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ALGERIA MOVING TOWARDS INVESTING IN RENEWABLE ENERGIES – A STUDY FROM ALEGAL AND ECONOMIC PERSPECTIVE

H'oriya SOUIKI

Doctor of Law, Associate Professor, Lecturer Class A, Faculty of Law Ain Temouchent university, Algeria

ABSTRACT

Over the past few years, Algeria has mainly focused on investing in renewable energies. For the purpose of promoting and encouraging this type of investment, the Algerian authoritiesdecreed a set of legal and regulatory texts in order to efficiently regulate the investment process in renewable energies. They also opened the door to new partners in the private sector and provided all the necessary incentives and motivators for that.

The present study aims to peruse the legal and regulatory framework that Algeria has seriously promoted in view of encouraging investment in the field of renewable energies. The results of that study were then assessed by addressing the investment strategies and models that were applied in some Wilayas (Provinces) in the southern region of the country.

KEYWORDS: Renewable energies, Economical development, Investment, Jurisdiction, Environment

INTRODUCTION

It is widely acknowledged that the energy sector is a strategic domain that plays a significant developmental role in every country. In addition, achieving economic and social development is predominantly linked to the availability of appropriate energy sources. It is also noteworthy that the consumption of energy has significantly increased due to various developments in all fields[1].

It is worth emphasising that energy in general, and renewable energies in particular,represent a promising alternative to conventional energies. They indeed constitute the principal engine of economic growth formost countries and major companies; they also represent an absolute priority for sustainable development[2].

Furthermore, in view of the depletion of conventional fossil energies, Algeria has sought to encourage investment in renewable energies that are not harmful to the environment. This was undertaken especially because its economy has known some hesitation in recent years due to the impact of high internationalprices on the main energy source, i.e. oil, which is considered the source of national income for Algeria[3].

For this, the country decided togive up its reference function in monopolising economic activities. Then, the features of the new state were clarified by opening national markets to competition and by providing new channels for the intervention of private operators in vital activities of strategic importance that were for a long time the monopoly of the state.

It is also important to note that the Algerian state has also made it one of its main priorities to preserve natural capital and alleviate the impacts of the energy system on the environment and its dire consequences[4].

Moreover, in order to perpetuate this strategy, the state had to enact legal textsto frame this plan of action.

The problem of this study lies in knowing and developing the legal and institutional mechanisms that were established by the legislator in order to frame the investment in renewable energies and promote them within the framework of sustainable development. It also tries to discuss the outcomes of this investigation.

In addition, this paperis intended to identify the legal and institutional mechanisms that control and regulate the investment requirements in renewable energies while addressing one of the economic models that have been established since the issuance of the legal arsenal that regulates this action program.

This study was essentially based on descriptive and analytical approaches in order to describe the concepts and analyse the legal texts in this respect.

FIRST: Legal mechanisms to promote investment in renewable energies

As a result of the drop in oil prices, which adversely impacted the country's hard currency income, Algeria decided to bet on establishing and developing a national industry for renewable energies and making this industry a prominent source for achieving sustainable development. It also tried to define legal and regulatory frameworks to encourage national or foreign investment in this domain. At the same, the government insisted on protecting the environment from pollution that has been partly degraded due to the use of fossil energies.

It is important to mention that the first step

1 Boufeniche Wassila: The Role of Energy in Activating the Dimensions of Sustainable Development in Algeria during the period from 1990-2016 - Algerian Journal of Social and Human Sciences, Volume 6, Number 2, 2018, p.17.

2 Safia Auld Rabih Akloubi, Mohamed Akloubi: The Legal and Institutional Framework for Renewable Energy in Algeria - Sawt al-Qanun Magazine, Volume 08, Issue 02, year 2022, p.1387.

3 Tarek Makhlouf: The Legal System for the Promotion of Renewable Energies in the Algerian Legislation - Algerian Journal for Security and Development, Volume 09, Issue 16, January 2022, p.153.

4 Belkhiri Mourad: Mechanism for Proving the Source of Renewable Energy in the Algerian Legislation - Journal of Real Estate Law, Volume 5, Number 1, 2018, p.112.

to do so consisted of completing an agreement with Belgium on April 08, 1982, for the development of renewable energies. Algeria ratified this agreement in 1983 under Decree 131-83[5].

Likewise, Algeriastarted enactingother legal texts, starting with Law No. 98-11,which includes the guiding law and the five-year program on scientific research and technological development[6]. This was the first law that actually reflected the legislator's vision of interest in renewable energies.

Afterwards, this first law was followed by Decree 99-09, which is related to energy control,[7]and by Ordinance 02-01, which concerns electricity and gas distribution through channels[8]. This is viewed as the first legislative framework dealing with the marketing of electric energy generated from renewable sourcesand with the promotion of using renewable energy. It also allowed the private sector to exploit this type of energy. This ordinance also permitted the self-production of renewable energies.

Algeria has also adopted supportive policies in conducting competitive bidding processes in order to develop major renewable energy projects for the private sector. This would guarantee the purchase of energy produced from renewable resources.

Similarly, Law 04-09, which was issued in 2004, was quite special as it was related to the promotion of renewable energies within the framework of sustainable development[9].

Then, the legislator stipulated within the core of Article 04 that the items given below enter within the framework of renewable energies:

- All kinds of electrical, thermal, or gas energies that are obtained from the conversion of solar radiation, wind power, geothermal heat, organic waste, water energies, and biomass utilisation techniques;
- Allmeans that contribute to significantly saving energy by resorting to bio-climatic engineering techniques in the construction field.

The legislator subjected the conversion of renewable energies to the provisions of Law 04-09, which include:

- *Solar energy,* which includes photoelectric conversion, thermal and kinetic conversion;
- *Biomass energy* which includes "wet" anaerobic conversion processes by means of alcoholic methanogenic fermentation, dry denaturation, carbonisation, and gasification processes;
- *Wind energy* which includes mechanical conversion and electromechanical conversion;
- *Geothermal energy,* which includes recovery in thermal form.

Furthermore, within the framework of enacting mechanisms for promoting renewable energies, the legislator required the issuance of an original certificate that proves the origin of renewable energy.

Here, the legislator referred to the organisation and regulation for which Executive Decree 15-69 was issued and was amended by Decree 17-167,[10] which specifies the precepts for that matter.

5 Decree 83-131 of February 19, 1983, including the ratification of the agreement concluded between the Government of the People's Democratic Republic of Algeria and the Government of the Kingdom of Belgium in the field of developing new and renewable energies - Official Gazette 08, issued on February 22, 1983.

6 Law 98-11, including the Directive Law and the Five-Year Program on Scientific Research and Technological Development - Official Gazette 62, issued on August 25, 1998, amended by Law 05-08 of February 23, 1998 - Official Gazette 10, issued on February 27, 2008, abolished by Law 12-15 of December 30, 2015, including the Directive Law on Scientific Research and Technological Development - Official Gazette 71, issued on December 30, 2015.

7 Law 09-99 of July 28, 1999, regarding energy control - Official Gazette 51, issued on August 02, 1999.

8 Law 01-02 of February 5, 2002, regarding electricity and gas distribution through channels - Official Gazette 08, issued on February 6, 2002.

9 Law 04-09 of August 14, 2004, regarding the Promotion of Renewable Energies within the framework of Sustainable Development - Official Gazette 52, issued on August 18, 2004.

10 Executive Decree 15-69 of February 11, 2015, specifying the Modalities for Proving the Renewable energy guarantee of origin certificate and the use of these certificates - Official Gazette 09, issued on February 18, 2015, amended and supplemented by the Execu-

The renewable energy guarantee of origin certificate is thatdocument that establishes that a specific energy source comes from renewable energy or from a joint production system that is granted by the Electricity and Gas Control Committee to the person that applies for a certificate that confirms the origin of renewable energy[11].

This certificate may be obtained by submitting to the Electricity and Gas Control Commission an application formthat is signed by the applicant. This form isthen attached to a set of other documents that are stipulated by the Algerian legislature in the same decree. Accordingly, the above commissioncarries out a preliminary study of that application within ten days starting from itsfiling date. If the committee finds out that the attached file does not comply with the effective regulations, then the owner will be notified so he can eventually complete it. However, if the file is confirmed, the committee shall issue an acknowledgement of receipt and decide on the application within a period of time not exceeding one month.

It then emits a decision either to accept the application on the basis of which a certificate proving the origin of the energy is delivered or to reject it with justification[12].

In the context of promoting renewable energies, the legislator provided incentive measures by granting the applicant financial, tax, and customs privileges for activities that contribute to enhancing energy efficiency and promoting renewable energies.

Moreover, project owners may also benefit from the privileges stipulated in the Investment Law due to the fact that investing in renewable energies helps to benefit from the incentive system for priority sectors[13].

SECOND: Institutional mechanisms to promote investment in renewable energies

It is worth indicating that Algeria has endeavoured to establish a set of infrastructures within the framework of the institutional dedication to promoting renewable energies. Some of these are:

1-*The National Observatory for the Promotion of Renewable Energies*

It was established under Article 17 of the aforementioned Law 09-04. It is considered a national agency that undertakes and is responsible for the promotion and development of renewable energies.

2-*The National Fund for Renewable Energies and Cogeneration*

It was established in accordance with Article 63 of Law 09-09, which includes the Finance Law for the year 2010[14]. This article states that: "*A Special Allocation Account number 131-302 is opened in the Treasury Writings, and is entitled the National Fund for Renewable Energies; it is registered in this account.*"

Executive Decree 11-423 defines the modalities for managing the Special Allocation Account 131-302 that is linked to the Fund.

The Fund is expected to finance projects and grant interest-free loans from banks and financial institutions without guarantees. It also endeavours to reduce customs rights and value-added fees when importing raw materials and semi-finished products that are supposed to be used in the equipment industry in the field of renewable energies in Algeria.

3-*Department of Renewable Energies and Energy Efficiency*

tive Decree 169-17 of May 22, 2017 - Official Gazette 31, issued on May 28, 2017.

11 Articles 02 and 03 of Executive Decree 15-69, amending and supplementing the aforementioned.

12 Article 05 of Executive Decree 15-69, amending and supplementing the aforementioned.

13 Executive Decree 22-302 of September 08, 2022, defining the criteria for qualifying structured investments and modalities for benefiting from exploitation advantages and evaluation networks - Official Gazette 43, issued on September 18, 2022

14 Law 09-09 of December 30, 2009, including the Finance Law for the year 2010 - Official Gazette 78, issued on December 31, 2009

It was created in 2019 by virtue of Executive Decree 19-280[15]. This is a public corporation in the field of energy that is endowed with legal personality and financial independence. It is under the tutelage of the Prime Minister and is administered by a governor who is appointed by Presidential Decree. Moreover, it ensures that the national strategy for the development of renewable energies and energy efficiencyis adequately implemented.

This agency is also responsible for following up on all related technical and economic developments, particularlywith the intention of informing and enlightening government institutions on issues related to their activities. It also seeks to identify and assess all scientific and technical information that is linked to their activity. It is accountable for the processing, exploitation, preservation, valorisation, and dissemination of this information. It is expected to identify and evaluate the capacities of renewable energy resources that are available and can economically be exploited in various regions of the country.

4- Ministry of Energy Transition and Renewable Energies

The Ministry of Energy Transition and Renewable Energies was established in the year 2020. Its primary mission is toensure the implementation of the renewable energies program that was set up by the government in a rapid and more dynamic way, especially now that fuel dependence has become impracticable,considering the significant drop in oil prices. For this reason, Algeria deems it necessary to search for alternative energy sources in order to secure domestic demand and liberate it from the reliance on hydrocarbons, and therefore embody the energy transition that depends on energy efficiency in a way that satisfies the consumer needs and guarantees theprotection of the environment.

Third: Renewable energies are an economical alternative in Algeria - Some southern Wilayas (Provinces) as a model

The solar power plant in Al-Khanj in the Sahara desert, in the region of Laghouat (southern Algeria),is composed of 240 000 solar panels with a capacity of 60 megawatts. The energy produced there covers one-seventh of the energy needs of the region.

This project, which was completed in 2016, is a prototype and is part of the country's metamorphosis. Its main objective is to conserve fossil fuel resources and reduce greenhouse gas emissions[16].

In the same context, the Wilaya of Adrar has supported several renewable energy projects. The purpose of these projects is to search for and develop new sources of energy that can generate electricity for the benefit of the population and can also raise the exploitation rate in order to eliminate the problem of summer power outages when the demand for electricity is significantly increased.

Moreover, the local authorities, as well as the research and development supervisors, launched important projects regarding the way wind and solar energy can be exploited efficiently throughout the whole year in the Wilaya of Adrar. It is worth specifying that this Wilaya has been strengthened with three new power generation stations with a total of 33 megawatts. The largest station to generate electricity from solar energy has a capacity of 20 megawatts. It is located at the northern entrance to the town of Adrar. This station was realised by a Chinese company with a total cost of around 380 million Algerian Dinars.

The second station, which is located in Ksar Kabartene in the municipality of Tsabit,about 60 km from Adrar, produces electricity from solar energy. Its production capacity is estimatedat 3 megawatts and contributes greatly to preserving the environment.

Another 10-megawatt wind power plant has also been completed in partnership between

15 Executive Decree 19-280 of October 20, 2019, for the creation of a Department for Renewable Energies and Energy Efficiency, with its Organization and Functioning - Official Gazette 65, issued on October 24, 2019.

16 https://www.euronews.com/2022/10/03/algerias-renewable-energy-potential-solar-power-is-the-way-to-go

Algeria and France. This stationcurrently has 12 wind columns as a first stage. After a deep study, it was decided to install this station in an area that is windy throughout the year[17].

The existing projects and those scheduled for the future are a clear indication that the Wilaya of Adrar is undergoing a real metamorphosisto become a leading energy producerin the medium term. This gives it the possibility to integrate into the course of developing energy sources in Algeria and will certainly contribute to local and national development in general.

CONCLUSION

This study allowed drawing the following conclusions:

- Algeria is seriously focusing its attention on renewable energies and is encouraging investment in this domain as an alternative to fossil energies;
- Investing in renewable energies contributes to achieving economic gains, improving social conditions, and preserving the environmental heritage. It also helps to reduce the depletion rate of energy resources;
- Algeria has established institutional bodies that structure the investment process in renewable energies. A special ministry was created for that, which reflects its perpetual intention to promote and develop this sector.

Based on the above, one can therefore make the following recommendations:

- Provide real estate for renewable energy projects that require large areas;
- Update the legal texts to allow using solar energy in private and public buildings;
- Pay attention to material and moral support in order to activate and encourage research in the field of renewable energies;
- Intensify foreign cooperation and partnership in renewable energy investments;
- Disseminate the renewable energy culture among citizens by organising awareness days;
- Develop a strategy for the development of renewable energies and createadequate financing mechanisms to support and encourage clean energy within the energy mix that is adopted and certified in the development process.

17 Research unit in renewable energies in the desert: https://urerms.cder.dz/

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2. Law 09-99 of July 28, 1999, regarding energy control - Official Gazette 51, issued on August 02, 1999.
3. Law 09-09 of December 30, 2009, which includes the Finance Law for the year 2010, Official Gazette No. 78, issued on December 31, 2009.

4. Law 01-02 of February 05, 2002, regardingElectricity and Gas Distribution through Channels - Official Gazette 08, issued on February 06, 2002.
5. Law 09-04 of August 14, 2004, regarding the Promotion of Renewable Energies within the framework of Sustainable Development - Official Gazette 52, issued on August 18, 2004.
6. Law 18-22 of July 24, 2018, regarding Investment - Official Gazette 50, issued on July 28, 2022.
7. Decree 83-131 of February 19, 1983, including the ratified agreement concluded between the Government of the People's Democratic Republic of Algeria and the government of the Kingdom of Belgium in the field of Developing New and Renewable Energies - Official Gazette 08, issued on February 22, 1983.
8. Executive Decree 11-423 of December 14, 2011, including the Modalities for Managing the Special Allocation Account 131-302, entitled the National Fund for Renewable and Shared Energies - Official Gazette 68.
9. Executive Decree 15-69 of February 11, 2015, specifying the Modalities for Proving the Renewable Energy Guarantee of Origin Certificatesand the way to use it - Official Gazette 09, issued on February 18, 2015, amended and supplemented by Executive Decree 169-17 of May 22, 2017 – Official Gazette 31, issued on May 28, 2017.
10. Executive Decree 19-280 of October 20, 2019, including the Establishment, Organization, and Functioning of the Department for Renewable Energies and Energy Efficiency - Official Gazette 65, issued on October 24, 2019.
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THE CLASH OF THEORIES: SEMIOTIC DEMOCRACY AND PERSONALITY THEORY IN INTELLECTUAL PROPERTY LAW

Cheng-chi (Kirin) Chang

J.D. Candidate, University of Florida Levin College of Law, United States,
Law Research Assistant, Institute for Studies on AI and Law, Tsinghua University

ABSTRACT

This article discusses the two justifications that are commonly used in intellectual property law: the semiotic democracy and the traditional personality theory of intellectual property. Semiotic democracy emphasizes the right to distribute and access information and the democratization of institutions, practices, speech, dress, mannerisms, etc., while the personality theory of intellectual property emphasizes the development of the personality and the protection of the creator's dignity and personhood. However, this paper highlights some objections to the personality theory, including the unclear moral claim of creators to their feelings, character traits, and experiences and that intellectual property creations may not embody more of a creator's personality than another object. Despite these objections, the personality theory of intellectual property rights is important for the protection of the creators' reputation and their economic interests. Therefore, policymakers must strive to protect these rights to the greatest extent possible.

KEYWORDS: Intellectual property law, Semiotic democracy, Personality theory, Moral claims, Self-actualization, Human flourishing, Rights of creators, Consumer empowerment, Cultural commons

INTRODUCTION

Intellectual property law is a complex and multifaceted field that encompasses various justifications and considerations. Two prominent justifications for intellectual property rights are the concept of semiotic democracy and the traditional personality theory of intellectual property. While both theories focus on moral considerations, their perspectives on who benefits from intellectual property differ. Semiotic democracy emphasizes the freedom of expression and rights of consumers, while personality theory focuses on the rights of creators to profit from their creations and protect their reputations. This article provides an overview of both theories, examining their strengths, weaknesses, and implications for intellectual property law, and explores the contrasting justifications of intellectual property rights and their implications for policymakers.

1. SEMIOTIC DEMOCRACY AND THE INTERSECTION OF INTELLECTUAL PROPERTY RIGHTS

1.1. Semiotic Democracy vs. Traditional Notions of Intellectual Property

In the field of intellectual property law, there are many important considerations and justifications. One of the most modern is the concept of a semiotic democracy, which stands in contrast to traditional notions and justifications for intellectual property law, including the personality theory expounded by 19th Century German philosopher Georg Hegel. However, semiotic democracy does some features in common with these justifications along with the contrasts and differences. Both justifications are concerned with morality and the rights of the creators and the general public, but their focus is on different aspects of the debate over intellectual property rights.

The concept of Semiotic democracy in intellectual property law means that audiences freely and widely engage in the use of cultural symbols in response to the forces of media and give certain cultural symbols different meanings from the ones intended by their creators.[1] Also within the field of intellectual property is the so-called “personality” theory of intellectual property, which states that individuals have moral claims to their own talents, feelings, character traits, and experiences, and this control is essential for self-actualization.[2] In relation to intellectual law, this means that the external actualization of the human will require property, in this case, the property right of the owner to the relevant material, and thus claims to control feelings, experiences, and character traits may be expanded to intangible works.[3] In some areas, the two concepts overlap and agree, and in others, the two justifications diverge and disagree. In other words, they differ in some features and share others.

1.2. The Origins and Implications of Semiotic Democracy

Media studies professor John Fiske introduced the concept of a semiotic democracy, which refers to the unrestricted participation of audiences in utilizing cultural symbols.[4] This concept was groundbreaking in that it allowed audiences to ascribe meanings to cultural symbols that deviated from those intended by their creators, thus granting power to consumers rather than producers.[5] Thus, a sort of "cultural commons" emerged, wherein a communal sphere of cultural information was accessible for the public to remix, exchange, and connect.[6]

1 Katyal, S. (2012). Between Semiotic Democracy and Disobedience: Two views of Branding, Culture and IntellectualProperty. Wipo J. Intell. Prop., 4, 50.

2 Moore, A., & Himma, K. (2011). Intellectual Property. <https://plato.stanford.edu/archives/win2018/entries/intellectual-property/>

3 Ibid.

4 Katyal, S. K. (2006). Semiotic Disobedience. Washington University Law Review, 84(3), 489–571.

5 S. Katyal, 2012, pp. 52–53.

6 Stark, E. (2006, June 19). Free culture and the internet:

This concept subverted the traditional view of intellectual property as belonging primarily to the creator because it gave the audience greater power in attaching meaning and different interpretations to intellectual property and allowing individuals to become both producers and creators.[7] In addition, it subverted the notion of exclusive ownership, where authors may dictate a great deal of control over an original image or text.[8]

1.3 Subverting Traditional Concepts of Intellectual Property

Semiotic democracy is a subversion of traditional concepts of intellectual property, such as trademarks, copyrights, etc., because trademarks consist of a trademarked concept adopted by a manufacturer or merchant to identify their goods and distinguish them from others, which allows the owner to use the mark/symbol and exclude others from doing so,[9] and copyright is the protection of original works of authorship fixed in any tangible medium of expression.[10] The work copyrighted must be that of the author himself or herself.[11] In addition, patents consist of the ownership by an inventor of processes, machines, articles of manufacture, or compositions of matter.[12]

Semiotic democracy upends the traditional notion that tangible and intangible items are solely the property of their creators, inventors, or merchants by granting consumers greater power. Nevertheless, the proliferation of corporate sponsorship and branding in both public and private realms has enabled corporations to maintain their symbols and images, leading to a blurring of the distinction between real and intellectual property.[13] This notion has taken root thanks to the digital revolution, or the proliferation of technologies such as television and the internet that facilitate the transmission of copyrighted works and ideas, which allows for the greater speech by consumers and greater freedom to use and interpret copyrighted works.[14] The digital revolution has aided the dissemination of copyrighted works and ideas by making it cheap and easy to copy and distribute information.[15] An example of this can be seen in the music industry, where copyrighted works can be freely remixed and distributed without regard to the intellectual property rights of the original artists.[16] The users are, in effect, creating their own product from the original product created by the producers, so in effect, anybody can now become a producer of original content.[17]

According to some views, conventional concepts of property rights have inhibited artistic expression by causing artists and activists to refrain from fully expressing themselves out of concern that they may face infringement lawsuits.[18] In response, semiotic democracy allows for the "democratization" of institutions, practices, speech, dress, mannerisms, etc., allowing ordinary people to fashion their own responses to cultural forces and allowing the audience to respond to an author by using the same channels and symbols.[19] The main focus of the notion of semiotic democracy is the concern over the right to distribute and access information, with the digital revolution creating greater opportunities for consumers to do so and potentially creating conflict with the property rights of creators.[20] For example, semiotic democracy has led to artistic parodies of many trademarked company logos and other intellectual property.[21] Another example is the rise of things

A new semiotic democracy. OpenDemocracy. <https://www.opendemocracy.net/en/semiotic_3662jsp/>

7 S. Katyal, 2012, pp. 50–51.
8 Ibid., p. 50.
9 Moore & Himma, 2011.
10 17 U.S.C. §102 (1988).
11 Moore & Himma, 2011.
12 Ibid.
13 S. Katyal, 2012, pp. 50, 52, 53, 57.
14 Balkin, J. (2004). Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society. New York University Law Review, 79(1), 1–58, pp. 3, 6, 13, 16.
15 Ibid., pp. 6, 13, 16.
16 Stark, 2006.
17 Ibid.
18 S. Katyal, 2012, p. 51.
19 Ibid., p. 53.
20 Balkin, 2004, pp. 43, 49.
21 S. K. Katyal, 2006, pp. 514–515.

like citizen journalism, blogging, and mashups made on platforms such as YouTube and Flickr, aided by the increased prominence of the internet in disseminating cultural information and copyrighted works.[22]

2. PERSONALITY THEORY AND INTELLECTUAL PROPERTY CONTROL

2.1. Defending Intellectual Property with Hegelian Philosophy

At the other end of the spectrum is the traditional justification for intellectual property rights of "personality theory", which was argued by thinkers such as the German theorist Georg Hegel, who argued that the external actualization of the human will require property.[23] In this justification, individuals have moral claims to their own talents, feelings, character traits, and experiences.[24] Therefore, by controlling and manipulating tangible and intangible objects through intellectual property rights such as copyrights, patents, and trademarks, producers obtain a measure of freedom by making there will take form in the world.[25] This theory states that the personality of everyone builds itself in work and creation, and thus the development of the personality is inherent to the property rights that we have.[26] In this way, according to Hegel, intellectual property rights permit the development of the personality and protect it as well, which extends to the material things developed by the person.[27] Hegel states that because intellectual works are an extension of the creator's personality, the creator deserves to have the right to control these works in order to preserve their dignity and personhood.[28] Therefore, granting creators property rights over their creations is part of their essential autonomy as human beings.[29]

2.2. Limitations of Personality Theory in Justifying IP Rights

However, there are some serious objections to the personality theory justification for intellectual property rights. For example, it is unclear whether or not people own their feelings, character traits, and experiences, so the moral claim of a person to these things may not, in fact, exist.[30] In addition, it does not necessarily follow that these claims are expanded when people expand moral claims to their personality through tangible and intangible works, so the personality theory may not justify anything more than usage rights or prohibitions on altering the person's works.[31] The personality is neither linked nor affected by the outcome of the creation because it does not constitute the human person by itself, and the work itself is independent of the creator and dependent upon whether the public decides to attach importance to it.[32] The personality argument does not account for the fact that intellectual property creations may not embody more of a creator's personality than another object, and intellectual property creations often do not embody any personality from their creators.[33] This justifica-

22 Stark, 2006.

23 Hegel, G. W. F. (1991). Hegel: Elements of the Philosophy of Right (A. W. Wood, Ed.; H. B. Nisbet, Trans.; Revised ed. edition). Cambridge University Press; Yoo, C. (2019). Rethinking Copyright and Personhood. University of Illinois Law Review, 1039–1078, p. 1039.

24 Hegel, 1991.

25 Ibid.

26 Boeraeve, C. (2016, October 19). Intellectual property theories: Are they fairly justified? Law Right. <https://www.law-right.com/intellectual-property-theories-are-they-fairly-justified/>.

27 Ibid.

28 Justifying Intellectual Property Rights. (2018, February 19). Flora IP. <https://www.floraip.com/2018/02/19/justifying-intellectual-property-rights/> personality-based (GWF Hegel)

29 Ibid.

30 Moore & Himma, 2011.

31 Ibid.

32 Boeraeve, 2016.

33 Papaioannou, T. (2006). Can Intellectual Property Rights be Morally Justified? The Case of Human Gene Patents. Dynamics of Institutions and Markets in Europe. <http://www7.bbk.ac.uk/innovation/publications/dime/docs/WP08-IPR.pdf>, pp. 8–9.

tion for intellectual property rights also does not take into account social recognition, which does not necessarily come from the recognition of property rights, but instead may come from processes that do not provide their creators with any compensation.[34] In addition, it can be said that the personality theory prioritizes the interests of the original creators at the expense of other uses or expressions of the protected works.[35] The personality theory has also been criticized as only being suitable for artistic and creative expressions protected under copyrights rather than technological products, which are invented to fulfil specific needs and are unrelated to the inventor's personality.[36]

2.3. Personality-Based IP: Protecting Creativity & Reputation

However, a case can be made that personality-based theories of intellectual property rights can help protect a creator's reputation and protect the creator himself/herself from unwarranted economic damage.[37] In this way, intellectual property rights help creators to have a measure of control over the risks they take in presenting their work to the public.[38] To this effect, Hegel's Philosophy of Rights has been used to develop a system for safeguarding intellectual property rights, which includes the following principles: (1) providing more extensive legal protection to highly expressive intellectual creations than to those with less expressiveness; (2) granting substantial legal protection to a creator's "persona," despite its not being the result of labour; and (3) allowing authors and inventors to earn recognition, esteem, admiration, and compensation by selling or distributing copies of their work, while also protecting them from the misappropriation or defacement of their work.[39] Thus, intellectual property rights are crucial for the satisfaction of some basic human needs and therefore policymakers must strive to protect these rights to the greatest extent possible.[40] In this way, the personality theory of intellectual property rights helps to protect the essential right of creators to protect their works, which are an expression of their personality and will, and thus create social and economic conditions conducive to intellectual activity and human flourishing.[41]

3. SEMIOTIC DEMOCRACY VS. PERSONALITY THEORY IN INTELLECTUAL PROPERTY

Semiotic democracy and the personality theory of intellectual property have one feature in common, namely, the focus on moral considerations. Semiotic democracy focuses on the moral considerations of empowering the consumer and enabling the freedom of expression,[42] and the main goal of this concept is to expand the marketplace of ideas.[43] This is made easy by the fact that the digital revolution has made it possible for content to cross-cultural and geographic borders, allowing consumers to do what only large commercial enterprises previously could.[44] Semiotic democracy allows the consumers to reshape cultural perceptions about the meaning of things or messages and to freely build on what others have before them.[45] In this way, this notion gives consumers greater freedom in shaping their culture and exercising their freedom of expression.[46] For example, the digital revolution has given consumers great-

34 Ibid., pp. 4, 9.
35 "Justifying Intellectual Property Rights," 2018. personality-based (GWF Hegel)
36 Ibid.
37 Moore & Himma, 2011.
38 Ibid.
39 Fisher, W. W. (2000). THEORIES OF INTELLECTUAL PROPERTY. <https://cyber.harvard.edu/people/tfisher/iptheory.pdf>.
40 Ibid.
41 Ibid.
42 S. Katyal, 2012, pp. 50, 52, 53, 60.
43 Ibid., p. 61.
44 Balkin, 2004, pp. 8, 13.
45 S. Katyal, 2012, pp. 53, 60.
46 Ibid., p. 53.

er power to alter existing content and produce something new.[47]

3.1. Four Pillars of Symbolic Democracy in Copyright Law

Generally, there are four main rights that semiotic democracy has outlined: (1) the entitlement to publish, distribute, and access an audience; (2) the entitlement to interact with others and exchange ideas, including the right to impact and be impacted, transmit culture, and absorb it; (3) the entitlement to draw from preexisting cultural materials, combining, innovating, annotating, and subsequently sharing the outcomes with others; and (4) the entitlement to engage in and create culture, and therefore the entitlement to contribute to the development of the cultural and communicative powers that shape the self.[48] These outlined rights illustrate the concern that semiotic democracy has for the freedom of expression of consumers as well as their freedom of expression. In this way, the justification of semiotic democracy focuses on the moral rights of the consumers to utilize and interpret copyrighted works in the way that they choose, regardless of whether or not the intellectual property rights of the creator are impacted.

3.2. Intellectual Property as Moral Rights: Justifying Protection

By contrast, the traditional personality theory of intellectual property focuses on the moral considerations of protecting the sciences and actively promoting them, therefore benefiting society by promoting progress and social utility.[49] This was the main concept and justification behind Hegel's personality-based justification of intellectual property.[50] It is for this reason that many corporations are attempting to shut down or limit the participation of consumers that semiotic democracy allows because it interferes with their economic interests.[51] In addition, intellectual property rights constitute a necessary part of the individual's personality, which can only be adequately expressed in an ethical community.[52] In this way, intellectual property rights are considered to be moral rights in that they facilitate the achievement of each individual's personality within this ethical community, which is a crucial part of the justification for laws protecting copyright and patent protection.[53] Therefore, since the creator's work is considered to be a key part of his or her personality, infringement is therefore considered to be a violation of his or her moral right to personality development.[54]

3.3. Semiotic Democracy vs. Personality Theory Clash

The issue of who benefits from intellectual property distinguishes semiotic democracy from personality theory. Semiotic democracy emphasizes the advantages to the consumer resulting from the challenge to conventional notions of intellectual property, whereas personality theory prioritizes the benefit conferred on creators by preserving the integrity of their creations. While traditional advertising seeks to enhance the economic value of the creator, semiotic democracy strives for the opposite outcome by allowing consumers to interpret the branded product in their own ways, even if the brand's image and philosophy remain constant in the consumer's interpretation.[55] Personality theory, in particular, focuses on private property as an abstract right related to needs and freedom, in that people need to have control

47 Balkin, 2004, pp. 13, 16.
48 Ibid., p. 46.
49 Moore & Himma, 2011.
50 Ibid.
51 Balkin, 2004, pp. 22, 25.
52 Papaioannou, 2006, pp. 5, 8, 20.
53 Ibid., pp. 4–5, 8.
54 Ibid., pp. 8–9, 20.
55 S. Katyal, 2012, pp. 51, 54, 60.

of resources in order to satisfy their physical needs and develop their own individuality and freedom.[56] Hegel stressed that both freedom and personality must be translated into the external objective world through the ownership of private property because the individual who owns an object may liberate himself or herself from any particular need and embody his or her own free will and personality into that object.[57] Thus, denial of the intellectual property rights of a creator results in their inability to gain recognition as persons in the community, necessitating the intervention of the state to protect these rights.[58]

Semiotic democracy, by contrast, is concerned with democratizing the impact of intellectual property rights by giving consumers more power relating to their ability to interpret copyrighted and trademarked works. As an example, the democratization of the marketplace caused by the digital revolution has caused an uptick in digital piracy, an act that is symbolic of the newfound power of consumers at the expense of creators.[59] Semiotic democracy places consumers and producers on a level playing field,[60] while traditional notions of intellectual property, such as personality theory, focus primarily on the welfare of the creator without any regard for the welfare of the consumers.[61]

Semiotic democracy highlights the tension between freedom of expression and intellectual property rights, as the digital revolution's democratization of the market challenges the exclusive rights awarded to creators under conventional intellectual property law.[62] These technological advances have caused many creators to be concerned about greater piracy and trademark infringement, even as they themselves leverage derivative rights in their own works.[63] Thus, the ascent of a semiotic democracy, facilitated by the digital revolution, has led to the expansion of intellectual property rights and a more assertive promotion of these rights by creators.[64] As an illustration, the Recording Industry Association of America (RIAA) has taken action against individuals who produce videos that infringe on their copyrighted content by issuing "cease and desist" notices to video creators and collaborating with YouTube to clamp down on offending videos.[65] In addition, digital rights management (DRM) technologies that limit access to a particular work have impeded the development of the digital commons.[66] However, these restrictions have been burdensome for creators and consumers alike because the threat of legal action has stifled the creation of any work that even remotely samples or makes legal use of others' works.[67]

Copyright is gradually assuming an enduring and infinite status as mere property, while trademarks and patents are expanding in range due to the digital revolution's democratization of content distribution.[68] As a result, intellectual property rights, once viewed as a government monopoly to incentivize innovation, have transformed into a counterforce to innovation, granting greater authority over digital content and constraining the free expression of consumers.[69]

Consequently, semiotic democracy diverges from personality theory and other conventional rationales for intellectual property by affording consumers greater democratic involvement, as opposed to promoting greater centralized control by creators.[70]

An instance of semiotic democracy in action can be seen in the case of Elizabeth Stark, a writer who uploaded a compilation of Brazilian Baile funk music to her blog.[71] The mix was subsequently picked up by multiple other blogs

56 Papaioannou, 2006, pp. 5, 8.
57 Ibid., pp. 8–9.
58 Ibid., pp. 2–5.
59 Balkin, 2004, pp. 9, 15–16.
60 S. Katyal, 2012, pp. 53, 60.
61 Moore & Himma, 2011.
62 Balkin, 2004, pp. 14, 49, 52.
63 Ibid., pp. 16–17.
64 Ibid., pp. 14, 25, 49, 52.
65 Stark, 2006.
66 Ibid.
67 Ibid.
68 Balkin, 2004, pp. 14, 15, 25, 27.
69 Ibid., pp. 25, 27.
70 Ibid., p. 49.
71 Stark, 2006.

and downloaded tens of thousands of times, earning a spot in The Wire's compilation of the best mixes of 2005, a leading electronic music magazine.[72] In doing so, Stark had entered the cultural commons, a public sphere of cultural information accessible for sharing, reworking, and remixing.[73] The mix was disseminated without regard for copyright, and this cultural common has facilitated the proliferation of Baile music in Brazil.[74] This stands in contrast to conventional copyright law, which would lock down the work and preclude public access to, or manipulation of, the mix.[75]

The notions of semiotic democracy and personality theory are two of the most interesting justifications for intellectual property rights in that they represent opposing viewpoints regarding the focus on who benefits. Semiotic democracy is primarily concerned with the benefits to the consumers, while personality theory necessarily focuses on the benefits to the producer of the patents, trademarks, copyrights, etc. However, both theories focus on the moral considerations involved in intellectual property rights, with the difference being where they place their focus. Semiotic democracy places its focus on the rights of the individual consumers to use copyrighted works in the way they see fit, while personality theory and other traditional notions of intellectual property rights place their focus on the rights of the creators to license and profit from their intellectual creations and therefore benefit from the efforts involved in their creations. Semiotic democracy and personality theory are two sides of the same coin in that they explain different perspectives on the same issue within intellectual property. Both of these theories are but a few of the different justifications and perspectives on intellectual property, which is a field that has many different theories and justifications looking at this amazingly complex and important topic.

CONCLUSION

In conclusion, the debate over intellectual property rights is complex and multifaceted, and policymakers must balance the competing interests of creators and consumers. The personality theory of intellectual property provides a moral justification for protecting the works of creators, but it has also been criticized for prioritizing the interests of creators over other uses of protected works. Semiotic democracy, on the other hand, emphasizes the rights of consumers to freely engage with cultural symbols and information, which challenges traditional notions of intellectual property.

Despite their differences, both semiotic democracy and personality theory highlight the importance of moral considerations in intellectual property law. As policymakers navigate this complex field, they should strive to protect the essential rights of creators while also allowing for the free exchange of information and ideas. By doing so, they can create conditions that are conducive to intellectual activity and human flourishing.

72 Ibid.
73 Ibid.
74 Ibid.
75 Ibid.

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EXAMINING THE KARA-SU TREATY AND THE TURANI CORRIDOR FROM THE PERSPECTIVE OF INTERNATIONAL LAW: THEIR IMPLICATIONS FOR IRAN AND THE CAUCASUS SECURITY

Faraz Baghbanno

Doctoral candidate in International Law, Allameh Tabatabi University, teacher assistant, Iran

ABSTRACT

The strategic area of Kara Su in the northwest of Iran was one of the areas where there was a dispute between Iran and Turkey regarding ownership, and it has yet to be investigated in any research. The importance of this area is due to the fact that the Republics of Azerbaijan and Armenia connect Iran and Turkey. The Ottoman government, Iran's most important Western neighbour, signed the first and second *Erzurum treaties*[1] with Iran to settle territorial disputes, but the territorial disputes with Iran persisted. Today, the importance of the Kara Su Corridor for Iran is twofold regarding Turkey's plan to build the Turani Corridor. Based on this, it is necessary to examine the two countries' historical territorial disputes following the collapse of the Ottoman Empire and the formation of the new Republic of Turkey, as well as the issues and measures that led to the separation of a region of Iran known as Kara Su. The goal of this study is to examine the Karabakh and Turani Corridor crises, as well as their relationship with the interests of the region's countries, particularly Russia, China, and Iran, and ask why such a plan could become the basis for causing a major crisis in the Caucasus region.

KEYWORDS: Kara-Su, Iran, Caucasus, Turani, Corridor, International law

1 The Treaties of Erzurum were two treaties of 1823 and 1847 that settled boundary disputes between the Ottoman Empire and Persia.

INTRODUCTION

The Aras River was designated the primary criterion for distinguishing the border between Iran and Tsarist Russia in the Treaty of Turkmen Chai. Since Tsarist Russia had sovereignty over Mount Ararat and the area known as Igdir (to the west of Iran's territory in the area of Small Ararat at the time of the Turkmen Chai Treaty's conclusion in Iran), and the Aras River did not flow in this area either, the Kara-su River flowed from source to mouth. The connection to the Aras River was determined as the beginning of the borderline between Iran and Russia, and the Aras River was determined as the borderline for the rest of the border after the connection of Kara-su to Aras.

The border protocol of the Turkmen-Chai Treaty was drawn up one year after the treaty's conclusion, and border signs were installed based on this protocol. The Kara-su region faces Armenia to the north, Iran to the south, Azerbaijan's Nakhichevan to the east, and Turkey to the west. This small 3.5-kilometre narrow strip, which was a part of Iran before 1310, today threatens more than 700 kilometres of Iran's transit route in the South Caucasus.

When the Nagorno-Karabakh ceasefire agreement was signed between Armenia and Azerbaijan on November 9, 2020, there were rumours of Turkey and Azerbaijan establishing a project called the Torani Corridor in this area. As a result, NATO could reach the northern borders of Iran and the western borders of China and thus pave the way to reach the southern borders of Russia and create an energy corridor towards Europe to weaken the activism of Iran, Russia, and China. Consequently, it is obvious that Iran, Russia, and China will not allow geopolitical changes in Armenia's southern borders to implement the Zangzor Corridor, citing the UN Charter, which prohibits any change in international borders. However, another point that should be mentioned and addressed is the situation in Armenia.

It is true that today Armenia has almost found the legal status of an impotent state and is under severe pressure from Turkey (to deny the Armenian Genocide) and the Republic of Azerbaijan (to determine the exact borders and not to grant autonomy to Karabakh). However, according to historical experiences and the approach, Armenian expatriates can say that this approach of Ankara and Baku will lead to the establishment of a nationalist and possibly radical government in the future. This will have stronger positions than the Sargsyan and Kocharyan governments, which will not adhere to the agreements of the Pashinyan[2] government and will probably be strongly supported by France, America, and even Russia.

Based on this, in the end, instead of pursuing tension-causing issues in the form of the Zangzor Corridor and the Lajordi Corridor while respecting the United Nations Charter, the North-South Corridors, the transit connection corridor between the Persian Gulf and the Black Sea, as well as the Eco Corridor, can create wonderful fields. Provide for transit cooperation between Iran, Turkey, Russia and the three Caucasus countries in the 3+3 format. Moreover, Turkey is currently connected to Pakistan, Afghanistan, and Central Asia with the existing rail lines through Iran through the Eco Corridor, and from this point of view, there is no need to create the Zangzor Corridor.

HISTORICAL BACKGROUND OF IRAN-TURKEY DISPUTES

Since the formation of the *Safavid*[3] government in Iran, due to various reasons, including religious differences, there have been many political and military conflicts between the governments of Iran at the time (*Safavid et al.*[4]) and

2 President of Armenia.

3 Safavid Iran or Safavid Persia, also referred to as the Safavid Empire, was one of the greatest Iranian empires after the 7th-century Muslim conquest of Persia, which was ruled from 1501 to 1736 by the Safavid dynasty.

4 was an Iranian royal dynasty of Turkic origin, specifically from the Qajar tribe, ruling over Iran from 1789 to 1925.

the Ottoman government. We briefly mention the events related to these conflicts:

After capturing the southern regions of the Ottoman Empire, including Syria and the cities of Mecca and Medina, and claiming the Muslim caliphate, Sultan Selim[5] Ottoman noticed the Safavid territory in the east. In 1516, Sultan Salim's army in Chaldaran Plain defeated Shah Ismail Safavid's army[6]. This defeat resulted in the capture of Diyarbakir and a part of Kurdistan from Iran, which was generally under Ottoman control in almost all subsequent periods, but Mesopotamia remained under Iran's control.

After the battle of Chaldaran, no peace treaty was established, and a state of war was established between them. *The contract of Amasiyah*[7] was concluded in 1555, during the time of Shah Tahmaseb Safavid[8] and Sultan Suleiman. This treaty was the first treaty signed between the two governments of Iran and the Ottoman Empire and ended the wars between the two countries, known as the Twenty Years' War. According to the Amasiyah Agreement, the states of Azerbaijan, Eastern Armenia, and Eastern Georgia were given to the Iranian government, Western Georgia, Western Armenia, and Mesopotamia (Arab Iraq) were handed over to the Ottoman government, and the city of Kars was declared a neutral zone. During the time of Shah Safi, Sultan Murad IV decided to attack Iran due to the defeat he suffered from Shah Abbas to recapture Baghdad and know about the chaotic situation in the Safavid bar. First, in 1935, he captured Yerevan, the centre of Karabakh, and in 1938, after capturing Diyarbakir and Mosul, he reached Baghdad and conquered there.

After the conquest of Baghdad, Zahab Agreement was concluded between Shah Safi and Sultan Murad. The boundaries of the occupations in the Caucasus region were determined according to the Amasya Agreement, but the border areas were not clearly and precisely determined. Nader Shah Afshar, in 1737 and the following years, fought with the Ottoman Turks, and since none of the parties achieved a decisive victory, he ended the hostilities by signing the "Kordan" peace treaty in September 1766. They ended themselves.

Both sides agreed that their borders would be established based on the *contract Zahab*[9], which was concluded between the Safavi Shah and Sultan Murad. The payment. In these battles, Eastern Armenia and Mesopotamia were captured by Iran. At the request of Ottomans, peace was established between the two countries and the first Erzurum treaty was concluded in July 1823 with an introduction, basis, conditions and eight articles. During the time of Mohammad Shah Qajar, due to the confusion of the Iranian states, Alireza Pasha, the ruler of Baghdad, attacked Muhamra (now Khorramshahr) in 1837 and caused a war between Iran and the Ottomans. With the intervention of Russia and England, on May 31, 1867, Muhammad Shah Qajar and Sultan Abd al-Majid Osmani signed the Second Treaty of Erzurum. Iran had arisen, used and occupied Qatar[10], a part of Iran's territory, and changed the border marks to its liking and considered this area part of its territory.

In the meantime, the Treaty of Berlin was concluded between Russia and the Ottoman Empire on July 13, 1873, at the behest of England, and according to its article 90, the Ottoman

5 Selim I known as Selim the Grim or Selim the Resolute, was the king of the Ottoman Empire from 1512 to 1520.

6 The Battle of Chaldiran took place on 23 August 1514 and ended with a victory for the Ottoman Empire over the Safavid Empire.

7 The Treaty of Amasya is the name of the treaty that was concluded between Shah Tahmasab I and Sultan Suleiman I in 1555 AD, after the war between these two countries, in the city of Amasya. This treaty marked the border of the Safavid and Ottoman Empires, ending the long-term wars between the two countries. This treaty brought 20 years of peace between the two countries. This treaty ended with Mustafa Pasha's campaign to the Caucasus (1578) and the start of the Chalder War.

8 Tahmasp I was the second Shah of Safavid Iran from 1524 to 1576.

9 The Zahab Agreement or the Shirin Palace Agreement is an agreement that was signed between the Safavids of Iran and the Ottoman Empire on May 17, 1639 in the city of Qasr Shirin.

10 Qatur is a city in Qatur section of Khoy city in West Azerbaijan province of Iran. Qatour city is the center of Qatour district, one of the Sunni districts of Khoy city.

government returned the Qasur region to Iran. The previous differences between Iran and the Ottoman Empire were the issue of determining the borders and insecurity in the borders. The previous treaties and the second treaty of Erzurum between Iran and the Ottoman Empire were able to end the territorial and border disputes between the two countries. On November 4, 1913, the Istanbul Protocol was concluded with the intervention of Russia and England between Iran and the Ottoman Empire to resolve territorial disputes, including an introduction and eight articles. The points' names and the border route were clearly defined and known. This protocol never took legal form in Iran and the Ottoman Empire and was not approved and signed by the responsible authorities because the First World War did not leave an opportunity for its approval and implementation. It did not take long before the First World War started, and Thai forces once again occupied a part of Iran. Until the end of the First World War in 1918, the northern and northwestern regions of Iran were occupied by Ottoman forces and other governments.

REVIEW OF THE FOREIGN POLICY OF THE NEW REPUBLIC OF TURKEY

Peaceful coexistence and peace at home and abroad were Atatürk's party slogans. The Turks avoided the idea of another victory or revising the borders.

Atatürk's foreign minister, Tawfik Rushdi Beyk[11], determined his country's foreign policy, in which the new Turkey did not want to capture an inch of foreign territory and was unwilling to surrender and lose an inch of Turkish soil. The basis of the foreign policy of this nascent government was neither border expansion nor retreat into the country.

Long before 1921, Mustafa Kamal[12] said:

«Let us recognise our borders by keeping Turkey small» (Herrera, 2016)

The Republic of Turkey only wished to preserve the integrity of its free territory. From the beginning of the formation of the government of the new Republic of Turkey, its foreign policy was based on the principle of neutrality and unity and friendship with all the governments of the world, especially the neighbouring countries. This principle, diligently implemented and followed by Turkey, constituted the program of Turkish foreign policy and was very different from the previous method of the Ottoman Empire. Atatürk now gained the freedom and independence of his foreign policy and followed a peaceful policy to complete the national reforms of his new country with peace of mind.

TURKEY'S OCCUPATION OF IRAN'S BORDER AREAS AND THE DARKENING OF RELATIONS BETWEEN THE TWO COUNTRIES

The governments of the Republic of Turkey and Reza Shah Pahlavi inherited the previous differences between the Ottoman Empire and the Qajar Kingdom after the collapse of the Ottoman Empire and the change of monarchy in Iran[13]. According to their interests in foreign relations and having special relations with their neighbours, both governments sought to establish and maintain peace and tranquillity for internal reforms. One of the important factors that strained the relations between Iran and Turkey was the aggression that Turkey had committed towards the villages and lands of Iran. At the beginning of the establishment of their republic, the Turks occupied the areas of "Bolagh

11 Turkey's foreign affairs were during Atatürk's government.

12 Mustafa Kemal Atatürk, or Mustafa Kemal Pasha was a Turkish field marshal, revolutionary statesman, author, and the founding father of the Republic of Turkey, its first president from 1923 until his death in 1938.

13 Reza Shah Pahlavi was an Iranian military officer, politician (who served as minister of war and prime minister), and first shah of the House of Pahlavi of the Imperial State of Iran and father of the last shah of Iran.

Bashi[14]", "Jozer[15]", and "Ghori Gol[16]", and despite Iran's official protests, they were not willing to evacuate those areas.

The reasons that the Turks expressed their legitimacy were that the mentioned areas belonged to the Turkish government. They did not accept the certificate of the border commission in 1913 and declared that the commission was formed under the pressure of Russia and England. The National Assembly of Turkey (Ottoman) did not approve it, which is invalid. The Turks also took over the pasture that belonged to the Kurds of "Jikanlu[17]" in the past and prohibited the cattle of the said Kurds from grazing in that pasture and sought to arrest their cattle. For this reason, the Ministry of Foreign Affairs of Iran contacted the Turkish ambassador in Tehran. After announcing the protest, he said:

"Initiating these aggressions and operations is completely contrary to the expectations of the Iranian government and will have no other result than the darkening of the good relations of the parents of the government who have always avoided it."

Ultimately, he asked the Turkish ambassador to take quick action to evacuate the mentioned points. Among the other areas of Iran that were captured by the Turkish military forces and brought protests from high-ranking Iranian officials were the villages of "Siro"[18] and "Sar Tik[19]", where the Turkish army had established a military post. Following this incident, the Ministry of Foreign Affairs of Iran, in a letter, expressed its protest against the encroachment of the Turkish forces on the mentioned villages and other places, such as "Bulagbashi", and demanded the evacuation of those places.

The aggressions carried out by the Turkish forces were in the circumstances that, according to the Treaty of Constantinople (Iran-Ottoman et al. dated 1913), the areas of Bulagbashi, Siro, and Sar Tik belonged to Iran. During a correspondence with the Iranian ambassador in Istanbul on November 21, 1929, the Ministry of Foreign Affairs of Iran highlighted Turkish aggression in Bulagbashi, Siro, and Sar Tik. The Iranian ambassador also drew attention to Turkish aggression in the regions of Bulagbashi, Jozer, Nafto[20], Farzah Qalandari[21], Beldesor[22], Sheikh Silavi Alia[23], Ghasouk[24], Velik Alia and Sefali[25] in the vicinity of Maku.[26] Moreover, Awajiq[27] points out that the Turkish authorities have yet to respond to Iran's request to evacuate the mentioned areas. He requested the Iranian ambassador to take the necessary action in this regard, the same year and the occupation of the Ibek Heights in the year on the side of the military forces of the Turkish government. It resulted in strong protests from Iran's foreign minister at the time, Mohammad Ali Foroughi.[28] Other incidents also increased the intensity of the differences between the two countries.

In April 1926, to express goodwill and strengthen mutual peaceful relations between Iran and Turkey, the *Treaty of Vedadie and Tamin-id*[29] was concluded between the two countries. In the introduction of this agreement, it is stated that *"the needs and duties that the present age creates and demands for the two nations have been taken into account, and as they believe and firmly believe that strengthening the friendship and brotherhood existing between them is obligatory. Therefore they decided that the material conditions of relations Let them light up their intimacy".*

14 A mountainous region located in Ardabil province of Iran.
15 Jozer is a village in Iran.
16 A region in the southeast of Tabriz city in Iran.
17 A region in Kurdistan.
18 A Village in Turkey.
19 A Village in Turkey.
20 A Village in West Azerbaijan.
21 A region in West Azerbaijan.
22 A Village in West Azerbaijan.
23 A Village in West Azerbaijan.
24 A Village in West Azerbaijan.
25 A Village in West Azerbaijan.
26 A City in West Azerbaijan.
27 Awajiq is one of the cities of the West Azerbaijan province of Iran. Avajik is one of the northern cities of West Azerbaijan, located in the Dashtak section of Chaldaran City, on the border of Iran and Turkey.
28 Mohammad Ali Foroughi, also known as Zoka-ol-Molk was a writer, diplomat and politician who served three terms as Prime Minister of Iran.
29 The border treaty between Iran and Turkey in 1926.

In the same treaty, the conclusion of customs and border agreements and postal exchanges were also foreseen. However, the border incidents and measures taken by the Turkish government to destroy the Kurds in the border areas between the two countries caused the situation to become complicated, and the relations between the two countries became darker. In this way, in October 1927, the Turkish government darkened its relations with Iran in a note expressing its resentment and in a harsh statement.

In that statement, Turkey claimed that some Turkish soldiers were captured by the Kurds in Turkey and were taken to Iran, and demanded the release of the captives along with their weapons and an apology from Turkey within ten days. Clive, in a note to Chamberlain in October 1927, states that according to the information he received from Azerbaijan, the attackers of the Turkish military forces were Turkish Kurds who did this in response to the offensive actions of the Turkish forces against the Kurds. In the following, he confirmed the content of the announcement of the Iranian government, which denied the accusation against him.

After receiving Turkey's statement, which had threatened Iran to cut off political relations, the Iranian government appointed Mohammad Ali Foroughi, with full authority, to conduct negotiations and sign contracts related to border demarcation and border security issues. Iran's ambassador to Turkey, In his confidential report to Tehran, during the meeting and conversation with the Turkish Foreign Minister Rushdi Beyk in Ankara, he pointed out the daily problems of Iran and Turkey and considered their roots to be the greed and fantasies of Russia. He also warned that we should use the opportunity that has now been obtained and in the situation where Tsarist Russia has also disappeared and unite, because there is a possibility that Russia will return to its former imperialist policy.

To prevent danger from Russia, we must agree on a plan. Rushdi Beyk and Foroughi also confirmed this opinion, which listed the problems that have hindered the establishment of friendly relations between Iran and Turkey. One of these problems is the issue of borders, which was resolved after prolonged conflicts but has now been renewed by the Turkish government. It is still being determined whether they are aware that it has already been resolved.

The other is the aggressions that the border tribes of Turkey have made on Iranian soil and deprived them of security. One is some actions outside the rules of your officers that you should prevent. Rushdi Bey emphasised the necessity of agreeing with Iran and added: the security of our borders is important to us so that we do not have to maintain a large military force and spend much money on our common borders, so we expect your support. Iran's opinion at the beginning of the work is to determine the borders on the ground. However, the task of border security must be determined first. However, because we want to conclude, we are ready to solve both the issues of securing and determining the boundaries simultaneously. Foroughi stated that border security would only be achieved once the new demarcation is implemented.

In response, Rushdi Bey declared: "We do not accept the border and the 1913 protocol for fundamental reasons; in addition, our parliament did not approve it, and after the collapse of the Ottoman Empire, we renewed all our previous agreements with all countries. And Iran should not refrain from renewing agreements with the Republic of Turkey".

The basis of Rushdi Bey's argument was that the Iranian-Ottoman border was based on the Treaty of Erzurum, and this border was not by it. In response, Foroughi said: "Border agreement" is related to the recognition of the country's identity; it is not like a commercial and political agreement that can be cancelled at will. Further, Foroughi brought up the arbitration issue and said: "When two governments have a dispute, if they do not come to terms with each other, they must either resort to arbitration or go to war."

Rushdi rejects the Big War and says: "We do not impose any burden on you, neither do we want you to fight with Akrad[30] nor disarm. We

30 Kurds.

just want you not to let your nomads come to our land and destroy our nomads. Do not let them into your land, and if they come, do not look in the border area.

For example, drive a hundred kilometres or fifty kilometres. In another confidential report that Foroughi sends from Istanbul to the high-ranking officials of Iran, he announces that since he has entered into negotiations again regarding Bulagbashi, the Turkish authorities have raised the issue of Aghri Dag[31] (Ararat) and the Jalali[32] tribe, and the issue of clearing the boundaries. Furthermore, they have considered the suppression of the rebel Kurds as vital for themselves. Referring to these cases, Foroughi advises the Iranian authorities that "it is obligatory for Iran to think about border security in any case and to prevent Jalalis from helping the rebel Kurds of Turkey and to be careful from the Jalalis of Iran or Turkish nationals." Who have come to Iran, the Turks, will not be harmed "because with these actions, our relations with Turkey have become very close, and the problem will be solved" (Pütter, 2017).

In May 1928, the Ministry of Foreign Affairs of Iran announced to Foroughi that recognising all the borderlines determined according to the 1913 protocol is extremely important for us, and we cannot ignore it in any way regarding Bolagh Bashi... In addition to all other reasons, the issue of the dignity of the government of His Majesty Humayun Shahshahi[33] is at stake, and we cannot in any way ignore the smallest part of Iran from the point of view of public opinion. The Iranian government wants to resolve security and boundary issues before starting cooperation in Aghri Dagh.

THE ISSUE OF AGHRI DAGH (LITTLE ARARAT MOUNTAIN)

Another case was the Turkish military forces' aggression in Iran's territory while suppressing the Ararat Kurdish rebellion.

During the conflict with the Kurds of Aghri Dagh (Ararat), under the pretext of suppressing the Kurds and needing to enter a part of Iran's territory in that area, Turkish forces occupied Iran's territory in Mount Ararat without permission and sufficient reason. Even after the end of the issue, the rebel Kurds of Ararat refused to evacuate the said point. In relation to these events, the Ministry of Foreign Affairs of Iran, on February 28, 1931, addressed the Turkish ambassador in Tehran in a protest note and announced that during the same days of the Kurds' repression, the Iranian government did not hesitate to cooperate with the Turkish forces and in operation took part against the Kurds. However, the Turkish officers were not satisfied with this. After the suppression of the rebel Kurds, they remained in Iran, and despite repeated objections from the Iranian government and the demand for the return of Turkish military forces, the Turks did not take any action. Iranian officials looked friendly, hoping all these issues would be resolved when the borders were determined, but Turkish military forces remained in Iran.

The Iranian government expected that the Turkish government would respect the rights of the Iranian government and return its military force from Iranian soil and the places where Turkey's ownership had not been determined. It is proof that the suppression of the Ararat Kurdish rebellion was not a mutual agreement and sincere cooperation between Iran and Turkey and that the issues of its neighbouring country unintentionally influenced Iran.

31 It is a mountain located in Agra Province, on the border of Armenia and Turkey.

32 Jalali is the name of one of the Kurdish tribes of Iran in the north of West Azerbaijan province in the cities of Maku, Shot, Poldasht, Chaipareh, Chaldaran and Khoi.

33 A title given to the kings of Iran.

THE ISSUE OF OWNERSHIP OF KARA-SU

Another area where there was a dispute between Iran and Turkey regarding its ownership was the strategic area of Kara-su. The region's importance after Tsarist Russia's collapse was that, like Dalani, it connected the fledgling republics of Azerbaijan and Armenia with Iran and Turkey. The source of the Kara-su River flows in the southern slope of Ararat (Agri), and after passing through the Ararat region, it goes to the south of Boralan[34] village and connects to the Aras River.

According to the Turkmen Chai Treaty, the Aras River was the basis and main criterion for distinguishing the border between Iran and Russia. Iqbal al-Sultaneh[35], in April 1923, wrote a letter to the agency of the Ministry of Foreign Affairs of Iran and the governor of Azerbaijan, requesting the government to take action to protect Iran's ownership of the Karasu River against the possible aggression of Turkey.

Following this letter, the Ministry of Foreign Affairs, in correspondence with Motamid Al-Wazareh[36], the border commissioner of Iran in Maku, asked for information about the Kara-su area. On April 1, 1923, Motamed al-Sultaneh wrote a letter to Iqbal al-Sultaneh and asked him eight questions about the Kara-su area. On April 25, 1923, Iqbal al-Sultaneh presented a detailed report to Motamed al-Sultaneh about the reasons for Iran's ownership of Kara-su. The report answered his eight questions and mentioned the names of six villages in the Kara-su region, the population of these villages, the types of their products, the history of the occupation by Russia in this region, the presence of Iranian nomads in Qara-su, the question of ownership of the region and its owners, opinions Ottomans mentioned about this area, and the claims of the Ottomans for the ownership of Kara-su.

Despite the efforts of the Ministry of Foreign Affairs, Iran's rapid political developments in 1923 prevented the pursuit of Iran's ownership of Qara-su.

The issue of preventing Mohammad Hasan Mirza, the crown prince of Ahmad Shah, from settling in Azerbaijan became the main program of the Ministry of War and the Northwest Army. In Tehran, severe political differences between Reza Khan, the Minister of War, Mushir al-Dawla, the Prime Minister, and Ahmad Shah postponed handling these matters. It was determined by the conducted investigations that Reza Khan emphasised to Amir Lashkar[37], Abdullah Khan Amir Tahmasabi[38] the following:

"Do not lose Kara Su." However, he suddenly changed his position at the end of 1923. In a letter on February 27, 1924, he implicitly ordered the termination of the pursuit of Iran's ownership of Qara-su. Reza Khan stated in this letter that the villages of Kara-su have belonged to Russia since the Treaty of Turkmen Chai. Following Reza Khan's order to Amir Tahmasbi, the issue of Iran's ownership of the northern region of Kara-su was no longer pursued, and after that, Turkey occupied this region. In the 1931 Iran-Turkey border agreement, Turkey's ownership of the said region was officially recognised. The Iranian government approved it.

LEGAL REASONS FOR IRAN'S OWNERSHIP OF KARA-SU

According to the Treaty of Turkmen Chai, the border between Iran and Russia was the Kara-su River. Iqbal al-Sultaneh's claim from the Iranian authorities that the border between Iran and Russia should be the Aras River is not true. Con-

34 A part of Maku City in Iran.

35 Morteza Qolikhan Iqbal al-Sultane Bayat Makoi was the son of Timur Khan Iqbal al-Sultaneh, the ruler of Mako, border guard of Iran and the head of the Mako Bayat tribe. It is said that Iqbal al-Sultaneh was killed in prison by the order of Reza Shah.

36 The highest-ranking minister.

37 The title of the army commander during Reza Shah's time.

38 Abdullah Khan Amir Tahmasbi was the commander of Ahmad Shah Qajar's bodyguard and for some time he became Reza Shah's superior before the reign. He was the governor general of Azerbaijan for a while. Then he became the war minister of Reza Shah and Foroughi government.

cerning the first and eleventh chapters of the 1921 Iran-Soviet Agreement, the Turkmen-Chai Treaty can be considered officially invalidated. Due to the invalidity of the Turkmen Chai Treaty, an agreement was signed between the two governments of Iran and the Soviet Union with the title "Agreement of Trust between the Government against Iran and the Soviet Socialist Republics of Azerbaijan, Caucasus, Georgia and Armenia." The Iranian government delegation established and approved it in the April 5, 1922, meeting. Based on this temporary agreement between Iran and the Soviet republics, the borderline was drawn and fixed according to the fourth chapter of the cancelled Turkmen Chai Treaty.

Considering that in the agreement between Iran and the Soviet republics, the nullity of the Turkmen Chai treaty is also specified, and it is emphasised that the borderline between Iran and the Soviet republics would be temporarily normalised. The Treaty of Turkmen Chai is invalid outside Iran's border region with the Soviet republics. Accordingly, that part of the borderline resulting from the Turkmen Chai Treaty, which was removed from the control of the Soviet republics and was given to Turkey, had no validity and formality. The third important point is that Turkey's claim to the ownership of the Kara-su region was based on the Kars Treaty and the transfer of the Igdir and region Aralig[39] states from this state to Turkey by the Soviets. However, during the Kars Treaty, the Soviet government had no ownership of the region. The north of the Kara-su stream did not have any because these areas were assigned to Tsarist Russia without any historical, geographical, or cultural reasons and only based on the Treaty of Turkmen Chai. The treaty of Turkmen Chai was officially cancelled on February 27, 1921, with the conclusion of the agreement known as the Iran-Soviet Agreement of 1921. *The Ghares Treaty*[40] was concluded between the Soviet Union and Turkey on March 20, 1921. That is when the Treaty of Turkmen Chai and all its effects, including the ownership of Russia or its successor, the Soviet Union, on the border area between Kara-su and Aras were officially cancelled, and the mentioned area was under Iran's practical and objective control. Therefore, the Soviet Union had no ownership over the said region, neither by contractual origin nor practical occupation. It lacked any authority to cede and donate this part of Iran's territory to Turkey. According to the stated cases, the Kars Agreement did not create any obligation for Iran.

The fourth important point from the analysis of the Qajar flood is that considering that the Turkmen Chai Treaty and the Kars Treaty are worthless for determining the ownership status of the Kara-su region. To determine the ownership of this region, the ownership of the said region should be considered before the Turkmen Chai Treaty because before the Treaty of Turkmen Chai, without a doubt, the Khanates of Ordubad[41], Nakhchivan[42], and Yerevan were part of Iran's soil. It is obvious that the region of Kara-su in the south of the mentioned khanate was also located in the territory of Iran.

The fifth point in the valuable explanation of the Qajar Bahmani[43] is that the inhabitants of the northern region of the Kara-su River were all Iranians, and the tribe that lived in this region, that is, the "Khalikanlu[44]" tribe, were a citizen of Iran. According to all the explanations given about the ownership of Kara-su, in this part of

39 It is a village in the central part of Urmia city, West Azerbaijan province, Iran.

40 It was a treaty that was signed on October 13, 1921 between Bolshevik Russia led by Vladimir Lenin and the Grand National Assembly of Turkey led by Mustafa Kemal Atatürk, with the presence of representatives from the Soviet Socialist Republic of Armenia, the Soviet Socialist Republic of Azerbaijan, and the Soviet Socialist Republic of Georgia in Kars.

41 It is the second city of Nakhchivan Autonomous Republic in the Republic of Azerbaijan. This city is located on the northern bank of the Aras River and at a distance of 94 kilometers northwest from the city of Tabriz. The city is 948 meters above sea level.

42 The Nakhchivan Autonomous Republic is a landlocked exclave of the Republic of Azerbaijan. The region covers 5,502.75 km with a population of 459,600 bordered by Armenia to the east and north, Iran to the southwest, and Turkey to the west.

43 from ancient Iranian tribes.

44 A Village in West Azerbaijan.

the research, it can be concluded that the area between the Aras River and the Kara-su River, that is, the strategic corridor of Kara-su, later became the only way to connect Turkey to the Nakhchivan region. In this way, it became the Republic of Azerbaijan, it should be considered a part of the territory of Iran, which was divided in the border agreement of 1932 and joined to the territory of Turkey. The reason for the loss of this strategic region is Iran's political turmoil during the transfer of power from the Qajar to Reza Shah and, after that, the weakness and indolence of the Iranian government. Additionally, the reasons were the indifference of the relevant officials regarding the invalidity of the Turkmen Chai Treaty and the Kars Treaty for Iran, following the conclusion of the 1921 agreement between Iran and the Soviet Union, and ignoring the importance of the former owner of Kara-su.

1932 BORDER TREATY

Finally, after many years of interruptions and disagreements, the final demarcation of the border between the two countries was done during the trip of Tawfiq Rushdi Beyk, the Minister of Foreign Affairs of Turkey, to Tehran. The borderlines were determined with the signing of a new border treaty in January 1932. In this treaty, how to use the water of Borolan[45] Lake was also determined.

On May 26, 1936, the National Assembly approved the agreement to determine the borderline between Iran and Turkey. The provisions of this agreement, including three articles, along with a declaration on the use of bord-military borders of the parties, from the waters of the springs of Bordlan Salib[46], Qazlo[47], Bukhari Yaram Kaya[48], and pastures located in the south and west of the borderline, which was on the 23rd, was signed between Iran and Turkey in January 1932. In the official announcement of the government about the border demarcation agreement, which was published on January 23, 1933, it was announced that they are going to resolve the existing differences in the way that "... Iran in the region of Aghri Dagh, a piece of land from the said mountain to the Turkish government hand over and in exchange in Barj [Barjh Geh[49]] area, the Turkish government surrenders some of its lands to the Iranian government. In addition, in the area of Qatar, which has been a dispute between the two governments for many years and the boundary remained unclear, the Turkish government agreed to hand over some of the disputed lands of FIMA to the Iranian government, and the borderline was recognised there as well. The territorial dispute between the two governments is resolved entirely. It was decided that a joint boundary commission would begin the work of delimitation in the spring of the following year (1932). The Iran-Turkey Delimitation Commission finally started its work after an interruption in late 1932. He started delimiting and marking the border from the confluence of the Aras and Kara-su rivers. He finished it in the middle of 1933 at Dalamper Mountain, the common border between Iran, Turkey and Iraq.

According to this agreement, small Ararat, captured by the Turkish military during the Turkish campaign against the forces of Ehsan Nouri, was handed over to the Turkish government. On the other hand, the Turkish government gave up its claims on the Qatur region, which was initially handed over to Iran based on the 1913 protocol. The amount of land in the Bargh Geh area that the Turks gave to Iran, according to the 3rd Bahman notification, also means a part of the areas south of Bargh Gah (southern borders of border marks 167 and 168 in approximate parallels to northern Urmia[50]).

In the case of the exchange of Aghri Dagh (Ararat), Colonel Riaz[51], an Iranian military ex-

45 Region in Maku.
46 River in Maku.
47 Iranian tribes.
48 Turkish tribes.

49 A part of Kurdish region in Iran.
50 Center of West Azerbaijan.
51 He is a gendarmerie officer born in Kazerun in 1262 and educated in Europe. After reaching the ministry,

pert in Paris, had sent two reports to high-ranking Iranian military officials about the importance of the military position of the small Ararat Mountain, which dominated the Aras valley and the Jolfa[52] railway and the adjacent plateau. Further, in the report he sent to the Ministry of Foreign Affairs of Iran, he announced that if one day the Turks do not have a reasonable opinion of us, their goal would be to destroy the Kurdish barrier between Azerbaijan and Erzurum. Continuing his report, he added that it is not in our interest for this barrier to be destroyed. Therefore, having the small Ararat Mountain in our possession would better establish our arbitrariness in the Kurdish conflicts. If we lost this mountain, we would lose an important strategic point, and the Kurds would slip away. They would notice the attention and help of others.

Another noteworthy point is that the Turks have occupied Mount Ararat illegally and are currently bargaining in the exchange. Their only advantage is to delay us so much that we will be satisfied with little or nothing if the Ministry of Galilee Before agreeing to any exchange, the foreign ministry should insist that the Turks vacate Iran's territory and then enter into a dialogue. If for the sake of peace, sometimes the decision of the government's elders against Ararat's surrender should be made a condition first. In the future, military fortifications should not be built from that mountain in any way so that one day it will not be used as a base for offensive operations against Azerbaijan, and international agreements will not be useless for this purpose.

Despite the foresight, recommendations, and warnings that Colonel Math had presented to Iran's high-ranking political and military officials regarding the exchange of the eastern slope of Mount Ararat, the outcome of Reza Shah's opinion was decisive. With his passing, this strategic mountain was removed from Iran's territory. It was taken out and given to the Turks. After the suppression of the Ararat Kurdish rebellion in 1930, the Turks became embroiled in constant conflict with the Kurdish rebellion in eastern Turkey. To prevent future rebellions and suppress them promptly, Turkey demanded that Iran hand over the eastern slope of the small Ararat Mountain, which is currently part of Iran's territory. In return, Turkey would give Iran a piece of land with a settlement. In addition, it was placed on the borderline of the two countries, which was fixed in 1916 by a commission consisting of Russia, England, Iran, and the Ottoman Empire. They should reconsider and return the points that the Turks had captured to Iran.

In January 1932, Tawfiq Rushdi Beyk came to Iran with his delegation to negotiate and sign the border demarcation agreement. After the argument between Colonel Turk and Colonel Hasan Arfa about the fate of the western hill of Qatur, he recommended Reza Shah as a mediator.

Reza Shah asked Hasan Arfa: [53]"What is the importance of this? I mean that this centuries-old rivalry and enmity between Iran and Turkey should be ended, and we two eastern states should be close and united; the Turks should be with us; I am not afraid of the Russians or the British." Finally, the border was drawn from the ridgeline. However, the Kurds of the Ararat revolt were not incited to correct the border. That revolt provided a suitable opportunity and excused for Turkey to claim the Ararat area from the Turks. To strengthen the territory of Iran (the eastern domain of Little Ararat) and, in the end, to annex that important area to its territory, the Pahlavi government raised two issues in justifying the division of Little Ararat.

First, the issue of land exchange was raised, and nothing has been reduced from Iran's soil, but an exchange has taken place in two parts of the border, and instead of small Ararat, "Bargh Geh Valley" has been handed over to Iran. Of course, such an argument was incorrect due to the disparity of the exchanged items and the

Sepahdar Azam was sent abroad and became Iran's military attaché in France.

52 City in West Azerbaijan.

53 An Iranian soldier and chief of staff of the Iranian army was one of the collaborators against the August 28 coup.

low value in those above compared to small Ararat, which was strategically important. The next issue was resolving the long-standing territorial disputes between the two countries. Such a necessity cannot be denied, but it was unjustifiable and unwise for Iran to bear all the costs of settling the disputes. However, the conclusion of the border agreement on January 23, 1932, brought a new chapter of friendly relations for the two countries.

In November 1939, Jamal Hassan[54] travelled to Iran with the Turkish delegation, and the Iranian Foreign Minister said in his speech to the Turkish delegation: "... the relations between Iran and Turkey... have never been better and more certain than today. This is not unless the conclusion of the delimitation agreement around 1932 as well as the agreements that were concluded between Iran and Turkey in the same year, put a definitive end to all the disputes that disturbed the good neighbourly relations between the two countries and what about the field of cooperation between Iran and Turkey. It has provided political issues and economic and spiritual affairs." In short, for whatever reason and justification, small Ararat was separated from Iran's territory, the new borderline between Iran and Turkey was drawn, and the differences between the two countries ended. In the meantime, there is an important point to consider: Iran did not benefit from Turkey's cooperation in suppressing the Kurdish rebels in Ararat. Iran did not gain anything but losses for its cooperation.

1937 BORDER LINE AMENDMENT AGREEMENT

Another case of agreement between Iran and Turkey on border issues was the amendment of the Iran-Turkey borderline in 1937. When defining the borders of Iran and Turkey in 1923, in a part of the border, near Marbisho,[55] the implementation of the borderline according to the rules of the border agreement of the mentioned year did not match with the land situation. For this reason, that part of the border was not demarcated and marked. Finally, on May 26, 1937, an agreement was signed between the representatives of the two countries to amend this part of the border, which the Iranian National Assembly approved on June 10, 1937. By the Turkish National Assembly on January 19, 1937, and after that, there was no dispute in the state of the border and the location of signs between Iran and Turkey did not exist.

THE DREAM PROJECT OF HALLWAY TURANI[56] AND ITS EFFECTS ON THE EQUATIONS OF THE CAUCASUS REGION

From a legal point of view, the corridor is considered a corridor over which the sovereignty of the host country does not exist or is very limited. If we want to look at the issue from a historical perspective, the corridors are proposed along with political, security and mainly territorial aspirations by the applicant country.

Like the Danzig Corridor[57] in 1939 when Hitler requested Poland to connect Germany to the Baltic Sea through the Danzig Corridor. This issue faced Germany's territorial ambitions and became one of the reasons for the world war. Therefore, the corridor is defined in terms of international law in the framework of international straits. After the law of the sea was developed in the form of the 1982 Convention of the Seas, parts of international straits and waterways within the territorial limits of coastal countries were included in a special legal regime, and so-called harmless passage or transit passage was taken. It meant that the coastal country could not simply prevent the passage through the

54 Iranian officials who were sent to Turkey in 1939.

55 Marmisho is located in the west of Urmia city in West Azerbaijan province of Iran.

56 Turkish generation.

57 The Polish Corridor, also known as Danzig Corridor, Sea Corridor, or Gdańsk, was a territory located in the Pomerania region that gave the Second Polish Republic (1920-1939) access to the Baltic Sea.

international strait, and the limitation of that country's sovereignty over the international corridor or strait would be established.

In fact, the Zangzor[58] project is known as Turani, which is pursued with regional and international goals. In general, four main goals have been defined for this project. The most important is the transit discussions, in which the Republic of Azerbaijan and Turkey are looking for the connection point for the disruption in the North and South Corridors. Another important is the disruption in the transit corridor between the Persian Gulf and the Black Sea which makes the border between Iran and Armenia difficult or creates restrictions for it through the corridor. As a result, the control of the north and south corridor on the path of communication between Iran and Russia will be entirely in the hands of the so-called Turani Corridor.

At the same time, regardless of the North and South corridors, the vast project (One Belt-One Road) will disturb China and make it fail. Because we know the danger of China's One Belt, One Road project is far greater than the military risks of China. This is why Turkey proposed the Lapis Lazuli Corridor[59] as part of the Turani project. It means connecting Turkey to Nakhchivan through the Turani project to the Republic of Azerbaijan and from there to the Caspian Sea and from this sea to Turkmenistan, Afghanistan and Pakistan and finally access to the Gwadar Dam and the Oman Sea.

The second function of this corridor is related to energy issues. Because one of the goals pursued in this project is the construction of a pipeline from three Central Asian countries, namely Kazakhstan, Uzbekistan and Turkmenistan, from the Caspian Sea to the Republic of Azerbaijan and through this fake corridor to Turkey and Europe.

Pipelines are ready from the Republic of Azerbaijan to the European Union. The South Caucasus pipeline, "Tap and Tanap,[60]" has cost more than 30 billion dollars, and its Tanap section (Gasim, 2019) which the Republic of Azerbaijan built in Turkey, has cost more than 11 billion dollars.

First, this pipeline currently does not have enough gas to reach Europe. Unless Turkmenistan, Uzbekistan, and Kazakhstan join it. The goal of the Turani Corridor is to achieve such a thing so that, in this case, the Central Asian gas will be sent to Europe instead of to China and Russia. Second, with the construction of this project, the discussion of Iran's gas transfer to Europe will be ruled out forever, and third, the issue of Iran's gas transfer from Nakhchivan to Armenia and Turkey will also be overshadowed by this issue in the future. Regarding Iran, as one of the countries, such a project will suffer. It should be stated that until the Iranian Parliament approves the Convention on the Legal Regime of the Caspian Sea, Turkmenistan and the Republic of Azerbaijan do not have the legal right to pull the pipeline from the Caspian Sea bed. Another function of this project is in security issues and NATO's direct presence in the Caucasus region, the Caspian Sea and Central Asia, that is, up to the western borders of China and the southern borders of Russia. With the creation of such a project, Turkey as a member of this project, NATO can practically be present in the Caspian region and Central Asia without any restrictions. In this case, it can be said that a blockade against Russia, which is from the Black Sea side, and against China, which is from the Black Sea South China, will be followed and will be established. With such a trend, Iran's security interests will also be in danger from the northwest and northeast. By examining more issues, we find that this project can also be a geopolitical, geo-economics, and even ecocultural threat from a cultural point of view to create a culture of Iran with the Caucasus.

58 Zangzor is a historical and geographical region in Armenia.

59 A corridor that connects Afghanistan to the Black Sea through Turkmenistan, the Republic of Azerbaijan and Georgia, and finally to the Mediterranean Sea and Europe via Turkey.

60 The plan to build the Trans-Adriatic Pipeline (TAP) and the Trans-Anatolian Gas Pipeline (TANAP) is one of the energy transfer plans, which, if implemented, will transfer the gas resources of the Shahid field of the Republic of Azerbaijan from Turkey and Greece to Bulgaria and Italy.

Issues that can invalidate this treaty today by presenting historical documents, including the Treaty of Turkman Chai, can be proven in the International Court of Justice that Iran's ownership of the Kara-su area is entirely legal and can be returned to Iran. This small three and a half kilometres of a narrow strip, which today has endangered more than 700 kilometres of Iran's transit route in the South Caucasus region, plays a vital role in realising the dream of the "Turani Corridor" of Recep Tayyip Erdogan,[61] who has been striving for in recent years its implementation. Kara-su is the starting point and the primary source of drawing and implementing the Turani project, which the current Turkish government is pursuing in the framework of the view of neo-Ottomanism.

The advancement of Erdogan's Turani Corridor project, which is not mentioned in the recent developments in the South Caucasus and the open, semi-open and hidden positions of the high officials of Turkey and Azerbaijan and others, has currently encountered problems in Syunik[62], Armenia. The insistence of Azerbaijan and Turkey's government to implement the so-called Zangzor Corridor in this area is aimed at removing the "most important obstacle" in front of the Turani Corridor.

The implementation of the so-called Zangzor Corridor, which cuts off Iran's communication and borderlines with Armenia, is of such "strategic importance" for Turkey and Azerbaijan that Baku is ready to acquire this area, which is located in the Sionik province of Armenia. He even gave up part of his demands in the northern parts of Karabakh. In other words, today, the implementation of this corridor by Baku-Ankara has become a priority over the recovery of Karabakh from Armenia. The realisation of the Turani Corridor, which is currently facing an obstacle called Zangzor, and all the efforts of Turkey and Azerbaijan are focused on opening Zangzor, has several strategic consequences for Iran, Russia, and China. The consequences of the implementation of the Zangzor Corridor, which will complete the communication lines between Turkey and Azerbaijan and from there to the Caspian Sea and Central Asia for Iran, can be listed as follows:

1. Weakening Iran's political role in the Caucasus region;
2. Disruption in the trade relations between Iran and Russia in the Caucasus;
3. Disruption in Iran's trade relations with Armenia;
4. Cutting off one of Iran's important transit routes to Europe and establishing dependence on Azerbaijan and Turkey;
5. Weakening Iran's position in the North-South and East-West corridors;
6. Weakening Iran's position and disrupting Iran's cooperation in the Eurasian Customs Union;
7. Weakening Iran's position and disrupting Iran's cooperation in the Shanghai Pact;
8. Weakening Iran's position in China's "one belt - one road" line (Yayloyan, 2018);
9. Eliminating Iran's geopolitical advantage in the Caucasus by upsetting the balance of transit lines in the region.

Implementing the Turani Corridor will remove Iran from all energy and transit equations in the Caucasus region. The important strategic consequences of the Turani Corridor for Russia and China include the following:

1. Reducing Russia's geopolitical advantages in the Caucasus;
2. Ending Europe's dependence on Russia in the field of energy and reducing Russia's leverage against Europe;
3. Strategic threats against Russia through the expansion and strengthening of NATO positions in the east and connecting NATO to the Caspian Sea;
4. Increasing China's gas demand for Central Asia;
5. Improving the level of acting of Central Asian countries against China;
6. Undermining China's $5 trillion "One

61 President of Turkey.

62 Syunik is the southernmost province of Armenia. It is bordered by the Vayots Dzor Province to the north, Azerbaijan's Nakhchivan Autonomous Republic exclave to the west, Azerbaijan to the east, and Iran to the south.

Belt-One Road" project, which is the most significant investment project in human history (Huang, 2017);
7. Violation of the Shanghai Treaty;
8. Completion of the blockade of Russia and China by America and Europe, with Turkey and Azerbaijan acting.

THE STATUS OF THE OCCUPATION OF KARABAKH IN TERMS OF INTERNATIONAL LAW

As one of the most complex ethnic and territorial conflicts in the world, the Karabakh conflict has faced different and even conflicting approaches from the countries of the region and the world. Besides the influence of political considerations, perhaps one of the reasons for this issue is the adherence of each of the parties involved in the Karabakh conflict to one of the important principles of international law and the use of these principles to justify their positions in the dispute. The existence of such a point of view shows the positions of various countries that have a role and influence in the Karabakh conflict that they consider the principles of international law in their positions regarding this conflict, but they often do not act in this direction.

In Article 1 of the UN General Assembly resolution approved in 1974, aggression is defined as "the use of force against the territorial integrity and political sovereignty of any state", and in Article 2 of this resolution, "any state that resorts to force for the first time is prima facie a transgressor." It will be considered, and it is the Security Council that, according to the case and special conditions, cannot consider the done act illegal. According to the third article of this resolution, there are several acts of aggression: Invasion or attack, occupying or annexing the territory or a part of the territory of a state, bombings, siege, use of military force in the territory of a state in a way that is not mentioned in specific agreements, sending armed groups to the state of an orderly or irregular state, carrying out severe military operations against another government or interfering in the carrying out of such operations.

From Baku's point of view, the developments that started in 1988 in Nagorno-Karabakh and after the collapse of the Soviet Union turned into a full-scale war between the Republic of Azerbaijan and Armenia, show that the Armenian army and the Armenian paramilitaries are moving into the countryside and the countryside. In February 1992, they started encroaching on the Republic of Azerbaijan from the region of Karabakh and massacring civilians, especially in the city of Khojali.[63] From Baku's point of view, what makes the occupation and encroachment by the Armenian forces decisive in the Karabakh conflict is that after occupying the five important cities of Karabakh, they moved to the centre of *Khankandi*. Armenians call it "*Stpankert*"[64] to encroach on cities outside of this region. Based on this, in the period from 1992 to 1994, seven cities were occupied outside the Republic of Azerbaijan, including *Zangilan*[65], *Fozuli*[66], *Agdam*[67], *Jebrayil*[68], *Qabadli*[69], *Kalbajar*[70] and *Lachin*[71]. Even the most radical Armenian groups

63 It is a city in Askran Province, Artsakh Republic.
64 Another name of Khankandi region.
65 Zangelan is a city in Zangelan city of the Republic of Azerbaijan. Between the first and second Karabakh wars (1993-2020), this city was de facto part of Kashataq province of Artsakh Republic for 27 years.
66 Fozuli is the name of a part in the south of the Republic of Azerbaijan and on the north bank of the Aras River, which borders with Iran. About one third of this part was under the control of Armenia.
67 It is an abandoned city in the Republic of Azerbaijan.
68 It is a city the Republic of Azerbaijan and is considered the center of this city. Between the first and second Karabakh wars (1993-2020), this city was a de facto part of Hadrut province of Artsakh Republic for 27 years.
69 It is the name of a part in the southwest of the Republic of Azerbaijan. This part is now under the control of Azerbaijani forces.
70 It is a city in the Republic of Azerbaijan. This city was previously located in Shahumyan province of Artsakh Republic.
71 It is a part of the Republic of Azerbaijan which was under the control of the Armenian forces since the Nagorno-Karabakh war and after the ceasefire agreement, the Azerbaijani army regained control of

do not have any claim on territorial ownership, like Agdam and Zangilan.

Based on this, the Security Council, the most important decision-making body of the United Nations, issued four resolutions on the Karabakh conflict in 1993. Although most of the permanent members of the Security Council support Armenia and the political intentions of the members and interfere in the decisions of this council, a look at the content of this resolution shows the conditions of the occupation of Karabakh from the point of view of international rights.

On April 30, 1993, the Security Council passed Resolution No. 822 during the 3205 meetings. This resolution expressed concern about the increasing armed military operations between the Republic of Azerbaijan and Armenia, particularly the attack by Armenian forces on the Kalbjar sector of Azerbaijan and the relocation of many civilians in the area. The resolution reaffirmed the importance of national sovereignty and territorial integrity for all countries in the region and the inviolability of internationally recognised borders. It also condemned any attempts to acquire land through military force. In this resolution, security explicitly states that the international borders of the Republic of Azerbaijan have been violated through aggression. However, it does not explicitly mention the name of the aggressor.

The resolution supports peace negotiations through the Organization for Security and Cooperation in Europe. It calls for an immediate end to military operations and hostile actions to establish a lasting ceasefire. It also urges the immediate withdrawal of all military forces from the Kalbjar sector of the Republic of Azerbaijan. The resolution emphasises the need to resume negotiations and allow unhindered international humanitarian aid in the region. On July 29, 1993, the Security Council unanimously passed Resolution 853.[72] The council expressed deep concern over the increasing military operations, including capturing the Agdam sector in the Republic of Azerbaijan. The council noted that this unrest threatened peace and security in the region, especially considering the relocation of many civilians in the Republic of Azerbaijan and the resulting humanitarian situation. The council reaffirmed the right to national sovereignty and territorial integrity of the Republic of Azerbaijan and other regional countries. The council also condemned hostile acts and behaviours in the region, including attacks on civilians and bombing and artillery attacks against residential areas. Finally, the council stressed the inviolability of internationally recognised borders and emphasised the inadmissibility of using military force to acquire lands in Agdam and other occupied parts. This resolution from the Security Council had a more forceful tone than the previous one. It acknowledged and praised the efforts of the Minsk Group from the Organization for Security and Cooperation in Europe. The resolution demanded that all military operations stop immediately and that the occupying forces withdraw entirely from the Agdam sector and other areas within the Republic of Azerbaijan. All parties involved were urged to come to a permanent agreement on the ceasefire and to follow through with it. At the same time, the Security Council did not explicitly name the aggressor in this resolution. Still, it strongly urged the Armenian government to continue exerting influence on Armenians to ensure compliance with the provisions of Resolution No. 822 (1993)[73] and the current resolution. The Council also has called for the acceptance of the proposals of the Minsk Group by this side.

With the intensification of the conflict between the Republic of Azerbaijan and Armenia and the increase in the number of refugees, three months had not passed since the second

this city.

72 Resolution 853 of the United Nations Security Council, approved on July 29, 1993, is an international document about Armenia-Azerbaijan. This resolution was approved during the 3259th meeting with 15 votes in favour, 0 against and 0 abstentions.

73 Resolution 822 of the United Nations Security Council, approved on April 30, 1993, is an international document about Armenia-Azerbaijan. This resolution was approved during the 3205th meeting with 15 votes in favour, 0 against and 0 abstentions.

resolution, when the Security Council unanimously approved Resolution 874[74] on October 14, 1993, in the 3292nd session. The main focus of the third resolution of the Security Council on Karabakh was to welcome and support the "renewed schedule of non-delayed measures in line with the implementation of Security Council Resolutions No. 822 and No. 853, which was prepared on September 28, 1993, at the consultative meeting of the Minsk Group."

The resolution states that other unresolved issues arising from the conflict in the "renewed table" that have not been examined should be resolved as soon as possible within the framework of peace talks in line with the Minsk process, and countermeasures and irrevocable measures are mentioned without delay. In the renewed schedule of the Minsk group, including the withdrawal of troops from the occupied territories and the removal of all existing obstacles in communication and transportation.

Finally, on November 12, 1993, in the 3313th session, the United Nations Security Council unanimously approved Resolution No. 884,[75] the final resolution of this Council regarding the Karabakh conflict since 1993. In this resolution, the Security Council once again expressed its support for the activities of The Minsk Group of the Organization for Security and Cooperation in Europe. The Council has emphasised and expressed concern regarding the escalation of military operations due to the ceasefire violation and the use of excessive forces in response to these cases, including the occupation of Zangilan and Horadiz[76] cities of the Republic of Azerbaijan. The confirmation of national sovereignty and territorial integrity of the Republic of Azerbaijan condemns the occupation of these two cities and the resumption of military operations. The Armenian government is influencing Armenians living in Nagorno-Karabakh, Azerbaijan, to comply with resolutions 822, 874, and 853. They are being asked not to provide equipment and supplies to participating military forces without mentioning the involvement of the Armenian army in occupying cities in Azerbaijan. In its resolution 884, the Security Council addresses the interested parties. It demands immediate cessation of hostilities and hostile behaviour, unilateral withdrawal of occupied forces from the Zangilan sector and Horadiz city, and withdrawal of military forces from other parts of Azerbaijan.

The resolution asks the Secretary-General and relevant international institutions to provide humanitarian aid to civilians affected by the conflict in Azerbaijan's Zangilan and Horadiz areas. It also acknowledges Iran's role in opening its border to prevent a humanitarian disaster. The resolution aims to ensure the safe return of war veterans and residents to their homes in the southern borders of Azerbaijan. The Security Council has not mentioned Armenia as an aggressor in its four resolutions. Despite these actions, it has identified the Armenian militia as occupying part of the territory of the Republic of Azerbaijan and emphasised the territorial integrity of the Republic of Azerbaijan and the inadmissibility of violating the immunity of international borders. The Security Council's insistence on the immediate, unilateral withdrawal of Armenian forces from the occupied territories of the Republic of Azerbaijan, including Agdam, Fozuli, Zangilan and Horadiz, showed that the justifications of the Armenian separatists of Nagorno-Karabakh for the use of force were not acceptable from the point of view of the United Nations Security Council. Security did not mention the situation of Armenians in Nagorno-Karabakh and the claim that the Republic of Azerbaijan violated their rights in their resolutions but confirmed the violation of the rights of civilians and refugees. Acknowledging the reality of the occupation of the lands

74 Resolution 874 of the United Nations Security Council, approved on October 14, 1993, is an international document about Armenia-Azerbaijan. This resolution was approved during the 3292nd meeting with 15 votes in favour, 0 against and 0 abstentions.

75 Resolution 884 of the United Nations Security Council, which was approved on November 12, 1993, is an international document about Armenia-Azerbaijan. This resolution was approved during the 3313th meeting with 15 votes in favor, 0 against and 0 abstentions.

76 It is in Fozuli city in the Republic of Azerbaijan.

of the Republic of Azerbaijan in four resolutions of the Security Council is considered an excellent achievement for Baku, which strengthens the legal and political position of this country. Therefore, it is not a coincidence that the authorities of the Republic of Azerbaijan always accuse Armenia of their positions, regardless of the resolutions of the Security Council. The Security Council, especially in its third and fourth resolutions, emphasised supporting the activities of the Minsk Group under the supervision of the Organization for Security and Cooperation in Europe regarding the Karabakh conflict. America, Russia, and France form the heads of the Minsk Group, which influence all three countries of the Armenian diaspora, and these three countries are interested in Armenia. For this reason, after the ceasefire on May 12, 1994, in Karabakh, the efforts of the Minsk Group, Karabakh, have not satisfied the authorities of the Republic of Azerbaijan. Especially since 2011, Baku has tried many times to discuss the Karabakh conflict with the UN and the Security Council, but the heads of the Minsk Group prevented it. Even because of these oppositions, Baku could not use the opportunity of its membership as a non-permanent member of the Security Council, including the presidency of this council for one month at the end of 2013, to re-propose the issue of the Karabakh conflict in the Security Council.

CAN THE OWNERSHIP OF KARABAKH CONFLICT WITH THE PRINCIPLE OF TERRITORIAL INTEGRITY?

According to most jurists, the principle of territorial integrity of countries is one of the binding rules of international law that all countries must comply with. Many international documents and the procedure of the International Court of Justice emphasise supporting countries' territorial integrity. The importance of the principle of territorial integrity in international law reaches such a point that any action against it does not have any legitimacy based on any principle, and this principle is generally accepted in international law. Of course, we should not lose sight of the fact that events such as the Iraq War in 1991, the Bosnian War in 1992, the Kosovo War in 1999, the attack on Afghanistan in 2001, the attack on Iraq in 2003, the Russian attack on Georgia in 2008, separatism in Donetsk and Luhansk in Ukraine in 2014, show that this principle has been severely neglected. Although the principle of the right to self-determination is also fundamental, the principle of the right to self-determination cannot become an excuse for violating the territorial integrity of countries. After the colonial period and the colonies' independence, the right to self-determination of minorities and ethnic groups has been supported only in the framework of the territorial integrity of the countries.

Separatists' instrumental use of the principle of the right to self-determination is synonymous with disregarding the traditional principles of the international order, such as maintaining territorial integrity and respecting the sovereignty of states. As a result, any attention to separatist requests will mean reconsidering the framework of international relations and its foundations, i.e. the principles governing contemporary international law - an issue that confronts the world and the Caucasus region, which has many ethnic groups, with the danger of chaos and disorder, and the consequences of this disorder threaten human rights.

Therefore, according to the rules of international law, an ethnic minority separating a part of a country under the pretext of self-determination is considered occupation and aggression, whether this act is supported by a foreign country or otherwise. As stated in the resolutions of the Security Council, the actions of the Armenian militias in Nagorno-Karabakh have damaged the territorial integrity of the Republic of Azerbaijan, and the separatists of Nagorno-Karabakh have violated one of the mandatory rules of international law by using force. Evaluating the relationship between the principle of self-determination and separatism

regarding Karabakh, to justify the occupation of Karabakh, the separatists insist on the principle of the right to self-determination and consider the passing of the independence referendum in 1993 as a sign of independent self-determination, the same action that the separatists did in Georgia's Abkhazia. The truth is that after the end of the cold war, the idea was established that the right to determine the fate of the other does not belong only to the people of occupied and colonial lands. However, this right belongs to all the people of a land, not religious groups, internal tribes or nations.

It is precisely for this reason that the Republic of Azerbaijan has called the holding of the independence referendum in Karabakh in 1993 illegal and contrary to the rules of international law. Officials in Baku have emphasised that a referendum to determine the legal fate of Karabakh should take place throughout the entire territory of the Republic of Azerbaijan and include all residents of the country. It should not be limited to the region of Karabakh and only among its Armenian population. This is because, according to the rules of rights groups, a tribe or nation, along with other people of a land, should have the right to determine their destiny and have the ability to exercise it. Usually, in most democratic systems, to provide more and more cultural rights to minorities, they give autonomy to their regions or use the federation and state system. Even though the Republic of Azerbaijan has faced criticism from the international community regarding democracy, it has announced to the Karabakh region that it is ready to provide the highest level of autonomy to this region.

In general, it should be said that based on documents such as Article 27 of the International Covenant on Civil and Political Rights approved in 1966 and the Declaration of the Rights of Minorities, "Persons belonging to National, Ethnic, Religious and Linguistic Minorities" approved in 1992, they have extensive rights to preserve their cultural identity. However, there is no right to the separatism of a national, ethnic or religious group. These groups not only do not have such a right, but their legitimate demands should be recognised in the framework of the right to determine their destiny, that is, to participate in the country's political, economic and social life and protect them. They benefit from it by adhering to the principle of territorial integrity of their respective countries. Based on this, the reference of the separatists of Karabakh to the principle of self-determination lacks legal validity. It is by Article 27 of the International Covenant on Civil and Political Rights approved in 1966, and the Declaration of the Rights of Minorities. People belonging to national, ethnic, religious and linguistic minorities" approved in 1992 is inconsistent (Poland, 2002).

Therefore, it is no coincidence that in 1993, the Declaration of the World Conference on Human Rights in Vienna emphasised, "The right to self-determination should not be used as a license or incentive for any act that leads to the division or threat of the whole or part of the territorial integrity or unity of self-determination of nations." They are in control of their affairs, and thus they have a government that is considered to be the representative of the entire people belonging to that land and without discrimination of any kind." The most significant justification of the separatists to separate from the country was to appeal to human rights issues. However, the various wars surrounding the separatists showed that this method did not help the observance of human rights but also damaged it even more. Based on this, the Anti-Discrimination Committee, in its General Recommendation No. 21 dated August 1996, states: "The Committee does not recognise the right to declare partition and separation from a state unilaterally, and declares that the state is in favour of partition". Moreover, maintaining peace and security is not only not useful but also harmful and destructive. One of the reasons for the disadvantage of this idea is that if any minority is allowed to call for secession, hundreds of new and small governments will be established in the world.

According to the mentioned cases, the reference of the separatists of Nagorno-Karabakh to

the principle of self-determination for the declaration of the independence of Nagorno-Karabakh is contrary to the provisions and standards of international law, especially the Covenant on Civil and Political Rights and the provisions of the United Nations Charter on the Inviolability of International Borders and the Declaration on the Rights of Minorities. Despite holding several presidential and parliamentary elections in the last two decades, the separatists of Karabakh have not received recognition from any country in the world. The Organization for Security and Cooperation in Europe (OSCE), which is crucial in resolving the Karabakh conflict, considers these elections illegal. This election has been highlighted as a result of these circumstances.

CONCLUSION

The territorial disputes between the Ottoman Empire and Iran were transferred to the new Republic of Turkey and Reza Shah Pahlavi during the Qajar era after the collapse of the Ottoman Empire and the change of monarchy in Iran. These disputes, which intensified with new aggressions by the Turkish military on Iranian soil, caused the relationship between the two countries to deteriorate. However, because the two mentioned countries needed peace inside and outside to strengthen their power and carry out internal reforms and modernisation, they had put the principles of their foreign policy based on adopting a policy of good neighbourliness with their neighbours and based on peaceful relations. This approach, in their foreign policy, became an important factor for the peaceful resolution of territorial disputes between the two countries, and their territorial disputes were resolved step by step with the conclusion of the Treaty of Vedadiyeh and Taminieh (1926) and the Border Treaty (1932). In the last treaty, the borderlines were defined, and the work of determining the boundaries and marking the border started from the confluence of the Aras and Kara-su rivers and ended in the middle of 1933 at Dalamper Mountain, that is, the common border between Iran, Turkey and Iraq. The ownership of the Kara-su region belonged to Iran, with the cancellation of the Turkmen Chai Treaty and Iran's lack of commitment to the Kars Treaty (following the conclusion of the 1921 Iran-Soviet Agreement). However, during the end of the Qajar period in Iran, political disturbances led to the Ministry of Foreign Affairs officials becoming indifferent towards the ineffectiveness of the Turkmen Chai Treaty. Additionally, Iranian politicians became lax, resulting in a loss of attention to the matter. After the Civil and Political Rights, the United Nations Charter and the practice of international law, especially after the Second World War, it is clear that the principle of the right to self-determination must be with the principle of territorial integrity. What is said as the conflict between the principle of territorial integrity and the principle of the right to self-determination is an apparent conflict, and this conflict is also caused by the separatists' unilateral and extensive interpretation of the right to self-determination. The existing order of the international system is based on the four principles of territorial integrity, state sovereignty, the prohibition of resorting to force and the prohibition of interference in the internal affairs of other states. These four principles are considered in the United Nations Charter. Paying attention to the separatist claims of ethnic, religious, national and linguistic groups and giving them any legitimacy means questioning the existing international order, which can have extensive negative consequences such as international anarchism, in which every ethnic group, language or national and religious can declare independence, in such a situation, the foundations of identification will also be destroyed. Creating new governments based on each national and ethnic group will lead to a world of thousands of governments. A society with so many governments, most of which will undoubtedly be small governments, is uncontrollable and brings many irregularities. This is why, even though after the collapse of the Soviet Union, separatism intensified in regions

such as the Caucasus, Central Asia, and the Balkans, none became a basis for legitimacy to disrupt the existing international order, despite the opposition of the rules of international law. With the separatism of minorities under the pretext of the right to self-determination, it seems that the existence of foreign support has caused separatist movements to continue or succeed in some parts of the world for a long time. The separatism in South Ossetia and Abkhazia has been ongoing for over two decades because Russia supports it. Moreover, Russia supports the separatists of Karabakh. Experience has shown that without foreign support, separatist movements will not succeed. Examples of this issue can be seen in Canada's Quebec, Russia's Chechnya, and Sri Lanka's Tamils. According to the rules of international law, national, ethnic or non-religious groups within a country do not have the right to seek separatism and establish an independent state, but this issue should not be interpreted in such a way that these groups cannot enjoy the right to self-determination. Rather, besides being able to exercise the right to self-determination along with other people of their land by choosing a democratic government and participating in its administration, they also have special rights. Based on this, it seems that the Republic of Azerbaijan has declared its readiness to grant autonomy at a high level to the Karabakh region to restore its territorial integrity and assure the Armenians of Karabakh that their cultural identity will be preserved and respected. The Republic of Azerbaijan has repeatedly emphasised this idea almost since 1997. The Organization for Security and Cooperation in Europe also emphasised the territorial integrity of the Republic of Azerbaijan and the autonomy of the Armenians of Karabakh. It guaranteed security in its proposal to resolve the Nagorno-Karabakh conflict at the 1996 summit in Lisbon, Portugal. According to Professor Antonio Cases, there is no legitimacy for the actions of the Nagorno-Karabakh separatists regarding the proposal of the Republic of Azerbaijan to grant high autonomy to the Armenians of Karabakh. According to the United Nations Charter, a country's territorial integrity must not be breached except in cases of preventing severe human rights abuses, threats to international peace and security, or when no other options are available. The purpose of this intervention is to stop countless violations of human rights and create an environment for negotiation and establishing peace. Only when crimes against humanity occur and with the permission of the Security Council the principle of territorial integrity can be temporarily violated.

"Turan Corridor" is supposed to create a geographical connection from Turkey to the Republic of Azerbaijan and Central Asia by eliminating the border of Iran and Armenia, and this issue can provide the basic and vital interests of China, Russia and Iran in the following four areas. Transit field: Russia, China and Iran are currently focusing on four major transit projects, namely "Silk Road Revitalization Project or One Belt - One Road", "North-South Corridor", "Corridor connecting the Persian Gulf to the Black Sea" and They are "Eco Corridor" (Yayloyan, 2018).

Using the term "Zangzor Corridor" instead of "Turani Corridor" is wrong from a historical, political and legal point of view. Because the term Zangzor Corridor, more precisely the unconfirmed word "Zangzor West" coined by the President of Azerbaijan Ilham Aliyev, refers to Syunik province (centred in Kapan[77]) in the south of Armenia, which forms the border between Iran and Armenia. This word has a territorial claim against the Syunik province of Armenia. The authorities' argument of the Republic of Azerbaijan is that this region was ceded to Armenia by a knight in 1922. If this argument is based, naturally, there are many similar examples, Including the Caucasus, where the Republic of Azerbaijan is located, it was separated from Iran in 1828 and handed over to Russia.

77 Kapan is a town in southeast Armenia, serving as the administrative center of the urban community of Kapan as well as the provincial capital of Syunik Province.

Igdir[78], Kars[79], and corridor Qara-su, all of which once belonged to Iran, were ceded to Turkey in 1931, or according to the 1920 *Treaty of Sèvres*[80], signed by the Ottomans, six provinces in the southeast of this country with the title "Western Armenia" belongs to Armenians. Naturally, with this argument of Baku, all these should be returned to their historical owners. This is why international law and international jurisprudence, which have been mentioned several times in the judgments of the International Court of Justice, emphasise that: "Historical events that have resulted in future changes in international relations cannot serve as the foundation for ownership claims" (SERVICE, 2001). Accordingly, the application of Zangzor to the south of Armenia means a violation of the territorial integrity of this country and a violation of Article 4 of the United Nations Charter. Therefore, the use of the title Zangzor Corridor" which is used by Ankara and Baku officials, is wrong from a political, legal and historical point of view.

78 City in East of Turkey.

79 Kars is a city in northeast Turkey.

80 The Treaty of Sèvres was a 1920 treaty signed between the Allies of World War I and the Ottoman Empire. The treaty ceded large parts of Ottoman territory to France, the United Kingdom, Greece and Italy, as well as creating large occupation zones within the Ottoman Empire.

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LEGAL CONUNDRUM OF LIVE-IN RELATIONSHIP IN INDIA: A JUDICIAL APPROACH

Anand Singh Prakash

Doctoral candidate at Banaras Hindu University, Research Scholar, Varanasi, India

ABSTRACT

The ideas of how men and women interact with one another and the attitude toward cohabitation, in general, have changed significantly with the advent of the post-modern or industrial society. "Live-in relationships" are an expression of a couple's decision to cohabitate as a couple without getting married. The modernisation of the community has brought an array of new ideas and values. With the affection growing towards each other and the decision to tie the knot after taking into consideration all the prospects of a healthy marriage, youngsters these days believe in living together before marriage to test compatibility, known as "live-in relationships." However, with modernisation comes the traditional thinking of our culture and the mindset of people towards these practices. Acknowledging the legal implications of the "live-in relationship" along with the challenges youngsters are facing nowadays, this paper highlights the analysis of laws that govern this practice in India.

KEWWORDS: Live-in-relationship, Cohabitation, Civilisation, Succession, Inheritance, Agreement, Sapinda

INTRODUCTION

"Live-in relationship" refers to an arrangement of staying together as a partner in a home for a long period without getting married. In this arrangement, an unmarried partner cohabitates in such a manner that it resembles marriage without formally getting married. The traditional obligations of married life are not forced upon the people living together in this type of partnership. Individual freedom is the cornerstone of a live-in relationship. Many countries all over the world have adopted the concept of relationships. An arrangement where two persons live together without being married with their agreement is no longer illegal. "Live-in relationships" are not a novel idea; they have developed with human civilisation. "Live-in relationships" were more common before the concept of marriage. There were no weddings in the time before civilisation. Traditionally, people, especially men and women, lived in close quarters. The people did not have any regard in relation to "sapinda marriages", and they were not concerned about the taboos associated with it. The institution of marriage was established in order to prevent disorder, confusion, and conflict in human relationships, to legalise cohabitation, and to gain social approval. The institution of marriage also has legal power because nearly every country in the world has passed laws regulating it. Indian culture regards marriage as sacred. Along with bringing two people together, it also brings two families together with diverse norms. Therefore, marriage is the greatest status institution in our society. The Supreme Court repeatedly reaffirmed that it is part of an individual's right to life to live with each other if they are in love.[1]

The Commission[2] suggested to the "Ministry of Women and Child Development" that the definition of "wife", as established in section 125 of the Cr.P.C, should be expanded to include women living together. The recommendation sought to equalise the status of a "live-in relationship" couple as a legally recognised marriage and harmonise the legal rules for protecting women from domestic abuse. Because of this, the SC established the "Justice Malimath Committee", which stated that "if a man and a woman are living together as husband and wife for a reasonable period of time, the male shall be judged to have married the woman."

The Committee[3] recommended that the definition of "wife", which is given in Cr.P.C, should also be amended and include women living in a "live-in relationship" so that the women can receive alimony in the case of domestic abuse. The SC held that in order to qualify for maintenance, there is no need to get married under section 125 of the Cr.P.C formally. The women living in "live-in relationships" are eligible for the demand of maintenance.

CONCEPT OF MARRIAGE AND LIVE-IN RELATIONSHIP

The concept of marriage in India has been seen as a sacred institution from the very beginning. Traditionally it is built around dedication and tolerance and includes "the coupling of two people possessing different desires, interests and needs, is a special association given shape by social rules, and laws and significantly affects individuals' development and self-realisation."[4] Marriage as a concept has evolved over time. After the formal ceremony, marriage is typically regarded as one of the fundamental civil rights. It has legal implications and implies several duties and obligations with regard to succession, property inheritance, and other concerns. Marriage thus encompasses all of the legal criteria related to tradition, selection and

1 Article 21 of the Constitution of India.

2 The National Commission for Women recommended on June 30, 2008.

3 Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs.

4 Melek Kalkan & Ercumend Ersanli, The Effects of the Marriage Enrichment Program Based on the Cognitive-Behavioral Approach on the Marital Adjustment of Couples, 8 Educational Sciences Theory and Practice 977 (2008).

exposure, as well as all of the legal outcomes that follow from such a union.

As we know that change is the rule of nature, and commitment has changed with the times. Now people are looking into alternatives to marriage. A "live-in relationship" is a voluntary arrangement where two adults agree to live together for a long-term relationship, which resembles a marriage.[5] If we compare it with other countries, a "live-in relationship" is still not socially acceptable in India.

In this growing society, people want to believe in order to long-term conjugal relationships but are not interested in the marital knot and choosing an alternate institution like a "live-in relationship." Basically, it is the result of the continual improvement of society and the intricate nature of marriage. "Live-in relationships" are "walk-in, walk-out relationships." In such kinds of relationships, people do not have any legal obligation, and there are no strings attached between them. It is, in simple words, cohabitation.[6] We can also refer to this relationship as a way of living a life wherein unmarried couples reside with each other in a home in order to maintaina long-term relationship that will eventually lead to marriage.

THE LEGALITY OF LIVE-IN RELATIONSHIP

No particular law in India acknowledges "live-in relationships." Therefore, it is very clear that there is no legal definition of it, and it does not determine the rights and responsibilities of the parties as well as the status of any children born to such marriages. No Indian law, including the Hindu Marriage Act of 1955,[7] recognises a "live-in relationship." The "Supreme Court of India" has held in many decisions that if two major persons (a man and woman) live together for a long period and procreate, the courts will assume they are married. They and their relationship would be subject to the same laws as are applicable to Indian marriages. Under Article 21 of the Constitution of India, living together with two major persons is a part of the right to life. The courts have explained the legal status of the "live-in relationship" in several cases and further held thatit cannot be a criminal act.

In the case of ***A. Dinohamy v. W.L.Blahamy,***[8] the "Privy Council" observed that if it is proved that two major persons are living together for a long period of time, it is a presumption of the law unless the contrary is proved beyond doubt that they were residing together in consequence of a valid legal marriage, and not in a state of concubinage. In ***Lata Singh v. State of U.P.***,[9] the court observed that even though the concept of a "live-in relationship" is considered immoral in society's eyes, consenting adults of the opposite sex is not illegal in the eye of the law. In the case of ***Badri Prasad v. Deputy Director of Consolidation***[10] Supreme Court held that few would be successful if a man and woman who are legally married and live as husband and wife had to demonstrate through eyewitness testimony that they were legally married fifty years back. Where the couples have cohabited for a considerable period as husband and wife, then there is a strong presumption in favour of marriage. Although the presumption can be rebutted, the burdenof proof is on that person who wants to deprive the legal foundation of such a relationship. In the case of ***SPS Balasubramanian v. Suruttayan***[11] Court reiterated the observation made in the Badri Prasad case along with the observation that observed that their children would be entitled to inherit the property of a parent, born to such a "live-in relationship." In a landmark case of ***Indra Sarma v. VKV, Sarma***[12] Supreme Court held that

5 Kalpana Vithalrao Jawale, Live-In Relationship: Recent Development and Challenges in India, SSRN Journal (2012).
6 Alok Kumar vs State & Anr. August 9, 2010.
7 Act No. 25 of 1955.
8 AIR 1927 P.C. 185.
9 Lata Singh vs State Of U.P. & Another on July 7, 2006.
10 AIR 1978 SC 1557.
11 AIR 1992 SC 756.
12 15 SCC 755. 2013.

if both parties are unmarried and enter into a "live-in relationship" and several types of implications were examined, it does not fall under any offences.

In ***Joseph Shine v. Union of India,***[13] case SC held that sec. 497 of the IPC is unconstitutional because this section was based on gender discrimination and violates Articles 14 (treating men and women unfairly) and 15 (discrimination on the ground of sex) of the Indian Constitution. However, adultery is no longer a crime but still could be grounds for divorce under civil law. In the same way, the apex court pronounced that Section 377 of the IPC is partially unconstitutional in ***Navtej Singh Johar v. Union of India***[14] case and further said that it is notonly unconstitutional but also irrational, indefensible and arbitrary and violating Articles 14, 15, 19, and 21 of the Constitution of India. Section 377 continues to apply to sexual acts committed against minors, bestial acts, and non-consensual actions between two adults. Despite the legalisation of consensual gay behaviour, executing a symbolic same-sex marriage is not against the law, but same-sex marriages have still not been acknowledged in India.

In the case of ***D. Velusamy and D. Patchaimal***,[15] the apex Court established specific guidelines for recognising the nature of marriage in relation to "live-in relationships."

1. To the public, the couple must present themselves as spouses;
2. The couple must be of legal marriageable age;
3. In order to be able to marry legally, they must not already be married;
4. They had to have lived together freely and presented themselves to others for a considerable time as being close to spouses.

In ***S. Vahini v. Union of India and Others***,[16] the SC held that choice-making is fundamental to liberty and dignity. The court determined that articles 19 and 21 of the Constitution guarantee an individual's choice as a vital part of their dignity and freedom. Further, once a right was recognised, it was the duty of the state as well as the courts to enforce and protect that right. Further, in ***Nandakumar and others v. State of Kerala,***[17] the court ruled that "live-in relationships" are now established by the Legislature and given such provisions to protect such relationships through the "Protection of Women from Domestic Violence Act, 2005."

The Constitutional Court, in a writ, held that even if it may or may not be acceptable to conventional sections of society but it is the fundamental duty of the Court is duty bound to protect and respect the basic right of a major to have a "live-in relationship."[18] In this petition, a father of a 19-year-old girl filed a petition to prevent her from living with an 18-year-old boy. The writ petition was dismissed by the Court, which held that the girl has the right to live with the boy and even can marry him after getting the age of marriage.[19]

The "Supreme Court of India" in the case ***Indra Sarma v. VKV Sarma,***[20] determined that if the appellant knew the fact that the respondent was already married, he could not have entered into a "live-in relationship" as in the nature of marriage because the essential characteristics of a marriage like inherent, maintenance etc. could not be fulfilled. Sections 494 and 495 of the Indian Penal Code strictly prohibit and even punish every marriage that takes place while a person is still legally married to their spouse unless expressly permitted by that person's personal law. Because it is specifically against the law, a "live-in relationship" between a married man and a married woman cannot be regarded as being in the nature of marriage. Children born from such a relationship, though not considered legitimate.

13 SCC Online 1676. 2018.
14 5 SCC 1. 2018.
15 (2010) 10 SCC 469.
16 (2018) 7 SCC 192.
17 (2018) SCC On Line SC 492.
18 Sharma, A., & Umpo, S. (2022). Judicial Approach amidst Growing Live-in Relationship. Law & World, 21, 27.
19 WP(Crl) No.178 of 2018.
20 Supra 12.

LEGAL STATUS OF CHILDREN

Under Hindu law, as a coparcener, it is very clear that children born into a "live-in relationship" are only eligible to claim the property in the parent's independently acquired property, not from joint family properties. The SC, in the case of ***Tulsa v. Durghatiya,***[21] observed that children born out of such a relationship would be considered legitimate. The essential precondition for such legitimacy is that the parents must be sincere towards their relationship, sharing of home, and it cohabit for a long period.

The question of the legitimacy of children born out of a "live-in relationship" was first highlighted in the case of ***S.P.S. Balasubramanyam v. Suruttayan***.[22] In this case, the SC ruled that Section 114 of the Evidence Act talks about the legal presumption under which persons live as husband and wife under a roof for a long period, and their children born out of this relationship are not illegitimate. The court further interpreted that Article 39(f)[23] directs policies toward "*ensuring that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.*"

PROPERTY RIGHT OF PARTNERS

Section 114 of the Evidence Act discusses the presumption of certain facts under which the Court may presume live-in relationship partners as legally married couples. The onus is on the opposing party to disprove such presumption. In the ***Vidyadhari v. Sukhrana Bai***[24] case, the court observed that partners who have been cohabitating for a reasonable amount of time are eligible to inherit one other's property which offered hope to many live-in partners. The court determined that because the live-in male partner, in this case, was already married, the lady could not inherit the property but that the children were the rightful heirs and could therefore make an inheritance claim.

Further, in another case of ***Dhannulal v. Ganeshram,***[25] the live-in partner and other family members spent a long period living in the same house. After the death of the male partner, a dispute of property came into existence, and the court held that if live-in partners were living together as husband and wife under the same roof with a long-term commitment towards each other were presumed to be legally married couples. Although the deceased's property type was not mentioned in the aforementioned instance, it was simply decided that a live-in partner could only inherit another person's property in the event of his death.

PROPERTY RIGHT OF CHILD

The legitimacy of a child has long been a contentious issue, and Hindu law has always regarded legitimacy as a key consideration for determining inheritance rights. A child born out of a "live-in relationship" has inheritance rights from their parents, and they must have spent a long period, as the courts have ruled this consistently. In a landmark judgement of ***Vidyadhari vs Sukhrana Bai,***[26] the Court provided the right of inheritance and legal position to children born out of a "live-in relationship." In ***Revanasiddappa Mallikarjun***,[27] the "Supreme Court of India" recognised that children born out of the "live-in relationship" have legal rights in inheritance, hence approving the bequest to them. Further Court has declared that one of the essential criteria of inheritance of children born out of the "live-in relationship" is a reasonable period that the partners must spend.

21 (2008) 4 SCC 520.
22 1994 AIR 133, 1994 SCC (1) 460.
23 Constitution (Forty-second Amendment) Act, 1976.
24 AIR 2008 SC 1420 (India).
25 (2015, SC) 19.
26 Vidyadhari & Ors vs Sukhrana Bai & Ors on January 22, 2008.
27 (2011) 11 SCC 1 (India).

The Supreme Court established the legality of a child born out of a "live-in relationship" in the eyes of the law in the ***Bharatha Matha v. R. Vijaya Renganathan*** case and declared that he might be permitted to inherit the parent's property. According to section 21 of the Hindu Adoption and Maintenance Act, children, either legitimate or illegitimate, are dependent and entitled to get maintenance from their father or from the estate of their deceased father while still a minor and while the daughter is single. If children born out of a "live-in relationship" are denied maintenance rights, this can be challenged in court because it is against the fundamental right, which is given in Chapter III of the Constitution of India.[28] This specific denial of rights is against the right to live with the dignity of the individual.

RECENT JUDICIAL PRONOUNCEMENTS ON LIVE-IN RELATIONSHIPS

Recently in the case of ***Kaminidevi v. State of UP and others***,[29] "The High Court of Allahabad" held that when two major persons, one male and one female, are living together with their free will and consent, it is the fundament right of those persons and nobody has the right to interfere with them including their parents. It is a fundamental human right and is also guaranteed under the right to life and personal liberty, further in the case where a minor girl who was living with her adult male partner Court has said that a "live-in relationship" is not acceptable by society and it is against the morality.[30] Once again, the "Punjab and Haryana High Court" refused to grant protection to a couple who were living together and said that if the protection as claimed were provided, the entire social structure of society would be upended. Therefore, there is no basis for granting the protection in the case of ***Ujjwal and another v. State of Haryana and others***.[31]

After these judgments, in ***Soniya and another v. State of Haryana and others,***[32] the "Punjab and Haryana High Court" granted protection to the person who was living together and observed that although the idea of living together without regard for the sanctity of marriage may not be acceptable to everyone, it cannot be said that such a relationship is unlawful or that it is a crime to do so. The court further stated that it would be "a travesty of justice" to deny protection to those who have chosen to live together outside of marriage's sanctity.

A "live-in relationship" between a married and an unmarried person is not allowed; the "Rajasthan High Court" stated in ***Rashika Khandal v. the State of Rajasthan***[33] case, it was stated that one requirement for such relationships was that the couple must be unmarried. In ***Sanjay and another v. State of Haryana and others***,[34] the "Punjab and Haryana High Court" granted protections to those who were living in a "live-in relationship" and said that although the "live-in relationship" is not a new phenomenon today, society has not yet developed to the point where it can accept such a relationship without objecting. Further, in the case of ***Pushpa Devi and another v. State of Punjab and others***,[35] while granting protection to a 21 and 19-year-old couple, the court said that two major persons are entitled to live together in a "live-in relationship"; it may be socially and morally not acceptable, but it is not against the law. In the case of ***Ridhima and another v. UT of Jammu &Kashmir***,[36] while hearing the protection plea by a couple living together, the court observed that the *"Right to exercise assertion of choice is an inseparable part of liberty and dignity of the individual."*

28 Constitution of India, 1949.
29 WP-C No. - 11108 of 2020.
30 Kajal and another v. State of Haryana and others CRWP No. 2160 of 2021 (O&M).
31 CRWP-4268 of 2021 (O&M).
32 CRWP No.4533 of 2021 (O&M).
33 S.B. Criminal Miscellaneous (petition) No.3023/2021.
34 CRWP-5531-2021.
35 CRWP -6314-2021.
36 WP (C) No. 1403/2021.

CONCLUSION

In this modern lifestyle, most youths are not prepared to accept obligations as well as engage in a whole-life committed bond, which is partially arising as a result of the rapid influence of globalisation. The acceptance of pre-nuptial agreements, broad-mindedness for sexual preferences, etc., as well as a broader knowledge of domestic living among spouses, is a new appeal for young people. They see a "live-in relationship" as one of the better options for living together, and it reduces enough complexities and problems associated with marriage. In reality, though, it requires far more responsibility and awareness of socio-legal viewpoints. In India, the view of the judiciary has a complex and non-linear view of "live-in relationships." The judicial viewpoint is not an easy case of black or white due to the variety of legal opinions that exist at different levels of the judiciary as well as the distinct demographics. There are numerous Supreme Court decisions that support "live-in relationships", yet there are just as many high court decisions that are critical of and even outright condemn "live-in relationships." Since there are still no specific laws addressing "live-in relationships" that have been established by the legislature, it would seem that the generally accepted rule in such cases is that courts of law havea great deal of discretion in determining how fundamental and natural rights should be interpreted to apply in specific circumstances. However, due to the binding character of the Supreme Court of India's decisions, consensual "live-in relationships" (subject to the age of the majority of both the party) are in themselves not prohibited by law and therefore are not illegal. In the absence of appropriate law on "live-in relationships", the Indian Judiciary has passed several morally driven judgments. Firstly, we must establish a dividing line between morality, which is full of debates and ambiguous areas, and legality, which is essentially unambiguous. The Judge's prime responsibility is to uphold the law of the land, not to pass new ones based on personal morality. According to Article 21 of the Indian Constitution, morality is no longer justified oncea person enters a space where they have the freedom to make their own decisions and exercisetheir own agency, which the state has a responsibility to uphold. In order to provide live-in couples with legal protection, the Indian judicial system should consistently apply the right to privacy throughout the entirety of India. Additionally, it is advised that a "live-in relationship" be treated as a domestic matter if they meet the criteria outlined in the Supreme Court of India's decision ***S. Khushboo v. Kanniammal & Anr***[37] or if the cohabiting couple is in a relationship that has the same characteristics as marriage. In addition, the legal system might make it possible to sign cohabitation agreements as a way to control patrimonial relationships and to recognise domestic relationships formally.

37 SLP (Crl.) No. 4010 of 2008.

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CRUISING DOWN THE STREETS OF JUDICIAL DISCRETION: CONSTRUING THE EQUITABLE RELIEF IN COMMON-LAW BANGLADESH

Syed Menhazul Bari

Department of Law, Khwaja Yunus Ali University, Director, Lumex Plastic Industries Ltd. Rajshahi, Bangladesh

ABSTRACT

Anizman Philip states that discretion starts at the dusk of law and has the potential to inflict justice and injustice. The legal realm of common-law Bangladesh historically evolved from *stare decisis*, which is mostly discretion in the conventionally accepted form. To better understand, specific reliefs, statutory interpretation, grant of bail in a non-bailable offence, and so on are discretionary equitable reliefs. This empirical qualitative study was conducted to expound the undefined concept of judicial discretion, its curb and extent, its possibility of misuse, and its application in the judiciary. Through this study, it has been settled that the scope of the misapplication of discretionary power is comprehensive. External factors such as the good character of a litigant influence discretionary decision-making immensely. Discretion is to courts like water is to a fish. It is inherent, whereby it finds its silver lining in *ex debito justitiae*. The scope of discretion is voluminous; thereby, greater are its concerns.

KEYWORDS: Court's Discretion, Judicial Discretion, Discretionary Jurisdiction, Discretionary Power, Suo Moto

1. INTRODUCTION

'When law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or unreasonableness.'[1]
Anizman Philip

Conceptually, discretionary jurisdiction is deferred statutory authority on judges[2] to evaluate facts within the premise of principles laid out by law,[3] especially at the juncture of a dilemma between multiple valid courses of action.[4] Whereby the doctrine of balance and comparative analysis is applied between various legal principles to determine the significance, relevancy, and applicability of each principle to a particular case[5] in order that conclusive outcomes forwarding justice are excavated wherever the use of such discretionary power is legislatively permitted.[6] Speaking of being statutorily allowed in Bangladesh, such notion is provided by any enactment containing phraseologies such as 'the Court may *suo moto*,' 'as the Court otherwise directs,' 'as the Court deems proper,' 'as the Court thinks reasonable,' etcetera[7] or confers discretionary power by the discreet use of the jargon. Courts electing to manifest such discretionary jurisdiction can base its decision on *stare decisis* or on established principles, policies, or prudence, on rights or relationships between an individual and state, identities,[8] which on an important note must be reasonable, logical, and probable based on *bonafide* deductions of facts to secure justice.[9] The perception that discretion strategically extends jurisdiction is not invalid. However, the preference lies on the broader prospect that discretion is jurisdiction itself,[10] extending to civil and criminal proceedings and private and public laws.[11] Furthermore, Court's discretionary power in Bangladesh is not constrained to the provisions of law. It, however, relies heavily upon and extends its exercise on sound judicial principles.[12] Griffith (1994), in his report providing guidelines for sentencing and judicial discretion for the then Australian Government, delineated discretion, stating that arbitrariness in decision-making could be vanquished by deliberating policy on a requirement basis to promote confidence between the state and its subject through belief in the fairness of the process.[13] Numerous instances call on discretion to resolve a dispute (Fletcher, 1984).[14] In Bangladesh, neither such instances nor the term 'discretion' has been expounded, and its parameters have been undefined.[15] This study identifies and expands the concept of discretion, its scope of misapplication, its reach and curb, and its applications in the courtroom.

1 Anizman Philip 'A Catalogue of Discretionary Powers in the Revised Statutes of Canada, 1970' [1975] Ottawa- Law Reform Commission of Canada.
2 Rashmi Goyal and others, 'Judicial Discretion' (2022) 2 Uttarakhand Judicial & Legal Review 58 <https://ujala.uk.gov.in/files/Ch8.pdf> [Last seen: 5.09.2022].
3 Cornell Law School, 'Judicial Discretion' (LII / Legal Information Institute2020) <https://www.law.cornell.edu/wex/judicial_discretion#:~:text=Judicial%20discretion%20refers%20to%20a> [Last seen:].11 July 2022.
4 Goyal (n2) 58.
5 Yuval Sinai and Michal Alberstein, 'Expanding Judicial Discretion: Between Legal and Conflict Considerations' (Harvard Negotiation Law Review 2015) <https://www.hnlr.org/wp-content/uploads/sites/22/HNR202_crop-1.pdf> [Last seen: 5.09.2022].
6 Cornell Law School (n3).
7 Goyal (n2) 58.
8 Sinai and Alberstein (n5) 229-230.
9 Richard Spindle, 'Judicial Discretion in Common Law Courts' (1947) 4 Washington and Lee Law Review 143 <https://scholarlycommons.law.wlu.edu/wlulr/vol4/iss2/3/> [Last seen: 5.09.2022].
10 J Grey, 'Discretion in Administrative Law' (1979) 17 Osgoode Hall Law Journal 107 <https://digitalcommons.osgoode.yorku.ca/ohlj/vol17/iss1/3/> [Last seen: 5.09.2022].
11 ibid. Goyal (n.2) 59.
12 *Afroza Khatun v Momtaz Begum* [1997] 2 BLC 41 (AD)
13 Gareth Griffith, 'Sentencing Guidelines and Judicial Discretion: A Review of the Current Debate' (NSW Parliamentary Library 1994).
14 George Fletcher, 'Some Unwise Reflections about Discretion' (1984) 47 Law & Contemp. Probs. 269 <https://scholarship.law.columbia.edu/faculty_scholarship/1074/> [Last seen: 5.09.2022].
15 Ummey Sharaban Tahura, 'Discretionary Power: Is It Conceit or Necessity?' (The Daily Star11 September 2018) <https://www.thedailystar.net/law-our-rights/news/discretionary-power-it-conceit-or-necessity-1631977> [Last seen: 5.09.2022].

1.1. Problem Statement

History is irrefutably evident that the independence of the Judicial Organ of Bangladesh exists only on paper. The organ of last resort is overshadowed by the executive authority of the Ministry of Law, Justice and Parliamentary Affairs, exercising exorbitant control over all its affairs like appointments, promotions, administration, dismissals, training, etcetera.[16] In the *Government of Bangladesh v Advocate Asaduzzaman Siddiqui*[17] popularly known as the 16th Amendment Case, the *obiter dictum* of the Appellate Division recognized that the constitutional responsibilities conferred on judges could not be performed diligently, with ease of mind, unless the judicial organ is separated completely in its truest sense. Surprisingly, the Masdar Hossain case relating to the independence of the lower judiciary has been called on for review to establish a balance of power by the finance minister.[18] Time has sufficiently disclosed that political variables and affinity towards wealth, displayed mainly through the ascension of the judicial hierarchy, disproportionally influence a judge's discretion.[19] In compliance with such, claims that the judicial organ of Bangladesh is incoherently politicized suffice the antagonism and distrust between the two dominant political parties of the State. Furthermore, elevation in judicial ranks is a product of the political discretion of the ruling party. Hence, such political discretion demands favours of judicial discretion from the elected appointees.[20] In respect of the above, the statement by Anizman Philip comes to mind as the variables directing the path of discretion are likely to invite unreasonableness and recur tyranny and injustice. Therefore, it is essential to reveal how the undefined discretionary jurisdiction of the Court functions. In Bangladesh, civil reliefs are moderated by the discretionary power of the Court, admissibility of evidence, permissive judicial presumptions are discretionary, and procedural aspects, both civil and criminal, allow discretionary intervention.

1.2. Aims and Scope

It has already been established hereinbefore that the concept of discretion and its parameters have not been defined in Bangladesh[21] and without definite standards lies the risk of discrimination and misapplication[22]. Considering such, this research undertakes to enlarge the followings *viz*.

- Expound the Concept of Discretion;
- Analyse the Equitable Relief factor of Discretionary Jurisdiction;
- Explore the probable misapplication of Discretionary Jurisdiction;
- Study the Applications of Discretionary Power in the Courts of Bangladesh;
- Investigate the limits of discretionary jurisdiction.

Not much work has been done on the current topic from the perspective of Bangladesh and since judicial discretion covers a wide array of legal affairs, hence, this study entices social prominence within the prospect of law.

2. METHODOLOGY

The course of this study is empirical, whereby the qualitative data analysis approach was adopted to extract its results. A qualitative study

16 USAID, 'Final Report Assessment Of Rule Of Law And Justice Sector In Bangladesh' (2022) <https://pdf.usaid.gov/pdf_docs/PA00ZB69.pdf>

17 [2019] 71 DLR 52 (AD).

18 Staff Correspondent, 'Masdar Hossain Case Verdict Should Be Reviewed: Muhith' (bdnews24.com4 July 2015) <https://bdnews24.com/bangladesh/masdar-hossain-case-verdict-should-be-reviewed-muhith> [Last seen: 7.09.2022].

19 Richard S Higgins and Paul H Rubin, 'Judicial Discretion' (1980) 9 The Journal of Legal Studies 129 http://www.jstor.org/stable/724041> [Last seen: 21.02.2023].

20 Minato Kazuki, 'Politics and Independence of the Judiciary in Bangladesh' (2019) <https://www.ide.go.jp/English/Publish/Reports/Rb/2018/2017240003.html> [Last seen: 7.09.2022].

21 Tahura (n15).

22 *Osius v City of St. Clair* [1956] 344 Mich 693 (MichSC).

deploys in-depth scrutiny *en route* revealing the relevant interconnection and interdependency between concepts.[23] Primary and secondary documents, e.g., relevant scholarly articles, news reports, relative laws of Bangladesh like the Specific Relief Act of 1877, the Code of Criminal Procedure 1898, the Code of Civil Procedure 1908, and reports of local and international organizations, was extensively studied and analyzed. It is well-settled that Bangladesh regulates within the legal system of the common law.[24] Wherein any decision of the Apex Court not subjected to *per incurium* by the same division gracefully maintains the status of *stare decisis*.[25] Moreover, the law declared by the Apex Court extends an irrebuttable binding effect on all other Courts inferior to it.[26] Keeping the doctrine of *stare decisis* and practical approach in mind, law journals, decisions of higher Courts of Bangladesh, and other countries relevant to the scope of this research have been elaborately analysed.

3. RESULTS & DISCUSSIONS

This study embarked on the journey to elaborate on the notion of discretion, and it is an equitable relief. This study also set out to discover the probable scope of misapplication of discretionary jurisdiction, its limits, and applications within the judicial system of Bangladesh. The following sections attend to all those queries.

3.1. Expounding Discretion

Imagine a crossroad, and each road presents itself as a viable travelling option. Like the crossroad, discretion empowers a judge to opt and choose between alternative options, and each option is viable and lawful.[27] *State v Hazi Osman Gani*[28] narrowed the crossroad of discretion to distinction evolved from one's conscience and judgement of facts parallel to the statutory guidance between right and wrong. In a broader sense, discretion implies freedom of conscious choice.[29] The legal standpoint of judicial discretion is best depicted and understood *via* the doughnut theory, i.e., like the hole in the doughnut, judges may only elect to exercise discretionary jurisdiction on instances where legislative loophole or scope for such exists.[30] The solid dough represents the guidelines of such jurisdiction, or better, the constraints of it.[31] Considering the solid dough, the frosting is served best when the discretion is sound and sprinkled with the combination of non-arbitrary, reasonable, and lawful stance as the toppings.[32] On another note, discretion is delegated authority conferred as an aid to draw substantive and procedural decisions,[33] especially on occasions when circumstantial fairness demands action by the Court given a litigant is disentitled to such as a matter of right.[34] Furthermore, judicial discretion plays an integral role in dispens-

23 Syed Menhazul Bari, 'The Legal Aspect of Rape: A Review of the 2020 Amendment of Nari O Shishu Ain (Act No VIII of 2000)' (2022) 4 Asian Journal of Social Sciences and Legal Studies 58.

24 ibid.

25 *Shahidul Haque Bhuiyan v Chairman First Court of Settlement* [2017] 69 DLR 241 (AD).

26 *ACC v Barrister Nazmul Huda* [2008] 60 DLR 57 (AD).

27 VV Kotskulych, 'Specifics of Implementation of Judicial Consideration within Judicial Discretion' [2019] Jurisprudence Issues In The Development Of Legal Literacy And Legal Awareness Of Citizens 100 <https://doi.org/10.36059/978-966-397-151-3/100-116 [Last seen:].1 .09.2022

28 [2011] 16 BLC 505 (HCD)

29 Ngozi Chukwuemeka Aja, 'Hart on Judicial Discretion: Sustaining Citizens' Confidence in the Law' (2022) 2 Humanities and Arts Academic Journal 10.

30 Li Li, *Judicial Discretion within Adjudicative Committee Proceedings in China: A Bounded Rationality Analysis* (Springer 2014) 146 146 <https://link.springer.com/book/10.1007/978-3-642-54041-7> [Last seen: 3.09.2022].

31 ibid. Aja (n29) 12.

32 TP Mukherjee and KK Singh, *The Law Lexicon*, vol. 1 (3rd edn., Central Law Agency 1982) 530 530.

33 Brian W Blaesser, 'The Abuse of Discretionary Power', *Design Review* (Springer 1994) <https://doi.org/10.1007/978-1-4615-2658-2_5> [Last seen: 1.09.2022].

34 HC Black, *Black's Law Dictionary* (Bryan A Garner, Tiger Jackson and Jeff Newman eds, Ninth, Thomson Reuters 2016) 534.

ing justice.[35] Given that discretionary power is founded on a judge's individual judgment and conscience, subject to general and special limits. Therefore, discretionary jurisdiction acts as an element of the legal status of a judge within the norms of duties and responsibilities.[36] According to Hart, discretionary jurisdiction, like precedent and legislation, potentially relates to a credible source of law.[37] Figure 1 depicts the various statutorily allowed discretionary provisions of Bangladesh.

3.2. Discretion & It's Principles

According to Bushway and Forst (2013),[38] discretion is appraised on outcomes anticipated to be generated from it, as the employment of discretionary jurisdiction is moulded of rules and obtained as a by-product of extensive inquiry. Such by-product of substantial inquiry is categorized into two specific ideologies, i.e., primary discretion and secondary discretion. The former allows a greater array and independence of choice, which is the general undertaking of the subject by professionals and academics of law. On the other hand, the latter is restricted mainly by rules and principles, thus permitting criticism of the correctness of such discretion.[39] *In re* above, it is apparent that secondary discretion governs judicial prudence in Bangladesh. Navigating further into the categorization, given the established grounds that discretion in Bangladesh is secondary, i.e., it is subjected to rules and generated as a result of judgement and *bonafide* conscience. Discretion and legal approach to rules can be correlated by delimiting a precise line of variation between discretion and judicial conduct regulated by rules and legislations.[40] Conceding to the above, discretion does not exist independently but with rules to exert *intra-vires* and is structured according to policy[41] or to deter from being a threat to the rule of law[42] or a technical unnecessity. Such scourges of discretionary jurisdiction exist based on its prospective of being deployed capriciously and arbitrarily.[43] Moreover, Kotskulych[44] proposed a few elite canons of judicial discretion and its functionality, *viz.*

- *Principle of Justice:*

provides the Court with the challenge of choosing from evidential information provided by litigants.

- *Principle of Pragmatism*:

The Court must obviate from jumping to any conclusion without scrutiny and conclusion of proceedings.

- *Principle of Devising*:

The presiding judge must weigh between evidence based on its significance to the matter presented.

- *Principle of Professional Optimism*:

The Court must adhere to the corresponding legislation in an effort to promote faith in it.

- *Principle of Prudence*:

The Judge must decide to apply *bonafide* conscience, knowledge and skill specific to the situation, justified by law with due regard for moral values, rationality and legal actuality.

- *Principle of Dynamic Acclimatization*:

The Court presiding must be equipped with skilful and prompt knowledge to implement legal proceedings.

35 Ekaterina Azarova, 'Judicial Discretion as an Element of Developing Judicial Law', *Proceedings of the 1st International Scientific Practical Conference 'The Individual and Society in the Modern Geopolitical Environment' (ISMGE 2019)* (Atlantis Press 2019) <https://doi.org/10.2991/ismge-19.2019.13> [Last seen: 1.09.2022].

36 Kotskulych (n26) 101.

37 Aja (n29) 12.

38 Shawn D Bushway, Emily G Owens and Anne Morrison Piehl, 'Sentencing Guidelines and Judicial Discretion: Quasi-Experimental Evidence from Human Calculation Errors' (2012) 9 Journal of Empirical Legal Studies 291.

39 George Christie, 'An Essay on Discretion' (1986) 35 Duke Law Journal 747 <https://scholarship.law.duke.edu/dlj/vol35/iss5/1/> [Last seen: 5.09.2022].

40 Peter Mascini, *Discretion and the Quest for Controlled Freedom* (Tony Evans and Peter Hupe eds, Palgrave Macmillan 2020).

41 ibid 123.

42 ibid 124.

43 ibid 123.

44 Kotskulych (n27) 103.

Table 1. *Cause of Action and Anticipation* of Results (Liu and Li, 2019, pp. 23-26)			
Sl.	Condition	Good Moral Character	Bad Moral Character
1.	Award for full damage	0%	28.3%
2.	Award favouring high compensatory amount	41.2%	66.7%
3.	Award favouring low compensatory amount	76.5%	33.3%
4.	Specific damage amount	14,000	23,000
5.	Interrelation between the act of the defendant and the injury of the plaintiff	35.8%	66.7%
6.	Non-existence of interrelation between the act of the defendant and the injury of the plaintiff	47.1%	28.6%
7.	A probable injury could not be anticipated	52.9%	19.0%
8.	A probable injury could be anticipated	Indistinguishable result	
9.	An issue in Fact: Storage of oxygen by the defendant	29.4%	28.6%
10.	An issue in Fact: Plaintiff being intoxicated	None	

- *Principle of Ethical Accountability*:

The Judge must assume to assist the moral demands of society and differentiate between social right and wrong and decide considering human emotions.

Liu and Li devised an experiment forwarding stimulated questionnaires to judges on the subjects of a cause of action and anticipation of results, legal concept and applicability of laws, and interpretation of legal standards to be discretionarily decreed. The experiment was designed around two distinct categories of defendants, *viz*. defendant of good moral character and defendant of bad moral character[45] (hereafter numerically represented in that respective order). Though, the character and morals of a litigant are nugatory aspects of the law. However, the results cumulated were auspicious and are tabulated below:

In the study on the cause of action and anticipation of results, the scenario presented to the 38 participant judges was a claim for medical damage resulting from injuries incurred on the plaintiff from attempting to extinguish a village fire caused by the explosion of oxygen tanks. In contrast, the plaintiff was intoxicated by alcohol. Only one participating judge applied the reasoning of character. The results, however, speak for itself *(see table. 1)*.

The test on legal concepts and applicability of laws dealt with an endangered parrot. Out of the 72 participating judges, only 1 ruminated the character of the defendant in the decision *(see table. 2)*.

This study presented a classic example of a delay in the performance of a contract. The sce-

45 John Liu and Xueyao Li, 'Legal Techniques for Rationalizing Biased Judicial Decisions: Evidence from Experiments with Real Judges' (2019) 16 Journal of Empirical Legal Studies 1.

Table 2. *Legal Concept and Applicability of Laws* (Liu and Li, 2019, pp. 17-20)			
Sl.	Condition	Good Moral Character	Bad Moral Character
1.	Conviction	37.1 %	64.9 %
2.	Average Sentence	0.4 years	1.5 years
3.	Parrot was recognized as wild animal, and their sale was a penal offence	25.7%	27.0 %
4.	Parrot was not recognized as a wild animal	48.6 %	18.9%
5.	The statute being unfavourable to the defendant	37.1%	59.5%
6.	The doctrine of *ignorantia juris non excusat*	28.6%	48.6%

Table 3. *Interpretation of a Legal Standard* (Liu and Li, 2019, pp. 8-14)

Sl.	Condition	Good Moral Character	Bad Moral Character
1.	Full or contractually specified compensation	0%	38.5%
2.	Specific amount when not awarding full compensation (Equitable Amount)	85,000	185,000
3.	Full compensation was excessively high	87.5%	30.8%
4.	Full compensation was not excessively high	0%	38.5%
5.	The defendant had no influence on the business of the plaintiff	50.0%	30.8%
6.	Discretionarily reasoned for low compensation	53.8%	100%

nario was that a rental contract for two units was established between the lessor and the lessee containing a specific amount of damage. The delivery of possession was delayed two days prior to the move-in date. The plaintiff's claim was the specified amount due to incurred loss of business and the shifting expenses, while the defendant argued that the liquidating damage was excessive *(see table. 3)*.

This study's pertinence to the Bangladeshi legal scenario is prominently immaculate, relating to the fact that judges in Bangladesh account for the character, social status, previous criminal history, etcetera., of the litigant while employing discretionary jurisdiction.

3.3. Equitable Relief

It has been determined beyond every query that a Judge is empowered *via* the statutory incorporation of the phrases 'the Court may *suo moto*,' 'as the Court otherwise directs,' 'as the Court deems proper,' 'as the Court thinks reasonable,' etcetera to apply discretionary jurisdiction.[46] Whenever a Judge commits to employ such legitimized discretionary power, it must ascertain that the use of such discretionary power expediate lawfulness and fairness *via* comprehensible judicial act and must not be a substitute for judicial arbitrariness.[47] A comprehensible judicial act denotes acquiring a solution that displays a direct juridical link, justice, accuracy, justifiability, and rightness[48] as justice must not only be done but must also be seen to have been done.[49] Adhering to constitutional principles is the perfect example of a direct juridical link.[50] Courts are the connectors of the missing link and possess the potential and responsibility to bring constitutional and democratic principles to task by reviewing the arbitrary use of discretionary power.[51] Arbitrary or fanciful use of discretionary power must be evidenced in Court for it not to be overturned.[52] According to Wright and Davis, discretionary decision-making allows flexible empirical growth of the common law by extending the scope of procedural fairness.[53] Thereby, judges could impose procedural obligations of consultative nature on the legislature[54] and not ignoring the fact that common law is judge-made law, i.e., law formulated from the knowledge, understanding, and discretion of judges. On every instance a Court elects to utilize discretionary jurisdiction, it acts as a Court of Equity. It,

46 Goyal (n2) 58.

47 Azarova (n35) 66.

48 Bartosz Wojciechowski and Marek Zirk-Sadowski, 'The Argument of Rightness as an Element of the Discretionary Power of the Administrative Judge' (2019) 33 International Journal for the Semiotics of Law 215.

49 Denise Meyerson, 'Why Should Justice Be Seen to Be Done?' (2015) 34 Criminal Justice Ethics 64.

50 Wojciechowski and Zirk-Sadowski (n47) 227.

51 David Mullan and DJ Galligan, 'Discretionary Powers: A Study of Official Discretion' (1988) 38 The University of Toronto Law Journal 420.

52 *Sarafat Ali v Pranballav Sarkar* [1998] 18 BLD 157 (HCD).

53 J Skelly Wright and Kenneth Culp Davis, 'Beyond Discretionary Justice' (1972) 81 The Yale Law Journal 575.

54 Mullan and Galligan (n50) 422.

therefore, must conform not to deliver any of the parties into a position of undue advantage over the other,[55] it must also conform conduct of the parties, i.e., the willing performance of the committed transaction as equity repudiates to remedy the one that aids to the impossibility of performance.[56] It is unethical to demand a remedy after callously forcing a situation into the dark room of intervening impossibility. The maxim *ex turpi causa non oritur actio*, i.e., the fraudulent behaviour of a man cannot be the basis of an action,[57] comes to the rescue. Discretionary equitable relief attempts to solidify justice by practicing freedom of circumscribed choice to implement conscious judicial functions.[58] Additionally, a conscious judicial functioning is more of an equilateral balance between awareness and action, i.e., the litigants are *vigilantibus non-dormantibus jura subveniunt*, i.e., the litigants are aware of the rights and laches and vigorously assert their rights as equitable relief only comes around when such conditions are uncompromised.[59] A notable example of such would be any objection relating to the usage of discretionary jurisdiction must be raised at the earliest possible occasion, as discretionary jurisdiction, once exercised unobjected, cannot be meddled with simply due to the availability of alternate efficacious remedy.[60] In Bangladesh, equity governs the rights of parties[61] and embodies discretionary equitable relief. For example, the common law courts in the country preside on matters relating to evidence, i.e., its relevancy, admissibility, granting or refusing an injunction, specific performances, amount of alimony, grant or refusal of bail, etcetera., at its discretion.[62] Furthermore, equitable reliefs hold the factor of time to high prospect notwithstanding the inclusion or exclusion of a specified time clause. It requires the completion of every agreed-upon task within a reasonable span. However, the inclusion of time constraints and the intent to treat it as the essence of a contract may displace the presumption provided such is evidenced by circumstances.[63] In Bangladesh, statutes like the Specific Relief Act of 1877, the Limitation Act of 1908 equitable grant relief. The Specific Relief Act formally makes mention of the discretionary aspect of its execution. On the other hand, the Limitation Act strives to eliminate laches and maintain ease of procedure whereby the calculation of the time is discretionary, e.g., in *Akbar Ali v State*,[64] it was held that working days of the court are the days on which the court officially sits that excludes all public holidays and private leaves, condonable delays supported by reason, etcetera.[65]

3.4. Limitations & Scope for Misuse

In *Government of Bangladesh v Advocate Asaduzzaman Siddiqui*,[66] the Apex Court held that the *malafide* exercise of discretionary jurisdiction attracts nullity, amounts to abuse, and is bad in law. Adding to the *obiter dictum* of the Apex Court, however much it is argued upon, discretion occupies a part in the various legal

55 *Kazi Rafiqul Islam v. Md Anwar Hossain Advocate* [2020] 25 BLC 150 (AD).

56 *Amir Hossain Sowdagar v. Harunur Rashid* [2013] 65 DLR 130 (AD).

57 *KN Enterprise v Eastern Bank Ltd* [2011] 63 DLR 370 (HCD).

58 Kotskulych (n27) 101.

59 Syed Menhazul Bari, 'The Constitutional Equilibrium of the Bangladesh Premises Rent Control Act, 1991' (2022) 4 British Journal of Arts and Humanities 52.

60 *University of Dhaka v Prof. AK Monowaruddin Ahmed* [2000] 20 BLD 28 (AD).

61 *Amir Hossain Sowdagar v Harunur Rashid* [2013] 65 DLR 130 (AD).

62 Richard Spindle, 'Judicial Discretion in Common Law Courts' (1947) 4 Washington and Lee Law Review 143 <https://scholarlycommons.law.wlu.edu/wlulr/vol4/iss2/3/> [Last seen: 5.09.2022].

63 *Amir Hossain Sowdagar v Harunur Rashid* [2013] 65 DLR 130 (AD).

64 [1988] 40 DLR 29 (HCD).

65 Michael LaBattaglia, 'American Hospital Association v. Burwell: Correctly Choosing but Erroneously Applying Judicial Discretion in Mandamus Relief Concerning Agency Noncompliance' (2016) 75 Maryland Law Review 1066 <https://digitalcommons.law.umaryland.edu/mlr/vol75/iss4/5/> [Last seen: 3.09.2022].

66 [2019] 71 DLR 52 (AD)

systems based on the recourse of subjecting it to the plethora of control.[67] The undeviating correlation between limitation and scope for abuse MUST NEVER be overlooked, as when limitation exhausts, abuse engages. Relating the previous concept to the doughnut analogy, it is safe to consider that discretion is illusory except when an opening is visible.[68] Concurring therefrom, a defined minimum standard must adhere to eliminate decisional autonomy[69] or discriminative/ prejudiced application of statutorily empowered discretionary jurisdiction.[70] Such exists under the presumption that provisions of law regulate society as a unit and that discretion is an individualized opinion susceptible to influence.[71] To address susceptibility to influence the human nature of the judges must not be ignored. Higgins & Rubin (1980) experimented on the Eighth Circuit district court judges, therein, the presumption of enforcing values on society through presiding over landmark judgements, human inclination to a particular party, urge to accumulate wealth in the form of professional accolades, political views, etcetera., were shown to relatively influence discretion.[72] Discretionary jurisdiction, when mathematically considered, represents a probability dependent on personalized overviews, with the upper limit being equity and the lower limit being due regard for the conferring statute.[73] A set of ground rules to contain the arbitrary deployment of judicial discretion proposed by Azarova were *viz.*

- Opportunities provided to judges are based on the commitment to resolve questions according to the provisions of the law;
- providing reasonable argument as to the solution of a question of law with clarity;
- opportunities to fill existing gaps in the law;
- moral and professional etiquette of the judge[74]

Somehow, discretion is always shaded under the agape criteria of good faith.[75] The pursuit of upright judging is essentially the quest for unbiassed principles,[76] i.e., sound discretion guided by law, reason and logic.[77] In those spirits, constitutional doctrines such as non-delegation and nullity for ambiguity vitally chain down abuse of discretionary power.[78] The maxims *optima lex quae minimum relinquit arbitrio judicis* and *optimus judex qui minimum sibi*, i.e., law is best when it leaves least to judicial discretion as unregulated discretionary jurisdiction of a judge is deemed 'law of the oppressors' by Spindle on the accounts of human shortcomings.[79] To better understand, the notion of expanding discretionary authority stands contrary to the doctrine of precedent as untamed discretion does not bind a judge to text or *stare decisis*;[80] e.g., the principle of *per*

67 David Mullan and DJ Galligan, 'Discretionary Powers: A Study of Official Discretion' (1988) 38 The University of Toronto Law Journal 420.

68 Anna C Pratt, 'Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act' (1999) 8 Social & Legal Studies 199.

69 George Fletcher, 'Some Unwise Reflections about Discretion' (1984) 47 Law & Contemp. Probs. 269 <https://scholarship.law.columbia.edu/faculty_scholarship/1074/> [Last seen: 5.09.2022].

70 Brian W Blaesser, 'The Abuse of Discretionary Power' [1994] Design Review 42.

71 Pratt (n68) 199-200.

72 Richard S Higgins and Paul H Rubin, 'Judicial Discretion' (1980) 9 The Journal of Legal Studies 129 http://www.jstor.org/stable/724041> [Last seen: 21.02.2023].

73 *Chairman, Bangladesh Textile Mills Corp v Nasir Ahmed Chowdhury* [2002] 22 BLD 199 (AD)

74 Azarova (n35) 106- 112.

75 Bartosz Wojciechowski and Marek Zirk-Sadowski, 'The Argument of Rightness as an Element of the Discretionary Power of the Administrative Judge' (2019) 33 International Journal for the Semiotics of Law 215.

76 William Baude, 'Precedent and Discretion' [2020] 2019 The Supreme Court Review 313 <https://chicagounbound.uchicago.edu/journal_articles/10063/> [Last seen: 6.09.2022].

77 MC Desai, *Venkataramaiya's Law Lexicon with Legal Maxims*, vol. 1 (2nd ed., Law Publishers (India) Private Limited 1996).

78 Brian W Blaesser, 'The Abuse of Discretionary Power' [1994] Design Review 42.

79 Richard Spindle, 'Judicial Discretion in Common Law Courts' (1947) 4 Washington and Lee Law Review 143 <https://scholarlycommons.law.wlu.edu/wlulr/vol4/iss2/3/> [Last seen: 5.09.2022].

80 Baude (n76).

incurium and its applicability is confined only to err in law.[81] Similarly, an exercise of discretion is reversed when such is abused or stands contrary to ordinary prudence or sound judgement.[82] *In re* arbitration, a judge may expand the discretionary horizon subject to the approval of the parties of the arbitration[83] which, however, *en route* judicial proceeding is constricted within the laws of evidence.[84] In conclusion, to avoid discretion from presuming tyranny, unfettered unnecessary discretionary power should be eliminated.[85]

3.4. Interpretation

The interpretation of statutes indeed requires discretion,[86] knowledge of the laws, etcetera., while following the guidance of the widely prevalent cannons of construction. Discretion finds its silver lining in statutory interpretation when broad scenarios such as 'good faith' are present in the picture, which without failure, affect the content and the sought outcome.[87] For example, the concept of good faith is mentioned numerously in the General Exceptions chapter of the Penal Code (1860). Furthermore, judicial discretion pays homage to its roots when it comes to interpretation pertaining to the fact that plural legal development is probable.[88] It is settled that a right to review legislature also exists as a *suo moto* rule. In the United States, Courts apply the arbitrary and capricious test primarily focusing on procedural violations when reviewing administrative rulemaking,[89] as a judge's discretion to interpret the law is directly proportional to legal indeterminacy.[90] The concept of indeterminacy of law finds its causes in incomprehension, i.e., the availability of multiple referrable legal materials and ambiguity of language preferred in the legislation.[91] The decision of *Gias Kamal Chowdhury and others v Dhaka University and others*[92] dictates negating all alternative remedies when the interpretation of the law is involved as discretionary jurisdiction of interpretation exists with high aspirations to help diminish vagueness, ambiguity or contribute to eradicate indeterminacy of law and not add to it.[93]

3.5. Evidential Discretion

The laws of evidence in Bangladesh assert greater responsibilities on judges as evidence naturally regulates the pathway of any litigation. Consider the doctrine of *res gestae* as an example; it demands materiality of time, place, and event; however, no definite standard can be formulated for applying such principle.[94]

81 *Shahidul Haque Bhuiya v Chairman First Court of Settlement* [2017] 69 DLR 241 (AD).

82 George Fletcher, 'Some Unwise Reflections about Discretion' (1984) 47 Law & Contemp. Probs. 269 <https://scholarship.law.columbia.edu/faculty_scholarship/1074/> [Last seen: 5.09.2022].

83 Yuval Sinai and Michal Alberstein, 'Expanding Judicial Discretion: Between Legal and Conflict Considerations' (Harvard Negotiation Law Review 2015) <https://www.hnlr.org/wp-content/uploads/sites/22/HNR202_crop-1.pdf [Last seen: 5.09.2022].

84 *Abdul Munim v Mst. Hazera Zaman* [2001] 21 BLD 338 (HCD).

85 William F Schulz and Kenneth Culp Davis, 'Review of Discretionary Justice, a Preliminary Inquiry' (1969) 21 Administrative Law Review 411 http://www.jstor.org/stable/40708673?origin=JSTOR-pdf> [Last seen: 2.09.2022].

86 George Fletcher, 'Some Unwise Reflections about Discretion' (1984) 47 Law & Contemp. Probs. 269 <https://scholarship.law.columbia.edu/faculty_scholarship/1074/> [Last seen: 5.09.2022].

87 Bartosz Wojciechowski and Marek Zirk-Sadowski, 'The Argument of Rightness as an Element of the Discretionary Power of the Administrative Judge' (2019) 33 International Journal for the Semiotics of Law 215.

88 Sebastián A Reyes Molina, 'Judicial Discretion as a Result of Systemic Indeterminacy' (2020) 33 Canadian Journal of Law & Jurisprudence 369.

89 Nino Kilasonia, 'Judicial Control of Discretionary Power Used in Administrative Rule-Making' (2018) 1 Journal of Law <https://jlaw.tsu.ge/index.php/JLaw/article/view/2574> [Last seen: 3.09.2022].

90 Sebastián A Reyes Molina, 'Judicial Discretion as a Result of Systemic Indeterminacy' (2020) 33 Canadian Journal of Law & Jurisprudence 369.

91 ibid

92 [2000] 52 DLR 650 (HCD).

93 Reyes Molina (n88).

94 Richard Spindle, 'Judicial Discretion in Common Law Courts' (1947) 4 Washington and Lee Law Review 143 <https://scholarlycommons.law.wlu.edu/wlulr/vol4/

Significant aspects such as the admissibility of evidence or a witness, presumption of the existence of a specific material fact, etcetera., are direct products of discretion. This section contemplates such grounds related to evidence.

3.5.1. Admission

The admissibility of any evidence depends on the test of relevance or its relation to the fact in issue, i.e., every form of evidence preferring admission must either be relevant or be related to the fact in issue.[95] While determining the relevancy, relation to fact in issue, or eligibility of evidence submitted to be placed on record,[96] the Judge must exercise discretion with utmost caution while having consideration of the possibility and consequence of error.[97] It is commendable to address questions related to admissibility as it is encountered[98] as an effort to preserve time.[99] Section 136 of the Evidence Act (1872) explicitly mentions the prospect of discretion transpiring upon admission of evidence. The provision uses the phrase 'if the judge thinks' the fact aspired to be proved would be relevant, applying the same condition on the relevancy of the asserted fact. *Government of Bangladesh v Amikun* [100] held that re-examination is allowed by the exercise of discretionary jurisdiction, permitted specifically to clarify or introduce evidence. It is settled that admission raises presumption, which generates an adverse reaction on the burden of proof on the opposition, hence, establishing the substance of admission of evidential components.

3.5.2. Presumption

It is conclusive that judicial presumption causes Courts to incline towards the party favoured with such presumption. The comprehensive scenario of evidential presumption effectuates either,

- *rebuttable mandatory presumption* of law designated using the word 'shall presume,'[101]
- *permissive rebuttable presumption* of fact employing the word 'may presume,'[102] i.e., the scope of this study.

Contradictory views of the obligatory nature of rebuttable mandatory presumption have been expressed *vide Bangladesh Water Development Board v GA Faiyaz Haider*.[103] The legislative intent behind using such phraseology is to allow the passage for discretion.[104] However, such is confined to the ordinary course of events, human nature,[105] and the existence of any fact that intrigues the judicial mind to likely have happened subject to relevancy to the specific case.[106] Considering a few examples, every piece of legislation is judicially presumed to be reasonable and errorless,[107] documents such as letters, notices, and summons sent by the registered post containing the correct address of the recipient, even when refused is presumed to have been duly served,[108] etcetera. The implications of the permissive rebuttable presumption of fact are analysed hereinafter, keeping Section 114 of the Evidence Act as its focal point.

iss2/3/> [Last seen: 5.09.2022].

95 M Monir, *Principles and Digest of the Law of Evidence* (Short Edition, University Book Agency 1984) 136.

96 Maher Jaber Aljaber and Asma'a Mohammad Al-Raqqad, 'The Discretionary Powers of the Civil Judge in Determining to Approve the Use of Personal Evidence as a Mean of Proof or Not' (2021) 24 Journal of Legal, Ethical and Regulatory Issues 1 <https://www.abacademies.org/articles/the-discretionary-powers-of-the-civil-judge-in-determining-to-approve-the-use-of-personal-evidence-as-a-mean-of-proof-or-not-11846.html> [Last seen: 6 .09.2022].

97 CD Field, *Law of Evidence*, vol. 5 (11th ed., Law Publishers (India) Private Limited 1990) 4768.

98 Monir (n95) 137.

99 Field (n97) 4769.

100 *Government of Bangladesh v Amikun* [2020] 25 BLC 73 (AD).

101 *Catherine Masud v Md Kashed Miah* [2018] 70 DLR 349 (HCD).

102 Monir (n95) 54.

103 [2017] 22 BLC 85 (AD).

104 Field (n97) 350-351.

105 *Zahirul Islam v State* [2014] 19 MLR 9 (AD).

106 *Chairman, Bangladesh Agricultural Development Corporation v Abedunnessa* [2021] 73 DLR 196 (AD).

107 *Wagachara Tea Estate Ltd v Md Abu Taher* [2017] 69 DLR 381 (AD).

108 *Abdur Rob Mollah v Shahbuddin Ahmed* [2008] 13 MLR 319 (AD). *Monirul Islam v State* [2017] 22 BLC 414 (HCD).

3.5.2.1. Suits of Civil Nature

Rebuttable presumptions are directing arrows guiding on whom the onus of proof lies, which on being addressed by the concerned party with reasonable evidence, eliminates such presumption.[109] The law dictates, as of principle and prudence, that all pertinent facts must be stated in the prosecution or defence by the respective parties.[110] The argument behind such is that evidence cannot be adduced at a later stage. Unless such has been declared in the pleadings[111] or the pleading has been amended lawfully for such evidence to be entertained.[112] Regarding pleadings, every positive assertion made therein must be denied explicitly by the opposition as the failure of such raises the presumption of admittance of every undenied allegation.[113] Keeping in mind that every denial must be precise and not elusive[114] to such a degree that withstands the significant judicial deduction against non-denial as courts do not entertain any question on the related subject at any later stage.[115] *Dayal Chandra Mondal v Assistant Custodian, ADC (Rev) Dhaka*[116] directed the Courts below to abstain from dismissing suits resorting to abstract assumptions, especially when the defendant fails to deny the assertions of the plaintiff specifically. Permissive presumptions exist to save procedural time[117] as it occasions to centre its focus on substantial proof against it, e.g., publications in the official gazette such as a list of abandoned buildings,[118] abandoned properties, etcetera,[119] are presumed correct unless the contrary is proved by substantial evidence because abandonment relates to deserting possession of the property. Possession of the same subject fosters the presumption of ownership in favour of the person in possession of the property,[120] provided the possession is neither *prima facie* proscribed nor is the title proved against such possession.[121] A defective title is good against all, but the true owner who asserts proprietorship of such property *via* evidence[122] as such presumption is always rebuttable.[123] In the suit of *GM Bangladesh Railway v Sharifjan Bibi*[124] the rebuttable presumption of the RS record was cast aside on the submission of a copy of an official gazette published in 1933 and the land's plan, which was older than thirty years. Likewise, official gazettes, a duly registered instrument, endorse the same pre-emptive presumption.[125] Essentially, registration is a certification that raises the presumption of its correctness as provided by section 79 of the Evidence Act.[126] Permissive presumption admits complete discretion to the Court to decide whether a party should be allowed such favour[127] unless witnesses are available, whereby again the Court may discretionarily elect not to embrace such presumption.[128]

3.5.2.2. Cases of Criminal Jurisdiction

A presumption of fact alludes to the extensive discretion of the Court.[129] When a rule of law and prudence hits the highway of divergence, circumstantial evidence comes in handy. *Rashed Kabir v State*[130] addressed the contra-

109 Abul Kaher Shahin v Emran Rashid [2020] 25 BLC 115 (AD).
110 *Reliable Jute Traders v Sonali Bank* [2002] 7 BLC 16 (HCD).
111 *Shamsul Haque v Sarafat Ali* [1994] 46 DLR 57 (HCD).
112 *Reliable Jute Traders v Sonali Bank* [2002] 7 BLC 16 (HCD).
113 *Hari Rani Basak v Govt of Bangladesh* [2008] 13 BLC 1 (HCD).
114 *Divisional Estate Officer, Bangladesh Railway v Jashimuddin* [2019] 24 BLC 36 (AD).
115 *Nurul Islam v Jamila Khatun* [2001] 53 DLR 45 (AD).
116 [1998] 3 MLR 18 (HCD).
117 Field (n97) 4769.
118 *Shadharan Bima Corporation v First Court of Settlement* [2008] 13 MLR 241 (AD).
119 *Amena Khatun v Chairman, Court of Settlement* [2011] 63 DLR 1 (AD).
120 *Abul Hossain v Amjad Hossain* [2010] 62 DLR 436 (AD.
121 *Gouri Das v ABM Hasan Kabir* [2003] 55 DLR 52 (AD).
122 *Abul Hossain v Amjad Hossain* [2010] 62 DLR 436 (AD).
123 *Abani Mohan Sana v Assistant Custodian (SDO) Vested Property* [1987] 39 DLR 223 (AD).
124 [1991] 43 DLR 112 (AD).
125 *Aslam Khan v Haji Abdur Rahim* [2007] 12 MLR 149 (AD).
126 *Rupali Bank v Shawkat Ara Salauddin* [2004] 24 BCR 315 (AD).
127 Monir (n94) 54.
128 *Abani Mohan Sana v Assistant Custodian (SDO) Vested Property* [1987] 39 DLR 223 (AD).
129 Monir (n95) 377.
130 [2017] 22 BLC 345 (AD).

dicting views between the principles relating to an accomplice provided in Section 133 and Illustration (b) of Section 114. Therein, the Court insisted on corroboration of such insofar as it incriminated the accused. Generally, a confession recorded by a competent Magistrate possesses quasi-judicial characteristics and comes attached with the presumption of its genuineness, professed voluntarily without coercion.[131] However, in the case of an accomplice, it comes with the tendency to be tainted. Hence, materializing the necessity of corroboration. A presumption exists only on evidence produced as a record in a judicial proceeding. The significance of that statement can be seen in the case of *Hossain alias Foran Miah v State*.[132] Therein, the statement recorded and the medical reports marked as exhibits were not done according to law, which renders it unadmitted, whereby presumption ceased to exist. On the subject of cessation of presumption, suppressing material evidence or witness evolves adverse presumption, i.e., presumption turns its table towards the opposition.[133] *Exempli gratia*, the unexplained non-production of a witness,[134] exclusion of a material witness,[135] etcetera raises the adverse presumption against the prosecution. However, not every charge sheeted witness is material, and the non-production of any such witness does not lead to an adverse presumption against the prosecution.[136] Material witnesses are those who have experienced the event first-hand. Inferring from such, every eyewitness is a material witness. Non-examination of a few witnesses named in the charge sheet who are not eyewitnesses does neither fulfil the criteria of a material witness nor does the non-examination of such witness suffer at the expense of negative presumption.[137] Documents are material evidence, especially the ones certified or official records; such document walks hand in hand with the presumption of its authenticity.[138]

3.6. Discretion: Civil Jurisdiction

In this section, discretionary power provided by various civil statutes, such as the Specific Relief Act of 1877 and the Code of Civil Procedure 1908, etcetera empowering various civil judges, is extensively discussed. *Tayeeb (Md) v Government of the People's Republic of Bangladesh*[139] reconfirmed that the Superior Court's jurisdictions provided under the sacred sanctity of the Constitution must never be thwarted by rules. The *suo moto* rule exists as a mode of reassurance of law safeguarding the interest of the helpless.

3.6.1. Discretionary Inherent Power

Commonwealth courts in Bangladesh have been exercising inherent jurisdictions long before the codification of the procedural laws. Inherent jurisdiction is complementary to the rest of the procedural laws[140] based on its characteristic vastness, residuum nature and not controlled by any other provision.[141] Such immensity of power is tempting. Isn't it? However, the language used in the provision often presents inherent power as unfettered,[142] which is figuratively true, but prudence speaks otherwise. *MH Ali v J Abedin*[143] provides that the inherent power is not an absolute discretion or a blank cheque for the Court to fill according to its whims. The denomination of inherent power is inherent within the essence of *ex debito justiti-*

131 *Babul v State* [1990] 42 DLR 186 (AD).
132 [2004] 24 BCR 64 (AD).
133 *State v Mukul alias Swapon* [2008] 13 MLR 246 (AD).
134 *State represented by Deputy Commissioner v Md Palash* [2015] 20 BLC 348 (AD).
135 *Zahirul Islam v State* [2015] 20 BLC 129 (AD).
136 *Rakhal Chandra Dey v State* [2002] 7 BLC 84 (AD).
137 *State v Ful Mia* [2000] 5 BLC 41 (AD).
138 *Moudad Ahmed v State* [2019] 71 DLR 25 (AD).
139 [2019] 67 DLR 57 (AD).
140 S Saipreethi and V Udayavani, 'A General Study on Inherent Powers of Courts under Civil Procedure Code' (2018) 120 International Journal of Pure and Applied Mathematics 2529.
141 *Robi Axiata Ltd v First Labour Court* [2016] 21 BLC 218 (AD).
142 *DPEO v Joynal Abedin* [1988] 8 BCR 151 (HCD).
143 *MH Ali v J Abedin* [1985] 5 BCR 259 (AD).

ae,[144] i.e., the absolute necessity for the ends of justice or to prevent abuse of power (MH Ali v J Abedin, 1985). To simplify, the Court's inherent power erases the boundaries. It empowers the Court to pass any order at its discretion to secure justice[145] and enhances confidence in the justice system. The intention behind conferring such jurisdiction is apparent in the impossibility of the legislature to even fathom contemplating all surroundings which may emerge in future litigations,[146] and time has been evidence of it. Undoubtedly inherent powers are vast, and within its vastness, it must display due cognizance to the express provisions of law[147] while aiming at the ends of justice,[148] applying its judicial mind and being satisfied on the facts and circumstances of each individual ease.[149] Alluding to the expression' ends of justice,' contextually, it literally means to disregard the established principles and norms of law to ensure justice.[150] On the other hand, the term 'disregard' is never synonymous with an arbitrary, fanciful, wrongful exercise of such discretionary jurisdiction.[151] In conclusion, the inherent discretionary jurisdiction is not unfettered. Such must be exercised having due regard to the express provisions of law and principles of equity,[152] as one who seeks equity must do equity and act promptly to secure ends of justice because justice neither knows nor entertains dirty hands or negligence.

144 S Saipreethi and V Udayavani, 'A General Study on Inherent Powers of Courts under Civil Procedure Code' (2018) 120 International Journal of Pure and Applied Mathematics 2529.

145 *Robi Axiata Ltd v First Labour Court* [2016] 21 BLC 218 (AD).

146 S Saipreethi and V Udayavani, 'A General Study on Inherent Powers of Courts under Civil Procedure Code' (2018) 120 International Journal of Pure and Applied Mathematics 2529.

147 *MH Ali v J Abedin* [1985] 5 BCR 259 (AD).

148 *Atiar Rahman v Mahatabuddin* [1998] 40 DLR 496 (HCD).

149 *Zainab Banu v Md Nisar Uddin* [2017] 22 BLC 442 (AD).

150 *BD Shilpa Bank v Bangladesh Hotels* [1988] 38 DLR 70 (AD).

151 *Ishaque Hosain Ch. v Shamsun Nessa Begum*, [1988] BCR 199 (HCD).

152 *DPEO v Joynal Abedin* [1988] 8 BCR 151 (HCD).

3.6.2. Amending Discretion

3.6.2.1. Discretion to Amend Time

In *Idris Shaikh v Jilamon Bewa*,[153] the Court reserved the discretionary jurisdiction for extending time even in cases where the decree limits time for execution. Discretion relating to the enlargement of time contemplated under section 148 of the Civil Procedure Code, 1908, extends to proceedings in all suits, excluding the suits wherein time is statutorily demarcated.[154] The discretion and the scope of the relevant provision are minimal as it cannot materially affect the decree.[155]

3.6.2.2. Discretion to Rectify

Vide the provisions of Section 152 of the Civil Procedure Code, 1908; the court is allowed to rectify its errors[156] of clerical or mathematical nature[157] surfacing from accidental slip or omission.[158] The said provision is the legislative acknowledgement of the court's inherent power.[159] However, amendments of substantial nature are discouraged.[160] Additionally, a judgement cannot be altered or affected with any addition after a judgement has been approved by attaching the presiding court's signature.[161] In *Ismailullah v Sukumar Chandra Das*,[162] the adjudged property was excluded from the category of the suit land, which according to the Apex Court, can be revised under section 152 while upholding the preliminary decree, and there exists no limitation of time relating to such amendment.

153 [1998] 50 DLR 161 (AD).

154 *Abdul Aziz v Tafazzal Hossain* [1998] 50 DLR 487 (HCD).

155 *Bangladesh v Luxmi Bibi* [1994] 46 DLR 158 (AD).

156 *Siddiqur Rahman (Md) v Profulla Bala Devi* [1998] 50 DLR 213 (AD).

157 *Abdul Motaleb and others v Shahed Ali* [1995] 47 DLR 9 (AD).

158 *Bodrul Ahsan v Janata Bank Ltd* [2017] 22 BLC 597 (HCD).

159 *Siddiqur Rahman (Md) v Profulla Bala Devi* [1998] 50 DLR 213 (AD).

160 *Abdul Motaleb and others v Shahed Ali* [1995] 47 DLR 9 (AD).

161 *Bodrul Ahsan v Janata Bank Ltd* [2017] 22 BLC 597 (HCD).

162 [1986] 38 DLR 125 (AD).

3.6.3. Discretionary Transfer of Suits

'Justice must not only be done, but it must also appear to be done'[163] is an established principle within the legal realm of Bangladesh. Keeping such in view, section 24 of the Civil Procedure Code, 1908 provides extensive discretion on the District Judge in matters relating to transfer and withdrawal of suits, appeals and other proceedings[164] available only to occasion ends of justice.[165] Further, it is inarguable that ends of justice can only be secured when discretion under the provision of section 24 is exercised judiciously, having applied judicial mind for the common convenience of both parties of the litigation.[166] For the sake of justice, the guidelines relating to transfer in *Md. Jamal Hossain v Md Mazid*[167] comes as an aid, viz.

- *The litigant reasonably apprehends that justice shall be forsaken in the Court wherein the suit is pending:*

Apprehension contemplated within the purview of this section must be justifiable, reasonable, and genuine, supported by specific concrete grounds.[168] In *Kashem Khan (Md) v Md Shamsul Hoque Bhuiyan*,[169] the submission of apprehension was that the defendant was seen to have entered the chamber of the Assistant Judge, which raised suspicion of receiving an unfair trial. Such grounds are invalid to invoke the provisions of transfer.

- Prevent multiplicity of proceedings or clashing decisions:

In *Integrated Services Ltd v Khaleda Rahman*,[170] the petitioners fraudulently secured an order of ad-interim injunction by suppressing the information of *lis pendens* of an earlier suit hence violating the clean hand requirement of equity. The Apex Court declared the order of injunction void and found the withdrawal of the first suit and its transfer for trial proper.

- The presiding judge is prejudiced towards one party and interested in the other:

In prudence, every presiding judge should maintain an impartial view while conducting the litigation and become *funtus officio* immediately after passing the decree.[171] However, in the event of an allegation of compromised impartiality, the onus lies on the applicant to show such prejudice to attain discretionary transfer of suit. Allegations of omission to record evidence in *Sirajul Islam Shikder (Md) v Suruj Miah*[172] were found immaterial and unreasonable. The allegation of bias must be real and cannot be based on mere assumptions, better understood *vide* the suit of *Shahida Khatun v Abdul Malek Howlader and others*,[173] therein the groundless allegation was that the party in opposition being a District Judge was presumed to be favoured.

Common questions of law and fact arise between the parties in two or more suits, i.e., where a joinder of suits is possible.

- Balance of ease between both parties:

It is evident from the title itself that the transfer must be convenient for both concerned litigants,[174] e.g., the money suit of *Shah Sekandar Molla v New Sagurnal Tea Co*[175] was *suo moto* transferred for trial alongside another money suit for the ease of both parties.

- Wherein the cause of action is the same in two different suits instituted in two different courts:

Bijoy Kumar Basak v Narendra Nath Datta[176] held that *suo moto* transfer of a suit is administrative, discretionary, and exercised in the interest of justice. In the aforenamed suit, the

163 *Haji Md. Elias v Mrs Suraya Rahman* [1981] 1 BCR 49 (HCD).
164 *Nasiruddin v Md Mozammel Hossain* [2011] 63 DLR 303 (HCD).
165 *Md. Jamal Hossain v Md Mazid* [2006] 11 MLR 409 (HCD).
166 *Sadrul Amin Budhu (Md) v Asaduzzaman* [1999] 4 BLC 340 (HCD).
167 [2006] 11 MLR 409 (HCD).
168 *Standard Chartered Bank v Farook Paints and Varnish Manufacturing Company Ltd* [2005] 10 BLC 414 (HCD).
169 [2005] 10 BLC 392 (HCD).
170 [2000] 5 BLC 69 (AD).
171 *Enamul Haque v Md. Ekramul Haque* [2011] 16 BLC 263 (HCD).
172 [2007] 12 BLC 299 (HCD).
173 [1998] 50 DLR 147 (AD).
174 *Tambia Khatun v Abdul Rouf Sowdagar* [1994] 46 DLR 521 (HCD).
175 [2011] 16 BLC 96 (AD).
176 [1991] 43 DLR 68 (HCD).

two suits instituted in two different courts were transferred collectively for trial analogously; hence complications of proceedings could be avoided.

- Avert the suit from being delayed and cutting redundant expenses:

The Apex Court in *Jamal Hossain (Md) v Md Mazid* [177] found that the transfer of the suit inflicts immense trouble and heavy expenditure on both parties; hence rejected such prayer exercising discretion.

- *Wherein the suit involves a significant question of law or a substantial Public Interest Litigation:*

Justice should not only be done, but it should appear to have been done.[178] In *Sree Satya Narayan Misra v Shamsuzzoha* (1984),[179] the learned Additional District Judge was the trial court and also the presiding appellate Court in the same suit. Hence, the case was remanded to be heard for appeal by another judicial authority other than the alleged Additional District Judge.

- Deter the misapplication of the process of Court:

Zahir Sheikh v Md Yakub Ali (1991)[180] established that a Court is competent to try a suit relating to an immovable property beyond its territorial jurisdiction, provided a competent authority transfers such a suit. A *suo moto* order of transfer of suit must be notified to the other party and allowed the opportunity of being heard of its objections.[181] Every unobjected transfer of a suit is judicially presumed to have eliminated all grounds of apprehension.[182] Such does not amount to an abuse of the process of the Court.

177 [2007] 12 BLC 452 (HCD).

178 *Haji Md. Elias v Mrs. Suraya Rahman* [1981] 1 BCR 49 (HCD).

179 [1984] 4 BCR 398 (AD).

180 [1991] 43 DLR 168 (HCD).

181 *Mathura Mohan Pandit being dead his heir Sudhir Chandra Das v Hazera Khatun* [1998] 48 DLR 190 (HCD).

182 *Saroj Kumar Sarker v Monoj Kumar Sarker* [2009] 14 BLC 40 (HCD).

3.6.4. Discretionary Specific Reliefs & Exceptions

This study itself is solemn evidence that equity is the GPS[183] directing the pathway of discretion.[184] Principles of equity, like coming to the Court with a clean slate,[185] the conduct of the parties, circumstances of execution,[186] etcetera govern discretion. Equity also anticipates the plaintiff's willingness to perform the share of affairs.[187] The Specific Relief Act (1877) has explicitly defined every relief under the statute as discretionary. Given that discretion is endowed with characteristic broad jurisdiction, such vast powers cannot be constricted to a prescribed set of rules when it comes to granting a discretionary specific relief.[188] However, refusal of such relief is constrained to the provisions of Section 22 of the aforementioned statute.[189] Having mentioned that contracts are usually regarded as the foundation of all civil aspects, e.g., paperwork related to establishing a business facility is an implied contract between the government and the institution: the grounds being the facility furnishes the government with the imposed taxes, and in return, the business facility is permitted to sale its commodities, the sale of both movable and immovable property is a contract, marriage according to the Muslim traditions is a contract of civil union, etcetera. Therefore, civil reliefs revolve around the centerpiece of the contract in the form of specific performance, including assertive or preventive remedies like reinstating possession of forceful dispossession of immovable proper-

183 *Amir Hossain Sowdagar v Harunur Rashid* [2013] 65 DLR 130 (AD).

184 *Mosammat Kamrun Nessa v Abul Kashem* [1997] 2 MLR 220 (AD). 3 BLC 218 (AD).

185 *Chairman, RAJUK v Manzur Ahmed* [2016] 68 DLR 337 (AD).

186 *Kazi Rafiqul Islam v Md Anwar Hossain Advocate* [2020] 25 BLC 150 (AD).

187 *Amir Hossain Sowdagar v Harunur Rashid* [2013] 65 DLR 130 (AD).

188 *Mosammat Rohima Khatoon v Md. Abdur Rashid & the Govt of Bangladesh* [2013] 18 MLR 449 (HCD).

189 *Jahangir Alam Sarkar v Dr. Motaleb* [2006] 11 MLR 273 (HCD). 11 BLC 391 (HCD).

ty, an injunction to maintain the *status quo* of immovable property, etcetera., respectively.[190] A contract appropriately executed have inviolability of its own[191] and by virtue raises the presumption of the crucial elements of a contract like genuineness,[192] thereby delivering the Court in a position to execute its discretionary power more independently than its ordinary jurisdictions.[193] From the trend above, it is well settled that the Courts are empowered to exercise broad scope of judicious,[194] non-arbitrary, reasonable, sound discretion, guided by judicial principles[195] in granting specific performance. On the other hand, refusal of such equitable relief is scrutinized at par with the entirety of the provisions of Section 22 of the Specific Relief Act.[196] However, in either of those cases, circumstantial evidence is a prominent source of adjudication.[197] The principles relating to non-granting of specific performance enunciated in *Latifur Rahman v Golam Ahmed Shah*[198] have been reaffirmed in numerous succeeding decisions like *Shah Alam v Abdul Hashem Bepari* (2002).[199] In those spirits, the constraining grounds provided in Section 22 of the Specific Relief Act, 1877 are enlisted hereinbelow:

- Instances wherein the plaintiff attains undue advantage over the defendant;
- Instances whereby the specific performance puts the defendant in a position of unforeseen/unwarranted burden, whereas its non-performance does not affect the plaintiff;
- Instances wherein the plaintiff is inflicted with irreparable loss due to the performance of substantial acts of the contract.

3.6.4.1. Exception: Attainment of Undue Advantage

The discretionary decree of specific performance under the Specific Relief Act 1877 is a revolting one. Based on the fact that there exists no binding clause on the Court to grant such relief just because it is lawful, even in instances whereby the disputed contract is proved, but the prosecution comes to the Court not doing equity but expecting equity.[200] Such equitable relief may be rejected. In *Jahangir Alam Sarkar v Motaleb*,[201] the plaintiff orchestrated unclean hands by premediating to grab the suit property unlawfully. Along with the subsistence of a lawful contract, specific performance stands on the grounds of being denied provided the alleged contract was not duly executed,[202] non-payment of the due consideration,[203] good faith of the plaintiff is non-existent, a third party is disadvantaged,[204] the purpose of the contract was not upheld,[205] the unwillingness of performance of obligations within a justifiable period,[206] laches or delayed enforcement of the infringed rights,[207] etcetera, therefore, failing to attract judicial confidence and belief.[208] Every grant of specific performance must not otherwise fall within the mischief of allowing undue advantage to the plaintiff. In *Jogesh Chandra*

190 Specific Relief Act 1877
191 *Shah Alam (Md.) v Abdul Hashem Bepari* [2003] 8 MLR 81 (HCD).
192 *Mosammat Kamrun Nessa vs. Abul Kashem* [1997] 2 MLR 220 (AD). 3 BLC 218 (AD).
193 *Kazi Fazlus Sobhan v Government of Bangladesh* [2020] 72 DLR 222 (AD).
194 *Jahangir Alam Sarkar v Dr. Motaleb* [2006] 11 MLR 273 (HCD). 11 BLC 391 (HCD).
195 *Latifur Rahman v Golam Ahmed Shah* [1986] 6 BCR 138 (AD).
196 ibid
197 *Abdul Jabbar Sheikh v Md Rafiqul Islam* [2011] 16 BLC 639 (HCD).
198 [1987] 39 DLR 242 (AD).
199 [2002] 54 DLR 550 (HCD).
200 *Tajul Islam v Siraj Miah* [1998] 3 BLC 393 (HCD).
201 [2006] 11 MLR 273 (HCD). 11 BLC 391 (HCD).
202 *Habibur Rahman alias Khorshed (Md) v Sree Brindaban* [2021] 26 BLC 725 (HCD).
203 *Pranay Kumar Malakar v Chowdhury Makhlisur Rahman* [2021] 26 BLC 40 (AD).
204 *Chairman, RAJUK v Khan Mohammad Ameer* [2021] 26 BLC 219 (AD).
205 *Nayeb Ali (Md) v Md Abdus Salam Khan* [2021] 26 BLC 174 (AD).
206 *Abul Boshar (Md) v Minakhi Begum* [2011] 63 DLR 519 (HCD).
207 *Silver Estate Ltd. v Abdul Hakim Mia* [1991] 43 DLR 360 (HCD).
208 *Mosammat Kamrun Nessa vs. Abul Kashem* [1997] 2 MLR 220 (AD). 3 BLC 218 (AD).

Das v Farida Hasan,[209] the plaintiff allowed the defendant to remain in possession of the disputed property and did not attempt to gain possession. Such disengagement to obtain possession could not be reasonably accounted for by the plaintiff, also additionally, the defendant remaining in possession invested and brought about developments to the disputed property. Keeping all those factors in mind, the Court concluded that the plaintiff would be advantaged over the defendant if specific performance is decreed. Equitable standards, hereinabove, must always succeed the 'being reasonable' test, i.e., being proper, fair, unprejudiced, or moderate.[210] To consider a few examples, the consideration money must be reasonably adequate.[211] A third-party purchaser must never be deprived of rights of ownership; the proper course is to decree specific performance; hence the third party does not suffer loss.[212] Furthermore, the significance of the maxim *vigilantibus iura scripta sunt*, i.e., in this context, the necessity of establishing a written contract, cannot be accentuated enough.[213] Keeping in mind that the plea of specific performance of an oral contract encumbers the heavy onus of proof on the prosecuting party.[214] It obliges proof of the legitimacy of such oral contract by consistent evidence.[215] Addressing legitimacy in *Chairman, RAJUK v Manzur Ahmed*,[216] the very instrument of power of attorney failed to appeal to the judicial mind on the equitable grounds that the defendant had passed away at the initial stages of the suit. Legitimacy is a question of *bonafide* claims that fall within the purview of the law. To better understand the above, trespassing is a criminal offense, and trespassers cannot claim the title on an intruding property and is liable to be evicted.[217] Regarding a *bonafide* claim being an equitable relief, the plaintiff usually attains an undue advantage over the defendant when an agreement inclines towards the factor of time as its essence. The mere inclusion of a void clause after the passage of a particular period is not sufficient grounds for denying specific performance.[218]

3.6.4.2. Exception: Unwarranted Burden

Inevitably equity acts *in personam*.[219] The relief of specific performance is a discretionary relief which, therefore, cannot be entertained as a rule based on the proof of the existence of the alleged contract. The Court, at its discretion, can elect to reject specific performance on the grounds of hardship.[220] The ground of hardship in prudence finds its cognoscibility in *ab inconvenienti*. It essentially denotes privation, adversity, or suffering,[221] which is to be considered against the circumstances existing at the time of the contract.[222]

Regarding privation, none should suffer at the expense of another, especially an innocent third party who, in good faith, purchases a property and is inflicted with hardship at the hands of the law.[223] Furthermore, when hardship befalls both parties, the Court applying the doctrines of equity looks to establish balance. For example, in *Yousuf (Md) v Al-Haj MA Wahab*,[224] the submission of the hardship of the defendant was rejected as the defendant would not

209 [1984] 4 BCR 127 (AD).
210 HC Black, *Black's Law Dictionary* (Bryan A Garner, Tiger Jackson and Jeff Newman eds, Ninth, Thomson Reuters 2016) 1379.
211 *Jogesh Chandra Das v Farida Hasan* [1984] 4 BCR 127 (AD).
212 *Ezaher Meah v Shaher Banu* [1997] 49 DLR 85 (AD).
213 Bari (n59) 56.
214 *Akteruzzaman Zakir v Md Enamul Kabir Khokan* [2021] 73 DLR 376 (AD).
215 *Jahangir Alam Sarkar v Dr. Motaleb* [2006] 11 MLR 273 (HCD). 11 BLC 391 (HCD).
216 [2016] 68 DLR 337 (AD).
217 *Nurul Islam v Jamila Khatun* [2001] 53 DLR 45 (AD).
218 *Abdus Sobhan (Md) v Md Ahsanullah* [2016] 21 BLC 268 (AD).
219 CILEx Law School, 'Chapter 2: Equitable Remedies: Specific Performance' (2018) <http://www.cilexlawschool.ac.uk/wp-content/uploads/2018/10/HQ05-Equity-and-Trusts-Sample-2018.pdf>
220 *Moslimuddin Ahmed v Chandra Nath Ghosh* [2001] 6 BLC 139 (AD).
221 Black (n209) 784
222 *Quazi Din Mohammad v Al-haj Arzan* [1995] 47 DLR 48 (AD).
223 *Jahangir Alam Sarkar v Dr. Motaleb* [2006] 11 MLR 273 (HCD). 11 BLC 391 (HCD).
224 [2000] 5 MLR 27 (AD).

become shelter-less and had alternative accommodation available in Dhaka and the contrary for the plaintiff. Sentimental values, such as homelessness, occupy prominent regions of the grounds of hardship.[225] Let's consider the case of *Tahera Khatun v AKM Shafiul Islam and others*,[226] whereby the plea of the hardship of the respondent having no other house in town and the appellant having no house in the country was compared parallel to each other. The Court recognized the significant hardship enveloping the appellant and decreed accordingly.

Furthermore, when hardship affects both sides, the safest guide and the safest approach is to examine the admitted facts and circumstances.[227] On another note, the plea of hardship resting on the argument of the sprouted price of a disputed property[228] or fluctuations of price[229] does not constitute a hardship. Plea of hardship does not always vitiate specific performance.[230] Along with such a plea, the additional grounds of equity, such as clean hands, etcetera., discussed above must be complied with.[231] Desperate times call for desperate measures, and one such despairing situation was the ground for rejecting the specific performance of a buy-sale contract in the case of *Rash Behari Moshalkar v Hiran Bala Debi*.[232] Therein the house of the defendant was listed for sale given the requirement of money for the treatment of one bedridden defendant and the educational expenses for the other defendant's son are satisfied. Such purposes were defeated. The plaintiff firstly falsely claimed payment of the consideration money in its totality hence not coming to the Court with clean hands; secondly, defeated the purpose of the agreement and thirdly, caused hardship on the defendant since the value of money depreciated over time. Moreover, a contract to establish a contract for the sale of land unreasonably burdens the selling party and is illegitimate and unenforceable in law.[233] Courts in Bangladesh discretionarily determine the legitimacy of the unwarranted burden on individual facts of each case. Such determination should not be arbitrary but the opposite, i.e., sound and reasonable, guided by judicial principles.[234]

3.6.5. Discretion in Awarding Interest

Subject to the particular facts and circumstances of individual suits, the Courts are empowered to discretionarily award interest acting judiciously under the shade of judicial principles.[235] Nevertheless, discretion is never unfettered and is extinguishable by statutory provisions.[236] Generally, in civil suits, the award of interest is discretionary as provided by Section 34 of the Code of Civil Procedure 1908, which in the suit of *Chalna Marine Products Ltd v Reliance Insurance Ltd and others* [237] was suspended by the insertion of Section 47B of the Insurance Act, 1938. Such provision prescribed a five percent (5%) higher rate than the prevailing bank rate.

3.6.5.1. Solatium

Courts in Bangladesh have adopted the view to discretionarily award solatium or compensation in cases involving hardships.[238] Whereby the award of solatium is an equitable relief against the non-grant of specific performance.[239] The compensatory award of solatium is the payment in addition to the consideration[240] and, like all

225 *Biplob Chandra Das v Biren Chandra Das* [2000] 52 DLR 586 (HCD).
226 [1997] 2 BLC 311 (HCD).
227 *Latfur Rahman v Golam Ahmed Shah* [1987] 39 DLR 242 (AD).
228 *Hamida Begum Chowdhury v Ahamad Hossain Khan* [1998] 50 DLR 276 (HCD).
229 *Azharul Islam v Md Idris Ali* [1987] 39 DLR 342 (HCD).
230 *Yousuf (Md) v MA Wahab* [2001] 6 BLC 99 (AD).
231 *Jalaluddin Miah v Md Younus* [1982] 2 BCR 277 (HCD).
232 [1984] 4 BCR 193 (AD).
233 *Durgarani Sarkar v United Bank of India* [1991] 43 DLR 121 (HCD).
234 *Latfur Rahman v Golam Ahmed Shah* [1986] 6 BCR 138 (AD).
235 *Agrani Bank v Orbit Enterprise Ltd* [2009] 61 DLR 710 (HCD).
236 *Bangladesh General Insurance Co Ltd v Chalna Marine Products Co Ltd* [1999] 51 DLR 357 (HCD).
237 [1998] 50 DLR 100 (AD).
238 *Dewan Abul Abbas v Muna Haque* [2005] 57 DLR 310 (HCD).
239 *Moslimuddin Ahmed v Chandra Nath Ghosh* [2001] 6 BLC 139 (AD).
240 *Md. Jaker Ali v Abdur Rashid* [19844] BCR 68 (AD).

discretionary processes, considers equitable aspects such as the award amount must be reasonable.[241] For example, *Abdus Sobhan v Md Ahsanullah*[242] held that solatium paid only considering the property's current market value defeats the principles of *ab inconvenienti* or the purpose of denying specific performance on the grounds of hardship as hardship can be nonfinancial. Furthermore, solatium is usually not denied because considerable time has elapsed from the execution of the contract to decree as price elevation due to elapsed time is a considered factor in calculating the solatium award.[243] However, the elevation of price is not a proper ground for hardship.[244] In *Tobarak Ullah v Rani Gupta* (1990),[245] the Apex Court increased the amount of solatium awarded by the High Court from Tk. 10,000 to Tk. 30,000 in total based on similar grounds as hereinabove.

3.7. Discretion: Criminal Jurisdiction

The criminal statutes in Bangladesh embrace the doctrine of an 'act done in good faith.' Principally, the concept allows vast discretion and interpretation. Section 54 of the Penal Code, 1860 concerns due care and attention to every act claimed *bonafide* or done in good faith. The magnitude of care and attention is directly proportional to the degree of danger, i.e., the greater the peril, the greater the caution.[246] Moreover, the court's inherent power is no stranger to the criminal procedure, and the court(s) does not shy away from exercising discretion to secure the ends of justice. This section discusses a few instances whereby the court(s) discretionary resolves a matter.

241 *Sheikh Salimuddin v Ataur Rahman* [1990] 10 BCR 262 (HCD).

242 [2009] 21 BLC 268 (AD).

243 *Mosammat Rohima Khatoon v Md. Abdur Rashid & the Govt of Bangladesh* [2013] 18 MLR 449 (HCD).

244 *Ram Chandra Das v Md. Khalilur Rahman* [1984] 4 BCR 364 (AD).

245 [1991] 43 DLR 100 (AD). 10 BCR 438 (AD).

246 Lutful Kabir, Lectures on the Penal Code: With Leading Cases (Arfatul Rakib ed, 10th., Ain Prokashan 2019) 47 47–49.

3.7.1. Discretion to Grant Bail

Conventionally, the term 'bail' denotes the temporary release of an arrestee. Such release demands assured attendance on a specific date, time, and at a particular place[247] and is a subject of judicial discretion guided by Constitutional and Statutory provisions.[248] Discretion related to bail is exercisable only for offenses prescribed 'non-bailable'[249] while having due judicial consideration of the circumstances of each individual case.[250] *Captain (Rtd.) Nurul Huda v State*[251] established that when exercising discretionary jurisdiction relating to bail for a non-bailable offense punishable with death or life imprisonment must not be proceeded on the presumption that it must be refused in all cases. Simply the heinousness of the offense is not sufficient for refusing bail without appreciating the materials on record.[252] Expanding on that thought, bail for offenses designated 'bailable' is granted as a matter of right,[253] and the Court has no discretionary power to refuse such statutory right.

Furthermore, granting bail as a matter of right for a non-bailable receives conflictive views. The High Court Division views it as a matter of concession.[254] However, such views can be overlooked *vide* the Apex Court decision of *Begum Khaleda Zia v State*.[255] Therein, procedural incompetence such as unfinished investigation,[256] inordinate

247 *State v Abdul Wahab Shah Chowdhury* [1999] 4 BLC 195 (AD).

248 Richard Spindle, 'Judicial Discretion in Common Law Courts' (1947) 4 Washington and Lee Law Review 143 <https://scholarlycommons.law.wlu.edu/wlulr/vol4/iss2/3/> [Last seen: 5.09.2022].

249 *State v Ariful Islam* [2011] 16 MLR 47 (AD).

250 *Captain (Rtd.) Nurul Huda v The State*, [2005] 25 BCR 66 (AD).

251 ibid.

252 *State v Ariful Islam* [2011] 16 MLR 47 (AD).

253 Rashmi Goyal and others, 'Judicial Discretion' (2022) 2 Uttarakhand Judicial & Legal Review 58 <https://ujala.uk.gov.in/files/Ch8.pdf> [Last seen: 5.09.2022].

254 *Khairuzzaman (M) (Major Retd) v State* [1999] 4 MLR 75 (HCD).

255 [2020] 72 DLR 80 (AD).

256 *State v Ariful Islam* [2011] 16 MLR 47 (AD).

delay in conducting the hearing of the case,[257] etcetera confers bail in a non-bailable offense as a matter of right. On revisiting the very definition of bail, along with the condition of secured attendance or non-abscission.[258] The granting of bail also demands non-interference with the investigation process, non-tampering of evidence, aversion from further committing any punishable offense,[259] elude recommissioning of the original offense,[260] etcetera. On similar standards, the High Court Division is endowed with broad discretionary jurisdiction to grant bail in cases relating to non-bailable offenses;[261] such broad discretion must, as a requirement, satisfy reason and logic while appreciating the evidence on record[262] and direction of law. Such judicious application of discretion is usually not impeded but for the interest of justice,[263] *exempli gratia* the enlarging of an accused on anticipatory bail for an indefinite time.[264] Within the circumference of comprehensive discretionary power exists sanctions for granting bail discretionarily for nonbailable offenses with prescribed short sentences.[265] Exercising such broad scope, the court(s) discretionarily grant bail in a non-bailable offense to establish a coherent equilibrium between characteristic traditional offenses and communal interest and divergent rights of individual freedom.[266] Assuming that varied faces of offense are on the rise, the Court(s) must adopt additional caution, judiciousness, and careful implementation of discretion with defined ground rules to prevent erroneous decisions or avoid the miscarriage of justice. Every miscarriage is pejorative to the mainstream interest of society.[267]

3.7.2. Discretion in Awarding Sentence

In re awarding sentences, the penal provision in Bangladesh authorizes judges to apply discretion based on observations of the facts and circumstances of individual cases. To clarify, injuries inflicted by a sharp cutting weapon are usually grievous in nature; however, the severity of the offense is also to be measured by the inflicted body part, i.e., a sentence for a grievous hurt of the eye and that of the finger caused by the same weapon should not be the same.[268] *Moreover, the penal laws extend the scope of discretion by providing multiple sentencing choices using the word 'or.' Considering the example of grievous hurt above, section 326 allows the presiding judge to award life imprisonment or imprisonment not exceeding ten years with fine.*[269] *The higher judicial body recognized the task of discretionarily awarding sentences as a 'difficult assignment.'*[270] *In an effort to resolve the difficulty, Bushway & Forst proposed the notion of optimal sentence whereby the awarded sentence shall just be appropriate to accomplish its preferred outcome.*[271] *Such optimum sentence can be awarded by the balance of aggregate between the magnitude of the offense and the mitigating circumstances surrounding the offense*[272] *within the legislative proposition and expectation of the society at large, as justice must not only be done, but it must also appear to have been done.*[273] *Mitigating factors such as private de-*

257 *Captain (Rtd.) Nurul Huda v The State*, [2005] 25 BCR 66 (AD). *Begum Khaleda Zia v State* [2020] 72 DLR 80 (AD).

258 *State v Abdul Wahab Shah Chowdhury* [1999] 4 BLC 195 (AD). *Khairuzzaman (M) (Major Retd) v State* [1999] 4 MLR 75 (HCD).

259 *Hasina Akhtar v Md Raihan & another* [2014] 66 DLR 298 (HCD).

260 Rashmi Goyal and others, 'Judicial Discretion' (2022) 2 Uttarakhand Judicial & Legal Review 58 <https://ujala.uk.gov.in/files/Ch8.pdf> [Last seen: 5.09.2022].

261 *Bachu Sheikh v State* [1999] 4 MLR 111 (HCD).

262 *State v Syduzzaman Faruq* [2011] 16 MLR 115 (AD).

263 *State v Ariful Islam* [2011] 16 MLR 47 (AD).

264 *State v Professor Dr. Morshed Hasan Khan* [2019] 71 DLR 364 (AD).

265 *Dhanu Mia v State* [1991] 43 DLR 119 (AD). *Saimuddin v State* [1991] 43 DLR 151 (AD).

266 Rashmi Goyal and others, 'Judicial Discretion' (2022) 2 Uttarakhand Judicial & Legal Review 58 <https://ujala.uk.gov.in/files/Ch8.pdf> [Last seen: 5.09.2022].

267 *State v Arman* [2015] 67 DLR 181 (AD).

268 *BLAST v Bangladesh* [2015] 1 SCOB 1 (AD).

269 Penal Code 1860

270 *State v Mofiz Miah* [2021] 73 DLR 502 (HCD).

271 Shawn D Bushway and Brian Forst, 'Studying Discretion in the Processes That Generate Criminal Justice Sanctions' (2013) 30 Justice Quarterly 199.

272 *State v Mofiz Miah* [2021] 73 DLR 502 (HCD).

273 Syed Menhazul Bari, 'The Legal Aspect of Rape: A Review of the 2020 Amendment of Nari O Shishu Ain (Act No VIII of 2000)' (2022) 4 Asian Journal of Social

fence, the plea of instigation, etc., are substantial compelling reasons which allow judges to travel the distance outside the sentencing guidelines.[274] *While on the topic of sentencing guidelines, law academics in the United States professed the necessity of definitive sentencing based on its wide disparity. Hence came about the sentence reformation, which broadly focused on restricting judicial discretion.*[275] *Inconsistency of sentencing*[276] *is very consistent and compliant given the fact that the story behind every case is different, the offense is perpetrated differently, and the parties of the case are different humans.*

4. CONCLUSION

The doughnut theory perfectly demonstrates that discretion exists as a method of reassuring the general mass that equitable relief exists when the road of law appears to have come to an unprecedented end. The rule especially assures the socially considered helpless class of citizens that the hands of justice extend beyond view and that their interests are preserved. The above finds its roots in the combined principles of *ex debito justitiae* and *ab inconvenenti*. Therein, the Court's discretionary power is exercised to satisfy the ends of justice. Moreover, the truth of *optima lex quae minimum relinquit arbitrio judicis* and *optimus judex qui minimum sibi* must always be noticed as unsupervised discretionary jurisdiction is volatile and can be detrimental to law and order of any state. Phrases such as the Court thinks fit, the Court may *suo moto*, as the Court directs, as the Court deems proper, etcetera, empower the Court to apply discretion.

Furthermore, the vital aspect of any legal proceeding, i.e., evidence and witness, are admitted discretionarily by the Court. The Courts are permitted to presume any fact by exercising their discretion within the provisions provided by the Evidence Act. Every specific relief is an act of discretion, and the Court's discretion directs many procedural aspects of a trial. The above causes one to put on the thinking hat and analyse the predicament in the context of the statement by Anizman Philip, as truly discretion begins at the dawn of law and can inflict justice and injustice. Every occasion where injustice prevails due to discriminatory discretionary power must be considered a slap on the face of justice. The secondary type of discretionary power, i.e., supervised/ controlled/ monitored/ limited by rules and principles, whereby criticism of its correctness is allowed prevails within commonwealth Bangladesh. Such comforts the heart, knowing that the opportunity to inflict injustice is kerbed at least in black and white.

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Conflict of interest between the author(s) in all matters relating to this article is non-existent.

Sciences and Legal Studies 58.

274 JV Roberts, 'Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales' (2011) 51 British Journal of Criminology 997.

275 Shawn D Bushway, Emily G Owens and Anne Morrison Piehl, 'Sentencing Guidelines and Judicial Discretion: Quasi-Experimental Evidence from Human Calculation Errors' (2012) 9 Journal of Empirical Legal Studies 291.

276 Rebecca Sklar, 'Executing Equity: The Broad Judicial Discretion to Stay the Execution of Death Sentences' (2012) 40 Hofstra Law Review <https://scholarlycommons.law.hofstra.edu/hlr/vol40/iss3/7> [Last seen: 18.09.2022].

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BLOOD FEUD – TRADITIONS OF RECONCILIATION IN SOUTH WEST GEORGIA

Otar Gogolishvili

Ph.D, Professor of Batumi Shota Rustaveli State University, Georgia

ABSTRACT

In the customary law of southwestern Georgia, first of all, the criminal law draws attention, which contains very riveting traditions. Firstly, criminal law reflected customs and folk forms of punishment related to vengeance, particularly the reconciliation of enemies. In the second half of the 19th century, the common Georgian customary law operating in Samtskhe and Adjara preserved several signs of customary norms in the sphere of hostility. The functioning of customary law, in turn, was determined by the existence of this type of communal category - the avenge rule and composition system. Because the legal norms of the avenge and composition system corresponded to the customs, thus it contained the noteworthy aspects of the old social relationship.

KEYWORDS: Reconciliation, Mediators, Alliance, Mediation court, Fraternity, Foster-father

INTRODUCTION

The custom of avenging was characteristic of almost all peoples of the world. Vendetta[1] existed in the consciousness of the people who created the states. In addition to the peoples of the Caucasus, including the mountain people of Georgia, it was typical among many peoples of the world, especially among the Greeks and Germans. The tradition of blood revenge had no less place in the legal life of primitive societies. For example, among Australians, if the husband refused to take revenge, his wife would divorce him. Its origin was related to the distant past - the early stages of human history. In particular, most scientists believe that the method of avenge originated in the pre-industrial, primitive-tribal era. It continued to exist in oligarchic - socially divided societies. Thus, the rule of avenge, which has functioned even in a heterogeneous - oligarchic society since ancient times, was reflected in the collections of laws of the world people, including Georgian legal monuments.

In the conditions of Georgian statehood and socially differentiated society, the rule of avenge got a clearly expressed class nature, i.e., In Georgian feudal law, social status was taken into account, and the price of blood was accordingly determined[2]. The existence of the custom among Georgian mountaineers, in particular, among Mtiuls, is confirmed by the "judgment" document. In the conditions of statehood, the habit of blood revenge appeared in the traditional peripheries at a time when political governing cells and, consequently, legal institutions were weakening. However, over time and in the process of epochal changes, this custom was forgotten, but in peculiar circumstances, it appeared in a modernised form.

In the customary law of southwestern Georgia, first of all, the criminal law draws attention, which contains very riveting traditions. Firstly, criminal law reflected customs and folk forms of punishment related to vengeance, particularly the reconciliation of enemies. In the second half of the 19th century, the common Georgian customary law operating in Samtskhe and Adjara preserved several signs of consuetudinary norms in a field of hostility[3]. The functioning of customary law, in turn, was determined by the existence of this type of communal category - the blood revenge rule and composition system. Because the legal norms of the blood revenge and composition system corresponded to the customs, thus it contained the noteworthy aspects of the old social relationship.

MATCHING TERMS FOR COMPOSITION IN ADJARA

In Adjara, the corresponding term for composition was “Darigeba” – Edification, Exhortation. That was named the reconciliation of hostile families, kinship groups, and clans. They had older, distinguished, and authoritative persons in the blood-related union. While resolving disputed issues, they did not receive material benefits, but they were observing and interested in the daily life of the relatives themselves. Authoritative elders acted as defenders of the lineage and tried to prevent blood relatives from being unjustly oppressed by a representative of another family. Such persons behaved as conciliators, and with the heads of villages and other clans, they also appeared as mediators. Distinguished persons were called "respected men" and "leading men" in some places. These peculiar elders determined not only the matters of reconciliation of the sworn but issues of mandatory revenge too. In Adjara, at the time of vengeance, atonement and composition had sufficiently established form. To reconcile the sworn parties - several elders of the clan or village, three or five men were allocated, among whom the most influential person was responsible for solving all the issues raised

1 In socio-cultural anthropology and ethnology, blood revenge – vendetta was revenge for murder, resentment or material loss.

2 Dolidze, I., (1953). Old Georgian Law. Tbilisi. 5.

3 Mgeladze, V., (1973). Zemo Adjarian village in ancient times. Batumi. 41-61.

in the reconciliation process[4]. According to the legal monuments, in ancient Samtskhe-Saatabago, mediators appeared as conciliators of disputing parties. The court of negotiators was the same as the court of mediators. There was a court of elders in Khevsureti - "Khevsuruli Rjuli", and its representatives were called Mebtcheni – Btcheebi (Arbiters)[5].

In the conditions of kindred, the duties assigned by custom were carried out by the heads of the family and the clan, and not by the elders of the governing body of the community, because avenge or reconciling - the composition was a legal event of a personal-legal nature and it only expressed the competence of the opposing parties. However, in the case of hereditary feud in generations, when the avenge continued permanently, when it threatened the functioning of the community as a single social organism, then, naturally, the community relied on its rights, and the problem was discussed in the deliberative body of the community. Therefore, the mediators were chosen by a general resolution of the community. In such a situation, the powers of conciliators were presented in a sufficiently expanded form. Both sides had to obey the decision of the heads of the village and community, in which the oldest members of the kinship groups - "Nogros" could also participate. In case of an objection from any of the parties, they used to end the case regardless of the will of that parties. If the sworn enemy did not agree to reconciliation, then the conciliators would forcefully put a tie around the neck of the murderer or his relative - father and brother and take him to the house of the murdered person without the permission of the victim and his relatives.

As we can see, in Adjara, when it came to murder, due to the complexity of the reconciliation process, both sides were involved in it. At the beginning of the reconciliation process, the sufferer's family members did not directly participate, and the guilty party usually asked the victim's friend or, in the conditions of the Muslim society, the godfather of the family - Kirva to intercede with the victim. The envoy's desire was informed to the elder of the kinship group - Nogro, the leading man. In the next step of the reconciliation process, several people from both sides participated. At this stage, depending on the family name and the complexity of the problem, it was permissible to choose three to five elders from the village and, in general, the community for reconciliation. That is why it is assumed that since the reconciliation itself was a heavy process and with the consent of both parties, one of the conciliators was appointed as the leader, which should have been the head of the affected village or the related group - Nogro, based on the fact that the final result greatly depended on his authority and eloquence.

Customary law recognised different types of murder and, appropriately, in the composition-exhortation process, it distinguished intentional and negligent murders from each other. In addition, Georgian customary law distinguished the forms of murder from each other. The outcome of reconciliation depended a lot on the type of murder. That was also the case in Adjara, where there was a distinction between intentional killing and careless killing. The participation of a hired killer was also significant in the proceedings. There were cases when the aggrieved party could not take revenge on the aggressor for some reason, so they would take the appropriate kind and amount of expenses and fulfil the plan through a hired assassin. Under similar conditions, it was permissible to reconcile with the customer, but the hostility with the direct executor continued eternally. Several kinds of reconciliation and blood atonement were distinguished: 1. Negligence - Keza, 2. Kill Accidentally - when the killer would have killed another instead of one; 3. Imposition of blood on one family name; 4. Premeditated murder - when the killer committed a premeditated murder or the victim was seriously injured but did

4 Shamiladze, V., (1961). About one of the remnants of the tribal community. Journal "Literaturuli Adjara", N5, 83.

5 Kharadze, R., (1947). Khevsuri law (blood-hostility). I, Tbilisi: Annales. 164-169.

not die; 5—murder for hire - when the Avenger would hire the person to kill the enemy[6].

It is established in the literature that when one particular person was intended to be killed, and another was mistakenly killed, the completed murder and the attempted murder had importance in the reconciliation. It is also interesting here that tradition forbade the avenge in case of murder within a kin group - Nogro, and if the murder still took place - blood would be imposed on the members of the same clan. Then the problem had to be resolved by reconciliation[7].

DIFFERENT FORMS OF RECONCILIATION IN ADJARA

One of the common forms of reconciliation in Adjara was Damokvreba – make related. In the late medieval Adjara, the term "Dadosteba" was also spread along with the "Damokvreba". After the murder, for reconciliation, mediators from both sides would intervene and marry a woman from the killer's relatives to a relative of the assassinated. The opposite did not happen. The side of the victim would never marry a woman to the murderer's side to reconcile, and if such a marriage would take place, then it would be considered a humiliation to the relatives of the killed. After the settlement, enmity and bloodshed between clans would cease. Still, in the mountains of Adjara, in the past, quarrels appeared between possible relatives by marriage, especially when a son to be married abducted a woman without her parent's consent - took her by force. Usually, the abduction of a woman used to be a common custom not only in Adjara but also in other parts of Georgia and generally in the Caucasus. The rule of abduction found its reflection in the Samtskhian laws of the high Middle Ages. In the code of Beka Jakeli and her grandson - Agbugha, it is listed point by point what kind of ruling could be made subsequently such an article of law. In the code of Beka-Agbugha, Article 39 of the law states that the Kidnap of an engaged fiancee by another was not considered a crime until the wedding[8]. In such a situation, the relatives of both sides had to decide the case themselves, and the abductor had to win the heart of the woman's old fiance. With this, the enmity between the families was over.

Naturally, the government's attempt to prevent the vendetta between the plaintiffs can see here, and the official law opposes the customary norms for the sake of innovations. In the mountainous regions of Georgia, which is confirmed by mountainous ethnographic materials, abducting a woman was considered a violation of the rules and seemed restricted. However, the act itself was not regarded as shameful[9].

The ethnographic history of Adjara has preserved the facts of the exhortation process at the time of the abduction. If the abductor was unlucky to abduct the bride and, nevertheless, he tried to kidnap the woman again, or on the contrary, if the prosecution of the female relatives failed the abduction, then the father-in-law asked the abductor for a negotiable amount of money[10]. Disagreement - enmity arising on the grounds of kidnapping women, in most cases, ended with a settlement, and the storytellers explained that hostility was inadmissible in a community. Because of this, the community also could intervene in solving the case of the woman's inaccessibility. Reconciliation was easier when abducting a woman than for raping her or other types of moral crime. This is ordinary because rape - the act of dishonouring a woman by force, was perceived as a specific physical insult. In contrast, kidnapping was perceived as a manifestation of custom, although, nevertheless, this was also included in the category of punishment.

6 Noghaideli, J., (1935). Ethnographic essays from the life of the Adjarians. Tbilisi. 34.

7 Kamadadze, M., (1997). Issues related to the custom of avenge. Batumi. 20.

8 Dolidze, I., (1953). Old Georgian Law. Tbilisi. 302.

9 Tchkonia, I., (1958). Institute of Marriage in Mtiuleti. Tbilisi. 112.

10 Bekaia, M., (1976). Old and new wedding traditions in Adjara. Batumi. 53.

An attractive custom in Adjara was to tie a rope to the neck of the sworn person and perform a simulation of sacrifice in the name of the murdered person. The last moment of this kind of reconciliation process was humiliating for the offender. Thus the injured party received moral satisfaction. If it were a matter of reconciling the sworn, they would tie a rope around the killer's neck and walk around the house of the killed three times. Carrying a murderer with a rope around his neck three times to the home of the deceased was an imitation of a sacrifice in the deceased's name. According to ethnographic sources, a murderer was led by an influential elder with a rope around his neck to the family of the murdered person, who knelt in front of his brothers. He would kick up the murderer and thereby violate his dignity. With the second similar option, for reconciliation, the killer was tied around the neck and carried three times to the grave of the murdered person. If the deadly enemy did not agree to reconciliation, the conciliators would tie the neck of the murderer or his relative, father, or brother to the neck and bring him to the house of the killed without agreement with the victim's brothers, cousins, fathers, and uncles. Researchers of the history of law in Adjara have identified other variants of the humiliation of personal dignity in the reconciliation process. For example, when the criminal was led around the victim's house by kneeling. In such cases, the victims would tie the offender to the cattle stall and put a few tufts of straw and salt, especially in abducting a woman or committing other minor crimes. In Svaneti, when the mediators reached a reconciliation agreement, the victim would enter the offender's house to reconcile and extinguish the fire by pouring water on the hearth of the murderer's household. There were cases when the offender begged the victim for forgiveness at the fireplace.

Begging at home was performed by the decision of the mediators and at the request of the victim, as well. According to Mikheil Chartolani, the comparison with the hearth could be of different types: coming to the fireplace with a rope tied around the neck, lying down near the fireplace, kneeling in front of the fireplace, or kneeling from the door to the fireplace, begging by kneeling on each other or lying down next to the fireplace, going around the fireplace three times with a kneeling knee[11].

The hearth, as a holy place of reconciliation, is also reflected in the oral history of the legal character of the population of the adjoining Georgian corners of Adjara, which are now in Turkey. According to one such story, culled from diaries of field materials collected at Sinope, such sacred symbols as the woman and the white scarf, the splinter, the candlestick, the lit fire, the hearth, and the fireplace are prominent in the process of reconciliation.

In almost all people, the accompanying component of the reconciliation process was a payment of compensation to the damaged family. Material compensation took place, especially during property revenge. In Adjara, when taking property revenge, they knew how to burn houses, kill cattle, and destroy crops. The crime had to be repaid with a fine. Sometimes the offender was forced to compensate the loss materially, for example, one bull for the dead bull. In the case of property revenge, when the avenger wanted to burn down the house, he would inform the family members or the relative group of the enemy - some members of the Nogro about the impending disaster by throwing a stone on the roofing of the house and giving the signal to the members of the house. Avengers chose a time when no one was home to fulfil the goal. If they did not manage to burn down the house, the Avengers would cut the corn in the garden of the rival, kill the cow, and throw down the beehive in the forest. This form of revenge excluded the killing - taking of blood, even though the ground was ready for it.

Composition - reconciliation with material compensation in the mountainous region of Adjara was at least an accompanying phenomenon of blood feuds in the past. In connection

11 Chartolani, M., (1961). From the history of the material culture of the Georgian people. Tbilisi. 134, 139. 143-144.

with bodily injury or murder, the accusing party would offer its demands for blood price. Even in Adjara, to equalise the "pledged blood", it was necessary to pay a definite material compensation in "Mosankleno". „Mosankleno“ was a certain material and monetary compensation during the period of revenge. One fixed norm of payment or the determination of the amount of blood price depended on the conciliators. It was taken into account intentional murder, as well as when the murdered person was guilty. Naturally, in such a case, the culpability was facilitated. When taking blood, the introduction of a certain material tax for the family of the affected party was a sign of the weakening of the blood relationship. Reimbursement of the blood price was mainly in material and monetary form. Blood relatives were paid in kind, but sworn enemies were reconciled by giving money or land and cattle. Also, they knew to hand over precious family utensils to the victims. When determining the blood price, the hierarchical status of the surname of murdered was important. That can is clear from the high medieval legal system of Samtskhe. In the Beka-Agbugha law system, the injured party was satisfied with half of the material wealth of the murderer, considering the relevant conditions that the victim was to be compensated according to his surname and honour. As Isidore Dolidze pointed out, the composition system in the monument of the law changed by the material compensation that should have been given to the victim's relatives according to the name, surname, estate, and honour of the murdered person. In Khevsureti, the amount of compensation was determined by the Council of the Elderly. According to the Georgian ethnographic materials, two types of composition are established: one, when it was for the benefit of the affected family, and the other - as compensation for public violation, for the benefit of the village community. For example, according to the rules of the Svan folk law, the family that violated the rules established by the society and thereby harmed the community paid "Hibar" in the form of a fine for the benefit of the village and community. Based on the analysis of the Ganchineba (Judgement), a composition known as the bloodline was established, which was judged and accepted by the men of the community – Btche (Judge). The payment was made according to the relative categories, the most important of which was the tax of house rank, fraternity rank, and maternal rank, which the murderer and his relatives had to compensate by giving a certain amount of goods.

It is clear from the brought materials depicting the folk legal norms that the blood price was not so small, and it could only sometimes be afforded by one family. The close and wide circle of kinship was included in the composition. Even in the Adjara mountains, when the family of the blood debtor was unable to pay the blood fee due to the economic situation, then the family group – Nogro, as well as the whole clan and close circle, participated in paying the material compensation. Field-ethnographic sources directly indicate the nature of rights and duties between members of the kinship group in customary law, where, often, the burden of the offender was assumed by the father, brother, or cousin. Also, this is evidenced by the custom of bringing the father, brother, and cousin of the murderer to the residence or grave of the murdered person with a tied rope. The moral and material support for blood relatives was more vital among close relatives than among relatively distant separated families. But if the family did not have the opportunity to provide conciliatory goods, land, or money, and could not compensate it with the forces of close relatives, then, despite the differentiation of blood relatives according to the distance-proximity, the whole patrimonial appeared as a defender and supporter of the damaged family. In the reconciliation process, they agreed with the mediators. They met the demands of the affected family and clan, after which they paid the compensation set in favour of the affected party. One of the proofs of this point of view is similar data from different parts of Georgia. In case of wounding in Mtiuleti, the mediators would consult with the relatives and genealog-

ical organisation of both sides - Mamishviloba and after that, they would put as many grains of wheat on the victim's wound, and the family of the guilty had to give as many cows to the family of the wounded. Interestingly, in the case of material poverty, families of the small kinship group, then the kin, appeared to support the family[12].

Thus, during the bloodshed in Adjara, the mutual assistance of the kinship group members - Nogro and clan was clearly defined. However, the protection and material and moral support of cognates confirmed during the revenge sometimes took place secretly within certain limits. The family that sheltered the killer supported him, and helped him materially, could become the object of the victim himself. As a rule, the murderer should have been enabled by a relative group - Nogro. That is how enmity between individuals would grow into hostility between blood-related groups.

THE CYCLE OF CUSTOMS RELATED TO MOTHER IN ADJARA

In the system of composition in Adjara, attention is drawn to the cycle of customs related to a woman's breast and milk, which is related to quite old social and legal norms in origin[13]. One group of businesses was associated with artificial kinship - kinship through milk, and the other group - with historically established blood revenge customs. In various ritualised forms, kinship through milk led to fraternisation in Adjara; it was marked by such terms as fraternity from milk (breastfeeding). Also, from the traditional terminology, attention was paid to the words expressing kinship with milk - suckling (lactation), fed by one breast, one breast suckled, and the other. Significantly, the milk relationship and blood relationship were considered on the same level. Therefore, the rule of prohibiting exogamy - inter-family marriage was also strictly regulated, although it was not blood that was decisive, but mother and milk. In Adjara, based on the agreement between the families who wanted to get closer, milk kinship was formally established by placing a tooth on the nipple. A person related through the milk and adopted would be carried in the mother's shirt. During adoption, a child's three teeth were often put on the mother's nipple. The fraternisation of adult men, in addition to an oath, was done by placing a tooth on the other's mother's breast. In Adjara, putting a tooth on the nipple and kinship in this way is reflected in traditions and fairy tales found in Adjara[14].

In some parts of Guria, adjoining Adjara, the symbolic ceremony of placing a tooth on the mother's breast by the adopted was performed even in the priest's presence in the church, which the father and his close relatives attended. In Samegrelo, putting a tooth on the mother's breast was one of the constituent parts of the custom. The custom of adoption with the symbolic suckle of the breast was known in Svaneti, Pshavi, and other parts of the Caucasus, including Balkareti, besides Georgia.

In the mountains of Adjara, the symbolic expressions of placing a tooth on the nipple were especially frequent in the rituals related to blood hostility, particularly in the process of blood enmity in the composition system. Mother played the role of mediator, and breast and milk served as means of kinship. The enemies were reconciled by senior, authoritative men of the sworn kinship groups and sometimes the entire community. Their reference could lead to the adoption of the killer by the damaged family. In Adjara, we find scarce material on the role of milk relations in blood enmity, although one

12 Mgeladze, N., (1984). Some issues of kinship relations in the light of customary norms in Adjara. N3. Tbilisi: Herald, History, Archaeology, Ethnography and Art History Series. 66.

13 Mgeladze, N., (1984). Some issues of kinship relations in the light of customary norms in Adjara. N3. Tbilisi: Herald, History, Archaeology, Ethnography and Art History Series. 57-58.

14 Matsaberidze, V., (1958). Diaries of the 1958 Ajara folklore expedition, (Case N3), Batumi: Manuscripts Fund of the Department of Folklore and Dialectology of Batumi Scientific Research Institute. 76-77.

part of the narration describes several interesting related episodes. According to the ethnographic sources of Adjara, in the blood feud process, one of the killers was able to enter the house of the affected brothers. He forced the family's mother to put the nipple in his mouth. Brothers saw this, lowered their guns, and bowed their heads. Placing a tooth on the breast of the mother of the murdered killer, e., the Simulation of breast-suckling as one of the forms of reconciliation is preserved in Adjara only in narrations. Similar variants of this rule, including forceful placing a tooth on the nipple for reconciliation, were verified in other parts of Georgia, for example, in Guria, Samegrelo, and Abkhazia, as well as in Khevi.

In the composition system in Adjara, the facts of the adoption of the sworn were also confirmed. When the vengeful father gave the murderer the place of his dead son, this was caused by a particular situation and the careful intervention of intercessors. According to one report recorded in upper Adjara, the mediators brought the murderer to the house of the deceased's father, but he was not at home by chance. They hid the killer under the bed. When the father returned home, seeing the intermediaries, he thought the culprit was with them, then found him and pulled him out from under the bed. The murderer was kneeling by the bed during the mediation's entire negotiation. In the end, the matter turned so that the father adopted the killer and dressed him in bloody and especially kept clothes of his dead son. According to another version of the story, in Tchvana Valley, the son who swore to take revenge for his father's murder caught the murderer, dragged him to his father's grave, tied his hands and feet, and threw him there to be punished. The avenger's mother understood this news, ran to the cemetery, took out her nipple, and said to her son: Son, if you do not let that man go, my milk will not benefit you. The son could not resist his mother's command and followed her will. He made the murderer his brother, and his mother adopted him. Mother sometimes played a particular role in the heavy burden of reconciling clan members and pacifying enemies. After adoption in Adjara, peaceful relations were established between the kin groups of the adoptee and the adopter, and the rights and duties related to blood kinship were laid. Among the artificially inbred kin groups, exogamy - the prohibition of intermarriage was observed in certain generations, and there was solidarity in the field of marriage, the birth of a child, burial of the dead, and other such types of relations, as it happened between members of a naturally arising blood kin group.

CONCLUSION

As we can see, the described form of artificial kinship in the field of blood in Adjara is one of the general Georgian and also one of the regional varieties of common Caucasian milk kinship, which seems to be a natural phenomenon, because in the process of origin and formation, therefore, during a long period of development, it was in close cultural contact with different corners of Georgia and the Caucasus, and Under the conditions of historical connections, it experienced mutual influences. Despite the three-hundred-year rule of the Ottomans, Samtskhe and Adjara preserved the Georgian ethnic traditions, including the ancient traditions of reconciliation in the field of blood relations, as well as the archaic aspects of milk kinship during reconciliation, which are an invaluable source for establishing old forms of social relations and folk legal norms in Georgia. In addition, the population preserved and handed down the ancient Georgian traditions from generation to generation.

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MARITAL CONFLICT AND PSYCHOSOCIAL WELL-BEING OF ADOLESCENTS, PROTECTIVE AND RISK FACTORS

Nino Kitoshvili

Doctoral Candidate at Tbilisi State University, Georgia

Ekaterine Pirtskhalava

Ph.D, Associate Professor, Tbilisi State University, Georgia

ABSTRACT

The family is the source of socialisation for the adolescent, whose main duty is to take care of the child and promote its development. When there is a conflict in the family that the parents cannot handle with their own resources, the well-being of the child is significantly affected. In order to protect the child's interests and ensure his well-being, the state should create family support programs that will help the child cope with psychosocial problems in the family. Currently, family support programs are very small and inaccessible. In addition, the existing programs do not have a preventive purpose and do not mean understanding the family as a unified system, thereby questioning the effectiveness of the existing record in the law of the state's obligation to care for the welfare of adolescents. The study considered it significant to determine in what cases the magnitude of the reflection of marital conflict on children increases or decreases and aimed to identify variables that interfere with the psychosocial well-being of adolescents and marital conflict. As a result of the research, the factors supporting the well-being of the adolescent in the process of marital conflict were identified. It is recommended to create a family support program focusing on the identified factors.

KEYWORDS: Adolescent, Well-being, Family support programs

INTRODUCTION

The family is the most important link in society, which reflects the connection between the changing and developing processes of humanity and plays a decisive role in the processes of human education, value transmission, influencing interests, and socialisation. The family, in turn, determines the level of satisfaction of its members, and marital conflict poses a threat to the psychosocial well-being of family members.[1]

The conflict between husband and wife, in turn, is related to the number of stressful situations in the family: the stress of family members; the child's aggression; with stress caused by the financial situation; a lack of care and attention; with the role of children as victims; with their intellectual, academic, and social life; with psychosocial changes and antisocial tendencies; with premature sexual relations; and with the decline of children's academic performance.[2]

According to scientists,[3] community- and state-level family support services play a major role in reducing the risk of marital conflict and its negative consequences. Services designed to support couples in marital conflict offer a variety of counselling or therapy services to the conflicted couple and their family members and care for their well-being.[4] The higher the level of marital conflict, the greater the risk that the adolescent will develop psychological and behavioural difficulties, in which case the presence of family support programs significantly reduces this risk.[5]

According to Article 24 of the Code of Children's Rights of Georgia, the parent is obliged to take care of the child and, as necessary, participate in child support measures offered by the state. For this, the state, according to the law, must create family support programs, taking into account the individual needs of the child.[6]

It was determined, as a result of research conducted in 2021[7], that there are few and/or unavailable family support programs in Georgia, and most of them only apply to cases of legal disputes between husband and wife over children. The research revealed the need to develop a program to deal with the conflict between the parents of the child, which will significantly reduce the negative reflection of the conflict on the child and find support for the parties. According to family welfare researchers[8], in order

1 Gunindi, Y., Tazel Sahin F., Demiracioghlu H., (2012) Functions of the Family: family Structure and Place of residence. Energy Education Science and Technology, Part B: Social and Education Studies, Vol. 4(1), p. 549: https://www.researchgate.net/publication/236620003

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6 Code of Rights of the Child, (2019), https://matsne.gov.ge/ka/document/view/4613854?publication=2

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8 Miner, J., Schofield, Th., S., (2016) Mediation and

to create an effective family support program that will prevent the negative reflection of marital conflict on children, it is necessary to consider the mediating variables of marital conflict and children's well-being, which change the relationship between these two variables.

The aim of this study was to identify the mediating factors of marital conflict and adolescent psychosocial well-being. The mentioned variables will form the basis for the flexible program needed to improve the psycho-emotional condition of the children of the conflicted husband and wife, based on scientific research and the practical experience of experts, and will be a kind of basis that will effectively support the psychosocial well-being of the adolescent in the process of marital conflict and will be able to prevent the reflection of harm.

MARITAL CONFLICT

arental disagreement affects the psycho-emotional state of children. It is difficult to pinpoint one specific cause of marital conflict[9]; however, according to Mosman and Falke[10], Conflict occurs when parents cannot agree on parenting approaches, time spent together, finances, and family roles. Conflict arising from any reason reduces harmony in the family, increases discomfort between family members, and manifests itself in a significant deterioration in the quality of cohesiveness, adaptability, and communication between husband and wife. Deteriorated communication, adaptability, and cohesiveness have a negative impact on the functioning of the family and the well-being of its members, in particular the children.[11]

THE PSYCHOSOCIAL WELL-BEING OF ADOLESCENTS

Raising and developing a child is a multi-faceted process that involves care so that the child takes place in society and has a high level of well-being. An adolescent's well-being is related to psychosocial and socio-pedagogical factors, which help him identify difficulties and develop the ability to develop solution strategies. It aids in the satisfaction of needs and self-realisation.[12] The assimilation process of norms, certain systems, and values in society is a prerequisite for the well-being of the adolescent.[13]

At the age of adolescence, the adolescent becomes a person, and at this time, the family acquires special importance. At this age, the well-being of the teenager should be considered, taking into account family relationships. The family represents a standard of behaviour for the adolescent that ensures the satisfaction of his psycho-emotional and economic needs.[14] Adolescent well-being is expressed in bio-psychosocial dim*ensio*ns, including material well-being, living conditions, level of education, social relationships, and self-esteem. All this poses a significant threat

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when there is a conflict between husband and wife, which they do not have the resources to overcome.[15]

INSTITUTIONAL MECHANISMS SUPPORTING ADOLESCENT PSYCHOSOCIAL WELL-BEING

In 2021, we were interested in the existence of psychosocial support services in the process of marital disputes in Georgia, their content, their availability, and the degree of involvement of experts working in this field in this service. According to studies conducted,[16] the following questions were answered: what psychosocial services exist for family members in the process of marital dispute; how accessible they are; what difficulties do the parties face; and what changes does the mentioned process require?

In the first stage, the legal details of the dispute process between the spouses in Georgia and the importance of psychosocial services for the parties were analysed in the framework of the desk research. Subsequently, publicly requested documents from various institutions were analysed, and finally, expert interviews were conducted with experts working in the family, judicial, legal, and psychosocial spheres. As a result of the research, we determined:

1. During a legal conflict between husband and wife:

1.1. The prerequisites for the use of court mediation are not established in court; the judge decides on the use of services subjectively.

1.2. There is no recording data on the involvement of a social worker and a psychologist in declared family disputes, as well as the deadlines are given to the couple for settlement;

1.3. The court does not collect or process statistical data on which service or activity has what result or whether the court contributed to existing settlement cases.

The main difficulty of the process was identified as the lack of the number and scope of services available to the parties in the process of marital conflict; also that the existing services are focused only on intervention and not prevention of the difficulties of families involved in legal disputes, and thus neglecting the child's rights to well-being and his real psychosocial needs.

According to family, court, legal, and psychosocial practitioners, it was necessary to create family psycho-education and effective services in the court and community. Increasing the number and qualifications of personnel involved in the process of marital conflict will significantly decrease the difficulties in the process.

MARITAL CONFLICT AND ADOLESCENT PSYCHOSOCIAL WELL-BEING

There are mediating variables that play a mediating and moderating role between marital conflict and adolescent psychosocial well-being.[17] Different authors emphasise different mediating variables, and all of them agree on the need to consider these variables in reducing or preventing the harm of marital conflict. Among them are:

Parenting style, which means ensuring that children's needs are met and being able to promote their development. The difference between parenting styles and how strict, lazy, and/or loyal a parent is affects a child's discipline,

15 OECD (2009), Compare Child Wellbeing across the OECD, Doing Better fro Children, OECD, ISBN 978-92-64-05933-7.

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emotional state, and behavioural tendencies.[18] In the family, the child learns behavioural models, and in this case, the parent's attitude becomes an example for him. The parenting style, in turn, is affected by the relationship between the couple. The more tense the relationship between parents, the more likely it is that the parent will change his attitude towards the child, which in turn affects the child's well-being.[19]

Family functioning is considered a family's ability to solve problems, have healthy communication between members, distribute roles, and have emotional involvement and responsibilities.[20] Of the functions of the family, the ability to solve problems and overcome conflicts is of special importance. [21] This means that if, despite the marital conflict, the current distribution of roles is satisfactory and the couple tries to find ways to resolve the conflict, then their disagreement will have less impact on the child's well-being.[22]

Perception of finances refers to the availability of the family to meet all material needs as well as the perception of the family members about these needs and the ways to meet them. This implies that people who perceive their income as low have less psychosocial well-being than those whose perception of material resources is more positive. [23] Access to certain resources, including financial resources, becomes relevant during the parental conflict. It was found that the higher the perception of the family's financial situation, the less negative the impact of marital conflict on the children. [24]

Psychosocial support refers to the safety of family members and the belief that they will be supported and accepted. Adults who feel supported feel better about themselves, even when there is conflict and disagreement between husband and wife.[25] In the case when the husband and wife cannot deal with the existing conflict, and there is no access to psychosocial services, there is a high probability that the parents will close in on themselves and ignore the child's need for support.[26]

Gender, age, education, and other factors influence whether the impact of marital conflict on children is intensified or reduced, as well as the children's gender, age, education, ethnicity, and the relationship between parent and child.[27]

18 Ibid., p.316.

19 Patchin, I., W., (2006). The Family Context of Childhood, Delinquency, Criminal Justice, Recent Scholarship. A Series from LFB Scholarly Publishing, New York, p.16-17; http://www.loc.gov/catdir/toc/ecip0615/2006019393.html

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RESEARCH FINDINGS

The conclusion of the research is the need to develop a program supporting children in the process of marital conflict, which, according to relevant literature and empirical studies, will significantly reduce the negative reflection of the conflict on the child and make the process less stressful for the parties.

Based on this, we can conclude that the following factors support the psychosocial well-being of adolescents in marital conflict: unchanged parenting style, family functioning, financial situation, and feeling of support.

Taking into account the results of the research, it is necessary to create a family support program that is focused on the research and modification of parenting styles, supporting and promoting healthy family functioning, promoting financial health, and providing psychosocial support.

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OLDER WOMEN AND INTEGRATING A GENDER PERSPECTIVE IN EMPLOYMENT POLICY

Irina Batiashvili

Doctoral Candidate at Caucasus International University,
Lawyer, Mediator, Consultant (Expert) to the Director General of LLC „Tbilisi Energy" on Gender Issues,
Researcher of the Analytical Department of the Ministry of Justice on the Rights of Older Persons, Georgia

ABSTRACT

The main challenge in creating dignified living conditions for older women is employment. If the employment process of older women is not properly regulated, they will lose the opportunity to maintain their health and well-being. Unpaid domestic work and discriminatory stigmas have a major impact on employment. Social security, which appears in the form of a post-employment (funded or state) pension, determines the economic status of older/eldest women. Based on the above, the research on the issue of employment should include an analysis of the issue of stigmas, gender perspective and employment issues, hence proposing legislative changes to the state for favourable conditions for older women.

In order to develop effective state policy, the article aims to analyse the international documents and the practice of the State of Israel to discuss the employment of elderly women in the central core of the state policy.

Keywords: Decent living of older women, Employment policy, Discriminatory stigmas

INTRODUCTION

Back in 1996, US Senator Carol Moseley-Braun of Illinois, in her essay "Women's Retirement Security", noted that reducing the gender gap (index of disparity) and ultimately closing the disparity is essential to improving real retirement security.[1] In order to eliminate the mentioned difference, it is necessary to recognise the caregiving activity of women at the legislative level, and at the same time, the state should develop an effective pension policy in parallel with the employment process and the work process. Senator Carol has likened retirement security to a three-legged stool[2] - social security, private pensions, and personal savings form the basis for a person to receive income later in life. The democratic world, in the Universal Declaration of Human Rights adopted in 1948, loudly affirmed its belief and respect for basic human rights as a whole and highlighted human dignity and equality principle as one of the fundamental rights among other basic rights based on which every state strives to promote social progress and to create a better standard of living for the people and citizens within its jurisdiction.[3] "The Declaration has inspired many newly independent states and new democracies in the process of forming and creating constitutions. It is the criterion and measure of how we define, or how we should define, what is good and what is bad."[4] Decent living conditions are a broad concept that crosses several human rights articles at the same time and combines several values. In particular, the first article of the Universal Declaration states that all human beings are born free and equal in dignity and rights. The declaration's 22nd, 23rd, 24th, and 25th articles appear as reinforcing norms of dignity and dignified existence. The aforementioned articles protect both older women and people of any age and gender, and if we rely on Article 28, everyone has the right to a social and international order to exercise the freedoms mentioned in the declaration fully. In the state, the national government is obliged to implement such a state policy to eliminate discriminatory and unfavourable conditions among people.[5] The above-mentioned articles of the Universal Declaration of Human Rights combine several values and are significant. In particular, social security is a necessary factor for maintaining dignity, which includes the free and full development of a person, which is significantly violated in the presence of age and gender discrimination against older women. In addition, the unity of these values includes the rights to a favourable (supportive) working environment, dignified human existence (economic status), labour and unemployment protection, which elderly women cannot fully use in the presence of employment difficulty and an unregulated informal economy. Ultimately, according to Article 25 of the Declaration, everyone has the right to a standard of living adequate for their health and well-being. This includes both the period of unemployment and old age. However, if the employment process for older women is not fairly regulated, they will lose the opportunity to maintain their health and well-being. The main challenge in creating decent living conditions for older women is employment.[6] **The purpose of the research is to analyse the international documents and the practice of the State of Israel to discuss the issue of employment of elderly (older) women in the main core of the state policy in order to develop effective state policy and legal regulations.**

1 Moseley-Braun, C. (1996). Women's Retirement Security. Elder Law Journal, 4(2), 493-498.

2 Ibid.

3 United Nations, the Universal Declaration of Human Rights, United Nations General Assembly, 1948.

4 United Nations, Universal Declaration of Human Rights, 60th Anniversary Special Edition 1948 -2008, Georgia's Office of the United Nations Public Information Department, Office of the United Nations High Commissioner for Human Rights, Georgia, DPI/876/Rev.4-07-55693/, 2008.

5 Batiashvili I., "Decent Living and Employment of Older Women", materials of the international scientific conference, challenges of modern law, "World of Lawyers" publishing house, Tbilisi, 2022.

6 Ibid.

OLDER WOMEN'S EMPLOYMENT, GENDER PERSPECTIVE, AND DISCRIMINATORY STIGMAS

It should be noted that unpaid domestic work and discriminatory stigmas have a major impact on employment. In addition, social security, which appears in the form of a post-employment (cumulative/private or state) pension, determines the economic situation of older women. Based on the above, research on the issue of employment should include an analysis of stigmas, gender perspectives, and employment.

As noted in the INSTRAW publication "Ageing in Gendered World Women's Issues and Identities:" ageing, as a stage of development, is a challenge for women. In this period of life, women should be able to cope creatively with new opportunities. The social consequences of stereotyping elderly women should be recognised and eliminated. Subsequent meetings on ageing began to emphasise the integration of older persons into the life of society, regarding them not as a burden of productive members of society but as creative and productive members in their own right. Women, who because they live longer, represent the majority of older people in almost every country, are a particularly neglected resource in their elder years."[7]

According to international studies, women generally live longer than men due to biological and behavioural advantages, but women's longer lives do not necessarily mean healthier lives.[8] It is a fact that only women experience the potentially negative consequences and risks associated with the health and psychological state of pregnancy and childbirth. Further, existing gender inequality is expressed in terms of income and employment. The mentioned gender inequality originates from when a woman is devoted to childcare, child-rearing, and family work, and if we go deeper, the result of the mentioned time is the formation of the next generation. Moreover, in response, women remain discriminated against both from an economic point of view (less accumulated pension, less income, lower position) and a moral point of view.[9]

A major challenge for health systems is likely to be meeting the needs of older women, as they live longer than men and represent a growing proportion of all older people.[10] "At first glance, longer life expectancy is no doubt a sign of progress, which is the result of increasing wealth and access to medical care all over the world according to relevant percentages. When you look at this picture from one point, it is tempting to think that the problem of women in poverty is gradually and moderately reduced, but unfortunately, this is a false impression. When you come closer and closer to this mosaic, you see a lot of problems regarding older women and a growing number of them without the growth of the economy and without changing the world's perception. Stereotypes bring devastating effects on older women and for the world as well."[11] Therefore, the state should start preparing to prevent cases of age-related discrimination. Caring for older women involves not only strengthening the health system but also pension and tax reform, which includes access to employment and related pension and social protection. By creating conditions for an active, healthy life, older women will be allowed to participate fully in the development of society.

Appropriate legal recognition of older women's labour resources, economic empowerment of older women, and reasonable access to public employment services may reduce gender inequality. According to the national legislation of Georgia, women of retirement age can

7 United Nations International Research and Training Institute for the Advancement of Women (INSTRAW) "Ageing in Gendered World: Women's Issues and Identities", Santo Domingo, Dominican Republic, 1999, VII.

8 www.101healthportal.com

9 World Health Organization, executive summary women and health Today's evidence tomorrow's Agenda, 2009, Geneva, 1-4.

10 Ibid.

11 Batiashvili I., Myth of elder women and world's stereotypes, Law and World, N17, 2021, 64, 68.

be considered in the category of older (elderly) women. The retirement age for women in Georgia is set at 60 years.[12]

The social security and state assistance of the State of Israel has a significant impact on the economic empowerment of older women. Israeli legislation recognises the contingent of unemployed women aged 50+ to 67 as vulnerable and a priority group for receiving benefits. The vision of the State of Israel in the development of financial support programs for older women, recognition of the rights of older women, and their regulation at the legal level can be appropriate for Georgia as well. By analysing the Israeli state policy regarding a specific age group of unemployed women, it is possible to define older women by age categories. It is worth noting several directions of social security and state assistance of the State of Israel:

1. The right of unemployed women aged 57-67 to receive state financial assistance.[13] It is also important that those women who have completed professional training courses be encouraged by the high percentage of allowance. The state's financial support for unemployed women at a particular age, when their skills are undergoing transformation, is an excellent motivator for older women to create decent living conditions and feel like a necessary asset to society.[14]

2. The state has an obligation to grant a pension to a 62-year-old female citizen. However, incentives (benefits) and assistance for elderly women are not cancelled for women who have reached the age of 67.

3. As of January 2022, the amount of work and non-work income has increased, in which case an Israeli citizen will be able to simultaneously use old age benefits, which start after the retirement age, namely from 70 years.[15] As of today, the retirement age for women under Israeli law is 62, although there will be a gradual change in the retirement age for women from 62 to 66.[16]

4. The National Insurance Institute pays monthly assistance to families with children under the age of 18. The allowance is aimed at helping families with the costs of raising children, and its amount does not depend on the family's income. This significantly helps women's social and economic empowerment, easing their burden. If we rely on the reasoning that older women often become caretakers of young children in their families by their own will or by necessity due to a lack of financial resources, this allowance allocated by the Israeli state can be considered as respect, compensation, and recognition of their work by the state.[17]

According to the March 20, 2023 interview of Mr Matan Hammou from the Israeli Ministry of Labor, that is the lead director of elderly employment (the person responsible for the advancement of special populations in the labour market) (recorded by scientist Irina Batiashvili), the analysis of the policy of employment of the elderly in Israel:

Employment has far greater effects and various connections and should not be seen only as

12 Law of Georgia "On State Pensions", 2442, Parliament of Georgia, 23/12/2005, Chapter II, Article 5.

13 национального страхования https://www.btl.gov.il/RussianHomePage/Benefits_ru/Vatikim_ru/IdkunimEzracjVatik2022/Pages/HatavotLenashimMuvtalot.aspx

14 Кнессет, Закон о национальном страховании [комбинированная версия], 5755–1995 гг, Глава 7 - Страхование по безработице, חסונ(ימואלה חוטיבה קוח בלושמ(, הנשתה- 1, קרפ 'ז: הלטבא חוטיב, https://www.btl.gov.il/Laws/Pages/LawsList.aspx (ეროვნული დაზღვევის კანონი (ინტეგრირებული ვერსია), 5755-1)

15 Министр социального равенства, Руководство для пожилых граждан Израиля права, льготы и информация, *8840, 2015, 34, https://www.gov.il/BlobFolder/guide/benefits_shvyon/he/%D7%94%D7%9E%D7%93%D7%A8%D7%99%D7%9A%20%D7%9C%D7%90%D7%96%D7%A8%D7%97%20%D7%94%D7%95%D7%95%D7%AA%D7%99%D7%A7%20-%20%D7%A8%D7%95%D7%A1%D7%99%D7%AA.pdf

16 национального страхования https://www.btl.gov.il/RussianHomePage/Benefits_ru/Vatikim_ru/IdkunimEzracjVatik2022/Pages/HaalatSchumHaachnasa.aspx; https://www.btl.gov.il/RussianHomePage/Benefits_ru/Vatikim_ru/IdkunimEzracjVatik2022/Pages/halaatGilPrishaLenashim.aspx

17 национального страхования, https://www.btl.gov.il/RussianHomePage/Benefits_ru/Yeladim_ru/Pages/default.aspx

a source of income. An employed person considers himself an active member of society and does not aspire to actively receive social protection or actively use social and health services.

The specificity of the issue of older women is related to the problem of "ageism", how employers look at the policy of hiring new staff. For example, we are looking for a young and energetic staff for a new and dynamic company. This means that as people get older, they are neglected, and at the same time, negative stigmas force the elderly to miss employment opportunities/earning opportunities. From the interview of the Senior Manager of Unique Populations Recruitment of the Ministry of Labor of Israel (Population Employment Administration, Work office), it can be seen that the percentage of employment of 45-year-olds is decreasing sharply. As people get older, it becomes harder for them to get back into the labour market. For example, if a young person can find a new job in 3-4 months, this opportunity becomes much more difficult for an older person. At the age of 54, there is a high probability that an unemployed, elderly person will not be able to return to the labour market. This affects part of the pensions because the pension system in Israel is similar to the accumulation system (the successive increase of the pension depends on the employee's percentage investment).

Therefore, Israel decided to strengthen its employment policy and invest in reintegrating the elderly, especially older women, into the labour market. Israel, therefore, decided to invest in increasing employment opportunities for vulnerable groups. These policies have long-term effects on employees, employers, the health system, and social services.

In addition, Israel's vision of the retirement age and related long-term policy is noteworthy, according to which in 2032, the gap between the retirement age of women and men will decrease, and in 2032, the retirement age of women will be set at 65 years and 67 years for men. This will help the country's employment policy. In this regard, Israel has developed a transitional mechanism, which includes training and employment of older women and financial motivations (incentives) for women trained before employment.

Regarding state employment programs, Israel has different employment programs for both women and men, but the gender perspective is also integrated into this direction.

The phenomenon of the Comptroller General provided by the record of Section 304 of the General Provisions of the United States Retirement Equity Act of 1984 is significant for Georgia in the process of implementing pension reform. In order to protect the rights of the vulnerable group in old age - elderly (older) women - it is necessary to study the impact of pension plans on women.

SEC. 304. STUDY BY COMPTROLLER GENERAL OF THE UNITED STATES.

GENERAL RULE. — The Comptroller General of the United States shall conduct a detailed study (based on a reliable scientific sample of typical pension plans of various designs and sizes) of the effect on women of participation, vesting, funding, integration, survivorship features, and other relevant plan and Federal pension rules.".[18]

A life-cycle approach is a useful strategy for addressing complex discrimination based on gender and age. This is used in the Beijing Platform for Action to examine the spread and incidence of discriminatory practices that affect women at different stages of their lives and development. A life-cycle approach analyses discrimination in terms of the accumulation of forms of discrimination that may affect different stages of a person's life and, at the same time, considers the positive contribution made by employees to society at different stages. The positive contribution also includes the unpaid care work of employed women. It is a fact that the life cycle approach has a 'helping function'; in particular, it helps to ensure that the discrimination a woman faces at one stage of her life will not continue into later stages (ILO, Gender Promotion Programme, 2001).

18 Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426, Title III, General Provisions, https://www.congress.gov/bill/98th-congress/house-bill/4280/text

The vision of the modern world's attitude when discussing the rights of older people is well seen in the work of Julie Childs: Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention. "[19], which will be reviewed below. The world's older (elder) population is growing at an unprecedented rate. About 8.5% of the world's people (617 million) are over 65 years old. According to a 2015 United Nations report, this percentage is forecasted to increase to nearly 17% of the world's population, or 1.6 billion, by 2050.[20] "The ageing population is growing at a rapid rate, stressing resources and spurring resentments that could lead to elder abuse. A convention on elder rights could mitigate the impact by providing a framework to manage the confluence of global modernisation, ageing, and demographic changes."[21] It is necessary for developing countries to face the reality that 1.7 billion people over the age of 60 - almost more than 80% of the world's elderly population - will live in less-developed regions in 2050.[22] The need for laws to protect the older population cannot be ignored, and it is too important to rely solely upon moral standards and cultural codes of conduct. Moreover, older persons need to have a say in these decisions.[23] An article by Julie Childs - Consultant to the United States Department of Justice Elder Justice Initiative, discusses ways to determine whether the rights of older people are human rights that international treaties should protect. The expert expands the discussion on how we can best protect the rights of the elderly (aged, senior people).

The Universal Declaration of Human Rights (UDHR) is one of the most recognised and influential agreements.[24] The UDHR was adopted by the UN General Assembly in 1948 and provides that human rights impose obligations on the state to ensure just and fair treatment of its citizens. The UDHR consists of thirty articles that affirm the rights of the individual. These rights are not legally binding per se but are described in subsequent international treaties, regional human rights instruments, national constitutions, and laws. "In addition to the UDHR, there are several other cross-cutting UN human rights treaties that generally moved human rights issues forward, but few that focus on protecting elder rights."[25] For example, the Madrid International Plan of Action on Ageing ("MIPAA") was adopted at the Second World Assembly on Ageing in April 2002.[26] MIPAA created a new stage

19 Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online.

20 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf Id. According to the National Institute on Aging ("NIA") and National Institutes of Health ("NIH"), the older demographic is rapidly growing in proportion the rest of the global population. See id. The growing population of older people around the world must be the impetus for ensuring the health, livelihood, and rights of our elders; the NIH and the US Census Bureau are collaborating to ensure that data collected is used to "better understand the course and implications of population aging." Id.
World's Older Population Grows Dramatically, NAT'L INST. OF HEALTH (March 28, 2016), https://www.nih.gov/news-events/news-releases/worlds-older-population-growsdramatically.

21 Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online. https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

22 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf World Population Ageing, supra note 2, at 9.

23 Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online. https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

24 G.A. Res. 217 (III) A, U.N. SCOR, Universal Declaration of Human Rights, U.N. Doc. A/RES/217(JJ) (Dec. 10, 1948)

25 Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online.

26 U.N. Assembly on Ageing, 2 nd Sess., Political Declaration and Madrid International Plan of Action on Ageing (Apr. 12, 2002), available at https://www.un.org/enl/events/pastevents/pdfs/Madrid-plan.pdf

for the protection of the rights of the elderly. According to MIPAA, the world's main challenge is "building a society for all ages". "The MIPAA plan of action focused on three priority areas: "older persons and development; advancing health and well-being into old age; and ensuring enabling and supportive environments." Significantly, it was the first time governments agreed to connect ageing to human rights as a central issue at the UN conferences and summits."[27] In 2009, the Committee on Economic, Social and Cultural Rights ("CESCR") identified age as one of the prohibited grounds of discrimination.[28] CESCR is a "UN body - composed of 18 independent experts that monitor the implementation of the International Covenant on Economic, Social and Cultural Rights by its member states".[29] CESCR has emphasised the need to prohibit age discrimination in finding work and vocational training (more focusing on people living in poverty) and to address the issue of unequal access to pensions.[30] The International Covenant on Economic, Social, and Cultural Rights stipulates that states are obliged to progressively implement the right to social security for all individuals within their territories. In 2010, the UN's General Assembly established the Open-Ended Working Group on Ageing ("OEWG") to examine the treatment and behaviour towards the aged population. The OEWG continues to study international human rights.[31] The need to regulate the rights of the elderly at the legislative level is slowly becoming evident.

Latin America has been a constant supporter of the protection of the rights of the elderly, and on June 15, 2015, the Americas became the first region in the world to have an instrument for the promotion and protection of the rights of the elderly.[32] The Organization of American States ("OAS"), with the support of the Pan American Health Organization ("PAHO"), adopted the Inter-American Convention on Protecting the Human Rights of Older Persons.[33] The Convention on the Protection of Older Persons ("CPHROP") recognises that older people can and should freely use all human rights and fundamental freedoms.[34] The Convention, which

27 Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online, https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

28 C.E.S.C.R., 4 2nd Sess., General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) 29, U.N. Doc. E/C. 12/GC/20 (July 2, 2009), https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

29 Committee on Economic, Social and Cultural Rights, UNITED NATIONS HUM. RTs. OFF. OF THE HIGH COMM'R, http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx (last visited Mar. 11, 2020). ("The Committee was established under [United Nations Economic and Social Council ("ECOSOC")] Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the [ECOSOC] in Part IV of the Covenant."). The main function of the CESCR is to oversee the covenant implementation by states parties. See UN Committee on Economic, Social and Cultural Rights (CESCR), ECOINET, https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf https://www.ecoi.net/en/source/11512.html (last updated Aug. 30, 2018). The committee strives to hold constructive discussions with state representatives regarding application of the terms of the covenant. Id. The committee also assists governments in fulfilling their responsibilities under the covenant through policy and legislation aiming to secure and protect social, economic, and cultural privileges. Id.

30 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

31 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf See the Independent Expert on the Enjoyment of All Human Rights by Older Persons, UNITED NATIONS HUM. RTs. OFF. OF THE HIGH COMM'R, http://www.ohchr.org/EN/Issues/ OlderPersons/IE/Pages/IEOlderPersons.aspx (last visited Mar. 11, 2020) ("In May 2014, the Human Rights Council appointed Ms. Rosa Kornfeld-Matte as the first Independent Expert on the enjoyment of all human rights by older persons.").

32 Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online.

33 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf Inter-American Convention on Protecting the Human Rights of Older Persons, June 15, 2015, O.A.S.T.S. A-70.

34 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

was signed by the governments of Argentina, Brazil, Chile, Costa Rica, and Uruguay, is an important catalyst for other countries to establish appropriate normative framework laws for the protection of old age.

"What Are Elder Rights and Why We Make Special Efforts to Protect Them?[35]

As human rights go, elder rights do not, in and of themselves, appear so extraordinary. For example:[36]

- *the right to work and to pursue other income-generating opportunities with no barriers based on age;*
- *to retire and participate in determining when and at what pace withdrawal from the labour force takes place. To permit informed planning and decision-making;*
- *to live in safe and adaptable environments to personal preferences and changing capacities. To reside at home for as long as possible;*
- *to remain integrated and participate actively in society, including the development process and formulation and implementation of policies that directly affect their well-being;*
- *to be valued independently of their economic contributions. To live in dignity and security and to be free of exploitation and physical or mental abuse."*[37]

Young women and men and employees of all ages need work-family balance policies. The ability of employed older women to earn a living wage for themselves and other vulnerable family members depends on work-family balance policies and the availability of jobs.[38]

There are several factors that have a more negative impact on older working women. In particular:

1. age discrimination at work, which means: the imposition of age restrictions for employment or training;

2. indirect discrimination through measures that force older workers to retire early, such as compulsory retirement savings schemes.[39]

Although, according to actuarial calculations, women live longer than men, the main obstacle to receiving an equivalent pension is that women may not be able to pay the contributions to pension schemes continuously, or they may not reach the minimum amount of earnings during their lifetime.[40]

Despite their common denominators concerning basic human rights in general, the reason why we must address the rights of the elderly separately and protect them uniquely is the systematic discrimination against older people at the individual, institutional and societal levels that impede, undermines, and in some cases destroys basic human rights.[41] "This is the necrotic power of ageism." Another false assumption characteristic of ageing (ageism) is that older people are a monolithic group.[42] Ageing may be the common denominator, but the counters are as infinite as the variations in culture and experience when reflecting on human history.[43] The assumption that all members

35 Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online, https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

36 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

37 Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online, https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

38 ILO ABC of women workers' rights and gender equality, Geneva, International Labour Office, 2000, Second edition 2007, 146-148.

39 Ibid.

40 Ibid.

41 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf (Tova Band-Winterstein, Health Care Provision for Older Persons: The Interplay between Ageism and Elder Neglect, 34:3 J. OF APPLIED GERONTOLOGY 113, 114 (2015)).

42 Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online, https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

43 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf (Diane E. Rykken,

of a group, such as the elderly, are the same creates a dangerous threat to the full protection of their rights. Each older person should enjoy these rights individually and may even be different. The chances of protecting the rights of the elderly are also reduced when a society confuses the elderly with the sick, weak, or disabled. A survey in Ireland found that the most common form of ageism was the attribution of age-related illnesses by health workers as a consequence of age.[44] "Perhaps the most insidious manifestation of ageism on elder rights is the misperception that older adults are a cohort of frail, burdensome, demented people".[45] For example, in 2016, in the "World Values Survey" analysed by the World Health Organization, 60% of respondents said that older people were not respected.[46] Other studies have shown that even healthcare providers' attitudes "are shaped by the persistent misconception that elderly patients are frail, demented, and have little chance of survival."[47] This stereotype can harm the standard of health and life. Isolation and marginalisation can also leave older people vulnerable to elder abuse.[48] English Longitudinal Study (ELSA) of Ageing Final Report[49] examined the social exclusion of older people and identified seven different dimensions of social exclusion: social relations, cultural activities, civic activities, access to basic services, neighbourhood exclusion, financial products, and material goods.

CONCLUSION

"If you can't measure it, you can't manage it" - Management Consultant Peter Ferdinand Drucker.[50]

According to the International Bill of Human Rights, the right to health is closely related to the realisation of other human rights, including rights such as Food, housing, work, education, human dignity, life, non-discrimination, equality, prohibition of torture, privacy, access to information, freedom of association, assembly and movement. These and other rights and freedoms are related to the components of the right to health.[51]

As a result of gender inequality, social consequences caused by existing stereotypes about older women, unfair distribution of resources, and lack of state employment policy for older women are against the 2030 Agenda of the United Nations for Sustainable Development goals. Therefore, it is better to understand this gap and further eliminate it, which will regulate and increase the potential contribution of older women in public life.[52]

Sex in the Later Years, in THE ELDERLY AS MODERN PIONEERS, 162 (Philip Silverman ed., 1987)).

44 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

45 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online.

46 https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf Discrimination and negative attitudes about ageing are bad for your health, WORLD HEALTH ORG. (Sep. 29, 2016), https://www.who.int/news-roori/detail/29-09-2016-discrimination-and-negative-attitudes-about-ageing-are-bad-for-your-health.

47 Childs, J. "Elder Rights Are Not Nesting Dolls: An Argument for an International Elder Rights Convention." Journal of Comparative and International Aging Law & Policy, 11, 2020, p. 141-170. Hein Online, https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

48 Ibid.

49 The Social Exclusion of Older People: Evidence from the First Wave of the English Longitudinal Study of Ageing Final Report, OFF. OF THE DEP. PRIME MINISTER 15-17 (Matt Barnes ed., 2006), https://www.researchgate.net/publication/37183878_The_social_exclusion_of_older_people_evidence_from_the_first_wave_of_the_English_Longitudinal_Study_of_Ageing_ELSA_final_Report https://www.stetson.edu/law/agingjournal/media/JCIALP%20Vol%2011%20(Final).pdf

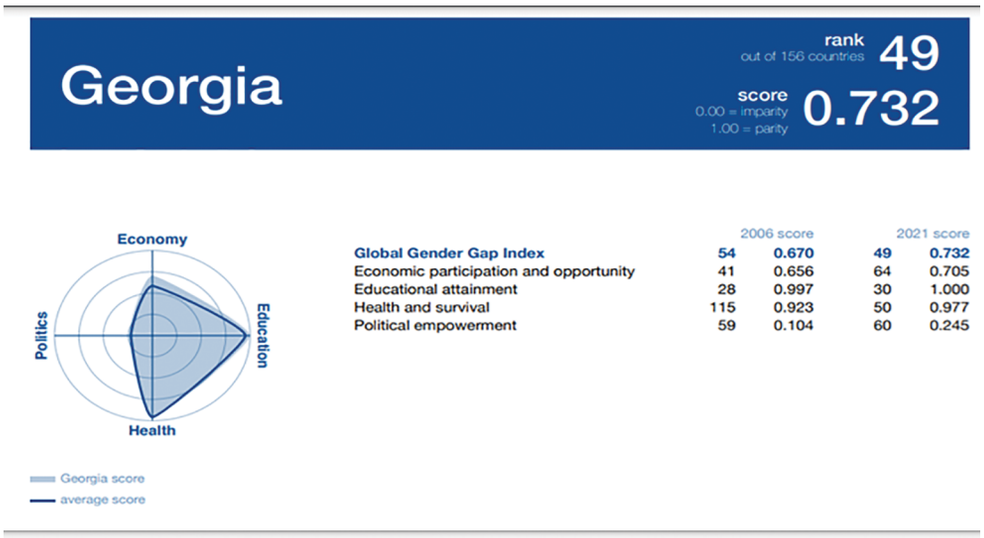
50 https://www.weforum.org/agenda/2022/03/international-womens-day-gender-gap-inequality/

51 United Nations, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General comment No.14, para.3, p.87.

52 Batiashvili I., "Decent Living and Employment of Older Women", materials of the international scientific conference, challenges of modern law, "World of

These are the four pillars of the Forum's gender gauge (economic participation and opportunity, education, health and political empowerment).[53]

ment should take care of the legal regulation (amendments to the labour code) that will regulate the working conditions of those employed in the informal economy.[54]



Work participation and leadership	female	male	value
Labour force, million people	752.8	910.6	0.45
Unemployed adults, % of labour force (15-64)	11.69	13.97	0.84
Workers employed part-time, % of employed people	42.89	28.33	1.51
Gender pay gap (OECD only), %	n/a	n/a	n/a
Proportion of unpaid work per day, female/male ratio	n/a	n/a	n/a
Advancement of women to leadership roles, 1-7			

"...respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work while emphasising the importance of work for personal development as well as for social and economic inclusion". Since there is a high increase in the informal economy (informal jobs) in Georgia, first of all, we should examine the statistical data about the exact number of people working in the informal economy, and in parallel with this process, the working conditions of the employees in the above-mentioned economy should be monitored. After that, the govern-

The state should designate an agency with an audit function to conduct a detailed study (based on a reliable scientific sample of typical pension plans of various designs and sizes) on women's participation, funding, integration, survival characteristics, and other relevant plans and the impact of state/cumulative pensions.

For citizens of retirement age to select state aid and benefits in a relevant and targeted manner, it is better to amend the Law of Georgia on State Pensions to create age categories. Thus, it will be possible to introduce a new term - "older". Two baskets will be taken into account:

Lawyers" publishing house, Tbilisi, 2022.

53 World Economic Forum, Global Gender Gap Report 2021, INSIGHT REPORT, MARCH 2021, 198, https://www.weforum.org/reports/global-gender-gap-report-2021

54 Batiashvili I., "Decent Living and Employment of Older Women", materials of the international scientific conference, challenges of modern law, "World of Lawyers" publishing house, Tbilisi, 2022.

Basket I - category of 60 to 70-year-olds; II basket - category of eldest over 70 years old. The specified baskets will help the government to plan appropriately targeted state policies. For example, the issue of professional training will be included in the basket of the older people (elderly), and at the same time, in the basket of the eldest - attention will be paid to the issue of social security.[55]

"The Assembly, generously and capably hosted by the Government of Spain, showed the United Nations playing its essential role of putting tomorrow's issues on today's agenda. However, the real test will be implementation. Each and every one of us, young and old, has a role to play in promoting solidarity between generations, in combating discrimination against older people, and in building a future of security, opportunity and dignity for people of all ages". - Kofi A. Annan.[56]

55 Ibid.

56 United Nations, The Madrid International Plan of Action on Ageing and the Political Declaration, Second World Assembly on Ageing, Spain, 2002.

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EVICTION PROBLEMS ARISING FROM TENANCY AGREEMENTS IN GEORGIA CURRENT REALITY AND CHALLENGES (Guarantee institution under French Law)

Nikoloz Pkhaladze

Doctoral Candidate of Law, Caucasus International University, Attorney, Founder Law Office "Pkhaladze and Partners", Georgia

ABSTRACT

Police evictions are back - The National Enforcement Bureau under the Ministry of Justice has a new initiative to protect landlords from contractual risks in real estate finance transactions. The idea, which belongs to the Ministry of Justice, will allow legal entities and individuals to register a contract of sale, including lease and tenancy contracts, with the National Enforcement Bureau. The parties can write in the tenancy agreement that the owner will have the opportunity to apply to the enforcement bureau in case of violation of the terms by the tenant and receive enforcement service from it in an expedited manner. As is known, the police eviction from the property no longer exists since 2015, which means that if the person who rented an apartment cannot or does not pay the amount, the landlord must apply to the court instead of the police. What problem did the cancellation of police eviction create, and what will the new initiative of the Ministry of Justice change? Is the mentioned initiative a way to fundamentally solve the problem? The reader will hear the answers to these questions in this article.

KEYWORDS: Rent, Landlord, Eviction

INTRODUCTION

In recent years (especially after the Russia-Ukraine war), cases have become more frequent when individuals, including migrants, rent an apartment or commercial space, then do not pay the rent but not leaving the real estate; Even the legal owner does not have the leverage to quickly recover the property, because the so-called after the abolition of the police eviction rule, this is only possible through the courts, and proceedings in the courts are often delayed for years due to procedural bureaucratic procedures. Society agrees that the right to property is paramount; it is the all-encompassing legal dominion over a thing. Ownership gives a person the right to possess, dispose and use. The right to property, as a natural right, is not only the basic basis of human existence but also ensures freedom and adequate realisation of skills and abilities. Also, the property right is the basis of the economic activity of a natural or legal person and the most important element determining it; ensuring the smooth transfer of the property right is considered to be a necessary condition for the effective use of resources and the increase of the universal state.[1]

LEGAL NATURE OF THE TENANCY AGREEMENT

According to the tenancy agreement, the lessor is obliged to transfer to the lessee the specified item for temporary use and to allow him to use this item during the term of the agreement, and the lessee is obliged to pay the lessor the rent agreed in the agreement.[2]

Under the tenancy agreement, the lessor is obliged not only to hand over the object of rent to the lessee (in possession and/or use) but also to maintain the appropriate condition of the object during the entire period of the lease. This condition is cumulative in nature, which means that if both conditions are not fulfilled, then the lessor cannot fulfil the obligation under the tenancy agreement in full, regardless of whether it is expressly stated in the rental agreement or not. The suitability of the subject of the tenancy agreement (determining the suitable condition) must be done in the presence of the lessee. When determining the suitable condition, it is necessary to determine to what extent this or that particular item (the subject of the contract) is suitable (for use) for the purposes provided for in the contract. The purpose of the item is determined by the nature of its normal use[3].

The tenancy agreement represents the number of agreements that provide for the transfer of the item for use. The main right of the lessee is to use the rented object, and the deprivation of this right or the late transfer of the object (rental object), gives him (the lessee) the right to refuse the contract[4].

It seems that the necessary component of the rental is the transfer of the thing (apartment), which in turn entitles the lessee to use it until the lease agreement is terminated or dissolved in accordance with the law to prevent any interference with the use of the item.

CONSIDERATION OF VINDICATORY CLAIMS AND ENFORCEMENT ISSUES

A vindictive action is an action by a non-possessor against the wrongful owner for the return of real property[5]. According to § 985 of the German Civil Code, the legal owner can demand the return of the item from the owner. The Supreme

1 Posner, R., (2011). Economic Analysis of Law. 8th edn, Aspen Publishers, p. 4.

2 Chechelashvili, Z., (2020). Contract Law, "Bona Causa" publishing house, vol., Tb. p. 234.

3 Tumanishvili, G., (2012). Contract drafting technique and obligation-legal normative regulation, Ilia State University, Tb., p. 70.

4 Collective of authors (2002). Commentary on the Civil Code of Georgia, book four (L. Chanturia, ed.) "Samartali" publishing house. Vol., p. 96.

5 Mikava, L., (2011). Vindication lawsuit as a legal means of protecting the right to a lawsuit, "Justice and Law" magazine, N1., Vol., Tb. p. 76.

Court of Georgia indicated in relation to one of the cases that the vindication claim is satisfied in the presence of three prerequisites: 1) there must be an owner of the thing, 2) there must be an owner, 3) the owner must not have the right to possess the thing[6]. The goal of a vindication lawsuit is for the former owner to recover his property status and get his item back. The owner cannot be accused of negligence, the owner may act more prudently when entering into an agreement for the temporary possession of the thing than when purchasing the thing, and the assumption about the fault of the owner, in its essence, means imposing civil legal responsibility of the owner on himself, which is not allowed[7].

When the contractual partner becomes the illegal owner of the item, both the claim of the item and compensation for damages must be made on the basis of a contractual claim because the party to the contract was obliged to return the item to the owner upon termination of the contractual relationship.[8] Thus, if the thing is with the tenant after the expiration of the contract, the owner can demand the thing from him, both on the basis of a vindication and a contractual claim.

As of today, many civil cases are pending in courts with the request to reclaim the item from illegal ownership; however, due to court congestion, the mentioned lawsuits continue until the last instance, which is a great financial loss for the owner in terms of unacceptable rent, to this is added the protracted enforcement processes, lack of personnel, sometimes during the eviction process, enforcement police from the regions the employees participate, so I believe that the financial interests of the owner will not be protected as much as possible during the long stage of the eviction procedures.

GUARANTOR AS A MEANS OF FINANCIAL SECURITY FOR THE LESSOR

Who is the guarantor, and what is his obligation to the tenant and the lessor? A guarantor, also called a "guarantor" (a natural or legal person - a company) undertakes to pay the rent (as well as any interest in the event of a delay) in the event that the tenant fails to fulfil his obligations. The guarantor must have a fixed income and a stable financial situation; the landlord can even require several guarantors if he considers that the tenant's income and financial situation are unstable (this is the rule in the French Republic).

The tenant is not obliged to have a guarantor when renting an apartment, but the landlord has the right to request it. In France, the presence of a guarantor is more and more required when signing a tenancy agreement. The surety bond must be a written deed between the lessee, the lessor and the guarantor, drawn up by a notary or a lawyer.

It is important for the lessor to know whom to turn to in case the lessee does not pay the rent; as for the guarantor/guarantor, he is obliged to fully understand the scope of his obligation before concluding the transaction, it is necessary to specify its duration in the act of guarantee, since the validity period of the guarantor's obligation depends on the period of completion of the rental agreement, and it is terminated immediately after the end of the current rental agreement, it should also be noted that the lessor and the lessee do not have the right to extend the term of the rental agreement without notifying the guarantor, the said agreement is void in terms of the guarantor's responsibility. According to Article 2297 of the French Civil Code, the guarantor signs a guaranty document specifying the amount of the rent and the conditions for its revision[9]. The reader will be interested in what measures the lessor should apply when the lessee cannot or does not fulfil his obligations; in such a case,

6 Decisions of the Supreme Court of Georgia on civil, entrepreneurial and bankruptcy cases, N8, 2003.

7 Kochashvili, K., (2015). Ownership and property - fact and right in civil law, "Bona Causa" publishing house, Tb. p. 193.

8 Zoidze, B., (2003). Georgian civil law, vol., Tb, p. 101.

9 French Civil Code; Art.2297.

the owner must submit the rental agreement to the National Bureau of Enforcement and a letter sent to the guarantor about the existence of the debt (with proof of delivery), after which the bailiff, without examining/evaluating any issue, will make a withholding of the guarantor's proceeds (as in foreclosure/collection), after which the National Enforcement Bureau will transfer the withheld amount/rent to the landlord.

CONCLUSION

In conclusion, it should be said that, as of today, the owner's interests are inadequately protected in this regard and require more guarantees so that they are not neglected, and I also believe that the above-mentioned guarantee mechanism will be highly appreciated in Georgia and Georgian society, and it will not be alienated, since Georgian Legislation already recognises the guarantor institution in banking and credit relations, so I think that if commercial banks require a guarantor in certain cases when granting a loan, why should it not be possible to introduce a guarantor mechanism during the conclusion of a rental agreement. When signing a tenancy agreement, the lessor, in addition to requiring a guarantor, can take certain preventive measures, e.g. check the potential tenant's previous rental history with the previous landlord; this will give the landlord some insight into his new counterparty. At the same time, it is important to understand that the Constitutional Court of Georgia discussed the issue of compliance with the Constitution in the first and second sentences of Article 268 Prima 1 of the Code of Civil Procedure of Georgia and Article 269 of the same Code. These articles allowed the parties, when signing the contract, to define themselves, in case of a dispute, the issue of immediate enforcement of the decision of the court of first instance.

In this case, the winning party had the opportunity to immediately start enforcement proceedings based on the decision of the court of first instance, regardless of the appeal of the decision to a higher court.

According to the decision of the Constitutional Court, the immediate enforcement of the decision of the court of first instance limits the rights of the losing party.

Although the Court recognised the practicality of immediate enforcement in terms of supporting civil settlements and speedy restoration of violated rights, it nevertheless found the adverse effect of immediate enforcement disproportionate to the benefits obtained.

According to the decision of the Constitutional Court, the above-mentioned articles of the Civil Procedure Code of Georgia lose their force as of October 1, 2023[10]. According to the above-mentioned decision, the courts will be overloaded even more, which will prevent the timely restoration of the violated rights of the legal owner, so I believe that the method of solving the problem mentioned in the article is an alternative for this stage.

10 Decision No. 2/3/1421,1448,1451 of the Constitutional Court of Georgia dated April 11, 2023.

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2. Decision No. 2/3/1421, 1448, 1451 of the Constitutional Court of Georgia dated April 11, 2023.

MORATORIUM MEASURE IN PROCEEDING OF THE REHABILITATION REGIME

Meri Ketiladze

Doctoral Candidate, Guest lecturer at the Caucasus International University, Georgia

ABSTRACT

The debtor, who is willing to implement the rehabilitation regime, needs proper support in order to maintain and protect insolvency, increase the liquidity of the entity, etc. The moratorium measure ensures all of the aforementioned in insolvency law, in particular in the rehabilitation regime.

The use of the moratorium measure in the rehabilitation regime should not be understood solely in favour of the debtor. It is a means of protecting the interests of creditors along with the interests of the debtor.

The law distinguishes between mandatory and additional moratorium measures. As soon as the court issues a ruling on opening the rehabilitation regime, certain measures of the moratorium are automatically put into effect, and in certain cases, based on the court's decision, it is possible to apply additional measures of the moratorium. Consequently, the moratorium measure requires the court's involvement and caution. When applying the moratorium, the court must act in accordance with the principles of justice and proportionality. The use of the moratorium measure in the rehabilitation regime can be considered an important means of implementation of one of the important principles of the law, "- Maintaining and increasing the insolvency and business value as much as possible".

KEYWORDS: Insolvency, Rehabilitation, Moratorium

INTRODUCTION

As we know, in 2020, the Parliament of Georgia adopted a new Law, "On Rehabilitation and Collective Satisfaction of Creditors". The legislator set the implementation of the rehabilitation regime as the primary goal of the law, which is the best way to protect the interest of both the debtor and the creditor.

The basis of the debtor's insolvency/expected insolvency is a financial crisis from which no business entity is immune. Therefore, to overcome the crisis, the debtor needs some legal support. In insolvency, in particular, in the rehabilitation regime, a moratorium measure appears as such, which ensures the suspension of obligations to be fulfilled by the debtor for a certain period of time. The moratorium measure cannot be understood only as a means of realising the interests of the debtor. It is also a means of protecting creditors' interests for the implementation of the rehabilitation regime.

This article is interesting and innovative in the sense that the moratorium measure within the framework of the new law is discussed in it.

In order for the work to be of a proper standard, such **types of research** as historical research, comparative, narrative, descriptive methods, etc., are used in it.

The purpose of the research topic is to study and discuss the moratorium measure in the field of insolvency, in particular, in the rehabilitation regime.

The subject of the study is the study of the current law of the Georgian legislation on insolvency, in which the institution of the moratorium falls.

The object of the research is to study the institution of a moratorium in the example of Georgia and Britain.

The Law of 2007 on Insolvency Proceedings was considered to be rigid with regard to moratorium measures and did not allow for the application of moratorium measures that were balanced and tailored to a particular debtor. It was also noted that the previous law was characterised by a lack of legal regulation.[1] Accordingly, it became necessary to organise it in a new way, which was implemented within the framework of the new law.

MORATORIUM MEASURED AS A FREE BREATHING SPACE FOR THE DEBTOR

The moratorium measure, in its turn, gives the financially distressed but still viable debtor the opportunity to prepare for rehabilitation, seek new investments or implement other rescue measures. During the moratorium, creditors cannot take any legal action against the company without approval (i.e. permission) of the court.[2] A moratorium protects a financially distressed company from taking legal action until a rehabilitation plan is approved or the company's affairs are settled.[3] By using the moratorium cover, the debtor is given an opportunity to improve liquidity, including by postponing the fulfilment of due obligations, which, in turn, increases its ability to rehabilitate and is one of the determining factors for successful rehabilitation.[4]

The most important feature of the rehabilitation regime in Great Britain is the moratorium, which is called a kind of "freeze".[5] Here,

1 Explanatory card on the draft of Georgian Law "On Rehabilitation and Collective Satisfaction of Creditors", 2020.

2 Lorraine Conway. Commons Library analysis of the Corporate Insolvency and Governance Bill [HC2019-21]. House of Commons Library. p. 23. <https://researchbriefings.files.parliament.uk/documents/CBP-8922/CBP-8922.pdf>

3 Lorraine Conway. Corporate insolvency framework: proposed major reforms. House of Commons Library. p. 6. <https://researchbriefings.files.parliament.uk/documents/CBP-8291/CBP-8291.pdf>

4 Meskishvili K., Batlidze G., Amisulashvili N., Jorbenadze S., (2021) Basics of conducting insolvency proceedings according to the Law of Georgia "On Rehabilitation and Collective Satisfaction of Creditors", Publisher: © GIZ, Tbilisi. p. 33. http://lawlibrary.info/ge/books/GIZ_Insolvency-reader_2021.pdf>

5 Vanessa Finch, (2009) Corporate Insolvency Law Perspectives and Principles, Second Edition. p. 22.

in order to take advantage of the moratorium measure, it is necessary to submit an application to the court and produce documents.[6] The moratorium comes into effect from the date when an application is made to the court for the appointment of a practitioner or when a notice of appointment of a practitioner is served during an out-of-court proceeding. In Great Britain, a moratorium halts all legal proceedings and enforcement of judgments already made and provides security without court permission or practitioner consent.[7] According to the applicable law of our country, the moratorium measures are automatically put into effect as soon as the court issues a ruling on the opening of the rehabilitation regime, and in certain cases, it is possible to use additional moratorium measures based on the court's decision. The law determines everything imperatively. Let's discuss each of them individually.

MORATORIUM MEASURES AUTOMATICALLY PUT INTO EFFECT

According to the law, the following measures of the moratorium will be automatically put into effect: the ongoing enforcement measures against the debtor's property shall be suspended, and the initiation of new enforcement measures will not be allowed; Enforcement measures provided for by the Tax Code of Georgia (tax liens, mortgages, etc.) and the accrual/payment of fines and penalties shall be suspended, and the initiation of new enforcement measures shall not be allowed, except for the measures implemented for the purpose of paying off the tax debt incurred after the ruling made on admissibility of the application for insolvency and opening of the rehabilitation or bankruptcy regime by the court in accordance with the procedure established by the Tax Code of Georgia, and many others.[8] When moratorium measures are directly established by law, they are called statutory moratoriums, the so-called: Oxygen space. For effective negotiation, it is necessary for the company to have free breathing space, which is provided by the moratorium measure.[9] Considering all of the above, the following can be said: the moratorium is crucial in order to give the debtor the breathing space he/she needs to achieve rehabilitation goals. In rehabilitation, a moratorium gives businesses the time and freedom they need to find logical solutions and ways to move forward. It depends on the debtor what way he/she will find. For example, it can be the sale of assets and the satisfaction of creditors with the money received from the sale, finding a partner who, in exchange for the company's share, will settle the liabilities with the amount paid by him/her, or finding a buyer through which the company's products will be purchased, etc. The debtor has absolute freedom as to what measures to take to fulfil obligations. When a debtor is facing a financial crisis, rehabilitation is the best way to avoid pressure from creditors. And the purpose of the moratorium and its legal regulation is crucial to achieving the goals of rehabilitation.

In Great Britain, a moratorium is considered a debtor-in-possession procedure, which means that the company is still controlled by management. However, a licensed insolvency practitioner known as a "monitor" shall be appointed to provide supervision and assurance to creditors. His/her duty is to monitor the company's current activities and the probability of its survival. If he/she considers that the result is unlikely to be achieved, it is his/her duty to terminate the moratorium measure.[10] The lat-

6 Corporate Insolvency and Governance Act 2020, Chapter 2, A3.

7 Adam Plainer, Jones Day Gouldens Bucklersbury House, Corinne Ball, Jones Day. Comparison of Chapter 11 of the United States Bankruptcy Code and the System of Administration in the United Kingdom.

8 Law "On Rehabilitation and Collective Satisfaction of Creditors", Article 55 [last viewed on April 11, 2023].

9 Amisulashvli N., Bashinuridze K., (2019) Guidelines for Regulated Agreements, USA International Development Project "Governance for Development", p. 21. <https://pdf.usaid.gov/pdf_docs/PA00TZGW.pdf>

10 Ashurst, Corporate Insolvency and Governance Act:

ter is established by the applicable law of our country, according to which the court is authorised to make a decision on the cancellation of certain measures of the moratorium based on a substantiated statement of the creditor, debtor, manager, or another interested person.[11] The law also establishes certain cases when the moratorium measure can be revoked.

ADDITIONAL MEASURES OF THE MORATORIUM

As for the use of additional measures of the moratorium, it requires a substantiated statement of the creditor, debtor, manager, or other interested person on which the court will make a ruling.

According to the ruling made on the basis of additional measures, it is possible: 1. To prohibit the debtor from returning the items in his/her possession that were transferred under leasing, conditional title reservation, or another basis; 2. To restrict or prohibit the debtor from disposing of the property, including its alienation or encumbrance, from suspending the operation of the norms of the agreement concluded by the debtor, which obliges the debtor to dispose of the property, etc.[12]

If the automatically implementable measures of the moratorium are aimed at the interests of the debtor and to give him/her the opportunity, to save him/her, the additional measures of the moratorium ensure the protection of the interests of the creditors so that satisfaction of the creditors' demands does not become more difficult or worse, impossible. And the third clause, which limits the choices of the debtor's counterparties, can be considered a means of protecting the interests of both parties.

MORATORIUM MEASURE IN ACCORDANCE WITH THE ACT ON INSOLVENCY PROCEEDINGS

According to the applicable law, a separate chapter is devoted to the moratorium measure. As mentioned, the 2007 law was distinguished by the scarcity of its legal regulation. The moratorium measure is not even mentioned by this name in the 2007 law. Accordingly, its definition does not exist, nor does the standard that the new law proposed by regulating it. The Law on Insolvency Proceedings only indicated that it was prohibited to secure debts taken before the court ruling on acceptance of application on insolvency, payment of debts, and accrual/payment of interest, penalty, and fine (including tax) were suspended.[13] The mere existence of this norm in the law on such an important institution is an unequivocal basis for stating that the 2007 Law was behind modernity; it was necessary for it to develop appropriate norms and then implement them. The disorder of these and many other issues can be considered as the basis for adopting a new Law, "On Rehabilitation and Collective Satisfaction of Creditors".

CONCLUSION

Based on the summary of everything, we can conclude that the applicable Law "On Rehabilitation and Collective Satisfaction of Creditors" gives the debtor an absolute opportunity to secure his/her rights through the rehabilitation regime, achieve the goals and overcome financial difficulties, primarily through the moratorium measure.

Based on the law and after analysing everything, it can be said that through the implementation of the rehabilitation regime, the debtor has such interests as a continuation of his legal existence as an entrepreneurial entity - in the registry of Entrepreneurs and Non-entrepre-

The Moratorium. London, June 26, 2020. <https://www.ashurst.com/en/news-and-insights/legal-updates/ciga---the-moratorium/>

11 Law "On Rehabilitation and Collective Satisfaction of Creditors", Article, 58.1 [last seen on April 11, 2023].

12 Law "On Rehabilitation and Collective Satisfaction of Creditors", Article, 57.1 [last seen on April 11, 2023].

13 Law on Insolvency Proceedings, Article 21.3 [last seen on April 11, 2023].

neurial legal entities, maintaining his/her business, where he/she carries out entrepreneurial activities and which is equipped with a number of organisational and structural units. The moratorium, the existence of which is very important because it allows the debtor to breathe by "pausing debts" and helps the debtor to ensure all the mentioned. For the debtor, in addition to personal material interest, it is interesting to maintain the existing relationship with the creditors and to continue it in the future, which is ensured by the rehabilitation regime and the moratorium institution. The rehabilitation regime is also important because it gives the debtor an opportunity to think about the future, enter into new legal relationships, conclude new agreements, acquire new partners, create new trade relations, think about the establishment of a branch office, etc. And for this purpose, it is necessary for him/her to be able to use the moratorium measure.

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2. Law "On Rehabilitation and Collective Satisfaction of Creditors".
3. Explanatory card on the draft of Georgian Law "On Rehabilitation and Collective Satisfaction of Creditors", 2020.
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DIFFERENCE BETWEEN REFUSAL TO INITIATE AN INVESTIGATION, REFUSAL TO INITIATE CRIMINAL PROSECUTION, TERMINATION OF CRIMINAL PROSECUTION AND WAIVER OF STATE ACCUSATION

Khvicha Begiashvili

Doctoral Candidate of Law, Davit Aghmashenebeli University of Georgia,
Instructor of the State Security Service Training Center, Georgia

ABSTRACT

The article discusses, in accordance with the Criminal Procedure Law of Georgia, the institutions of refusing to initiate an investigation, refusing to initiate a criminal prosecution, terminating a criminal prosecution and refusing to file a state accusation, the similarities and differences between them. The author presents the problems of initiation and implementation of the aforementioned procedural institutions in practice and ways of solving them.

The author is working on a doctoral dissertation, the title of which is "The Refusal of the State Accusation by the Prosecutor and Its Legal Consequences." Although this article is not part of the thesis, it is closely related to the scientific characterization of the institution of waiver of charges. In addition, the topics discussed in it will help the reader to have a clear idea about the legal regulation of the institution of refusal to charge, its role and its importance in procedural legislation. The study of the mentioned issue will help us to compare the issue under consideration with the procedural institutions that are

close to it, which will allow us to clearly present the legal analysis of the specific discretionary powers of the prosecutor. The article will give the reader a clear idea about the powers of the prosecutor, which at first glance does not represent a characteristic right of the prosecutor's office, but has a special place in the extensive arsenal of the prosecutor's powers and perform certain functions of protecting rights.

KEYWORDS: Prosecutor, Accusation (charge), Accuser, Termination of prosecution, Waiver of accusation

INTRODUCTION

At present, Georgian scientific works do not pay attention to the issue of waiving state charges and their legal consequences. We believe that the scientific study of this component, the identification of existing problems and the search for ways to solve them will contribute to the perfect implementation of the principles of the criminal justice process in the sense that everyone who has committed a crime will be held criminally liable, and at the same time, the conviction of an innocent person should be excluded.

We believe that related instruments for waiving charges in procedural legislation are presented in the form of a refusal to initiate an investigation, a refusal to initiate criminal prosecution and a termination of criminal prosecution. The mentioned procedural decisions are fully harmonized with the recommendation of the Council of Europe Committee of Ministers, according to which state accusers should not initiate or continue criminal prosecution, if, as a result of an objective investigation, the groundlessness of the accusation is established.[1]

Studying the research topic from a scientific point of view will allow us to fill the void that is accompanied by the rejection of the state accusation in the Georgian reality, and this void will be filled by answering such questions, which are problematic and interesting for both scientists and practising lawyers. A scientific study of the institution of waiver of state charges, a detailed analysis of its essence and results, in the light of current legislation of Georgia, will allow us to identify the problems that accompany the aforementioned procedural action, as well as create a clear idea and formulate recommendations that will ensure, on the one hand, in finding ways to solve the problems surrounding the procedural institution and on the other hand for the perfection of the procedural legislation. A scientific study of the issue will help the prosecutor to more actively and smoothly use his discretionary authority and to minimize subjective and criminal approaches by the state prosecutor when refusing the state charges.

In this regard, a discussion on the problems of the prosecutor's refusal to file state charges should be published in the Georgian legal literature. For comparison, this issue is actively raised and discussed in the legal circles of foreign states.

The conviction of an innocent person has been considered a serious crime since ancient times. Therefore, the ancient world severely punished those who illegally accused a righteous person. For example, the laws of Hammurabi punished with death the accuser who failed to prove the person's guilt. Ancient Greece and ancient Rome also shared this approach and believed that it was better for the guilty to go unpunished than to punish the innocent. According to the Roman Constitution of 212, the burden of the accusation rested on the accuser, and according to the Magna Carta (Great Charter of Freedoms), the authority to judge a person could not be given to the king but only to a fair trial.[2]

Justice in Georgia is carried out on the basis of equality and competitiveness of the parties,

1 Recommendation No R (2000) of Council of Europe Committee of Ministers to member states on ,,The Role of the Prosecutor's Office in the Justice System".

2 Thandilashvili, Kh., (2018), Prosecutor's Public Statement and Presumption of Innocence, "Justice and Law" magazine, № 4(60) 2018, p.164.

which ensures the democratization and perfection of the justice process.[3]

In this process, a decisive role is assigned to the process of exercising the discretionary powers of the prosecutor, who at the decisive stage of the legal proceedings, in particular during the trial of the case, acts as the state prosecutor, is responsible, not only for criminal prosecution but also, if there are legal grounds, for waiver of state accusation. The mentioned authority gives the prosecutor, as a state accuser, the rights and duties of a human rights defender since, if there are sufficient grounds, the rejection of state charges are directly related to the realization of a person's legal rights. During the use of the authority to refuse to execute state charges, the prosecutor protects the rights of the accused and the use of this right is assigned by the law to the state prosecutor with the same success as the implementation of criminal prosecution, which excludes the implementation of criminal prosecution procedures against an innocent person before the final decision of the court and will promote fair and lawful administration of justice.

DIFFERENCE BETWEEN REFUSAL TO INITIATE AN INVESTIGATION, REFUSAL TO INITIATE CRIMINAL PROSECUTION AND WAIVER OF STATE ACCUSATION

If a crime is reported, the law obliges the investigator and the prosecutor to initiate an investigation[4]. In practice, is an investigation initiated on the basis of any report of a crime? As mentioned above, the positive obligation to start an investigation upon receipt of information about the commission of a crime is assigned to the investigator and the prosecutor by procedural law and in this case, it does not represent such discretionary powers as, for example, initiating a criminal prosecution, as well as its termination and refusal to present accusations.

It should be noted here about a formal but important circumstance. In particular, procedural legislation does not recognize either the procedural institution of refusal to initiate an investigation or the system of pre-investigative actions. In some cases, scientists positively evaluate this legislative trend and believe that such an approach will prevent the establishment of the "syndrome of impunity" in the country[5].

The refusal to initiate investigation and/or criminal prosecution at the early stage of criminal proceedings is in accordance with the principles of the criminal proceedings[6], as it speeds up the process of resolving the conflict between the participants in the process, it saves material and human resources, which in turn directs these assets to the investigation of serious and especially serious crimes.

In what cases the investigator and the prosecutor cannot start the investigation? To answer this question, we should again be guided by the text of Article 100 of the Civil Code, which deals with information about crimes. It should be noted that the investigator and the prosecutor must, first of all, establish the presence of signs of crime in written, oral or otherwise recorded reports[7], Which is an extremely important issue also for the initiation of the investigation in order to determine the qualification of the crime. Currently, there are seven independent investigative structures in Georgia, namely: the Prosecutor's Office of Georgia, the Ministry of Internal Affairs, the State Security Service, the Ministry of Defense, the Ministry of Justice, the Ministry of Finance and the Special Investigation Service. Of course, the aforementioned bodies will not have the same approaches to

3 Constitution of Georgia, Tbilisi, 1995, Article 62, Part 5.

4 Criminal Procedure Code of Georgia, Tbilisi, 2009, Article 100.

5 Overbaugh, E., (2009). Human Trafficking: The Need for Federal Prosecution of Accused Traffickers, 39 Seton Hall, L. Rev. 635, 641-42.

6 Criminal Procedure Code of Georgia, Tbilisi, 2009, Article 8 and Article 16.

7 Ibid., Article 101, Part 2.

recording information about crimes, but what unites them all is the electronic program for the investigation of criminal cases, which has been adapted to all investigative bodies of Georgia since 2010 and which is used by all investigators and prosecutors of Georgia in their daily activities. Registration of the report in the mentioned program assigns it a unique registration number, after which, if the investigator and the prosecutor come to the conclusion that there are obvious signs of a crime, the electronic program allows the investigator to start an investigation on an action-by-action basis, after which the program automatically creates a so-called Form #1, in which the number of the criminal case, the plot of the crime, the criminal qualification of the crime and the electronic signature of the authorized person are indicated.[8]

If the investigator and the prosecutor fail to establish the signs of a crime in the report and, moreover, the report unambiguously indicates the absence of signs of a crime based on its content, in such a case, the investigator and the prosecutor will not have an obligation to initiate an investigation, and they must make an objective decision to refuse to initiate an investigation.

It should be noted here that a report on a crime, if we do not consider the case revealed during criminal proceedings, always has a specific initiator, which in some cases is subjective and acts based on personal interests. Accordingly, the investigator and the prosecutor, before starting the investigation, should study and analyze the facts and circumstances mentioned in the information in detail, at which time, based on their professionalism, they should, first of all, determine the presence of signs of crime in the report, and then give legal qualifications to the illegal activity.

What legal mechanism exists in the case when the report does not allow for categorical analysis? In particular, there are no signs of crime, but the fact requires further study. The following question logically arises, in the conditions when the current procedural legislation of Georgia does not recognize pre-investigation proceedings, how should the investigator and prosecutor check the facts indicated in the report, which do not contain obvious signs of crime? This issue is regulated by various laws and subordinate normative acts, which generally regulate the activities of law enforcement agencies. As an example, we can cite the laws of Georgia "On operative-search activity" and "On counter-intelligence activity". In addition to the above, before the investigation, the police officers, including the investigator of the Ministry of Internal Affairs, have the right to interrogate a person, identify him, call him, examine him and perform a superficial inspection[9]. Employees of the State Security Service, which also includes the service investigators, have the right to conduct these procedures[10] before the start of the investigation. Employees of the General Inspection of the Ministry of Defense, including investigators, have the right to request information, consider complaints, demand explanations from employees regarding their official activities, etc., before the investigation begins[11]. After the completion of the relevant legal procedures, if there are no grounds for the initiation of the investigation, the investigator and the prosecutor refuse to initiate the investigation. The specified decision does not have the form of a procedural document since, as mentioned above, the Code of Procedure does not recognize such a situation, and therefore it cannot have the form of a procedural document such as a resolution. In such a case, the investigators draw up a written document, which can be in the form of a notice or protocol, which indicates the receipt of the report, its content, the ver-

8 Begiashvili, Kh., (2019). "Essence, Meaning and Scope of the Electronic Program of Criminal Proceedings", the scientific-practical legal journal of the Supreme Court of Georgia and the Georgian Judges Association ,,Justice and Law", Tbilisi, №2(62)19, p. 123.

9 Law of Georgia "On Police", Tbilisi, 2013, Articles 19-22.

10 Law of Georgia "On the State Security Service", Tbilisi, 2015, Articles 14-17.

11 Regulations of the General Inspection of the Ministry of Defense of Georgia, Tbilisi, 2019, Article 3, "g", "m", "n", subsection.

ification of the factual circumstances indicated in the report, the measures taken and the conclusion obtained as a result of their analysis that it does not contain signs of crime[12]. The mentioned document should be reflected in the electronic investigation program, and the status of the registered report should be changed from "active" to "completed".

When starting an investigation, it is important to take into account the issue of its expediency. Since it is possible to start an investigation on a specific action, it may be more difficult and painful, even for public and private interests, as well as senseless and unfair, than to refuse to start it.

We should also touch on such a matter when we have formal signs of crime, but due to private, public and social interests, it may not be appropriate to start an investigation. In general, the investigation process is related to the time factor and human and material resources, which should be consistent with its legal outcome. For example, the sanction of a specific criminal act includes a minimum fine and/or community service.

We believe that the investigation should not be started on the facts of a crime with such a formal composition, which is a less serious crime, and when the time and resources required for conducting the investigation will be incompatible with its results. For example, when an investigation is to be conducted on the fact of a less serious crime, which is punishable by a minimum fine when the person does not pose a public danger, the damage has been compensated, the situation has changed, the victim does not demand offender's punishment, or when, based on public, private or social interests, it is inappropriate to open an investigation.

In case of refusal to initiate an investigation, it is necessary to analyze the set of factual circumstances based on which the prosecutor and/or investigator can use this authority. In particular, the issue of compensation for material and moral damage should be considered; it can be expressed both in kind and in monetary form, as well as by an apology, payment of treatment costs, assistance in the restoration of other violated rights, which corresponds to personal and public interests.

It should also be noted here that in a number of cases, by starting an investigation, it is possible to achieve such legitimate goals as the reconciliation of the participants in the process, awareness and repentance of the perpetrator of his illegal actions, compensation for damages, prevention of similar or other crimes in the future, and others.

Accordingly, it can be concluded that the absence of signs of a crime in the notification may be considered the basis of the classic form of refusal to initiate an investigation.

According to Georgian legislation, the prosecutor leads the litigation process up to the stage of judicial review, which also includes the pre-investigation stage. Despite the foregoing, the investigator has the right to refuse to start the investigation, which on the one hand, speeds up the litigation process and, on the other hand, strengthens the institution of the investigator, which is a positive issue since the levelling of the investigator's rights under the current regulations may be considered the Achilles heel of the current procedural code.

Some scientists consider the moment of registration[13] of the crime as the stage of the beginning of the investigation, which we cannot agree with because we believe that the pre-investigative activities, as its name clearly shows, are the previous stage of the investigation, in addition, the electronic criminal investigation program considers the moment when on an action-by-action principle, the investigator receives an investigation initiation card in the program, which provides a unique identifier of

12 The information is based on the results of interviews with practicing investigators and prosecutors as part of the study.

13 Meurmishvili, B., (2014). Initiation and Implementation of Criminal Prosecution in the Criminal Legal Process of Georgia (at the stage of investigation), scientific work submitted for the degree of Doctor of Law, Tbilisi, p. 103.

the criminal case - the case number. Here we must also take into account the formal conditions established by the current legislation. In particular, the application of the norms of the Criminal Procedure Code in practice, implementation is possible only after the beginning of the investigation, and the pre-investigation procedures are not regulated in it. Simply put, there cannot be an investigation process without the implementation of procedural legislation, and its implementation is directly related to the issue of initiating an investigation, and if we use the old terminology, "Criminal proceedings are the first step in the initiation of an investigation into a criminal case, it is the beginning of a criminal case that provides a basis for conducting all kinds of procedural investigative actions".[14]

With regard to the similarity between the initiation of the investigation and the refusal to bring charges, it should be noted that in both cases, the prosecutor has the authority to make a decision (when refusing to initiate an investigation jointly with the investigator or independently) and in both cases (the case of complete waiver of charge) a specific stage of the proceedings is completed. And as for the difference between them, in the first case, we have the stage and procedures before the start of the investigation, which is not regulated by the procedural legislation, and the refusal of the accusation is possible, according to the procedural legislation, only after the investigation has begun, it is conducted in its full scope, and the case is sent to the court for consideration.

Regarding the issue of termination of the investigation of the criminal law case, it should, first of all, be noted that the investigation belongs to the special administration of the highest state bodies of Georgia[15], despite the indicated constitutional reservation, the basic principle of the current procedural legislation is competition[16], which implies the equality of the parties in terms of gathering evidence as well. Such procedural regulation of the issue, on the other hand, as a democratic starting point, limits the monopoly of the state on criminal proceedings and, accordingly, strengthens the authority of the defense side in terms of independent collection of evidence[17]. The process of obtaining evidence independently by the parties, in turn, accelerates the criminal proceedings and makes it possible to make a timely summary decision on the case, even as the termination of the investigation in the case.

The legal grounds for termination of investigation and/or refusal to initiate criminal prosecution, as well as its termination, are regulated by Article 105 of the Code of Criminal Procedure. Termination of the investigation is the authority of the prosecutor[18]. We agree to divide the grounds for termination of the investigation into two main groups: substantive and procedural. The first group includes all the grounds that categorically exclude the existence of corpus delicti (a crime) in the act, which in turn excludes the issue of criminal prosecution and conviction against a person. Procedural grounds for termination of the investigation and refusal to start the investigation exist in such circumstances, the presence of which indicates the committed crime and the possibility of applying the punishment, but the legal regulations do not provide proper conditions for starting and/or continuing the proceedings[19].

The prosecutor issues a decision to terminate the investigation, which is reflected in the electronic program of the investigation of the criminal case. After the decision is made, in the electronic program, the status of the case, "ac-

14 Mjavanadze, Z., (1999). Criminal Proceedings, Issues of Initiation of Criminal Proceedings and Preliminary Investigation, Tbilisi, p. 10.

15 Constitution of Georgia, Tbilisi, 1995, Article 7, Section 1, Subsection "D".

16 Criminal Procedure Code of Georgia, Tbilisi, 2009, Article 9.

17 Elsner, B., Lewis, Ch., Zila, J., Police Prosecution Service Relationship within Criminal Investigation. In: European Journal on Criminal Policy and Research 14, 2008, pp. 203-224.

18 Criminal Procedure Code of Georgia, Tbilisi, 2009, Article 106, Part 1.

19 Paliashvili, A., (1968). Soviet Criminal Law Process, Tbilisi, p. 301.

tive", is changed to "terminated", and the program no longer provides technical means for performing any investigative action. The current procedural legislation, for its part, does not recognize the possibility of conducting any investigative or procedural action after the termination of the investigation. If we do not include the protocols and/or notices showing the disposal of the material evidence[20] attached to the case, the investigator and/or the prosecutor draw up these procedural documents in accordance with the resolution part of the decision to terminate the case[21], by which the fate of the material evidence was decided. Such procedural documents can be, for example, a protocol on unsealing, viewing and returning material evidence to the owner, a protocol on the destruction of material evidence, and others.

Professor Apollon Paliashvili divided the grounds for terminating the investigation into three groups:

1. Grounds that exclude the investigation of a criminal case;
2. Grounds that give the producer of the process the right to terminate the investigation;
3. Grounds for terminating the investigation due to non-confirmation of the accused's involvement in the crime.

There is the following similarity between the termination of the investigation and the refusal of the accusation, in both cases, the investigation has been started, and only the prosecutor has the right to terminate the investigation, as well as to refuse the accusation, and in both cases, formal grounds are required to make a procedural decision, which is presented in Article 105 of the Civil Code of Georgia. As for the difference between them, the prosecutor can terminate the investigation only before sending the case to the court for consideration, while the charge is dropped only at the trial stage, the investigation can be terminated even when the case has not been prosecuted, while the charge is withdrawn only after such, if any. In the first case, it is possible that we do not have a victim the case, but if there is one, the victim has the right to appeal the termination decision made by the prosecutor.[22] At the time of refusal to bring the charge, the current procedural code does not give the victim this right, which we consider to be an essential violation of the adversarial procedural principle and which we will talk about in detail in other studies since it is beyond the scope of the article.

After the investigation into the case, based on the analysis of the evidence obtained in the case, the prosecutor is authorized not to initiate a criminal prosecution. As a rule, the prosecutor makes such a decision when the investigation does not determine an action provided for by the criminal law, no harm has been caused or has already been compensated, as well as in the case of other factual circumstances, which is provided for by the procedural legislation.[23] As for the similarity between refusal to initiate prosecution and refusal to charge, both decisions are within the competence of the prosecutor. In both cases, the investigation is launched, and investigative actions are carried out. The difference between them is that the prosecutor can refuse to initiate prosecution by his decision only at the investigation stage, and it is possible to refuse charges only during the trial. In the first case, we do not have the fact of initiation of criminal prosecution against a person, which is a necessary component for the second case.

Refusal to prosecute those persons who first committed a less serious or reckless crime, who confessed and repented of it, fully compensated the damage and cooperated with the investigation, we consider it to be consistent with the fundamental principles of the Constitution of Georgia and Criminal Procedural Legislation in terms of protecting human rights, also represents a certain and objective order of society.

Along with the termination of the investiga-

20 Criminal Procedure Code of Georgia, Tbilisi, 2009, Article 3, Section 25.

21 Ibid., Article 81.

22 Ibid., Article 106, Article 1^1.

23 Molins, F., L'action public, 2009, (dernière mise à jour: 2013), 12.

tion, procedural legislation allows the prosecutor, in the presence of appropriate formal and factual circumstances, to terminate the criminal prosecution as well or to terminate only the criminal prosecution without the termination of the investigation. This occurs when there are obvious signs of a crime, the commission of which, on the basis of the additional evidence obtained in the case, confirms with a reasonable assumption that the person who is accused of committing it did not commit the crime.

DIFFERENCE BETWEEN TERMINATION OF CRIMINAL PROSECUTION AND WAIVER OF STATE ACCUSATION

Termination of criminal prosecution, by its nature, is the closest to the procedural institution of refusal to charge. Therefore, there are more similarities between them than with such rights of the prosecutor, such as the refusal to initiate an investigation and the initiation of criminal prosecution or to terminate the investigation. This similarity is expressed in the fact that both decisions are taken only by the prosecutor. In both cases, the criminal prosecution has already started, and both decisions directly refer to the further fate of the accused, in particular, the issue of stopping the criminal prosecution against him. In both cases, the prosecutor may decide in whole or in part to continue the criminal prosecution. The essential difference between them is the legal norm, according to which the prosecutor can terminate criminal prosecution only at the stage of the investigation, as well as refuse the charge during the trial.

In practice, the waiver of the charge is more often presented when the case is considered on the merits, during the presentation of the closing speech by the prosecutor, although this authority can also be used when the evidence obtained during the investigation is examined in court, and the prosecutor can also waive the accusation at the stage of the pre-trial hearing. With regard to the partial refusal of the charge, the prosecutor can do this at any stage of the trial, while the partial waiver may affect both individual episodes of the charge as well as one specific charge as a whole.

In addition, in contrast to the complete cessation of criminal prosecution, the complete rejection of the accusation leads to the termination of the trial of the criminal case due to the absence of corpus delicti (composition of the crime).

A partial or complete waiver of the state charge or a partial or complete termination of the criminal prosecution is possible only if there are proper grounds stipulated by the law[24].

In the legal literature, we find an interesting division of grounds for exemption from criminal prosecution into interesting categories: imperative objective grounds, imperative subjective grounds, discretionary objective grounds and discretionary subjective grounds[25]. When making a decision on exemption from criminal liability, it is necessary to assess whether it corresponds to the tasks of protecting the rights and legal interests of the individual, society and the state. Cumulative analysis of objective and subjective criteria will contribute to the validity of such an assessment and will also make it possible to determine whether a refusal of criminal prosecution is in the public interest. Termination of criminal prosecution should not be applied automatically to the fact of reconciliation of the participants in the process and a formal correction of the situation, but it should be decided to take into account public interests. The current procedural legislation makes it possible to easily resolve the issue with the mentioned criteria since the right of discretion has been introduced into Georgian legislation since the entry into force of the new procedural code, which can be considered an important moment in law-making activity, which is based on the data of comparative jurisprudence and legal science.[26]

24 Criminal Procedure Code of Georgia, Tbilisi, 2009, Article 105.

25 Golovko, L., Alternatives to Criminal Prosecution in Modern Law. St. Petersburg, 2002, pp. 286-287.

26 Mefarishvili, G., (2014). Concerning the Principles of Discretion, Journalistics of Law, Tbilisi, p. 18.

The formation of charges in a criminal case is preceded by a complex and lengthy procedural activity of investigation. In addition, after the initiation of the criminal prosecution, the prosecutor has the right to change its wording, which is also related to the new evidence obtained in the case. The specified change can be carried out both in favour of the accused, in particular, to facilitate his accusation and also against his interests, which entails aggravation of the accusation. At the investigation stage, the prosecutor is not limited in the decisions made in relation to the charge, and he makes decisions based on the factual circumstances presented by the totality of the evidence gathered in the case, based on his own inner conviction.

In order to decide whether to stop the investigation and/or criminal prosecution, the prosecutor needs to be properly motivated, which in turn should be created by an objective analysis of the set of evidence in the case since the decision to terminate the criminal case, which can be made by subjective opinion and arbitrary decision-making, essentially violates the legality of the case, the requirements of validity and justice.

The prosecutor's subjective refusal to stop the criminal prosecution before sending the case to trial, which can be explained by various even non-corrupt motives, such as avoiding conflict[27] with investigative bodies, is objectively considered by scientists as a negative event, but it is a fact that the legal systems of different countries are facing this risk and the objective decision of the prosecutor to terminate the criminal prosecution in a timely manner should not be perceived as a failure of the investigative or prosecutorial bodies.[28] Based on the foregoing, the opinion is valid that if there are grounds for terminating the investigation and criminal prosecution, and the prosecutor has not used this right, the court has a positive obligation to terminate it during the trial. An unjustified refusal by the prosecutor to terminate the criminal case is considered a substantial violation of the Criminal Procedure Law, which should entail the annulment of the sentence[29].

When making a decision on exemption from criminal liability, it is necessary to assess whether it corresponds to the tasks of protecting the rights and legal interests of the individual, society and the state. Cumulative analysis of objective and subjective criteria will contribute to the validity of such an assessment and will also make it possible to determine whether the refusal of criminal prosecution is in the public interest. Termination of criminal prosecution should not be applied automatically to the fact of reconciliation of the process participants and a formal correction of the situation, but it should be decided to take into account public interests.[30]

In recent years, the issue of the expediency of criminal prosecution has come to the fore in the legislation of different countries, which in turn has led to the emergence of alternative institutions of criminal responsibility in the procedural legislation, which is related to the expediency of criminal prosecution in case of a crime.[31]

In such a situation, the problem of the synthesis of expediency and legality is on the agenda, which must be decided by the prosecutor, taking into account the factual circumstances of the specific case, the personality of the accused, his age and the illegal outcome. This issue becomes particularly relevant when

27 Flanagan, Sir Ronnie, The Review of Policing. Final Report, 2008, p. 60.

28 Osce Odihr, III Expert Forum on Criminal Justice for Central Asia (op.cit. note164), pp. 9 and 22.

29 Kononenko, V., Application by the Courts of the Norms of Criminal Procedure Law on the Termination of Criminal Cases after Reconciliation of the Parties in Cases of Public Prosecution, 2016., pp. 303-305.

30 Kaminsky, E., Ensuring Public Legal Interests in the Application of Alternative Methods for Resolving Criminal Law Conflicts in Pre-trial Proceedings, Moscow, 2021, p. 119.

31 Golovko, L., Alternatives to Criminal Prosecution in Modern Law. St. Petersburg, 2002, p. 21;
Samarin, V., The Principle of Expediency Versus the Principle of Publicity in the Modern Criminal Process, Criminal Procedure As a Means of Ensuring Human Rights in a State of Law. Materials of the International scientific-practical conference. Minsk, 2017, p. 76.

the burden of proof and the potential consequences are disproportionate, for example, when the human and financial resources spent on the investigation will greatly exceed the size and nature of the potential harm. In addition, the issue of compensation for damages should be resolved in accordance with the legislation of Georgia and it should not harm the interests of third parties, which should also be taken into account when waiving criminal prosecution or public prosecution.

In Georgian procedural legislation, an important innovation in this respect is the establishment of procedural institutions of diversion[32] and diversion-mediation[33], the use of which is a discretionary authority of the prosecutor.

On the other hand, diversion and diversion-mediation may be considered a kind of conditional release from the criminal liability of the accused under the legislation of Georgia, during which it is possible to apply such obligations as a fine, community service and others. The legislation of France, Moldova, Poland and other countries provides for the possibility of refusing criminal prosecution and conditional release from criminal liability.

32 Criminal Procedure Code of Georgia, Tbilisi, 2009, Article 168[1].

33 Juvenile Justice Code, Tbilisi, 2015, Article 39.

CONCLUSION

Summing up, it should be noted that the existence in the Criminal Procedure Legislation of Georgia of such institutions as refusal to initiate an investigation, termination of an investigation, cessation of criminal prosecution and refusal of the accusation indicates the primacy of democratic principles. The state has exclusive authority to both investigate and prosecute and the procedural instruments we have reviewed present the prosecutor as an authorized representative of the state, not as an inquisitor but as a powerful authority figure. And when the appropriate factual and formal conditions occur, which contribute to the objective transformation of the prosecutor's inner convictions, he can easily wear the mantle of a human rights defender and stop the investigative and incriminating procedures. As the research showed us, the rights of the prosecutor in this regard are diverse, and it is advisable to establish a limit between them, which was scientifically presented by us in the above study.

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ტელეფონი: (+995 32) 2 000 171 (120); (+995 596) 171 171

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