation between the parties to the Treaty.⁴³ Importantly, this provision applies only to extraditions requested by the United States from Georgia, not vice versa. Accordingly, only the Georgian executive authority will be empowered to request assurances that the death penalty will not be imposed or enforced, and this provision will extend to the extradition of Georgian nationals as well.

³⁵ Law of Georgia on International Cooperation in Criminal Matters, Article 22, 48, 09/08/2010 (in Georgian).

³⁶ Law of Georgia on Georgian International Treaties, Article 15, Paragraph 4, The Legislative Herald of Georgia, 44, 11/11/1997 (in Georgian).

³⁷ *Clarke A.*, Terrorism, Extradition, and the Death Penalty, *William Mitchell Law Review*, Vol. 29, №3, 2003, 783, 793-98.

³⁸ *Drake S. K.*, Dangerous Precedents: Circumventing Extradition to Implement the Death Penalty, *Suffolk Transnational Law Review*, Vol. 36, №2, 2013, 333, 342-43.

³⁹ *Beltran M. B., Martin A. N.*, Post 9/11 Trends in International Judicial Cooperation Human Rights as a Constraint on Extradition in Death Penalty Cases, *Journal of International Criminal Justice*, Vol. 10, №3, 2012, 581, 584-87.

⁴⁰ *Gregg R.*, The European Tendency toward Non-Extradition to the United States in Capital Cases: Trends, Assurances, and Breaches of Duty, *Miami International and Comparative Law Review*, Vol. 10, №1, 2002, 113, 123-28.

⁴¹ *Harkins and Edwards v. United Kingdom*, [2012] ECHR140-41.

⁴² *Gregg R.*, The European Tendency toward Non-Extradition to the United States in Capital Cases: Trends, Assurances, and Breaches of Duty, *Miami International and Comparative Law Review*, Vol. 10, №1, 2002, 113, 123-25.

⁴³ *Ibid.*

Scholarly opinions remain divided on the reliability of diplomatic assurances provided by the United States. Some legal scholars maintain that the U.S. has consistently fulfilled such assurances, particularly when required by treaty obligations.⁴⁴ Others argue that diplomatic assurances may be legally insufficient, citing documented instances in which extradited individuals were subjected to treatment tantamount to torture despite the existence of formal guarantees.⁴⁵ This raises broader questions about the extent to which law can effectively constrain executive power in politically asymmetric relationships and whether diplomatic assurances are a sufficient safeguard in such contexts.⁴⁶

At present, it is difficult to predict how these issues will play out in the Georgian context or what mechanisms may be developed to minimise associated risks. What is clear, however, is that the Georgian executive branch has committed itself to this framework and will bear the legal and political consequences of its implementation.

A legislative amendment removing the death penalty as an absolute bar to extradition will be a necessary precondition for the Treaty's entry into force. While such a change will not fully align with Georgia's existing legal framework, the introduction and reliable enforcement of death penalty assurances may serve to reconcile this legal inconsistency.

4. Institutional Mechanism for Extradition and Standard of Submission of Evidence

This section analyzes the institutional and procedural mechanisms involved in the implementation of extradition under the Treaty, with particular emphasis on the role of the judiciary and the evidentiary standards established for extradition requests to and from the United States. It also examines potential practical challenges that may arise during the implementation of the Treaty.

The Treaty marks Georgia's first bilateral extradition agreement with a common law jurisdiction, wherein the judicial system operates according to distinct structural and interpretative principles. In common law systems, courts perform a more proactive and interpretive role in adjudicating legal questions.⁴⁷ This structural divergence has significant implications for extradition processes, particularly regarding the assessment of evidence and the role of judicial discretion.

Under Georgian legislation, extradition proceedings are classified as semi-legal in nature.⁴⁸ However, there is ongoing debate as to whether their legal component is subordinate to or overshadowed by political considerations. A brief review of the decisions of the Supreme Court of Georgia in extradition cases reveals a high degree of uniformity: prosecutorial motions are almost

⁴⁴ Ibid 127-28.

⁴⁵ *Hawkins K. R.*, The Promises of Torturers: Diplomatic Assurances and the Legality of Rendition, *Georgetown Immigration Law Journal*, Vol. 20, №2, 2006, 213, 217.

⁴⁶ *Khutsishvili K.*, Extradition and Deportation under the European Convention on Human Rights, in *European Human Rights Standards and Their Impact on Georgian Legislation and Practice*, ed. *Korkelia K.*, Tbilisi, 2006, 313, 334 (in Georgian).

⁴⁷ *Lomio P. J., Spang-Hanssen H., Wilson G. D.*, Legal Research Methods in a Modern World: A Coursebook, 3rd ed., Copenhagen, 2011, 11.

⁴⁸ Law of Georgia on International Cooperation in Criminal Matters, Article 34, 48, 09/08/2010 (in Georgian).

invariably granted,⁴⁹ and the judicial decisions tend to follow a standard format, replicating identical reasoning across multiple cases.⁵⁰ This pattern suggests a formalistic approach in which procedural compliance and uniformity are prioritised over substantive legal analysis or case-specific considerations.

This tendency may be partly attributed to the nature of extradition proceedings themselves, which are not required to meet the full standards of fairness applicable to criminal trials, as they do not involve the adjudication of civil rights, duties, or criminal liability.⁵¹ The scope of judicial review in extradition cases is limited;⁵² the primary task of the court is to assess the legality of the extradition request and ensure the protection of fundamental rights, rather than to determine whether sufficient evidence exists to establish guilt.⁵³

Nevertheless, extradition proceedings, while not equivalent to standard criminal trials, must still adhere to the procedural safeguards established under Georgia's Criminal Procedure Code, which aligns with the standards set out in the European Convention on Human Rights.⁵⁴ This ensures that a minimum threshold of procedural fairness and legality is maintained, even in limited-scope proceedings.⁵⁵

In legal systems based on precedent, judicial decisions carry a different normative weight. It is important to distinguish between rules established by courts and rules imposed by statute.⁵⁶ Recognising this distinction underscores that judicially enforced rules may coexist with, or even operate independently from, statutory law.⁵⁷ In the extradition context, this distinction is especially relevant given that the final decision rests not with the judiciary, but with the executive branch, by a political person.⁵⁸ The non-final nature of court decisions in extradition cases resembles quasi-judicial procedures, where decision-makers operate within a limited mandate, focusing on legal compliance without engaging in substantive fact-finding or normative interpretation.⁵⁹ Even where the court

⁴⁹ There is no official statistical data to confirm this. However, experts with multiple years of experience cannot recall more than a single instance in which a court overturned a decision after recourse to the judiciary became mandatory in extradition cases.

⁵⁰ <<https://www.supremecourt.ge/ka/cases>> [02.05.2025].

⁵¹ *Langford P.*, Extradition and fundamental rights: the perspective of the European Court of Human Rights, *The International Journal of Human Rights*, Vol. 13, №4, 2009, 512, 516.

⁵² Procedural measures such as interrogating witnesses, cross-examining the case, presenting and requesting evidence, and other actions related to proving the charge during the hearing on the merits.

⁵³ *Arnell P., Davies G.*, The Forum Bar in UK Extradition Law: An Unnecessary Failure, *The Journal of Criminal Law*, Vol. 84, №2, 2020, 142, 143.

⁵⁴ *Kester J.G.*, Some Myths of United States Extradition Law, *Georgetown Law Journal*, Vol. 76, №4, 1988, 1441, 1444-47.

⁵⁵ See the statistics on violations of the European Convention by Georgia, including with respect to Article 6 of the Convention, available at: <https://www.echr.coe.int/documents/d/echr/cp_georgia_eng> [02.05.2025].

⁵⁶ *Lomio P. J., Spang-Hanssen H., Wilson G. D.*, Legal Research Methods in a Modern World: A Coursebook, 3rd ed., Copenhagen, 2011, 63.

⁵⁷ *Ibid.*

⁵⁸ Law of Georgia on International Cooperation in Criminal Matters, Article 34, 48, 09/08/2010 (in Georgian).

⁵⁹ *Koh S. A.*, Core Criminal Procedure, *Minnesota Law Review*, Vol. 105, №1, 2020, 251, 279.

approves an extradition request, the executive retains the authority to override the decision and decline to surrender the individual.⁶⁰

Another issue concerns the evidentiary standards applied in extradition proceedings.⁶¹ Extradition requests generally pertain to two categories of individuals: (i) accused persons whose cases have not yet been adjudicated, and (ii) convicted individuals who are sought for the purpose of serving their sentence.⁶² In this regard, judicial review is more relevant for accused individuals, as procedural protections related to trial rights are no longer applicable once a final judgment has been rendered.⁶³

Georgia's domestic legal framework does not currently provide for the evidentiary threshold that may be required by U.S. courts. According to the Treaty, the requesting state (in this case, Georgia) must submit documentation sufficient to establish a "basis" for believing that the individual committed the alleged offence.⁶⁴ However, this standard will not be reciprocally applied to requests from the United States. The justifications for this asymmetry include, first, the maximum duration of extradition detention under Georgian law, which is limited to nine months,⁶⁵ presumably identified as insufficient to accommodate complex evidentiary procedures, and second, the absence of such a requirement in Georgian legislation.

Georgian legislation imposes only limited obligations on courts involved in extradition procedures,⁶⁶ and there is currently no indication of legislative intent or a willingness to revise or

⁶⁰ Law of Georgia on International Cooperation in Criminal Matters, Article 34, Paragraphs 13-15, 48, 09/08/2010 (in Georgian).

⁶¹ There are three primary grounds for extradition: individuals who are accused, those who have been convicted, and persons subject to decisions rendered in absentia who may face trial upon extradition. This study focuses specifically on the extradition of individuals who are formally accused.

⁶² *Arnell P.*, The Contrasting Evolution of the Right to a Fair Trial in UK Extradition Law, *The international journal of human rights*, Vol. 22, №7, 2018, 869, 871-72.

⁶³ Ibid.

⁶⁴ According to the Article 8(3) of the Treaty: "In addition to the requirements in paragraph 2 of this Article, a request for extradition of a person who is sought for prosecution shall also be supported by: (a) a copy of the warrant or order of arrest or detention issued by a judge or other competent authority; (b) a copy of the charging document, if any; and (c) such information as would provide a reasonable basis to believe that the person sought committed the offense or offences for which extradition is requested, where it is so required under the law of Requested State." The United States includes similar provisions in other bilateral extradition treaties as well; see, for example: Protocol on the application of the Agreement on Extradition between the United States of America and the European Union to the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Lithuania, signed 15 June 2005, Article 8(3); <<https://www.state.gov/wp-content/uploads/2019/02/10-201.14-Lithuania-EU-Extradition-Treaty.pdf>> [02.05.2025]. Extradition Treaty Between The Government of the United States of America and The Government of the Republic of Latvia, signed 7 December 2005, Article 7(3); <<https://2021-2025.state.gov/wp-content/uploads/2019/02/09-415-Latvia-Extradition-Treaty.pdf>> [02.05.2025]. Extradition Treaty Between The Government of the United States of America and The Government of the Republic of Estonia, signed 8 February 2006, Article 8(3). <<https://www.state.gov/wp-content/uploads/2019/02/09-407-Estonia-Extradition-Treaty.pdf>> [02.05.2025].

⁶⁵ Law of Georgia on International Cooperation in Criminal Matters, Article 30, Paragraph 6, 48, 09/08/2010 (in Georgian).

⁶⁶ Ibid, Article 30.

expand judicial participation. Moreover, neither statutory provisions nor judicial practice provides detailed guidance on the principles that courts should apply during extradition hearings. In light of potential cooperation with the United States – where criminal sanctions may include severe penalties⁶⁷ such as life imprisonment,⁶⁸ it is essential that Georgia clearly define its procedural approach, including, for example, the provision of consular protection for Georgian citizens subject to extradition.

Strengthening the role of the judiciary in extradition proceedings would also provide long-term institutional benefits. The standards developed through the implementation of the Treaty with the United States could serve as a model for future extradition agreements with other common law jurisdictions, helping Georgia to harmonise its legal practice with international norms and to ensure the protection of fundamental rights in cross-border criminal cooperation.

5. Conclusion

This study has identified several legislative amendments that must be enacted prior to the Treaty's entry into force. In particular, amendments will be required to revise the normative content of provisions that currently prohibit the extradition of Georgian citizens and the extradition of individuals for offences punishable by the death penalty under the laws of the requesting state.⁶⁹

From the perspective of legislative drafting, such amendments could take either a general form or be limited in scope to the specific extradition relationship between Georgia and the United States. Among these options, the latter – targeted amendments limited to U.S.-Georgia cooperation – is recommended as the more prudent and contextually appropriate approach.

Whether Georgian authorities will be able to effectively obtain and monitor the enforcement of death penalty assurances remains an open question. The answer can only emerge through the practical application of the Treaty and the evolution of bilateral cooperation between Georgia and the United States in the field of criminal justice.

The analysis of the relevant Treaty provisions further reveals an asymmetry in the evidentiary standards required by the two parties. There is no indication of an intention to apply a uniform evidentiary threshold in both directions. As a result, Georgia's domestic legislation will remain unchanged in this respect, which in turn highlights the need to strengthen the role of the judiciary to ensure the Treaty's effective implementation in practice.

To address these challenges, it is advisable to establish clear guiding principles, develop detailed procedural instructions, and provide specialised training for judges on managing cases that involve different evidentiary standards. By addressing these institutional and procedural gaps, Georgia

⁶⁷ King K.F., *The Death Penalty, Extradition, and the War against Terrorism: U.S. Responses to European Opinion about Capital Punishment*, Buffalo Human Rights Law Review, Vol. 9, №1, 2003, 161, 167-70.

⁶⁸ Asta B., *International Extradition Law – European Court of Human Rights Develops Adapted Test for Life Sentence in International Extradition Context – Sanchez-Sanchez v. United Kingdom*, Suffolk University Law Review, Vol. 56, № 4, 2023, 811, 821-822.

⁶⁹ Law of Georgia on International Cooperation in Criminal Matters, Articles 21 and 22, 48, 09/08/2010 (in Georgian).

will not only reinforce its domestic mechanisms for extradition but also lay the groundwork for future cooperation with other common law jurisdictions and prepare for deeper integration into the European legal space.

Bibliography:

1. Constitution of Georgia, The Legislative Herald of Georgia, 31-33, 24/08/1995.
2. Law of Georgia on International Cooperation in Criminal Matters, 09/08/2010.
3. Law of Georgia on Georgian International Treaties, The Legislative Herald of Georgia, 44, 11/11/1997.
4. Law of Georgia on the Complete Abolition of the Special Measure of Punishment - Death Penalty, The Legislative Herald of Georgia, 45, 21/11/1997.
5. Law of Georgia on Cooperation of Georgia with the International Criminal Court, 20/08/2003 (in Georgian).
6. Extradition Treaty Between Georgia and The United States of America
7. *Khutsishvili K.*, Extradition and Deportation under the European Convention on Human Rights, in *European Human Rights Standards and Their Impact on Georgian Legislation and Practice*, ed. *Korkelia K.*, Tbilisi, 2006, 313 (in Georgian).
8. Vienna Convention on the Law of Treaties, United Nations Treaty Series, 1969, 1155.
9. European Convention on Extradition, European Treaty Series, 1957, 24.
10. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, European Treaty Series, 1983, 114.
11. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, European Treaty Series, 2002, 187.
12. Protocol on the application of the Agreement on Extradition between the United States of America and the European Union to the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Lithuania, signed 15 June 2005 <<https://www.state.gov/wp-content/uploads/2019/02/10-201.14-Lithuania-EU-Extradition-Treaty.pdf>> [28.02.2025]
13. Extradition Treaty Between The Government of the United States of America and The Government of the Republic of Latvia, signed 7 December 2005 < <https://2021-2025.state.gov/wp-content/uploads/2019/02/09-415-Latvia-Extradition-Treaty.pdf>> [28.02.2025]
14. Extradition Treaty Between The Government of the United States of America and The Government of the Republic of Estonia, signed 8 February 2006 <<https://www.state.gov/wp-content/uploads/2019/02/09-407-Estonia-Extradition-Treaty.pdf>> [28.02.2025].
15. 18 USC §§ 3181–3196.
16. *Arnell P., Davies G.*, The Forum Bar in UK Extradition Law: An Unnecessary Failure, *The Journal of Criminal Law*, Vol. 84, №2, 2020, 142.
17. *Arnell P.*, The Contrasting Evolution of the Right to a Fair Trial in UK Extradition Law, *The international journal of human rights*, Vol. 22, №7, 2018, 869.
18. *Asta B.*, International Extradition Law - European Court of Human Rights Develops Adapted Test for Life Sentence in International Extradition Context - *Sanchez-Sanchez v. United Kingdom*, *Suffolk University Law Review*, Vol. 56, № 4, 2023, 811.
19. *Bassiouni M. C.*, *International Extradition United States Law and Practice*, 6th ed., Oxford, 2014.

20. *Beltran M. B., Martin A. N.*, Post 9/11 Trends in International Judicial Cooperation Human Rights as a Constraint on Extradition in Death Penalty Cases, *Journal of International Criminal Justice*, Vol. 10, №3, 2012, 581.
21. *Blekxtoon R., Zsuzsanna D.R.*, The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-)Surrender of Nationals and Dual Criminality under the European Arrest Warrant, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 13, №3, 2005, 317.
22. *Cassese A.*, *International Law*, 2nd ed., Oxford, 2005.
23. *Chhabra S.*, Nationality and Extradition, *RGNUL Law Review*, Vol. 4, №2, 2016, 1.
24. *Clarke A.*, Terrorism, Extradition, and the Death Penalty, *William Mitchell Law Review*, Vol. 29, №3, 2003, 783.
25. *Drake S. K.*, Dangerous Precedents: Circumventing Extradition to Implement the Death Penalty, *Suffolk Transnational Law Review*, Vol. 36, №2, 2013, 333.
26. *Gregg R.*, The European Tendency toward Non-Extradition to the United States in Capital Cases: Trends, Assurances, and Breaches of Duty, *Miami International and Comparative Law Review*, Vol. 10, №1, 2002, 113.
27. *Harkins and Edwards v. United Kingdom*, [2012] ECHR.
28. *Hawkins K. R.*, The Promises of Torturers: Diplomatic Assurances and the Legality of Rendition, *Georgetown Immigration Law Journal*, Vol. 20, №2, 2006, 213.
29. *Hutchinson T., Duncan N.*, Defining and Describing What We Do: Doctrinal Legal Research, (2012) 17 *Deakin Law Review*, Vol. 17, №1, 2012, 83.
30. *Kester J.G.*, Some Myths of United States Extradition Law, *Georgetown Law Journal* Vol. 76, №4, 1998, 1441.
31. *Kester J.G.*, Some Myths of United States Extradition Law, *Georgetown Law Journal*, Vol. 76, №4, 1988, 1441, 1444-47.
32. *King K.F.*, The Death Penalty, Extradition, and the War against Terrorism: U.S. Responses to European Opinion about Capital Punishment, *Buffalo Human Rights Law Review*, Vol. 9, №1, 2003, 161, 167-70.
33. *Koh S. A.*, Core Criminal Procedure, *Minnesota Law Review*, Vol. 105, №1, 2020, 251.
34. *Langford P.*, Extradition and fundamental rights: the perspective of the European Court of Human Rights, *The International Journal of Human Rights*, Vol. 13, №4, 2009, 512.
35. *Lomio P. J., Spang-Hanssen H., Wilson G. D.*, *Legal Research Methods in a Modern World: A Coursebook*, 3rd ed., Copenhagen, 2011, 11.
36. *Parisi F., Ghei N.*, The Role of Reciprocity in International Law, *Cornell International Law Journal*, Vol 36, №1, 2003, 93.
37. *Plachta M.*, (Non-)Extradition of Nationals: A Neverending Story?, *Emory International Law Review*, Vol. 13, №1 1999, 77, 97-98.
38. *Sorensen, J. S.*, The Interplay Between the Executive and Judicial Branches in Extradition, Litigation, Vol. 40, №4, 2014, 60.
39. *Staker C.*, Jurisdiction, in *Evans M.D. (ed.)*, *International Law*, 5th ed., Oxford, 2014, 299-01.
40. *Factor v. Laubenheimer*, (1933), 290 US 276, 287
41. *United States v. Rauscher*, (1886), 119 US 407, 414
42. *Soering v. United Kingdom* [1989] ECHR (Ser. A.).

43. *Mamatkulov and Askarov v. Turkey* [2005] ECHR.
44. *Othman (Abu Qatada) v. the United Kingdom* [2012] ECHR.
45. *Kirkwood v. United Kingdom* [1984] ECHR.
46. *Chahal v. the United Kingdom* [1996] ECHR.
47. <<https://www.supremecourt.ge/ka/cases>> [28.02.2025].
48. <<https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=024&codeNature=10&codePays=GEO>> [28.02.2025].
49. <<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyNum=024>> [28.02.2025].
50. <https://www.echr.coe.int/documents/d/echr/cp_georgia_eng> [28.02.2025]
51. <<https://infocenter.gov.ge/blog/kandidatis-statusis-mnishvneloba-da-misi-praktikuli-sargebeli/>> [28.02.2025].

Marina Londaridze*

The Essence of Freedom of Expression in a Democratically Governed State

This paper discusses the importance of freedom of expression for democratic countries and its role in shaping and self-realizing the individual. It defines the scope of freedom of expression concerning defamation, citing numerous examples from court decisions.

Keywords: *Freedom of Expression, Democracy, Defamation.*

1. Introduction

Freedom of expression is a fundamental part of a democratic state. Democracy is a form of governance in which state power originates from the people. Former U.S. President Abraham Lincoln famously described democracy as “government of the people, by the people, for the people.”¹ The people are the power; they are the “source of authority,” and they can form independent opinions to create a world where individuals can exercise their natural rights and fight for freedom, dignity, and happiness. Freedom enables the individual to develop independently; through freedom, one can make rational decisions that contribute to personal progress and well-being. A democratically governed society is actively engaged in the process of building the country and realizes its potential through this participation. From a historical perspective, countries reach high levels of development through democratic governance: the people deliberate, the people debate, and the people make decisions.

2. Freedom of Expression as a Means of Human Growth

Freedom of expression is one of the fundamental human rights, enshrined in the Declaration of the Rights of Man and of the Citizen on August 26, 1789, during the French Revolution in Versailles. Article 11 of the Declaration states: “The free communication of thoughts and opinions is one of the most precious of the rights of man. Every citizen may speak, write, and print freely, but shall be responsible for such abuses of this freedom as shall be defined by law.”² In democratic countries, freedom of expression and opinion exist without censorship, allowing individuals to express their inner voice. When expression is restricted, people become obedient, and consequently, their ability to participate in the rebuilding of the country is diminished.

Freedom of expression includes not only the right to hold one's own opinions, but also the right to live by and act upon those beliefs. It is a fundamental right in a democratic society. Everyone has the freedom to make decisions and act according to their beliefs and abilities, as long as they do not

* Doctor of Law, Visiting Lecturer at St. Andrew the First-Called Georgian University.

¹ <<https://www.lpb-bw.de/merkmale-demokratie>> [17.04.2025].

² <<https://www.bpb.de/themen/politisches-system/abdelkratie/311350/meinungsfreiheit>> [13.06.2020].

infringe on the rights of others.³ “A free society consists of free individuals who live in a free information space, think freely, have an independent view, and participate in democratic processes, which means exchanging opinions.”⁴ Sometimes it is very difficult to express one's opinion, especially when it challenges the opinion of the majority.” However, it is important to remember that individuals create wonders that benefit all of humanity. What seems strange to us today often becomes natural and accepted by the majority tomorrow. Freedom of expression encourages us to consider different perspectives, analyze them, and make better decisions. According to the prominent 19th-century English thinker John Stuart Mill, freedom of expression enables us to develop new ideas; This process is directly linked to the growth of society. Democratic values help individuals discover their true selves, become creative, and stand out through their individuality. Freedom of expression, closely associated with critical thinking, inspires society: one voice can lead to many, and the ideas of many can bring great benefit to the development of a democratic state. Freedom of expression is a necessary precondition for development and the progress of society as a whole. “Freedom of expression, as the individual interest of every person, is not only intertwined with the public interest; It also constitutes the public interest itself. It is an essential condition for democratic processes.”⁵ Democratic “The state recognizes and protects freedom of speech and expression as indescribable and supreme values.”⁶ Freedom of speech and expression is the foundation for realizing all other human rights. It is the source of truth. The more freedom of speech and expression is restricted, the further we drift from democratic values, which remain the most refined principles humanity has yet achieved. Naturally, freedom of expression does not concern only favorable or agreeable words and ideas; it may also include disturbing views. Yet without such freedom, the democratic development of a country is impossible. According to the case law of the European Court of Human Rights, expression encompasses the right to ask questions, to convey information and ideas, whether through words, images, conduct, or clothing. It also protects negative expression, which includes silence and inaction.⁷ Democratic states prioritize human rights, among which the legal protection of freedom of expression holds a prominent place.

The state acts based on the will of society and bears both negative and positive obligations: it must not interfere with the individual's exercise of this right; on the contrary, it must also ensure and promote it. The ultimate goal of states governed by democratic principles is to serve the welfare of their citizens. The government establishes legal frameworks through which individuals are either protected or are able to protect themselves. Relations and meetings between democratic countries aim to promote human well-being not only within individual states but also on an international scale. One

³ <<https://www.demokratiewebstatt.at/thema/thema-sag-deine-meinung/meinungsfreiheit-grundlage-der-demokratie>> [16.05.2022].

⁴ Decision # 1/3 421-422 of the Constitutional Court of Georgia of 10 November 2009 on case N1/3 421-422.

⁵ Decision of the Supreme Court of Civil Affairs of Georgia on 28 June 2022 on the case #As-989-2019.

⁶ Law of Georgia on Freedom of Speech and Expression, Article 3, Part 1, 04/06/24.

⁷ *Gotsiridze E.*, Freedom of Expression in Conflict of Value According to the European Convention on Human Rights and the Jurisprudence of the Strasbourg Court, Tbilisi, 2008, 69 (in Georgian).

of the most important objectives of democratic governance is to empower each individual and to provide opportunities for their full self-realization.

3. Legal Essence of Freedom of Expression

Article 10(1) of the European Convention on Human Rights gives everyone the right to freely express their opinions, and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. Freedom of expression is protected both by the Constitution of Georgia and by other legislative acts. According to Article 17 of the Constitution of Georgia, freedom of speech and expression is a protected legal good. Moreover, on June 24, 2004, Georgia adopted the Law on Freedom of Speech and Expression (commonly referred to as the “Special Law”), which defines the nature of freedom of expression and sets its legal limits.

In judicial practice, opinion and freedom of expression are often treated as having equal legal value. However, under the Special Law, an opinion is granted absolute privilege, whereas expression may be subject to restrictions specifically prescribed by law. It is important to distinguish between the two: opinion and expression have different lexical and legal implications. An opinion is a personal belief or thought that can arise spontaneously and is inherently protected. The mere holding of an opinion does not give rise to legal liability. However, the content of an expressed opinion is often the subject of legal scrutiny, especially in determining whether it falls within the legally protected scope of freedom of expression. According to Article 5 of the Basic Law for the Federal Republic of Germany: *“Everyone has the right to freely express and disseminate their opinion in speech, writing, and pictures.”*⁸ The European Court of Human Rights on the privilege of opinion explains that it is an absolute right to have an opinion, not to express an opinion, and disseminate it.⁹ As for the special law, I think, based on this reasoning, it is better to call it the Law on Freedom of Expression, since the word is also a product of expression.

Despite the importance of freedom of expression, an individual's freedom may be exercised in a manner that infringes upon the rights of others. Therefore, the limits of freedom of expression are defined by the rights of others.¹⁰ It does not enjoy its own advantages over any constitutional good, if freedom of expression poses a real threat to the rights protected by law, “freedom of expression can also be restricted and this is also one of the main rules of democracy.”¹¹ In this regard, following the paragraph 5 of Article 17 of the Constitution of Georgia, the restriction is allowed only “under the law to ensure security or territorial security in a democratic society, to protect the rights of others, to prevent the disclosure of confidentially recognized information, or to provide the independence and impartiality of the court.” A restriction may also arise in cases where information is disseminated that contains false facts or obscene statements, which lack political, cultural, educational, or scientific value, and which grossly violate the universally accepted ethical norms of society.”¹² The expression

⁸ <https://www.gesetze-im-internet.de/gg/art_5.html> [14.12.2018].

⁹ *Meskhishvili St.*, Current Issues of Private Law, Difamation, Tbilisi, 2020, 258 (in Georgian).

¹⁰ Ruling of the Supreme Court of Georgia on December 16, 2022, on the case # as-237-2022.

¹¹ Decision of the Constitutional Court of Georgia of September 30, 2016 on the case 1/6/561, 568.

¹² Law of Georgia on Freedom of Speech and Expression, Article 1, “f”, sub-paragraph, 04/06/2004.

of opinion may be disturbing and staggering, but it must have some value and should not only violate the rights and protected values of others. The dissemination of staggering, offensive information is justified if the public has a certain weight.¹³ Freedom of expression must not serve solely as a means of inflicting insult; it must have some form of value.

Even when a statement constitutes a value judgment (normative judgment), the proportionality of any interference may depend on whether there exists a sufficient factual basis for the contested statement, since even a value judgment (normative judgment) may be regarded as excessive if it lacks any factual foundation.”¹⁴

Freedom of speech and expression attains a broader scope in relation to individuals who play a role in shaping public opinion. Such individuals are subject to a heightened duty of tolerance. Accordingly, when adjudicating a claim brought against the exercise of freedom of speech and expression, significant attention is paid to whether the claimant is a private individual or a public figure. Under special legislation, a person may incur civil liability for defamation against a private individual, provided that the claimant proves that the respondent's statement contains a substantially false factual allegation directly concerning the claimant, and that the statement caused the claimant harm.¹⁵ In connection with the civil liability of a public person, together with the prerequisites of Article 13 of the Special Law, the following conditions shall exist: “The false nature of the stated fact was known to the defendant in advance or the defendant showed obvious and gross negligence, which led to the dissemination of a statement containing a substantially false fact.”¹⁶ “In the case of a public person, the plaintiff must additionally assert the fact that the disseminator of the information knew or should have known that the information he was disseminating was false.”¹⁷ According to the special law, a public figure shall be considered: a) a public official as defined in Article 2 of the Law of Georgia on Conflict of Interest and Corruption in Public Institutions; b) a person whose decisions or opinions have a significant influence on public life; or (c) a person who, through certain actions, attracts public attention to specific issues.”¹⁸ A public person has a greater degree of tolerance, especially politicians. According to the case law of the European Court of Human Rights, the permissible limits of criticism are widest in respect of the government and its representatives. In such cases, the Court does not require that factual allegations be proven with absolute precision; The existence of even a minimal factual basis may be considered sufficient. In *Castell v. Spain*, the Court held that the right to criticize the actions of the government constitutes an integral part of the freedom of expression of an elected representative.”¹⁹ Under paragraph 5(a) of the Special Law, liability for defamation shall not arise from a statement made: “A. within the framework of political debates, as well as concerning the performance of duties by the Parliament, the Supreme Council of the Autonomous Republic, or a member of the City Council.”

¹³ *Meskhishvili St.*, Current Issues of Private Law, Defamation, Tbilisi, 2020, 262 (in Georgian).

¹⁴ *Meskhishvili St.*, Current Issues of Private Law, Defamation, Tbilisi, 2020, 258 (in Georgian).

¹⁵ Law of Georgia on Freedom of Speech and Expression, Article 13, 04/06/2024.

¹⁶ Law of Georgia on Freedom of Speech and Expression, Article 14, 04/06/2024.

¹⁷ *Meskhishvili St.*, Current Issues of Private Law, Defamation, Tbilisi, 2020, 254 (in Georgian).

¹⁸ Law of Georgia on Freedom of Speech and Expression, Article 1, “I, Sub-paragraph, 04/06/24.

¹⁹ Ruling of the Supreme Court of Georgia of 17 January 2018 on the case #-As-928-868-2017.

The burden of proof regarding any restriction on freedom of speech lies with the party initiating the restriction, whether the claimant is a private individual or a public figure. Moreover, if a defamation claim is manifestly unfounded, the defendant has the right to seek reasonable monetary compensation from the plaintiff.”²⁰

The legal protection of freedom of expression serves as a motivating factor for individuals to become active members of society and to realize their potential. At the same time, public figures are expected to show greater tolerance toward criticism and to act with a heightened sense of responsibility toward the public. Since, alongside freedom of expression, individuals also enjoy other fundamental rights, each of which is independently protected under the law, Article 2 of the Civil Code of Georgia provides that “A person shall have the right to protect, through judicial means and following the procedure established by law, their honor, dignity that is interpreted within the context of the Special Law. The abuse of the right to freedom of expression occurs when an opinion or a value judgment (normative judgment) is based on false facts, thereby constituting defamation. Defamation that causes harm to an individual results in the violation of their honor and dignity, which, in turn, constitutes an interest worthy of legal protection.

4. The Distinction Between Judgment and Defamatory Statement in Judicial Practice

Before 2004, defamation was a criminal offense; Accordingly, defamation is now predominantly addressed within the framework of civil litigation. Protection of rights is good for the public when one is not restricted by the other. Freedom of expression is indeed the foundation of ensuring the existence of all rights, but it also has natural boundaries that are not permitted by law. The question is frequently raised: *Where should the line be drawn?* At first glance, the answer seems straightforward: freedom of expression must not be misused to commit defamation. Defamation entails the dissemination of false factual claims that harm another person’s reputation, dignity, or honour.

If a statement is based on verifiable facts, it does not constitute defamation. However, when an incorrect fact is fabricated or distorted, and a damaging opinion is formed and expressed following that falsehood, such expression is considered defamatory. As mentioned above, this gives rise to civil liability under applicable law. According to the definition provided in special legislation, *defamation* is understood as the communication of a false factual statement that causes damage to an individual's reputation.”²¹ As for the fact, the law comes from its general definition, according to which the fact is a Latin word, explained as a real, true, not fictional story, case, or event.²² According to court practice, it is established and interpreted based on special law that the plaintiff must confirm whether the expression is a fact or an evaluation. Assessing the issue of liability of a person for violating the rights of another person as a result of the dissemination of information, the distinction between value

²⁰ Law of Georgia on Freedom of Speech and Expression, Article 18, 04/06/ 2004.

²¹ “Freedom of Speech and Expression”, Article 1 of the Law on Freedom of Speech, Sub-paragraph “e” 04/06/2004.

²² <<http://www.nplg.gov.ge/gwdict/index.php?a=term&d=3&t=41720>> [08.04.2025].

judgments and factual assertions must be established as a primary consideration.”²³ An opinion reflects an evaluative perspective, whether in the form of commentary, viewpoint, or expressive statement that conveys an attitude toward an individual, event, or subject, and does not involve verifiable or harmful factual claims.”²⁴ The assessment is related to the subject, and the fact is derived from an objective circumstance. “Thoughts and facts are often interconnected, and it is difficult to separate them, which is since both forms of expression are rarely found in pure form.”²⁵ In the process of legal qualification, it may be permitted to isolate certain parts of a statement, considering the context. However, such an approach is justified only if it does not distort or misrepresent the overall content and true meaning of the expression. If the content cannot be separated without altering its substantive meaning, the statement must be assessed as a value judgment or an opinion, and, accordingly, it must be fully protected under the scope of the fundamental right to freedom of expression.”²⁶ The court decision reads: “The cassation claim is checked: who said, to whom, and in what circumstances, and what exactly the phrase expressed based on examining the context, to assess and distinguish the opinion protected by the freedom of expression of the person.”²⁷ According to the precedent established by the European Court of Human Rights, “It is an inherently impossible task to prove the truth of a value judgment (normative judgment). While a fact may be demonstrated, the truth of a value judgment is not subject to proof. Requiring proof of the truth of a value judgment constitutes an interference with freedom of opinion.”²⁸ In one of its decisions, the Court of Cassation upheld the conclusion of the Court of Appeals and noted the following: “The claimant disputes two statements of the published article, one of which reads: ‘Interpol has suspended the search for the number one enemy of the Georgian public.’ The accuracy of the information regarding Interpol’s decision to suspend the search for I.G. is not in dispute between the parties. However, the reference to the claimant as the ‘number one enemy’ does not constitute a factual statement, as it is not capable of being verified against objective reality.”²⁹ Therefore, the court did not consider the expression defamatory. “The Cassation Chamber determines whether a disputed statement constitutes a factual assertion or an expression of opinion; it is impossible without taking into account the full context of the statement. Individual words or sentences cannot be assigned independent meaning outside of their broader context, as isolating them in this way would lead to a distortion of the overall content of the expression. In this regard, the substantive meaning of a statement takes precedence over its literal wording.”³⁰

Finally, under Article 7, Paragraph 5 of the Special Law: “In determining whether a statement should be classified as a factual assertion or an opinion, any reasonable doubt that cannot be resolved

²³ Ruling of the Supreme Court of Georgia on December 16, 2022, on the case # as-237-2022.

²⁴ <https://idfi.ge/public/upload/FBarticle/Freedom_of_Expression_Guidebook.pdf> [05.04.2025].

²⁵ Ruling of the Supreme Court of Georgia on December 16, 2022, on the case #as-237-2022.

²⁶ Decision of the Supreme Court of Civil Affairs of Georgia on November 25, 2022, on the case #As-797-2022.

²⁷ Ibid.

²⁸ *Lingens v. Austria*, 1986, cited in: *Meskhishvili K.*, Current Issues of Private Law: Defamation, Tbilisi, 2020, 259.

²⁹ Ruling of the Supreme Court of Georgia on December 16, 2022 on the case #as-237-2022.

³⁰ Decision of the Supreme Court of Civil Affairs of Georgia on January 14, 2021, on case #547-2020.

following the procedures established by law must be interpreted in favor of assigning the statement the status of an opinion.”

5. Conclusion

In conclusion, it can be said that the most important component of a democratically governed state is freedom of expression, which is a source of all other rights. Freedom of expression promotes the process of human growth, its realization, and formation as an active member of society. However, it is important to protect a person's honor and dignity. In this regard, attention is paid to the distinction between assessment and fact by the legislator. If an assessment is based on incorrect facts and is simultaneously offensive to an individual, it naturally results in a violation of that person's dignity, rights that are equally protected under the Constitution. One of the core responsibilities of democratic states is to strike a fair balance: protecting both freedom of expression and the individual's dignity requires limits on expression itself.

Bibliography:

1. Universal Declaration of Human Rights 10/12/1948.
2. Constitution of Georgia 24/08/1995.
3. Civil Code of Georgia 26/06/1997.
4. Law of Georgia on Freedom of Speech and Expression, 04/06/2004.
5. *Gotsiridze E.*, Freedom of Expression in Conflict of Value According to the European Convention on Human Rights and the Jurisprudence of the Strasbourg Court, Tbilisi, 2008, 69.
6. *Meskhishvili St.*, Current Issues of Private Law, Defamation, Tbilisi, 2020, 258, 262, 254 (in Georgian).
7. Decision of the Supreme Court of Civil Affairs of Georgia on November 25, 2022 on the case #As-797-2022.
8. Decision of the Supreme Court of Civil Affairs of Georgia on 28 June 2022 on the case #As-989-2019.
9. Ruling of the Supreme Court of Georgia on December 16, 2022 on the case #as-237-2022.
10. Ruling of the Supreme Court of Georgia of 17 January 2018 on the case #As-928-868-2017.
11. Decision of the Constitutional Court of Georgia of September 30, 2016 on the case 1/6/561,568.
12. Decision #1/3 421-422 of the Constitutional Court of Georgia of 10 November 2009 on case #1/3 421-422.
13. <<https://www.lpb-bw.de/merkmale-demokratie>> [17.04.2025].
14. <<https://www.bpb.de/themen/politisches-system/abdelkratie/311350/meinungsfreiheit>> [17.04.2025].
15. <<https://www.demokratiewebstatt.at/thema/thema-sag-deine-meinung/meinungsfreiheit-grundlage-der-demokratie>> [17.04.2025].
16. <https://www.gesetze-im-internet.de/gg/art_5.html> [17.04.2025].
17. <<http://www.nplg.gov.ge/gwdict/index.php?a=term&d=3&t=41720>> [17.04.2025].
18. <https://idfi.ge/public/upload/FBarticle/Freedom_of_Expression_Guidebook.pdf> [17.04.2025].

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>

Giorgi Kiria

Defamation as an Illegitimate Source of Income

Gvantsa Khasia

The Entity Responsible for Ensuring Compliance with Safety Standards under the Package Travel Contract

Lavrenti Maglakelidze

The Application of the Principle of Prohibition of Double Jeopardy (ne bis in idem) in the Case-Law of the European Court of Human Rights and National Courts

Sophio Lasareishvili

The Duration for Conducting Covert Investigative Actions as a Criterion for Determining the Intensity of Interference with the Right to Personal Life

Anzor Makharadze

Problems of Victimization of the Injured Party at the Trial Stage

Levan Dzeladze

Organized Crime as a Transnational Threat in the Modern Period

Nino Monaselidze

The Dangerous Dissemination of Personal Data and Its Legal Consequences

Paata Turava, Gvantsa Varamashvili

The EU-Georgia Association Agreement as a Process of Harmonization of Georgian Environmental Law

Khatuna Loria, Tatia Barakadze

Annulment of an Individual Administrative-Legal Act without Resolving the Disputed Issue by the Court and Ordering the Issuance of a New Act – an Effective Means of Protecting the Rights of an Interested Person?

Shalva Kipshidze

Agricultural Land as a Resource of Special Importance and Practical Aspects of Privatization

Mariam Berbichashvili

The Problematic Issues About Compensation for Damages Caused by Suspension of Appealed Individual Beneficial Administrative-Legal act, key Aspects About Mutual Separation of Procedural Standards Established in Civil and Administrative Court Proceedings

Konstantin Korkelia

Prevention of Natural Disasters: Situation in Georgia and its Compliance with European Human Rights Standards

Lia Ablotia

Specific Aspects of Establishing Specialized Courts

Nana Ghvaladze

The Extradition Treaty between Georgia and the United States – A Legal Analysis and Perspectives for Implementation

Marina Londaridze

The Essence of Freedom of Expression in a Democratically Governed State