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TOWARDS A HARMONISED EAC TAX SYSTEM: CURRENT STATUS, CHALLENGES AND WAY FORWARD*

Pie Habimana

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ABSTRACT

Under Article 79 of the EAC Treaty, the Partner States have undertaken to harmonize and rationalize investment incentives to promote the Community as a single investment area while avoiding double taxation. Article 83 of the same Treaty states that the Partner States have committed themselves to adjust their tax policies to eliminate tax distortions. These provisions show the extent to which the EAC Partner States are willing to advance with tax integration as part of comprehensive regional integration. This approach is welcomed, as scholars generally agree that full regional integration cannot be achieved without tax integration. In this sense, tax harmonization is seen as a sure path to tax integration, a driver for effective regional integration. It is unfortunate, however, that tax harmonization in the EAC faces several challenges. Some causes of the challenges are legal, such as differences in legal systems, while others are geopolitically motivated. This paper discusses where the EAC currently stands in relation to tax harmonization. Starting with a theoretical framework, the paper focuses on the current practical aspects of tax harmonization in the EAC. The paper, therefore, highlights the existing discrepancies alongside the challenges in building a harmonized tax system in the EAC. The paper identifies three ways out de jure har-

* This paper draws from remarks I gave on 08 November 2022 during the 2022 East African Magistrates and Judges Association (EAMJA) Conference held in Kigali, Rwanda.

monization through traditional law-making by the legislature, de facto harmonization through judicial law-making processes, and tax coordination where tax harmonization does not work.

KEYWORDS: EAC, Tax harmonisation, Tax coordination, Regional integration

INTRODUCTION

The East African Community (EAC) is one of the eight regional integrations on the African continent recognized by the African Union.[1] It is important to note that several elements set the EAC apart. First, the EAC is the only African regional integration with the vision of creating a political federation.[2] Second, there is widespread agreement among scholars that the EAC is the oldest regional integration in Africa. This view is based on various initiatives taken in the 1900s in the British East African colonies, i.e., Kenya, Uganda, and Tanzania. These initiatives include, for example, the construction of the Kenya – Uganda Railway (1897-1901), the establishment of the Customs Collection Centre (1900), the East African Currency Board (1905), the Postal Union (1905), the Court of Appeal for Eastern Africa (1909), the Customs Union (1919), the East African Governors Conference (1926), the East African Income Tax Board (1940), and the Joint Economic Council (1940).[3] A more formal EAC was established in 1967 when Kenya, Tanzania, and Uganda signed an East African Cooperation Treaty. Unfortunately, this community collapsed ten years after its formation, i.e., in 1977, for various socio-economic and political reasons.[4] A new EAC was re-established two decades after the collapse of the old EAC, in 1999, when the three original Partner States again signed a treaty re-establishing the EAC, which came into force on 07 July 2000.

Currently, the EAC consists of seven Partner States, including the recently admitted Democratic Republic of Congo (DRC).[5] Today, the EAC covers an area (including water) of 4.8 million sq. km, with a population of 283.7 million in 2021, and a GDP of $305.3 billion in 2021.[6] The objective of the EAC is to develop policies and programs aimed at broadening and deepening cooperation among the Partner States in the political, economic, social and cultural, research and technological, defense, security, and legal and judicial fields, for mutual benefit.[7]

Although the EAC is considered the most active and successful regional integration in Africa,[8] it is not the world's most advanced regional economic integration. Indeed, in terms of age, the EAC rivals the European Union (EU), which was established in 1957, and formalized in 1992 with the Maastricht Treaty.[9] To date, the EU has a fully functioning customs union, a common market known as the single or internal market, a monetary union, and is on its way to becoming a political federation. Today, EU citizens are much closer than ever before, and it becomes difficult for a foreigner traveling across the EU

1 Clayton, V. H., (2019). African Regional Economic Integration in the Era of Globalisation: Reflecting on the Trials, Tribulations, and Triumph. *International Journal of African Renaissance Studies*, 14(1), p. 3, doi: 10.1080/18186874.2019.1577145.

2 Tharani, A., Harmonization in the EAC, in Ugirashebuja, Ruhingisa, J. E., Ottervanger, T., Cuyvers, A. (2017). East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*, p. 486.

3 Masinde, W., Omolo, C. O., The Road to East African Integration in Ugirashebuja, Ruhingisa, J. E., Ottervanger, T., Cuyvers, A., (2017). East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*, p. 15.

4 Ibid., p. 16.

5 East African Community, Secretariat, Communique on the signing of the Treaty of accession of the Democratic Republic of Congo to the Treaty for the Establishment of the East African Community, Kenya, 8th April 2022.

6 EAC, Quick Facts about EAC. <https://www.eac.int/eac-quick-facts> [Last seen 10.12.2022].

7 Treaty for the establishment of the East African Community (As amended on 14/12/2006 and 20/08/2007), art. 5(1).

8 Mei, A. P., (2009). Regional Integration: The Contribution of the Court of Justice of the East African Community. *ZaoRV*, 69, p. 404.

9 Fairhurst, J., (2018). Law of the European Union. *Pearson Longman*, 11th ed., p. 52.

in a train or car to know that they have crossed the border from one country to another.

In contrast, despite the Common Market Protocol signed in November 2009,[10] an EAC citizen has to go through several immigration protocols when traveling from one country to another. This costs time and causes stress due to differences in language, culture, currency, etc. These discrepancies are partly because there are no harmonized procedures,[11] among others. In this context, the question arises whether the EAC is integrated? If so, to what extent? When will integration be fully achieved? etc.

The aim of this paper is not to answer all these questions about the effectiveness of integration in the EAC. It is about some legal aspects of integration. More specifically, this paper is about the harmonization of laws as one of the drivers of full integration. In this context, the focus of this paper is on tax harmonization.

Therefore, the problem examined herein is the current extent of tax harmonization in the EAC. This general problem gives rise to specific research questions, such as the current state of tax harmonization in the EAC, the challenges of tax harmonization in the EAC, and the possible ways to overcome these challenges.

In preparing this paper, I have extensively used a qualitative methodology based on the famous doctrinal approach to legal research. To this end, I have thoroughly reviewed the available documents on tax harmonization, focusing on the EAC. I have also looked at some tax cases from the national courts. The data used herein are divided into primary and secondary sources. Primary sources were first-hand information, legal instruments, court decisions, etc. Secondary sources consisted of scholarly research articles, books, dissertations, etc.

This paper is divided into six sections. I introduce the paper in the first section, which is current. In the second section, I set the framework for the research and discussion by outlining the importance of tax harmonization from a theoretical and practical perspective. In the third section, I give a brief overview of the current state of the practical aspects of tax harmonization. In the fourth section, I reflect on the challenges for the envisaged tax harmonization, while in the fifth section, I formulate suggestions for the way forward. In the sixth and final section, I draw a conclusion.

1. SETTING THE SCENE: THE RELEVANCE AND CONSIDERATIONS FOR TAX HARMONIZATION

Harmonization of tax systems is widely advocated in the literature as a pillar for achieving a fully functioning regional integration.[12] In the case of the EAC, several legal instruments touch upon tax harmonization as part of the overall objective of regional integration.[13] The question here is whether there has been a case in practice that argued for harmonization of tax systems in the EAC. I first address the theoretical aspect of tax harmonization in the EAC in the following subsections. I then shift the focus to the practical aspect of tax harmonization in the EAC through a case that argued for harmonization of tax systems in the EAC.

10 Gastorn, K., Wanyama, M., (2017). The Legal Analysis of the Common Market of the East African Community as Market Freedoms in the Open Market Economy in Ugirashebuja, E., Ruhingisa, J. E., Ottervanger, T., Cuyvers, A. (2017). East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*, p. 285.

11 Caroline, K., Wanyama, M., Free Movement of Workers in the EAC, in Ugirashebuja, E., Ruhingisa, J. E., Ottervanger, T., Cuyvers, A., (2017). East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*, p. 351.

12 Fair, D. E., Boissieu, C. D., (2012). Fiscal policy, Taxation and the Financial System in an Increasingly Integrated Europe, *Springer Science & Business Media*, 22, pp. 374-375.

13 EAC treaty, art. 80(f), 82(b), 83(e); Protocol on the establishment of the East African Community Common Market, art. 32.

1.1. The need for harmonization in theory

Tax harmonization is seen as a prerequisite for economic integration,[14] and part of regional integration is economic integration.[15] In this way, regional integration cannot be achieved without tax integration, as regional integration depends on tax integration, and the former remains unachievable until the latter is achieved.[16] In other words, tax harmonization, economic integration, and regional integration are closely linked, as tax harmonization, and economic integration constitute essential components of regional integration. In this respect, harmonization of tax systems in a regional community is important, if not necessary, to achieve fully functioning regional integration.[17]

As far as the EAC is concerned, the EAC Treaty contains a considerable number of provisions aimed at harmonizing tax systems in the Community. This is evident from Article 75 of the Treaty, in which the Partner States have agreed not to impose new duties and taxes on products traded within the EAC or to increase existing ones. Under the same provision, the Partner States have also undertaken not to enact legislation or apply administrative measures that could directly or indirectly discriminate against the same or similar products of other Partner States.[18] This is a standstill clause that provides a good starting point for the harmonization of tax systems by firstly immobilizing existing practices.

Similarly, Article 79 of the Treaty provides for the commitment of the Member States to ensure the development of the industrial sector. To this end, the Partner States have undertaken to further harmonize and rationalize investment incentives within the Community, including those relating to the taxation of industries using, in particular, local materials and labor, in order to promote the Community as a single investment area.[19] In the same vein, Article 85 of the Treaty expresses the commitment of the Partner States to harmonize the taxation of capital market transactions.[20]

Similarly, Article 82 of the Treaty underlines the obligation of the Partner States to cooperate in monetary and fiscal matters. To this end, they undertake to remove obstacles to the free movement of goods, services, and capital within the Community.[21] In the same spirit, Article 83 of the EAC Treaty provides for harmonizing monetary and fiscal policies. Under this provision, the EAC Partner States undertake to adjust their fiscal policies and net domestic credit to the government to ensure monetary stability and sustainable economic growth.[22] In addition, the EAC Partner States undertake to harmonize their tax policies to eliminate tax distortions and thus achieve a more efficient allocation of resources within the Community.[23]

As part of the harmonization of tax policies, in conjunction with the implementation of Article 75 of the Treaty establishing the EAC Customs Union, the EAC Partner States adopted the East African Community Customs Management Act in 2004, which was last amended on 8 December 2008. This Customs Union is governed in detail by a Protocol whose roots lie in Article 75 of the Treaty. So far, the Customs Union has been instrumental in bringing the EAC Partner States closer together.

All these provisions show how eager the EAC is for tax harmonization. Given the importance of tax harmonization for developing regional integration systems, it is imperative to re-

14 Petersen, H. G., (2010). Tax Systems and Tax Harmonization in the East African Community (EAC), *Report to the GTZ and EAC on Tax Harmonization and Regional Integration*, p. 3.

15 Oloruntoba, S. O., (2015). Regionalism and integration in Africa: EU-ACP economic partnership agreements and Euro-Nigeria relations. *Palgrave Macmillan*, p. 35.

16 Ibid.

17 Keuschnigg, C., Loretz, S., Winner, H., (2014). Tax Competition and Tax Coordination in the European Union. *Working Papers in Economics and Finance No. 2014-04*, p. 2.

18 EAC Treaty, art. 75(4), 75(6).

19 EAC Treaty, art. 80(1) f).

20 EAC Treaty, art. 85(1)(c).

21 EAC Treaty, art. 82(1)(c).

22 EAC Treaty, art. 83 (2)(c).

23 EAC Treaty, art. 83 (2)(e).

flect on the practical side of tax harmonization in the EAC.

1.2. The need for harmonization in practice

Based on the above description of the theoretical assertions about the necessity and legal support for tax harmonization in the EAC, the question now arises about the practical aspects of harmonizing tax systems in the EAC. The question here is whether tax harmonization is essential or not.

To show the case, I refer to a recent case in Rwanda where one party invoked the EAC Common Market Protocol application and referenced Kenyan case laws. This occurred when a law firm challenged a VAT levied on exported services. The firm pointed out in its submissions that Rwandan law does not clearly define exported services. Therefore, the firm requested that the court refers to Article 1 of the General Agreement on Trade in Services (GATS), which almost mirrors the idea of Article 16 of the EAC Common Market Protocol (EACCMP).[24] Article 1(2) of GATS reads as follows: *"For the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member."*

Article 16(2) of the EACCMP states the following: *"The free movement of services shall cover the supply of services: (a) from the territory of a Partner State into the territory of another Partner State; (b) in the territory of a Partner State to service consumers from another Partner State; (c) by a service supplier of a Partner State, through commercial presence of the service supplier in the territory of another Partner State; and (d) by the presence of a service supplier, who is a citizen of a Partner State, in the territory of another Partner State."*

In addition, the firm requested the court to refer to the case law of the High Court of Kenya in Commissioner of Domestic Taxes v. Total Touch Cargo Holland – Income Tax Appeal No. 17 of 2013 (para. 30), where the judge held as follows:[25] *"I am in full agreement with the above finding by the tribunal. The location where the service is provided does not determine the question of whether the service is exported or not. The test is the location (or place) of use or consumption of that service. Therefore, the relevant factor is the location of the consumer of the service and not the place where the service is performed.*

That party also referred to the case of Coca-Cola Central East and West Africa Limited v. The Commissioner of Domestic Taxes [Tax Appeal No. 5 of 2018] dated 31/03/2020, where the Kenya High Court applied the destination principle".[26]

In contrast to the Kenya High Court, the Rwanda Commercial Court ruled in RCOM 01492/2019/TC of 20/03/2019 between ENSAfrica Rwanda Ltd and the Rwanda Revenue Authority that the relevant factor is not the location (or place) of the consumer. Even if the consumer resides abroad, but the service was consumed in Rwanda, the VAT is due.[27] In this case, the court applied the consumption principle.

The decision RCOM 01492/2019/TC was appealed in case RCOMA 00350/2019/HCC. In appeal, ENSAfrica argued that an exported service should be considered as a service supplied to a non-resident, regardless of the place or location

24 ENSAfrica Rwanda Ltd v RRA, RCOMA 00350/2019/HCC, Commercial High Court, 04/12/2019, par. 11(a); Urugaga rw'Abavoka mu Rwanda v. Leta y'u Rwanda, RS/INTL/SPEC 00001/2020/SC, Supreme Court, 23/10/2020, para. 15; ENSAfrica Rwanda Ltd v RRA, RCOM 01512/2020/TC, Commercial Court, 08/12/2020, para. 5.

25 RRA v. ENSAfrica, RCOMA 00017/2021/HCC, Commercial High Court, 29/12/2021, para. 26.

26 Ibid., para. 27.

27 ENSAfrica Rwanda Ltd v RRA, RCOM 01492/2019/TC, Commercial Court, 20/03/2019, pars. 13 and 14.

of consumption of the service.[28] The appellant relied on Article 1(2)(b) GATS, to which Rwanda is a party, and Article 16(2)(b) of EAC CMP, to which Rwanda is also a party. The appellant also referred to the Kenya case law in Commissioner of Domestic Taxes v. Total Touch Cargo Holland, which confirmed that the OECD's International VAT/GST Guidelines are internationally recognized principles that should be followed. The Commercial High Court upheld the Commercial Court's decision, i.e., it confirmed that the destination principle should apply.

However, it seems that this position was discussed and decided differently in RCOM 01512/2020/TC.[29] In paragraphs 18 and 19, the Court appears to have accepted the application of the destination principle. This was also confirmed by the Commercial High Court in case RCOMA 00017/2021/HCC, which stated in paragraph 31 that it is important to consider where the service recipients are located, whether in Rwanda or abroad. The Court further stated in paragraph 32 that whether or not the service was consumed in Rwanda or where it was provided was irrelevant. The Court further confirmed that the fact that the service was provided to a person resident abroad is sufficient to exempt VAT. In this sense, the Commercial High Court of Rwanda now appears to apply the destination principle.

At this point, it should be noted that the Rwandan courts' position is not yet clear. In some decisions, the consumption principle has been applied, and in others, the destination principle. The current situation in the Rwandan court seems to be in contrast to the Kenyan High Court, which applies the destination principle.

From this, one can partly conclude that VAT on exported services may be levied differently in the EAC, as the Kenyan judicial view may differ from the Rwandan one. On the one hand, this would not be a problem given the principle of tax sovereignty, whereby each country is sovereign to adopt a tax system it deems best in light of its socio-economic and political factors.[30] On the other hand, however, it seems problematic when regional integration aspects are taken into account.

As stated by the Supreme Court of Rwanda in the case RS/INTL/SPEC 00001/2020/SC of 02/08/2022,[31] this Court confirmed that since Rwanda signed and ratified GATS and EAC CMP, these legal instruments have been incorporated into the laws of Rwanda as provided for in Article 95 of the Constitution of the Republic of Rwanda.[32] The same should apply *mutatis mutandis* to all EAC Partner States that have signed and ratified EAC CMP. Therefore, EAC Partner States should apply EAC CMP as part of their legal instruments. Thus, the court decisions of the EAC Partner States must also be harmonized to a certain extent.

2. CURRENT STATUS OF TAX HARMONIZATION IN THE EAC

Four elements can be used here to discuss the current state of tax harmonization in the EAC: tax rates, tax bases, tax dispute resolution, and tax treaties. These elements have been chosen because they are inherent parts of a tax system. The focus of this section is on the differences between these four elements. Nevertheless, the section ends with a discussion of an area of tax law quasi-harmonized in the EAC.

28 ENSAfrica Rwanda Ltd v RRA, RCOMA 00350/2019/HCC, Commercial High Court, 04/12/2019, para. 10 and 11.

29 ENSAfrica Rwanda Ltd v. RRA, RCOM 01512/2020/TC, Commercial Court, 08/12/2020, para. 18 and 19.

30 Cachia, F., (2017). Analyzing the European Commission's Final Decisions on Apple, Starbucks, Amazon and Fiat Finance & Trade. *EC Tax Review*, 1, p. 34; Sentsova, M., et al., (2018). Tax Sovereignty and the Concept of Fiscal Rule-making in the Countries of Central and Eastern Europe. *VSU Publishing House*, p. 78.

31 Nzafashwanayo Dieudonné v. Government of Rwanda, RS/INTL/SPEC 00001/2020/SC, Supreme Court, 2/8/2020, para. 35.

32 The Constitution of the Republic of Rwanda of 2003 revised in 2015 (*O.G.* No. Special of 24/12/2015), art. 95.

2.1. Tax rates

Apart from customs duties, which are discussed in the following sub-section, there is no harmonization of tax rates in the EAC. This is epitomized by the fact that each EAC Partner State has its tax rates concerning different taxes payable. For some taxes, there are even significant differences in tax rates. This is the case, for example, with the withholding tax on dividends. While Kenya levies this tax at 5%, it is 15% in Uganda, 10% in Tanzania, and 15% in Rwanda.[33] Another example is the withholding tax on royalties. For this tax, the rate in Rwanda is 15%, while Uganda levies 6%, Tanzania 15%, and Kenya 5%.[34] The VAT rates in the EAC also vary, as Kenya charges 16% in contrast to the standard rate of 18% in the other countries.[35]

2.2. Tax bases

With regard to tax bases, the situation is the same as for tax rates. Each EAC Partner State defines the tax base for each tax payable independently of the definitions of the others. Not only the tax base *per se*, but also some details related to the tax base differ. A typical example is the VAT registration requirements, where there are differences in the thresholds required. In Uganda, for example, the annual threshold for mandatory VAT registration is UGX 50 million (about USD 13,300).[36] In Kenya, it is KES 5 million (about USD 41,250), while in Tanzania, it is TZS 100 million (about USD 42,800).[37] In Burundi it is FBU 100 million (about USD 48,300),[38] while in Rwanda it is FRW 20 million (about USD 19,050).

2.3. Tax disputes

Concerning the resolution of tax disputes, this area is also not harmonized, as each EAC Partner State has its methods of resolving them. For instance, some EAC Partner States have established tax appeal tribunals that hear tax cases at first instance. This is the case in Kenya, Uganda, and Tanzania. In others, such as Rwanda, such cases fall under the jurisdiction of the commercial courts.

2.4. Double taxation treaties

Another case that can be used to assess the situation of tax harmonization in the EAC is the area of double taxation avoidance agreements. All EAC Partner States have signed various double taxation treaties, but the number and counterparties differ. Regarding the number, some Partner States have signed a large number of tax treaties, such as Kenya with 15,[39] Rwanda with 12,[40] and Tanzania and Uganda with nine each;[41] while others have signed only a few, such as Burundi, which only recently ratified the EAC double taxation avoidance agreement.[42] Differences

33 KMG, Tax Data Card East Africa 2020/21. <https://assets.kpmg/content/dam/kpmg/ke/pdf/tax/EA%20Tax%20Data%20Card%202020-2021%20updated%20-%20Final.pdf> [Last seen 19/10/2022]; Law No. 016/2018 of 13/04/2018 establishing taxes on income (*O.G.* No. 16 of 16/04/2018), art. 60(2).

34 Ibid.

35 Kenyan VAT Act 2013, section 5(2); Law (Rwanda) No. 37/2012 of 09/11/2012 establishing the value added tax (*O.G.* No. Special of 05/02/2013), art 3(3); Tanzania VAT Act 1997, section 5; Loi (Burundi) No. 1/12 du 29 Juillet 2013 portant révision de la loi No. 1/02 du 17 Février 2009 portant institution de la taxe sur la valeur ajoutée, art. 15.

36 Ugandan VAT Act, section 7(2).

37 Kenyan VAT Act, section 32(1)(b); Tanzania VAT Act, section 28(4).

38 Ordonnances Ministérielle No. 540/708/2009 du 2/06/2009 portant mesures d'application de la loi No. 1/02 du 17 Février 2009 portant institution de la taxe sur la valeur ajoutée, art. 2.

39 Kenya has tax treaties with the UK, Germany, Norway, Sweden, Denmark, India, Canada, Zambia, France, Iran, Qatar, Seychelles, SA, UAE, and South Korea.

40 Rwanda has tax treaties with Belgium, China, DRC, Jersey, Luxembourg, Mauritius, Morocco, Qatar, Singapore, SA, Turkey, UAE.

41 Tanzania has tax treaties with Canada, Denmark, Finland, India, Italy, Norway, SA, Sweden, Zambia, while Uganda has tax treaties with Denmark, India, Italy, Mauritius, Netherlands, Norway, SA, UK, Zambia.

42 Loi No. 1/02 du 30 juin 2020 portant ratification par la République du Burundi à l'accord pour l'élimination

can also be observed in the states with which the EAC Partner States have signed the treaties. The lack of harmonization is also evident in the EAC double taxation avoidance agreement. This Agreement was signed on 30 November 2010 by the then five EAC Partner States, namely Burundi, Kenya, Rwanda, Tanzania, and Uganda, to avoid double taxation and prevent fiscal evasion with regard to taxes on income. The entry into force of this Agreement is governed by Article 30(1), which states that the Agreement shall enter into force on the date of the last notification of the ratification process with respect to partners' domestic procedures. To date, almost 12 years later, the Agreement has not entered into force as it has only been ratified by Kenya, Rwanda, Uganda, and Burundi.

Without belittling the above differences, the EAC has a green area of tax harmonization. This is the area of customs duties governed in the EAC by the EAC Customs Management Act of 2004, amended in 2007. Details on the current status of customs duties in the EAC are given below.

2.5. Quasi-harmonised management of customs duties

The only tax aspect that is quasi-harmonized in the EAC concerns customs duties. The EAC has established a customs union, as provided for in Article 75 of the Treaty. All EAC Partner States signed the Protocol establishing the Customs Union, and the EAC Customs Union Act was gazetted in 2004. This was amended in 2007 to include the accession of Rwanda and Burundi. According to Article 110(1) of the East African Customs Management Act (EACMA), all EAC Partner States apply the same import duty rates. The tax base of import duties is also harmonized, and the tax bases are the same in the EAC. This means that a product from outside the Community is subject to the same regime irrespective of the entry border.

Administrative appeals relating to import duties are also harmonized as they are all addressed to and dealt with by the Commissioner of Customs.[43] Understandably, all EAC Partner States have Commissioners of Customs. Nevertheless, after this step of administrative appeals, the judicial appeals related to customs duties are not harmonized. This is due to the inconsistent implementation of Article 231 of the EACCMA, which reads as follows: *"Subject to any law in force in Partner States with respect to tax appeals, each Partner State shall establish a tax appeals tribunal for the purpose of hearing appeals against the decision of the commissioner under section 229."*

So far, the EAC Partner States have implemented this provision differently. Countries such as Kenya, Uganda, and Tanzania have literally implemented this provision by establishing tax appeal tribunals. Other countries, such as Rwanda, do not yet have tax appeal tribunals in their court structures. The corresponding jurisdiction of tax appeal tribunals in Rwanda lies with the commercial courts. But, a commercial court differs from a tax tribunal, not only by its name but also by its jurisdiction. Indeed, while tax appeal tribunals have jurisdiction over tax matters only, commercial courts have a broader mandate, as they also have jurisdiction over all commercial and financial matters, among others.[44] It is therefore understandable that the tax appeal tribunals are much more specialized than the commercial courts.

Apart from the question of jurisdiction, the specialization of Rwanda's commercial courts is also broadly contestable. Established for the first time in 2008,[45] the commercial courts

de la double imposition et prévention de l'évasion fiscale en matière d'impôt sur le Revenu entre les gouvernements de la République du Burundi, du Kenya, de l'Ouganda, du Rwanda et de la République Unie de Tanzanie.

43 East African Community Customs Management Act, sections 5 and 229.

44 Law (Rwanda) No. 30/2018 of 02/06/2018 determining the jurisdiction of courts (*O.G.* No. Special of 02/06/2018, art. 81.

45 Organic Law (Rwanda) No. 59/2007 of 16/12/2007 establishing commercial courts and determining their organization, functioning and jurisdiction (*O.G.* No. 5 of 01/03/2008).

are currently governed by Law No. 30/2018 of 02/06/2018, determining the jurisdiction of the courts. The law refers to these courts as specialized courts. However, several elements call this character into question.

First, specialization is limited to the institution but not to the staff. Some judges in these courts do not have a degree of specialization compared to judges in ordinary courts. There are no special requirements to become a judge in the commercial courts, and from time to time, judges of the ordinary courts are assigned to the commercial courts and vice-versa. Commercial court judgments are appealable before the Commercial High Court and, at a second appeal, before the Court of Appeal. This Court does not have a special chamber for commercial cases. Consequently, the judges for ordinary cases are the same judges who decide the commercial cases. When one considers that the reference to commercial matters here includes, among other things, tax matters, it becomes easier to digest how critical the concern is.

Apart from that, there is also criticism of the procedural aspects. One of the justifications for establishing the commercial courts was to expedite commercial cases, which by their nature require quick processing. In practice, however, there has been no significant difference between commercial and ordinary courts. The same lack of a substantial difference also applies to tax cases, whose proceedings can drag on for a very long time.

All these criticisms are sensitive in commercial disputes and become even more sensitive in tax cases, which by their nature require a high level of expertise. The point of establishing tax appeal tribunals might be to recognize tax law as a technical area of law whose dispute resolution requires expertise and special procedures. This suggests in part that the requirements of the EAC Customs Management Act are not fully met even today, as a tax tribunal differs from a commercial court.

3. CHALLENGES

From the above, it is clear that harmonizing the tax system in the EAC faces several challenges. Some challenges are legal, some are political, and others are natural. These three challenges are discussed below.

3.1. Legal challenges

From a legal point of view, the harmonization of tax systems in the EAC is complicated by the diversity of legal systems. Three of the seven EAC Partner States, namely Kenya, Tanzania, and Uganda, apply the common law system. Burundi and the Democratic Republic of Congo use a pure civil law system. Rwanda used to have a civil law system, but since 1994 has started to adopt some elements of the common law system, along with elements of Rwandan traditions, so Rwanda now applies a sui generis legal system. South Sudan, despite having several lawyers trained in Arab-Islamic law and civil law, the legal system is based on statutes and customary law.[46]

These differences in legal systems pose both substantive and procedural challenges when it comes to harmonization. For example, Article 137(1) of the EAC Treaty mentions English as the Community's official language. Even though English is not spoken and used everywhere in the EAC territory. Not only that but the laws of each Partner State are also written in different languages, which is also not conducive to harmonization. This is exacerbated by the lack of interpretation and translation services in the administration of Community affairs.[47] This diversity of legal systems not only poses a chal-

46 Harriet, L., (2015). Unraveling an Intricate Legal System: A Strategic Review of the Duality of Customary and Statutory Laws in South Sudan, p. 2. <http://dx.doi.org/10.2139/ssrn.2658541> [Last seen 30/09/2022].

47 Döveling, J. et al. (2018). Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities, *LawAfrica*, p. 12.

lenge in terms of where to start harmonizing tax systems in the EAC but also contributes to practices that hinder harmonization.

In addition, the style of legislation, the language of national courts, etc., are also not harmonized, adding to the divergence of legal systems. For example, it is not common for judges in the EAC to refer to other Partner States case laws to rule on the same matter. Opining from a Rwandan perspective, it is common for Rwandan judges to refer to foreign case laws and laws, mainly from the West.[48] However, it is not common for a Rwandan judge to refer to a case law or legislation from an EAC Partner State. I have not managed to find any research that has discussed the reasons for this. In my view, the question is twofold: (a) are they documented/published and easily accessible? (b) are they sufficiently researched?

As for the first question, the fact is that the world today lives in an era of digitalization. Nowadays, much of the research in various sciences, including law, is done using online tools. If one uses the Google search engine and types key search words, most references are from Western and developed countries. It would not be an exaggeration to affirm that finding a case law from an EAC Partner State is more difficult than a European case law. The question is where to find EAC case law, and what can be done to find it easily? As for the second question, one could admit that the reference to Western case law is partly motivated by the quality of this case law. Without belittling the above concern, even the available EAC case law is challengeable as it may be of little use due to its low quality.

3.2. Political and geo-political challenges

The political challenges can be divided into three deficits: rhetorical defiance, nationalism, and protectionism. Starting with rhetorical defiance in political forums, meetings, summits, conferences, and other gatherings of EAC authorities, compositional and persuasive speeches are made in favor of fully functioning regional integration. But in practice, the rhetorical strategies remain dead words. This concerns several aspects, including tax harmonization. If this rhetorical disregard continues, tax harmonization will not be achieved, which will affect full integration.

As far as nationalism is concerned, the EAC has so far been characterized by an excessive state monopoly, as the EAC Partner States have so far been reluctant to cede power to the Community organs.[49] In this regard, decision-making power remains in the hands of the Partner States and not with the EAC as a Community, whose organs and other non-state actors remain locked-out of the integration process.[50] This leads to a Community in which each Partner State fights for itself, and tries to reap the benefits of integration more than others. In this view, the EAC Partner States put their national interests above the interest of the Community. This is commonly associated with protectionism, where each EAC Partner State seeks to protect its tax base, without regard to the interests of the other Partner States. A study conducted in 2010 found that despite the ostensible support for harmonization, there is a fear that tax harmonization could lead to a loss of more or less tax revenue, and doubts about the competitive situation of the partner states, as one Partner could dominate the entire Community.[51]

48 see for example in RCOMAA 00040/2016/CS in which reference was made to Salomon v. Salomon & Co Ltd [1896] and UKHL AGC (Investments) Limited v Commissioner of Taxation, Federal Commissioner of Taxation (1964) 111 CLR 443 from UK; RS/INCOST/SPEC 00001/2020/SC in which reference was made to Delhi-v, Supreme Court of India, Civil Appeal Nos. 5105-5107 of 2009 from India; RS/INCONST/SPEC 00004/2019/SC in which reference was made to Conseil Constitutionnel, décision no 2009-599 DC du 29 décembre 2009, para 80 from France; Gulf, Colorado & Santa Fe Ry. Co. v. Ellis 165 U.S. 150 (1897) from USA, and Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS), Appeal No. CA/556/2018, p. 23 from Nigeria.

49 Masinde, W., Omolo, C. O., (2017), p. 20.

50 Ibid.

51 Petersen, H. G., (2010), p. 87.

These political deficits pose a serious challenge as a lack of political will is fatal to the success of regional integration efforts.[52]

In addition to the political challenges, geopolitical challenges are exacerbated by various natural factors and differences in comparative advantages. Some of the EAC Partner States are landlocked, while others are not. Some are also economically advanced, while others are economically underdeveloped. Differences also exist in terms of political stability and security. Some EAC Partner States are broadly peaceful, while others are in constant internal and external conflicts, either intra – or extra-community. The consequence of such persistent insecurity and political instability is to inhibit an effective and deeper regional integration.[53] In this context, it is suggested that peace, security, stability, and mutual trust are the necessary conditions for the success of regional integration.[54]

4. WAYS FORWARD

Given the current situation, as discussed in section three, combined with the scene described in section two and the challenges mentioned in section four, it is important to reflect on the possible paths to a harmonized tax system in the EAC. In my view, two paths are possible, namely de jure harmonization and de facto harmonization, as described below. A third option is also conceivable, namely tax coordination.

4.1. *De jure* harmonization

The simplest way to harmonize tax systems in the EAC is through regular legislation. This route is called de jure harmonization, given the traditional legislative process. De jure harmonization is understood here as the harmonization of EAC tax systems through parliamentary acts. Regarding Articles 9(f), 48, and 49 of the EAC Treaty, which establishes and empowers the Community's Legislative Assembly, the East African Legislative Assembly would be the right body to legislate at the EAC level. Alternatively, EALA, as the Community Legislative Body, would take the lead regarding Article 49 of the Treaty and liaise with the National Assemblies of the Partner States on harmonizing tax systems. However, considering the sovereignty of the Partner States and the socioeconomic differences between them, the use of a directive is recommended. In this way, the EAC Council would provide the guidelines and set the objectives to be achieved by each Partner State, leaving it to them the freedom to design the ways to achieve the set goals.

To be successful, I recommend that de jure harmonization be undertaken strategically and gradually. The point here is not to undertake general harmonization. Rather, proceed step by step, starting with a particular type of tax or a specific tax base. An example of this is the harmonization of the cigarette tax, as was the case in the EU. With particular attention to the EAC, J. Posen and C. Van Walbeek conducted a study in 2014 on the impact of increasing and harmonizing excise tax on cigarettes in the EAC and concluded that increased levy of a uniform excise tax on tobacco in the EAC would generate more revenue for the treasury.[55] Another example is the EU's Common Consolidated Corporate Tax Base (CCCTB), which sets a single set of rules for calculating the taxable profits of companies in the EU. If a similar CCCTB can be introduced in the EAC, it would positively contribute to the harmonization of corporate taxation.

52 Otieno-Odek, J., Regional Integration and Fundamentals of Legal Harmonization, in Döveling, J. et al. (2018). Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities, *LawAfrica*, p. 30.

53 Masinde, W., Omolo, C. O., (2017), p. 20.

54 Otieno-Odek, J., (2018), p. 32.

55 Posen, J., Walbeek, C., (2014). The Impact of Cigarette Excise Tax Increases and Harmonization in the East African Community, *SALDRU*, p. 49.

4.2. *De facto* harmonization

An alternative to de jure harmonization is de facto harmonization. This process is called de facto because it requires no formal legislative act. De facto harmonization of the tax system in the EAC would be achieved through the use of judicial legislative power. This concept is well and easily understood from a common law perspective. Under the common law, a judge can make laws through judicial decisions that are consistently made and thus deemed constituted into laws. Not only in the common law, but also the judges' power to legislate is recognized, both at international and national levels.[56] Judicial lawmaking is even said to be inevitable due to the incompleteness of every legal system, which therefore calls the judge to apply existing and recognized rules, but also to create laws by developing, adapting, modifying, interpreting, and filling gaps.[57] In the words of Stephen E. Sachs, both courts and scholars regard the law created by judges as inevitable,[58] as they do something more than discovering law, to fill in the vague, indefinite or generic terms through judicial interpretation.[59] Some legal systems also explicitly refer to judges' power to make laws. This is the case, for example, with Article 9(1) of Rwanda's Law No. 22/2018 of 29/04/2018 relating to the civil, commercial, labor, and administrative procedure, which requires a judge to adjudicate a case brought before him/her. Paragraph one of Article 9 states that a judge adjudicates based on the relevant rules of law. However, in the absence of such rules, a judge is obliged to decide according to the rules he/she would establish if he/she were the legislature. Undoubtedly, this provision gives the judge the power to make law without legislature-created laws. However, this process could face resistance from jurisdictions that apply civil law systems, where judges are not used to making law.

A practical implementation of de facto harmonization would start with East African judges' consciousness that a reference to EAC case law is more helpful than Western case law. A reference to an EAC case law would be more helpful because its applicability to EAC peers would be relatively easy and possible, given that the EAC Partner States share common features compared to the Western. Of course, as discussed in 4.1, some challenges might slow down this approach. Nevertheless, I commend the efforts of some judges who understand the importance of referring to the Community law. An example is the Ugandan case of Kawuki Mathias v. Commissioner General of Uganda Revenue Authority before the Uganda High Court. In this case, it was held that "[S]tatutory procedure under the EAC Customs Management Act must be followed. When statute prescribes a certain procedure, it is unlawful to follow a different procedure".[60]

4.3. A viable option: tax coordination

Although both ways, i.e., de jure and de facto harmonization, can work well, it is also necessary to consider whether it is not time to harmonize the tax systems in the EAC. Indeed, the harmonization of tax systems would bring several integration benefits. However, introducing a system with the same tax rates, tax bases, exemptions, statutory deductions, etc., could also have difficult economic consequences. From a practical point of view, it would not be easy to claim that the EAC Partner States are ready to deal with such consequences today.

The importance of taxes to the life of each country, combined with differences between the EAC Partner States, such as socioeconomic differences, geo-political differences, and other

56 Ginsburg, T., (2004). Bounded Discretion in International Judicial Lawmaking. *Virginia Journal of International Law*, 45(3), p. 632.

57 Ibid., p. 635.

58 Sachs, S. E., (2019). Finding Law. California Law Review, 107(527), p. 560.

59 Ibid.

60 HC Miscellaneous Cause No. 14 of 2014 cited in Otieno-Odek, J., Judicial Enforcement and Implementation of EAC Law, in Ugirashebuja, E., Ruhingisa, J. E., Ottervanger, T., Cuyvers, A., (2017). East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*, p. 475.

economic comparative advantages, add doubts to the acceptance of a fully harmonized tax system by the EAC Partner States. Such reluctance would not be a special case for the EAC but seems to be a general trend for regional integrations. Indeed, it is important to mention here that the process of tax harmonization takes a relatively long time, especially if one considers the potential challenges that may arise from state sovereignty.[61] Having this said, if it is not time to advocate for harmonization of tax systems, an alternative would be tax coordination.

Speaking of tax harmonization as opposed to tax coordination, it is important to highlight the difference between the two concepts. The two concepts differ in that tax harmonization is seen as closer coordination, leading to almost identical or at least similar tax systems, tax bases, and tax rates within a regional integration.[62] In this respect, tax harmonization requires three elements, namely: (1) an equalization of tax rates, (2) a common definition of national tax bases, and (3) a uniform application of the agreed rules.[63] On the other hand, tax coordination stands as another possible way of implementing tax integration in the mechanisms of the Community.[64] In this sense, tax coordination refers to a cooperative tax design in which countries or a group of countries work on their national tax systems to bring them compatible with the objectives of regional integration.[65]

Hence, given the lesser extent nature of tax coordination compared to tax harmonization, it is relatively easier for EAC Partner States to accept tax coordination in the first place before embarking on complete tax harmonization. Against this background, I recommend the EAC Partner States proceed steadily by not rushing into harmonization of the tax systems, rather by first trying out the possibilities of tax coordination, as a way that will later lead to tax harmonization.

CONCLUSION

In this paper, I have discussed the current status of tax harmonization in the EAC, the existing challenges, and the possible ways to overcome these challenges. Based on the provisions of the EAC Treaty, which requires Partner States to harmonize their tax systems, this paper has highlighted some areas that have not yet been harmonized. Among other things, the EAC Partner States have not yet harmonized their tax rates, tax bases, and the resolution of tax disputes. Nevertheless, in this paper, I have highlighted one quasi-harmonized area, namely, the taxation of customs duties. Discussing the current state of affairs was to pave the way for uncovering the underlying challenges. I have divided these challenges into two categories, namely, the legal and the geopolitical challenges.

Given the EAC's desire to harmonize tax systems, vis-a-vis the existing challenges that have hindered achieving a fully harmonized tax system, I propose three paths to harmonization. The first is de jure harmonization, whereby the EALA can legislate, or the Council can adopt a directive to this effect. The second is de facto harmonization, where judges can use their indirect legislative power by harmonizing case law. The third is coordination, where Partner States would cooperate in adopting domestic tax systems that are compatible with the objectives of the Community.

61 Sentsova, M., et al. (2018), p. 78.

62 Keuschnigg, C., Loretz, S., Winner, H., (2014), p. 2.

63 Quak, E. J., (2018). Tax Coordination and Tax Harmonization within the Regional Economic Communities in Africa, *Institute of Development Studies*, p. 3. <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/13797/Tax_Coordination_within_Regional_Economic_Communities_Africa.pdf?sequence=1&isAllowed=y> [Last seen 04/10/2022].

64 Sentsova, M., et al. (2018), p. 213.

65 Keuschnigg, C., Loretz, S., Winner, H., (2014), p. 2.

BIBLIOGRAPHY:

1. Cachia, F., 2017. Analyzing the European Commission's Final Decisions on Apple, Starbucks, Amazon and Fiat Finance & Trade. *EC Tax Review*, 1.
2. Caroline, K., Wanyama, M., Free Movement of Workers in the EAC, in Ugirashebuja, E., Ruhingisa, J. E., Ottervanger, T., Cuyvers, A., 2017. East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*.
3. Clayton, V. H., 2019. African Regional Economic Integration in the Era of Globalisation: Reflecting on the Trials, Tribulations, and Triumph, *International Journal of African Renaissance Studies*, 14(1).
4. Döveling, J. et al. 2018. Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities, *LawAfrica*.
5. EAC, Quick Facts about EAC. <https://www.eac.int/eac-quick-facts> [Last seen 10/12/2022].
6. ENSAfrica Rwanda Ltd v RRA, RCOM 01492/2019/TC, Commercial Court, 20/03/2019.
7. ENSAfrica Rwanda Ltd v RRA, RCOMA 00350/2019/HCC, Commercial High Court, 04/12/2019.
8. ENSAfrica Rwanda Ltd v RRA, RCOM 01512/2020/TC, Commercial Court, 08/12/2020.
9. Fair, D. E., Boissieu, C. D., 2012. Fiscal policy, Taxation and the Financial System in an Increasingly Integrated Europe, *Springer Science & Business Media*, 22.
10. FairHurst, J., 2018. Law of the European Union, *Pearson Longman*.
11. Gastorn, K., Wanyama, M., The Legal Analysis of the Common Market of the East African Community as Market Freedoms in the Open Market Economy in Ugirashebuja, E., Ruhingisa, J. E., Ottervanger, T., Cuyvers, A., 2017. East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*.
12. Ginsburg, T., 2004. Bounded Discretion in International Judicial Lawmaking. *Virginia Journal of International Law*, 45(3).
13. Keuschnigg, C., Loretz, S., Winner, H., 2014. Tax Competition and Tax Coordination in the European Union, *Working Papers in Economics and Finance No. 2014-04*.
14. Masinde, W., Omolo, C. O., The Road to East African Integration in Ugirashebuja, Ruhingisa, J. E., Ottervanger, T., Cuyvers, A., 2017. East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*.
15. Mei, A. P., 2009. Regional Integration: The Contribution of the Court of Justice of the East African Community, *ZaoRV*, 69.
16. Nzafashwanayo Dieudonné v. Government of Rwanda, RS/INTL/SPEC 00001/2020/SC, Supreme Court, 2/8/2020.
17. Oloruntoba, S. O., 2015. Regionalism and Integration in Africa: EU-ACP Economic Partnership Agreements and Euro-Nigeria relations, *Palgrave Macmillan*.
18. Otieno-Odek, J., Judicial Enforcement and Implementation of EAC Law, in Ugirashebuja, E., Ruhingisa, J. E., Ottervanger, T., Cuyvers, A., 2017. East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*.
19. Otieno-Odek, J., Regional Integration and Fundamentals of Legal Harmonization, in Döveling, J. et al., 2018. Harmonization of Laws

in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities, *Law Africa*.
20. Petersen, H. G., 2010. Tax Systems and Tax Harmonization in the East African Community (EAC), *Report to the GTZ and EAC on Tax Harmonization and Regional Integration*.
21. Posen, J., Walbeek, C., 2014. The Impact of Cigarette Excise Tax Increases and Harmonization in the East African Community, *SALDRU*.
22. RRA v. ENSAfrica, RCOMA 00017/2021/HCC, Commercial High Court, 29/12/2021.
23. Sentsova, M., et al., 2018. Tax Sovereignty and the Concept of Fiscal Rule-making in the Countries of Central and Eastern Europe. *VSU Publishing House*.
24. Tharani, A., Harmonization in the EAC, in Ugirashebuja, Ruhingisa, J. E., Ottervanger, T., Cuyvers, A., 2017. East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*.
25. Treaty for establishment of the East African Community (As amended on 14/12/2006 and 20/08/2007).
26. Urugaga rw'Abavoka mu Rwanda v. Leta y'u Rwanda, RS/INTL/SPEC 00001/2020/SC, Supreme Court, 23/10/2020.

THE FATE OF THE FOSTER CHILD WHEN THE FOSTER MOTHER GETS MARRIED – AN ANALYTICAL STUDY IN ALGERIAN LAW SUPPORTED BY JURISPRUDENCE

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ABSTRACT

Custody is viewed as the most significant consequence resulting from the disruption of the marital bond in the presence of children as it is directly related to their fate after the separation of their parents. In this case, the person who is granted custody has the right and obligation to take care of the foster child and to manage his affairs as well. For this, it is generally said that the mother is the first person that can assume the guardianship of the child as she is entitled to do so.

Except that usually, the custodial mother wants to start a new life through a new marriage, which is generally followed by the father's filing a lawsuit to drop custody.

The present study aims to determine and examine the fate of the foster child following the custodial mother's remarriage in accordance with the requirements of the Algerian Family Code and jurisprudence in this respect.

KEYWORDS: Custody, Foster child, Mother, Marriage, Interest, Lawsuit

INTRODUCTION

The separation of spouses, when children are involved, automatically entails assigning custody to the person worth of it and who is expected to take care of them. This was approved by the principles of Islamic Law, International Agreements[1] as well as the Legal Terms of the Algerian Family Code.[2]

The legislator supported the issue of custody with provisions while taking into consideration the interests of the fostered child, regardless of who takes custody over. However, he did not accurately specify what was meant by the word interests, which opened the door to jurisprudence in several issues.[3]

The Algerian legislator considers that the marriage of the custodial mother is one of the reasons for invalidating custody. The foster mother generally fears that, once she starts her new life and founds a new family, she may lose her child. The reality has proven that, in several cases, the father immediately after hastens to file a lawsuit to drop the custody, because in some situations, it is actually feared that the fostered child may be brought up with a non-mahram foreign person. In addition, in most other times, this is done for the purpose of disengaging oneself from paying the alimony of food expenses and rent.

As the legislator is well aware of this, and in order to guarantee the protection of the fostered child, he provided the judge with the discretionary power that allows him to assess the child's interest, based on some criteria upon which he can rely to build his judgment.

The present study attempts to answer the following research question: *To what extent is it permissible for a custodial mother to keep her child after her marriage to a non-mahram foreigner in light of the discretional power granted by the legislator to the judge in this regard?*

Indeed, the purpose of the present study is to deal with an important social issue in a legal manner that can certainly enlighten the reader's thought, whether this reader is legal or informed. This is the case of a foster mother who fears losing custody of her child after her new marriage, and thus she considers the option of customary (clandestine or unregistered) marriage in order to avoid that problem. The major purpose is to discuss the concepts and clarify the legal procedures with respect to the role of the effective judiciary through jurisprudence.

This study relies upon the descriptive and analytical methods in order to describe the concepts and analyze the legal texts as well as the operative rulings of the judicial decisions that are related to the problem under consideration.

DROPPING CUSTODY DUE TO THE MARRIAGE OF THE CUSTODIAL MOTHER TO A NON-MAHRAM FOREIGNER

Custody is a term that derives from the Latin word *custodia* which means guarding, watching, or taking care of. The foster father or mother who is entrusted with the child is expected to raise him/her and protect him/her.[4] Legally, the Algerian legislator defined custody in Article 62 of the Family Code as follows:

".....This is all about taking care of the child, teaching him/her, educating him/her according to the religious precepts and beliefs of his/her father, watching over his/her protection and preserving his/her health and morals. The custodian must be qualified for that".

1 *The Convention on the Rights of the Child* (1989), ratified by Algeria by virtue of Presidential Decree No. 92-41, dated 19/12/1992. The agreement approved foster care and considered it a means of alternative care.

2 Law No. 84-11 of June 9, 1984, including the Family Code, amended and supplemented by Decree No. 27 of February 2005.

3 Adel Aissaoui – The discretionary power of the judge in determining the interests of the fostered child in accordance with the jurisprudence of the Supreme Court – Annals of the University of Algiers 1, Volume 34, Issue 04, 2020, p. 163.

4 Muhammad Bejaq – *Considering the interests of the fostered child between jurisprudence requirements and judicial practice* – Journal of Research and Studies, Issue 17, 2014, p. 183.

Likewise, in Article 64 of the same law, the legislator arranged those people who are worth of custody, starting with the mother, then the father, then the maternal grandmother, then the paternal grandmother, then the maternal aunt, then the paternal aunt, then the child's closest living relative, while taking into account the interests of the fostered child.

On the comparative level, it was found that, in Indonesian law, the legislator had adopted two systems for Muslims. The age of differentiation is that of twelve. In fact, in Indonesia, custody is granted to the mother until the age of 12. Then, at that age, the foster child is empowered to choose his/her custodian. However, some exceptions may apply to granting custody to the father, even if the child is under 12 years old, or to the mother even when she is under punishment of deprivation of liberty or has an improper behavior.[5]

As for non-Muslims, the parents have the moral obligation to raise and care for children less than 18 years of age and those not married yet.[6]

The Algerian legislator framed custody invalidators or nullifiers. He considers that the marriage of the custodial mother with a non-mahram relative is one of them.[7] The reason for that is that it is generally feared that the custodial mother will be preoccupied rather with her foster child, while the non-mahram foreign husband does not take good care of the child, which is not the case for the mahram relative who has a certain family relationship with the child.[8]

The Algerian legislator followed the path of Islamic law. It was narrated that a woman said: *"O Messenger of God, this son of mine, my belly was for him a vessel, my lap was for him Eve, and my breasts were for him a waterskin. His father divorced me and claimed to take him away from me. Then, may God's prayers and peace be upon him, said, 'You have more right to him as long as you do not get married."*[9]

The following gives a breakdown of the issues on which the claim for dropping custody in the Algerian law is based, as well as the discretionary power that is granted by the legislator to the judge regarding:

1.1. The case for dropping custody due to the marriage of the custodial mother to a non-mahram foreigner and its obligations

The right to custody is lost as soon as the custodial mother marries a non-mahram relative, as stipulated in Article 66 of the Algerian Family Code.

This ruling is derived from the Islamic law that several countries adopted in their national laws, including the Indonesian law which stipulated, in addition to that, other cases where child custody is dropped, like the punishment of deprivation of liberty.[10] It is worth noting that the Algerian legislator did not provide for this in the Family Code. However, the practical reality states that the judges in charge of the matter can assign custody to the person who is entitled to it when the divorced mother is sentenced to imprisonment after committing a crime. The mother's demand to regain custody of the child after being released is subject to

5 Dikko Ammar, Abdul Halim, Mahzaniar, and Halimatul Maryani – Implementation of Child Custody (Hadhanah) After Marriage Dissolution Due to Divorce (Juridical Analysis in Law Number 35 of 2014 concerning Child Protection and Compilation of Islamic Law), Electronic Research Journal of Social Sciences and Humanities, Vol. 3: Issue IV, Oct-Dec 2021, p. 35.

6 Republic of Indonesia – Law Number 1 of 1974 regarding Marriage, 1974.

7 Article 66 of the Algerian Family Code.

8 Hayat Maghari and Dalila Farkous – The Role of Jurisprudence in Protecting the Interests of the fostered Child – Algerian Journal of Legal and Political Sciences, Volume 58, Issue 04, 2021, p. 170.

9 Othman Al-Takrouri – Explaining the Personal Status Law at Dar Al-Fikr for Culture, Publishing and Distribution in Jordan, in 1990, p. 271.

10 Farida Prihatini, Abdul Karim Munthe, Delila Stefanya Pusparani, Ali Sumihar – The Problem of the Execution of Child Custody (Ḥadhanah) – Decision by the The Religious Courts in Indonesia– Journal of Syariah, Jil. 27, Bil. 2 (2019), p. 305.

the discretionary power of the judge who investigates the matter and builds his judgment in accordance with what is required by the interests of the fostered child.

Furthermore, it is worth emphasizing that the term custodial person does not automatically refer to the mother solely; it may refer to the grandmother, maternal aunt and paternal aunt in the event that custody is assigned to them. However, if they marry a non-mahram relative, custody is systematically dropped.

On the other hand, one has to note that the wording of Article 66 is devoid of the controls regarding the child's interests in the matter under study, which suggests that the marriage of the custodial person to a foreigner is absolutely inconsistent with the interests of the fostered child, and this is not true.

Nevertheless, in all cases, this cannot be considered as such because the legislator did not arrange the effect of losing custody by force of law in the event that the custodial mother gets married to a non-mahram relative. Rather, the custody loss would be based on a judicial ruling once the owner of the right to custody has submitted a claim for it. In this case, the judge will have the discretionary power to assess the matter.[11]

Based on the provisions of Article 426 regarding the Civil and Administrative Procedures Law,[12] the lawsuit to drop custody is supposed to be filed in the place where custody is exercised.

The plaintiff has to prove that:

- **The husband is a foreigner and is not a close relative** – This is done in accordance with the provisions of Article 66 of the Family Law and the principles of Islamic Law.
- **The marriage is well documented** – The fact is that the aforementioned provisions of Article 66 did not specify whether only customary or formal marriages are considered. Nevertheless, the jurisprudence in this regard ruled that the allegation about the marriage of the custodial mother must be confirmed with certainty, by means of a marriage contract for example, that has been established in accordance with the law in force. This means that a record that is withdrawn from the civil status registry office must prove that marriage. This is what is already being practiced in the courts.
- **The marriage is consummated with the custodial wife** – It must be noted that this case is not stipulated in the Family Code. However, the jurisprudence specified that when it ruled that the custody of a woman is conditioned by the fact that no husband has consummated the marriage with her. However, in that was the case, then he is forbidden to the custodial woman's house, and therefore the wife loses custody.[13]

Furthermore, when the plaintiff proves the above, it is not possible to state with certainty that custody has been taken away from the mother and assigned to the husband because, in this case, the judge takes into account the interests of the foster child. These interests may be determined by the judge based on mechanisms that the law grants him the powers to use for that purpose.

1.2. Mechanisms for investigating the interests of the fostered child

When stipulating the parameters for assigning custody, the legislator considered that it was sufficient to refer only to the criteria that can help to achieve the interests of the child in custody, with the obligation to take care of

11 Mohamed Haidara – Marriage of the foster mother in Islamic law and the Algerian Family Law – The Academia Journal of Social and Human Studies, Issue 20(June 2018), p. 196.

12 Law No. 09/08 of February 25, 2009, including the Code of Civil and Administrative Procedures – Official Gazette No. 21, issued on April 23, 2008, as amended and supplemented.

13 These judicial decisions were referred to by Mohamed Haydara, ibid., p. 196.

him/her, teach him/her, and raise him/her in accordance with the religious precepts of his father, in addition to ensuring his protection. There is no need to give a specific definition for it, because its concept is flexible and can change when the temporal conditions vary. This concept may also change from one child to another.[14]

In a decision issued by the Supreme Court, the Personal Status Chamber ruled that the interests of the fostered child are assessed by the trial judge.[15] He can rely on several mechanisms in accordance with the general rules in the case of revocation of custody for the purpose of verifying the interests of the child under custody. The most prominent of these are:

- *Expertise* – This is intended as an investigative measure to obtain the necessary information from specialists, or to prove certain material facts that are the subject of a real or imminent dispute dealing with the material side and not with the legal one which is the prerogative of the judge alone.[16]

With regard to custody, the judge resorts to expertise by appointing a social worker to investigate the validity of the custody applicant to exercise it in accordance with the interests of the child in custody, not only through direct personal contact with that applicant, but also by assessing the place where the fostered child is going to live.[17] In this regard, it is worth citing the decision of the Supreme Court[18] that ruled that the trial judge must examine where the interests of the fostered child lie using various means, including the appointment of a social worker.

The judge may also request a medical examination to assess the physical or psychological condition of the fostered child.

- *Inspection* – The judge is expected to go to the place where the custody is practiced in order to assess the social milieu in which the fostered child lives. He can enquire about the type of neighborhood, state of the dwelling, proximity to school, and other issues through which he can determine or assess the interests of the fostered child. Based on the above, he can then make a sound judgment about the matter.[19]
- *Hearing witnesses* – The judge may seek the assistance of family members of the fostered child to collect the necessary information that enables him to base his judgment in accordance with what is needed for the interests of the fostered child.

Now, if the custody applicant argues that the mother married a non-mahram foreigner residing abroad, then the custody shall be forfeited. It is worth mentioning a judicial decision that was issued by the Supreme Court which ruled the loss of custody due to distance because the custodial mother resides in a foreign country without even being married, while the father's residency is in Algeria.[20]

Referring back to the text of Article 69 of the Family Law, one may find that the legislator once again granted the discretionary power, in this regard, to the judge according to what is required regarding the interests of the fostered

14 Boubaker Khalaf – *The interests of the fostered child – A comparative jurisprudence study* – Journal of Human Sciences, Issue 44 at Mohamed Kheidar University in the city of Biskra in Algeria (2016), p. 521.

15 A decision issued by the Supreme Court from the Personal Status Chamber, on 18-06-1991, File No. 75171. Unpublished.

16 Bousabeat Sawsan – *Protection of the fostered child between the unfairness of the legislative texts and the jurisprudence of the family affairs judge* – Journal of Human Sciences, Volume 31, Issue 04 – University of Mentouri Brothers in the city of Constantine in Algeria (2020), p. 246.

17 Ahmed Hiltali – Custody entitlement in the Algerian Legislation between Legal Text Arrangements and Granting Caveats – Journal of the Researcher for Legal and Political Studies, Issue 11 (September 2018), p. 376.

18 Decision issued by the Supreme Court from the Personal Status Chamber No. 337176, issued on 11/16/2005.

19 Bousabeat Sawsan – Previous reference, p. 247.

20 A decision issued by the Supreme Court from the Personal Status Chamber No. 237526, issued on 26/12/2001, and published in the Judicial Journal, Special Issue, 2001, p. 258.

child when the person entrusted with custody lives in a foreign country.

In the same context, and in another judicial decision that was issued by the Supreme Court concerning an unmarried mother residing in a foreign country, it was ruled that the judges of the Council had erred in applying the law when they assigned custody to the father because the custody was entitled to the mother who, after her divorce, gave birth in France and took care of her newborn, while the father did not oppose that, but only asked to drop the alimony. They considered that this did not violate the custody conditions that are stipulated in Article 62 of the Family Law.[21]

On the other hand, although the legislator provided the judge with several mechanisms to ascertain the interests of the fostered child, he, however, left the discretionary power to him. This allowed the judges, and even the courts, to resort to that discretionary power in completely different manners. This may lead to discrepancies in the rulings on the issue of dropping custody for the marriage of the custodial mother. It should be noted that, sometimes, the interests of the foster child are not taken into account and are completely neglected.

Furthermore, one has to mention that the defendant, who in this case is the custodial mother, can prove, in turn, that it is highly important to let the fostered child under her care, particularly when the child is too young or is an infant, and that taking him away from her may cause him psychological harm. She may also argue that the child has a disability or handicap that makes his custody difficult for anyone other than his mother.[22]

In addition, if the child goes to school, the mother can refer to his school results and highlight the good grades he gets, which indicates she is keen on his success and she is the only one who can take care of him in the best way.

Therefore, the discretionary power of the judge remains in all cases. Indeed, if he decides to keep the custody with the mother, then the father will be exempted from paying the rent dues. Nevertheless, if a judgment is issued to drop custody, then it will be assigned to the applicant, and the mother is then granted the right to visitation.

2. THE EXTENT TO WHICH CUSTODY CAN BE RECOVERED BY THE MOTHER AFTER HER DIVORCE FROM THE NON-MAHRAM FOREIGN HUSBAND OR FOLLOWING HIS DEATH

In fact, many cases have been raised regarding the custodial mother's recovery of custody of her child after her divorce from a non-mahram foreigner or following his death. This must obviously be proven by a divorce judgment issued by the court or by the husband's death certificate. Then, the mother files a lawsuit in order to restore her right to custody.[23] How permissible is that?

2.1. Disappearance of the reason for forfeiting custody

With reference to the provisions of the Algerian Family Code, and particularly in Article 71, it is asserted that the Algerian legislator provides for the possibility of returning the right to custody once the non-voluntary foregone reason has disappeared. In the sense of violation, this signifies that there are some optional reasons for which the right to custody cannot be recovered after its demise.

The lack of interpretation of that issue by the legislator engendered some ambiguity in the matter, which generally requires reference to the provisions of Islamic Sharia.

In this regard, the Maliki jurisprudence makes a distinction between the reasons for

21 Decision issued by the Supreme Court from the Personal Status Chamber No. 1302053, issued on 03/07/2019, published in the Judicial Journal Issue 02, 2019, p. 83.

22 Fawzi, Ṣuwar – Al-Haḍānahba'da al-ṭalāqfī Aceh al-Wusṭá – Indonesian Journal for Islamic Studies, volume 24, N 01(2017), p. 117.

23 Haidara Muhammad – Previous reference, p. 197.

optional custody invalidators or nullifiers, as these reasons have a significant effect on the person's decision to achieve it. Some of these reasons can be the marriage of the custodial mother or the relinquishment of custody.

However, the reasons for non-voluntary custody invalidators or nullifiers are those that are achieved without the person's will, such as illness or disability.[24]

Based on the aforementioned, one may wonder about the position of Algerian jurisprudence in this respect.

2.2. The position of the Algerian jurisprudence regarding the extent to which the mother can regain custody of her child

It is worth emphasizing that the judicial decisions issued by the Supreme Court, with regard to the interpretation of the non-voluntary reason, have varied.

In fact, this was previously considered as a non-voluntary reason for the divorce of the custodial mother from a non-mahram foreigner. In this case, the custody of the girl was assigned to her mother after she filed a lawsuit for the attribution of custody again, and the Supreme Court considered that the Council judges applied the law properly.[25]

By founding the decision on that, they would have made the distinction between the marriage of the custodial mother to a non-mahram relative as an involuntary dropout reason, and the relinquishment of custody, which is considered as a purely voluntary reason that prevents the mother from regaining custody after retracting from it.

Nevertheless, jurisprudence has recently been explicit in conditioning the marriage of a custodial mother to a non-mahram foreigner, among the optional reasons. It indeed ruled in a decision issued in 2017 that the principle is about returning custody once the non-optional reason has disappeared. Among these reasons, one may mention the sickness, temporary disability, or residence abroad for a legitimate reason.[26]

CONCLUSION

It is widely admitted that today child custody deals with a social fact that stems from the separation or disintegration of the family, whether through a divorce or the like. Its high-quality organization requires the drafting of legal texts that are related to all its aspects while ensuring the proper application of these texts.

In addition, the fact that the legislator gives the discretionary power to the judge to assess the interests of the child under custody is quite logical, because the facts related to the issue of custody raised here differ from one case to another. The judge must actually identify the interests of the fostered child through mechanisms that he is authorized to apply.

Based on the above, the following recommendations can therefore be proposed:

- The legislator should stipulate that the marriage that forfeits custody is the legal one that is clearly established in the civil status register;
- The legislator has to prevent jurisprudence divergence in deciding about the issue of regaining custody after the divorce of the custodial mother from a non-mahram husband or his death, while taking into account the interests of the fostered child;
- The legislator should specify the date for calculating the year for the loss of custody for those who have the right to request it, as stipulated in Article 68 of the Family Law;

24 Ibid., p. 197.

25 Decision issued by the Supreme Court from the Personal Status Chamber No. 201336, issued on 21/07/1998.

26 Decision issued by the Supreme Court from the Personal Status Chamber No. 1067582, issued on 04/05/2017, and published in the Judicial Journal Issue 01, 2017, p. 153.

- A custodial mother who is married to a non-mahram relative must excuse the husband from changing the place of custody exercise so that he can exercise his right to visitation. Otherwise, she can be pursued based on the misdemeanor of deporting the fostered child and not handing him over to the one who has the right to do so, according to Article 328 of the amended and supplemented Penal Code;
- The Indonesian legislator must reconsider the issue of giving the fostered child to choose his custodian once he reaches the age of 12, because a 12 years old child does not have sufficient awareness that enables him to know his interest.

REFERENCES:

Books:

1. Othman Al-Takrouri – Explaining the Personal Status Law – Dar Al-Fikr for Culture, Publishing and Distribution in Jordan (1990).

Articles:

1. Boubaker Khalaf – *The interests of the fostered child – A comparative jurisprudence study* – Journal of Human Sciences, Issue 44 at Mohamed Kheidar University in the city of Biskra in Algeria (2016).
2. Bousabeat Sawsan – *Protection of the fostered child between the unfairness of the legislative texts and the jurisprudence of the family affairs judge* – Journal of Human Sciences, Volume 31, Issue 04 – University of Mentouri Brothers in the city of Constantine in Algeria (2020).
3. Adel Aissaoui – *The discretionary power of the judge in determining the interests of the fostered child in accordance with the Supreme Court jurisprudence* – Annals of the University of Algiers 1, Volume 34, Number 04 (2020).
4. Muhammad Bejaq – *Considering the interest of the fostered child between jurisprudence requirements and judicial practice* – Research and Studies Journal, No. 17 (2014).
5. Hayat Maghari and Dalila Farkous – *The role of jurisprudence in protecting the interests of the fostered child* – Algerian Journal of Legal and Political Sciences, Vol. 58, No. 04 (2021).
6. Mohamed Haidara – Marriage of the foster mother in Islamic law and the Algerian Family Law – The Academia Journal of Social and Human Studies, Issue 20 (June 2018).
7. Ahmed Hiltali – Custody entitlement in the Algerian Legislation between Legal Text Arrangements and Granting Caveats – Journal of the Researcher for Legal and Political Studies, Issue 11 (September 2018).
8. Dikko Ammar, Abdul Halim, Mahzaniar, and Halimatul Maryani – Implementation of Child Custody (Hadhanah) After Marriage Dissolution Due to Divorce (Juridical Analysis in Law Number 35 of 2014 concerning Child Protection and Compilation of Islamic Law) – Electronic Research Journal of Social Sciences and Humanities, Vol. 3: Issue IV (Oct – Dec 2021).
9. Farida Prihatini, Abdul Karim Munthe, Delila Stefanya Pusparani, Ali

Sumihar – The Problem of the Execution of Child Custody (Ḥadhanah) – Decision by the Religious Courts in Indonesia– Journal of Syariah, Jil. 27, Bil. 2 (2019).
10. Fawzi, Ṣuwar – Al-Haḍānahba'da Al-Talāqfī Aceh Al-Wusṭá – Indonesian Journal for Islamic Studies, volume 24, N 01 (2017).

International agreement:

1. The Convention on the Rights of the Child 1989. Algeria ratified it pursuant to Presidential Decree No. 92-41, dated 19/12/1992.

Legal texts:

1. Law No. 84-11 of June 9, 1984, which includes the Family Code, amended and supplemented by Decree No. 27 (February, 2005).
2. Law No. 09/08 of February 25, 2009, which includes the Code of Civil and Administrative Procedures, Official Gazette No. 21, issued on April 23, 2008, as amended and supplemented.
3. Republic of Indonesia – Law Number 1 of the year 1974 regarding Marriage (1974).

Judicial decisions:

1. A decision issued by the Supreme Court from the Personal Status Chamber, on 18/06/1991, File No. 75171. Unpublished.
2. A decision issued by the Supreme Court from the Personal Status Chamber No. 337176, issued on 16/11/2005.
3. A decision issued by the Supreme Court from the Personal Status Chamber No. 1302053, issued on 07/03/2019, and published in the Judicial Journal Issue (February, 2019).
4. A decision issued by the Supreme Court from the Personal Status Chamber No. 237526, issued on December 26, 2001, and published in the Judicial Journal, special issue (2001).
5. A decision issued by the Supreme Court from the Personal Status Chamber No. 201336, issued on 21/07/1998.
6. A decision issued by the Supreme Court from the Personal Status Chamber No. 1067582, issued on 04-05-2017, and published in the Judicial Journal Issue 01 (2017).

CONSUMER DETRIMENT IN B2C TRANSACTIONS UNDER CONSUMER LAW IN INDIA: ROLE OF CONSUMER COURTS

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ABSTRACT

The Indian consumer protection law confines itself to Business to Consumer (B2C) transactions and leaves out Business to Business (B2B) transactions from its ambit. This issue has been a subject of litigation in consumer courts over the years. The Supreme Court of India has had to adjudicate the issue a number of times over last three and a half decades.

A two Judge Bench of the Supreme Court of India (SCI) in the recent case of *Shrikant G. Mantri vs Punjab National Bank* again observed that 'business to business'(B2B) disputes cannot be construed as consumer disputes and claims arising out of the same cannot be entertained under the Consumer Protection Act (CPA). The judgment brings back to focus one of the most contentious issues in the consumer protection arena – the '*commercial purpose*' interpretation.

This research paper seeks to explore the rationale for the rigid classification between Business to Business (B2B) and Business to Consumer (B2C) transactions and argues the justification of the said classification under the CPA. It shall trace the development of consumer jurisprudence on this issue through some of the landmark

Judgments of the National Commission (NC) and Supreme Court of India (SCI).

KEYWORDS: Consumer Law, Commercial Purpose, B2B, B2C, Consumer Courts

INTRODUCTION

The moment a person is born, he is a consumer of various goods and services. Had it not been for consumer, no business or industry would have ever existed. When any person purchases any goods or avails any service, he does weigh *value for money* proposition.[1] This value for money consideration exists in the aspects of quality, quantity, price, merchantability etc. Unfortunately, the consumers in India have been neglected a lot. The manufacturers, traders and wholesalers have dominated the marketplace and exploited the consumers to a great extent. Whenever our foreign brethren narrated the rights of consumer on their soil, it always seemed to be more of a childhood fairy tales.[2] The story of "*Consumer is King* "is more of a fiction than reality.

The Law of Contracts in India was enacted under British colonial rule and it was meant to regulate commercial contracts under the colonial mercantile era. It covered all kinds of contracts and there was no distinction among the types of contracts it applied to. It was based on the principles of equity among the contracting parties who were considered supreme to fashion terms of the contract and bind themselves to it. The British mercantile tradition in 19th century Britain mainly catered to the needs of the British merchants and the industrial class which grew during the industrial revolution. It was also meant to serve the colonial maritime trade of the British merchant fleet. *The Indian Contract Act 1872* and the *Sales of Goods Act 1930* which were enacted to cover this domain were based on the British laws and the common law doctrines that were evolved in British Courts. These laws covered all kinds of sales of goods and services in India for nearly four decades after interdependence in 1947.

CONSUMER PROTECTION ACT, 1986: THE SUNSHINE LEGISLATION

The Indian economy from the very beginning was a highly regulated one and not much was being thought on the aspect of consumer rights. In fact, State itself was the substantial provider of goods and services. Later on, with the opening up of the economy, the private players too joined the market as providers of various goods and services. The doctrine of *caveat emptor*, meaning 'let the buyer beware' absolved all manufacturers and suppliers from all liabilities all these years to the detriment of consumers. The post-emergency period actually led to activism in various spheres of social activity.

After almost four decades of independence, the CPA, 1986 came up in recognition of power asymmetries in terms of bargaining position between consumers and providers of goods and services. It has a consumer-friendly design and is aimed at resolving consumer disputes by taking care of the issues of cost, time and procedural technicalities involved in conventional court litigation.

B2B AND B2C CONTRACTS: THE RECOGNITION OF DISTINCTION

Importantly, the business laws enacted earlier covered commercial contracts (B2B) as well as Consumer contracts (B2C). Thus, hitherto there was no distinction being made between B2B and B2C contracts from the aspect of seeking remedy for the aggrieved party. Giving similar treatment

1 Commentary on Consumer Protection Act, available at: <http://ncdrc.nic.in/bare_acts/1_1_2.html#:~:text=The%20Consumer%20Protection%20Act%2C%201986,express%20additional%20rights%20on%20him> [Last seen August 19, 2022]

2 K. R. Bulchandani, Business Law for Management, Himalaya Publishing House 6th Edition.

to both these kinds of contracts was unfair and the apple-orange classification was imperative in context of market realities. The Indian consumer protection law changed the legal basis of B2C contracts and defined Business to Consumer (B2C) transactions and left out Business to Business (B2B) transactions from its ambit.

In order to avail the benefits of this benevolent legislation, the person has to be a 'consumer'. The act has defined this term and one needs to be falling within the four corners of this definition to avail the benefits under the act. Also, not falling within this definition, doesn't imply that a person doesn't have a remedy at all. Just that, the remedy shall be then available under the conventional civil court. The legislative intent of excluding commercial disputes from the ambit of the legislation is reflected in the definition of the term 'Consumer'. This law is meant to compensate for consumer detriment caused by unfair methods to consumers but not to compensate business losses in B2B transactions.

BUSINESS DISPUTES AND CONSUMER DISPUTES: THE BLURRED BOUNDARIES

Consumer Protection Act is aimed at protecting the interests of consumers and in order to be eligible to claim remedy under CPA, the definition of the term 'Consumer' needs to be satisfied. The opening paragraph of the definition of '*Consumer*' (dealing with goods) prevailing then was:

"*consumer means any person who buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose*".[3]

Thus, resale and commercial purpose were two specific exclusions provided under the definition and the people purchasing goods for themselves as end users of goods/services were the ones to be called Consumers under the act.

THE AMBASSADOR CASE: PUSHING FOR A RE-LOOK

During the early days of CPA, *Western India State Motors Vs. Sobhag Mal Meena*[4] was one of the very interesting cases that came up for consideration before the National Commission (NCDRC).

The complainant purchased an ambassador car from the respondent manufactured by Hindustan Motors. The car developed engine issues after the first use itself and had to be taken up for repairs. Unfortunately, even after repairs the car wasn't functional and it became a recurring problem. The complainant had purchased it to run it as a taxi for earning his livelihood. Also, he had availed loan from bank for the same. He approached the State Commission claiming a new car, compensation for loss of profits and mental agony. The NCDRC dismissed the complaint and held that buying of the car for running as a taxi was surely for a commercial purpose and was explicitly excluded from the definition of consumer. Even the plea of livelihood wasn't entertained by National Commission.

The judgment in this case attracted a lot of public attention and consumer associations were very disappointed with the existing provision. This case of even earning a livelihood to be treated as commercial in nature appeared very unjust. This interpretation was surely to exclude a lot of deserving cases being ruled out. The NCDRC judgment would go on to serve as a ratio decidendi and would henceforth be followed by all subordinate consumer courts. This would exclude a number of consumers from these courts.

3 The Consumer Protection Act, 1986, Section 2(d)(i).

4 MANU/CF/0016/1989.

SYNCO TEXTILES CASE: RAISING AN INTERESTING ARGUMENT

Another case that deserves mention on this issue is *Synco Textiles Pvt. Ltd. Versus Greaves Cotton & Company Ltd* (1991)[5]. Synco Textiles which was dealing in edible oil contracted with Greaves Cotton Co. for supply of generating sets (3) at Rs 553,000 for usage in factory. The generating sets supplied were found to be defective and resultantly led to loss of business for Synco Textiles. It approached the State Commission claiming cost of machines and compensation for loss of business. The claim was dismissed the purpose for generating sets being commercial. Synco Textiles argued that the electricity to be produced from generating sets was for a production purpose and electricity itself was not for sale. It added:

"a fridge, a fan, a water cooler etc. purchased and installed in a residence will not be considered 'commercial purpose' and hence covered by the Act but, if installed in a factory, a shop, a lawyer's chamber or a doctor's clinic, will become an acquisition for a commercial purpose and hence would not attract the provisions of the Act. The same situation will arise in respect of a car purchased by an officer of a company with the funds provided by his employer, and a car purchased by a company for the use of its officers: the former would not be for a commercial purpose whereas the latter would be for a commercial purpose".

Notably, as the term commercial purpose wasn't defined in the act. The commission thus resorted to ordinary dictionary meaning and maintained commercial meant 'large scale'. The National Commission made a distinction between small-scale and large scale. It held Synco Textiles to be 'large' and thus was not 'consumer' within the act.

Meanwhile, the Department of Consumer Affairs (DCA) was created and it later got elevated to a separate ministry.[6] The Act too got later amended to assimilate the demand of the consumer groups and the following explanation was added to the definition of consumer under Section 2(d) of the Consumer Protection act.

"Explanation: For the purposes of this clause, 'commercial purpose' does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment".[7]

Thus, the following conditions had to be satisfied to claim benefit of the exception provided in Explanation:

- The product or service is exclusively used;
- The exclusive use is for the purpose of earning livelihood;
- Such livelihood is earned by means of self-employment.

CORPORATE CONSUMERS: THE DISTURBING TREND

The Consumer Protection Act clearly leaves out the commercial purpose from its ambit. However, in order to avail the benefits of this legislation, even the large-scale business houses claim it to be case of business for livelihood.[8] It is pertinent to point out that the distinction between large vs small was not spelt out in Synco Textiles case. At what size small became large was left unanswered. Around this time a number of commercial disputes between business having insurance contracts also started filing cases in Consumer Courts alleging deficiency in service on a repudiation of insurance contracts. The Insurance Act of 1938 was already in force and the litigation between insurers and

5 MANU/CF/0109/1990.

6 Akhileshwar Pathak, Legal Aspects of Business, p.no.349, McGraw Hill Publication, Fourth Edition, 2010.

7 The Consumer Protection (Amendment) Act, 1993, Explanation to Section 2(d).

8 Jehangin B Gai, "Commercial Transaction for livelihood comes under Consumer Protection Act" Times of India, August 16, 2016 available at: <https://timesofindia.indiatimes.com/city/mumbai/commercial-transaction-for-livelihood-comes-under-consumer-protection-act/articleshow/53701980.cms>

those claiming insurance payments would normally have been litigated as contracts in civil Courts subject to the Civil Procedure Code and payment of Stamp duty on amounts claimed. Business lawyers started filing cases in Consumer courts which did not require payment of stamp duty and Civil Procedure Code was not applicable in the summary procedure. One could watch cases of crores of Rupees of compensation claimed by businesses eating away the bulk of the judicial time in NCDRC then located at Indian Oil Bhavan in the early 1990s. Consumers were relegated to the background when such cases were asked to wait for their turn. This also gave rise to the argument as to why businesses were being allowed to come to consumer courts when there were hundreds of civil courts in each state.

The terms livelihood and self-employment being added in the explanation after Synco Textiles case were dealt with elaborately by SCI in the case of *Laxmi Engineering Works Vs PSG Industrial Institute* (1995).[9]

Mr. Joshi was a diploma holder in engineering discipline and wanted to start a SSI – Laxmi Engineering Works. It was also registered with the Directorate of Industries, Maharashtra. He contracted with Premier Automobiles for the supply of parts required by them. The machinery procured from PSG Industrial Institute was found to be defective. The Consumer commissions at State and National level held the appellant not to be a consumer. The case finally reached the SCI. It observed that commercial purpose is a question not of law but of fact and needs to be appraised on case-to-case basis. The emphasis is on the purpose and not the value of goods under consideration. It held:

"The several words employed in the explanation, viz., uses them by himself, exclusively for the purpose of earning his livelihood and by means of self-employment, make the intention of Parliament abundantly clear, that the goods bought must be used by the buyer himself, by employing himself for earning his livelihood. The ambiguity in the meaning of the words "for the purpose of earning his livelihood" is explained and clarified by the other two sets of words."

Thus, the SCI laid down in this landmark case that commercial purpose is a question of fact in a respective case and needs to be dealt with on a case-to-case basis. It is on account of it that a good deal of subjectivity has crept in the interpretation of commercial purpose.

COMMERCIAL PURPOSE INTERPRETATION: LANDMARK JUDGMENTS

The legislative intent as envisaged under the objectives of the act was to exclude business-to-business disputes from the domain of CPA. The consumer courts were set up for consumer disputes and not commercial disputes. Interestingly, after the insertion of the Explanation to Section 2(d)(i) under Consumer Protection (Amendment) Act, 1993 some commercial disputes too managed to venture into consumer courts.

The court in case of *Cheema Engineering Services v. Rajan Singh* (1997)[10] held that in the absence of the definition of 'Self-employment' it becomes a matter of available evidence. There is a fine line between manufacture and sale of bricks for a commercial purpose and for earning a livelihood. The court also held *'He' "includes the members of his family, Whether the respondent is using the machine exclusively by himself and the members of his family for preparation, manufacture and sale of bricks or whether he employed any workmen and if so, how many are matters of evidence".*

Meanwhile, the explanation added in the year 1993 was further enlarged for *Services* as well in the year 2003. The revised explanation being: *"commercial purpose does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment".*[11]

9 (1995) 3 SCC 583.

10 (1997) 1 SCC 131.

11 The Consumer Protection (Amendment) Act, 2002, Ex-

The Hon'ble apex Court in the case of *National Seeds Corporation Ltd. vs. M. Madhusudhan Reddy and Ors*[12] held that where farmers have entered into buyback agreements for the sale of crops grown from those seeds, it will still not oust them from being consumers under the act. The transaction is means of earning livelihood and not a transaction for resale.

In the case of *Kalpavruksha Charitable Trust vs. Toshniwal Brothers (Bombay) Pvt. Ltd.*[13] the matter before the court was to adjudicate whether the machines purchased for being used at the Diagnostic Centre by a Charitable Trust were meant for 'commercial purpose' or not. The Apex court seconded the decision of the National Commission that machinery was indeed installed for a business purpose and as such, the Trust was not a 'consumer'.

In *Paramount Digital Colour Lab and others vs. AGFA India Private Limited and others*[14] This Court, on facts in the said case, found that the appellants therein were unemployed graduates and had bought the said machine for their own utility, personal handling and for their own venture to make a livelihood. This Court further found that this was quite different from a large-scale manufacturing activity carried on for making huge profits. It was, therefore, held that the appellants therein would be taken as 'consumers'.

In the case of *C.P Moosa vs. Chowgle Industries Ltd*,[15] the appellant purchased EPBAX system for the hotel. It also had a warranty and AMC (annual maintenance contract). The EPBAX system turned out to be a case of service deficiency. The National Commission allowed the contention of the appellant as Consumer.

The utilization of goods/services for the expansion purposes in scale of operations or supplementing income or which involves an employment of a full-fledged workforce will rule out the claim for availing benefit under the act. In *Sunil Kohli and Ors. Vs. Purearth Infrastructure Ltd*[16] the complainants disposed of their property in Denmark and booked a commercial space in Delhi to start their own business. The appellants here had left their existing employment and commercial space was booked *"exclusively for the purpose of earning livelihood by means of self-employment"*.

In *Shrikant G. Mantri Vs. Punjab National Bank*[17], the Commission has come to a finding that the appellant opened a bank account with the respondent, and availed an overdraft service for the expansion of business. Also, the overdraft service has been subsequently enhanced as well. The appellant-respondent relationship is thus purely a "business to business" relationship. As such, it would surely come under 'commercial purpose' and the argument *"exclusively for the purpose of earning livelihood by means of self-employment"* doesn't stand in the given case.

CAMEL IN THE DESERT TENT: ADMISSIBILITY OF BUSINESS DISPUTES

According to the classical fiction – Camel in the tent, on a cold night, the camel requests the master to allow him to put his head for warmth which the master accepts. Later, the camel request for bringing his neck and legs as well in the tent which is allowed by the master. Finally, the camel gets in the tent completely and as the size of the tent wasn't that big the master is forced out from the tent.

The story conveys a caution that acts with noble intentions too can lead to unexpected consequences. When the desert storm gets into the camel's eyes, the result will be obvious. The creeping camel in the tent analogy is the counter view to the admissibility of business disputes under the protective umbrella of CPA. The very idea of a Consumer forum is to provide a forum where the aggrieved consumers can represent cases on their own and the services of an advocate are also

planation to Section 2(d).

12 (2012) 2 SCC 506.

13 (2000) 1 SCC 512.

14 (2018) 14 SCC 81.

15 (2001) CPJ-3-9-NC.

16 (2020) 12 SCC 235.

17 (2022) 5 SCC 42.

not required. With the business houses coming in as consumers, the heavyweight legal practitioners arguing cases for their clients are going to seriously tilt the balance and disturb the equilibrium at consumer courts.

WAY FORWARD

There are plethora of commercial ventures and start-ups operating today which are in the nature of self-employment and are indeed very much for livelihood. According to the Ministry of Micro, Small & Medium Enterprises (MSME) micro, small and medium enterprises account for more than 7.9 million (As on March, 2022). As per the revised criteria under MSME dated July 2020, investment in plant and machinery or equipment should be not more than 1 crore, not more than 10 crores and not more than 50 crores respectively for Mirco, Small and Medium enterprises.[18]

The MSME is one of the most vibrant sectors of the Indian economy. The contribution of the said sector is immense and next only to agriculture. The sector is significant as it encourages entrepreneurship and generates large employment opportunities at comparatively lower capital cost. It will surely make a lot of sense to include them as 'Consumers' under the act irrespective of the amount involved.

The Australian law too adopts a cost criterion to draw the line between consumer and commercial purpose. The value criteria are combined with nature of usage criteria. According to the Australian Competition and Consumer Commission (ACCC) "*A person – or a business – will be considered a consumer if:*

1. *they purchase goods or services that cost less than $100,000.*
2. *the goods or services cost more than $100,000, but they are of a kind ordinarily acquired for domestic, household or personal use or consumption.*
3. *the goods are a commercial road vehicle or trailer used primarily to transport goods on public roads".*[19]

CONCLUSION

The SCI in the landmark case of Laxmi engineering Works in 1995 stated that: *"It is not the value of the goods that matters but the purpose to which the goods bought are put to".* The case being an authority on the subject has been a guiding light for last 3 decades. However, considering the overall scenario it will make good sense if reliance is in fact placed on value as well. The commercial courts are the appropriate forum for resolution of commercial disputes and the consumer courts should confine itself to consumer disputes only. The terms 'livelihood' and 'self-employment' have not been defined in the act. It is on account of this reason that there is a good deal of uncertainty involved and it depends on the subjective interpretation of the concerned consumer commission.

The major reason attributed to the exclusion of business players from the ambit of the legislation is to discourage the benefits of this beneficial legislation to those who can afford the hefty fees of civil courts and more importantly to ensure the ones vulnerable in the real sense of the term are provided a time bound and cost-effective dispute resolution mechanism. The District, State and National Commissions have well defined pecuniary jurisdiction to entertain complaints relating to goods and services. One way to remove ambiguity and ensure greater clarity is to link the turnover based on tax returns to objectively oust the business entities from the domain of the act.[20]

18 Ministry of Micro, Small and Medium Enterprises, GOI available at: <https://msme.gov.in/know-about-msme> [Last seen on September 1, 2022]

19 Australian Competition and Consumer Commission (ACCC), Who is a Consumer, available at: <https://www.accc.gov.au/business/treating-customers-fairly/consumers-rights-obligations#:~:text=Who%20is%20a%20consumer%3F,or%20personal%20use%20or%20consumption> [Last seen on August 16, 2022].

20 Sanjay Pinto, "Define 'livelihood' and 'self-employment' in Consumer Law, Deccan Chronicle, December

Many of the small and average-sized start-up ventures have been unjustly deprived a relief on account of the commercial purpose aspect in the amendment. They are surely deserving case and needs to be roped in to this benevolent legislation. This approach will surely be forward-looking and likely to ensure level playing field instead of a blanket commercial apartheid.

Hence, we feel that more definitive criteria be laid down under this law to avoid litigation on the issue of who is a consumer. Consumer Commissions should be focused on determining the amount of. Compensation due to a consumer caused by defective goods, deficiency in services, unfair contracts or unfair trade practices rather than wasting time to determine who is a consumer?

Therefore, it is recommended that a micro enterprise should be considered as a small enterprise primarily meant for livelihood of the entrepreneur and its workers. A micro enterprise should be covered under definition of a consumer. Hence, it is recommended that any small enterprise registered as micro enterprise under the law be included in definition of a consumer.

Since all small enterprises are not registered as micro enterprises, it is also recommended that a threshold of income or turnover be defined for the purpose of inclusion of a small enterprise being defined as a consumer. As an illustration any small enterprise with either an annual net profit below ₹25 L or a turnover below ₹1 crore be included in definition of consumer. The figures can be debated and decided. The crucial issue being that a small enterprise where business is on a small scale primarily for livelihood of the entrepreneur who may employ a small number of people who are also dependent on him for livelihood can be protected under this law.

9, 2018, available at: <https://www.deccanchronicle.com/nation/in-other-news/091218/define-livelihood-and-self-employment-in-consumer-law.html>

BIBLIOGRAPHY:

1. Akhileshwar Pathak, (2010), Legal Aspects of Business, McGraw Hill Publication.
2. Australian Competition and Consumer Commission (2022), Who is a Consumer. (in English)
3. Bulchandani, K. R. (2015). Business Law for Management. Himalaya Publishing House. (in English)
4. Commentary on Consumer Protection Act – Division Two (1986), National Consumer Disputes Redressal Commission (NCDRC). (in English)
5. Gai B Jehangir, (2016), Commercial Transaction for livelihood comes under Consumer Protection Act, Times of India. (in English)
6. Ministry of Micro, Small and Medium Enterprises, (2022) Government of India. (in English)
7. Pinto Sanjay (2018) Define 'livelihood' and 'self – employment' in consumer law, Deccan Chronicle. (in English)
8. The Consumer Protection (Amendment) Act, 2002.
9. The Consumer Protection Act (1986) Bare Act.
10. The Consumer Protection Act (2019) Bare Act.

A REVIEW OF THE BASIC LEGAL REQUIREMENTS FOR SECURED CREDIT TRANSACTIONS IN NIGERIA

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ABSTRACT

Secured Credit Transactions (SCTs) are necessary and unavoidable transactions that business owners engage in to ensure their businesses thrive. However, because of the possibility that a person seeking to take a loan may be desperate and be taken advantage of in a time of dire need, or on the other hand, the possibility that the party may present fake properties as security for the loan, there are legal requirements that both the debtor and the creditor must meet. This paper addresses the possible parties to the SCT and the condition each category of the party must meet for the transaction to be valid. It further identifies the measures to be implemented to ensure the validity of Secured Credit Transactions.

This paper finds that Nigerian Law protects both the creditor and the debtor to ensure that the SCT does not fail and none of the parties run at a loss. This paper concludes that there is a need to further protect the debtor and the creditor against failed SCT and to ensure that parties are aware of the Legal requirement for successful SCT in Nigeria. This paper recommends that the age of infants should be reviewed and made uniform across the country and that there should be a possibility to have a thorough investigation of the title of landed properties online.

KEYWORDS: Creditor, Debtor, Loan, Property, Secured credit transaction

INTRODUCTION

In the modern world, Secured Credit Transaction (SCT) seems inevitable, especially for persons who are into business. There is a need to raise capital from time to time to enhance business and finance certain projects. People approach different sources of credit, ranging from individuals to financial institutions such as microfinance banks. The source being approached for credit seeks security to ensure that the loan, which will now include principal and interest, will be paid as when due.

To have a legally recognized SCT, the parties must comply with specific legal requirements. This paper explores who the parties to the SCT are, what the law says about the capacity of each party, and the measures to be taken legally by the parties to ensure the three pillars of security: protection, assurance, and indemnity put in place.

This paper is divided into three sections. The first part gives an insight into who the parties to the SCT are; the second part looks at the necessary steps to be taken to ensure the validity of SCT agreements and lastly, the third section gives a succinct conclusion and necessary recommendations that would provide the smooth running of SCTs in Nigeria. This paper will undertake a doctrinal research design to analyze the topic properly.

1. PARTIES TO SECURED CREDIT TRANSACTIONS

For the sake of this paper, the following are considered necessary parties to the SCT:

1. Secured creditor;
2. Debtor;
3. Guarantor;
4. Loan debt;
5. Security.

1.1. Secured creditor

A creditor, according to the Cambridge dictionary, is 'someone who the money is owed to'.[1]

This is the person from whom the debtor has borrowed money and has given security to make room for the assurance that his money will be repaid, that security is protected, and that even if his money is not paid, he will get his money from the sale of the security and as such he will be adequately indemnified. In a mortgage transaction, he is the mortgagee in the simple term, he is referred to as the lender. Where the creditor is a bank, there is a restriction placed on the bank with regard to how much it can give out as a loan.[2] Hence people in charge of loans in the bank should ensure that they do not, out of excitement, give more than the amount that is legally allowed, as loan.

1.2. Debtor

The Cambridge dictionary defines a debtor as 'someone who owes money'.[3]

This is the party who owns the collateral and has secured it as evidence for the payment of a loan he took. He has an interest in the property and has agreed to do away with the interest he has if he is unable to repay the loan.

Therefore, depending on the type of secured credit transaction, he can be referred to as the

1 Cambridge Dictionary, 'Creditor'. <https://www.google.com/search?q=cambridge+definition+of+creditor&rlz=1C1CHBD_enNG883NG884&oq=cambridge+definition+of+creditor&aqs=chrome..69i57.58590j0j7&sourceid=chrome&ie=UTF-8> [Last seen 06 January 2023].

2 Banks and Other Financial Institutions Act CAP B3 Laws of the Federation of Nigeria, 2004 (BOFIA), Section 18.

3 Cambridge Dictionary, 'Debtor'. <https://www.google.com/search?rlz=1C1CHBD_enNG883NG884&sxsrf=ACYBGNTytXNtHH5V0umVh0FZ0iak-I78Rg%3A1581020993930&ei=QXc8XuW0OOiAhbIPiqC-4AU&q=cambridge+definition+of+debtor&oq=cambridge+definition+of+debtor&gs_l=psy-ab.3..0i71l8.350617.352125..353040...0.3..0.0.0.....6....1..gws-wiz.RWzwfNijJ44&ved=0ahUKEwil2eaV4r3nAhVoQEEAHQqQD1wQ4dUDCAs&uact=5> [Last seen 06 January 2023].

mortgagor as in the case of a mortgage transaction or, in simple term as the borrower.

1.3. Guarantor

The Cambridge dictionary defines a guarantor as a person who makes certain that something happens or that something is protected'.[4]

A guarantor may be the owner of the security or someone standing as surety for the debtor. If the debtor is not a customer of a particular financial institution, he would need a surety. A surety must be a customer of the financial institution facilitating the loan and meet a certain required financial status.[5] Also, when the debtor does not have a property commensurate with the loan about to be taken from the creditor, a guarantor is needed; in this case, the guarantor uses his property instead and agrees to be liable should the debtor be unable to repay the debt.[6]

1.4. The Loan debt

Debt has been defined as "Something, especially money that is owed to someone else..."[7] The debtor is expected to pay the loan debt to the secured creditor. It is the money the secured creditor has advanced, and the debtor has given security. The loan debt is usually comprised of the principal sum, the original sum advanced by the secured creditor, and the interest, which is a particular percentage of the principal sum paid as profit on the loan to the secured creditor. The best practice is for the debtor to pay the interest in lump sum as soon as the SCT starts, and he then pays the principal sum in installments; this practice is known as amortization.[8]

1.5. The Security

Security is an asset that is promised by the debtor as protection in case he defaults on the reimbursement.[9] Section 1 (3) (b) (ii) of the Failed Banks Act (FBA)[10] prohibits naked lending by banks. A secured creditor has priority over an unsecured creditor,[11] and this was upheld in First Bank Nigeria Plc v. Nigerian Deposit Insurance Corporation.[12] Therefore a borrower needs to give security before he can be granted a loan.

2. LEGAL CAPACITY OF CERTAIN PARTIES

SCT places no restrictions on anybody legally allowed to enter into contracts in Nigeria from being a party to an SCT. It follows that once a person can enter into a contract, he can enter into SCT because it is a form of contract. This further implies that the provisions guiding the capacity of specific categories of parties to a contract also govern those categories when they are involved in SCTs.

2.1. Infants

In Nigeria, a person under twenty-one (21) cannot enter a legal contract.[13] Any contract with an infant will be declared null and void and unenforceable against the infant. A mortgage involving an infant is void and cannot be

4 Cambridge Dictionary, 'Guarantor'<https://dictionary.cambridge.org/dictionary/english/guarantor> [Last seen 03 January 2023].

5 Yusufu Yilzum Dadem, *Property Law Practice in Nigeria* (Jos University Press Limited 3rd Edition, 2015).

6 ibid.

7 Cambridge Dictionary, 'Debt' <https://dictionary.cambridge.org/dictionary/english/debt> [Last seen 03 January 2023].

8 Alicia Tuovila 'Amotization' <https://www.investopedia.com/terms/a/amortization.asp> [Last seen 03 January 2023].

9 Net Lawman, 'What is meant by "security" on a secured loan' <https://www.netlawman.co.uk/ia/security> [Last seen 03 January 2023].

10 Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, Cap F2 Laws of the Federation of Nigeria 2004.

11 BOFIA Section 54.

12 *First Bank Nigeria v. Nigerian Deposit Insurance Corporation* (Federal High Court Lagos) Punch Newspaper, 28/7/17.

13 Infant Relief Act 1874, A Statute of General Application. Section 1.

enforced against the infant.[14] For an infant to be involved in any contract, he must involve a guardian.

While this provision seems to protect the infant, it remains questionable if it is realistic and in line with modern practice. In recent times it has been experienced that people under 21 are exposed and mature and can make good decisions for themselves. Some of them are already university graduates and are working. If they can be allowed to work, make money, and save, it becomes a question what then is preventing them from owning properties and being parties to any form of an SCT? Persons above 18 can vote in Nigeria[15] and be held liable for any offense they commit. If they can take responsibility for their actions, if they can make decisions as to who the leaders in a country should be, then they should be able to make personal life decisions such as when to take a loan and how they choose to go about it and be allowed to take responsibility for any default.

The traditional provision (especially under customary and Islamic law), which was upheld in Labinjo v. Abake[16] that the contractual capacity of a person under customary law begins at puberty and can be determined by the physical development and maturity of the person involved seems a better provision than the strict provision generalizing that all persons under 21 cannot make decisions involving SCT.

It is suggested that the contractual age be reviewed and each person dealt with on an individual basis considering the person's intellectual capacity, level of education, and area of growth, among others.

2.2. Illiterates

There is no general definition of who an illiterate is in Nigeria. However, it can be said and as held in some cases[17] that a person who does not understand the language of the agreement is illiterate. Like every other person, illiterates can exercise contractual capacity subject to certain formalities being complied with while preparing the contract agreement. An illiterate jurat must be inserted in any agreement involving an illiterate. The jurat must state that the terms of the agreement have been read to the illiterate in a language he understands and explained to him, and he signed the agreement upon a full understanding of the terms. So, an SCT agreement involving an illiterate must have an illiterate jurat.

This provision seems fair to avoid the manipulation of people who do not understand the language of the contract.

2.3. People with Unsound Mind

The general rule is that people with the unsound mind can enter into a contract during their lucid interval.[18] However, a secured credit transaction entered into with a person of unsound mind is valid and only voidable at the instance of the borrower if the secured lender was not aware of the insanity or void if the unsoundness of mind is such that the transaction should not have happened at all.[19]

The term unsound mind has been opined to be a broad term that covers numerous cases. It becomes questionable if a general law should govern all forms of unsoundness of mind cases in relation to the contract.

2.4. Corporations

A company is a legal person and, as such, has contractual capacity. However, the capacity of a company is limited by its memorandum of association and if a statutory company by the

14 ibid.
15 Electoral Act, 2010. Section 12.
16 5 NLR 33.
17 Nigeria Law Claz, 'Capacity to Contract' <https://nigerianlawclaz.blogspot.com/2017/07/capacity-to-contract.html> [Last seen 06 January 2023]. Otitoju v. Governor of Ondo State (1994) 4 NWLR (Pt.340)518.
18 *Hall v. Warren* 32 E.R 738.
19 *Johnson v. Simmonds* (1961) 25 Con. (N.S) 319.

establishing statute. Any act outside the scope of the memorandum of association or the establishing statute is done *ultra vires.*[20] There is protection, however, for third parties who are involved in any act, conveyance, or transfer of property with a company if the sole reason for nullity of the transaction would be that it is *ultra vires*.

2.5. Trustees

Equity will not allow a trustee to unduly subject the trust property to financial risk, which would be to the detriment of the beneficiaries. Therefore, a trustee cannot borrow money using the trust property as security unless he is allowed to do so under the trust instrument.[21] He must, however, protect the beneficiary's interest at all times, even if he is permitted under the trust instrument to use the property as security.

3. RELEVANT MATTERS TO BE TAKEN INTO CONSIDERATION BY THE SECURED CREDITOR TO ENSURE VALIDITY OF A SECURED CREDIT AGREEMENT

A secured creditor must ensure that he takes certain steps and does certain things to ensure that the security truly belongs to the debtor and that he will be indemnified if repayment becomes impossible. Failure to do so may lead to a great loss to the creditor. They include:

3.1. Having a Written Agreement

For ease of reference and enforcement, an agreement evidencing a secured credit transaction should be in writing. There is a legal requirement for the mortgage agreement to be in writing. According to Section 4 of the Statute of Frauds 1677,[22] any transaction involving land must be in writing; failure to do so makes action arising from the transaction unenforceable.[23] The written document must contain the following to ensure its validity: the names and description of the parties, the description of the property, statement of the principal sum given as a loan, interest payable, time and mode of repayment, provision for redemption and other terms. The written document must be a deed; that it must be **signed, sealed, and delivered** by both parties. It must be elegantly drafted, and the execution must be properly done by all parties such that parties who require extra measures to be contained in their execution clauses should not have the special contents missing, such as illiterate jurat.

3.2. Investigation of Title

In the case of mortgage transactions, there are steps that the mortgagee can follow to ensure the safety of the security. They are:[24]

- Physical inspection: the mortgagee should visit the land that has been used as security and ensure that the land exists, is located where stated, and does not have any encumbrance that would prevent a sale should a sale arise. E.g., a tomb;
- Traditional evidence: if the land is a family land or communal land, the mortgagee should search with the principal members of the family or community leaders, ensuring that they have given their consent to the transaction to avoid difficulties during enforcement;
- Search at the land registry: Land Instrument Registration law establishes a land registry in each state. It is a place where

20 Companies and Allied Matters Act 2020 Section 44.

21 I.O. Smith, *Practical Approach to Law of Real Property in Nigeria* (Ecowatch Publications Limited 2nd edn. 2007).

22 A statute of general application.

23 *United Bank of Africa v. Tejumola* (1988) SCNJ 173.

24 *Elton C. Mpi,* 'How to Investigate Land in Nigeria' <https://legalpuzzles.wordpress.com/2017/08/03/how-to-investigate-title-to-land-in-nigeria/> [Last seen 05 January 2023].

documents relating to land are kept because, under the Land Use Act,[25] ownership of all lands in a state is vested in the governor of that state; any transfer made in respect of any land must be registered. A mortgagee should search at the land registry (usually for a fee) as this will show if there is any encumbrance, such as if the land has been mortgaged to another creditor;

- In Lagos and Abuja, it is important to get the consent of the owner of the land before a search can be conducted. This is a good practice and should be done in all states as this would put the mortgagor in check and may even urge him to be honest with the mortgagee;
- Search at the company registry: where at any point in time the land has been owned by a company registered under Companies and Allied Matters Act, or the mortgagor is a company, search should be conducted at the company registry, as this would help the mortgagee to know if the mortgage is ultra vires or not;
- Search at the Probate Registry: the mortgagee should ensure that the mortgagor if he got the land through a testamentary document has been granted probate in respect of the land. Mere having his name in the will does not connote transfer of ownership to him;[26]
- Court judgment: from time to time lands are subject to disputes in court and land disputes take years in most cases before they are settled. A search by the mortgagee at the court where he can obtain the certified true copy of any judgment relating to the land where necessary can save him from the mortgagor using a land already subjected to litigation and to which he can possibly loose ownership or may have lost ownership and probably appealing the case, as security.

25 Land Use Act Cap L5 Laws of the Federation of Nigeria 2004. (LUA) Section 1.

26 Elton (n14).

3.3. Valuation of Property

Valuation is 'the analytical process of determining the current worth of an asset or a company'.[27] It is done to determine the fair value of a property.[28] This is a procedure expected to be done by the secured creditor to ensure there is a margin of safety and that he never suffers a loss if the need for the sale of the property arises. The secured lender should ensure the valuation report makes provision for the following, among others:[29] state of the economy as at the date of valuation, location of the property, physical features, suitability of the property for lending, demand for the property, valuation method used, the amount the property is worth now and proposed worth after the term of the loan and so on.[30]

3.4. Compliance with Planning Regulation

Planning regulation is a system of land use restrictions and proposals regulating the exploitation and development of land in a particular place.[31] In Nigeria, the planning law is the Nigerian Urban and Regional Planning Act.[32]

It has become pathetic that one main challenge of real estate in Nigeria is the lack of compliance with planning regulation provisions. Several builders and landowners are not even aware of the existence of planning regulations, and they go ahead to build houses where houses should not be built, places that should be

27 James Chen, 'Valuation Defintion'< https://www.investopedia.com/terms/v/valuation.asp> [Last seen 07 January, 2023].

28 ibid.

29 Oluwunmi Adedamola and Omolade Akinjare and Joshua Opeyemi, 'What Lenders Want from Mortgage Valuation Reports: A Survey of Nigeria Banks' (2013) 2 International Journal of Economy, Management and Social Sciences.

30 ibid.

31 J.A. Omotola, 'Planning Law in Nigeria' (1991) 13(4) Third World Planning Review.

32 N0. 88 1992 CAP N138 Laws of the Federation Nigeria 2004.

commercial areas are made into residential and vice-versa; people build where roads should be constructed and so on. All these are violations of planning regulations and, in turn, lead to the destruction of property by the government, disaster such as fire outbreak which is often uncontrollable, and so on.

It is expected that landowners should seek planning permission before constructing on land. The mortgagee must ensure that the land or building being used as security is effectively covered by planning permission and that the planning permission is religiously obeyed, not the case that a planning permit is obtained for a bungalow to be built and a story building is built instead.

3.5. Immediate or Subsequent Acquisition

The constitution provides that every citizen of Nigeria has the right to own both moveable and immovable property.[33] Also, as earlier stated, ownership of all lands is vested in the Governor of a state. This means that although a Nigerian can own land, such right is subject to the interests of the Governor of a state and hence the reason why any form of alienation without the Governor's consent is prohibited.[34] The Governor reserves the right to take possession of the land at any point in time for overriding public interest.[35] Examples of overriding interests are:[36] exclusive government use or for general public use, use in connection with sanitary improvements of any kind, land required for mining purposes and so on.

The statutory owner of the land has a right to be informed of the acquisition and, as such, must be given a personal notice of revocation of his right of occupancy stating the reason for the acquisition and that compensation would be paid.[37] The statutory owner can protest acquisition is not within the confines of the overriding public interest.

A mortgagee should ensure that the land is not already subject to the acquisition or, if subject to acquisition during the terms of the loan, that he is aware and duly compensated. He can confirm this by checking the red copy of the survey plan and being sure that the term "free from acquisition" is boldly written on it.

3.6. Integrity Test

The lender must conduct an integrity test on the debtor to ensure that he is a person of his own words and he is truly who he parades himself to be. If he claims to own certain properties or has certain social and political connections, the secured creditor should investigate and be sure the information is accurate. Where the lender is a company such as a financial institution, the directors and managers of the bank must ensure that due diligence is put in place to ensure the borrower's integrity. They should ensure that loans are not granted to insolvent persons.[38] This is essential because, according to Section 12 (2) of the Failed Banks Act, directors, shareholders, and corporate officers of banks are liable for any loss the bank runs into because of unprofessional lending practices.

3.7. There Must be a Provision for Insurance of the Security

An insurance provision in the loan agreement is made to provide for what will happen in the event of any damages or destruction done to the property. It is an essential provision because the transaction is dependent on security. Any damage or destruction to the property would adversely affect the right of the parties, and in most cases, the mortgagee would be the

33 Constitution of the Federal Republic of Nigeria 1999, CAP C3 Laws of the Federation of Nigeria 2004. Section 43.

34 LUA Section 22.

35 LUA Section 28.

36 LUA Section 51

37 *Olatunji v. Military Governor of Oyo State* (1994) LPELR 14116.

38 CAMA Section 280.

one to experience the most significant loss because he may not be able to recover the mortgage debt and also the security with which he would have sought indemnification has been destroyed.

Content of an insurance provision:

1. The party to insure the property in whose name the insurance policy will be taken out. It is advisable that the secured creditor insures the property during the term of the loan and then charge the debtor the premium paid with the loan debt. If, on the other hand, the debtor insures, the secured creditor should be made his lawful attorney so that he can also access the money upon damage to the property. With regards to Mortgage by deed, the mortgagee has the right to *insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature... and the premium paid for any such insurance shall be in a charge on the mortgaged property or estate or interest, in addition to the mortgage money;*[39]
2. The risk to be insured against and this is determined by the use to which the property is put, the location of the property, e.g., is it erosion-prone, is it in a flooded area etc. the nature of the property, and if there is the existence of any government policy, e.g., the government could state that all property in a certain area must be insured against fire;
3. The insurance company to be used and must be a reputable company;
4. The amount of the insurance premium must not be an outrageous amount of money;
5. The date of commencement of the insurance policy. The duration of the policy must be clearly stated, and the secured creditor should ensure it covers the term of the loan;
6. The application of the insurance money in the event of damage, whether to use it to reinstate the property or not. If the secured creditor has done the insurance, the secured creditor, upon receipt of the insurance money, would disburse the funds first to pay off the principal sum and interest owed him by the debtor and then render the remaining amount to the debtor. As such, the mortgagee would not have to wait to reinstate the damaged property as this may never happen or may take time and make it harder for the creditor to enforce the loan agreement. The parties may agree that the application of the insurance money in the event of damage should be made in such a way that it will negate S.67 of the Insurance Act,[40] which provides that every property that is destroyed by fire must be reinstated. Whatever the case may be, the parties are expected to agree on applying the insurance money to avoid dispute.

The provision for insurance is essential because if there is no insurance provision, the creditor will lose the security to damage and not be entitled to any reimbursement because he cannot compel the debtor to surrender the insurance money to him if damage occurs to the property.

CONCLUSION

SCTs are delicate transactions; they involve the parties to be extra careful and exercise due diligence to ensure that the transactions run smoothly. The basic legal requirements are put in place to ensure that the secured creditor and the debtor are both safe regarding the transaction.

There are several provisions on due diligence to be expected from the parties involved legally while the law protects the mortgag-

39 Property and Conveyancing Law, Cap 100 Laws of Western Nigeria 1959 Section 123 (1) (ii), Conveyancing and Laws of Real Property Act 1881 Section 19 (1) (ii).

40 Insurance Act 2003 Cap 4 Laws of the Federation of Nigeria 1990.

or with the phrase "once a mortgage always a mortgage"[41] and some other rights to ensure he is not manipulated because of urgent need for money, the law also protects the mortgagee who is expected to ensure that the collateral is secured and once secured he can use it to enforce his right under the transaction agreement and he must be seen to be indemnified.

The capacities of different parties were discussed, and specific questions and suggestions were made on the position of law concerning the ability of some parties to be involved in SCTs hence till any amendment is made the SCTs should not affect those stipulated not to be applied to avoid suffering a loss that could have been prevented.

- The age of infants should be reviewed and made uniform: there are various provisions on the age of persons who fall within the infant category in Nigeria. There is the age stipulated in the Electoral Act. There is an age specified in the Child Right Act and an age defined in the Infant Relief Act. It is believed that a general age should be adopted, and a law should be made to this effect; this law should also replace the outdated Infant Relief Act of 1874.
- Awareness for planning regulations: one of the significant problems with the enforcement of laws in Nigeria is the lack of understanding of the existence of those laws. Efforts should be made to educate the members of the public about the laws in existence, how they apply to them, the reasons for enacting them, and the consequences of not complying with them.
- Title investigation should be made easier through online platforms: in developed countries, information about a particular sector is found online. Information about every land in Nigeria should be made available in an online database which should be created for the land registry. Every transaction that has occurred or is occurring with land should be on the database. That way, investigation of the title would be done easily and more effectively.

41 *Owoniboys Tech. Services Ltd v. Union Bank of Nigeria Ltd* (2003) JELR 15757 (SC).

BIBLIOGRAPHY:

Statutes:

1. Banks and Other Financial Institutions Act CAP B3 Laws of the Federation of Nigeria, 2004.
2. Companies and Allied Matters Act Cap C20 Laws of the Federal Republic of Nigeria, 2004.
3. Constitution of The Federal Republic of Nigeria 1999, CAP C3 Laws of the Federation of Nigeria 2004. Section 43.
4. Conveyancing and Laws of Real Property Act 1881.
5. Electoral Act 2010.
6. Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act Cap F2 Laws of the Federation of Nigeria, 2004.
7. Infant Relief Act 1874.
8. Insurance Act 2003 Cap 4 Laws of The Federation of Nigeria 1990.
9. Land Use Act Cap L5 Laws of the Federation of Nigeria 2004.
10. Nigerian Urban and Regional Planning Act N0. 88 1992 CAP N138 Laws of the Federation Nigeria 2004.
11. Property and Conveyancing Law Cap 100 Laws of Western Nigeria 1959.
12. Statute of Frauds 1677.

Books:

1. Dadem Y. Y, *Property Law Practice in Nigeria* (Jos University Press Limited 3rd Edition 2015).
2. Smith I. O., *Practical Approach to Law of Real Property in Nigeria* (Ecowatch Publications Limited 2nd edn. 2007).

Dictionary:

1. Cambridge Dictionary, 'Creditor'. <https://www.google.com/search?q=cambridge+definition+of+creditor&rlz=1C1CHBD_enNG883NG884&oq=cambridge+definition+of+creditor&aqs=chrome..69i57.58590j0j7&sourceid=chrome&ie=UTF-8> [Last seen 06 January 2023].
2. Cambridge Dictionary, 'Debtor'. <https://www.google.com/search?rlz=1C1CHBD_enNG883NG884&sxsrf=ACYBGNTytXNtH-H5V0umVh0FZ0iak-I78Rg%3A1581020993930&ei=QXc8Xu-W0OOiAhbIPiqC-4AU&q=cambridge+definition+of+debtor&oq=cambridge+definition+of+debtor&gs_l=psy-ab.3..0i71l8.350617.352125..353040...0.3..0.0.0.....6....1..gws-wiz.RWzwf-NijJ44&ved=0ahUKEwil2eaV4r3nAhVoQEEAHQqQD1wQ4dUDCAs&uact=5> [Last seen 06 January 2023].

Journal articles:

1. Adedamola O., and Akinjare O., and Opeyemi J, 'What Lenders Want from Mortgage Valuation Reports: A Survey of Nigeria Banks' (2013) 2 International Journal of Economy, Management and Social Sciences.
2. Aluko B.T., 'Reliability of mortgage valuation for institutional lending in Nigeria' (2004) 8(4) Journal of Strategic Property Management 193-203.
3. Okafor K, 'Current Loans in Nigeria' (2019) 3(3) International Journal of Family Business and Management.
4. Omotola J. O., 'Planning Law in Nigeria' (1991) 13(4) Third World Planning Review.

Online materials:

1. Chen J, 'Valuation Definition'. <https://www.investopedia.com/terms/v/valuation.asp> [Last seen 07 January, 2023].
2. Elton C. Mpi, 'How to Investigate Land in Nigeria'. <https://legalpuzzles.wordpress.com/2017/08/03/how-to-investigate-title-to-land-in-nigeria/> [Last seen 05 January 2023].
3. Net Lawman, 'What is meant by "security" on a secured loan'. <https://www.netlawman.co.uk/ia/security > [Last seen 03 January 2023].
4. Nigeria Law Claz, 'Capacity to Contract'. <https://nigerianlawclaz.blogspot.com/2017/07/capacity-to-contract.html> [Last seen 06 January 2023].

A CRITICAL LEGAL ANALYSIS OF COMMERCIAL BANK MONEY

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ABSTRACT

Because of the role that commercial banks play in today's financial and banking system, this article discusses the activity of commercial banks with regard to how money (commercial bank money) is created. By exploring the nature of the fractional reserve banking system, this article establishes that commercial banks are not mere financial intermediaries but rather exclusive money creators. A critical legal analysis of this money creation process concludes, with solid supporting arguments, that commercial bank money is riddled with legal violations and harmful socioeconomic effects, which are inevitably borne by the individual and society in the form of 'privatizing the profits of money creation' and 'socializing the losses and its outrageous financial burden'.

KEYWORDS: Commercial banks, Fractional reserve banking, Legal Analysis, Money creation

INTRODUCTION

The fact that things are scarce everywhere is, for us as humans, the most fundamental economic reality of our existence. We don't have enough resources to accomplish all of our goals. Time is limited, and so are all other available resources. This compels us to carefully and wisely choose how to use (or not use) these resources. The use of all means of action is basically governed by the law of diminishing marginal value**,** which stipulates that the marginal value (relative importance) of any unit of an economic good for its owner decreases with the control and acquisition of a greater overall supply of this good, and vice versa. For example, the marginal value of a sip of water (additional) is very different for a person stranded in a desert than for the same person diving and swimming in a lake. Therefore, the creation (production) of additional units of money makes money less valuable for the owners of these additional units, especially when compared to all other goods and services. Consequently, buyers of goods and services will tend to pay more in exchange for these goods and services; in turn, sellers of these goods and services will tend to demand higher money compensations. In short, money generation results in a propensity for prices to rise, even though this may occur gradually over time in a process that has a varied impact on each price.

To legally analyze the process of money creation in today's banking system, this article first explores the role of commercial banks by providing evidence pointing to the fact that commercial banks are not financial intermediaries but rather (*de facto*) private entities with an exclusive right (privilege) to create money out of thin air. The article adopts a descriptive-analytical approach to explore the nature of commercial bank money under fractional reserve banking as it builds its arguments and portrayal of the fractional reserve system on previous empirical research backed with assertions of experts and practitioners in the field of finance and banking. After that, the research paper delves into the discussion with a critical analysis of this money creation or production process from different legal perspectives. The article concludes, with irrefutable supporting arguments, that commercial bank money is blatantly harmful to the individual and society, with many legal violations at its core.

Some of the most influential and pertinent previous research on the subject came from Huerta de Soto[1] (2006) and Hulsmann[2] (2008); they both offer comprehensive analysis in their legal examination of the fractional reserve banking system, Bagus & Howden, (2010[3], 2011[4]) contributed to the subject by arguing against free banking as it is conceptualized by the likes of Selgin[5] (1988), who in turn responded to their arguments (2011) with his rebuttal[6] (article). My article builds and expands on the works mentioned above by delving, with new perspectives and arguments, deeper into the nature of this process of money creation by commercial banks to expose its inherent socio-economic and legal harms and defects that essentially constitute blatant violations of the legal framework.

What is money? And how is it created (commercial bank deposit money)?

Most attempts to define money focused on its functions. It is anything that is generally accepted by law in the fulfillment of obligations and is used as an intermediary in the exchange, as a unit of account, as a store of value, and as

1 J. Huerta de Soto, *Money, Bank Credit, and Economic Cycles,* Ludwig Von Mises Institute, Auburn, AL., 2006.

2 J. G. Hulsmann, *The Ethics of Money Production,* Ludwig Von Mises Institute, Auburn, AL., 2008.

3 P. Bagus & D. Howden, 'Fractional Reserve Free Banking: Some Quibbles.' *Quarterly Journal of Austrian Economics,* vol. 13, no. 4, 2010, pp. 29-55, <https://mpra.ub.uni-muenchen.de/79590/1/MPRA_paper_79590.pdf> [Last seen 15 December 2022].

4 P. Bagus & D. Howden, 'Unanswered Quibbles: George Selgin Still Gets It Wrong With Fractional Reserve Free Banking', *Revista Procesos de Mercado*, vol. 8, no. 2, July 2011, pp. 83-111, <http://dx.doi.org/10.52195/pm.v8i2.248>

5 G, Selgin, *The Theory of Free Banking: Money Supply under Competitive Note Issue*, Rowman and Littlefeld, New Jersey, 1988.

6 G, Selgin, 'Mere Quibbles: Bagus and Howden's Critique of The Theory of Free Banking', April 4, 2011, <http://dx.doi.org/10.2139/ssrn.1800813>

a tool for settling deferred or future payments. Scitovsky argues that money *"is a difficult concept to define, partly because it fulfills not one but three functions, each of them providing a criterion of moneyness ... those of a unit of account, a medium of exchange, and a store of value".*[7] Standard textbooks define money as any medium that is commonly considered to have the following three properties: (1) store of value, which allows money holders to conserve purchasing power over time; (2) unit of account, which serves as a reference in which the value of goods and services is measured; and (3) medium of exchange, which makes it ideal to settle transactions.[8]

For this research, I will include the definition of the form of money that this paper's discussion part will revolve around; commercial bank money (deposit money). The portion of the total money stock held by non-bank agents in the form of electronic bank deposits is what we call commercial bank money. While keeping system-wide money stocks constant, bank customers (commercial bank money holders) turn their commercial bank money into physical cash back and forth (similar to transferring funds electronically across banks). So when banks lend money (granting a loan), they create a deposit (money). Therefore, lending adds to the bank's total money stocks, while loan repayments destroy its total money stocks accordingly. In contrast, non-bank lending refers to a transfer of (already) existing legal money stocks from one economic agent to another. Hence, through a debt, one economic agent subtracts from its money holding and adds to another's.[9]

First, I must briefly tackle Fractional Reserve Banking, as it is an essential component of all today's modern economies. The practice of lending out most, but not all, of the deposits held by bankers (institutions) was first developed in Europe in the 16th century and has been followed ever since. To protect the bank in the event that many or all of its depositors demanded cash at the same time, the practice of holding a fraction in reserve was initially instituted. Fractional reserve banking allows banks to "create money" through lending, thus increasing the money supply during periods of economic expansion and growth, whether it is mandated by caution or a system of banking regulations. The majority of economics textbooks assert that banks "create" money. "*Eighty percent of the bank deposits are loaned out, but they're still considered as being 'in the bank".*[10]

Throughout the era of gold trading, Goldsmiths observed that not everyone demanded their deposits simultaneously, which essentially opened the door for fractional banking to exist. People received promissory notes whenever they deposited their silver and gold coins at goldsmiths. Later, the notes were recognized as a valid medium of exchange, and their owners used them in commercial transactions. The goldsmiths understood that not every saver/depositor would withdraw his deposits at the same time because depositors used the notes directly in trade. Therefore, goldsmiths started issuing loans and bills with high interest rates along with the storage fee they were charging the deposits. Eventually, the goldsmiths turned from being safe-keepers of valuables to interest-paying and interest-earning banks. Later, history revealed that whenever the note-holders lost faith in the goldsmiths, they would withdraw all their deposits simultaneously, leaving the bank (goldsmith) insolvent due to the lack of reserves to support the mass withdrawals. This prompted governments to develop laws to establish a central institution (agency) to control and regulate the banking industry. In this

7 T. Scitovsky, *Money and the Balance of Payments*, 1st edn, Routledge, 1969, p. 1, <https://doi.org/10.4324/9781315438924>

8 N.G. Mankiw, *Macroeconomics,* 7th edn, Worth Publishers, New York, 2010, pp. 80-81.

9 M. Gross & C. Siebenbrunner, 'Money Creation in Fiat and Digital Currency Systems', *IMF Working Paper*, WP/19/285, December 2019, pp. 8-9, <https://doi.org/10.5089/9781513521565.001>

10 Foundation For Teaching Economics, 'Activity 6: Show Me the Money! A Fractional Reserve Banking Simulation', *fte* [website], <https://www.fte.org/teachers/teacher-resources/lesson-plans/efiahlessons/show-me-the-money-activity/> [Last seen 13 December 2022].

regard, Sweden established the first central bank in 1668, and the rest of the world followed. Central banks became in charge of regulating commercial banks, setting reserve requirements, and, more importantly, they became the lender of last resort to any commercial bank affected by banks runs.[11]

Professor Salerno testified before the U.S. house of representatives and had this to say when asked about fractional reserve banking: "*Fractional reserve banking occurs when the bank lends or invests some of its deposits payable on demand and retains only a fraction in cash reserves, hence the name "fractional reserve banking". All U.S. banks today engage in fractional reserve banking.*"[12] Similarly, Professor Cochran stated, "*Fractional reserve banks developed from two separate business activities: banks of deposit, or warehouse banking, where banks offering transaction service for a fee; and banks of circulation or financial intermediaries. Circulation banking, if clearly separated from deposit banking, reduces transaction costs and enhances the efficiency of capital markets, leading to more savings, investment, and economic growth. Fractional reserve banking combined these two types of banking institutions into one: a single institution offering both transaction services and intermediation services. With the development of fractional reserve banking, money creation--either through note issue or deposit expansion--and credit creation became institutionally linked. Banks create credit if credit is granted out of funds especially created for this purpose. As a loan is granted, the bank prints bank notes or credits the depositor on account. It is a creation of credit out of nothing. Created credit is credit granted independently of any voluntary abstinence from spending by holders of money balances*".[13]

Some economics textbooks claim that commercial banks must hold only a fraction of customer deposits as reserves and may use the rest to grant loans to borrowers. However, when awarding loans, commercial banks merely accept promissory notes in exchange for credit that they deposit (digitally) in the borrower's account. Hence, deposits to the borrower's account, as opposed to giving loans in the form of cash or currency, are part of the process banks use to create money. Because of this, whenever a bank grants a loan, it generates new money, increasing the total amount of money in circulation. For instance, when a person takes out a $100,000 mortgage loan, the bank credits the borrower's account with the appropriate amount rather than handing him currency or cash equal to the loan's value.[14]

In an attempt to defend fractional reserve banking and commercial bank money, Rendahl and Freund said: *"In recent years, some have claimed that banks create money 'ex nihilo'. This column explains that banks do not create money out of thin air. From an economic viewpoint, commercial banks create private money by transforming an illiquid asset (the borrower's future ability to repay) into a liquid one (bank deposits)".*[15] Notice how they considered 'someone's ability to repay in the future' an illiquid asset, I am not going to focus on this debatable claim but rather examine how they portrayed the granting of a loan as an exchange of a borrower's promise to pay back in the future for what they considered a liquid asset 'bank deposits'. This begs the question: where did the bank get the liquid asset? Only three possibilities are conceivable in this context; a) prior to the borrower's demand for the loan. The bank

11 Corporate finance institute team, 'Fractional Banking', *Corporatefinanceinstitute* [website], <https://corporatefinanceinstitute.com/resources/economics/fractional-banking/> [Last seen 28 December 2022].

12 J. T. Salerno, 'Fractional Reserve Banking and The Federal Reserve: The Economic Consequences of High-Powered Money', *Hearing Before The Subcommittee on Domestic Monetary Policy and Technology of The Committee on Financial Services*, U.S. House of Representatives, 112th Congress, 2nd Session, June 28, 2012, <https://www.govinfo.gov/content/pkg/CHRG-112hhrg76112/html/CHRG-112hhrg76112.htm> [Last seen 21 November 2022).

13 Ibid, J. P. Cochran.

14 Corporate finance institute team, Para. 4.

15 P. Rendahl & L. B. Freund, 'Banks do not create money out of thin air', *Centre for Economic policy research cepr* [website], 14 December 2019, <https://cepr.org/voxeu/columns/banks-do-not-create-money-out-thin-air> [Last seen 17 December 2022].

already had the money in its possession (bank's liquid money – i.e. investors/savers money deposited with the bank), b) the bank created the money demanded by the borrower 'instantly' as soon as he approached it for the loan (computer inputs into the borrower's deposit account) and c) the bank turned the borrower's promise (ability) to pay in the future into an instant liquid asset (deposit money) which is exactly similar to what Rozeff[16] tried to argue in his defense of the fractional reserve banking by claiming that when banks grant loans they create new money in the form of a purchase of the borrower's IOU in exchange of the bank's IOUs, so ultimately the money in this magical context belongs to the borrower in the first place and yet the bank loaned him 'his own future money' with an obligation of him relinquishing the same amount of money to the bank in the future (plus interest)!! So the granted loan is basically computer inputs banks add to the borrower's account. It is like 'the bank' saying *I will lend you money that I don't have (did not exist until you (the borrower) demanded it) because I have a right and privilege (by law) to create it (computer inputs) as soon as you demand it (need it). I am exchanging (trading) something that do not exist (new deposit money) for another thing that do not exist yet 'today', which is your ability (promise) to pay in the future*. How can this not be creating money out of nothing?! Moreover, they cannot explain where did they get the liquid asset (bank deposits), as their premise would only make sense if the liquid asset they were referring to came from savings/investments (i.e., saving deposits), which in reality does not.

So are commercial banks financial intermediaries? Do they create money out of thin air? Werner[17] (2014) (2014) examined the three hypotheses (theories) that are recognized in the literature. The financial intermediation theory of banking contends that banks are simply intermediaries, gathering deposits to be lent out like other non-bank financial institutions. The fractional reserve theory of banking holds that while individual banks are merely financial intermediaries and cannot create money, they do so through systemic interaction as a group. The third theory, known as the "credit creation theory of banking," holds that every single bank can create money "out of nothing" when it extends credit. Which of the theories is correct has significant ramifications for research and policy. Unexpectedly, no empirical study has, up until now, tested the theories, despite the ongoing controversy. Werner carried out an empirical test whereby a loan is taken (borrow money) from a cooperating bank while its internal records are being scrutinized and monitored to determine whether the bank transferred funds from other accounts—within or outside the bank—or if they were created from scratch when making the loan available to the borrower. For the first time using empirical evidence, Werner's study proved that banks individually create money out of thin air. The banks independently create (in his own words) the "fairy dust" that serves as the money supply. According to Werner's study, customer deposits are accounted for on the financial institution's balance sheet. The financial intermediation theory, which contends that banks are not unique and are essentially undifferentiated from non-bank financial institutions that must keep customer deposits off the balance sheet, conflicts with the empirical evidence provided by Werner's study. While non-bank financial institutions record customer deposits off their balance sheet, banks treat customer deposits very differently. Werner discovered that the bank treats customer deposits as a loan to the bank, which is why they are listed under the heading "claims by customers." This concords with the legal analysis of the demand deposit (current account) I previously conducted[18] (2022). Therefore, only

16 M. Rozeff, 'Rothbard on Fractional Reserve Banking: A Critique', *The Independent Review,* vol. 14, no. 4, 2010, p. 500, <https://www.independent.org/pdf/tir/tir_14_04_02_rozeff.pdf> [Last seen 20 September 2022].

17 R. A. Werner, 'Can banks individually create money out of nothing? — The theories and the empirical evidence', *International Review of Financial Analysis*, vol. 36, 2014, pp. 1-19, <http://dx.doi.org/10.1016/j.irfa.2014.07.015>

18 M. A. Benlala, 'A Scrutiny of The Demand Deposit (Cur-

the credit creation theory or the fractional reserve theory of banking can reconcile and make sense of these findings.

The following statements are some valuable quotes from past and current literature:

Schumpeter (1912): *"It is much more realistic to say that the banks 'create credit', that is, that they create deposits in their act of lending, than to say that they lend the deposits that have been entrusted to them. And the reason for insisting on this is that depositors should not be invested with the insignia of a role which they do not play. The theory to which economists clung so tenaciously makes them out to be savers when they neither save nor intend to do so; it attributes to them an influence on the 'supply of credit' which they do not have."*[19]

Keynes (1930): *"... [a bank] may itself purchase assets, i.e. add to its investments, and pay for them in the first instance at least, by establishing a claim against itself. Or the bank may create a claim against itself in favour of a borrower, in return for his promise of subsequent reimbursement; i.e. it may make loans or advances."*[20]

Minsky (1986): *"Money is unique in that it is created in the act of financing by a bank and is destroyed as the commitments on debt instruments owned by banks are fulfilled. Because money is created and destroyed in the normal course of business, the amount outstanding is responsive to the demand for financing. [.] Banking is not money lending; to lend, a money lender must have money. The fundamental banking activity is accepting, that is, guaranteeing that some party is creditworthy. [...] When a banker vouches for creditworthiness or authorizes the drawing of checks, he need not have uncommitted funds on hand. He would be a poor banker if he had idle funds on hand for any substantial time. In lieu of holding non-income-earning funds, a banker has access to funds. Banks make financing commitments because they can operate in financial markets to acquire funds as needed; to so operate, they hold assets that are negotiable in markets and hold credit lines at other banks."*[21]

Berry et al. (2007): (The Bank of England Quarterly Bulletin): *"When banks make loans, they create additional deposits for those that have borrowed the money."*[22]

Constâncio (2011): (Vice President, the European Central Bank, 2010-18): *"It is argued by some that financial institutions would be free to instantly transform their loans from the central bank into credit to the non-financial sector. This fits into the old theoretical view about the credit multiplier according to which the sequence of money creation goes from the primary liquidity created by central banks to total money supply created by banks via their credit decisions. In reality the sequence works more in the opposite direction with banks taking first their credit decisions and then looking for the necessary funding and reserves of central bank money."*[23]

King (2012): (Governor, the Bank of England, and Chairman, the Monetary Policy Committee, 2003-13): *"When banks extend loans to their customers, they create money by crediting their customers' accounts."*[24]

Turner (2013): (Chairman, Financial Services Authority, UK, 2008-13): *"Banks do not, as too many textbooks still suggest, take deposits of existing money from savers and lend it out to borrowers: they create credit and money ex nihilo – extending a loan to the borrower and si-*

rent Account) through the Lenses of Law And Islamic Jurisprudence', *Law and World*, vol. 8, no. 4, December 2022, pp. 16-33, <https://doi.org/10.36475/8.4.2>

19 J. Schumpeter, *The Theory of Economic Development,* Harvard University Press, Massachusetts, 1949, pp. 97-98.

20 J. M. Keynes, *A Treatise on Money,* Macmillan and Co., London, 1930, p. 21.

21 H. P. Minsky & H. Kaufman, *Stabilizing an unstable economy*, Vol. 1, McGraw-Hill, New York, 2008, pp. 256, 278.

22 S. Berry, R. Harrison, R. Thomas & I. Weymarn, 'Interpreting movements in broad money', *Bank of England Quarterly Bulletin Q* 3, 2007.

23 V. Constancio, 'Challenges to monetary policy in 2012', *Speech at 26th International Conference on Interest Rates,* Frankfurt am Main, 8 December 2011, p. 5, <https://www.bis.org/review/r111215b.pdf> [Last seen 28 November 2022].

24 M. King, 'Speech to the South Wales Chamber of Commerce at the Millennium Centre', Cardiff, October 23rd, 2012.

multaneously crediting the borrower's money account. That creates, for the borrower and thus for real economy agents in total, a matching liability and asset, producing, at least initially, no increase in real net worth. But because the tenor of the loan is longer than the tenor of the deposit – because there is maturity transformation – an effective increase in nominal spending power has been created."[25]

Bank of England (2014): *"One common misconception is that banks act simply as intermediaries, lending out the deposits that savers place with them... rather than banks lending out deposits that are placed with them, the act of lending creates deposits — the reverse of the sequence typically described in textbooks... Whenever a bank makes a loan, it simultaneously creates a matching deposit in the borrower's bank account, thereby creating new money."*[26] So the Bank of England has come forward clearly in support of the credit creation theory.

Bundesbank (2017): *"Bank loans to non-banks are the most important money-creating transaction in terms of quantity...long-term observations have found that lending is the most significant factor propelling monetary growth."*[27]

THE LEGAL ANALYSIS

After establishing that banks are not financial intermediaries by putting forward irrefutable economic arguments and empirical evidence asserting that they do create money (out of thin air) in reality, let us delve into the interlocked socioeconomic and legal aspects of these findings. The legal doctrines that support and justify fractional reserve banking have not been founded on previously established legal precepts that gave rise to specific legal acts. Instead, they have been drafted and set *ex post facto.* It was crucial for the banks and their advocates to find sufficient legal grounds to preserve the network of vested interests that fractional-reserve banking generates "for them" overall.[28]

First, the acts of using depositors' money and/or issuing deposit receipts for a greater amount than is deposited share a common trait with all other illegal acts of misappropriation, which have always been the focus of doctrinal analysis by criminal law specialists. Because of this, the similarities between the two sets of actions are so striking that theorists could not remain unmoved by this legal inconsistency. Unsurprisingly, significant efforts have been made to justify what is utterly unjustifiable: to make it acceptable and legal from the perspective of general legal principles to misappropriate funds deposited for safekeeping and to issue 'unbacked' deposit receipts without having the corresponding deposited money in reserves. There are two main categories of doctrinal justifications for using a fractional reserve in a demand deposit (current account). The first group sought to resolve the conflict by characterizing the demand deposit as a loan; this has been extensively discussed and refuted based on Issues pertaining to the debtor-creditor relationship, the standard-form contract and the contractual discretionary power, the duplicate property titles and availability of funds, the distinguishable economic and legal purposes of the two contracts.[29] The second

25 A. Turner, 'Credit, Money and Leverage', *Conference on: Towards a Sustainable Financial System*, Stockholm School of Economics, September 12th, 2013, p. 3, <https://cdn.evbuc.com/eventlogos/67785745/turner.pdf> [Last seen 13 December 202]).

26 Bank of England, 'Money creation in the modern economy', *Quarterly Bulletin*, Q1, 2014, <https://www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/2014/money-creation-in-the-modern-economy.pdf> [Last seen 13 December 2022].

27 Bundesbank, 'The role of banks, non-banks and the central bank in the money creation process', Monthly Report 2017, <https://www.bundesbank.de/resource/blob/654284/df66c4444d065a7f519e2ab0c476df58/mL/2017-04-money-creation-process-data.pdf> [Last seen 13 December 2022].

28 Huerta de Soto, p 115.

29 For more on this particular issue, you can see M.A. Benlala, 'The Characterization of the Demand Deposit as a Loan under Fractional Reserve Banking: A Critical Legal Analysis,' *Perspectives of Law and Public Administration*, vol. 11, no. 4, December 2022, pp. 638-649, <https://www.adjuris.ro/revista/articole/An11nr4/16. M.A. Benlala.pdf> [Last seen 03 January 2023].

group of theorists recognize the fundamental distinctions between the loan and demand deposit contracts but concentrate their focus on their newly developed legal concept of "availability" and maintain that this notion must be interpreted "in a loose manner," which means that bankers should only be required to make their investments "in a prudent manner" and to always comply with regulations and bank legislation. The notion of availability being redefined is irrelevant and a mere leap into the unknown.[30] First, banks continue to treat deposits like loans and invest them in private business deals accordingly, while depositors continue to make deposits with the primary goal of transferring custody and safekeeping of their money while maintaining its full availability. In other words, the forced attempt to redefine the idea of availability did not make the legal logic's inconsistency any less apparent. Moreover, from the point of view of private law, the general guideline of "prudent" use of resources combined with the "calculation of probabilities" is far from sufficient to guarantee that fractional reserve banks will always be able to honor all repayment requests. Au contraire, it carelessly starts a process that, at least once every few years, inevitably leads to a loss of trust in banks and a massive, unforeseen withdrawal of deposits.[31] Availability has also been depicted as the compliance of the private banks with the entire structure of government banking legislation. However, this is another blatantly artificial requirement that aims to shift the unsolved problem with regards to legally defining the fractional-reserve bank deposit contract from the field of private law (where the demand deposit cannot be a loan) to the field of public law; namely the administrative law with its pure voluntarism by which the authorities can legalize any institution, no matter how legally outrageous and immoral it may be. So the fact that fractional-reserve banking has not been able to survive without a government-created central bank, which would impose legal-tender regulations and force the acceptance of paper money with the aim to produce out of thin air the liquidity needed in emergencies, serves as conclusive evidence for everything stated above. Only an organization that complies with general legal principles can endure in the marketplace without the recourse to privileges and government support and funding, but only by virtue of individuals' voluntary use of its services.[32]

We can understand why, in his critique of the history of the government's management of money, Hayek points to the fact that today's banking structure may appear sustainable despite its juridical and legal inconsistency. This is because of the support it presently obtains from the government and an official central banking institution that produces the liquidity necessary to bail out banks in need (in return for their adherence to an intricate web of administrative law made up of countless, enigmatic, and ad hoc directives).[33]

At the end of the day, there has never been a formal justification for fractional reserve banking concerning demand deposits. This explains the constant ambiguity in doctrines regarding this type of bank contract, the vain attempts to avoid transparency and accountability in how it is handled, the general lack of accountability, and, more importantly, the support and backing it has received from a central bank that implements the rules and provides the liquidity required at all times to prevent the collapse of the entire system (since on its own, fractional reserve banking would perish and cannot possibly survive economically).[34] This blatant vulnerability of the entire banking system was the main underlying reason for the creation of central banks (with the principal role of providing the system with "liquidity" in times of need and distress). However, the central bank's "liquidity pool" only works for a while. After a while, commercial banks get used to the easy supply of money in dire situations and start losing

30 Huerta de Soto, p 117.

31 Ibid, p. 151.

32 Ibid, p. 152.

33 F. A. Hayek, *The Fatal Conceit: The Errors of Socialism,* 1st edn, Routledge, 1990, pp. 103-104.

34 Huerta de Soto, p 118.

the fear of such situations. Consequently, they start issuing "unbacked" titles on an even larger scale. Obviously, this does not solve the problems of fractional reserve banking, it rather creates moral hazard and inflates those problems.[35] Even if bankers maintain a sufficiently high reserve ratio, a banking system based on the demand deposit with a fractional reserve causes bankers to go bankrupt and unable to uphold their commitment to return deposits on demand. History revealed[36] that this is precisely the reason the vast majority of private banks that did not fully abide by the safekeeping obligation (full reserve banking) ultimately failed. This situation prevailed up until bankers demanded the establishment of a central bank.[37] Bankers use demand deposits to create bank deposits (money) and in turn, loans (purchasing power transferred to borrowers, whether businessmen or consumers) from nothing. The problem is that these deposits/loans do not result from any real increase in voluntary saving by non-bank agents (individuals in the society).

My previous research about the characterization of the demand deposit as a loan concords with Werner's empirical study, in which he discovered that the bank treats customer deposits as a loan to the bank, this act is legally unfounded. Ignoring the rule of *contra proferentem* and the fact that the demand deposit contract is a standard-form contract (contract of adhesion) when explaining the depositor-banker (bank-customer) relationship, the radically distinct and different purposes of the two contracts, the conundrums of duplicate property titles and the continuous full availability of the deposited sum of money to the depositary all point to the refutation of the loan theory.[38]

As a result, there are always inevitable negative social consequences when traditional property rights principles are violated. For instance, although the return of deposits might be thus "guaranteed," at least theoretically (even when using a fractional reserve ratio if we assume that the central bank continuously lends its support), what cannot be guaranteed is that there won't be a significant change in the monetary units' purchasing power relative to the initial deposit. In fact, since the development of modern monetary systems, we have experienced severe chronic inflation that has significantly reduced the purchasing power of the monetary units returned to depositors, with only minor variations in severity from year to year. Furthermore, we have recurrently experienced the cyclical, successive phases of artificial booms and economic recessions marked by high unemployment rates that are inherently detrimental to our societies' orderly, steady growth. This proves the validity of Hayek's seminal theory that whenever a traditional rule of conduct is broken, whether through direct government compulsion, the granting of special governmental privileges to certain people/organizations, or a combination of both (as is the case with the monetary demand deposit under a fractional reserve), sooner or later harmful, unintended consequences follow, which essentially damage and disrupt the spontaneous social processes of cooperation. The 'traditional' legal rule of conduct broken in banking is that in the demand deposit contract, custody, safekeeping, and continuous availability and access to funds can only take the form of a continuous 100% reserve requirement. Therefore, any use of this money, especially to make loans (whether directly under the fractional reserve theory or indirectly under the money/credit creation theory), constitutes a breach of this principle and an act of misappropriation. What seems obvious now is that bankers and authorities realized that by sacrificing and ditching traditional legal principles in the demand deposit, they could reap the benefits of a highly lucrative

35 J. G. Hulsmann, 'Banks Cannot Create Money', *The Independent Review,* vol. 5, no 1, summer 2000, p. 105, <https://www.independent.org/pdf/tir/tir_05_1_hulsman.pdf> [Last seen 17 December 2022].

36 For details see Huerta de Soto, p 69.

37 M. N. Rothbard, *The Case Against the Fed,* Ludwig Von Mises Institute, Auburn, AL., 2007, pp. 90-106.

38 For further extensive analysis see M. A. Benlala, 'A Scrutiny of The Demand Deposit (Current Account) through the Lenses of Law And Islamic Jurisprudence', *Law and World*, vol. 8, no. 4, December 2022, pp. 23-29, <https://

doi.org/10.36475/8.4.2>

financial activity, even though a lender of last resort, or a central bank, was needed to provide the necessary liquidity in times of difficulty (history and experience showed that sooner or later, these times always returned). However, until the theory of money and capital theory made enough advancements in economics and was able to explain the cyclical emergence of economic cycles, the damaging social effects of this privilege granted only to bankers were not fully understood.[39] From a legal 'contractual' and economic perspective, the Austrian School, in particular, has taught us that the contradictory goal of providing a contract made up of essentially incompatible elements and intended to combine the benefits of loans with those of the conventional monetary 'demand' deposit, which entails the withdrawal of funds at any time, is bound to result in unavoidable spontaneous adjustments sooner or later. The first signs of these adjustments are increases in the money supply (due to the creation of loans that do not correspond to actual increases in voluntary saving), inflation, a generalized misallocation of the limited productive resources available to society at the microeconomic level, and in the prolonged run recession, the correction of errors and flaws in the productive system brought on by credit expansion, and endemic unemployment.[40]

Going back in history, when the formulation of the theory of money first emerged, theorists only acknowledged the immorality of creating unbacked banknotes and the significant harm it results in. They initially failed to recognize or acknowledge the exact same effects of the massive creation of loans backed by deposits created from nothing. This explains why the Peel Act of July 19, 1844, which served as the basis for all modern banking systems and forbade the issuance of unbacked bills, utterly failed to achieve its goals of monetary stability and a sufficient definition and defense of citizens' property rights with regards to banking. It failed because lawmakers could not grasp that bank deposits with a fractional reserve have the same effects (from an economic standpoint) and nature as unbacked banknotes. The long-standing practice of issuing unbacked "secondary" deposits was thus permitted to continue because the Act did not outlaw fractional reserve banking. The issuing of secondary deposits preceded the fiduciary issue of banknotes. However, only the latter was "very tardily" made illegal because the former was inherently ambiguous and complex. Although it has the same economic characteristics (nature) and adverse effects as the issuance of unbacked banknotes outlawed in 1844 by the Peel Act, the monetary bank 'demand' deposit contract with a fractional reserve is still legal in today's all societies.[41] Moreover, in the UK, for instance, the 'Client Money Rules' of the FCA, which are regarded as the cradle of financial regulations and modern banking, require all firms that hold client money (under CASS 7.4 Segregation of client money) to segregate such funds from the firm's assets and liabilities by holding them in accounts that maintain their separation.

"Depositing client money CASS 7.4.1 R

A firm, on receiving any client money, must promptly place this money into one or more accounts opened with any of the following:

(1) a central bank;

(2) a CRD credit institution;

(3) a bank authorised in a third country;

(4) a qualifying money market fund".[42]

Therefore, customer deposits must be held in segregated accounts at banks or money market funds of unlicensed entities. In other words, the firm's client assets, including those of non-bank financial intermediaries, continue to be an off-balance sheet, and the depositor continues to be the actual legal owner. However, with a banking license, things are entirely different. Under the section "Depositaries" 1.4.6 Rule stipulates that the above-mentioned client money chapter does not apply to a depositary acting

39 Huerta de Soto, pp. 153-154.

40 Ibid, 154-155.

41 Ibid, pp. 252-253.

42 Financial Conduct Authority, Client asset sourcebook (CASS), FCA PRA handbook, 2013, <http://fshandbook.info/FS/html/FCA/> [Last seen 27 December 2022].

as such. This is further explained in chapter 7:

"*Chapter 7 Client Money Rules*

Credit Institutions and Approved Banks

7.1.8 R The client money rules do not apply to a CRD credit institution in relation to deposits within the meaning of the CRD held by that institution.

7.1.9. G If a credit institution that holds money as a deposit with itself is subject to the requirement to disclose information before providing services, it should, in compliance with that obligation, notify the client that: (1) money held for that client in an account with the credit institution will be held by the firm as banker and not as trustee (or in Scotland as agent); and (2) as a result, the money will not be held in accordance with the client money rules".[43]

Therefore, this exemption of banks from the client money rule allows them to create credit and thus money. They can continue keeping customer deposits on their balance sheet because of this exemption. In other words, once a depositor places money in a bank, he is no longer the actual owner of that money. Instead, he is considered one of the many banks' creditors to whom it owes money. Additionally, it can create a new "customer deposit" that wasn't actually paid in but was instead reclassified as an account payable liability of the bank resulting from a loan contract.[44] The legal question that arises here is whether the Client Money Rules were intended for this use and whether this reclassification of general "accounts payable" items as specific liabilities designated as "customer deposits," without any actual depositing on the part of the customer "borrower" is a lawful and legitimate act.

Moreover, one must be baffled by the misconception that money titles and an increase in these titles are the same as money and an increase in money. The reality is that, unlike an increase in the amount of money (i.e., gold) or an increase in the number of titles to money backed by a corresponding increase in the amount of money, any increase in the volume of money titles without a corresponding increase in the amount of money entails simultaneous possession of the same amount of money by multiple people (holders of both types of titles –backed with money and unbacked), which is physically impossible. Every redemption of a fiduciary title, whether it is into money or another form of real property, involves an act of illicit appropriation because the amount of money is unchanged, and all money currently in existence must be owned by someone (at that given moment). For the same reasons and in the same way that titles to cars are 'and should be' backed by cars, titles to money are 'and should be' backed by money. This is merely in accordance with the nature of property and property titles. Hence, a title to money backed by assets other than money is, in essence, a contradiction in terms. Its issuance and use represent an objective misrepresentation, just like the issuance of a title to a car backed by assets other than a car (a bicycle, for instance). Deposit 'receipts' contracts cannot be made into debt, and fractional reserve agreements are ethically unacceptable because they go against (deny) the very nature of things. Therefore, any such contract is –a priori – invalid. More importantly, contracts acknowledge and transfer existing property rather than creating a new property. The theory of property must therefore come first before discussing contracts, just like in Rothbard's ethical framework. Property and property theories are prerequisites for contracts and contract theory constraints, respectively. In other words, rather than the other way around, the range of possible (valid) contracts is constrained and limited by the quantity (stock) of existing property and the nature of things.[45] A startling lack of understanding exists that a fractional reserve banking agreement implies no less of an impos-

43 Ibid.

44 R. A. Werner, 'How do banks create money, and why can other firms not do the same? An explanation for the coexistence of lending and deposit-taking', *International Review of Financial Analysis*, vol. 36, December 2014, p. 75, <https://doi.org/10.1016/j.irfa.2014.10.013>

45 H. Hoppe, J. G. Hulsmann & W. Block, 'Against Fiduciary Media', *Quarterly Journal of Austrian Economics*, vol. 1, no. 1, 1998, p. 23, <https://cdn.mises.org/qjae1_1_2.pdf> [Last seen 27 December 2022].

sibility and fraud than, for instance, the trade of squared circles. Fractional reserve banking involves an even greater degree of impossibility. A necessary and categorical conclusion is that fractional reserve banking contracts are impossible. That is to say, it is implausible (praxeologically impossible) for a bank and its customer to decide to convert money substitutes (banknotes, demand deposit accounts-claims to present –available – money in his account) into debts. Of course, they could assert or certify that they are debts, just as someone could argue that triangles are squares. But their claims would be demonstrably false. Money substitutes (titles to present money) would continue to be distinct from debt claims (titles to future goods 'not yet existing') and equity claims (titles to existing property other than money), just as triangles would continue to be triangles and differ from squares. Any other claim would be an objective misrepresentation of reality rather than a change of it.[46]

The following illustration will clarify the legal misconduct and infringements involved in this process:

When depositing his money, instead of receiving a debt or equity title from bank **B**, money depositor **A** receives a claim to current 'available' funds. That is to say, **A** does not relinquish ownership of the money he deposited (as would have been the case with a debt or equity claim received from **B**). Now, while **B** treats **A's** money deposit as a loan rather than a bailment (a demand deposit) and records it as an asset on its balance sheet (which is offset by an equivalent amount of outstanding demand liabilities), **A** retains ownership and title to the money deposit (the sum of the money deposited). At first glance, this might seem like a meaningless accounting trick, but it actually involves lying and misrepresenting the real state of affairs. The financial accounts of both **A** and **B** count the same quantity of money simultaneously among their own assets, making them financial impostors. And despite being fraudulent, it would not be as significant if the legal misconduct stopped here. Because The moment **B** behaves as though the situation is exactly as it appears on his balance sheet—that is, as though the bank owns the money deposited and is only required to redeem outstanding (inherently larger than its reserves) money deposit receipts upon demand—then what was merely a misrepresentation becomes a misappropriation. Accordingly, If **B**, lends money in the form of issuing additional 'unbacked' money deposit receipts and lends these to some third party **C** (who is expected to repay principal and interest in the future), the bank commits unjustified appropriation because what **B** lends out to **C**—whether money or titles to money—is not its (**B's**) own property but that of someone else (**A's**). Fractional reserve banking is inherently fraudulent because the title that was transferred from **B** to **C** concerns a property that **B** does not own in the first place. Contrary to mainstream belief, fraud or a breach of contract does not only occur when **B**, the fractional reserve bank, is unable to accommodate all redemption requests as they come in. Instead, each time **B** fulfills its obligations related to redemption, fraud is also committed. Because whenever **B** converts a fractionally covered banknote into money or when a note holder takes possession of the property, it does so with money that belongs to someone else. For example, if **B** redeems **C's** note into money, it does so with money that belongs to **A**, and if **A** wants his money too, **B** pays him with money that belongs to **D** ... and it goes on and on. Therefore, proponents of fiduciary media and fractional reserve banking would have to contend that there is no breach of contract if **B** can fulfil its obligations using another party's property (money). According to Rothbard's contract theory, people can only enter into agreements involving transferring their property. Eventually, even when it is successfully implemented, fractional reserve banking involves contracts involving the transfer of other people's property by its very nature. In light of this, the title-transfer contract theory is fundamentally (inherently) incompatible with the issue of fidu-

46 Ibid, p. 26.

ciary media.[47]

Murray Rothbard regarded fractional reserve banking as a fraud based on his thorough study of property rights theory and ethics over a long time. A number of fundamental misconceptions and issues plague proponents of money creation under fractional reserve banking, including confusion about the difference between property and property titles, the impossibility of something (property) having multiple owners at once, the logical precedence of property and property theory over contract and contract theory, and the requirement of fulfilling contractual obligations with owned property and not with someone else's property. Voluntary agreements do not define nor make for a valid contract. Legally valid contracts are agreements about the transfer of real property; As a result, the range of legal contracts is restricted first and foremost by the nature of things and property and only then by agreement. Hoppe eloquently explained: "*Freedom of contract does not imply that every mutually advantageous contract should be permitted.... Freedom of contract means Instead that A and B (B and C in the above example) should be allowed to make any contract whatsoever regarding their own properties, yet fractional reserve banking involves the making of contracts regarding the property of third parties.*"[48]

Treating money, which is property, and money substitutes (banknotes and commercial bank deposit money), which is property titles, as the same thing is illogic because changes in the supply or demand of one have different consequences to the other. Proponents of money creation in the form of bank deposit money under fractional reserve banking argue that fiduciary titles to money (titles backed by assets other than money) are money, so following the same logic (as an illustration), they should say that fiduciary titles to cars (titles backed by assets other than cars) are cars!! For the sake of argument (example), we are willing to dismiss the previous illogic. I want to discuss the impact of how changes in the supply or demand for cars differ from changes brought about by changes in the supply or demand for titles to non-existing (unchanged) quantities of cars on car owners' wealth position. In the first scenario, if the price of cars decreases due to a greater supply, all current car owners continue to possess the same amount of property (cars) without any changes. Nobody's physical property is reduced. Likewise, the physical quantity of cars owned by any current owner is unaffected if the price drops due to buyers offering only smaller amounts of other goods in exchange for cars. In stark contrast, in the second scenario, there is a quantitative reduction of some current owners' physical property due to the issuance and sale of additional titles to an unchanged number or quantity of cars. It does more than just affect the value: the purchasing power of car titles will drop. In the process, the issuer and seller of fiduciary car titles misappropriate other people's cars. So it does have a tangible physical impact. In exchange for an empty property title, the issuer/seller of fiduciary titles takes possession of other people's property without giving up any of his own.[49] In short, banks can only transfer or redistribute existing property from one person to another when they issue fiduciary notes because no contract can increase the amount of existing property. That is why every time they purchase a piece of existing property in exchange for the titles to a piece of non-existing property, the bank and its client (borrower) are committing an act of fraudulent appropriation because they have agreed to falsely represent themselves as the owners of a quantity of property that neither of them owns and does not exist.

Thus, the conclusion is the same; issuing fiduciary media in fractional reserve banking is ethically unjustified whether we look at it through the lens of the title transfer theory of contract or the principle of freedom of contract.

From a socioeconomic perspective, the na-

47 Ibid, p. 27.

48 H. Hoppe, 'How is Fiat Money Possible? – or, The Devolution of Money and Credit', *Review of Austrian Economics*, vol. 7, no. 2, 1994, p. 70.

49 H. Hoppe, J. G. Hulsmann & W. Block, p. 30.

ture of fiduciary media (as titles to non-existing quantities of money property or titles to money covered by things other than money) can only result in ongoing income and wealth redistribution. Real wealth (property) is transferred and redistributed in favor of the issuing bank and the initial and early recipients and sellers of this 'fiduciary' money, and at the expense of its late or never receivers and sellers, as the unbacked money substitutes circulate from the issuing bank and its borrower clientele outward through the economy and in so doing inevitably raise the price of gradually more and more goods. Rothbard explains that the new money's initial recipients profit the most, the subsequent recipients profit slightly less, etc., until the halfway point, at which each receiver loses more as he waits for the new money. For the first individuals, selling prices soar while buying prices remain the same (to a great extent); however, after a while, buying prices increase while selling prices remain unchanged.[50]

Furthermore, this money creation process inherently contradicts Say's law: No one can demand something without supplying something else, and no one can demand or supply more of one thing (good) without reducing their demand or supply of another good. All goods (any property) are acquired and bought with other goods. This does not apply to the supply and demand of fiduciary notes. The increased demand for money is met without the demander requesting less of anything else or the supplier providing less of anything else. Wishes, not actual demand, are satisfied through the issuance and sale of fiduciary media. Consequently, the property is appropriated (demanded and satisfied) without supplying other property in exchange. As a result, what is happening here is an act of wrongful appropriation rather than a market exchange (which is governed by Say's law). This is why, following the lead of Rothbard, Hoppe criticized the Keynesian view regarding the relationship between the demand for money and savings (actual loanable funds) by pointing out that:

"*Not-spending money is to purchase neither consumer goods nor investment goods.... Individuals may employ their monetary assets in one of three ways: they can spend them on consumer goods; they can spend them on investment or they can keep them in the form of cash. There are no other alternatives.... The consumption and investment proportion, that Is, the decision of how much to spend on consumption and how much on investment, is determined by a person's time preference, that is, the degree to which he prefers present consumption over future consumption. On the other hand, the source of his demand for cash is the utility attached to money, that is, the personal satisfaction derived from money in allowing him immediate purchases of directly or indirectly serviceable consumer or producer goods at uncertain future dates. Accordingly, if the demand for money increases while the social stock of money is given, this additional demand can only be satisfied by bidding down the money prices of non-money goods. The purchasing power of money will increase. The real value of individual cash balances will be raised, and at a higher purchasing power per unit money, the demand for and the supply of money will once again be equilibrated. The relative price of money versus non-money will have changed. But unless time preference is assumed to have changed at the same time, rear consumption and real investment will remain the same as before: the additional money demand is satisfied by reducing nominal consumption and investment spending in accordance with the same preexisting consumption and investment proportion, driving the money prices of both consumer as well as producer goods down, and leaving real consumption and investment at precisely their old levels*".[51]

Simply put, Hoppe's analysis proves that accommodating an increased demand for money by issuing fiduciary credit (bank deposit money) is unjustifiable.

The other burdensome effect that this nefarious activity inflict on the individual and society is inflation. The debasement was the common

50 M. N. Rothbard, *Man, Economy, and State,* Ludwig Von Mises Institute, Auburn, AL., 1993, p. 851.

51 H. Hoppe, pp. 72-73.

type of inflation before the advent of banking; it is a unique method of modifying precious metal coins. When a coin is debased, one of two things can happen: (a) the fine metal content is decreased without the imprint changing, or (b) a higher nominal value is imprinted on the coin. Its absence in more recent times can only be explained by the fact that modern debasement perpetrators could rely on the significantly more effective inflationary techniques of fractional-reserve banking and paper money.[52] Now if titles to money (unbacked by real money), which are false money certificates, were the same as real money, there would be no need for governments to 'legalize' them by declaring these fractional reserve banknotes (debased coins) to be a means of payment that must be legally accepted at par by every creditor.[53] These money certificates (and created bank deposit money) are subject to legal tender laws, which establish a legal equivalence between the certificates and the underlying money and a requirement that creditors accept the certificates up to their full nominal value. As a result, legal tender laws frequently lead to social unrest and economic inequality. So, the combination of legalizing false money certificates and granting exclusive monopolistic privileges (of creating money out of thin air) to fractional reserve banks is essentially enforced, reinforced, and protected by legal tender laws.[54] This Legal-tender protection for fractional-reserve banking results in a downward spiral. Every banker has a reason (incentive) to minimize his reserves while maximizing (inflating) the number of notes he issues**.** Now the technical superiority of this form of fiat inflation has led governments to stop debasing their currency and start working with fractional-reserve banks. It made it possible for governments to raise additional funds that they were unable to get through taxation of their citizens while also keeping their other sources of revenue intact and their creditors happy, and without getting their countries in trouble with the international division of labor or having to eliminate competition in the banking industry. From the government's perspective, these were remarkable benefits. The situation appeared somewhat less appealing from the standpoint of the average citizen. The result is too many resources were sucked from the rest of the economy by the inflation of banknotes, just like it would have been the case with debasement, if not more. Additionally, it established a long-term alliance between governments and banks. Fractional reserve banking greatly exacerbates the inflationary effects of legal tender laws. Legal tender regulations, on the other hand, are a blessing (advantageous) for fractional-reserve banking. It has to be noted that the same argument goes for both money creation theories discussed in the previous section of this article (Werner's empirical study findings); fractional reserve theory and credit creation theory. Therefore, similar considerations come into play when legal tender privileges are granted to credit money with its inherent default risk. When market participants accept it by law in lieu of natural money, the operation of the market process is perverted, and a race to the bottom sets in. Like all forms of inflation, fractional-reserve banking and credit money supported by legal-tender privileges result in unlawful income redistribution. Since it produces significantly more inflation than any other institutional setup, the quantitative impact can be huge. Inflation-profiting fractional reserve banks have a strong economic incentive to extend their note issues, which increases the likelihood of redemption failure. Even if a banker is generally prudent, the competition from other bankers forces him to increase the number of notes he is issuing to avoid losing market share to these rivals. Thus, the situation arises where the amount of money needed for redemption exceeds the amount of money in the bank vaults. These demands are beyond the bank's capacity. It declares bankruptcy. Due to the numerous connections between banks and other companies, the failure of one bank would

52 J. G. Hulsmann, *The Ethics of Money Production,* pp. 89-90.

53 Ibid, p. 109.

54 Ibid. p. 131-132.

probably result in the collapse of the entire fractional-reserve banking sector. Throughout the history of fractional-reserve banking, this has frequently been the case.[55] The problem is when fractional reserve banks make their banknotes and credit money available through the credit market**,** credit-seeking entrepreneurs are unaware that inflation, not additional savings, is the source of the additional credit they are taking, and this, in turn, makes the interest rate likely to be lower than it would be in an equilibrium market**.** And since the interest rate is a key factor in determining the prospects of business projects, there are suddenly a lot more investment projects that appear to be profitable even though they are not (in reality). Consequently, when entrepreneurs and business owners begin making large-scale investments in these projects, a crisis is pre-programmed and bound to occur. The completion of these projects would require resources that are simply nonexistent. These required resources exist only in the minds of business owners and entrepreneurs who have mistaken more credit for more savings. Additionally, a sizable portion of the resources that are actually available are actually being wasted on unachievable projects. There are not only transitory short-term production interruptions when the crisis first sets in. Instead, a lot of projects must be completely abandoned, and the resources and time invested in them are most likely lost forever.[56]

Redemption is one more fundamental problem related to bank deposit money creation. The issuer will be unable to comply if enough customers choose to demand redemption at the same time. He declares bankruptcy. From the viewpoint of a bankrupt person and his business partners, it is understandable to consider bankruptcy a negative occurrence that should be prevented if possible. However, from a larger social viewpoint, bankruptcy is beneficial as it fulfills a crucial social necessity for preserving the available capital stock. From my previous analysis and discussion, banks' bankruptcy might result from fraud, insolvency, or illiquidity. In each scenario, bankruptcy is justified and beneficial from a socio-legal and economic perspective. **A)** Fraud: The distinguishing trait of a fraudulent company is that it never intended to generate income or revenue from actual products or production. It was only interested in channeling the money from lured investors (and the public/society) into its own pockets. The investors and the public have suffered harm. However, because such fraud depletes capital without replenishing it, it also has a negative social impact by dwindling the productivity of human labor and future wages. A prime example of this is fraudulent fractional reserve banking. Its natural death is bankruptcy, which should be followed by criminal prosecution of the banker. **B)** Insolvency: An insolvent company unintentionally uses more resources than it generates. Even though it benefits some stakeholders of the insolvent company in the short term, such as employees and suppliers, it also impoverishes society. An insolvent company can only continue to operate for any time if it has access to another entity's capital. This person is typically the owner, though he may also be the creditor occasionally. The insolvent company comes to a halt when these people refuse to contribute more money to it. The machines and other capital goods are sold to other firms for less than their initial actual book value, and the fired employees go on to work for other companies at lower pay rates. This is bankruptcy. It eliminates wasteful, and consequently socially undesirable, firms and forces their stakeholders—laborers, and investors—to allocate their financial and material resources to other businesses that offer lower rewards but greater output. **C)** Illiquidity: unlike an insolvent company, an illiquid company does not experience a fundamental mismatch between sales proceeds and cost expenditure. A temporary financial mismanagement issue is "just" the issue. Legalized fractional reserve banking is a prime example. A temporary mismatch between payments and receipts is what banks put forward when faced with large-scale redemp-

55 Ibid, p. 138-140.

56 Ibid, p. 141.

tion demands (for example, during a run). If given time (days, weeks, months), they could sell their assets for cash, thus complying with the redemption demands. First of all, it is typically impossible for fractional-reserve banks to sell their assets at book value in a reasonable amount of time, especially if the run doesn't just affect their bank but also spreads to other banks. The money prices of all assets plummet more or less sharply below their book values during an economy-wide run, which historically has been a common phenomenon. Then, no bank can sell its assets for book value. As a result, the whole (artificial) distinction between insolvency and illiquidity disappears. And even if we assume for the sake of the argument that the bank's assets could be sold in a relatively reasonable amount of time at or above book value, the economic case for the strict application of bankruptcy law is still valid. Therefore, at the very least, the banker must be viewed as a bad manager of his clients' funds, and the purpose of bankruptcy would be to remove him from a position of authority for which he is unqualified. So rather than encouraging and promoting qualified bankers and banking, exempting fractional reserve banking from bankruptcy law does the opposite. Worse than that, legislators have frequently allowed fractional reserve banks to suspend payments. However, "suspended payments" is a rather blatant euphemism, as is the case so frequently in politics. Although it seems kind and open-handed, the truth is very different. In reality, the government no longer enforces payments promised to creditors by the privileged banks, but it still does so for payments that these banks collect from their debtors. In one breath, the bank that halts payments takes the incongruous position of insisting on receiving payments in fulfillment of its contractual rights while simultaneously rejecting the same principle by refusing to make payments in fulfillment of its contractual obligations. A moral hazard is evident if a bank can rely on the government to approve the suspension of payments. There is less need for the bank to exercise caution and maintain high reserves. Customers of the bank will be encouraged to borrow money from a bank because they will know that the bank has the government's approval and blessing. More bankruptcies occur as a result.[57]

Since fractional reserve banks can create additional bank credit at very little cost (to no cost), they can offer credit at lower interest rates than those that would have otherwise been the norm. This, in turn, encourages the entrepreneurs to resort to created bank money (not theirs or the money from real savings) to finance through debts some ventures and projects that they otherwise would have funded with their own money or that they would not have begun at all. Business is more reliant on banks as a result of fiat inflation. Compared to a free market, credit creation inflation establishes a higher hierarchy and more centralized power. An entrepreneur is no longer considered an entrepreneur if they operate with 90% debt and 10% equity. In reality, this makes the bankers, who are the entrepreneur's creditors, the real (true) entrepreneurs because they are the ones who make all crucial decisions. Therefore, the entrepreneur becomes merely a manager or more or less a well-paid executive. The presence of central banks and paper money bailouts make debt-based financial strategies more attractive than strategies based on prior savings. Thus, fiat and credit creation inflation are detrimental to genuine prosperity because it reduces the number of genuine entrepreneurs (independent individuals who run their businesses using their funds). There are still a startlingly large number of these individuals, they can continue to exist and prosper thanks to their superior talents that match the subpar financial conditions they must contend with. Compared to their rivals, they must be more inventive and diligent. They are willing to pay whatever it takes to maintain their independence. Unlike their competitors (bankers' puppets), they typically have a stronger sense of loyalty to the family business and much more concern and

57 Ibid, p. 153-157.

care for their employees.[58] Let me just stress that money hoarding has no detrimental macroeconomic effects. Without a doubt, it does not discourage commercial investment. Hoarding makes money more valuable, increasing the "weight" of the currency units still in use. With these remaining units, any purchases of goods and services and any financially sound investments can be made. Fundamentally, there are no new resources created by inflation. It simply changes how the existing resources (already available) are distributed and allocated. They deprive companies run by entrepreneurs who operate with their own money from these resources to grant them to business executives who run companies financed with credit. This is why banks can act (grant credit) as financial intermediaries only in a natural system of money production. This means that they would only be able to lend out those sums of money that they had either saved themselves or had been saved by people and lent to them.

CONCLUSION

Nowadays, it has been established, without any shadow of a doubt, that commercial banks do, in fact, create money "out of nothing" when they extend credit and grant loans. This research backed its arguments with Werner's empirical test that confirmed the veracity of 'the credit creation theory of banking', which states that banks individually create money out of thin air. This article exposes the inherent legal violation of traditional legal principles governing property rights due to the confusion about the difference between property and property titles (acts of misappropriation), the incompatibility of the money creation process with the title-transfer theory of contract, the impossibility of something (property) having multiple owners at once, the logical precedence of property and property theory over contract and contract theory and the requirement of fulfilling contractual obligations with owned property and not with someone else's property, and socioeconomic issues related to money debasement and inflation (legal tender and deposit money laws). Therefore, this research paper provides an extensive critical analysis of the numerous legal violations and harmful socioeconomic effects that are inevitably (and ultimately) borne by the individual and society in the form of 'privatizing the profits of money creation' and 'socializing the losses and its outrageous financial burden'.

58 Ibid, p. 180-181.

BIBLIOGRAPHY:

1. Bagus, P. and Howden, D., 'Fractional Reserve Free Banking: Some Quibbles.' *Quarterly Journal of Austrian Economics,* vol. 13, no. 4, 2010, pp. 29-55, <https://mpra.ub.uni-muenchen.de/79590/1/MPRA_paper_79590.pdf>
2. Bagus, P. and Howden, D., 'Unanswered Quibbles: George Selgin Still Gets It Wrong With Fractional Reserve Free Banking', *Revista Procesos de Mercado*, vol. 8, no. 2, July 2011, pp. 83-111, <http://dx.doi.org/10.52195/pm.v8i2.248>
3. Bank of England, 'Money creation in the modern economy', *Quarterly Bulletin*, Q1, 2014, <https://www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/2014/money-creation-in-the-modern-economy.pdf>
4. Benlala, M. A., 'A Scrutiny of The Demand Deposit (Current Account) through the Lenses of Law And Islamic Jurisprudence', *Law*

and World, vol. 8, no. 4, December 2022, pp. 16-33, <https://doi.org/10.36475/8.4.2>

5. Benlala, M. A., 'The Characterization of the Demand Deposit as a Loan under Fractional Reserve Banking: A Critical Legal Analysis,' *Perspectives of Law and Public Administration*, vol. 11, no. 4, December 2022, pp. 638-649, <https://www.adjuris.ro/revista/articole/An-11nr4/16.%20M.A.%20Benlala.pdf>
6. Berry, S., Harrison, R., Thomas, R. and Weymarn, I., 'Interpreting movements in broad money', *Bank of England Quarterly Bulletin Q* 3, 2007.
7. Bundesbank, 'The role of banks, non-banks and the central bank in the money creation process', Monthly Report 2017, <https://www.bundesbank.de/resource/blob/654284/df66c4444d065a7f519e2ab-0c476df58/mL/2017-04-money-creation-process-data.pdf>
8. Constancio, V., 'Challenges to monetary policy in 2012', *Speech at 26th International Conference on Interest Rates,* Frankfurt am Main, 8 December 2011, <https://www.bis.org/review/r111215b.pdf>
9. Corporate finance institute team, 'Fractional Banking', *Corporatefinanceinstitute* [website], <https://corporatefinanceinstitute.com/resources/economics/fractional-banking/>
10. Financial Conduct Authority, Client asset sourcebook (CASS), FCA PRA handbook, 2013, <http://fshandbook.info/FS/html/FCA/>
11. Foundation For Teaching Economics, 'Activity 6: Show Me the Money! A Fractional Reserve Banking Simulation', *fte* [website], <https://www.fte.org/teachers/teacher-resources/lesson-plans/efiahlessons/show-me-the-money-activity/>
12. Gross M. and Siebenbrunner, C., 'Money Creation in Fiat and Digital Currency Systems', *IMF Working Paper*, WP/19/285, December 2019, <https://doi.org/10.5089/9781513521565.001>
13. Hayek, F. A., *The Fatal Conceit: The Errors of Socialism,* 1st edn, Routledge, 1990.
14. Hoppe, H., 'How is Fiat Money Possible? – or, The Devolution of Money and Credit', *Review of Austrian Economics*, vol. 7, no. 2, 1994, pp. 49-74.
15. Hoppe, H., Hulsmann. J. G. and Block, W., 'Against Fiduciary Media', *Quarterly Journal of Austrian Economics*, vol. 1, no. 1, 1998, pp. 19-50, <https://cdn.mises.org/qjae1_1_2.pdf>
16. Huerta de Soto, J., *Money, Bank Credit, and Economic Cycles,* Ludwig Von Mises Institute, Auburn, AL., 2006.
17. Hulsmann, J. G., 'Banks Cannot Create Money', *The Independent Review,* vol. 5, no 1, summer 2000, pp. 101-110, <https://www.independent.org/pdf/tir/tir_05_1_hulsman.pdf>
18. Hulsmann, J. G., *The Ethics of Money Production*, Ludwig Von Mises Institute, Auburn, AL., 2008.
19. Keynes, J. M., *A Treatise on Money,* Macmillan and Co., London, 1930.
20. King, M., 'Speech to the South Wales Chamber of Commerce at the Millennium Centre', Cardiff, October 23rd, 2012.
21. Mankiw, N. G., *Macroeconomics,* 7th edn, Worth Publishers, New York, 2010.
22. Minsky, H. P. and Kaufman, H., *Stabilizing an unstable economy*, Vol. 1, McGraw-Hill, New York, 2008.
23. Rendahl, P. and Freund, L. B., 'Banks do not create money out of thin air', *Centre for Economic policy research cepr* [website], 14 December 2019, <https://cepr.org/voxeu/columns/banks-do-not-create-money-out-thin-air>

24. Rothbard, M. N., *Man, Economy, and State,* Ludwig Von Mises Institute, Auburn, AL., 1993.
25. Rothbard, M. N., *The Case Against the Fed,* Ludwig Von Mises Institute, Auburn, AL., 2007.
26. Rozeff, M., 'Rothbard on Fractional Reserve Banking: A Critique', *The Independent Review,* vol. 14, no. 4, 2010, pp. 497-512. <https://www.independent.org/pdf/tir/tir_14_04_02_rozeff.pdf>
27. Salerno, J. T. and Cochran, J. P., 'Fractional Reserve Banking and The Federal Reserve: The Economic Consequences of High-Powered Money', *Hearing Before The Subcommittee on Domestic Monetary Policy and Technology of The Committee on Financial Services*, U.S. House of Representatives, 112th Congress, 2nd Session, June 28, 2012, <https://www.govinfo.gov/content/pkg/CHRG-112hhrg76112/html/CHRG-112hhrg76112.htm>
28. Schumpeter, J., *The Theory of Economic Development,* Harvard University Press, Massachusetts, 1949.
29. Scitovsky, T., *Money and the Balance of Payments*, 1st edn, Routledge, 1969, <https://doi.org/10.4324/9781315438924>
30. Selgin, G., 'Mere Quibbles: Bagus and Howden's Critique of The Theory of Free Banking', April 4, 2011, <http://dx.doi.org/10.2139/ssrn.1800813>
31. Selgin, G., *The Theory of Free Banking: Money Supply under Competitive Note Issue*, Rowman and Littlefeld, New Jersey, 1988.
32. Turner, A., 'Credit, Money and Leverage', *Conference on: Towards a Sustainable Financial System*, Stockholm School of Economics, September 12th, 2013, <https://cdn.evbuc.com/eventlogos/67785745/turner.pdf>
33. Von Mises, L., *The Theory of Money and Credit*, Liberty Classics, Indianapolis, Ind., 1980.
34. Werner, R. A., 'Can banks individually create money out of nothing? — The theories and the empirical evidence', *International Review of Financial Analysis*, vol. 36, 2014, pp. 1-19, <http://dx.doi.org/10.1016/j.irfa.2014.07.015>
35. Werner, R. A., 'How do banks create money, and why can other firms not do the same? An explanation for the coexistence of lending and deposit-taking', *International Review of Financial Analysis*, vol. 36, December 2014, pp. 71-77, <https://doi.org/10.1016/j.irfa.2014.10.013>

LEGAL ASPECTS OF DIGITAL DIPLOMACY

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ABSTRACT

The rapid development of digital technologies and the pandemic experience at the international and national levels have made it clear that every day all key areas are undergoing digital transformation. From this perspective, the diplomatic service is no exception. Information and communication technologies have become the tools or means by which, at little or less cost and within a given time frame, a country can ensure the implementation of its foreign policy priorities. Furthermore, the possibilities of the digital world are not limited by borders. Therefore, the purpose of this article is to explore the legal aspects of digital diplomacy, especially in the context of the Vienna Convention on Diplomatic Relations of 1961[1]. The authors of the Convention could not foresee that digital platforms could be created and foreign policy goals could be implemented remotely between representatives of states by using information and communication technologies.

KEYWORDS: Digital Diplomacy, Digital Transformation, Digital Policy

1 Vienna Convention on Diplomatic Relations, (1961). United Nations, Treaty Series, vol. 500, p.2.

INTRODUCTION

In the wake of the development of a modern type of diplomacy – digital diplomacy – we can say that innovative diplomatic services of states require a greater emphasis on the possibilities of information and communication technologies. Digital advances will contribute to developing automated approaches in the decision-making process. It will promote achieving foreign policy goals timely without physical representation in different parts of the world. This process is also important for the improvement of electronic management systems for high-level events.

For the first time in the history of diplomacy, the Danish government appointed a tech ambassador in 2017. A digital ambassador aims to strengthen ties with the IT industry and encourage investment in Denmark from tech companies.[2] The President of the French Republic Emmanuel Macron named David Martinon as an ambassador for digital affairs. The functions of an ambassador include digital governance, international negotiations and the development of cooperation with digital companies.[3] In 2020, Austria appointed its first tech ambassador.[4] Estonia also has an ambassador for cybersecurity. Overall, the number of countries with representatives in this area is increasing.

The development of digital platforms and the establishment of virtual embassies will give ministries of foreign affairs the ability to communicate with different types of audiences. Countries, especially small states, can better present their foreign policy agenda to a wider audience if they properly plan and execute social media campaigns. Furthermore, online ministerial meetings, summits, conferences and forums in bilateral and multilateral formats have been held in response to the pandemic.

In light of the above, based on the Vienna Convention on Diplomatic Relations terms – digital diplomacy and virtual embassy should be defined for states to create modern international legal norms for digital diplomatic relations. This international legal framework will facilitate the development of appropriate national laws for the diplomatic services of states.

DIGITAL FOREIGN POLICY FRAMEWORKS

To develop a digital foreign policy framework, some states have adopted digital foreign policy strategies. Such documents outline countries' approaches to digital issues and digitization concerning their foreign policies. They also include areas of policy priorities regarding digitization and how these priorities are pursued as part of the country's foreign policy.[5] At the same time, the absence of a comprehensive digital foreign policy strategy does not indicate that a country is paying less attention to digital topics in its foreign policy. For example, although Germany does not have a comprehensive digital foreign policy strategy document, 'cyber foreign policy' is listed as one of the key German foreign policy topics on the website of its ministry of foreign affairs. Also, Estonia and Canada refer to digital topics in their respective foreign policy strategies.[6]

As for digital foreign policy strategies, in 2020, Switzerland adopted its digital foreign policy strategy 2021-2024. According to this document, a global phenomenon such as digitalisation requires an international set of rules, comprising both legally binding and non-binding instruments. International treaties and cus-

2 Sanchez Alejandro W., (2018). The Rise of the Tech Ambassador. <https://www.diplomaticourier.com/posts/the-rise-of-the-tech-ambassador> [Last seen March 3, 2023].

3 Hussein Dia, (2018). Tech + Diplomacy = TechPlomacy; Cities Drive a New Era of Digital Policy and Innovation. <https://www.indrastra.com/2018/01/tech-diplomacy-cities-new-era-digital-policy-innovation-004-01-2018-0036.html> [Last seen March 3, 2023].

4 Tech Diplomacy. <https://www.open-austria.com/tech-diplomacy> [Last seen March 3, 2023].

5 Andjelkovic, K., Hone, K., Perucica, N., Digital Foreign Policy. <https://www.diplomacy.edu/topics/digital-foreign-policy/> [Last seen March 7, 2023].

6 Id.

tomary international law are legally binding instruments. Non-binding instruments include soft law best practices, technical standards and benchmarks.[7]

Switzerland supports capacity-building in the areas of digital technologies and cybersecurity. States must have the necessary capacities to receive benefits from digitalisation. These capacities include both the ability to develop strategies and policies as well as specific technical expertise. In this regard, Switzerland works closely with multilateral partners.[8]

Switzerland as a highly developed state can benefit from the opportunities that digitalisation opens up in foreign markets as well as access to high-quality digital services. Digitalisation is shaping global supply chains, in which the Swiss economy is highly integrated. Simultaneously, it is equally important that personal data and intellectual property are properly protected and that companies and infrastructures are protected against cyberattacks and industrial espionage. Regional approaches to the regulation of the digital space, in particular at a European level, also play a significant role for Switzerland, which has an interest in ensuring that divergent standards do not create barriers to trade. It is essential to put in place transparent structures for the use and forwarding of data to enable the development of innovative applications and increase added value as well.[9]

As one of the world's most digitised countries, Denmark has a strong foundation for engaging with international technological development. The strategy for Denmark's tech diplomacy focuses efforts towards a democratic and safe technological future. According to the document, there is no question that the tech sector must be regulated – the question is how to regulate it.[10] The tech giants should uphold their part of the social contract. Denmark will help drive forward the global discussion on challenges related to tech companies' data-driven and algorithmic business models and push for international solutions including on the issue of taxation of the digital economy – an issue where Denmark is actively engaged in negotiations internationally.[11]

Investments in research and development of new technologies are a key competitive parameter that is shifting the geopolitical balance of power. Many countries are using digital tools to advance foreign policy objectives in the grey area between war and peace. Digital platforms connect different actors and have provided an unprecedented number of people globally with the opportunity to express their views. Denmark's tech diplomacy contributes to domestic discussions with perspectives and knowledge on global trends from the frontier of technology development.[12]

Digital technology is a key issue for French foreign policy and public action as a whole, be it for the success of France's economy in the global competitive sphere or for conditions of stability, security and power on a global scale. The French international digital strategy focuses on three key pillars: governance, the economy and security. It is a reference framework and diplomatic roadmap. This strategy enables France to promote a world which associates freedom and respect for standards.[13]

The Dutch Digitalisation Strategy is a government-wide approach. The Netherlands aims to become a digital frontrunner in Europe – a testbed for companies from all over the world, where they can develop and test new applications. When things change rapidly, as in the digital transformation, it is important to get – and keep – everyone on board. That applies to people in the labour market and to society as a whole. This means that everyone needs to learn the basics at an early age and that people need to keep their skills up-to-date throughout their

7 Digital Foreign Policy Strategy, (2020). The Federal Council, Switzerland, p.8.
8 Id., p. 9.
9 Id., p. 10.
10 Strategy for Denmark's Tech Diplomacy 2021-2023, (2021)., Ministry of Foreign Affairs of Denmark, pp.2-3.
11 Id., p. 7.
12 Id., p. 6.
13 France's International Digital Strategy. <https://www.diplomatie.gouv.fr/en/french-foreign-policy/digital-diplomacy/france-s-international-digital-strategy/> [Last seen March 10, 2023].

lives in response to new types of jobs.[14] The digital transformation is changing the Dutch economy and society, but common values remain the same. The government sees opportunities but also understands the concerns that people have about digitalisation. In this regard, the government will continue to preserve values and fundamental rights in the digital age, including safety, security, the rights to privacy and self-determination, fair competition, solidarity and good governance.[15]

In view of the above, states have created a digital foreign policy framework by the adoption of the country's digital foreign policy strategy and digitalisation strategy of the state. These documents define the role of information and communication technologies in implementing foreign policy priorities. They represent roadmaps for the digital transformation of diplomatic services and determine values that should be protected by state bodies in this process. At the same time, digital foreign policy frameworks of states pay special attention to the challenges of digital technologies and define some ways to overcome obstacles including protecting critical information infrastructures from cyberattacks. However, they could not provide a legal understanding of digital diplomacy. States can clarify legal aspects of digital foreign policy based on the development of the international legal framework for digital diplomacy.

PRACTICAL STEPS FOR DIGITAL TRANSFORMATION OF DIPLOMATIC SERVICES

One of the practical steps for the digital transformation of diplomatic services was to establish a new diplomatic position – a tech ambassador or an ambassador for digital affairs and cybersecurity. In the case of Denmark, the tech ambassador has a global mandate and is supported by a team based in Silicon Valley, Copenhagen and Beijing. The presence in Silicon Valley is particularly important for representing Denmark and building bridges to the tech industry. Denmark's tech diplomacy focuses on six defined roles: 1) Representation of the Danish Government and central administration concerning the global tech industry; 2) Collection of knowledge about technological developments and support of innovation, 3) Building coalition with global stakeholders, including other countries, companies, business organizations, multilateral organizations and civil society; 4) Contributing expertise and insight to the Danish public debate on technological development and the influence of the tech industry; 5) Developing Policy through the collection of knowledge and international perspectives on technological development; 6) Promoting Danish tech exports and foreign investment in Denmark.[16]

French digital diplomacy is structured around five major themes: 1) Promoting and supervising the development of innovations and the control of breakthrough technologies, in particular, artificial intelligence; 2) Ensuring the security and international stability of the digital space; 3) Protecting human rights, democratic values and the French language in the digital world; 4) Strengthening the influence and attractiveness of French digital actors; 5) Contributing to Internet governance.[17] The French ambassador for digital affairs focuses on the following functions: advocating broad governance that is faithful to the diversity of actors in the digital sphere (states, private sector, civil societies); supporting the concepts of privacy; advocating fair platforms that are transparent and act responsibly; protecting intellectual property rights without restraining innovation; participating in the development of the European tech ecosystem (supporting industries,

14 Dutch Digitalization Strategy. <https://www.nederlanddigitaal.nl/english/dutch-digitalisation-strategy> [Last seen March 10, 2023].

15 Id.

16 See supra note 10, p. 10.

17 France Diplomacy. <https://www.diplomatie.gouv.fr/en/french-foreign-policy/digital-diplomacy/news/article/2019-annual-report-of-the-ambassador-for-digital-affairs> [Last seen March 12, 2023].

education and training, fair taxation rules, funding the innovation, ensuring equal broadband coverage); promoting European standards in international negotiations (Internet governance, trade agreements); supporting the French Tech network, that highlights tech ecosystems throughout the country and in hubs abroad.[18]

After a major cyber-attack in 2007, Estonia prioritized cybersecurity. The NATO Cooperative Cyber Defense Center of Excellence was established with the support of the Alliance in Tallinn one year after the attack.[19] Since 2018, Estonia has had an ambassador at Large for Cyber Diplomacy. Cyber ambassador is supported by the Cyber Diplomacy Department, established in 2019 at the Ministry of Foreign Affairs of Estonia. Safeguarding Estonia's cyberspace depends on the capability to secure critical information systems and a global, open, free, stable and secure cyberspace that is subject to existing international law and norms for responsible state behaviour. Cyber diplomacy is mainly focused on state behaviour in cyberspace and the principles and norms that apply to states in cyberspace. Cyber diplomats also contribute to the fight against international cybercrime and the protection of free and open internet.[20] The United States, Australia, the UK, France and Germany already have named top diplomats in charge of cyber policy.[21]

Based on the analysis of international practice, the functions of ambassadors for digital and cyber affairs may be: 1) Protecting human rights and democratic values in the digital world; 2) Constant communication with information and communication technology and data-oriented companies, including transnational technology companies. As a result of regular communication with them, attracting investments and offering to these companies the opening of representative offices and data centers in the sending state based on international investment agreements concluded at the bilateral level; 3) Representation of their countries in international bilateral and multilateral forums of digital transformation, cybersecurity and participation in determining issues related to digital, cyber policy; 4) Establishing close cooperation with senior diplomats of other countries with a similar mandate, relevant representatives of international organizations, both global and regional levels, including with the UN Secretary-General's Envoy on technology; 5) Obtaining and analyzing information about international trends in digital transformation and sectoral issues of implementation of digital governance, both in terms of foreign policy and education, health, agriculture, tourism, energy and other priority areas for the country; 6) Proactively offering partners initiatives on developing digital skills and protecting critical information systems in the sending state; 7) Promoting enhancement of the digital capacities in the diplomatic service of the sending state; 8) Preparing a strategic vision for the use of artificial intelligence and the development of automated approaches in the diplomatic missions; 9) Developing the concept of virtual embassies in cooperation with host states and technology companies; 10) Participating in international forums and other activities with the focus on defining cybersecurity issues and strengthening cyber capacities.

In terms of the digital transformation of diplomatic services, artificial intelligence can play a significant role, especially in cases of analyzing big data timely. Artificial intelligence is a real instrument to provide automatic routine tasks in the field of foreign policy. More precisely, robots as re-programmable multi-purpose devices designed for the handling of materials and tools for the processing of parts or spe-

18 France unveiled its international strategy for digital affairs and appointed a dedicated ambassador. <https://ife.ee/en/international-strategy-for-digital/> [Last seen March 12, 2023].

19 Stupp, C., (2018). Estonia's First Cyber Ambassador Seeks to Improve Global Cyber Defense. <https://www.wsj.com/articles/estonias-first-cyber-ambassador-seeks-to-improve-global-cyber-defense1536358734> [Last seen March 14, 2023].

20 Cyber Diplomacy, Ministry of Foreign Affairs of the Republic of Estonia. <https://www.vm.ee/en/international-law-cyber-diplomacy/cyber-diplomacy> [Last seen March 14, 2023].

21 See supra note 19.

cialized devices utilizing varying programmed movements to complete a variety of tasks.[22] Regardless of opportunities, artificial intelligence may pose some risks and challenges. Because of the nature of AI ethical and legal questions can be pondered especially in terms of protecting human rights. The EU has a clear vision of the development of the legal framework for AI. Particularly, the EU AI Act proposed a regulatory framework for Artificial Intelligence. It focuses on the following 4 specific objectives: 1) ensure that AI systems placed on the Union market and used are safe and respect existing law on fundamental rights and Union values; 2) ensure legal certainty to facilitate investment and innovation in AI; 3) enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems; 4) facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation.[23] It is essential to take into consideration that AI applications should be provided with objective information. Based on such information, robots would be able to make the right conclusions and assist diplomats. Chatbots are integral parts of the digital world and they can effectively perform automatic routine tasks for various purposes.

CONCLUSION

The development of the legal framework for digital diplomacy will generally facilitate the achievement of modern foreign policy goals more effectively and timely. Furthermore, it will enable states to obtain new functions in modern international politics. Nowadays digital components are significant elements of international politics. There are discussions of the necessity to build alliances around digital affairs. Therefore, countries need their representatives – ambassadors for digital affairs to be involved in defining priorities of international digital policy. They will contribute to creating new opportunities to respond to the demands of digital reality and determining states' new functions in the international digital order.

In addition, ministries of foreign affairs will have continuous communication with both external and internal audiences by using automated approaches, including "chatbots". Developing the concept of virtual embassies and defining related legal issues at the international level will allow states, especially small states, to establish digital diplomatic relations with any country in the world through appropriate secure programs and applications. To achieve this goal, amendments should be made to the Vienna Convention on Diplomatic Relations of 1961 which contributes to the development of diplomatic relations among nations, irrespective of their differing constitutional and social systems and creates international legal grounds for this.

Overall, in the future, the international digital system will further change traditional approaches to diplomatic services and illustrate the effectiveness of digital tools, especially in terms of improving digital rapid response capabilities.

22 Jarota, M., (2021). Artificial Intelligence and Robotization in the EU – Should We Change OHS Law? Journal of Occupational Medicine and Toxicology. p. 2.

23 Artificial Intelligence Act. (2021). Regulation of the European Parliament and of the Council. p. 3.

BIBLIOGRAPHY:

1. Andjelkovic, K., Hone, K., Perucica, N., Digital Foreign Policy. <https://www.diplomacy.edu/topics/digital-foreign-policy/> [Last seen March 7, 2023].
2. Artificial Intelligence Act. (2021). Regulation of the European Parliament and of the Council.
3. Cyber Diplomacy, Ministry of Foreign Affairs of the Republic of Estonia. <https://www.vm.ee/en/international-law-cyber-diplomacy/cyber-diplomacy> [Last seen March 14, 2023].
4. Digital Foreign Policy Strategy, (2020). The Federal Council, Switzerland.
5. Dutch Digitalization Strategy. <https://www.nederlanddigitaal.nl/english/dutch-digitalisation-strategy> [Last seen March 10, 2023].
6. France Diplomacy. <https://www.diplomatie.gouv.fr/en/french-foreign-policy/digital-diplomacy/news/article/2019-annual-report-of-the-ambassador-for-digital-affairs> [Last seen March 12, 2023].
7. France's International Digital Strategy. <https://www.diplomatie.gouv.fr/en/french-foreign-policy/digital-diplomacy/france-s-international-digital-strategy/> [Last seen March 10, 2023].
8. France unveiled its international strategy for digital affairs and appointed a dedicated ambassador. <https://ife.ee/en/international-strategy-for-digital/> [Last seen March 12, 2023].
9. Hussein Dia, (2018). Tech + Diplomacy = TechPlomacy; Cities Drive a New Era of Digital Policy and Innovation. <https://www.indrastra.com/2018/01/tech-diplomacy-cities-new-era-digital-policy-innovation-004-01-2018-0036.html> [Last seen March 3, 2023].
10. Jarota, M., (2021). Artificial Intelligence and Robotization in the EU – Should We Change OHS Law? Journal of Occupational Medicine and Toxicology.
11. Sanchez Alejandro W., (2018). The Rise of the Tech Ambassador. <https://www.diplomaticourier.com/posts/the-rise-of-the-tech-ambassador> [Last seen March 3, 2023].
12. Strategy for Denmark's Tech Diplomacy 2021-2023, (2021)., Ministry of Foreign Affairs of Denmark.
13. Stupp, C., (2018). Estonia's First Cyber Ambassador Seeks to Improve Global Cyber Defense. <https://www.wsj.com/articles/estonias-first-cyber-ambassador-seeks-to-improve-global-cyber-defense 1536358734> [Last seen March 14, 2023].
14. Tech Diplomacy. <https://www.open-austria.com/tech-diplomacy> [Last seen March 3, 2023].
15. Vienna Convention on Diplomatic Relations, (1961). United Nations, Treaty Series, vol. 500.

EUROPEANIZATION AS AN INSTRUMENT FOR GEORGIA'S DEMOCRATIZATION

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ABSTRACT

This paper reviews the European Union-Georgia relations and explores why and how the Europeanization has been a tool for Georgia's democratization. It examines the notions of Europeanization and democratization, and scrutinizes their linkage in the context of Georgia. In order to prove the research question, the research reviews several major official documents and implemented reforms, mostly in democracy, good governance, human rights, strengthening democratically accountable institutions, justice, freedom and security. The paper argues that democratization agenda has been driven by Europeanization because of three reasons: it was a legitimization factor; they had value convergence; and pragmatic reason – EU provided necessary technical expertise, knowledge and financial resources for facilitating the painful reforms and easing their transitional consequences.

KEYWORDS: Democratization, Europeanization, Georgia, Association Agreement

INTRODUCTION

Since the restoration of independence, the intensity of Georgia's European orientation has varied from government to government. However, from a historical point of view, overall, it can be said that the country has been firmly on the path of rapprochement with the West. Since 1995, all Georgian governments have chosen European integration as the foreign policy orientation (at least on rhetorical level), which was due to several major factors. The latter created a demand for European integration across the country, and the authorities used European integration to legitimize their political decisions and actions.

One such factor was the democratic development – the European Union was the main source of financial, technical and expert assistance necessary for the implementation of critical reforms. Also, the implementation of reforms was accompanied by tangible results for the population, which was an opportunity for the authorities to receive additional political dividends in the society.

During this period, Georgia has taken a long and overall quite a successful path towards the EU. The latter has had a decisive influence on the development of institutions in Georgia. With the signing of the Association Agreement in 2014, the EU, Georgia's foreign policy towards the Union and the country's European integration became an integral part of Georgia's internal policy.

By EU becoming an integral part of Georgia's polity, politics and policies, it can be said that Europeanization has become the driving force of Georgia's democratization and that the border between these two processes has actually been erased (it has becoming ever more challenging to demarcate the borders between these two processes).

Therefore, the research question is as follows – why and how Europeanization is an instrument of democratization of Georgia? To answer it, the paper analyzes official documents signed between Georgia and the EU, including the European Neighborhood Policy, its agenda and progress reports, the Association Agreement, its agenda, and speeches made by high-ranking officials.

Also, for comparing with official documents, important democratic reforms implemented in 2014-2022 are reviewed to demonstrate that Europeanization was the determinant of the democratization agenda in Georgia.

Additionally, in order to fully understand the research and its results and to correctly understand the terms used, the relevant academic literature has been studied.

Following the introduction, the second chapter is devoted to the definition, operationalization and interrelation of the concepts of Europeanization and democratization. The next chapter briefly reviews the Georgia-EU relations, as well as the tools, institutions and mechanisms necessary for the Europeanization of Georgia. The fourth chapter analyzes the relationship between Europeanization and democratization in the context of Georgia. The fifth chapter summarizes the research results, while the last section of the document is a bibliography.

In one part, the paper reviews the Europeanization instruments, institutions and structures, that is, how Europeanization is processed domestically triggered by the interaction with the Union. In another part dedicated to why Europeanization is an instrument for Georgia's democratisation, the paper argues that democratization agenda has been driven by Europeanization because of three reasons: 1) Europeanization is a legitimization factor for decision makers; 2) Europeanization and democratization has a similar value dimension and thus, complement each other in the Georgia context; 3) the European Union provided necessary political support, technical expertise, knowledge and financial resources for facilitating the painful reforms and easening their transitional consequences, be it financial or electoral, thus, adding pragmatism and feasibility to the cost and benefit calculations of the decision makers.

The paper is prepared in the frameworks of

a three-year EU Erasmus+ Jean Monnet module "Europeanization as a Tool for Democratzation of Georgia" (620916-EPP-1-2020-1-GE-EPPJMO-MODULE) managed by European University. The module aims at promoting EU knowledge among Georgian students and young academics by using interdisciplinary approaches for teaching and research with the particular focus on the EU-Georgia Association Agreement and democratization of Georgia. The entire action is designed to stimulate knowledge on the European integration process as an instrument of democratization among the students of various disciplines and ensure developing the research by the young academics. The module also includes the component of the policy dialogue on national level with academics and policy makers regarding the implementation of the current EU obligations that Georgia takes.

1. EUROPEANIZATION AND DEMOCRATIZATION

This chapter is devoted to the definition of the concepts of Europeanization and democratization. Since each of them is a rather broad term, this document will discuss only their main aspects, which are important to understand the example of Georgia.

In order to fully comprehend the Georgia's case, it is necessary to define and distinguish between the concepts and terminologies of complex fields of Europeanization and democratization, as well as to relate them to the Georgian context.

1.1. Europeanization

Europeanization has been a buzzword for Georgia for decades. It is usually understood in the society as an implementation of European values, governance and institutional systems. Indeed, Europeanization in this paper is understood as establishing a "local analogue" of the EU, adapting national social and political principles and mechanisms to the EU standards and practices.

In addition, since the inclusion of Georgia in the European Neighborhood Policy in 2004, Europeanization is associated with Georgia's European integration and the achievements on this path. In other words, this is the legislation (i.e. acquis communitaire), "ideas, norms, rules, organizational structures and procedures, behavioral patterns, [that] spread intentionally or unintentionally beyond integrated Europe", in this case in Georgia.

Europeanization as a research topic in academic scholarship has become a growth industry in EU research since the early 1990s when Central and Eastern European countries started a massive transition from communism to democracy. Researchers refered to this 'Europeanization' as a process of "EU-driven change of their political and economic systems"[1]. The understanding of Europeanisation was expanded by harmonization of Switzerland and Norway to the EU[2] as well as the transitions of the EU membership candidate states[3]. The European-

1 Matlak, M., Schimmelfennig, F. & Woźniakowski, T.P. (2018). *Europeanization Revisited: Central and Eastern Europe in the European Union*. Florence: European University Institute, p. 6.

2 Sciarini, P. (2022). How Europe hits home: Evidence from the Swiss case. *Journal of European Public Policy*, 11 (3), pp. 353-378; Fischer, M. & Sciarini, P. (2014). The Europeanization of Swiss decision-making processes. *Swiss Political Science Review*, 20 (2), pp. 239-245; Lægreid, P., Steinthorsson, R. & Thorhallsson, B. (2004). Europeanisation of Central Government Administration in the Nordic States. *Journal of Common Market Studies*, 42 (2), pp. 347-369; Lavenex, S., Lehmkuhl, D. & Wichmann, N. (2009). Modes of external governance: a cross-national and cross-sectoral comparison. *Journal of European Public Policy*, 16 (6), pp. 813-833.

3 Sedelmeier, U. (2011). Europeanisation in new member and candidate states. *Living Reviews in European Governance*, 6(1); Schimmelfennig, F. & Sedelmeier, U. (2005). "Introduction: Conceptualizing the Europeanization of Central and Eastern Europe". In: Schimmelfennig, F. & Sedelmeier, U. (*eds.*). *The Europeanization of Central and Eastern Europe*. Ithaca: Cornell University Press, pp. 1–28; Schimmelfennig, F. & Sedelmeier, U. (2004). Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe. *Journal of European Public Policy*, 11(4), pp. 661–679; Schimmelfennig, F. & Sedelmeier, U. (2020). The Euro-

ization literature was enriched by the inclusion of more distant EU neighbors in the research[4].

Schimmelfennig & Sedelmeier[5] suggest two dimensions of mechanisms of Europeanization. First, they believe Europeanization can be either EU-driven or domestically-driven. Second, they argue that institutional logics (i.e. 'logic of consequences' or 'logic of appropriateness'[6]) also influence the Europeanization process. In any way, the authors believe that the EU's impact is generated by conditionality and socialization as two main mechanisms.

First, conditionality is based on rewards/sanctions. The "EU provides non-member governments with incentives such as financial aid, market access or institutional ties on the condition that they follow the EU's demands". In the conditionality mode, transposition of norms happen because of material or social rewards. The process can be voluntary or non-voluntary – decision-makers may make certain steps without pressure or by realizing that appropriate action will be followed by unwanted EU response or consequences.

Second, socialization is about EU's effort to 'teach' a partner country those norms, values and rules that build an 'appropriate behavior'. Socialization is a long, gradual and voluntary process of persuasion during which its new participants learn, grasp the deeply rooted 'acceptable' rules, norms and values in a step-by-step manner. As Schimmelfennig puts it, socialization "comprises all EU efforts to "teach" EU policies – as well as the ideas and norms behind them – to outsiders, to persuade outsiders that these policies are appropriate and, as a consequence, to motivate them to adopt EU policies".

For instance, how is Europeanisation made on institutional level? Based on the EU pressure/impact, changes start to happen on national level – establishment and/or transformation of institutions. When an impact of Europeanisation is strong on a country, an institutional architecture is established or the current system is adapted to the new needs in the country. In order to manage the harmonization process, the country needs to transform its regulatory, institutional and legal framework into the EU analogue, harmonize its legislation to the EU acquis communitaire, etc.

Internal situation in the country has a decisive role in such transformation – national administrative culture, traditions, political setup, experience/history of statehood and other factors are critical. It is for this reason that each candidate country has its own approach and experience in the EU accession process.

Schimmelfennig[7] argues that "EU's impact in candidate countries has resulted primarily from the external incentives of accession conditionality rather than social learning or lesson-drawing". Or in other words, candidate countries strived for the EU membership and implemented relevant reforms in anticipation of the membership benefits.

1.2. Democratization

Democratization is one of the most frequently used legal and political terms in modern Georgia. In this work, democratization is seen as the establishment of democracy, the process of transition from an undemocratic political system to a democratic order.

peanization of Eastern Europe: the external incentives model revisited. *Journal of European Public Policy*, 27 (6), pp. 814-833.

4 Flenley, P. & Mannin, M. (2018). *The European Union and its eastern enighbourhood: Europeanisation and its twenty-first-century contradictions*. Manchester: Manchester University Press; Korosteleva, E., Natorski, M. & Simão, L. (2014). *EU Policies in the Eastern Neighbouhrood: The practices perspective*. Routledge.

5 Schimmelfennig, F. & Sedelmeier, U. (2004). Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe. *Journal of European Public Policy*, 11(4), pp. 661–679; Schimmelfennig, F. & Sedelmeier, U. (2005). "Introduction: Conceptualizing the Europeanization of Central and Eastern Europe". In: Schimmelfennig, F. & Sedelmeier, U. (*eds.*). *The Europeanization of Central and Eastern Europe*. Ithaca: Cornell University Press, pp. 1–28.

6 March, J. G. & Olsen, J. P. (1989). *Rediscovering Institutions: The Organizational Basis of Politics*. New York: Free Press.

7 Schimmelfennig, F. (2007). Europeanization beyond Europe. *Living Reviews in European Governance*, 7 (1), p. 8.

Democratization has its determinants and factors:

- Social determinants/internal factors (past, traditions and social norms) – democracy has a higher chance of success where there is relevant cultural and historical experience. The more democratic experience, traditions and social norms exist in a society, the greater the possibility of democratization success;
- International determinants/external factors (for instance, international intervention, Europeanization, etc.) – the process of democratization can be hindered or facilitated by international events, foreign intervention, Europeanization, etc.;
- Economic determinants (including modernization, industrialization, level of education, development) – as a rule, the more economically strong and developed a society is, the more there is a demand on the establishment of democratic institutions.

1.3. Interdependence of Europeanization and democratization

Democratization and Europeanization do not describe a static, stagnant state. On the contrary, they describe changing processes, constant renewal, constant striving for improvement.

According to the first and most important block of EU membership criteria (the so-called Copenhagen criteria), the state institutions that ensure the protection of democracy, rule of law, human rights and minority rights should function properly in accordance with European standards. Therefore, it can be said that Europeanization (the process of joining the EU) implies the democratization of the country., meaning that Europeanization and democratization (as processes) are closely related.

This was especially evident during the accession process of Central and Eastern European countries to the EU. Their path to membership involved a transition from a communist system to democracy[8]. Similarly, close relationship has existed during the already implemented or ongoing expansion of the Union to the Balkans and the East. Georgia is one of such countries.

2. EUROPEANIZATION OF GEORGIA

2.1. Europeanization of Georgia: History

The development of Georgia-EU relations was contingent upon various internal and external factors. In the periods when circumstances were promising, there was an opportunity to expand the ties. According to these windows of opportunity, the history of EU-Georgia relations can be roughly divided into three stages: 1991-2004, 2004-2013, and 2014 to date.

During all three periods, the EU had a regional approach. In particular, relations with Georgia were strengthened within a broader approach, in parallel with strengthening relations with other countries – first by using the partnership and cooperation agreements, then the European Neighborhood Policy and Eastern Partnership, and finally the Association Agreements.

2.2. 1991-2004 – Distanced Engagement

In 1991-2004, for the EU, Georgia was a geographically distant, politically unstable country located in a region with numerous conflicts. During this period, the main tool of the Union was the provision of humanitarian and technical aid[9], which may not have been impressive in absolute numbers, but it gave hope for de-

8 Emerson, M. & Noutcheva, G. (2004). Europeanisation as a Gravity Model of Democratisation. *CEPS Working Document*, 214, pp. 1-31.

9 Delcour, L. & Duhot, H. (2011). Bringing South Caucasus Closer to Europe: Achievements and Challenges in ENP Implementation. *Natolin Research Papers*, 3.

velopment to the Georgian society immersed in poverty and lawlessness.

Since 1995, Georgia has been given the opportunity to benefit from the EU's Generalized System of Trade Preferences (GSP). In 1996, a Partnership and Cooperation Agreement was signed, which entered into force in 1999[10]. Thus, the first steps were taken to regulate and approximate the economic, political and legal framework.

Overall, apart from isolated cases, due to the lack of interest from the EU, the agenda of Georgia-EU relations was quite limited. Accordingly, the years 1991-2004 can be rightfully called the period of "distanced engagement".

2.3. 2004-2013 – Growing Engagement

In the early 2000s, internal and external factors changed dramatically: in 2003, through the "Rose Revolution", a new political force in Georgia came to power initiating radical democratic transformation. Georgia appeared on the radar of the EU, and, from the point of view of its member states, was able to do the unthinkable – despite the difficult regional and internal context, Tbilisi started building a democratic state. Moreover, the accession of the Central and Eastern European countries to the EU was in preparation, which would move the borders of the Union further eastward, towards Georgia. First potential, and then new member states (especially Poland and the Baltic states) actively supported the expansion of EU's ties with Georgia. This prompted EU's interest in the energy resources of the Caspian Sea, which would allow the Union to diversify its imports. The changing international security environment (campaigns against international terrorism in Iraq and Afghanistan) increased the West's interest toward Georgia[11].

As a result, pragmatic interests and rising needs led to the expansion of the newly created European Neighborhood Policy towards the South Caucasus and the inclusion of Georgia in it from 2004. The EU's interest toward Georgia grew exponentially: in 2003, it appointed a special representative for the South Caucasus in Georgia, and in 2004, it sent the EU Rule of Law Mission (EUJUST THEMIS) to Georgia.

The 2008 Russia-Georgia war was a turning point as the EU for the first time assumed the role of a security actor in Georgia. For instance, the Union mediated between the warring sides and mediated the process of signing the ceasefire agreement. On September 25, 2008, the EU created the post of the Special Representative for the crisis in Georgia, which was merged with the post of the EU Special Representative in the South Caucasus in 2011. On October 1, 2008, the European Union Monitoring Mission (EUMM) was established in Georgia. The 2008 Russia-Georgia war also accelerated the implementation of the Eastern Partnership Initiative.

On February 25, 2013, an action plan for visa liberalization was officially presented to Georgia, within the framework of which Georgia implemented large-scale reforms in the areas of document security, border and migration management, asylum policy, public order and security, foreign relations and human rights.

No less important was the framework agreement signed on November 29, 2013, which allowed Georgia to participate in the ongoing crisis management operations under the auspices of EU.

Thus, the period of 2004-2013 can be called "growing engagement" within the European Neighborhood Policy and the Eastern Partnership. However, each integration step was more of a response to specific needs and existing challenges than a part of a strategic vision and proactive policy on EU's part.

10 Information Center on NATO and EU (2019). *Guide to NATO and the European Union*. Tbilisi: Author, pp. 140-144.

11 Delcour, L. & Duhot, H. (2011). Bringing South Caucasus Closer to Europe: Achievements and Challenges in ENP Implementation. *Natolin Research Papers*, 3, pp. 7-8.

2.4. 2014 to date – Associated Engagement

With the signing of the Association Agreement in 2014, a new stage in Georgia-EU relations began. The Agreement, which also includes a Deep and Comprehensive Free Trade Area component, replaced the earlier Partnership and Cooperation Agreement. Today, relations between Georgia and the EU are legally regulated by this document. It provides for the political, economic, and institutional Europeanization of Georgia and significantly improves the quality of bilateral ties.

Simultaneously with the Association Agreement, several important events took place, which further strengthened Georgia's European aspirations: on June 23, 2016, an agreement on mutual exchange of classified information was signed: on March 28, 2017, after the successful implementation of large-scale reforms, the visa-free travel regime for Georgian citizens in the Schengen area was launched; from July 1, 2017, Georgia became a member of the Energy Union; on October 11, 2017, the Georgia-EU high-level strategic dialogue on security issues was launched; Georgia participated in several ongoing crisis management operations under the auspices of the European Union; the EU actively continued to participate in the conflict settlement process both at the political-diplomatic level and in confidence-building mechanisms.

Moreover, with the constitutional reform of 2017, Georgia's aspiration for membership in the EU and NATO was constitutionally enshrined.

Thus, overall, since 2014, the EU-Georgia ties have been completely adjusted to the association agreement and the reforms in it. This period can be described as the era of "associated engagement".

Russia's war against Ukraine fundamentally changed the conditions for the EU's eastward enlargement. On February 28, 2022, Ukraine applied for the EU membership, which was followed by the membership applications of Georgia and Moldova on March 3, 2022. Georgia was able to independently answer 2,669 questions in the two-part accession application and return it to the European Commission in one month. In June 2022, according to the historic decision of the European Council, Georgia was given a European perspective and asked to fulfill 12 recommendations in order to obtain a candidate status. From then on, Georgia is in the process of fulfilling the proposed recommendations.

Presently the Association Agreement remains the regulatory document of the EU – Georgia bilateral ties. In case of receiving the candidate status and initiating the accession negotiations, the associated engagement will end and the foundation will be laid for a new, more ambitious stage, the ultimate goal of which will be Georgia's membership in the Union.

2.5. Europeanization of Georgia: Actors, Institutions

The Georgian model of European policy coordination is as follows: the main decision-making body is the governmental commission for European Integration, headed by the Prime Minister. The Ministry of Foreign Affairs is the central coordinating institution and the secretariat of the government commission. Within the framework of the government commission, interagency working groups have been created that work on specific topics.

More specifically, the Governmental Commission for EU Integration has the following main functions:

A. Support of proposals and recommendations to support separate directions of Georgia's European integration process;
B. Discussion of relevant information and facilitation of the National Action Plan implementation process;
C. Facilitation of the process of harmonizing Georgian legislation with EU legislation;
D. Facilitation of the process of implementation/enforcement of the recommendations developed within the framework

of separate institutional mechanisms of Georgia-EU cooperation.

Among the other actors operating in Georgia in the process of Europeanization, the following are worth mentioning:

- Information center on NATO and the European Union, the main topics of which are the European Neighborhood Policy and the Eastern Partnership, the Partnership for Mobility, the Association Agreement, visa liberalization, the EU's involvement in conflict resolution and security and stability. The main activities of the information center include seminars, trainings, EU week, publications, regular meetings in the regions, thematic competitions, simulation games, NATO and EU corners;
- The Ministry of Economy and Sustainable Development, which is responsible for the preparation and the implementation of the National Action Plan for the implementation of the Deep and Comprehensive Free Trade Agreement;
- The Ministry of Justice, which is responsible for the analysis of the conformity of Georgian legislation with EU laws at the governmental level, before sending draft laws to the Parliament. More specifically, its activities include the following components: 1) study and analysis of the legal framework (acquis) of the European Union, including the decisions of the European Court of Justice; 2) taking necessary measures for the harmonization of Georgian legislation with the legal base of the European Union;
- Sectoral ministries with each of them having structural units related to the European Union (department, division, section), which carry out the following: 1) fulfill the specific obligations undertaken with the European Union; 2) study and analysis of the legal framework of the European Union in accordance with competence. In this structural unit, the so-called liaison officer with whom the Ministry of Foreign Affairs is closely linked. For example, in the Ministry of Justice – EU Law Department (under the first deputy), while in the Ministry of Environment Protection and Agriculture – Department of European Integration;
- Representatives of non-governmental organizations, academia, business circles and media, who also play a critical role in this process with their individual/group programs/reports/researches; through competitions, conferences, awareness raising activities and media programs.

The following institutions are envisioned by the Association Agreement, which within their competences manage and promote the process of Georgia's approximation with the EU and, therefore, lay the basis for the Europeanization of Georgia:

- Association Council (ministerial level).
- Association Committee (deputy ministerial level).
- Association Committee on Trade (deputy ministerial level)
- Association Sub-Committees (Liberty, Security & Justice; economic and sectoral cooepration; geographic indications; sanitary and phytosanitary norms; customs; trade and sustainable development).

2.6. Role of Parliament in Georgia's Europeanization

One of the central institutions of Europeanization is the Parliament of Georgia, which is also the center of democratization in the country. The Parliament has a Committee on European Integration, which prepares the bills necessary for the implementation of the Association Agreement. More specifically, its responsibilities include the following: law-making and providing legal expertise on determining compliance of Georgian legislation with EU standards; monitoring the fulfillment of the obligations undertaken within the framework of the action plan developed within the framework of the

neighborhood policy with the European Union; participating in the work of EURONEST PA and Parliamentary Association Committee (PAC). Representatives of the Parliament, including the European Integration Committee, participate in the meetings of the government commission and working groups.

The Parliament of Georgia maintains close contact with the European Parliament through two main platforms: the Euronest Parliamentary Assembly (representatives of the European Parliament and the parliaments of the six Eastern Partnership countries; multilateral format) and the Parliamentary Association Committee (representatives of the European Parliament and the Parliament of Georgia; bilateral format).

Overall, within the process of Europeanization, the Parliament of Georgia performs its role by using legislative and supervisory functions, as well as through parliamentary diplomacy.

Apart from strengthening the country's European and Euro-Atlantic aspirations at the constitutional level (Article 78) within the framework of the constitutional reform implemented in 2017, the Parliament's resolutions on Georgia's foreign policy (March 7, 2013, December 29, 2016, and December 29, 2020) also played an important role in strengthening the country's western orientation.

The most important process began after the June 2022 summit of the European Council, when the Parliament of Georgia pledged to implement the EU recommendations and coordinate the process. Parliamentary working groups were created in the Parliament with the participation of representatives of state agencies and civil society. Initiatives were jointly prepared for each recommendation, which were discussed and adopted during the committee and plenary sessions. It is interesting that in Ukraine and Moldova the implementation of EU recommendations has been led by the governments, while in Georgia this critical role is played by the country's Parliament.

3. EUROPEANIZATION AS AN INSTRUMENT FOR GEORGIA'S DEMOCRATIZATION

Given the above-mentioned information, it is now possible to investigate how and why Europeanization and democratization were interlinked in Georgia, how and why Europeanization was an instrument of Georgia's democratization?

To begin with, let us see how Europeanization was an instrument of Georgia's democratization. As already mentioned, Europeanization in Georgia or European integration was connected with implementation of democratic reforms in the country. After Georgia's inclusion into the European Neighborhood Policy in 2004, Europeanization became an encouraging tool for democratization – Europeanization determined the democratization agenda. To use the words of Emerson and Nucheva[12], for Georgia "Europeanization was a gravity model of democratization".

Democratic reforms, in turn, strengthened the process and perspective of Europeanization, creating new incentives and opportunities for further progress on the path to Europeanization. Accordingly, Europeanization and democratization in Georgia complemented and facilitated each other.

This cannot be surprising, since the most important part of the Copenhagen criteria is the building of democratic institutions. Therefore, Europeanization – that is, in the context of Georgia, progress on the path of European integration – meant progress on the path of democratization in the country, strengthening of democratic institutions. All important agreements and initiatives in Georgia-EU relations – Partnership and Cooperation Agreement, European Neighborhood Policy, Eastern Partnership, Association Agreement, Visa Liberalization Action Plan, EU recommendations for candidate status – included a large component of democ-

12 Emerson, M. & Noutcheva, G. (2004). Europeanisation as a Gravity Model of Democratisation. *CEPS Working Document*, 214, pp. 1-31.

ratization. On the other hand, the successful steps taken towards democratic consolidation would strengthen the further process of Europeanization. It is this "closed circle" in Georgia – Europeanization creates pressure for democratization, the progress of democratization strengthens Europeanization – during the last two decades, which created a situation where Europeanization became an instrument of democratization of Georgia.

If we look at the reform initiatives and progress in these years, it is clear that democratization is driven by Europeanization – the democratization agenda of Georgia closely goes hand in hand with and is defined by the Europeanization agenda.

In order to prove that Georgia's Europeanization and democratization are intertwined, the Association Agenda between the European Union and Georgia, AA action plans, AA's implementation reports made by European Commission, European Parliament and civil sociaty as well as ENP Action Plans and progress reports will be explored. These policy documents will be compared with the implemented reforms to conclude that Georgia's democratization is linked to closely to its Europeanization that Europeanization has become an instrument for the country's democratization process.

3.1. European Neighborhood Policy and Eastern Partnership

On June 14, 2004, based on the decision of the Council of the European Union, Georgia joined the European Neighborhood Policy, within the framework of which active Europeanization and democratization of Georgia began. In 2009, with the involvement of six eastern neighbors of the European Union (Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine), the Eastern Partnership was created, which further strengthened these processes and made Georgia's European perspective more realistic with the ideas provided within the mentioned initiative.

Within the framework of the European Neighborhood Policy and Eastern Partnership initiatives, a number of reforms were implemented in the directions of the rule of law, good governance, protection of minority rights.

Before the Association Agreement, the main process of Europeanization and democratization of Georgia was carried out with the help and framework of these two initiatives.

3.2. Human Rights Dialogue

Since 2009, within the framework of the political dialogue between Georgia and the EU, a new format of cooperation was created – Human Rights Dialogue (HRD). The HRD is one of the most active annual formats. Within its framework, the current situation in the country and the obligations taken and undertaken by Georgia are discussed in this direction. For example, the 2018 HRD agenda included such issues as "Preparation of the new Human Rights Action Plan", "Strengthening of national mechanisms of implementation of HR instruments", "Freedom and pluralism of media", etc.

3.3. The Association Agreement

The Association Agreement is a legal document that regulates the bilateral relations between Georgia and the EU. With the Association Agreement, on the one hand, Georgia undertakes to introduce European values, legislation and practices. On the other hand, in return, the EU undertakes to open access to the EU market, finance and information for Georgia. The purpose of the Association Agreement is (1) to expand the political and economic relations between Georgia and the EU and (2) to gradually integrate Georgia into the internal market of the Union.

The Association Agreement will gradually ensure the implementation of reforms, which will ultimately lead to similarities with the EU member states – in economic, social and political aspects;

the basic European values of mutual respect, tolerance, rule of law will be established in the public space. The Agreement will lead to increased predictability and consistency of public life as well as help to improve the quality of life of Georgian citizens[13]. In the end, full Europeanization of Georgia will take place – economically, socially, politically, institutionally.

Association Agreement has around 450 directives and regulations[14]:

- I-III titles – political dialogue democracy, human rights, the rule of law, good governance, peaceful conflict resolution, fight against terrorism, weapons of mass destruction).
- IV title – trade and tra-related matters (Deep and Comprehensive Free Trade Area – DCFTA).
- V-VI titles – sectoral cooperation (taxation, environmental protection, energy, transport, media, health protection, consumers' rights, education, etc.).
- VII-VIII titles – institutional, financial and procedural provisions.

There are several provisions in the Association Agreement that clearly acknowledge the central importance of this document and Georgia's European integration for the democratization process of this country. For instance, the preamble of the Association Agreement states the following: "recognising that the common values on which the EU is built – democracy, respect for human rights and fundamental freedoms, and the rule of law – lie also at the heart of political association and economic integration as envisaged in this Agreement". There is also another statement in the Objectives of the Association Agreement that highlights the importance of the document in Georgia's democratisation: "The aims of this association are: ... to contribute to the strengthening of democracy and to political, economic and institutional stability in Georgia (Article 1, paragraph 2c)". Moreover, general principles of the AA also provide further foundation for this: *"The Parties commit themselves to the rule of law, good governance, the fight against corruption, the fight against the various forms of transnational organised crime and terrorism, the promotion of sustainable development, effective multilateralism and the fight against the proliferation of weapons of mass destruction and their delivery systems. This commitment constitutes a key factor in the development of the relations and cooperation between the Parties and contributes to regional peace and stability (Article 2, paragraph 3)".*

It also underlines that *"[aims] of political dialogue is to strengthen respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms, including media freedom and the rights of persons belonging to minorities, and to contribute to consoli dating domestic political reform (Article 3, paragraph 2h)".*

The following clause lays the foundation of concrete areas for cooperation with the aim of further democratising Georgia based on its EU agenda (i.e. Europeanisation agenda):

"The Parties shall cooperate on developing, consolidating and increasing the stability and effectiveness of democratic institutions and the rule of law; on ensuring respect for human rights and fundamental freedoms; on making further progress on judicial and legal reform, so that the independence of the judiciary is guaranteed, strengthening its administrative capacity and guaranteeing impartiality and effectiveness of law enforcement bodies; on further pursuing the public administration reform and on building an accountable, efficient, effective, transparent and professional civil service; and on continuing effective fight against corruption, particularly in view of enhancing international cooperation on combating corruption, and ensuring effective

13 Emerson, M. & Kovziridze, T. (2016, *eds.*). *Deepening EU-Georgian Relations: What, why and how?* Brussels: CEPS.

14 Official Journal of the European Union (2014). *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*. Retrieved on 14 June 2021 from <https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02)>

implementation of relevant international legal instruments, such as the United Nations Convention Against Corruption of 2003 (Article 4)".

Most of the concrete democracy-related aspects are enshrined in the Title III "Freedom, Security and Justice" of the Association Agreement. For instance, Article 13 is dedicated to the rule of law and respect for human rights and fundamental freedoms:

1. *"In their cooperation in the area of freedom, security and justice the Parties shall attach particular importance to further promoting the rule of law, including the independence of the judiciary, access to justice, and the right to a fair trial.*
2. *The Parties will cooperate fully on the effective functioning of institutions in the areas of law enforcement and the administration of justice.*
3. *Respect for human rights and fundamental freedoms will guide all cooperation on freedom, security and justice."*

It also deals with protection of personal data (Art. 14), cooperation on migration, asylum and border management (Art. 15), movement of persons and readmission (Art. 16), the fight against organised crime and corruption (Art. 17), cooperation in the fight against terrorism (Art. 20), and legal cooperation (Art. 21).

This democracy-related agenda has been included in annual Association Committee agendas that translate general Association Agreement terms into concrete operational actions. For example, operational conclusions of EU-Georgia Association Justice, Liberty and Security SubCommittee included the following commitments of Georgia taken to implement the Association Agreement in the following years:

- Georgia will fully address the 12 priorities of the Commission opinion related to the JLS sector as well as the Association Agenda 2022 – 2027 Short-term priorities on Justice Reform;
- Georgia will implement the 2021-2030 Migration Strategy and will approve new Integrated Border Management Strategy in 2022;
- The EU will continue providing support on anticorruption and transparency policies to all relevant institutions through the Public Administration Reform support programme and other relevant projects;
- Equip the Personal Data Protection Service with resources commensurate with its mandate and ensure its institutional independence, in line with visa liberalisation benchmarks; etc.

The earlier Association Committee agendas and other official reports throughout 2014-2021 contained the commitments in judiciary, prosecution, law-enforcement, public administration reform, penitentiary, migration, border management, asylum, preventing and combating organised crime and other illegal activities, etc.[15]

3.4. Reforms in 2014-2022

Georgia made significant progress in adopting legislative changes and implementing policy reforms that further consolidated democracy in the country based on the AA/European agenda. Several of them are worth mentioning to demonstrate that Europeanisation was an instrument of Georgia's democratisation.

The following is neither an exhaustive list of

15 Government of Georgia (2016). *2016 National Action Plan for the Implementation of the Association Agreement between Georgia, of the one part and the European Union and the European Atomic Energy Community and their Member States, of the other part and the Association Agenda between Georgia and the European Union*; Government of Georgia (2015). *2015 National Action Plan for the Implementation of the Association Agreement between Georgia, of the one part and the European Union and the European Atomic Energy Community and their Member States, of the other part and the Association Agenda between Georgia and the European Union*; European Commission (2016). *Association Agenda between the European Union and Georgia 2017-2020*; EPRS (2020). *Association agreement between the EU and Georgia – European Implementation Assessment*. Brussels: EPRS; Parliament of Georgia (2019). *2019-2020 Action Plan for the Parliament of Georgia for the Implementation of the EU-Georgia Association Agreement.* Tbilisi: Parliament of Georgia.

the reforms nor an assessment of the progress or challenges. This is just to demonstrative that Georgia's Europeanisation process has been a locomotiv of the country's democratisation by creating pressure, agenda and legitimacy of/for further democratic reforms.

The EU pushed, facilitated or otherwise supported the following reforms and legislative/institutional harmonization in 2014-2020[16]:

- **New institutions:** such as MIA's Human Rights Department, State Inspector's Service (later split in State Investigation Service and Personal Data Protection Service), Anti-Corruption Bureau, Food Safety Agency, Competition Agency, Department of Labor Inspection, etc.
- **New legislation**: Code of Juvenile Justice; new and expanded labor safety regulations; new law on public service; new gender protection legislation joining the Istanbul Convention; new law on mediation; new Code on Customs; new electoral legislation; new law on Entrepreneurship ('Company Law'); law on consumer protection; four waves of judicial reform; etc.
- **Spillover of the Association Agreement-related reforms**: the AA-related reforms also facilitated a successful completion of Georgia's Visa-Liberalization Action Plan, granting Georgia a visa-free access to the Schengen zone in 2017. The Visa-Liberalization Action Plan contained various reforms, including in democracy area such as human rights protection, anti-discimination and anti-corruption legislation, and the rule of law.

3.5. EU recommendations to Georgia

In June 2022, European Council adopted 12 recommendations for Georgia to implement in order to grant candidate status. These recommendations mostly summarize earlier efforts of the EU in further consolidating democracy in Georgia[17]:

1. *"Depolarization;*
2. *Guarantee the full functioning of all state institutions, strengthening their independent and effective accountability as well as their democratic oversight functions; further improve the electoral framework, addressing all shortcomings identified by OSCE/ODIHR and the Council of Europe/Venice Commission in these processes;*
3. *Judicial reform;*
4. *Strengthen the independence of its Anti-Corruption Agency; equip the new Special Investigative Service and Personal Data Protection Service with resources commensurate to their mandates and ensure their institutional independence.*
5. *"De-oligarchisation";*
6. *Strengthen the fight against organised crime;*
7. *Undertake stronger efforts to guarantee a free, professional, pluralistic and independent media environment;*
8. *Move swiftly to strengthen the protection of human rights of vulnerable groups;*
9. *Consolidate efforts to enhance gender equality and fight violence against women;*
10. *Ensure the involvement of civil society in decision-making processes at all levels.*
11. *Adopt legislation so that Georgian courts proactively take into account European Court of Human Rights judgments in their deliberations;*

16 EPRS (2020). *Association agreement between the EU and Georgia – European Implementation Assessment*. Brussels: EPRS; Emerson, M. & Kovziridze, T. (2021, *eds.*). *Deepening EU-Georgian Relations: Updating and upgrading in the shadow of Covid-19*. Brussels: CEPS.

17 European Commission (2022). *Opinion on the EU membership application by Georgia*. Retrieved on 15 December 2022 from <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_3800>

12. *Ensure that an independent person is given preference in the process of nominating a new Public Defender (Ombudsperson) and that this process is conducted in a transparent manner; ensure the Office's effective institutional independence.*"

In short, it can be said that the process of democratization of Georgia was increasingly connected with the country's Europeanization agenda. Today, these two processes are closely interlinked. By signing the Association Agreement and starting the implementation of related reforms, as well as gaining a European perspective and implementing the recommendations of the EU, the topic of the EU and European integration is no longer only a foreign policy issue in Georgia. Rather it became an integral part of the internal political discussions of the country.

3.6. Europeanisation as an instrument for Georgia's democratization

Based on the above-mentioned information, it is clear how Europeanization created the agenda of democratization of Georgia. Now let us consider the reasons why Europeanization was a tool for the democratization of Georgia, why this process was acceptable to the country's decision-makers. In our opinion, there are three reasons for this:

Firstly, Europeanization (i.e. European integration) was a legitimization factor for all consequent governments to pursue painful reforms that would have otherwise been impossible to implement.

Secondly, Europeanization and democratization have had value convergence – both processes entailed common values that the vast majority of population supported. Thus, it was politically feasible and benefitial for government to pursue Europeanization and democratization hand-in-hand. Public speeches of high-level officials from Speakers of Parliament to Prime ministers of Georgia throughout 2014-2022 explicitly highlight this argument when they closely link Europeanization to value system of Georgia and its society.

Thirdly, pragmatic/materialistic reasons – European Union provided necessary technical expertise, knowledge and financial resources for facilitating the arduous reforms and easening their transitional consequences. In addition, tangible benefits of Europeanization (for instance, visa-free access to Schengen Zone) further legitimized the process and gave credits to incumbent governments.

CONCLUSION

This paper sought to explore why and how the Europeanization has been a tool for Georgia's democratization. For this reason, after clarifying the terms of Europeanization and democratization, we reviewed a historic evolution of the EU-Georgia ties, looked at institutions, instruments, agreements and formats of Europeanization in reference to Georgia's democratization, and demonstrated key EU-driven reforms in Georgia in 2014-2022.

It was clear that democratization agenda has been driven by Europeanization. We believe this has been so for three reasons: it was a legitimization factor; Europeanization and democratization had value convergence; and pragmatic reasons related to Europeanization benefits and democratization costs.

This paper is one of the first attempts to explain the links between Georgia's Europeanization and democratization in a more systemic manner. We hope it will be useful for reference in future research seeking to shed more light on this issue.

BIBLIOGRAPHY:

1. Usherwood, S. & Pinder, J. (2019). *European Union: A Very Short Introduction*. 3rd edition. Oxford: Oxford University Press.
2. Makhashvili, L. & Gokhelashvili, M. (2020). *Political History of European Integration*. Tbilisi: European University.
3. Information Center on NATO and EU (2019). *Guide to NATO and the European Union*. Tbilisi: Author.
4. Delcour, L. & Duhot, H. (2011). Bringing South Caucasus Closer to Europe: Achievements and Challenges in ENP Implementation. *Natolin Research Papers*, 3.
5. EPRS (2020). *Association agreement between the EU and Georgia – European Implementation Assessment*. Brussels: EPRS.
6. Emerson, M. & Kovziridze, T. (2021, *eds.*). *Deepening EU-Georgian Relations: Updating and upgrading in the shadow of Covid-19*. Brussels: CEPS.
7. Emerson, M. & Kovziridze, T. (2016, *eds.*). *Deepening EU-Georgian Relations: What, why and how?* Brussels: CEPS.
8. Emerson, M. & Noutcheva, G. (2004). Europeanisation as a Gravity Model of Democratisation. *CEPS Working Document*, 214, pp. 1-31.
9. European Commission (2022). *Opinion on the EU membership application by Georgia*. Retrieved on 15 December 2022 from <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_3800>
10. European Commission (2016). *Association Agenda between the European Union and Georgia 2017-2020*.
11. Government of Georgia (2016). *2016 National Action Plan for the Implementation of the Association Agreement between Georgia, of the one part and the European Union and the European Atomic Energy Community and their Member States, of the other part and the Association Agenda between Georgia and the European Union*.
12. Government of Georgia (2015). *2015 National Action Plan for the Implementation of the Association Agreement between Georgia, of the one part and the European Union and the European Atomic Energy Community and their Member States, of the other part and the Association Agenda between Georgia and the European Union*.
13. Korosteleva, E., Natorski, M. & Simão, L. (2014). *EU Policies in the Eastern Neighbouhrood: The practices perspective*. Routledge.
14. Fischer, M. & Sciarini, P. (2014). The Europeanization of Swiss decision-making processes. *Swiss Political Science Review*, 20 (2), pp. 239-245.
15. Flenley, P. & Mannin, M. (2018). *The European Union and its eastern enighbourhood: Europeanisation and its twenty-first-century contradictions*. Manchester: Manchester University Press.
16. Lægreid, P., Steinthorsson, R. & Thorhallsson, B. (2004). Europeanisation of Central Government Administration in the Nordic States. *Journal of Common Market Studies*, 42 (2), pp. 347-369.
17. Lavenex, S., Lehmkuhl, D. & Wichmann, N. (2009). Modes of external governance: a cross-national and cross-sectoral comparison. *Journal of European Public Policy*, 16 (6), pp. 813-833.
18. March, J. G. & Olsen, J. P. (1989). *Rediscovering Institutions: The Organizational Basis of Politics*. New York: Free Press.
19. Matlak, M., Schimmelfennig, F. & Woźniakowski, T.P. (2018). *Europeanization Revisited: Central and Eastern Europe in the European Union*. Florence: European University Institute.

20. Official Journal of the European Union (2014). *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*. Retrieved on 14 June 2021 from <https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02)>
21. Parliament of Georgia (2019). *2019-2020 Action Plan for the Parliament of Georgia for the Implementation of the EU-Georgia Association Agreement*. Tbilisi: Parliament of Georgia.
22. Sciarini, P. (2022). How Europe hits home: Evidence from the Swiss case. *Journal of European Public Policy*, 11 (3), pp. 353-378.
23. Schimmelfennig, F. & Sedelmeier, U. (2020). The Europeanization of Eastern Europe: the external incentives model revisited. *Journal of European Public Policy*, 27 (6), pp. 814-833.
24. Schimmelfennig, F. & Sedelmeier, U. (2004). Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe. *Journal of European Public Policy*, 11(4), pp. 661–679.
25. Schimmelfennig, F. & Sedelmeier, U. (2005). "Introduction: Conceptualizing the Europeanization of Central and Eastern Europe". In: Schimmelfennig, F. & Sedelmeier, U. (*eds.*). *The Europeanization of Central and Eastern Europe*. Ithaca: Cornell University Press, pp. 1–28.
26. Schimmelfennig, F. (2007). Europeanization beyond Europe. *Living Reviews in European Governance*, 7 (1), pp. 5-31.
27. Sedelmeier, U. (2011). Europeanisation in new member and candidate states. *Living Reviews in European Governance*, 6(1).

THE LEGAL NATURE OF FORUM SHOPPING IN INTERNATIONAL CIVIL PROCEDURE LAW

Litigation involves strategic choice, as game theory illustrates. One of those strategic choices includes the plaintiff's initial selection of the forum, which the defendant may attempt to counter through transfer strategies of its own. Criticizing and trivializing forum selection through the label of forum "shopping" Misapprehends the forum game by treating forum selection as a parlor trick-as Unfair and abusive – rather than as a lawful, authorized strategy. "Forum shopping is not a form of 'cheating' by those who refuse to play by the rules. Playing by the rules includes the ability of plaintiff's counsel to select – and the ability of defendant's counsel to attempt to counter-the set of rules by which the litigation 'game' will be played.[1]

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Globalization increase transnational legal relations, which in turn gives rise to multinational disputes. In these circumstances, parties try to choose the court of the country whose favorable legislation gives a preference. By comparing potentially available courts, a plaintiff can determine where to begin litigation process. From a simple, rational choice perspective, it will select a forum whose substantive and procedural legal rules will produce the appropriate result.

KEYWORDS: Positive Conflicts of Jurisdiction, Forum Selection, Court Jurisdiction

1 Bassett, D. L., (2006). THE FORUM GAME, North Carolina Law Review,1.

INTRODUCTION

In an ever shrinking world, in which trade and commerce flow across all national boundaries, it is no surprise that the number of cross-border disputes continues to rise. Civil litigation has itself become to some extent a commodity which prospective claimants shop for amongst the potentially available national legal systems. In this environment, the scope for conflict between the courts of different countries is much increased.[2] In a world where every aspect of human affairs is increasingly international, it is only natural that opportunities for private litigants should be correspondingly globalized. This phenomenon has led, in fact, to frequent complaints in the latter half of the twentieth century that private litigation has become too internationalized, and that plaintiffs are seeking justice in courts outside their own 'natural' jurisdictions in order to gain procedural or substantive advantages in a way that is at least vexatious, at worst oppressive. The term to describe this is, of course, 'forum-shopping' (also sometimes referred to as 'law-shopping').[3] The most famous form of positive conflicts of jurisdiction is Forum Shopping.[4] In international civil procedural law, the term refers to the right of the claimant to choose the preferred court in which the dispute litigation is most favorable, taking into account the relevant factual, procedural, and substantive consequences. It is the legitimate right of the claimant to file the claim where wishes based on pleading strategy, taking into account that the international procedural law of the respective countries allows such a choice.[5] Domestic forum shopping occurs when a plaintiff chooses between two or more courts within a single country's legal system, whereas transnational forum shopping occurs when the choice is between the courts of two or more countries' legal systems.[6] Global (transnational) forum shopping may lead to disharmony of decisions. In order to harmonize decisions, similar cases should be decided in the same way, regardless of which state's court hears it.[7]

Forum shopping depends on two conditions: First, as the foregoing definition implies, more than one court must be potentially available for resolving the plaintiffs claim. Second, the potentially available legal systems must be heterogeneous.' If all legal systems were the same, plaintiffs would have little reason to prefer one court instead of another.' In contrast, the heterogeneity of legal systems means that a plaintiff may be more likely to win (and likely to recover more) in some legal systems than others, thus creating an incentive to forum shop.[8]

FOR THE DEFINITION OF FORUM SHOPPING

Forum shopping behavior is based not only on a plaintiffs preference for a particular legal system's substantive and procedural law but

2 International Law Association London Conference, (2000). Committee on International Civil and Commercial Litigation, Third Intern Report: Declining & Refering Jurisdiction in International Litigation, 1.

3 Guthri, N., (1995). "A Good Place to Shop": Choice of Forum and the Conflict of Laws, Ottawa Law Review, 203.

4 Forum shopping is by no means a negative or suspect phenomenon. It arguably only takes on an abusive nature, in those instances where a litigant selects a forum purely on the basis of 'qualities' of the forum which do not serve the rule of law. This would include for a selected for the time they take to decide a case, the technique of the so-called 'torpedo'. In combination with the impossibility of the other party to sue elsewhere, torpedo action literally torpedoes the possibility for the bona fide party to seek timely settlement of his action. Calster, G.V., (2016). European Private International Law, Second Edition, Hart Publishing, 8.

5 Svanadze, G., (2016). Negotiation and conclusion of international business agreements against the background of international sales law, presentation at the National Business Law Conference, Tbilisi, 50.

6 Whytock, C. A., (March 2011). The Evolving Forum Shopping System, Cornell Law Review, 485.

7 In the 2010 case of Shady Grove Orthopedic Assocs. v. Allstate Ins.Co. The court noted: "Forum shopping is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure." Bookman, P. K., (2016). The Unsung Virtues of Global Forum Shopping, Notre Dame Law Review, Vol 92, Issue 2, 597, 601.

8 Whytock, C. A., (March 2011). The Evolving Forum Shopping System, Cornell Law Review, 486.

also on the court access and choice-of-law decisions of courts.[9]

The English Court of Appeal held in a famous case that Dutch plaintiffs whose barge was damaged in the river Scheldt by Belgian defendants could bring an action for location of the thing against a vessel which was due to enter Liverpool and which was the property of the defendants. Lord Denning made this famous comment about the right to justice of all comers in the courts of England: This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.[10]

The exact definition of Forum Shopping is ambiguous. In common understanding, the term refers to the choice of the most favorable jurisdiction or court in which to bring an action.[11] By this definition, it means that plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of forum non conveniens.[12]

The legal system within which Forum Shopping is conducted affects its definition, making a uniform definition difficult. The decision of the Court of Rimini of November 26, 2002 attracted a lot of attention as an Italian court interpreted Forum shopping for the first time. Court compares forum shopping to the "activity which aims at reaching the most favorable jurisdiction for the interests of the plaintiff". [13] It is clear from this definition that the understanding in Italy, but this holds true in many other Civil Law countries as well, is that only the plaintiff can forum shop. There is no space for forum shopping by the defendant. Once a case is pending, the defendant can object to the jurisdiction of the court seized, arguing that there is no head of jurisdiction that allows the court to hear the case.[14] Unlike the definition proffered by some U.S. courts, pursuant to which forum shopping amounts to a selection of a court with an eye towards gaining an advantage based on the forum's favorable substantive law or the avoidance of unfavorable law in an alternative forum.[15]

Piper Aircraft Co. v. Reyno,[16] which involved several domestic and transnational forum choices, illustrates the difference between domestic and transnational forum shopping as well as the definitional problem. A Pennsylvania-manufactured airplane with Ohio-made propellers crashed in Scotland, killing the passengers. The California lawyer hired by the passengers' Scottish next-of-kin asked the court to appoint his legal assistant, Gaynell Reyno, to administer the deceased passengers' estates. Reyno, a California resident, filed wrongful death actions in California state court on the estates' behalf against the manufacturers, alleging that mechanical problems with the plane or the propellers caused the crash. The plaintiffs decided to sue in the United States, rather than Scotland (a transnational forum choice); in California, rather than the defendants' home states of Ohio or

9 Whytock, C. A., (March 2011). The Evolving Forum Shopping System, Cornell Law Review, 488,489.

10 Atlantic Star 1973, Guthri, N., (1995). "A Good Place to Shop": Choice of Forum and the Conflict of Laws, Ottawa Law Review, 209.

11 Juenger, F. K., (1989). Forum Shopping, Domestic and International, 63 TUL. Law Review, 553, 554.

12 Ferrari, F., (August 2014). Forum Shopping: A Plea for a Broad and Value-Neutral Definition, New York University School of Law, Public Law & Legal Theory, Research Paper Series,Working Paper, NO. 14-39, 21-23. <https://ssrn.com/abstract=2474181>

13 Tribunale di Rimini, 26 November 2002, Ferrari, F., (August 2014). Forum Shopping: A Plea for a Broad and Value-Neutral Definition, New York University School of Law, Public Law & Legal Theory, Research Paper Series,15.

14 Tribunale di Rimini, 26 November 2002, Ferrari, F., (August 2014). Forum Shopping: A Plea for a Broad and Value-Neutral Definition, New York University School of Law, Public Law & Legal Theory, Research Paper Series, 15,16.

15 Tribunale di Rimini, 26 November 2002, Ferrari, F., (August 2014). Forum Shopping: A Plea for a Broad and Value-Neutral Definition, New York University School of Law, Public Law & Legal Theory, Research Paper Series, 15,16.

16 Bookman, P. K., (2016). The Unsung Virtues of Global Forum Shopping, Notre Dame Law Review, Vol 92, Issue 2,591.

Pennsylvania; and in state rather than federal court (two domestic forum choices). The defendants removed the case to federal court and then had the case transferred from the Northern District of California to the Middle District of Pennsylvania. The defendants then moved for forum non conveniens dismissal, arguing that the case had closer ties to Scotland and should be heard there. Which of these choices qualifies as forum shopping? Under a broad definition, all of them. Under a contacts-based definition, the plaintiffs' pursuit of a U.S. forum would not be forum shopping, especially after the case was transferred to Pennsylvania, because under private international law it is typically considered legitimate to sue a defendant at home. But if forum shopping refers only to illegitimately motivated choices, which of these moves qualify? With each of these moves, the plaintiff and defendants were seeking the most advantageous forum, as is true of almost any forum decision. Nevertheless, the maligned forum choice in Piper was the plaintiffs' choice of U.S. court over Scottish court—not the choice of California over Pennsylvania, or state over federal court. Those latter choices—similarly strategically motivated—are broadly considered to be within the plaintiff's discretion. Likewise, the defendants' efforts to remove the case from state to federal court, from one district court to another, and out of the country are considered wise parts of a thoughtful litigation strategy.[17]

Some courts and scholars use the term "forum shopping" to refer to a narrower subset of has little connection to the dispute.[18] Regardless of one's view of forum shopping, this is a common occurrence. As pointed out by what was formerly known as the House of Lords, "if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favorably presented: this should be a matter neither for surprise nor for indignation." Indeed, "every lawyer thinks about the best forum before filing a case or before answering a complaint." Not only, " it is part and parcel of the litigator's job to explore the feasibility of bringing suit in the most advantageous forum, as part of an effective tactical strategy". In effect, "lawyers ethically are compelled to seek the most favorable forum to further clients' interests."[19]

DISADVANTAGES AND ADVANTAGES OF FORUM SHOPPING

There is a negative attitude towards Forum Shopping, especially in the context of global litigation. The term is associated with unprincipled, worthless tactics and undeserved victories. It can lead to expensive and cumbersome litigation in a forum not ideally suited to hear the case, which inconveniences courts and parties alike. Finally, simultaneous or seriatim proceedings in multiple courts duplicate effort and further prolong litigation—creating waste from the point of view of both the courts and the parties.[20] There is an opinion that forum shopping contrasts with the idea of a "level playing field" in that it may distort the playing field, and that forum shopping may create a negative popular perception about the equity of the legal system.[21]

The general attitude of the House of Lords towards Forum shopping was formulated as follows: that forum-shopping is unfair to defendants, who may be put to unwarranted expense and inconvenience in defending actions

17 Bookman, P. K., (2016). The Unsung Virtues of Global Forum Shopping, Notre Dame Law Review, Vol 92, Issue 2, 595.

18 Amchem Prods. Inc. v. B.C. (Workers' Compensation Bd.) 1993 Bookman, P. K., (2016). The Unsung Virtues of Global Forum Shopping, Notre Dame Law Review, Vol 92, Issue 2, 589.

19 Ferrari, F., (August 2014). Forum Shopping: A Plea for a Broad and Value-Neutral Definition, New York University School of Law, Public Law & Legal Theory, Research Paper Series,Working Paper, 14.

20 Bookman, P. K., (2016).The Unsung Virtues of Global Forum Shopping, Notre Dame Law Review, Vol 92, Issue 2, 603.

21 Ferrari, F., (August 2014). Forum Shopping: A Plea for a Broad and Value-Neutral Definition, New York University School of Law, Public Law & Legal Theory, Research Paper Series,8,9.

brought somewhere other than the 'natural' forum of the dispute; that it is biased in favour of plaintiffs, who are likely to choose for a that will be sympathetic to their versions of events; that it is an inefficient use of judicial resources, tending to clog the courts of the selected jurisdiction with 'foreign' actions; that it creates doubts about the fairness of the justice system when opportunism, rather than justice, seems to be the determining factor in litigation; that it creates uncertainty of judicial result; and that, in a federal system of government or in an international context, it creates tensions between jurisdictions by undermining the policy choices of one of them in preference to those of the other.[22]

The negative attitude towards forum shopping is not unique to national legal systems. It can be defined at the European level. In this region, one of the justifications for efforts to unify private international law was to avoid forum shopping. At the international level, it is worth noting that one of the main goals of developing the 1980 UN Convention on the International Sale of Goods, when the UNCITRAL Secretariat stated: "Reduce the search for courts with the most favorable law." [23]

A well-known, high-profile case of global forum shopping is the suit of Austrian law student Schrems against Facebook.[24] In 2013, the student filed complaints with an Irish privacy regulator against Facebook Ireland Limited, the company that contracts with all Facebook users outside of the United States and Canada. The student alleged that Facebook, through its participation in the U.S. government's Prism surveillance program, had violated European privacy laws. Unsatisfied with the slow pace of the Irish response, the student withdrew most of his complaints and refiled in Austria. The student also advertised online that Facebook users all over the world should assign their claims to him, and through a claim-assignment procedure already recognized in Austrian courts, he has created the largest putative class action in Europe, financed in part by crowd-sourced funding. This case, which the Austrian Supreme Court recently referred to the Court of Justice of the European Union (ECJ), may make Austria and its courts confront some of the most perplexing procedural issues in transnational litigation, including claim aggregation, litigation funding, and law's extraterritorial reach.

The Regional Civil Court dismissed his claim on the ground that, since he was also using Facebook for professional purposes, he could not rely on that provision regulating consumer contracts. Furthermore, the Regional Civil Court found that the jurisdiction to hear the assignors' claims could not be assigned to Mr. Schrems. The decision focused on the jurisdictional side of the case, looking at whether Schrems shared the view that Austrian Facebook users were allowed to take legal action based on their place of residence under Austrian consumer rights legislation. The judge disagreed, stating that the plaintiff used the social media service both privately and professionally and had a commercial interest against Facebook. The court ruled that the lawsuit – involving German and Indian plaintiffs who chose Vienna as the venue – was legally problematic and inadmissible. Facebook's lawyer argued that Mr Schrems was not a user in the legal sense and that the Vienna court had no jurisdiction – either against the California firm or its Dublin-based international subsidiary. Shrems' lawyer denied the accusation that his client was conducting the case for commercial purposes.[25]

22 Guthri, N., (1995). "A Good Place to Shop": Choice of Forum and the Conflict of Laws, Ottawa Law Review, 208.

23 International Law Association London Conference, (2000). Committee on International Civil and Commercial Litigation,Third Interm Report: Declining & Refering Jurisdiction in International Litigation, 6.

24 Bookman, P. K., (2016).The Unsung Virtues of Global Forum Shopping, Notre Dame Law Review, Vol 92, Issue 2, 584,585.

25 The Regional Civil Court dismissed his claim on the ground that, since he was also using Facebook for professional purposes, he could not rely on that provision regulating consumer contracts. Furthermore, the Regional Civil Court found that the jurisdiction to hear the assignors' claims could not be assigned to Mr. Schrems. On appeal, the Higher Regional Court

Sometimes, scholars applaud when parties designate a forum for disputes. Some scholars argue that forum shopping through contractual forum selection clauses is essential to encourage governments to develop better laws. Because the parties' choices reflect their joint agreement, some scholars contend that through these clauses, individuals and firms seek out the best regulatory regimes, and that interested states may be encouraged to compete for the parties' presence and business. Interested governments, in turn, will seek to provide those legal "products."[26]

in Vienna upheld the claims related to the contract between Mr. Schrems and Facebook Ireland, but dismissed the appeal as it concerned the assigned claims on the ground that the forum of a consumer could only be invoked by an applicant relying on his own claims. The parties brought an appeal on a point of law (i.e. Revision) to the Supreme Court of Austria, which subsequently referred the following questions for preliminary ruling by the Court of Justice of the European Union. The Court first recalled the general principle under EU law that persons domiciled in a Member State must be sued in the courts of that Member State. It went on to note that derogations to this general principle were provided for in an exhaustive list, and had to be strictly interpreted. Therefore, the Court reasoned that the notion of "consumer" under Articles 15 and 16 of Regulation 44/2001 had to be strictly construed. Secondly, the Court explained that the special jurisdiction rules for "consumers" only apply to contracts "concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption. A social network user can only rely on the special rules on jurisdiction in bringing a case, in such circumstances, where they can show that their predominantly non-professional use of those services had not subsequently become predominantly professional. The Court clarified that the special rules on jurisdiction in cases concerning "consumers" was "inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, the consumer is protected only in so far as he is, in his personal capacity, the plaintiff or defendant in proceedings. Consequently, an applicant who is not himself a party to the consumer contract in question cannot enjoy the benefit of the jurisdiction relating to consumer contracts. The Court disagreed with the argument put forward by Mr. Schrems and found that the fact that he was bringing claims on his consumer rights before the courts where he was domiciled that were similar to those which were assigned to him did not, as such, bring those assigned claims within the jurisdiction of the courts where he was domiciled. The Court also stated that the jurisdiction of courts could not be established through the concentration of several claims in the person of a single applicant. JUDGMENT OF THE COURT (Third Chamber) 25 January 2018 <https://globalfreedomofexpression.columbia.edu/cases/maximilian-schrems-v-facebook-ireland-limited/>

FORUM SHOPPING IN COURT PRACTICE

Forum Shopping was born out of American case law. It is now widely believed that the United States is experiencing an explosion of transnational litigation-litigation involving foreign parties or foreign activity. The United States has substantive and procedural laws that are more advantageous to plaintiffs than the laws of other countries. according to the conventional understanding, two features of the U.S. legal system encourage plaintiffs to bring transnational disputes to the United States by promising access to these advantages. First, the United States employs a permissive approach to personal jurisdiction, giving plaintiffs-both domestic and foreign-broad access to U.S. courts. Second, U.S. judges have a strong tendency to apply the U.S. substantive law that plaintiffs often prefer, even in lawsuits arising out of events occurring in foreign countries.[27] Lord Denning characteris-

26 Bookman, P. K., (2016). The Unsung Virtues of Global Forum Shopping, Notre Dame Law Review, Vol 92, Issue 2, 586, 587.

27 Many observers assume that transnational litigation in U. S. courts is increasing. As one observer puts it, "certain facts on the ground are clear: in recent decades, litigation in U.S. courts with a foreign or international component has been growing in volume and It is now widely believed that the United States is experiencing an explosion of transnational litigation-litigation involving foreign parties or foreign activity, Also in complexity." According to another, "the last thirty years have seen a growing torrent of cases with international and foreign issues." Although both U.S. plaintiffs and foreign plaintiffs can forum shop transnational claims into U.S. courts, some commentators focus specifically on the latter. For example, one scholar describes a "tide of foreign plaintiffs against United States shores." Whytock, C. A., (March 2011). The

tically described Forum shopping in one of his cases: „As a moth is drawn to the light, so is a litigant drawn to the United States."[28]

In September 2015, Volkswagen announced it had rigged diesel emissions tests to make its "Clean Diesel" cars seem to comply with U.S. environmental regulations while they were being tested.[29] In f act, the cars emitted pollutants up to forty times more than U.S. law permits. After that announcement, which affected 11 million cars worldwide, Volkswagen's market value dropped by about $ 25 billion, or thirty percent. Volkswagen owners, car dealerships, and shareholders around the world started wondering how they could hold Volkswagen accountable. Outside the United States, affected consumers, car dealerships, and shareholders are suing Volkswagen. Aggregate litigation is pending in countries from Canada, to Australia, to South Korea. In Europe, Volkswagen is facing litigation in many different countries on civil, criminal, and regulatory fronts. Litigation funding firms and U.S. law firms are leading many of these efforts. In Germany, Volkswagen faces private securities fraud litigation. Consumer suits are in the works. Within the United States, groups of Volkswagen owners sued in many different state and federal courts, seeking the best forum under different criteria. These efforts were examples of domestic forum shopping. Volkswagen shareholders around the world have also sought out the best possible forum for their securities litigation. Some who bought American Depositary Receipts (ADRs) on U.S. exchanges have sued in federal district court. But many shareholders have filed suit in Germany, Volkswagen's home forum. These choices are examples of transnational or global forum shopping. From one perspective, these lawsuits represent efforts of scheming, opportunistic lawyers searching worldwide for the best forum for extorting the highest possible judgment or settlement out of Volkswagen. From another perspective, however, Volkswagen's actions harmed parties all over the world; since many different nations empower private citizens to sue Volkswagen under such circumstances, it is only natural for those parties to hold Volkswagen accountable anywhere they can.

Airbus Industrie v Patel,[30] in which the courts of India, Texas and England became embroiled. The facts are instructive on a number of levels. On 14 February 1990, an Indian Airlines flight took off from Bombay on a domestic flight to Bangalore. The aircraft was an Airbus A320, manufactured in Toulouse, France. There was a full complement of passengers. Almost all of them were Indian. But there were also two British families and three Americans. During its final approach to land in Bangalore, the aircraft struck the ground short of the runway. Ninety-two persons died. No-one escaped uninjured. An Indian Board of Enquiry found that the principal cause of the accident was pilot error. But it also found that the Bangalore airport company was at fault in failing to have adequate safety procedures in place. In India, litigation against the airline and the airport company resulted in a total award for all claimants of US$75,000 (after costs). The English claimants then brought an action in Texas against a number of parties who may have had some connection to the aircraft or its operation. One such party was the manufacturer, Airbus. Airbus applied successfully to the Indian court for an injunction to restrain the English claimants from suing it anywhere other than India. But the injunction had no effect because the English claimants were outside India, and thus not amenable to the process of the Indian court. Airbus therefore came to England and sought an injunction in the home courts of the English claimants to stop them from continuing the Texas action against it. In the Court of Appeal, Airbus succeeded. But the House of Lords thought otherwise. Lord Goff held that the English court had to have a "sufficient interest" in

Evolving Forum Shopping System, Cornell Law Review, 482,483, 496,497.

28 Smith Kline & French v. Bloch 1983 Guthri, N., (1995). "A Good Place to Shop": Choice of Forum and the Conflict of Laws, Ottawa Law Review, 206.

29 Bookman, P. K., (2016). The Unsung Virtues of Global Forum Shopping, Notre Dame Law Review, Vol 92, Issue 2, 580-582.

30 International Law Association London Conference, (2000). Committee on International Civil and Commercial Litigation,Third Interm Report: Declining & Refering Jurisdiction in International Litigation, 2,3.

the matter in order to justify the indirect interference with the foreign court which an antisuit injunction entails.

Manufacturers Life Insurance Co. v. Guarantee Co. of North America, where judge was willing to accept that forum-shopping is a valid way for a party to pursue legitimate interests, but who intervened when the conduct of the shopping expedition began to work unfairness on the defendant. Both parties to the action were Ontario companies. The plaintiff had sued in California and Utah to recover losses under a life insurance company's blanket bond. When the defendant disputed the jurisdiction of the American courts, the plaintiff commenced proceedings in Ontario. The plaintiff then moved to stay its own proceedings in Ontario, until the determination of the jurisdictional questions in California and Utah. Judge in dismissing the motion to stay proceedings, held that while the plaintiff was entitled to shop for favourable law, it was unfair "to put the defendant 'on hold' until the plaintiff has shopped the world.[31]

31 Manufacturers Life Insurance Co. v. Guarantee Co. of North America 1987 Guthri, N., (1995). "A Good Place to Shop": Choice of Forum and the Conflict of Laws, Ottawa Law Review, 206,207.

CONCLUSION

Forum Shopping is not a negative legal phenomenon. It is a fact that different legal systems allow parties to determine where to initiate proceedings for a transnational dispute of any complexity. Forum shopping is a form of strategic behavior based on the law system characteristics that influence the formation of plaintiffs' expectations of court proceedings. Sometimes, substantive legal differences dictate the choice of party. Often, the choice of parties is dictated by the relevant procedural characteristics of the court (low costs, the possibility of receiving high compensation, etc.), as Forum shopping is an attempt to gain a tactical advantage that will contribute to the successful conclusion of the plaintiff's case.

BIBLIOGRAPHY:

1. Bassett, D. L., (2006). THE FORUM GAME, North Law Review. (In English)
2. Bookman, P. K., (2016). The Unsung Virtues of Global Forum Shopping, Notre Dame Law Review, Vol 92, Issue 2. (In English)
3. Calster, G.V., (2016). European Private International Law, Second Edition, Hart Publishing. (In English)
4. International Law Association London Conference, (2000). Committee on International Civil and Commercial Litigation,Third Interm Report: Declining & Refering Jurisdiction in International Litigation. (In English)
5. Ferrari, F., (August 2014). Forum Shopping: A Plea for a Broad and Value-Neutral Definition, New York University School of Law, Public Law & Legal Theory, Research Paper Series,Working Paper, NO. 14-39, 21-23. <https://ssrn.com/abstract=2474181> (In English)
6. Guthri, N., (1995)."A Good Place to Shop": Choice of Forum and the Conflict of Laws, Ottawa Law Review. (In English)
7. Svanadze, G., (2016). Negotiation and conclusion of international business agreements against the background of international sales

law, presentation at the National Business Law Conference, Tbilisi. (In Georgian)
8. Whytock, C. A., (March 2011).The Evolving Forum Shopping System, Cornell Law Review. (In English)
9. Juenger, F.K., (1989). Forum Shopping, Domestic and International, 63 TUL. Law Review. (In English)

THE IMPORTANCE OF MEDIATION IN THE PROCESS OF RESOLVING INTERNATIONAL PRIVATE DISPUTES

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ABSTRACT

The normal functioning of the justice system existing in the state, which should ensure the satisfaction of the private interests of the subjects of law, should be evaluated as an expression of public and private interests. After all, the well-being of the subjects of law is significantly determined by the existence of a flexible dispute resolution system and mechanisms, the correct formation and implementation of which guarantees the stability of the civil turnover and the satisfaction of the interests of legal subjects. Despite the importance of the issue, ensuring that the legal subjects are offered fast and affordable forms of dispute resolution, remains to be a challenge. Achieving the mentioned goal becomes more difficult, when the dispute is loaded with international private law elements, is characterized by complexity in this way and its resolution is connected with a number of peculiarities.

That is why, on the one hand, it is considered important to make changes in the law of Georgia "On Private International Law", which will eliminate the risks of its misinterpretation. On the other hand, it is important to emphasize the role and importance of mediation in the process of resolving international private law disputes. Accordingly, following the legislative amendments, it is also considered important to raise public awareness in this direction and improve legal culture. The above-mentioned, significantly helps the formation of a chain of effective means of dispute resolution, where, on the other hand, an important place shall be given to the form of remote proceedings.

KEYWORDS: Alternative dispute resolution, Mediation, Legal proceedings

INTRODUCTION

Human history shows, that the existence of conflicts between people are inevitable. Therefore, one of the purposes of the existence of legislation is to neutralize them in order to ensure public order and peace.[1] Accordingly, the perfect functioning of the justice system operating in the state should be evaluated as a matter of interest for both – public and private law subjects. Regardless of the importance of the issue, which is related to the right to a fair trial, the overcrowdedness of the judicial system has historically been an actual issue and remains to be a challenge in the modern Georgian reality. The resolution of each dispute within the court system is associated with a long waiting period and the risks of violating the terms stipulated by the Civil Procedure Code of Georgia.

At the same time, it is recognized, that the internationalization of people's relations in the modern world led to the rapid development of directions of law, which regulate legal relations "burdened with foreign law". In private law, international private law has a dominant role in the process of regulating the relationship having the foreign element.[2] In some cases, the term "conflict of law" or the term "choice of law" is used as a synonym for private international law. It should be also noted that in the case of an international private law disputes, a decision must first be made – which state's law should be applied in relation to a specific case.[3] After all, there are various legal systems in the world, which are more or less different from each other. And each system of law operates in a specific area. For example, French law applies to the territory of France, not England. And English law applies in England, not in France.[4]

Accordingly, in case, when there is a dispute loaded with a foreign element, which is subject to the sphere regulated by the international private law, its resolution becomes even more complex. First of all, the subjects of law have to determine the following issue: which state's law should be applied to regulate the conflict; And only after that, the issue is assessed from a substantive point of view.

Therefore, in case of international private law disputes, the goal of offering legal subjects the means of quick and effective dispute resolution alternatives, becomes even more important. Achieving the mentioned goal should be considered possible through the development of alternative dispute means, among which mediation is the dominant form. Therefore, with legal regulation of mediation, the presentation of its importance in the process of resolving international private disputes should be considered a necessity for the development of the practice.

Considering the importance of the issue, the article discusses the importance of using mediation as a means of dispute resolution in the process of resolving international private law disputes and the existing challenges. At the same time, necessity of the changes in the law of Georgia "On Private International Law" is emphasized, because at the present time, the existence of defective regulation is evident, which can be used as a basis for its misinterpretation in practice.

As a methodological basis of the article, both general scientific – historical, as well as special – normative and comparative legal research methods are used.

CHARACTERISTICS OF INTERNATIONAL PRIVATE LAW DISPUTES

It is recognized that private international law as a branch of law, regardless of its name, is part of the national legislation of the states.[5] It

1 Sudini L., (2016). Mediation in the Settlement of Business Disputes in Indonesia, Journal of Law, Policy and Globalization, p. 41.

2 Gabisonia Z., (2016). Georgian private international law, Tbilisi, p. 30.

3 Juenger F., (1994). Private International Law or International Private Law, King's College Law Journal, p. 45.

4 Salmond J., (1902). Territorial and Personal Law, Jurisprudence or the Theory of the Law, p. 599.

5 Bookman P., (1931). Boston University Law Review Online, Is Private International Law International? p. 9.

answers the question of which state's law should be used for the purposes of settling a specific legal relationship. According to the recognized approach, in order to qualify the relationship as an international private legal relationship, there needs to be a private legal relationship containing a "foreign element". Such a relationship can exist in the following cases: a) if the subject of legal relationship is connected to a foreign element; b) the object of legal relationship is connected to a foreign element; c) legal facts, which must be confirmed, are connected to the foreign element.[6] The conclusion that the private international law belongs to the private law and not to the international law was finally solidified in the early the 1900s,[7] that is completely natural – international private law regulates the existing relations between subjects of private law.[8]

It should also be noted that mainly around the world and also in Great Britain, the term "private international law" is used as an alternative to the term "conflict law" used in the United States of America,[9] which is defined as the law on the applicable law.[10] And yet, when does the need to apply the law on private international law arise? It is clear that in the geographical area where the law is unified, there may not exist a coflict of laws and the need to resolve the relevant issue.[11] As mentioned, the necessity of private international law arises, when there exists a conflict of laws.

In any case, current events in the world, including the diversity of economic turnover, the development of modern technologies, or other circumstances affect the content and characteristics of the relationships between legal entities. In the world legal sphere, the number of cases where the foreign element exists, is increasing, which first of all raises the question of which country's law should be used for the purpose of settling a specific legal relationship. And only after this issue is resolved, the dispute can be settled from a material-legal point of view. That is why, in the mentioned case, subjects of law have to solve a complex issue, the search for the possibility of timely resolution of disputes becomes even more urgent. The issue is important to the extent that an unified chain of dispute resolution mechanisms operating throughout the state should ensure the implementation of interests of the subjects of law. And in this direction, in the process of discussing international private legal disputes, it is important to highlight the role of mediation as a means of dispute resolution and its importance, because it is a form of dispute resolution that, considering its fundamental ethical values, has the ability to transform the existence of the society.

THE ESSENCE OF MEDIATION AS A MEANS OF DISPUTE RESOLUTION AND THE EXPEDIENCY OF ITS USE IN THE PROCESS OF RESOLVING INTERNATIONAL PRIVATE LAW DISPUTES

For the purposes of determining the expediency of using mediation as a means of dispute resolution, in relation to the international private law disputes, it is important to represent the peculiarities of the case consideration through mediation.

What is mediation? Mediation is defined as a process in which a neutral third party helps disputing parties to resolve a dispute.[12] Since

6 Gabisonia Z., (2016). Georgian private international law, Tbilisi, p. 31.

7 Hessel E., (1953). The Historic Bases of Private International Law, American Journal of Comparative Law, p. 297.

8 Becker J., (1916). Elements of Japanese Law , International Private Law Book II: Chapter X, p. 442.

9 Juenger F., (1995). Private International Law or International Private Law, King's College Law Journal, p. 45.

10 Rigaux F., (2000). Codification of Private International Law: Pros and Cons Conflict of Laws, Comparative Law and Civil Law: A Tribute to Symeon C. Symeonides, Louisiana Law Review, p. 1321.

11 Hessel E., (1953). The Historic Bases of Private International Law, American Journal of Comparative Law, p. 298.

12 Hyde L., (1984). Mediation, Juvenile & Family Court Journal, Core U.S. Journals, p. 57.

the 1980s and 1990s, different approaches have been formated in relation to alternative means of dispute resolution, namely mediation. According to the opinion of a part of the society, its functioning is evaluated positively, while the opinion of another part of society – is negative.[13] In any case, it is a fact, that in modern society, court proceedings are considered to be expensive and in most systems – an ineffective method of dispute resolution. The overcrowdedness of the city courts results in the fact that each civil legal dispute is being heard in court for years.[14] And the cases when mediation is completely unsuccessful are extremely rare. Even when mediation does not end with an agreement, it has positive results – it is possible to narrow the range of issues to be discussed and/or neutralize mutual resentment.[15] One of the advantages of mediation is that parties have the opportunity to make a creative decision.[16] They are not bound by the claims.

However, mediation is always considered confidential in contrast to the court proceedings, as court proceedings are usually held in public. In mediation, there is always a presumption of confidentiality.[17] Confidentiality is a prerequisite for successful mediation. This principle helps to create an environment where parties can freely talk about their relationship. They know that information cannot be used against them.[18] It is also important to note that two standards of confidentiality are distinguished in the mediation process: internal and external confidentiality. The meaning of each is as follows: 1. Internal confidentiality involves the mediator's obligation to keep the information secretly from the other party, unless the relevant party has explicitly stated desire to disclose. 2. As for "external confidentiality", in accordance to the mentioned standard, any information disclosed during the mediation process must be protected from third parties. The mentioned requirement applies not only to the mediator, but also to the parties or participating third parties.[19]

It should be noted that the above-mentioned advantages of mediation, which have been indicated in an incomplete form, apply equally in case of implementation of any form of mediation. In theory and practice, three main forms of mediation are distinguished – judicial, private and court – annexed mediation forms.[20] In any case, nowadays mediation is recognized as one of the fastest means of dispute resolution, which at the same time ensures saving of financial resources of legal subjects.

It should also be noted, that from 2020, which was related to the pandemic situation and its consequences, the mentioned issue – timely resolution of disputes has gained special relevance. In addition, under the threat of a spread of the coronavirus, the issue of online dispute resolution has become more relevant, because in the presence of force majeure, whether it is caused by a pandemic or another reason, further delay of court proceedings can cause significant damage to the subjects of law.

That is why, recently, online means of dispute resolution have gained special importance. The use of technology has become necessary in order to maintain existing relationships between the subjects.[21] In fact, online mediation has been recognized as a fair, effective, convenient and inexpensive mean of dispute resolution ac-

13 Lande J., (2000). Getting the Faith: Why Business Lawyers and Executives Believe in Mediation Harvard Negotiation Law Review, p. 140.

14 Lisnek P., (1993). Mediation: Untangling Business Disputes through ADR Feature, Commercial Law Bulletin, p. 12.

15 Ehrman K., (1989). Why Business Lawyers Should Use Mediation ADR: Alternative Dispute Resolution, ABA Journal, p. 74.

16 Parish L., (2003). After the Mediation, What Feature on Alternative Dispute Resolution, p. 24.

17 Kovach K., (2004). Mediation Principles and Practice, third edition, "THOMSON WEST", p. 262.

18 Macturk Ch., (1995). Confidentiality in Mediation: The Best Protection Has Exceptions, Student Note American Journal of Trial Advocacy, p. 412.

19 Kallipetis M., (2014). Mediation Ethics in Europe, Dovenschmidt Quarterly, p. 71.

20 Khandashvili I., (2018). Judicial and Non-Judicial Forms of Alternative Dispute Resolution on the Example of Mediation in Georgia, p. 183.

21 Lenz C., (2021). Virtual Mediation – The New Modus? Section II: Alternative Dispute Resolution, Yearbook on International Arbitration, p. 160.

cepted in the global e-commerce market.[22]

Therefore, nowadays, online mediation is widely used in the process of resolving various types of disputes, especially in relation to property disputes. For example, a website like Tao-Bao offers customers a solution to resolve sales issues through online negotiation. Pages – Ebay, Paypal are also considered to be the leaders in the field of online dispute resolution.[23] It is recognized that in addition to a number of advantages of online mediation, such as their convenience and availability, its impersonal nature is also considered as an advantage.[24]

However, of course, there exist opposite opinions as well – according to skeptics, mediation societies develop mediators' skills, that are related to direct communication. In their view, active listening, questioning skills, negotiation skills, body language or other means of non-verbal communication are considered to be critical for the success of mediation and may not be achieved in the online proceedings.[25]

In response to this, it is possible to say that online mediation involves the use of standard mediation techniques, only in virtual space.[26] However, considering its nature, online mediation can be used with success in the process of resolving business disputes and disputes between corporations. After all, transnational societies represent the leading force of economic globalization.[27] And for them, the wise use of time and financial resources is very important.

In any case, in Georgia, the institution of mediation is supported by state policy. Following the legislative support of mediation, a number of important projects have been implemented. Therefore, its successful functioning across the state, along with other means of dispute resolution, in the chain, should be evaluated as a significant issue. Therefore, it is considered important to ensure effective use of its resources in relation to any category of dispute. More significantly, to resolve the disputes which are loaded with the international private law element, which, as mentioned, increases their complex nature and parties have to additionally determine – which state's law can be used while resolving a specific dispute. It should also be noted that in case of international private legal disputes, there is a high probability that the subjects of law may belong to different states and be in different countries physically, which further increases the costs related to litigation. Therefore, in such cases, the ability to conduct online mediation can acquire special importance. In this way, the time and financial resources of the conflict participants will be saved even more.

This approach echoes the reality that in recent years, both in Europe and globally, significant efforts have been made to develop means of non-judicial dispute resolution. Among them, online dispute resolution has been thought to have significant resources for resolving smaller disputes.[28] In addition, mediation has been recognized as a major force in the process of resolving international business disputes.[29]

ABOUT THE EXISTING REGULATION IN GEORGIA

It should be noted that, on the other hand, international private law includes many legal issues in the field of private law, including: business law, family law, bankruptcy law and others. It is the structure, that the Law of Georgia "On

22 Lavi D., (2016). Three is not a Crowd: Online Mediation-Arbitration in Busines to Consumer Internet Disputes. U. Pa. J. Int l L., 37(3), p. 940

23 Zhao Y., (2008). Rethinking the Limitations of Online Mediation, American Journal of Mediation, p. 164.

24 Zhao Y., (2008). Rethinking the Limitations of Online Mediation, American Journal of Mediation, p. 163.

25 Krivis J., (2000). Taking Mediation Online, Law Practice Quarterly, p. 19.

26 Lombardi E., (2012). Is Online Mediation the Way to Fit the Forum to the Fuss, Maastricht Journal of European and Comparative Law, p. 531.

27 Wang G., (2009). Mediation in the Globalized Business Environment, Asia Pacific Law Review 17 Asia Pac., p. 48.

28 Stegner M., (2017). Online Dispute Resolution: The Future of Consumer Dispute Resolution Section V: ADR Yearbook on International Arbitration, p. 347.

29 Posin Q., (2004) Mediating International Business Disputes, Fordham Journal of Corporate & Financial Law, p. 449.

International Private Law" has been formed, which has not undergone significant changes since its adoption, and by objective evaluation, it is possible to recommend improving a number of its articles. For example, the following legal gap is noticeable: according to Article 68, Part 5 of the mentioned law, "The issue of recognizing a foreign court decision shall be considered by the Supreme Court of Georgia". And according to Article 73 of the same law, it is provided that "the decisions (rulings and resolutions) adopted by a court of first instance according to provisions of this Chapter shall be subject to appeal under the procedures established by law". Obviously, the existence of such regulation is contradictory and needs to be harmonized. In particular, if only the Supreme Court of Georgia, the court of the third instance, considers the issue of recognition of a foreign court decision, the court of the first instance, obviously, cannot provide decisions that can be regulated by the mentioned law.

Taking into account the above, it is considered important to harmonize the conflicting regulations in the law of Georgia "On Private International Law", to eliminate the existing inaccuracies.

CONCLUSION

The goal of the existence of the law is to protect the parties from harm caused by the conflict between them. In addition, in the modern world, the number of legal relations, which are characterized by a foreign element, is growing and, therefore, before resolving the dispute from a material and legal point of view, the law "On Private International Law" must be applied.

In addition, the perfect functioning of various forms of dispute resolution operating within the state significantly determines the stability of civil relations, ensures the realization of the interests of the subjects of law and should be considered as an expression of public interest. And after the legal regulation of mediation, it should be considered necessary, to show the importance of its use in the process of considering international private law disputes. Among them, it is desirable to focus on the possibility of using the resource of online mediation. In this direction, it is considered necessary to raise the awareness of the public so that the court shall be considered as one of the ways to resolve the dispute and not the only one. In the direction of raising public awareness, it is also important to involve legal professional societies in order to present mediation as one of the effective alternatives for resolving international disputes. On the other hand, it is considered necessary to improve the law of Georgia "On Private International Law" and eliminate the existing gaps.

Taking into account the above-mentioned recommendations, they will ensure the use of the possibility of timely resolution of existing private legal disputes, as well as the encouragement of the use of mediation throughout the state. For the subjects of law, the goal may become more visible – to trust mediation as a process, that allows realization of their best interests.

BIBLIOGRAPHY:

Normative acts:

1. The Civil Procedure Code of Georgia. <https://www.matsne.gov.ge> (In Georgian)
2. Law of Georgia "On Mediation". <https://www.matsne.gov.ge> (In Georgian)
3. Law of Georgia "On Private International Law". <https://www.matsne.gov.ge> (In Georgian)

Used literature:

1. Gabisonia Z., (2016). Georgian Private International law, Tbilisi.
2. Khandashvili I., (2018). Judicial and Non-Judicial Forms of Alternative Dispute Resolution on the Example of Mediation in Georgia,
3. Becker J., (1916). Elements of Japanese Law, International Private Law Book II: Chapter X.
4. Bookman P., (1931). Boston University Law Review Online, Is Private International Law International?
5. Burman H., (2009). Private International Law Tax, Estate and Individuals, International Lawyer (ABA).
6. Ehrman K., (1989). Why Business Lawyers Should Use Mediation ADR: Alternative Dispute Resolution, ABA Journal.
7. Hyde L., (1984). Mediation, Juvenile & Family Court Journal, Core U.S. Journals.
8. Hessel E., (1953). The Historic Bases of Private International Law, American Journal of Comparative Law.
9. Juenger F., (1994). Private International Law or International Private Law, King's College Law Journal.
10. Juenger F., (1995). Private International Law or International Private Law, King's College Law Journal.
11. Kallipetis M., (2014). Mediation Ethics in Europe, Dovenschmidt Quarterly.
12. Krivis J., (2000). Taking Mediation Online, Law Practice Quarterly.
13. Kovach K., (2004). Mediation Principles and Practice, third edition, THOMSON WEST .
14. Lavi D., 2016. Three is not a Crowd: Online Mediation-Arbitration in Busines to consumer Internet Disputes. U. Pa. J. Int l L., 37(3).
15. Lenz C., (2021). Virtual Mediation – The New Modus? Section II: Alternative Dispute Resolution, Yearbook on International Arbitration.
16. Lande J., (2000). Getting the Faith: Why Business Lawyers and Executives Believe in Mediation
17. Harvard Negotiation Law Review.
18. Lisnek P., (1993). Mediation: Untangling Business Disputes through ADR Feature, Commercial Law Bulletin, p. 12
19. Lombardi E., (2012). Is Online Mediation the Way to Fit the Forum to the Fuss, Maastricht Journal of European and Comparative Law.
20. Macturk Ch., (1995). Confidentiality in Mediation: The Best Protection Has Exceptions, Student Note American Journal of Trial Advocacy.
21. Parish L., (2003). After the Mediation, What Feature on Alternative Dispute Resolution.
22. Petsche M., (2013). Mediation as the Preferred Method to Solve International Business Disputes: A Look into the Future.
23. Posin Q., (2004) Mediating International Business Disputes, Fordham Journal of Corporate & Financial Law.

24. Rigaux F., (2000). Codification of Private International Law: Pros and Cons Conflict of Laws, Comparative Law and Civil Law: A Tribute to Symeon C. Symeonides, Louisiana Law Review.
25. Salmond J., (1902). Territorial and Personal Law, Jurisprudence or the Theory of the Law.
26. Stegner M., (2017). Online Dispute Resolution: The Future of Consumer Dispute Resolution Section V: ADR Yearbook on International Arbitration.
27. Sudini L., (2016). Mediation in the Settlement of Business Disputes in Indonesia, Journal of Law, Policy and Globalization.
28. Wang G., (2009). Mediation in the Globalized Business Environment, Asia Pacific Law Review 17 Asia Pac.
29. Zhao Y., (2008). Rethinking the Limitations of Online Mediation, American Journal of Mediation.

COHABITATION AND CIVIL UNION ACCORDING TO THE FRENCH CIVIL CODE as of November 14, 2022

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ABSTRACT

After the Civil Code of Georgia entered into force in 1997, more than 25 years, the analog of the German family law at that time – Georgian family law – has not become the object of legislative changes. While all over Europe, around the fundamental core of society called the family, the states establish new regulations, create institutions, expand the concepts and support all this to the free development and choice of the individual, our family law is more and more distant from reality. In this article, the types of relationships between couples provided by the French Civil Code, different from marriage, are reviewed, which, according to the French national statistics, are much more in demand among young couples than marriage. These types allow individuals to decide of their own free will which legal institution is the most favorable for their relationship and goals. Georgian society belongs to the big family of Europe, that is why it is necessary for the legislation of Georgia to follow the dynamics of European development and take into account the changes made by the neighboring states, of course, adjusting it to its reality.

KEYWORDS: Family law, Marriage, Cohabitation, Act of solidarity, Couple

INTRODUCTION

The family is the nucleus of Georgian and French society, which is organized and protected by law due to its high importance. The family is a large or small group of natural persons who have some kind of kinship or family-legal relationship with each other. The French Civil code, in contrast to the Georgian law, which only recognizes the existence of the institution of marriage between a couple, recongnizes two legal forms of a couple's relationship: cohabitation (concoubinage) and act of solidarity (Pacte civil de solidarité*). As a result of many parliamentary debates, the Chapter on cohabitation and the act of solidarity was added to the French Civil Code on November 15, 1999, based on Law No. 99-944. The development of society caused the aforementioned legislative change, women's movements, and the establishment of women's rights, the desire for an independent life, and personal freedom. According to French National Institute of Statistics research, cohabitation and act of solidarity are significantly more common among young couples than marriage.[1]

COHABITATION

Unlike the act of solidarity, cohabitation in the French civil code is devoted to only one article (Article 515-8), according to which cohabitation is the fact of living together between two persons of different sexes or of the same sex, which is characterized by stability and continuity.[2] For a couple's life together to be considered cohabitation, it is necessary that their stay together be characterized by the following conditions:

- Two authorized persons must represent the couple;
- Not married;
- Lived together with minimal stability;
- Their relationship should be characterized by continuity.

The French Civil Code recognizes cohabitation only as a fact and does not give it legal force; cohabiting persons are not even considered members of the same family, and their relationship status is single.** Despite this, a person can live in only one cohabitation (concoubinage). The French Civil Code does not set an age limit for cohabitation therefore, even minors can live together as a couple under cohabitation. By integrating cohabitation into the French Civil Code, the legislator did not create a new institution; it simply recognized the right of the couple to have a free union (union libre), but outside of the relationships regulated in detail by the Civil Code. Nevertheless, Article 515-8 of the French Civil Code has often become the basis for decision-making by the French Supreme Court. Despite the law limiting cohabitation to only one article, jurisprudence has established various principles.

Since, according to French legislation, cohabitation is a legal fact, its registration, unlike marriage, is impossible, but it is possible for the state body to recognize the fact. The City Hall[3] will issue the notification about cohabitation, although it is not obliged to issue such a document by law. According to the official website[4] of the state services, based on the couple's request for a certificate of cohabitation, some City Halls issue a document and determine the existence of the fact of cohabitation. This document does not have legal force; it is more like a certificate and can be used in some cases defined by law, for example, when a couple requests social assistance. Obtaining a certificate is free of charge, and to receive it, the couple must submit identity cards and residence documents (utility payment receipt, rental agree-

* Civil Pact of Solidarity.

1 <https://www.insee.fr/fr/statistiques/3306175#tableau-figure1>

2 Article 515-8 du Code civil – Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe diffèrent ou de même sexe, qui vivent en couple.

** In French Doctrine, only the persons who have sexual relations with each other are referred to as a couple.

3 In France, City Hall is a body where any information about a person is registered.

4 <https://www.service-public.fr/particuliers/vosdroits/F1433>

ment, etc., which is, in a way, an alibi of the couple's cohabitation). It may also be necessary to present witnesses who will confirm that the couple is living together. Although cohabitation does not create a legal relationship between the couple, it does not entirely exclude them either. For example, a partner can demand from the other partner the return of the property obtained due to unjust enrichment,[5] since they do not have mutual maintenance obligations. According to the decision[6] of the French Supreme Court, a cohabiting couple does not have an obligation of fidelity. Since cohabitation is a free relationship, separation can occur at the initiative of one party without the other party's consent, without his knowledge, and without any legal measures or appeal to the state authorities. The pregnancy of the partner is also not an obstacle to separation, as it is considered, for example, in marriage, however, in the presence of certain circumstances, based on Article 1240 (formerly Article 1382) of the French Civil Code, which deals with the question of compensation for damages caused by tortious obligations, after infidelity and separation, it is possible to claim compensation for moral damages against the spouse who initiated the breakup or was the author of the betrayal.[7] During cohabitation, if one of the partners dies, the other party has no right to legal inheritance. However, it is possible to be a testamentary heir, and the partner does not have the right to reversion* of the deceased partner's pension.

ACT OF SOLIDARITY

The act of solidarity is a contract between two adults. In its essence, the act of solidarity, which the french refer to as PAX (P.a.c.s), lies between cohabitation and marriage and concerns the property and money matters of the couple; it does not affect the family and filiation. According to the Franch public services website, Pax affects a couple's social, income, tax, housing, and property rights and does not affect filiation or name. Under the act of solidarity, partners are not considered to be spouses of each other, and whether they are members of the same family or not, neither the law nor the doctrine nor the jurisprudence has an unequivocal answer.

The articles on the act of solidarity of the French Civil Code have undergone several changes since 1999, namely in 2005 and 2006. According to the first sentence of Article 515-4 of the French Civil Code, a couple bound together by an act of solidarity undertakes to live together and support each other materially and mutually.

According to data published by the French institute of Statistics and National Studies on January 16 in 2018, 181,900 different-sex couples and 7,000 same-sex couples signed the act of solidarity in 2015, and 184,400 different-sex couples and 7,100 same-sex couples in 2016. This data shows the fact that the act of solidarity is a sought-after institution in French society.

The act of solidarity is not only characteristic of French law; a similar type of institution is also found in Belgian law under the name of legal cohabitation (cohabitation légale), which differs in its content from the institution of the French act of solidarity. According to Belgian law, legal cohabitation can even be enjoyed by members of the same family; the couple doesn't need to be in a sexual relationship, and the partners in legal cohabitation undertake to manage the residence together, take care of living expenses together and share certain debts. In German law, the institution of the French solidarity act can be found under the name of cohabitation (Lebenspartnerschaft). However, the content is different in particular, a couple is only homosexual, they undertake to take care of each other and live together they have the right to take each other's surname. Unlike French civ-

5 Decision of the French Supreme Court of May 18, 2022 N 18-12.808.

6 Decision of the French Supreme Court of February 3, 1999 N 96-11946.

* Le droit à la pension de réversion.

7 Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer – Any action that causes harm to another obligates the author of that action to correct it.

il law, the German Civil Code gives cohabiting partners more rights and obligations, almost similar to that of a married couple. German law gives the cohabiting partner the right to adopt the biological child of the other partner, which is impossible under the French Civil Code. Canadian civil law recognizes cohabitation under the name of living common law, while some American states recognize – common-law marriage. However, the content of each institution and regulation by law is not similar. Common-law marriage in the United States was based on the New York Supreme Court's decision in 1809 (Frenton v. Reed), in which the court notes that a couple who have lived together for several years and are perceived as husband and wife in the eyes of the public, are considered married even without a formal marriage, and they are spouses for each other.

According to Article 515-1 of the French Civil code, the act of solidarity is a contract between two adults, of the same or different sex, for the organization of their common life. Signing a so-called Pax contract is prohibited if one (or both) partners are already married or are "Paxed". Incest is strictly prohibited by French law. According to Article 515-2 of the French Civil Code, the act of solidarity is void if it is concluded between relatives in direct ascending and descending lines and between relatives in lateral lines (cousins) and their children and grandchildren.

Since the act of solidarity is a contract signed between the partners, it becomes effective for the parties upon its signature, and the right of dispute for the third parties arises upon its publication by the notary. The contract is filed before a civil officer, who first verifies the admissibility of the couple's applications and then registers it and delivers the documents to a notary for registration and subsequent publication. If the parties, after the publication of the contract, want to make changes to the act of solidarity, they are obliged to register them through the procedure of entry into force of the contract. Two types of the contract act of solidarity exist: 1. Prepared in advance by the City Hall[8] and 2. Drawn up by the free will of the parties, and the principle of freedom of contract applies to it. According to the first sentence of Article 515-5 of the French Civil Code, if the contract does not provide otherwise, the parties dispose of personal belongings according to their interests and wishes. Also, the payment of the loan taken by one partner for personal interests is only his obligation. If one of the partners took the loan for common interests, the other partner is also responsible for paying. If one of the partners dies, another party has no right to inherit without a will. According to the French Civil Code, if the heir bequeaths part of his property to his partner, he is obliged to bequeath the other party of the property to the legal heirs.[9]

Partners have the right to end the act of solidarity independently, and the relationship will be considered completed for the couple from the moment of registration of the contract's termination statement by one of the partners. According to the French law of May 12, 2009, the Family Court is authorized to hear the claim if a dispute arises between a couple.

CONCLUSION

Marriage is a significant fact in the life of any person and gives rise to important legal, moral responsibilities and obligations. According to Article 30 of the Constitution of Georgia, marriage, as a union between a man and a woman to create a family, is based on the legal quality and free will of the spouses. For a long time, the fact of a couple living together without marriage is no stranger to Georgian society; however, since Georgian law does not consider any other fact or institution of a couple being together besides marriage, the relationship of the parties remains without legal regulation or recognition of this relationship by the law,

8 <https://www.formulaires.service-public.fr/gf/cerfa_15725.do>

9 <https://www.service-public.fr/particuliers/vosdroits/F2529>

which unfortunately causes many problems, especially in case of separation of the couple. Since a couple's relationship in an unregistered marriage is not legally recognized, the parties cannot enjoy a number of rights, which threatens their personal and property rights.

The Georgian Civil Code must consider the example of the French Civil Code and integrate institutions other than marriage, such as the act of solidarity, into the Civil Code. By integrating this institution into the law, the couple will have the opportunity to decide how to legally regulate the relationship between them. Also, recognizing cohabitation as a fact by the law and bringing it into a particular legal framework will be an important innovation since the couple will have the opportunity to recognize the fact of their cohabitation before the law, which will to some extent, bring legal recognition of their relationship. Since the supreme law of the country strictly defines marriage as a union between a man and a woman, it is possible to regulate the institution of the act of solidarity or the fact of cohabitation, allowing a same-sex couple to regulate their monetary and property relations. In addition, if the law allows a same-sex couple to enjoy the act of solidarity or the fact of cohabitation, in this way, their relationship will be recognized and brought into the legal framework, and the institution of the family will not be violated.

Since the law is a living organism and constantly undergoes changes due to the development and needs of the society, the Georgian Civil Code must follow the rhythm of developed countries, integrate such legal issues, and adapt to the society's demands already been introduced and tested.

BIBLIOGRAPHY:

1. Constitution of Georgia of August 24, 1995.
2. Civil Code of Georgia of June 26, 1997.
3. Law of Georgia on Civil Acts of December 20, 2011.
4. The Civil Code of France of March 21, 1804.
5. Aline Cheynet de Beaupré Family Law; Paris, Ellipses, 2019.
6. J. Carbonnier Civil law – the family; Puf; 21st ed. 2003.
7. P. Coubre, A. Gouttenoire and M. Farge – Family Law; Sirey, 8th ed. 2021.
8. Decision of the French Supreme Court of May 18, 2022 N 18-12.808.
9. Decision of the French Supreme Court of February 3, 1999 N 96-11946.
10. <www.service-public.fr>

INSOLVENCY COURT IN THE REGIME OF REHABILITATION PROCEEDINGS

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ABSTRACT

As it is known, the court is the body that administers justice. Georgia has a system of general courts, including District, Appeal, and Cassation courts. The district court is a court of first instance covering the entire territory of Georgia. Considering the specificity of insolvency, its cases are considered only by the city courts of Tbilisi and Kutaisi. The powers assigned to the insolvency court include reviewing the application, opening the rehabilitation regime, appointing a manager/supervisor, etc.

The activity of a judge often goes beyond the scope of civil law and Civil Procedure Code. Accordingly, the rights and obligations established by other branches of law apply to him/her. One is the law of insolvency, which mainly has independent general and procedural norms.

The current law envisages the court's involvement in such a regime as rehabilitation. In the work, the role of the court is considered within the framework of the regulation of the law of insolvency, the rehabilitation regime, which is regulated by the law of insolvency. And the research revealed that certain issues need to be regulated at the legislative level.

Due to the fact that the role and rights, and duties of the court in the rehabilitation regime have not been elaborated in accordance with the new law by the researchers, the research topic is relevant and interesting. To properly discuss the topic provided by the article, the law "On Rehabilitation and Collective Satisfaction of Creditors' Claims", insolvency proceedings, and bankruptcy proceedings are compared. The normative acts in force in Georgia are used in the work, which regulates the rights and duties of the judge. In addition, various international acts are cited in the article for comparison and strengthening of the position.

KEYWORDS: Insolvency, Rehabilitation regime, Statement of insolvency, Insolvency court

INTRODUCTION

In the law of insolvency, the rehabilitation regime is of special importance. The court decides to open it. In particular, it examines the application submitted on the request of the rehabilitation regime and makes an appropriate decision on recognizing the application on insolvency as admissible.

This article is interesting and noteworthy because it discusses the court/judge in the context of insolvency and the necessity of its independence at the level of specialization in this field.

Research methods such as historical, comparative, descriptive, and others were used during the work.

The purpose of **the research topic** is to study the role, independence and rights, and duties of the judge in insolvency.

The research topic is the study of Georgian and foreign legislation on insolvency within the framework of the judge/court.

The object of the research is the study of the rights and duties of the court/judge.

ADMISSIBILITY OF INSOLVENCY PETITION BY COURT

Every action is committed to achieving the appropriate result. While applying, the applicant is focused on the court's acceptance of the application. The appropriate result will be obtained when the applicant considers the reservations defined by the law and properly submits the application to the court. In particular, the declaration of admissibility of the application for insolvency will be made by the court. Otherwise, the court will refuse to declare the application admissible.

To initiate the rehabilitation regime, the court shall conduct a kind of "investigative" procedure to determine whether the debtor is, in fact, insolvent. This investigation requires an insolvency test. The court discusses the admissibility of the application for insolvency within the time limits established by law, which are different depending on the applicant's status.

Since the application has been submitted in accordance with the law and the court considers that it meets the formal requirements, and the debtor is insolvent or facing imminent insolvency, it will issue a ruling on the admissibility of the application and the opening of the rehabilitation regime.[1] The mentioned issue is similarly regulated by German legislation. The application filed by the creditor or the debtor must be based on insolvency or imminent insolvency, verified by a judge, to start the proceedings.[2] According to the new law, the court has a 7-day deadline for the application filed by the debtor and a 10-day deadline for the submission by the creditor, after the creditor presents the document confirming the delivery of the court order to the debtor.[3] The Law "On Insolvency" of 2007 provided for the submission of the latter before the filing of the application, for which a 5-day period was determined, and it could be extended by a court order for 10 days.[4] The court had a 5-day deadline for accepting the application filed by other applicants.[5] Setting a 5-day deadline for the judge was called unreasonable by Professor Roin Migriauli, who spoke in his article about the mentioned issue in 2013. He believes that the given time is not enough to make a decision.[6]

If we consider that our judicial system suffers from a lack of judges, is characterized by many cases, and not insolvency judges. Still, judges

1 Law "On Rehabilitation and Collective Satisfaction of Creditors' Claims". 47.4. [Last seen December 31, 2022]

2 Lawyer for Insolvency Law: German Proceedings. <https://se-legal.de/insolvency-lawyers-germany/?lang=en&fbclid=IwAR0UdnHpQ-S1c3Tmojw3LXsyYlntG22UerEeoLBVs2MoAVo6l8so4QlgHnM>

3 Law "On Rehabilitation and Collective Satisfaction of Creditors' Claims". 47.1. [Last seen December 31, 2022].

4 Law "On Insolvency Proceedings". Article, 22.2. [Last seen December 31, 2022].

5 Ibid. Article, 19.1. [Last seen December 31, 2022].

6 Migriauli R., To Critics of the Bankruptcy Law, 2013. Newspaper: Banks and Finances.

from other branches of law consider insolvency law cases, 7 and 10 days will not be enough to study the factual circumstances stated in the application, especially the basis of insolvency given in the application, and to make appropriate decisions. As the practice of the previous law showed, five days were not enough. It is regrettable that the new law did not consider this problem, failed to assess the dangers that an unreasonable deadline can cause, and refused to make appropriate changes. In my opinion, the new law should at least consider the deadline of 1996 law "On Bankruptcy", according to which the court would review the application within 45 days.[7] The differentiation of application deadlines by the legislator in accordance with subjects is an important innovation, which shall be positively evaluated, considering the risks and responsibilities accompanying the application submission. Also, submitting an application by the creditor requires a special assessment because they do not have access to complete information about the debtor, which requires additional effort and time from the court. This all confirms the opinion that the terms established by the current law for considering the application are not enough.

THE COURT IN THE PROCEEDINGS OF INSOLVENCY

The admissibility of the application is interesting and distinctive as the judge's involvement in the process begins at this stage. Accordingly, in the cases and within limits provided by the law, the judge starts to implement in practice the rights and duties assigned to him/her.

Special attention should be paid to the role and involvement of the judge. First, since the 1996 law, their powers have changed. Accordingly, their role has a different character depending on the content of the norms of the law. For example, if we consider the rights and duties of a judge under the Bankruptcy Act 1996, their role was divided into two parts: making an order in judicial[8] and extra-judicial[9] rehabilitation to start the rehabilitation regime.

It is believed that the functions of the bankruptcy court were minimized during extra-judicial recovery. This is because it only carried out legal supervision, and the course of rehabilitation and its development were not the subjects of the court's interest. Court supervision meant bringing the existing private legal dispute between the debtor and the creditor into the legal framework and creating the necessary legal guarantees to settle the dispute.[10]

In contrast to extra-judicial rehabilitation, judicial rehabilitation was characterized by the active involvement of the court. The court's involvement in implementing judicial rehabilitation was manifested in accepting and approving the application for bankruptcy settlement, accepting settlement proposals, and developing the proposal by the court itself.[11] The latter can be considered a special fact of autonomy in implementing the rehabilitation regime. Therefore, in accordance with the Civil Procedure Code, the course of the proceedings in the court is based only on the principles of disposition, competition, and the implementation of justice by the court on the principles of equality of citizens. Accordingly, the course of the proceedings and the opinions related to it are

7 See the law "On Bankruptcy Proceedings", 7.1. [Last seen December 31, 2022].

8 Note: The active role of the court was typical for judicial rehabilitation. In particular, accepting, approving, etc. bankruptcy settlements.

9 Note: Extra-judicial rehabilitation was carried out with minimal court involvement. Under the law "On Bankruptcy Proceedings" of 1996, only the debtor was entitled to request a postponement of the opening of the bankruptcy proceedings to develop a rehabilitation plan. The postponement to be achieved, the debtor had to prove to the court the possibility of rehabilitation. The role of the court was revealed in the latter's decision to postpone the opening of the bankruptcy proceedings, considering the rehabilitation to be expedient. See more law "On Bankruptcy Proceedings" of 1996, Article 10.

10 R. Migriauli, Introduction to Bankruptcy and Insolvency Law, 3rd Revised Edition, Publishing House: World of Lawyers, Tbilisi, 2017. p. 239.

11 The law "On Bankruptcy Proceedings", Article 23. [Last seen December 31, 2022].

perceived as a means of realizing the rights of the parties and not as a means of realizing the rights of the judge.

We know that usually, in the process of civil cases, the court is actively involved. Its powers in conducting the proceedings of insolvency are different and small. The difference from civil law proceedings is due to the specificity of insolvency. The difference manifests from the application preparation to its acceptance by the court and the issuing of a decision on the opening of the rehabilitation regime.[12]

Although insolvency proceedings are different from civil contentious proceedings, the judge's activity was manifested in the presiding, which meant ensuring the equality of the parties. Actually, it is considered that – "the role of the court is diminished in individual cases and is limited only to the formal approval of decisions",[13] however, the same opinion should not be applied to the development of the court's sentence, at least for the equality of the parties. In the legal literature, there is an opinion that "the promotion of separate groups already means inequality".[14] If we consider that the court should be actively involved in the proceedings of insolvency, in particular, in the rehabilitation regime, it can be considered favorable for the protection of the equality of the parties to propose a sentence with the active involvement of the parties, which implies the reconciliation of the parties, under the norm of the Civil Procedure Code. [15] The law "On Rehabilitation and Collective Satisfaction of Creditors' Claims" does not envisage the drafting of any proposal by the court. The word that became the leitmotif of the law: equality, was ensured by the legislator in this context as well, and in case of remaining in management for the debtor, the approval of the project of the rehabilitation plan prepared by him/her depends on the creditors and also provides for the submission of proposals by the creditors.

"The Bangalore Principles of Judicial Conduct can be considered as one of the sources of sharing the mentioned opinion, according to which – "A judge should not make any comments on a case he/she is conducting".[16] According to the rules of judicial ethics of Georgia, – "A judge must render justice without showing any preconceived notions".[17] While drawing up a reconciliation proposal meant determining the satisfaction of the order of creditors, which is a matter to be determined by the parties to the regime. In my opinion, the judge's involvement in the mentioned process and the existence of any of his/her opinions created a basis and doubt in favor of one of the parties or vice versa. Accordingly, I believe that the norms established by the new law ensure the increase of the standard of independence of the judge and the transparent course of the process between the parties, the means of providing of which are guaranteed, as by the mentioned, as well as by other normative-legal acts.

Finally, it can be said that implementing the extra-judicial rehabilitation regime guarantees the interests of the parties and their protection, at least until the Supreme Council of Justice will not raises the field of insolvency to the proper height and will not equalize the economic, financial, labor and international importance of the area with other narrow specialization fields in the court. In particular, by creating an apparatus by judges specializing in insolvency law, which will be staffed directly with judges who know the field of insolvency and not according to the existing practice when judges dealing with commercial, contractual, and other matters consider insolvency cases. In this case, the problem is not only the independence of the field but also the overloading of the general courts of Geor-

12 Ketiladze M., The Role of the Court in Accepting the Application for the Rehabilitation Regime, III Online international scientific-practical interdisciplinary conference of Tbilisi University of Humanities, May 28, 2022.

13 Explanatory card on the draft law "On Rehabilitation and Collective Satisfaction of Creditors' Claims".

14 Khubua G., Theory of Law, Publishing House: Meridian, Tbilisi, 2004.

15 Civil Procedure Code of Georgia. Article, 218.2. [Last seen December 31, 2022].

16 Bangalore Principles of Judicial Conduct. 2.4. 2002 [Last seen December 31, 2022].

17 Rules of Judicial Ethics of Georgia. Article 6. [Last seen December 31, 2022].

gia. There are frequent cases when one judge has more than 300 cases that have to be heard. In such conditions, the deadlines established by the law are very long, which carries a special risk for insolvency cases. Similar to my opinion, the European Court explains the following to eliminate the mentioned problem: – "It is necessary to employ a sufficient number of judges to avoid overloading them with cases and to finish in a reasonable period the cases already assigned to the judges, regardless of their volume".[18] The European Charter assigns responsibility to the state for hearing the case within a reasonable period – "the state is obliged to ensure that judges have the necessary means for the proper performance of their duties and in particular for hearing cases within a reasonable period of time".[19]

I believe that if the talks of judicial overloading over the last decade had not been in vain and had been given the proper attention, time, and effort, we would not have seen the dire consequences of the Insolvency Procedure Act in the form of more bankruptcy cases in comparison with the rehabilitation regime. The issue of specialization and independence of the field remains a challenge in the judicial system within the framework of the new law, which requires a radical change from a practical, normative, or scientific point of view.

Implementing the mentioned issue may cause a difference of opinion and raise the question of how to select the insolvency judges by election or appointment?

The organic law of Georgia "On General Courts" recognizes the election and appointment of judges. According to the law, the judge of the Supreme Court is elected by the Parliament of Georgia,[20] and judges of appeal and district (city) courts are appointed by the High Council of Justice of Georgia.[21] Considering that the hearing of insolvency cases throughout the country only occurs in Kutaisi and Tbilisi City Courts, the competence to appoint judges is uniquely the prerogative of the High Council of Justice. Accordingly, an insolvency judge appointed by the Council shall meet all the requirements stipulated by the law, including passing the qualifying examination, which involves the basic legislation of the field.[22] Except for civil law, the branches of law given for examination have very little connection with the law of insolvency. Also, it is worth noting that the law regulating insolvency proceedings and the fields close to it, such as business and tax law, are not part of the exam topic. Accordingly, I can say that the qualification exam for judges cannot ensure the training of insolvency judges according to the current standard, and their passing of the exams is inappropriate under the current standard. In addition to the knowledge of legal norms, in my opinion, an insolvency judge should have a basic understanding of business administration and management. All this is necessary, so the judge has an accurate idea of business management, risks, income, expenses, etc. To support this point, a quote from the opinion of the Consultative Council of European Judges (CCJE) can be cited: "Where judges are appointed or may be appointed from a group of experienced practitioners, the need for examinations is doubtful, and the basis for appointment should be more practical skills and consultation with others, who have direct information about the relevant candidate's work experience".[23]

18 Committee of Ministers Recommendation #R (94) 12, Explanatory note for member states on the independence, effectiveness and role of judges, Commentary 27. [Last seen December 31, 2022].

19 European Charter on the Status of Judges. 1.6 [Last seen December 31, 2022].

20 Organic law of Georgia "On General Courts". Article, 36.2. [Last seen December 31, 2022].

21 Ibid. Article, 36.4. [Last seen December 31, 2022].

22 Ibid. Article, 53. [Last seen December 31, 2022].

23 Conclusion of the Consultative Council of European Judges (CCJE) #1 (2001) for the attention of the Committee of Ministers of the Council of Europe on the independence of the judicial corps and the standard of inadmissibility of termination of authority of judges. [Last seen 31 December 2022].

CONCLUSION

As a result of the summary of the paper, the following can be concluded:

- The time limits established by the law for the court to discuss the admissibility of the application for insolvency, if the debtor is insolvent/faced with imminent insolvency, is not reasonable.

It is necessary to create a judicial apparatus specializing in insolvency, which will be staffed by judges who have the

- Knowledge in the field of insolvency.
- In my opinion, the question of how to select judges of Insolvency, by election or by appointment, the practice of other countries should be shared, and only passing the exam should not be the criterion for evaluating the judge's knowledge and qualifications.
- If it is a matter of principle that the judges in the field of insolvency shall pass the exam, I think that the judges should be evaluated in such fields that have a close connection with the field of insolvency, because the qualification exam of judges according to the current standard cannot ensure the proper training of the judges of insolvency.

Considering all the mentioned above, it would be correct to say that in the system of general courts, it is necessary to establish an independent judicial apparatus in the field of insolvency, for judges to pass the qualification exam with appropriate specialization and in case of failure to pass the exam, to select appropriately qualified judges and to set a reasonable time limit for the court to consider the application.

BIBLIOGRAPHY:

Used literature:

1. ISET, Regulatory impact assessment of selected issues under the rehabilitation and collective satisfaction of creditors bill, (2019) Final Report. <https://info.parliament.ge/file/1/BillPackageContent/27794>
2. Lexology GTDT, INSOLVENCY LITIGATION France, Germany, Spain, United Kingdom and 1 more, Generated 21 December 2021. <https://www.lw.com/admin/upload/SiteAttachments/Insolvency%20Litigation.pdf>
3. Ketiladze M., (2022) The role of the court in accepting the application for the rehabilitation regime, Tbilisi Humanitarian Education University III online international scientific-practical interdisciplinary conference.
4. Migriauli R., (2013) Bankruptcy Law Critics, Newspaper: Banks and Finances.
5. Migriauli R., (2017) Introduction to Bankruptcy and Insolvency Law, 3rd Revised Edition, Publishing House: World of Lawyers, Tbilisi.
6. Meskhishvili K., Batlidze g., Amisulashvili N., Jorbenadze S., (2021) Insolvency case production Basics According to the Law "On Rehabilitation and the Collective Satisfaction of Creditors' Claims", publishing house: GIZ, Tbilisi. <http://lawlibrary.info/ge/books/GIZ_Insolvency-reader_2021.pdf>
7. Khubua G., (2004) Theory of Law, Publisher: Meridian, Tbilisi.

Normative material:

1. Law on Bankruptcy Proceedings 1996. <https://matsne.gov.ge/ka/document/view/652?publication=8>
2. Bangalore Principles of Judicial Conduct 2002. <https://www.supremecourt.ge/files/upload-file/pdf/aqtebi15.pdf>
3. Civil Procedure Code of Georgia 1997. <https://matsne.gov.ge/ka/document/view/29962?publication=153>
4. Insolvency Proceedings Act, 2007. <https://matsne.gov.ge/document/view/4993950?publication=0>
5. Conclusion #1 of the Consultative Council of European Judges (CCJE) (2001) for the attention of the Committee of Ministers of the Council of Europe on the independence of the judicial corps and the standard of inadmissibility of the termination of the authority of judges.
6. European Charter on the Status of Judges. <https://www.supremecourt.ge/files/upload-file/pdf/mosamartleta.qcevis-wes1.pdf>
7. Explanatory card on the draft law of Georgia "On Rehabilitation and Collective Satisfaction of Creditors' Claims, 2020. <https://info.parliament.ge/file/1/BillReviewContent/245931>
8. Judicial ethics rules of Georgia. <http://dcj.court.ge/geo/კანონმდებლობა/ეთიკის_წესები>
9. Law "On Rehabilitation and Collective Satisfaction of Creditors' Claims", 2020. <https://matsne.gov.ge/document/view/4993950?publication=0>
10. Organic law of Georgia "On General Courts". <https://matsne.gov.ge/ka/document/view/90676?publication=47>
11. Recommendation of the Committee of Ministers #R (94) 12, Explanatory card for member states on the independence, efficiency and role of judges.

THE INFLUENCE OF ISLAM ON THE FORMATION AND IMPLEMENTATION OF JUDICIAL POWER IN ISLAMIC STATES

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ABSTRACT

In Islamic states, massive violation of human rights, sadly, is a well-known topic for the contemporary world. Much research and work has been published in this direction, which underlines the actual situation in Islamic states concerning specific rights. The novelty of the particular work is not in discussing concrete right/rights, but in analyzing Islam's influence on the formation of the judiciary system and then on implementing the judiciary governance. The judiciary system is a fundament, through which the study of the problems of Islamic countries should begin. The article discusses eleven Islamic states and their judiciary systems. While working on the research, the constitutions of all of them were found, particularly the records on the judiciary. The similarities-differences in the countries under examination are separated by the method of comparative analysis. The research aims to show the distinguishing features in a narrow group, particularly in Islamic countries. These distinctive features directly impact the quality of human rights protection in specific countries. The research has shown that the religious affiliation of the population is not the only reason for the influence of Islam on the judicial system. An example is Turkey, in case of which, even though 98% of its population is a follower of Islam, in terms of human rights protection, does not share the conditions of other Islamic countries. The importance of the topic discussed in the article is pressing, as

evidenced by the modern protest in the world, which began with the tragic death of a 22-year-old Iranian girl, Mahsa Amin, behind which the judicial system discussed in the article stands. To sum up, the article offers interesting findings on the problematic aspects of the Far and not so Far East.

KEYWORDS: Islamic state, Human rights, Religion, Constitution, Judicial system, Influence

INTRODUCTION

The main goal of the law, like other fields, is people. To achieve this goal, it is necessary to perform many tasks, but the goal is one, and that is human and the protection of his/her rights and freedoms. In law, this goal is directly served by the judiciary, therefore, it can be said that the achievement of the primary goal of law in the country directly depends on the activity of the judiciary. As soon as Islamic states are mentioned, a person interested in law may associate, in addition to the undoubtedly beautiful culture of the Far East, many cases when human rights are violated. We remember such famous cases as even the stoning of Soraya or Malala and the modern tragedy of the death of 22-year-old Mahsa Amin and the events that followed. However, these seem to have become mere statistics. How, most important, natural human rights are violated not far from us due to the abundance of such cases is, unfortunately, already a statistic. The great Bernard Shaw says that the death of one person is a tragedy, and the death of more than one person is already a statistic, and the same applies to the violation of rights. The fact is, the problem remains a problem, and the search for the roots of the problem will surely lead us to the judiciary in Islamic states. Of course, the search for the root of the problem of mass violations of human rights should begin with the investigation of the psycho type and mentality of society, but this is a rather difficult mission. It is better to leave the influence of Islam on the judiciary of Islamic states as the goal of this article.

The fact that the main specificity of Islamic states is their religious views is not new. It is precisely on this basis that they are united. However, I would like to make one note here: religious dogmatics may be understood in different ways, and its rough interpretation leads to the formation of wrong ideas about a specific religion, but our current goal is not to reveal the true ideology of the Islamic faith, so we will not touch on religious topics in depth within the article. This article aims to show the influence of Islam on the judiciary in Islamic states such as Iran, Iraq, Afghanistan, Somalia, Saudi Arabia, Kuwait, Yemen, Egypt, Pakistan, Malaysia, Palestine, and Turkey. The majority of the Muslim population unites these states. Although their legislation is significantly similar, there are also differences between them. Our research serves to present and analyze these similarities and differences.

ISLAM AS THE MAIN SOURCE OF LEGISLATION

The close connection with Islam in the countries mentioned above is quite obvious, but the constitutional records in which this connection can be seen are interesting. In the majority of the studied countries, Islam is declared as the state religion. However, in some of them, it is mentioned that they respect other religions, but in all cases, it is unnecessary to talk about religious secularism in these countries.

It is an interesting fact that, for example, in the Republic of Somalia, Article 17 of the Constitution guarantees the right of people to choose and follow their religion freely. However, the second sentence of the same article prohibits the promotion of any other religion except Islam.[1] 11 of the 12 countries under study have

1 The Federal Republic of Somalia, Provisional Constitution [01.08.2012]. <http://hrlibrary.umn.edu/

a similar approach to religion, the exception being Turkey, where although followers of the Islamic religion represent the majority of the population, Turkey prefers the principle of religious secularism, and this is reinforced both in the preamble of the Constitution and in specific articles, for example, Article 24 of the Turkish Constitution.[2] This review aims to give the reader a general idea of the legal systems of the countries concerned with religion. More specifically, reviewing such legislative records that emphasize that Islam is the primary source of legislation is interesting. This connection with Islam is a direct declaration at the constitutional level that any legal act is strictly checked considering the dogmatics of Islamic law. In such countries as **Palestine** (Article 5 of the Constitution),[3] **Kuwait** (Article 2),[4] **Egypt** (Article 2),[5] the **Republic of Somalia** (Article 50),[6] **Afghanistan** (Article 3),[7] **Yemen** (Article 3),[8] **Malaysia** (Article 3)[9] Islam, in particular, Sharia, is mentioned as the main source of the country's legislation. Justice and equality are cited as the primary sources of legislation in **Saudi Arabia**,[10] which, in turn, must be consistent with Islam. According to the **Iraqi**[11] constitution, Islamic law is not indicated as the source of legislation, but it is declared that it is not allowed to adopt such a law against Islam. This is essentially the same as naming Islam as the source of legislation, although the connection with religion is more intense here, because the adoption of anti-Islamic legislation is presented in a negative light by the constitution. The constitution of **Pakistan**[12] also indicates a special connection with Islam, in which the rules and laws of the Islamic way of life are spelled out at the constitutional level; the link is even more extreme in the case of **Iran**. In the preamble of the Iranian constitution, it is stated in various terms that the entire constitution and Sharia constitute Islamic law based on two primary sources, the Qur'an and tradition.[13] The legislation fully complies with the principles of Islam. More specifically, Article 2 of the Constitution states that the Iranian state is based on the idea that there is one God to whom they are obliged and whose orders they must follow, that divine justice must be shown in the legislation. Although it is clear from the example of all ten countries how closely connected they are with Islam, it is still possible to notice the distinguishing marks of the degree of this connection outlined above. We do not find such a record in the Turkish constitution, which is obviously caused by its religious secularism. Although the article's primary purpose is to focus on the judiciary, the reader must understand what type of states we deal with and how their connection is strengthened with Islam. Without this presenta-

research/Somalia-Constitution2012.pdf> [Last seen 30.11.2022].

2 Constitution of the Republic of Turkey [7.11.1982]. <https://www.refworld.org/docid/3ae6b5be0.html> [Last seen 30.11.2022].

3 Constitution of the State of Palestine [7 March 2003, revised in March 25,2003]. <http://menarights.org/sites/default/files/2016-11/PAL_Constitution2003_EN_0.pdf> [Last seen 30.11.2022].

4 Kuwaiti Constitution. <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/kw/kw004en.pdf> [Last seen 30.11.2022].

5 The Constitution of the Arab Republic of Egypt, 1971. <https://constitutionnet.org/sites/default/files/Egypt%20Constitution.pdf> [Last seen 30.11.2022].

6 The Federal Republic of Somalia, Provisional Constitution [01.08.2012]. <http://hrlibrary.umn.edu/research/Somalia-Constitution2012.pdf> [Last seen 30.11.2022]

7 Afghanistan's Constitution, 2004. <https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en> [Last seen 30.11.2022].

8 Constitution of Yemen [16.05.1991]. <http://hrlibrary.umn.edu/research/yemen-constitution.html> [Last seen 30.11.2022].

9 Laws of Malaysia Federal Constitution 2009. <https://www.jac.gov.my/spk/images/stories/10_akta/perlembagaan_persekutuan/federal_constitution.pdf> [Last seen 30.11.2022].

10 Saudi Arabia – Constitution 1992 <https://www.legal-tools.org/doc/8942f2/pdf/> [Last seen 30.11.2022].

11 Iraq's Constitution 2005. Article 2. <https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en> [Last seen 30.11.2022].

12 The Constitution of the Islamic Republic of Pakistan. Article 2 [28.02.2012]. <https://na.gov.pk/uploads/documents/1333523681_951.pdf> [Last seen 30.11.2022].

13 Constitution of Islamic Republic of Iran 1979. <https://www.constituteproject.org/constitution/Iran_1989.pdf> [Last seen 30.11.2022].

tion, it will be impossible to talk about any constitutional institution, in this case, the judiciary.

JUDICIARY SYSTEMS

Although the above analysis has shown us that in the case of countries other than Turkey, the influence of Islam is quite considerable (in some cases significantly) on the legal world of the country, it would certainly be wrong to equate their legal institutions with each other. Therefore, at this stage, it is necessary to consider what kind of judicial systems are established in the studied countries. It should be noted as a standard feature that depending on the political ideologies and situation of the nations, military courts are very common. For example, the Palestinian judicial system consists of courts of first instance, followed by a "higher court" that combines the courts of appeal and cassation. There is a separate administrative court, which considers administrative and disciplinary issues separately (Article 102 of the Constitution).[14] There is also a Constitutional Court, whose authority is to determine the conformity of legislation with the Constitution and to adjudicate disputes before the General Courts and the Administrative Court (which court hears a particular case), as indicated by Article 103 of the Palestinian Constitution. The judicial system of Saudi Arabia is similar to this system,[15] with the difference that there is no such thing as a constitutional court, and the king is named as the highest person of the judiciary. As we can see, the judicial system is quite clearly established in Palestine, which cannot be said about Kuwait, where the chapter on the court in the constitution is limited only to general principles and does not specify what kind of judicial system the country has. Iraq has a more clearly established judicial system at the level of the Constitution than Palestine. In Article 89 of the Constitution, we find the exact names of the bodies that exercise judicial power. Their competencies are given in detail in the following articles. These bodies are the Supreme Council of Justice, the Federal Supreme Court, which combines the functions of the Constitutional Court, and the Court of Cassation. In the same article, the Department of Judicial Prosecution is allocated, which includes the Prosecutor's Office. This specificity is interesting that, unlike the previously discussed countries, the Prosecutor's Office is considered a part of the judicial system. Afghanistan's case is similar to Iraq's judicial system, although the prosecutor's office is not considered a judicial authority here.[16] Like Iraq, the prosecutor's office is a part of the judicial system, in the case of Egypt, where this system is detailed in the constitution. In the general court system, there is a separate court that hears only administrative appeals. In Egypt, too, we find the Constitutional Court, whose competencies are similar to the competencies of the courts of the previous countries. In the case of Somalia, there is a Supreme Court, which combines civil, criminal, and administrative courts and has the competencies of the Constitutional Court. The Constitution of Malaysia also mentions the Supreme Court, which is referred to as the country's highest judicial authority. Turkey has a fairly complete judicial system, there are state security courts that consider cases related to the country's territorial integrity. The highest judicial bodies are the Supreme Constitutional Court, the Court of Appeal, and the State Council, which is essentially a court of cassation. There is a separate Supreme Court of Auditors and a dispute settlement council, which deals with the disputes between courts on jurisdictions.[17,18]

14 Constitution of the State of Palestine [7 March 2003, revised in March 25,2003]. <http://menarights.org/sites/default/files/2016-11/PAL_Constitution2003_EN_0.pdf> [Last seen 30.11.2022].

15 Saudi Arabia – Constitution 1992. <https://www.legal-tools.org/doc/8942f2/pdf/> [Last seen 30.11.2022].

16 Iraq's Constitution 2005. <https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en> [Last seen 30.11.2022].

17 The Constitution of the Arab Republic of Egypt 1971. <https://constitutionnet.org/sites/default/files/Egypt%20Constitution.pdf> [Last seen 30.11.2022].

18 Constitution of the Republic of Turkey [7.11.1982].

This discussion shows that the court system in these countries is similar, but the serious differences we have already discussed are also apparent. In the end, it is important that the examples of the discussed countries have established judicial systems, which are more or less written at the level of the constitution, and this conclusion is necessary to approach the main goal of the study in more depth and to discuss the influence of Islam on these judicial systems.

SHARIA COURT – PAKISTAN

Although we have reviewed the judicial systems of specific countries in a general way using the method of comparative analysis above, it is necessary to single out the case of Pakistan. According to the constitution's text, there is a court of first instance and a highest instance, the exclusive competence of the highest instance includes the consideration of disputes between administrative and federal bodies. The main reason for the separate review of Pakistan's judicial system is the Federal Sharia Court, which combines the competencies of the Constitutional Court. The very name of the court suggests strict religious control. The court's primary goal is to determine the compliance of legislative acts with Islamic principles and traditions, Sharia. It has the power to declare void any act he deems inconsistent with Islam. The Sharia Court also has exclusive jurisdiction to hear special criminal cases. It should be noted that Pakistani society often protests the existence of this court, although the Sharia court remains the most crucial constitutional body exercising judicial power.[19]

IMPACT ON COURT FORMATION

We have already reviewed what judicial authorities exist in the studied countries, and we have also emphasized how closely the legislation of each country depends on Islam. As for the influence of Islam directly on the judicial systems of countries, it is logical that this influence will be directly proportional to the impact of Islam on the legislation, which we have already touched on in general. In its essence, the religion of Islam incorporates the functions of positive law, as evidenced by the existence of such an act as Sharia. Sharia outlines the basic principles of Islam, specific crimes, and their appropriate sanctions. For example, theft is punishable by amputation of the right hand. The given example is relatively humane in light of other reservations contained in the Sharia. However, an extensive discussion on Islamic law will not be relevant at this stage.

In the case of some countries, Islam has a direct influence on the formation of the judicial system itself, an example of this is even Pakistan mentioned above, where the highest federal court is known as the Sharia Court, which accommodates the competence of the Constitutional Court. However, it determines the conformity of legislation with Islamic law.

At the stage of discussing the influence of Islam on the formation of the judiciary, we should also mention the case of Iraq. In particular, we are talking about Article 92 of the Iraqi Constitution, which refers to the Federal Supreme Court. As mentioned above, this court combines the competencies of the Constitutional Court. The court's composition is significant, according to paragraph 2 of Article 92. The court consists of 5 judges, legal scholar-practitioners, and Islamic religious experts. In the constitution itself, there is a reference to the law that will regulate their number and the method of election. As we can see, the strong influence of Islam is noticeable not only at the implementation stage but also at the formation of judicial power in Iraq. Chapter 7 of the Constitution of Iran deals with the judiciary. There is no direct reference to

<https://www.refworld.org/docid/3ae6b5be0.html> [Last seen 30.11.2022].

19 The Constitution of the Islamic Republic of Pakistan. Article 2 [28.02.2012]. <https://na.gov.pk/uploads/documents/1333523681_951.pdf> [Last seen 30.11.2022].

the manner of formation of the court, although there is a separate Supreme Court of Iran, the way of formation of which is regulated by a separate law.[20] As in Iraq, in the composition of the court, here too, we find specialists of the Islamic religion, whose competence is to bring judicial analysis and decisions into conformity with the Sharia. There is also an interesting entry in the Palestinian constitution, namely Article 101, which states that Sharia regulates specific issues and it belongs to religious courts. The list of matters to be adjudicated by such courts is not given in the constitution and should probably be found in the specific normative acts of Palestine.[21] Similar issues may apply to inheritance law because in Islamic states, for example, in Kuwait, inheritance law is fully regulated by Islamic law i.e. Sharia (Article 18 of the Kuwaiti Constitution).[22]

In such countries as, for example, Egypt, Malaysia, and Somalia, the direct influence of Islam at the level of the constitution is not observed at the stage of the formation of the judiciary. The case of Afghanistan, which differs from the countries mentioned above, deserves attention. Article 118 of the Constitution lays down the qualifications and requirements for Supreme Court judges. For example, things like a good reputation and Afghan citizenship. In addition to such criteria, the Afghan constitution requires that a judge have a higher education in Islamic law. This case is quite specific because, unlike Iraq, the need for an Islamic expert in the judiciary is not directly established, although this constitutional reservation in Afghanistan implies that all judges of the Supreme Court must have in-depth knowledge of Islamic law.[23] This has a more significant impact on the formation of the judiciary than in the case of Iraq.

The case of Saudi Arabia is also specific, where the supreme judicial authority is the king, who is accountable to Allah and whose decisions must be in accordance with Islamic law. As for Turkey, it is not surprising that there is no entry in the constitution indicating any sign of its judicial system being influenced by the Islamic religion. This is not surprising, and the reasoning given in the previous chapters also shows this.[24]

IMPACT ON THE EXERCISE OF JUDICIAL POWER

The influence on judicial power is understood as the influence on the formation of the court and the implementation of justice by the court. Above, we have already discussed the impact on the formation stage. Therefore, there may be a feeling that in such countries as, for example, Malaysia or Egypt, where we do not see a record at the level of the constitution, which does not directly emphasize Islamic requirements during the formation of the judiciary, there is no influence of Islam. Such a representation does not correspond to reality because in most countries under consideration, we must not forget that the direct, main source of legislation is Sharia. Furthermore, in the constitutions, we find entries that do not accentuate directly to judicial formation, although it is clear that Islam has a direct influence on the exercise of judicial power. First, I will review countries such as Egypt, Malaysia, and Somalia, because they are united by the fact that there is no direct influence of Islam at the stage of the formation of their courts. The case of Egypt is quite simple. In particular, there are no reservations about Islam in the head of the judiciary. However, court decisions must be in accordance with the law,

20 Iraq's Constitution 2005. <https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en> [Last seen 30.11.2022].

21 Constitution of the State of Palestine [7 March 2003, revised in March 25,2003]. <http://menarights.org/sites/default/files/2016-11/PAL_Constitution2003_EN_0.pdf> [Last seen 30.11.2022].

22 Kuwaiti Constitution. <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/kw/kw004en.pdf> [Last seen 30.11.2022].

23 Afghanistan's Constitution 2004. <https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en> [Last seen 30.11.2022].

24 Saudi Arabia – Constitution 1992. <https://www.legal-tools.org/doc/8942f2/pdf/> [Last seen 30.11.2022].

and according to the constitution, the primary source of law is Islamic law. It should be noted here that, unlike other countries, the Egyptian constitution gives special advantages to Judaism and Christianity. These advantages are constitutionally spelled out in Article 3, which states that the source of legislation may also be the laws of these two religions. Regarding Somalia, it is worth noting an interesting note, namely Article 98 of the Constitution, which establishes the constitutionality of norms. Here, not only the compliance of specific norms with the constitution is implied, but also a direct reference to Islamic principles. Therefore, it is clear that the court, which establishes the constitutionality of the norm, is thoroughly guided by Islamic law. There is a similar arrangement in Kuwait and Iraq, where the source of legislation is Islamic law. The head of the Malaysian state is the Yang di-Pertuan Agong, i.e. king, who, like the king of Saudi Arabia, is responsible to God, Allah. The judicial power is subordinate to him. Therefore justice is in his hands, so the conclusion that the influence of Islam on the implementation of the judicial authority in this country is the greatest does not require special argumentation.[25]

On the example of the discussed countries, I will summarize once again that although the direct influence on the formation method is not felt in the given countries, it is a fact that Islam has a serious impact on the court. In fact, the state-level mechanism of human rights protection is fully adapted to the teachings of Islam. In the case of Palestine, we do not find a separate provision in the constitution, although it is enough to demonstrate the influence of Islam that the existence of church courts, which Sharia guides, is constitutionally established there.

Also interesting is the case of Afghanistan, where Article 119 of the Constitution provides for the oath taken by the judge of the Constitutional Court. The words of the oath are noteworthy when the judge swears before God that he will administer justice by following the laws of holy Islam.[26] There may be an opinion that taking an oath is a rather symbolic process that characterizes even the judges of secular states. However, in this case, the text of the oath is worth noting, in which an appeal is made to the laws of Islam. Therefore, it must be said that Islam greatly influences the implementation of judicial power in Afghanistan.

Such a direct and immediate influence is less noticeable in the Yemeni constitution, although this country also belongs to the number of countries where the source of legislation is the Sharia, so the court decision will not be inconsistent with Islam in any option, although it is also worth noting that the constitution does not establish the direct influence of Islam on the implementation of justice. The cases of similar countries may even allow positive readers to see some progress and perspectives.

It should not be surprising that in the constitution of a highly theocratic country – Iran, we see a separate norm that directly indicates the influence of Islam on the court. Such a norm is Article 170 of the Constitution, according to which the courts must refrain from making decisions that conflict with Islamic law. This restraint is an obligation, not a discretion. Moreover, any person can challenge any act against Islamic law in an administrative court. Also, interesting entries can be found in the constitution of Saudi Arabia, which formally differs little from the countries discussed and brings the judicial system closer to Islam. In particular, Article 46 of the Constitution states that the court is independent and cannot be influenced. However, it mentions Sharia as an exception, which can influence the administration of justice. Article 48 also reinforces the active use of Sharia in the justice process.[27] Above, there was already a separate discussion on the judicial system of

25 Laws of Malaysia Federal Constitution 2009. <https://www.jac.gov.my/spk/images/stories/10_akta/perlembagaan_persekutuan/federal_constitution.pdf> [Last seen 30.11.2022].

26 Afghanistan's Constitution 2004. <https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en> [Last seen 30.11.2022].

27 Constitution of Islamic Republic of Iran 1979. <https://www.constituteproject.org/constitution/Iran_1989.pdf> [Last seen 30.11.2022].

Pakistan, the existence of the Sharia court does not require special justification, and it is clear that this court is nothing but the enforcement of Islamic law. Regarding Turkey, it can be said again that it maintains the principle of a secular state, and the influence of Islam on the constitutional level is also excluded.

CONCLUSION

As mentioned at the beginning of the article, the judiciary is one of the central guarantees of human rights protection. The topic of our research was not human rights in Islamic states. However, it should probably not be news to the readers that, unfortunately, there are many facts of gross violations of human rights in Islamic states. The article's purpose was to show that the strong influence of religious ideology on judicial systems can lead to such results, which are not so rare in the Islamic world. It is worth noting that 11 of the studied countries were purely theocratic countries, which declared Islam as the state religion. The 12th country – Turkey – is a secular state. One might feel that discussing Turkey with these 11 countries was irrelevant. However, I would like to emphasize an important circumstance in this comparison. The majority of the population in Turkey (98%) are followers of Islam, the same as for example in Kuwait or Palestine. Still, despite this, this state was able to create a state closer to the concept of a legal state, independent of religious ideology. This indicates that the religious factor is not the only determining factor in forming a legal state. The majority of followers of a particular religion in the state does not mean (should not mean) such an influence of religion as in the 11 countries under review.

In other words, cases of violated human rights in the Islamic world are not only the "responsibility of Islam". State institutions can exist independently even in a regime of strongly expressed religious dogma, and Turkey, with the majority of the Muslim population, is an example of this.

Despite the marked differences in the 11 countries discussed, it must be said that the influence of Islam on the judicial institutions is equally strong, although Iran, Saudi Arabia, Afghanistan, and Pakistan, where the Federal Sharia Court operates, stand out. Yemen can be considered relatively progressive, although seeing this progress also requires special efforts. Within the scope of this article, of course, the problem is not studied in depth, and it is limited to the level of the constitutions of the countries with the influence of Islam on the judiciary. I think that the position we have already expressed regarding the example of Turkey is progressive, and to eliminate the problem, the in-depth study and sharing of the model of Turkey will be effective.

The fact that the problem is urgent does not need to be mentioned anymore. The feeling of injustice in the Far and not-so-Far East reaches us. Whether we want it or not, we too find ourselves part of the protest, shocked by injustice because of Mahsa Amin. Girls cut their hair here as well as a gesture of solidarity. We must not forget that it is about human life and other important rights inherent in nature, not a particular state's beneficence. It is necessary to expand targeted studies in this direction, which will not simply reveal the facts of rights violations but instead focus more on the judicial processes before these facts. Unfortunately, international law is powerless in the face of such facts, because the main concept of international law is to regulate the legal relations and legal status of those countries to the extent that these parties themselves agree. The fact that stoning and mutilation of people is a legal sanction in certain countries, I think it is primarily a problem of law and not of religion because the law must protect a person, and when it is necessary, the law must protect a person even from a specific religion.

BIBLIOGRAPHY:

1. The Federal Republic of Somalia, Provisional Constitution [01.08.2012]. <http://hrlibrary.umn.edu/research/Somalia-Constitution2012.pdf> [Last seen 30.11.2022].
2. Constitution of the Republic of Turkey [7.11.1982]. <https://www.refworld.org/docid/3ae6b5be0.html> [Last seen 30.11.2022].
3. Constitution of the State of Palestine [7 March 2003, revised in March 25,2003]. <http://menarights.org/sites/default/files/2016-11/PAL_Constitution2003_EN_0.pdf> [Last seen 30.11.2022].
4. Kuwaiti Constitution. <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/kw/kw004en.pdf> [Last seen 30.11.2022].
5. The Constitution of the Arab Republic of Egypt, 1971. <https://constitutionnet.org/sites/default/files/Egypt%20Constitution.pdf> [Last seen 30.11.2022].
6. Afghanistan's Constitution 2004. <https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en> [Last seen 30.11.2022].
7. Constitution of Yemen [16.05.1991]. <http://hrlibrary.umn.edu/research/yemen-constitution.html> [Last seen 30.11.2022].
8. Laws of Malaysia Federal Constitution 2009. <https://www.jac.gov.my/spk/images/stories/10_akta/perlembagaan_persekutuan/federal_constitution.pdf> [Last seen 30.11.2022].
9. Saudi Arabia Constitution 1992. <https://www.legal-tools.org/doc/8942f2/pdf/> [Last seen 30.11.2022].
10. Iraq's Constitution 2005. Article 2. <https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en> [Last seen 30.11.2022].
11. The Constitution of the Islamic Republic of Pakistan. Article 2 [28.02.2012]. <https://na.gov.pk/uploads/documents/1333523681_951.pdf> [Last seen 30.11.2022].
12. Constitution of Islamic Republic of Iran 1979. <https://www.constituteproject.org/constitution/Iran_1989.pdf> [Last seen 30.11.2022].
13. Laws of Malaysia Federal Constitution 2009. <https://www.jac.gov.my/spk/images/stories/10_akta/perlembagaan_persekutuan/federal_constitution.pdf> [Last seen 30.11.2022].

LEGAL FEATURES OF RENUNCIATION OF INHERITANCE

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ABSTRACT

The topic concerns the legal features of refusing to accept an inheritance. The prototype of rejection of inheritance originates from ancient times. Roman law occupies a special place among the ancient legal systems, which belongs to the strong values of the legal culture, emphasizing its enormous importance for the legal development of both European and other states. According to the legislation in force in Georgia, the law regulates relations related to the refusal to accept an inheritance. The heir has the right to refuse to receive the inheritance by law and by will from the circle of heirs. Refusal to accept inheritance is irreversible and requires special attention. In its content, it is clearly different from the avoidance of inheritance. It is not allowed to refuse to receive the inheritance partially, for a period or with any reservation.

If the heir refuses to accept the inheritance, he must altogether refuse it within the time limits defined by the law. An inheritance that passes to a decedent's heirs is considered the total of all assets and liabilities of the decedent.

Legal norms related to inheritance relations need to be adjusted. The central part of the legal norms regulating inheritance has not changed after the adoption of the Civil Code of Georgia. Georgian legislation and practice in this area are not without flaws, and problematic issues have accumulated that need to be understood in a new way.

The work is a legal study, the purpose of which is to review the legal features of the refusal to accept the inheritance, the shortcomings, the legal norms used, and judicial and notary practices based on the comparative legal analysis of the legal literature of foreign countries, related to the refusal to accept the inheritance and the

avoidance (non-acceptance) of the inheritance. Also, the work aims to present the problems, which will allow us to develop conclusions and recommendations to determine how to regulate this relationship.

KEYWORDS: Estate, Heir, Refusal, Avoidance, Unacceptability, Term

INTRODUCTION

Inheritance law has an important place in our daily life as well as in civil turnover. It gives each member of society a guaranteed opportunity to live and work with the knowledge that the material and spiritual good he created during his life, based on his own will, will pass into the hands of close people after his death. In exceptional cases, it is possible, in accordance with the established rule, to transfer part of such property to persons not foreseen by the will of the deceased. The acceptance of an inheritance and the refusal to accept it are essential components of the estate proceedings and are considered both by law and by will at the time of inheritance. It is the observance of the general provisions that ensure the protection of the interests of the deceased person and his successor, as well as other participants in the inheritance relationship.[1]

LEGAL FEATURES OF REFUSAL TO RECEIVE THE INHERITANCE

Rejection of an inheritance, like acceptance of it, is a one-sided transaction and is subject to the general requirements of the transaction.[2] The main categories of inheritance law received detailed regulation within the Roman legal system, which fully addresses the institution of disinheritance. The ancient Roman institution of inheritance allowed only privileged heirs to disinherit.[3]

It is interesting to discuss the topic according to the Civil Code of Georgia and compare it with the norms of the Civil Code of foreign countries. According to German inheritance law, the heir can accept or refuse the inheritance from the moment of the opening of the estate,[4] considered as acts of a purely personal nature. According to Swiss law, legal or designated heirs can refuse the inheritance passed to them if the solvency of the heir is officially established at the time of his death.[5] According to French inheritance law, an heir who refuses to accept an inheritance is considered never to be an heir.[6] In the doctrine of the Russian Federation, refusal of inheritance is regulated based on Article 1157 of the Civil Code of the Russian Federation. 1140.1. On the basis of the Article, it is not allowed to refuse the inheritance if the property is transferred to the inheritance fund in the order of inheritance.[7] As we can see based on comparison, the rejection of inheritance originates from ancient times, the law allows the heir to express his will freely, to refuse to receive the inheritance if he does not want to receive the inheritance.

To smoothly conduct the inheritance proceedings, the heir must submit the application of refusal within a reasonable time; that is why the terms related to the refusal to accept the inheritance are particularly emphasized. According to Article 1434 of the Civil Code of Georgia "an

1 Shengelia, R., & Shengelia, E., (2007). Law of Inheritance. Tbilisi: "Meridian", pp. 13-14.

2 Akhvlediani, Z., (2000). Commentary on the Civil Code of Georgia. Tbilisi: "Law", p. 480.

3 Bichko, M., & Bichko, I., (2020). Heritage Pronunciation Institute History of Forms and Development. p. 144. <https://cyberleninka.ru/article/n/institut-otkaza-ot-nasledstva-istoriya-stanovleniya-i-razvitiya?fbclid=IwAR2MxeIQDreLHjiEUmiX_eL2T6lfrq4h7bovxtHp>

4 German Civil Code (2019). Article 1946. <http://www.library.court.ge/upload/giz2011-ge-bgb.pdf> [Last seen May 5, 2022].

5 Chechelashvili, Z., (2018). Swiss Civil Code. Tbilisi: "Translator" Article 566, p. 160.

6 Gresse, M.E., (2014). Notarial Notebooks of European Comparative Law. France: Volume I, p. 65.

7 Shishmareva, T.P., (2021). Disputing Disinheritance Transactions in Insolvency Proceedings in Russia and Germany. Law, 41, p.195. <https://cyberleninka.ru/article/n/spornye-voprosy-notarialnoy-deyatelnosti-v-oblasti-nasledovaniya-svyazannye-s-neprinyatiem-nasledstva-i-otkazom-ot-nego>

heir may renounce the estate inheritance within three months after the day when he/she became aware or ought to have become aware of the fact that he/she had been called to accept the inheritance. If there is a valid reason, a court may extend this period, but for not more than two months. [...]".[8] In relation to time limits, German law is noteworthy, according to which the time limit for renunciation is the same as for the acceptance of the inheritance. In addition, it is important that the heir can no longer refuse the inheritance if he agrees to receive the inheritance or if the deadline for submitting an application on this issue has expired; from that moment the inheritance is considered accepted.[9]

It is true that the concept of "silence" or "inaction" is not used in German law, but it is through "inaction" that the inheritance is considered. The heir can refuse the inheritance only within six weeks, and the issue is resolved differently if the heir had his last place of residence only abroad or the heir was abroad at the beginning of the term, the period of refusal to accept the inheritance is six months;[10] As far as Greece is concerned, the refusal can be done within four months from the day when the heir learned of his departure and the reason for it. If the deceased lived abroad or the heir learned about the transfer of the estate while abroad, the term is one year and is suspended for the same reasons as the statute of limitations.[11]

According to Swiss law, the time limit for the declaration of refusal of inheritance is three months. The term is counted from the moment when they became aware of the death of the heir unless they can prove that they learned about the opening of the estate later,[12] it is possible to extend the current term by the competent authority, or a new term is established.[13] As we can see, in the legislation of all countries, people are given a reasonable period, it is also worth noting the different terms by which, due to a number of circumstances, certain benefits are provided for the heir in relation to the terms. It would be better to have some regulation regarding the deadlines in the Georgian legislation. Because the deadline is the necessary component that often becomes problematic in the inheritance proceedings due to a number of circumstances, such as: the heir's health condition, being in a prison, being abroad, lack of information of the heir and other factors.

Based on comparative law, it is worth noting the place of declaration of refusal to accept the inheritance: based on the legislation in force in Georgia, such an application must be submitted to the notary bureau, in Germany – before the court; In France, disinheritance is done by an authentic specific deed by two notaries; In Greece, the refusal is carried out at the secretariat of the conciliation court; According to Swiss law, the refusal must be declared orally and in writing before the competent authority. It turns out that the place of declaration of refusal is the competent authority everywhere.

I would like to touch on the problem of the heir's refusal to accept the inheritance by the heir's evasion, non-acceptance. In such a case, the heir does not apply to the Notary Bureau for acceptance of the inheritance, nor does he refuse to accept it. It is implied that he does not want to receive the inheritance. Such behavior puts the heirs receiving other estates and creditors of the heir in an uncertain situation. It is better if the will of heir will be expressed from the beginning. Expiration of the term indicates the termination of the possibility of the heir being involved in inheritance-legal relations.[14] It is important to distinguish whether the heir refuses or avoids receiving the inheritance. In

8 Civil Code of Georgia (1997). Article 1434. <https://matsne.gov.ge/ka/document/view/31702?publication=117> [Last seen February 25, 2022].

9 German Civil Code (2019). Article 1943. <http://www.library.court.ge/upload/giz2011-ge-bgb.pdf> [Last seen May 5, 2022].

10 Also, there is Article 1944.

11 Greek Inheritance Proceedings. Article 1847. <https://www.notary.ge/res/docs/sakanonmdeblo/elegtronuli_biblioteka/saberdznetis_memkvidreoba.pdf> [Last seen April 30, 2022].

12 Chechelashvili, Z., (2018). Swiss Civil Code. Tbilisi: "Translator" Article 567, p. 160.

13 Also, there is Article 576, p. 162.

14 Shengelia, R., & Shengelia, E. (2007). Law of Inheritance. Tbilisi: "Meridian", p. 158.

Georgian inheritance relations, a person at any time can make a statement confirming the fact of non-receipt of inheritance.[15] The fact of evading inheritance is unclear and disorderly. The main reason for this is the presence of creditors of the heir, which hinders the heir.[16]

There are often cases when the heir's creditors are present when receiving the inheritance; therefore, the heir has to satisfy their demands. Avoidance of responsibility by the heir has become more common in recent years. The cases revealed in judicial and notary practice show the difficulties associated with evasion of inheritance both by will and by law during inheritance.[17] The heirs do not intentionally receive the inheritance within the period defined by the law, nor refuse it and/or in the second case when they did not receive the inheritance. However, it is proved that they own it. But if the heirs want to avoid liability to the decedent's creditors in the first place, the question of meeting the creditor's demands comes into question.

A comparative legal analysis of the laws of foreign countries is important for considering the issue in every way.[18] As can be seen from the research, the absence of an open expression of the heir to receive the inheritance by the heir has been considered since the early period, which historically originates during the reign of Emperor Justinian, and continues in German and Swiss law. In German law, the law "by omission" provides for the acceptance of the inheritance; it contains an indication that the inheritance is considered accepted if the deadline for its acceptance has expired. According to Swiss law, if the heir does not apply for a refusal to accept the inheritance within the prescribed period, then he is considered to have accepted the inheritance without any reservations. It is worth noting that, as a result of settling the issue in this way, it is possible to consider the heir as having received the inheritance, giving the heir a certain responsibility and obligation. He will try to appear on time to apply to the relevant competent authority, if he does not want to get involved in the legal relations of inheritance, he will to some extent, regulate the uncertainty related to the avoidance/non-acceptance of inheritance, which is often expressed by the inaction of the heir.

CONCLUSION

In conclusion, it can be said that to be citizen-oriented and simplify the problematic circumstances related to inheritance proceedings, it would be better to share and use the experience of other countries. Based on the consideration of a number of circumstances, such as the health condition of the heir, stay in prison, stay abroad, and other factors, the existing legislation of foreign countries on the mentioned issue should be shared in the Georgian law, in the light of legislative regulation, the terms of acceptance of inheritance and refusal to accept inheritance should be equalized, as well as acceptance of inheritance and determining a single period of refusal to accept the inheritance for a period of up to one year, which is enough time for the heir to decide to refuse to accept the inheritance and take appropriate measures. In addition, if the heir expires the refusal period to accept the inheritance and does not apply to the relevant competent body with a statement of refusal, he should be considered to have received the inheritance. Against the background of the legislative regulation of the mentioned issues, it will be possible to reduce the appeal to the court for citizens, creditors, and interested persons, to partially solve the problems related to the refusal to receive the inheritance and the avoidance of receiving the inheritance.

15 Ministry of Justice of Georgia (2010, March 31) Order #71, "On the rules of notarial execution", Article 78. <https://matsne.gov.ge/ka/document/view/1010061> [Last seen May, 2022].

16 Shengelia, R., & Shengelia, E. (2007). Law of Inheritance. Tbilisi: "Meridian", p. 159.

17 Akhvlediani, Z., (2000). Commentary on the Civil Code of Georgia. Tbilisi: "Law", p. 468.

18 Johnson, E., Successor Liability: A Key Consideration for Business Acquisition Planning, FryBerger Law firm press, 2019. <https://www.fryberger.com/articles/successor-liability-a-keyconsideration-for-business-acquisition-planning/> [18.03.2022].

BIBLIOGRAPHY:

1. Akhvlediani, Z., 2000. Commentary on the Civil Code of Georgia. Tbilisi: Law.
2. Bychko.M. and Bychko.I., 2020. History of the Institute of Inheritance and Development of Forms and Development. <https://cyberleninka.ru/article/n/institut-otkaza-ot-nasledstva-istoriya-stanovleniya-i-razvitiya?fbclid=IwAR2MxeIQDreLHjiEUmiX_eL2T-6lfrq4h7bovxtHp>
3. Gresse, M.E., 2014. Notarial Notebooks of Comparative European Law. France: Volume I.
4. Shengelia, R. and Shengelia, E., 2007. Inheritance Law. Tbilisi: Meridian.
5. Shishmareva, T.P., 2021. The Problem of Disputing Transactions of Disinheritance in Insolvency Proceedings in Russia and Germany. <https://cyberleninka.ru/article/n/spornye-voprosy-notarialnoy-deyatelnosti-v-oblasti-nasledovaniya-svyazannye-s-neprinyatiem-nasledstva-i-otkazom-ot-nego>
6. Chechelashvili, Z., "Translator", 2018. Swiss Civil Code. Tbilisi.
7. Johnson, E., Successor Liability: A Key Consideration for Business Acquisition Planning, FryBerger Law firm press, 2019. <https://www.fryberger.com/articles/successor-liability-a-keyconsideration-for-business-acquisition-planning/> [Last seen 18.03.2022].

Normative materials:

1. German Civil Code. 2019. <http://www.library.court.ge/upload/giz2011-ge-bgb.pdf> [Last seen May 5, 2022].
2. Greek Inheritance Proceedings. <https://www.notary.ge/res/docs/sakanonmdeblo/eleqtronuli_biblioteka/saberdznetis_memkvidreoba.pdf> [Last seen April 30, 2022].
3. Order 71 of the Minister of Justice of Georgia dated March 31, 2010 "On the rules of notarial execution" <https://matsne.gov.ge/ka/document/view/1010061> [Last seen May 10, 2022].
4. Civil Code of Georgia. <https://matsne.gov.ge/ka/document/view/31702?publication=117> [Last seen February 25, 2022].

A NOTE FOR THE NEED TO REGULATE PRIVATE DEBT COLLECTORS' ACTIVITIES IN GEORGIA – EXISTING REGULATORY GAP AND SELECTED COMPARATIVE APPROACHES

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ABSTRACT

The economic recession, COVID-19 pandemic, growing indebtedness of the consumers, and enhancement of credit borrowings such as credit cards, personal and household loans have led to the growing numbers of the credit default, and the subsequent surge of the debt collection practices in the World and Georgia is no exception. Even though private debt collection is necessary on the market, it usually involves abusive or unfair practices towards the debtors in the debt recovery process. This Article identifies an existing regulatory gap in the field of private debt collection and analyzes traditional branches of Georgian law to answer the question of whether they can tackle and prevent abusive and unfair debt recovery practices. It also gives an overview of the selected regulatory responses – Anglo-Saxon systems (the United States and the United Kingdom) possessing the most developed system. The specific focus rests on the building blocks of an efficient regulatory system touching upon the private debt collection activities with the idea that will follow the best practice and fill the regulatory gap.

KEYWORDS: Private debt collection, Abusive and unfair practices, Harassment, Validation of debt, Licensing, Private action, Public action

"Professional bill collectors have one objective: getting paid via the shortest most, most direct route."

"Collectors are a valuable asset to any business, but, unfortunately, they are often viewed as a necessary evil."

A. Michael Coleman[1]

INTRODUCTION

The economic recession, growing indebtedness of the consumers, enhancement of the credit borrowings such as credit cards, personal loans, store cards, and reduction of welfare policies have led to the growing numbers of the credit default and subsequent surge of debt collection practices.[2] In recent years, Covid-19 pandemic induced economic crises and further defaults on the credits, and substantially affected the debt market worldwide.[3] Debt collection is an integral part of the business, but, it is usually proclaimed as a "necessary evil"[4] in a society. Debt collectors usually have a negative image, whose only intention is to extract money without feelings and compassion towards the debtors. It is rightly mentioned that "[t]he collection of debts brings out the ugliness in people".[5] On the other hand, promises shall be fulfilled by the debtors, contracts – enforced by the state to ensure the market continues functioning. Therefore, despite the proclaimed image of the debt collectors, it is rightly noted that they are necessary evils in the states. Their job starts when the debtor defaults on the debt and repayment terms are violated. Creditors can resort to judicial or out-of-court debt collection. In the cases when court proceedings and subsequent enforcement is relatively expensive, the credits resort to the private debt collection service or sale of debt to the secondary market where debt collecting firms operate.[6] Problem arises when private debt collectors involve outrageous, abusive practices in the process of collecting debts.[7] Multiple phone calls, embarrassing comments, threatening debtors with criminal charges, informing third parties regarding the debtor's monetary obligations, and violating their privacy – are examples of abusive practices used worldwide, and Georgia is no exception.[8] Allowing the co-existence of the private enforcement together with the public enforcement on the market is an efficient decision made by the state that can result in timely debt collections and fulfillment of contractual obligations.[9] However, private enforcement needs to be regulated to avoid excessive human rights violations during the debt collection that cannot be justified by the aim of timely enforcement of contracts and debt re-

1 Coleman, M.A., (2004). *Collection Management Handbook: The Art of Getting Paid*. (2nd end.). John Wiley & Sons Inc. Preface XIV, p. 1.

2 Tajti, T., (2019). *A Holistic Approach to Extra-Judicial Enforcement and Private Debt Collection: A Comparative Account of Trends, Empirical Evidences, and the Connected Regulatory Challenges* –Part One. Pravni Zapisi, (2), p. 278; Stănescu, C. G. (2021). *Regulation of Abusive Debt Collection Practices in the EU Member States: An Empirical Account*. Journal of Consumer Policy, 44(2), p. 179; Ferretti, F. (Ed.). (2016). Spooner, J. (2016). *Comparative Perspectives of Consumer Over-Indebtedness: A View From The UK, Germany, Greece, And Italy*. International Insolvency Review, 25(3), p. 241-244; *See* generally, Deville, J. (2015). Lived Economies Of Default: Consumer Credit, Debt Collection and The Capture of Affect. Routledge.

3 Botta, A., Caverzasi, E., & Russo, A., (2020). *Fighting The Covid-19 Crisis: Debt Monetisation and EU Recovery Bonds*. Intereconomics, 55(4), p. 239-244; Kurowski, Ł. (2021). *Household's Overindebtedness During the COVID-19 Crisis: The Role Of Debt And Financial Literacy*. Risks, 9(4), p. 62.

4 Coleman, M.A., (2004).

5 Whaley, D. J., (2020). *Problems and Materials on Consumer Law*. Aspen Publishers, p. 785.

6 Fox, J., (2012). *Do We Have Debt Collection Crisis Some Cautionary Tales of Debt Collection in Indiana*. Loyola Consumer Law Review, 24(3), p. 359.

7 Stănescu, C. G., (2021), p. 180.

8 Whaley, D. J., (2020).

9 *See* Landes, W. M., & Posner, R. A., (1975). *The Private Enforcement of Law.* The Journal Of Legal Studies, 4(1), 1-46 (regarding general privatization of law enforcement); Gow, H. R., Streeter, D. H., & Swinnen, J. F. (2000). *How Private Contract Enforcement Mechanisms Can Succeed Where Public Institutions.* Agricultural Economics, 23(3), p. 253-265.

payment. States strike to find the balance between allowing private debt collection agencies to work on the market for the efficiency of debt collection (where it is possible) and the protection of debtors' rights.

Georgia lacks sector-specific regulation of the private debt collection process. It should be noted that the statement does not refer to the service of the "*private bailiff*" ("*private enforcement officer*") exercising public authority under the Law of Georgia on Enforcement Proceedings.[10] Their actions are regulated under the law, but activities of the private debt collection business representatives stay out of the specific regulation. Private debt collectors (or private debt collector agencies) are the ones who do not constitute governmental bodies, nor perform such functions on behalf of the state and whose services include collection of personal data of debtors, identifying their property, contacting debtors by telephone, mail or any other means, contacting debtors relatives, involving persuasion or any other tactics to ensure debt collection.[11] Illegal processing and disclosure of personal data of the debtors to the third parties in the collection process has been addressed by Personal Data Protection Service of Georgia.[12] Debt collecting agencies operating on the market were fined for the processing and disclosing debtors' personal data to the third parties, violating data protection laws of Georgia.[13] Despite the fact that one aspect of the debt collection abusive practices is caught by the data protection laws, it is questionable whether Georgian legislation without sector-specific regulation addressing data collectors' activities can ensure collection of debts without excessive calls, threatening practices, violating debtor's dignity or peace. Hence, this paper aims to analyze the existence of the regulatory gap in the Georgian system in relation to the private debt collectors' activities and provide comparative approaches from the selected jurisdictions regulating the area that can serve as the starting point for further legal research in the stated direction.

1. EXISTING REGULATORY GAP

Classical branches of law are generally considered to be ill-suited to catch abusive practices in the process of private debt collection.[14] Extreme abuses in debt collection, such as taking or threatening illegal action that does not involve a threat of violence, killing, damaging health or destroying property cannot be qualified as a crime according to the Criminal Code of Georgia.[15] Therefore, continuous threatening of debtors to institute criminal, civil or administrative proceedings even in cases when the statute of limitations to sue has expired (in case of a civil action) is an abusive debt collection practice that is not caught by any provision of the Criminal Code of Georgia unless debt collectors involve a threat of killing, damaging health or destroying property and the threatened debtors have a reasonable fear that the threat will be carried out. In addition to this, false statements and representations of the debt collectors, such

10 Law of Georgia on Enforcement Proceedings, Article 14^6, No. 1908 (1999). <https://matsne.gov.ge/ka/document/view/18442?impose=translateEn&publication=99>

11 Tajti, T., (2019), p. 294.

12 Personal Data Protection Service of Georgia, *Report on the State of Personal Data Protection and Activities of the Inspector* (2020), (2018) and (2017) <https://personaldata.ge/en/about-us>

13 Business Media Georgia, *Private Debt Collecting Companies Fined for Disclosing Personal Data* (2018) <https://bm.ge/ka/article/sesxis-amomgebi-kompaniebi-personaluri-informaciis-gamjgavnebistvis-daajarimes/17015>

14 Tajti, T., (2019), p. 294; Florida Statutes Title XXXIII, Chapter 559, section 559.542.

15 Law of Georgia Criminal Code of Georgia, No. 2287 (1999). <https://matsne.gov.ge/ka/document/view/16426?publication=241> Article 151 (Threat) "A threat of killing, damaging health or destroying property, when a person threatened has started to have a reasonable sensation of fear that the threat will be carried out […]"; Article 181 (Extortion) "Extortion, i.e. demanding another person to hand over property or title in property or the right to use property by threatening to use violence against the victim or the victim's close relative or to destroy or damage their property or to make public the information that may damage their reputation or otherwise damage substantially their rights […]".

as attempts to collect an amount greater than was owned or handing in letters to the debtors that look like court decisions without forgery (without forging signatures or stamps), are also not caught by the Criminal Code of Georgia. In line with the stated argumentation, excessive phone calls or other means of communication during non-working hours, harassing, oppressing, or abusing practices in the communication within the process of debt collection are not punishable as crimes in Georgia. Hence, criminal law is inadequate to deal with unlawful and misleading (or fraudulent) activities involved by private debt collectors.

Turning to corporate law, it is relevant to mention that this body of law ensures the registration, structuring, and functioning of the business entities.[16] Absence of any licensing requirement for private debt collecting agencies (firms) leads to the conclusion that the National Agency of the Public Registry as the registration authority cannot serve as an effective gatekeeper disciplining debt collecting agencies working on the market.[17] Hence, company registration proceedings and rules related to the functioning of the business entities can hardly prevent debt collecting agencies involving abusive practices from entering the market. The National Agency of the Public Registry of Georgia is not obliged to look behind the corporate shield and prevent certain debt collectors from entering the market. In addition to registration requirements, no special regulation is in force that could subject debt collectors to licensing or require non-conviction of the debt collectors. Furthermore, no governmental authority is equipped with supervisory powers to oversee the activities of the private debt collectors that could have adequate abilities to tackle abusive practices and protect debtors from excessive debt collection.[18] Absence of disciplinary authority means that no governmental authority can impose disciplinary sanctions, revoke licenses (as it is not required to obtain), monitor debt collection practices for ensuring fair debt collection. Hence, general corporate law cannot preclude private debt collection agencies involving abusive practices to enter the market and operate.

Resorting to consumer protection law, it should be noted that new law on consumer rights protection was adopted in Georgia in March 2022 after several years of gap in consumer protection regulation.[19] However, consumer protection law pays attention to radically different risks that business entities might pose for the consumers (as a weaker party), while classical risks inherent to the debt collection, such as abusive or oppressive practices, stay out of the reach of the consumer protection laws. Therefore, laws addressing abusive commercial practices or discriminatory approaches towards consumers in the process of selling goods or receiving services are different from debt collection since debtor cannot be considered as the consumer of the service or purchaser of goods. Hence, consumer protection law and the one that recently entered into force without corresponding cases and legal tradition in this area cannot serve as the basis for the protection of debtors.

To sum up, traditional branches of law developed and currently in force in Georgia are insufficient to cover the whole spectrum of abusive practices private debt collectors undertake, and therefore, the regulatory gap exists.

16 Law of Georgia on Entrepreneurs, Article 1(1), No. 875-Vრს-Xმპ (2021) It "regulates the legal forms of an entrepreneur, the procedures for their incorporation and registration, and issues related to their activities".

17 Law of Georgia on Entrepreneurs, Article 4(3); Law of Georgia on Licenses and Permits, No. 1775 (2005). <https://matsne.gov.ge/ka/document/view/26824?impose=translateEn&publication=62> Article 1(1) states that the law provides for the exhaustive (comprehensive) list of all permits and licenses that are required in Georgia.

18 Tajti, T., (2019), p. 297-298 (stating that licensing requirements together with disciplinary powers can end up unsuccessful if tactics of debt collectors are not regulated in sector-specific laws).

19 Law of Georgia on Consumer Rights Protection, No. 1455-VIIIრს-Xმპ (2022). <https://www.matsne.gov.ge/ka/document/view/5420598?publication=0>

2. GENERAL OVERVIEW OF THE EXISTING REGULATORY APPROACHES

States have different regulatory approaches to debt collection practices, in general, and activities of private debt collectors, in particular. Common law legal family has always been favorable to self-help and debt collection practices[20] and, therefore included regulations tackling abusive debt collection practices. Within the common law system, sector-specific legislation (separately addressing abusive debt collection practices) and general regulations (involving traditional branches of law) are present. As mentioned above, general regulations (substantive law) operate differently as they aim to enforce contracts, ensure the operation of business entities, protect consumers, or punish criminal offenses; while sector-specific regulations aim to address abusive debt collection practices as such.[21]

It is relevant to start with the U.S. sector-specific regulations addressing private debt collection since the U.S. approach represents itself as the most comprehensive legal framework in the stated direction.

2.1. The U.S. Model

The U.S. model includes a legal framework concerning private debt collection practices on federal and state levels. The primary protection of individual debtors is provided by the Federal Debt Collection Practices Act (FDCPA), aiming to prevent, monitor and sanction unfair debt collection practices.[22] The stated Act includes the definition of the private debt collector that involves any person using "any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts"[23] or any person directly or indirectly involved in the collection or attempts of collection of debts. It also includes the procedure of the debt validation and the list of prohibited practices that include (non-exclusively) the following: threatening to use violence or other means to harm an individual's reputation or property, usage of obscene and any other abusive language, publishing or disclosing debtor's data, repetitive calls, false representations of debt collectors regarding status and amount of debt, or any possible legal actions related to debt, collection of additional interest fees and charges incidental to the debt obligation, threatening to start prosecution against the debtor, communicating outside working hours.[24] The Act also provides for the defense mechanisms, individual and collective actions of debtors if unfair debt collection practices were involved.

Most states of the U.S. have implemented state fair debt collection practices statutes – mini FDCPAs, that are more detailed than federal regulation and provide for more protective rules for debtors.[25] It should also be stated that federal FDCPA is a *de minimis* rule and state statutes can afford more protection to consumer-debtors, such as licensing requirement.[26] Most of the mini-FDCPAs include the licensing requirement at a state level for private debt collectors that is another *ex-ante* protective mechanism against unfair debt collective practice.[27] List of the unfair debt collection cases together with the licensing requirements and the

20 Tajti, T., (2020). *A Holistic Approach to Extra-Judicial Enforcement and Private Debt Collection: A Comparative Account of Trends, Empirical Evidences, and the Connected Regulatory Challenges* – Part Two. Pravni Zapisi, p. 18.

21 *See* further discussion, Stănescu, C. G., (2015). *Self-Help, Private Debt Collection and the Concomitant Risks*: *A Comparative Law Analysis*. Springer, p. 217.

22 *See* generally, The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692–1692.

23 15 U.S.C. §1692a(6).

24 *Ibid.* §1692.

25 *See* the list of the States adopting mini-FDCPAs, National Conference of State Legislatures, *State Fair Debt Collection Statues* (2021). [Last seen 10.09.2022] <https://www.ncsl.org/research/financial-services-and-commerce/state-fair-debt-collection-practices-acts.aspx>

26 Stănescu, C. G. (2015), p. 218.

27 *Ibid*.

regulatory framework for the civil action in case of violation, collectively constitute an excellent example of the sector-specific regulation of the debt collection practices.

2.2. The U.K. Model

The U.K. Model is described as the "soft touch" approach in relation to the debt collection practice regulation.[28] Rules are fragmented and can be found in different branches of law, mostly consumer protection law; however, it was rightly mentioned by Tibor Tajti that the U.K. "has one of the most developed and tested laws on private debt collection – even if fragmented and scattered over more branches of law, and the most important part actually being soft law today."[29] The fact that the U.K. does not have a comprehensive act regulating debt collection cannot lead to the conclusion that the unfair practices are not addressed. Consumer Credit Act involves the protection of consumer debtors, regulates relevant conditions for the acquisition of debt collection licenses, allows taking of measures against applicants, authorizes debt adviser services, and considers vulnerability conditions of particular debtors (for instance, mental health conditions).[30] It is idiosyncratic characteristics of the U.K. system that it is only concerned with consumers and affords to them wide range of protections against unfair collection practices.

The Financial Conduct Authority (FCA) is the responsible state agency guaranteeing that customer debtors are treated with "forbearance and due consideration".[31] The FCA has broad enforcement, supervisory, investigative, and disciplinary powers *vis-à-vis* private debt collectors.[32] Also, there are restricted debt collection practices in the Consumer Credit Sourcebook (CONC)[33] and the Regulated Activities Order of 2001 which indicates that debt collection is the regulated activity and special permission is required to get engaged into those activities.[34] Hence, the FCA views debt collection practice as an inherently *high-risk* activity, and the regulatory structure is designated to protect the consumer and limit unfair approaches.

The FCA oversight over the debt collection practices starts with communicating the information to debtors. Private debt collectors are obliged to communicate the information in a clear, fair, and not misleading in nature, also they do not have the right to mislead the debtors regarding their legal position or the amount of debt.[35] Hence, debt collectors are not allowed to send the letters that look like court claims, using inappropriate language, contact debtors at unreasonable times or require premium calls.[36] Debt collectors are obliged to present balance statements to the debtors and provide adequate information regarding their outstanding debt obligation; also, debtors are entitled to a reasonable period of time and opportunity to repay their debts, and it is even required to consider "suspending, reducing, waiving or canceling any further interest or charges" in

28 *Ibid*. p. 220.

29 Tajti, T. (2020).

30 The Consumer Credit Act (2006) (as amended); *See* Financial Conduct Authority (FCA) Handbooks. <https://www.handbook.fca.org.uk/handbook> [Last seen 30.11.2022].

31 *See* Financial Conduct Authority (FCA), CONC 7.3 Treatment of Customers in Default or Arrears (Including Repossessions): Lenders, Owners and Debt Collectors (CONC 7.3.4). <https://www.handbook.fca.org.uk/handbook/CONC/7/3.html> [Last seen 30.11.2022]

32 *See* Financial Conduct Authority (FCA), The FCA's Duties and Powers <https://www.handbook.fca.org.uk/handbook/PROF/3.pdf> [Last seen 30.11.2022]; *See* also, FCA's Approach to Enforcement. <https://www.handbook.fca.org.uk/handbook/EG/2.pdf> [Last seen 30.11.2022]

33 Consumer Credit Sourcebook (CONC), a combination of Standards, General Principles for Business (1.1.4.). <https://www.handbook.fca.org.uk/handbook/CONC/>.

34 The FSMA, Regulated Activities Order (2001). [Last seen 01.02.2023] can be accessed from <https://www.legislation.gov.uk/uksi/2001/544/contents/made> (Article 39F states that the debt collectors fall under the scope of "credit intermediaries"; the same applies under the Article 3 (f) of Parliament and Council Directive 2008/48/EC1 Directive on Credit Agreements for Consumers).

35 CONC 7.11.1.

36 CONC 7.3.2, 7.3.2A, 7.3.6.

cases when a debtor is in financial difficulties.[37] Moreover, debt collection is prohibited when a debtor is particularly vulnerable (for example, mentally ill) to make any financial decision.[38]

In addition to the abovementioned protections against abusive debt collection practices guaranteed under the CONC, the Consumer Rights Act 2015 deals with unfair debt collection assignment terms and debt collection contracts.[39] What is considered to be "unfair" under the stated Act is decided on a case-by-case basis, but it shall cause a significant disbalance between the parties to the detriment of the debtor.[40] Debt collection assignment terms are subject to the judicial review. The same applies to the fee and charges that are subject to general regulations, as well as court oversight from the perspective of the common law approaches to the penalty clauses.[41] The U.K. regulatory structure also provides for the Financial Ombudsman Service, which is entitled to regulatory oversight mechanisms to stop excessive debt collection practices.[42]

Despite the various mechanisms in force in the U.K.'s regulatory structure to tackle excessive debt collection practices, it is criticized for lack of clarity since various legal acts are involved in the process, and enforcement of the rights guaranteed in relation to the vulnerable debtors is not always guaranteed.[43] It should also be noted that criticism of one of the prominent legal approaches is relevant for the countries without regulatory structure designated for the private debt collection process and activities.

2.3. The Building Blocks of an Efficient Regulatory System

The main building blocks employed by an efficient regulatory system shall be the following: *"(1) definition of the debt collectors; (2) the existence of a licensing system; (3) the presence of legal requirements concerning (a) communication with the debtor and third parties, (b) harassment of the debtor or third parties, (c) using misrepresentation or misleading information, (d) validation of the debt, and (e) costs and additional charges; (4) open-end definitions; (5) enforcement via private action; and (6) enforcement via state action".*[44]

2.3.1. Defining Private Debt Collectors

In the process of regulating private debt collectors, it is noteworthy to determine to whom the law applies. For example, the U.S. model (federal level FDCPA) only covers private debt collectors involved in debt recovery, their employees and agents, and lawyers active in the process.[45] Definitions are more extensive on State levels aiming to involve creditors and assignees.[46] Taking into account the idea that regulating debt collectors aims to protect debtors and prevent abusive debt recovery practices, the definition of a debt collector shall be clear, precise and all-encompassing. Hence, it shall include original creditors, assignees, and any third parties (including lawyers) involved in the debt collection process.

2.3.2. Licensing System

Jurisdictions regulating private debt collection (namely, the U.S. (State level), the U.K., Germany, Sweden, Belgium, Finland, Norway, Denmark, Greece, and Latvia) have implemented licensing systems designated for private

37 CONC 7.3.5 (1).
38 CONC 7.10.
39 Consumer Rights Act (2015). <https://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> [Last seen 01.02.2023].
40 *Ibid*. s 62(4).
41 Gardner J., Gray M. (2022). *Regulation of Abusive Informal Debt Collection Practices. The U.K. Debt Collection Industry: Why Regulation is not Enough* in Regulation of Debt Collection in Europe. p. 206.
42 *Ibid*. p. 207.
43 *Ibid*. p. 213.
44 Stănescu, C. G. (2015), p. 230-231.
45 Fair Debt Collection Practices Act (FCDPA). <https://www.federalreserve.gov/boarddocs/supmanual/cch/fairdebt.pdf> [Last seen 01.02.2023].
46 Stănescu, C. G., Albanezi A. (2022). *Romania's Struggle to Regulate Abusive Debt Collection Practices* in Regulation of Debt Collection in Europe. p. 168.

debt collectors.[47] Operating licenses are issued upon request to the private debt collectors who meet regulatory requirements and aim to observe them throughout their activity. Failure to meet the preconditions can result in criminal sanctions,[48] or administrative measures, suspension, or termination of the debt collection activity.[49] It is also possible to impose the financial guarantee system for recovery of financial losses or damages from abusive practices. A licensing system is one of the major building blocks for an effective regulatory system designated to protect debtors from abusive debt recovery activities.

2.3.3. Abusive Practices

Regulating system of the debt collection activities shall include the list of abusive practices. It shall be clearly stated in law debtors shall be communicated in a fair and precise manner. Restrictions shall include activities related to communication with the debtor or third parties. Debtors shall be notified regarding their current standing and outstanding debt obligations; on the other hand, regulating communication with debtors shall protect the private life of the debtor, their relationship with third parties, their public image and dignity.[50] Hence, debtors shall not be exposed to public shame or abusive language and behavior in the process of debt collection.

In addition, debtors shall be entitled to the validation of debts to ascertain that the claim is valid and it is their obligation to pay. Debtors are entitled to a written notice specifying the amount owed and the documents certifying the debt.[51] Thus, debtors shall get information regarding the original creditor, assignee, and their outstanding debt.

Moreover, the abusive practices list shall include the activities of the private debt investors that are aggressive in nature or intends to harass or abuse the debtors. They shall also be protected from any misleading information regarding the debt, its collection, their legal standing, fees, or charges.

2.3.4. Open-end Definitions

The regulating system shall also include open-end definitions to follow the innovation and creation in the field of abusive debt collection practices. Adopting "soft law" mechanisms such as guidelines by the supervisory bodies are discussed as one option (such as the U.K.'s Consumer Credit Sourcebook); however, it is inherently challenging for the civil law jurisdictions.[52]

2.3.5. Enforcement via Private and Public Actions

Abusive private debt collection practices shall be prevented and cured via private and public actions. An efficient regulatory system shall allow remedies against abusive and unfair debt collection activities. Private action and civil liability are the core of FDCPA in the U.S. system.[53] Debt collectors shall be liable for their actions and breaches of law, while debtors need to be entitled to the damages and compensation of legal and administrative fees. In the U.K. system, debtors can resort to the Financial Ombudsman Service. Notwithstanding the problems in the court procedures, the existence of civil liability is one of the main building blocks of the efficient regulatory system touching upon the activities of private debt collectors.

Another important mechanism shall include the existence of public actions. In this scenario, supervisory or regulatory bodies shall be entitled to impose administrative sanctions or proceed with criminal charges against private debt collectors when they breach the law and engage in abusive or unfair debt recovery practice or pursue their activities without the necessary authorization.

47 *Ibid*. p. 169.
48 Operating without authorization is considered a criminal offence in the U.K. See Finlay S. (2009) *Consumer Credit Fundamentals.* p. 79.
49 *See* Stănescu, C. G., Albanezi A. (2022). p. 169.
50 *Ibid*. p. 171.
51 *Ibid*. p. 174.
52 *Ibid*. p. 175.
53 *Ibid*. p. 176.

CONCLUSIONS

This Article gave a general overview of the importance of debt recovery and the abusive practices of debt collectors. It is argued that debt collection is an inherently risky activity that can excessively violate the debtor's rights if not properly executed. Debt recovery practice is not new for the Georgian market; however, information on the matter is only presented on television or social media. It is noteworthy to stress that Georgian legislation does not provide for sector-specific regulation touching upon the activities of private debt collectors. Also, traditional branches of law cannot deal with abusive practices in the debt recovery process. It is also analyzed that even the brand-new consumer rights protection law of Georgia does not include provisions protecting debtors from private debt collectors' unfair practices.

Additionally, the Article provided selected regulatory approaches based on the U.S. and the U.K. experience. Leading examples involved sector-specific regulations (the U.S. model) and "soft touch", fragmented laws (the U.K. model) to show that both are acceptable if they include the building blocks relevant for an efficient regulatory structure. Georgia has not yet taken its path toward private debt collectors' regulation. Therefore, it is relevant to acknowledge the regulatory gap and analyze the existing approaches and the building blocks of an efficient system.

BIBLIOGRAPHY:

1. Law of Georgia on Enforcement Proceedings, Article 14⁶, No. 1908 (1999).
2. Law of Georgia Criminal Code of Georgia, No. 2287 (1999).
3. Law of Georgia on Entrepreneurs, No. 875-Vრს-Xმპ (2021).
4. Law of Georgia on Licenses and Permits, No. 1775 (2005).
5. Law of Georgia on Consumer Rights Protection, No. 1455-VI-IIმს-Xმპ (2022).
6. National Conference of State Legislatures, *State Fair Debt Collection Statues* (2021), <https://www.ncsl.org/research/financial-services-and-commerce/state-fair-debt-collection-practices-acts.aspx>
7. The Consumer Credit Act (2006) (as amended).
8. Financial Conduct Authority (FCA) Handbooks, <https://www.handbook.fca.org.uk/handbook>
9. Financial Conduct Authority (FCA), CONC 7.3 Treatment of Customers in Default or Arrears (Including Repossessions): Lenders, Owners and Debt Collectors (CONC 7.3.4), <https://www.handbook.fca.org.uk/handbook/CONC/7/3.html>
10. Financial Conduct Authority (FCA), The FCA's Duties and Powers <https://www.handbook.fca.org.uk/handbook/PROF/3.pdf>
11. FCA's Approach to Enforcement <https://www.handbook.fca.org.uk/handbook/EG/2.pdf>
12. Consumer Credit Sourcebook (CONC), a combination of Standards, General Principles for Business <https://www.handbook.fca.org.uk/handbook/CONC/>
13. The FSMA, Regulated Activities Order (2001), <https://www.legislation.gov.uk/uksi/2001/544/contents/made>
14. Consumer Rights Act (2015), <https://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>
15. Botta, A., Caverzasi, E., & Russo, A. (2020). *Fighting The Covid-19 Crisis: Debt Monetisation and EU Recovery Bonds*. 55(4) Intereconomics.

16. Business Media Georgia, *Private Debt Collecting Companies Fined for Disclosing Personal Data* (2018) <https://bm.ge/ka/article/sesxis-amomgebi-kompaniebi-personaluri-informaciis-gamjgavnebistvis-daajarimes/17015>
17. Coleman, M.A. (2004). *Collection Management Handbook: The Art of Getting Paid*. (2nd end.). John Wiley & Sons Inc.
18. Deville, J. (2015). Lived Economies Of Default: Consumer Credit, Debt Collection and The Capture of Affect. Routledge.
19. Ferretti, F. (Ed.). (2016). Spooner, J. (2016). *Comparative Perspectives of Consumer Over-Indebtedness: A View From The UK, Germany, Greece, And Italy*. 25(3) International Insolvency Review.
20. Finlay S. (2009) *Consumer Credit Fundamentals*.
21. Fox, J. (2012). *Do We Have Debt Collection Crisis Some Cautionary Tales of Debt Collection in Indiana*. 24(3) Loyola Consumer Law Review.
22. Gardner J., Gray M. (2022). *Regulation of Abusive Informal Debt Collection Practices. The U.K. Debt Collection Industry: Why Regulation is not Enough* in Regulation of Debt Collection in Europe.
23. Gow, H. R., Streeter, D. H., & Swinnen, J. F. (2000). *How Private Contract Enforcement Mechanisms Can Succeed Where Public Institutions.* Agricultural Economics, 23(3).
24. Kurowski, Ł. (2021). *Household's Overindebtedness During the COVID-19 Crisis: The Role Of Debt And Financial Literacy*. Risks, 9(4).
25. Landes, W. M., & Posner, R. A. (1975). *The Private Enforcement of Law.* 4(1), The Journal Of Legal Studies.
26. Personal Data Protection Service of Georgia, *Report on the State of Personal Data Protection and Activities of the Inspector* (2020), (2018) and (2017) <https://personaldata.ge/en/about-us>
27. Stănescu, C. G. (2021). *Regulation of Abusive Debt Collection Practices in the EU Member States: An Empirical Account*. 44(2) Journal of Consumer Policy.
28. Stănescu, C. G., Albanezi A. (2022). *Romania's Struggle to Regulate Abusive Debt Collection Practices* in Regulation of Debt Collection in Europe.
29. Tajti, T. (2019). *A Holistic Approach to Extra-Judicial Enforcement and Private Debt Collection: A Comparative Account of Trends, Empirical Evidences, and the Connected Regulatory Challenges* –Part One. Pravni Zapisi.
30. Tajti, T. (2020). *A Holistic Approach to Extra-Judicial Enforcement and Private Debt Collection: A Comparative Account of Trends, Empirical Evidences, and the Connected Regulatory Challenges* – Part Two. Pravni Zapisi.
31. Whaley, D. J. (2020). *Problems and Materials on Consumer Law*. Aspen Publishers.

SEIZURE AND CONFISCATION AS AN EFFECTIVE MEANS OF COMBATING TRANSNATIONAL ORGANIZED CRIME*

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ABSTRACT

Transnational organized crime and the fight against it are big challenges for the world. That is why international cooperation plays an important role in the fight against transnational organized crime. Two types of international cooperation should be distinguished: the cooperation between courts and judicial institutions and international police cooperation. In Georgian legislation, they are sharply separated from each other. The Law of Georgia "On International Cooperation in the Field of Criminal Law" regulates international cooperation between courts and judicial cooperation. The mentioned law is one of the important documents from the point of view of international cooperation. It regulates matters related to the revealing of legal aid in criminal cases, extradition, forwarding of criminal case materials or their duly certified copies, execution of judgments, international cooperation related to confiscation of property, and transfer of persons sentenced to imprisonment. The article will directly discuss confiscation as a mechanism of fighting against transnational organized crime based on the Palermo Convention and the law of Georgia, "On International Cooperation in the Field of Criminal Law". The norms governing confiscation in the Criminal Code will be discussed,

* According to the United Nations Convention against Transnational Organized Crime, hereafter the Palermo Convention.

as well as the Civil Code of Georgia, the provisions of which provide the opportunity to file a lawsuit for confiscation of property.

The article is divided into three chapters and seven subsections; the first chapter deals with the analysis of confiscation and confiscation regulatory norms in international law according to the Palermo Convention and will also discuss the European judicial practice of human rights. The second chapter deals with the confiscation regulatory norms in the Georgian legislative acts, including the Criminal Law of Georgia and the Civil Procedure Code of Georgia. Moreover, the third chapter will include international cooperation, particularly between Georgian judicial cooperation and suitable institutions of other states.

KEYWORDS: Palermo convention, Organized crime, Confiscation, International cooperation

INTRODUCTION

Transnational organized crime and the fight against it is a big problem for the civilized world. Due to the nature of the transnational organized crime, close cooperation between countries is considered a unique way to combat it. A number of areas of cooperation between courts and judicial institutions are described in the Palermo Convention, which is an essential document in organized crime prevention. In Georgia are two important documents in this regard: The Law on "International Cooperation in the Field of Criminal Law" and the "Law on International Cooperation in the Field of Law Enforcement". The purpose of both laws is to strengthen international cooperation between courts and judicial institutions, as well as between law enforcement agencies.

The confiscation of illegal and undocumented assets and the seizure/confiscation of assets intended for the commission of such crimes is considered one of the best ways to combat transnational organized crime. When committing/preparing transnational organized crime, property/profits are accumulated in different countries, and the property obtained as a result of such activities is returned and strengthens organized groups. That is why it is relevant and essential to enhance international cooperation and close legal relations between countries to confiscate property/income due to the commission of a transnational organized crime or intended it to be committed.

The purpose of the research topic is to study the norms of the Palermo Convention, which at the international level regulate the rules for the confiscation of property between state parties as a result of or for the purpose of committing transnational organized crimes. Determining its compliance with the Law of "Georgia on International Cooperation in the Field of Criminal Law" is also important.

The subject of the article is the internal legal acts of the country, including the regulation of confiscation/seizure of the Criminal Code of Georgia and the Civil Procedure Code of Georgia, with the attitude of international cooperation – the Law of Georgia on "International Cooperation in the Field of Criminal Law."

1. THE REGULATORY NORMS OF CONFISCATION AND SEIZURE IN THE INTERNATIONAL LAW

1.1. Assets/Benefits Subject to Confiscation under the Palermo Convention

We find confiscation and seizure as one of the measures of procedural coercion in the different international legal acts. Among them are the Palermo Convention and the 1998 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances."[1]

According to Article 2 of the Palermo Con-

1 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, see the official website of the Legislative Herald of Georgia. <https://www.matsne.gov.ge/ka/document/view/2540250?publication=0f> [Last seen 14 February 2023].

vention, "freezing" or "seizure" shall mean temporarily prohibiting the transfer, conversion, disposition, or movement of property or temporarily assuming custody or control of the property based on an order issued by a court or other competent authority.[2] Concerning "confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.[3] Before adopting the Palermo Convention, an identical definition existed in the 1998 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[4]

Article 12 of the Palermo Convention requires the participating states to confiscate the proceeds or property of relevant value obtained by committing crimes under the Convention, as well as confiscation of property, equipment, or other means used or intended to be used to commit these crimes.[5]

This refers explicitly to committing or intending to commit acts criminalized under articles 5 (participation in an organized criminal group), 6 (laundering of proceeds of crime), 8 (corruption), and 23 (obstruction of justice) of the Palermo Convention on Confiscation of Property. For example, money paid in bribes, income received as a result of the activities of organized groups and other criminal benefits.[6] Interestingly, what is meant by "confiscation of equipment or other means"? Devices may include vehicles, computer equipment, and other similar items that criminals have used or will use to commit crimes. Other means may include documentation or intangible goods.

Article 12 of the Convention also obliges the member states to take such measures as may be necessary for the possible identification, search, seizure, or freezing of any item specified in the first paragraph of this article, with the aim of its final confiscation.[7] This article again obliges the member states to adopt the relevant legislation so that the courts and other institutions can carry out the function mentioned above.[8] For example, in England, there is an "Agency for the recovery of assets", which in 2005 received more than 17 million pounds sterling from the confiscation of property.[9]

According to this article, if the proceeds obtained through crime are partially or wholly converted or transformed into other property, measures aimed at confiscating the property provided for in this article shall be applied to such property.[10] Also, if proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.[11] In this case, income means the benefit obtained directly or indirectly from criminal activity. Conversion means changing the type of thing, for example, converting one product of gold into another product and mixing the income obtained through criminal means with legal income; this means, for example, buying a house partially with the income received through lawful means, and partially as a result of criminal

2 Palermo Convention, see the official website of the Legislative Herald of Georgia. <https://matsne.gov.ge/ka/document/view/1485286?publication=0> [Last seen 14 February 2023].

3 Ibid.

4 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, see the official website of the Legislative Herald of Georgia. <https://www.matsne.gov.ge/ka/document/view/2540250?publication=0f> [Last seen 14 February 2023].

5 Palermo Convention, see the official website of the Legislative Herald of Georgia. <https://matsne.gov.ge/ka/document/view/1485286?publication=0> [Last seen 14 February 2023].

6 McMclean, D., (2007). Transnational Organized Crime a Commentary on the UN Convention and its Protocols. Oxford University Press, 1st, p. 144.

7 Palermo Convention, see the official website of the Legislative Herald of Georgia. <https://matsne.gov.ge/ka/document/view/1485286?publication=0> [Last seen 14 February 2023].

8 McMclean, D., (2007). Transnational Organaized Crime a Commentary on the UN Convention and its Protocols. Oxford University Press, 1st, p.144.

9 Ibid.

10 Palermo Convention, see the official website of the Legislative Herald of Georgia. <https://matsne.gov.ge/ka/document/view/1485286?publication=0> [Last seen 14 February 2023].

11 Ibid.

activity. In this case, the part of the property obtained by illegal means is subject to confiscation/seizure.

In the Palermo Convention, the legislator made confiscation not only of the property or benefits obtained directly as a result of the crime but also of the profit obtained from the criminal activity. According to Article 12, Section 5 of the income or other benefits derived from proceeds of crime, from the property into which proceeds of crime have been transformed or converted or from the property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner, and to the same extent as proceeds of crime.[12] The idea behind this provision is, for example, to prevent income from renting a house bought due to a crime from being considered "legitimate" income. This article clarifies that confiscation of this kind of proceeds is possible.

1.2. Analysis of the European Court of Human Rights Case-Law

There is another interesting note in Article 12 of the Palermo Convention. According to this note, States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.[13] A similar provision is contained in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention), under which each Party may consider shifting the burden of proving the legal origin of alleged proceeds or other property. Subject to confiscation to the extent that such action is consistent with the principles of its domestic law and the nature of judicial and other procedures.[14] Both entries are almost identical and place the onus on the alleged perpetrator to prove the legal origin of the proceeds of crime and the property subject to confiscation.

Interestingly, this protocol contradicts Article 6 of the European Convention on Human Rights and how the burden of proof is legally transferred to the accused/convict. In connection with this, it is crucial to consider the judicial practice. For example, consider the case of Telbis and Viziteu against Romania.[15] In the present case, Telbis and Visiteau, as the owners of the seized property, had an opportunity at any time of their initiative to be involved in the forfeiture proceedings. Even though they were not accused in the specific case, they were granted party status upon request and became involved in the judicial process. According to the European Court of Human Rights assessment, the decision to confiscate the property was made in full; the trial was conducted per the principle of competition, where the owners were entitled to present their opinions and evidence.[16] "Based on the basic research, the national court decided to confiscate only that part of the property whose legal origin could not be convincingly demonstrated by the owners. Therefore the European Court considered that the applicants had an adequate opportunity to protect their interests at the national level".[17]

Regarding confiscation of property, when analyzing judicial practice, the 2015 decision of the

12 Palermo Convention, see the official website of the Legislative Herald of Georgia. <https://matsne.gov.ge/ka/document/view/1485286?publication=0> [Last seen 14 February 2023].

13 Ibid.

14 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, see the official website of the Legislative Herald of Georgia. <https://www.matsne.gov.ge/ka/document/view/2540250?publication=0f> [Last seen 14 February 2023].

15 Tskhvediani, T., Kvatchantiradze, D., Noselidze, A., (2019) Guarantees of Protection of Property Rights in Criminal Proceedings, p. 25. <https://alfg.ge/wp-content/uploads/2020/07/kvleva.pdf> [Last seen February 14, 2023].

16 Ibid.

17 Ibid.

European Court of Human Rights, "Gogitidze et al. v. Georgia" is important. The case was about the confiscation of illegal and undocumented property. In particular, during the consideration of the case, it was revealed that the salary of the accused Gogitidze was three times lower than the value of the property purchased by him, in particular, the applicants complained about the non-compliance of the administrative rule, according to which they confiscated their property with the right of ownership protected by the European Convention.[18] The mentioned decision is interesting from several aspects. In particular, the applicant contested two elements of the proceedings: 1. National legislation allowed the confiscation of the applicant's property as illegally obtained and undocumented until his guilt is proven; 2. During the proceedings, the burden of proof lay on the applicant.[19]

In this decision, the European Court noted that states can confiscate property related to serious crimes (such as corruption, money laundering, drug-related crimes, etc.).[20] At the same time, the European Court notes that the burden of proving the legal origin of property declared illegal falls on the defendant. Confiscation measures are applied not only in relation to proceeds from crime but also in relation to such property as other income and indirect benefits that are used for conversion, exchange, or obtained by joining with other possible legal property.[21]

The European Court considers the confiscation decision by the national court based on the assertion that the defendants' legal income was insufficient to purchase the said property, to be legal, even without a guilty verdict. In such cases, the European Court does not require the "beyond reasonable doubt" standard to be met.[22] Regarding the violation of Article 6, the European Court reiterates that according to the case-law established by it, confiscation of property, without establishing guilt, has a preventive and/or compensatory nature, not punitive. Therefore, it does not lead to violating the provisions mentioned above in the Convention.[23]

The above-mentioned reasoning and this approach of the European Court allow us to make important conclusions. In particular, confiscation of property should not be understood as only a form of additional punishment; the purpose of confiscation is to prevent crimes. Secondly, concerning the presumption of innocence and the defendant's burden of proof, it should be noted that in this case, the defendant is obliged to prove the legality of the income, otherwise, it is assumed that the person has obtained this property illegally and unjustifiably. In the case of Gogitidze and al., the person was deprived of his property because, based on the evidence, A. Gogitidze's annual income was much less than the value of his purchased property.

2. REGULATORY NORMS OF CONFISCATION IN GEORGIAN LEGISLATIVE ACTS

2.1. Confiscation and Seizure as a Form of Punishment in the Criminal Code

As for the regulatory norms of confiscation/seizure in Georgia today, confiscation is a form of additional punishment in the Criminal Code, and in the Civil Procedure Code, it is considered the basis for starting civil proceedings. It is necessary to distinguish between them, and it is also important to assess the issue of their compatibility with each other.

According to the Georgian Criminal Code, confiscation of property means free-of-charge

18 Decision of the European Court of Human Rights "Gogitidze and others v. Georgia", Strasbourg, (2015). <https://www.supremecourt.ge/files/upload-file/pdf/saqartvelos-winaagmdeg-gogitidze-da-sxva.pdf> [Last seen 14 February 2023].

19 Ibid.

20 Decision of the European Court of Human Rights "Gogitidze and others v. Georgia", Strasbourg, (2015). <https://www.supremecourt.ge/files/upload-file/pdf/saqartvelos-winaagmdeg-gogitidze-da-sxva.pdf> [Last seen 14 February 2023].

21 Ibid.

22 Ibid.

23 Ibid.

confiscation of the object of crime and/or weapon, the object intended for the commission of a crime, and/or property obtained through crime for the benefit of the state.[24] This last definition appeared in the Georgian Criminal Code in 2005. According to the current edition, in each specific case, it is necessary to determine the object of the crime, the weapon, the item intended for the commission of the crime, and the property obtained as a result of the criminal act.[25] As we have already mentioned, the first part of Article 52 of the Criminal Code defines confiscation, and the second one talks about to whom this measure can be used. Confiscation of the object of the crime and/or the weapon or the thing intended for the commission of the crime means the confiscation of the property used for the commission of the intended crime in the possession or legal possession of the accused, the convicted person, for the benefit of the state.[26] The object of the crime and/or the weapon or the thing intended to commit the crime is confiscated by the court, for all the intended crimes stipulated by the Criminal Code, in the event that there is an object of the crime and/or a weapon or an item designed to commit a crime and their confiscation is necessary due to state and public necessity or the interests of protecting the rights and freedoms of individuals or to prevent new crimes.[27] According to this part of the law, the property can be confiscated from both the accused and the convicted. If we take into account that Article 52 of the Criminal Code is a substantive criminal law norm and, at the same time, an additional form of punishment, the question arises as to how much it is possible to punish a person against whom a guilty verdict has not been issued?! Obviously, the current version of the law contradicts itself, allowing additional punishment for the accused person.

2.2. Civil Process for Confiscation of Property

The Code of Civil Procedure of Georgia regulates filing a claim for confiscation and transfer to the State of property derived from racketeering activities, or property of officials, members of the 'criminal underworld', human traffickers, persons facilitating the distribution of drugs or property of persons convicted of a crime under Article 194 and/or Article 331[1] of the Criminal Code of Georgia. A claim for confiscation and transfer to the State of property derived from racketeering, or property of officials, members of the 'criminal underworld', human traffickers, persons facilitating the distribution of drugs, or property of persons convicted of a crime under Article 194 and/or Article 331[1] of the Criminal Code of Georgia may be filed by a prosecutor within ten years after a court ruling against the racketeer, the official, the member of 'criminal underworld', the human trafficker, the person facilitating the distribution of drugs or the person convicted of a crime under Article 194 and/or Article 331[1] of the Criminal Code of Georgia has entered into force.[28] According to the Code of Civil Procedure a claim for confiscation and transfer to the State of property derived from racketeering may be filed against a racketeering group, a racketeer, a racketeer's family member, a close relative or a person connected with the racketeer.[29] The above may be interesting and, at the same time, controversial. Still, this article serves to confiscate undocumented and illegal property from all those who obtained it due to committing a crime.

When we talk about the confiscation of property, it is important to distinguish between the confiscation of property as a form of additional punishment and the initiation of civil proceedings/lawsuits for the confiscation of property. It should also be noted here that since a person

24 Criminal Code of Georgia, see on the official website of the Legislative Herald of Georgia. <https://matsne.gov.ge/ka/document/view/16426?publication=246> [Last seen February 14, 2023].

25 Ibid.

26 Ibid.

27 Ibid.

28 Civil Procedure Code of Georgia, see on the official website of the Legislative Gazette of Georgia. <https://matsne.gov.ge/ka/document/view/29962?publication=153> [Last seen February 14, 2023].

29 Ibid.

is accused, confiscation of property cannot be used as a form of punishment, and at this time, there is no reason to initiate a civil lawsuit. In this case, one more criminal procedure mechanism, seizure, ensures the seizure of the property that may be confiscated from the person in the future. According to Article 151 of the Criminal Procedure Code, as a coercive measure in criminal procedure, the court may, upon motion of a party, seize the property, including bank accounts, of the accused, of the person materially responsible for the accused person's actions, and/or of the person related to the accused person, if there is information to suggest that the property will be concealed or destroyed, and/or the property has been obtained criminally.[30] The property seizure provided for by this Code shall also be applied in the case of preparation of one of the crimes provided for by Articles 323-330 and 331[1] of the Criminal Code of Georgia or any other severe crime, as well as for their prevention if there is sufficient information to believe that the property in question could be used for the commission of a crime.[31]

This entry in the Criminal Procedure Code is preventive and prevents serious crimes such as terrorism and other related crimes. In the end, a seizure can be considered to carry such a preventive function of coercion.

2.3. Compliance of the Requirements of the Palermo Convention with the Georgian Legislation

The Palermo Convention requires States Parties to confiscate/seize property intended to commit acts criminalized by the Convention. In the Georgian Criminal Code and the Civil Procedure Code, attention is focused on two categories of actions criminalized by the Palermo Convention: the legalization of illegal income and crimes committed by organized groups (racketeering, membership in criminal underworld, etc.). It may be questioned whether this contradicts the requirements of the Palermo Convention. First of all, it should be noted that according to the Civil Procedure Code, any property may be seized if there is evidence that the property was obtained through criminal means. Second, Article 52 of the Criminal Code defines confiscation of property as a form of additional punishment that may be applied to a person convicted of all categories of crimes, including corruption and obstruction of justice. Thirdly, one limitation that remains is Article 356[2] of the Code of Civil Procedure, which provides for filing a lawsuit only against persons convicted of the following crimes: Possession of racketeering property, official, member of the "criminal underworld", human trafficker, facilitator of the distribution of narcotic drugs or Articles 194 and/or 331[1] of the Criminal Code of Georgia. It turns out that civil proceedings cannot be initiated against persons convicted of obstructing the administration of justice based on confiscation of their property. Their property may be subject to seizure and confiscation of property.

3. INTERNATIONAL COOPERATION FOR THE PURPOSE OF CONFISCATION/SEIZURE

3.1. International Cooperation for the Purpose of Confiscation under the Palermo Convention

The rise and nature of transnational organized crime have made close legal cooperation between countries necessary. Many states have chosen confiscation as a form of responsibility to fight crime. Its use is significant both for crime prevention and punishment.

According to the Palermo Convention, a State Party that has received a request from another State Party having jurisdiction over an offense covered by this Convention for confisca-

30 Criminal Procedure Code of Georgia, see on the official website of the Legislative Gazette of Georgia. <https://matsne.gov.ge/ka/document/view/90034?publication=151> [Last seen February 14, 2023].

31 Ibid.

tion of proceeds of crime, property, equipment, or other instrumentalities of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system: submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect.[32] Submit to its competent authorities, with a view of giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities situated in the territory of the requested State Party.[33] This article aims to strengthen international legal mutual assistance, which includes the obligation of the participating states to confiscate property based on the request received from the state party to the convention. In case of receiving such a request, the requesting state is obliged to take appropriate measures to identify, find, seize, or remove proceeds, property, devices, or other means obtained through criminal means, with the aim of their final confiscation.

The existence of a request does not deprive the requesting State of the right to refuse the measure or to modify it. The State Party receiving the request has the right to refuse cooperation if the crime to which the request relates is not the subject of the regulation of this Convention. With this record, we can assume that the request for confiscation/seizure within the framework of this Convention can only be submitted for only four categories of crimes criminalized by the Convention in the participating State. This does not exclude the possibility that Georgia may receive a request for confiscation/seizure of property in connection with other crimes within the framework of international cooperation because Georgia is a member state of the 1990 "Convention on Money Laundering, Tracing, Seizure and Confiscation of Proceeds of Crime" of the Council of Europe.[34]

The member states of this Convention of the Council of Europe agree on the need to implement a common criminal justice policy and agree on different methods of combating severe crimes. One of them is the confiscation of the proceeds of criminal activity by criminals.[35]

3.2 Cooperation between Georgian Judicial Institutions and other States for the Purpose of Confiscation/Seizure

The Law of Georgia on "International Cooperation in the Field of Criminal Law" is one of the most important documents from the point of view of international cooperation. This Law defines the procedures for rendering legal assistance in criminal cases, for carrying out extradition, for transmitting criminal files or their duly certified copies for the further criminal prosecution of a person, as well as the procedures for enforcing court judgments and for transferring to, or receiving from, the state of nationality persons sentenced to imprisonment.[36] In 2018, a new chapter was added to the mentioned law, which regulates the main issues of international cooperation related to the confiscation of property. Interestingly, before that, the law did not say anything about international cooperation regarding confiscation. Concerning the current version of the law, the object of crime and/or weapons, items intended for the commission of a crime, and/or property obtained through criminal means (all items and intangible prop-

32 Palermo Convention, see the official website of the Legislative Gazette of Georgia. <https://matsne.gov.ge/ka/document/view/1485286?publication=0> [Last seen February 14, 2023].

33 Ibid.

34 Council of Europe Convention on Money Laundering, Tracing, Seizure and Confiscation of Proceeds of Crime, see on the official website of the Legislative Gazette of Georgia. <https://www.matsne.gov.ge/ka/document/view/1216554?publication=0> [Last seen February 14, 2023].

35 Ibid.

36 Law of Georgia on "International Cooperation in the Field of Criminal Law", see on the official website of the Legislative Gazette of Georgia. <https://matsne.gov.ge/ka/document/view/112594?publication=10> [Last seen February 14, 2023].

erty, legal document that gives some right to property), as well as any kind of income from this property, are subject to confiscation,[37] as well as property subject to confiscation by the Code of Civil Procedure.[38] The Chief Prosecutor's Office of Georgia is responsible for international cooperation and mutual assistance.

For the confiscation of property to be carried out on the territory of Georgia based on the petition of a foreign state, it is necessary that fundamental human rights and freedoms are not violated in the decision made by the foreign state. What is most important is that the satisfaction of such a petition should not pose a threat to Georgia's sovereignty, security, public order or other essential interest.

CONCLUSION

The above reasoning allows us to formulate conclusions and recommendations. Greater unity is needed to fight organized crime, which implies implementing a common criminal justice policy.

The confiscation of property is important in two respects. In particular, the confiscation of property intended for the commission of a crime has a kind of prevention function, and confiscation of property already obtained as a result of committing a crime prevents the commission of new crimes at the international level and also prevents the commission of new crimes, the strengthening of transnational organized groups. Moreover, confiscated property may be used to fight transnational organized crime.

As for Article 52 of the Criminal Code of Georgia, confiscation of property is used as an additional punishment. And in the same Article, the word accused is mentioned since the accused has not yet been convicted, it is impossible to talk about the confiscation of his property. Therefore, it is appropriate not to write the term "accused" in Article 52 of the Criminal Code; the norms of the Criminal Procedural Code should be used at the accusation stage, which directly implies the seizure of the item. And if there is already a guilty verdict, Article 52 of the Criminal Code may be used for punishment.

Depending on the goals of the Palermo Convention, a note of such content may be added to the Civil Code of Georgia, allowing the prosecutor to file a lawsuit, against a person convicted of obstructing justice, based on confiscation of property for ten years.

37 Ibid.

38 Law of Georgia on "International Cooperation in the Field of Criminal Law", see on the official website of the Legislative Gazette of Georgia. <https://matsne.gov.ge/ka/document/view/112594?publication=10> [Last seen February 14, 2023].

BIBLIOGRAPHY:

1. Nachkebia, G., Gorashvili, G., Mamulashvili, G., Todua, N., Gogshelidze, R., Sulakvelidze, D., Dvalidze, I., Problems of Criminalization of Modern Manifestations of Organized Crime in Georgian Criminal Law, Tbilisi: Shota Rustaveli Foundation, 2012, <https://www.tsu.ge>
2. Fafiashvili, L., Tumanishvili, G., Commentaries on the Criminal Justice Process of Georgia, Tbilisi, 2015, <https://sdasu.edu.ge>
3. Tkesheliadze, G., Lekveishvili, M., Nachbiya, G., Todua, N., Fourth Edition of the General Part of Criminal Law, Tbilisi, Meridian, 2019.
4. Criminal Code of Georgia, 1999, <https://matsne.gov.ge/> [Last seen 02.06.2022].

5. Criminal Procedure Code of Georgia, 2009, <https://matsne.gov.ge/> [Last seen 07.06.2022].
6. Civil Procedure Code of Georgia, 1997, <https://matsne.gov.ge/> [Last seen 07.06.2022].
7. United Nations Convention Against Transnational Organized Crime, 2000, <https://matsne.gov.ge> [Last seen 02.06.2022].
8. Council of Europe Convention on Money Laundering, Tracing, Seizure and Confiscation of the Proceeds of Crime, 1990, <https://matsne.gov.ge/> [Last seen 07.06.2022];
9. Council of Europe Convention on Money Laundering, Tracing, Seizure and Confiscation of the Proceeds of Crime and the Financing of Terrorism, 2005, <https://matsne.gov.ge/> [Last seen 07.06.2022].
10. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, <https://www.supremecourt.ge/files/upload-file/pdf/aqtebi65.pdf> [Last seen 29.12.2022].
11. Law of Georgia on "International Cooperation in the Field of Criminal Law", <https://matsne.gov.ge/ka/document/view/112594?publication=10> [Last seen 29.12.2022].
12. Council of Europe, Crime Analysis: Organised crime – Best practice survey no. Strasbourg, France, 2002.
13. Legislative guides for the implementation og the united nations conventions against transnational organized crime and the protocols thereto. (UNITED NATIONS New York, 2004).
14. McMclean, D., Transnational Organaized Crime a Commentary on the UN Conversetion and its Protocols (Oxford University Press, 1 st 2007).
15. Case of the European Court of Human Rights "Gogitidze and others v. Georgia", Strasbourg, 2015, <https://www.supremecourt.ge/files/upload-file/pdf/saqartvelos-winaagmdeg-gogitidze-da-sxva.pdf> [Last seen 14.02.2023].

COMMUNITY WORK AS AN ALTERNATIVE TO IMPRISONMENT IN THE MODERN GEORGIAN LAW (Evolution and Transformation)

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ABSTRACT

This article is devoted to community service as an alternative to imprisonment and the legal problems of its use. It includes interesting and different views on the distribution of the benefit provided by the law of exemption from serving a sentence, which is based on a deep analysis of practice and research of scientific works.

This small journalistic work is an attempt to make a modern scientific analysis of the introduction/establishment of a punishment that was previously foreign to our country, to what extent the mentioned legal innovation was justified, and what can be done for its further refinement/perfection, in addition, the specified concept focuses on the factors that allow for a correct complex approach from both the court and the decision-making body when deciding on the usage of the named legal mechanism.

In addition, the present article aims to discuss the main problems with the given mechanism of release from serving a sentence, as well as to propose suggestions of a recommendatory nature for the regulation of legal relations, including, as mentioned, legislative initiatives in terms of improving/perfecting the current legislation.

Additionally, a comparative legal analysis is made in the article, which makes the scientific research process of changing the punishment from punishment to work useful for society even more inter-

esting and diverse. In particular, the existing system at the national level is compared with internationally known models, based on this comparison, a comparative analysis is made, which shows the similarities and differences between the models.

The final part is devoted to the summary propositions that I have acquired due to the study and scientific processing of the raised issue.

Historical, formal-logical, dogmatic, formal-legal, comparative-legal, descriptive, and systematic methods are used to research the problem in a separate chapter. Furthermore, the data of legal statistics are used through the study and generalization of the practice of local councils and the court.

The opinions, proposals, and recommendations presented in the article will be interesting for theorists and practitioners interested in the given issue, as well as for legislative and administrative bodies, as well as for the court. In addition, the work will be interesting for non-lawyers, as it scientifically elaborates on community service as an alternative to imprisonment in modern Georgian law.

KEYWORDS: Community service, Evaluation criteria, Imprisonment, Resocialization, Judicial practice

INTRODUCTION

In modern Georgian law, a lot of attention is paid to the humanization of criminal legislation because the strictness of the law did not turn out to be a solution to the situation created in practice. Such a trend can be observed in European and American criminal law; Georgian criminal law does not lag behind this approach. This is also confirmed by the fact that the democratic processes implemented in recent years and the liberalization of the criminal law policy have added a special importance to such an important institution in modern Georgian law, which is called useful work for society. This is mainly because the mentioned legal mechanism is both a real and effective alternative to imprisonment, which is not related to the complete isolation of a person from society and is the best means of limiting the use of imprisonment, as well as the resocialization of convicts – rehabilitation. That is, in the field of fighting crime, in addition to coercive methods, the state already uses other methods of persuasion. It is regulated in the "post-criminal incentive" norms, such as the legal bases for assigning work useful to society and others. Community service as an alternative to imprisonment is not new in Georgian legislation, and it was introduced/developed in 1999. After establishing this institution as an alternative type of punishment, a considerable period has passed, and a certain scientific analysis has already been performed on how effective this type of punishment is and what can be done for its further perfection and improvement. Based on this, there is no doubt that the interest in the mentioned issue is constant, which requires a correct understanding of the given legal mechanisms at the stage of scientific research and conducting measurable operations in practical activities to solve the problems raised during the appointment of community service, as well as to achieve the goals of punishment. The named topic, along with the theoretical one, has great practical importance in law-making and law enforcement. In addition, modern Georgian legal literature on this topic is very scarce because the main focus is on the problem of crime, and the final opinion on what can be done to solve the legal problems in assigning community service has not yet been formed, there is still no answer to the question of how to To make the correct use of this legal mechanism so that the goals of the punishment are effectively achieved and to prevent the commission of new illegal and criminal acts and the return of a non-resocialized person to society. In addition to this, the domestic legislation is not entirely favorable and requires appropriate changes, in addition, there is a heterogeneous practice of the court in

relation to the "revision" of the decisions made by the local councils of the Special Penitentiary Service. Also, it should be noted that until now, there is no statistical recording of the subjects related to the issue of return to the penitentiary institution of those persons who were released by the local councils of the special penitentiary service and replaced the unpaid part of the sentence with community service, also there is no statistical recording of the persons whom the court mainly As a punishment, useful work for the society was determined, but despite this, they did not fulfill the assigned duties or they committed crimes again. The purpose of the research topic is to determine the essence and meaning of community service, to establish the pros and cons of community service as an alternative to imprisonment, to analyze the importance of legitimate operations when using a lighter type of punishment – community service, to establish how much it is possible for the local council of the special penitentiary service to rely on when making a decision Only one criterion is to determine to what extent it is permissible for a court to deprive a person of one type of benefit provided for by the law in another form, which is designated by the local council of the special penitentiary service, to outline the circumstances leading to the heterogeneous practice of the court, to determine the main methods that will contribute to the effective functioning of the given mechanisms, to analyze the punishment Procedural legal problems of discharge, for example, the extent to which enforcement is possible assigned duties and how adequate their form is in relation to the circumstances of a specific person, etc. Hypothesis of the research topic: how effective is the form of punishment, and what causes the legal problems of its use. To achieve the goal of the research, the task is formulated: to study the opinions of scientists and to achieve the goal of the research by answering questions related to problematic topics, at the same time, to examine the experience of foreign countries and make recommendations in terms of adjusting/improving the current legislation. The subject of the research is the opinions in the legal, sociological, and philosophical literature in relation to the issue of assigning work useful to society, as well as identifying the causes of the problems arising from its use, and the types and forms of detection. The object of the research is legal problems identified in the use of community service. The paper will discuss the characteristic features of the critical aspects of the given topic and the determining factors. When talking about the scientific novelty of the topic, the following should be emphasized:

- This article is the first attempt at a complex study of the research topic;
- In the article, the position will be formulated as to whether the court has the right to invalidate the decision made by the local council of the Special Penitentiary Service on the basis that it only mentions the issue of resocialization of the convict and goes beyond the evaluation criteria established by Article 13 of the rule approved by the order N320 of the Minister of Justice of Georgia on August 7, 2018;
- It will be substantiated from a judicial and rule-making point of view, how reasonable it is to regulate the most important detail of replacing the unpaid part of the sentence with a lighter one – the standard of justification of the decision – by a by-law;
- The idea is proposed to add other types of evaluation marks, "evaluative measures" to the criteria established by Article 13 of the rule approved by the order N320 of the Minister of Justice of Georgia on August 7, 2018;
- The opinion will be analyzed as to how appropriate it is to add the victim's position to the criteria established by Article 13 of the rule approved by Order N320 of the Minister of Justice of Georgia on August 7, 2018;
- Legal problems of criminal procedure will be analyzed, for example, when appointing the mechanism of release, the

court takes into account the issue of achieving the goals of punishment, how far it is possible to fulfil the assigned duties and how adequate their form is in relation to the circumstances of a particular person;

- It will be discussed whether the local council of the Special Penitentiary Service is justified in justifying the negative decision based on only one criterion;
- The manner of conducting the oral hearing session, etc., will be evaluated.

1. A BRIEF HISTORICAL PERSPECTIVE OF THE ESTABLISHMENT AND DEVELOPMENT OF WORK USEFUL TO SOCIETY, EXISTING PRACTICE AND ITS COMPARATIVE LEGAL CHARACTERIZATION

1.1. The Essence of Work Useful to Society

Work useful to society is in absolute accordance with the definition of work, the only difference is that, in this case, work is not a voluntary measure, but it is a form of punishment. Community service is a healthy alternative to punishment that benefits the convict, the community, and the government. This type of punishment is cost-effective and helps the state to save costs. The convict is required to perform certain work for free under the supervision of a probation officer. The main goal is to make the offender understand the crime committed and take responsibility for it. In addition, community service should be used only when no specific victim exists.[1]

According to paragraph 47 of the Recommendation of the Committee of Ministers of the Council of Europe CM/Rec (2010) 1 "On the Probation Rules of the Council of Europe to the Member States", community service is a form of public punishment or a measure that involves the organization of free labor by the probation authority for the benefit of the community and Overseeing it, in the form of real or symbolic compensation for the damage caused by the offender. Community service should not have a humiliating character, and probation authorities should try to find work that will contribute to developing the convict's skills and social involvement.[2] In its essence, this type of punishment represents a form of restitution, its punitive function is manifested in the fact that it restricts the freedom of the convicted person for a particular time and deprives him of time.[3]

1.2. Labor Origin and Development Useful Work to the Public

This form of punishment has stood the test of time. The origin of useful work to the society is the original collective work of the Soviet government in 1920 without imprisonment.[4] In Germany, it was mentioned for the first time in 1892 in Liszt's criminal policy tasks. In 1895, the German Lawyers' Union paid attention to him at the 23rd Conference of Lawyers.[5] Community service was first used in European countries in 1971 in Switzerland in juvenile criminal law.[6] From 1972, this form of punishment was introduced in England and Wales. Then community service was introduced in the Netherlands in 1981, in Denmark, France, and Ireland in 1982, and in Norway in 1984. Today, the legislation of almost all European states recognizes community service and assigns it as public

1 Abadinsky, H., (2009). Probation and Parole, Theory and Practice, NJ, p. 336.

2 Recommendation CM/Rec(2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules.

3 Branham, L., Krantz, S., (1997). The Law of Sentencing, Corrections, and Prisoners, Rights, MINN, p. 151.

4 Pradel, J. (1999). Comparative Criminal Law, Tbilisi, p. 436.

5 Kubinik. (2002). Strafen und ihre Alternativen im zeitlichen Wandel, Berlin, p. 568.

6 <https://rsf.uni-greifswald.de/storages/uni-greifswald/fakultaet/rsf/lehrstuehle/ls-harrendorf/Bd36_3_9783936999969.pdf> [Last seen 29.03.2023]

sanctions and measures.[7] Scandinavian countries (except Denmark) introduced community service in the 90s.[8]

At this stage, useful work for society is used in various ways as an alternative to short-term imprisonment in European countries. In less serious and serious crimes, this is the punishment provided by the sanction. This type of punishment is voluntary. Community service will be replaced by a fine or imprisonment if the person does not work. It can also be used as a surrogate for a specific punishment, i.e., punishment is imposed, and then the particular punishment is replaced by community service. The judge will first pass a sentence of imprisonment and then replace this sentence with community service. Community service is used only when a person is sentenced to imprisonment. In Luxembourg, Denmark, and Sweden, community service is not an independent form of sanction but an obligation linked to sanctions, fines, and imprisonment. In Sweden, community service is not a separate form of sanction but is a commitment to a form of sanction such as protective supervision, which is used instead of short – and medium-term imprisonment for young offenders, and in Norway, it is used not only as a sanction but also as a commitment in juvenile probation.[9]

Community service was first used in the US in 1966 for drunk drivers, and has since been introduced in all states, and has since spread to Australia, New Zealand, and South Africa.[10] Today, community service is used in every state in the US as either an independent sentence or a requirement of probation, or an alternative to imprisonment or fines. It should also be taken into account that in the USA, every day of community service reduces the amount of the fine.[11]

In Georgia, community service as a punishment appeared in the legislation since 1999, when the Criminal Code of Georgia was adopted, although for a long time, it was the so-called "Dead norm". Its effective use started on March 11, 2011, after the implementation of legislative changes. Currently, community service is used not only as a punishment but also as one of the conditions of diversion.[12]

According to the legislation in force in Georgia, work, useful to society, can be assigned in five instances, namely:

- The corresponding norm of the private part of the Criminal Law Code of Georgia provides for community service as punishment;
- When the justice implementing body appoints this punishment as an additional punishment;
- During the signing of the plea agreement, based on Article 55 of the Criminal Code of Georgia, when community service is prescribed as the main punishment, while the corresponding article of the private part of the criminal law of Georgia does not provide community service as a punishment;
- Based on Article 42, Part 6 of the Criminal Code of Georgia;[13]
- by the local board of the special penitentiary service, although this does not apply to high-risk convicts and persons deprived of liberty for life.[14]

Here, the council decides in accordance with Article 73 of the Criminal Code of Georgia, Arti-

7 Van Kalmthout, A., Durnescu, I. (2011). European Probation Service Systems, CEP, pp. 26-27.

8 Dünkel, Gemeinnützige Arbeit, What Works? p.4. <https://tri.swisscovery.slsp.ch/discovery/fulldisplay?docid=alma991001086529705532&context=L&vid=41SLSP_TRI:ISDC&lang=fr&search_scope=ISDC&adaptor=Local%20Search%20Engine&tab=ISDC&query=sub,exact,Arbeit,AND&mode=advanced&offset=40> [Last seen 29.03.2023].

9 Kubinik. (2002). Strafen und ihre Alternativen im zeitlichen Wandel, Berlin, p. 572.

10 Klaus, J. (1998), Handbook on Probation Services, Rome/London, p. 15.

11 <https://famm.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf> [Last seen 19.11.2022].

12 Getiashvili, G., (2016).The Essence of Work Useful to Society, Tedo Ninidze – 65, Jubilee Collection, Law Journal N2, p. 231.

13 Davitadze, M., (2018). The Use of Work Useful to Society and its Legal Limitations, Current Issues of Criminal Law, N3, Tbilisi, p. 82.

14 Ivanidze, M., (2016). Alternative Punishments, Criminal Law (general part), Tbilisi, p. 470.

cles 40, 41 and 43 of the Prison Code, as well as the "Parole from serving a sentence by the local councils of the special penitentiary service, a state sub-departmental institution included in the system of the Ministry of Justice of Georgia On approval of the procedure for considering the issue and making a decision" the procedure approved by the order No. 320 of the Minister of Justice of Georgia dated August 7, 2018. From the aforementioned legal acts, the Criminal Law Code and the Prison Code of Georgia regulate the issue of the use of benefits provided by the law only in general, the important details of the issue, such as evaluation criteria and the measure of justification, are determined by the Order N320 of the Minister of Justice of Georgia. In this case, the question is logically raised: from the point of view of justice, how appropriate is it to resolve the issue of replacing the unpaid part of the sentence with a lighter punishment by order of the minister? The answer to this question is not so simple.

For example, Papuna Guruli believes that it is inappropriate for the most important detail of the grounds for conditional release, replacing the unpaid part of the sentence with a lighter one – the standard of justification of the decision – to be regulated by a by-law.[15] He writes: *"In order to achieve the goals of the punishment, both the stage of imposing the punishment and its execution are important. During the latter, control over the effectiveness of the punishment should be carried out and two things should be determined: 1. Have the goals of the punishment already been achieved? 2. Will it help to achieve the goals of the punishment if it is only partially done?"*. The question arises – if the punishment is regulated by the criminal law code, why should its effectiveness be checked based on the by-law? Naturally, the law goes through a much more difficult and multi-step verification process before adoption, and the level of trust in it is much higher. Moreover, the "Typical decree of the local council of the Ministry of Corrections of Georgia" is in its essence only an organizational (administrative) document, and entrusting it with an important criminal law issue indicates a decrease in the importance of the issue.[16]

It is true that, on the one hand, there may be a tendency to "lower the game", but it should be noted that this issue will be regulated by the criminal law code or will be binding in all cases written by an individual administrative-legal act. Therefore, the local council will not exceed the established limits in any case. Requirements, in no case, will he have the authority to reject or leave any criteria outside the evaluation; according to the results, I believe that the implementation of law-enforcement activities will take a more formal form. In addition, the Minister's order was issued on Article 41 of the Prison Code, "On Normative Acts", Article 25, Sub-Clause 1 of the Law of Georgia, and "On Amendments to the Prison Code" of Georgia on the 5th of 2018 According to Article 2, Clause 5 of Law N3128 of July, i.e., an individual administrative-legal act is based on the foundations of a normative act, it should also be taken into account that there are no less procedures to go through in terms of acceptance before the legal act takes a perfect form and arbitrary writing of a specific legal issue cannot be done.

Article 13 of the rule approved by Order No. 320 of the Minister of Justice of Georgia on August 7, 2018, "About reviewing and deciding on the issue of parole release from serving a sentence by the local councils of the special penitentiary service, a state sub-departmental institution included in the system of the Ministry of Justice of Georgia", establishes five criteria, based on which the appropriate decision is made based on their assessment and mutual reconciliation, here one may think that the legislator rejected the legitimate approach altogether, however, we must remember that the council is not given unlimited authority, at its own discretion, to decide without any normative basis, especially when there is a right to appeal, which is not difficult at all.

15 Guruli, P., (2017). Parole from Serving a Sentence – a Legitimate Understanding, *Law and the World*, N6, p. 57.

16 Ibid. pp. 52-53.

It is also necessary to analyze how exhaustively all the evaluation marks are written, whether one of the mandatory criteria is necessarily the position of the victim in relation to the person whose freedom is prevented since the clarification of the relationship between the offender and the victim should be given the most significant importance, first of all, because this does not contribute to new revenge-based to commit a crime. I think that the correct measurement of this fact implies the use of legimetry, which should also take into account the fact that there are often cases when the victims, due to personal feuds, do not give their consent to not have a claim against the convicted and want to retaliate in this way, in addition, there are facts when forced or by providing certain material benefits, the desired document is obtained. To avoid such consequences, I think a logical question arises, would it not be unreasonable for the position of the victim to be taken into account by the review body as a non-binding guideline standard? My answer to this question is positive, based on the goals of its activity, the local council does not reject this concept.

The same approach can be used to determine the mandatory criteria for holding an oral hearing. In the special report of the Public Defender of Georgia, it is recommended to write a norm that will directly oblige the council to invite the convicted person to the oral hearing.[17] I believe that the mentioned legislative initiative to amend the Prison Code is inappropriate because it violates the Council's discretionary powers based on its content, and all mandatory criteria are expected to be general in nature, which are taken into account based on unwritten norms. Also, it is impossible to hold an oral hearing session for all persons. It is pointless because there are cases when the presented motion and case materials do not need to raise additional questions.

The need to use a legitimate approach is visible in the cases of administrative appeals against the local council's decision on the refusal to change the unpaid part of the sentence of the convicts to a lighter one in relation to the proceedings of the persons deprived of their liberty. Due to the established practice, prisoners cannot always benefit from the relief mechanisms provided for by law, in particular, if the convicted person has appealed against the negative decision in the court according to the administrative procedure, it is not possible to re-examine his case in the council until the end of the trial, and the reason is that their complete personal files are sent to the justice administration body. That's why the special accounting department of the institution can no longer send the relevant petition (characterization). In this case, it turns out that the convicted person has to choose between the rights guaranteed by the law to appeal the individual administrative-legal act adopted by the council or not to appeal and use the mechanism provided by the law within the time limit set again. I believe there is a need for a regulation that will eliminate the named problem and not hinder the regular functioning of the preferential mechanisms defined by the law.

The fact that community service is an effective and real alternative to imprisonment in Georgia is evidenced by the provisions mentioned above, as well as the statistical data that confirm the use of this legal mechanism, even in the case when the local councils replace the remaining sentence of the convict with community service. Let us cite the statistical data of 2022 as an argument: for 117 convicts, within 12 months, the unpaid part of the sentence was changed to a lighter type of punishment – community service,[18] here we should not miss the point that the council will consider the issue in general based on the written consent of the convicts, i.e., in accordance with their wishes. It is only regrettable, the fact that at this

17 Special Report of the Public Defender of Georgia, The Practice of Parole and Substitution of the Unpaid Part of the Sentence with a Lighter Punishment in Georgia, (2019). Tbilisi, p. 56.

18 <http://sps.gov.ge/ka/saqmianoba/sasjelisgan-gathavisufleba/msjavrdebulis-pirobith-vadamde-gathavisufleba.html> [Last seen 05.01.2023].

stage, statistical data is not counted according to the principle that directly describes what its use has brought and how many returned to the penitentiary institution; similar statistics are not produced by the justice implementing body, which prescribes community correction as a main punishment and does not use a more severe form of punishment, such as imprisonment. Based on this, we can conclude that it is necessary to carry out statistical accounting in accordance with the named principle to analyze how effective the form of punishment is, how beneficial it is and whether its use has brought some kind of loss even if the goals of the punishment are not achieved at an angle.

As we can see, implementing useful work for society globally takes place differently. Its introduction and use depend on the state arrangement, society's attitude towards crime and criminals in general, available resources, and priority directions in the country.[19]

1.3. Court Practice in regards to Lighter Type of Punishment – Useful Work to Society

There are frequent cases when the judge has not substantiated the expediency of appointing the benefit provided by the law and the argumentation that this punishment is adequate, proportionate, and proportional to the illegal and guilty action.

The analysis of court practice has established that judges, when approving a plea agreement, do not carefully examine the features of the offender's personality, such as his state of health and the extent to which he will be able to perform community service. We are dealing with a similar case with the judgment of Gori District Court 1/491-20 of November 24, 2020, when the plea agreement was approved and G.V. He was found guilty under Article 178, Part 1 of the Criminal Code of Georgia, and 200 hours of community service was determined as an additional punishment along with a 4-year suspended sentence. During his admission to the probation bureau, when the probation officer was explaining to him the terms and conditions of serving a sentence, G.V. stated that he had difficulty with his eyesight. In a few days, he submitted an appropriate report, which revealed that the convicted person had been granted the status of the second group of disabled since 2019. As a result of the interview, it was established that he received information about the essence of the punishment at the probation bureau, and no one explained the essence of the punishment to him, neither during the plea agreement nor during the trial, nor did he ask about his health. This judgment also states that the sentence determined by the plea agreement is legal. However, I believe that we have a legal basis for refusing to approve the plea agreement and returning the case to the prosecutor.[20] The analysis of the court judgments made even clearer the flaws accompanying this punishment when entering into a plea agreement in Georgia.

As for the appeal mechanism regarding the decisions made by the local councils, it is presented as follows: the internal departmental appeal of the decisions of the local councils is not provided for by the legislation, it is only possible to appeal by court order. It should be noted that when the court examines the action of the convicted person regarding the annulment of the decision taken by the local council, the court examines the legality of the act and not the expediency. In court practice, we often come across the opinion that the court cannot assess the appropriateness of an administrative legal act. The court checks whether the decision of the local council contains all the elements of the legal definition of an individual administrative-legal act, as well as the compliance of the decision with the relevant norms governing the issuance of the act established by the General Administrative Code of Georgia, the Prison Code and the provisions of the regulatory by-law re-

19 Klaus, J. (1998). Handbook on Probation Services, Rome/London., p. 17.

20 Verdict of Gori District Court of November 24, 2020 on case 1/491-20.

garding the mentioned topic. In the research process, the point was also highlighted that in practice, such a case is often made when the court makes an unsubstantiated decision, the reason for this is that the criteria established by Article 13 of the rule approved by order of the Minister of Justice of Georgia on August 7, 2018, N320 are not taken into account – the nature of the crime, the severity of the crime. Based on this, there are cases when a non-resocialized convict is released.

As an illustration, we present the court's decision by which G.B.'s claim was satisfied regarding the annulment of an individual legal act and the order to issue a new act. The case was as follows: O. A. On 05.11.2018, according to the verdict of the Tbilisi City Court, he was found guilty of committing the crime stipulated by Article 330 1, Part 2 of the Criminal Code of Georgia, and imprisonment for a term of 4 years was determined as the main punishment. The nature of the O.A. crime was as follows: "Ruh Abbas – O." was registered in the social network "Facebook" under the name of A. At the beginning of April 2016, hostilities resumed in Nagorno-Karabakh, and the situation between the republics of Armenia and Azerbaijan became extremely tense. On April 4, 2016, O.A. On his personal page on the social network "Facebook", he publicly published a post with the following content in the Azerbaijani language: "For those who want to go to war in order to liberate Nagorno-Karabakh from the Armenians, we offer an easy way to seize the Armenian embassy in Tbilisi and take all the embassy employees under the command of the ambassador as hostages. If the occupying Armenian army leaves Nagorno-Karabakh, give them 24 hours, this is the simplest and most optimal way." On April 8, 2016, on the same personal page, he published a post with the following content: "If we want Nagorno-Karabakh to be freed from Armenian occupation, instead of going to the embassy of the Republic of Azerbaijan in Tbilisi in support, a protest should be held at the embassy of the occupying Armenia and the flag of Armenia should be burned". In such a serious matter, with the said procamations, in the conditions of ongoing hostilities between the Republics of Armenia and Azerbaijan, an obvious, direct, and substantial threat of terrorist activity was created in Georgia. On June 6, 2022, the local council discussed O.A. Petition to replace the remaining sentence with community service, and the petition was not accepted, which was based on the nature of the committed crime June 6 decision of O.A. He appealed to the court, where the convicted person's claim was rejected. The court considered that the appealed act does not contain sufficient motivation regarding the reasons for the negative decision of the disputed issue by the administrative body. I think the given argument is not enough to invalidate the decision of the local council, first of all, the attention is paid here to the circumstances and circumstances of the crime, its gravity, and expected consequences, in addition, the council's reasoning is rightly based in relation to the crime and in reality it could not have been exceeded. When evaluating the criteria approved by the statute, the legislation also does not impose an unconditional obligation to release the convicted person in case of serving the relevant part of the prescribed sentence, and also, it seems that the court did not take into account how adequate the served sentence is to the committed action.

In the process of research, I noticed that there are cases when the justice implementing body annuls an individual administrative-legal act and returns it to the council for reconsideration, basing part of the justification on such factual circumstances, which are not given in the decision-making standard of the decision to replace the unpaid part of the sentence with a lighter one, nor in the assessment is a criterion. For example, the following case: by the verdict of the Ozurgeti District Court on April 19, 2018, the person convicted was convicted under the first part of Article 116 of the Criminal Code, which involves the negligent killing of a person. The board denied the convicted person parole. The court shared the position of the local council concerning the nature of the crime but con-

siders that in each specific case, the personal characteristics of the convict, the achievement of the purpose of the sentence, and the issues of resocialization of the convict should be of principle importance. The court explains that the decision made by the local council should be based on the examination of all the criteria established for the evaluation of the issue, mutual opposition, and determination of their priorities. According to the court's opinion, the decision should be within the framework established by the statute, which means that the local council, based on its discretionary powers, has the authority to evaluate individual criteria, the possibility of giving priority to any of them, although this does not mean its right to reject and/or leave any of them out of the evaluation. According to the court's assessment, the decision made against the said convicted person contains a discussion only about the general characteristics established by the law for the committed act, which without the attitude of the convicted person himself regarding the committed act, cannot be considered as an evaluation of the issue according to the criteria defined by the typical regulation of the council. The court's decision mentions that the council did not evaluate the execution of the sentence by the convict in a semi-open institution. I think this argument cannot be shared because no criterion considers the mark in the given assessment.[21]

It is also interesting to note the decision of the Administrative Affairs Board of the Tbilisi City Court dated September 21, 2022, by which the plaintiff P.J. The lawsuit request to replace the unpaid part of the sentence with community service was completely rejected, and in the reasoning, the court pointed out that the council did not thoroughly investigate P.J. The issue of resocialization. The resolution of the issue by the council unequivocally focusing only on the nature and gravity of the committed crime on the facts of past crimes, without properly confronting it with the criteria considered positive, calls into question the legality and illegality of the exercise of discretionary powers.[22] I think that in this case, the court already made the appropriate argumentation in terms of expediency and did not take into account its authority, in addition, it based the main justification on a concept that is not provided for by the guiding standard of the councils, besides, it did not take into account a number of circumstances that the person who has been convicted more than once, did not take into account as The valid conviction was also disproved, no attention was paid to how many times and what gravity and what type of crime was committed, how many times he was convicted. In addition, it did not consider the fact that the said person had been given legal relief in the past and was released by amnesty, although he still committed a new crime. It should have been taken into account here that there was still a high probability of committing a new crime on the part of P.J. Therefore, I think the given justification is illogical on the part of court. He opposed a number of factors and even explained the regularity of obtaining such a result.

It should also be noted that the appellate court rarely changes the decision made by the court of first instance 27[1] of the Administrative Procedure Code of Georgia. The Court of Appeal's legal assessment of leaving the decision of the first instance court unchanged mainly indicates the correct assessment of the factual circumstances and the legal validity of the City Court. It was one of the exceptional cases Amendment of the decision No. 3/6450-19 of the Tbilisi City Court of November 21, 2018, by which the lawsuit of the convicted person was fully satisfied regarding the replacement of work useful to society. Based on the factual circumstances of the case, the Tbilisi Court of Appeal partially satisfied the appeal of the Special Penitentiary Service and ordered the administrative body to reconsider the case.[23]

21 Decision No. 3/3769-20 of Tbilisi City Court of September 24, 2020.

22 Decision No. 3/541-22 of Tbilisi City Court of September 21, 2022.

23 Decision No. 3b/295-19 of the Tbilisi Court of Appeal dated September 11, 2019.

The appellate court's decision on the replacement of socially useful work may be appealed in the court of cassation, although such a practice does not exist at this stage.

In conclusion, I would like to illustrate the only precedent when the judge replaced community service ordered by the council with another type of legal measure, namely parole. The basis of the appeal to the court was the appeal of the Probation Bureau Office, which was accepted by D. c. The submission was based on the fact that D.G. performed his assigned duties, he had a total of 1203 hours of work and 254 hours left to be paid, so the behavior shown by the mentioned person became the basis for the fact that he was replaced by conditional release from community service. In particular, the court determined one month and 22 days as the probationary period. The court was guided by Articles 72-73 of the Criminal Code of Georgia, 291 of the Criminal Code of Georgia, and Article 21 of the Georgian Law on "Crime Prevention, Procedures for Execution of Non-Custodial Sentences and Probation". The given case is pleasing and presents a motivating tool for other convicts and a contributing factor to their resocialization-rehabilitation.

1.4. Comparative – Legal Description of Useful Work to Society

Current legislation of the countries of the border region allows us to prove that in different countries, community service is used in different ways and forms and is an alternative to imprisonment, which achieves the goals of punishment. I will support the given position with the examples below, which refer to the current legal issues in foreign countries regarding community service assignment.

In Spain, the court can order the convict to do community service with his prior consent. The character of the work useful to society derives from the character of the criminal act. The convicted person is obliged to perform unpaid work for at least 31 days to 180 days for serious crimes or from 1 day to 30 days for violations. The convict is obliged to serve a maximum of 8 hours of Unpaid work in one day.[24] If we analyze, we will see that the requirements of the criminal law regarding the labor useful to public are similar in our country and in Spain, with beneficial working conditions. In Spain, no special service (e.g., the relevant probation authority) would be responsible for supervising the execution of alternative sentences. A competent administrative service or center (mainly a labor center) is a body that offers the convicted individual work, and some fixed allowances and regularly informs the judge (superior judge) whether the convict fulfills his duty and also other conditions as part of the sentence imposed. Failure to properly perform community service may result in the revocation of this sentence. Failure to properly perform the assigned duty means, for example, If the convict did not report to his work voluntarily total For less than two days or the convict does not fulfill the responsibility orders issued by a person. There is also a case when the imposed working activity is low on the convict's side. In such cases, the court may decide that convict can stay in the same center or be sent to another one in the center. The court may decide that the convicted person does not meet the requirements of the sentence.[25]

Community service has been in effect in France since June 10, 1983. It is of two types: 1. autonomous, i.e., similar to English; 2. Or one of the forms of conditional punishment is a correctional regime. i.e., we are talking about a conditional sentence, which is added Obligation to perform work useful to society. Both In this case, the duration of work is 40 – 240 hours. Its implementation The maximum term is 18 months. This punishment cannot be imposed if the accused refuses to report it or does not attend the session.[26]

24 Tobiasova, L., (2007). Development And Construction of the European Legal System, Alternative Penalties, Bratislava, p. 274.

25 Collective of authors. (2016).Trends of Liberalization of Criminal Law in Georgia, Tbilisi, p. 343.

26 Pradel, J., (2003). Comparative Criminal Law, ed.

The duration of socially useful work in Slovakia ranges from 40 to 300 hours. It can be assigned to a person for the crime for which imprisonment is defined for 5 years. The convicted person has no right to receive compensation for the work performed. Except that the offender is subject to to perform certain work, he is also subject to various duties and restrictions. One of these conditions, which the offender must fulfill, is that he must engage in "proper (orderly) life". Specific prohibitions are imposed on such persons. For example: visiting specific places, such is sports spectacles and play areas. Also, visit the place where the crime was committed; Alcoholic beverages are prohibited for such persons' consumption, as well as relationships with people with whom he committed the crime. Often, such persons are prohibited from at least 5 meters approaching the victim's house at a distance; He is on probation and must compensate for the loss during the period; is obliged to leave the house or apartment where the violation of the law was committed; is obliged to participate in educational programs – under the supervision of a probation and mediation employee; The person is obliged to pay alimony and repay debts; In some instances, a person is obliged to personally or publicly apologize to the victim; Such a person is obliged to undergo medical treatment; He is obliged to attend educational training during the probationary period or participate in retraining courses, etc. In Slovakia, N. 528/2005 – Community Service Act contains a special provision on community service.[27]

In Belgium, the content of danger to society is expressed by the so-called community sentences, which exist as alternatives to imprisonment; however, this type of punishment is not successful. They cite as an example the decision of the criminal court against the accused in drunkenness about a student who did not want to work for three years on the prevalence of alcoholism in youth. Although in Belgian legislation, the failure of this punishment is related to the absence of social services. The situation is similar in Canada. Here, this sentence is combined with probation; for example, the judge orders the offender to assist the Refugee Association. The courts here are the best for community work rehabilitation.[28]

German criminal law considered community service as a way to pay the fine when unable or unwilling to pay the fine. Since 1986, German law has provided for imprisonment in lieu of fines for non-payment of fines. Later, the federal states' governments were granted the right to allow the prosecutor to allow the convicted person to serve imprisonment in lieu of fines by performing community service. Therefore, this type of labor is not used as an independent form of punishment but as a means of serving a prison term in lieu of a fine. The German Constitutional Court indeed points out the necessity and importance of compensation for the convict's labor in its decision, but in accordance with paragraph 2, paragraph 2 of the introductory law of the German Criminal Code, the work useful to society must be free of charge. The said work does not give rise to the rights and duties between the worker and the employer as a result of the labor contract. The use of community service as a punishment is controversial in German literature because of its compatibility with the constitution. In particular, we refer to the constitutional norm that guarantees that free work and forced labor is prohibited.[29] According to the legislation in force in Georgia, the work performed to serve a sentence does not belong to forced labor, this is confirmed even by Article 73 of the Criminal Code, Article 43 of the Prison Code, etc. Therefore, community service is not a form of punishment in Germany, but an obligation related to non-custodial sentences, that is why there is a discussion in the German

"Sani", pp. 437-438.

27 Tobiasova, L., (2007). Development And Construction of the European Legal System, Alternative Penalties, Bratislava, pp. 273-274.

28 Haney, C., (2005). Reforming Punishment, Psychological Limits to the Pains of Imprisonment, ,,Amer Psychological Assn'', p. 7.

29 <http://vmrz0183.vm.ruhr-uni-bochum.de/krimlex/artikel.php?BUCHSTABE=G&KL_ID=73> [Last seen 06.01.2023].

criminal law literature about the possibility of introducing it as a punishment. A new type of punishment is proposed – a combination of a fine and community service. When this punishment is imposed, the person will be obliged to pay a monetary fine or repay the corresponding amount with his labor in installments over time. The positive resolution of this issue and the introduction of community service as one of the main punishments is opposed by the prohibition of forced labor specified in Article 12 of the German Basic Law. That is why this legal change is not expected in German criminal law. The example of Switzerland should also be considered, where establishing community service as a criminal sanction worsened the statistics of its use.[30]

To clearly present the advantage of alternative punishment, it is legally relevant to consider the practice of community service on the example of the USA, since it successfully implements the effective use of said alternative punishment. In particular, the juvenile justice system actively uses the institution of probation, which in many cases includes community service, and in some instances, the latter is used independently as an alternative to imprisonment. For example, in Canada, the sentence is combined with probation, as a result of which the judge, in some instances, instructs the offender to provide specific assistance to the refugee association. Courts consider community service as the best means of rehabilitation. It is the same approach in the USA.[31] For example, in the state of Arizona, under the conditions of enhanced supervision of probation, a minor, along with obediently observing the conditions of probation, which include receiving a mandatory high school education and completing a course of compulsory treatment, must also perform community service under supervision for at least 32 hours per week.[32] In the US, the situation varies by state. Some state laws list conditions, or the judge is free to do so, while in other states, the judge refers the case to probation committees. The American Bar Association supports specific conditions, including the imposition of duties that include medical care, restitution, restitution, or a curfew.[33] American researchers in the fight against recidivism have made a positive conclusion regarding using alternative punishments such as community service programs. In this regard, it is appropriate to distinguish the following types of alternative sentences in the USA – community service, work release, and weekend punishment programs, of which only community service is used for both adult and juvenile offenders, as much as work release and weekends The weekly punishment programs do not indicate the possible participation of juvenile delinquents in them. Thus, it is appropriate to focus on the specificity of community service according to the USA, where the mentioned alternative punishment is often additional to other punishments. It is mainly used as a punishment for the so-called white-collar criminals, juvenile delinquents, and those who have not committed serious crimes. In accordance with the Georgian Criminal Law Code, the mentioned non-custodial sentence can be used in the case of a less serious crime, which is considered to be a legal flaw since the majority of cases on less serious crimes end with a plea agreement.[34] Their distribution is in such governmental or private non-profit agencies, whose activities aim to perform such activities as cleaning parks, collecting roadside garbage, and assisting relevant institutions in nursing matters.[35] There are no restrictions regarding the place of employment

30 <https://www.nzz.ch/schweiz/gemeinnuetzige-arbeit-nimmt-ab-ld.823830?reduced=true> [Last seen 01.12.2022].

31 Pradel, J., (1999).Comparative Criminal Law, Tbilisi, p. 437.

32 <https://lernerandrowelawgroup.com/arizona-probation/> [Last seen 02.12.2022].

33 Stojkovic, S., Lovell, R., (1992). Corrections, An Introduction, Anderson pub, Cincinnati, Ohio, p. 475.

34 Shalikashvili, M., (2014). Research on Alternative Punishments in Georgia, Mzia Lekveishvili – 85, Anniversary Collection, Tbilisi, p. 106.

35 Kherkehulidze, I., (2014). Probation Institute – a Tool for Ensuring the Reintegration of Juvenile Offenders (a comparative analysis of the criminal justice approach of Georgia and the USA), Mzia Lekveishvili – 85, Anniversary Collection, Tbilisi, p. 195.

and the employer's profile at the international level. In New Jersey, community service can be employed in public institutions and private, non-commercial, non-profit organizations.[36] As we can see, the list of types of work performed in the USA is quite extensive, in addition, the following jobs can be listed: cleaning parks and squares, attending educational programs, preparing a presentation about the negative aspects of crime, talking to schoolchildren about why it is harmful to drive a car while intoxicated, get a job in an enterprise, carry out renovation work, remove obscene paintings from the walls of the city, work for charity, study law, tutor children, work on construction in the slums of the city, help the elderly, take care of animals in the shelter, participate in the operations carried out by the emergency medical service and other rescue services, take care of the amenities of the city, rake leaves, mow grass, clean windows, sweep driveways, put up and then take down Christmas decorations, work for a breast cancer awareness organization, work for water conservation.[37] As international experience shows, community service is a favorable penal measure for less serious crimes. In addition, it should be said that in Georgia, unlike other countries, there is still the problem of the amount of work useful for society, I think that, in addition to the public sector, the private sector should also be involved in the process of this type of punishment execution, because the increased employment area will give the convict a real perspective of employment, which is on the way to resocialization. It will undoubtedly be a contributing factor. However, the difference lies in the competence of the decision-making bodies and the persons determining the type of work performed since the National Probation Agency determines the kind of work performed in Georgia.[38]

CONCLUSION

As we can see, community service is an alternative form of imprisonment and is not alien to Georgian legislation, judicial practice and the past period has presented the positive and critical aspects of this type of punishment, which was discussed in the present paper with a general legal characterization.

As a result of the study of practical and scientific materials, I consider it expedient to formulate several provisions that include an innovative solution to the existing shortcomings in relation to the present topic:

- The court must take into consideration the criteria established by Article 13 of the rule approved by order of the Minister of Justice of Georgia dated August 7, 2018, N320 – the nature of the crime, the severity of the crime, because there should be no place for the release of a non-resocialized convict;
- It is desirable for the justice implementing body to consider the issue of replacing the unpaid part of the sentence with a lighter type of punishment – community service;[39]
- From the judicial point of view, it is not a problem to order the decision of the minister to change the unpaid part of the sentence with a lighter one;
- The position of the victim should be taken into account by the reviewing body as a non-binding guideline standard;
- I believe that the legislative initiative to amend the Prison Code, which would directly oblige the Council to invite the convicted person to an oral hearing, is inappropriate, because it violates the Council's discretionary powers, and it is also impossible to conduct an oral hearing session for all persons, and it also makes no sense, because it is cases when the submitted petition and case materials do not necessarily require additional questions;

36 Abadinsky, H., (2009). Probation and Parole, Theory and Practice, New York, p. 336.

37 <https://pja.gov.pk/research> [Last seen 04.01.2023].

38 Gelashvili, M. (2020). Problems of Exemption from Serving the Sentence in Modern Georgian law, master's thesis, Tbilisi, p. 68.

39 Ibid., p. 72.

- It is mandatory for review bodies to process and produce statistical data, based on the principle that directly presents the positive and negative sides of the use of the given mechanism, even in terms of the person's return to the penitentiary institution and others;
- By means of a comparative legal analysis, we can conclude that in all countries community service is a favorable criminal measure, which is an alternative to imprisonment. In addition, it should be said that in Georgia, unlike other countries, there is still a problem with the amount of work that is beneficial to the society, besides, the difference lies in the competence of the decision-making bodies, in addition, to the persons and bodies determining the type of work;[40]
- Based on the conducted research, we can conclude that the importance of this type of punishment, in general, of this institution, is undoubtedly great.

40 Ibid, p. 66.

BIBLIOGRAPHY:

Georgian literature:

1. Collective of authors, (2016). Trends of Liberalization of Criminal Legislation in Georgia, Tbilisi.
2. Davitadze M., (2018). The Use of Socially Beneficial Labor and its Legal Limitations, Current Issues of Criminal Law, N3, Tbilisi.
3. Gelashvili M., (2020). Problems of Release from Serving the Sentence in the Modern Georgian Law, Master's degree paper, Tbilisi.
4. Getiashvili G., (2016). The Essence of Work Useful to Society, Tedo Ninidze – 65, Jubilee Collection, Law Journal N2.
5. Gotua Z., (2001). General Part of Criminal Law, Tbilisi.
6. Guruli P., (2017). Parole from Serving a Sentence – a Legitimate Understanding, "Law and the World" Journal.
7. Ivanidze M., (2016). Alternative Punishments, Criminal Law, General Part, Tbilisi.
8. Kherkheulidze I., (2014). Probation Institute – a Tool for Ensuring the Reintegration of Juvenile Osffenders (comparative analysis of the criminal justice approach of Georgia and the USA), Mzia Lekveishvili 85, Anniversary collection, Tbilisi.
9. Kherkheulidze I., (2020). Community Service – One of the Best Agents of Resocialization of Juvenile Offenders Among Non-Custodial Punishments, Tbilisi.
10. Pradel J., (1999). Comparative Criminal Law, Tbilisi.
11. Shalikashvili M., (2014). Research on Alternative Punishments in Georgia, Mzia Lekveishvili – 85, Anniversary Collection, Tbilisi.

Foreign literature:

1. Abadinsky H., (2009). Probation and Parole, Theory and Practice, NJ.
2. Branham L., Krantz S., (1997). The Law of Sentencing, Corrections, and Prisoners, Rights, MINN.
3. Haney C., (2005).Reforming Punishment, PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT.
4. Klaus J., (1998). Handbook on Probation Services, Rome/London.
5. Kubinik., (2002). Strafen und ihre Alternativen im zeitlichen Wandel, Berlin.

6. Stojkovic S., Lovell R., (1992). Corrections, An introduction, Anderson pub, Cincinnati, Ohio.
7. Tobiasova L., (2007). Development And Construction of the European Legal System, Alternative Penalties, Bratislava.
8. Van Kalmthout A., Durnescu I., (2011). European Probation Service Systems, CEP.

Normative material:

1. Criminal Code of Georgia.
2. Criminal Procedure Code of Georgia.
3. Administrative Procedure Code of Georgia.
4. Juvenile Justice Code of Georgia.
5. Imprisonment Code of Georgia.
6. Order N320 of the Minister of Justice of Georgia dated August 7, 2018.

Recommendations:

1. Recommendation CM/Rec (2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules.
2. Special Report of the Public Defender of Georgia, The Practice of Parole and Substitution of the Unpaid Part of the Sentence with a Lighter Punishment in Georgia, (2019). Tbilisi.

Internet sites (web pages addresses):

1. <https://rsf.uni-greifswald.de/storages/uni-greifswald/fakultaet/rsf/lehrstuehle/ls-harrendorf/Bd36_3_9783936999969.pdf> [Last seen 29.03.2023].
2. Dünkel F., (2013)Gemeinnützige Arbeit, What Works? Deutschland, S:4. <https://tri.swisscovery.slsp.ch/discovery/fulldisplay?docid=alma991001086529705532&context=L&vid=41SLSP_TRI:ISDC&lang=fr&search_scope=ISDC&adaptor=Local%20Search%20Engine&tab=ISDC&query=sub,exact,Arbeit,AND&mode=advanced&offset=40> [Last seen 29.03.2023].
3. <https://famm.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf> [Last seen 19.11.2022].
4. <http://sps.gov.ge/ka/saqmianoba/sasjelisgan-gathavisufleba/msjavrdebulis-pirobith-vadamde-gathavisufleba.html> [Last seen 05.01.2023].
5. <http://vmrz0183.vm.ruhr-uni-bochum.de/krimlex/artikel.php?BUCHSTABE=G&KL_ID=73> [Last seen 06.01.2023].
6. <https://www.nzz.ch/schweiz/gemeinnuetzige-arbeit-nimmt-ab-ld.823830?reduced=true> [Last seen 01.12.2022].
7. <https://lernerandrowelawgroup.com/arizona-probation/> [Last seen 29.03.2023].
8. <https://pja.gov.pk/research> [Last seen 29.03.2023].

Court decision:

1. Verdict of Gori District Court of November 24, 2020 on case 1/491-20.
2. Decision No. 3/3769-20 of Tbilisi City Court of September 24, 2020.
3. Decision No. 3/541-22 of Tbilisi City Court of September 21, 2022.
4. Decision No. 3b/295-19 of the Tbilisi Court of Appeal dated September 11, 2019.

FORMATION OF LAW CONSCIOUSNESS AND FORMS OF ITS DEFORMATIVE EXPRESSION

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ABSTRACT

Interpersonal relations are regulated by legal norms, which proactively and reactively control what a citizen should and should not do. Knowledge of the law and its norms contributes to the formation of law awareness and consciousness, expressed in human social attitudes towards order and law. In response to violating the rule of law, society applies reactive social control, which takes the form of punishment and whose purpose is to restore justice, prevent new crimes, and resocialize the offender. There is a great abundance of norms and various punishments in society; however, despite this, crime has always been and most likely will continue to be an integral part of society, significantly reducing people's well-being. In the modern world, the formation of teenagers' law consciousness as their criminal behavior regulator deserves special attention. Law consciousness means understanding the existing norms and forming the necessary practical skills for implementation. Without it, society's future welfare is put into doubt, and the risk of committing a crime increases significantly. The research was interested in the factors contributing to law consciousness formation and/or its deformative expressions. Identifying factors influencing the formation or non-formation of

law consciousness allowed us to make recommendations for its formation, thereby contributing to crime prevention and increasing civil well-being.

KEYWORDS: Social control, Law consciousness, Crime

INTRODUCTION

A person has to make different daily decisions, gets into a strange situation, and has little time to solve the problem, which adds an emotional tone to this process. At this time, some take reasonable steps while others act impulsively. The behavior of both of them is based on personal traits, which include the uniqueness of their perceptions of the situation and the behavioral manifestations of every person. Despite the uniqueness of a person and the diversity of the environment responsible for its formation, the amount of response to a foreign, stressful environment significantly depends on the quality and experience of general and legal education, which is a kind of resource for solving the problem.[1]

Society creates norms to promote, control, and protect human interests. From the law's protective role perspective, the law is an effective tool for protecting potential victims.[2] Legal norms are an important achievement of society's civilization. The main goal of state governance is for its people to understand the law, the rule of law, and its importance.[3]

The culture of law in the state determines the quality of society's life and represents the level of development achieved by legal actions, realities, and opportunities, also, feeling of freedom, the guarantee of security, and the legal responsibility in society. Law consciousness is a part of the legal culture; however, legal culture is more general; it reflects the prevailing reality in society. Law consciousness is a dynamic process; it involves the internalization of the meaning of the prevailing laws and includes the psychological understanding of the content of the law. As for the legal culture, it is more conservative, consists only of the facts of public law enforcement, and does not involve individual cognitions, which form the public's understanding of this law.[4]

The law consciousness of children and adolescents is a challenge for the modern society because the formation of a culture of justice, a sense of public safety, and the level of public prosperity and success depend on it.[5] Law consciousness is a regulator of human behavior and a prerequisite for understanding rights and their enforcement. Deformation of law consciousness, a crime puts the safety of society at risk, and to deal with it, there are three levels of crime prevention in society.[6]

In the modern world, against the backdrop of political or social changes, there is a significant difference in values between the youth and the older generations. This is especially noticeable in Post-Soviet countries. Taking care of the next generation is the main task for the development of society because their socialization and values are vulnerable to the current processes in society. In taking care of the future generation, the state and society should ensure its correct socialization, legal upbringing, formation of legal awareness, and law consciousness,

1 Dehnad V., (2017), A Proactive Model to Control Reactive Behaviors, World Journal of Education, 7(4), p. 24.

2 Hakim M., H., (2016), Legal Protection Versus Legal Consciousness (The Changing Perspective in Law and Society Research, Al-Bankari, HLM, 15(1), p. 57.

3 Yi L., Li L., (2022), Effective Strategies to Promote the Cultivation of Public Legal Consciousness from the Perspective of Social Psychology, Journal of Environmental and Public Health, vol.22, p. 1, <https://doi.org/10.1155/2022/8275938>

4 Kravchenko O., V., (2021), Legal Consciousness and Forms of its Deformation, Journal of Legal, Ethical and Regulatory Issues, 24(1), pp. 8-9.

5 Pevtsova E., (2013), The functions of legal awareness of children and young people, Acta Universitatis George Bacovia. Juridica, 2(2), p. 1.

6 Kravchenko O., V., (2021), Legal Consciousness and Forms of its Deformation, Journal of Legal, Ethical and Regulatory Issues, 24(1), p. 2.

which can only be achieved by planning and implementing a successful educational policy.[7]

The interest of the research is the formation of legal consciousness and the identification of factors influencing its lack. To satisfy the interest, a theoretical discussion of the circumstances necessary for social control, its manifestation, and functioning and an analysis of the existing literature on the topic of the circumstances affecting the formation of legal consciousness were planned. As a result, the probable causes of the deforming manifestations of law consciousness were determined, and recommendations were developed for forming law consciousness.

SOCIAL CONTROL

Lambert and his colleagues[8] point out that society uses various forms of control to regulate the observance of social norms. There are formal and informal norms, the violation of which provides for various punishments. Control can be proactive or reactive: proactive control is when the implementation or non-implementation of behavior is controlled, and reactive control is when a response is made to already implemented behavior. It can be both a negative and a positive sanction. Society goes both ways, actively monitoring its members to ensure that the norm is not violated (proactive control), admonishing those who do not or no longer violate the norm, and punishing those who do (positive and negative manifestations of reactive control). Encouragement, like punishment, can be both formal and informal e.g., reward and penalty are forms of formal control, and a good reputation in society, thanks, smiles, and stigmatization is forms of informal control disclosure.

Usually, the forms of social control used by the state are mostly reactive, including legal feedback on violations; legal supervision; public opinion management; and employment restrictions.[9]

The proactive form of social control is mostly responsible for the society in which the child grows up, goes through the socialization process, and acquires the forms of right and wrong behaviors. It is necessary for a person to believe in the necessity of these norms and to internalize them, which implies the conformity of attitude formation and behavior. In addition to the forms of pro – and reactive control implemented by the state, the behavior of public figures is important. Their vision is very important, which creates public opinion and, in turn, pro – and reactively controls societal trends.[10]

Public movements, Universities, and educational institutions pro – and reactively shape social opinion and behavior. In this case, the university, "in como parentis," like parents, becomes responsible for the child's socialization.[11] Society needs a norm for formal and informal control. By which the society imposes an obligation or duty on the member to fulfill them. To be effective, the norm should be:

- Timely – its violation must be responded to in a timely manner;[12]
- An adequate – response to its violation should be related to the type of violation;[13]

7 Mischenko E., V., Kriskovets T., N., Lopanova A., P., Mushanova I., V., Inalkaeva K., S., Shulga T., I., Ivanova A., V., (2021). Student Youth Legal Consciousness: Formation Problems and Prospects, Current context of education and psychology in Europe and Asia,9(3), p. 7, <http://dx.doi.org/10.20511/pyr2021.v9nSPE3.1135>

8 Lambert E., Karuppannan J., Jiang Sh., Pasupuleti S., Bhirarasetty J., (2011). Correlates of Formal and Informal Social Control on Crime Prevention: An Exploratory Study among University Students, Andhra Pradesh, India, Asian Journal of Criminology, 7 (3), p.240, <10.1007/s11417-011-9108-9>

9 Cable Sh., (2019). Social Movements and Social Control, The Handbook of Social Control, 1st ed. By Deflem M., John Wiley & Sons. Ltd, p. 122-124.

10 Cable Sh., (2019). Social Movements and Social Control, The Handbook of Social Control, 1st ed. By Deflem M., John Wiley & Sons. Ltd,p. 129.

11 Ibid., p. 131.

12 Banks E., (2018). The Purpose of Punishment, Criminal Justice Ethics, Sage Publications, Sagepub.com, <https://www.sagepub.com/sites/default/files/upm-binaries/5144_Banks_II_Proof_Chapter_5.pdf> [Last seen 25.02. 2023].

13 Kolber A., J., (2013). Against Proportional Punishment, Vanderbilt Law Review, 66 (4), p. 1142.

- And unmistakable, inevitable – response to its violation must be guaranteed.[14]

All this helps society members to develop law consciousness, establish positive relations between society members, and by promoting the full-fledged development of the next generation, it appears as a significant determinant of society's well-being.[15] [16]

THE RULE OF LAW AS A GUARANTOR OF SECURITY

To ensure social control, people criminalized undesirable actions, created norms, and, to ensure compliance with those norms, established punishments, which at different times had different theoretical explanations and objectives. The Criminal Code sets out restrictions on certain behaviors, the violation of which is considered a crime and leads to punishment or the imposition of other criminal legal measures.[17] Therefore, criminal law is a body of law that prescribes certain forms of conduct, criminalizes undesirable actions (so as not to harm public safety and welfare), and prescribes appropriate forms of punishment in response to prohibited conduct.[18]

The use of punishment is justified for two reasons. The first is that criminal law focuses on crime prevention, which it does by imposing punishment in response to crime to prevent future unwanted behavior or harm. The second explanation connects the punishment of an unfinished, fruitless crime (an attempted crime) with moral guilt and believes that since the person wanted to carry out the prohibited behavior, regardless of the unsuccessful result, he still deserves to be punished.[19]

Punishment is an inseparable institution of every social system; however, it is used by society on different grounds and in different ways. The correct understanding of the essence of punishment is related to the legitimation of criminal law and implies the imposition of certain restrictions by the state, their implementation, and their justification.[20]

The theoretical explanation of punishment and the focus of the individual and society in the past and future determines the goals of punishment and the orientation towards which the punishment ratio is justified. The goal of restorative justice in punishment, like the absolute theory, only involves reacting to past actions and emphasizes the supremacy of law and social norms and the need to uphold them. Crime prevention sees punishment in a relatively broad perspective and aims to prevent new crimes, which shifts from focusing on the past to the future protection of society and thus becomes more humane and more acceptable to society. Finally, the resocialization/rehabilitation goal of sentencing summarizes restorative and preventive justice. Because it implies the return of a non-resocialized (criminal) person to society as a rehabilitated or resocialized member, thereby ensuring the observance of the law, the formation of law consciousness, the prevention of new crimes, and, as a result, the protection of society.[21]

14 Shevchenko A., Y., Kudin S., V., Loshchykhin O., M., Fatkhudinov V., H., (2021). The Principle of Inevitability and the Institution of Exeption From Legal Liability: Aspects of the Relationship, <https://www.periodicojs.com.br/index.php/gei/article/download/130/89/419> [Last seen 21.11.2022].

15 Yi L., Li L., (2022), Effective Strategies to Promote the Cultivation of Public Legal Consciousness from the Perspective of Social Psychology, Journal of Environmental and Public Health, vol.22, p. 10, <https://doi.org/10.1155/2022/8275938>

16 Mischenko E., V., Kriskovets T., N., Lopanova A., P., Mushanova I., V., Inalkaeva K., S., Shulga T., I., Ivanova A., V., (2021), Student Youth Legal Consciousness: Formation Problems and Prospects, Current Context of Education and Psychology in Europe and Asia, 9(3), pp. 1-2, <http://dx.doi.org/10.20511/pyr2021.v9nSPE3.1135>

17 Lekveishvili M., Todua N., Mamulashvili G., (2011). Private Part of Sikh Law, Meridian, Tbilisi, p. 3.

18 Keiler J., Panzavolta M., Roef D., (2014). Hage J., Akkermans B., (eds.) Introduction To Law, Springer International Publishing Seitzerland, pp. 121-22, DOI 10.1007/978-3-319-06910-4.

19 Ibid., p. 142.

20 Dvalidze I., (2013). General Part of Criminal Law, Punishment and Other Criminal Consequences of Crime, Meridian, Tbilisi.

21 Hallevy G.(2013) The Right to Be Punished, Springer-Verlag Berlin Heidelberg, p. 37,

LAW CONSCIOUSNESS AND FORMS OF ITS DEFORMATIVE EXPRESSSION

Law consciousness is a form of social awareness and represents individuals' subjective perception of the law, their emotions, and their attitude toward the content of the law. Public attitudes shape individual law consciousness just as individual law consciousness determines the understanding and observance of public law.[22]

According to Kravchenko, law consciousness is not only understanding the content of the law and having legal values but also understanding the meaning of this law, which is the axis of legal awareness. Although individual law consciousness does not directly shape the public's understanding of the law, it significantly regulates the psychological factors of legal relations and human behavior. It is a prerequisite for human involvement in social and legal reality and ensures the formation of social norms, social experiences, and the culture of law. This, in turn, creates a civil society and is a necessary prerequisite for the development of society.[23]

Deformation of law consciousness is a social phenomenon that, contrary to the positive understanding of the law, implies a negative and/or nihilistic attitude toward existing societal norms, which often manifests itself in criminal behavior. The deformation of law consciousness and its manifestations are related to a lack of legal knowledge and social responsibility, due to a low level of education. It is legal education that is responsible for understanding the importance of norms and forming public discipline and public law culture.[24]

According to Khasanovich,[25] there are several ways for crime prevention: the formation of law consciousness and legal culture, which are carried out by offering and engaging in social activities; the influence of public and civil persons, whose opinions are authoritative and the correct information of the society, share legal processes and increase legal literacy among teenagers.

FORMATION OF LAW CONSCIOUSNESS

According to Chua and Engel, three things influence the formation of a teenager's legal consciousness: worldview—their social relations in society, understanding of a person's social role, and the level of involvement in public life; Perceptions are their interpretation of current events in society, about justice, success, goodness, and well-being, and the conclusions they draw, which derive from the spectrum of their worldview and the events in the environment, their interpretation of the information they perceive.[26]

Jurisprudence among teenagers has several functions: regulatory, which determines their behavior; teleological, which determines the goals of human behavior; transactional, which forms motives; and praxeological, which is the expression of existing attitudes in relation to the law. Among them, the teleological function plays a special role, during which the target behaviors of the adolescent are identified. It, in turn, is divided into cognitive and behavioral functions and consists of logical, emotional, and behavioral behaviors.[27]

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22 Yi L., Li L., (2022). Effective Strategies to Promote the Cultivation of Public Legal Consciousness from the Perspective of Social Psychology, Journal of Environmental and Public Health, vol. 22, p. 1, <https://doi.org/10.1155/2022/8275938>

23 Kravchenko O., V., (2021). Legal Consciousness and Forms of its Deformation, Jurnal of Legal, Ethical and Regulatory Issues, 24, pp. 10-12.

24 Ibid., pp. 8-9.

25 Khasanovich A., SH. (2021). The Role of Legal Consciousness and Legal Culture in Official Prevention, Web of Scienrist: International Scientific research Journal, 2 (5), pp. 575-576.

26 Chua L., J., Engel D., M., (2019). Legal Consciousness Reconsidered, Annual Review of Law and Social Science, Vol. 15, p. 3.

27 Pevtsova E., (2013). The functions of legal awareness of children and young people, Acta Universitatis George Bacovia. Juridica, 2 (2), p. 4.

Kravchenko talks about two ways of forming law consciousness: general and separate. In a general sense, the socialization of law and the formation of law consciousness serve common goals, and a separate way of forming law consciousness proceeds independently of the general socialization process; however, it serves the general goals of general socialization (for example, when a child learns that lying is bad and this helps him not to become a liar).[28]

According to Tereschenko and his colleagues, the more law-aware a citizen is, the more he strives to get an education. They consider the level of education as a prerequisite for the formation of law consciousness, and education is an important determining factor of law consciousness. Therefore, the authors conclude state and public figures should put more emphasis on legal education.[29]

To form a sense of law in a society, it is necessary to establish the supremacy of the law through cooperation between the state and the society, the correct understanding of the law, and the conclusion of the social contract. For the law to be supreme and for the members of society to believe in the necessity of its protection, several factors of the existence of the norm must be guaranteed, namely: the law must be clear so that its social meaning can be easily perceived; the law must be applicable and focused on human protection; protection of the law must be ensured; and retaliatory punishment for its violation must be guaranteed. Compliance with the law should not cause discomfort but rather a feeling of security, and finally, a necessary prerequisite for the formation of law **consciousness** is the raising of legal awareness at all levels of education, especially in the adolescent age group.[30]

SUMMARY

Based on the reviewed literature, social control is seen as a prerequisite for societal well-being. Social control can be proactive, which involves identifying injustices to ensure the safety of its members and teaching the next generation, or reactive when punishment is applied in response to an established injustice. During proactive control, at the stage of establishing a norm in society, to ensure the protection of this norm, it is necessary that the norm be effective, necessary, and applicable and that the importance of its protection is understood. At the stage of reactive social control, the punishment imposed on injustice must be unmistakable, timely, and adequate.

In implementing proactive social control, it is common for adults to try to implement imposed injustice. One of the reasons for this is low education, the ineffectiveness of the norm, and, in general, a lack of legal awareness. At this time, it is the responsibility of the state and society to take care of the teenager, promote his proper socialization, and promote the formation of a legal system that has not yet been formed. Even if proactive control and support failed to justify legal injustice and it was carried out, the state applies a form of reactive control and imposes punishment, the goal of which is to restore justice, prevent crime, and resocialize the offender. This can be achieved through the formation of his law consciousness.

CONCLUSION/ RECOMMENDATION

By analyzing the mentioned theoretical material, we wanted to identify the factors affecting the lack of law **consciousness**. Based on the reviewed literature, research concludes that these factors are:

28 Kravchenko O., V., (2021). Legal Consciousness and Forms of its Deformation, Journal of Legal, Ethical and Regulatory Issues, 24(1), p. 1.

29 Tereshchenko E., A., Kovalev V., V., Trofimo M., S., Zasseev D., A., (2020), Legal Consciousness as a Factor Promoting The Achievement of Educational Objectives and the Realization of The Right to Education by Individuals and Collectives, Rev. Tempos Espaços Educ., 13(32) pp. 15-16, <http://dx.doi.org/10.20952/revtee.v13i32.14690>

30 Yi L., Li L., (2022). Effective Strategies to Promote the Cultivation of Public Legal Consciousness from the Perspective of Social Psychology, Journal of Environmental and Public Health, vol.22, pp. 4-5, <https://doi.org/10.1155/2022/8275938>

- When the need to observe the norm is not clear;
- When the norm is ineffective and/or unusable;
- When the punishment imposed for breaking the norm is not timely, accurate, and adequate;
- When there are no civil movements, authoritative public and private individuals, and educational institutions in the society, who emphasize the need to protect the law in their activities.

Based on the analysis of the literature, the results of the study allow for the following recommendations:

- Educational priorities of law should be determined at the state and public level (raising legal awareness and popularizing law);
- To emphasize the importance of its protection during the development of the norm;
- The punishment imposed in response to the violation of the norm must be unmistakable, timely and adequate.

BIBLIOGRAPHY:

Georgian language literature:

1. Dvalidze I. (2013), General Part of Criminal Law, Punishment and Other Criminal Consequences of Crime, Meridian, Tbilisi. (In Georgian)
2. Lekveishvili M., Todua N., Mamulashvili G., (2011), Private Part of Criminal Law, Meridian, Tbilisi. (In Georgian)

Foreign language literature:

1. Cable Sh., (2019). Social Movements and Social Control, The Handbook of Social Control, 1st ed. By Deflem M., John Wiley & Sons. Ltd.
2. Chua L., J., Engel D., M., (2019). Legal Consciousness Reconsidered, Annual Review of Law and Social Science, Vol. 15.
3. Dehnad V., (2017). A Proactive Model to Control Reactive Behaviors, World Journal of Education, 7 (4).
4. Hakim M., H., (2016). Legal Protection Versus Legal Consciousness (The Changing Perspective in Law and Society Research, Al-Bankari, HLM, 15(1).
5. Hallevy G. (2013) The Right to Be Punished, Springer-Verlag Berlin Heidelberg, DOI: 10.1007/978-3-642-32388-1
6. Keiler J., Panzavolta M., Roef D., (2014) Hage J., Akkermans B., (eds.) Introduction To Law, Springer International Publishing Seitzerland.
7. Khasanovich A., SH. (2021). The Role of Legal Consciousness and Legal Culture in Official Prevention, Web of Scienrist: International Scientific research Journal, 2(5).
8. Kolber A., J., (2013). Against Proportional Punishment, Vanderbilt Law Review, 66(4).
9. Kravchenko O., V., (2021). Legal Consciousness and Forms of its Deformation, Journal of Legal, Ethical and Regulatory Issues, 24(1).
10. Lambert E., Karuppannan J., Jiang Sh., Pasupuleti S., Bhiraraset-ty J., (2011). Correlates of Formal and Informal Social Control on Crime Prevention: An Exploratory Study among University Students, Andhra Pradesh, India, Asian Journal of Criminology, 7(3), 10.1007/s11417-011-9108-9

11. Mischenko E., V., Kriskovets T., N., Lopanova A., P., Mushanova I., V., Inalkaeva K., S., Shulga T., I., Ivanova A., V., (2021). Student Youth Legal Consciousness: Formation Problems and Prospects, Current Context of Education and Psychology in Europe and Asia, 9(3), <http://dx.doi.org/10.20511/pyr2021.v9nSPE3.1135>
12. Pevtsova E., (2013), The functions of legal awareness of children and young people, Acta Universitatis George Bacovia. Juridica, 2 (2).
13. Tereshchenko E., A., Kovalev V., V., Trofimo M., S., Zasseev D., A., (2020). Legal Consciousness as a Facor Promoting The Achievement of Educational Objectives and the Realization of The Right to Education by Individuals and Collectives, Rev. Tempos Espaços Educ., 13(32), <http://dx.doi.org/10.20952/revtee.v13i32.14690>
14. Yi L., Li L., (2022). Effective Strategies to Promote the Cultivation of Public Legal Consciousness from the Perspective of Social Psychology, Journal of Environmental and Public Health, vol.22, <https://doi.org/10.1155/2022/8275938>

Web Sources

1. Banks E., (2018). The Purpose of Punishment, Criminal Justice Ethics, Sage Publications, Sagepub.com, <https://www.sagepub.com/sites/default/files/upm-binaries/5144_Banks_II_Proof_Chapter_5.pdf> [Last seen 25.02.2023].
2. Shevchenko A., Y., Kudin S., V., Loshchykhin O., M., Fatkhudinov V., H., (2021). The Principle of Inevitability and the Institution of Exception From Legal Liability: Aspects of the Relationship; file:///C:/Users/595-424-424%20Temo/Downloads/filipe,+GEI+05-+February+2021%20(1).pdf [Last seen 21.11.2022).

PLEA BARGAIN – AIM, IMPORTANCE, AND PROBLEMATIC ASPECTS IN THE REALITY OF THE US, GERMANY AND GEORGIA

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ABSTRACT

The parties come to a plea bargain, based on which the defendant receives a reduced punishment than would be appropriate in a formal trial. Based on its core, it is obvious that the given system largely favors the accused, but after a thorough investigation, we can see that several significant concerns need to be addressed right now.

The purpose of the paper that is being provided is to examine the plea bargain, its growth over time, and its status in three distinct states.

The writers of the article examine the realities in Germany, Georgia, and the United States of America, which will be a fascinating depiction of the present situation. The study of the facts provided will be highly fascinating and varied in this regard because the United States of America is a country of Anglo-American law, and Germany and Georgia are countries of continental European law.

The article will examine not only the legislative history of the described issue in the given states but also genuine situations, using which the problematic elements of this institution in all three nations will be distinctly highlighted. As a conclusion, the authors' viewpoint on the current models in each of the three states will be stated.

KEYWORDS: The US, Germany, Georgia, Plea Bargain, Court

INTRODUCTION

Criminal law has a long history of using plea bargains. Depending on the laws of various countries worldwide, its purpose and meaning might vary. As you are aware, there are nations with continental European law and nations with Anglo-American law. Their respective legal bases are vastly dissimilar. Regarding the countries of continental European law, the situation is different here because we have written law that is provided in codified form, unlike Anglo-American law, which is based on precedents, which eventually establishes the legal foundation on which the court acts.

Due to its unique qualities around the globe, the plea bargain system is fascinating. It goes without saying that each state has its unique legal system. Based on the work, the key elements of plea bargains, legal realities, and problems will be explored using the examples of the US, Germany, and Georgia.

The constitution of America serves as the cornerstone of this state. The dignity of the constitution is its fundamental component, and the 27 additional articles work in concert to produce an intriguing reality. The US Constitution does not include plea bargains as a right, but it should also be emphasized that they do exist in the American criminal court system. Based on the Supreme Court's broad view, it has been determined that plea bargains are necessary in America. Considering the paper's objectives, we will review the existing procedures, history, and court practices in America connected to plea bargains. We'll next concentrate on the benefits and drawbacks of this institution before drawing a judgment concerning its potential demise.

The German criminal proceeding corresponds to the model of a triadic value conflict: the victim's need for retribution is replaced by society's need for deterrent action, which is transformed into the state's demand for punishment, with the judge conditioned to act as an impartial third party.[1] As a result of the different legal concepts and traditions, the establishment of plea bargains in German criminal proceedings turned out to be more controversial and problematic. The core of the problem was that establishing the American model of plea bargains meant that the traditional German structure of value-conflict needed to be transformed into interest-based negotiations between defendants and prosecutors, where the judge's role and function would be limited. For the reasons mentioned above, several judicial decisions set clear limitations on plea bargains in Germany, which differed its regulation from the traditional American model. Within this article, the general principles of German criminal law; the arguments of critics and legal scholars against the establishment of plea bargains in German criminal law practice; the necessity of significant changes, and the first steps towards changes in the German criminal justice system; disadvantages of the current regulation and the possible recommendations for its improvement, will be discussed and analyzed.

1 <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1306&context=pilr> [Last seen 27.03.2023].

The article's purpose is to discuss one of the most important issues regulated by the Criminal Procedure Code – the plea bargain. The article "Plea bargain – aim, importance, and problematic aspects in the reality of the US, Germany, and Georgia" discusses the problematic issues related to the Georgian plea bargain. The changes made after the introduction of the plea bargain into the legislative space and the extent to which it limits the judge's role in considering the criminal case. At the end of the article, a position will be presented as a conclusion regarding what legislative changes should be made to make the institution of plea bargain more effective and fairer. Georgian criminal procedural legislation has recognized the institution of plea bargain since 2004.[2]

Kalenike Uridia

1. PLEA BARGAIN IN THE US
1.1. The Meaning of Plea Bargain

In the American judicial system, plea bargains are frequent, making up to 90% of all criminal cases. However, plea bargains are not permitted in many nations because they are seen as unethical and immoral. A bargain between the prosecution and the defendant in a criminal case, known as a plea bargain, often involves the defendant admitting guilt in exchange for a less punishment or charge.[3] They don't always represent a traditional sense of "justice" and are frequently only seen as a technique for developing a "mutual awareness" of the case's advantages and disadvantages. The question of who is best served by these bargains does arise, even if courts, in theory, are willing to let the parties involved resolve their conflicts by themselves.[4] A plea bargain is a contract between the prosecution and the defendant; if either party doesn't uphold their half of the bargain, the most likely option is to go to court to enforce the bargain. Usually, a lower charge is offered in exchange for something the defendant must undertake. A prosecutor has the right to cancel the offer if the defendant doesn't keep up half of the bargain.[5] There are three main varieties of Plea bargain recognized in the U.S:[6]

- Charge Bargaining: The most typical type of plea bargaining, in which the defendant agrees to admit guilt to a lower charge in exchange for the dismissal of more serious charges. A classic illustration would be to admit manslaughter as opposed to murder;
- Sentence bargaining: is when a defendant agrees to plead guilty to the charged offense in exchange for a less severe sentence. It is far less prevalent and strictly regulated than charge bargaining. Most often, a court must consider this, and many countries explicitly forbid it;
- Fact bargaining: The least frequent type of plea bargain involves a defendant agreeing to concede to some facts to block the admission of other facts into evidence. Most lawyers oppose using fact bargains, and many courts do not permit them.[7]

2 Fafiashvili, L., Tumanishvili, G., Akubardia, I., Gogniashvili, N., Ivanidze, M., Criminal Procedural Law of Georgia, Meridian Publishing House, Tbilisi, 2017, p. 545.

3 Malcolm M. Feeley, Plea Bargaining and the Structure of the Criminal Process, Berkeley Law Berkeley Law Scholarship Repository, 1-1-1982, 338-354.

4 Albonetti, C., (1992). Charge Reduction: An Analysis of Prosecutorial Discretion in Burglary and Robbery cases. Journal of Quantitative Criminology 8:317-333.

5 Bibas, S., (2001). Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas. Yale Law Journal 110:1097-1120.

6 Bibas, S., (2004). The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain. Journal of Criminal Law & Criminology 94:295–309.

7 Champion, D., (1989). Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining. Journal of Criminal Justice 17:253-263.

1.2. Principal Causes and Influencing Factors for Using a Plea Bargain

The primary justifications include the following: Courts are congested; if they were to continue operating, they would be overloaded; prosecutors' workloads are likewise overcrowded, fewer trials allow them to focus their efforts on the most severe matters, and defendants save time and money by skipping the necessity to appear at trial. These main arguments benefit the court, the prosecutor, and the defendant in their respective roles, but they don't automatically benefit the public. The plea-bargaining system has been openly criticized by many in the legal community for this reason and other moral, ethical, and constitutional ones.[8] As an illustration, the Alaska Attorney General outright prohibited plea bargaining in 1975, and other states and towns have followed suit. In 1978 research on the impact of Alaska's ban on plea bargaining, the author concluded that being unable to rely on plea bargaining strengthened accountability at every stage of the legal system and prevented the court system from being overburdened. The research concludes that plea bargaining was unnecessary to effectively run Alaska's criminal justice system.[9]

Finally, research in other areas, such as "Prisoner's Dilemma" studies, has shown that suspects have every motivation to accept arrangements that don't represent their guilt or innocence, either out of fear or to shift the responsibility to someone else. Despite these worries, plea bargains remain a significant part of the American judicial system.[10]

8 Holmes, M., Daudistel, H., and Taggart, W., (1992). Plea Bargaining Policy and State District Court Caseloads: An Interrupted Time Series Analysis. Law and Society Review 26:139-160.

9 King, N., Soule, D., Steen, S., and Weidner, R., (2005). When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guideline States. Columbia Law Review 105:960-1009.

10 Meyer, J., and Gray, T., (1997). Drunk Drivers in the Courts: Legal and Extra-Legal Factorsaffecting Pleas and Sentences. Journal of Criminal Justice 25:155-163.

1.3. How Plea Bargains Function in the US

The U.S. Supreme Court has deemed plea bargaining not only legal and constitutional but also "a fundamental component of the administration of justice and should thus be promoted." When handled properly, the court explained that plea bargains might be advantageous to all parties. The defendant obtains a rapid resolution of his case, the opportunity to admit guilt and a head start on achieving any possibilities for rehabilitation. He also avoids the prolonged fears and uncertainties of a trial. Prosecutors and judges protect precious and limited resources. The public is shielded from dangers presented by criminal suspects free on bail while their cases are being processed.[11] The right to a jury trial is not unlawfully restricted by the mere chance that a jury trial may result in a worse punishment than a plea bargain. It is also legal for a defendant to plead guilty despite maintaining his innocence if there is a factual foundation for the plea and the defendant wants to avoid the possibility of receiving a harsher sentence. The defendant and the prosecution are not guaranteed the right to have a guilty plea accepted, and the defendant cannot compel the prosecution to enter a plea bargain.[12]

According to the constitution, a guilty plea must be offered willingly, with knowledge of the charges against the defendant and their potential implications. The court must (1) conduct a thorough investigation of the defendant in open court on the record and (2) determine that the defendant has made a voluntary, knowing, and intelligent waiver of these rights before a plea can be accepted because significant constitutional rights are being waived, including the right to a jury trial, the right to confront witnesses, the privilege against self-incrimination, and the right to be convicted only by proof be-

11 Santobello v. New York, 404 U.S. 257, 260 (1971).

12 Piehl, A., and Bushway, S., (2007). Measuring and Explaining Charge Bargaining. Journal of Quantitative Criminology 23:105-125.

yond a reasonable doubt. For nolo contendere pleas and specific admissions to sufficient facts equal to guilty pleas in their finality, explicit inquiries and waivers are also necessary.[13]

The "critical stage" of a guilty plea necessitates counsel or a legally binding renunciation of counsel. If the defendant enters her guilty plea without legal representation, she has the right to change her mind before the sentence. A guilty plea does not surrender the right to improper aid of counsel, a typical basis for applications to withdraw the plea.[14]

The court must examine the defendant, make specific findings, and inform the defendant of the potential consequences of entering a plea. The defendant is put under oath in open court during the colloquy section of the hearing and is asked a series of questions.

According to relevant case law, the judge must:

- Find out if there are any bargains that are dependent on the plea from the defendant or their attorney. The nature of any bargain must also be disclosed to the court;
- Let the defendant know that he has the option to change his plea if the court decides to impose a harsher penalty;
- Inform the defendant that his plea waives trial rights;
- Inform the offender of potential criminal and/or immigration repercussions;
- Make sure the defendant is aware of the components of each charge to which he is entering a plea of guilty;
- Make inquiry about voluntariness and come to conclusions;
- Accept or reject plea.

1.4. Alford Plea VS. The "Nolo Contendere" (No Contest) Plea

In an Alford Plea, the accused admits guilt but maintains his innocence. A defendant who enters a nolo contendere plea accepts punishment (the court's sentence), but they do not acknowledge guilt. In both cases, the defendant is found guilty.[15]

Alford received a 30-year jail term from the court. An appeals court overturned the conviction, but the U.S. Supreme Court overturned it in 1970. The Supreme Court rejected Alford's contention that his plea was forced because he wanted to avoid the death penalty and thus was "the consequence of fear and coercion." Because Alford and his counsel wisely determined that accepting the plea offer was in his best interests, given on the significant incriminating evidence against him, the court determined that Alford's guilty plea was voluntary.[16]

The Alford plea is not accepted in all jurisdictions, and in those that do, the consequences differ. But in general, even if the genuine offender hasn't been found and apprehended, a case can be closed with a conviction after an Alford plea. Unfortunately, this may imply that the actual criminal is still free and able to commit more crimes without fear of being tracked down. The weight of a conviction staying on their record and the impossibility of pursuing financial damages for the erroneous conviction due to their admission of guilt are the effects of an Alford plea on people exonerated but facing a retrial.[17] The Alford plea has quickly emerged as the prosecution's first choice due to the sharp rise in wrongful convictions for wrongful accusations. The case is concluded with a con-

13 Steffensmeier, D., and DeMuth, S., (2001). Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons. Criminology 39:145-78.

14 Steffensmeier, D., Ulmer, J., and Kramer, J., (1998). The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male. Criminology 36:763-98.

15 Uviller, R., (2000). The Neutral Prosecutor: The Obligation of Dispassion in an Enthusiastic Pursuit. Fordham Law Review 68:1695-1718.

16 Steffensmeier, D., and Hebert, C., (1999). Women and Men Policymakers: Do the Judge's Gender Affect the Sentencing of Criminal Defendants? Social Forces 77:1163-196.

17 Ulmer, J., and Bradley, M., (2006). Variation in Trial Penalties Among Serious Violent Offenses. Criminology 44:631-670.

viction, and the defendant is also barred from suing the state or collecting statutorily permitted compensation for the incorrect conviction.[18]

How an innocent person may consent to a plea that ends in a conviction that will last their whole lives may be a mystery to those who have never had to consider the possibility of spending decades or their entire lives behind bars. But after spending years, even decades, behind bars, the overwhelming yearning is just to be free. This is particularly true if the defendant spent a significant amount of time on death row in solitary confinement. It is reasonable that many who have been exonerated have little trust in the judicial system after having been found guilty of crimes they did not commit. Therefore, the decision is simple when given the option of freedom while admitting guilt or a new trial and going back to jail.[19]

1.5. Benefits and Drawbacks of Plea Bargaining

Although some Americans believe that the practice of plea-bargaining results in offenders receiving lower sentences than they should, the system has several advantages for both the accused and the judicial system. There are benefits and drawbacks for the prosecution, the defendant, the victims, and society.

Plea bargaining has the main benefit of accelerating the legal system's procedures. In many cases, a criminal trial will last many days. A few may require weeks. For 135 days, the OJ Simpson murder trial for Ronald Goldman and Nicole Brown Simpson was broadcast on television. This can be avoided with a plea bargain so that the judge can address punishment right away. The main drawback of plea negotiations is that they might still result in the imprisonment of innocent persons. For instance, California voters enacted Proposition 8 in 1982 to restrict the times when plea bargaining may take place to address this problem and prevent innocent individuals from feeling pressured to risk going to trial.[20]

Based on the discussion, we can conclude that the advantages of a **plea bargain** are:

- It eliminates uncertainty in the judicial system;
- It gives a convincing certainty;
- It could work well as a negotiation tactic;
- It gives the community access to more resources;
- It lowers the number of inmates in local prisons.
- Along with the advantages, the named mechanism also has disadvantages such as:
- It eliminates the option of a jury trial;
- It could result in poor investigative techniques;
- For the innocent, a criminal record is still created;
- A plea bargain is not binding on judges;
- Plea bargains take away the possibility of an appeal;
- It offers the guilty soft justice.

1.6. The Divergent Views on whether to Outlaw Plea Bargains in the US

- Plea bargaining is a contentious aspect of the legal system. Plea bargaining opponents make claims about rights, justice, and appropriate punishment;[21]
- Plea bargaining is unjust because of the rights that defendants give up, such as the right to a jury trial;

18 Ma, Y., (2002). Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective. International Criminal Justice Review 12:22-52.

19 Kurlychek, M., and Johnson, B., (2004). The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court. Criminology 42:485-515.

20 Lee, S., (2005). The Scales of Justice: Balancing Neutrality and Efficiency in Plea Bargaining Encounters. Discourse & Society 16:33-44.

21 Steffensmeier, D., Kramer, J., and Streifel, C., (1993). Gender and Imprisonment Decisions. Criminology 31:411-46.

- Plea bargaining enables offenders to thwart the judicial system, which lowers public confidence in the criminal justice system;
- Giving offenders who enter plea deals lesser sentences leads to unfair punishments when the punishment is overly moderate in comparison to the seriousness of the offense;
- Plea negotiations increase the likelihood that innocent persons would confess to crimes they didn't commit;
- Proponents emphasize plea bargaining's advantages in real life;[22]
- Plea negotiating enables criminal justice professionals to customize sanctions and lessen their severity;
- Plea bargaining is a necessary administrative practice because without it, the judicial system would become clogged with cases, and the courts would be overrun;
- Plea negotiations spare the prosecution, the judiciary, and the prisoner the expense of a trial;
- Plea bargaining has many real-world advantages; thus, it is unlikely to be abolished very soon. According to the current bargain, any injustice and unfairness that plea bargaining may bring about in the legal system are at least balanced out by the advantages it provides for both the state and the defendant.

22 Stuntz, W., (2004). Plea Bargaining and Criminal Law's Disappearing Shadow. Harvard Law Review 117:2548-2569.

Elene Landia

2. PLEA BARGAINS IN GERMANY

2.1. Argumentation of Critics and Legal Scholars Against the Establishment of Plea Bargains in German Criminal Law

The legislative regulation of plea bargaining in German criminal law has not had as long a history as in American criminal law. It was not until 2009 that Germany's constitutional court upheld a law that allowed plea bargains in criminal trials. In 2013 the German constitutional court affirmed that plea bargains in criminal court cases are legal under the German constitution.[23]

For many years German legal scholars and commentators considered that plea bargaining could not become a part of German criminal law. They were motivated by the significant difference between the German and American criminal justice systems. In the American criminal justice system, criminal proceedings are adversarial. It means the defense counsel and the prosecutor have almost equal adversarial postures. The judge is presented as a neutral observer with a limited scope of authority. By contrast, the German trial is led by a judge who has quite an active role in the process. The judge searches out the truth to determine which crime was committed and the most appropriate sentence for this punishment. Many basic principles relating to criminal prosecution go back even further in German legal history — they're outgrowths of the German notion of the "Rechtsstaat", translated as "the rule of law". The "Rechtsstaat" requires that an unbiased judge probe all the facts of the case in a public proceeding in which all parties have a right to be heard, with the ultimate purpose of discovering the fundamental historical truth of what happened.[24] It is important to discuss what dangers

23 <https://p.dw.com/p/180F3> [Last seen 29.11.2022].

24 <https://hammeltranslations.com/2019/05/22/the-

the opponents of establishing plea bargains in German practice might have seen:

- As plea bargaining is an out-court negotiation process, a well-established principle of public trial gets violated. As a result, society may lose their respect and confidence in criminal justice proceedings;
- Society may cast doubts on "Fair-trial" guarantees, as defendants are giving up some of their constitutional rights, such as the right to be presented and to participate in proceedings, the right to a jury trial, the privilege against self-incrimination, the right to confront witnesses, the right to be convicted only by proof beyond a reasonable doubt, etc.;
- Even though the primary advantage of plea bargaining is to speed up the processes of the justice system and make courts less overcrowded, it may lead to poor investigation procedures. As a result, an innocent defendant may also plead guilty and in some cases, the truth of what happened may not ever completely be known;
- Moreover, criminal statistics will not be fully consistent with reality as guilty pleas count as convictions although there was no trial;
- Another problematic issue is that there is a presumption of innocence and a key principle of "In dubio pro reo" (In doubt for the accused) established in German criminal justice proceedings. It means that when in doubt, the judge must rule in favor of the accused. By establishing plea bargaining in German criminal law, this principle becomes questionable, because there is a danger that while pleading guilty, the defendant is providing evidence against himself;
- The impartiality of judges could also be problematic. As defendants are pleading guilty voluntarily, judges may become biased against them;
- Finally, it may also violate the principle of legality, because there is a danger that the state may forfeit its indispensable claim to be the sole legitimate punishing authority, especially in the case of serious crimes.[25]

2.2. The necessity of significant changes in the German criminal justice system

Even though critics and opponents might have made solid and well-grounded arguments against the establishment of plea bargaining in German criminal law, the German criminal justice system needed significant changes. In the 70th of the 20th century, a significant growth of crimes in Germany – quantitatively and qualitatively – was observable.[26] But the budget for criminal courts remained the same. As a result, courts became overloaded and were not functioning effectively. To ensure fair criminal proceedings, the State hires and pays the judge, the prosecutor, the police, and criminal laboratories.[27] It is necessary to consider that the average person accused of a crime does not have a great deal of money. So, the state also has to hire and pay for lawyers to protect their rights. As we can see, the effective functioning of criminal proceedings requires significant financial expenditure from the state. In return, the state receives a guarantee that the law is functioning effectively.

Governments spend just enough money to ensure the criminal-justice system functions minimally, but no more than this. If the state needs to tighten its belt, budgets for criminal justice are one of the first line-items to be, and

difficult-birth-of-the-criminal-plea-bargain-in-germany/> [Last seen 24.03.2023].

25 <https://hammeltranslations.com/2019/05/22/the-difficult-birth-of-the-criminal-plea-bargain-in-germany/> [Last seen 24.03.2023].

26 Crime and Criminal Justice History in Germany. A Report on Recent Trends Herbert Reinke; VOL. 13, N°1, 2009; paragraph 2.

27 <https://www.stimmel-law.com/en/articles/trial-preparation-what-happens-month-trial> [Last seen 29.11.2022].

the most efficient way to resolve a criminal case is by a deal, or "plea bargain", in common-law parlance. The defendant appears before the judge, enters a guilty plea, formally waives his right to a trial, gets his reduced sentence, and the case is closed without needing an expensive, uncertain trial. Everyone is happy, sometimes even the defendant.[28]

2.3. First steps towards changes in the German criminal justice system

In 2009 Germany's constitutional court upheld a law that allowed plea bargains in criminal trials. In the same year, section 257c was added to the German Criminal Procedure Code by the Federal legislature. To discuss the circumstances of the changes briefly, in suitable cases, the German court was able to reach an bargain with the participants on the further course and outcome of the proceedings. However, according to the legislature, the court could announce what content the negotiated bargain could have. It could also indicate an upper and lower sentence limit, and the negotiated bargain shall exist if the defendant and the public prosecution office agree to the court's proposal. Moreover, the court could cease to be bound by a negotiated bargain if legal or factually significant circumstances have been overlooked.

As we can see, because of the new legislative regulation in the German Criminal Procedure Code, a strict legal framework was defined within which plea bargains had to be implemented. A judge still had quite an active role in the process, could control the content of the bargain, and even declared the bargain invalid because of circumstantial changes.

Such an arrangement differed from the American regulation, where the goal of the entire criminal justice system is to encourage plea bargains. Deals between the prosecutor and the defendant are enforceable in courts, and, moreover, the existence of the Alford plea (An opportunity for the defendants to plead guilty to the crimes they state they did not commit) encourages the more frequent use of plea bargains in practice. The addition to the German Criminal Code was challenged in the German Federal Constitutional Court, which published necessary clarifications in 2013 – "Criminal law is based on the principle of individual guilt, which has constitutional status. This principle is anchored in the guarantee of human dignity and personal responsibility. The government is obliged under the Constitution to ensure the functioning of the criminal justice system to establish the real facts of a case, without which it is impossible to implement the substantive principle of individual guilt". "Even if it is currently not possible to conclude from the deficits in the implementation of the Plea-Bargaining Act that the statutory provision is unconstitutional, it is nonetheless necessary that the legislature keep a close eye on future developments. the legislature must take reasonable steps to counteract this undesirable development.... Should it fail to do so, an unconstitutional situation would arise". [29] To briefly summarize the decision of the German Federal Constitutional Court, the court considered that the new law provided adequate protections for the defendants' rights. Even though there is a serious implementation deficit, the regulation is currently not yet unconstitutional. However, the legislator should take effective steps to solve implementation deficits and, if necessary, improve them.

28 <https://hammeltranslations.com/2019/05/22/the-difficult-birth-of-the-criminal-plea-bargain-in-germany/> [Last seen 24.03.2023].

29 Bundesverfassungsgericht, Press Release No. 17/2013 of 19 March 2013 – Legal Regulation of Plea Bargaining is Constitutional – Informal Bargains are Impermissible: Decision – 2 BvR 2628/10.

Nikoloz Thomasiani

3. PLEA BARGAINS IN GEORGIA

3.1. Georgian Legislative Amendments Concerning Plea Bargaining

Along with the changes made in the Code of Criminal Procedure, the grounds for entering into a plea bargain changed. Initially, if in order to enter into a plea bargain, it was necessary for the accused to cooperate with the prosecution, confess to the crime, and provide the investigative authorities with unmistakable information about a serious crime or a criminal act committed by an official, the current criminal law procedure According to the Code, a plea bargain is a basis for the court to issue a verdict without considering the merits of the case. Accordingly, the conclusion of a plea bargain between the parties was simplified from a procedural point of view.[30]

The accused was not considered convicted under the original version of the legislation in the case of signing a plea bargain, but in the case of signing a plea bargain, the court issues a guilty verdict without considering the case's merits, which automatically leads to the person's conviction.

According to the Criminal Procedure Code, valid until 2014, the basis for the court to issue a verdict without considering the case's merits was a plea bargain, and the basis for a plea bargain was a bargain on guilt or punishment. With the changes made by law N2517 of July 23, 2014, one of the grounds, namely the bargain on punishment, was canceled. In the explanatory note of the named law, we read: the existence of the possibility of bargain on the punishment in the conditions of not admitting guilt may represent another factor for the accused, who recognizes himself as innocent, to agree to a plea bargain with the motive of mitigating the punishment. The draft law envisages the abolition of the sentence bargain as a form of a plea bargain. Accordingly, the basis of the plea bargain will be only the bargain in which the accused admits the crime and agrees to the punishment with the prosecutor.[31]

According to Article 211, Part 1 of the Criminal Procedure Code, which is still in effect until 2014, the court should state in the motion for a verdict, without considering the merits of the case, that there is evidence sufficient to make a reasonable assumption that this person committed the crime in question.[32] The named legislative amendments of 2014 also affected the said legal record, as it directly contradicted Article 13, Part 2 of the Code of Criminal Procedure, which unequivocally states that a guilty verdict must be based only on a set of evidence that must prove a person's guilt beyond a reasonable doubt.[33] As a result of the above-mentioned changes, the motion for a plea bargain must reflect sufficient evidence to issue a judgment without a substantive review of the case provided for in Article 3, Section 11^1 of this Code, which is more than the standard of reasonable suspicion, but still cannot fully meet the requirements of Article 13 of the Code of Criminal Procedure to the requirements established by part 2.

A legislative amendment implemented in 2014 addressed the grounds for appealing a plea bargain. As a result of the changes, another ground was added to Article 215 of the Code of Criminal Procedure, namely, the convicted person has the right, within 15 days from the delivery of the sentence provided for in this chapter, to file a complaint with the higher court instance regarding the approval of the plea bar-

30 Law of Georgia, Code of Criminal Procedure of Georgia, Article 209, Article 1. The law was published on 03/11/2009.

31 Law of Georgia of July 25, 2014, N 2517, explanatory card. An explanatory card is available at <https://info.parliament.ge/file/1/BillReviewContent/10720>

32 Law of Georgia, Code of Criminal Procedure of Georgia, Article 211. The law was published on 03/11/2009. Editorial valid until July 24, 2014.

33 Law of Georgia, Code of Criminal Procedure of Georgia, Article 13, Section 2. The law was published on 03/11/2009.

gain regarding the annulment of the court verdict if: the plea bargain was concluded in such a way that: There was not enough evidence to issue a verdict without considering the merits of the case provided for in Article 3, Section 11[1] of this Code. The mentioned change should be positively evaluated because it is aimed at protecting the rights of the convicted person.

Prior to the changes, the principles that should guide the state prosecutor when deciding on a plea bargain were too vague. Before the legislative change, the mentioned issue was regulated according to Article 210, Part 3 of the Code of Criminal Procedure, when deciding to reduce the punishment for the accused or to reduce or partially remove the charge, the prosecutor must consider the public interest, the severity of the punishment for the committed crime, the illegality of the action and the degree of guilt.[34]

As a result of the legislative changes of July 24, 2014, all the circumstances that should be considered to conclude a plea bargain were written in detail the state's judicial priorities, the severity of the crime committed and the expected punishment, the nature of the crime, the degree of guilt, the public danger of the accused, personal characteristics, conviction, with the investigation. Cooperation and conduct of the accused to compensate for the damages caused by the crime.[35] The said amendment serves to bring more clarity and predictability to the process of concluding a plea bargain.

3.2. Plea Bargain and rights of the victim

When negotiating a plea deal, it is critical to consider the victim's legal situation. Although the victim is not a party to the proceedings under the Code of Criminal Procedure, he shall enjoy the rights recognized by international legal acts. According to Article 217, Part 2 of the Criminal Procedure Code, the victim has no right to appeal the plea deal.[36] It is critical to assess if the legislative record in question infringes the victim's right to a fair trial. The victim values the sense of justice and the knowledge that the court considered his circumstances while determining the punishment. Despite the fact that the victim does not have the right to appeal the decision on the plea bargain under the current procedural code, he is given the opportunity to provide the court with the approval of the plea bargain in writing or orally at the court session about the damage he suffered as a result of the crime, and the plea bargain does not deprive the victim of the right to file a civil suit. To make a fair decision, it is important that the victim's position is known to the prosecutor in concluding a plea bargain. According to the Procedural Code, the prosecutor must consult with the victim before concluding the plea bargain and inform him of the conclusion of the plea bargain, about which the prosecutor draws up a protocol. It is important that the victim has rights in the plea bargain process so that his position is not completely ignored, and he should not have the right to veto the plea bargain. In accordance with international standards, the victim should have the opportunity to appear in court to hear his opinion, a similar opportunity is given to the victim according to the Criminal Procedure Code of Georgia.

3.3 Plea Bargain and the Judge's Role in Sentencing

Several provisions of the Criminal Code address the question of plea bargaining. If the parties reach a plea bargain, the court may impose a sentence shorter than the lowest limit of the penalty imposed by the relevant article of this Code, or another, lesser kind of punishment, ac-

34 Law of Georgia, Code of Criminal Procedure of Georgia, Article 210. Law published on 03/11/2009. Editorial valid until July 24, 2014.

35 Law of Georgia, Code of Criminal Procedure of Georgia, Article 210, Article 3. The law was published on 03/11/2009.

36 Law of Georgia, Code of Criminal Procedure of Georgia, Article 210, Article 2. The law was published on 03/11/2009.

cording to Article 55 of the Criminal Law Code.[37] Because there is no plea bargain between the parties, the mentioned norm opposes the concept of individualization of punishment, because the court has no power to impose a milder sentence than the one given by law. Even in the absence of a plea bargain, the court should have the authority to impose a lesser sentence than that prescribed by law, which will contribute to the practical application of the principle of individualization of punishment.[38]

In Georgian criminal law, the imposition of conditional punishment is linked to the parties reaching a plea bargain. According to Article 63, Part 1 of the Criminal Code, if the parties reach a plea bargain, the court has the authority to determine that the imposed sentence is conditional. As a result, a plea bargain must be reached between the parties for the prescribed punishment to be considered. According to Article 63, Part 2 of the Criminal Code, if the convicted person has committed a particularly serious or intentionally serious crime, the imposed sentence may not be considered conditional, this norm contradicts Article 50, Part 5 of the Criminal Code of Georgia, which regulates part of the imposed punishment subject to consideration and where no importance is attached to the seriousness of the crime committed. The contradiction between the two named norms should be decided in favor of part 5 of Article 50 of the Criminal Code because it refers to a private case of the use of conditional sentence and, simultaneously, decides the issue in favor of the person.[39]

CONCLUSION

The discussion made it evident how significant plea deals are in Georgia, Germany, and America. Additionally, it became evident that the three states take various approaches to the problem of regulating plea bargains and had different ideas on how to resolve it. Despite this institution's strengths, negative things that should be changed or corrected were brought to light.

In the United States of America, as can be seen from the paper, there are different forms of a plea bargain, which were formed because of court practice and are still in use. Based on a plea bargain, a person loses and gives up the right to a fair trial, which is the most problematic issue, and the judge in America can ignore the type of punishment in the plea bargain, which makes the deal between the prosecutor and the accused unstable. Despite its drawbacks, a plea bargain shortens court proceedings, and the parties must spend less time and resources to reach an outcome. There is a prevailing view in America that the disappearance of a plea bargain would be impermissible because it plays a more positive role in the litigation process than a negative one.

The law which regulates plea bargains in Germany is still controversial. It defines a strict legal framework within which plea bargains must be implemented. Yet neither the state nor the federal government has enough budget to ensure complete and detailed conduction of all stages of criminal proceedings. As a result, courts are overloaded, and the quality of justice may be harmed. Even though the representatives of the German legal system are proud of their longstanding principles, following high principles is expensive. Something needs to be given up. Though the primary purpose of the traditional model of the German criminal justice system was to pursue the truth and justice with the active involvement of judges, the modern state faces various challenges and has to regulate many new areas of a complex society. The criminal justice system needs to be per-

37 Law of Georgia, Criminal Code of Georgia, Article 55. Law published on 22/07/1999. <https://matsne.gov.ge/ka/document/view/16426?publication=243>

38 Tkesheliadze, G., Lekveishvili, M., Nachkibia, G., Todua, N., Mchedlishvili-Hedrichi, K., Mamulashvili, G., Ivanidze, M., Sarkeulidze, I., Criminal Law General Part, Meridian Publishing House, TB, 2019, p. 600.

39 Law of Georgia, Criminal Code of Georgia, Article 63, Article 2, Code published on 22/07/1999. <https://matsne.gov.ge/ka/document/view/16426?publication=243>

ceived as a regulatory tool that has the main goal of conducting efficient deterrence rather than applying strict retribution.

In conclusion, it should be noted that in Georgian reality, it is important to conclude a plea bargain in such a way that the conviction of an innocent person is minimized. When concluding a plea bargain, several problems arise in practice, including the issue of the limited authority of the prosecutor directly supervising the case. It would be preferable if the current rule is changed through legislative amendments, the authority of the prosecutor directly supervising the case is increased in this regard, and the approval of the superior prosecutor is not required, at least in the case of less serious and serious crimes, ensuring the actual implementation of the principle of speedy justice while not having a plea bargain. Existence restricts the judge's ability to apply the concept of individualization of punishment genuinely and, if required, to be more humanitarian considering the purposes of the penalty or to utilize such forms of criminal action as a conditional sentence.

BIBLIOGRAPHY:

1. Fafiashvili, L., Tumanishvili, G., Akubardia, I., Gogniashvili, N., Ivanidze, M., Criminal Procedural Law of Georgia, Meridian Publishing House, Tbilisi, 2017.
2. Malcolm M. Feeley, Plea Bargaining and the Structure of the Criminal Process, Berkeley Law Berkeley Law Scholarship Repository.
3. Albonetti, C., (1992). Charge Reduction: An Analysis of Prosecutorial Discretion in Burglary and Robbery cases. Journal of Quantitative Criminology.
4. Bibas, S., (2001). Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas. Yale Law Journal.
5. Bibas, S., (2004). The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain. Journal of Criminal Law & Criminology.
6. Champion, D., (1989). Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining. Journal of Criminal Justice.
7. Holmes, M., Daudistel, H., and Taggart, W., (1992). Plea Bargaining Policy and State District Court Caseloads: An Interrupted Time Series Analysis. Law and Society Review.
8. King, N., Soule, D., Steen, S., and Weidner, R., (2005). When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guideline States. Columbia Law Review.
9. Meyer, J., and Gray, T., (1997). Drunk Drivers in the Courts: Legal and Extra-Legal Factorsaffecting Pleas and Sentences. Journal of Criminal Justice.
10. Santobello v. New York, 404 U.S. 257, 260 (1971).
11. Piehl, A., and Bushway, S., (2007). Measuring and Explaining Charge Bargaining. Journal of Quantitative Criminology.
12. Steffensmeier, D., and DeMuth, S., (2001). Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons. Criminology.
13. Steffensmeier, D., Ulmer, J., and Kramer, J., (1998). The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male. Criminology.

14. Uviller, R., (2000). The Neutral Prosecutor: The Obligation of Dispassion in an Enthusiastic Pursuit. Fordham Law Review.
15. Steffensmeier, D., and Hebert, C., (1999). Women and Men Policymakers: Do the Judge's Gender Affect the Sentencing of Criminal Defendants? Social Forces.
16. Ulmer, J., and Bradley, M., (2006). Variation in Trial Penalties Among Serious Violent Offenses. Criminology.
17. Ma, Y., (2002). Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective. International Criminal Justice Review.
18. Kurlychek, M., and Johnson, B., (2004). The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court. Criminology.
19. Lee, S., (2005). The Scales of Justice: Balancing Neutrality and Efficiency in Plea Bargaining Encounters. Discourse & Society.
20. Steffensmeier, D., Kramer, J., and Streifel, C., (1993). Gender and Imprisonment Decisions. Criminology.
21. Stuntz, W., (2004). Plea Bargaining and Criminal Law's Disappearing Shadow. Harvard Law Review
22. Law of Georgia, Code of Criminal Procedure of Georgia. 03/11/2009.
23. Law of Georgia, Criminal Code of Georgia. 22/07/1999.
24. Law of Georgia of July 25, 2014, N 2517, explanatory card.
25. Tkesheliadze, G., Lekveishvili, M., Nachkibia, G., Toduana, N., Mchedlishvili-Hedrichi, K., Mamulashvili, G., Ivanidze, Sarkeulidze, I., Criminal Law General Part, Meridian Publishing House, TB, 2019.
26. Crime and Criminal Justice History in Germany. A Report on Recent Trends Herbert Reinke; VOL. 13, N°1, 2009.
27. Bundesverfassungsgericht, Press Release No. 17/2013 of 19 March 2013 – Legal Regulation of Plea Bargaining is Constitutional – Informal Bargains are Impermissible: Decision – 2 BvR 2628/10.
28. <https://p.dw.com/p/180F3>
29. <https://www.stimmel-law.com/en/articles/trial-preparation-what-happens-month-trial>
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