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LEGAL AND JUDICIAL PROBLEMS FOR DIVORCE ACCORDING TO ALGERIAN LAW

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ABSTRACT

Divorce is the dissolution of the marital bond between the parties, and it is either retroactive or irrevocable with minor or major evidence. It is one of the most frequently raised issues before the judiciary and raises many problems, the most important of which is the issue of proving divorce, especially with the ambiguity surrounding some of the articles that the legislator singled out for the issue of divorce and the difficulty of applying it judicially.

However, it is shrouded in some ambiguity, especially with the existence of Article 49 of the Family Code, which considers that divorce can only be established by a ruling. Is the judgment in this case considered revealing or decided?

Also, once a divorce from the husband occurs, its effects are achieved by dissolving the marital bond and the wife's waiting period. This is from a legal point of view, but this contradicts what is stated in the legal texts. What are the procedures, if any?

KEYWORDS: Divorce, Obstacles, Dissolution of the marital bond, Waiting period, Family code

INTRODUCTION

Marriage is considered sacred, which is why it was called the heavy charter, as it was surrounded by a set of legal rules that guarantee its continuity and stability. Nevertheless, an exception is represented in divorce, which solves the disintegrated marital ties through which it is difficult to form a healthy family.

However, divorce is the most hated halal to Allah Almighty. Yet, it has been legislated and regulated by provisions that the husband must observe for the divorce to take place in a valid manner that is positive for its legal and legal effects.

Divorce is the dissolution and dissolution of the marriage bond, as it is defined legally as “lifting the restriction of marriage immediately or in the future with a term derived from the article of divorce or its meaning”¹

Article 48 of the Family Code² defines divorce according to the cases taken by the latter, stating: “[...] A marriage contract shall be dissolved by divorce concluded by the will of the husband or by the consent of the spouses or at the request of the wife within the limits of Articles 53 and 54 of this Law”.³

It is evident from the legal concept that divorce is a dissolution of the marital bond using one of the words that indicate it, and it can take place by the will of the husband, at the wife's request or by mutual consent.

But what interests us in this study is the divorce that takes place by the will of the husband, in which the judge has a negative role that is sufficient to verify the husband's will and its validity to rule to prove this will and does not intervene except if it comes to reconciliation.

However, if we look at the text of Article 49 of the Family Code⁴ which states: “Divorce shall

not be established except by a judgment after several attempts at reconciliation conducted by the judge, but its period does not exceed three months from the date of filing the lawsuit [...]”.

However, it is shrouded in some ambiguity, especially with the existence of Article 49 of the Family Code, which considers that divorce can only be established by a ruling. Is the judgment in this case considered revealing or decided?

Also, once a divorce from the husband occurs, its effects are achieved by dissolving the marital bond and the wife's waiting period. This is from a legal point of view, but this contradicts what is stated in the legal texts. What are the procedures, if any?

To answer these questions, we will divide this study into two sections, the first of which deals with how to prove divorce, and the second section the procedures for proving divorce in accordance with the provisions of the Algerian Family Code.

1. HOW TO PROVE A DIVORCE

Divorce is the dissolution of the marital bond by the will of the husband or the lifting of the marriage restriction at the husband's rhythm, and divorce does not take place except in the form prescribed by Sharia.⁵

However, looking at the aforementioned Article 49 of the Criminal Code, we find that the legislator has submitted the issue of proof of divorce to the judiciary, but what is problematic is that divorce takes place outside the court and must be proved by a court ruling.

In this regard, the legislator began the article with the phrase, “It does not prove, and divorce is not held, so we wonder whether the judicial ruling, in this case, is a means of proving divorce, or is it a formal condition in which divorce occurs?”

In view of article 48 of the Penal Code, it

1 Abu Zahra, M., (2016). Personal Status. Dar Al-Fikr Al-Arabi, Cairo, p. 279.

2 The Family Code. (June 9, 1984). G.R. No. 24 of June 12, 1984, amending and supplementing. <http://jaf-base.fr/docMaghreb/Algeriecode_famille.pdf> [30 – 07-2023].

3 This Article was amended by Ordinance 05-02 of February 27, 2005, G.R. No. 15 of February 27, 2005.

4 This Article was amended by Ordinance 05-02 of Feb-

ruary 27, 2005, G.R. No. 15 of February 27, 2005.

5 Ahmed, I. A. H., Al-N. (1996). Women's Rights in Islamic Law. Dar Al-Thaqafa Library for Publishing and Distribution, p. 143.

is explicitly stated that the dissolution of the marital union may occur as a first case by the husband's sole will and as soon as he utters the word divorce or what benefits him. However, article 49 of the Code deprives the husband of the freedom granted to him by Article 48 of the Code by restricting filing a lawsuit demanding the dissolution of the marital bond by the judiciary and subjecting him to attempts at reconciliation established by a record. Consequently, this legal article affirms that customary divorce outside the courts' walls is not recognized.

Unlike the Egyptian legislation, which recognizes the occurrence of divorce outside the walls of the judiciary, where it can be proven by all means of proof such as evidence, oath and acknowledgement.⁶

Article 50 A⁷ adds and makes the matter ambiguous when the legislator did not differentiate between retroactive divorce and definitive divorce, as the article stated that whoever visits his wife during the reconciliation does not need a new contract, while the one who reviews it after the issuance of the divorce judgment is the one who needs a new contract. In this case, does the legislator not recognize retroactive divorce, and what is the fate of the shot that occurred and led in the end and after filing the lawsuit to reconciliation?

According to Dr. Zoda Omar, divorce can only be done by a ruling, and revocation that takes place before the judge issues a divorce ruling does not fall within the concept of revocation related to retroactive divorce.⁸ Article 49 restricts Article 50 of the Code of Criminal Justice to the need for a judgment to prove the occurrence of divorce.

This article also raises another issue related

to the waiting period, which, if we look closer, we find has become double so that the wife is considered when the divorce from the husband occurs twice, once when the divorce occurs, which is the legal waiting period, and again when the judgment is issued, which is the legal waiting period.

In this regard, the judiciary affirms that: "Divorce is only a statement of the unilateral will of the husband to put an end to marital life, and the trial judges, when it is proven, can only testify and declare it [...]".⁹

Also: "It is prescribed by Sharia and according to what has been done by the Supreme Council that the husband's utterance of divorce obliges him [...]".¹⁰

This means that divorce becomes binding as soon as the husband utters it, while a judicial ruling only proves it because of its implications.

The legislator has restricted the husband's right to divorce even though it is a voluntary right and subjected him to the need to obtain a judicial ruling, and therefore, the will of the husband stands unable to arrange its legal effects unless it meets the conditions required by law, which is the existence of the form required by the legislator by issuing a judicial ruling proving this will.¹¹

However, Dr. Omar Zoda considers that the affirmation of a divorce judgment is a condition for convening and not for proof since the legislator when stipulating the need to have a judgment to prove divorce, meant that there is no divorce unless attempts at reconciliation precede it. Consequently, the husband must declare his will to divorce before the judge after the reconciliation proceedings have been completed, and therefore, the judge is considered a witness to this. On this basis, the judicial judg-

6 Al-Bakri, M. A. (1996). *Encyclopedia of Jurisprudence and the Judiciary in Personal Status*. Dar Mahmoud for Publishing and Distribution, p. 183.

7 Article 50 of the Code states: "Whoever visits his wife during the reconciliation attempt does not need a new contract, and whoever returns to her after the divorce judgment is issued needs a new contract".

8 Zoda, O. (2003). *The Nature of the Judgments Terminating the Marital Bond and the Effect of Appealing It*. Exclidea Publications Algeria, p. 32.

9 Supreme Court, Civil Chamber, 27/03/1968. Annual Bulletin 1968, p. 106, quoted in: Al-Arabi, B. (1994). *Family Law, Principles of Jurisprudence According to the Decisions of the Supreme Court*. University Publications Office Algeria, p. 58.

10 Supreme Court, Personal Status Chamber, 17/12/1984, file No. 35322, Judicial Journal 1984, No. 4, p. 91, quoted by: Al-Arabi, B. Previous reference, p. 73.

11 Zoda, O. Previous reference, p. 107.

ment is considered a condition for the validity of the divorce and not a condition of proof.¹²

Accordingly, according to this view, the legislator has been in line with the jurisprudence of Islamic law regarding the need to witness divorce with two witnesses.

2. PROCEDURES FOR PROVING A DIVORCE

Under Article 48 of the Family Code, a judicial ruling is considered a means or condition for divorce, without which the law does not recognize the existence of divorce.

The judicial ruling for divorce is characterized as a prescribed ruling, according to which the judge reveals the divorce that occurred at the will of the husband before resorting to the judiciary. The establishment of new legal centres represented the divorced and divorced after they were married, and therefore, the divorce judgment is a prescribed and established ruling. In this case, it is characterized by the following:

- Its content includes the obligation to respect what has been decreed and the need to implement what it says.
- As an official paper, it must be in writing.
- It is issued by a judicial body whose rulings are characterized by legitimacy.¹³

Therefore, a divorce lawsuit is filed by an interested person by resorting to the competent court¹⁴ accompanied by a petition stating all the necessary information, facts and reasons for the divorce, with the husband's signature at the end.

However, problems can occur if there are symptoms that prevent the plaintiff from completing the judicial litigation, such as the court cancelling the lawsuit due to the plaintiff's ab-

sence from the hearing despite the correct notification, the plaintiff leaving the litigation, or the lawsuit dropping. In reality, all these cases are divorced, but it is impossible to prove it under a judicial ruling. Therefore, a solution must be found to these problems that lead to the loss of the rights of the defendant party from a legal and legal point of view.

Therefore, we believe the divorce should be documented immediately after its occurrence by each interested party and by those who claim to prove the opposite.

Article 49 of the Family Law also shows that there must be reconciliation procedures after applying to the judiciary to prove divorce. Are they considered and mentioned within the ruling of reconciliation? Or it is ignored. If it is ignored, what is the fate of that relationship from a legal point of view?

Reconciliation is considered an essential and compulsory procedure before the divorce is issued. Still, it is useless if the divorce takes place outside the court framework, and the parties contact the court only to prove the fact of divorce in an official capacity. Especially if it happens, for example, if a man divorces his wife outside the court and resorts to the latter to prove the divorce and the reconciliation was made, and he divorced her again, and the reconciliation was made, and he divorced her again, and the reconciliation was made, does the judge, in this case, solve it forbidden by reconciling them or does he calculate the previous three shots and sign the divorce and the wife shows him a major statement and is not permissible for him after that except by marrying another and divorcing her or dying for her.¹⁵

However, if the judge reconciles several times and this is not done, he must prove this using a record signed by the parties, the registrar and the judge, with a parallel public hearing to pronounce the divorce ruling.¹⁶

12 *Ibid*, p. 31.

13 Ma'amir, H. (2013). Proof of divorce between law and the judiciary. *Al-Haqiqa Magazine* (27), pp.134-166.

14 Article 8 of the C.E.M.E.D. stipulates: "Applications relating to claims for divorce or return to the marital home shall be filed before the court within whose jurisdiction the marital home is located".

15 Ma'amir, H. Previous reference, p. 159, Article 51 of the Penal Code stipulates: "A man cannot return to a person who divorces her three times in a row until she marries another person and divorces him or dies from her after construction".

16 See Articles 37 and 144 of the Code of Civil and Ad-

The role of the Public Prosecution was also activated after the amendment of Article 49 of the Family Law, so it seeks to register the divorce judgment in the civil status records obligatorily, without a request from one of the parties, as a legitimate representative of society.¹⁷

CONCLUSION

Finally, we conclude that the legislator did not recognize extrajudicial divorce, although the articles suggest otherwise. The legislator did not explicitly distinguish between retroactive divorce and irrevocable divorce. Although he did so in Article 51 of the Law when he distinguished between divorce with a minor intention and a divorce with minor evidence, this is when he stated that a husband cannot return to his divorced wife three times in a row until she marries another person and divorces him or dies from her after construction.

Articles 48, 49 and 50 of the Family Code have sought to give the divorce ruling an official form even though these articles affect the provisions of Islamic law in several respects:

- Divorce is a major effect of the marital bond;
- The issue of divorce is one of the most serious issues affecting society, and that affects it negatively, as it leads to the dispersion of the family and its collapse and the beginning of the loss of children who will grow up in an inappropriate environment that affects their psychology, which leads them to deviation in the future;
- Divorce is a man's exclusive right to Algeria, as marital infallibility is in his hands, so the husband must make good use of this right for extreme necessity and seek to follow the procedures stipulated in

ministrative Procedure.

17 Previously, the parties were in charge of the process of registering the judgment after possessing the authority of the *res judicata* in the civil status records, but now the matter is entrusted to the Public Prosecution, see: Ma'amir, H. Previous reference, p. 161.

the law to guarantee the rights and the legal effects of divorce;

- The legislator's goal through Article 49 is to narrow the cases of divorce and to preserve the cohesion of the family and the children;
- The legislator obliges the judge to attempt reconciliation between the spouses, as it is an essential procedure in divorce before deciding on the case;
- The Algerian legislator omits divorce outside the judiciary despite its recognition by jurisprudence;
- The absence of a procedural law on personal status has led to many problems in the field of application;
- The Code of Civil and Administrative Procedure is the procedural reference for divorce cases;
- Referral from the legislator to the provisions and principles of Islamic jurisprudence and the opinions of jurists in complex divorce matters, in accordance with Article 222 of Law 11/84 as amended and supplemented;
- Incompatibility of the family law with the requirements of Islamic law;
- The Algerian legislator does not recognize divorce outside the judiciary through its stipulation in Article 49 of the Algerian Family Code that divorce can only be proven by a ruling. Therefore, the husband must declare the divorce before the judge. The legislator's silence on customary divorce created serious problems, especially if the waiting period expires, and thus, the divorce becomes a major manifestation and its consequences;
- Despite the legislator's silence on customary divorce, judicial applications work by proving it retroactively from the day it was uttered by the husband after confirming the validity of the divorce by the testimony of witnesses;
- The irrational formulation of the legal texts that regulate divorce, especially

Articles 49, 50, and 51, compared to the provisions of Islamic Sharia;

- The legislator omits and does not refer to the issue of witnessing divorce because witnessing has many benefits that limit the use of the right to divorce, especially the fanatic husband who is hasty in divorcing his wife;
- The terrible increase in divorce rates is due to the absence of religious scruples of people and their ignorance of the seriousness of this procedure, so the Algerian family has become fragile and rapidly collapsing, which will necessarily lead to a lack of cohesion in society;
- The judge makes an effort to apply the law and the provisions of Islamic law in the matter of proving divorce. Still, his conviction remains relative, especially in the case of denial by the husband of the occurrence of a divorce. Therefore, the spouses must be more careful than the judge when applying their religion and what Islamic law stipulates.

Therefore, we call on the legislator to change the method of proving the divorce ruling, which has become a violation of the provisions of Islamic law, and this is a Muslim country. For this, we propose the following:

- Witnessing the divorce for those who want to divorce, and this is so that the shots that occurred without applying

to the court are counted. Therefore, the court is resorted to in this case only for the sake of proof, and in this way maintaining the provisions of Islamic law;

- Delete the article related to proof because it violates the provisions of Islamic law and limits the proof of divorce to documenting it, with penalties if the divorcee does not do so. Adding articles within the family law protects the injured party in the event of failure to document the divorce, especially since manipulation in such matters seriously affects the family and society alike and falls into haram;
- Determining the duration of the beginning of the waiting period accurately, and this is because there is a difference between divorce located outside the walls of the judiciary and divorce before the court, and this is not to create legal problems.

In the end, we say that although divorce is the right of the husband to sign, the legislator must regulate it with tight legal rules that prevent manipulation of it, as it is the most hated halal to Allah Almighty. Its occurrence leads to dismantling of family ties, considered the basis of society. Insufficient regulation and lack of clarity of legal texts lead to the loss of rights, especially the rights of the child who is considered a victim of divorce.

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ADVOCATES EXEMPTION FROM LIABILITY UNDER CONSUMER PROTECTION ACT: OPENING OF A PANDORA BOX OF EXEMPTIONS?

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ABSTRACT

A two-Judge Bench of Honourable Supreme Court (SC) of India in *Bar of Indian Lawyers Through its President Jasbir Singh Malik v. D. K. Gandhi PS National Institute of Communicable Diseases and Anr (2024)*¹ held that professional services rendered by advocates fall under “contract of personal service” as opposed to a “contract for service” and accordingly, advocates are exempt from liability for deficiency in services under the Consumer Protection Act (CPA), 2019. The judgement brings the contentious issue of advocate’s liability as ‘service providers’ under the Act back to focus. The case arose out of challenge to a ruling by National Consumer Disputes Redressal Commission (NCDRC) in *D.K. Gandhi PS v. M. Mathias (2007)*². The NCDRC made advocates liable as service providers under CPA. The apex court, in fact, also went on to opine that the landmark SC ruling by three-judge bench in *Indian Medical Association v. V P Shantha (1995)*³ delivered almost 3 decades ago needs reconsideration and referred it to the Chief Justice for determination by a larger bench. This article seeks to uncover the liability of advocates as service providers in light of landmark supreme court judgements and the implications of recent judgement on other professions.

KEYWORDS: Advocates, Service, Deficiency in Service, Consumer Protection

1 Civil Appeal No. 2646 of 2009 along with Civil Appeal No. 2647 of 2009, 2648 of 2009 and 2649 of 2009.

2 MANU/CF/0142/2007

3 MANU/SC/0836/1995

INTRODUCTION

The consumer movement primarily started in the west. *Carlill v. Carbolic Smoke Ball Company*⁴ was one of the notable early cases which recognised the liability of the manufacturer for certain minimum standards of quality. *Donoghue v. Stevenson*⁵ was another leading case where it was held that manufacturer owes a *duty of care* towards end-consumer. Thus, the consumer movement kept gaining significant momentum over the years. The United Nations – General Assembly approved guidelines for protection of interests of the consuming class on April 9, 1985. These guidelines intended to encourage governments across the globe to develop consumer protection through appropriate legislation. United Nations Guidelines on Consumer Protection provide that there exists great asymmetry on all frontiers-economic, educational and bargaining power between the business class and the consuming class and consumer protection becomes all the more necessary, more so in developing countries.⁶

The Consumer policy framework as laid down in UN Guidelines stressed on consumer rights and accordingly CPA came up in India in 1986. It had the noble intention of ensuring justice which is simple, speedy and inexpensive. It aimed to address major issues associated with commercial litigation-time, cost and technicalities. The proceedings under the Act are also to be conducted through summary trial. The strict rules of civil procedure code or the Evidence act are not required to be followed by consumer commissions. Another distinct feature of the legislation was that one doesn't need to engage the services of an advocate. A consumer could fight his case on his own. However, the experience over the years shows that the consumer self-representation at consumer courts has

taken a serious hit and complainants engage the services of advocates in majority of cases. It is very difficult to find consumers at consumer courts. On account of changed market dynamics – international supply chains and the massive growth of E-commerce the law needed to catch up. Accordingly, the new CPA 2019 replaced the erstwhile 1986 legislation. The Act provides that the consumers aggrieved by defect in goods or deficiency in service can seek relief by filing consumer complaints before appropriate consumer disputes redressal commissions.

In *D. K. Gandhi PS National Institutes case*⁷ the two-Judge Bench of SC held that services rendered by advocates falls under “contract of personal service” as opposed to a “contract for service” and accordingly, advocates are exempt from liability for deficiency in services under the CPA, 2019. The judgement brings the contentious issue of advocate's liability as ‘service providers’ back to focus. The case arose out of challenge to a ruling by NCDRC in *D.K. Gandhi PS v. M. Mathias*⁸.(2007). The NCDRC held advocates liable as service providers under CPA.

1. THE CASE AT HAND: FACTUAL MATRIX

Mr D.K, Gandhi-the complainant/respondent availed the services of appellant advocate and a complaint was filed against Kamal Sharma. The said complaint was filed under Section 138 of Negotiable Instruments (NI) Act, 1881. The issued cheque of Rs 20,000/ – got dishonoured. Later on, the accused Kamal agreed to pay back Rs 20,000 and additional Rs 5000 for expenses suffered by Mr Gandhi. The respondent claimed that appellant has received the cheque from the accused on behalf of the respondent, however has not provided it to him and instead demanded Rs 5000/ – as fees for his services. The appellant also filed a suit in the court of Small Causes, Delhi for recovery of Rs. 5000/ – Lat-

4 Carlill v. Carbolic Smoke Ball Co. (1893)1Q.B. 256

5 Donoghue v. Stevenson (1932) A.C. 562: 147 LT 281:48 TLR 494 (HL).

6 United Nations Guidelines for Consumer Protection, United Nations Conference on Trade and Development (UNCTAD), (2016) [ditccplpmisc2016d1_en.pdf](https://unctad.org/en/publications-and-publications/ditccplpmisc2016d1_en.pdf) (unctad.org) (Last accessed: May 17, 2024).

7 Civil Appeal No. 2646 of 2009 along with Civil Appeal No. 2647 of 2009, 2648 of 2009 and 2649 of 2009.

8 MANU/CF/0142/2007

er though the Demand Draft of Rs. 20,000 was handed over to the respondent but the cheque of Rs 5000 was not paid as Kamal did stop payment at the instructions of appellant.

Aggrieved by this, the respondent filed a consumer complaint claiming total Rs 15000/ that included cost for mental agony and harassment. The appellant raised the argument that the advocates are not contemplated to be covered by CPA. District Forum rejected the contention and decided in favour of respondent. The State Commission reversed District forum's order and held advocates are not covered by the Act. The NCDRC overturned the ruling and laid that advocate too are covered by the CPA.

Aggrieved by NCDRC's order, the present appeal was preferred by the appellants. The Apex Court held services rendered by advocates to be falling under "contract of personal service" as opposed to a "contract for service" and accordingly held advocates not exempt from liability under CPA, 2019.

1.1 Service Providers Liability: Indian Medical Association Case

CPA covers cases of defective goods as well as deficient services. Indian Medical Association v. V P Shantha (1995) involved an interesting question as to whether a medical practitioner can be said to be providing service under the Act. The legal team of Indian Medical Association (IMA) argued the distinction between

occupation and profession. While the services rendered as part of occupation attracts being a service, the professional service providers like medical professionals are not intended to be covered. The medical professionals are already covered by Medical Council of India (MCI) and are governed by Medical Code of Ethics. It was also contended that in professions like medicine failure and success depends on many factors outside the control of medical practitioners. They also claimed that '*which is made available to potential users*' partakes to only institutional type services, i.e., commercial enterprise to the exclusion of professional service providers.

It was also argued from IMA that 'service' needs to be evaluated and judged on specific norms of quality. nature and manner of performance. There exist no standards for evaluating and judging medical practitioners' services cannot be equated with a commercial service. SC disagreed with the contention and referred to Section 14 of the earlier legislation by quoting the nature of reliefs for deficiency in services provided under the Act: As per Section 38 of CPA 2019, the following reliefs can be granted to the complainants in case of deficiency in services.

- (c) *Return of price/charges along with interest, as may be decided,*
- (d) *compensation for any loss/injury suffered due to the negligent act or omission of other party;*
- (f) *removal of defects in goods/ deficiency in services;*

Table 1

SERVICE under Section 2(42) of The Consumer Protection Act, 2019	
Main Part	It provides that service of <i>any description</i> which is offered to any <i>potential consumer</i> can be subject matter of service
Inclusionary Part	It provides few suggestive services – banking, financing, insurance, transport, telecom, etc. By stating ' <i>but not limited to</i> ' it also states that the list is merely indicative and there can be many others services as well.
Exclusionary Part	Any services which is provided <i>free of charge</i> (without consideration) or under any <i>contract of personal service</i> is to be excluded from the scope of service.

The term ‘Service’ means “*service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service*”;⁹ It can be bifurcated into three parts as follows (see Table 1.).

The use of word ‘potential’ mentioned in the main part of the definition conveys an extensive meaning in the sense that the word ‘any description’ and ‘potential’ includes something which does not exist for now but which will come in existence at some future time. The way this part is spelt out indicates the legislative intent that the term is accommodative and ever evolving with time.

The second part of the definition provides idea as to suggestive services—banking, financing, insurance, transport, processing, etc. In fact, even in Lucknow Development Authority case, the SC held that ‘housing’ too is service and was included in the definition later on in 1995.

The Exclusionary part lays down that when services are provided free of charge (without consideration) and when provided under a contract of service, are to be excluded from the definition of service. ‘Contract of service’ and ‘contract for service’ are significantly different. ‘Contract for service’ means a kind of arrangement in which one party renders service (professional or technical) where service provider is not subject to superintendence of the service recipient.¹⁰ ‘Contract of Service’ refers to a scenario where service provider is under the supervenience of the service recipient. It’s like a master-servant relationship – master dictated what is to be done, when is to

be done and how is to be done. The servant does not exercise autonomy and discretion in work unlike a professional. The exclusionary part of the definition intentionally uses ‘contract of personal services’.

1.2 Enlarged Scope of Deficiency in Service under CPA, 2019

It is also important to note the definition of ‘Deficiency’ under CPA, 2019 with regards to the issue. “*Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes—*

(i) *any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and*

(ii) *deliberate withholding of relevant information by such person to the consumer*”;¹¹

Under the earlier CPA, 1986 deficiency was provided as: ‘deficiency’ means “*any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service*”¹²

Thus, definition of ‘Deficiency’ under 2019 legislation is much more comprehensive and wider than the one under earlier 1986 legislation. The latest definition also expressly provides the acts of negligence or omission or commission and withholding of information deliberately which causes an injury or injury to consumer as elements of deficiency. It is very ironical that the medical services which was held to be a service by the apex court un-

9 Section 2(42) of the Consumer Protection Act, 2019.

10 Venkatesan V., Supreme Court Observer (SCO) (2024, June 20), Lawyers excluded from the consumer protection law. Are doctors next? [Lawyers excluded from the consumer protection law. Are doctors next? – Supreme Court Observer \(scobserver.in\)](#) (Last accessed: 30 June, 2024).

11 Section 2(11) of The Consumer Protection Act, 2019.

12 Section 2(1)(g) of The Consumer Protection Act, 1986.

der the previous definition of deficiency. With the addition of the aspects of negligence/act/omission/withholding of information causing loss or injury, it is all the more ironical that the services of advocates have been excluded from the framework of CPA.

The Disturbing Judgement:

SC in *D. K. Gandhi* case emphasised that professionals cannot be appraised at par with businessmen or traders. The later involve a deep-rooted commercial aspect. It stated that including the advocates as service providers will be a very far – fetched interpretation. The court also held that making advocates liable under the act might lead to multiplicity of litigation and many vexatious claims might be brought before the court. It shall seriously hit the objective of providing timely and inexpensive relief to the consumers. SC even went on to state that the legislature never intended to include professional service providers. This is sharp contrast to the ruling of 3 judge bench of the SC in 1995. The bench in the recent case, invoked Order VI Rule 2 of the Supreme Court rules to refer the matter to a larger bench. Referring the matter to Chief Justice for consideration by a larger bench and simultaneously also exempting advocates from CPA sets a very bad precedent and is a clear case of judicial indiscipline.¹³

As regards the advocates liability, the duties of an advocate are provided under The Advocates Act, 1961. The advocate owes duties towards the court, client, opponent and professional colleagues.¹⁴ There can be conflicting situations at times. However, the duty towards

the court in administration of justice assumes great significance. In fact, the lawyers have been exempted from consumer protection regime in several other jurisdictions too. Their services are well recognised in administration of time and are accordingly taken to be sui-generis.¹⁵ The court held that advocates can be made liable under civil/criminal law. But holding them liable under consumer protection law will be against the legislative intent.

The NCDRC had held that services provided by lawyers fell under CPA. It did acknowledge that an advocate cannot be made liable for unfavourable outcome of a case of complainant. There are many factors which decide the outcome and many of such factors are beyond control of advocate. However, a total exclusion from liability goes against the basic tenets of the Act.

Even with regards to medical services, if they are excluded from CPA, it shall seriously affect the range of rights available to patients. Though it is true that the professional bodies like MCI do provide a recourse to the affected parties, the rights available under CPA are much wider and it extends far beyond practitioners in individual capacity and also includes the institutions they are affiliated with. Comparatively, this offers a wide bouquet of remedies than the one provided by professional bodies. Thus, judgement might just open the Pandora box for other professions to seek exemption on similar grounds—Medical, Chartered Accountants etc. to name a few.

Concluding Remarks:

Medicine, Law and Teaching are held to be oldest professions. It is true that these are noblest of professions however one also needs to be in sync with the changing times. The consumerism has expanded like never before and arguably the three oldest professions are also

13 Venkatakishnan Haripriya, Columns Bar and Bench (2024, May 28). Supreme Court on advocates and Consumer Protection Act: A case of judicial indiscipline? [Supreme Court on advocates and Consumer Protection Act: A case of judicial indiscipline? \(barand-bench.com\)](#) (Last accessed: June 20, 2024).

14 Attri Sumit, Pandey Priyanshi & Singh Mayank Dispute Resolution Blog Cyril Amarchand Mangaldas (2024, May 16) Advocates no longer liable under Consumer Protection Laws for alleged deficiency in services [Advocates no longer liable under Consumer Protection Laws for alleged deficiency in services | Dispute Resolution Blog \(cyrilamarchandblogs.com\)](#) (Last accessed: June 2, 2024).

15 Sharma Rachit, Chourikar Parth, Taxmann's Advisory & Research [Corporate Laws] (2024, May 18). [Analysis] Advocates' Accountability vs. Consumer Rights | M. Mathias v. D. K. Gandhi PS National Institute of Communicable Diseases [\[Analysis\] Advocates' Accountability vs. Consumer Rights | M. Mathias v. D. K. Gandhi PS National Institute of Communicable Diseases \(taxmann.com\)](#) (Last accessed: 12 July, 2024).

the most commercialised ones today. The consumer seeks value for money from the service provider. Like there is a Bar Council of India (BCI) for Advocates, there also exists the Medical Council of India (MCI) for the medical professionals. The current ruling is likely to dilute consumer law. It opens the doors for many other professions to seek exemptions on similar ground. A professional by its very nature is governed by a professional regulatory body. By that

logic most professions will have to be left out to the detriment of consumers. The recent ruling of the supreme court might open the Pandora box for many other professional service providers to be claiming exemption on similar ground. A blanket exclusion for advocates shall do more harm than good. One only hopes that the larger bench of the Supreme Court gives an all-pervasive consideration on the issue with a consumer centric approach.

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2. Bar of Indian Lawyers Through its President Jasbir Singh Malik v. D. K. Gandhi PS National Institute of Communicable Diseases and Anr (2024) Civil Appeal No. 2646 of 2009 along with Civil Appeal No. 2647 of 2009, 2648 of 2009 and 2649 of 2009.
3. Carlill v. Carbolic Smoke Ball Co. (1893)1Q.B. 256
4. D.K. Gandhi PS v. M. Mathias (2007) MANU/CF/0142/2007
5. Donoghue v. Stevenson (1932) A.C. 562: 147 LT 281:48 TLR 494 (HL)
6. Indian Medical Association v. V P Shantha (1995) MANU/SC/0836/1995
7. Section 2(1)(g) of The Consumer Protection Act, 1986
8. Section 2(11) of The Consumer Protection Act, 2019
9. Section 2(42) of the Consumer Protection Act, 2019
10. Sharma Rachit, Chourikar Parth, Taxmann's Advisory & Research [Corporate Laws] (2024, May 18). [Analysis] Advocates' Accountability vs. Consumer Rights | M. Mathias v. D. K. Gandhi PS National Institute of Communicable Diseases [\[Analysis\] Advocates' Accountability vs. Consumer Rights | M. Mathias v. D. K. Gandhi PS National Institute of Communicable Diseases \(taxmann.com\)](#) (Last accessed: 12 July, 2024)
11. United Nations Guidelines for Consumer Protection, United Nations Conference on Trade and Development (UNCTAD), (2016) [ditccplp-misc2016d1_en.pdf \(unctad.org\)](#) (Last accessed: May 17, 2024)
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13. Venkatesan V., Supreme Court Observer (SCO) (2024, June 20), Lawyers excluded from the consumer protection law. Are doctors next? [Lawyers excluded from the consumer protection law. Are doctors next? – Supreme Court Observer \(scobserver.in\)](#) (Last accessed: 30 June, 2024)

THE CONCEPT OF THE ENTERPRISE IN THE ALGERIAN COMPETITION LAW (Between the Legal and Economic Concept)

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ABSTRACT

In the context of competition law, the concept of an enterprise includes any entity engaged in economic activity, irrespective of the legal status of that entity and how it is financed.

From this definition of the company, we can see its characteristics, which are essentially the economic activity of this entity on the one hand and its legal independence on the other.

Any conduct in the market can only be considered if the undertaking concerned carries out an economic activity, i.e., an activity of production, distribution or import and export. It must also be independent of other companies in the same market. In other words, each company must be in a position to compete with the other to create perfect competition in the market. Therefore, competition law prohibits anti-competitive practices only if economic and independent entities commit them.

Through this study, we will highlight the concept of the institution in competition law, whether from a legal or economic perspective, and we will learn about the conditions for applying competition rules to the institution as a key element in the market.

KEYWORDS: Enterprise, Entity, Economic Activity, Independence, Market

INTRODUCTION

The importance of competition law appears in protecting the principle of free competition itself, thus protecting the market as the domain of this competition. This protection is achieved through the legislator's dedication to the principle of free competition between economic agents within the market, especially in the face of certain prohibited behaviors, and includes in this context the prohibition of arbitrariness resulting from the position of economic domination, the abuse of the status of economic dependence and anti-competitive agreements, etc. It falls under the phrase "anti-competitive practices".

The customer element is the essence of competition law, and the purpose of its existence, where competition is located between institutions located in the same market, and some jurisprudence believes¹ that the institution is the real subject of the rules of competition law.

The institution allows the determination of the field of application of competition rules, but the institution considers the "distinctive" concept of competition law.² This concept is based on general criteria that give competition authorities broad discretion.

1. ENTREPRISE CONCEPT

The use of the term enterprise has become commonplace at present by most legal legislations without delving into the concept of this term itself, but competition law is concerned with the concept of enterprise to define the scope of application of the prohibition of anti-competitive practices.

1 Arcelin, L. (2009). The Concept of the Enterprise in Competition Law. *Juris. Class.: com., conc.* 1, Lexisnexis, (35), p. 2.

2 *Ibid.*, p. 3.

1.1. LEGAL AND ECONOMIC CONCEPT OF THE ENTERPRISE

The legal definition of the company is purely jurisprudential, and therefore, its definition differs from the multiplicity of jurists. Some jurisprudence defines³ the institution as a legal person that includes a capital element on the one hand and a human on the other, where the first element contributes to the formation of the institution while the second element contributes to its management and management. Others define it as a harmonious group of people and money that is formed for a specific goal and directs its activity to achieve that goal.⁴ Some consider it "an independent organization that includes a set of factors, with the aim of producing certain products or services for the market."⁵

In economic terms, the institution is considered the engine of the economy in the market, and therefore, some define it as every economic unit that has a potential gain from the economic activity it practices. But this does not mean that the legal concept of the institution is separated from its economic concept, but the institution may be based on both concepts,⁶ as some jurisprudence considers the institution as a unit that includes human and material factors to produce and sell products or services in the market.⁷

The Algerian legislator also mixed the legal and economic concepts in its definition of the institution, as it stipulates that it is: "Any natural or legal person, whatever his nature, who permanently carries out the activities of production, distribution, services or import".

The Court of Justice of the European Com-

3 Guevel, D. (2007). *Commercial and Business law* (3rd edition). L. G. D. J., France, p. 118.

4 Goldman, B. (1970). *European Commercial Law*. Dalloz, France, p. 263.

5 Ripert, G., Roblot, R. (1989). *Treatise on Commercial Law* (13th edition). L. G. D. J. France, p. 238.

6 Murat, A. (1967). *Essential Notions of Political Economy* (2nd edition). Sirey, Belgium, p. 117.

7 Pedamon, M. (2000). *Commercial Law: Merchants and Business Assets, Competition and Commercial Contracts* (2nd edition). Dalloz, France, p. 309.

munity also affirmed that “an enterprise is composed of a body composed of personal elements, material and intangible, linked to a legally independent subject and continuously pursuing a certain economic objective”.⁸ In another decision, it affirmed⁹ that, within the content of the competition law, the enterprise means an economic unit from the point of view of the subject matter of the agreement in question, even if this economic unit is legally composed of several natural or legal persons.

Thus, restrictive competition practices can be carried out by companies, whatever their legal form, whether they are financial companies, companies of persons, professional organizations, trade unions, cooperative societies or groupings of the same economic interest.

1.2. Economic Activity of the Enterprise

It should be noted that the company concept cannot be separated from economic activity since both define the sphere of application of competition law. Some jurisprudence considers that¹⁰ the practice of economic activity is an essential element in the definition of the institution in the competition law, where the latter focuses on economic activity while the commercial law uses the phrase “business”, and some believe it replaces the term economic activity used in competition law with the term business provided for in the Commercial Code.¹¹ Economic activity is defined as the supply of goods or services in a particular market.¹²

The Algerian legislator has addressed the concept of economic activity by defining the ac-

tivities to which the competition law applies, as the second article of Law No. 10-05 states: “... Production activities, including agricultural and livestock activities, distribution activities, including those carried out by importers of goods for resale as they are, agents, livestock brokers, wholesale meat sellers, service activities, handicrafts and fishing, and those carried out by public legal persons, associations and professional organizations regardless of their legal status, form and purpose;

– Public procurements, starting from the publication of the tender announcement until the procurement’s final award.

However, applying these provisions shall not impede the performance of the public utility functions or the exercise of the powers of public authority. We note that the legislator has included activities related to imports, allowing distributors not directly supplied by producers to benefit from the same guarantees granted to other distributors, especially since most of the products distributed in the Algerian market are considered imported.¹³

The concept of enterprise is also not based on profit-making, as non-profit-oriented bodies can be adapted to institutions due to their economic activity, such as associations.¹⁴ The competition law applies to the latter in the event of production or distribution activities.¹⁵

Thus, associations may be concerned with prohibiting anti-competitive practices when economic agents establish them to conduct economic activity in the market like other institutions. In this case, the association can issue orders and instructions to its members with the aim of unifying prices or sharing markets, so we are dealing with a prohibited practice, and

8 C. J. C. E. 13 July 1962, Mannes man. Rec. 1965, p. 677 www.eur-lex.europa.eu

9 C. J. C. E. 12 July 1984, Hydrotherm/Compact. Aff. 170/83 Rec.1984, p. 2999 www.eur-lex.europa.eu

10 Bertrel, J. P., Bonneao, T. Campana, M-J., Collard, C., Gury, G. (2001). Corporate Law: The Essentials to Understand. Lamy, p. 474.

11 Guevel, D. *Ibid.*, p.114.

12 ECJ, 18 June 1987, Case 118/85 Commission v Italian Republic. [1987] ECR 2599 www.eur-lex.europa.eu

13 Saintourens, B., Zennaki, D. (2011). Distribution Contracts: French law, Algerian law, Community Law. P. U. B, Algeria, p. 18.

14 Commission E.C. Dec. 19 Apr. 2001, aff. COMP/31.516, UEFA Broadcasting Rules. O. J. E. C. No. L 171, 26 June 2001.

15 Touat, N. D. (2001). Associations and Competition Law in Algeria. Memorandum for obtaining a Master’s degree in business law. Faculty of Legal and Administrative Sciences, Ben Aknoun, University of Algiers, p. 7.

therefore, the competition law is applied.

Therefore, no sector can be excluded, including banking, insurance, agriculture, etc. But what is the matter with social activities?

As for social insurance bodies, the Algerian Supreme Court has subjected the relations between the National Social Insurance Fund for wage earners and others to the ordinary rather than the administrative judiciary because they conduct business. The Court of Justice of the European Community also stipulated that these bodies be of a purely social nature, the latter embodied in the forced accession of the participants, the disproportion of the value of the subscription to the insured risk, its disproportion to the revenues of the participants and finally the lack of a direct relationship between the subscriptions and the services provided.¹⁶

To draw the boundaries between social activity and economic activity, the European law authorities have resorted to solidarity, the latter being the engine of social behavior, and considered that the bodies responsible for the administration of social security systems are not a company and therefore do not fall within the economic activities,¹⁷ due to their social and non-profit theme. Therefore, profit is not an element on which to base the adaptation of the enterprise, but it is sufficient to contribute to economic exchange to say that the institution is engaged in activity economically¹⁸

Economic activity, therefore, lies in producing or distributing goods and services. Some jurisprudence even considers that “the primary function of the enterprise lies in the production of goods and services in order to exchange them in the market”¹⁹

As for the French legislation, it does not define the concept of an enterprise but focuses on

the nature of the activities carried out by it, as it stipulates that the provisions of the competition law apply to all production, distribution and service activities, including those issued by public authorities.²⁰ Jurisprudence has argued²¹ that the prohibition should be applied to practices committed by persons exercising economic activity independently. The Court of Justice of the European Community affirmed that “within the scope of competition law, an enterprise means any entity engaged in economic activity independently of the legal framework of that entity and of how it is supplied”.²² In this regard, a fundamental problem arises concerning the applicability of competition law to public law subjects.

It should be noted that the provisions of the Competition Law apply even to the conduct of public enterprises when the latter carry out economic activity, provided that their activities are separated from their powers relating to public utilities. Algerian jurisprudence affirms that “if the commission aims to make a profit, it takes on a commercial and industrial character. If it is intended to achieve the public benefit in a field of national life,²³ this body is considered to be of an administrative nature”. Some also assert that “...As soon as the latter intervenes in the economy, on the same terms as the private person, the same rules are imposed on them, including the rules of competition”.²⁴ Administrative conduct is prohibited only if the law is allowed to be violated by an “institution”.²⁵

A public enterprise is defined in Algerian

16 Poucet, C. (1993). General Insurance of France and Mutual Fund. ECR, Belgium, p. 637 <www.eur-lex.europa.eu>

17 E. J. C. J. 17 Feb. 1993, aff. Poucet and Pistre, prev.

18 Behar, M. (1995). The Concept of the Enterprise in Community law. PUR, France, p. 26.

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23 Zeraoui, F., Salah, Al-K., Al-Q., Al-J. Business-Trader-Artisan-Organized, Commercial Activities-Commercial Register (2th edition). Publication, Ibn Khaldun, Algeria p. 132.

24 Berlin, D. (1995). Acts of Public Authority and Competition Law, A. J. D. A. (No. 4), p. 259.

25 Kovar, J. P. (2000). Subjection of Acts of Public Authority to French Competition Law. Dissertation presented with a view to obtaining the D. E. A. in business law, Robert Schuman University – Strastbourg III, Faculty of Law and Political Science, p. 83.

legislation as: “commercial companies in which the State or any other legal person subject to public law owns the majority of social capital, directly or indirectly. It is subject to the general Sharia.²⁶ Jurisprudence defines it as: “legal persons of an industrial and commercial nature, whose capital – in whole or most of it – is not subject to private ownership and is in a position of public dependency”.²⁷

Thus, the economic activities of public persons are subject to the control of the ordinary judge instead of the administrative judge, just like private persons, and the decision of the Supreme Court in its Administrative Chamber of February 14, 1969, concerning the case of the National Office for Agrarian Reform is the most prominent example in this area. The Court ruled that: “It is established that the National Office for Agrarian Reform is a public institution of an industrial and commercial character and that in the application of the provisions of Article 7 of the Code of Civil Procedure, the Judicial Council of Algeria, which decides on administrative matters, is not entitled to properly consider a case against this institution”.

However, when public persons exercise the powers of public authority in the framework of their ordinary function, they are foreign to all economic activity, whether production, distribution or services and are therefore not subject to the provisions of competition law because the State acts, in this case, as a public authority and not as an economic agent.²⁸ In other words, in order to exclude the prohibition on public institutions, the latter must intervene in their capacity as public agent and public authority.²⁹

Public persons may engage in economic activity but within the scope of the ordinary authority vested in them to achieve the public interest, so we are in a dual framework, an

activity subject to the market on the one hand and foreign to it on the other. In this case, the provisions of the competition law shall apply unless such activity is necessary to achieve the desired public interest, but if this interest can be achieved without resorting to economic activity restricting competition, we are dealing with a practice prohibited by Competition rules.³⁰ The public authority’s restrictive conduct of competition is embodied by subjecting the exercise of a particular activity to quantitative restrictions, which constitute a barrier to market entry by new customers and allowing the retention of the limited number of institutions present in the market, or by imposing uniform practices in the field of prices or conditions of sale, which is the most common practice.³¹

Article III of Presidential Decree No. 02-250 of 24 July 2002 regulating public procurements defines the latter as: “Contracts written within the meaning of the legislation in force, concluded in accordance with the conditions provided for in this decree, to carry out works and acquire materials, services and studies, for the benefit of the contracting authority”. According to Article II of the same decree, the contracting authority is represented by “public administrations, independent national bodies, states, municipalities, public institutions of an administrative nature, research and development centers, private, public institutions of a scientific, cultural and professional nature, and public institutions of an industrial and commercial nature”.

In French law, this problem was resolved in one of the cases before the Court of Dispute in 1989, where one municipality decided to suspend the concession of the public service for the distribution of water granted to one institution in order to grant it to another institution.³² The victim claimed that there was a restrictive competition agreement between the municipality concerned and the concessionaire institution, and she petitioned the French Competition Council to put an end to this restriction,

26 Public Economic Enterprises, O. J., August 23, 2001, p. s4.

27 Dufau, J. (1973). Public Enterprises. Legal News Editions, France, p. 54.

28 C. J. C. E. 18 March 1997, *Diego cali et Figli SRL c / Servizi ecologica porto di Genova SPA*. Aff. C-343/95, Rec. 1997, p.1547 <www.eur-lex.europa.eu>.

29 Kovar, J. P., *Ibid.*, p. 10.

30 Frison-Roche, M. A., Payet, M. S., *Ibid.*, p. 69.

31 Kovar, J. P., *Ibid.*, p. 89.

32 T. C. 6 June 1989, *Ville de Pamiers*. R. F. D. A. p. 465.

but the Council rejected the case, reasoning its decision not to apply competition law to such cases,³³ while the Paris Court of Appeal considered that the distribution of water constitutes an economic activity and therefore subject to competition rules, and the Dispute Court took the same position, stressing the need to apply the prohibition related to agreements stipulated in the competition law, given the existence of economic activity represented in the distribution of water. Therefore, the lesson is not in the nature of the institution but the lesson in the nature of its activity.³⁴

We note that economic activity constitutes a necessary criterion in the adaptation of the enterprise in both Algerian, French and European law, and the latter's use of the phrase "prejudice to trade between member states" does not lead to a narrow interpretation of the activity practiced by the institution, but rather means trade "exchange of an economic nature".³⁵

2. INDEPENDENCE OF THE ENTERPRISE

Restrictive practices are practiced by economic units that can be in a competitive position among themselves. Therefore each institution is required to enjoy its economic independence, in other words, to have sufficient independence in making decisions related to the demonstration of its behavior in the market. They must be legally and economically independent and bear the risks of the operations they conclude.³⁶ This raises the question of whether it is possible to distinguish between the institution and the person who owns or exploits it, or in other

words, about the practices concluded between companies belonging to the same group.

The different subsidiaries of a single group form a single entity in the event that the companies concerned do not independently determine their market behavior.³⁷ In this case, we are within the framework of a group of companies, which some consider be a group linked by common interests,³⁸ through which the parent company has authority over the rest of the branches and exercises control over them, thus ensuring the unity of decision. Some jurisprudence also asserts that when it is impossible for an institution to search for its own interest, and when its actions are just implementing the instructions of another institution, we are dealing with one entity due to its lack of independence and the need to abandon its goal of in order to follow that desired by the parent company.³⁹

Thus, the problem of the branch in the competition law is raised in several aspects, the most important of which is that it is the fruit of an emerging accession through a cooperation agreement within a partnership framework, which gives the parent company the authority to control it on the one hand, and retains the authority to act as an economic customer in the market on the other hand.⁴⁰

The problem of branch autonomy in competition law should be examined from two perspectives: the first is to determine the possibility of managing subsidiaries of the same group, i.e., can the parent company distribute markets among its branches or determine the prices of services or products provided by the latter?

The second is that restrictive practices are attributable only to the company that actually

33 Decision of the French Competition Council No. 88-D-24 of 17 May 1988 on a referral and a request for interim measures from the Société of water exploitation and distribution (S. A. E. D. E.). Annual Report for 1988, p. 61 <www.autauritedelaconurrence.fr>

34 C. A. Paris, 30 June 1988, B. O. C. C. R. F. of 9 July 1988 <www.lexinter.net>

35 Goldman, B., *Ibid.*, p. 259.

36 Boutard Labarde, M. C., Canivet, G., Claudel, E., Michel-Amsellem, V., *Ibid.*, p. 21.

37 Decocq, G. (2009), Cartels and Procedures: The Parent Company is Liable for Infringements Committed by its 100% Owned Subsidiary. R. J. C.: contrats, conc., cons., (No. 12), p. 28.

38 Kossentini, W. (2003). The Companies Group and Competition Law. Legal Studies, Revue published by the Faculty of Law of SFAX, (No. 10), p. 329.

39 Lamarche, T. (2006). The Concept of a Company. R. T. D. Dalloz, France (07), p. 21.

40 Brill, J. P. (1992). Joint Subsidiaries and Article 85 EEC: Study of recent decisions of the Commission of the European Communities. R.T.D. Dalloz France, (03). p. 85

performs such actions.

A prohibited practice can only exist between independent institutions, and practices between a branch and a parent company fall within the scope of competition law only in the case of branch independence.⁴¹ In other words, when the branch does not have effective autonomy in determining its own commercial policy and forms with the parent company a common economic unit, the adaptation of the agreement or orchestrated practice is excluded in which the criminalization of the latter requires multilateralism.⁴² This independence is manifested through the presence of the branch in a competitive position with the parent company due to the lack of dependency between them, such as the branch manufacturing products with new technology compared to those manufactured by the parent company, so we are in the process of competition – current or probable – between them.⁴³

It should be noted that the branch does not always have the freedom to act independently, without any control from the parent company, and the branch may carry out the latter's instructions. In this case, this dependent relationship must be proved, so how can the latter be proved?

The competition authorities refer to the presumption that the parent company owns the total or almost total capital of the branch. If this presumption is insufficient in proof, the authorities are forced to search for other evidence.

2.1. Capital Control and the Presumption of Specific Impact:⁴⁴

The presumption of the parent company's possession of the total capital of the branch was raised as evidence of the latter's lack of in-

41 Annual Report of the French Competition Council for 2006, Thematic Studies: The Proof of Agreements of Wills Constitutive of Agreements, p. 77.

42 Lamarche, T., *Ibid.*, p. 23.

43 Brill, J. P. *Ibid.*, p. 7.

44 Capitalist control and the presumption of determining influence.

dependence by the Court of Justice of the European Community, which held in one of its cases that the branch necessarily followed the policy set by the parent company.⁴⁵ This presumption exempts the Committee from proving the existence of control on the one hand, and its exercise by the parent company on the other. Thus, the higher the percentage of capital owned by the parent company, the more difficult it is to prove the independence of the branch.⁴⁶

Some even believe that the ownership by the parent company of a certain percentage of the branch's capital is a presumption of the latter's lack of independence, even if this percentage is small, as the independence of the institution assumes that it enjoys its financial disclosure.⁴⁷

As for French law, the French Competition Council confirmed that the competition authorities could assume that the branch carried out the instructions of the parent company when it owned a large percentage of its capital without ensuring that it exercised this power.⁴⁸

Therefore, the control exercised by the parent company and the decision unit is a key factor in excluding agreements concluded within the group from the scope of the ban, as although the branch has legal personality, it lacks independence.⁴⁹

2.2. Additional Evidence

In the absence of a capital relationship between the parent company and the branch, the authorities must prove the existence of means through which the parent company monitors its subsidiaries and the actual existence of such control. These include the existence of

45 C. J. C. E. 25 Oct. 1983, *Allgememe Elektrizitats – Gesellschaft AEG – Telefunken AG c/commission C.E. Aff. C-107/82*: Rec. C. J. C. E., p. 03151 <www.eur-lex.europa.eu>

46 Chaput, F. (2010). *The Autonomy of the Subsidiary in the Law of Anti-Competitive Practices*, R. J. C.: *contrat, conc. Cons.*, (No. 1), p. 12.

47 Lamarche, T., *Ibid.*, p. 24.

48 Report of the French Competition Council for 2006, note 3 <www.auritedelaconurrence>

49 Kossentini, W., *Ibid.*, p. 337.

the authority to decide within the branch, the identity of the managers, the instructions provided by the parent company, the commercial policy... In general, the parent company's doing the most important things or performing all the management functions related to its branch is evidence of the absence of the latter's independence. This is evident in one of the cases petitioned before the Court of Justice of the European Community, where it confirmed the absence of the independence of a branch of one of the institutions from the parent company even though the capital contribution did not exceed 55%, due to the presence of the same administrative members, and therefore relied on the presumption of members.⁵⁰ In another case, it ruled that all elements related to economic, regulatory and legal relations between the branch and the parent company should be considered.

The French Competition Council also considers that the intervention of the parent company in the matters of its branch constitutes an essential criterion for control, as well as for its intervention in contracts concluded between the branch and third parties, either by writing the terms of the contract or by interfering in negotiations between the branch and third parties.⁵¹

It should be noted that in most cases, clauses are included in partnership contracts between the parent company and its subsidiaries that are necessary for the conclusion of these contracts, but at the same time, may constitute a prejudice to competition, and perhaps the most important of these clauses: the non-competition clause, as this clause constitutes a presumption of the independence of the branch from the parent company.⁵²

The non-competition clause may be included in favor of the parent company or vice versa, constituting an additional presumption that both the parent company and the branch are in

a competitive position and, thus, a presumption of their independence.

CONCLUSION

It follows from the preceding that the subsidiarity of the branch to the parent company is a major reason for avoiding the application of the prohibition relating to existing practices within the group, provided that it concerns an "effective" dependency. In other words, it must be ensured that there is insufficient commercial and financial independence to guarantee the independence of enterprises to make decisions in the economic field.⁵³

But what about the case where the parent company delegates its powers to the branch?

When delegation aims to transfer all management powers to the branch, the idea of the autonomy of the latter can be invoked, but only if it is free from the control of the commissioner. Partial delegation of authority, which grants only part of the power to report, does not allow the autonomy of the branch to be derived.

As for the merger, it does not fall under the prohibition as it is considered a restructuring of the institution.⁵⁴

Finally, it should be noted that contracts between commercial agents and their clients can constitute prohibited agreements, thus requiring their economic independence. Accordingly, the agency contract falls outside the scope of the prohibition if it is found that the agent does not contribute to the expenses related to supply or transportation and that he does not bear any responsibility towards third parties.⁵⁵ However, if the agent bears the risks of these expenses, he adjusts to the institution and is therefore subject to the provisions of the competition law.

50 C. J. C. E. 21 Dec. 1993, *Sea Containers c/ Stena Sealink*. Aff. 94/119, J. O. C. E 18 Janv. 1994, p. 8-19 www.eur-lex.europa.eu

51 Counsel Decision No. 96-D-44, June 18 1996, *Advertising Sector*: B. O. C. C. R. F. p. 564.

52 Brill, J. P., *Ibid.*, p. 14.

53 Kossentini, W. *Ibid.*, p. 340.

54 Brun, A., Gleis, A., Hirsh, M. *Ibid.*, p. 69.

55 Arcelin, L. *Ibid.*, p.47.

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THE CHANGES IN DRUG LAWS TO APPLY THE DEATH PENALTY FOR DRUG-RELATED OFFENCES IN VIETNAM

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ABSTRACT

Vietnam has a history of executing individuals for particularly serious crimes. Applying the death penalty for drug-related crimes has sparked considerable debate since the first criminal code in 1985. Vietnam has retained this toughest punishment as one of the deterrent methods to combat drug trafficking in the last three decades. However, as a retentionist-and-reductionist state, Vietnam abolished capital punishment for several crimes in the last code (2015), including drug possession and appropriation. The application of the death penalty for drug offences in Vietnam has evolved in response to international standards and the country's global integration. Despite these changes, the death penalty remains a contentious issue in Vietnam, with the country maintaining its right to use it in its criminal code system. The path towards the complete abolition of capital punishment for drug offences is still uncertain because this complex issue involves political, legal, and social aspects in Vietnam's context, particularly when the Communist Party's ideologies still prefer a supply-driven reduction. This study uses personal reflections from over 20 years to focus and combine with the grey literature from national reports and desk-study in Vietnam's legislative documents. Seven specific thoughts with relevant recommendations in the last section will explain why we should need further evidence to (re) call for consideration to reduce the death penalty for drug offences before requesting/asking Vietnam to abolish these concerns immediately.

KEYWORDS: Drug-related offences, Capital punishment, Crime policy, Vietnam

INTRODUCTION

Law and punishment have existed in Vietnam to prevent and combat crimes and ensure national security and social order. Since the implementation of the Renovation Period (*Đổi Mới* in Vietnamese) in the middle of the 1980s, particularly after Vietnam released a new Constitutional vision (1992), increasing attention has been given to capital punishment in Vietnam. In Vietnam, the information and data about the death penalty have been limited strictly and unpublished officially by media communication caused by legal matters and political attitudes.¹ Particularly, it is tough for foreigners to obtain valid and reliable data to assess the practical application and executions in Vietnam.² Vietnamese researchers can understand and collect the data through their native language pathways, but it is still unclassified, and even 'they are very wary... and fear reprisals for investigating.'³ Besides that, Vietnamese scholars are often self-conscious about assessing the death penalty's policies and executions as objectively as possible.⁴ To a lesser extent, they only share

this information at national events with the official permission of authorities to avoid trouble because Vietnam had classified all court documents, records, and reports on the death penalty as belonging to the 'extremely secret level' since the 2000s.

Alongside implementing the economic reform within the scope of the Renovation Period (*Doi Moi* in Vietnamese) in the 1980s, the Communist Party of Vietnam (CPV) has been committed to updating and adjusting its legal norms and perspectives in punitive applications. The Criminal Code of Vietnam (CCV) was published in 1985 as the first official legal document in criminal law's field after Vietnam's war reunification. The death penalty is classified as one of the six principal sentences in the Vietnamese punishment system, including warning, fine, non-custodial reform, termed imprisonment, life imprisonment, and the death penalty. It is prescribed in regulations as 29 separate articles at seven independent chapters, accounting for 14.89% of the total 195 offences, but did not apply to drug-related crimes. Specific conditions, scopes and subjects of application of the death penalty are also stipulated. Accordingly, the death penalty is only available for offenders in particularly serious cases such as violation of national security; crime against peace; crime against humanity; war crime; socialist property violation; violation of human dignities such as health violation, murder and rape. However, this toughest punishment is not applicable for youth offenders and pregnant women or when the offender is tried, meanwhile suspending the execution of those pregnant or women taking care of their children under 12 months old.⁵

- 1 Johnson, D., & Zimring, F. (2009). *The Next Frontier: National Development, Policy Change, and the Death Penalty in Asia*. Oxford: Oxford University Press; see also Rahman, f. (2013). Capital Punishment for Drug Offenses. In F. Rahman & N. Crofts (Eds.), *Drug Law Reform in East and Southeast Asia* (pp. 255-271). Plymouth, the U.K.: Lexington Books.
- 2 Johnson, D., & Zimring, F. (2009). *The Next Frontier: National Development, Policy Change, and the Death Penalty in Asia*. Oxford: Oxford University Press.
- 3 Luong, H. T. (2021). Why Vietnam Continues to Impose the Death Penalty for Drug Offences: A Narrative Commentary *International Journal of Drug Policy*, 88, 1-9, p.2.
- 4 Le, L. C., Hoang, H. Y., Bui, T. H., Nguyen, Q. D., Mai, T. S., & Luong, T. H. (2022). Understanding Causes for Wrongful Convictions in Vietnam: A View from the Top and the Bottom of the Iceberg. *Asian Journal of Criminology* 17, 55-73; see also Le, L. C., Hoang, H. Y., Bui, T. H., Nguyen, Q. D., Mai, T. S., & Luong, T. H. (2023). Wrongful convictions in Asian countries: A systematic literature review. *International Journal of Comparative and Applied Criminal Justice*, 1-18; Luong, T. H. (2018, 28 February). *Death Penalty to Drug-Related Crimes: A Vietnam Perspective* Drug-related Offences, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia, Bangkok, Thailand; Luong, T. H. (2019, October). *Why Vietnam Continue to Main-*

- tain the Death Penalty with Drug-Related Crimes? 1st Asian Regional Meeting for Drug Policy, Hong Kong; Luong, T. H. (2021). Why Vietnam Continues to Impose the Death Penalty for Drug Offences: A Narrative Commentary *International Journal of Drug Policy*, 88, 1-9; Luong, T. H., & Ta, J. (2021). What Are the Specific Actions If Vietnam Still Retains the Death Penalty for Drug-Related Offences? In S. Biddulph, S. Kowal, T. Q. A. Nguyen, C. G. Vu, K. T. La, & L. C. Le (Eds.), *Death Penalty in Asia: Law and Practice* (pp. 319-317). Social Science Publishing House.
- 5 Luong, T. H. (2014). The Application of the Death Pe-

Based on society's distinct conditions and cultural backgrounds, the 1985 CCV has been amended four times to respond to the increasingly demanding requirements of Vietnam's society after *Đổi Mới*. The first time was on 28 December 1989; the amended and supplemented provisions with several articles of the 1985 CCV prescribed four drug offences in Article 96a, and there is a maximum death penalty. Secondly, on 12 August 1991, the law amending and supplementing several articles of the 1985 CCV prescribed the death penalty for other crimes, namely fraud, misappropriating socialist assets (Article 134); fraud appropriating the private property of citizens (Article 157); bribery (Article 226). Thirdly, on 22 December 1992, Vietnam's government continued to amend and supplement to apply the death penalty for smuggling. On 10 May 1997, it has been added the death penalty for six law-prescribed offences in the final adjustment. At the same time, lawmakers split Article 96a into four different types (185b, 185c, 185d, 185đ) and retained the death penalty for this crime. Article 112 stipulates rape is divided into two charges, rape and rape against the child (Article 112A), and also retains the death penalty for this crime.

Notably, in all four amendments and supplement times, the supply and demand for drugs began to increase in Vietnam. To enhance drug control with stricter punishments, the death penalty was codified as the harshest sentence for drug-related offences in article 96a in the First Amendment and supplementation of the 1985 CCV in December 1989.⁶ As a

result, the fourth amendment of the 1985 CCV expanded capital punishment for drug-related crimes with seven separate articles, among 44 death-sentence articles in 1997, accounting for 20.37% of the total 216 articles. The 1999 CCV, however, narrowed down and clearly defined the scope and conditions of this punishment. In 1997, Vietnam signed all three United Nations Drug Control Conventions to incorporate international drug control standards into domestic law.⁷ Consequently, the assessment of particularly serious drug-related crimes, whether punishable by death or life imprisonment, was re-examined and re-regulated. Article 200 of the 1999 CCV, which pertains to forcing and inducing someone to use narcotics illegally, changed the punishment from the death penalty to life imprisonment. The death penalty was also removed for some specific crimes to align with the new requirements of economic, political, social, and international integration. The number of articles prescribing the death penalty was reduced to 29, accounting for 11% of the total 267 articles in the 1999 CCV.

However, while reprieving and commuting could be applied to economic offences (e.g., embezzled property and bribed property), reducing the capital drug-related offences and their related reprieves was not yet implemented as much as possible.⁸ Among eight death articles abolished in the 1999 CCV, the illegal

nality for Drug-Related Crimes in Vietnam: Law, Policy, and Practice. *Thailand Journal of Law and Policy*, 17(1), 1-6; see also Tran, K., & Vu, C. G. (2019). The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry. *Societies* 9(3), 1-28.

6 Ho, T. N. (2009). *Some Issues Related to Death Penalty Judiciary in Vietnam* The XVII IADL Congress, Hanoi, Vietnam; see also Huyen, T. T. (2006). *Mot So Van De Ly Luan va Thuc Tien ve Hinh Phat Tu Hinh Trong Luat Hinh Su Viet Nam* Dai hoc Quoc gia Hanoi [trans: Huyen, Thi Tran 2006, "Basic Issues on Theory and Practice of the Death Penalty in Criminal Law of Vietnam" LLM Thesis, Hanoi National University]]. Hanoi, Vietnam; Tran, H. N. (2003). *Hinh Phat Tu Hinh Trong*

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7 Nguyen, T. P. H. (2015) Drug-Related Crimes Under Vietnamese Criminal Law: Sentencing and Clemency in Law and Practice. In: *Vol. 8. Policy Paper*. Melbourne, Australia: the University of Melbourne; see also Trinh, Q. T. (2012). *Che dinh Hinh Phat Tu Hinh Trong Luat Hinh Su Viet Nam va Mot So Kien Nghi Hoan Thien* [trans: The Death Penalty in Criminal Law of Vietnam – Proposed Issues to Improve]. *Law Journal*, 28, 30-41.

8 Pham, V. B. (2015). Abolishing or Retention the Death Penalty for Some Crimes? *Journal of Legal Studies*. Retrieved 11 December 2017, from: <http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=208505>; see also Tran, K., & Vu, C. G. (2019). The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry. *Societies* 9(3), 1-28.

organisation for drug use (article 197) passed; meanwhile, the four drug-related activities (stockpiling, transporting, trading, and appropriating) merged into one article in the 1999 CCV (article 194). After over 15 years of implementing the 1999 CCV, many conditions and the scope of applying the death penalty have changed due to various factors, prompting Vietnam's policymakers to reform this severe punishment towards humanitarian goals. In the latest version of the 2015 CCV and its first amendment in 2017, the reduction of death penalties remained a debated topic among National Assembly delegates. Currently, there are 18 'particularly serious crimes' punishable by death, in which drug trafficking activities have re-separated as similar to the 1985 CCV with four independent articles, but illegal stockpiling and appropriation of narcotics abolished the death penalty. In other words, there are only three drug-related crimes in the latest code (2015) compared to seven in the first code (1985).⁹

In this study, combining grey literature and legislative documents, I will (re)call for further

consideration to understand fully why Vietnam still resist the death penalty for drug trafficking activities and how Vietnam should act to reform their current drug laws to reduce it before abolishing. As part of my observations and reflections over twenty years on this topic, this study has continued to remain and support my previous studies and other Vietnamese scholars cited in this paper's references. It will be analysed after briefing the current drug laws with this punishment in the region compared to Vietnam's perspectives. In this part, the actuality of the given issue, research topic, established aims, tasks, and stages are emphasised. Structuring the problem and clearly establishing the issue are important.

1. DRUG-RELATED OFFENCES AND THE DEATH PENALTY IN SOUTHEAST ASIA REGION

The ongoing movement to abolish the death penalty to uphold the fundamental 'right to life' is expected to become a widespread trend soon. Yet, some nations persist in upholding and enforcing capital punishment within their legal systems. Asia is at the heart of the global effort to end the death penalty, which covered over 90% of all executions in the past decades, with a fluctuation in the number of executions in 35 countries, including several Southeast Asian countries.¹⁰ Despite the variety of political, religious, historical, and social systems, it is an irrefutable issue that the region remains many drug-related executions occur.¹¹ Accordingly,

9 The latest criminal code (2015) regulates this punishment may apply for three offences, including illegal manufacturing (article 248), illegal transporting (article 250), and illegal trading (article 251), if any trafficker has been demonstrated to commit these crimes at Clause 4 of each article, including:

- The offence involves a quantity of ≥ 05 kg of poppy resin, cannabis resin, or coca glue;
- The offence involves a quantity of ≥ 100 g of heroin, cocaine, methamphetamine, amphetamine, or MDMA;
- The offence involves a quantity of ≥ 75 kg of cannabis leaves, roots, branches, flowers, fruits or coca leaves;
- The offence involves a quantity of ≥ 600 kg of dried opium poppy fruits;
- The offence involves a quantity of ≥ 150 kg of fresh opium poppy fruits;
- The offence involves a quantity of ≥ 300 g of other solid narcotic substances;
- The offence involves a quantity of ≥ 750 ml of other liquid narcotic substances;
- The offence involves ≥ 02 narcotic substances. The total quantity is equivalent to the quantity of narcotic substances specified in points A through g of this Clause.

The English version is available at <https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn086en.pdf>

10 OHCHR. (2018). *Drug-Related Offences, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia*. Retrieved from Bangkok, Thailand: <https://bangkok.ohchr.org/wp-content/uploads/2020/01/Drug-Related-Offences-2018.pdf>

11 Nicholson, P. (2015, 2 October 2018). The Death Penalty in SE Asia: Is there a Trend Towards Abolition? *Politics & Society*. 4 March. Retrieved from: <https://theconversation.com/the-death-penalty-in-se-asia-is-there-a-trend-towards-abolition-37214>; see also Nicholson, P. (2017). *The Death Penalty and Its Reduction in Asia: An Overview*. Retrieved from Melbourne: https://law.unimelb.edu.au/_data/assets/pdf

Table 1: The death penalty (including drug-related offences) in the Southeast Asian countries.

Countries	Abolitionist for all crimes	De facto abolitionist	Retentionists	Mandatory for drug-related offences	Discretionary for drug-related offences
Brunei	✓	✓		✓	
Cambodia					
Indonesia			✓		✓
Laos		✓		✓	
Malaysia			✓		✓
Myanmar		✓		✓	
Philippines	✓				
Singapore			✓	✓	
Thailand			✓		✓
Timor-Leste	✓				
Vietnam			✓		✓

approximately 75% (8 out of 11 countries) impose capital punishment for these most serious crimes in their domestic regulations. Table 1 below shows this region’s different policy perspectives with diverse death penalty applications. Noticeably, while those eight countries argued their applicable punishment for drug-related crimes aligned with the international law (para 2, article 6 ICCPR) to “impose only most serious crimes”, the recent arguments from the United Nations do not support this claim.¹² (see Table 1)

Those who advocate for maintaining the death penalty for drug-related crimes do so in two main ways. One approach is through mandatory sentences, and the other is by incorporating provisions in criminal law that prescribe the death penalty for certain offences but allow

for commutation to life imprisonment. For the former, a mandatory sentencing system automatically imposes the death penalty upon conviction of a crime under their legislative regulations. Singapore, for instance, is a prominent example in Southeast Asia. Under section 17 of the Misuse of Drugs Act, anyone who possesses, consumes, manufactures, imports, exports, or traffics illegal drugs (above a certain amount) will be sentenced to death, regardless of any potential mitigating factors. A national survey revealed that at least one-third of 1,500 Singaporeans aged between 17 and 74 support this issue.¹³ For the latter, some states choose to temporarily suspend the death penalty for drug-related offences or seldom carry out executions of those convicted of them based on specific considerations and practical contexts. For instance, while Thailand still officially imposes the death penalty for drug trafficking, only 12 out of 281 potential executions between 1935 and 2001 were for drug-related crimes;

file/0010/2675386/Nicholson-EN_final.pdf; Pascoe, D. (2019). *Last Chance for Life: Clemency in Southeast Asian Death Penalty Cases*. Oxford: Oxford University Press.

12 General Comment No.36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, (2019); see also OHCHR. (2018). *Drug-Related Offences, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia*. Retrieved from Bangkok, Thailand: <https://bangkok.ohchr.org/wp-content/uploads/2020/01/Drug-Related-Offences-2018.pdf>

13 Cheong, C., Ser, T., Lee, J., & Mathi, B. (2018). *Public Opinion On The Death Penalty In Singapore: Survey Findings*. Retrieved from National University of Singapore (NUS): https://law.nus.edu.sg/wp-content/uploads/2020/04/002_2018_Chan-Wing-Cheong.pdf

executions were even rarer between 2009 and 2018.¹⁴ However, this nine-year hiatus ended in 2018 with at least ten executions, including one for a drug offence by a woman from Myanmar, though the number of executions fell back to zero in 2019. In essence, Thailand is a typical case in Asia of a de facto abolition of executions for drug-related crimes, even though they are still codified in law.

2. PREVENTING AND COMBATING DRUG-RELATED OFFENCES THROUGH RESISTING THE STRICTEST PUNISHMENTS: A LEADING POWERPOINT OF COMMUNIST PARTY AND GOVERNMENT

In Vietnam, the Communist Party is 'the leading force of the State and society... maintains close ties with the People, serves the People, submits to People's supervision and is accountable to the People in its decisions' (Para 1 & 2, Article 4, the 2013 Constitution). Accordingly, the Party strongly established its position on this issue and 'brook no debate or drafting that differed from its views'.¹⁵ As the highest functions, the Communist Party of Vietnam (CPV) is central in establishing and controlling law enforcement agencies for 'protecting national security and social order' (Article 65, the 2013 Constitution). Dealing with drug concerns, Vietnam has established multiple agencies in

their drug control system under the leadership of CPV. Under the CPV's commission, Directive No.06/CT-TW of the Political Bureau of the Party in 1996 has been considered one of the first official documents to expose the role of the CPV in drug control. This document is requested that:

Taking all measures to prevent drug sources from being brought into Vietnam from abroad, punishing promptly and severely those who produce, traffic, store, organise or force the use of drugs.

In Vietnam, the Party will instrumentalise 'the Government and its ministries, the legal system, economic life, and social life, masks other strands of thought and action'.¹⁶ Regarding social order, accordingly, preventing and combating drugs are compulsory responses of Party Committees, members and organisations at all levels, in which the drug law enforcement forces are the central bodies.¹⁷ To deploy this requirement, as a core armed force of the CPV, the Ministry of Public Security (MPS) established the first-ever anti-narcotics police forces (ANPF) in 1997 to be responsible for directly advising the CPV, the Government, and the National Committee for AIDS, Drugs and Prostitution Prevention and Control. Accordingly, the MPS's Decision No.192 determined that:

They (ANPF) carry out professional measures to prevent, detect, fight, and handle all types of drug-related crimes. They directly investigate large, especially complex, drug crimes... contributing to protecting national security and preserving social order and safety.

To support absolutely the ANPF (MPS) in supply reduction, Vietnam passed the first National Action Plan on Preventing and Combating

14 Luong, H. T. (2024). Capital Punishment in Vietnam. In B. Fleury-Steiner & A. Sarat (Eds.), *The Elgar Companion to Capital Punishment and Society* (pp. 287-292). London: Edward Elgar; see also Leechaianan, Y., & Longmire, D. (2013). The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis. *Laws*, 2(2), 115-149; Luong, T. H., & Ta, J. (2021). What Are the Specific Actions If Vietnam Still Retains the Death Penalty for Drug-Related Offences? In S. Biddulph, S. Kowal, T. Q. A. Nguyen, C. G. Vu, K. T. La, & L. C. Le (Eds.), *Death Penalty in Asia: Law and Practice* (pp. 319-317). Social Science Publishing House.

15 Sidel, M. (2008). *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective*. London, the U.K.: Cambridge University Press, p.45.

16 *Ibid*, 2.

17 Jardine, M., Crofts, N., Monaghan, G., & Morrow, M. (2012). Harm reduction and law enforcement in Vietnam: influence on street policing. *Harm Reduction Journal*, 9(27), 1-10; see also Cao, N. A. (2017). Examining Drug Trafficking as a Human Security Threat in Vietnam. *Journal of Security Studies*, 19 (Special issue), 69-90; Vuong, T., Nguyen, N., Le, G., Shanahan, M., Ali, R., & Ritter, A. (2017). The Political and Scientific Challenges in Evaluating Compulsory Drug Treatment Centers in Southeast Asia. *Harm Reduction Journal*, 14(2), 1-14.

Crimes (known as Program 138). Particularly, the Resolution No.09/1998/NQ-CP, Vietnam also identified that:

Using synchronous measures to promptly and resolutely suppress dangerous crime (e.g., organised crime, drug trafficking, and others). The Ministry of Public Security (MPS) shall preside over and coordinate with relevant ministers and branches to improve and strengthen professional forces to directly prevent and fight against those crimes.

As part of the main duties to implement Project 3 of Program 138 – Fighting and Combatting Organised Crimes, Particularly Serious Criminals, and International-related Crimes, ANPF's main functions, obligations, and responsibilities focus on anticipating, prevent, and combat drug-related crimes, including proposing to amend the 1985 CCV to apply the strictest measures for drug-related offences. Most complex operations have resulted in several deaths for traffickers and their accomplices, as the ANPF's external officials also observed that.

The number of death sentences has increased rapidly, which can be explained by the fact that the amounts of drugs seized by law enforcement agencies are exceptionally large, many times greater than the minimum amount required to attract a death sentence under the law.¹⁸

The situation of drug trafficking from the Golden Triangle area pushed the high volume of heroin into Vietnam's market, which made the rate of drug users and drug-related crimes more severe and threatened social order. To deal with this concern by being influenced and experiencing the model of the Soviet's sentencing in dealing with criminals, CPV could be ideologised that increasing the severity of punishment can

deter drug offences.¹⁹ Therefore, at the fourth amendment of the 1985 CCV, they proposed to apply capital punishment for drug-related crimes with seven separate articles, among 44 death-sentence articles in 1997. By establishing the comprehensive and professional task force (ANPF) in the late 1990s, CPV expected its leading role forever to prevent and combat the war on drugs by applying punitive-based policing to investigate and prosecute any drug dealers with the toughest punishment.

2.1. Rising the Transnational Narcotics Trafficking: Applying the Death Penalty to Respond to the 'Cat-and-Mouse' Game

As a transnational hub, the threat of illicit drug resources from outside has continued to explore Vietnam as a valuable and economic target as practically possible in both destination and transit markets. Our grey literature identified that in recent years, drug trafficking has become much more complicated in Southeast Asia, with rapid increases in local consumption linked to growing affluence and social expectations, particularly with synthetic drugs and their diverse types.²⁰ Geographically,

18 Nelder, V., & Pham, T. T. N. (2023). *Application of Alternatives to Capital Punishment and the Right to Defence through Self-Representation in Criminal Proceedings: International Experiences and Recommendations for Vietnam*. Retrieved from Hanoi, Vietnam: https://www.undp.org/sites/g/files/zskgke326/files/2023-02/ENG_FINAL%20Alternatives%20to%20DP_%207Feb2023%281%29.pdf, p.49>

19 Ginburgs, G. (1973). Soviet Sources on the Law of North Vietnam. *Asian Survey*, 13(10), 980-988; see also Ginburgs, G. (1973). Soviet Sources on the Law of North Vietnam. *Asian Survey*, 13(7), 659-676; Nagin, D. (1998). Criminal Deterrence Research at the Outset of the Twenty-First Century. *Crime and Justice*, 23(1), 1-42; Sidel, M. (1993). Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training. *Pacific Basin Law Journal* 11(2), 221-259; Sidel, M. (1996). New Directions in the Study of Vietnamese Law. *Michigan Journal of International Law*, 17(3), 705-719.

20 UNODC. (2021). *Synthetic Drugs in East and Southeast Asia: Latest Development and Challenges*. Retrieved from Bangkok, Thailand: https://www.unodc.org/documents/southeastasiaandpacific/Publications/2021/Synthetic_Drugs_in_East_and_Southeast_Asia_2021.pdf>; see also UNODC. (2022). *Synthetic Drugs in East and Southeast Asia: Latest Development and Challenges*. Retrieved from Bangkok, Thailand: https://www.unodc.org/documents/scientific/Synthetic_Drugs_in_East_and_South-

porous borderlands with Cambodia, China and Laos and a long coastline offer advantageous conditions for trafficking illicit drugs into and through Vietnam. In the last reports on trends and patterns of transnational organised crime, UNODC also warned that Vietnam is now exploiting transnational networks to transfer synthetic drugs into third countries and beyond.²¹ To respond to it, under requesting of the CPV, the ANPF routinely organises raids and intensively suppresses drug-related crimes as the highest operation in their policing duty. Applying the death penalty for these practically serious crimes is the priority in the policing strategies of ANPF. In other words, punitive-based policing was considered one of the specialised duties of fighting and combating drug offences under the request of the CPV. Some ANPF officials recently shared that.

Drug use and addiction are the fastest pathways to criminal behaviours.... and drug use makes up the highest number of offenders across society...preventing and combating all drug-related crimes are our most prioritised duties: nothing more, nothing less.²²

Additionally, as a prominent member of the Association of Southeast Asian Nations (ASEAN), Vietnam has taken seriously its responsibility to implement regional drug control policies through pre-dominating supply reduction operations to combat drug trafficking. Although Vietnam is facing critical suspicions about the rigid policy to use the death penalty to demonstrate its powerful provision in the war on drugs, retaining this toughest punishment is considered a clear declaration in their drug policy and law.²³ As Luong (2021) argued that

[east Asia 2022 web.pdf](#); UNODC. (2023). *Synthetic Drugs in East and Southeast Asia: Latest Development and Challenges*. Retrieved from Bangkok, Thailand: <https://www.unodc.org/roseap/uploads/documents/Publications/2023/Synthetic_Drugs_in_East_and_Southeast_Asia_2023.pdf>

21 *Ibid.*

22 Luong, H. T. (2021). Why Vietnam Continues to Impose the Death Penalty for Drug Offences: A Narrative Commentary *International Journal of Drug Policy*, 88, 1-9, p.4.

23 Notably, the current criminal code (2015) reduced

Concern over the situation led to new provisions in counter-narcotics policing in Vietnam, namely, a zero-tolerance measure for any drug trafficking groups/networks... as soon as any organisation grows in size and operation, it will attract attention from the police. The Communist Government will not tolerate the existence of any organised criminal groups.²⁴

According to the MPS' annual report, between 1992 and 2000, the annual crime rate averaged 60,000 cases, of which there are around 11,000 drug-related crimes, approximately 20 per cent.²⁵ Between 1993 and 2010 (excluding 2003-4 without data), the total number of defendants sentenced to death was 2,600 defendants.²⁶ Numbers of death row defendants tend to increase in this period, more particularly with the most remarkable growth of drug-related crimes occurring since 1997. Courts at all levels sentenced 22,058 offenders for drug-related offences involving 288 death penalty, 255 sentences of life imprisonment, 2,292 of between 10 and 20 years in prison and 19,223 of less than 10 years or other kinds of punishment.²⁷ Although Vietnam succeeded in eradicating opium poppy cultivation, from an estimated 18,000 hectares in 1990 reduced to just 32,4 hectares in June 2004,²⁸ they remained an important Southeast Asian transit route for trafficking illicit drugs. Perhaps Marina Mahathir was cor-

death penalties to only three of these crimes are drug-related crimes, in comparison to the seven drug-related crimes in the first version (1985).

24 *Ibid.*, 5.

25 UNODC. (2005). *Vietnam Country Report*. Retrieved from Hanoi, Vietnam: <http://www.unodc.org/pdf/vietnam/country_profile_vietnam.pdf>.

26 Trinh, Q. T. (2012). Che dinh Hinh Phat Tu Hinh Trong Luat Hinh Su Viet Nam va Mot So Kien Nghi Hoan Thien [trans: The Death Penalty in Criminal Law of Vietnam – Proposed Issues to Improve]. *Tap chi Luat hoc [trans: Law Journal]*, 28, 30-41.

27 Rapin, A.-J. (2003). *Ethnic Minorities, Drug Use and Harm in the Highlands of Northern Vietnam: A Contextual Analysis of the Situation in Six Communes from Son La, Lai Chau, and Lao Cai*. Hanoi, Vietnam: Thegioi Publishing.

28 UNODC. (2005). *Vietnam Country Report*. Retrieved from Hanoi, Vietnam: <http://www.unodc.org/pdf/vietnam/country_profile_vietnam.pdf>.

rect with the specific statement, ‘traffickers continue to smuggle drugs across borders in a continuous game of cat-and-mouse with law enforcement’,²⁹ and they also ignore the strictest punishment under Vietnam’s regulations. Over the past three years, on average, more than 20,000 cases and 30,000 drug offenders have been detected and arrested annually, and substantial quantities of various types of drugs have been confiscated.³⁰ Notably, over 1,000 intricate drug locations have been eradicated, and numerous transnational drug trafficking routes have been dismantled, thereby preventing the smuggling of drugs from foreign countries into the domestic market. It is one of the main reasons there were different views when discussing the Draft of the 2015 CCV by the National Assembly at the 10th session (known as the Draft) to amend Article 194 of the 1999 CCV. While withdrawing capital punishment for illegal possession (Article 249) and appropriation (Article 252), Vietnam wants to retain it for illegal trading (Article 250) and transporting (Article 251). The Draft supports this argument due to one out of the three main reasons:

Geographically, our country is close to the “golden triangle”, a major illegal drug producer. To prevent international drug criminals from using our country as a transit point, it is necessary to apply preventive measures, including legal ones like the death penalty for illegal drug transportation.³¹

29 Mahathir, M. (2013). Foreword. In F. Rahman & N. Crofts (Eds.), *Drug Law Reform in East and Southeast Asia* (pp. vii-viii). Plymouth, the U.K.: Lexington Books, p.vii.

30 Ministry of Public Security. (2021). *Bao Cao Tong Ket Cong Tac Phong, Chong Toi Pham ve Ma Tuy o Vietnam nam 2020* [trans: *Annual Report on Anti-Narcotics in Vietnam 2020*]; see also Ministry of Public Security. (2022). *Bao Cao Tong Ket Cong Tac Phong, Chong Toi Pham ve Ma Tuy o Vietnam nam 2021* [trans: *Annual Report on Anti-Narcotics in Vietnam 2021*]; Ministry of Public Security. (2023). *Bao Cao Tong Ket Cong Tac Phong, Chong Toi Pham ve Ma Tuy o Vietnam nam 2022* [trans: *Annual Report on Anti-Narcotics in Vietnam 2022*].

31 Ministry of Public Security (nd). See more detail (Vietnamese) at <[https://bocongan.gov.vn/van-ban/van-ban-moi/khong-bo-hinh-phat-tu-hinh-doi-voi-](https://bocongan.gov.vn/van-ban/van-ban-moi/khong-bo-hinh-phat-tu-hinh-doi-voi-toi-van-chuyen-trai-phep-chat-ma-tuy-trong-bo-luat-hinh-su-sua-doi-242.html)

Particularly, the structure and modus operandis of those (transnational) drug trafficking groups have grown increasingly complicated in Vietnam that request to enhance professional enforcement activities. Examine the complexity of the trend and pattern of drug trading across the borderland between Vietnam and Laos in recent years, Luong (2020)³² assesses that

The hot-spot drug trafficking routes across borderlands have continued to expand to different drug-related cases through cunning operations. Although the Government applied some strict measures with its absolute power for law enforcement agencies to counter-narcotics, the lucrative profits of illicit drugs have been “encouraging” traffickers to supply domestic markets.

2.2. Pressure the High Rate of Drug Use: Harder Punishment, Easier Management?

With the creation of compulsory centres through Resolution 06/CP in 1993, many people were forced to engage in centre-based compulsory treatment or CCT, even though most did not have a criminal conviction. Significant changes were made from 2000 to 2009 with some initial pilots of methadone maintenance therapy (MMT) for people who use drugs (PWUD) in Ho Chi Minh City and Hai Phong. Although these activities accordingly achieved positive outcomes regarding expenditure cost, physiologic, and management in the community, expanding this program at compulsory detention and prison for PWUD has not yet been prioritised. The high rate of PWUD at that time, with an increased average of 10,000 people annually, pushed more pressure on the CPV to adjust and implement drug control policies rather than investing only

[toi-van-chuyen-trai-phep-chat-ma-tuy-trong-bo-luat-hinh-su-sua-doi-242.html](https://bocongan.gov.vn/van-ban/van-ban-moi/khong-bo-hinh-phat-tu-hinh-doi-voi-toi-van-chuyen-trai-phep-chat-ma-tuy-trong-bo-luat-hinh-su-sua-doi-242.html).

32 Luong, H. T. (2020). Drug Trafficking in the Mainland Southeast Asian Region: The Example of Vietnam’s Shared Borderland with Laos. *Annals International of Criminology*, 58(1), 130-151, p.136.

in ANPF to fight drug-related crimes. Since 2009, as the first country in Southeast Asia, Vietnam has decriminalised drug use, and no more imprisonment applies to PWUD (article 199) and abolishing capital punishment for organising use of illegal narcotics (article 197).³³ Alternatively, they have been under-sanctioned as an administrative measure and treated as a patient rather than a criminal. This effort reduced death row for organising the illegal use of narcotics and controlled the number of PWUD prisoners, respectively. However, it also increased pressure on CDC officers when covering many PWUDs annually.

Although Vietnam had already attempted to conduct several measures in the rehabilitation and education policies with PWUD, the sustainable outcomes of ensuring those drug users' human rights were still questionable. Particularly, the Government passed and declared their expectations in the National Project to Renovating the Detoxicated Drugs Centres towards 2020 and orients in 2030 with promises to reduce from 123 CDCs to 71 centres in 2020 through changing these centre's reductions into voluntary detoxification centres (VDC) and also establishing at least 30 private owners of VDC. Unfortunately, as of February 2023, there were still 97 CDCs and only 16 VDSs with licensed operations. The total number of PWUDs managed at these drug rehabilitation centres is 63,253 (January – December 2022), while the National Project promised to reduce around 20,000 people.³⁴ Furthermore,

after fifteen years of decriminalising drug use (2009), Vietnam has not yet organised and assessed what they implemented in their relevant policies in the post-decriminalisation period. Indeed, they still pushed them into the CDCs, without or with limited MMT interventions, for up to two years with strict control, labour forces, and even physiology abuses. At the end of the 2010s, policymakers who support supply reduction operations and suspect harm reduction interventions continued questioning the effective finances for illegal drug users and registered drug abusers.

Regarding daily expenditure cost, if one PWUD needs around USD 1,000 annually plus around USD 85 for personal profiles with its necessary paperwork, the Government invested at least USD 248,043 million from 2009–2018.³⁵ Besides that, although the Government invested at least USD 44.6 million annually to run these CDCs, effective treatment is currently facing many problems and difficulties for many relapsed cases. To oppose these, since the early 2020s, in the latest amendment and supplement of law on drug prevention and control, the MPS's representatives have proposed tougher restrictions and harder measures for PWUD by proposing to re-enact Article 199 (drug use) in the 1999 CCV, which decriminalised in 2009.

Currently, the high demand for drug users in Vietnam contributed to pull-and-push factors to make the situation of drug trafficking from neighbouring countries to Vietnam via land more difficult to control and manage. Although the CPV has passed several prohibition policies,

33 The death penalty has now been abolished and changed to life imprisonment for organising the illegal use of narcotics in the 2015 criminal code (section 4, article 255); if committing a crime in one of the following cases, they include

- Causing harm to the health of 02 or more people with a bodily injury rate of 61% or more for each person.
- Killing 02 or more people.

34 Giang, O. (2023, 8 June). *Nhin Lai Mot Nam Thuc Hien Cai Nghien Ma Tuy Theo Luat Phong, Chong Ma Tuy 2021* [trans: *Assessing the First Year to Rehabilitate Drugs from the 2021 Law on Drug Control*]. Tieng Chuong (The Bell). Retrieved 11 August from: <https://tiengchuong.chinhphu.vn/nhin-lai-mot-nam-thuc-hien-cai-nghien-ma-tuy-theo-luat-phong-chong-ma-tuy-2021-113230608092244765.htm>

35 This number belongs to my consultancy report with Harm Reduction International about Drug Law Enforcement Expenditures in Vietnam in 2021. Accordingly, A standard spreadsheet template, developed and released in [July 2020 by HRI](#), was used for reporting annual indicators of law enforcement and expenditure figures in activities about policing, interdiction, judicial process, penitentiary institutions, and compulsory drug treatment over the 2015–2020 period. It is part of my consultancy with Harm Reduction International (HRI). Unit costs and expenditures were collected in Viet Nam Dong (VND) and converted to USD using the annual exchange rates to avoid confusing decimal statistics.

including the death penalty for illegal drug trading and transporting combined with propaganda campaigns, the long-term effectiveness still raises questions when the rate of PWUD is still high, particularly with the amphetamine-type stimulant users in young groups. Alongside pushing PWUD into the CDC as the high priority of the demand reduction, it requires CPV and the Government to continue to support drug law enforcement agencies policing drug resources with the hardest strikes. As part of the supply reduction, ANPF has been encouraged to deploy all their professional operations to prevent and combat drug smuggling and trafficking. Consequently, it is also recorded as other reasons to require keeping the death penalty for drug trafficking activities, particularly for illegal trading and transporting. The Draft³⁶ noted that:

Despite some positive changes in drug prevention and control, the situation remains complex due to high relapse rates, ineffective detoxification, worrying levels of HIV infection among drug addicts, increasing use of synthetic drugs and crystal meth among teenagers, and sophisticated activities of organised, transnational crime. Abolishing the death penalty for illegal drug transportation could complicate the situation further, as life imprisonment may not be a sufficient deterrent.

Many advocates believe that applying the death penalty to this group of criminals is entirely justified as it breaches the state's monopoly on narcotics management and controls.³⁷ Recently, to control the rate of PWUD on a do-

mestic scale (demand reduction), supply-driven reduction with policing measures continues to play as the pillar priority in the newest National Action Plan (2021-2025). Accordingly, CVP and the Government still requested to:

6. Concentrate on preventing and effectively combat illegal transporting and trading from overseas to internal markets, dismantle entirely any transnational drug trafficking to investigate and prosecute those traffickers...

9. Continue improving and strengthening specialised agencies' capacity in drug prevention and control... in which the ANPF plays a core role.

In other words, although the National Action Plan's general goals expect to balance 'overall supply, demand, and harm reduction solutions' in theory, its specific actions need to be interpreted and implemented in practice. It could lead to blurred points and unclear studies for Vietnamese and non-Vietnamese who want to understand the nature of the counter-narcotics policies in Vietnam fully.

3. DISCUSSIONS

Many changes have impacted the conditions and scope of applications of the death penalty in Vietnam after nearly 40 years since the first CCV in 1985. I am only a new scholar born in the Doi Moi era and had a timely chance to study and research in a Western country where I can open views with different approaches to review and examine what and how Vietnam changed and applied capital punishment. From a balanced perspective, I recognised that some of Vietnam's policymakers have been urged to reform, reduce, and ultimately abolish this harsh punishment to make its legal system more humanitarian. Particularly when Vietnam implemented their first requirements of Judiciary Reform in the 2000s-2010s to look for optional reduction of the death penalty, including for drug-related offences. To date, there are 18 'particularly serious crimes' for which capital punishment is imposed; only three of these

36 Ministry of Public Security (n.d). See more detail (Vietnamese) at <https://bocongan.gov.vn/van-ban/van-ban-moi/khong-bo-hinh-phat-tu-hinh-doi-voi-toi-van-chuyen-trai-phep-chat-ma-tuy-trong-bo-luat-hinh-su-sua-doi-242.html>

37 Nguyen, G. (2015). Khong bo hinh phat tu hinh doi voi toi pham van chuyen trai phep chat ma tuy trong bo luat hinh su sua doi [trans: No Abolish the Death Penalty for Illegal Transporting Narcotics in Amendment and Supplement of Criminal Code]. Retrieved from <http://bocongan.gov.vn/vanban/Pages/van-ban-moi.aspx?ItemID=242>; see also Pham, V. B. (2015). Abolishing or Retention the Death Penalty for Some Crimes? *Journal of Legal Studies*. Retrieved 11 December 2017, from: <http://lapphap.vn/Pages/tintuc/tinchiti-et.aspx?tintucid=208505>

crimes are drug-related crimes, in comparison to the seven drug-related crimes for which capital punishment was imposed in the 1985 CCV. This change reflects a trajectory leading from a strictly retentionist to a partly reductionist position towards the death penalty and needs further roadmap.³⁸ I also continue to agree with the straightaway comment of Professor Pip Nicholson, a leading expert in Vietnamese criminal justice reform, 'Vietnam is reformist and reductionist through reduce the offences to which the death penalty applies given recent changes to their laws, its resumption of executions, to advance human rights – but it is premature to classify it as an abolitionist.'³⁹ Nicholson correctly sketched here the roadmap that will move Vietnam beyond reduction and towards the abolition of the death penalty for drug-related crimes.

Thus, I do not think some recent arguments by scholars and non-government organisations who rank Vietnam among the top non-humanitarian states with the highest applications of the death penalty reflect the positive objectives with specific efforts from Vietnamese policymakers. Vietnam has implemented many changes reducing capital punishment since the first CCV in 1985, with their reductions exceeding those of other current retentionists.⁴⁰ It may be that analysts are making arguments that lack information about legislative actions,

practical applications, international reviews, and humanitarian policies in Vietnam regarding the use of the death penalty for drug offences. Again, with the country following up the punitive-based approach and leading under the Party, I assumed that drug laws in Vietnam would not transfer immediately to abolitionists without their specific conditions in the short-term of five years ahead.

In June 2019, a group of Vietnamese scholars worked with the Ministry of Justice and the Ho Chi Minh National Academy of Politics, with support from the EU Justice and Legal Empowerment Program in Vietnam, as well as UNDP and UNICEF, to organise a national workshop. Thirty interviews were conducted with government agencies, law enforcement officers, criminal justice officials, lawyers, and legal scholars. They also discussed the appropriate ways for Vietnam to enter the Second Optional Protocol of the ICCPR and abolish the death penalty. Accordingly, we should support Vietnam with a more detailed roadmap and accurate assessments to set up a comprehensive framework that can refer to Vietnam what and how to make suitable progress towards abolishing the death penalty in the future. It was also analysed and reflected in my latest five-year publications.⁴¹

38 Tran, V. H. (2014, 1 April). *Can mot lo trinh de tien toi xoa bo an tu hinh* [trans: *Need a Progress to Abolish the Death Penalty*] [Interview]. Radio Freedom International (RFI) <<http://www.rfi.fr/vi/viet-nam/20140407-can-mot-lo-trinh-de-tien-toi-xoa-bo-an-tu-hinh>>

39 Nicholson, P. (2017). *The Death Penalty and Its Reduction in Asia: An Overview*. Retrieved from Melbourne: <https://law.unimelb.edu.au/_data/assets/pdf_file/0010/2675386/Nicholson-EN_final.pdf>; see also Nicholson, P. (2015, 2 October 2018). *The Death Penalty in SE Asia: Is There a Trend Towards Abolition?* The Conversation. Retrieved 11 December from: <<https://theconversation.com/the-death-penalty-in-se-asia-is-there-a-trend-towards-abolition-37214>>

40 Nicholson, P. (2017). *The Death Penalty and Its Reduction in Asia: An Overview*. Retrieved from Melbourne: <https://law.unimelb.edu.au/_data/assets/pdf_file/0010/2675386/Nicholson-EN_final.pdf>

41 Luong, T. H. (2014). The Application of the Death Penalty for Drug-Related Crimes in Vietnam: Law, Policy, and Practice. *Thailand Journal of Law and Policy*, 17(1), 1-6; see also Luong, T. H. (2018, 28 February). *Death Penalty to Drug-Related Crimes: A Vietnam Perspective* Drug-related Offences, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia, Bangkok, Thailand; Luong, T. H. (2019, October). *Why Vietnam Continue to Maintain the Death Penalty with Drug-Related Crimes?* 1st Asian Regional Meeting for Drug Policy, Hong Kong; Luong, T. H. (2020). Drug Trafficking in the Mainland Southeast Asian Region: The Example of Vietnam's Shared Borderland with Laos. *Annals International of Criminology*, 58(1), 130-151; Luong, T. H. (2021). Why Vietnam Continues to Impose the Death Penalty for Drug Offences: A Narrative Commentary *International Journal of Drug Policy*, 88, 1-9; Luong, T. H., & Ta, J. (2021). What Are the Specific Actions If Vietnam Still Retains the Death Penalty for Drug-Related Offences? In S. Biddulph, S. Kowal, T. Q. A. Nguyen, C. G. Vu, K. T. La, & L. C. Le (Eds.), *Death Penalty in Asia: Law and Practice* (pp. 319-317). Social Science Publishing House; Luong, H. T. (2024). Capital

Recently, reporting on the fourth cycle of the national report for the Human Rights Council Working Group on the Universal Periodic Review (UPR) urged Vietnam to abolish capital punishment for all crimes, including drug offences.⁴² As part of the continuous recommendations from three out of the fifteen countries for Vietnam's report (Belgium, Leichesten, and the Netherlands),⁴³ they submitted their questions about what, when, and how Vietnam set up long-term approaches to reduce and abolish all death penalty offences after completing four stimulus UPR cycles. In any case, however, the roadmap leading to abolition must be synchronised with a one-term meeting of Vietnam's National Assembly period in the new term (2021-2026). Again, it was not surprising when Vietnam continued to neglect supporting the 75th Session of the United Nations General Assembly (30 October 2020) and the 2nd Optional Protocol ICCPR to abolish the death penalty in the fourth cycle of UPR (7 May 2024).

To some extent, I propose seven specific recommendations for drawing the necessary roadmap to abolish drug offence groups, if applicable for Vietnam, which has been partly published in previous studies. By doing this, we can expect a review and re-balancing of international standards with national priorities, further facilitating the abolition or continued reduction of articles involving death sentences for drug-related offences before officially retaining or abolishing the death penalty.

Firstly, regarding scientific evidence, only one national survey has been conducted by the School of Law National University of Hanoi since the 2010s, alongside some internal research. Yet, this survey is a general assessment – ‘*Survey on Impacts of Some Sentences in the Penal Code*’, which did not design and focus on

the death penalty to drug-related offences as an independent issue. Furthermore, trends and patterns of public opinion to objectively abolish or retain the death penalty for drug-related crimes have not yet been designed and analysed. Therefore, after 15 years, we call for a national survey focusing on drug-related offences as the first pilot before expanding to the rest of the 15 articles covering the death penalty.

If approved, *secondly*, this survey should be referred to and learnt in both design and conduct as professional and academic approaches in the Asia region and invited external experts to collaborate with the School of Law. As a typical example, I suggest kindly looking at the recent survey of public opinion on the death penalty in Singapore,⁴⁴ particularly in Chapter 3: Support for Death Penalty in Specific Offences and Chapter 5: Preferred Alternative Measures and Sentences, with a focus on drug-related crimes. To do it as objectively as possible, we can carefully examine the public opinion of each drug-related offence, both pros and cons. These findings about three drug-related offences should also be compared to the rest of the capital crimes in the current CCV (15 articles) to understand the general trend and pattern of capital punishment.

Thirdly, although the death penalty is still frequently applied, its effectiveness in deterring drug-related crimes is still questionable, as Nguyen's proposed above statement since the 2010s. For the first national survey, we need to design three separate sections with each relevant article in the 2015 CCV (Article 248: illegal manufacturing; Article 250: illegal trading; and Article 252: illegal transporting) to collect and analyse data more objective and accurate what, how, and why Vietnam should or not maintain the capital punishment for those offences.

Fourthly, some specific circumstances and scenarios relating to those three drug-related

Punishment in Vietnam. In B. Fleury-Steiner & A. Sarat (Eds.), *The Elgar Companion to Capital Punishment and Society* (pp. 287-292). London: Edward Elgar.

42 See more details at <<https://documents.un.org/doc/undoc/gen/g24/024/70/pdf/g2402470.pdf?to-ken=vBtuBERKPRy2hJK16l&fe=true>>

43 See more details at <<https://uprmeetings.ohchr.org/Sessions/46/VietNam/Pages/default.aspx>>

44 Cheong, C., Ser, T., Lee, J., & Mathi, B. (2018). *Public Opinion On The Death Penalty In Singapore: Survey Findings*. Retrieved from National University of Singapore (NUS): <https://law.nus.edu.sg/wp-content/uploads/2020/04/002_2018_Chan-Wing-Cheong.pdf>

offences should be included and explained to surveyors. For example, with illegally transporting drugs (Article 250), someone, including myself, proposed to withdraw the death penalty and transfer to life imprisonment as the highest punishment,⁴⁵ like illegal possession (Article 249) and illegal appropriation (Article 251), if drug mule belongs to some circumstances such as 1) the first time to commit a crime; 2) vulnerable groups, including homeless with poor economic, ethnic minorities, disabled persons or mental health; and 3) people who are seduced, forced or coerced to join trafficking networks.⁴⁶

Fifthly, there is a need for an open-access workshop or seminar among experts in drug-related offences, including policymakers, law enforcement agencies, and scholars. Although few events have been organised recently by the United Nations and School of Law (with support from Melbourne Law School and the Anti-Death Penalty Asian Network), their themes and discussions were vague. They did not focus only on drug-related offences. Alternatively, such a workshop or conference will allow participants to discuss the use of the death penalty for drug offences in Vietnam and how Vietnam can reduce and abolish it in the future.

Sixthly, Vietnam need to clarify their legislative documents to regulate the death penalty as their state secret. Since the 2000s, Vietnam has classified the list of top-secret state secrets of the Court, including 'files and documents related to the trial of cases of national securi-

ty offences and *reports, statistics of the death penalty* and closed trials without public announcements' (Decision No.01/2004/QD-TTg on 5 January 2004 of the Prime Minister). However, the latest regulation on the State Secret Listing in the Court (Decision No.970/QD-TTg on 7 July 2020 of the Prime Minister) divided it into two levels: *extremely secret* and *secret*. Accordingly, the death penalty belongs to a secretive level with five types, including 'reports of the Courts relating to *not yet executing* the death penalty to serve the extensive investigation's requests.' In my view, this point still leads to some misunderstanding and confusion because leaders of the Ministry of Justice and the Ministry of Public Security have often informed the death penalty's charges per year during their annual execution of criminal judgements at the National Assembly Meeting.

Seventhly, Vietnam should collect and analyse data in the five-year implementation of the latest criminal code, 2015 CCV (from it took effect on 1 January 2018 to 31 December 2023). It is a helpful database to reflect what and how effective the application of the death penalty is for three current drug offences (Article 248, 250, and 252). While Vietnam still classifies the database of cases involving the death sentence as 'state secrets', their authorities in the criminal justice system should conduct this first step for assessing internally. The data need to reflect and clarify the rate of applying capital punishment for each article. As Singapore's recent survey found, this step can help Vietnam re-consider and re-scale the best pathway forward concerning these three articles.

Finally, as Table 1 shows, Vietnam should objectively assess and analyse three de facto abolitionists' procedures and values, including two countries in the Golden Triangle region (Laos and Myanmar). Alongside Thailand, these countries have not executed in practice any drug-related offences for at least the past ten years. Continuing the form of a retentionist-and-reductionist state, Vietnam can withdraw for illegal transporting (Article 252) if some of the above conditions are met (see the *fourth*

45 See more details (Vietnamese) at <http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=208505>; <https://quochoi.vn/hoatdongcuaquochoi/cacky-hopquochoi/quochoikhoaXIII/Pages/danh-sach-ky-hop.aspx?ItemID=2708&CategoryId=0>; <https://quochoi.vn/uybantuphap/lapphap/Pages/home.aspx?ItemID=79>

46 Based on some informal conversations between the first author and anti-narcotics police officers in recent years, we can confirm that some of the officers are against imposing the death penalty for illegally transporting substances (article 250, the 2015 CCV), particularly with minority groups. Other officers confessed that implementing the death penalty, either by shooting or injecting prisoners with poison, could lead to adverse psychological effects for themselves, including chronic stress after participating in executions.

comment). Besides that, Vietnam can also keep capital punishment in law but without practising executions for illegal manufacturing (Article 248) and illegal trading (Article 250) to achieve physical and economic benefits. Doing so is likely to provide evidence for the argument that Vietnam should end killings for drug-related offences by taking the second step – namely, abolishing capital punishment.

CONCLUSION AND RECOMMENDATIONS

The above brief of drug laws with its related capital punishment has reflected on Vietnam's distinguishing perspectives in their make-policy decisions and legal frameworks. While the first version (1985 CCV) reflected the harshest punishment approaches with several offences in their criminal code, the newest one (2015 CCV) is showing to reduce the use of the death penalty. It shows us that the decision to maintain or abolish the death penalty in criminal law should be based on each nation's unique characteristics, conditions, and crime-fighting requirements. Furthermore, capital punishment in Vietnam is not only to show a legal matter but also to cover political and social attitudes, particularly within the scope of CPV's leadership, that led to limited reliable statistics regarding the practical application and executions. To some extent, thus, it is likely to be more curious for international human rights scholars and activists to conduct this topic in Vietnam. This study illustrated that one of the common trends in law enforcement agencies, policymakers, practitioners, and national assembly delegations is to favour retaining the harshest punishment for drug trafficking. With unclear evidence of crime deterrence theory through applying the death penalty, but they believe that applying the death penalty to this group of criminals is entirely justified because drugs are the root cause of various other crimes. Most consider that these drug-related offences contribute to the emergence of a new class of drug addicts

in society, particularly among adolescents, causing significant harm and damage in terms of economic development, social stability, and traditional culture. These arguments have been presented and explained in the basic principles of Vietnam to affirm why Vietnam still maintains the death penalty for drug-related crimes. Twenty years ago, the CPV's Resolution of the Politburo on Judicial Reform Strategy changed from 'research to limit to apply the death penalty' (Resolution No.08-NQ/TW in 2002) to 'limit to apply the death penalty, *only* implementing to practically serious crimes' (Resolution No.48 and No.49-NQ/TW in 2005). However, the latest version of the CPV in 2022 – Resolution No.27-NQ/TW on Continuing to Build and Improve the Vietnamese Socialist Rule-of-Law State in the New Period – had not yet mentioned the death penalty and its progress as the two previous resolutions. As above final/personal thoughts recommendations, rather than requesting/calling to abolish this punishment in Vietnam, we need further evidence to demonstrate what and how reducing/withdrawing the death penalty for some drug offences impacted social order and, in convert, whether keeping this punishment could(not) lead to crime prevention effectively before toward this abolishing expectation.

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THE NECESSITY OF ARTIFICIAL INTELLIGENCE AND ITS IMPACT ON ELECTRONIC TRANSACTIONS

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ABSTRACT

The technological revolution, fueled by the sweeping changes of the information age, has profoundly impacted all spheres of life. This transformation has revolutionized the realms of inventions and communications, setting the stage for the rise of Artificial Intelligence (AI). AI has evolved into a formidable force that rivals human intellect, increasingly becoming a focal point of research aimed at integrating it across all aspects of daily life. Its capacity to address individual needs and provide tailored solutions has made it an indispensable tool in today's digital world.

This rapid scientific progression and the burgeoning interest in AI have established it as a critical necessity, offering significant benefits in various fields. These advancements have transformed traditional, human-controlled mechanisms into intelligent systems that emulate human reasoning and decision-making processes. This shift is particularly evident in the realm of electronic transactions, where AI has played a pivotal role in advancing these technologies and has been instrumental in the development of smart electronic contracts.

KEYWORDS: Electronic Transactions, Scientific Revolution, Electronic Contract, Artificial Intelligence

INTRODUCTION

The information revolution has pervasively influenced various domains of life, altering perceptions of invention and sparking significant innovations such as smart websites, computers, intelligent devices, and cars, all influenced by scientific and cognitive advancements.

These innovations have significantly propelled the development of Artificial Intelligence (AI), where inventors are now focused on enhancing their programming skills and addressing various developmental issues to enable computers or devices to function at the level of human intellect.

Devices are now capable of interacting like sentient beings through sophisticated software, addressing individual needs in contemporary times and significantly expanding the scope of inventive development and output in smart forms. This information revolution has broadened the role of computers and related software to more advanced levels and capabilities.

This progress raises pivotal questions about the necessity of integrating AI into social life and its services and reflections therein. This study aims to delve into the reasons behind the inevitability of AI and its impacts, particularly its rapid proliferation, by exploring two main ideas: firstly, the necessity of artificial intelligence in electronic transactions, and secondly, the impact of artificial intelligence on electronic transactions.

1. THE NECESSITY OF ARTIFICIAL INTELLIGENCE IN ELECTRONIC TRANSACTIONS

The ongoing necessities of life, especially informational, drive the need to provide and develop ways to fulfil them, thus necessitating the exploration of reasons underpinning the inevitability of AI in electronic transactions.

1.1. SCIENTIFIC DEVELOPMENT

The advancement of science in digital and information domains has made AI a global requirement, as every scientist strives to develop an invention managed by humans into a smart invention or create an intelligence capable of functioning fully with its artificial mind.¹ This development is grounded in digitization and the information field.

1.1.1. Programming

Considering the behavior and characteristics of AI, which mimic human mental capabilities inherent in computer programs, research topics and objectives in programming have shifted towards stimulating human capabilities. This enables AI to independently perform tasks typically executed by the human brain, such as image recognition and voice recognition, through neural networks.²

Programming aims to develop information technology from various aspects, including software, electronic sites, and applications. For instance, intelligent search engines like Google Translate have facilitated translation. Although initially lacking in quality and considered literal, it has been improved to provide a logical understanding of paragraphs, sentences, or texts without stumbling or altering the text's concept or even contradicting words in the same context.

This site allows for uploading a file or pasted text, resulting in a translation as precise as that of a human translator. Additionally, many smart sites now generate quality content without resorting to the slow design processes of traditional programs like PowerPoint and Photoshop, which offer subpar performance during this information revolution.

In the field of design and images, intelligent programs provide limited services such as designing a logo or an image, available freely on

1 Hassani, I., & Mansour, D. (2023). Uses of Artificial Intelligence in Light of Civil Liability Rules. *Journal of Law and Environmental Sciences*, 2(3), pp. 10-11.

2 *Ibid.*

platforms like logo.com with AI, offering more options than traditional programs.³

1. 1.2 Programming Features

Programming involves several essential characteristics:

- **Precision:** The code must be accurate and error-free to achieve the desired or targeted results from the research or development efforts.
- **Mastery and Understanding:** It is crucial for programmers to thoroughly understand the project requirements before starting the programming process. Otherwise, their research may be incomplete or deviate from the prescribed requirements.
- **Maintainability:** The code or instruction should be easily maintainable and modifiable to keep up with the project's needs.
- **Documentation:** The code should be well-documented and stored in a file for ease of understanding and use by other programmers.⁴
- **Testing:** Regular testing of the code is necessary to ensure it functions correctly and meets the project's requirements.

1. 1.3 Informatics

Informatics necessitates advanced equipment and a robust internet flow for the development of programming and the creation of artificial intelligence for specific online tasks. A minimum of fourth-generation (4G) coverage is essential, with the scientific and informational race pushing beyond to embrace the fifth generation as a fundamental base for internet coverage and communication means.

It is inconceivable to undertake programming operations or digital development with substandard internet quality and flow. Such high standards are crucial for developers or pro-

grammers to be poised to implement and apply their innovative ideas akin to those in advanced countries. For instance, the Arab Gulf states utilize high internet flow and are renowned for attracting professionals in this field.

Additionally, devices capable of performing these operations require highly advanced equipment and technologies, such as RAM and processors, which evolve or are upgraded frequently due to new programming requirements that demand specific qualifications.⁵

Informatics and programming are undeniably pivotal in the development of inventions and the integration of artificial intelligence, aside from other reasons related to more specialized scientific fields rather than social and legal ones. Several features of programming include:

- **Storage and Retrieval:** Informatics encompasses the capability to efficiently store and retrieve information at the disposal of its owner for use on demand.
- **Internet:** The informational network plays a crucial part in informatics, enabling access to a vast array of information and services.
- **Data Analysis:** Utilizing methods and tools for data analysis to extract valuable knowledge from big data is instrumental in developing learning systems and making smart decisions based on recorded and analyzed data and even linking between them.⁶

1.2 DIGITIZATION AND THE SHORTCOMINGS OF CLASSICAL INVENTION

Scientific progress has significantly contributed to the inevitability of artificial intelligence for several reasons, two of which have been previously mentioned. This section will discuss

³ *Ibid.*

⁴ Rafaf, L., & Maouche, F. (2023). The Specificity of Civil Liability for Damages of Artificial Intelligence Systems in Algerian Law. *Tabna Journal for Academic Scientific Studies*, 6(1), pp. 21-22.

⁵ *Ibid.*

⁶ Boubaha, S. (2022). Artificial Intelligence: Applications and Implications. *Journal of Money and Business Economics*, 6(4), pp. 11-12.

two more reasons that contribute to this inevitability, stemming from the changing individual requirements and needs.⁷

1.2.1. Digitization

Digitization is the process of converting data from a traditional paper form into a digital format using numbers, typically through a computer. It is employed in various programs and applications for personal, scientific, and administrative purposes. This feature will be discussed with a focus on digitization in the higher education sector in Algeria, which has been developed and specialized in various methods and topics.⁸

Higher education, a stage in the educational ladder following secondary education, is provided by universities, institutes, or higher schools to impart all types of information in a specific field chosen by the student.

Information and communication technology has significantly saved effort and time for its users, thanks to its technical features that facilitate easy and flexible storage, processing, retrieval, and also transmission of information. This has prompted most institutions to adopt it, leading to the digitization of scientific education.

Educational Scientific Digitization is defined as the utilization of information and communication technologies in the teaching and learning process. These technologies are employed for storing, processing, retrieving, and transferring information from one place to another, thereby enhancing and modernizing education through tools such as computers and their software, the internet, electronic books, databases, and various electronic means, including email.⁹

It also encompasses technologies that facilitate the aggregation, storage, processing, and transmission of information based on the principle of electronic encoding or coding, whether the data is digital, textual, imagistic, or auditory. This integration of information and commu-

nication technologies permeates all facets of the educational process, from lectures and interventions to study days, fundamentally transforming the educational landscape.

1.2.2 The Shortcomings of Classical Invention

The scientific revolution has precipitated significant lifestyle changes, ranging from the simplest to the most complex, spurred by rapid scientific development and the proliferation of inventions. This evolution has transitioned the world from traditional paradigms to embracing significantly broader dimensions, particularly with the advent of the internet.¹⁰

Despite these advancements and the plethora of inventions, traditional inventions have proven inadequate in terms of individual management. This inadequacy has spurred the development of intelligent inventions designed to perform tasks traditionally executed by rational humans.

Recent research in informatics has thus increasingly focused on Artificial Intelligence (AI), leading initially to the creation of smart inventions that are eagerly adopted due to their autonomous operational nature, programmed to function independently without human intervention. This is exemplified by tools like Google Translate, which autonomously translates text across multiple languages without human oversight.

Although it has dominated scientific research and translation fields for some time, its shortcomings have been recognized, prompting the development of highly sophisticated translation applications or programs.

These tools, such as Yandex Translate, adhere to scientific specialization and control terminology used meticulously, considering the context of specialization such as law or medicine, and ensure vocabulary does not deviate from the intended meaning of texts or documents.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*, pp. 11-14.

10 Hassani, I., & Mansour, D. (2023). Uses of Artificial Intelligence in Light of Civil Liability Rules. *Journal of Law and Environmental Sciences*, 2(3), pp. 10-17.

Additionally, specialized websites in fields like graphic and logo design, such as logo.com, provide users with multiple high-quality logo suggestions within the same theme, resembling professional designs. In language education, applications like Duolingo offer robust educational methodologies where users undergo level assessment tests and are taught progressively until they advance to higher levels.

Moreover, online training courses, conducted remotely with electronic agreements, provide certification at various levels based on speciality and academic qualifications.¹¹

2. THE IMPACTS OF ARTIFICIAL INTELLIGENCE ON ELECTRONIC TRANSACTIONS

The features and necessities of artificial intelligence have positioned it at the forefront of the current industrial revolution, profoundly impacting electronic transactions as it spans various fields in social life. This discussion will define electronic contracts and electronic communications, exploring whether AI aligns within these categories.

2.1 The Concept of the Electronic Contract and its Relationship with Artificial Intelligence

To thoroughly understand and elucidate these concepts, they must be explored in a systematic manner to enable a detailed analysis and description.

2.1.1 Definition of the Electronic Contract

The Algerian legislator has taken a keen interest in the electronic contract, enacting the Electronic Commerce Law to regulate it. Before delving into the current legislative definition, it is instructive to reference a prior definition:

11 *Ibid.*

2.1.2 Definition of the Electronic Contract by the Algerian Legislator:

Article 06 of Law 18-05, as informed by the legal framework of Law No. 04-02 dated June 23, 2004 (5 Jumada Al-Awwal 1425), which outlines the rules applicable to commercial practices, defines the electronic contract as “a contract concluded remotely, without the physical and simultaneous presence of its parties, exclusively using electronic communication technology”.¹²

This definition by the Algerian legislator aligns with other legislations, demonstrating clarity despite its enactment after pioneering Arab legislations in this field. It is important to note that while the electronic contract is defined, electronic transactions are legally encompassed within several interrelated legislations, including the Law on Electronic Communications 18-04 and the Law on Electronic Signing and Authentication No. 15-04, alongside the aforementioned Electronic Commerce Law. Thus, understanding the legislative definition involves navigating through multiple laws due to their interconnectedness on the same subject.¹³

2.1.3 Definition of Electronic Communications

In discussing the definition of the electronic contract, the term “electronic communications” emerged, which serves as the medium for electronic contracting. Therefore, it is crucial to define this term, although no specific law solely addresses it. The Algerian legislator outlined electronic communications in Law 18-04, which sets the general rules related to this domain.¹⁴

The definition posits that any process executed through electronic means qualifies as

12 Hizam, F. (2023). The Specificity of the Electronic Supplier’s Liability under Law 18-05 on Electronic Commerce. *Journal of Legal Studies*, 7(1), p. 3.

13 Abdellaoui, K. (2022). Lectures in the Module of Electronic Transactions Law. Ain Temouchent University – Faculty of Law, First Year Master in Private Law, p. 4.

14 Law 18-04 dated 24 Sha’ban 1439 corresponding to May 10, 2018, defines the general rules related to mail and telecommunications, Official Gazette No. 28, issued on May 16, 2018.

electronic communication. The legislator has delineated various aspects of correspondence, including the transmission of anything meaningful via electronic methods. This expansive definition reflects the legislator's intent to encompass all forms of electronic correspondence under the legal umbrella of "electronic communications".

Currently, electronic communications pervade all transactions whether civil, commercial, or administrative, as countries have digitized their sectors aligned with principles of public service operation and in response to scientific advancements amid the ongoing scientific revolution.¹⁵

Prior to the formal regulation by law, various laws and decrees had addressed electronic communications, particularly in the post and telecommunications sectors. However, the enactment of Law 18-04 has provided more explicit regulation than before. Its stipulations were subject to the general rules of proof found in civil law under articles 323 repeated and 323 repeated¹, which specify the conditions and rules of electronic proof.¹⁶

These do not serve as the standard of proof in electronic transactions, but the advent of electronic signatures and certifications has introduced specific controls and conditions due to the evolution and complexity of electronic transactions. This necessitated regulatory adjustments to protect the electronic consumer, amending consumer protection and anti-fraud laws to ensure legal safeguards.

The use of the term "all" by the legislator is particularly significant as it implies inclusivity and provides examples on a non-exhaustive basis. The absence of restrictive phrases such as "only" or "these forms only" broadens the scope of what is included.

Additionally, the use of "or" suggests a choice among various alternatives, reflecting the diversity and evolution of communication

methods. Traditionally, email was a primary tool for electronic expression and communication, but now, several other forms have emerged, notably social media platforms.

For instance, Skype was once a leader in communication platforms until the advent of smartphones equipped with diverse operating systems that support app downloads changed the landscape. The Windows system was initially prevalent in computers and smartphones, but it was soon overtaken by the Android system, which has revolutionized the market and remains the most widely used system in mobile devices today, facilitating app downloads from the Google Play store.

Apple's proprietary system competes closely with Android, contributing to a digital and technological revolution that has seen electronic communications evolve to become intelligent and capable of operating independently.¹⁷

2.2 The Relationship of Artificial Intelligence to the Electronic Contract

It is crucial to preserve the legal positions of the parties involved, particularly the electronic consumer, who receives significant legal protection. The other party in the contractual relationship might be a program or a smart application equipped with programmed intelligence to operate autonomously. This aspect will be explored in more detail later in the discussion.

2.2.1 The Impact of Artificial Intelligence on Electronic Transactions

The scientific development and the interaction between artificial intelligence and electronic contracts underscore several intersecting points. To comprehend these intersections, it is essential to define artificial intelligence and elucidate its implications, then explore its effects.

¹⁵ *Ibid.*

¹⁶ Decree 75-58 dated September 26, 1975, containing the Algerian Civil Code, amended and supplemented. Barti Publishing, 2016-2017 edition, p. 73.

¹⁷ Ashir, G., & Allal, G. (2022). The Legal System of the Electronic Contract in Algerian Legislation. *Journal of Legal and Political Thought*, 6(2), pp. 6-7.

2.2.2 Definition of Artificial Intelligence

Artificial Intelligence (AI) is a discipline within computer science dedicated to the creation of computer systems and programs that display intelligent behaviors. These systems are designed to reason and perform effectively on the problems under study. They possess capabilities such as understanding various languages and recognizing patterns, among other attributes that enable them to function with a level of intelligence comparable to human intelligence.¹⁸

AI is also characterized as the theory and development of computer systems able to perform tasks traditionally requiring human intelligence, including visual perception, speech recognition, and decision-making.¹⁹

Characteristics of AI systems include:

- **Problem-solving:** AI systems do not require manual initiation by a programmer; they autonomously start and resolve the problems or data they encounter.
- **The ability to think and perceive:** Once developed and programmed, AI can offer insightful solutions based on its algorithms, enabling it to comprehend its actions and the outcomes it produces.
- **The ability to acquire and apply knowledge:** AI systems are continuously enhanced with updates that maintain the digital and scientific standards of the programs, introducing new iterations such as the ChatGPT program, which has evolved through several versions to its latest, significantly more intelligent version.
- **Using old expertise in new contexts:** While programming relies on pre-established data, updates and new information can be integrated, allowing the program to amalgamate old and new data effectively.²⁰

18 *Ibid.*

19 Hizam, F. (2023). The Specificity of the Electronic Supplier's Liability under Law 18-05 on Electronic Commerce. *Journal of Legal Studies*, 7(1), p. 7.

20 Laroui, Z. (2017). The Electronic Contract and the Contractual Liability Arising from It. *Journal of Legal and*

2.2.3 The Intersection of Artificial Intelligence and the Electronic Contract

Artificial Intelligence (AI) has played a transformative role in the evolution of electronic contracts, leading to the development of smart contracts, which are predominantly used in specific sectors. This discussion will focus specifically on the smart contract.

2.2.4 Concept of the Smart Contract

Smart contracts are self-executing contracts that typically operate without the need for a mediator. They are implemented through electronic devices like smartphones, tablets, and computers via the internet.²¹

The concept of smart contracts is relatively recent, and initially, both their definition and legal regulation were not straightforward. They have been defined as “contracts between two or more parties that are programmatically encoded and whose clauses automatically execute when specified conditions or events occur”.

Smart contracts are self-executing agreements that are established and programmed within a decentralized distribution network, the blockchain, to manage the relationship between the seller and the buyer without any specific authority's intervention or oversight through AI.

Notably, smart contracts are categorized under electronic contracts as AI has tailored changes in electronic transactions,²² specifically confining them to areas such as digital currencies and cryptocurrencies during trading, as well as the digital exchange and transfer of funds without the physical presence of individuals in these transactions.

AI has also propelled advancements in electronic contracts through the upgrading of programs and applications. There are now AI-powered programs capable of performing tasks

Political Research, 8(1), p. 13.

21 Feddad, S. A. (2020). Smart Contracts. *Al-Salam Journal for Islamic Economy*, 1(1), p. 5.

22 *Ibid*, p. 7.

traditionally done by humans, such as language teaching and accounting. These programs interact with users as a professional would with an electronic consumer, precisely addressing and fulfilling the individual's requests, and often astonishing them if the AI's performance level is exceptionally high.²³

CONCLUSION

The findings underscore that AI is a social and legal inevitability encompassing all areas and sectors, including electronic contracts and other electronic transactions. It has significantly contributed to the emergence of smart contracts through AI.

However, despite these advancements, electronic contracts still command a broader legal framework compared to smart contracts, which

23 Laroui, Z. (2017). The Electronic Contract and the Contractual Liability Arising from It. *Journal of Legal and Political Research*, 8(1), p. 14.

largely remain under the purview of programmers. The social landscape reveals substantial interest in electronic contracts and the influence of AI on them.

Results:

- Artificial intelligence is an inevitable necessity in electronic transactions.
- The development and expansion of electronic transactions are being propelled by artificial intelligence.
- There is a growing desire among individuals for access to all means in a smart, autonomous manner.

Recommendations:

- Mastery of artificial intelligence controls and their activation within societal contexts.
- Keeping pace with scientific advancements in the domain of electronic transactions and their legal regulations.

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4. Laroui, Z. (2017). The electronic contract and the resulting contractual liability. *Journal of Legal and Political Research*, 8.
5. Ashir, G., & Gachi, A. (2022). The legal system of the electronic contract in Algerian legislation. *Journal of Legal and Political Thought*, 6(2).
6. Feddad, S. A. (2022). Smart contracts. *Al-Salam Journal for Islamic Economy*, 1.
7. Boubaha, S. (2022). Artificial intelligence: Applications and implications. *Journal of Money and Business Economics*, 6(4).

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1. Decree 75-58 dated September 26, 1975, contains the Algerian Civil Code, amended and supplemented. Barti Publishing, Edition 2016-2017.
2. Law 18-04 dated 24 Sha'ban 1439 corresponding to May 10, 2018, defines the general rules related to mail and telecommunications. *Official Gazette*, No. 28, issued on May 16, 2018.

CRIMES OMISSIONS: A PSYCHO-SOCIOLOGICAL PERSPECTIVE

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ABSTRACT

This research was based on understanding and managing crimes of omission is a key strategy for reducing their harmful effects. The research aim was to analyze the personal and social characteristics of individuals responsible for crimes committed by inaction in Georgia. The study employed a mixed-methods approach to explore the psycho-sociological foundations of inaction and was conducted in two stages. The first stage discussed the theoretical framework surrounding inaction, while the second stage analyzed cases of inaction in Georgia. During the research process, significant gaps in public data were identified, highlighting the challenges of recording and accessing information about these crimes. Despite these challenges, a strong theoretical and empirical connection was identified between crimes of omission and the broader context of cultural and social passivity in developing post-Soviet Georgian society. This connection underscores the significant impact of the post-Soviet legacy in understanding the legal and psychosocial context of crimes of omission. As a result, to reduce crimes of omission and increase public involvement, the study suggests improving the judicial system, promoting legal knowledge, and encouraging civic activism and initiative within society.

KEYWORDS: Crimes of omission, Cultural factors, Obedience to authority, Situational factors, Conformity

INTRODUCTION

The science of psychology is interested in human behaviour, including the nature of law-abiding and law-breaking cases. Violation/crime can be committed either by act or omission. Of special interest is when a person does not perform an action despite having a moral or legal responsibility.

In explaining criminal inaction, we must consider the social nature of humans and the influence of the environment on our formation. It is important to understand how moral norms are formed and how they influence our behaviour and attitudes. Understanding the psychological processes of inactivity helps us to study the socio-legal system, explain crime by omission, and plays a crucial role in preventing crime and ensuring the welfare of society.¹

Discussion and study of crimes committed by inaction, in turn, play an important role in strengthening the accountability of the legal system, increasing legal awareness, and ensuring justice.² In the process of research, the nuances of justice are identified, and an opportunity is created to avoid the negative social and legal manifestations of inaction.³ Both on the specific individual (who was directly harmed) and on the societal (individual, family, community, economic, social, and political) level and, as a result, on overall well-being.⁴

Today, in the discourse of Georgian society, there is no study of the features of crimes com-

mitted by inaction,⁵ accordingly, when analyzing the relatively low statistics of registered crimes committed by inaction (from 15 to 25 cases per year),⁶ there is no basis for the belief that crime in Georgia is committed only by action. In addition, the paucity of registered crimes committed by inaction can be linked to the difficulties of recording the relevant facts, indicating, on the one hand, the lack of public legal awareness and, on the other hand, the malfunctioning of the relevant agencies.⁷

When discussing inaction in Georgian society, it should be taken into account that as a result of the collapse of the Soviet Union, Georgian society is undergoing a psychological, socio-legal, and political transformation. At this time, there is still a change in social, legal, and political values, norms, and expectations.⁸ In Georgia, as well as in other post-Soviet countries, the inaction and passivity of the population can be explained by historical and cultural factors, including distrust of the system, fear of taking responsibility for results, and learned passivity/weakness⁹ by situational and contextual factors¹⁰ and by not feeling supported.¹¹

- 1 Rockett, M. J., & Cuddy, A. (Eds.). (2015). *Current Opinion in Behavioral Sciences*, 3, 147–151. Retrieved from <http://dx.doi.org/10.1016/j.cobeha.2015.04.006>;
- 222 Ng, K., Niven, K., & Notelaers, G. (2021). Does bystander behavior make a difference? How passive and active bystanders in the group moderate the effects of bullying exposure. *Journal of Occupational Health Psychology*. Advance online publication. <http://dx.doi.org/10.1037/ocp0000296>
- 2 Ashworth, A., & Horder, J. (2013). *Principles of Criminal Law*. Oxford: Oxford University Press.
- 3 Kukhianidze, L. (2020). Theories about crimes committed by omission in German criminal law. *Academic Messenger*. Grigol Robakidze University.
- 4 Harvard François-Xavier Bagnoud Center for Health and Human Rights. (2012). Cost of inaction. Retrieved from <https://fxb.harvard.edu/cost-inaction/>

- 5 Kukhianidze, L. (2020). Theories about crimes committed by omission in German criminal law. *Academic Messenger*. Grigol Robakidze University.
- 6 Ministry of Internal Affairs of Georgia. (2021). *Annual report on crime statistics*. Retrieved from <https://info.police.ge/uploads/61cedae67c41e.pdf>
- 7 Transparency International Georgia. (2019). *The state of corruption and crime reporting in Georgia*. Retrieved from transparency.ge
- 8 Nodia, G. (2002). The dynamics and sustainability of the Rose Revolution. *Journal of Democracy*, 19(1), 15–19.
- 9 Tatarko, A. N., & Lebedeva, N. M. (2023). Psychological adaptation of Russians in post-Soviet countries: The role of context. *Population and Economics*, 7(3), Article e107416 <https://doi.org/10.3897/pecon.7.e107416>
- 10 Ullman, S. E., Geller, N. M., & DeMartini, K. L. (2021). Understanding bystander intervention in situations of intimate partner violence: A conceptual model.
- 11 Albarracin, D., Sunderrajan, A., Dai, W., & White, B. (2019). The social creation of action and inaction: From concepts to goals to behaviors. In *Advances in Experimental Social Psychology* <https://doi:10.1016/bs.aesp.2019.04.001>; Wang, C. S., Vadera, A. K., & Liao, H. (2021). Silence speaks volumes: How awareness of organizational corruption prompts silence

There is also an opinion that the passivity and low social responsibility of a citizen who does not take action, despite having moral and legal responsibility, is not related to personal characteristics but to the high level of conformity of the citizen.¹² Conformity, in this case, is considered in a social context as adjusting one's behaviour, attitudes, or beliefs to conform to the norms of a group or society, which plays a crucial role in shaping people's motivation for action and inaction.¹³

Understanding the explanatory variables of said inaction and the interrelationship dynamics of inaction is a necessary prerequisite for explaining, preventing, and promoting responsible behaviour regarding crimes committed by inaction.¹⁴

The purpose of the research was to analyze the circumstances of crimes committed by inaction in Georgia, identify the personal and social characteristics of the persons responsible for this crime, explain the crimes, and create recommendations for developing preventive strategies.

1. METHODS AND MATERIALS

To analyze the circumstances of crimes committed by omission in Georgia, the research was conducted in two stages. In the first stage, the theoretical and empirical framework of human inaction and crimes committed by inaction was discussed. In the second stage, the relationship between the theoretical factors of human inaction identified within the framework of the desk research and the economic, social, and political circumstances of the crimes committed by in-

among non-managerial employees.

12 Cordonier, L., Nettles, T., & Rochat, P. (2018). Strong and strategic conformity understanding by 3- and 5-year-old children. *British Journal of Developmental Psychology*, 36, 438–451.

13 Sorrels, J. P., & Kelley, J. (1984). Conformity by omission. *Personality and Social Psychology Bulletin*, 10(2) <<https://doi.org/10.1177/0146167284102017>>

14 Zimbardo, P. G. (1971). The power and pathology of imprisonment. *Congressional Record*, (Serial No. 15, October 25, 1971).

action in Georgia and the people convicted of these crimes was analyzed.

In the first stage of the research, we discussed the theory of conformity, obedience to authority, and situational factors and roles. We also examined the crime of omission and its determinants, conceptual foundations of variables, and contextual nuances. By synthesizing theoretical insights with empirical evidence, the interaction between personality, social factors, and legal responsibility for crimes of omission was analyzed.

In the second stage, the relationship between the identified factors of inaction and the circumstances of the crimes committed by inaction in the Georgian context was analyzed. Using systematic case study methods, publicly available decisions in the civil court proceedings system of Georgia¹⁵ were analyzed. These documents related to cases of abandonment in the trial and to allegations of non-assistance. The selection criteria for these cases were based on the specificity of the sample and the unavailability of other alternative samples.

The economic, social, and personal characteristics of the criminal acts were considered during the study of each case. Data analysis focused on extracting specific variables related to personal and social circumstances documented in the descriptive sections of court decisions.

2. RESULTS AND DISCUSSION

2.1. Desk Research

In the initial stage, the research examined the theoretical and empirical framework related to inaction and crime omissions.

Crime omissions – according to the legislation of Georgia, crimes can be committed by action or inaction. Abandonment, failure to help, and failure to report a crime are considered crimes of omission. For all three of them, the prerequisite for imposing criminal liability is

15 Georgian Courts Proceedings System. *Search system of court verdicts*. Retrieved from <<https://ecd.court.ge/Decision>>

the existence of a person's intention – their understanding of the situation, when they could, should have acted and did not act, and as a result, damage occurred.¹⁶

According to Georgian criminal law, inaction when there is moral and legal responsibility for it is punishable. However, public inaction in Georgia has more social nature and is related to a mixture of historical, social, economic, and political factors: the Soviet legacy of control; often political instability; poverty and unemployment; economic migration; constant corruption; weak institutions and cultural emphasis on acceptance (in the family and community). Additionally, the education system lacks emphasis on civic activism and media literacy and promotes learned helplessness and mistrust of civic institutions.¹⁷

There is an opinion (*actus reus*) that only actions and not inaction can be a crime; however, the law recognizes situations when a person's inaction should be considered a crime. It usually refers to cases where someone neglects their legal and moral responsibility to prevent harm to others. It is crucial to recognize that an omission must be considered a contributing factor to the resulting harm when the individual had the opportunity to avoid it and did not use it.¹⁸

However, it is a challenge to determine moral and legal responsibilities when a person must be given a clear duty, and the ability to act must be established. When considering a person's legal responsibility, their psychological and social nature (intention, ability to understand, profession, activity, and relationship with the victim) should be considered. The degree to which the causal link between the omission and the resulting harm is determined whether the

person is responsible for the inaction. At this point, the level of awareness and the ability to realize the person's responsibility at the time of the inaction is decisive.¹⁹

Theoretical framework – to explain the psychological nature of inaction and crimes committed by inaction, the research relies on the theoretical frameworks developed by scientists Solomon Asch (1951), Stanley Milgram (1963) and Philip Zimbardo (1971). Among them:

Solomon Asch – Conformity theory attempts to explain human actions and inactions to gain acceptance from the group and/or to avoid ostracism and exclusion from the group.²⁰

Stanley Milgram – According to the theory of obedience to authority, people obey authority orders even at the cost of harming others. To understand why a person may be inactive, it is possible to consider the authority's responsibility for action and their lack of understanding of responsibility at a particular moment. At this point, they may assume that another authority will intervene if necessary.²¹

Philip Zimbardo – According to the theory of Situational Factors and Social Roles, individuals act in certain situations because of their perceived social roles and environmental influences. When they have a passive role, and this is the norm for them, they show less initiative.²²

In the context of crimes of omission, inaction is explained by these theories: escape from social displeasure (Conformity Theory), attribution of responsibility (Obedience Theory), and inappropriate situational factors for action (Situational Factors and Role Theory). The mentioned theoretical framework for people's in-

16 **Mchedlishvili-Heydrich, K.** (2011). *Separate forms of crime detection* (Vol. II, p. 287). Meridian Publishing House.

17 **Bogishvili, D., Osepashvili, I., Gavashelishvili, E., & Gugushvili, N.** (2016). Georgian national identity: Conflict and integration. Center for Social Sciences. Publishing House "Nekeri". Retrieved from <https://ascn.ch>

18 **Tskitishvili, T.** (2020). Review of Merab Turava, *Criminal Law, General Part, Doctrine of Crime* (p. 690). University Publishing House.

19 **Mchedlishvili-Heydrich, K.** (2011). *Separate forms of crime detection* (Vol. II, p. 287). Meridian Publishing House.

20 **Asch, S. E.** (1951). Effects of group pressure upon the modification and distortion of judgments. In H. Guetzkow (Ed.), *Groups, leadership and men* (pp. xx-xx). Pittsburgh, PA: Carnegie Press.

21 **Milgram, S.** (1963). Behavioral study of obedience. *Journal of Abnormal and Social Psychology*, 67(4), 371-378 <https://doi.org/10.1037/h0040525>

22 **Zimbardo, P. G.** (1971). The power and pathology of imprisonment. *Congressional Record* (Serial No. 15, October 25, 1971).

action in situations where they have moral and legal responsibility for it.

Factors affecting inaction/omission crime

– Several studies confirm the content of the considered theoretical framework in practice by distinguishing the role of social psychology, legal aspects, and cultural factors in criminal behavior committed by inaction. For example:

Disorganized environment – When the enforcement mechanism of the regulatory framework for the protection of norms is inadequate or does not exist at all, this may result in inappropriate inaction of citizens’ moral and legal responsibility, considering the inadequacy, untimeliness, and infallibility of the punishment;²³

Demographic characteristics – A high level of education is associated with citizen activity, high employment and achievement rates, and, as a result, a low level of crime. Conversely, a low level of education is associated with low self-efficacy, passivity, and both active and passive crime.²⁴

Awareness – The level of legal awareness of a person is related to their implementation of actions under the conditions of moral and legal responsibility;^{25, 26}

Social factors – refers to: a) social norms and cultural values about what is right and wrong for a person. It affects the motivation of their action and inaction;²⁷ b) Expectations and feelings of support refer to services and prac-

tices in the community. A lack of expectation and feeling of support can prevent a person from intervening in a certain situation; c) The situational environment implies the presence of others in a specific situation and, if they are present, their actions and inactions according to their attitudes.^{28,29} d) Social reservations establish the rules of behavior at a particular moment and determine a person’s decision on action or inaction.³⁰

Economic factors – The fewer economic resources a person has, the less chance they have to act. Research shows that having fewer resources makes people feel powerless and pushes them toward inactivity, including committing a crime by inaction;^{31, 32}

Psychological characteristics – Individuals may commit crimes by inaction if: a) they do not have an appropriate upbringing; b) they are cognitively biased and/or emotionally unstable/labile; c) they lack the ability to empathize and/or are anti-social; d) they have mental health problems.³³ e) They assign responsibility to someone else; f) They are afraid of failure; g) They cannot understand the severity of the situation and their responsibility; h) The situation is ambiguous and confusing; i) The situation puts them under stress.³⁴

23 **Greenwatch Uganda.** (n.d.). *Criminal aspects of environmental law*. Retrieved from <https://greenwatch.or.ug/sites/default/files/documents-uploads/Criminal_aspects_of_environmental_law.pdf>

24 **Gupta, M., & Sachdeva, P.** (2017). Economic, demographic, deterrent variables and crime rate in India. Goa Institute of Management. Retrieved from <<https://mpr.ub.uni-muenchen.de/80181/>>

25 **LawTutor.** (n.d.). Omissions. *LawTutor*. Retrieved from <<https://lawtutor.co.uk/articles/omissions-o2Rl6>>

26 **Rodrigues, C. M. de O., Almeida, J. P. A., Ferreira, P. A. D., & Guizzardi, G.** (2020). Handling crimes of omission by reconciling a criminal core ontology with UFO. *Applied Ontology*, 15(1), 37-62 <<https://doi.org/10.3233/AO-200223>>

27 **Axinn, S.** (2008). An act of omission. In R. L. Heath (Ed.), *Encyclopedia of Violence, Peace, & Conflict* (2nd ed.). Retrieved from <<https://www.sciencedirect.com/science/article/abs/pii/B9780123739858001112>>

28 **LawTutor.** (n.d.). Omissions. *LawTutor*. Retrieved from <<https://lawtutor.co.uk/articles/omissions-o2Rl6>>

29 **Silva Sanchez, J.-M.** (2008). Criminal omissions: Some relevant distinctions. *New Criminal Law Review*, 11(3), 452-469 <<https://doi.org/10.1525/nclr.2008.11.3.452>>

30 **Rodrigues, C. M. de O., Almeida, J. P. A., Ferreira, P. A. D., & Guizzardi, G.** (2020). Handling crimes of omission by reconciling a criminal core ontology with UFO. *Applied Ontology*, 15(1), 37-62 <<https://doi.org/10.3233/AO-200223>>

31 **LawTutor.** (n.d.). Omissions. *LawTutor*. Retrieved from <<https://lawtutor.co.uk/articles/omissions-o2Rl6>>

32 **Rodrigues, C. M. de O., Almeida, J. P. A., Ferreira, P. A. D., & Guizzardi, G.** (2020). Handling crimes of omission by reconciling a criminal core ontology with UFO. *Applied Ontology*, 15(1), 37-62 <<https://doi.org/10.3233/AO-200223>>

33 **Silva Sanchez, J.-M.** (2008). Criminal omissions: Some relevant distinctions. *New Criminal Law Review*, 11(3), 452-469 <<https://doi.org/10.1525/nclr.2008.11.3.452>>

34 **Rodrigues, C. M. de O., Almeida, J. P. A., Ferreira,**

Criminal history – The presence of past criminal experience can result in inactivity because: a) The sense of justice has decreased, leading to inaction; b) By being inactive, the person avoids drawing attention to themselves; c) They distrust the system and do not want to intervene in a case where they would have to contact the system; d) They have low self-esteem and a feeling of weakness or uselessness.³⁵

Cultural norms – The cultural attitude towards authority differs in individualistic and collectivist societies. These differences create varying cultural norms regarding passivity and activity when needing help from others.^{36, 37}

In summary, the desk research provides a comprehensive overview of the existing theoretical and empirical framework of inaction and crimes committed by inaction. The analysis of Ash, Milgram, and Zimbardo's theories, along with empirically proven factors influencing inaction, highlights the importance of various circumstances in understanding crimes committed by inaction. These circumstances include the social environment, demographic characteristics, legal awareness, social norms, economic resources, psychological qualities, criminal history, and cultural norms. The first stage of the research emphasized the role of the complex interaction of individual, social, and situational factors in determining moral and legal responsibility for inaction. This stage played an important role in the second stage of the research, which involved analyzing and explaining crimes committed by inaction in Georgia.

2.2. Qualitative Study

In the second stage, the research delved into the multifaceted landscape of individuals sentenced for criminal omissions in Georgia, investigating various dimensions, including their conformity, to understand their involvement in criminal inactions.

Only 8 of the decisions made by the courts of Georgia on the crimes of neglect and failure to help were found to be publicly available. This number is less than the small statistical indicator that the National Statistics Office publishes every year. Additionally, all available cases were not independent offenses (omission) as a separate charge, but in all eight cases, the failure to stand trial charge was accompanied by a traffic safety or operating violation case.

Legal Statistics – Although the registered crimes committed by inaction are small and refer only to the episodes of failing to test during traffic accidents, the inaction of society in the case of domestic violence is also noteworthy. For example, an entire neighborhood may know someone is abusing a family member but, despite a moral duty to act, not report it. The lack of charges for such inaction is explained by the low level of cultural and social responsibility. This once again confirms the civil passivity and conformity of the Georgian tendency in the form of avoiding responsibility or initiative. This argument is also supported by linguistic determinism, which can be seen in Georgian phrases such as: “One is wise in another’s business”, “Whatever happens to you, David, take it all yourself”, and “The fool thought that the quarrel between husband and wife was right”. The reluctance of domestic violence victims in Georgia to acknowledge their victimhood or seek help contributes to the inaction of others and can be explained by the theory of obedience. This circumstance reduces the likelihood of bystander intervention, as the victim’s refusal to report the abuse to the police serves as an authoritative signal to others not to interfere in their situation.

Legal and social context – a) The statistics of registered crimes committed without action

P. A. D., & Guizzardi, G. (2020). Handling crimes of omission by reconciling a criminal core ontology with UFO. *Applied Ontology*, 15(1), 37-62 <<https://doi.org/10.3233/AO-200223>>

35 *Ibid.*

36 LawTutor. (n.d.). Omissions. *LawTutor*. Retrieved from <<https://lawtutor.co.uk/articles/omissions-o2RI6>>

37 Rodrigues, C. M. de O., Almeida, J. P. A., Ferreira, P. A. D., & Guizzardi, G. (2020). Handling crimes of omission by reconciling a criminal core ontology with UFO. *Applied Ontology*, 15(1), 37-62 <<https://doi.org/10.3233/AO-200223>>

in Georgia are small, and the number of court decisions available on the mentioned cases is even smaller. However, this scarcity does not imply that crimes are not being committed by inaction. Passive inactivity represents a cultural and social legacy common in post-Soviet countries.³⁸ Several factors contribute to this phenomenon. Firstly, the low registration of crimes committed by inaction (few registered crimes) can be attributed to limited awareness—people may not know when and what type of inaction is considered a crime. Additionally, weak law enforcement and judicial systems, characterized by corruption or low capacity to adequately assess blame, may hinder proper registration. Cultural and social norms also play a role, as they tend to recognize crimes committed by action more readily than those committed by inaction. Social passivity, which avoids social confrontation, further prevents accusations from being made. Moreover, the low funding of relevant agencies often prioritizes other, more straightforward cases.³⁹ Overall, these factors highlight the challenges in accounting for and providing public access to similar cases within the legal system. The fact that the victim died in all recorded cases can be explained by the legal system's focus on recording only those cases of inaction that have serious consequences. b) Connection with traffic accidents: It should be noted that all the analyzed cases of crimes committed by omission in Georgia were related to traffic safety. This association underscores the peculiarities and challenges of Georgia's legislative practice. Law enforcement agencies may prioritize recording and investigating traffic violations rather than inactions per se. This perspective is reinforced by the cultural-legal emphasis on road safety

38 **Nodia, G.** (2002). The dynamics and sustainability of the Rose Revolution. *Journal of Democracy*, 19(1), 15-19.

39 **McCarthy, L., Gehlbach, S., Frye, T., & Buckley, N.** (2021). Who reports crime? Citizen engagement with the police in Russia and Georgia. *Europe-Asia Studies*, 73(1), 8-35 <<https://doi.org/10.1080/09668136.2020.1851354>>

and the existence of statistics on traffic accidents and other related crimes in Georgia.⁴⁰

Personal characteristics – a) Alcohol consumption – the analysis showed a potential relationship between alcohol consumption while driving and the crime of omission. In all cases of crimes committed by inaction, the fact that the criminal was in a drunken state is explained by cultural and social characteristics. Georgia is a wine country where alcohol consumption is socially encouraged. Added to this is the low law awareness of citizens, which is related to the lack of focus on law enforcement and crime prevention at the general level; b) Absconding – in most of the discussed cases, the defendants absconded from the scene, and only later reported to the police. The fact that all the criminals fled the scene reflects the social nature of the lack of responsibility, which leads to the passivity of society. In this case, the perpetrators' absconding may be due to panic, guilt, or a desire to avoid legal consequences after an accident. They may have created a moral conflict between their actions and duties, which could not be balanced/understood by the influence of alcohol, as a result of altered consciousness.⁴¹ In addition, it is considered as a case of avoiding legal consequences, fear and/or lack of understanding of the situation (legal awareness, affect, alcohol, etc.);⁴² c) Repentance and cooperation: Despite initial attempts to evade responsibility by hiding, the majority of criminals eventually repented and cooperated with the authorities. This behavior may stem from feelings of guilt or remorse, as well as their sense of accountability and recognition of the importance of adhering to societal norms. Their

40 **Ross, H. L.** (1999). Alcohol and highway safety: Problems, research approaches, and challenges. *Alcohol Research & Health*, 23(1), 4-14 <[https://doi.org/10.1002/1097-4679\(199901\)55:1+<::AID-JCLP6>3.0.CO;2-I](https://doi.org/10.1002/1097-4679(199901)55:1+<::AID-JCLP6>3.0.CO;2-I)>

41 **Sener, I. N.** (2018). Hit-and-run crashes: Evidence from China. *Journal of Safety Research*, 64, 83-89 <<https://doi.org/10.1016/j.jsr.2017.12.005>>

42 **Tyler, T. R.** (2006). *Why people obey the law*. Princeton University Press. Retrieved from <<https://press.princeton.edu/books/paperback/9780691126739/why-people-obey-the-law>>

eventual return and cooperation underscore their conformity and desire for social recognition (which is encouraged by law). Research supports the notion that a perpetrator may be motivated to confess and cooperate with the authorities for several reasons. Firstly, there may be feelings of guilt or remorse. Expectations of a reduced sentence can also serve as motivations for returning and/or assisting after absconding.⁴³ Furthermore, societal legal and ethical principles, along with expectations of responsible citizenship, may influence their remorse, desire to maintain social order, and sense of meaning.⁴⁴ Repentance of offenders after absconding may be influenced by societal norms and cultural values that emphasize the importance of taking responsibility for one's actions and seeking ways to make amends. While hiding from the scene, individuals may come to regret their actions and feel compelled to make amends by confessing and cooperating with the investigation.⁴⁵

Cultural and Social Context – The social passivity observed in Georgia, influenced by historical, social, economic, and political factors, adversely affects the process of registering, accusing, and proving crimes committed through inaction. Cultural norms, along with social passivity, encourage avoidance of confrontation, reluctance to intervene, and, in certain instances, a lack of concern for preventing harm.⁴⁶

Psycho-Social Features – Demographic and psychological factors, including gender, age, place of residence, attitudes, and values, are

also crucial for analyzing crimes committed by inaction. Unfortunately, we were unable to analyze these factors due to the lack of documentation and the absence of recorded circumstances in the available documents.

The theoretical and empirical framework analyzed in the first and second stages of the research provides an opportunity to explain human passivity and inaction. However, the level of passive behavior and obedience may differ significantly between developed and developing countries due to cultural, socio-economic, and historical factors.⁴⁷

Additionally, the fact that Georgia currently holds the status of a developing country⁴⁸ parallel to the post-Soviet legacy emphasizes the validity of explaining passivity and inaction in Georgia with social and cultural preconditions.

1. Cultural dimensions – In collectivistic cultures (developing countries) compared to individualistic cultures, a higher rate of conformity and obedience exists,⁴⁹
2. Socio-economic factors – Economic instability and authoritarian rule characteristic of developing countries, which are related to passivity and inactivity of citizens,⁵⁰
3. Historical and Social Context: Historically, the presence of colonial experiences also contributes to attitudes towards authority and conformity.⁵¹

43 **Bandura, A.** (1990). Mechanisms of moral disengagement. *Wiley Online Library* <<https://doi.org/10.1002/ejsp.2420200106>>

44 **Cialdini, R. B., & Trost, M. R.** (1998). Social influence: Social norms, conformity and compliance. In D. T. Gilbert, S. T. Fiske, & G. Lindzey (Eds.), *The handbook of social psychology* (Vol. 2, pp. 151-192). McGraw-Hill.

45 **Tangney, J. P.** (2015). Shame and guilt in antisocial and risky behaviors. In *APA Handbook of Personality and Social Psychology, Volume 2: Group Processes* (pp. 703-728) <<https://doi.org/10.1037/14341.026>>

46 **Bogishvili, D., Osepashvili, I., Gavashelishvili, E., & Gugushvili, N.** (2016). *Georgian national identity: Conflict and integration*. Center for Social Sciences. Publishing House "Nekeri". Retrieved from <<https://ascn.ch>>

47 **Matsumoto, D., & Juang, L.** (2016). *Culture and psychology*. Cengage Learning.

48 **International Monetary Fund.** (n.d.). Georgia and the IMF. Retrieved from <<https://www.imf.org/en/Countries/GEO>>

49 **Hofstede, G.** (2001). *Culture's consequences: Comparing values, behaviors, institutions, and organizations across nations*. Sage Publications.

50 **Bond, R., & Smith, P. B.** (1996). Culture and conformity: A meta-analysis of studies using Asch's (1952b, 1956) line judgment task. *Psychological Bulletin*, 119(1), 111-137.

51 **Moghaddam, F. M., Taylor, D. M., & Wright, S. C.** (1993). *Social psychology in cross-cultural perspective*. W.H. Freeman.

3. FINDINGS

Based on the theories of Ash, Milgram, and Zimbardo, the research analyzed the circumstances of crimes committed by inaction in Georgia to identify the personal and social characteristics of the perpetrators and formulate recommendations for preventive strategies.

From the perspective of Ash, Milgram, and Zimbardo's theories, analyzing the circumstances of crimes committed by inaction in Georgia highlighted the personal and social characteristics of the perpetrators.

The results indicate a significant influence of the social context on crimes of omission in Georgia. According to Ash's studies of conformity, individuals may refrain from acting due to social pressure or a desire to conform to perceived societal norms, leading to social passivity and inaction despite their obligations. Milgram's obedience experiments also illuminate the power of authority to influence human behavior. In cases where individuals act regardless of moral or legal responsibility, obedience to authority can be a critical factor. Offenders may see themselves as subordinate to authority figures, such as the law enforcement system, and therefore refrain from acting without clear guidance. Finally, Zimbardo's Stanford Prison Experiment highlights the impact of situational factors on behavior, and the analyzed data reveal how situational factors, such as intoxication, can influence decisions regarding inaction.

The research's novelty lies in its holistic examination of the relationship between economic, social, and psychological circumstances and crimes committed by inaction. Through theoretical analysis and empirical research, the paper contributes to understanding crimes of omission in Georgia and offers valuable insights for policymakers, legal practitioners, and scholars in the field of crime prevention.

CONCLUSION

Research on crimes of omission in Georgia emphasizes the complex interrelationship of cultural, social, and legal factors that lead to such crimes. Specifically, the cultural legacies of post-Soviet societies, such as alcohol consumption and a low sense of responsibility, and the social and cultural features of Georgia as a developing country foster an environment where passive inaction is normalized. This social passivity is further reinforced by Georgian linguistic determinism and collective behavior patterns that reduce the likelihood of taking action to reduce harm to others.

This complicates the criminogenic situation, reduces the legal and social response to such crimes, and negatively impacts civil well-being. To overcome civil passivity in the country and ensure social and legal well-being, the research suggests issuing recommendations. In particular, it is recommended to ensure a response to inaction by improving the existing litigation system and, in parallel, raising public legal awareness and culturally encouraging civic responsibility and involvement in society.

Study Limitations and Future Research Interests:

Firstly, the study's limitations include the sample size and the insufficient amount of analyzed data. Secondly, the reliability and validity of the analysis of the collected data can be questioned due to the incomplete content of the decisions considered. As a result, the study did not consider contextual factors such as cultural norms and socio-economic differences, limiting the findings' generalizability.

Therefore, future research interests include studying the peculiarities of proceedings of crimes committed by omission and researching circumstances that were not possible to explore within the scope of the present study.

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THE REFLECTIONS OF THE CEDAW CONVENTION ON THE LEGAL STATUS OF WOMEN IN ALGERIAN FAMILY CODE

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ABSTRACT

Even though the Convention on the Elimination of All Forms of Discrimination Against Women is the first international document that guarantees all rights for women in all areas of life and ensures all effective means to eliminate discrimination against them, the latter has come with a set of positive and negative effects on the Arab Islamic family and the Algerian family.

After Algeria ratified the CEDAW convention to eliminate all forms of discrimination against women and uphold the principle of equality between women and men, the family legislator found itself amending numerous legal provisions in line with the principles of the Committee on the Elimination of Discrimination against Women. This resulted in granting mature women the right to conclude their marriage contracts themselves, making their consent in the marriage contract equal to that of men. Additionally, it imposed restrictions on men's right to polygamy as a safeguard for women while also bolstering their position in terminating marital relationships by granting them the right to seek divorce through khula and granting them guardianship rights.

KEYWORDS: CEDAW, Women, Family code, Equalit

INTRODUCTION

Women's rights are considered a priority for the international community.

This concern has been manifested through convening conferences and seminars and establishing several international organizations to achieve a global system to protect these rights.

This has led to multiple conventions that obligate all United Nations member states to sign and implement their provisions without considering their suitability and compatibility with the principles and needs of countries. One of these conventions is the CEDAW convention.

The CEDAW convention has sparked an intense debate because it is the most daring convention to address the issue of women's rights and family rights, especially with unparalleled candor.

It aimed for equality in rights and duties as commonly practised in previous declarations, but it did not confine itself to a declarative nature; rather, it surpassed it to become mandatory. It stipulated the establishment of a United Nations committee known as the Committee on the Elimination of Discrimination against Women, tasked with monitoring women's issues, caring for their rights globally, and monitoring the extent to which countries comply with the convention's provisions.

Since women's rights are of interest to the Algerian state, as they are to other countries, it sought to join this convention to empower women and align with the international system. It also sought to adapt domestic legislation in accordance with the provisions of this convention. Among these adaptations was the amendment and supplementation of laws, including the Family Law, which is the most important law concerning women rights. The recent amendments included several articles that entrenched gender equality in marriage and divorce matters, influenced by international agreements. This was influenced by a report from the Committee on the Elimination of Discrimination against Women on January 27, 1999, which expressed deep concern that "the Family Law still

contains many discriminatory provisions that deprive women of fundamental rights such as free consent to marriage"¹

Based on the preceding, while the CEDAW convention constitutes a positive step towards advancing women's rights worldwide, the question arises: What are its prominent impacts on family legislation in promoting women's rights when amending the Algerian Family Code? We address this issue by examining the reflections of the CEDAW convention on the legal status of women in marriage matters as a first point, followed by presenting its legal status in matters of marriage dissolution in compliance with the provisions of the CEDAW convention as a second point.

1. THE IMPACT OF THE CEDAW CONVENTION ON THE LEGAL STATUS OF WOMEN IN MARRIAGE CONTRACTS

The Convention on the Elimination of All Forms of Discrimination Against Women, issued in 1979 and ratified by Algeria in 1996 with certain reservations, is regarded as a significant achievement of the international community in protecting women's rights and ensuring their quality with men. Among the issues addressed by this convention concerning women's rights during the conclusion of marriage contracts and its codification in Algerian family law is the women's right to freely choose their spouse and enter into marriage contracts, as well as their right to impose conditions on the spouse in the marriage contract.

1.1. The right of women to enter into marriage contracts

The CEDAW convention advocates for women's freedom to choose their spouse and prohibits the conclusion of marriage contracts

1 The Algerian Family Code. (2005). Official Gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?zno=15>> (Last accessed: August 12, 2024).

without their full and voluntary consent, as outlined in Article 16, the first paragraph. It urges member states to take appropriate measures to eradicate discrimination against women in all matters related to marriage and family relations, ensuring specifically the equal right of men and women to freely choose their spouse and enter into marriage contracts.²

The Algerian legislator also stressed the woman's consent to marriage contracts and her right to choose her husband freely. This document is evident in the requirement of several single pillars of the combined knot,³ even in Islamic law, where it is considered one of its pillars.

Therefore, the Algerian legislator has granted women the right to choose a suitable spouse with whom they wish to build a private marital life, considering that the family is the fundamental nucleus in shaping society. However, the question remains: Has the legislator left this right unrestricted ?

1. 1. 1. Women's right to choose a spouse

Referring to the Algerian Family Law, we find that it acknowledges women's right to enter into marriage contracts with their consent, without coercion. Article 4 defines marriage as "a contract of consent between a man and a woman",⁴ while Article 10 states that consent is manifested by a positive expression from one party and acceptance by the other party in words implying the meaning of marriage according to Islamic law. Similarly, Article 9 asserts that consent is the sole pillar of the marriage contract, thereby equalizing the rights of men and women in this regard.⁵

The right to consent gives rise to another right, namely the woman's right to choose her

spouse, as outlined in Article 16, paragraph 4 of the Convention on the Elimination of All Forms of Discrimination Against Women. The Convention advocates for equality between women and men in all matters concerning marriage, including selecting a spouse by the woman's full volition. This is known as the principle of "the sovereignty of will" in contracts, where contracts are established based on the will of both parties.

All international treaties have emphasized the right to choose a spouse, leaving it unrestricted, thus disregarding religious, racial, and even environmental beliefs of the women's surroundings. This may be attributed to the hardships women have faced in some societies, such as being forced into marriage for the sake of financial gain obtained by the father or being inherited to another person after the death of their spouses.⁶

As for the Family Code, it recognizes the women's right to choose their spouses when entering into marriage without imposing any conditions on this right. It uses the term "consent" without distinguishing between women and men. However, upon examining this law, we find that it includes several provisions that may restrict this choice, such as the requirement for the presence of the guardian on the day of concluding the marriage contract, the issue of a Muslim woman marrying a non-Muslim, and various impediments to marriage. All of these provisions are derived from Islamic law.

Additionally, in Article 222,⁷ the legislator states that the provisions of Islamic law shall apply without specific provisions in the Family Code. Furthermore, in Article 24 of the Family Code, the legislator mentions absolute impediments to marriage, including kinship, affinity, and breastfeeding, which restrict women's free-

2 Convention on the Elimination of All Forms of Discrimination against Women. (1979). <<https://www.ohchr.org/sites/default/files/cedaw.pdf>> (Last accessed: August 11, 2024).

3 The Algerian Family Code. (2005). Official Gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

4 *Ibid.*

5 *Ibid.*

6 Aissawi, A. N. (2015). Rights of Married Women under International Conventions and Algerian Family Law. PhD thesis in Private Law, University of Tlemcen, Algeria, p. 32.

7 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

dom to choose their spouses. This restriction is not uncommon in societies because kinship holds significance and cannot be disregarded by women.

When exercising their right to choose their spouses, women can select their partners based on the qualities they desire in a life partner. The character and uprightness in their religion and their chivalry are among the most important attributes that women value. For any virtue in a man holds no value if devoid of religion and good character.⁸

For women's freedom in choosing their life partner to be complete, their consent must be valid. It is considered in valid if the woman lacks the legal capacity or is incompetent. Hence, a relationship between consent in marriage contracts and the legal age for marriage begins.⁹

Article 7 of the Family Code¹⁰ states that the legal capacity of both men and women is attained at 19. Therefore, the Algerian legislator has set the legal age for marriage at 19 for both spouses. However, there is an exception to this requirement, allowing minors who have not reached this age to marry with the judge's authorization, considering necessity and interest.

The Algerian legislator was criticised for not specifying the minimum age for marriage and leaving the matter unrestricted. However, it is commendable that the judge is required to ensure the ability of both parties to marry, whether it be financial, mental, or physiological, including considerations of physical maturity or puberty as dictated by Islamic law.

Dr Chawarjilali's opinion on this matter states: "The interests of the parties themselves and society dictate that minors should not be granted the right to marry until they reach a certain age at which their physical ability to bear

the consequences of marriage is confirmed. They should also possess a sufficient level of discernment to understand the outcomes and consequences of what lies ahead. To achieve these objectives, the legislators should set the minimum age for girls at sixteen years and for boys at eighteen years. Marriages should be prohibited regardless of the interest or necessity if the age at the time of the contract is below that threshold.¹¹

Making marriage authorization the responsibility of the judge serves as legal protection for underage women to prevent them from being coerced into marriage without their consent. The judge ensures her full consent to the person she is about to marry, laying the foundation for the family, which is essential for societal formation.

After a woman freely chooses her spouse without any external pressure, she faces another issue related to concluding the marriage contract: does the woman have the right to initiate her marriage contract as one of the parties? To what extent has family law legislator enshrined this right for her?

1.1.2. The women's right to conclude a marriage contract

International conventions stipulate women's right to contract their marriage independently without requiring a guardian's approval for the marriage contract. Article 16 of the Universal Declaration of Human Rights asserts equality between men and women in the right to marry. This means that just as men have the right to enter into marriage contracts independently, without any restriction, women also have the same freedom and level of enjoyment of this right.

As affirmed by the Convention on the Elimination of All Forms of Discrimination Against Women, women are equal to men in matters

8 [8] Aissawi, A. N. (2015). The aforementioned reference, p. 32.

9 [9] Daoudi, A. K. (2012). Family Provisions between Islamic Jurisprudence and Family Code. Dar Al-Basa'ir, Algeria, p. 28.

10 [10] The Algerian Family Code. (2005). Official Gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARA-BE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

11 [11] Chouar, D. (1999). Age of Marriage between Consent and Sanction in Algerian Family Law. Legal Journal of Legal, Economic, and Political Sciences, Faculty of Law and Administrative Sciences, Ben Aknoun, University of Algiers, No. 2, p. 79.

concerning marriage. Since men can marry without needing another person, such as a guardian, women should also be able to marry without any requirement. However, the recent amendment to the family law has regressed on the issue of guardianship through Article 11,¹² which states: “An adult woman may marry in the presence of her guardian, who may be her father, a relative, or any person of her choice. Without prejudice to the provisions of Article 7 of this law, the guardianship of minors’ marriages is undertaken by their guardians, who are the father, closest relatives, or a judge for those who have no guardian.”

The text of the article indicates that the Algerian legislator distinguished between women who have reached the age of maturity and granted them the right to marry directly while preserving the role of the guardian in the marriage of minors. This attempts to embody the principle of equality between women and men as stipulated in the Convention on the Elimination of All Forms of Discrimination Against Women.

Indeed, the legislator in this article does not explicitly grant mature, rational women the right to enter into marriage contracts independently but instead uses implicit language by changing the wording of Article 11 of the Family Law from “the guardian undertakes marriage...” to “the mature woman contracts...”. This leads to contradiction and ambiguity in Articles 9 and 3 of the Family Code, as the guardian’s role becomes merely formal and secondary since he cannot force his ward to marry in all cases. The wording of Article 11 explicitly states “presence” rather than “approval”,¹³ meaning that the woman herself enters into the marriage contract, and the presence of the father suffices without requiring his consent. If he attends but does not consent, it does not affect the marriage contract. The

right granted to mature women through this article is the choice of their guardian or someone else, leaving it open-ended. Here, we wonder if she can choose someone outside her family.

So, the family legislator entrenched the women’s right to personally conclude and initiate their marriage contract and be satisfied with the guardian’s presence at the contract. Thus, guardianship in the marriage contract has become a mere formality, devoid of substance, as it does not require them to bring a specific guardian to the contract, granting them the freedom to choose the guardian. As a result, the guardian now has the same role as a witness, as both must attend the contract session.¹⁴ Consequently, the mature woman bears alone the responsibility for initiating the marriage of her own full volition without facing any pressure from the guardian because his consent or lack thereof does not affect the marriage contract.¹⁵

From here, the legislator allowing the mature woman to initiate her marriage does not apply to the minor woman who has been granted judicial authorization to marry. Does the guardian have the right to force her to accept someone she does not agree with?

The family legislator has allowed the minor woman who has not reached the age of 19 to marry before that age for reasons dictated by the girl’s best interests, as outlined in Article 7 of the Family Law, which says: “The judge may authorize marriage before that age for the sake of necessity or urgency, provided that the parties are proven capable of marriage...”

Yet, the legislator in this case has made her marriage conditional firstly on judicial authorization, which is obtained by the guardian submitting a request to the judge to obtain it. Secondly, it is stipulated that her guardian is the one who oversees her marriage, as stated in Article 11/2 of the Family Law: “Without prejudice to the provisions of Article 7 of this law, the guardians undertake the marriage of mi-

12 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

13 Hamidou, Z. (2011). Some Newly Established Women’s Rights. *Journal of Legal Sciences*, Faculty of Law and Political Science, University of Abu Bakr Belkaid Tlemcen, Algeria, No. 12, p. 77.

14 Daoudi, A. K. The aforementioned reference, p. 112.

15 Ibn, R. (1995). *Bidayat Al-Mujtahidwa Nihayat Al-Muqtasid*. Al-Nadjah Book, Dar Al-Salam for Printing, Publishing, and Distribution, Cairo, No. 1, p. 6.

nors, who are their fathers, close relatives, or the judge for those who have no guardian”.

The Algerian legislator has maintained guardianship as a condition for concluding a marriage contract for minors, unlike for adult women. This is because minors do not possess full autonomy in deciding to marry,¹⁶ and the guardian is responsible for protecting them from being deceived or coerced by a man they intend to marry. However, the Algerian legislator did not give the guardian absolute authority to conclude a marriage contract for the minor, Article 13 of the Family Law states:¹⁷ “The guardian, whether a father or another, may not force the minor under his guardianship to marry, nor may he marry her without her consent.” Thus, Algerian law grants the guardian, in the case of minors, the right to choose, shifting from a position of coercion to one of consent. Therefore, the guardian cannot compel the minor under their guardianship to marry someone she does not wish to marry. This ensures that the minor is not forced or coerced into marriage by her guardian and that her marriage contract is based on her own will and desires.¹⁸

1.2. The women’s right to stipulate conditions in marriage contract

The issue of stipulation is one of the most important rights provided by the Algerian legislator for the benefit of the spouses, avoiding marital problems in the future and establishing understanding. In fact, no explicit provision in international agreements speaks directly to the right of spouses to set conditions when concluding a marriage contract. Referring to

Article 19 regarding stipulation in the marriage contract, we find that the Algerian legislator has allowed for stipulation in the marriage contract or a subsequent official contract. Additionally, two fundamental conditions were specified, particularly the condition of monogamy and the condition of the woman not working.

If we compare this text with its predecessor in the law before the amendment, where the legislator did not specify the important conditions and left them general by stating that the spouses can stipulate in the marriage contract all conditions they see fit as long as they do not conflict with this law, it can be implicitly understood that the legislator mentioned the condition of women’s employment influenced by Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women, which states: “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment to ensure, based on equality between men and women, the same rights, in particular the right to work as an inalienable right of all human beings”.

This amendment was made to promote family unity and harmony and to preserve society in line with all decisions, declarations, agreements, and recommendations issued by the United Nations and specialized agencies, particularly in compliance with the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁹

2. THE IMPACT OF THE CEDAW CONVENTION ON THE EVOLUTION OF WOMEN’S STATUS IN MATTERS OF MARITAL DISSOLUTION

The family legislator has granted women the right to dissolve the marital bond through divorce and khula, influenced by the Convention

16 Abu Zahra, M. (2005). *Personal Status*. Dar Al-Fikr, Cairo, Egypt, p. 107.

17 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

18 Ben Oumr, M. S. (2016). *Gender Equality in Marriage Contract in Family Law and International Conventions*. Ph.D. thesis in Private Law, University of Tlemcen, Algeria, p. 165.

19 Ahmad Waseem, H. A. D. (2011). *International Conventions on Special Human Rights, Children’s Rights, Women’s Rights, Refugee Rights, Workers’ Rights, Rights of Persons with Disabilities, Prisoners’ Rights*. Halabi Human Rights Publications, Lebanon, p. 89.

on the Elimination of All Forms of Discrimination Against Women, which considers equality between women and men as the general principle governing all its provisions. Consequently, Algerian family law recognizes a woman's right to divorce and *khula* on par with the man's right to dissolve the marital bond. Not stopping there, the legislator also added another right for women, which is the right to guardianship over her children who are under her custody.

2.1. Enshrinement of the principle of equality for women in the rights of divorce and *khula*

The Algerian legislator granted the spouse the right to request divorce at any time he wishes without restricting his request because marital authority is in his hands. Conversely, the woman was granted the right to dissolve the marital bond by filing for divorce and *khula* due to the harm inflicted upon her by her spouse, thus embodying the principle of gender equality. To what extent did the legislator equalize them in matters of marital dissolution?

2.1.1. *Divorce as a right for women in dissolving the marital bond*

By "divorce" it is meant to terminate the marital relationship by a court ruling based on the wife's request for a matter stipulated by law and according to Article 53²⁰ of the old Algerian Family Code. The specified cases include the spouse's failure to provide for his wife, following a court order mandating it; defects that prevent the marriage's purpose from being fulfilled; the spouse's desertion of his wife in bed for a period of four months; a sentence of dishonorable punishment restricting the spouse's freedom for more than a year; absence for more than a year, in addition to

20 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

committing an immoral act. Upon amending the Family Law by Order 05/02, the legislator added three other cases: continuous discord between the spouses, violation of agreed-upon conditions in the contract, and violation of the provisions of Article 08 related to polygamy.²¹

The legislator added these three reasons because they were influenced by the text of Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, which states that women should have the same rights as men regarding the dissolution of marriage contracts. In line with this article and harmony with the Algerian Family Code, the Algerian legislator amended the provisions allowing women the right to dissolve the marital bond by expanding the grounds for divorce to enable women to alleviate harm inflicted upon them.²²

2.1.2. *The woman's right to khula embodies the principle of gender equality*

Article 54²³ of the Family Law states: "The wife may, without the spouse's consent, initiate judicial separation in exchange for financial compensation.

If the spouses do not agree on the financial compensation for *khula*, the judge shall rule based on not exceeding the value of customary dowry at the time of the ruling."

Thus, when amending this article, the legislator added the phrase "without the consent of her spouse," meaning that the wife has the right to initiate *khula* without her spouse's consent and has complete freedom to do so without any reason. Previously, obtaining the spouse's consent was necessary for a *khula* ruling,²⁴ which

21 *Ibid.*

22 Ayssat, E. Y. (2003). Divorce by Request of the Wife in Algerian Family Law Supported by Judicial Ijtihad of the Supreme Court. Master's thesis in Law, Contracts and Liability Department, Faculty of Law, Algeria, p. 10 and following.

23 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

24 Ben Sghi, M. (2014). Impact of Amending Family Law 05-02 on the Legal Status of Women. University of

often allowed the spouse to pressure the wife to agree to a higher compensation for khula, especially with the decline in religious influence.

Therefore, the legislator may also have been influenced by the text of Article 16, paragraph 1, of the aforementioned Convention on the Elimination of All Forms of Discrimination against Women. This means that the right to divorce granted by the legislator to the spouse in Article 48 of this code directly corresponds to khula for the wife. On the one hand, khula, as provided for in Islamic law before international agreements, is permissible and legitimate because it helps alleviate harm and damage to the woman and compensates the spouse for the consequences of separation.

2.2. The woman's right to guardianship over her nurtured child

The Convention on the Elimination of All Forms of Discrimination against Women equalizes parental rights between fathers and mothers in guardianship over their children and all matters related to them, as stated in Article 16, paragraph (d) of the Convention for the Elimination of All Forms of Discrimination against Women for the year 1979.

As for the Algerian legislator regarding guardianship, Article 87 of the Family Code²⁵ stipulates that guardianship over minors belongs to the father. In the event of his death, the mother assumes guardianship by law. If the father is absent or incapacitated, the mother takes over urgent matters concerning the children. In divorce cases, the judge grants guardianship to the parent awarded custody of the children.

Through this article, it becomes evident that the Algerian legislator has granted women guardianship rights over their minor children in the

absence of the father or in cases of separation where custody is awarded to the mother. This embodies the principle of equality between men and women regarding rights and responsibilities towards their children. This change was influenced by the CEDAW convention on the one hand and, on the other hand, due to the neglect sometimes experienced by children from their fathers after separation, leading to administrative difficulties for the nurtured child with their mother.

CONCLUSION

Despite the Convention on the Elimination of All Forms of Discrimination Against Women being the first international document to ensure all rights for women in all areas of life and also guaranteeing all effective ways to eliminate discrimination against them, it has brought about both positive and negative impacts on Arab-Islamic and Algerian families. The Convention aims to establish absolute equality between men and women in all areas. At the same time, Islamic law recognizes the natural differences between men and women, assigned by the Creator, and distinguishes the roles and responsibilities of each in life. These differences are not considered discrimination but complementary factors that help each fulfill their role comprehensively to complement the other.

The Algerian legislator attempted to reconcile Islamic and international references in the Family Code, oscillating between equality between men and women and protecting women, whether at the conclusion of marriage, during marriage, or in the dissolution of marital relationships.

Consequently, women were granted several rights, such as the right to choose a spouse, the right to conditions, and the right to dissolve the marital bond at her sole discretion. However, women have not achieved this advancement effectively, and there are still many loopholes that prevent the realization of the desired goals of the Family Code.

Recommended proposals for developing and enhancing the status of women includes:

Khenchela, No. 1, p. 109.

25 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

- Activating the judiciary's role in family matters by adding new legal provisions, whether in family law or civil and administrative procedures law, to provide greater protection for women before the judiciary;
- Returning the role of the guardian in marriage to its position before the amendment for adult women because their presence is a protection for women and not a diminishment of their will in marriage or an underestimation of their ability to determine their fate, as some may think;
- Abolishing Article 6 of the Family Code, which recognizes customary marriage, and Article 22 of the same code, which allows its registration, to protect women from the risks of customary marriage and its potential consequences.

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2. Ahmad Wasee, H. A. D. (2011). *International Conventions Related to Human Rights, Child Rights, Women's Rights, Refugee Rights, Workers' Rights, Rights of the Disabled, Prisoners' Rights*. Al-Halabi Legal Publications, Lebanon.
3. Daoudi, A. K. (2012). *Family Provisions between Islamic Jurisprudence and Family Law*. Dar Al-Basair, Algeria.
4. Ibn, R. (1995). *Bidayat Al-Mujtahidwa Nihayat Al-Muqtasid*. Part 1, Al-nadjah Book, Dar Al-Salam for Printing, Publishing, and Distribution, Cairo.

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1. Ben Sghir, M. (2014). Impact of Amending Family Law 05-02 on Enhancing Women's Legal Status, *Journal of Rights and Political Sciences*, University of Khenchel, No. 1.
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THE ROLE OF ARTIFICIAL INTELLIGENCE IN CRIMINAL JUSTICE – REALITY AND PERSPECTIVE

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ABSTRACT

Artificial intelligence has recently become one of the hot topics in scientific and professional circles of various fields. Current technological processes in the world have significantly increased the use of digital technologies in practically all fields. Over the past century, several researchers and mathematicians have been developing the idea that computing machines can not only perform typical technical tasks but also learn to think and perform individual tasks accordingly, like humans. This idea has developed over time, and nowadays, the main topic among scientists, researchers, and practitioners worldwide is artificial intelligence and the tasks it can perform. Artificial intelligence is already actively used in various fields of public activity and many professions, and there is still talk that many professions can be replaced by artificial intelligence in the future. In this regard, using artificial intelligence in jurisprudence is particularly important and controversial. Based on the relevance of the mentioned issue, this article is dedicated to the use of artificial intelligence in the field of criminal proceedings and investigations. The article discusses the origin and development of artificial intelligence and its primary role in criminal proceedings and investigations. In the work, special attention is paid to the experience of different countries. The paper also analyzes court decisions of precedent importance in this regard. The paper also contains the main challenges of using artificial intelligence in criminal justice and investigation.

KEYWORDS: Justice, Ethics, Technology

INTRODUCTION

Nowadays, artificial intelligence and its role in various fields is one of the most relevant issues, and advice is given in almost all directions. With the development of technologies, it becomes increasingly important to set complex and large-scale tasks for artificial intelligence.

The issue has become particularly relevant in recent years. Various technologies based on artificial intelligence are improving more and more. In scientific and professional circles, the opinion is often heard that in a fairly short period, people will be replaced by the so-called Thinking Machines, and many scientists even express the opinion that many professions will no longer exist. Obviously, this will not be the first time for humanity; the history of human existence testifies that many professions have been replaced by technological progress, which is not strange. However, replacing a judge with a thinking machine is still strange. Many works can be found on the use of artificial intelligence in law. Still, this time, based on the issue's relevance, our goal is to study in what part artificial intelligence can be used in criminal proceedings and investigations. To achieve this goal, the essence of artificial intelligence will be studied within the framework of the research, its capabilities, the area of its use, the existing practice of use, the approaches of different countries will be analyzed, and the author's position on the following issues will be presented at the end of the paper:

- Main challenges and weaknesses of using artificial intelligence in criminal litigation and investigation;
- The current area of use of artificial intelligence in criminal proceedings and investigation and the perspective of its further use.

1. THE HISTORY OF CREATION AND DEVELOPMENT OF ARTIFICIAL INTELLIGENCE

A few people are considered to be the founders of artificial intelligence itself. First of

all, Alan Turing's contribution is noteworthy in this regard. He is often referred to as the father of artificial intelligence. Turing's 1950 scientific work "Computing Machine and Intelligence" is noteworthy in this regard. The paper presented the concept of a computing machine with human intelligence. Turing's thinking laid the foundation for further development of artificial intelligence – i.e. To create a computing machine that thinks like a human.¹ Later, the topic was developed by John McCarthy, a professor of mathematics, who used the term "artificial intelligence" in 1956. It was under his organization that the Dartmouth conference was organized in 1956, where the phenomenon known to us today was called artificial intelligence, and this practically laid the foundation for the development of this great direction, thus artificial intelligence even became a separate discipline.² McCarthy co-founded the MIT AI LAB with Marvin Minsky, and in the fields of robotics and cognitive psychology, Minsky made virtually inestimable contributions to the development of artificial intelligence.³ Later, Herbert Simon and Allen Newell developed early artificial intelligence programs that were focused on solving human problems. This laid the foundation for the "thinking" of artificial intelligence, according to how it would be possible to use human cognitive skills for a computing machine.⁴ Arthur Samuel, who created one of the first self-learning programs in the fifties of the last century, proved that a computer can learn from experience.⁵ The analysis of modernity reveals that in the development of artificial intelligence, Geoffrey Hinton, Joshua

1 Turing, A. M. (1950). Computing machinery and intelligence. *Mind*, Volume LIX, Issue 236, pp. 433-460.

2 Moor, J. (2006). The Dartmouth College Artificial Intelligence Conference: The Next Fifty Years. *AI Magazine*, Volume 27, pp. 87-91.

3 Dormehl, L. (2017). *Thinking Machines*. USA, New York, TarcherPerigee, pp. 9-10.

4 Gugerty, L. (2006). Newell and Simon's Logic Theorist: Historical Background and Impact on Cognitive Modeling. *Proceedings of the Human Factors and Ergonomics Society Annual Meeting*, 50(9), pp. 880-884.

5 Samuel, A. (1992). Arthur Samuel: Pioneer in machine learning. *BM Journal of Research and Development*, 36(3), pp. 329-33.

Bengio and Ian Lekun have also made special contributions, and that's why Hinton is called the godfather of artificial intelligence.⁶

In addition to science and researchers, organizations have made the greatest contribution to the development of artificial intelligence. Thanks to an IBM project and artificial intelligence, in 1997, chess champion Garry Kasparov was defeated by artificial intelligence, proving that it can be used in strategy games.⁷ Google DeepMind did a similar project with Go World Champion Lee Sedol in 2016.⁸

2. THE ROLE OF ARTIFICIAL INTELLIGENCE IN CRIME PREDICTION AND ANALYSIS

Along with the development of artificial intelligence, an irreversible process of its application in various fields has started step by step, and law is no exception in this regard. From an early stage of development, the field of criminal justice and investigations has used artificial intelligence as part of investigative data analytics to make it easier for investigative agencies to manage critical operational investigative information and identify suspects by following data patterns.⁹ Early applications of artificial intelligence in criminal justice included the use of data analytics to manage and analyze crime databases. For example, the Federal Bureau of Investigation (FBI) created the National Crime Information Center (NCIC) in the 1960s, which

used computer systems to efficiently store and retrieve criminal records.¹⁰ Since 1990, artificial intelligence has been actively used for prediction in criminal proceedings and the fight against crime.¹¹ Law enforcement agencies have begun experimenting with predictive policing methods. These models used statistical techniques to predict future crime hotspots. This model laid the foundation for today's sophisticated forecasting systems using artificial intelligence.¹² The IBM organization also made a special contribution in this case and, in cooperation with various police departments, implemented a number of important projects in the creation of a crime analysis and prediction system using artificial intelligence.¹³

3. ARTIFICIAL INTELLIGENCE IN CONTEMPORARY CRIMINAL PROCEEDINGS

Nowadays, artificial intelligence is used even more actively in criminal proceedings and investigations. Artificial intelligence in criminal law involves a technological process (algorithms, language processing, computer vision) designed to perform tasks that normally require human intelligence, human intervention. All these technological processes are focused on increasing the efficiency of the investigative and justice process. In this regard, even today, one of the main missions of artificial intelligence in criminal law is prediction.¹⁴ In

6 MIT Management Sloan School. (23.03.2023). Why neural net pioneer Geoffrey Hinton is sounding the alarm on AI <<https://mitsloan.mit.edu/ideas-made-to-matter/why-neural-net-pioneer-geoffrey-hinton-sounding-alarm-ai>> (Last accessed: 20.07.2024).

7 Newborn, M. (2000). Deep Blue's contribution to AI. *Annals of Mathematics and Artificial Intelligence*, 28(1-4), pp. 27-30.

8 Google DeepMind. (02.04.2023). Alphago <<https://deepmind.google/technologies/alphago/>> (Last accessed: 25.07.2024).

9 Gund, P., Phalke, V. S. (2023). Investigating crime a role of Artificial intelligence in criminal Justice. *The Online Journal of Distance Education and e-Learning*, Vol. 1. pp.50-56.

10 Kabol, A. F. (2022). The Use Of Artificial Intelligence In The Criminal Justice System (A Comparative Study). *Webology*, 19(5), p. 593.

11 Ashley, K. D. (2017). *Artificial intelligence and legal analytics*. Cambridge University press, UK, pp. 60-62.

12 Bendouzi, B. (2019). To predict and to manage. *Predictive policing in the United States*. *Big Data & Society*, 6(1), pp. 1-5.

13 Prof. Banafa, A. (2023). The use of AI in the criminal justice field <<https://www.linkedin.com/pulse/use-ai-criminal-justice-field-prof-ahmed-banafa-mrtnf>> (Last accessed: 20.07.2024).

14 Kelly, W. R. (2016). *The future of crime and punishment: Smart policies for reducing Crime and saving money*. Rowman & Littlefield Publishers, USA pp. 72-74.

particular, analysis of existing data based on various sources, for future crime prediction and prevention. A good example is the experience of the Los Angeles Police Department (LAPD), which introduced the Predpol program for more efficient use of police resources and, accordingly, to increase the efficiency of police work. The Chicago Police Department uses artificial intelligence to identify individuals who are at high risk of committing violence. This has helped to prevent violence across the state.¹⁵

Artificial intelligence systems can process large amounts of data better than humans, so it is often used to process such voluminous investigative information. For example, the New York Police Department (NYPD) uses pattern recognition software to analyze information important to investigations and identify serial criminals, which helps them work more efficiently.¹⁶

We must not forget the research part as well. Artificial intelligence is a very effective tool for research. Even LexisNexis or HeinOnline helped lawyers and judges find the necessary information in their time. It is safe to say that artificial intelligence has made it even easier. In some jurisdictions, the courts use artificial intelligence as a decision-making tool. This does not apply to all decisions. Such systems analyze past cases and outcomes to provide recommendations to reduce bias and improve the consistency of judicial decisions, ensuring uniformity of judicial practice. However, the use of artificial intelligence in this field has led to differences of opinion about the risks of algorithmic bias and the transparency of decision-making processes.¹⁷ No less interesting is the Estonian experi-

ence, which created a judge with artificial intelligence, which aims to consider small disputes, which ultimately significantly relieves the judicial system.¹⁸

4. THE ANALYSIS OF DIFFERENT COUNTRIES' EXPERIENCES

Comparative studies prove that the tasks described above can be performed smarter and more effectively using artificial intelligence, which improves the quality of the work performed. Nevertheless, it should be noted that using artificial intelligence to perform such tasks poses a rather acute ethical issue. It is about the transparency and accountability of decisions based on artificial intelligence.¹⁹ It is impossible not to mention here that one of the biggest challenges in processing important information for legal proceedings through artificial intelligence is the issue of personal data protection. Although the use of artificial intelligence in criminal proceedings and investigations is at first glance a novelty, many countries already have many years of experience in using artificial intelligence in this field. In this regard, first of all, the experience of the United States of America we described should be mentioned above. It has been using artificial intelligence for a long time in crime prediction and prevention. Among them, as mentioned above, special programs (Predpol, Compstat) are used for crime analysis and management.²⁰

The People's Republic of China is a leading country in terms of the most widespread and unrestricted use of artificial intelligence. Artifi-

15 Rigano, G. (2018) Using artificial intelligence to address criminal justice needs. National institute of justice (NIJ) <<https://nij.ojp.gov/topics/articles/using-artificial-intelligence-address-criminal-justice-needs>> (Last accessed: 20.07.2024).

16 Carpertner, W. (2023). Presidents' message: AI's transformative impact. <<https://www.policechiefmagazine.org/presidents-message-ais-transformative-impact/>> (Last accessed: 22.07.2024).

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18 Vasdani, T. (2023). From Estonian AI Judges to robot mediators in Canada. U.K, The Lawyer's Daily, Vol. III. pp. 5-10.

19 Wischmeyer, T. (2020). Artificial intelligence and transparency: Opening the black box. Regulating Artificial Intelligence, pp. 75-101.

20 Mugari, I., Obioga, E. (2021). Predictive Policing and Crime Control in The United States of America and Europe: Trends in a Decade of Research and the Future of Predictive Policing. Social Sciences, 10(6), p. 234.

cial intelligence is used for total surveillance in China, one of the goals of which is crime prevention. Thousands of so-called facial recognition devices are installed throughout the country, and a smart camera is integrated with the social credit system, thus ultimately evaluating the citizens.

Obviously, this system of assessment goes beyond the goals of criminal law, and it is also undisputed that this system of surveillance has developed, especially in China, to the extent that prohibitions and restrictions in relation to democratic values are not found in this country.²¹

As for European countries, in the wake of the development of artificial intelligence, more and more attention is being paid to personal data protection regulations in these countries in order to exclude the misuse of artificial intelligence that would violate human rights and affect people's personal lives, etc. For example, United Kingdom police agencies use AI-based programs to predict crime, subject to ethical and legal constraints. Germany actively uses artificial intelligence in legal research, in full compliance with the principles of good faith. France, Japan, South Korea, and India also use AI for crime prediction/analysis and scientific research, subject to ethical and legal constraints.²²

5. THE ANALYSIS OF JUDICIAL PRACTICE

Obviously, in this case, a certain practice was adopted. In 2016, a court case was reviewed

in the United States of America: *Loomis v. Wisconsin*. Eric Loomis was sentenced to 6 years in prison based on a risk assessment calculated using the Compas (Correctional Offender Management Profiling for Alternative Sanctions) algorithm. Loomis disputed using this program and algorithm to determine his fate, appealing that it violated his due process rights because the evaluation process was completely opaque to him, and it remained unclear how the algorithm arrived at such a risk score. The court did not share the person's position based on the argumentation that this was not the only indicator on which the court made its decision. Therefore, although the appellant's request was not satisfied, the case is precedent based on this argumentation.²³ No less precedential was the case from the UK judicial practice – *R. (Bridges) v. Chief Constable of South Wales police*. In 2020, a person challenged South Wales Police's use of a facial recognition system, claiming it breached his right to privacy, the European Convention on Human Rights and the Data Protection Act. The court considered the appellant's opinion and granted his request, noting that the police did not realize how large and harsh the impact of such systems was on people's privacy and confidentiality and the protection of personal data. This decision also sets a precedent in the sense that despite the great influence of technological processes and artificial intelligence in the world, it is necessary to maintain a balance to avoid the abuse of rights and gross infringement of personal data.²⁴ Speaking about practice, it is impossible not to analyze the practice of the European Court of Human Rights. In one of the decisions (the case related to the situation when the bank evaluated credit applications through a special pro-

21 Yu cel, G. (2024). Crime prevention effort with artificial intelligence in China: analysis <<https://www.linkedin.com/pulse/crime-prevention-efforts-artificial-intelligence-china-gokcen-yucel-aascf>> (Last accessed: 25.06.2024).

22 Industry views. (2024). Mahalias, I. AI adoption in criminal justice – How can industry support the justice system in implementing Artificial intelligence <<https://www.techuk.org/resource/ai-adoption-in-criminal-justice-how-can-industry-support-the-justice-system-in-implementing-artificial-intelligence.html>> (Last accessed: 25.07.2024).

23 State v. Loomis. (2016). Harward law review, Vol. 130. Issue 5, Harward University, pp. 1530-1537.

24 Hunton, A. K. (2020). UK court of appeal finds automated facial recognition technology unlawful in *Bridges v South Wales police* <<https://www.huntonak.com/privacy-and-information-security-law/uk-court-of-appeal-finds-automated-facial-recognition-technology-unlawful-in-bridges-v-south-wales-police>> (Last accessed: 20.07.2024).

gram), the court noted that transparency and accountability in the decision-making process are important when using artificial intelligence. An individual has the right to have an automated decision reviewed by a human. Automatic decisions that significantly affect the fate of a person must be explained and justified.²⁵

CONCLUSION

Therefore, there is no doubt that the creation and development of artificial intelligence results from the joint work of many scientists and organizations, and many people and organizations have been involved in this chain. Alan Turing and John McCarthy are still considered pioneers in this field because they laid the foundation for such capabilities of the computing machine as the idea. Subsequently, Hinton's team's contribution to developing this idea is immeasurable, and finally, such large organizations as IBM and Google DeepMind have better demonstrated the capabilities of artificial intelligence in practice.

Therefore, it seems that a large number of countries are using artificial intelligence in criminal proceedings, investigations and scientific activities. However, their attitude is different. For example, China focuses more on population control and does not consider human rights; in the United States of America, it is mostly used in crime analysis and prediction. Obviously, the country pays a lot of attention to human rights. However, in this case, in terms of personal data, we do not have such strict regulations here as in many European countries, where artificial intelligence is also used, although the greatest attention is paid to human rights and personal data. In European countries, human rights and privacy are considered to be of paramount interest when using artificial intelligence technologies.

The cases we discussed above illustrate the

growing trend of using artificial intelligence in criminal proceedings and investigations. In general, the justice systems of various countries support the use of artificial intelligence only on the condition that the process is transparent and that it is not the only prerequisite for determining substantive legal consequences. It is also important that artificial intelligence systems are free from bias and take into account the rights of individuals – the inviolability of their private lives.

Although technologies and programs based on artificial intelligence have greatly facilitated the tasks in criminal proceedings and investigations, it is clear that we face certain risks and challenges. First of all, in the conditions of such systems, the probability of error is quite high. Therefore, it is very important to assemble and generate them correctly. For the system's proper functioning, it is very important to correctly generate and reflect the existing data because a mistake made here can lead to an incorrect or discriminatory decision. Unlike humans, artificial intelligence will not be self-critical about its own decisions. The biggest challenge is privacy and personal data; when using artificial intelligence systems on a massive scale, it is important to maintain the necessary balance and data security. One of the ethical issues is that the decisions made by this system should be transparent, and there should be a system of accountability. The use of artificial intelligence in criminal law in different jurisdictions is associated with substantial challenges, as legal standards, regulations, and cultural attitudes towards artificial intelligence vary widely. Along with the development and improvement of artificial intelligence in the field of criminal proceedings and investigation, it is expected:

- To improve the police forecasting systems, to create even more complete algorithms that will combine a large amount of data with the help of which the algorithm will be able to perform the closest to reality, perhaps the most inaccurate, forecast in this regard better than people and criminologists;

25 Szappanyos, M. (2023). Artificial intelligence: Is the European court of Human rights prepared? *Acta Humana*, Vol. 11(1), pp. 93-110.

- Artificial intelligence technologies will be used more and more in the examination, so it will be possible to obtain and attach more evidence, and this evidence will be more accurate and reliable;
- Artificial intelligence technologies will increasingly make it possible to restore the most accurate crime scene or route, which will obviously make the response to it and the investigation process more complete;
- Artificial intelligence technologies will facilitate the management of inmates in prisons, including tracking their behavior and planning personalized responses, including rehabilitation.

The extent to which artificial intelligence can replace judges is a separate discussion. In addition to the ethical objections discussed above,

another objection arises. In particular, we are talking about such a necessary component of implementing justice as the inner faith of the judge. Could a computing machine have internal beliefs? Of course it can, although it may have an internal belief such that humans again write it with an appropriate algorithm. Will the calculating machine be able to evaluate such circumstances as extreme cruelty? Sincere repentance of actions by a person, etc. The answer to this question is rather vague and ambiguous. It is clear that artificial intelligence technologies are improving more and more, and their application area is expanding more and more. It is also undisputed that the idea looks quite attractive in the background of an overburdened judicial system. However, the real perspective of its implementation is rather vague at this stage.

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ხელოვნური ინტელექტის როლი სისხლის სამართალში – რეალობა და პერსპექტივა

თათია დოლიძე

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აბსტრაქტი

ხელოვნური ინტელექტი ბოლო პერიოდში ერთ-ერთი აქტუალური თემაა სხვადასხვა სფეროს სამეცნიერო და პროფესიულ წრეებში. მსოფლიოში მიმდინარე ტექნოლოგიურმა პროცესებმა არსებითად გაზარდა ციფრული ტექნოლოგიების გამოყენება პრაქტიკულად ყველა სფეროში. გასულ საუკუნეში, არაერთი მკვლევარი და მათემატიკოსი ავითარებდა მოსაზრებას, რომ გამოთვლით მანქანებს შეუძლიათ არა მხოლოდ ტიპური ტექნიკური ამოცანების შესრულება, არამედ მათ, ასევე, შეუძლიათ აზროვნების დასწავლა და ამის შესაბამისად ცალკეული ამოცანების ინდივიდების, ადამიანების მსგავსად შესრულება. აღნიშნული იდეა გარკვეული პერიოდის განმავლობაში სულ უფრო და უფრო განვითარდა და, დღესდღეობით, პრაქტიკულად მთელი მსოფლიოს მასშტაბით მეცნიერებს, მკვლევრებსა თუ პრაქტიკოსებს შორის მთავარი თემა სწორედ ხელოვნური ინტელექტია და ის, თუ რა ამოცანების შესრულება შეუძლია მას. ხელოვნური ინტელექტი უკვე აქტიურად გამოიყენება საზოგადოებრივი საქმიანობის სხვადასხვა სფეროში, არაერთ პროფესიაში და კვლავაც საუბარია იმაზე, რომ მომავალშიც არაერთი პროფესიაში შეიძლება იქნას იგი გამოყენებული. ამ მხრივ განსაკუთრებით მნიშვნელოვანი და სადავოა იურისრპუდენციაში ხელოვნური ინტელექტის გამოყენება. სწორედ აღნიშნული საკითხის აქტუალობიდან გამომდინარე, წინამდებარე სტატია ეთმობა სისხლის სამართალწარმოებასა და გამოძიების სფეროში ხელოვნური ინტელექტის გამოყენებას. სტატიაში განხი-

ლულია ხელოვნური ინტელექტის წარმოშობა და განვითარება, მისი პირველადი როლი სისხლის სამართალწარმოებასა და გამოძიებაში. ნაშრომში განსაკუთრებული ყურადღება ეთმობა სხვადასხვა ქვეყნების გამოცდილებას. ნაშრომში, ასევე, გაანალიზებულია პრეცედენტული მნიშვნელობის სასამართლო გადაწყვეტილებები აღნიშნულ ქრილში. ნაშრომი, ასევე, შეიცავს ხელოვნური ინტელექტის სისხლის სამართალსა და გამოძიებაში გამოყენების ძირითად გამოწვევებს.

საკვანძო სიტყვები: მართლმსაჯულება, ეთიკა, ტექნოლოგია

შესავალი

დღესდღეობით ხელოვნური ინტელექტი და მისი როლი სხვადასხვა სფეროში ერთ-ერთ ყველაზე უფრო აქტუალურ საკითხად რჩება პრაქტიკულად ყველა მართულეებით. ტექნოლოგიების განვითარებასთან ერთად სულ უფრო და უფრო აქტუალური ხდება ხელოვნური ინტელექტისათვის რთული და მასშტაბური ამოცანების დასახვა.

საკითხი განსაკუთრებით მწვავე გახდა ბოლო წლებში, სულ უფრო და უფრო იხვეწება ხელოვნურ ინტელექტზე დაფუძნებული სხვადასხვა ტექნოლოგიები და სამეცნიერო თუ პროფესიულ წრეებში ხშირად ჟღერს მოსაზრება იმის შესახებ, რომ საკმაოდ მოკლე ვადაში, ე.წ. მოაზროვნე მანქანები არაერთ პროფესიაში ჩაანაცვლებენ ადამიანებს და არაერთი მეცნიერი გამოთქვამს კიდევ მოსაზრებას, რომ ბევრი პროფესია აღარც იარსებს. ცხადია, ეს კაცობრიობისთვის პირველი შემთხვევა არ იქნება, ადამიანთა არსებობის ისტორია მოწმობს, რომ არაერთი პროფესია ჩაანაცვლა ტექნოლოგიურმა პროგრესმა და ეს ახალი რამ სულ არ არის. თუმცა მოაზროვნე მანქანის მიერ მოსამართლის ჩანაცვლება მაინც უც-

ნაური პერსპექტივაა. არაერთი ნაშრომი გვხვდება სამართალში ხელოვნური ინტელექტის გამოყენების კუთხითაც, თუმცა ამჯერად, საკითხის აქტუალობიდან გამომდინარე, ჩვენი მიზანია შევისწავლოთ, თუ რა ნაწილში შეიძლება გამოყენებულ იქნას ხელოვნური ინტელექტი სისხლის სამართალწარმოებასა და გამოძიების სფეროში. აღნიშნული მიზნის მისაღწევად, კვლევის ფარგლებში შესწავლილი იქნება ხელოვნური ინტელექტის არსი, გაანალიზებული იქნება მისი შესაძლებლობები, მისი გამოყენების არეალი, გამოყენების არსებული პრაქტიკა, სხვადასხვა ქვეყნების მიდგომები და ნაშრომის ბოლოს წარმოდგენილი იქნება ავტორის პოზიცია შემდეგ საკითხებზე:

- სისხლი სამართალწარმოებასა და გამოძიებაში ხელოვნური ინტელექტის გამოყენების ძირითადი გამოწვევები და სისუსტე;
- სისხლი სამართალწარმოებასა და გამოძიებაში ხელოვნური ინტელექტის გამოყენების არსებული არეალი და მისი შემდგომი გამოყენების პერსპექტივა.

1. ხელოვნური ინტელექტის შექმნის და განვითარების ისტორია

თავად ხელოვნური ინტელექტის ფუძემდებლად რამდენიმე ადამიანი ითვლება. უპირველეს ყოვლისა, ამ მხრივ, აღსანიშნავია ალან ტიურინგის ღვაწლი. ის ხშირად ხელოვნური ინტელექტის მამადაც მოიხსენიება. 1950 წელს, ტიურინგის სამეცნიერო ნაშრომში „გამოთვლითი მანქანა და ინტელექტი“ წარმოდგენილი იყო კონცეფცია ადამიანური ინტელექტის მქონე გამოთვლითი მანქანის შესახებ. ტიურინგის ნააზრევმა საფუძველი ჩაუყარა შემდგომ ხელოვნური ინტელექტის განვითარებას – ე.ი. ადამიანის მსგავსად მოაზროვნე გამოთვლითი მანქანის შექმნას.¹ მოგვიანებით, ეს თემატიკა განა-

1 Turing A.M., (1950). Computing machinery and intel-

ვითარა მათემატიკის პროფესორმა ჯონ მაკ-კართიმ, რომელმაც 1956 წელს გამოიყენა ტერმინი „ხელოვნური ინტელექტი“. სწორედ მისი ორგანიზებით მოეწყო 1956 წელს დართმუზის კონფერენცია, სადაც დღეს უკვე ჩვენთვის კარგად ნაცნობი მოვლენა „ხელოვნურ ინტელექტად“ იწოდება და ამან პრაქტიკულად ამ დიდი მიმართულების განვითარებას ჩაუყარა საფუძველი, მალე ხელოვნური ინტელექტი ცალკე დისციპლინადაც კი იქცა.² მაკ-კართიმ, მარვინ მინკსთან ერთად დააფუძნა MIT AI LAB. რობოტიკისა და კოგნიტური ფსიქოლოგიის სფეროში მინსკმა პრაქტიკულად შეუფასებელი წვლილი შეიტანა ხელოვნური ინტელექტის განვითარებაში.³ შემდგომ უკვე ჰერბერტ საიმონმა და ალენ ნიუელმა შეიმუშავეს ადრეული ხელოვნური ინტელექტის პროგრამები, რომლებიც ადამიანური პრობლემების გადაჭრაზე იყო ორიენტირებული. ამან კი საფუძველი ჩაუყარა ხელოვნური ინტელექტის „აზროვნებას“, ანუ იმას, თუ როგორ იქნებოდა შესაძლებელი გამოთვლითი მანქანისათვის ადამიანის კოგნიტური უნარების გამოყენება.⁴ არანაკლებ აღსანიშნავია არტურ სამუელის ღვაწლიც, რომელმაც გასული საუკუნის ორმოცდაათიან წლებში შექმნა ერთ-ერთი პირველი თვითდასწავლის პროგრამა და დაამტკიცა, რომ გამოთვლით მანქანას შეუძლია გამოცდილების დასწავლა.⁵ თანამედროვეობის ანალიზი ცხადყოფს, რომ ხელოვნური ინტელექტის განვითარების ნაწილში, ასევე, აღსანიშნავია ჯეფრი ჰინტონის, იოშუა ბენჟიოსა და იან ლეკუნის განსაკუთრებული წვლილი,

რის გამოც უშუალოდ ჰინტონი ხელოვნური ინტელექტის ნათლიმამადაც კი იწოდება.⁶

გარდა მეცნიერებისა და მკვლევარებისა, ხელოვნური ინტელექტის განვითარებაში უდიდესი წვლილი შეიტანეს ორგანიზაციებმა. IBM-ის პროექტის წყალობით და ხელოვნური ინტელექტის საშუალებით, 1997 წელს ხელოვნურმა ინტელექტმა ჭადრაკში მსოფლიო ჩემპიონი გარი კასპაროვი დაამარცხა და ამით დამტკიცდა, რომ ის შეიძლება გამოყენებულ იქნას სტრატეგიულ თამაშებში,⁷ ხოლო Google DeepMind-მა მსგავსი პროექტი განახორციელა გოუს მსოფლიო ჩემპიონ ლი სედოლთან მიმართებაში 2016 წელს.⁸

2. ხელოვნური ინტელექტის როლი დანაშაულის პრობნოზა და ანალიზში

ხელოვნური ინტელექტის განვითარებასთან ერთად, ეტაპობრივად დაიწყო მისი სხვადასხვა სფეროში გამოყენების შეუქცევადი პროცესი და, ცხადია, ამ მხრივ არც სამართალია გამონაკლისი. ჯერ კიდევ ადრეული განვითარების ეტაპიდან, სისხლის სამართლისა და გამოძიების სფეროში ხელოვნური ინტელექტი გამოყენება საგამოძიებო მონაცემთა ანალიტიკის ნაწილში, რათა საგამოძიებო ორგანოებს გაადვილებოდათ მათთვის მნიშვნელოვანი ოპერატიული, საგამოძიებო ინფორმაციის მართვა და ეჭვმიტანილთა იდენტიფიცირება მონაცემთა ნიმუშების კვალდაკვალ.⁹ ხელო-

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 3 Dormehl L., (2017). Thinking Machines. USA, New York, tarcherperige, pp.9-10.
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 7 Newborn M., (2000). Deep Blue's contribution to AI. Annals of Mathematics and Artificial Intelligence 28(1-4). Pp.27-30
 8 Google DeepMind, (2.04.2023). Alphago. <<https://deepmind.google/technologies/alphago/>> (Last accessed: 25.07.2024).
 9 Gund P., Phalke V.S., (2023). Investigating crime a role of Artificial intelligence in criminal Justice. The Online Journal of Distance Education and e-Learning,

ვნური ინტელექტის ადრეული გამოყენება სისხლის სამართლის მართლმსაჯულებაში მოიცავდა მონაცემთა ანალიზის გამოყენებას დანაშაულის მონაცემთა ბაზების მართვისათვის. მაგალითად, გამოძიების ფედერალურმა ბიურომ (FBI) 1960-იან წლებში შექმნა დანაშაულის ეროვნული საინფორმაციო ცენტრი (NCIC), რომელიც იყენებდა კომპიუტერულ სისტემებს კრიმინალური ჩანაწერების ეფექტიანად მოსაპოვებლად და შესანახად.¹⁰ 1990 წლიდან სისხლის სამართალწარმოებასა და დანაშაულთან ბრძოლაში აქტიურად იწყება ხელოვნური ინტელექტის გამოყენება პროგნოზების გაკეთების მიზნით¹¹. სამართალდამცავმა უწყებებმა დაიწყეს ექსპერიმენტირება საპროგნოზო, პოლიციური მეთოდების გამოყენებით. ეს მოდელები იყენებდნენ სტატისტიკის ტექნიკას და ამით პროგნოზირებდნენ სამომავლო დანაშაულებრივ კერებს. ამ მოდელმა საფუძველი ჩაუყარა დღეს არსებული პროგნოზირების დახვეწილ სისტემებს ხელოვნური ინტელექტის გამოყენებით.¹² ორგანიზაცია IBM-მა ამ შემთხვევაშიც განსაკუთრებული წვლილი შეიტანა და პოლიციის სხვადასხვა განყოფილებებთან თანამშრომლობით არაერთი მნიშვნელოვანი პროექტი განახორციელა ხელოვნური ინტელექტის საშუალებით დანაშაულობის ანალიტიკისა და პროგნოზირების სისტემის შექმნაში.¹³

3. ხელოვნური ინტელექტი თანამედროვე სისხლის სამართალწარმოებაში

დღესდღეობით ხელოვნური ინტელექტი კიდევ უფრო აქტიურად გამოიყენება სისხლის სამართალწარმოებასა და გამოძიებაში. ხელოვნური ინტელექტი სისხლის სამართალში მოიცავს ტექნოლოგიურ პროცესს (ალგორითმები, ენის დამუშავება, კომპიუტერული ხედვა), რომელიც შექმნილია იმ ამოცანების შესასრულებლად, რომლებიც, ჩვეულებრივ, მოითხოვს ადამიანის ინტელექტს, ადამიანურ ჩარევას. ყველა ეს ტექნოლოგიური პროცესი ორიენტირებულია საგამოძიებო და მართლმსაჯულების პროცესის ეფექტიანობის ზრდაზე. ამ მხრივ დღესაც, სისხლის სამართალში ხელოვნური ინტელექტის ერთ-ერთი ძირითადი მისიაა პროგნოზირება.¹⁴ კერძოდ, სხვადასხვა წყაროზე დაყრდნობით, არსებული მონაცემების ანალიზი, სამომავლო დანაშაულის პროგნოზირებისა და, შესაბამისად, მისი პრევენციისთვის. ამ მხრივ საკმაოდ კარგი მაგალითია ლოს ანჯელესის პოლიციის დეპარტამენტის (LAPD) გამოცდილება, რომელმაც დანერგა პროგრამა Predpol, პოლიციური რესურსების უფრო ეფექტიანად გამოყენებისა და, შესაბამისად, პოლიციის მუშაობის ეფექტიანობის ამაღლებისთვის. ჩიკაგოს პოლიციის დეპარტამენტი ხელოვნურ ინტელექტს იყენებს იმ პირების გამოსავლენად, რომელთა მიმართ მაღალია ძალადობის ჩადენის რისკი. ამან ხელი შეუწყო ძალადობის პრევენციას მთელ შტატში.¹⁵

ხელოვნური ინტელექტის სისტემებს ადამიანებზე უკეთ შეუძლიათ დიდი რაოდენობით მონაცემების დამუშავება. შესა-

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ბამისად, ისინი ხშირად გამოიყენება დიდი მოცულობითი საგამოძიებო ინფორმაციის დამუშავებისთვის. მაგალითად, ნიუ იორკის პოლიციის დეპარტამენტი (NYPD) იყენებს ნიმუშის ამოცნობის პროგრამას გამოძიებისთვის მნიშვნელოვანი ინფორმაციის გასაანალიზებლად და სერიული დამნაშავეების იდენტიფიცირებისთვის, რაც ხელს უწყობს მათი მუშაობის ეფექტიანობას.¹⁶

არ უნდა დავივიწყოთ კვლევითი ნაწილიც. ხელოვნური ინტელექტი საკმაოდ ეფექტიანი ინსტრუმენტია კვლევისათვის, ისევე როგორც, თუნდაც LexisNexis ან Heinonline ეხმარებოდა თავის დროზე იურისტებსა და მოსამართლეებს საჭირო

ინფორმაციის მოძიებაში. თამამად შეიძლება ითქვას, რომ ხელოვნურმა ინტელექტმა ეს პროცესი ნამდვილად კიდევ უფრო გააადვილა. ზოგიერთ იურისდიქციაში ხელოვნური ინტელექტი გამოიყენება, როგორც სასამართლოს მიერ გადაწყვეტილების მიღების ინსტრუმენტი. ცხადია, ეს არ ეხება ყველა გადაწყვეტილებას. ასეთი სისტემები ანალიზებენ წარსულ საქმეებსა და შედეგებს, რათა უზრუნველყონ რეკომენდაციები, რომლებიც მიზნად ისახავს შეამციროს მიკერძოება და გააუმჯობესოს სასამართლო გადაწყვეტილებების თანმიმდევრულობა, უზრუნველყოს სასამართლო პრაქტიკის ერთგვაროვნება. თუმცა, ამ განხრით ხელოვნური ინტელექტის გამოყენებამ აზრთა სხვადასხვაობა გამოიწვია ალგორითმული მიკერძოების რისკებისა და გადაწყვეტილების მიღების პროცესების გამჭვირვალობის შესახებ.¹⁷ არანაკლებ საინტერესოა ესტონური გამოცდილება, რომელმაც ხელოვნური ინტელექტით შექმნა მოსამართლე, რომელიც მიზნად ისახავს მცირე დავების განხილვას, რაც საბოლოო

ჯამში, მნიშვნელოვნად განტვირთავს სასამართლო სისტემას.¹⁸

4. სხვადასხვა ქვეყნების გამოცდილების ანალიზი

შედარებითი კვლევები მოწმობენ, რომ ხელოვნური ინტელექტის გამოყენებით ზემოთ აღწერილი ამოცანების შესრულება შესაძლებელი ხდება უფრო სწრაფად და ეფექტიანად, რაც საერთო ჯამში, ნამდვილად აუმჯობესებს შესრულებული საქმის ხარისხს. მიუხედავად ამისა, უთუოდ უნდა აღინიშნოს ის გარემოებაც, რომ ხელოვნური ინტელექტის მიერ ასეთი ამოცანების შესრულებისას საკმაოდ მწვავედ დგას ეთიკური საკითხი. საუბარია ხელოვნური ინტელექტზე დაფუძნებული გადაწყვეტილების გამჭვირვალობასა და ანგარიშვალდებულებაზე.¹⁹ აქვე შეუძლებელია არ აღინიშნოს, რომ ხელოვნური ინტელექტის საშუალებით სამართალწარმოებისათვის მნიშვნელოვანი ინფორმაციის დამუშავებისას ერთ-ერთი დიდი გამოწვევაა პერსონალურ მონაცემთა დაცვის საკითხიც. მიუხედავად იმისა, რომ სისხლის სამართალწარმოებასა და გამოძიებაში ხელოვნური ინტელექტის გამოყენება, ერთი შეხედვით, სიახლეს წარმოადგენს, სხვადასხვა ქვეყნებში უკვე გვხვდება ამ სფეროში ხელოვნური ინტელექტის ხელოვნური ინტელექტის გამოყენების მრავალწლიანი გამოცდილება. ამ მხრივ, უპირველეს ყოვლისა, უნდა აღინიშნოს ჩვენ მიერ ზემოთ აღწერილი ამერიკის შეერთებული შტატების გამოცდილება, რომელიც უკვე დიდი ხანია იყენებს ხელოვნურ ინტელექტს დანაშაულობის პროგნოზირებისა და მისი პრევენციის ნაწილში. მათ შორის, როგორც ზემოთ აღინიშნა, გამოიყენება სპეციალური პროგრამები (Predpol, Compstat) და-

16 Policechiefmagazine.org (2023). Carpertner W., Presidents' message: AI's transformative impact. <<https://www.policechiefmagazine.org/presidents-message-ais-transformative-impact/>> (Last accessed: 22.07.2024).

17 Antunes H., S., Freitas P., M., Oliviera A., L., Pereira C., M., Sequiera E., V., Xavier L., B., (2023). Multidisciplinary Perspectives on Artificial intelligence and the law. Springer. Spain. pp. 15-20.

18 Vasdani T., (2023). From Estonian AI Judges to robot mediators in Canada, U.K. The Lawyer's Daily, Vol. III. pp.5-10.

19 Wischmeyer T.,(2020) Artificial intelligence and transparency: Opening the black box. Regulating Artificial Intelligence, pp. 75-101.

ნაშაულის ანალიზისა და მართვისთვის.²⁰ ხელოვნური ინტელექტის ყველაზე ფართოდ და შეუზღუდავად გამოყენების კუთხით მონინავა ჩინეთის სახალხო რესპუბლიკა. ამ ქვეყანაში ხელოვნური ინტელექტი გამოიყენება ტოტალური მეთვალყურეობისთვის, რისი ერთ-ერთი მიზანიც დანაშაულის პრევენციაა. ქვეყნის მასშტაბით დამონტაჟებულია ათასობით სახის ამომცნობი ე.წ. ქვიანი კამერა, რომელიც ინტეგრირებულია სოციალური კრედიტების სისტემასთან, რითაც საბოლოო ჯამში ხდება მოქალაქეთა შეფასება. ცხადია, შეფასების ეს სისტემა სცდება სისხლის სამართლის მიზნებს და ისიც უდავოა, რომ მეთვალყურეობის ეს სისტემა განსაკუთრებით განვითარდა ჩინეთში, იმდენად რამდენადაც დემოკრატიულ ფასეულობებთან მიმართებაში აკრძალვები და შეზღუდვები ამ ქვეყანაში არ გვხვდება.²¹

რაც შეეხება ევროპის ქვეყნებს, ხელოვნური ინტელექტის განვითარების კვალდაკვალ ამ ქვეყნებში სულ უფრო დიდი ყურადღება ექცევა პერსონალურ მონაცემთა დაცვის რეგულაციებს, რათა გამოირიცხოს ხელოვნური ინტელექტის ბოროტად გამოყენება, რომ არ მოხდეს ადამიანის უფლებების ხელყოფა, მათ პირად ცხოვრებაში არასანქცირებული ჩარევა და ა.შ. მაგალითად, გაერთიანებული სამეფოს საპოლიციო ორგანოები ხელოვნური ინტელექტზე დაფუძნებულ პროგრამებს იყენებენ დანაშაულის პროგნოზისთვის, ეთიკურ-სამართლებრივი შეზღუდვების გათვალისწინებით; გერმანია აქტიურად იყენებს ხელოვნურ ინტელექტს სამართლის კვლევებში, კეთილსინდისიერების პრინციპების სრული დაცვით; საფრანგეთი, იაპონია, სამხრეთ კორეა, ინდოეთი, ასევე, იყენებენ ხელოვნურ ინტელექტს და-

ნაშაულის პროგნოზირების/ანალიზის და სამეცნიერო კვლევებისათვის, კეთილსინდისიერებისა და ეთიკურ-სამართლებრივი შეზღუდვების გათვალისწინებით.²²

5. სასამართლო პრაქტიკის ანალიზი

ცხადია, ამ შემთხვევაში გარკვეული პრაქტიკაც შეიქმნა. ჯერ კიდევ 2016 წელს, ამერიკის შეერთებულ შტატებში შედგა სასამართლო დავა: ლუმისის ვისკონსინის წინააღმდეგ (Loomis v. Wisconsin). ერიკ ლუმისს მიესაჯა 6 წლით თავისუფლების აღკვეთა პროგრამა Compas-ის (Correctional Offender Management Profiling for Alternative Sanctions) ალგორითმის საშუალებით გამოთვლილი რისკების შეფასების საფუძველზე. ლუმისი სადავოდ ხდიდა მისი ბედის გადანყვეტი-სათვის ამ პროგრამისა და ალგორითმის გამოყენებას, აპელირებდა რა იმით, რომ ეს არღვევდა მის საპროცესო უფლებებს, რადგან მისთვის შეფასების პროცესი სრულიად არაგამჭვირვალე იყო და გაუგებარი რჩებოდა, თუ როგორ მიიღო ალგორითმმა რისკის შესაფასებლად ასეთი ქულა. სასამართლომ არ გაიზიარა პირის პოზიცია იმ არგუმენტაციაზე დაყრდნობით, რომ ეს არ იყო ერთადერთი მაჩვენებელი, რის საფუძველზეც სასამართლომ გადანყვეტილება მიიღო. მაშასადამე, მიუხედავად იმისა, რომ აპელანტის მოთხოვნა არ დაკმაყოფილდა, საქმე პრეცედენტულია სწორედ ამ არგუმენტაციიდან გამომდინარე.²³ არანაკლებ პრეცედენტული მნიშვნელობის იყო საქმე გაერთიანებული სამეფოს სასამართლო პრაქტიკიდან – R. (Bridges) v. Chief constable of south wales police. 2020 წელს,

20 Mugari I., Obioga E., (2021). Predictive Policing and Crime Control in The United States of America and Europe: Trends in a Decade of Research and the Future of Predictive Policing. Social Sciences 10(6). p.234.
 21 <https://www.linkedin.com/> Yu cel G., (2024). Crime prevention effort with artificial intelligence in China: analysis. <<https://www.linkedin.com/pulse/crime-prevention-efforts-artificial-intelligence-china-gokcen-yucel-aascf>> (Last accessed: 25.06.2024).

22 www.techuk.org. Industry views. (2024). Mahalias I., AI adoption in criminal justice – How can industry support the justice system in implementing Artificial intelligence <<https://www.techuk.org/resource/ai-adoption-in-criminal-justice-how-can-industry-support-the-justice-system-in-implementing-artificial-intelligence.html>> (Last accessed: 25.07.2024).
 23 State v. loomis. (2016). Harward law review. Vol.130. issue 5. Harward University. pp. 1530-1537.

პირმა სადავოდ გახადა სამხრეთ უელსის პოლიციის მიერ სახის ამომცნობი სისტემის გამოყენება და ამტკიცებდა, რომ ამით დაირღვა მისი პირადი ცხოვრების უფლება, ადამიანის უფლებათა ევროპული კონვენცია და პირად მონაცემთა დაცვის აქტი. სასამართლომ მხედველობაში მიიღო აპელანტის მოსაზრება და დააკმაყოფილა მისი მოთხოვნა იმის აღნიშვნით, რომ პოლიციას გაცნობიერებული არ ჰქონდა, თუ რაოდენ დიდი და უხეში იყო ასეთი სისტემების გავლენა ადამიანების პრივატულობასა და კონფიდენციალობაზე, ასევე, პერსონალურ მონაცემთა დაცულობაზე. ეს გადაწყვეტილება ეერთგვარი პრეცედენტის მატარებელია იმ ქრილში, რომ მიუხედავად მსოფლიოში მიმდინარე ტექნოლოგიური პროცესებისა და ხელოვნური ინტელექტის უდიდესი გავლენისა, აუცილებელია დაცული იქნას ბალანსი, რათა თავიდან ავიცილოთ უფლებამოსილების ბოროტად გამოყენება და პერსონალურ მონაცემთა უხეში ხელყოფა.²⁴ პრაქტიკაზე საუბრისას შეუძლებელია არ გავანალიზოთ ადამიანის უფლებათა ევროპული სასამართლოს პრაქტიკა. ერთ-ერთ გადაწყვეტილებაში (საქმე შეეხებოდა შემთხვევას, როდესაც ბანკი სპეციალური პროგრამის საშუალებით აფასებდა საკრედიტო აპლიკაციებს) სასამართლომ დააფიქსირა, რომ ხელოვნური ინტელექტის გამოყენების დროს მნიშვნელოვანია გადაწყვეტილების მიღების პროცესის გამჭვირვალობა და ანგარიშვალდებულება. ინდივიდს უფლება აქვს მოითხოვოს, რომ მის შესახებ ავტომატიზებული მიღებული გადაწყვეტილება გადასინჯულ იქნას ადამიანის მიერ. ისეთი ავტომატური გადაწყვეტილებები, რომლებიც არსებითად ახდენენ ადამიანის ბედზე გავლენას, უნდა აიხსნას და დასაბუთდეს.²⁵

24 Hunton Andrews Kurth, (2020). UK court of appeal finds automated facial recognition technology unlawful in Bridges v South Wales police. <<https://www.huntonak.com/privacy-and-information-security-law/uk-court-of-appeal-finds-automated-facial-recognition-technology-unlawful-in-bridges-v-south-wales-police>> (Last accessed: 20.07.2024).

25 Szappanyos m., (2023). Artificial intelligence: Is the

დასკვნა

მაშასადამე, უდავოა, რომ ხელოვნური ინტელექტის შექმნა და განვითარება მრავალი მეცნიერისა და ორგანიზაციის ერთობლივი მუშაობის შედეგია. ამ სფეროში პიონერებად მაინც ალან ტიურინგი და ჯონ მაკ-კართი მიიჩნევა, რადგან სწორედ მათ ჩაუყარეს საფუძველი იდეის დონეზე გამოთვლითი მანქანის ასეთ შესაძლებლობებს. შემდგომ ჰინტონის გუნდის წვლილი განუზომელია ამ იდეის განვითარებაში და ბოლოს უკვე ისეთმა დიდმა ორგანიზაციებმა, როგორებიც არის IBM და Google DeepMind, პრაქტიკაში მოახდინეს ხელოვნური ინტელექტის შესაძლებლობების უკეთ დემონსტრირება.

მაშასადამე, როგორც ჩანს, ქვეყნების დიდი ნაწილი იყენებენ ხელოვნურ ინტელექტს სისხლის სამართალწარმოებაში, გამოძიებასა და სამეცნიერო საქმიანობაში. თუმცა მათი დამოკიდებულება განსხვავებულია. მაგალითად, ჩინეთი მეტად აკეთებს აქცენტს მოსახლეობის კონტროლზე და არ ითვალისწინებს ადამიანის პირად უფლებებს; ამერიკის შეერთებული შტატებში იგი მეტწილად გამოიყენება დანაშაულის ანალიზისა და პროგნოზირების ნაწილში, ცხადია ქვეყანაში დიდი ყურადღება ექცევა ადამიანის პირად უფლებებს, თუმცა ამ შემთხვევაში პერსონალურ მონაცემთა ქრილში აქ არ გვხვდება ისეთ მკაცრი რეგულაციები, როგორც ევროპის ბევრ ქვეყანაში, სადაც ასევე გამოიყენება ხელოვნური ინტელექტი. ევროპის ქვეყნებში, ხელოვნური ინტელექტის ტექნოლოგიების გამოყენებისას ადამიანის პირადი უფლებები და კონფიდენციალურობა აღმატებულ ინტერესად არის მიჩნეული.

ჩვენ მიერ ზემოთ განხილული შემთხვევები ასახავს ხელოვნური ინტელექტის გამოყენების ზრდის ტენდენციას სისხლის სამართალწარმოებასა და გამოძიებაში. ზოგადად, სხვადასხვა ქვეყნის მართლმსაჯულების სისტემები მხარს უჭერენ ხელოვნური ინტე-

European court of Human rights prepared? Acta Humana. Vol 11(1) pp. 93-110.

ლექტის გამოყენებას მხოლოდ იმ პირობით, რომ პროცესი იქნება გამჭვირვალე და ის არ იქნება არსებითი სამართლებრივი შედეგების განმსაზღვრელი ერთადერთი წინაპირობა. მნიშვნელოვანია ისიც, რომ ხელოვნური ინტელექტის სისტემები თავისუფალი უნდა იყოს მიკერძოებისაგან და გათვალისწინებული იქნას ინდივიდთა უფლებები – მათი პირადი ცხოვრების ხელშეუხებლობა.

მიუხედავად იმისა, რომ ხელოვნურ ინტელექტზე დაფუძნებულმა ტექნოლოგიებმა და პროგრამებმა მნიშვნელოვნად გაადვილეს სისხლის სამართალწარმოებასა და გამოძიებაში არსებული ამოცანები, ცხადია არსებობს გარკვეული რისკები და გამოწვევებიც. პირველ რიგში, ასეთი სისტემების პირობებში, საკმაოდ მაღალია შეცდომის ალბათობა, ამიტომ უმნიშვნელოვანესია მათი სწორად აწყობა-გენერირება. სისტემის გამართულად მუშაობისთვის ძალიან მნიშვნელოვანია არსებული მონაცემების სწორი ასახვა, რადგან აქ დაშვებულმა შეცდომამ შეიძლება მიგვიყვანოს არასწორ ან დისკრიმინაციულ გადაწყვეტილებამდე, ადამიანისგან განსხვავებით ხელოვნური ინტელექტი ვერ იქნება თვითკრიტიკული საკუთარი გადაწყვეტილების მიმართ. უდიდესი გამოწვევაა პირადი ცხოვრების ხელშეუხებლობა და პერსონალური მონაცემები. ხელოვნური ინტელექტის საფუძველზე შექმნილი სისტემების მასიურად გამოყენებისას მნიშვნელოვანია დაცულ იქნას საჭირო ბალანსი და მონაცემთა უსაფრთხოება. ერთ-ერთი ეთიკური საკითხია ისიც, რომ ამ სისტემით მიღებული გადაწყვეტილება უნდა იყოს გამჭვირვალე და უნდა არსებობდეს ანგარიშვალდებულების სისტემა. ხელოვნური ინტელექტის გამოყენება სისხლის სამართლის კანონმდებლობაში სხვადასხვა იურისდიქციებში დაკავშირებულია არსებით გამოწვევებთან, რადგან სამართლებრივი სტანდარტები, რეგულაციები და კულტურული დამოკიდებულებები ხელოვნური ინტელექტის მიმართ ძალიან განსხვავდება. უშუალოდ სისხლის სამართალწარმოებისა და გამოძიების ქრილში ხელოვნური ინტელექტის განვითარებასა და დახვეწასთან ერთად მოსალოდნელია:

- დაიხვეწოს საპოლიციო პროგნოზირების სისტემები, შეიქმნას კიდევ უფრო სრულყოფილი ალგორითმები, რომლებიც თავის თავში გააერთიანებენ დიდი რაოდენობის მონაცემებს, რომელთა საშუალებით ალგორითმი კრიმინოლოგებზე უკეთ შეძლებენ ამ ქრილში რეალობასთან მაქსიმალურად მიახლოებული, შესაძლოა უზუსტესი პროგნოზის შესრულებას;
- ხელოვნური ინტელექტის ტექნოლოგიები სულ უფრო მეტად იქნება გამოყენებული ექსპერტიზის ნაწილში, რითაც უფრო მეტი მტკიცებულების მოპოვება და დამაგრება იქნება შესაძლებელი და ეს მტკიცებულებები იქნება მეტად ზუსტი და უტყუარი;
- ხელოვნური ინტელექტის ტექნოლოგიები სულ უფრო და უფრო მეტად გახდინან შესაძლებელს დანაშაულის უზუსტესი სცენის თუ მარშრუტის აღდგენას, რაც, ცხადია, მასზე რეაგირებას და გამოძიების პროცესს უფრო სრულყოფილს გახდის;
- ხელოვნური ინტელექტის ტექნოლოგიები გაადვილებენ ციხეში პატიმართა მენეჯმენტს, მათ შორის მათ ყოფა-ქცევაზე დაკვირვებას და ამის საფუძველზე პერსონალიზებული რეაგირების გზების, მათ შორის, რეაბილიტაციის დაგეგმვას.

ცალკე მსჯელობის საგანია ის, თუ რამდენად შეძლებს ხელოვნური ინტელექტი მოსამართლეების შეცვლას. ჩვენ მიერ ზემოთ განხილული ეთიკური წინააღმდეგობების გარდა, თავს იჩენს სხვა წინააღმდეგობაც: კერძოდ, საუბარია მართლმსაჯულების განხორციელების ისეთ აუცილებელ კომპონენტზე, როგორიც არის მოსამართლის შინაგანი რწმენა. შესაძლოა კი გამოთვლით მანქანას ჰქონდეს შინაგანი რწმენა? ცხადია შეიძლება, თუმცა მას შეიძლება ჰქონდეს შინაგანი რწმენა ისეთი, როგორსაც მას ისევ ადამიანები გაუწერენ შესაბამისი ალგორითმით. შეძლებს კი გამომთვლელი მანქანა შეაფასოს ისეთი გარემოებები, როგორიცაა: განსაკუთრებუ-

წინააღმდეგობა, პირის მიერ ქმედების გულ-
წრფელი მონანიება და ა.შ.? ამ კითხვაზე
პასუხი საკმაოდ ბუნდოვანი და არაერთგ-
ვაროვანია. ცხადია, რომ სულ უფრო და
უფრო იხვეწება ხელოვნური ინტელექტის
ტექნოლოგიები და სულ უფრო და უფრო
ფართოვდება მისი გამოყენების არეალი.
ისიც უდავოა, რომ გადატვირთული სასა-
მართლო სისტემის ფონზე, იდეა საკმაოდ
მიმზიდველად გამოიყურება, თუმცა მისი
განხორციელების რეალური პერსპექტივა
ამ ეტაპზე საკმაოდ ბუნდოვანია.

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A PRELIMINARY AGREEMENT IN FRANCHISING BUSINESS – RISKS AND CHALLENGES

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ABSTRACT

This article constitutes a Preliminary Agreement in Franchising. The research process focuses on theoretical and practical aspects of legal issues that concern franchise agreement.

This article represents problematic legal issues, experience and tradition in legalizing pre-sale information disclosure plays a significant role in the franchise business. Franchisee maintenance justice mechanisms signify the importance of pre-sale information disclosure and provision principles in the initial stage of making pre-agreements.

The article deals with certain controversies revealed in a franchise business caused by the absence of legal regulations at the pre-contractual stage. It emphasizes the lack of a mechanism to protect franchisees' rights – information disclosed in the Franchise Disclosure Document. It contains recommendations on how to solve existing problems.

As a result of observing different models of legal systems and regulations in the pre-contractual stage, it becomes necessary to integrate this new franchising system and pre-sale information disclosure into Georgian law.

On the one hand, this study suggests implementing legislation

and franchising regulations by combating several legal problems.

On the other hand, the research accentuates the adopted model law on information disclosure, “UNIDRUA”, that will be a strongly recommended model contract for such a country as Georgia since it lacks a special law on franchising. The analysis based on this research can be applied by commercial organizations and entrepreneurs that run businesses in terms of franchising.

KEYWORDS: Preliminary agreement, Pre-contractual information, Pre-contractual disclosure, Franchise, Franchisor

INTRODUCTION AND RESEARCH OBJECTIVE

1. THE MEANING OF PRE-CONTRACTUAL STAGE IN FRANCHISE BUSINESS

1.1 Foreign doctrine about pre-contractual stage

Pre-contractual stage: This is an Essential period that involves contract preparation procedures. Despite long-term contract negotiations, the parties are most likely to sign the contract at a very early stage. It is the legal basis for administrative compulsion, including several principles that must be considered when making a franchise agreement.¹

A franchise relationship is a kind of relationship between the franchisor and the franchisee and involves regulations and standards to define and protect the quality of the service or products to be provided. The franchisee’s business is one which they are licensed to carry out

in accordance with the terms of their contract with the franchisor.² The franchise agreement is the basis of the relationship between the franchisor and the franchisee in all franchises. The relationship between franchisors and franchisees has often been termed a “commercial marriage”. In many ways, this is true, though the difference is that in the franchise relationship, there must, by definition, be a “senior partner” – the franchisor. Also, the franchise agreement defines the entire basis of the relationship upfront so that both parties know their rights and obligations to the relationship³.

A franchise agreement: This is an agreement between a franchisor (exclusive rights-holder) and a franchisee that sets out certain rights and obligations for franchisees to purchase a franchise within restricted franchise territory in accordance with those terms and submission period dates that are defined in the contract.

The complex of exclusive rights (licensed complex) – Intellectual property rights of all objects (trade mark, trade name, service marks, patents, covered (obscure) information, production secrets (know-how); Goodwill.⁴

Doctrinal studies assess pre-contractual agreement as a traditional version aroused due to agreement responsibilities. We all know the very postulate: The general rule is that signing the agreement’s appropriate form isn’t preceded by establishing mutual intercourse between the parties. What’s more, preparation for pre-contractual agreement gives resistance to the dichotomy (reciprocity) approach of civil legal liability that is attributed to Roman law.⁵

If we analyze foreign Doctrinal research,

1 Vashakidze, G., Gelashvili, I., Baghishvili, E., Rusiashvili, G., Aladashvili, A., Meskishvili, K., Motsonelidze, N., Batlidze, G., Zorbenadze, S., Gatsereia, A., Svanadze, G., Robakidze, I. (2019). Commentary to the Civil Code of Georgia. Book III, Tbilisi, GIZ, p. 99.

2 Greene, N., Newton, D., Olson, K. J. (2021). The Annotated Franchise Agreement <<https://www.franchise.org/faqs/basics/what-is-a-franchise>> (Last access 07.09.2024).

3 Hussein, M. A. Z. (2019) Legal Aspects for the Pre-contract Stage, Publisher: رهاظلا دب ع دم ح م رهاظلا دب ع دم ح م p., 40;

4 Association of Franchising Projects. (2000). Small and medium business in Franchising, (Bulletin). ISBN 99928-945-98. Publishing “Thani”.

5 Zweigert, K., Kötz, H. (1998). An Introduction to Comparative Law. Oxford, Vol. II, Oxford University Press, p. 291-300.

we may come to the following conclusion that the Continental-European, as well as the Anglo-American legal system, tends to impose several restrictions and duties on both parties to protect The obligation of faithful business and in case of violation of requirements and misconduct the side that has inflicted some kind of wrong upon another party or has brought some kind of harm to his personal property is to make reimbursement for the loss of income.⁶

Pre-contractual liability of franchising is likely to be a special element when providing pre-sale disclosures.

It is very interesting if we realize the meaning of the pre-contractual stage in the franchise business. What is the core (essence) of business formation? One side that is right holder is maybe a professional entrepreneur (commercial organization), A contrario franchisee (beneficiary) who isn't unlikely to possess the necessary business experience and some kind of professional level, which compels him to compensate for this disability by making a franchising agreement. Each side aims at making a maximum profit because of the actual inequality of those two entering a franchise business; the one who is always strong and more omnipotent and experienced is a franchisor, and the weaker side is mostly a franchisee rather than a right-holder. That's why regulating franchise businesses necessitates solving the problem of creating legal guarantees to protect a franchisee.

Actual inequality of the parties entering a franchise business might occur in the early pre-contractual stage. In fact, in this stage, two negative factors are juxtaposed. First, as it has already been mentioned, this is insufficient job experience for a franchisee (beneficiary), and this is a plus for the franchisor as he/she possesses a preferable position. Second, the authoritative factor in this respect is that there is no clearly modified legal regulation in the pre-contractual stage.⁷ So fighting the legisla-

tive vacuum is likely to be critical in the early pre-contract stage that's why it is significant to form special regulation to avoid insolence and violation of franchisee's rights and the diversion from the equality principles of civil legal relations.

For instance, if we analyze the hypothetical model for a franchise business, according to civil law, a franchisee (beneficiary) is to make up his mind whether to trust and accept insufficient and obscure information about a franchisor's job performance (know-how) his entrepreneurial activities and take notice of those data that a franchisor deems necessary, desirable or scratch the surface and get things intuitively what is the business perspective before signing a contract.⁸ Can a franchisee make a motivated and argumentative decision over franchise agreement in such a legal vacuum? Is it legal to allow a franchisor decide the extent of information disclosure and provision in the early pre-contractual stage?

The negative answer is irrevocable, which can be explained in the following way: It's foremost to work out an efficient and effective legal mechanism in the early pre-contractual stage to provide equal conditions for the parties entering a franchise business.

Common law system, as well as continental, signals what is the key instrument of the legal mechanism to protect the interests of a franchisee (beneficiary), and this major principle is the provision of pre-sale disclosure that is activated in the initial stage of business formation.⁹

If we define schematic processing, this principle lies in the fact that a franchisor (right-holder) is under obligation to give and represent essential information to a potential franchisee (beneficiary) before the contract is drawn up.

Before we get to the conclusion and put forward the answer to the question of whether our

6 Ali, A. O. (2020). Legal Aspects of the Franchise Contract, an Analytical Study. Arab Renaissance House Publishing, p. 231.

7 Kokiashvili, M. (2009). Franchising and its legal regula-

tion. Tbilisi, Publishing "Meridiani", p. 20.

8 Emrich, N., Twiehoff, M. (2022). Die 7 Irrtümer im Franchise: Was Einsteiger wissen müssen. Humburg, S. 20.

9 Kucher, A. N. (2005). Theory and practice of the pre-contractual stage: a legal aspect. M. Statute, p. 213.

legal system needs a new legal institution, pre-sale information disclosure and transferring in the early pre-contractual stage, it's very important to be aware of its legal nature, because such research will help us understand how our legal system organically absorbs this foreign construction.

1.2. Problems at the pre-contractual stage and a special law on information disclosure

A franchise business's pre-contractual stage is usually regulated by a special information disclosure law, which imperatively addresses a franchisor's obligation, i.e., requirements to provide a franchisee with equivalent objective information earlier than signing a contract. This kind of obligation seems natural; a potential franchisee (This is a legal action in accordance with its legal nature) remains connected to another part using a set of rights and obligations before forming contractual relationships, and this makes us familiarize ourselves with the special pre-agreement statement within the framework of legal relations which involves unilateral commitment, a franchisee's right to be provided with information and requirement to make a franchisor meet all the liabilities concerning pre-sale franchise disclosure.

Thus, the distinctive features of the franchising contractual mechanism are a continual legal relationship, the franchisor's right of control over the franchisee's activities, and the franchisee's commitment to follow the advice and directives of the franchisor. In case of not yielding to the range of requirements interconnected and mutually related contractual partners are to abide by any liability mechanism. (Legal systems in the case of several foreign countries involve intersectoral liability mechanisms that consist of private and public legal norms (France, Italy).

What's the aim of franchising legal relationships? It imposes obligations upon franchisees as well as franchisors and affects pre-contractu-

al conduct as well as the fundamental elements of the relationship. Pre-contractual relations and contract negotiations are made separately and provided the franchise agreement is drafted or terminated, it won't have any bias upon these pre-contractual relations, i.e. it recognizes the need to activate liability mechanism imperatively in case of violation of rights and interrupting a franchisee from being provided by the pre-contractual duty of Information disclosure even though franchise contract is never signed.¹⁰ Existence of pre-contractual legal relationships is defined by two factors: submission period of potential franchisor's information liability terms and potential franchisee's rights terms to have confidentially protected, detailed franchise information and resources and these terms are negotiated and endorsed mutually, and when the contract is overdue, or all the commitments are fulfilled, then it results in cancellation of pre-contractual negotiations.

2. CULPA-IN-CONTRAHENDO DOCTRINE

It is very important to make first Pre-contractual liability of legal regulation reform (for example, in Germany, while focusing on obligations law reform, it recognized the need to expand the German Civil Code with a special norm & 311 (2) in 2002, that imposes both franchise business partners to act honestly when franchise negotiations are underway and second, we shouldn't resist to the presumption that pre-sale information disclosure process follows doctrine of (culpa-in-contrahendo) pre-contractual relationship between the parties entering a franchise business. The main intention is to enable the principle of good faith in a contractual relationship of franchising.

It is necessary to analyze the franchisor's (right holder) information obligation in detail. The legal obligation involves the representation of a franchise disclosure statement similar

¹⁰ Martius, W. (2024). Fairplay Franchising, Springer Gaber. 4. Auf., S. 55.

to the offer to a great extent. What's the meaning of offer and its principles? Let's compare it with the information disclosure statement:

The legal nature of the Offer lies in the fact that it shows the willingness of the partner to draft an agreement that conveys the intentions of the person who has already made a suggestion. Due to the proposal, he asserts that the agreement is made for the addressee, who accepted it. The Offer concerns the distinctive terms, conditions and issues of the agreement.¹¹ It can be concluded that the Offer is quite clarified and modified to express the Offerant's wish. In case of acceptance, sign the following document. If we get to the bottom of the franchise disclosure statement and analyze its essence, we will realize that the Offer, as well as the franchise disclosure statement, share the same characteristic feature: "comprehensibility (clearance)". Moreover, a special law on franchising urges a franchisor to provide a franchisee with an information disclosure statement alongside all the detailed and exhausted sources of information involving substantial terms and conditions.

There is no doubt that when a potential franchisor provides a franchisee with an information disclosure statement, by doing this, he expresses his willingness to form a franchise relationship and sign a franchise contract; what's more, any pre-contractual legal regulation model for franchise business contains franchise disclosure statement, and its content consists of the very text of the agreement and Offer doctrinal definition is similar to commentary made in Criminal Code – the article 329. "Offer is a proposal to Offer an Agreement, show one-sided willingness and meet expectations of accepting this agreement from the other side, and postulates legal regulation results for both sides standing for a franchise business, i.e. involving Offerer and addressee "(Acceptant)".¹² Offer has

a broad meaning, and its identifying features are doctrinally interpreted: The First feature is clearance of Offer, and due to it, the addressee should clearly define the Offerer's willingness. Second – Offer directives that assert acceptance of suggestions, terms and conditions from the addressee for successful business plan implementation. Third, it's the content of the Offer – it must contain substantial terms and conditions of the contract. The fourth element is addressee – It should be obvious to whom the offer is addressed.

2.1. Disclosing pre-sale information – a distinctive principle

Considering prominent elements and factors while concentrating on information disclosure, we may conclude that the Offer is mostly characterized by clearance, directiveness and content. As for the addressee, the Information disclosure document is always directed toward the potential franchisee.

Therefore, the information disclosure document is characterized by every trait of "Classic Offer's" shares; therefore, its content is regulated in every pre-contractual legal regulation model by the special law on franchising. (The imperative norms determine the content of Offer That's why it enables us to conclude that the information disclosure document has the same nature as Offer but is "special Offer with imperative steps".

Thus, disclosing pre-sale information on the pre-contractual stage of franchising is the distinctive principle. It is associated with the classical contract-signing concept involving minor analysis toward the offer content. This enables us to give a positive answer to the question that there is no need to copy construction law research methods; moreover, in this particular case, drastic reforms in existing legislation are unnecessary.

11 Vashakidze, G., Gelashvili, I., Baghishvili, E., Rusiashvili, G., Aladashvili, A., Meskhishvili, K., Motsonelidze, N., Batlidze, G., Zorbenadze, S., Gatsereia, A., Svanadze, G., Robakidze, I. (2019) Commentary to the Civil Code of Georgia. Book III, Tbilisi, GIZ, p. 99.

12 *Ibid.*

2.2 Pre-contractual liability in European legal family

The pre-contractual liability institute was originally founded in the German legal system and then interpreted by the meaning of French jurisdictional terms. Nowadays, it is depicted and enacted in many normative acts of those countries that attribute to continental European legal family (Videlicet in Italy, France, Spain, and Switzerland).¹³ Notwithstanding the differences in the contents of the pre-contractual liability mechanism, in the case of different national legal systems, it is notable that the main principle of pre-contractual liability remains a civil-legal liability, implying opportunities to violate and terminate contract terms and remunerate the damages caused by unlawful acts.

Alongside it, existing pre-contractual liability in concrete separate national systems isn't limited to civil legal liability only, but also it foresees for minor violations administrative liability and for serious violations – criminal liability (for example, in France, Italy, and Spain). Regulating pre-contractual stage in franchising is guaranteed neither by the Civil Code nor any legislative act in Georgia. So, it should be considered that the Georgian model for legal regulations should be established at the pre-contractual stage with the main objective of enacting and legalizing intersectional liability mechanisms to avoid unlawful acts. That kind of regulation model would involve public and private legal forms.

When we talk about the pre-contractual stage and preparation of the franchise disclosure document, we shouldn't forget the existence of the model franchise disclosure law officially adopted by the UNIDROIT Study Group on franchising on 25 September 2002. According

to the franchise agreement, preparing a model franchise disclosure law started in 1985 when the Governing Council of UNIDROIT worked on the UNIDROIT Conventions¹⁴ on International Leasing and International Factoring.

The first and foremost factor in model law is regulating franchise relationships by providing pre-sale information disclosure in the pre-contractual stage. Model law, of course, is short and consists of a single preamble and ten chapters. As for the preamble, it depicts and forwards the significant role franchising plays in many high-ranked countries, for example, but the chapters concern information disclosure and provision elements that must be taken into account before drawing up an agreement.

Information vacuum challenges compass unavailability and disclosure of information concerning the parent company and beneficiary's company. (i.e. information on both parties entering the franchise business). This specific feature in business formation is characterized as transparency and disclosure that restricts franchise efficiency and effectiveness. This means that some of the elements of a system cannot be seen but can nevertheless affect the system's operation. Many challenges in franchise systems can be avoided if franchisors and franchisees have more open and frequent communication, mutual respect and transparency. That is why information disclosure concerning franchise business entities seems to be of most requireable principles at the pre-contractual stage according to franchising legislation in certain countries such as The USA, France, Germany, Australia, Belgium, Brazil, Indonesia, Spain, Canada, etc. Violating certain aspects of franchise agreement obligations is sanctioned even by criminal liability. Unfortunately, no chapter in the Civil Code will regulate franchise business in the pre-contractual stage.

To overcome a series of challenges, the franchise industry necessitates law enforce-

13 Nedzel, N. E. (1997). A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability, 12 TUL. <EUR. & CIV. L.F. 97.p.147; Southern University Law Center; [14 UNIDROIT Principles of commercial contracts. \(2016\) <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/> \(Last accessed: 02.09.2024\).](https://elsevier-ssrn-document-store-prod.s3.amazonaws.com/15/11/02/ssrn_id2685374-code624997.pdf?response-content-disposition=inline&X-Amz-Security-Token=IQoJb></p>
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ment and representation of (“Law on Franchising”, law on “Changes and Amendments to the seventh chapter in Civil Code”), parties entering franchise business are bound to abide by the law to disclose any special information at the pre-contractual stage. Developed countries, through special disclosure obligations put onto a franchisor, ease franchisee destiny by formulating its inner will to conclude a franchise agreement. Having received disclosure information, the franchisee fully understands the meaning of its actions directed to franchise agreement execution. Thus, in such a situation, we may conclude that the foreign franchisee’s expression of will corresponds to its inner will.

If information disclosure obligations are terminated or violated, then we may face several challenges even in developed countries: e.g. The existence of a large number of franchisors who lack successful technologies, The existence of those franchise companies that work only on gathering royalties and give nothing in exchange for this payment (Franchise royalty is a sum paid to the franchisor. It typically is the percentage of sales (usually the gross) that the franchisees pay to the franchisors). The existence of subsidiary companies, i.e., franchisee companies, seeks the way and resort to certain measures to face business challenges by drafting a franchise contract. The agreement gives both parties a clear understanding of the basis on which they will continue to operate.

RESULTS AND CONCLUSION

There is no doubt that when a potential franchisor provides a franchisee with an information disclosure statement, he expresses his willingness to form a franchise relationship and sign a franchise contract. In addition, any pre-contractual legal regulation model for business consists of a franchise disclosure statement, and its content involves the agreement’s text and the offer doctrinal definition, similar to commentary made in Civil Code Georgia.

Considering prominent elements and factors

while concentrating on information disclosure, we may conclude that the offer is mostly characterized by ineligible clearance, directiveness and content. As for the addressee, the Information Disclosure document is always directed towards the potential franchisee.¹⁵

Therefore, every trait of “Classic Offer” shares characterises the information disclosure document. Therefore, its content is regulated in every pre-contractual legal regulation model by the special law on Franchising (The content of the offer is determined by the imperative norms). As a result, this enables us to conclude that the Information Disclosure document has the same nature as the “Proper Offer”; however, this is a “special offer with imperative steps”.

In summary, disclosing the pre-sale information on the pre-contractual stage of franchising is the distinctive principle. It is associated with the classical concept of contract signing that involves a minor offer content analysis. Thus, its content often isn’t visible. This allows us to give a positive answer to the need for reforms in the existing legislation.

15 Schwenken, C., Riedl, H. (2024). *Praxisleitfaden Franchising, Strategien und Werkzeuge für Franchisegeber und –nehmer*, München, Springer Gaber, 3. Aufl., S. 20.

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LEGAL CHALLENGES THROUGH THE THEORY OF HARMONY OF LABOR AND CAPITAL INTERESTS

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ABSTRACT

This article explores the relationship between labor and capital interests through the lens of Frederick Winslow Taylor's scientific management theory and Georgian legal frameworks. It examines how harmonizing these interests can address organizational conflicts and enhance labor efficiency and capital growth. The concept of "interest" plays a critical role in this analysis. In a broader sense, interest reflects an individual's motivation and engagement with various subjects, shaped by their legal, social and economic context. Interest pertains to production relationships and the distribution of resources, influencing how labor and capital interact within a corporate setting. Optimizing work processes can align employee and employer goals, fostering a more equitable distribution of wealth. The analysis highlights the role of interest in legal contexts and the importance of compliance in managing conflicts. Organizations can improve governance and achieve a balanced, productive work environment by integrating scientific management with fiduciary duties and ethical practices.

Keywords: Interest, Harmony, Conflict, Corporate law, labor, Fiduciary duty, Director

“All we want is to see wealth spread among the laboring classes”
Napoleon

INTRODUCTION

Cooperation between employee and employer is vital; in this process management takes an important role. The best management might be described as a true science; therefore, scientific management encourages the principle of spreading wealth among the laboring classes. However, before discussing the issues, we should define the word *interest*, which may be crucial in addressing the matter.

1. THE CONCEPT OF “INTEREST”

Interest is the desire for an object's perception and cognition (Subject, Event, Action). Interest is attributed to the class of intellectual feelings. The interests of their social circle significantly determine the content of an individual's interests. Strong and deep interest often defines an individual's motivation for action. Interest is generally considered regarding direction (i.e., content), volume, intensity, and stability. The content of interests represents the category of objects towards which interest is directed. High-intensity interest may lead to a strong will to achieve the relevant goal; stability is often associated with the intensity of interest but not necessarily. A person with a certain temperament may quickly lose intense interest, while someone with the relatively weaker intensity of interest may retain it throughout their lifetime.¹ Hence, it may be said that you are defined by what you are interested in.

Besides, interest also has its economic perspectives. From an economic standpoint, interest is an objective economic category and a crucial form of manifesting production rela-

tionships. As a motivating force for social subjects, it reflects the state of workers within the production system of society, the connection between their material needs, and their economic activities. The essential aspect of this concept is that it is based on material needs and reflects the specific production relationships of each society. It is a system of interests encompassing the interests of societies, classes, groups, and individual interrelationships. It is a general economic category characteristic of all economic formations of society,² and it also has an indirect but close connection to labor and corporate legal systems.

2. PROFIT-MAKING AND LEGAL FRAMEWORKS IN GEORGIAN ENTREPRENEURSHIP

According to the Georgian Law on Entrepreneurs, entrepreneurial activity is defined as lawful, independent, organized, and repetitive conduct aimed at generating profit.³ This implies that profit-making is the primary objective of establishing a legal entity. However, how can it be achieved? Of course, many mechanisms may exist, for instance, individuals with executive and representative authority, such as directors, company partners, or supervisory boards, whose decisions are crucial for achieving corporate profits. Still, ordinary workers should also play an essential role in this procedure. Indeed, the Georgian Law on Entrepreneurs does not directly address ordinary employees' rights to participate in a corporation's everyday business decisions, but laborers' rights are guaranteed through the Labor Code of Georgia. In this context, one of our goals is to highlight the strong connection between these two legal acts.

The connection between the aforementioned

1 Natadze, R. (1986). Georgian Soviet Encyclopedia. Vol. 5. Tbilisi, Georgia: Main Editorial Office of the Georgian Soviet Encyclopedia, p. 175.

2 Chanukvadze, G. (1986). Georgian Soviet Encyclopedia. Vol. 5. Tbilisi, Georgia: Main Editorial Office of the Georgian Soviet Encyclopedia, p. 175.

3 Law of Georgia on Entrepreneurs (2021). Article 2 (2). <https://matsne.gov.ge/ka/document/view/5230186?publication=9#DOCUMENT:1> [Last accessed: September 4, 2024].

legal acts underlines the relevance of the Theory of Harmony of Labor and Capital Interests. This theory may encounter legal challenges that need to be clarified in the context of modern society. Both Labor Code of Georgia and the Law of Entrepreneurs as a new legal act in the Georgian legal system should address specific legal issues effectively. However, the law might lead to a range of other effects, both positive and negative, that were not initially apparent. Therefore, we must look beyond the surface to fully understand the broader impact of any legal measure.

3. THE THEORY OF HARMONY BETWEEN LABOR AND CAPITAL INTEREST

Frédéric Bastiat, a French economist, writer, and a defender of free markets, proposed the Theory of Harmony of Labor and Capital. Frédéric Bastiat suggested that the interests of labor (employees) and capital (employers or capital holders) can be harmonized to establish a collaborative and mutually advantageous relationship. According to this perspective, when labor and capital align their goals and efforts, they can enhance productivity and profitability for the corporation. This improved economic performance that can be equitably distributed, with benefits manifested through increased wages, improved working conditions for employees, and elevated returns on investment for capital holders. This alignment fosters a balanced and effective partnership between labor and capital within a legal framework that promotes shared benefits and cooperation.⁴ The theory posits that labor and capital are not inherently in conflict. Rather, their interests can be harmonized through mechanisms such as profit-sharing arrangements, employee stock ownership plans, and participatory management practices. These strategies provide work-

ers with a vested interest in the enterprise's success, thereby aligning their goals with those of capital holders and fostering a cooperative relationship. This alignment can contribute to a more integrated and mutually beneficial business environment, where both labor and capital benefit from the overall success and profitability of the organization.⁵

In his essay "That Which Is Seen and That Which Is Not Seen," Frédéric Bastiat presents the "broken window fallacy" as a simple and prominent example. According to this case, the shopkeeper's careless son broke a pane of glass when he left it open. But the question arises: "Everybody must live, and what would become of glaziers if panes of glass were never broken?"⁶ Spending money by the shopkeeper on the broken window despite unhappiness illustrates regulation of the great part of economic institutions.⁷ Cost for repairing the damaged window is the encouragement of trade and it might be granted, however, Bastiat adds that shopkeeper instead the broken window could spend money on another need, for example, he could have replaced his old clothes instead.⁸ And sure, money circulation and the encouragement of industry, in general, is provided by hiring the glazier and paying him money for the services provided, but for the glazier's trade "destruction is not profit".⁹ Frédéric Bastiat observes that much more significant is what is not seen. For more clarity, he states that if the shopkeeper had not had a window to replace, he would, perhaps, have replaced his old shoes.¹⁰ In point of Frédéric Bastiat's view for money circulation, for industrialization and encouragement it does not matter for what the money will be spent for, but it should be understood that "neither industry in general, nor the total of national labor, is affected, whether windows are bro-

4 Mill, J. S. (1848). Principles of Political Economy. Discusses the potential benefits of cooperation between labor and capital. London, UK: John W. Parker, pp. 189-213.

5 Miles, R. E. (1978). Organizational Strategy, Structure, and Process. Explores participatory management practices. New York, NY: McGraw-Hill.

6 Bastiat, F. That Which Is Seen and That Which Is Not Seen. Paris, France: Guillaumin & Co., p. 2.

7 *Ibid.*, pp. 3-4.

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

ken or not”¹¹ The shopkeeper instead of broken window, might have spent the money for other needs too. The saying “What would become of the glaziers if nobody ever broke windows?” is a rhetorical question that highlights a flawed way of thinking. Breaking windows might be good for glaziers because it gives them work; however, this perspective ignores that resources spent on repairing windows could have been used for something more productive or beneficial, leading to a net loss for society.

In essence, Frédéric Bastiat’s saying challenges the idea that destruction or harm can be economically beneficial just because it creates work or stimulates certain industries. This concept underscores the notion that harmonizing the interests of labor and capital can yield substantial, albeit less immediately visible, benefits essential for a society’s sustained economic well-being. By recognizing the direct and indirect effects of economic decisions, legal frameworks can better support practices promoting long-term economic health and equitable benefit distribution.

The Evolution of Labor Rights

Due to the idea of protecting laborers’ rights, Bastiat’s views were shared by the Georgian public figure, journalist, politician, lawyer, and writer Ilia Chavchavadze. In 1863, he published Bastiat’s work, *The Physiology of Plunder*, in issue No. 8 of the journal *Sakartvelos Moambe*.¹² *The Physiology of Plunder* exposes the mechanisms through which wealth is unfairly redistributed from individuals to others, especially impacting laborers.

According to Bastiat’s work, wealth is not merely the affluence of two individuals; it is contentment, well-being, security, independence, and the opportunity to gain an education.¹³ In opposition to all these benefits, war,

slavery, and monopoly are cited,¹⁴ because war destroys the sustenance, slavery nullifies talent and monopoly transfers wealth from one person to another.¹⁵ However, there comes a time when the loss of wealth reaches a point where even the *plunder* feels that if he had acted honestly, he would have lost less.¹⁶ For example, forcible plunder involves waiting until a person has created something, then using violence to take it away from them,¹⁷ but the Commandment says: “*Thou shalt not steal*”.¹⁸ Forcible plunder can also occur in a different way. Instead of waiting for someone to produce something and then taking it from them, the plunderer takes control of the person, stripping them of their freedom and forcing them to work. Rather than offering a trade of services, the plunderer says: “You do all the work, and I take all the benefits.” This is essentially slavery, which always involves the abuse of power.¹⁹ In contemporary times, slavery has persisted up to the present day without causing plantation owners much moral discomfort²⁰ and how could it be otherwise when it is well established that even Aristotle was unable to conceive of a society that could function without the institution of slavery.²¹

Even in modern, developed legal systems, labor rights face many obstacles, highlighting their relevance due to their high impact on our everyday lives. For example, what promoted the Georgian Labor Code to establish in the legal framework an 8-hour working day for laborers?²² This is not solely due to the imitation of

11 *Ibid.*

12 Sakartvelos Moambe. (1863). No. VIII, August, first year, Tbilisi, Georgia.

13 Bastiat, F. (1863). *The Physiology of Plunder* (translat-

ed into Georgian). Sakartvelos Moambe, No. VIII, August, first year, Tbilisi, Georgia, p. 62.

14 *Ibid.*, pp. 62-63.

15 *Ibid.*

16 *Ibid.*, pp. 63-64.

17 Bastiat, F. (1863). *The Physiology of Plunder* (translated into Georgian). Sakartvelos Moambe, No. VIII, August, first year, Tbilisi, Georgia, p. 65.

18 *Ibid.*, pp. 65-66.

19 *Ibid.*, pp. 68-69.

20 Bastiat, F. (1850). *The physiology of plunder*. New York, NY: D. Appleton & Company. <<https://www.econlib.org/book-chapters/chapter-s-2-ch-1-the-physiology-of-plunder/>> [Last accessed: September 4, 2024].

21 *Ibid.*

22 Labor Code of Georgia (2010). Article 24. <<https://www.matsne.gov.ge/ka/document/view/1155567?>

developed legal systems of different countries. One of the main reasons was the international good practice of successful corporations' corporate governance policies. Thus, Henry Ford, the founder of the Ford Motor Company, played a pivotal role in adopting the 8-hour workday. On January 5, 1914, Ford made a groundbreaking decision that changed labor practices. He reduced the working hours for his employees from 9 to 8 hours per day while also doubling their wages to \$5 a day.²³ Despite this unprecedented decision being aimed at increasing productivity and reducing employee turnover. Henry Ford's introduction of the 8-hour workday represented a significant milestone in labor practices in the United States and internationally. This innovative approach established a crucial precedent for other organizations, significantly advancing the objectives of the broader labor movement. Ford's successful implementation of the 8-hour workday facilitated its adoption across diverse industries and played a pivotal role in shaping subsequent legislative measures that formalized labor reforms. This paradigm shifts not only enhanced working conditions but also contributed to the institutionalization of fair labor standards.²⁴

4. HARMONIZING LABOR AND CAPITAL INTERESTS BY USING FIDUCIARY DUTIES, SCIENTIFIC MANAGEMENT AND CORPORATE GOVERNANCE

Fair labor standards and gaining profits for corporations have a crucial connection. According to the Georgian Law on Entrepreneurs, the

only individual who makes decisions, controls procedures and defines labor policy in the corporation is the executive and representative authority of the corporation, known as the director or manager in many legal systems. He or she is the stone corner in the relationship with laborers and makes decisions regarding their dismissal, incentives, etc. However, the aforementioned legal act does not directly address this procedure, which encourages us to consider which principle we should adhere to in addressing this issue.

In resolving this matter, fiduciary duties may provide guidance, which are defined as individuals holding executive and representative authority. Fiduciary relationships are trust-based connections between a corporation and its governing body members, such as directors. These relationships originated from English law, dating back to 1742, and have since permeated American legislation.²⁵

According to the Georgian Law on Entrepreneurs, fiduciary duties are encapsulated in the general part of the law, specifically Article 50 (1). This article stipulates that directors must fulfill three essential conditions to be exonerated from liability: first, they must act in good faith while making decisions (duty of good faith); second, they must exercise due care towards the enterprise, which implies acting with the diligence and prudence that an ordinarily prudent person would exercise under similar circumstances (duty of care); and third, they must act with the belief that their actions are in the best economic interests of the corporation (duty of loyalty).²⁶

These obligations could collectively be known as the "triad", comprising the duties of good faith, care, and loyalty obligations.

It should be noted that while these duties are conditionally applied in corporate law, they

[publication=26](#) [Last accessed: September 4, 2024].

23 Ford, H. (1922). *My Life and Work*. Garden City, NY: Garden City Publishing Co. This autobiography provides insight into Ford's views and the motivations behind his labor policies.

24 Hirsch, J. (2005). *The Rise and Fall of the American Economic Order*. Chicago, IL: University of Chicago Press. This source examines the impact of Ford's labor policies on the American economy and labor standards.

25 Chanturia, L. (2006). *Corporate Governance and Accountability of Leaders in Corporate Law*. Tbilisi: Samartali, p. 290.

26 Law of Georgia on Entrepreneurs (2021). Article 50 (1). <https://matsne.gov.ge/ka/document/view/5230186?publication=9#DOCUMENT:1> [Last accessed: September 4, 2024].

are closely interrelated.²⁷ However, it is worth emphasizing that Article 50 of the Law on Entrepreneurs, which consolidated these duties, titles the section only as “Duty of Care.” This section focuses on the obligation to exercise reasonable care, skill, and diligence. As a result, the law prioritizes the duty of care, whereas the duty of loyalty is not explicitly defined within this legal framework.

An exception is found in Article 53 of the new edition of the Law on Entrepreneurs, which addresses the prohibition of competition. This provision contains elements of the duty of loyalty but represents only a specific manifestation of this obligation.²⁸ Therefore, under Georgian law, the so-called “duty of loyalty”, in essence, relates to the prohibition of competition within the corporation.²⁹

Given that the new edition of the Law on Entrepreneurs is based on European directives, the absence of a direct definition of the duty of loyalty in Georgian law may be explained by the fact that, for example, in German law, the legal regulation of the duty of loyalty is less developed in both judicial and academic contexts than in American law.³⁰ This is because the doctrine concerning the exploitation of corporate opportunities in German law was developed much later than in American law.³¹

Nevertheless, it must be stated that the duty of loyalty requires directors to prioritize the corporation’s interests over any personal ones.³² It should be used to enhance the harmony of interests and safeguard against conflicts of interest.

Before delving further into the duty of loyalty, it is crucial to distinguish it from the duty of

care, as determining which duty a director has violated is practically important for establishing liability. First and foremost, it should be noted that the business judgment rule, as defined in Article 52 of the Law on Entrepreneurs, does not apply to the duty of loyalty³³. The legislature determined that applying this rule to the duty of loyalty would lead to many ambiguities and complicate the issue of holding directors accountable, which is already a complex matter.

The existence of the duty of loyalty is recognized in Georgian legal literature, but distinguishing it from the duty of care is not as simple as it may initially appear. The complexity arises primarily from the fact that the duty of loyalty is not directly defined by legislation.

Consequently, it should be noted that the duty of care establishes an objective procedural standard for performing duties by the governing person when acting in the company’s interests. In contrast, the duty of loyalty pertains to the motives behind the actions of the governing person and aims to prevent actions contrary to the company’s interests. Thus, a presumption of breach is applied in cases of breach of the duty of loyalty. Conversely, in cases of breach of the duty of care, the presumption is the opposite, derived from the business judgment rule.³⁴

As for the prohibition of competition, as already noted, it is a specific manifestation of the duty of loyalty and is regulated by Georgian legislation. The law imposes an obligation on directors to refrain from competing activities during their tenure and, possibly, after their departure if stipulated in their employment contract. This condition arises from the principle that directors should dedicate all their skills and energy to the company. However, the law only addresses the restriction of employment in competitive enterprises.

Thus, schematically, the duty of loyalty encompasses essential principles for regulating and preventing conflicts of interest, such as

27 Tsertsvadze, L. (2015). Duties of Directors in Company Mergers and the Disposal of Control Packages (Comparative-legal Analysis of the U.S., Primarily Delaware State, European, and Georgian Legal Systems). Tbilisi, Georgia: Publishing House of TSU, p. 135.

28 Chanturia, L. (2006). Corporate Governance and Accountability of Leaders in Corporate Law. Tbilisi: Samartali, p. 303.

29 *Ibid.*, pp. 310-311.

30 *Ibid.*

31 *Ibid.*, pp. 312-313.

32 *Ibid.*, pp. 316-317.

33 Chanturia, L. (2006). Corporate Governance and Accountability of Leaders in Corporate Law. Tbilisi: Samartali, p. 320.

34 *Ibid.*, pp. 321-322.

self-dealing transactions, related-party transactions, the exploitation of corporate opportunities, insider trading, and relationships revealed within the scope of conflicts of interest.³⁵ Generally, the duty of loyalty is a fundamental part of fiduciary duties that requires directors of a corporation to act in the best interests of the corporation.³⁶ It is also true that, traditionally, this duty is understood to protect the corporation and its shareholders itself, ensuring that nobody could put personal interests above those of the company, but the idea of extending this duty to consider the interests of labor and capital interests could theoretically be framed as part of a broader corporate governance model in corporations. Corporate Social Responsibility (CSR) principles serve this purpose exactly. CSR principles encompass: 1. Accountability; 2. Transparency; 3. Ethical behavior; 4. Respect for stakeholder interests; 5. Respect for the rule of law; 6. Respect for the international norms of behavior; 7. Respect for human rights.

The European Union has been instrumental in influencing and advancing CSR practices through its directives and policies. The EU's stance on CSR is based on the belief that businesses should voluntarily incorporate social, environmental, and economic considerations into their operations and their engagements with stakeholders.³⁷ The Non-Financial Reporting Directive (2014/95/EU)³⁸ and the EU Directive on Corporate Sustainability Due Diligence (proposed in 2022)³⁹ are prime examples of

encouraging corporations to act in a socially responsible manner, which often includes fair treatment of employees.⁴⁰ If the duty of loyalty is understood in a wider, more socially responsible context, it could be leveraged to support policies and decisions that align the interests of both labor and capital, including initiatives like profit-sharing schemes, involving employees in decision-making processes, or investing in their well-being.⁴¹

5. "TAYLORISM" AS THE PRINCIPLE OF SCIENTIFIC MANAGEMENT

Therefore, what should prevent a corporation, under an appropriate management system, from fostering harmony between labor and capital interests? We can refer to Frederick Winslow Taylor, known as one of the first management consultants, in his work *The Principles of Scientific Management*, which provides significant insights into this matter and attempts to answer the question – how can harmony between labor and capital interests be achieved in practice?

After defining the liabilities of managers, it is essential to reveal the principal objective of management in practice, which should be to secure the maximum prosperity for the employer in conjunction with ensuring the highest level of prosperity for each employee.⁴² This is because the duty of loyalty toward corporate development should necessarily result in this outcome as well.

Prosperity should be described in its broad sense, meaning not only large dividends for

35 Norwood, P., Beveridge, Jr. (1992). The Corporate Director's Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction. *Journal of Corporation Law*, 27 (2), p. 657.

36 Dodd, E. M. (1932). For Whom Are Corporate Managers Trustees? *Harvard Law Review*, 45, No. 7, pp. 1145-1163.

37 European Commission. (2001). Promoting a European Framework for Corporate Social Responsibility. Green Paper, COM (2001) 366.

38 European Parliament and Council (2014). Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups. <<https://eur-lex.europa.eu/eli/dir/2014/95/oj>> [Last accessed: September 4, 2024].

39 European Parliament and Council (2022). Directive 2024/1760 on corporate sustainability due diligence.

<<https://eur-lex.europa.eu/eli/dir/2024/1760/oj>> [Last accessed: September 4, 2024].

40 Carroll, A. B. (1979). A Three-Dimensional Conceptual Model of Corporate Performance. *Academy of Management Review*, 4, No. 4, pp. 497-505.

41 Carroll, A. B. (1991). The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders. *Business Horizons*, 34(4), 39-48.

42 Taylor, F. W. (1911). *The Principles of Scientific Management*. New York, NY: Harper & Brothers., p. 9.

the company or owner but also the development process of every branch or division of the business to its state of excellence by matching employees with work suited to their natural abilities.⁴³ According to Taylor's perspective throughout the industrial world, a large part of the organization of employers, as well as employees, is oriented towards conflict rather than harmony, and perhaps the majority on either side do not believe that their interests become identical. Therefore, contrary to this antagonistic view, the true interests of both parties are fundamentally the same.⁴⁴ For illustration, Taylor provided a simple example: when two men working together produce two pairs of shoes in a day, while the worker from a competing corporation produces only one pair, it becomes clear that after selling the two pairs of shoes, the manager can afford to pay his workers much higher wages than the competitor who produces only one pair. Consequently, the manager's corporation will not only be able to offer higher wages but will also achieve a larger profit compared to the competitor.⁴⁵

Defective systems of management make employees work slowly because they try to protect their best interests by avoiding full-load work.⁴⁶ As a result, the primary goal for workers and management should be the training and development of every individual within the organization. This would enable them to perform the highest quality work that aligns with their natural abilities at their fastest pace and with maximum efficiency.⁴⁷ If the above reasoning is correct, it may be enforceable through scientific study and analysis.

For further illustration, a comparison can be made between scientific management, also known as "task management," and ordinary management, where workers give their best initiative in exchange for some special incen-

tive from their employers.⁴⁸ The initiative of the workers includes their hard work, goodwill, and ingenuity. However, scientific management suggests much greater efficiency than the old plan.⁴⁹ As Taylor explained in his work, under the "initiative and incentive" management approach, practically the whole problem is "up to the workman," while under scientific management, fully one-half of the problem is "up to the management".⁵⁰

The biggest advantage of scientific management is the concept of task planning, where the employee's work is fully planned out by management at least one day in advance. Each employee receives complete written instructions detailing the task they are to accomplish, as well as the means to be used in completing the work.⁵¹ This kind of plan encourages the principle of joint effort between the worker and management, specifying not only what is to be done but also how it is to be done and the exact time allowed for doing it.⁵² To summarize: scientific management largely consists of preparing for and carrying out these tasks.⁵³

Taylor's principles aimed to improve economic efficiency and labor productivity through a systematic and scientific approach to management. However, while Taylor's ideas brought significant advantages in terms of efficiency and productivity, they also introduced a range of disadvantages that have been scrutinized in subsequent research.

Taylor's theory is grounded in four key principles that collectively aim to optimize work processes and labor productivity:

- The first principal advocates for the scientific study of tasks to determine the most efficient way to perform each job. This involves breaking down tasks into smaller components, timing each movement, and identifying the best tools and techniques for each task. The goal is to

43 *Ibid.*, pp. 9-10.

44 *Ibid.*

45 *Ibid.*

46 *Ibid.*, pp. 14-15.

47 Taylor, F. W. (1911). *The Principles of Scientific Management*. New York, NY: Harper & Brothers., p. 12.

48 *Ibid.*, pp. 34-35.

49 *Ibid.*, pp. 36-37.

50 *Ibid.*, pp. 37-38.

51 *Ibid.*, pp. 38-39.

52 *Ibid.*, pp. 39-40.

53 *Ibid.*

eliminate inefficiencies and standardize work methods to ensure consistency and quality in production.⁵⁴

- The second principle emphasizes the importance of selecting and training workers based on their capabilities. Taylor argued that workers should be scientifically trained to perform their tasks in the most efficient manner rather than relying on traditional methods or personal experience.⁵⁵ This approach not only improves individual productivity but also ensures that the entire workforce operates at a higher level of efficiency.
- The third principle calls for cooperation between management and workers to ensure that work is carried out according to scientifically devised methods. Taylor believed that both parties should work together to achieve mutual benefits from increased productivity.⁵⁶
- The fourth and final principle is the division of work and responsibility between management and workers. Taylor proposed that management should focus on planning and designing work scientifically, while workers should be responsible for executing the tasks. This clear division of labor was intended to optimize both the planning and execution stages of production.⁵⁷

One of the most significant advantages of Taylor's scientific management is the substantial increase in efficiency and productivity. By optimizing each task through scientific methods, Taylor's approach reduced wasted time and effort, allowing workers to produce more in less time.⁵⁸ This not only benefited employers by increasing output but also allowed workers to earn higher wages. Taylor argued that the increased productivity would enable companies to pay higher wages, thus benefit-

ing both workers and employers.⁵⁹

Another advantage is the development of standardized work methods, which improved consistency and quality in production. Standardization made it easier to train new workers and ensured that all employees performed tasks in the most efficient manner. This led to more predictable outcomes and smoother operations in the workplace.⁶⁰

Despite its many advantages, "Taylorism" has been criticized for its dehumanizing effects on workers. One of the main criticisms is that it reduces workers to mere cogs in a machine, focusing solely on their mechanical functions while neglecting their human needs and creativity. This dehumanization can lead to low job satisfaction and a lack of motivation among workers.⁶¹ The rigid structures imposed by Taylor's methods often stifle creativity and discourage workers from taking initiative.

Another disadvantage is the overemphasis on efficiency at the expense of workers' well-being. The intense pressure to perform tasks quickly and efficiently can lead to burnout, stress, and physical strain. The relentless focus on productivity sometimes overshadows the importance of maintaining a healthy and motivated workforce.⁶²

Moreover, scientific management has limited applicability in modern, dynamic work environments. While Taylor's principles were highly effective in manufacturing settings with repetitive tasks, they are less suitable for jobs that require creativity, critical thinking, or flexibility. The rigid structures of "Taylorism" can hinder innovation and adaptability, both of which are crucial in today's fast-changing business landscape.⁶³

54 Taylor, F. W. (1911). *The Principles of Scientific Management*. New York, NY: Harper & Brothers., pp. 25-26.

55 *Ibid.*, pp. 30-32.

56 *Ibid.*, pp. 37-38.

57 *Ibid.*, pp. 42-43.

58 *Ibid.*, pp. 56-58.

59 *Ibid.*, pp. 60-61.

60 Taylor, F. W. (1911). *The Principles of Scientific Management*. New York, NY: Harper & Brothers., pp. 65-66.

61 Braverman, H. (1974). *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century*. Monthly Review Press, pp. 95-96.

62 Rose, M. (1980). *Industrial Rationalization and the New Division of Labor*. *The British Journal of Sociology*, Vol. 31, No. 4, pp. 485-498.

63 Hales, C. (1999). *Management Through Organization*:

The application of Taylor's principles has had a profound impact on various industries, particularly during the early 20th century. Among the companies that have successfully implemented these principles, Ford Motor Company stands out as a paradigm of corporate governance by efficiently utilizing scientific management techniques.

5.1. The Effect of the Scientific Management

Henry Ford, the visionary founder of Ford Motor Company, revolutionized the automobile industry by introducing the assembly line, a concept deeply rooted in the principles of scientific management.⁶⁴ Frederick Taylor's Principles of Scientific Management emphasized the importance of optimizing work processes, increasing efficiency, and reducing costs—all of which were key factors in Ford's success. Ford's approach to standardizing work processes, emphasizing worker training and specialization, and implementing a clear division of labor are direct applications of Taylor's theories.⁶⁵

Ford standardized automobile production by dividing the manufacturing process into smaller, repetitive tasks assigning each worker a specific role. This method minimized the need for skilled labor and significantly reduced production time, leading to the mass production of affordable automobiles. The introduction of the assembly line in 1913, which cut the production time of a car from over 12 hours to just 1.5 hours, is perhaps the most notable example of Ford's application of Taylor's principles.⁶⁶ Ford's focus on training workers to perform their tasks efficiently and consistently ensured high-quality

output and contributed to the overall success of the company.⁶⁷

The implementation of scientific management principles at Ford Motor Company yielded several significant advantages. First and foremost, the efficiency gains from the assembly line allowed Ford to produce automobiles at an unprecedented rate, transforming the Model T into an affordable vehicle for the average American.⁶⁸ By lowering production costs, Ford was able to sell the Model T at a much lower price, making car ownership accessible to a broader segment of society.⁶⁹

Ford's methods were soon adopted by various sectors, leading to widespread industrial growth and the expansion of consumer goods markets during the 20th century.⁷⁰ The intense focus on efficiency and productivity also had social implications. While Ford's methods made automobiles more accessible, they also reinforced the divide between management and labor.⁷¹

Despite its success, Ford's application of scientific management principles was not without its disadvantages. The repetitive nature of the tasks assigned to workers on the assembly line led to significant worker dissatisfaction.⁷² The monotony of performing the same task repeatedly contributed to high turnover rates and a sense of dehumanization among workers.⁷³ Critics of scientific management have often pointed to this dehumanizing aspect, arguing that work-

The Management Process, Forms of Organization and the Work of Managers. Management Decision, Vol. 37, No. 10, pp. 754-765.

64 Taylor, F. W. (1911). *The Principles of Scientific Management*. New York, NY: Harper & Brothers., pp. 20-23.

65 *Ibid.*, pp. 45-50.

66 Tedlow, R. S. (2001). *The Rise and Fall of the Conglomerate Kings*. New York: Harper Collins, pp. 72-75.

67 Adas, M. (1990). *Machines as the Measure of Men*. Ithaca: Cornell University Press, pp. 98-100.

68 Taylor, F. W. (1911). *The Principles of Scientific Management*. New York, NY: Harper & Brothers., pp. 55-58.

69 Tedlow, R. S. (2001). *The Rise and Fall of the Conglomerate Kings*. New York, NY: Harper Collins., pp. 77-80.

70 Taylor, F. W. (1911). *The Principles of Scientific Management*. New York, NY: Harper & Brothers, pp. 102-105.

71 Tedlow, R. S. (2001). *The Rise and Fall of the Conglomerate Kings*. New York, NY: Harper Collins., pp. 85-88.

72 Adas, M. (1990). *Machines as the measure of men: Science, technology, and ideologies of Western dominance*. Ithaca, NY: Cornell University Press. Braverman, H. (1974). *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century*. Monthly Review Press., pp. 120-125.

73 Taylor, F. W. (1911). *The Principles of Scientific Management*. New York, NY: Harper & Brothers., pp. 85-88.

ers were treated as mere cogs in the machine, with little regard for their personal fulfillment or motivation.⁷⁴

5.2. Optimizing Corporate Performance through Flexible Management and Harmonization of Labor and Capital Interests

Any development, sophistication, or suggestion of a successful corporate government system that affects larger profits would come to the whole world in general. The existence of a flawless management system should not be our goal; rather, we should strive to minimize the risks that could potentially negatively impact the harmonization of interests among the parties. Disadvantages of scientific management such as discouragement of workers from taking initiative, the intense pressure to perform tasks quickly and efficiently and finally, the dehumanizing aspect for employees encourages us to think for creating better opportunities.

Today's fast-changing business landscape has shown that achieving high and effective productivity requires harmony between labor and capital interests. It is also true that the

fast-changing business environment does not adhere to rigid frameworks but demands flexibility. Therefore, in practice, a situation should be envisioned where a company founder who decides to reorganize a limited liability company into a joint-stock company may choose to distribute shares to employees for successful operation and, in addition to labor relations, involve them in daily business decisions. Such a decision may reduce dehumanizing aspects, directly affect creativity, improve task performance through critical thinking and flexibility, and ultimately encourage corporations in their profit-making processes.

CONCLUSION

The integration of scientific management principles, the harmonization of labor and capital interests, and the adherence to fiduciary duties represent significant aspects of modern corporate governance. Companies can strive towards more balanced and effective management systems by understanding and addressing the hidden legal challenges within these frameworks. This approach can lead to better alignment of interests, more equitable wealth distribution, and improved overall corporate health.

74 *Ibid.*, pp. 90-95.

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PRIVATE MEDIATION AS A MEANS OF ACHIEVING PUBLIC GOALS

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ABSTRACT

The development and strengthening of private mediation significantly determine the possibilities of overcoming the challenges in the process of the institutionalization of mediation. Establishes an effective system of dispute resolution at the state level. The legal or practical regulation of the abovementioned should be considered a prerequisite for implementing the interests of the subjects of law and forming legal awareness.

In addition, the perfect functioning of the justice system, which should ensure the implementation of the legal interests of the subjects of law, is an expression of public and private interests. The well-being and satisfaction of the civil turnover participants are significantly determined by the existence of flexible dispute resolution systems and mechanisms, the correct implementation of which creates guarantees for the stability of civil turnover. In addition, it's in the public interest that the chain of the means of dispute resolution should be flexible and diverse and allow the interested parties to choose an acceptable method in each case. Regardless of its importance, providing fast and affordable forms of dispute resolution remains a challenge. In addition, it's important to strengthen cooperation between the public and private sectors in this process, which will be considered an innovation in Georgia. Accordingly, following legislative changes, it is important to raise public awareness, improve legal culture, and strengthen the court's role in implementing state policy regarding dispute resolution.

KEYWORDS: Dispute, Resolution, Advantage

INTRODUCTION

Conflicts in societies are inevitable. In individual cases, the conflict can manifest itself in different forms: it can mean an interstate war and a family or work dispute.¹ Circumstances arising within the interrelationship may lead to the impossibility of independently resolving the dispute. Thus, flexible and many-sided legal mechanisms for resolving disputes throughout the state significantly determine the stability of civil turnover. In addition, it should be considered a prerequisite for realising the interests of the subjects of law. Mediation is considered important in this direction, as it occupies a prominent place in the justice chain and manifests in different forms. However, in any case, the fundamental ethical principles of mediation are essential for understanding the purpose of any form of mediation, and these principles also directly determine the procedural side or content of any form of mediation.

Accordingly, the issues related to the institution of mediation in Georgia are discussed within the paper's framework. In particular, for the purposes of the paper, attention will be paid to one of its forms – private mediation, because the institutionalization of judicial mediation is currently more active. After the fundamental legislative changes, a number of judicial mediation programs have been implemented that can not be said about private mediation. However, it is a fact that the degree of success of the functioning of private mediation significantly shapes public opinion towards the institution of the mediation in total. The subject is also actual, as the positive role of mediation, which also includes the implementation of the fundamental principles of mediation, is visible in the case of private mediation, and a number of states, it is private mediation that is considered to be the most acceptable form in the process of solving various categories of disputes.

Therefore, the development and strengthening of private mediation in Georgia is consid-

ered inevitable, and in this process, the court's role should be considered important. So, judicial mediation should ensure the strengthening process of private mediation, its establishment in the legal culture and establishment in the society, as well as the presence of the mediation component in the judicial system – strengthens the court. As a methodological basis of the paper, general scientific-historical and, special-normative and comparative legal research methods are used.

1. MEDIATION AS A MEANS OF DISPUTE RESOLUTION AND ITS POSSIBLE FORMS

John F. Kennedy mentioned, "Let us never negotiate out of fear. But let us never fear to negotiate."² Human history shows that conflicts between people are inevitable. Therefore, one of the purposes of the legislation is to neutralize them to ensure public order and peace.³ Mediation probably originated 4000 years ago – from the Sumerian society. However, it continues to evolve as a means of dispute resolution, and it is necessary to offer ways to ensure its perfection process.⁴ Mediation has been regarded as the preferred method of conflict resolution in China for thousands of years. In the United States of America, society concluded that court proceedings could not fully satisfy the interests of the subjects of law, and mediation was recognized as the best form of dispute resolution. Consequently, in recent decades, mediation has been introduced in schools, the judicial system, government institutions, and the business/private sector.⁵

2 Ozturk, N. (2015). *Banka ve Ticaret Hukuku Dergisi*, p. 203.

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

4 Hesser, D., Craig C., Jarrell E. (2007). *Team Mediation: An Interdisciplinary Model Balancing Mediation in the Matrix. Pepperdine Dispute Resolution Law Journal*, p. 113.

5 Mosten, F. (2004). *Institutionalization of mediation. Family Court Review*, p. 292.

1 Kovach, K. (2003). *Mediation in a nutshell*, Printed in the United States of America, p. 3.

What is mediation? Mediation is defined as a process in which a neutral third party facilitates communication between the disputing parties in order to reach a mutually acceptable resolution of the dispute.⁶ According to another definition, mediation is a voluntary process in which, with the involvement of a neutral third party, the parties try to find ways to resolve the conflict and achieve satisfactory results.⁷ According to a recent definition by the Center for Dispute Resolution in the UK, mediation is a flexible process, conducted confidentially, in which a neutral person acts as a mediator to help the parties reach an agreement within their dispute, where the parties have authority to determine the content and terms of the agreement.⁸ In any case, the recognized definitions of mediation as an institution, are based on emphasizing its fundamental principles as an institution, the prohibition of third-party interference in the rights of the parties, and the principle of self-determination of the parties as the nature of the mediation itself is based on the substantive and procedural goal of self-determination and the free will of the parties.

The mediator does not influence the results of the mediation. The mediator looks for ways to bring the parties closer to each other and the problem.⁹ Therefore, the transformation of relations should be evaluated as a kind of goal of mediation.¹⁰ It is recognized that mediation affects public relations like a drop of liquid in a glass of water. It slowly and imperceptibly changes the entire environment. By teaching mediation to young people and legal entities, by offering transformative alternatives of dispute resolution, and by introducing non-violent methods, the existing environment is being

changed.¹¹ Even recent scientific studies indicate that one person's positive attitude and aspirations can change the physical environment, emotions, and even the energy of those around them. Therefore, the mediator's thoughts, mind state and emotions have a direct influence on the results obtained.¹² One of the characteristics of mediation is that with its help it becomes possible to resolve disputes in the area of a particular society/institution. For example, mediation centres are established in schools or other types of institutions, in which case mediators work voluntarily, or the municipality finances their remuneration.¹³

As for the possible forms of mediation, which can be considered as the type of services to be provided to citizens, according to the established approaches in international legal spaces, the following dominate: court and private mediation, also referred to as voluntary mediation. In addition, court mediation is of two types: 1. Court-annexed mediation,¹⁴ which is institutionally coordinated with the court, however, procedurally, it is independent of the court as an independent institution;¹⁵ 2. Judicial mediation¹⁶ is related to the court regarding building and staff. In case of this kind of mediation, the process may be conducted by a judge.¹⁷

Currently, a number of programs in Georgia

6 Richler, J. (2011). Court-Based Mediation in Canada. *Judges' Journal*, p. 14.
 7 Hyde L. M. Jr. (1984). *Mediation. Juvenile & Family Court Journal*, p. 57.
 8 Khouri, N. (2021). *Mediation. New Zealand Law Review*, p. 170.
 9 Picard, C. A., Melchin, K. R. (2007). *Insight Mediation: A Learning-Centered Mediation Model In Practice. Negotiation Journal*, p. 35.
 10 Riskin, L. L. (1997). *Mediation Quandries. Florida State University Law Review*, p. 1007.

11 Fisher, J. (2000). *Symbol in mediation. Mediation Quarterly*, p. 87.
 12 Noll, D. E. (2007). *Mediation. Then Mediation Deeper Dimensions Dispute Resolution Magazine*, p. 37.
 13 De Vries, T. (2012). *The Legal Regulation of Mediation in Germany. Part I: Studies: Section 2: Private Judicial Law. Acta Universitatis Lucian Blaga*, p. 209.
 14 Steffek, F. (2012). *Mediation. In The Max Planck Encyclopedia of European Private Law, Vol. II, Basedow, J., Hopt, J. K., Zimmermann, R., Stier, A. Oxford University Press, Oxford*, p. 163.
 15 Lindblom, P. H. (2017). *Progressive Procedure. Iustus*, p. 422.
 16 Brunet, E. (2002). *Judicial mediation and signaling. Nevada law journal*, p. 232.
 17 Steffek, F. (2013). *Mediation und Güterichterverfahren. Zeitschrift für Europäisches Privatrecht, (ZEuP) #3. Verlag C. H. Beck, München*, 538. Mentioned in: Khandashvili, I. (2018). *Judicial and non-judicial forms of alternative dispute resolution on the example of mediation in Georgia. Ivane Javakhishvili Tbilisi State University Faculty of Law*, p. 184.

have been developed with the purpose of developing the form of mediation – court-annexed mediation, that cannot be said about private mediation. However, as Albert Einstein said, it is possible to see an opportunity in any difficulty.”¹⁸

Accordingly, following the legislative regulation of mediation and the implementation of court mediation programs, support for the development of private mediation is necessary for the development of mediation practice. The development of private mediation indicates the formation of mediation as a profession. In addition, since completing the unified justice chain is a public goal, it is necessary to introduce forms of cooperation between the court and the private sector – for example, such would be the implementation of joint programs. In this way, cooperation with the court will strengthen private mediation – just as the institution of mediation strengthens the court.

In addition, private mediation has a special role in different aspects. For example, for the representatives of the business sector, the advantages are of special importance: the ability to control the result; the possibility of controlling procedural issues; the possibility of determining the participating parties; saving financial resources; the ability to save on expert costs; time-saving; ability to maintain full privacy.¹⁹ All of these advantages are also visible in the case of private mediation.

It should also be noted that the support for developing private mediation does not imply recognition of its superiority over other means of dispute resolution. Private mediation should be understood as one of the means of dispute resolution available in the state, which also has the support of the public sector, and the subjects of the law should have the opportunity to determine, in terms of free choice, the form of dispute resolution that is more acceptable for them.

Indeed – private mediation is not always the solution – for example, in cases where the parties are limited in terms of budget, it is less desirable to use private mediation. In these conditions, it is more reasonable, for example, to apply for court-annexed mediation.²⁰

2. COOPERATION BETWEEN THE COURT AND PRIVATE MEDIATION PROVIDERS AS A PREREQUISITE FOR THE DEVELOPMENT OF MEDIATION

It is recognized that PPP: Public-Private Partnership is one of the most flexible forms of implementation of public tasks. Its general definition implies the inclusion of private finance in the implementation of public tasks. In this model, the pairs of “public and private” entities imply cooperation.²¹ Accordingly, taking into account the fact of the importance of the development of private mediation throughout the state, the question arises whether it would be appropriate to develop projects/such as mediation programs, on the basis of which the development of private mediation would be promoted on the basis of mutual cooperation between the judicial and private sectors, which would ultimately serve the common interests of both sectors.

Cooperation in this direction will be especially significant in building public trust and raising awareness towards private mediation. In this direction, examples of relevant successful practices should be considered: for example, in 1992, the Alberta Better Business Bureau established an independent, private legal entity, which gained a reputation as a Dispute Settlement Centre (BBB). The Center works with the Alberta Provincial Court and offers free alternative dispute resolution to disputing parties. The court proceedings are terminated if the parties

18 Prabakar, R., Kripa S. J. (2022). Mediation in Family Dispute. *Indian Journal of Law and Legal Research*, p.1.

19 Lovenheim, P., Guerin, L. (2004). *Mediate, don't litigate*. Printed in the USA, pp. 300-301.

20 Maas, F. (2017). A Magistrate Judge's Plunge into the World of Private Mediation. *Litigation Journal*, p. 42.

21 Khubua, G., Kalichava, K. (2018). *Handbook of administrative science*. Tbilisi, p. 161.

agree to mediation, and it ends successfully. In case of impossibility of resolving the dispute, a standard consideration of the case within the framework of civil proceedings is being continued.²²

It has also to be mentioned that in 1987, a Florida court initiated a program in which the court referred disputes to private mediators paid by the parties themselves. As a result of the implementation of the program, the number of cases to be discussed by the courts was reduced, access to the court was improved, and the degree of satisfaction of the parties was significantly higher than in the case of court proceedings.²³

The indicated experience unequivocally confirms the effective practice of cooperation between the courts and legal entities of the private sector. This can be described as a hybrid form of court and private forms of mediation, which ensures the strengthening of the role of the court in the process of institutionalizing mediation, as well as the promotion of private mediation, the establishment of a culture of peaceful dispute resolution, and the transformation of the court into a space that offers citizens a variety of dispute resolution mechanisms.²⁴

CONCLUSION

As a result of the discussion carried out within the framework of the work, it is determined that following the process of institutionalization of mediation, its regulation at the legislative level and the implementation of one of its forms – court programs in Georgia, it is considered relevant to take concrete steps for the

development of private mediation. Improving practice in the relevant direction. Obviously, the mentioned process should not be carried out by automatically recognizing the experience of any state, and each innovation should be introduced based on a cause-and-effect analysis. It is considered necessary to involve the judicial system in developing a judicial form of mediation and private mediation. For this purpose, establishing and implementing projects should occur based on the principle of mutual cooperation between the public and private sectors. The above conditions, which consider strengthening the role of private mediation, complete the unified chain of dispute resolution operating throughout the state. In a broader sense, this means ensuring the Georgian reality and its compliance with the standards of leading democratic values-oriented legal systems – each subject should have the opportunity to decide as a result of a multifaceted and complete assessment of the issue under the conditions of free will – Within the discussion of a specific issue, which means of dispute resolution would be most suitable. The legal awareness of the subjects of the law should be based on the principle that the court proceedings should be considered not the main but one of the means of resolving the dispute. The abovementioned, which means a kind of cooperation between the public and private sectors, will contribute to the implementation of both public and private interests. On the one hand, the judicial system will be relieved; On the other hand, it will promote the development of private mediation. At the same time, an opportunity will be created to quickly and effectively satisfy the real interests of the subjects of the law.

In this way, as a result, two kinds of effects will be revealed. After all, mediation, in its essence, changes the court and determines the possibilities of overcoming a number of challenges in the judicial system. In addition, according to the recommendation, the judicial system will ensure the development of the forms of mediation in Georgia.

22 Gold, N. (1997). Prospects, Problem and Potential: An Assessment of Trends and Issues regarding Mediation in Canada. *Journal of Arbitration Studies*, p. 94.

23 Clarke, S., Gordon, H., Ellen, E. (1997). Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation. *Justice System Journal*, pp. 326-327.

24 Gurieli, A. (2019). The scope of the judge's authority in relation to the conduct of the court mediation process. *Tbilisi*, p. 126.

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კერძო მედიაცია, როგორც საჯარო მიზნების განხორციელების საშუალება

ანა გურიელი

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აბსტრაქტი

სახელმწიფოს მასშტაბით კერძო მედიაციის განვითარება და მისი გაძლიერება მნიშვნელოვნად განსაზღვრავს მედიაციის ინსტიტუციონალიზაციის პროცესში არსებული გამოწვევების დაძლევის შესაძლებლობებს; სახელმწიფოს მასშტაბით აყალიბებს დავის გადაწყვეტის საშუალებების ფუნქციონირების ეფექტიან სისტემას. აღნიშნულის სამართლებრივი თუ პრაქტიკული მოწესრიგება, სამართლის სუბიექტთა ინტერესების განხორციელებისა და სამართლებრივი ცნობიერების ჩამოყალიბების წინაპირობად უნდა შეფასდეს.

ამასთან, მოქმედი მართლმსაჯულების განმახორციელებელი სისტემის სრულყოფილი ფუნქციონირება, რამაც უნდა უზრუნველყოს სამართლის სუბიექტთა კერძოსამართლებრივი ინტერესების განხორციელება, საჯარო და კერძო ინტერესების გამოხატულებად მიიჩნევა. სამოქალაქო ბრუნვის მონაწილეთა კეთილდღეობა ხომ მნიშვნელოვნად განისაზღვრება დავის გადაწყვეტის მოქნილი სისტემის არსებობით და მექანიზმებით, რომელთა სწორი ფორმირება და ამოქმედება სამოქალაქო ბრუნვის სტაბილურობისა და სამართლის სუბიექტთა ინტერესთა დაკმაყოფილების გარანტიებს ქმნის. ამასთან, საჯარო ინტერესია, რომ დავის გადაწყვეტის საშუალებების ერთიანი ჯაჭვი იყოს მოქნილი, მრავალფეროვანი და დაინტერესებულ პირებს აძლევდეს შესაძლებლობას ყოველ ინდივიდუალურ შემთხვევაში, თავისუფალი არჩევანის პირობებში, თავად შეარჩიონ დავის გადაწყვეტის მისაღები მეთოდი. საკითხის მნიშ-

ვნელობის მიუხედავად, საქართველოში სამართლის სუბიექტთათვის დავის გადაწყვეტის სწრაფი და ხელმისაწვდომი ფორმების შეთავაზების უზრუნველყოფა გამოწვევად რჩება. ამასთან, მნიშვნელოვანია ამ პროცესში საჯარო და კერძო სექტორს შორის თანამშრომლობის გაძლიერება, რაც საქართველოს რეალობაში ერთგვარ სიახლედ განიხილება. შესაბამისად, ფუნდამენტური საკანონმდებლო ცვლილებების განხორციელების კვალდაკვალ, მნიშვნელოვნად მიიჩნევა საზოგადოების ცნობიერების ამაღლება, სამართლებრივი კულტურის დახვეწა და სასამართლოს როლის გაძლიერება დავის გადაწყვეტის საშუალებებთან მიმართებით სახელმწიფო პოლიტიკის მეტად აქტიურ განხორციელებაში.

საკვანძო სიტყვები: დავა, გადაწყვეტა, უპირატესობა

შესავალი

საზოგადოებებში კონფლიქტების არსებობა გარდაუვალია. ინდივიდუალურ შემთხვევებში, კონფლიქტი შეიძლება გამოვლინდეს სხვადასხვა ფორმით: შესაძლებელია გულისხმობდეს როგორც სახელმწიფოთაშორის ომს, ასევე – ოჯახურ ან სამსახურეობრივ დავას.¹ სამართალური ერთობის ფარგლებში აღმოცენებულმა გარემოებებმა შესაძლებელია დამოუკიდებლად დავის გადაწყვეტის შეუძლებლობა განაპირობოს. ამდენად, სახელმწიფოს მასშტაბით დავის გადაწყვეტის მოქნილი და მრავალმხრივ განვითარებული სამართლებრივი მექანიზმების არსებობა მნიშვნელოვნად განსაზღვრავს სამოქალაქო ბრუნვის სტაბილურობას. ამასთან, იგი სამართლის სუბიექტთა ინტერესების განხორციელების წინაპირობად უნდა შეფასდეს.

ამ მიმართულებით მნიშვნელოვნად მიიჩნევა მედიაციის მნიშვნელობა, რომელიც მართლმსაჯულების განმახორციელებელ ერთიან ჯაჭვში საყურადღებო ადგილს იკავებს და რომელიც სხვადასხვა ფორმებით ვლინდება. თუმცა ნებისმიერ შემთხვევაში, მედიაციის ერთიანი ფუნდამენტური ეთიკური პრინციპები უმნიშვნელოვანესია მედიაციის ნებისმიერი ფორმის არსობრივი მიზნის გააზრებისთვის და აღნიშნული პრინციპები ასევე პირდაპირ განაპირობებს მედიაციის ნებისმიერი ფორმის პროცედურულ თუ შინაარსობრივ მხარეს.

შესაბამისად, ნაშრომის ფარგლებში განიხილება მედიაციის ინსტიტუტთან დაკავშირებული საკითხები საქართველოში. კერძოდ, ნაშრომის მიზნებისათვის ყურადღება დაეთმობა მისი ერთ-ერთი ფორმის – კერძო მედიაციის შესახებ მსჯელობას, რამეთუ მიმდინარე დროისათვის სასამართლო მედიაციის ინსტიტუციონალიზაცია მეტად აქტიურად მიმდინარეობს. ფუნდამენტური საკანონმდებლო ცვლილებების შემდგომ, ხორციელდება სასამართლო მედიაციის რიგი პროგრამებისა, რასაც ვერ ვიტყვივით კერძო მედიაციასთან მიმართებით. თუმცა ფაქტია, რომ კერძო მედიაციის ფუნქციონირების წარმატების ხარისხი მნიშვნელოვნად აყალიბებს საზოგადოებრივ აზრს სრულად მედიაციის ინსტიტუტის მიმართ. საკითხს აქტუალობას სძენს ის გარემოება, რომ მედიაციის დადებითი როლი, მათ შორის, მედიაციის ფუნდამენტური პრინციპების განხორციელების თვალსაზრისით, კერძო მედიაციის შემთხვევაშიც გამოკვეთილად ვლინდება და რიგ სახელმწიფოთა მასშტაბით, სწორედ კერძო მედიაციას მიიჩნევენ სხვადასხვა კატეგორიის გადაწყვეტის პროცესში მეტად მისაღებ ფორმად.

შესაბამისად, აუცილებლად მიიჩნევა კერძო მედიაციის განვითარება და გაძლიერება საქართველოში, ხოლო ამ პროცესში, მნიშვნელოვნად უნდა ჩაითვალოს სასამართლოს როლი. ესე იგი, სასამართლო მედიაციამ, უნდა უზრუნველყოს კერძო მედიაციის გაძლიერება, მისი დამკვიდრება საზოგადოების სამართლებრივ კულტურასა

1 Kovach K., (2003). Mediation in a nutshell, Printed in the united states of America, p. 3.

და მართლშეგნებაში, ისევე როგორც თავის მხრივ მედიაციის კომპონენტის არსებობა სასამართლო სისტემაში – აძლიერებს სასამართლოს.

ნაშრომის მეთოდოლოგიურ საფუძვლად გამოყენებულია როგორც ზოგადმეცნიერული – ისტორიული, აგრეთვე, სპეციალური – ნორმატიული და შედარებითსამართლებრივი კვლევის მეთოდები.

1. მედიაცია, როგორც დავის გადაწყვეტის საშუალება და მისი გამომწვევების შესაძლო ფორმები

ჯონ კენედიმ განაცხადა: „არასოდეს შეგეშინდეთ მოლაპარაკების, თუმცა არასოდეს დათანხმდეთ მოლაპარაკებას შიშით.“² კაცობრიობის ისტორია გვიჩვენებს, რომ ადამიანებს შორის გარდაუვალია კონფლიქტების არსებობა. ამიტომაც, კანონმდებლობის არსებობის ერთ-ერთი მიზანია მათი განეიტრალება, იმისათვის რათა უზრუნველყოფილი იყოს საზოგადოებრივი წესრიგი და სიმშვიდე.³ მედიაცია სათავეს, სავარაუდოდ, 4000 წლის წინ იღებს – შუმერული საზოგადოებიდან. თუმცა ის, როგორც დავის გადაწყვეტის საშუალება, უწყვეტად აგრძელებს განვითარებას და აუცილებელია იმგვარი გზების შეთავაზება, რომელიც უზრუნველყოფს სრულყოფის პროცესს.⁴ მედიაცია ჩინეთში ათასწლეულების განმავლობაში განიხილებოდა, როგორც კონფლიქტების გადაწყვეტის უპირატესი მეთოდი. ამერიკის შეერთებულ შტატებშიც საზოგადოება მივიდა დასკვნამდე, რომ სასამართლო საქმისწარმოება სრულად ვერ აკმაყოფილებდა სამართლის სუბიექტთა

ინტერესებს და მედიაცია აღიარებულ იქნა, როგორც დავის გადაწყვეტის საუკეთესო ფორმა. შესაბამისად, ბოლო ათწლეულების განმავლობაში მედიაცია დაინერგა სკოლებში, სასამართლო სისტემაში, სახელმწიფო დაწესებულებებში, ბიზნეს / კერძო სექტორში.⁵

რა არის მედიაცია? მედიაცია განისაზღვრება როგორც პროცესი, რომლის ფარგლებშიც მესამე ნეიტრალური მხარე წარმართავს კომუნიკაციას მოდავე მხარეებს შორის იმისათვის, რათა მიღწეული იქნეს დავის ორმხრივად მისაღები გადაწყვეტა.⁶ სხვა განმარტების თანახმად, მედიაცია ნებაყოფლობითი პროცესია, რომლის ფარგლებშიც მესამე ნეიტრალური პირის ჩართულობით, მხარეები ცდილობენ მოიძიონ კონფლიქტის გადაწყვეტის და დამაკმაყოფილებელი შედეგების მიღების გზები.⁷ დიდ ბრიტანეთში მოქმედი დავის გადაწყვეტის საშუალებების ცენტრის ბოლოდროინდელი განმარტების შესაბამისად, მედიაცია მოქნილი პროცესია, რომელიც ტარდება კონფიდენციალურად და რომლის ფარგლებშიც ნეიტრალური პირი მედიატორის სახით ეხმარება მხარეებს, მიაღწიონ შეთანხმებას მათი დავის ფარგლებში, სადაც მხარეებს გააჩნიათ ერთპიროვნული უფლებამოსილება – განსაზღვრონ შეთანხმების შინაარსი და პირობები.⁸ ნებისმიერ შემთხვევაში, მედიაციის, როგორც ინსტიტუტის, აღიარებული განმარტებები ეფუძნება მისი, როგორც ინსტიტუტის, ფუნდამენტური პრინციპების ხაზგასმას, მესამე პირების მხრიდან მხარეთა უფლებამოსილებაში ჩარევის აკრძალვასა და თითოეული განსახილველი საკითხის მხარეთა მიერ თვითგანსაზღვრას. მედიაციის ბუნება ხომ მხარეთა თვითგამორკვევის შინაარსობრივი და პროცესუალური მიზნის გათვალის-

2 Ozturk N., (2015). Banka ve Ticaret Hukuku Dergisi, p. 203.

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

4 Hesser D., Craig C., Jarrell E., (2007). Team Mediation: An Interdisciplinary Model Balancing Mediation in the Matrix, Pepperdine Dispute Resolution Law Journal, p. 113.

5 Mosten F., (2004). Institutionalization of mediation, Family Court Review, p. 292.

6 Richler J., (2011). Court-Based Mediation in Canada, Judges' Journal, p. 14.

7 Hyde Laurance M. Jr., (1984). Mediation, Juvenile & Family Court Journal, p. 57.

8 Khouri N., (2021). Mediation, New Zealand Law Review, p. 170.

წინებით, მხარეთა ნების თავისფლებას ეფუძნება.

მედიატორი მედიაციის შედეგებზე გავლენას არ ახდენს. მედიატორი ეძებს გზებს, რათა მხარეების ხედვა ერთმანეთს დაუახლოვდეს არსებული პრობლემის მიმართ.⁹ შესაბამისად, ურთიერთობების ტრანსფორმაცია მედიაციის ერთგვარ მიზნად უნდა შეფასდეს.¹⁰ აღიარებულია, რომ საზოგადოებრივ ურთიერთობებზე მედიაცია ისე მოქმედებს, როგორც სითხის წვეთი, ჭიქა წყალში. ის ნელა და შეუმჩნევლად ცვლის სრულ გარემოს. ახალგაზრდებისათვის თუ იურიდიული პირებისთვის მედიაციის სწავლებით, სასამართლოთათვის დავის გადაწყვეტის ტრანსფორმაციული ალტერნატივების შეთავაზებით, არაძალადობრივი მეთოდების დანერგვით, იცვლება არსებული გარემო.¹¹ ბოლოდროინდელი სამეცნიერო კვლევებიც კი მიუთითებს, რომ ერთი სუბიექტის პოზიტიურმა დამოკიდებულებამ და მისწრაფებებმა შესაძლებელია შეცვალოს ფიზიკური გარემო, ემოციები და გარშემომყოფთა ენერჯიაც კი. ამიტომ, მედიატორის ფიქრები, მდგომარეობა და ემოციები პირდაპირ და უშუალო გავლენას ახდენს მიღებულ შედეგებზე.¹² მედიაციის ერთ-ერთი მახასიათებელია ისიც, რომ მისი დახმარებით შესაძლებელი ხდება დავების გადაწყვეტა კონკრეტული საზოგადოების/ინსტიტუციის არეალში. მაგალითად მედიაციის ცენტრები იქმნება სკოლებში ან სხვა ტიპის დაწესებულებებში, რა შემთხვევაშიც მედიატორებს მუშაობენ მოხალისეობრივ საწყისებზე ან მათი ანაზღაურება ფინანსდება მუნიციპალიტეტიდან.¹³

9 Picard, Cheryl A.; Melchin, Kenneth R., (2007). Insight Mediation: A Learning-Centered Mediation Model In Practice, *Negotiation Journal*, p. 35.
10 Riskin, Leonard L., (1997). Mediation Quandries, *Florida State University Law Review*, p. 1007.
11 Fisher J., (2000). Symbol in mediation, *Mediation Quarterly*, p. 87.
12 Noll Douglas E., (2007). Mediation, Then Mediation Deeper Dimensions *Dispute Resolution Magazin*, p. 37.
13 De Vries T., (2012). The Legal Regulation of Mediation in Germany Part I: Studies: Section 2: Private Judicial Law *Acta Universitatis Lucian Blaga*, p. 209.

რაც შეეხება მედიაციის გამოვლინების შესაძლო ფორმებს, რაც სწორედ მოქალაქეებისათვის მისაწოდებელი სერვისის სახეებად შეიძლება შეფასდეს, საერთაშორისოსამართლებრივ სივრცეებში დამკვიდრებული მიდგომების შესაბამისად, დომინირებს: სასამართლო (სავალდებულო) და სასამართლოს გარე (კერძო) მედიაცია, რომელიც ნებაყოფლობითი მედიაციის სახელწოდებითაც მოიხსენიება. ამასთან, თავის მხრივ სასამართლო მედიაცია ორგვარია: 1. სასამართლოსთან არსებული მედიაცია (Court-annexed mediation¹⁴), რომელიც ინსტიტუციურად არის კოორდინაციაში სასამართლოსთან, თუმცა, პროცედურულად აბსოლუტურად დამოუკიდებელია სასამართლოსგან, როგორც ცალკე მდგომი ინსტიტუცია.¹⁵ 2. სასამართლო/სასამართლოსმიერი მედიაცია (Judicial mediation)¹⁶, რომელიც დაკავშირებულია სასამართლოსთან შენობისა და პერსონალის კუთხით. მედიაციის მსგავსი ფორმის დროს, მედიატორი შეიძლება იყოს მოქმედი მოსამართლე.¹⁷

მიმდინარე დროისათვის მედიაციის ფორმის – სასამართლოსთან არსებული მედიაციის განვითარების მიზანს საქართველოში რიგი პროგრამები ემსახურება, რასაც ვერ ვიტყვით კერძო მედიაციასთან მიმართებით. თუმცა, როგორც ალბერტ აინშტაინმა განაცხადა, ნებისმიერ სირთულეში შესაძლებელია დავინახოთ შესაძლებლობა“¹⁸

14 Steffek F., (2012). Mediation, in *The Max Planck Encyclopedia of European Private Law*, Vol. II, Basedow J., Hopt J.K., Zimmermann R., Stier A., Oxford University Press, Oxford, p. 163.
15 Lindblom P.H., (2017). *Progressive Procedure*, Iustus, p. 422.
16 Brunet E., (2002). Judicial mediation and signaling, *Nevada law journal*, p. 232.
17 Steffek F., (2013). *Mediation und Güterichterverfahren*, *Zeitschrift für Europäisches Privatrecht*, (ZEuP) #3, Verlag C.H.Beck, München, p. 538. მითითებულია: ყანდაშვილი ი., (2018). საქართველოში მედიაციის მაგალითზე დავის ალტერნატიული გადაწყვეტის სასამართლო და არასამართლო ფორმები, ივანე ჯავახიშვილის სახელობის თბილისის სახელმწიფო უნივერსიტეტი იურიდიული ფაკულტეტი, თბილისი, გვ. 184.
18 Prabakar R., Kripa Somi J., (2022). *Mediation in Family*

შესაბამისად, მედიაციის საკანონმდებლო მოწესრიგებისა და სასამართლო მედიაციის პროგრამების იმპლემენტაციის კვალდაკვალ კერძო მედიაციის განვითარებისადმი ხელშეწყობა მედიაციის პრაქტიკის სრულფასოვანი განვითარებისათვის აუცილებლობას წარმოადგენს. კერძო მედიაციის განვითარება მედიაციის პროფესიად ფორმირების – პროფესიონალიზაციის მანიშნებელია. ამასთან, რამეთუ მართლმსაჯულების განმახორციელებელი ერთიანი ჯაჭვის სრულყოფა წარმოადგენს საჯარო მიზანს, აუცილებლად მიიჩნევა სასამართლოსა და კერძო სექტორის შორის ურთიერთთანამშრომლობის ფორმების დანერგვა – მაგალითად ისეთის, როგორცაა საერთო პროგრამების განხორციელება. ამგვარად, სასამართლოსთან თანამშრომლობა გააძლიერებს კერძო მედიაციას – ისევე როგორც მედიაციის ინსტიტუტი აძლიერებს სასამართლოს.

ამასთან, კერძო მედიაციას განსაკუთრებული დატვირთვა გააჩნია რიგი სუბიექტების მიმართ. მაგალითად, ბიზნეს სექტორის წარმომადგენლებისათვის განსაკუთრებულ მნიშვნელობას ატარებს შემდეგი უპირატესობები: შედეგის კონტროლის შესაძლებლობა; პროცესუალური საკითხების კონტროლის შესაძლებლობა; მონაწილე მხარეთა განსაზღვრის შესაძლებლობა; ფინანსური რესურსის დაზოგვა; ექსპერტის ხარჯების დაზოგვის შესაძლებლობა; დროის დაზოგვა; კონფიდენციალურობის შენარჩუნების შესაძლებლობა.¹⁹ ყოველივე აღნიშნული კერძო მედიაციის შემთხვევაში თვალსაჩინო ხასიათს ატარებს.

აქვე აღსანიშნავია ისიც, რომ კერძო მედიაციის მხარდაჭერა არ გულისხმობს მისი უპირატესობის აღიარებას დავის გადაწყვეტის სხვა საშუალებებთან მიმართებით. მოიაზრება ის, რომ ის უნდა წარმოადგენდეს სახელმწიფოს მასშტაბით არსებული დავის გადაწყვეტის საშუალებებიდან ერთ-ერთს, რომელსაც აგრეთვე გააჩნია საჯარო სექტორის

თანადგომა და სამართლის სუბიექტებს უნდა გააჩნდეთ შესაძლებლობა, თავისუფალი არჩევანის პირობებში განსაზღვროს დავის გადაწყვეტის მათთვის მისაღები ფორმა.

მართლაც – კერძო მედიაცია ყოველთვის არ არის გამოსავალი. მაგალითად, იმ შემთხვევაში, როდესაც მხარეები შეზღუდული არიან ბიუჯეტის თვალსაზრისით, ნაკლებად სასურველია კერძო მედიაციის გამოყენება. ამ პირობებში მეტად გონივრულია სასამართლო მედიაციისათვის მიმართვა.²⁰

2. სასამართლოსა და მედიაციის კერძო პროვანიდერების ურთიერთთანამშრომლობა, როგორც მედიაციის განვითარების წინაპირობა

აღიარებულია, რომ კერძო და საჯარო სექტორის თანამშრომლობა (PPP: Public-Private Partnership) არის საჯარო ამოცანების განხორციელების ერთ-ერთი ყველაზე მოქნილი ფორმა. მისი ზოგადი განმარტება გულისხმობს კერძო ფინანსების ჩართვას საჯარო ამოცანების განხორციელებაში. ამ მოდელში „საჯარო და კერძო“ სუბიექტთა წყვილები გულისხმობს თანამშრომლობას.²¹ შესაბამისად, სახელმწიფოს მასშტაბით კერძო მედიაციის განვითარების მნიშვნელობის ფაქტის გათვალისწინებით, ჩნდება კითხვა, ხომ არ იქნებოდა მიზანშეწონილი პროექტების/იმგვარი სამედიაციო პროგრამების შემუშავება, რომელთა საფუძველზეც სასამართლო და კერძოს სექტორის ურთიერთთანამშრომლობის საფუძველზე ხელი შეეწყობოდა კერძო მედიაციის განვითარებას, რაც შედეგობრივად მოემსახურებოდა ორივე სექტორის საერთო ინტერესების განხორციელებას.

19 Dispute, Indian Journal of Law and Legal Research, p. 1. Lovenheim P., Guerin L., (2004). Mediate, don't litigate, Printed in the USA, p. 300-301.

20 Maas F., (2017). A Magistrate Judge's Plunge into the World of Private Mediation Litigation Journal, p. 42.

21 ხუბუა გ., ყალიჩავა კ., (2018). ადმინისტრაციული მეცნიერების სახელმძღვანელო, თბილისი, გვ.161.

ურთიერთთანამშრომლობა ამ მიმართულებით განსაკუთრებით მნიშვნელოვანი იქნება კერძო მედიაციის მიმართ საზოგადოების ნდობის ჩამოყალიბების და ცნობიერების ამაღლების კუთხითაც. მაგალითად, ამ მიმართულებით გასათვალისწინებელია შესაბამისი წარმატებული პრაქტიკის მაგალითებიც: მაგალითად 1992 წელს, ალბერტა ბეთერის ბიზნეს ბიუროს მიერ დაარსდა დამოუკიდებელი, კერძო სამართლის იურიდიული პირი, რომელმაც სახელი მოიპოვა დავების გადაწყვეტის ცენტრის (Dispute Settlement centre (BBB)) სტატუსით. ცენტრი თანამშრომლობს ალბერტას პროვინციის სასამართლოსთან და მოდავე მხარეებს უფასოდ სთავაზობს დავის ალტერნატიულ გადაწყვეტას. იმ შემთხვევაში, თუ მხარეები დათანხმდებიან მედიაციას და იგი წარმატებით დასრულდება, ხდება სარჩელის გამოხმობა. დავის გადაწყვეტის შეუძლებლობის შემთხვევაში, ინიშნება საქმის სტანდარტული განხილვა სამოქალაქო სამართალწარმოების ფარგლებში.²²

1987 წელს, ფლორიდის სასამართლოში ინიცირებულ იქნა პროგრამა, რომლის ფარგლებშიც სასამართლოს მიერ დავები განსახილველად გადაეცემოდა კერძო მედიატორებს, რომელთა ანაზღაურებასაც თავად მხარეები ფარავდნენ. პროგრამის განხორციელების შედეგად შემცირდა სასამართლოთა გადატვირთულობა, ხელი შეეწყო სასამართლოსადმი ხელმისაწვდომობას, ხოლო მხარეთა კმაყოფილების ხარისხი იყო არსებითად უფრო მაღალი, ვიდრე სასამართლო საქმისწარმოების შემთხვევაში.²³

თავის მხრივ, მითითებული გამოცდილება ერთმნიშვნელოვნად ადასტურებს სასამართლოებისა და კერძო სამართლის იურიდიული პირების ურთიერთთანამშრომლობის შედეგიან პრაქტიკას. აღნიშნული შესაძლებელია შეფასდეს, როგორც

მედიაციის სასამართლო და სასამართლოს გარე ფორმების ჰიბრიდული ფორმა, რომელიც უზრუნველყოფს სასამართლოს როლის გაძლიერებას მედიაციის ინსტიტუციონალიზაციის პროცესში, აგრეთვე, სასამართლოს გარე მედიაციის პოპულარიზაციას, დავის გადაწყვეტის მშვიდობიანი გზების კულტურის დამკვიდრებასა და სასამართლოს გარდაქმნას სივრცედ, რომელიც მოქალაქეებს სთავაზობს დავის გადაწყვეტის მრავალფეროვან მექანიზმებს.²⁴

დასკვნა

ნაშრომის ფარგლებში განხორციელებული მსჯელობის შედეგად დგინდება, რომ საქართველოში მედიაციის ინსტიტუციონალიზაციის, საკანონმდებლო დონეზე რეგლამენტაციის და მისი ერთ-ერთი ფორმის – სასამართლო პროგრამების დანერგვის პროცესის კვალდაკვალ, რელევანტურად მიიჩნევა კერძო მედიაციის განვითარების მიზნებისათვის კონკრეტული ნაბიჯების გადადგმა. შესაბამისი მიმართულებით პრაქტიკის სრულყოფა. ცხადია, აღნიშნული პროცესი არ უნდა ხორციელდებოდეს რომელიმე სახელმწიფოს გამოცდილების ავტომატური რეცეფციით და თითოეული სიახლე უნდა დაინერგოს მიზნულ-შედეგობრივი ანალიზის საფუძველზე. საჭიროდ მიიჩნევა სასამართლო სისტემის ჩართულობა არა მხოლოდ მედიაციის სასამართლო ფორმის, არამედ კერძო მედიაციის განვითარების პროცესშიც. ამ მიზნით – პროექტების დანერგვა და იმპლემენტაცია, რაც უნდა ეფუძნებოდეს საჯარო და კერძო სექტორის ურთიერთთანამშრომლობის პრინციპს. შედეგობრივად აღნიშნული განაპირობებს კერძო მედიაციის როლის გაძლიერებას, რაც თავის მხრივ სრულყოფს სახელმწიფოს მასშტაბით მოქმედ ერთიან ჯაჭვს. უფრო ფართო ქრილში, აღნიშნული

22 Gold N., (1997). Prospects, Problem and Potential: An Assessment of Trends and Issues regarding Mediation in Canada, *Journal of Arbitration Studies*, p. 94.

23 Clarke S., Gordon H., Ellen E., (1997). Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation, *Justice System Journal*, p. 326-327.

24 გურიელი ა., (2019). მოსამართლის უფლებამოსილების ფარგლები სასამართლო მედიაციის პროცესის წარმოებასთან მიმართებაში, თბილისი, გვ. 126.

მოიაზრებს ქართული რეალობის და მისი შესაბამისობის უზრუნველყოფას წამყვან, დემოკრატიულ ღირებულებებზე ორიენტირებულ სამართლებრივი სისტემების სტანდარტებთან. სამართლის თითოეულ სუბიექტს ხომ უნდა გააჩნდეს შესაძლებლობა, თავისუფალი ნების პირობებში, საკითხის მრავალმხრივი და სრულყოფილი შეფასების შედეგად მიიღოს გადაწყვეტილება – კონკრეტული საკითხის განხილვის ფარგლებში დავის გადაწყვეტის რომელი საშუალება იქნება უმჯობესი. სამართლის სუბიექტთა სამართლებრივი ცნობიერება უნდა ეფუძნებოდეს პრინციპს, რომ სასამართლოსადმი სასარჩელო წარმოების ფარგლებში მიმართვა უნდა განიხილებოდეს არა ძირითად, არამედ დავის გადაწყვეტის ერთ-ერთ საშუალებად. აღნიშნული, რაც მოიაზრებს საჯარო და კერძო სექტორის

ერთგვარ თანამშრომლობას, ხელს შეუწყობს როგორც საჯარო – აგრეთვე კერძო ინტერესების განხორციელებას. ერთის მხრივ განიტვირთება სასამართლო სისტემა; მეორეს მხრივ, ხელი შეეწყობა კერძო მედიაციის განვითარებას; ამავედროულად შეიქმნება სამართლის სუბიექტთა რეალური ინტერესების სწრაფად და ეფექტურად დაკმაყოფილების შესაძლებლობა.

ამგვარად შედეგობრივი თვალსაზრისით გამოვლინდება ორგვარი ეფექტი. მედიაცია ხომ თავისი არსით ცვლის სასამართლოს და განსაზღვრავს სასამართლო სისტემაში არსებული რიგი გამოწვევების დაძლევის შესაძლებლობებს. ამასთან, თავის მხრივ, სასამართლო სისტემაც უზრუნველყოს მედიაციის ფორმების განვითარებას საქართველოში.

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NAVIGATING THE DIGITAL MARKETPLACE: LEGAL REQUIREMENTS FOR ONLINE CONTRACTS WITH CONSUMERS IN THE EUROPEAN UNION

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ABSTRACT

The internet has revolutionized shopping, offering unparalleled convenience for consumers in the EU and worldwide. However, this digital ease is underpinned by a robust legal framework that ensures fair play for businesses and consumers. Understanding the key legal requirements for online contracts in the EU is crucial for businesses to operate smoothly and ethically within this dynamic market. This article delves into these requirements, equipping businesses with the knowledge to navigate the online contracting landscape confidently. This article explores the key legal requirements for businesses operating in the EU when forming online contracts with consumers. This article further discusses the challenges in the present legal framework and suggests potential solutions. Furthermore, the author has attempted to present a comparative framework with legal requirements of online contracts with consumers in the United States (US) and the United Kingdom (UK). Thus, this article will provide insight to businesses and consumers and aid in navigating the e-commerce and digital marketplace by ensuring the rights of the consumers in the EU are protected.

KEYWORDS: E-commerce, Digital marketplace, Legal requirements for online contracts, Online contracting landscape, Rights of the consumers

INTRODUCTION

The growth of e-commerce has revolutionized how businesses interact with consumers. Increasingly, consumers purchase goods and services online, and businesses enter into contracts with consumers electronically. However, the ease and convenience of online contracts with consumers can also create risks, particularly with respect to consumer protection. In response, the European Union (EU) has established a legal framework for online contracts with consumers to ensure that consumers are adequately protected.

The European Union (EU) thrives on a bustling online commerce sector. But with great digital convenience comes responsibility, especially when protecting consumers. EU law establishes a strong framework to ensure fair and transparent online contracts between businesses and consumers. The legal requirements for online contracts with consumers in the EU are an important aspect of consumer protection in the digital age. The European Commission has enforced several directives and regulations such as Directive on Consumer Rights,¹ Directive on Electronic Commerce,² Directive on Electronic Signatures³ repealed by eIDAS Regulation 2016,⁴ Directive for the supply of digital content and digital services to consumers,⁵

Sales of Goods Directive⁶ etc., which provide such framework the legal requirements for online contracts with consumers in the EU. The businesses established or operating within the EU or having their source of interest or providing services within the EU, including online businesses, shall and must comply with the legal requirements for online contracts with consumers, such as the information requirements, order confirmation and acknowledgement of receipt, technical steps, cooling-off period, unfair contract terms, electronic signature, and data protection, etc.

This legal framework significantly impacts the dealings of businesses that operate online and enter into contracts with consumers in the EU. Failure to comply with such legal requirements leads to the risk of legal liability. Thus, this paper aims to provide an overview of these legal requirements, analyze their impact on online businesses, and offer recommendations for businesses to ensure compliance with the legal framework.

1. OVERVIEW OF THE ONLINE CONTRACTS WITH CONSUMERS WITH EMPHASIS ON THE EU LEGISLATION

Online Contracts, often also called Electronic Contracts, form an imperative part of the E-Commerce and are seen to be entered between service providers or businesses selling online products & services (including digital content) and the consumers. Thus, the legal requirements for online contracts with consumers only apply when service provider offers such product or service to a consumer i.e. "any natural person acting for purposes outside his/her trade, business or profession".⁷ Thus, this defi-

1 Directive 2011/83/EU – Consumer Rights Directive. (2011). EUR-Lex. European Union <<http://data.europa.eu/eli/dir/2011/83/oj>> (Last accessed: June 10, 2024).

2 Directive 2000/31/EC – Electronic Commerce Directive. (2000). EUR-Lex. European Union <<http://data.europa.eu/eli/dir/2000/31/oj>> (Last accessed: June 10, 2024).

3 Directive 1999/93/EC Electronic Signatures Directive. (1999). EUR-Lex. European Union <<http://data.europa.eu/eli/dir/1999/93/oj>> (Last accessed: June 09, 2024).

4 Regulation (EU) No 910/2014 eIDAS Regulation. (2014). EUR-Lex. European Union <<http://data.europa.eu/eli/reg/2014/910/oj>> (Last accessed: June 11, 2024).

5 Directive (EU) 2019/770 – Digital Content Directive. (2019). EUR-Lex. European Union <<http://data.europa.eu/eli/dir/2019/770/oj>> (Last accessed: June 12, 2024).

6 Directive (EU) 2019/771 – Sale of Goods Directive. (2019). EUR-Lex. European Union <<http://data.europa.eu/eli/dir/2019/771/oj>> (Last accessed: June 12, 2024).

7 Directive 2000/31/EC – Electronic Commerce Directive. (2000). Definition of Consumer, Article 2(e). EUR-Lex. European Union <<http://data.europa.eu/eli/>

definition makes it clear that consumer is a person who buys for personal purposes and not for professional usage and therefore, legal entities such as corporations and associations does not qualify as 'Consumers'. This definition of Consumer has been harmonised at the EU level, and member states cannot introduce a different legal definition.

The online contracts are constituted when the offer is made by one party and the same is accepted by the other party in an electronic setting. For example – when you buy any product on Amazon or even a Prime subscription (premium service of using Amazon), the prices for the product or service are indicated, and by clicking on the buy button, we accept the offer made by the service provider which by action/conduct of making payment or agreeing to receive the benefits of the product of service, the consumer concludes the online contract.

It is important to note here that there may arise several circumstances when a person may use some good for personal and professional use, for example – a lawyer buying a computer for herself and her kids through a digital marketplace to use for their study, entertainment and other personal usage but also to draft e-mails and briefs for her clients. This situation will give rise to dual purpose contract i.e. when a good or a service has a double purpose. In such cases, to determine whether consumer law applies, one needs to check the prevailing purpose of that contract.⁸ Thus, it has to be determined for what purpose the computer is used more and if it is used 25% for professional work and 75% by herself and her kids for personal reasons, then consumer law will apply on the online contract.

Online contracts not only include goods supplied through the digital marketplace but also includes digital content and services, for

example, computer programs, applications, video files, audio files, music files, digital games, e-books or other e-publications, etc. However, consumers are not always confident when buying across borders, especially when it is done online. One of the major factors for consumers' lack of confidence is uncertainty about their key contractual rights and the lack of a clear contractual framework for digital content or digital services. Many consumers experience problems related to the quality of, or access to, digital content or digital services. To remedy such problems, businesses and consumers should be able to rely on fully harmonised contractual rights in certain core areas concerning the supply of digital content or services across the European Union. Thus, with this aim and objective, Directive (EU) 2019/770⁹ on certain aspects concerning contracts for the supply of digital content and digital services was adopted in May 2019.¹⁰

To remain competitive in global markets, the Union adopted the Digital Single Market (DSM) Strategy in 2015, laying down a comprehensive framework facilitating the integration of the digital dimension into the internal market. The DSM has three pillars: improving access to digital goods/services across the EU, fostering conditions for digital networks and innovative services; and optimising the digital economy's growth potential. Following the strategy's release, the Commission proposed several legislative measures to achieve a DSM.¹¹ These legislative measures include Directive (EU) 2019/771¹² on certain aspects concerning contracts for the sale of goods, which cover rules applicable to the sales of goods, including goods with digital elements, only in relation to key contract ele-

9 Supra at 6.

10 *Ibid.*

11 Martinello, B. (2024). The Ubiquitous Digital Single Market. Fact Sheets on the European Union – 2024 by European Parliament <<https://www.europarl.europa.eu/factsheets/en/sheet/43/the-ubiquitous-digital-single-market#:~:text=On%206%20May%202015%2C%20the,the%20digital%20economy%27s%20growth%20potential>> (Last accessed: May 30, 2024).

12 Supra at 7.

<[dir/2000/31/oj](https://eur-lex.europa.eu/legislation/summaries/directives/2000/31/oj)> (Last accessed: June 10, 2024).

8 The European Consumer Organisation. (2018). Module 1: Pre Contractual Information Requirements. Handbook on Consumer Law Training for SMEs. Consumer Law Ready Project <https://www.consumerlawready.eu/sites/default/files/2019-04/CLR_Module_1_UK_Precontractual%20information%20requirements.pdf> (Last accessed: June 12, 2024).

ments needed to overcome contract-law related barriers in the internal market. Furthermore, finally, with the adoption of the Digital Services Act¹³ and Digital Markets Act,¹⁴ the European Commission has attempted to create a safer digital space in which the fundamental rights of users of digital services are protected and to establish a level playing field to foster innovation, growth and competitiveness in the European single market and globally.¹⁵

Thus, with such legislative protection for consumers, the EU has prescribed several legal requirements for determining the legality of online contracts with consumers since, as consumers, we usually skip to reading the terms and conditions that we agree to while making any online purchase, but this aforesaid legal framework in EU protects the interests of the consumers by regulating mandatory disclosure requirements, unfair contract terms, cooling-off period, electronic signature, data protection etc. Such legal requirements are elaborated in the next section.

2. LEGAL REQUIREMENTS FOR ONLINE CONTRACTS WITH CONSUMERS

With the enforcement of the Digital Services Act [Regulation (EU) 2022/2065] and Digital Markets Act [Regulation (EU) 2022/1925], the core requirements for online contracts with consumers remained unaffected, and the Electronic Commerce Directive (2000/31/EC) still applies largely to the contracts concluded electronically. Though the Digital Services Act (DSA) has amended the e-commerce directive but, the part dealing with legal requirements

for online contracts remains the same and the conditional legal liability exemptions regarding providers of intermediary services, also known as “platform liability” or “notice and takedown” in the European context will be laid down in the Digital Services Act (DSA).¹⁶ The Digital Markets Act (DMA) aims to prevent gatekeeper platforms from unfairly favouring their services or disadvantaging businesses using the platform. This indirectly benefits consumers by promoting a more competitive online marketplace. Furthermore, DSA focuses on creating a more transparent and trustworthy online environment by requiring online platforms to be more transparent in their terms and conditions. It also mandates online marketplaces to implement stronger verification processes for businesses selling on their platforms, thus reducing risks of scams. Therefore, the DSA and DMA don’t replace existing legal requirements for online contracts. However, they create a broader framework that promotes transparency, trust, and fair competition in the digital marketplace. This indirectly strengthens consumer protection in online contracting within the EU.

The key Legal Requirements for Online Contracts with Consumers in the EU are as follows:

2.1 Information Disclosure Requirements: One of the key requirements for online contracts with consumers in the EU is that the business must provide the consumer with certain information before the contract is concluded. The information requirements are set out in Directive 2011/83/EU on Consumer Rights,¹⁷ which applies to distance contracts and off-premises contracts, and the Electronic Commerce Directive (2000/31/

13 Regulation (EU) 2022/2065 – Digital Services Act. (2022). EUR-Lex. European Union <<http://data.europa.eu/eli/reg/2022/2065/oj>> (Last accessed: June 14, 2024).

14 Regulation (EU) 2022/1925 – Digital Markets Act. (2022). EUR-Lex. European Union <<http://data.europa.eu/eli/reg/2022/1925/oj>> (Last accessed: June 15, 2024).

15 Supra at 12.

16 Eenennaam, J., V. (2023). The New Platform Liability: From the e-Commerce Directive to the Digital Services Act Regulation. WiseMen Advocates <<https://www.wisemen.nl/en/news/the-new-platform-liability-from-the-e-commerce-directive-to-the-digital-services-act-regulation-dsa-/#:~:text=The%20e%2Dcommerce%20directive%20from,this%20subject%20from%20now%20on>> (Last accessed: June 16, 2024).

17 Supra at 2.

- EC),¹⁸ which applies to contracts concluded electronically. Under these directives, businesses are required to provide the following information to consumers before the contract is concluded:
- 2.1.1 Identity and contact details of the business:** Businesses must provide their name, address, telephone number, email address, and any other relevant contact information.
- 2.1.2 Description of the goods or services:** Businesses must provide a description of the goods or services being offered, including their main characteristics, features, and functionality.
- 2.1.3 Price of the goods or services:** Businesses must provide the total price of the goods or services, including all taxes and fees.
- 2.1.4 Delivery costs and arrangements:** Businesses must provide information on the delivery costs and arrangements, including the delivery time and any applicable delivery restrictions.
- 2.1.5 Payment methods:** Businesses must provide information on the accepted payment methods, including any fees or charges that may apply.
- 2.1.6 Right of withdrawal:** Businesses must inform consumers of their right to withdraw from the contract within a minimum of 14 calendar days without giving any reason.
- 2.1.7 Complaints and redress mechanisms:** Businesses must provide information on how consumers can file complaints and access redress mechanisms if they have a dispute with the business.
- 2.1.8 Technical steps to conclude the contract:** Businesses must provide information on the technical steps that the consumer needs to follow to conclude the contract, including any technical requirements for accessing and using the service. It has been made clear in the legal framework that the failure to provide
- the required information can result in the contract being considered null and void, and the business may be subject to legal liability.
- 2.2 Technical Steps:** In addition to providing the required information to consumers before the contract is concluded, businesses must also provide information on the technical steps that the consumer needs to follow to conclude the contract. By providing this information, businesses can ensure that consumers are able to navigate the online purchasing process and conclude the contract with ease. This requirement is set out in the Electronic Commerce Directive (2000/31/EC),¹⁹ which applies to contracts concluded electronically. Under this directive, businesses are required to provide clear and understandable information on the technical steps that the consumer needs to follow to conclude the contract. This information must be provided in a way that is easily accessible and must include the following:
- 2.2.1** Information on how to correct errors before placing the order.
- 2.2.2** Information on the technical means for identifying and correcting input errors before placing the order.
- 2.2.3** A clear and understandable confirmation that the order has been placed.
- 2.2.4** Information on the technical means for concluding the contract.
- 2.2.5** Information on how the consumer can access and store the terms of the contract.
- By providing clear and understandable information on the technical steps, businesses can reduce the risk of errors and misunderstandings and the resulting risk of legal liabilities in case of non-compliance.
- 2.3 Cooling-off Period** – The cooling-off period is a period of time during which con-

18 Supra at 3.

19 Ibid.

sumers have the right to withdraw from a contract without penalty and without giving any reason. The cooling-off period is an important aspect of consumer protection, and it is provided for under Directive 2011/83/EU on Consumer Rights,²⁰ which applies to distance contracts and off-premises contracts.

Under this directive, consumers have a cooling-off period of 14 days to withdraw from a contract. The cooling-off period starts from the day the consumer receives the goods or from the day the consumer enters into the contract for the provision of services. During this period, consumers can exercise their right of withdrawal by notifying the business of their decision to withdraw from the contract. The notification of withdrawal must be made in a durable medium (i.e. in writing or another format that allows the consumer to store the information) and must include the following information:

- 2.3.1 The consumer's name and address.
- 2.3.2 A clear statement of the consumer's decision to withdraw from the contract.
- 2.3.3 The date on which the consumer received the goods or entered into the contract for the provision of services.
- 2.3.4 Information on how to return the goods (if applicable).

This information must be provided before the contract is concluded, and if the business fails to provide the required information on the right of withdrawal, the cooling-off period may be extended to 12 months. In addition, failure to comply with the requirements relating to the cooling-off period can result in the contract being considered null and void, and the business may be subject to legal liability.

2.4 Unfair Contract Terms – Another important aspect of consumer protection in online contracts is the prohibition of

unfair contract terms. The Unfair Contract Terms Directive²¹ aims to protect consumers from unfair contract terms that may be included in contracts with businesses.

Under this directive, businesses must ensure that their contracts with consumers do not contain unfair contract terms. Unfair contract terms are defined as terms that have not been individually negotiated and that, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Examples of unfair contract terms include terms that:

- 2.4.1 Limit or exclude the business's liability in the event of a breach of contract.
- 2.4.2 Allow the business to unilaterally change the terms of the contract.
- 2.4.3 Make it difficult or impossible for the consumer to enforce their rights under the contract.
- 2.4.4 Limit the consumer's right to terminate the contract.
- 2.4.5 Allow the business to terminate the contract without notice.

In addition to the Unfair Contract Terms Directive, the Consumer Rights Directive (2011/83/EU) also sets out requirements relating to unfair contract terms. Under this directive, businesses must ensure that their contracts with consumers are transparent and that the terms are expressed in plain and intelligible language. This is intended to ensure that consumers are able to understand the terms of the contract and make informed decisions when entering into the contract. Failure to comply with the requirements of the Unfair Contract Terms Directive can result in the contract being considered null and void, and the business may be subject to legal liability.

21 Directive 93/13/EEC – Unfair Terms Directive. (1993). EUR-Lex. European Union <<http://data.europa.eu/eli/dir/1993/13/oj>> (Last accessed: 15 June, 2024).

20 Supra at 2.

- 2.5 Electronic Signature – In the context of online contracts, electronic signatures are an important aspect of contract formation. The Electronic Signatures Directive²² provides a framework for the use of electronic signatures in EU member states. Under this directive, an electronic signature is defined as “data in electronic form which are attached to or logically associated with other data in electronic form and which serve as a method of authentication”.²³ This means that electronic signatures can take a variety of forms, such as a typed name, a scanned signature, or a digital signature. The level of legal validity of an electronic signature will depend on the circumstances in which it is used and the level of assurance it provides as to the identity of the signatory. The eSignature Directive was repealed as of 1 July 2016 when the rules on trust services under the eIDAS Regulation came into effect. In addition to the Electronic Signatures Directive, the eIDAS Regulation²⁴ provides a more comprehensive framework for electronic signatures, electronic seals, electronic time stamps, and electronic delivery services. The eIDAS Regulation establishes a common legal framework for the use of electronic identification and trust services throughout the EU and provides a high level of legal certainty for electronic transactions.
- 2.6 Other legal requirements: There are several other legal requirements which are also important to be considered while entering into an Online Contract with the consumer, such as Data protection and processing of personal data in compliance with GDPR,²⁵ the use of clear,

legible and comprehensible text on electronic medium for display of information, language in which information shall be presented, etc.

3. CHALLENGES AND POTENTIAL SOLUTIONS

Even with the present legal framework for Online Contracts with consumers in the EU, they face several challenges and issues, which are as follows:

- 3.1. Enforceability: Online contracts can be difficult to enforce, especially if the business and consumer are located in different countries. This challenge can be addressed by including a choice of law and jurisdiction clause in the contract, specifying which country’s laws will govern the contract and which courts will have jurisdiction over any disputes.
- 3.2. Accessibility: Not all consumers have equal access to the Internet, and some may not be able to access online contracts due to disabilities or other limitations. Businesses can address this challenge by providing alternative means of accessing the contract, such as offering printed copies upon request or providing an audio version of the contract for visually impaired consumers.
- 3.3. Language barriers: Online contracts can present challenges related to language barriers, particularly for consumers who are not fluent in the language of the contract. To address this challenge, businesses can provide online contracts in multiple languages or offer translation services for consumers who require them.
- 3.4. Clarity and understandability: Online contracts may not always be clear and easy to understand for consumers, particularly those who are not familiar with legal terms and concepts. This challenge can be addressed by ensuring that the

22 Supra at 4.

23 Supra at 8.

24 Supra at 5.

25 Regulation (EU) 2016/679 – General Data Protection Regulation. (2016). EUR-Lex. European Union <<http://data.europa.eu/eli/reg/2016/679/oj>> (Last accessed: 16 June, 2024).

contract is written in clear and concise language, free from legal jargon, and providing clear explanations of any legal terms or concepts.

3.5 Electronic signatures: The use of electronic signatures in online contracts can also present challenges related to authentication and verification. Businesses can address this challenge by using secure electronic signature technology that meets the requirements of EU regulations.

Though businesses face the aforementioned challenges, there are efficient ways of addressing them, which can promote trust and confidence in online transactions and ensure compliance with EU regulations.

4. COMPARISON WITH THE INTERNATIONAL LEGAL FRAMEWORKS (EU, USA & UK)

While comparing the legal framework of the EU with that of the United States and the United Kingdom with regard to legal requirements of the online contracts with consumers, it can be observed that there are certain similarities and differences which are highlighted below:

4.1 Formation of Contracts: In the United States, online contracts are generally governed by state law, which may require certain elements for a contract to be valid, such as an offer, acceptance, and consideration. Some states also require that online contracts be in writing and signed by both parties. Whereas, in the UK, online contracts are governed by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which require businesses to provide certain information to consumers before the contract is concluded, such as the identity of the business, the main characteristics of the goods or services, and the total price.

This is also similar to European Standards and requirements.²⁶

4.2 Information Requirements: In the U.S., online businesses are required to provide consumers with certain information, such as the terms and conditions of the contract, the total price, and any applicable taxes or fees. Whereas in the EU, online businesses are required to provide consumers with certain information before the contract is concluded, such as the main characteristics of the goods or services, the total price, and any applicable taxes or delivery costs, and this is also similar in the UK as in EU.

4.3 Cooling-off Period: In the U.S., there is no federal cooling-off period for online purchases, but some states have their cooling-off periods for certain types of transactions. Whereas, in the EU, consumers have a right to a 14-day cooling-off period for most online purchases, during which they can cancel the contract without giving any reason and this is also the case similar in UK as in EU.²⁷

4.4 Electronic Signatures: In the U.S., electronic signatures are generally considered legally binding if they meet certain requirements under the Electronic Signatures in Global and National Commerce Act (ESIGN) or the Uniform Electronic Transactions Act (UETA). Similarly, in the EU, electronic signatures are governed by the eIDAS Regulation & Electronic Signatures Directive and in the UK, by the Electronic Communications Act 2000.²⁸

26 Cordera, M. (2001). E-consumer Protection: A Comparative Analysis of EU and US Consumer Protection on the Internet. Rutgers Computer & Technology Law Journal, 27. L.J. 231, 237.

27 *Ibid.*

28 *Ibid.*

CONCLUSION/SUMMARY

There has been constant emphasis on following the legal requirement of online contracts with consumers in the EU, as they are designed to protect the interests of consumers and promote trust and confidence in online transactions. These legal requirements cover a wide range of areas, including information requirements, order confirmation and acknowledgment of receipt, technical steps, cooling-off periods, unfair contract terms, electronic signatures, and data protection etc.

To comply with these legal requirements, businesses must take a proactive approach to online contract formation and ensure that their online contracts are clear, concise, and easy to understand. They must also ensure that they provide consumers with clear and concise information about their contractual rights and obligations and any additional charges or fees that may apply. In addition, businesses must

ensure that they comply with the technical requirements for online contracts, such as providing consumers with a clear and unambiguous means of correcting errors in their orders and acknowledging receipt of their orders.

Furthermore, businesses must also ensure that they comply with the data protection requirements for online contracts, including obtaining explicit consent from consumers before processing their personal data and ensuring that personal data is processed securely and lawfully. By complying with these legal requirements, businesses can promote trust and confidence in online transactions and ensure that consumers can make informed decisions about their contractual rights and obligations. This, in turn, can help to promote the growth and development of e-commerce in the EU and ensure that online transactions continue to be a safe, reliable, and convenient way for consumers to purchase goods and services.

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DEVELOPMENT IN PARLIAMENTARY OVERSIGHT OF GOVERNMENT WORK IN LIGHT OF THE 2020 CONSTITUTIONAL AMENDMENT (ALGERIA)

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ABSTRACT

In most comparative law systems, the role of parliament is not limited to issuing various types of legislation and improving the legislative framework. It goes beyond its fundamental function of legislating to include another important role: oversight, specifically the restraining role over the actions of government members in certain cases defined by the Constitution. Parliament exercises this oversight role alongside its legislative function. It is also important in maintaining public interest and evaluating the government's work by questioning its members on the progress and execution of agreed-upon projects.

Referring to the Algerian system, we find that the Algerian Parliament, which consists of two chambers—the National People's Assembly (APN) and the Council of the Nation—exercises oversight over the government's actions. The first chamber, the APN, primarily does this. Consequently, this type of oversight may sometimes lead to political accountability, which can result in either the resignation of the Prime Minister or the dissolution of the first chamber of parliament. These mechanisms include the motion of censure and the interpellation process.

KEYWORDS: Parliamentary oversight, Political responsibility, Public policy statement, Oversight petition, No-confidence, Questioning

INTRODUCTION

The function of the parliament is embodied in two main roles: legislating laws and parliamentary oversight of the government's actions. The latter, parliamentary oversight, has become a central concept in any democratic political system. Some even consider it more important than legislative work because it embodies the principle of the people's sovereignty and their right to oversee the actions and management of state institutions, thereby protecting individual rights and freedoms. This type of oversight has been constitutionally affirmed to ensure and entrench the legitimacy of the executive authority's practices.

Parliamentary oversight refers to the parliament's authority to investigate the actions of the executive authority to ensure the proper implementation of laws, identify errors, and hold those responsible accountable. It also refers to the legislative authority's power to investigate the actions of the executive apparatus in order to uncover any improper execution of general rules in the state, identify those responsible, and question them.

Referring to the Algerian Constitution of 2020,¹ we find that it acknowledges the parliament's authority to oversee the government's actions through various means and mechanisms. These include tools that do not result in political responsibility for the government, such as questions and investigative committees, and others that do result in political responsibility, such as the motion of censure and the interpellation. The latter is a new addition to the 2020 Constitution, as it was previously among the tools that did not entail political responsibility for the government.

The importance of parliamentary oversight lies in ensuring the proper implementation of the government's action plan, according to what was presented at the start of the government's

work, to ensure that the government does not deviate from the proposed plan. Parliamentary oversight aims to rationalize the government's domestic and foreign policies and ensure they serve the public interest.²

Based on the above, we may ask about the effectiveness of the innovations introduced by the 2020 constitutional amendment in government oversight.

To address the abovementioned issue, we will rely on the descriptive method to outline the necessary definitions and the various mechanisms used in parliamentary oversight. Additionally, we will use both historical and comparative approaches concerning the successive Algerian constitutions and their amendments by highlighting the previously used method and how it has evolved under the 2020 Constitution.

To answer the posed issue, we will follow a dual approach by addressing the following:

- First Chapter: The role of the parliament in monitoring the government's plan and discussing the general policy statement.
- Second Chapter: The impact of the motion of censure and interpellation on establishing the government's responsibility.

1. THE ROLE OF THE PARLIAMENT IN MONITORING THE GOVERNMENT'S PLAN AND DISCUSSING THE GENERAL POLICY STATEMENT

The parliament plays an important role by exercising its parliamentary oversight over the government's actions, ensuring that they align well and consistently with what was previously declared in the government's action plan or program through its approval (First Requirement) and by discussing the general policy statement one year after the presentation of the government's action plan (Second Requirement).

1 Presidential Decree N°. 20-422. (2020). On the issuance of the constitutional amendment approved in the referendum of November 1, 2020. *Official Gazette*, 82.

2 Ahmad, Y. (2016). *The supervisory role of the Iraqi parliament after 2003*. Al-Sanhoury Library, Lebanon, 16.

1. 1. Presenting the Government's Plan to the Parliament and the Impact of Its Discussion

The Algerian constitutional system mandates that the government's action plan or program, depending on the situation, must be presented to the parliament after being reviewed by the Council of Ministers for approval (First Subsection). Consequently, when presented to the parliament, or more specifically to the members of the People's National Assembly, it will be subject to discussion, which may conclude with either its approval or rejection (Second Subsection).

1. 1. 1. *The Government's Action Plan or Government Program*

After the President appoints the Prime Minister or Head of Government, depending on the case, and the members of the government,³ the latter prepares its action plan or program, as appropriate. This plan is of significant importance because it represents the comprehensive strategic framework for all executive sectors, defining how they will operate and manage their activities.⁴ Once prepared, the Prime Minister or Head of Government presents it to the Council of Ministers for approval, as stipulated in Article 105 of the 2020 Constitutional Amendment. This procedure constitutes the first official action undertaken by the government and represents the standard practice for initiating its activities. This mechanism is crucial because the action plan represents the general strategic framework that includes all sectors and outlines how they will operate and manage their activities, thus requiring parliamentary approval.

It is important to note that after the 2020 constitutional amendment, the government's action plan varies according to the parliamen-

tary majority. If it pertains to the Prime Minister, the action plan aligns with the presidential program. Conversely, if it pertains to the Head of Government, the action plan aligns with the parliamentary majority's program.

After the Prime Minister or Head of Government presents the government's action plan to the Council of Ministers, it is then submitted to the People's National Assembly for approval, as stipulated in Article 47 of Organic Law No. 16-12 regulating the relationship between the People's National Assembly and the Council of the Nation.⁵ The Prime Minister is required to present it within 45 days of their appointment. The People's National Assembly will conduct a general discussion to review the plan, and discussions can only begin after seven days from notifying the deputies about the plan. According to Article 49 of Law No. 16-12, the action plan must be voted on within ten days of its presentation. Once approved, it is submitted to the Council of the Nation for further approval, as Article 106 of the 2020 Constitutional Amendment outlines.

If the People's National Assembly rejects the plan, the Prime Minister or Head of Government must submit their resignation to the President, according to Article 107 of the 2020 Constitutional Amendment. The President will then appoint a new Prime Minister to prepare and present a new action plan as previously described. If this new plan is not approved by the People's National Assembly again, the Assembly will be dissolved automatically, as provided in Article 108 of the 2020 Constitutional Amendment. If the plan is approved, the Prime Minister must implement it, as Article 109 states: "The Prime Minister shall implement and coordinate the action plan approved by the People's National Assembly".

The same applies to the Head of Government if the legislative elections result in a parliamentary majority, as provided by Article 110 of the 2020 Constitutional Amendment, which

3 Constitution of 2020. Article 91, Paragraph 5.

4 Kersas, M., & Azzaz, H. (2021). Parliamentary oversight mechanisms on government actions and their activation in light of the 2020 constitutional amendment. *Legal and Social Sciences Journal*, vol (6) N° (4).

5 Law No. 16-12 (2016). Organizing the People's National Assembly and the Council of the Nation, and specifying their relations with the government. *Official Gazette*, 5.

states: “If the legislative elections result in a parliamentary majority different from the presidential majority, the President of the Republic shall appoint a Head of Government from the parliamentary majority and task them with forming a government and preparing the parliamentary majority’s program. In all cases, the President of the Republic shall present their government program to the Council of Ministers and then submit it to the parliament according to the conditions specified in Articles 106 (paragraphs 1, 3, 4) and Articles 107 and 108”.

1. 1.2. Discussion of the General Policy Statement

The general policy statement, presented by the Prime Minister or Head of Government, constitutes the second major action undertaken by the government. It demonstrates the government’s commitment to implementing the action plan submitted upon its appointment and serves to oversee the government’s activities.

Thus, parliamentary oversight of the government’s plan is not sufficient on its own; there must be subsequent oversight after a period of time following the plan’s approval. This involves monitoring the actual performance of the executive work in light of the agreed-upon plan through the government’s annual report to the parliament on its general policy.⁶

The general policy statement submitted to the parliament serves as a tool to inform it about the program’s implementation from the previous year and what is currently underway. It highlights the challenges faced by the government, the goals it aims to achieve in the future, and potential obstacles that may arise.⁷

Consequently, the general policy statement allows the parliament to review the facts and

difficulties facing the implementation of the government’s action plan that was previously approved. It provides a means and a mechanism for the parliament to oversee the government’s activities.

According to Article 111 of the 2020 Constitutional Amendment, the constitutional founder has mandated that the general policy statement be presented for discussion in the People’s National Assembly within a specific period of one year, starting from the date of approval of the government’s action plan by the Assembly. This period enables the Assembly to provide an annual evaluation of the government’s work and assess the government’s adherence to the action plan. This requirement was also established by the constitutional founder⁸ in the 2016 Constitution⁹ under Article 98: “The government must present an annual statement on its general policy to the People’s National Assembly.” It was similarly outlined in the 2008 Constitutional Amendment and the 1996 Constitution.¹⁰

It is a sufficient period for the People’s National Assembly to monitor the progress in implementing the plan. If the constitutional founder had not set this period, the presentation of the general statement would have depended solely on the government’s will, making it difficult for the Assembly to track and evaluate the government’s work.

Accordingly, the Prime Minister presents the general policy statement, which provides an outline of his government’s achievements, leaving the finer details to the written statement handed over to the members of parliament. This is according to Article 111 of the 2020 constitutional amendment, which mandates this procedure before the first chamber of parliament while making it optional before the second chamber. The article states: “The Prime Minister or Head

6 Soadqia, H. (2020). The general policy statement as a mechanism for parliamentary oversight over government actions in light of the 2016 constitutional amendment. *Annals of the University of Algiers*, Vol (1), N°(34), 167.

7 Alem, Z. (2021). The limits of legislative power in light of the 2016 constitutional amendment and reform requirements. *Doctoral thesis*, University of Mohamed El Bachir El Ibrahimy, Bordj Bou Arreridj, Algeria, 207.

8 Bousalem, D. (2007). Parliamentary oversight of government actions under the Constitution of 1996. *Master’s thesis*, University of Badji Mokhtar, Annaba, Algeria, 38.

9 Law N°. 16-01. (2016). Constitutional amendment of March 2016. *Official Gazette*, 14.

10 Presidential Decree N°. 96-438. (1996). Issuing the Algerian Constitution. *Official Gazette*, 76.

of Government, as the case may be, may present a statement on general policy to the Council of the Nation.” However, presenting it before the second chamber has become customary, thereby establishing a constitutional norm that necessitates its presentation.

Thus, the obligation to present the general policy statement to the members of the first chamber is self-evident, while the freedom to present it to the second chamber members is granted. The obligatory and optional nature of the two chambers can be explained by the potential consequences of filing a censure motion. Therefore, it can only be used by the chamber that can be dissolved by the President of the Republic, which is the People’s National Assembly, while the Council of the Nation, which cannot be dissolved, is deprived of this right.¹¹

1.2. Following the Discussion of the General Policy Statement with a Motion

The importance of discussing the general statement lies in its consequences, whether represented by the issuance of a motion of support and approval from the People’s National Assembly (First Section) or a motion expressing its dissatisfaction and disapproval (Second Section).

1.2.1. Issuance of a Motion of Support and Approval

After the discussion on the general policy statement, the discussion may be accompanied by the proposal of one or several motions concerning the general policy statement. For these motions to be accepted, they must be signed by 20 deputies and submitted to the office of the People’s National Assembly.

Article 51, paragraph 03, of Law No. 16-12 states, “The general policy statement shall result in a discussion on the government’s work,

which may be concluded with a motion”.

The motion must be submitted by at least 20 deputies to the office of the People’s National Assembly within 72 hours following the end of the deputies’ interventions in the discussion.

1.2.2. Motion of Censure

The motion issued by the People’s National Assembly can also express their dissatisfaction with the general policy statement by including a range of criticisms, observations, and revealing contradictions. In this case, the motion does not have any legal effect and can be considered a warning to the government about its failure to adhere to what was presented during the outline of its plan. It also indicates the possibility of holding the government politically accountable if it is followed by another procedure, which is filing a motion of censure.

2. THE IMPACT OF A MOTION OF CENSURE AND INTERPELLATION ON DETERMINING GOVERNMENT RESPONSIBILITY

The government’s political responsibility is determined if the discussion of the general policy statement is followed by submitting a motion of censure, or as it is called in some Arab countries, a motion of no-confidence, according to the legal conditions for its determination (First Requirement). Additionally, the constitutional founder introduced the procedure of interpellation as another mechanism for establishing the political responsibility of the government (Second Requirement).

2.1. Motion of Censure

After members of the People’s National Assembly submit a motion expressing dissatisfaction with the proceedings of the discussion on the general policy statement, in cases of serious overreach and the government’s failure to

11 Drif, K. (2017). Parliamentary oversight of government actions through the motion of censure. *Journal of Legal and Political Research*, Vol (5) , 89.

achieve what was planned in the government program submitted a year before the discussion of the general policy statement, the motion of no-confidence or dissatisfaction can be followed by the submission of a motion of censure (First Section), according to the conditions (Second Section) and procedures (Third Section) specified in the constitution, additionally, the Prime Minister may intervene and request a vote of confidence from the People's National Assembly after the submission of the motion of dissatisfaction (Fourth Section).

2.1.1. Definition of a Motion of Censure

A motion of censure is considered the second outcome or effect resulting from the discussion of the general policy statement, as a measure taken by the deputies to pressure the government and force it to resign.¹² It is the inevitable result of the People's National Assembly's dissatisfaction and disapproval of the government's work, holding it politically accountable.

The Algerian constitutional founder linked the activation of this mechanism to two main actions: the government's action plan and the annual general policy statement, through either disapproval of the government's action plan or voting on a motion of censure, or through disapproval of a request for a vote of confidence submitted by the government, known as a vote of no confidence.¹³

The Algerian constitutional founder established this mechanism under the 1989 Constitution and the 1996 Constitution with subsequent amendments, as outlined in Article 161 of the 2020 constitutional amendment: "The People's National Assembly, during the discussion of the general policy statement or following an inter-

pellation, may vote on a motion of censure targeting the government's responsibility".

It should be noted that throughout the past years of constitutional experience, there has been no reference to any parliamentary initiative to submit a motion of censure or to threaten the government with the necessity of requesting a vote of confidence. Many successive governments in Algeria have refrained from presenting the annual general policy statement. For instance, the President terminated the duties of Ahmed Ouyahia's government on September 3, 2012, without the government presenting an annual general policy statement.¹⁴

The constitutional founder's linkage of the submission of a motion of censure to the annual general policy statement is due to his desire to achieve a form of institutional stability and to avoid political crises resulting from frequent government changes. The constitutional founder believed that this stability could be achieved by granting the government an annual immunity, enabling it to act calmly and steadily without fear of the effects of a motion of censure being submitted on every occasion, triggering its political accountability. However, this situation somewhat changed in the 2020 Constitution, when the legislator expanded the chances of triggering the government's political accountability by adding interpellation as another procedure that also triggers its political responsibility.

2.1.2. Conditions for Submitting and Discussing a Motion of Censure

Article 161 of the constitutional amendment states: "The People's National Assembly may, during its discussion of the general policy statement or following an interpellation, vote on a motion of censure targeting the responsibility of the government."

The motion of censure must be signed by

12 Abdellawi, Z. (2020). Parliamentary oversight of the government's general policy statement in light of the 2016 constitutional amendment. *Journal of Academic Research*, Vol (7), N°(1), 598.

13 Ben Hida, M. (2021). The scope of the motion of censure under the 2020 constitutional amendment. *Journal of International Law and Development*, Vol (9), N°(2), 122.

14 Amar, A. (2013). The general policy statement of the government between deterrent oversight and supporting resolutions. *Algerian Journal of Legal, Economic and Political Sciences*, Vol (50), N° (3), 113.

at least one-seventh (1/7) of the total number of deputies in the People's National Assembly, a quorum specified in the second paragraph of Article 161, which states: "This motion shall not be accepted unless it is signed by at least one-seventh (1/7) of the deputies."

This same quorum is reiterated in Article 59 of Organic Law 16-12. Once the required legal number of signatures is obtained, the process of submitting, publishing, and distributing the motion of censure follows, as outlined in Article 60 of the Organic Law. A representative of the motion's sponsors handles the submission, after which the text of the motion is published in the Official Journal of Parliamentary Debates and voted upon. This ensures that it complies with the relevant legislative texts. The motion must also be posted and distributed to all deputies to inform them in preparation for the discussion and vote.

The motion of censure is then discussed before being put to a vote. The Algerian legislature has specifically designated the parties involved in the discussion, namely the government's representative (upon its request), a representative of the motion's sponsors, any deputy who wishes to speak against the motion, and any deputy who wishes to support the motion. The discussion is limited to these parties because they are directly concerned with the oversight relationship initiated by the motion. Other deputies' interventions may sway the outcome in favor of either the government or the motion's sponsors, making the discussion a crucial arena for determining the result and impact of the vote on this mechanism.¹⁵

It is important to note that a deputy is not allowed to sign more than one motion of censure, a requirement clarified in Article 59 of Organic Law No. 16-12, although it does not specify whether this applies to the entire legislative term or just within a single year.

The quorum required for the censure motion is relatively easy to meet if the government's statement fails to fulfill the promises and expectations outlined in its action plan.

15 Ben Hida, M. (2021). *Previous reference*, 129.

However, this percentage is higher compared to some other systems, such as in France, where the quorum required for a motion of censure is one-tenth (1/10) of the deputies.¹⁶

The constitutional founder set a deadline of three days before the vote, starting from the date of the motion's submission, according to Article 162, paragraph 2 of the 2020 constitutional amendment. This period is sufficient for the government and its supporters to conduct necessary communications within the parliamentary bloc to undermine the effectiveness of the motion of censure by persuading undecided deputies to support the government. It also facilitates consultation and coordination among deputies.

2.1.3. Procedures for Voting on a Motion of Censure

After the discussion of the general policy statement and its follow-up with a motion of censure, provided that the legal conditions are met, such as having it signed by at least one-seventh of the deputies in the People's National Assembly, the vote on the motion cannot commence until after three days from the date the proposal was submitted to the Office of the People's National Assembly.

The constitutional founder required a two-thirds majority vote from the deputies to approve the censure motion, as stipulated in Article 162: "The motion of censure is approved by a two-thirds majority of the deputies," corresponding to Article 62 of Organic Law 16-12.

It is worth noting here that the requirement for a two-thirds majority is notably high. Given the parliamentary majority supporting the government on the one hand and the opposition on the other, practical reality has shown that it is difficult to present a censure motion. Even if the opposition gathers the necessary signatures to submit the motion, it may struggle to secure the majority needed to pass it.

16 Hamli, M. (2014). *The dominance of the executive over the legislature in the Algerian constitutional system: A comparative study of the Egyptian and French constitutional systems*. New University House, Egypt, 129.

Therefore, by requiring this high threshold, the constitutional founder has reduced the likelihood of the People's National Assembly holding the government accountable, thereby supporting its stability.

Furthermore, the success of a censure motion largely depends on the type of majority present in the People's National Assembly. If the government enjoys a clear majority, the chances of a motion of censure succeeding are very slim.

Finally, if the People's National Assembly approves the censure motion, the government must submit its resignation to the President of the Republic. In this situation, the President may either accept the resignation or reject it and decide to dissolve the People's National Assembly, according to Article 151 of the constitutional amendment.

2.2. Vote of Confidence

To protect its political position from the consequences of a vote on a motion of censure, which could lead to the government's resignation or the dissolution of the People's National Assembly, the constitutional founder granted the Prime Minister or Head of Government the ability to resort to a measure that strengthens the government's position against the opposition. This is stipulated in Article 111, Paragraph 05, which states: "The Prime Minister or Head of Government, as the case may be, may request a vote of confidence from the People's National Assembly, and in the event of a lack of confidence, the Prime Minister or Head of Government shall submit the resignation of their government".

Following the discussion of the general policy statement, the Prime Minister can request a vote of confidence from the deputies of the People's National Assembly to confirm their support. If they vote in favor, it indicates continued support for the government; if they vote against, it indicates a withdrawal of confidence, leading to the resignation of the Prime Minister.

This mechanism serves as an alternative to a motion of censure, allowing the Prime Minister to gain the support of the deputies and avoid a motion of censure. If the government receives this support, it will continue implementing its action plan. If confidence is withdrawn, the Prime Minister submits their resignation to the President of the Republic, who can either accept it or reject it and dissolve the People's National Assembly, leading to early legislative elections.

Notably, the request for a vote of confidence serves as both a supervisory tool and a means of exerting pressure by the government against the parliament. If the People's National Assembly does not approve the request for a vote of confidence, the Prime Minister or Head of Government may be forced to resign. Conversely, the President of the Republic may counter this by dissolving the People's National Assembly instead of accepting the government's resignation. This could instill a sense of caution among deputies in deciding whether to reject the vote of confidence to preserve their positions in parliament.¹⁷

A simple majority passes the vote of confidence. If the vote of confidence is approved, it indicates that the People's National Assembly supports the government, promoting stability in executing the government's action plan.

A simple majority conducts the vote of confidence. If the vote passes, it signifies that the People's National Assembly supports the government and bolsters its stability in carrying out its action plan. However, if the assembly votes against granting confidence or withdraws it, the government is obliged to resign. In this case, the President of the Republic may intervene by dissolving the assembly instead of sacrificing the government.

Furthermore, the government may present a statement of general policy before the second chamber, the Council of the Nation, according

17 Khadidja, K (2020). The constant and variable in parliamentary oversight mechanisms in light of the 2016 Algerian constitutional amendment and the 2011 Moroccan constitution. *Journal of Legal and Political Sciences, Vol (11), N°(1), 231.*

to Article 111, Paragraph 08, which states that “The Prime Minister or Head of Government, as the case may be, may present a statement of general policy to the Council of the Nation.” This is an optional measure and not mandatory for the government.

Naturally, resorting to this procedure is considered after the general policy statement has been passed without resulting in any legal effect that could impact the government’s legal standing. The situations in which the statement might be presented to the Council of the Nation can be summarized as follows:

- If the presentation of the general policy statement before the first chamber did not lead to a request for a vote of confidence or the filing of a motion of censure.
- If the government requested a vote of confidence and received the confidence of the People’s National Assembly.
- If the censure motion did not reach the required legal quorum of two-thirds of the deputies to be effective.

2.2.1. Interpellation

The constitutional founder, with the issuance of the 2020 Constitution, introduced another mechanism to hold the government politically accountable alongside the motion of censure. This mechanism is the interpellation, which was previously categorized among the procedures that did not entail political responsibility for the government (First Subsection). The conditions for activating this mechanism have also been outlined (Second Subsection).

2.2.2. Definition of Interpellation

Parliamentary interpellation is defined as an accusation directed by a member of the House of Representatives towards one of the ministers. It is also considered one of the most serious means of parliamentary oversight over government members, given the potential consequences it may entail, as we will see later.¹⁸

Through the 2020 constitutional amendment, the constitutional founder classified the effect of interpellation within the category of oversight mechanisms that can lead to the government’s accountability. According to Article 160 of the Constitution: “Members of Parliament may interpellate the government on any issue of national importance, as well as on the state of implementation of laws, and the response must be provided within a maximum period of thirty days”. This marks a significant shift from previous constitutions, where interpellation was merely a mechanism that did not entail political responsibility.¹⁹

2.2.3. Conditions for Activating Interpellation as a Mechanism for Political Accountability

An interpellation is a constitutional tool through which deputies can request clarifications on national issues or the implementation of laws. It carries implications of accusation and accountability and can be directed at the Prime Minister, the head of government, a specific minister, or the entire government. The process of interpellation begins with its written submission, signed by at least 30 deputies or 30 members of the Council of the Nation, and delivered to the Prime Minister through the President of the Council of the Nation or the President of the National People’s Assembly, depending on the case.

The submission of the interpellation must occur within 48 hours following its acceptance. The Bureau of the National People’s Assembly or the Bureau of the Council of the Nation, in consultation with the government, is granted the authority to set a session for the interpellation within a maximum of thirty days following the notification of the interpellation. The interpellation can also be withdrawn by its sponsors before it is presented during the session to hear the government’s defenses, with the President

18 Khalfa, N. & Louhani, H. (2018). Parliamentary oversight of government actions under the 2016 constitutional amendment. *Journal of Academic Researcher*,

Vol (12), 72.
19 Oussif, S. (2016). The Algerian parliament under the Constitution of 28-11-1996, amended and supplemented. *Doctoral thesis*, University of Algiers, 363.

of the relevant chamber notifying the government of the withdrawal.

After the session for hearing the government's defenses is set, the session may conclude with a vote of thanks and support for the government. Alternatively, it may end with either a lack of response to the interpellation or dissatisfaction with the response, which could result in a vote of no confidence, also known as a motion of censure, thus establishing the political accountability of the government. If the motion is approved by a seventh of the members of the National People's Assembly and meets its legal quorum, it could lead to the resignation of the government or the intervention of the President of the Republic to dissolve the National People's Assembly.

Thus, the acts that trigger the mechanism of the motion of censure, according to the 2020 constitutional amendment, include the general policy statement, addressing national issues, and the state of law implementation.

CONCLUSION

Through issuing the 2020 Constitution, the Algerian legislator sought to expand the scope of political accountability by referencing both the motion of censure and interpellation. The constitutional founder had previously only tied political responsibility to filing a motion of censure, excluding interpellation, which was classified among mechanisms not tied to government responsibility alongside oral and written questions and investigative committees.

Accordingly, the implementation of both the motion of censure and interpellation, according to the conditions set out in the Constitution, could have significant effects, such as the dissolution of major constitutional institutions. After the vote on the motion of censure and interpellation, the Prime Minister or head of government must submit their resignation to the President of the Republic, who then has the option to either accept the resignation or take another countermeasure to protect and preserve

the government, potentially by dissolving the National People's Assembly.

From the above, the following conclusions can be drawn:

- The 2020 constitutional amendment broadened the mechanisms for establishing government political responsibility by including interpellation.
- Political responsibility for government members is now determined more frequently than once a year through the activation of the motion of censure.

The key recommendations are:

- The need to reduce the quorum required for approving a motion of censure from the current one-seventh, which is a high threshold for parliamentary members. By requiring this proportion, the constitutional founder has diminished the National People's Assembly's ability to hold the government accountable, thus supporting its stability.

In conclusion, the constitutional founder succeeded in enhancing the parliamentary oversight role over government activities by expanding the range of mechanisms for political responsibility. However, these mechanisms are surrounded by conditions and voting thresholds that could be seen as restrictive or obstructive to their practical implementation.

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2. Law N° 16-01 dated 26 Jumada al-Awwal 1437, corresponding to March 6, 2016, containing the constitutional amendment. *Official Gazette of the Algerian Republic*, No. 14, issued on March 7, 2016.
3. Presidential Decree N° 20-422 dated 15 Jumada al-Awwal 1442, corresponding to December 30, 2020, concerning the issuance of the constitutional amendment approved in the November 1, 2020 referendum. *Official Gazette*, No. 82.
4. Presidential Decree N° 96-438, dated December 7, 1996, containing the Algerian Constitution. *Official Gazette of the Algerian Republic*, N° 76.

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IMPLICATIONS OF DIGITALIZATION AND AI IN THE JUSTICE SYSTEM: A GLANCE AT THE SOCIO- LEGAL ANGLE

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ABSTRACT

This research paper critically explores the digital transformation of justice systems, applying the theoretical frameworks of “Law and Society” and “Legal Realism” to analyze the socio-legal implications of this shift. As digital technologies increasingly permeate the judicial landscape, they bring opportunities and challenges. The “Law and Society” theory, which views law as a social phenomenon shaped by cultural, economic, and political factors, is crucial for understanding how digital tools can redefine accessibility and inclusivity within the legal system. Conversely, “Legal Realism” focuses on the practical outcomes of legal processes, emphasizing the importance of assessing the real-world effectiveness of these digital tools. This paper discusses the potential benefits and significant challenges posed by digital justice systems, such as disparities in technological adoption and the risk of exacerbating existing inequalities. This study highlights the operational efficiencies gained and the barriers encountered by examining digital initiatives across various jurisdictions. It provides a nuanced view of how digitalization can bridge and widen legal access gaps, emphasizing the need for a balanced approach that considers both technological advancements and their socio-legal impacts. This analysis aims to contribute to the discourse on modernizing justice systems in a way that is equitable, effective, and reflective of contemporary societal needs.

KEYWORDS: Justice, Digital transformation, Artificial intelligence, Socio-legal impact, Realism, Law and society

INTRODUCTION

In the midst of a rapidly evolving global landscape, the relentless march of technology stands as a beacon of both transformation and challenge.¹ Worldwide judicial systems are adopting digital technology to make civil and commercial legal processes more effective. Evidence shows that these digital tools increase efficiency, transparency, and access to justice.² The success of digital technology in improving judicial systems depends on its strategic use. When used correctly, it can strengthen the rule of law, protect human rights, and make justice systems more efficient.³ Technology can both support and undermine justice and human rights. It's crucial to understand its benefits and risks to ensure it promotes justice, human rights, and the rule of law. Despite global efforts to digitize judicial systems, challenges in technology, law, culture, and training often slow down progress.⁴ In 2020, the pandemic caused many courts to close, disrupting judicial systems. This led to a quick and significant turn to technology to keep justice services running. The crisis sped up the digital upgrade of the justice sector, with governments implementing online applications, digital procedures, and vir-

tual courts. This rapid change renewed calls for global modernization and digitization of justice services.⁵ The pandemic highlighted the lack of technology in judicial systems around the world. However, some systems adapted well, depending on their readiness for digital change. In contrast, poorer countries, especially in Africa, suffered more due to their lack of technology, poor communication, and limited internet access.⁶ As a result, the justice sector in some countries came to a complete halt.⁷ Talking about digitizing the justice sector is pointless without first setting up the needed infrastructure, which is key to digital transformation. Recognizing the need to digitize, especially for handling court files, documents, filing lawsuits, and paying fees, is essential for making progress.⁸ The main challenge for the justice sector is achieving smooth cooperation between different judicial bodies within the same area. This goal can't be reached without using integrated e-government services.⁹ The use of AI (artificial intelligence) in legal processes has significantly improved the speed and accuracy of legal services.¹⁰ Law firms and legal offices now widely

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6 Drabo, F. (2021). *The Digitization of Court Processes in African Regional and Subregional Judicial Institutions*. (Doctoral dissertation, Walden University). p. 21.

7 Arewa, O. B. (2021). *Disrupting Africa: Technology, Law, and Development*. Cambridge University Press. pp. 16-28.

8 European Commission. (2018). The 2018 EU Justice Scoreboard. Publications Office of the European Union <<https://data.europa.eu/doi/10.2838/72153>> (Last access: February 29, 2024).

9 Zhurkina, O., Filippova, E., & Bochkareva, T. (2021, March). Digitalization of legal proceedings: Global trends. In *1st International Scientific Conference "Legal Regulation of the Digital Economy and Digital Relations: Problems and Prospects of Development"* (LARDER 2020), pp. 119-124. Atlantis Press <<https://doi.org/10.2991/aebmr-k.210318-018>>.

10 Pirmatov, O. (2021). The Role of Artificial Intelligence in the Digitalization of Civil Cases. *Jurisprudence* <<https://doi.org/10.51788/tsul.jurisprudence.1.5/>>

use AI tools, marking a significant trend. However, using these smart tools raises complex issues, including concerns about privacy, bias, accuracy, and ethics.¹¹ AI's use in criminal cases shows it can quickly process vast amounts of data, making decision-making smoother. This not only makes the legal system more efficient but also cuts down on costs, greatly advancing the move towards automating legal decisions digitally.¹² AI and machine learning are greatly improving legal research, making it faster and more accurate. This helps lawyers provide better, quicker services. The shift towards AI in law is changing the field, highlighting the need for lawyers, both new and experienced, to learn about AI tools.¹³ Despite the significant attention that digital transformation and artificial intelligence (AI) have received in the context of the justice sector, existing literature predominantly focuses on isolated aspects of this phenomenon.¹⁴ Studies have extensively explored the technological advancements in legal proceedings and the potential of AI to disrupt traditional legal practices.¹⁵ However, there remains

a conspicuous gap in comprehensive analyses that bridge the dual impact of digital transformation and AI integration, especially in the wake of the global pandemic which has acted as a catalyst for rapid technological adoption.

This research paper critically examines the digital transformation of justice systems through the dual theoretical lenses of “Law and Society” and “Legal Realism”. These theories are instrumental in dissecting the interactions between law, technology, and societal needs, offering a nuanced perspective on the implications of digital tools within legal contexts.

The “Law and Society” theory posits that law is a social phenomenon shaped by various cultural, economic, and political factors. This perspective is crucial for understanding how digital technologies can redefine the accessibility and inclusivity of the legal system, making it imperative to consider the societal contexts in which these technologies are deployed. On the other hand, “Legal Realism” argues that the law is what the law does in practice, emphasizing the real-world outcomes of legal processes. This theory highlights the need to evaluate the practical implications of digital tools in justice delivery, focusing on their effectiveness in actual legal settings rather than theoretical ideals.

These theoretical frameworks are chosen because they allow for a comprehensive analysis of both the potential benefits and the complex challenges digital justice systems pose. They help unpack the dynamic relationship between evolving technologies and established legal practices and how this relationship impacts legal systems' structure and the societal outcomes they produce.

The paper progresses by applying these theories in a detailed examination of digital initiatives across various jurisdictions. It assesses the operational efficiencies gained, the barriers encountered, and the disparities in tech-

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nological adoption across different socio-economic landscapes. Through a critical analysis, this study also explores how digital justice can bridge and exacerbate legal access gaps, underscoring the dual edge of technological integration in legal systems.

In sum, this introduction sets the stage for a deep dive into the transformative role of digitalization in justice systems, guided by robust socio-legal theories illuminating the complexities and imperatives of adapting to a digital legal era. By integrating these theories into our analysis, the paper aims to provide a balanced view that not only celebrates technological advancements but also critically addresses the socio-legal implications accompanying the digital transformation of justice.

1. THE IMPERATIVE ROLE OF DIGITALIZING JUSTICE FOR MODERN LEGAL SYSTEMS

The digital transformation of justice systems is not merely a technological upgrade but a profound socio-legal evolution that intersects significantly with the “Law and Society” and “Legal Realism” theories.¹⁶ These frameworks emphasize the dynamic interaction between law, technology, and society, advocating for a legal system that reflects societal needs and realities.

1.1 Law and Society Perspective

From the “Law and Society” perspective, digitalizing justice serves more than operational efficiency; it redefines the accessibility and inclusivity of the legal system.¹⁷ By integrating digital tools strategically, there is a

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potential to enhance the rule of law and safeguard human rights comprehensively. For instance, online submissions of legal requests and court filings, as well as the digitization of evidence and case records, promote transparency and accountability.¹⁸ These measures ensure that the justice system is not only efficient but also equitable, reducing procedural delays that often disproportionately affect marginalized communities. The global shift toward digital platforms during the COVID-19 pandemic underscored the critical role of technology in maintaining the continuity of judicial processes, highlighting a shift from traditional in-person engagements to more inclusive digital interactions that could potentially democratize access to justice.¹⁹

1.2 Legal Realism Application

Incorporating “Legal Realism,” this section examines the practical implications of digital tools in judicial processes. Legal Realists argue that the law is what the law does hence evaluating the effectiveness of digital transformation involves looking at its real-world impact on justice delivery.²⁰ For example, the introduction of video conferencing and electronic filing in various jurisdictions during the pandemic, not only continued but arguably improved the functioning of courts by making them more accessible to the public and enhancing participation rates.²¹ The adoption of these technol-

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ogies, however, presents a dual-edged sword; while it benefits those with legal representation, it may increase the complexity of legal proceedings for pro se litigants.²² Thus, while digital tools have the potential to streamline processes and reduce case backlogs, they also necessitate critical considerations regarding equal access and the potential for digital divides within the legal system.²³

1.3 Critical Analysis of Socio-Legal Implications

Despite the advancements and positive outcomes observed in Denmark, Portugal, Slovenia, Belgium, Greece, and certain U.S. states, a critical socio-legal analysis reveals varying levels of readiness and adaptation across global jurisdictions.²⁴ This disparity often reflects underlying socio-economic factors and the availability of technological infrastructure, which can either facilitate or hinder the equitable application of justice.²⁵ Therefore, while digital transformation offers significant benefits, it also requires a nuanced understanding of its implications on different populations, especially in regions with limited internet connectivity.²⁶

1.4 Future Directions and Theoretical Integration

Looking forward, the integration of digital tools into justice systems should be guided by socio-legal theories that advocate for a more humane and socially responsive legal system.²⁷ This involves not only deploying technology to expedite procedures but also ensuring that such technologies are accessible and beneficial to all segments of society. The United Nations Development Programme (UNDP) has recognized the potential of technology to safeguard rights and prevent violations, signaling an international move towards embracing digital justice as a strategy to enhance legal systems worldwide.²⁸

2. THE ROLE OF LEGISLATIVE SUPPORT IN FACILITATING THE DIGITALIZATION OF JUSTICE

2.1 Integration of Sociological Jurisprudence

2.1.1 Legislative Frameworks and Social Dynamics

The advancement of justice systems through digital transformation requires an inclusive approach in legislative policymaking that actively incorporates considerations for privacy, cybersecurity, and access to justice for all.²⁹ This necessitates an understanding of how digital tools intersect with various social

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characteristics, including class, race, and gender.³⁰ For instance, the UNCITRAL's Model Law on Electronic Commerce establishes a legal foundation but must also ensure these systems are accessible to those with limited digital literacy, thereby preventing new forms of social and digital divide.³¹

2.1.2 Addressing Global Disparities

Legislation supporting digital justice must not only standardize procedures but also tailor these to the specific socio-economic contexts of different regions.³² For example, the disparities in digital infrastructure between countries in the European Union highlight the need for policies that not only promote digitalization but also bridge the digital divide.³³ The integration of digital tools should be accompanied by measures that ensure all members of society can benefit from them equally, without exacerbating existing inequalities.³⁴

2.2 Application of Legal Realism

2.2.1 'Law in Action' in Digital Justice

Legal Realism pushes us to examine the practical implementation of digital justice reforms.³⁵ It highlights the divergence between the theoretical goals of legislation and their real-world execution.³⁶ For instance, despite the existence of comprehensive frameworks like the Hague Conventions for cross-border judicial processes, the actual effectiveness of these laws in practice can be limited by local resistance to digital methods, particularly from legal professionals who prioritize traditional, face-to-face interactions.³⁷

2.2.2 Practical Barriers and Resistance

The slow pace of digital transformation in places like the European Union can be attributed to practical barriers, including significant costs and diverse levels of infrastructure readiness. Furthermore, resistance from legal professionals who are sceptical of replacing personal interactions with digital processes underscores the need for legislative bodies to not only pass laws but also manage change effectively within the legal community.³⁸

2.3 Detailed Analysis of Regional Efforts

2.3.1 Asia-Pacific Initiatives

In the Asia-Pacific region, the Asia-Pacific Economic Cooperation (APEC) has undertaken

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36 Dagan, H. (2012). Lawmaking for Legal Realists. *The Theory and Practice of Legislation*, 1, pp. 187-204 <<https://doi.org/10.5235/2050-8840.1.1.187>>

37 Khatri, B. (2016). The Effectiveness of the Hague Convention on Choice of Court Agreements in Making International Commercial Cross-border Litigation Easier – A Critical Analysis. *Victoria University of Wellington Legal Research Paper, Student/Alumni Paper*, (48).

38 Skabelina, L. (2022). Psychological Reasons for the Resistance of Attorneys to the Introduction of Digitalization. *Advocate's practice* <<https://doi.org/10.18572/1999-4826-2022-1-55-57>>

en initiatives to improve the legal landscape for electronic commerce and tackle issues like electronic authentication and data protection.³⁹ In a similar manner, the ASEAN Agreement, ratified by the Association of Southeast Asian Nations (ASEAN), establishes a legal framework aimed at improving electronic transactions and facilitating cross-border e-commerce. As per Article 7 of this agreement, every member state is required to broaden the adoption of electronic versions of trade administration documents and streamline the exchange of electronic documents utilizing information and communication technology. This is to be done in alignment with the stipulations outlined in the ASEAN Customs Agreement signed on March 30, 2012, in Phnom Penh, Cambodia, as well as other relevant international agreements.⁴⁰

2.3.2 African Union's Digital Legal Framework

Africa's focus on aligning legal frameworks with digital advancements reflects a forward-thinking approach but also presents challenges in ensuring these frameworks can keep pace with rapid technological changes. Policymakers must remain flexible and responsive to both local needs and global digital trends to prevent legal obsolescence.⁴¹

2.3.3 Variability in the GCC

The contrast between the UAE's progressive digital laws and Bahrain's more conservative stance highlights the variability in legislative adaptation within the GCC.⁴² This region shows

how cultural values and legal traditions significantly influence the acceptance and implementation of digital justice systems.

2.3.4 Ensuring Equitable Access

Ensuring that digital transformation in the justice sector is inclusive and equitable is a recurring theme across all regions.⁴³ Legislative efforts need to focus on creating frameworks that not only support technological advancements but also promote fairness, privacy, and access to justice for all, especially the underrepresented and disadvantaged groups.

3. HURDLES OF DIGITALIZATION IN THE JUSTICE SECTOR: A SOCIO-LEGAL PERSPECTIVE

Digital transformation within the justice sector heralds a potential paradigm shift in how justice is administered⁴⁴. However, this transformation is riddled with significant hurdles that go beyond the integration of new technologies, touching deeply on socio-legal realities.⁴⁵ Employing the "Law and Society" and "Legal Re-

39 APEC. (2020). *Regulations, Policies and Initiatives on E-Commerce and Digital Economy for APEC MSMEs' Participation in the Region*. (n.d.). APEC <<https://www.apec.org/Publications/2020/03/Regulations-Policies-and-Initiatives-on-E-Commerce-and-Digital-Economy>> (Last accessed: 29 August 2024).

40 ASEAN Agreement on Electronic Commerce. (2019). *Article 7*.

41 African Union. (2020). *The Digital Transformation Strategy for Africa (2020-2030)*. Addis Ababa: African Union <<https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>> (Last accessed January 20, 2024).

42 Ali, F., & Al-Junaid, H. (2019). Literature Review for

Videoconferencing in court "E-Justice-Kingdom of Bahrain". *2nd Smart Cities Symposium (SCS 2019)*, p. 8 <<https://doi.org/10.1049/cp.2019.0181>>; Federal Decree No. 10 of 2017. (2017). *Amending the Civil Procedures Law, issued by Federal Law Number 11 of 1992*.

43 Sari, E., Ghazali, M., Tedjasaputra, A., Kurniawan, Y., Chintakovid, T., Nuchitprasitchai, S., Zulaikha, E., Norowi, N., & Makany, T. (2022). SEACHI 2022 Symposium: Bringing Equality, Justice, and Access to HCI and UX Agenda in Southeast Asia Region. *CHI Conference on Human Factors in Computing Systems Extended Abstracts*. pp. 1-5 <<https://doi.org/10.1145/3491101.3504031>>

44 Maslennikova, L. N. (2019). Transformation of Pre-trial Proceedings in the Initial Stage of Criminal Proceedings, Ensuring Access to Justice in the Industry 4.0 Era. *Actual problems of Russian law*, (6), pp. 137-146 <<https://doi.org/10.17803/1994-1471.2019.103.6.137-146>>

45 Kirsienė, J., Amilevicius, D., & Stankevičiūtė, D. (2022). Digital Transformation of Legal Services and Access to Justice: Challenges and Possibilities. *Baltic Journal of Law & Politics*, 15, pp. 141-172 <<https://doi.org/10.2478/bjlp-2022-0007>>.

alism” perspectives, this analysis seeks to critically examine these challenges, underlining the complex interplay between technological advances and entrenched legal and societal structures.⁴⁶

3.1 Technological Infrastructure Weakness

1. Law and Society Analysis:

The provision of adequate technological infrastructure, crucial for digital transformation, mirrors underlying socio-economic inequalities.⁴⁷ In the United States, discrepancies in access to high-speed Internet and advanced computing technology often align with socio-economic status, disproportionately affecting those with disabilities or limited English proficiency.⁴⁸ This reflects a broader issue of digital equity that must be addressed within the framework of societal readiness for technological adoption.

In developing regions, such as Africa and Asia, disparities are more pronounced.⁴⁹ For instance, Kenya’s internet penetration rate stands at 87.2%,⁵⁰ starkly contrasting with South Su-

dan’s 7%.⁵¹ Most countries in these regions have internet access rates below 50%,⁵² underscoring the urgent need for a socio-legal approach that considers economic and technological disparities in the digital transformation efforts.

2. Legal Realism Considerations:

The practical effects of inadequate technological infrastructure on justice delivery are significant. In conflict-affected areas like Sudan, not only do physical infrastructures suffer, but intentional disruptions to internet and communication services further impair judicial functions.⁵³ For example, the ongoing conflict in Sudan involving the Sudanese army and the Rapid Support Forces has highlighted the extreme weakness of the technological and communication infrastructure, rendering it incapable of offering alternative solutions in such dire circumstances.⁵⁴ In war-affected regions like Khartoum State and Darfur States, the courts have ceased to operate, resulting in a complete paralysis of the judicial system.⁵⁵ At certain times, internet and communication services were intentionally disrupted. For example, MTN, a telecommunications company, suspended its services for approximately 10 hours on April 16th.⁵⁶ Ad-

46 Bochkov, A. (2021).

47 Robinson, L., Schulz, J., Blank, G., Ragnedda, M., Ono, H., Hogan, B., Mesch, G., Cotten, S., Kretchmer, S., Hale, T., Yan, P., Wellman, B., Harper, M., Quan-Haase, A., Dunn, H., Casilli, A., Tubaro, P., Carveth, R., Chen, W., Wiest, J., Dodel, M., Stern, M., Ball, C., Huang, K., Khilnani, A., & Drabowicz, T. (2020). Digital inequalities 2.0: Legacy Inequalities in the Information Age. *First Monday*, 25(7) <<https://doi.org/10.5210/fm.v25i7.10842>>

48 Dobransky, K., & Hargittai, E. (2006). The Disability Divide in Internet Access and Use. *Information, Communication & Society*, 9, pp. 313-334 <<https://doi.org/10.1080/13691180600751298>>; Shi, L., Lebrun, L., & Tsai, J. (2009). The Influence of English Proficiency on Access to Care. *Ethnicity & Health*, 14, pp. 625-642 <<https://doi.org/10.1080/13557850903248639>>

49 Petrazzini, B., & Kibati, M. (1999). The Internet in Developing Countries. *Communications of the ACM*, 42, pp. 31-36 <<https://doi.org/10.1145/303849.303858>>

50 Mbata, P. A. (2022). *Effects of Internet Connectivity on Economic Growth in Kenya* (Doctoral dissertation, University of Nairobi).

51 Kemp, S. (2023). *Digital 2023: South Sudan*. Datareportal <<https://datareportal.com/reports/digital-2023-south-sudan>> (Last accessed: March 6, 2023).

52 Ismail, H. G. I. (2020). The Need to Re-examine the Route of Pre-emption Law in Sudan: A Critical Analysis. *Arab Law Quarterly*, 36(3), pp. 324-350 <<https://doi.org/10.1163/15730255-BJA10063>>

53 Siddig, A., & Ellison, A. (2022). How is the Coup Impacting Science and Scientists in Sudan?. *AfricArXiv Preprints* <<https://doi.org/10.31730/osf.io/u2p7h>>

54 Nashwan, A. J., Osman, S. H., & Mohamedahmed, L. A. (2023). Violence in Sudan: A Looming Public Health Disaster. *Cureus*, 15(6) <<https://doi.org/10.7759/cureus.40343>>

55 United Nations Human Rights Council. (2024). Annual report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General <<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session55/advance-versions/a-hrc-55-29-auv.docx>> (Last accessed: 15 March, 2023).

56 Tomé, J. (2023, May 2). Effects of the Conflict in Sudan on Internet Patterns. Cloudflare Blog <<https://blog.cloudflare.com/sudan-armed-conflict-impact-on-the->

ditionally, Sudanese telecom company Sudatel halted operations starting Sunday, April 23rd.⁵⁷ However, according to statistics from World Internet Stats, the global internet access rate surpasses 67%.⁵⁸

3.2 Resistance to Change

1. Cultural and Organizational Barriers:

Resistance to digital transformation in the justice sector often stems from deep-rooted socio-legal issues such as fears of job displacement, entrenched traditionalism in judicial practices, and a general lack of technological literacy among judicial personnel.⁵⁹ This resistance reflects broader cultural and organizational challenges that need strategic intervention.⁶⁰

For instance, despite technological advancements, Spain and Italy have experienced significant resistance to digitalization in the justice sector.⁶¹ This resistance is indicative of broader

organizational and cultural misalignments that can impede effective digital transformation.⁶²

2. Strategic Solutions:

Addressing these challenges extends beyond technological implementation to include comprehensive socio-legal strategies that embrace training, stakeholder engagement, and policy reform.⁶³ Cultivating a supportive culture for technological adaptation requires changing mindsets as much as changing laws, ensuring that technological and legal reforms align with the societal contexts and expectations of the judicial community.⁶⁴

Integrating “Law and Society” and “Legal Realism” into the analysis of digital transformation in the justice sector provides a richer understanding of the challenges faced. This approach highlights the necessity of viewing these transformations through a socio-legal lens, ensuring that technological upgrades in the justice sector are not only about efficiency but are also socially equitable and legally grounded.

4. DIGITALIZING JUSTICE IN THE ERA OF AI

The integration of artificial intelligence (AI) into the justice sector marks a profound shift in the landscape of legal services.⁶⁵ Initially met

[internet-since-april-15-2023>](#) (Last accessed: November 29, 2023).

57 Accessnow. (2023, April 25). *Sudan: Millions Surviving Armed Conflict Need Internet, Access to Information* <<https://www.accessnow.org/press-release/keepi-ton-armed-conflict-sudan/>> (Last accessed December 12, 2023).

58 Miniwatts Marketing Group. (2023). *Internet world stats: Usage and Population Statistics*. World Internet Stats. <<http://www.internetworldstats.com/stats.htm>> (Last accessed: March 4, 2024). Penetration Rates are based on a world population of 7,932,791,734 and 5,385,789,406 estimated internet users in June 30, 2022

59 Chundur, S. (2020). Digital justice: Reflections on a Community-based Research Project. *The Journal of Community Informatics*, 16, pp. 118-140 <<https://doi.org/10.15353/joci.v16i0.3485>>

60 Latta, G. F. (2015). Modeling the Cultural Dynamics of Resistance and Facilitation: Interaction Effects in the OC3 Model of Organizational Change. *Journal of Organizational Change Management*, 28(6), pp. 1013-1037 <<https://doi.org/10.1108/JOCM-07-2013-0123>>

61 Marcolin, A., & Gasparri, S. (2024). Digitalization and Employment Relations in the Retail Sector. Examining the Role of Trade Unions in Italy and Spain. *European Journal of Industrial Relations*, 30(2), pp. 151-178 <<https://doi.org/10.1177/09596801231213809>>

62 Moreno-Monsalve, N. A., Delgado-Ortiz, S. M., & García, J. V. V. (2021). Incidence of Organizational Culture in Digital Transformation Projects. In *Handbook of Research on Management Techniques and Sustainability Strategies for Handling Disruptive Situations in Corporate Settings*, pp. 30-48. IGI Global <<https://doi.org/10.4018/978-1-7998-8185-8.ch002>>

63 Byrne, M. (2019). Increasing the Impact of Behavior Change Intervention Research: Is There a Role for Stakeholder Engagement? *Health Psychology*, 38(4), pp. 290–296 <<https://doi.org/10.1037/hea0000723>>; O’Riordan, L., & Fairbrass, J. (2014). Managing CSR Stakeholder Engagement: A New Conceptual Framework. *Journal of business ethics*, 125, pp. 121-145 <<https://doi.org/10.1007/s10551-013-1913-x>>

64 Zhu, C. (2015). Organisational Culture and Technology-enhanced Innovation in Higher Education. *Technology, Pedagogy and Education*, 24(1), pp. 65-79 <<https://doi.org/10.1080/1475939X.2013.822414>>

65 Alarie, B., Niblett, A., & Yoon, A. H. (2018). How Artificial Intelligence will Affect the Practice of Law. *Uni-*

with scepticism, the role of AI in the justice sector has evolved from a theoretical concept to a practical reality, challenging traditional perceptions of the legal profession's immunity to technological disruption.⁶⁶ This transformation invites a thorough examination through the lenses of "Law and Society" and "Legal Realism" to understand the broader implications of AI on legal systems and societal norms.⁶⁷

4.1 AI's Role in Legal Decision-Making

4.1.1 Law and Society Perspective

AI technologies, such as rule-based systems and machine learning, are not just tools for efficiency but also agents of change in the legal landscape.⁶⁸ These technologies interact with legal norms and practices in ways that can redefine the access to and delivery of justice.⁶⁹ For instance, AI's ability to analyze large volumes of legal texts and precedents can democratize legal knowledge, potentially leveling the playing field for those who cannot afford traditional legal services.⁷⁰ However, this also raises ques-

tions about the standardization of legal interpretations and the potential for a 'one-size-fits-all' approach in complex legal scenarios.⁷¹

4.1.2 Legal Realism Considerations

From the standpoint of Legal Realism, the practical impact of AI on the justice sector is profound.⁷² While AI can assist in decision-making processes, its application must be scrutinized for accuracy, fairness, and transparency.⁷³ The belief that AI could replace human judges is controversial and merits critical evaluation.⁷⁴ The technology's current usage in anti-money laundering and routine legal analyses highlights its utility but also underscores the need for oversight to prevent biases embedded in AI algorithms from perpetuating inequalities in judicial outcomes.⁷⁵

4.2 Challenges and Ethical Considerations

4.2.1 AI and Ethical Dilemmas

The deployment of AI in legal contexts introduces complex ethical dilemmas, particular-

iversity of Toronto Law Journal, 68(supplement 1), pp. 106-124 <<https://doi.org/10.2139/SSRN.3066816>>

66 Farayola, M. M., Tal, I., Malika, B., Saber, T., & Connolly, R. (2023, August). Fairness of AI in Predicting the Risk of Recidivism: Review and Phase Mapping of AI Fairness Techniques. In *Proceedings of the 18th International Conference on Availability, Reliability and Security*, pp. 1-10 <<https://doi.org/10.1145/3600160.3605033>>

67 Surden, H. (2020). Ethics of AI in law: Basic questions. In D. Dubber, F. Pasquale, & S. Das (Eds.), *The Oxford handbook of Ethics of AI*. pp. 719-736. Oxford University Press <<https://doi.org/10.1093/oxford-hb/9780190067397.013.46>>

68 Laukyte, M. (2019, June). AI as a Legal Person. In *Proceedings of the Seventeenth International Conference on Artificial Intelligence and Law*, pp. 209-213 <<https://doi.org/10.1145/3322640.3326701>>

69 Papyshva, E. S. (2022). Artificial Intelligence and Criminal Justice Principles: Compatibility Issues. *Gaps in Russian Legislation*, 15(5), pp. 430-436 <<https://doi.org/10.33693/2072-3164-2022-15-5-430-436>>

70 Mentzingen, H., António, N., & Bacao, F. (2023). Automation of Legal Precedents Retrieval: Findings from a Literature Review. *International Journal of*

Intelligent Systems, 2023(1), 6660983 <<https://doi.org/10.1155/2023/6660983>>

71 Abu-Elyounes, D. (2020). Contextual Fairness: A Legal and Policy Analysis of Algorithmic Fairness. *Journal of Law, Technology and Policy, Forthcoming*, p. 1 <<https://doi.org/10.2139/ssrn.3478296>>

72 Eliot, L. (2020). An Impact Model of AI on the Principles of Justice: Encompassing the Autonomous Levels of AI Legal Reasoning. *arXiv preprint arXiv:2008.12615*.

73 Angerschmid, A., Zhou, J., Theuermann, K., Chen, F., & Holzinger, A. (2022). Fairness and Explanation in AI-informed Decision Making. *Machine Learning and Knowledge Extraction*, 4(2), pp. 556-579 <<https://doi.org/10.3390/make4020026>>

74 Ulenaers, J. (2020). The Impact of Artificial Intelligence on the Right to a Fair Trial: Towards a Robot Judge? *Asian Journal of Law and Economics*, 11(2) <<https://doi.org/10.1515/ajle-2020-0008>>

75 Day, M. Y. (2021, November). Artificial Intelligence for Knowledge Graphs of Cryptocurrency Anti-money Laundering in Fintech. In *Proceedings of the 2021 IEEE/ACM International Conference on Advances in Social Networks Analysis and Mining*, pp. 439-446 <<https://doi.org/10.1145/3487351.3488415>>

ly concerning privacy, data protection, and the risk of algorithmic bias.⁷⁶ These issues necessitate a socio-legal framework that considers the implications of AI beyond mere efficiency, focusing on ethical governance and the protection of fundamental rights.⁷⁷

4.2.2 Socio-Legal Impact of AI

As AI technologies become more embedded in legal practices, their influence extends to shaping the very structure of legal reasoning and outcomes.⁷⁸ This shift requires a critical analysis of how AI impacts legal equity and justice delivery, especially in cases involving vulnerable populations who may be disproportionately affected by automated decision-making processes.⁷⁹

The advent of AI in the justice sector represents a significant milestone in the digitization of legal services, transcending traditional assistance tools to initiate a broader transformation across various legal domains.⁸⁰ By adopting a socio-legal perspective, this analysis highlights the need to balance innovation with accountability, ensuring that AI's integration into the justice system enhances rather than undermines the principles of fairness and justice.⁸¹ The critical examination through

“Law and Society” and “Legal Realism” offers valuable insights into the evolving relationship between technology and law, emphasizing the importance of developing robust legal frameworks that govern the use of AI in ways that are both ethical and effective.⁸²

5. THE DAWN OF AI IN LAW FIRMS

The integration of artificial intelligence (AI) into law firms represents a significant stride in the ongoing digitization of the justice sector.⁸³ This evolution is particularly pronounced within the distinct regulatory and operational environments of legal entities, which differ markedly from those of the judiciary.⁸⁴ Law firms, central to the administration of justice and the protection of individual rights, have now begun to harness AI's potential to transform their practices.⁸⁵

5.1 Enhancement of Legal Practices through AI

5.1.1 Operational Efficiency

AI technologies have been integrated into law firms with the primary aim of enhancing productivity and streamlining decision-making processes.⁸⁶ Tools such as AI-powered docu-

76 Wang, T., Zhao, J., Yu, H., Liu, J., Yang, X., Ren, X., & Shi, S. (2019, November). Privacy-preserving Crowd-guided AI Decision-making in Ethical Dilemmas. In *Proceedings of the 28th ACM International Conference on Information and Knowledge Management*, pp. 1311-1320 <<https://doi.org/10.1145/3357384.3357954>>

77 Aizenberg, E., & Van Den Hoven, J. (2020). Designing for Human Rights in AI. *Big Data & Society*, 7(2), 2053951720949566 <<https://doi.org/10.1177/2053951720949566>>

78 Eliot, L. (2020).

79 Wang, J. X., Somani, S., Chen, J. H., Murray, S., & Sarkar, U. (2021). Health Equity in Artificial Intelligence and Primary Care Research: Protocol for a Scoping Review. *JMIR research protocols*, 10(9), e27799 <<https://doi.org/10.2196/27799>>.

80 Kirsienė, J., Amilevičius, D., & Stankevičiūtė, D. (2022), pp. 141-172.

81 Putra, P. S., Fernando, Z. J., Nunna, B. P., & Anggrawan, R. (2023). Judicial Transformation: Integration of AI Judges in Innovating Indonesia's Criminal Justice System. *Kosmik Hukum*, 23(3), pp. 233-247. <<https://doi.org/10.30595/kosmikhukum.v23i3.18711>>

82 Acharya, S. (2019). Sociological Jurisprudence: A Reference of Functional Approach of Law. Available at SSRN 3442521. <<https://doi.org/10.2139/ssrn.3442521>>

83 Armour, J., Parnham, R., & Sako, M. (2021). Unlocking the potential of AI for English law. *International Journal of the Legal Profession*, 28, pp. 65 – 83. <<https://doi.org/10.1080/09695958.2020.1857765>>

84 Skoler, D. L. (1982). The administrative law judiciary: Change, challenge, and choices. *The Annals of the American Academy of Political and Social Science*, 462(1), pp. 34-47. <<https://doi.org/10.1177/0002716282462001004>>

85 Armour, J., & Sako, M. (2020). AI-enabled business models in legal services: from traditional law firms to next-generation law companies?. *Journal of Professions and Organization*, 7(1), pp. 27-46. <<https://doi.org/10.1093/jpo/joaa001>>

86 *Ibid* 85, pp. 27-46.

ment analysis and contract review systems enable lawyers to process large volumes of information with greater accuracy and less effort.⁸⁷ This efficiency gain not only boosts firm competitiveness but also allows attorneys to focus more on strategic aspects of their cases rather than mundane tasks.⁸⁸

5.1.2 Economic Impact

The adoption of AI in law firms also indirectly enhances access to justice.⁸⁹ By automating routine tasks, AI tools reduce the time and resources required to handle cases.⁹⁰ This efficiency can lead to lower legal fees, making legal services more accessible to a broader segment of the population and potentially increasing the firm's client base.⁹¹

5.2 Socio-Legal Implications of AI in Law Firms

5.2.1 Law and Society Perspective

From a "Law and Society" viewpoint, the adoption of AI in law firms raises significant questions about the balance between technological advancement and ethical legal prac-

tice.⁹² While AI can democratize access to legal resources, it also necessitates careful consideration of how these technologies are implemented to ensure they do not compromise the quality of legal representation or exacerbate existing disparities in legal access.⁹³

5.2.2 Legal Realism Considerations

The "Legal Realism" framework prompts a critical examination of how AI tools operate in real-world scenarios.⁹⁴ For example, while AI can efficiently analyze legal precedents and documents, there is a need for oversight to ensure that the outcomes of such analyses are fair and unbiased.⁹⁵ The practical application of AI must be continuously assessed to avoid perpetuating or creating biases that could influence judicial outcomes.⁹⁶

5.3 Challenges and Ethical Considerations

5.3.1 Ethical and Regulatory Challenges

The integration of AI into legal practice is not without its challenges.⁹⁷ Ethical concerns such as data privacy, security, and the poten-

87 Yaqin, L., Gang, C., Runkai, Z., & Mengting, S. (2020, August). Design of Contract Review System in Enterprise Legal Department Based on Natural Language Processing. In *2020 15th International Conference on Computer Science & Education (ICCSE)* pp. 331-335. IEEE <<https://doi.org/10.1109/ICCSE49874.2020.9201618>>

88 Wang, W. (2000). Evaluating the Technical Efficiency of Large US Law Firms. *Applied Economics*, 32(6), pp. 689-695 <<https://doi.org/10.1080/000368400322309>>

89 Linna, D. W. (2021). Evaluating Artificial Intelligence for Legal Services: Can "Soft Law" Lead to Enforceable Standards for Effectiveness? *IEEE Technology and Society Magazine*, 40(4), pp. 37-51 <<https://doi.org/10.1109/MTS.2021.3123732>>

90 Dabass, J., & Dabass, B. S. (2018). Scope of Artificial Intelligence in Law <<https://doi.org/10.20944/PREPRINTS201806.0474.V1>>

91 Soukupová, J. (2021). AI-based Legal Technology: A Critical Assessment of the Current use of Artificial Intelligence in Legal Practice. *Masaryk University Journal of Law and Technology*, 15(2), pp. 279-300.

92 Surden, H. (2020). pp. 719-736.

93 Simshaw, D. (2018). Ethical Issues in Robo-lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of law. *Hastings LJ*, 70, p. 173.

94 Miles, T. J., & Sunstein, C. R. (2008). The New Legal Realism. *U. Chi. L. Rev.*, 75, p. 831.

95 Wachter, S., Mittelstadt, B., & Russell, C. (2021). Why Fairness Cannot be Automated: Bridging the Gap between EU Non-discrimination Law and AI. *Computer Law & Security Review*, 41, 105567 <<https://doi.org/10.2139/ssrn.3547922>>

96 Landers, R. N., & Behrend, T. S. (2023). Auditing the AI auditors: A Framework for Evaluating Fairness and Bias in High Stakes AI Predictive Models. *American Psychologist*, 78(1), p. 36 <<https://doi.org/10.1037/amp0000972>>

97 Ebers, M. (2019). Regulating AI and Robotics: Ethical and Legal Challenges. In M. Ebers & S. N. Navarro (Eds.), *Algorithms and Law*. Cambridge University Press. (Forthcoming) <<https://doi.org/10.2139/ssrn.3392379>>

tial for algorithmic bias must be rigorously addressed.⁹⁸ Law firms must navigate these issues carefully, establishing clear guidelines and protocols to ensure that AI tools are used responsibly and transparently.⁹⁹

5.3.2 Future Outlook and Adaptation

As AI technology evolves, so too must the regulatory and ethical frameworks that govern its use in legal practices.¹⁰⁰ Continuous education and adaptation are essential for law firms to keep pace with technological advancements while adhering to high ethical and professional standards.¹⁰¹

The dawn of AI in law firms marks a transformative era in the legal sector, characterized by significant gains in efficiency and potential improvements in the accessibility of justice. However, this transformation also brings with it complex socio-legal challenges that must be addressed to fully realize the benefits of AI while mitigating its risks. By embracing both the potential and the pitfalls of artificial intelligence, law firms can lead the way in shaping a more efficient and equitable legal landscape.

6. CURRENT PRODUCTS OF AI TOOLS IN THE LAW FIELD

Recent studies have categorized the applications of artificial intelligence (AI) in the legal field into main groups, emphasizing their transformative impact on legal practices.¹⁰² These categories reflect the diverse capabilities of AI technologies to enhance the efficiency and accuracy of legal operations.

6.1 First Category: Due Diligence Tasks

Kira Systems: This tool is renowned for aiding in due diligence by allowing lawyers to review contracts and conduct legal research more efficiently. Kira Systems helps prevent errors due to oversight or fatigue by extracting and analyzing case-related content.¹⁰³ For lawyers to achieve optimal results with Kira Systems, regular use and familiarity with the platform are essential, as it enhances their proficiency in navigating complex legal documents.¹⁰⁴

LEVERTON: Developed by the German Institute for Artificial Intelligence, LEVERTON has been utilized in real estate transactions for document management and lease contracts. In a notable application, LEVERTON collaborated with Colliers International in 2015 to extract critical data such as due rent, maintenance costs, and expiration dates from thousands of documents, organizing this information into a coherent spreadsheet. This application demonstrates AI's potential to streamline and improve the accuracy of managing extensive legal documents.

eBrevia: Employed for contract review and

98 Tat, E., & Rabbat, M. (2021). Ethical and Legal Challenges. In *Machine Learning in Cardiovascular Medicine*, pp. 395-410. Academic Press <<https://doi.org/10.1016/B978-0-12-820273-9.00017-8>>

99 Simshaw, D. (2018). Ethical Issues in Robo-lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law. *Hastings LJ*, 70, p. 173.

100 Lescrauwaet, L., Wagner, H., Yoon, C., & Shukla, S. (2022). Adaptive Legal Frameworks and Economic Dynamics in Emerging Technologies: Navigating the Intersection for Responsible Innovation. *Law and Economics*, 16(3), pp. 202-220 <<https://doi.org/10.35335/laweco.v16i3.61>>

101 Lucaj, L., Van Der Smagt, P., & Benbouzid, D. (2023, June). AI Regulation is (not) All You Need. In *Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency*, pp. 1267-1279 <<https://doi.org/10.1145/3593013.3594079>>

102 Dabass, J., & Dabass, B. S. (2018).

103 Linna Jr., D. W., & Muchman, W. J. (2020). Ethical Obligations to Protect Client Data when Building Artificial Intelligence Tools: Wigmore meets AI. *Prof. Law.*, 27, p. 27.

104 Faggella, D. (2021, September 7). *AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications*. Emerj. <<https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice/>> (Last accessed: April 21, 2023).

legal amendments, eBrevia aids lawyers in identifying potential gaps that could lead to legal complications in the future. This tool enhances the thoroughness of legal analyses, ensuring that all contractual obligations and potential legal issues are adequately addressed.

6.2 Second Category: Predictive Technology

Predictive Tools: These AI applications are crucial in anticipating future judicial decisions by analyzing specific data and information.¹⁰⁵ Such tools are instrumental in expediting litigation processes and increasing the likelihood of reaching settlements. By revealing likely outcomes early in the legal process, predictive tools can guide parties toward resolutions that avoid prolonged litigation, benefiting those at greater risk in a dispute.

6.3 Examples of Predictive AI Tools

ChatGPT, Bard, Lex Machina, and Casetext: These systems allow lawyers to analyze legal precedents, texts, and judicial patterns to forecast legal outcomes. Casetext, for example, enables lawyers to predict opposing counsels' arguments by identifying previously utilized legal opinions. This capability helps lawyers prepare more effective legal strategies and anticipate challenges in their cases.

Reliability and Risks: While these tools offer significant advantages, they also require careful management to avoid reliance on potentially biased or inaccurate data. Users must be vigilant in evaluating the sources and methods used by these AI tools to ensure their reliability and ethical application.

The integration of AI in the law field through

tools designed for due diligence and predictive analyses has profoundly impacted legal practices, making them more efficient and proactive. However, from the "Law and Society" perspective, it is crucial to consider how these technologies alter the landscape of legal access and equity. Meanwhile, "Legal Realism" urges a pragmatic assessment of how these tools function in actual legal settings, emphasizing the need for continuous oversight to prevent the perpetuation of existing biases or the introduction of new ones. The responsible use of AI in law firms can significantly enhance the delivery of legal services while maintaining the commitment to justice and fairness.

7. THE DUAL BLADES OF JUSTICE IN THE AI ERA

In the swiftly evolving realm of justice, the incorporation of artificial intelligence (AI) presents a dual-edged sword. While AI brings myriad opportunities for the justice sector, it also introduces significant challenges that must be navigated with care.

7.1 Opportunities Presented by AI

Efficiency and Accessibility: AI enhances judicial processes by automating procedures, which not only expedites case resolutions but also broadens access to justice. This is achieved through intelligent tools that bolster data analysis capabilities, helping legal professionals to identify remedies more efficiently and predict judicial rulings with greater accuracy.¹⁰⁶

Enhanced Legal Resources: The deployment of AI in the justice sector significantly enhances the accessibility of legal resources, allowing more individuals to benefit from legal support

105 Mejia, N. (2019, April 4). Predictive Analytics in Banking – 4 Current Use-Cases <<https://emerj.com/ai-sector-overviews/predictive-analytics-banking/>> (Last accessed: April 21, 2023).

106 Davis, A. E. (2020). The Future of Law Firms (and lawyers) in the Age of Artificial Intelligence. *Revista Direito GV*, 16(1), e1945 <<https://doi.org/10.1590/2317-6172201945>>

and advice without the traditional barriers of high costs and limited lawyer availability.

7.2 Challenges and Risks

Algorithmic Bias: One of the most pressing concerns in the use of AI within litigation is the risk of algorithmic bias. If AI systems are trained on biased data, there is a risk that these biases will be perpetuated in judicial rulings.¹⁰⁷ This issue is of such concern that AI systems used in justice administration have been classified as high-risk under the draft of the European Union's Artificial Intelligence Act.¹⁰⁸ It is crucial for the development and implementation of these systems to actively mitigate bias and ensure that technical flaws do not compromise judicial impartiality.

Privacy Concerns: The extensive data collection and utilization by AI systems raise significant privacy issues within the justice system. The legal and ethical implications of how data is collected, used, and protected are at the forefront of discussions regarding AI in justice. The General Data Protection Regulation (GDPR) enacted by the European Union in 2018 and the disparate efforts across various U.S. states illustrate the fragmented approach to addressing these critical issues.¹⁰⁹ Despite some bipartisan agreement on the importance of national data privacy legislation, resistance from powerful technology lobbies has hindered unified legal standards in the United States.¹¹⁰ This has

107 Angwin, J., Larson, J., Mattu, S., & Kirchner, L. (2022). Machine Bias. In *Ethics of Data and Analytics*. Auerbach Publications. pp. 254-264.

108 European Union. (2021). *Recital 40*. In *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts* <<https://artificialintelligenceact.eu/recital/40/>> (Last accessed: May 18, 2024).

109 The EU General Data Protection Regulation went into effect on May 25, 2018, replacing the Data Protection Directive 95/46/EC.

110 Sokolova, M. (2019). Between Business Interests and Security: American IT Giants and New Laws on Personal Data Protection. *Russia and America in*

led to a patchwork of state laws, with California leading the way and five other states considering similar regulations.¹¹¹

The integration of AI into the justice sector offers significant advancements in terms of efficiency and accessibility, potentially transforming how justice is administered. However, the challenges it presents particularly regarding algorithmic bias and privacy, demand rigorous attention and careful management. To harness the full potential of AI while safeguarding fundamental rights, a balanced approach involving stringent regulations, transparent practices, and ongoing oversight is essential. This dual perspective ensures that as we embrace the benefits of AI, we remain vigilant about the ethical and legal standards that underpin justice in the AI era.

8. THE USE OF AI PRODUCTS POSES CONCERNS OF LIABILITY

The integration of artificial intelligence (AI) tools in legal practices, such as Lex Machina, Casetext, or ChatGPT, offers significant advantages in terms of data processing and legal analysis capabilities. However, these tools also introduce potential risks of bias and errors, which can lead to complex legal and ethical challenges, particularly in terms of accountability and liability.

8.1 Potential for Errors and Bias

AI tools process and analyze data based on the logic and information they are fed.¹¹² If this data is flawed or biased, the AI's outputs, such

the 21st Century, (2) <<https://doi.org/10.18254/S207054760006015-3>>

111 Rothstein, M. A., & Tovino, S. A. (2019). California Takes the Lead on Data Privacy Law. *Hastings Center Report*, 49(5), pp. 4-5 <<https://doi.org/10.1002/hast.1042>>

112 AI tools process and analyze data based on the logic and information they are fed.

as legal advice, contract analysis, or predictive outcomes, might also be incorrect or biased. This increases the likelihood of errors during legal proceedings, raising critical questions about the accuracy and reliability of AI-assisted decisions.¹¹³

8.2 Accountability for AI-Induced Errors

When AI tools lead to erroneous outcomes or legal advice, determining who is liable, the lawyer, the law firm, or the AI developer, becomes a contentious issue.¹¹⁴ This scenario is further complicated when these tools are employed in sensitive tasks like contract drafting or critical legal analyses.

8.3 Hypothetical Scenario Analysis

Consider a scenario where Lawyer X uses an AI platform like Casetext to provide legal advice, which turns out to be incorrect and adversely affects the client's case. Typically, liability would fall on Lawyer X or their law firm under professional liability norms. However, if it is shown that the AI tool was fundamentally flawed or provided incorrect outputs despite correct usage, the responsibility could extend to the AI tool's developers or manufacturers.

8.4 Complexity in Assigning Responsibility

The challenge in such scenarios is determining the extent of due diligence exercised by the lawyer in using the AI tool. If Lawyer X followed all proper procedures and relied on the AI in a

manner consistent with legal standards, assigning sole responsibility to the lawyer could be seen as unjust. This situation necessitates a re-evaluation of how liability is distributed among the creators, developers, and end-users of AI tools in legal settings.

9. LEGAL FRAMEWORKS AND FUTURE DIRECTIONS

Existing legal frameworks may need adaptation to adequately address the new realities posed by AI in legal practices. This adaptation could involve creating standards for developing and testing AI tools to ensure their reliability and accuracy, as well as clear guidelines on how lawyers should use these tools. Furthermore, the legal profession may require new forms of insurance or indemnity clauses specifically designed to address the risks associated with AI tool usage.

The use of AI in law firms raises intricate questions about professional liability and the appropriate distribution of responsibility when errors occur. As AI tools become more embedded in legal operations, the legal community, together with policymakers, must develop robust frameworks to ensure that all parties involved lawyers, firms, and AI developers are fairly accountable for their roles. Such frameworks will not only protect clients' interests but also promote trust and integrity in using AI in legal practices.

CONCLUSION

The digital transformation of justice systems is not merely a technological enhancement but represents a profound socio-legal shift in modern legal frameworks. Through the lenses of "Law and Society" and "Legal Realism," the integration of digital tools in the justice sector underscores a dual necessity: to adapt legal structures to contemporary societal demands and to maintain an equitable balance in access to justice.

113 Dutta, B. M. (2018). The Ethics of Artificial Intelligence in Legal Decision Making: An empirical study. *Psychology and Education Journal*, 55(1) <<https://doi.org/10.48047/pne.2018.55.1.38>>

114 Bosley, W. B. (1894). Liability of an Attorney for Erroneous Advice. *Yale LJ*, 4, p. 65 <<https://doi.org/10.2307/783724>>

Digitalizing justice has shown significant potential in enhancing efficiency, transparency, and inclusivity within judicial processes. This transformation was notably accelerated by the COVID-19 pandemic, which forced a pivot from traditional in-person engagements to digital platforms, thereby not only maintaining but potentially enhancing access to justice. However, this shift also brings to light the profound challenges and disparities that exist, particularly in regions with limited digital infrastructure or where socio-economic factors hinder equitable access to these new tools.

The application of digital tools has had varying levels of success across different jurisdictions, reflecting a broader spectrum of readiness and adaptation to digital justice. Countries like Denmark and Portugal have seen advancements, whereas others still face significant hurdles due to infrastructural and socio-economic constraints.

Going forward, it is crucial that the digitalization of justice is approached not just with an eye towards technological advancement but also through a critical socio-legal framework that ensures these technologies are accessible, fair, and effective for all segments of society. The role of legislative support is instrumental in creating a conducive environment for these

transformations. Legislators must craft policies that not only address the integration and standardization of digital tools but also consider the broader socio-legal impacts, such as privacy, cybersecurity, and the potential for digital divides.

As we look to the future, particularly with the emerging role of artificial intelligence (AI) in the justice sector, the need for a balanced approach becomes even more critical. AI presents vast potential for enhancing legal processes but also introduces complex ethical and legal challenges that must be navigated carefully to avoid exacerbating existing disparities or introducing new forms of bias.

In conclusion, while the digital transformation of justice is an imperative step towards modernizing legal systems, it requires a nuanced and inclusive approach that adheres to the principles of legal equity, social justice, and human rights. The successful integration of these technologies into judicial systems worldwide will depend not only on the technological capabilities but also on the socio-legal frameworks that support them. Thus, ensuring that the digitization of justice contributes positively to the overall functionality of legal systems and upholds the fundamental principles of law and society.

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Doctoral dissertation:

1. Drabo, F. (2021). *The Digitization of Court Processes in African Regional and Subregional Judicial Institutions* (Doctoral dissertation, Walden University), p. 21.

RETHINKING THE SCOPE OF SEXUAL VIOLENCE FOR CRIMINAL LAW REFORM

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ABSTRACT

Rape survivors are mostly women, and the perpetrators are mostly men. So, it has a social and cultural dimension. In the article, the problems regarding rape law are shown from the angle of the female rape survivors. The paper discusses how rape is interpreted in Georgian criminal law practice and why one paradigm of rape prevails to this day – a male stranger and a fighting woman who physically resists the perpetrator. Criminal law rules of action during rape; in particular, it determines what the “typical behavior” is for a woman before, during, and after sexual violence. If the female rape survivor’s response does not fit into this standard, she remains outside the legal system; her voice is suppressed and disbelieved by the justice.

The paper critically examines the Georgian legislative and judicial definition of rape; However, the research is not limited to this; it also includes an analysis of the approaches and scientific views of other jurisdictions. The paper supports a liberal understanding of sexual autonomy and consent. The goal of the paper is to show the essence of non-consensual sexual violence and its superiority compared to the old rape law.

KEYWORDS: Rape law, Consent, Yes means yes

INTRODUCTION

The paper aims to show the incompleteness of the composition of rape limited to physical violence that it fails to protect sexual autonomy adequately. The Georgian rape law, which enumerates methods of rape by names such as violence, threat of violence, and helplessness, their judicial interpretation is even narrower.¹ Such a non-comprehensive definition of sexual violence runs counter to the goals of liberal criminal law. And the state violates the positive obligation to protect citizens from violence.² This paper discusses the definitions of rape, both the Georgian rape law and the definitions of non-consensual sexual violence, by observing different countries and scholarly approaches. Georgia, as a signatory state to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention), must modify non-consensual rape.

Today, the main discussion among scholars in Western society and academia is about how to formulate the non-consent rape law, in particular, whether consent as its main element should be considered “attitudinal” or always in the form of “communication”. A universal approach to consent has proven to be one of the most difficult issues to tackle, and this has led to many different views and perspectives surrounding it.³ In this paper, communication theory is supported. The aim of the paper is also to outline the negative and positive aspects of sexual autonomy to draw a line between the actions that must be punished to protect the

negative right to sexual autonomy and also to outline the behaviors that should not be punished to protect the positive right to sexual autonomy. The paper also discusses the mens rea of rape, analyzing which is the best model for criminal law purposes, such are the approaches of England and Wales^{4,5} which involves evaluating the perception of consent from the perspective of a reasonable person, taking into account what efforts were made to ensure the consent of the other party regarding sex. Thus, under this model, a person will not be punished for a mistake in consent if the mistake is reasonable, which precludes avoiding liability simply for an “honest mistake”. This standard leaves no space for shielding responsibility by referring to the cultural factor. However, what is considered “reasonable” can be subject to manipulation. Maximum certainty of law, consistent judicial interpretations, and scholarly interpretations are important to ensure this.⁶

The goal of the paper is to show the superiority of consent-based rape law over coerced-based rape law. In addition, the task of the paper is not to propose any specific model of consent but rather to outline the superiority of more general theoretical foundations and approaches that will strengthen the position for rape law reform.

As far as I understand the scope of criminal law with a liberal philosophy, I look at the regulation of sexual violence from the same perspective. My views are influenced by liberal thinkers such as J.S. Mill, H. L. A. Hart, J. Feinberg, S. Green and many other liberals. Regarding the boundaries of sexual autonomy, consent, and sexual violence, the influence of liberal femi-

1 See Gegelia, T. (2020). Commentary on Article 137 of the Criminal Code of Georgia in the book: Jishkariani, B. (ed). *Sexual Offenses*, World of Lawyers.

2 J. Nedelsky also agrees with this opinion, although she accuses liberalism of being gender blind when it comes to violence against children and women. See Nedelsky, J. (2012). *Law’s Relations: A Relational Theory of Self, Autonomy, and Law*. Oxford Academic, 200.

3 For an overview of consent models, see Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*. Oxford University Press, 26; Also see Hörnle, T. (2024). *The Challenges of Designing Sexual Assault Law*. *Current Legal Problems*, Vol. XX, 7-9.

4 See Munro, V. (2014). *Sexual Autonomy*. In Dubber, M. D. & Hörnle, T. (eds). *The Oxford Handbook of Criminal Law*. Oxford University Press, 752.

5 For an analysis of the Canadian consent model, see Nedelsky, J. (2012). *Law’s Relations: A Relational Theory of Self, Autonomy, and Law*. Oxford Academic, 219-221.

6 For a critical analysis, see Lacey, N. (2000). *General Principles of Criminal Law? A Feminist View*. In the book: Bibbings, L., & Nicolson, D. *Feminist Perspectives on Criminal Law* (eds.) *Feminist Perspectives on Criminal Law*, Routledge-Cavendish.

nists and scholars is also great,⁷ in particular, such as M. Nussbaum, C. Paglia, K. Harding, V. Desportes, and many others. Although I did not follow the views of radical feminists in terms of the application of substantive criminal law, in particular, the extent to which sexual violence should be defined, how to define exploitation, or the voluntariness of sexual consent, I was greatly influenced by their texts. There are issues on which feminists, whether radical or liberal, agree, and these are the issues of disclosure of sexual violence and access to justice. I share their views on the discriminatory impact of gender stereotypes and rape myths on access to justice.

1. THE NEED TO RETHINK THE DEFINITION OF RAPE

1. 1. Understanding of Rape Law

There are different views on what should be considered sexual violence and what should be a legal interest protected from rape.

One approach is patriarchal-moralistic, which is reflected with more or less intensity by a large number of jurisdictions, including liberal criminal law, especially its judicial interpretations.⁸ In this approach, the boundaries of sexual violence are very narrow. Physical violence (with few exceptions), as well as the victim's utmost resistance to the perpetrator, are the necessary actus reus of the crime. Even if the law does not explicitly emphasize the requirement to resist the aggressor, it is interpreted as such in practice. It was with the same approach that the husband was protected by immunity from raping his wife.⁹ Such a reservation was never

found in the Georgian legislation, but practically there were no statistics of cases of marital rape. Those women who could not fit into the existing social constructs regarding women, the standard of the "ideal woman" established by the patriarchy, were also not protected. The legal good protected by the patriarchal-moralistic approach is not the sexual autonomy of a person but some abstract entity – family honor, father's property, and female chastity. This was the legal interest protected by medieval European criminal law.¹⁰ These "interests" have been banished from modern liberal criminal law. In the patriarchal-moralistic approach, many actions that are inherently sexual and which are done without the will of the other party, and thus it is sexual violence, are not prohibited. It should also be noted that the moralistic approach justifies the criminalization of some sexual behaviors that are excluded from the catalog of crimes under liberal criminal law. Such is prostitution, although it is not punishable by the article prohibiting rape, but by another norm. The legal interest protected from prostitution is the institution of the family and morals. The sex worker is usually punished for this.¹¹

The prohibition of rape defined by the Georgian criminal law and its court interpretations is precisely moralistic-patriarchal.¹² Despite recent legislative changes, it has not fundamentally changed.

Chapter 22 of the Criminal Code of Georgia (hereinafter CCG), which includes five crimes against sexual freedom and inviolability, was partially reformed under the influence of the Istanbul Convention. With the amendments of

7 See Gegelia, T. (2022). Georgian Regime of Regulation of Prostitution and its Watchdogs. *Journal of Constitutional Law – Vol. 2*, 45-59.

8 For criticism of the German model in this sense, see Hörnle, T. (2024). *The Challenges of Designing Sexual Assault Law. Current Legal Problems*, Vol. XX.

9 For historical analysis, see Gavey, N. (2019). *JUST SEX? The Cultural Scaffolding of Rape*. Routledge. Also see Temkin, J. (2002). *Rape and the Legal Process*. Oxford

University Press.

10 See Temkin, J. (2002). *Rape and the Legal Process*. Oxford University Press, 57. Also see Hörnle, T. (2022). *The New German Law on Sexual Assault*. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press. 141.

11 For an overview of prostitution regimes, see Gegelia, T. (2022). *Georgian Regime of Regulation of Prostitution and its Watchdogs*. *Journal of Constitutional Law – Vol. 2*, 45-59.

12 For an analysis see Gegelia, T. (2021). *The Rape Paradigm: Violent Stranger VS Warrior Victim*. *Law and World*, Vol. 7 (3), 73-97.

May 2017, the definition of rape became gender neutral; the legislator removed moralistic terms and differentiation into “traditional” and “non-traditional” forms of sex. According to the new definition, for a sexual act to be classified as rape, it must necessarily be penetrative in another person’s body, and penetration with any part of the body and in any form will not change the qualification of rape. However, the definition still reflects both moralism and gender specificity. In particular, as far as the emphasis in the definition is on penetration into another’s body, and such a case of rape is ignored, when the body of the victim is used to penetrate the body of the perpetrator, practically according to the formalistic definition, such cases are not assessed as rape.¹³

The main problem that the Georgian rape law has is limiting it to narrow cases of violence, threats of violence, and helplessness. The need for the reform to be modified in the absence of consent to include more actions that encroach on sexual autonomy has been delayed for many years for unjustified reasons, even though more and more books and articles are being written in the Georgian academic field in support of the changes, as well as the great efforts of non-governmental organizations and feminists to make the state reform.¹⁴

It is also true that the methods of rape – violence, threats of violence, and helplessness can be interpreted more broadly than their current understanding,¹⁵ especially since the European

Court of Human Rights (hereinafter Strasbourg Court) standard exists in this regard,¹⁶ however, we see that the Georgian criminal law practice still views and evaluates sexual violence from a moralistic and patriarchal perspective, and this is the main obstacle to progress. The standard for defining violence as sufficient to suppress a woman’s will is very strict, while much less pressure is sufficient to overcome a woman’s resistance. The starting point of moralistic-patriarchal criminal law is not the protection of individual sexual autonomy but the determination of the self-sacrificing struggle of a woman to protect her “honor”. Female rape survivors examine with a magnifying glass how they behaved before, during, and after the rape.¹⁷ The ideal rape victim is a dead woman or a woman who has been mutilated in a fight with the rapist to defend her “honor”. This unfairly strict standard also applies to child victims, which will be discussed later with the analysis of a specific case.

The extent to which patriarchal ideology defines the boundaries of sexual violence is interesting for a systematic analysis of the law. In particular, the definition of Article 143³ of the Criminal Code, the first part of which stipulates three to five years of imprisonment as a punishment for using the services of a trafficking victim, is important for understanding the limits of the legislator’s understanding of rape. This article includes both adult and minor victims. The victim of trafficking has been deprived of free choice, which is why she is a victim of trafficking. When a person understands that the other sex participant gives consent to sex due to coercion (i.e. her consent is not genuine) and despite this, sex is initiated with her, this is rape.¹⁸

13 For a critical analysis of Georgian judicial practice in this regard, see (eds) Dekanosidze, T. and Pataraiia, B. (2020). *Commentary on Crimes Against Sexual Freedom and Inviolability*. Sapari, 74-75. Cf. Jishkariani, B. (2022). *Private Part of Criminal Law. Crime Against a Person*. World of Lawyers, 222.

14 For an analysis of other changes in 2017 and beyond, see Gegelia, T. (2021). *The Rape Paradigm: Violent Stranger VS Warrior Victim*. Law and World, Vol. 7 (3), 73-97.

15 The tendency to broadly define the composition of rape has clearly appeared in modern Georgian legal literature. See Gegelia, T. (2020). *Commentary on Article 137 of the Criminal Code of Georgia* in the book: Jishkariani, B. (ed). *Sexual Offenses*. World of Lawyers; Also see (eds) Dekanosidze, T. and Pataraiia, B. (2020). *Commentary on Crimes Against Sexual Freedom and*

Inviolability, Sapari.

16 See *C.R. v. The United Kingdom* (Application No. 48/1994/495/577), ECtHR, Judgment of 27 October, 1995, para. 34. para 41 and 42. For the case analysis, see Eriksson, M. (2010). *Defining Rape, Emerging Obligations for States under International Law?* Kållerød, 365, 95-98.

17 Gegelia, T. (2024). In forthcoming article: *Female Rape Survivor in the Trial and Epistemic Injustice*. *Journal of Constitutional Law*, N1.

18 For a similar assessment, see Lernestedt, C. & Kagrell,

A systematic interpretation of these and other norms reveals that the legislation supports the narrow scope of rape. Only rape committed with physical violence is considered serious enough to be considered rape, and the punishment is imprisonment for six to eight years in the case of an adult, while the same action against a minor is imprisonment for a term of fifteen to twenty years or life imprisonment. The practical interpretation of Article 139 of the Criminal Code also proves this. Establishing sexual relations with a person without her consent under the influence of the threat of disclosure of personal information is punishable by imprisonment for up to five years. Both the doctrinal and the modern Georgian court's interpretation of this norm is such that the norm includes not only threats but also the realization of threats, that is if a frightened victim obeys the threat of the abuser and has sex with him.¹⁹

It is interesting to discuss the case, and how Georgian criminal law will deal with it. This case of rape actually happened²⁰ but did not reach the justice system due to gender prejudices and rape myths against the female victim.

Anna was 19 years old when she woke up to find her roommate, a 30-year-old man, “groping” her in her bed. She had no past or present romantic relationship with this man. That night, while Anna was sleeping, the man lay down next to her and then sexually penetrated Anna's body without any communication with her. Anna, talking to the researcher, when she remembered the case, mentioned that after waking up, although everything happened very quickly, she remembered what thought came to her mind for a moment when she found a man lying next to her, it was fear, because if she tried

to escape, he would still catch her and, worse might happen.

Is it rape? Yes, it is. Sexual penetration of the woman's body took place without her consent. Anna frightened and captivated by the thoughts that the worst would happen to her, simply “preferred” immobility. It is unreasonable for a 30-year-old man to expect that the woman's silence meant that she agreed to his initiative. The woman did not consent to sex. It would not be a surprise to the perpetrator that he could frighten the woman by initiating sexual behaviour on the body while she was sleeping, especially if they were alone at home.

According to Georgian criminal law, this case would not be considered rape. Because the perpetrator did not use the physical violence established by the Georgian standard, he did not make any threats, nor is it a classic case of helplessness.²¹ If her body had been sexually penetrated while she was asleep, it would have been rape, but Anna woke up before the penetration, so according to the Georgian criminal code, she had to fight physically to protect her “honesty”.

Rape defined as non-consensual includes all of the above, which is fair. Where sexual penetration of another person's body takes place without the other person's free consent – it is rape, regardless of the physical marks on the body.

A Feminist Approach

One of the broadest understandings of sexual violence is the feminist approach. “Broad” refers to the low threshold for violence to be considered a crime. Sexual violence is any unwanted sex, sex that takes place under any form of pressure. These include prostitution (pressure caused by social inequality), sex with the threat of separation (emotional pressure),²² in a

M. (2022). The Swedish Move Towards (In)Voluntariness. In Hörnle, T. (ed.). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 180.

19 See Comments on Article 139 in the book: (eds) Dekanosidze, T. and Pataraiia, B. (2020). *Commentary on Crimes Against Sexual Freedom and Inviolability*. Sapari; Cf. Jishkariani, B. (2022). *Private Part of Criminal Law. Crime Against a Person*. World of Lawyers.

20 This case is cited in this book: Gavey, N. (2019). *JUST SEX? The Cultural Scaffolding of Rape*. Routledge, 167.

21 For a critical analysis of the narrow interpretation of the elements of rape See Gegelia, T. (2020). *Commentary on Article 137 of the Criminal Code of Georgia in the book: Jishkariani, B. (ed). Sexual Offenses*. World of Lawyers.

22 Cf. Feinberg, J. (1986). *Harm to Self. The Moral Limits of Criminal Law*. Oxford University Press, 209; Also see Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal*

word, sex that takes place without the enthusiasm of the other party. A feminist understanding of sexual exploitation takes into account the general context of gender and social inequality, statistics on employment and unequal pay, as well as social constructs, and more.²³ That is why they consider sex work as a form of exploitation because, according to their assessment, it is “inherent” for prostitution to objectify a woman and dehumanize her.²⁴ According to this approach, the legal interest protected from sexual violence is the dignity and equality of women as a group.²⁵ With the same approach, pornography should be banned as a tool for the “normalization” of violence against women, as well as BDSM, which is a “romanticization” of the patriarchal order.²⁶ However, taking into account the general context mentioned above, they do not trust women’s consent regarding the listed sexuality, they do not consider women as autonomous decision-makers. This radical feminism approach is paternalistic, presenting a woman as childlike who needs special

protection from the state.²⁷ Such paternalism is unacceptable to the liberal understanding of personal autonomy I discuss below.

There are two common understandings of autonomy: the liberal understanding of autonomy – individual autonomy and relational autonomy. This latter approach is popular in the radical feminist texts mentioned above. Among the supporters of relational autonomy is the British scholar J. Herring too.²⁸ According to him, the liberal understanding of autonomy does not consider that a person is a social being and makes decisions under the influence of society. That is why he suggests that to understand autonomy, we should pay attention to the context, both special and general.²⁹ Jenifer Nedelsky is also a supporter of relational autonomy.³⁰ According to this approach, a person’s decision should not be judged in isolation from the demands of society.³¹ The origin of this type of autonomy is to protect the individual from the harm of violent relationships.³² It should be noted here that protecting an individual from a violent relationship not only does not contradict the liberal approach, but it is a strict follower of this principle. J. Herring, without naming the liberal authors, writes that they don’t seem to take into account the violent experience that precedes sex, which affects free will, which I think is an undeserved criticism of liberal scholars I know.³³ Liberals

Theory. Oxford University Press, 31. Hörnle, T. (2022). The New German Law on Sexual Assault. In Hörnle, T. (ed.). Sexual Assault Law Reform in a Comparative Perspective. Oxford University Press, 157-158.

23 For criticism, see Hörnle, T. (2024). The Challenges of Designing Sexual Assault Law. *Current Legal Problems*, Vol. XX, 22-23.

24 See Mackinnon, C. A. (2019). *Butterfly Politics Changing the World for Women*. Harvard University Press. Also see Herman, J. (2023). *Truth and Repair: How Trauma Survivors Envision Justice*. Basic Books; Kelly, L. (1998). *Surviving Sexual Violence*. Polity press; For the opposite opinion, see Nussbaum, M. (1995). Objectification, *Philosophy & Public Affairs*, Vol. 24(4), 249-29; Also see Gegelia, T. (2022). Georgian Regime of Regulation of Prostitution and its Watchdogs. *Journal of Constitutional Law*, Vol. 2, 45-59.

25 See Mackinnon, C. A. (2019). *Butterfly Politics Changing the World for Women*. Harvard University Press, 2019.

26 See Bow H. & Herring, J. (2023). ‘Rough Sex’ and the Criminal Law. Emerland Publishing. For the liberal view, see Kramer Bussel, R. (2019). Beyond Yes or No: Consent as Sexual Process. In Friedman, J. & Valenti, J. (eds) *Yes Means Yes, Visions of Female Sexual Power and a World without Rape*. Seal Press, 43-53. In the same book, see Fowles, S. M. The Fantasy of Acceptable “Non-Consent”: Why the Female Sexual Submissive Scares Us (and Why She Shouldn’t), 117-125.

27 For criticism, see Paglia, C. (2018). *Free Women, Free Men: Sex, Gender, Feminism*. Pantheon, 85-91. Jenkins, S. (2009). Exploitation: The Role of Law in Regulating Prostitution. In Sclater, S. D. (ed.), *Regulating Autonomy: Sex, Reproduction and Family*. Oxford Legal Studies.

28 See Herring, J. (2009). Relational Autonomy and Rape. In Sclater, S. D. (ed.), *Regulating Autonomy: Sex, Reproduction and Family*. Oxford Legal Studies.

29 *Ibid.*, 53.

30 Nedelsky, J. (2012). *Law’s Relations: A Relational Theory of Self, Autonomy, and Law*. Oxford Academic, 19-21.

31 Herring, J. (2009). Relational Autonomy and Rape. In Sclater, S. D. (ed.), *Regulating Autonomy: Sex, Reproduction and Family*, Oxford Legal Studies, 54.

32 *Ibid.*, 58.

33 E.g. see Feinberg, J. (1986). *Harm to Self. The Moral Limits of Criminal Law*. Oxford University Press; It should be noted that Feinberg’s concept of coercion is also used by feminists for a broad definition of for-

have a problem with the very broad definition of a “violent environment” for criminal law purposes, while proponents of relational autonomy explain it by accepting the general unequal social context, which is sufficient for them to exclude the voluntariness of the given consent.³⁴ This is not enough from a liberal point of view, it tries to maintain a balance based on the goals of criminal law and also shows caution based on the goals of protecting positive sexual autonomy.³⁵ J. Herring, based on this approach, advocates a “strong” form of consent, which implies freedom from all coercion for the validity of consent.³⁶ The liberal understanding of consent and sexual autonomy is disliked by relational autonomy advocates precisely because it does not define the voluntariness of consent so strictly.³⁷ That’s why many cases of what is acceptable sex for liberals are sexual assaults for relational autonomy advocates. An example of this is prostitution.³⁸

ced marriage. See Anitha, S. & Gill, A. (2009). Coercion, Consent and the Forced Marriage Debate in the UK. *Feminist Legal Studies*, 17, 165–184. Also see T. Hörnle and S. Green in the book: Hörnle, T. (ed.) *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press; Also see Gegelia, T. (2020). Commentary on Article 137 of the Criminal Code of Georgia in the book: Jishkariani, B. (ed.) *Sexual Offenses*. World of Lawyers; Also see Commentary on Article 137, Jishkariani, B. (2022). *Private Part of Criminal Law. Crime Against a Person*, World of Lawyers.

34 Herring, J. (2009). Relational Autonomy and Rape. In Sclater, S. D. (ed.) *Regulating Autonomy: Sex, Reproduction and Family*. Oxford Legal Studies, 62.

35 See Jenkins, S. (2009). Exploitation: The Role of Law in Regulating Prostitution. In Shelley Day Sclater (ed.), *Regulating Autonomy: Sex, Reproduction and Family*, 25-27.

36 Herring, J. (2009). Relational Autonomy and Rape. In Sclater, S. D. (ed.), *Regulating Autonomy: Sex, Reproduction and Family*. Oxford Legal Studies, 62. For a critique of neglecting the diversity of the relationship between men and women and showing it from a narrow perspective, see Nussbaum, M. (1995). Objectification. *Philosophy & Public Affairs*, Vol. 24(4), 278.

37 For a critique of liberalism that it does not take the general context into account, see Munro, V. (2014). *Sexual Autonomy*. In Dubber, M. D. & Hörnle, T. (eds) *The Oxford Handbook of Criminal Law*. Oxford University Press.

38 For a liberal perspective, see Jenkins, S. (2009). Exploitation: The Role of Law in Regulating Prostitution. In Sclater S. D. (ed.) *Regulating Autonomy: Sex, Repro-*

It’s also an unfair accusation against liberals that they seem to ignore gender stereotypes and rape myths.³⁹ Cultural factors and social learning affect a person in general; it is not related to liberalism.⁴⁰

A Liberal Approach

As for the liberal understanding of personal autonomy, it views the individual as a rational agent and entrusts her with the right to dispose of their own life.⁴¹ S. Green distinguishes normative and descriptive understanding of autonomy. The first is related to the right to act according to one’s desire and will.⁴² The restriction of which is justified only when its realization poses a threat to another person’s right.⁴³ Sexual autonomy also means the right to use your sexuality as a tool for your own needs.⁴⁴ The descriptive aspect of autonomy is related to the ability of a person to manage her own life, which will be dictated by her motives, and not by exploitation.⁴⁵

Sexual autonomy has a variety of expressions, just as there are people and their individual choices and attitudes regarding sexuality. Sexual autonomy includes a person’s

duction and Family, 25. Cf. Mackinnon, C. A. (2019). *Butterfly Politics Changing the World for Women*. Harvard University Press.

39 Herring, J. (2009). Relational Autonomy and Rape. In Sclater, S. D. (ed.) *Regulating Autonomy: Sex, Reproduction and Family*. Oxford Legal Studies, 67.

40 I have discussed the direct negative impact of gender myths and prejudices on the judicial decision-making process in the forthcoming article: Gegelia, T. (2024). In the forthcoming article: *Female Rape Survivor in the Trial and Epistemic Injustice*. *Journal of Constitutional Law*, N1.

41 See Raz, J. (1988). Autonomy, Toleration, and the Harm Principle. In Mendus, S. *Justifying Toleration: Conceptual and Historical Perspectives*. Cambridge University Press, 156; Dworkin, R. (1997). *Taking Rights Seriously*. Harvard University Press, 272-273.

42 Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*. Oxford University Press, 19.

43 Mill, J. S. (1859). *On Liberty*. Batoche Books Limited 2001 edition.

44 Jenkins, S. (2009). Exploitation: The Role of Law in Regulating Prostitution. In Sclater, S. D. (ed.) *Regulating Autonomy: Sex, Reproduction and Family*, 32.

45 Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*. Oxford University Press, 19.

right to have sex with whoever they want and in whatever way they want, or not to have sex at all. Have sex by yourself, own and use a sex toy for sexual purposes, use legal pornographic material, buy or sell sex work, get involved in BDSM, have sex in a group, and more.⁴⁶ From the liberal point of view, the main thing is that all these activities take place with the participants' consent, and the expressed consent is informed and free. Liberal criminal law establishes paternalistic care only for certain groups who are incapable of making free decisions, e.g., due to their age or health condition..

1.2. The Impact of Different Approaches on the Application of Criminal Justice

Criminal law is applied to different extents, depending on whether it is understood liberally or under some other philosophy. Legal scholars list the types of relationships that are characterized by subordination and power imbalance. Sexual intercourse in this type of relationship and context attracts the attention of the law. These types of relationships include relationships between a prisoner and prison warden, a prisoner and a police officer, a student and a lecturer, a priest and a parishioner, a patient and a doctor, and many others.⁴⁷

In an absolute approach, the sexual proposal and act of the person in the vertical of power in this type of relationship is violent and should be criminalized without any contextual analysis.

The contextual approach favours a differentiated approach in this relationship (concerning some parts). Liberal scholar of criminal law, S. Green, separates the relationship between the arrested and the policeman, where he allows an absolute approach. Focusing on the power of the policeman, his special training, weapon-

ry, and ability to cause life-threatening harm to the arrested, and on the other side is the person deprived of his/her liberty, which is completely defenseless and completely under the control of the state, such an imbalance of power is considered enough to prohibit sex in such a relationship with an absolute approach. Here, Green believes that even if we imagine consensual sex in this type of relationship, an absolute ban is acceptable for him, assuming that the risk of abuse of power is very high. A flexible law would complicate investigations, increasing false negatives in the cases of accused police officers.⁴⁸ Thus, the liberal point of view is not unfamiliar to absolute approaches, depending on the context. Green advocates absolute punishment, among other things, because of the institutional issue that it is in everyone's interest for an official who is a witness, investigator, or prosecutor to be impartial.⁴⁹

From the liberal perspective, a contextual approach is preferred in other types of relationships, such as a lecturer and an adult student relationship, social hierarchy in the workplace and so forth.

To the extent that radical feminists take into account the general situation and social constructs, this is where the linear evaluations of the sexual relationship of the parties regarding sex in hierarchical social relations come from. With such an approach, there is no space left for opinions about voluntary sex. According to a liberal approach, the criminalization of sex in a workplace would be justified in the case of analysis of the specific context and detection of suppression of the will.

2. SEXUAL AUTONOMY, CONSENT, VOLUNTARINESS

2.1. Sexual Autonomy

The legal interests protected from sexual violence are sexual autonomy and inviolability. Also, the attack on an individual's sexual auton-

46 *Ibid.*, 20.

47 For the list, see Green, S. (2022). Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 84.

48 *Ibid.*, 87.

49 *Ibid.*, 88.

omy is rightly considered an insult to human dignity.⁵⁰ Chapter 22 of the Criminal Code, which includes violent acts of a sexual nature, is entitled to sexual freedom and inviolability.

Sexual autonomy has two aspects, positive (the right to have sex according to one's motives) and negative (the right not to be subjected to unwanted sexual behavior).⁵¹ An individual's positive right to have sex with whoever they want will always be outweighed by the other person's negative right to be protected from unwanted sexual activity.⁵² The goal of criminalizing sexual behavior is to protect a person's negative sexual rights, but the positive rights of the same person should not be overlooked here. For example, the intersections of negative and positive aspects of sexual autonomy are best seen when legislation prohibits sexual intercourse with an individual with an intellectual disability.⁵³ Such an absolute approach violates the human right to have sex.⁵⁴ That is why it is always important to take into account the degree of disability, the context, and the nature of the relationship between individuals. Legal scholars, such as S. Green and T. Hörnle, in such a case they, are opposed to an absolute ban.⁵⁵ Because where there is a person's con-

sent, the state must respect it and not interfere in the relationship, because there is no interest to protect.

2.2. Voluntariness

The liberal understanding bases the assessment of the voluntariness of participation in sexual relations on objective criteria.⁵⁶ Voluntary participation in sex means the free choice and decision of the participants. A sex-related offer that is not a **freedom-restricting** but a **freedom-enhancing coercive** offer,⁵⁷ whether or not the consent given to sex excludes the voluntariness, is considered controversial in the philosophy of law⁵⁸ and the doctrine of criminal law.⁵⁹ Feinberg gives an example of this from a millionaire's offer to finance surgery to save her critically ill son if she has sex with him.⁶⁰ Due to the situation, Feinberg calls this proposal coercive, because a person is in a hopeless situation, if she does not agree to the proposal, her child will die. That is why Feinberg agrees with the nullification of such a contract, although he considers such consent regarding sex **sufficiently voluntary** for criminal law purposes and, therefore does not justify its use.⁶¹ The millionaire has no obligation to pay her for anything. With this proposal, the chances of the child increase; if she does not agree, she will remain in the same situation as before, for which

50 See Hörnle, T. (2024). The Challenges of Designing Sexual Assault Law. *Current Legal Problems*, Vol. XX, 4; Green, S. (2022). Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 77; Gardner, J. and Shute, S. (2002). *The Wrongness of Rape*. Oxford Essays in Jurisprudence, Oxford, 205.

51 See Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*. Oxford University Press, 21.

52 See *Ibid.*, 23; Also see Hörnle, T. (2024). The Challenges of Designing Sexual Assault Law. *Current Legal Problems*, Vol. XX.

53 See Hörnle, T. (2024). The Challenges of Designing Sexual Assault Law. *Current Legal Problems*, Vol. XX, 4.

54 See Green, S. (2022). Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 79.

55 See Hörnle, T. (2024). The Challenges of Designing Sexual Assault Law. *Current Legal Problems*, Vol. XX; Also see Green, S. (2022). Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative*

Perspective. Oxford University Press.

56 See Feinberg, J. (1986). Harm to Self. *The Moral Limits of Criminal Law*. Oxford University Press, 211-212. Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*. Oxford University Press, 23.

57 Feinberg, J. (1986). Harm to Self. *The Moral Limits of Criminal Law*. Oxford University Press, 233.

58 See Feinberg, J. (1986). Harm to Self. *The Moral Limits of Criminal Law*. Oxford University Press.

59 See Bakhtadze, U. (2020). In: (eds) Dekanosidze, T. and Pataraiia, B. (2020). *Commentary on Crimes Against Sexual Freedom and Inviolability*. Sapari, 65; Jishkariani, B. (2022). *Private Part of Criminal Law*. *Crime Against a Person*, World of Lawyers, 214-215.

60 See Feinberg, J. (1986). Harm to Self. *The Moral Limits of Criminal Law*. Oxford University Press, 231-233.

61 *Ibid.*, 253.

the millionaire is not responsible.⁶² Taking advantage of a person's predicament situation and offering a sex proposal excludes consent and is therefore considered sexual violence in the Georgian criminal law doctrine. One approach takes into account the age of the victim, if the manipulative proposal is not evaluated as rape about an adult, the author is in favor of paternalistic approach concerning minors.⁶³ This approach is compatible with the objectives of criminal law. The second approach focuses on the special intensity of the pressure, regardless of whether the offer is freedom-restricting or freedom-enhancing,⁶⁴ another view focuses on the victim's vulnerability and need for care, and when a person manipulates this situation to achieve the desired result, even though he has no duty of care⁶⁵ A freedom enlarging offer addressed to a person in need, needs a more careful approach for criminal law purposes⁶⁶ because in such cases attention should be paid to the positive right of the offeree to sexual autonomy. As mentioned above, part of sexual autonomy is using sexuality for a need, not just for pleasure.

Freedom restricting coercion affects the voluntariness and, ultimately, the validity of consent.⁶⁷ Coercion and voluntariness should be assessed precisely by analyzing the specific context according to the degree and intensity of coercion used.⁶⁸ Circumstances may exclude the validity of consent; an example of this is the

case that will be discussed below.

Georgian judicial practice is problematic in defining the voluntariness of consent concerning sex. There are hundreds of judgments confirming this from both old and modern times.⁶⁹ Clear evidence of this is one of the last cases from the Georgian judicial practice, which, along with other similar cases, drew the attention of the Public Defender of Georgia.⁷⁰ The judge does not take into account the violent climate in which the victim is, they look for physical injuries and other signs of hand-to-hand combat with a magnifying glass on the victim's body to determine rape, which is an oversimplification of the rape narrative. In the case discussed below, the perpetrator was punished for sexual intercourse with a minor (the victim was 15 years old). Although the prosecutor's office charged him with rape, the court downgraded the qualification (voluntary sexual intercourse with a person under the age of consent (art. 140)).⁷¹ According to the court, you cannot be a victim of rape if you do not have physical marks on your body, in the absence of such traces, the justice system tells the victim that she got what she wanted – "asking for it".⁷²

According to the mentioned case, a 15-year-old girl was kidnapped by three adult men, one of whom wanted to marry her. The court did not question the fact of abduction and illegal deprivation of liberty,. The judge said that it would be difficult for the child to overcome the resistance of three men, but the accusation of rape was not convincing. According to the judge,

62 If a person himself creates the conditions of another person's helpless condition and then exploits her, Feinberg agrees with the use of criminal law. See Feinberg, J. (1986). *Harm to Self. The Moral Limits of Criminal Law*. Oxford University Press, 263.

63 Jishkariani, B. (2020). Commentary on Article 139 in Jishkariani, B. (ed.). *Sexual Offenses*. World of Lawyers, 72.

64 See Bakhtadze, U. (2020). In: (eds) Dekanosidze, T. and Pataraiia, B. (2020). *Commentary on Crimes Against Sexual Freedom and Inviolability*. Sapari, 67.

65 See Lekveishvili, M., Mamulashvili, G. and Todua, N. (2019). *Private Part of Criminal Law*. Book 1. Meridian, 255.

66 Feinberg, J. (1986). *Harm to Self. The Moral Limits of Criminal Law*. Oxford University Press, 255.

67 *Ibid.*, 254.

68 *Ibid.*

69 See Decision of the Supreme Court of Georgia N 2K-207 Ap.-04; Also the judgment of the Signaghi District Court, November 26, 2014, N 1/67-14. See also Public Defender's Special Report. (2021). *Implementation of Justice for the Crime of Child Sexual Abuse and Sexual Exploitation*, 21-23. See also 2022 Report: *Harmful Practice of Early/Childhood Marriage in Georgia – Current Challenges and Solutions*, 32-33.

70 Public Defender's Special Report. (2022). *Harmful Practice of Early/Childhood Marriage in Georgia – Current Challenges and Solutions*.

71 Decision of the Bolnisi District Court, Criminal Affairs Panel, 22 April 2021, N1/322-20.

72 For an analysis of rape myths, see Harding, K., (2015). *Asking for It. The Alarming Rise of Rape Culture – and What We Can Do About It*, Da Capo Press.

sexual intercourse took place in private, where only the child and the accused were in the room; in such a situation, the child was obliged to resist physically. The judge emphasized that the child had no physical injuries on her body and her clothes were not torn.⁷³ The fact that the child was deprived of liberty, left alone at home, where there is no chance of help, and the perpetrator is physically stronger than her, was not enough for the judge to consider sex in such a violent environment as rape. Moreover, in such an environment, the “consent” of a person could not be valid. The judge narrowed the rape down to the presence of physical harm and its failure to find it was sufficient to establish the voluntariness of the sex. This is an oversimplification of what constitutes sexual violence and the context in which it occurred, the very primitive measure used by law enforcement agents to define abuse. In the same situation, if the victim were 16, the perpetrator would not be held criminally responsible with such an explanation. The content of sexual violence, consent, and voluntariness regarding sex are understood from a patriarchal perspective. Georgian criminal law functions with a patriarchal logic.

2.3. Consent

The element of consent is not new to Georgian criminal law. Absence of consent, although not spelt out in words, is implied in the definition of rape just as it is considered in other crimes, such as illegal deprivation of liberty (Art. 143). Consent, as an objective element of rape, excludes its actus reus, as well as illegal deprivation of liberty. Concerning assault, consent is not the composition of the act but the matter of wrongfulness. According to Green's correct remark, such a division is correct for theoretical and practical reasons.⁷⁴ Not consid-

ering non-consent as actus reus of rape would lead to the formal criminalization of any sex,⁷⁵ which is unimaginable. The principle of “not to harm” justifies criminal law. Therefore, assault is prohibited regardless of consent, and given the specific context, it may be justified. These two approaches differentiate these crimes in terms of the burden of proof. In the first case (sexual violence), the prosecutor asserts the absence of consent, and in the second case (assault), the defendant proves that the injury occurred with consent.⁷⁶

According to Article 36 of the Istanbul Convention, the definition of rape is as follows:

“engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object”.⁷⁷

According to this definition, the essential objective element constituting rape is the sexual penetration of another person's body without consent. Physical violence or threats are not a necessary element. Consent is what gives a person the right to sexually penetrate the body of the consent giver, and in case of withdrawing the consent, he is obliged to stop the sexual act. A person's body is not accessible to others until they give their consent. In the case of consent, there is no longer any obligation to refrain from sexually touching the other person's body, and the giver of consent will no longer have a claim unless the sexual impact on her body continues despite the refusal of permission. Thus, consent must accompany the entire process, from start to finish, or the action will turn into violence.

The rape-by-violence paradigm is very common in various jurisdictions, and such an understanding is still common in countries where

73 Decision of the Bolnisi District Court, Criminal Affairs Panel, 22 April 2021, N1/322-20. Par. 3.83-3.94.

74 See Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*. Oxford University Press, 34-35. For differentiating the effect of the element of consent with respect to different crimes, see also Weigend, T.

(2022). *Consent and Sexual Offenses Germany*. In Hoven E. & Weigend, T. (eds). *Consent and Sexual Offenses, Comparative Perspectives*. Nomos, 186.

75 See Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*. Oxford University Press, 34-35.

76 *Ibid.*, 34.

77 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (CETS No. 210), Art. 36. Available in the following link <<https://rm.coe.int/168008482e>>.

the definition of non-consensual rape was reformed a long time ago, notably in Germany⁷⁸ and England/Wales.⁷⁹

The deconstruction of this paradigm was initiated by international criminal tribunals in the legal assessment of sexual violence committed in war contexts.⁸⁰ This was later followed by a 2003 case of the Strasbourg Court,⁸¹ where the Court criticized the overly simplistic narrative of rape, which does not always cover what happened, leaving sexual autonomy unprotected. The Court found the violation due to a one-dimensional investigation of rape, which is narrowed down to the physical marks on the body and does not take into account the full picture, where a lot of other evidence can reveal what happened. After the mentioned case, the Strasbourg Court issued dozens of other decisions against Romania, Moldova, Slovakia, and others and found violations of fundamental human rights on the part of the state, with the same arguments.⁸² The Strasbourg court will also establish a violation in Georgia if such a lawsuit is filed, because this is a systemic problem in Georgian criminal justice, gender prejudices are ingrained in prosecutors and judges. Among the instruments of international law, the CEDAW Committee, its 2008 decision *Tayag Vertido v. Philippines*,⁸³ where the committee found a gender-biased justice system and a primitive

rape paradigm as a violation of human rights.

Thus, it is very clear under international human rights law that rape is a violation of a fundamental human right.

Rape in several cases and contexts constitutes genocide and crimes against humanity. Also, in the presence of a relevant purpose and motive, it constitutes a composition of torture. This is one of the reasons why it is considered a *Jus Cogens* norm.⁸⁴

Consent Models

Many countries have reformed the rape law, including several US states, Great Britain, Germany, Spain, Sweden, Denmark, Iceland, and others. Many academic texts have been written, and there are many ongoing projects in various research centers to understand the nature of consent regarding sex.

There are already many understandings of consent regarding sexual penetration. Among them, “attitudinal” and “communication” theories are the most common. The first focuses on the victim’s perspective and their rights,⁸⁵ what matters is what they wanted, and what the abuser thought is irrelevant. And, for the communication theory, it is important how the abuser understood the consent of the party.⁸⁶ The main thing here is that consent is declared objectively because only after that is sexual contact allowed. If an aggressor sexually penetrates a passive person because the aim was to rape her and post factum, it turns out that the party wanted to have sex with him, this is not rape according to the “attitudinal” theory. According to the theory of communication, it should be punishable because consent regarding sex was not declared objectively.⁸⁷

78 See Hörnle, T. (2024). *The Challenges of Designing Sexual Assault Law*. Current Legal Problems, Vol. XX.

79 See Smith, O. (2018). *Rape Trials in England and Wales Observing Justice and Rethinking Rape Myths*. Palgrave Macmillan.

80 E.g. see *Prosecutor v. Dragoljub Kunarac*, Appeal Judgment, 12 June 2002; *Katanga Judgment*. *Prosecutor v. Germain Katanga*, No.: ICC-01/04-01/07, 7 March 2014; *Prosecutor v. Dominic Ongwen* (2021), ICC-02/04-01/15.

81 *M. C. v. Bulgaria* (Application no. 39272/98) 04/03/2004.

82 See *I. G. v. Moldova* (Application no. 53519/07), 15.03.2012; *Y. v. Slovenia* (Application no. 41107/10), 28.08.2015; *I. C. v. Romania* (Application no. 36934/08), 24.08.2016; *C. A. S. and C. S. v. Romania – 26692/05* 30.03.2012; *M. G. C. v. Romania* (appl. 61495), 11. 15. 03. 2016; *E. B. v. Romania* (appl. 49089/10), 19.03.2019.

83 *Tayag Vertido v. Philippines*, CEDAW/C/46/D/18/2008.

84 Eriksson, M. (2010). *Defining Rape, Emerging Obligations for States under International Law? Källered*.

85 Vera Bergelson supports this theory. See *Sex and Sensibility. The Meaning of Sexual Consent*. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 36.

86 Supporters of this theory are: T. Hörnle and S. Green. See Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press.

87 See Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*. Oxford University Press, 26.

One of the supporters of the attitudinal theory is the American legal scholar V. Bergelson, her main criticism of communication theory is directed at its comprehensiveness, also criticizes paternalism towards women, that women's will to have sex does not trust the state until they actively and loudly say about it.⁸⁸ Criticism is directed at the limitation of personal autonomy because passivity is part of it and must be respected by the state.⁸⁹

Consent about sex should be the result of communication. This is the correct approach for criminal law purposes, because what a person thinks cannot be known otherwise.

In general, criticism has been accumulated regarding the consent model, among which it is worth noting T. Palmer's remarks, which defines sex as a free negotiation between parties, and describes the essence of sexual violence accordingly, is correct.⁹⁰ The author considers the "consent" model to be the cause of all the practical problems that accompany the investigation and conviction of rape, which cannot be shared. The problem is a sexist culture, and neither the definition she offers will be a panacea in such a culture. During and simultaneously with the introduction of the consent model, we should not forget that it is necessary to fight against gender stereotypes and rape myths.

No Means No vs Yes Means Yes **"No" Model**

There are two models of formulating consent: "No means No" and "Yes means Yes". Both models have been criticized. The "no" model has been mainly criticized for its under-inclusiveness.⁹¹ According to Green, this model looks like an old rape law because the refusal to

have sex – "no" is interpreted with violence.⁹² It should also be said that the "no" model, which demands activity from the victim, is not only a case of tonic immobility,⁹³ which modern science indicates to show the non-comprehensive nature of violence-based rape law,⁹⁴ but also cannot deal with classic cases of helplessness.⁹⁵ The "no model has been criticized for maintaining the old approach, namely placing the burden of proof on the victim to have refused sex.⁹⁶ The criticism is fair because the "no" model creates fertile ground for perpetuating the old narrative that silence is consent. The "yes" model tells the parties that before you initiate sexual behavior, you must make sure that the participant also wants it, otherwise, it is violence, and you will be punished.

"Yes" model

It is considered that the "Yes" model has an educational function.⁹⁷ It is a more understandable concept for criminal law⁹⁸ and does not contain a signal supporting rape, as is the case with the "no" model.

The "Yes" model has also been criticized on various counts, including for being over-inclu-

88 Bergelson, V. (2022). Sex and Sensibility. The Meaning of Sexual Consent. In Hörnle, T. (ed). Sexual Assault Law Reform in a Comparative Perspective. Oxford University Press, 41.

89 *Ibid.*

90 Plamer, T. (2017). Distinguishing sex from sexual violation: Consent, Negotiation and Freedom to Negotiate. In Reed, A. & Bohlander, M., Consent Domestic and Comparative Perspectives. Routledge.

91 Green, S. P. (2020). Criminalizing Sex: A Unified Liberal Theory. Oxford University Press, 80.

92 *Ibid.*

93 Green agrees with this opinion. See Green, S. P. (2020). Criminalizing Sex: A Unified Liberal Theory. Oxford University Press, 81.

94 See Möller, A., Söndergaard, H. P. & Helström, L. (2017). Tonic Immobility During Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression. Acta Obstetrica et Gynecologica Scandinavica; de Heer, B. A. & Jones, L. C. (2023). 'Tonic Immobility as a Defensive Trauma Response to Rape: Bridging Public Health and Law'. Violence Against Women.

95 Cf. Green, S. P. (2020). Criminalizing Sex: A Unified Liberal Theory. Oxford University Press, 81.

96 Torenz, R. (2021). The Politics of Affirmative Consent: Considerations from a Gender and Sexuality Studies Perspective. German Law Journal, 2(5), 724.

97 Criticism of the "yes" model was also expressed from the point of view that it does not actually change the culture because it revives heteronormative concepts of gender and sexuality. See Torenz, R. (2021). The Politics of Affirmative Consent: Considerations from a Gender and Sexuality Studies Perspective. German Law Journal, 2(5), 719, 721, 725.

98 Valentiner, D-S. (2021). The Human Right to Sexual Autonomy. German Law Journal, 22(5):703-717.

sive and for rigid guidelines in interpersonal relationships.

It should be noted that the “Yes” model is also criticized for supporting the rape myth. In particular, it strengthens the myth that rape occurs due to improper communication between the parties, for which the woman is responsible.⁹⁹ The criticism is not fair. By changing the coerced-based rape law to non-consensual, the message is not that before the law was vague and people did not understand each other’s communication, but like the purpose of all new norms, the purpose of this change is to say more loudly what was previously silenced in society and became a social norm, that today is not tolerated. And it does this with a new formulation of the norm.

The “yes” model is criticized in terms of establishing one standard of communication when people’s abilities are different,¹⁰⁰ as well as the absolute obligation of the parties to actively express their consent to sex when the participant may want to be passive.¹⁰¹ In response to the criticism, it should be said that the context matters, if people tell each other what they want with signs that others may not understand, this is not a violation of the prohibition of rape understood by the “yes” model.¹⁰² The purpose of the law is not to allow sexual exploitation, where the latter did not take place,

the act will not be assessed as rape. Mens rea is also a protective mechanism against excessive criminalization.

It is Green’s opinion that the “Yes” model overcomes gender stereotypes; the established idea that a woman is passive and the initiator of sex is always a man is opposed to it. This model tells sex participants if they want sex, then they should say about it.¹⁰³ Green considers the way to avoid over-inclusivity of rape law, on the one hand, to formulate actus reus with many situations¹⁰⁴ and to define mens rea by the standard of reasonable person.¹⁰⁵ When a person reasonably believes in consent, this should exclude criminal liability. It should also be said that there are a thousand forms and signs of consent regarding sex in a very close and interpersonal relationship. Therefore, in such a relationship, if the consent is disputed, mens rea will be the shield, and the person who made a mistake in understanding the consent will not be punished.

Schulhofer¹⁰⁶ is a supporter of the communication theory and the “Yes” model, who, to overcome the criticism mentioned above that the “Yes” model leads to excessive criminalization of sex, supports the contextual model of the “Yes” model, which, taking into account the context, in particular cases excludes liability for sexual intercourse with a passive partner.¹⁰⁷ Unlike the “no” model, this will apply to narrower cases and the law will be based on a pos-

99 Torenz, R. (2021). The Politics of Affirmative Consent: Considerations from a Gender and Sexuality Studies Perspective. *German Law Journal*, 2(5), 721; Lockwood Harris, K. (2018). Yes Means Yes and No Means No, but Both These Mantras Need to Go: Communication Myths in Consent Education and Anti-Rape Activism. *Journal of Applied Communication Researcher*, vol. 46(2), 159.

100 Lockwood Harris, K. (2018). Yes Means Yes and No Means No, but Both These Mantras Need to Go: Communication Myths in Consent Education and Anti-Rape Activism. *Journal of Applied Communication Researcher*, vol. 46(2), 170.

101 Bergelson, V. (2022). Sex and Sensibility. The Meaning of Sexual Consent. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press.

102 Schulhofer, S. J. (2022). What Does ‘Consent’ Mean? In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press.

103 Green, S. (2022). Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 87. Nedelsky also shares this opinion and agrees with the theory of communication. See Nedelsky, J. (2012). *Law’s Relations: A Relational Theory of Self, Autonomy, and Law*. Oxford Academic, 224.

104 Green, S. (2022). Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 75.

105 *Ibid.*, 98.

106 Schulhofer, S. J. (2022). What Does ‘Consent’ Mean? In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 63.

107 *Ibid.*

itive wording of consent.¹⁰⁸ It should be noted that the contextual understanding of consent is also supported by the Istanbul Convention. From this point of view, the Swedish model is interesting, explaining consent by communication – by word or action and in any other form. In the definition of rape, the word “consent” is not mentioned at all, and the emphasis is on the voluntariness of participation in the sexual act, which is the *actus reus* of rape. Consent may be expressed verbally or non-verbally and in any form. Based on the explanatory note of the law, the researchers emphasize that the Swedish model is a hybrid.¹⁰⁹ It is a synthesis of communication and implied consent.¹¹⁰ In certain contexts, female passivity is considered sexual autonomy. For example, according to the explanatory notes of Swedish law, sexual penetration with a sleeping partner is not rape.¹¹¹

Another supporter of the theory of communication is T. Hörnle, however, taking into account the *ultima ratio* principle of criminal law, she supports the German “no” model.¹¹² The difference is that according to the “yes” model,

you need active consent from the other person before starting sex, for the “no” model passivity is a sign of consent in a situation that does not suppress the will. If the person does not refuse despite the opportunity, sexual penetration will not be considered rape.¹¹³ This model is recognized by the criminal law of Germany,¹¹⁴ (as well as Switzerland¹¹⁵) where the definition of rape is formulated as initiating sex with a person despite his clear refusal.¹¹⁶ Thus, with this model, the burden of denial is shifted to the victim. T. Hörnle, in a situation that is not oppressive, sees no problem in shifting the burden of refusal onto the victim in comparison to how much punishment the other party may face.¹¹⁷ I cannot say that this model is non-comprehensive and therefore bad, especially since the German penal Code defines many situations where the victim is not obliged to refuse, including cases of helplessness and intimidating circumstances.¹¹⁸ Although, on a symbolic level, it evokes those old, gender stereotypes that refusal is a sign of consent, it can also blur the line between sex and rape in many situations, invoking the cultural factor.¹¹⁹ Especially if the *mens rea*

108 The Canadian model is also based on the theory of communication. For analysis, see Thorburn, M. (2022). *Sexual Assault Law in Canada* In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 100.

109 See Bladini, Moa & Andersson, W. S. (2020). *Swedish Rape Legislation from use of Force to Voluntariness – Critical Reflections from an Everyday Life Perspective*. *Bergen Journal of Criminal Law and Criminal Justice*, vol. 8(2).

110 For an analysis of the Swedish model, see Lernestedt, C. & Kagrell, M. (2022). *The Swedish Move Towards (In)Voluntariness*. In Hörnle, T. (ed.). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 174-175. Cf. Hörnle, T. (2024). *The Challenges of Designing Sexual Assault Law*. *Current Legal Problems*, Vol. XX, 9. T. Hörnle does not consider the Swedish approach as a “yes” model. She calls it the *Circumstances model*.

111 For criticism, see Bladini, Moa & Andersson, W. S. (2020). *Swedish Rape Legislation from use of Force to Voluntariness – Critical Reflections from an Everyday Life Perspective*. *Bergen Journal of Criminal Law and Criminal Justice*, vol. 8(2).

112 See Hörnle, T. (2022). *The New German Law on Sexual Assault* in Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 146.

113 Weigend, T. (2022). *Consent and Sexual Offenses Germany*. In Hoven E. & Weigend, T. (eds). *Consent and Sexual Offenses, Comparative Perspectives*. *Nomos*, 189-90.

114 The extent to which the refusal was obvious is tested from the perspective of an objective observer familiar with the relevant facts. Weigend, T. (2022). *Consent and Sexual Offenses Germany*. In Hoven E. & Weigend, T. (eds). *Consent and Sexual Offenses, Comparative Perspectives*. *Nomos*, 190.

115 For an analysis of the Swiss “no” model, see Scheidegger, N. (2022). *Switzerland*. In Hoven E. & Weigend, T. (eds). *Consent and Sexual Offenses, Comparative Perspectives*. *Nomos*, 271.

116 For an explanation of paragraph 177 of the German Criminal Code, see Weigend, T. (2022). *Consent and Sexual Offenses Germany*. In Hoven E. & Weigend, T. (eds). *Consent and Sexual Offenses, Comparative Perspectives*. *Nomos*.

117 Hörnle, T. (2024). *The Challenges of Designing Sexual Assault Law*. *Current Legal Problems*, Vol. XX.

118 See Weigend, T. (2022). *Consent and Sexual Offenses Germany*. In Hoven E. & Weigend, T. (eds). *Consent and Sexual Offenses, Comparative Perspectives*. *Nomos*, 185-186.

119 For a similar idea, see Schulhofer, S. J. (2022). *What Does ‘Consent’ Mean?* In Hörnle, T. (ed). *Sexual As-*

standard is as weak as in the German rape law. Therefore, the legislation formulated with the “yes” model is more acceptable.

It should be noted here that the practical definition of gender crimes showed the tendencies of dishonest use of criminal law. For example, qualifying the act as provoked murder instead of evaluating it under a strict article of femicide;¹²⁰ Non-fatal strangulation of a female partner is considered assault;¹²¹ Lightly punishing forced marriage and rape in the name of “creating a family”, etc.¹²² Therefore, to completely prevent such interpretations, a strict approach to the law is desirable, if you want sex, say about it. And informing the party in advance that a woman’s body is inviolable until she gives her consent is fair. A Canadian scholar agrees to allow implied consent only in very intimate relationships and non-penetrative sexual behaviors.¹²³ Also, when we talk about the permission given for sex, we don’t mean only a verbalized “yes”. “Yes” can be expressed by different signs, when these signs are familiar to the partners, no problem arises. When people are strangers to each other, more effort is needed to ensure agreement.

3. IN SEARCH OF A BETTER

assault Law Reform in a Comparative Perspective. Oxford University Press, 65-66. Also see Bladini, Moa & Andersson, W. S. (2020). Swedish Rape Legislation from use of Force to Voluntariness – Critical Reflections from an Everyday Life Perspective. *Bergen Journal of Criminal Law and Criminal Justice*, vol. 8(2), 122.

- 120 For a critical analysis of Georgian judicial practice, see Gegelia, T. (2021). *Murder Provoked by Adultery*. Caucasus University Periodical Edition, Collection of Articles, vol. 1.
- 121 For a critical analysis of judicial practice on the example of Georgian and other jurisdictions, see Gegelia, T. (2022). *Non-Fatal Strangulation in the Context of Family Violence*. Caucasus University Periodical Edition, Collection of Articles, vol. 2.
- 122 Also see Gegelia, T. (2022). *Criminalization of Defensive Violence in Response to Intimate Partner’s Aggression*. *Bad Law or Vicious Criminal Practice?* *Journal Law and World*, N24, Issue 8.
- 123 Thorburn, M. (2022). *Sexual Assault Law in Canada* In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 100-101.

MODEL OF MENS REA

Under the reformed rape laws, two main approaches to mens rea have been established. Both models are essentially the same,¹²⁴ because communication regarding sex and perception of circumstances are evaluated from the perspective of a reasonable person. Canada, some jurisdictions of the US, and England/Wales may belong to the first group, and Sweden to the second group.¹²⁵ In assessing the efforts made by the accused to ensure the risk, whether the partner consented to the sexual intercourse with him or not is tested, and how reasonable the mistake was, taking into account the circumstances in which it occurred. In the first approach, there is only one rape law and a mistake made concerning consent is evaluated under one offense. And in the case of the second approach, rape committed with intent is punished by a separate article, and its commission by negligence is a separate article. In the latter case, the punishment is light.¹²⁶

The approach implies that a person can initiate sexual activity only if he is sure of the consent of the other party. The judge/jury will look at what the defendant did to make sure the sex partner permitted him to have sex. It is not enough for the defendant to claim that he made an “honest mistake” or “thought that she agreed”, nor will his interpretations of the events become a sufficient basis for excluding responsibility.¹²⁷ Mistakes and reasonable ef-

- 124 See Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*. Oxford University Press, 97; Also see Herring, J. (2020). *Criminal Law: Text, Cases, and Materials*, Oxford University Press, 505-509.
- 125 For an analysis of the Swedish model, see Lernestedt, C. & Kagrell, M. (2022). *The Swedish Move Towards (In)Voluntariness in Hörnle, T. (ed). Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press.
- 126 E.g. see Wegerstad, L. (2022) *Negligent Rape Law*. In Hoven E. & Weigend, T. (eds). *Consent and Sexual Offenses, Comparative Perspectives, Nomos*, 125-126.
- 127 For an analysis of the Canadian model, see Thorburn, M. (2022). *Sexual Assault Law in Canada* In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*. Oxford University Press, 103-105; Also

forts made to ensure the consent of the party are evaluated by what steps the accused took for this, and what kind of communication he had with the victim. According to Canadian rape law, as indicated by the scholars, it is not enough to prove that “honest mistake” or “I thought that her “no” actually meant “yes” and other similar voluntary manifestation of blindness, the purpose of which is to avoid responsibility.¹²⁸ As V. Munro rightly notes, the high degree of mens rea of rape creates an opportunity to use the patriarchal cultural factor.¹²⁹ That is why the law should not allow a person to justify himself with simple words because of the mistake he made.¹³⁰ A person will be punished if there is no evidence in the case that the party actively and voluntarily participated in sex.¹³¹ It should be noted that the German model sets the minimum threshold of mens rea about consent to indirect intention, whose volitional element differs from the Anglo-American recklessness.¹³² The German court’s definition of indirect intention is very similar to the approach of England and Wales before 2003 when even a silly, unbelievable but “honest mistake” was enough to exclude mens rea concerning consent. It should be noted that the reform did not touch the subjective element of sexual violence in Germany. German scholar T. Hörnle is in favor of mens rea reform with sexual violence according to the Swedish model.¹³³ Hörnle explained this by saying that the test of evaluating factual mistakes and recklessness from the perspective of a rea-

sonable person is generally not an established institution in German criminal law.¹³⁴

Several researchers pointed out the practical problems of the second approach. Most of the cases are classified as negligent rape, and the perpetrators are given light sentences.¹³⁵ It has become even more manipulative to distinguish between cases of intent and negligence.¹³⁶ That is why the first model deserves support. The difficulty of communicating about sex is surmountable. If you are not sure about the consent of the other party, you should not initiate sex. If a person takes a risk, then responsibility is also fair.

The case of R v Ewanchuk¹³⁷ is interesting which the Supreme Court of Canada decided in 1999 and found the accused guilty. With this decision, the court followed the theory of communication of consent and took into account the test of “reasonable steps” to evaluate mens rea of sexual violence.¹³⁸

The victim, 17 years old, went to the accused for an interview. The accused offered to enter the trailer to show the woodworks (he related himself as a businessman in wood-working business). The victim left the door open, but the accused closed it, making the girl think he blocked the exit. The victim was terrified. The man started touching her, each subsequent touch was more intimate and with more intensity. The victim told him to stop several times. Then the man would stop, the girl wouldn’t make a sound at that time, and the man would continue the sexual touch.

The court did not interpret the girl’s shorts and passivity in moments as her consent to sexual touch (The defense strategy is to use the rape myth to defend the accused, that the wom-

see Nedelsky, J. (2012). Law’s Relations: A Relational Theory of Self, Autonomy, and Law, Oxford Academic, 219-221.

128 *Ibid.* 103.

129 Munro, V. (2014). Sexual Autonomy. In Dubber, M. D. & Hörnle, T. (eds). The Oxford Handbook of Criminal Law. Oxford University Press, 752.

130 *Ibid.*, 752.

131 *Ibid.*, 752. Also see Thorburn, M. (2022). Sexual Assault Law in Canada In Hörnle, T. (ed). Sexual Assault Law Reform in a Comparative Perspective. Oxford University Press, 103.

132 See Hörnle, T. (2022). The New German Law on Sexual Assault in Hörnle, T. (ed). Sexual Assault Law Reform in a Comparative Perspective. Oxford University Press, 149.

133 *Ibid.*

134 *Ibid.*

135 Wegerstad, L. (2022). Negligent Rape Law. In Hoven E. & Weigend, T. (eds). Consent and Sexual Offenses, Comparative Perspectives. Nomos, 125-126.

136 *Ibid.*

137 R. v. Ewanchuk (1999) 1 SCR 330 The case is cited and analyzed in the article: Thorburn, M. (2022). Sexual Assault Law in Canada In Hörnle, T. (ed). Sexual Assault Law Reform in a Comparative Perspective. Oxford University Press.

138 *Ibid.*, 104.

an dressed provocatively and she invited rape – asking for it) . It is beyond all reasonableness for the accused to expect that the girl liked and wanted his touch. The Supreme Court has criticized the definition of consent with similar gender prejudices. In the given situation, the girl refused to be touched several times, and she was scared and had no control over the situation. The abuser should not initiate sexual contact without consent. A woman’s “no” means “no”, translating it into consent is the stubbornness of the abuser and nothing else.

CONCLUDING REMARKS

The article has shown that the composition of rape provided by Georgian criminal law is based on patriarchal-moralistic ideology, this is especially well seen during judicial interpretations of the norm, how voluntary participation in sex is defined. It is also clear that the legal design to protect an individual’s sexual autonomy is practically still evaluated through the lens of morality. Women subjected to violence are looked at by the agents of justice with a magnifying glass, they are required to remain in the construction of the “ideal victim”, otherwise the system leaves them behind.

The paper supports the liberal understanding of sexual autonomy and related concepts,

which, on the one hand, requires a strict approach to punish all those actions that are performed in disregard of the true will of another person and, on the other hand, to limit punishment where there is free consent to sex, to protect the individual’s positive right to sexual autonomy.

In the paper, based on my observation and also on many other Georgian and foreign studies, it is clear that there is a need to change the coerced-based rape law to non-consent rape law.

Among the consent models, the paper has shared consent understood through communication as the “yes means yes” model. This model will most likely create a basis for cultural myths not to be used as a shield to protect the perpetrators. The same argument supports the mens rea standard of rape, which considers only a reasonable mistake of fact to exclude liability, which is determined by observing what reasonable steps the accused took to convince the other person’s consent.

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პროფესორი, კავკასიის უნივერსიტეტი, საქართველო

აბსტრაქტი

გაუპატიურებას, ძირითადად, ქალები ექვემდებარებიან, ხოლო მოძალადე, ძირითადად, კაცია. აღნიშნულს სოციალური და კულტურული განზომილებები აქვს. სტატიაში სექსუალური ძალადობის განმსაზღვრელი კანონმდებლობის პრობლემები ქალი დაზარალებულის რაკურსიდან არის ნაჩვენები. ნაშრომში განხილულია, თუ როგორ განიმარტება გაუპატიურება ქართული სისხლის სამართლის პრაქტიკაში, რატომ არის დღემდე გაბატონებული გაუპატიურების ერთი პარადიგმა – უცხო კაცი და ქალი, რომელიც ფიზიკურ წინააღმდეგობას უწევს მოძალადეს. სისხლის სამართალი ქალს უდგენს იდეალური დაზარალებულის სტანდარტს, გაუპატიურების დროს მოქმედების „რაციონალურ“ წესებს, კერძოდ, ადგენს – თუ როგორია „ტიპური ქცევა“ ქალისთვის გაუპატიურებამდე, გაუპატიურების დროს და მას შემდეგ. თუკი ძალადობაგამოვლილი ქალის ქცევა ამ სტანდარტში არ ჯდება, ის სამართლებრივი სისტემის მიღმა რჩება, მის ხმას სამართლის სისტემა ახშობს და არ უჯერებს. სტატიაში კრიტიკულადაა განხილული გაუპატიურების ქართული საკანონმდებლო და სასამართლო განსაზღვრება, თუმცა კვლევაში სხვა იურისდიქციების მიდგომებისა და მეცნიერული ხედვების ანალიზიცაა მოცემული. ნაშრომი ემყარება ლიბერალურ ფილოსოფიას, შესაბამისად, მხარდაჭერილია სექსუალური ავტონომიისა და თანხმობის ლიბერალური გაგება. ნაშრომის ამოცანაა – აჩვენოს თანხმობის არარსებობით გაგებული სექსუალური ძალადობის არსი და მისი უპირატესობა ძალადობის ძველ გაგებასთან შედარებით.

საკვანძო სიტყვები: გაუპატიურება, თანხმობა, „კი“ ნიშნავს „კი“-ს

შესავალი

სტატიის მიზანია – აჩვენოს ფიზიკური ძალადობით შემოსაზღვრული გაუპატიურების შემადგენლობის არაყოვლისმომცველობა, რომ ის სათანადოდ ვერ იცავს სექსუალურ ავტონომიას. გაუპატიურების ქართული მოდელი სახელდებით ჩამოთვლის გაუპატიურების ისეთ ხერხებს, როგორცაა ძალადობა, ძალადობის მუქარა და უმნებობა, მათი სამოსამართლო ინტერპრეტაცია კი კიდევ უფრო ვიწროა.¹ სექსუალური ძალადობის ასეთი არაყოვლისმომცველი დეფინიცია წინააღმდეგობაში მოდის ლიბერალური სისხლის სამართლის მიზნებთან, სახელმწიფო კი არღვევს პოზიტიურ ვალდებულებას – დაიცვას მოქალაქეები ძალადობისგან.² ამ ნაშრომში განხილულია გაუპატიურების როგორც ქართული მოდელი, ისე თანხმობის არარსებობით განსაზღვრული სექსუალური ძალადობის დეფინიციები სხვადასხვა ქვეყნებზე დაკვირვებით. თანხმობის არარსებობით გაუპატიურების მოდიფიცირების ვალდებულება აქვს საქართველოს, როგორც ქალთა მიმართ ძალადობისა და ოჯახში ძალადობის პრევენციისა და აღკვეთის შესახებ ევროპის საბჭოს კონვენციის (შემდგომში სტამბოლის კონვენცია) ხელმომწერ ქვეყანას. დღეს დასავლურ საზოგადოებაში და საგანმანათლებლო სივრცეში მთავარი დისკუსია მეცნიერებს შორის იმის თაობაზე მიმდინარეობს, თუ როგორ უნდა ჩამოყალიბდეს თანხმობის არარსებობით გაუპატიურების დეფინიცია, კერძოდ, თანხმობა, როგორც მისი მთავარი ელემენტი, „ნაგულისხმევად“ უნდა მოვიაზროთ, თუ ყოველთვის „კომუნიკაციის“ ფორმით. აღმოჩნდა რომ თანხმობის საკითხი ერთ-ერთი ყვე-

ლაზე უფრო რთულია გადასაწყვეტად, სწორედ ეს განაპირობებს ბევრნაირი ხედვისა და პერსპექტივის არსებობას მის ირგვლივ.³ ამ ნაშრომში კომუნიკაციის თეორიაა მხარდაჭერილი.

ნაშრომის მიზანია, ასევე, გამოკვეთოს სექსუალური ავტონომიის ნეგატიური და პოზიტიური ასპექტები, რათა ზღვარი გაივლოს ქმედებებს შორის, რომლებიც აუცილებლად უნდა ისჯებოდეს, რათა სექსუალურ ავტონომიაზე ნეგატიური უფლება იქნეს დაცული და, ასევე, გამოიკვეთოს ქცევები, რომლებიც არ უნდა ისჯებოდეს სისხლის სამართლის წესით, რათა დაცული იყოს სექსუალური ავტონომიის პოზიტიური უფლება.

ნაშრომში ადგილი ეთმობა, ასევე, გაუპატიურების *mens rea* საუკეთესო მოდელის ძიებას, ასეთია მაგალითად ინგლისისა და უელსის მიდგომა,⁴ რაც გულისხმობს თანხმობასთან დაკავშირებით ცოდნის კეთილგონიერი ადამიანის პერსპექტივით განსჯას, იმის მხედველობაში მიღებას, თუ რა ძალისხმევა გასწია სუბიექტმა რათა დარწმუნებული ყოფილიყო მეორე მხარის ნებართვაში სექსთან დაკავშირებით. ამდენად, ამ მოდელის მიხედვით, ადამიანი არ დაისჯება სექსში მონაწილის თანხმობის შეფასებისას დაშვებული შეცდომისთვის, თუ შეცდომა გონივრულია, რაც გამორიცხავს პასუხისმგებლობისთვის თავის არიდებას უბრალოდ „გულწრფელი შეცდომისთვის“. ეს სტანდარტი სივრცეს არ ტოვებს პასუხისმგებლობისგან თავის დასაძვრენად კულტურის ფაქტორზე მითითებით, რომ ქალის უარი თანხმობად გადათარგმნოს მოძალადემ. თუმცა ის, თუ რა ჩაითვლება „გონივრულად“, შესაძლოა გახდეს მანიპულაციების საგანი, ამისთვის კი ცხადი კანონი, თანმიმდევრული სამოსამართლო გან-

1 იხ. გეგელია, თ. (2020). სსკ-ის 137-ე მუხლის კომენტარი წიგნში: რედ. ბ. ჯიჰარიანი, სექსუალური დანაშაულები, იურისტების სამყარო.

2 ამ აზრს ეთანხმება ჯ. ნედელსკი, თუმცა ის ლიბერალიზმს გენდერულ სიბრმავეში სდებს ბრალს, როდესაც საქმე შეეხება ბავშვის და ქალის მიმართ ძალადობას. იხ. Nedelsky, J. (2012). *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, Oxford Academic, 200.

3 იხ. თანხმობის მოდელის მიმოხილვისთვის იხ. Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*, Oxford University Press. 26; ასევე იხ. Hörnle, T. (2024). *The Challenges of Designing Sexual Assault Law*, *Current Legal Problems*, Vol. XX, 7-9.

4 იხ. Munro, V. (2014). *Sexual Autonomy*. In Dubber, M. D. & Hörnle, T. (eds). *The Oxford Handbook of Criminal Law*, Oxford University Press, 752.

მარტებები და მეცნიერული განმარტებებია მნიშვნელოვანი.⁵

ნაშრომის ამოცანა გაუპატიურების შემადგენლობის „თანხმობის არარსებობით“ განსაზღვრის უპირატესობის ჩვენებაა ძველ არქაულ მოდელთან შედარებით. ამასთან, ნაშრომის ამოცანა არაა „თანხმობის“ რომელიმე კონკრეტული მოდელის შემოთავაზება, არამედ უფრო ზოგადი თეორიული საფუძვლებისა და მიდგომების უპირატესობის გამოკვეთაა, რაც გააძლიერებს პოზიციას ძალადობით განსაზღვრული გაუპატიურების შემადგენლობის თანხმობის არარსებობით ტრანსფორმაციისთვის.

რამდენადაც სისხლის სამართლის ფარგლები ლიბერალური ფილოსოფიით მესმის, იგივე პერსპექტივიდან ვუყურებ სექსუალური ძალადობის რეგულირებასაც. ჩემი შეხედულებები ჯ.ს. მილის, ჰ.ლ. ა. ჰარტის, ჯ. ფაინბერგის, ს. გრინისა და მრავალი სხვა ლიბერალი მოაზროვნის მნიშვნელოვან ზეგავლენას განიცდის, ამასთან, უშუალოდ სქესობრივი ავტონომიის, თანხმობისა და სექსუალური ძალადობის საზღვრებთან დაკავშირებით ლიბერალი ფემინისტებისა და მეცნიერების გავლენაც დიდია,⁶ კერძოდ, დავასახელებდი მ. ნასბაუმს, კ. პალიას, კ. ჰარდინს, ვ. დეპანტს და ბევრ სხვასაც. მიუხედავად იმისა, რომ რადიკალი ფემინისტების შეხედულებებს არ ვიზიარებ მატერიალური სისხლის სამართლის გამოყენების კუთხით, კერძოდ, თუ რა მოცულობით უნდა განისაზღვროს სექსუალური ძალადობა, როგორ უნდა განიმარტოს ექსპლუატაცია თუ სექსთან დაკავშირებული თანხმობის ნებაყოფლობითობა, მათი ტექსტების დიდი გავლენასაც განვიცდი. არსებობს საკითხები, რაზეც ფემინისტები, იქნებიან ისინი რადიკალები თუ ლიბერალები, თანხმდებიან, რომ ეს არის სქესობრივი ძალადობის გა-

მოვლენისა და მართლმსაჯულებაზე წვდომის საკითხები. ვიზიარებ მათ ხედვებს გენდერული ცრურწმენებისა და გაუპატიურებასთან დაკავშირებული მითების დისკრიმინაციულ გავლენაზე მართლმსაჯულების წვდომასთან მიმართებით.

1. გაუპატიურების დეფინიციის გადაზღვრების საჭიროება

1.1. გაუპატიურების არსის გაგება

იმის შესახებ, თუ რა უნდა ჩაითვალოს სექსუალურ ძალადობად და რა უნდა მოვიხილოთ სექსუალური ძალადობისგან დაცულ ინტერესად, განსხვავებული ხედვები არსებობს.

ერთი მიდგომა **პატრიარქალურ-მორალისტურია**, რომელსაც მეტ-ნაკლები ინტენსივობით დღემდე ირეკლავს იურისდიქციათა დიდი ნაწილი, მათ შორის, ლიბერალური სისხლის სამართალიც, განსაკუთრებით მისი სამოსამართლო განმარტებები.⁷ ამ მიდგომით სქესობრივი ძალადობის საზღვრები ძალიან ვიწროა. ფიზიკური ძალადობა (მცირე გამონაკლისებით) და, ასევე, დაზარალებულის მხრიდან მოძალადისთვის გაწეული წინააღმდეგობა დანაშაულის აუცილებელი actus reus არის. თუნდაც კანონში პირდაპირ არ იყოს ამაზე ხაზგასმა, პრაქტიკულად ის ასე განიმარტება. ამავე მიდგომით იყო, რომ ქმარს იმუნიტეტი იცავდა ცოლის გაუპატიურებისგან.⁸ ასეთი დათქმა ქართულ კანონმდებლობაში არასოდეს ყოფილა, მაგრამ, პრაქტიკულად, ცოლის გაუპატიურების შემთხვევების სტატისტიკა არ იძებნება. ასევე, არ იყვნენ დაცული ის ქალები, რომლებიც ვერ თავსდე-

5 კრიტიკული ანალიზისთვის იხ. Lacey, N. (2000). General Principles of Criminal Law? A Feminist View. წიგნში: Bibbings, L., & Nicolson, D. Feminist Perspectives on Criminal Law (eds.) Feminist Perspectives on Criminal Law, Routledge-Cavendish.

6 იხ. Gegelia, T. (2022). Georgian Regime of Regulation of Prostitution and its Watchdogs, Journal of Constitutional Law – Vol. 2, 45-59.

7 ამ თვალსაზრისით გერმანული მოდელის კრიტიკისთვის იხ. Hörnle, T. (2024). The Challenges of Designing Sexual Assault Law, Current Legal Problems, Vol. XX.

8 ისოტიული ანალიზისთვის იხ. Gavey, N. (2019). JUST SEX? The Cultural Scaffolding of Rape, Routledge. ასევე იხ. Temkin, J. (2002). Rape and the Legal Process, Oxford University Press.

ბოდნენ ქალთან დაკავშირებით არსებულ სოციალურ კონსტრუქტებში, პატრიარქატის მიერ დადგენილ „იდეალური ქალის“ სტანდარტში, რადგან პატრიარქალურ-მორალისტური მიდგომით დაცული სიკეთეა არა ადამიანის სექსუალური ავტონომია, არამედ რაღაც აბსტრაქტული ერთეული – ოჯახის ღირსება, ქონება და ქალის პატიოსნება, სწორედ ეს იყო შუასაუკუნეების ევროპული სისხლის სამართლით დაცული სამართლებრივი ინტერესი.⁹ ეს „ინტერესები“ თანამედროვე ლიბერალური სისხლის სამართლის კანონმდებლობიდან განდევნილია. პატრიარქალურ-მორალისტური მიდგომით ბევრი ქმედება, რომელიც თავისი არსით სექსუალური ხასიათისაა და რომელიც მეორე მხარის ნების უგულვებლყოფით ხდება და, შესაბამისად, ძალადობაა, არ ექცევა აკრძალვის ქვეშ. ისიც უნდა აღინიშნოს, რომ მორალისტური მიდგომა ამართლებს ზოგიერთი ისეთი სექსუალური ქცევის კრიმინალიზებას, რომელიც ლიბერალური სისხლის სამართლით დანაშაულთა კატალოგებიდან ამორიცხებულია. ასეთია პროსტიტუცია, თუმცა ის არა გაუპატიურების ამკრძალავი მუხლით, არამედ სხვა ნორმითაა დასჯადი. პროსტიტუციისგან დაცული სიკეთეა ოჯახის ინსტიტუტი, ზნეობა და მორალი და, როგორც წესი, ისჯება სექსუალური მომსახურების გამწვევი.¹⁰

ქართული სისხლის სამართლის კანონით განსაზღვრული გაუპატიურების აკრძალვა და მისი სამოსამართლო განმარტებები სწორედ მორალისტური-პატრიარქალური გაგებისაა¹¹ და მიუხედავად ბოლო პერიოდის საკანონმდებლო ცვლილებებისა, ის ძირეულად არ შეცვლილა.

9 იხ. Temkin, J. (2002). Rape and the Legal Process, Oxford University Press, 57. ასევე იხ. Hörnle, T. (2022). The New German Law on Sexual Assault. In Tatjana Hörnle(ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press. 141.

10 პროსტიტუციის რეჟიმების მიმოხილვისთვის იხ. Gegelia, T. (2022). Georgian Regime of Regulation of Prostitution and its Watchdogs, Journal of Constitutional Law – Vol. 2, 45-59.

11 ანალიზისთვის იხ. Gegelia, T. (2021). The Rape Paradigm: Violent Stranger VS Warrior Victim, Law and World, Vol. 7 (3), 73-97.

საქართველოს სისხლის სამართლის კოდექსის (შემდგომში სსკ) 22-ე თავმა, რომელიც სქესობრივი თავისუფლებისა და ხელშეუხებლობის წინააღმდეგ მიმართულ ხუთ დანაშაულს მოიცავს, სტამბოლის კონვენციის გავლენით, ნაწილობრივი რეფორმა განიცადა. 2017 წლის მაისის ცვლილებებით, გაუპატიურების დეფინიცია გენდერულად ნეიტრალური გახდა, კანონმდებელმა ამოიღო მორალისტური ტერმინები და სექსის „ტრადიციულ“ და „არატრადიციულ“ ფორმებად დიფერენცირება. ახალი დეფინიციის მიხედვით, სექსუალური აქტი რომ გაუპატიურებად შეფასდეს, ის აუცილებლად სხვის სხეულში შეღწევითი ხასიათის უნდა იყოს, ხოლო შეღწევა სხეულის რა ნაწილით და რა ფორმითაც არ უნდა მოხდეს, ეს არ შეცვლის გაუპატიურების კვალიფიკაციას. თუმცა, ერთი შეხედვით მორალიზმისგან გათავისუფლებული და გენდერულად ნეიტრალური დეფინიცია ჯერ მაინც ირეკლავს მორალიზმსაც და გენდერულ სპეციფიურობასაც. კერძოდ, რამდენადაც დეფინიციაში ხაზგასმია სხვის სხეულში შეღწევაზე, ყურადღების მიღმაა დარჩენილი გაუპატიურების ისეთი შემთხვევა, როდესაც დაზარალებულის სხეულის გამოყენებით ხდება მოძალადის სხეულში შეღწევა. პრაქტიკულად, ნორმის ფორმალური განმარტების გამო, ასეთი შემთხვევები გაუპატიურებად არ ფასდება.¹²

მთავარი პრობლემა, რაც გაუპატიურების ქართულ მოდელს აქვს, მისი ძალადობის, ძალადობის მუქართა და უმწეობის ვიწრო შემთხვევებით შემოსაზღვრაა. უკვე მრავალი წელია დაუსაბუთებელი მიზეზებით ფერხდება რეფორმის საჭიროება, რომ ის თანხმობის არარსებობით მოდიფიცირდეს, რათა სექსუალური ავტონომიის ხელმყოფი მეტი ქმედება მოიცვას, მიუხედავად იმისა,

12 ამ კუთხით ქართული სასამართლო პრაქტიკის კრიტიკული ანალიზისთვის იხ. ლეკანოსიძე, თ. და პატარაია, ბ. (2020). (რედ.), სქესობრივი თავისუფლებისა და ხელშეუხებლობის წინააღმდეგ მიმართული დანაშაულების კომენტარი, საფარი, 74-75. შეად. ჯიშკარიანი, ბ. (2022). სისხლის სამართლის კერძო ნაწილი. დანაშაული ადამიანის წინააღმდეგ, იურისტების სამყარო, 222.

რომ ქართულ აკადემიურ სივრცეში სულ მეტი წიგნი და სტატია იწერება ცვლილებების მხარდასაჭერად, ისევე როგორც აშკარაა არასამთავრობო ორგანიზაციებისა და ფემინისტების დიდი ძალისხმევა – გატარდეს სახელმწიფო რეფორმა.¹³

ისიც მართალია, რომ გაუპატიურების ხერხები – ძალადობა, ძალადობის მუქარა და უმწეობაც უფრო ფართოდ შეიძლება განიმარტებოდეს, ვიდრე მათი ამჟამინდელი გაგებაა,¹⁴ მითუმეტეს რომ ამ თვალსაზრისით ადამიანის უფლებათა ევროპული სასამართლო (შემდგომში სტრასბურგის სასამართლო) სტანდარტი არსებობს,¹⁵ თუმცა ვხედავთ, რომ ქართული სისხლის სამართლის პრაქტიკა კვლავ მორალისტური და პატრიარქალური პერსპექტივიდან უყურებს და აფასებს სექსუალურ ძალადობას და ესაა პროგრესის მთავარი შემაფერხებელი. ქალის ნების დათრგუნვისთვის დადგენილი მინიმალური სტანდარტი ძალიან მკაცრია, მაშინ როცა წინააღმდეგობის დასაძლევად გაცილებით ნაკლები ზეწოლის გამოყენებაა საკმარისი. მორალისტურ-პატრიარქალური სისხლის სამართლის ამოსავალია არა ადამიანის სექსუალური თავისუფლების დაცვა, არამედ „პატიოსანი ქალის“ პატივის დასაცავად თავგანწირული ბრძოლის დადგენა. ძალადობაგამოვლილ ქალებს ისევე ლუპით ამოწმებენ – როგორ იქცეოდა ის

გაუპატიურებამდე, გაუპატიურების დროს და მას შემდეგ.¹⁶ სწორედ ამიტომაც, რომ გაუპატიურების იდეალური დაზარალებული მკვდარი ქალია ან ქალი, რომელიც დასახიჩრდა „პატივის“ დასაცავად მოძალადესთან ორთაბრძოლაში. ეს უსამართლოდ მკაცრი სტანდარტი მოქმედებს ბავშვი დაზარალებულების მიმართაც, რაზეც მოგვიანებით იქნება საუბარი კონკრეტული საქმის დამოწმებითა და ანალიზით.

ის, თუ როგორ განსაზღვრავს სექსუალური ძალადობის საზღვრებს პატრიარქალური იდეოლოგია ამისთვის კანონის სისტემური ანალიზია საინტერესო. კერძოდ, კანონმდებლის ნების გასაგებად მნიშვნელოვანია სსკ-ის 143³ მუხლი, რომლის პირველი ნაწილი ტრეფიკინგის მსხვერპლის მომსახურებით სარგებლობისთვის ითვალისწინებს სასჯელის სახით **სამიდან ხუთ** წლამდე თავისუფლების აღკვეთას. აქ იგულისხმება **როგორც სრულწლოვანი, ისე არასრულწლოვანი დაზარალებული**. ტრეფიკინგის მსხვერპლს თავისუფალი არჩევანი წართმეული აქვს, სწორედ ამიტომაც „ტრეფიკინგის მსხვერპლი“. როდესაც ადამიანს გააზრებული აქვს, რომ სქესობრივი აქტის მეორე მონაწილეს სექსზე თანხმობას იძულების გამო გასცემს (ე.ი. მისი თანხმობა არაა ნამდვილი) და მიუხედავად ამისა, ამ აქტს მაინც აქვს ადგილი, ეს გაუპატიურებაა.¹⁷ ამ და კიდევ სხვა ნორმების სისტემური განმარტება ცხადყოფს, რომ კანონმდებლობა მხარს უჭერს გაუპატიურების ვიწრო საზღვრებს. მას მხოლოდ ფიზიკური ძალადობით ჩადენილი გაუპატიურება მიაჩნია საკმარისად სერიოზულად იმისთვის, რომ გაუპატიურებად გაფორმდეს. სრულწლოვანის შემთხვევაში სასჯელი ექვსიდან რვა წლამდე ვადით თავისუფლების აღკვე-

13 2017 წლის და შემდგომი პერიოდის სხვა ცვლილებების შესახებ ანალიზისთვის იხ. Gegeleli, T. (2021). The Rape Paradigm: Violent Stranger VS Warrior Victim, *Law and World*, Vol. 7 (3), 73-97.

14 გაუპატიურების შემადგენლობის ფართოდ განმარტების ტენდენცია აშკარად გაჩნდა თანამედროვე ქართულ იურიდიულ ლიტერატურაში. იხ. გეგელია, თ. (2020). სსკ-ის 137-ე მუხლის კომენტარი წიგნში: ჯიშარიანი, ბ. (რედ.), სქესობრივი დანაშაულები, იურისტების სამყარო; ასევე იხ. დეკანოსიძე, თ. და პატარაია, ბ. (2020). (რედ.), სქესობრივი თავისუფლებისა და ხელშეუხებლობის წინააღმდეგ მიმართული დანაშაულების კომენტარი, საფარი.

15 იხ. C.R. v. The United Kingdom, (Application No. 48/1994/495/577), ECtHR, Judgment of 27 October, 1995, para. 34. para 41 and 42. საქმის ანალიზისთვის იხ. Eriksson, M. (2010). Defining Rape, *Emerging Obligations for States under International Law? Kållered*, 365, 95-98.

16 გეგელია, თ. (2024). სექსუალური ძალადობაგამოვლილი ქალი და ეპისტემური უსამართლობა, საკონსტიტუციო სამართლის ჟურნალი N1. მალე გამოქვეყნდება.

17 მსგავსი შეფასებისთვის იხ. Lernestedt, C. & Kagrell, M. (2022). The Swedish Move Towards (In)Voluntariness in Hörnle, T. (ed.), *Sexual Assault Law Reform in a Comparative Perspective*, Oxford University Press, 180.

თაა, ხოლო იგივე ქმედება არასრულწლოვნის მიმართ – თხუთმეტიდან ოც წლამდე ვადით ან უვადო თავისუფლების აღკვეთით ისჯება.

სსკ-ის 139-ე მუხლის პრაქტიკული განმარტებაც ამას მოწმობს. ადამიანთან, მისი თანხმობის გარეშე, პირადი ინფორმაციის გამჟღავნების მუქარის გავლენით სქესობრივი კავშირის დამყარება, ხუთ წლამდე თავისუფლების აღკვეთით ისჯება. ამ ნორმის როგორც ძველი დოქტრინალური, ისე ძველიც და თანამედროვე ქართული სასამართლოს განმარტება იმდაგვარია, რომ ნორმა მოიცავს არა მხოლოდ დამუქრებას, არამედ მუქარის რეალიზებასაც ანუ თუკი შეშინებული დაზარალებული დაჰყვება მოძალადის მუქარას და მასთან სექსი ექნება.¹⁸

საინტერესოა ერთი შემთხვევის განხილვა, თუ როგორ გაუმკლავდება მას ქართული სისხლის სამართალი. ეს შემთხვევა სინამდვილეში მოხდა,¹⁹ თუმცა მართლმსაჯულების სისტემამდე ვერ მიაღწია დაზარალებული ქალის მიმართ გენდერული ცრურწმენებისა და გაუპატიურების მითების გამო.

კვლევის თანახმად, ანა 19 წლის იყო. მას გამოეღვიძა, რა დროსაც აღმოაჩინა, რომ ადამიანი რომელთანაც ბინას იყოფდა, 30 წლის მამაკაცი, მის ლოგინში იწვა და მას ჩქმეტდა. ანას ამ კაცთან რაიმე რომანტიული ურთიერთობა ანმყოში ან წარსულში არ ჰქონია. იმ ღამეს კაცი მძინარე ანას გვერდით დაწვა და შემდეგ ანას სხეულში, მასთან რაიმე კომუნიკაციის გარეშე, სქესობრივად შეაღწია. ანამ მკვლევართან საუბრისას გაიხსენა, რომ გამოღვიძების შემდეგ, მიუხედავად იმისა, რომ ყველაფერი ძალიან სწრაფად მოხდა, ახსოვდა, თუ რა

აზრმა გაუელვა თავში წამიერად, როდესაც მის გვერდით მწოლიარე მამაკაცი აღმოაჩინა – ეს იყო შიში იმისა, რომ თუკი იგი გაქცევას შეეცდებოდა, მამაკაცი მაინც დაიჭერდა მას და „უარესს დამართებდა“. ასე ახსნა ანამ საკუთარი უმოქმედობა.

არის თუ არა ეს გაუპატიურება? არის. ქალის ნებართვის გარეშე მის სხეულში სექსუალური ხასიათის შეღწევა მოხდა. ანამ, დაზარალებულმა იმ ფიქრებით, რომ „უარესს დამართებდნენ“, უბრალოდ უმოძრაობა „ამჯობინა“. 30 წლის კაცის მოლოდინი ქალი თანხმობის შესახებ, რადგან ის დუმილით შეხვდა მის წამოწყებას, გონივრული არაა. ქალს სექსზე თანხმობა არ მიუცია. ჩაძინებული ქალის სხეულზე სექსუალური ქცევის წამოწყება რომ ქალისთვის საშიშ ქმედებად აღიქმება, მითუმეტეს როცა ისინი სახლში მართონი იყვნენ, მოულოდნელი ვერ იქნებოდა მოძალადისთვის.

ეს საქმე ქართული სისხლის სამართლის მიხედვით გაუპატიურებად არ შეფასდებოდა, იმიტომ რომ მოძალადეს ქართული სტანდარტით დადგენილი ფიზიკური ძალადობა არ გამოუყენებია, არც დამუქრებია, არც უმწეობის კლასიკურ შემთხვევასთან გვაქვს საქმე.²⁰ ჩაძინებულ მდგომარეობაში რომ მომხდარიყო პენეტრაცია, ეს ქმედების გაუპატიურებად შეფასებისთვის საკმარისი იქნებოდა, მაგრამ ანას პენეტრაციამდე გამოეღვიძა, ამიტომ ქართული პატრიარქალური სს-ით მას ფიზიკურად უნდა ებრძოლა „პატიოსნების“ დასაცავად.

თანხმობის არარსებობით განსაზღვრული გაუპატიურება ყველა ზემოთ ჩამოთვლილ შემთხვევას მოიცავს, რაც სამართლიანია. სხვა ადამიანის სხეულში სექსუალური პენეტრაცია მეორე ადამიანის მხრიდან თავისუფალი თანხმობის გარეშე – გაუპატიურებაა. სხეულზე ფიზიკური ზიანის არსებობა ამისთვის არაა საჭირო.

18 იხ. 139-ე მუხლის კომენტარები წიგნში: დეკანოსიძე, თ. და პატარაია, ბ. (2020). (რედ.), სქესობრივი თავისუფლებისა და ხელშეუხლებლობის წინააღმდეგ მიმართული დანაშაულების კომენტარი, საფარი; შეად. ჯიშკარიანი, ბ. (2022). სისხლის სამართლის კერძო ნაწილი. დანაშაული ადამიანის წინააღმდეგ, იურისტების სამყარო.

19 ეს საქმე მოყვანილია მითითებულ ნაშრომში: Gavey, N. (2019). JUST SEX? The Cultural Scaffolding of Rape, Routledge, 167.

20 გაუპატიურების ხერხების ვიწრო ინტერპრეტაციის კრიტიკული ანალიზისთვის იხ. გეგელია, თ. (2020). სსკ-ის 137-ე მუხლის კომენტარი წიგნში: ჯიშკარიანი, ბ. (რედ.), სქესობრივი დანაშაულები, იურისტების სამყარო.

ფემინისტური მიდგომა

სექსობრივი ძალადობის ერთ-ერთი ყველაზე ფართო გაგება ფემინისტური გაგებაა. „ფართოში“ იგულისხმება ქცევის ძალადობად მიჩნევის დაბალი ზღვარი. სექსუალურ ძალადობად მიიჩნევა ნებისმიერი არასასურველი სექსი, რომელიც ნებისმიერი სახის ზეწოლით მოხდა, მათ შორის მოიაზრება პროსტიტუცია (სოციალური უთანასწორობით გამოწვეული ზეწოლა); სექსი დაშორების მუქარით (ემოციური ზეწოლა),²¹ ერთი სიტყვით, სექსი, რომელიც მეორე მხარის ენთუზიაზმის გარეშე ხდება. სექსუალური ექსპლუატაციის ფემინისტური გაგება მხედველობაში იღებს გენდერული და სოციალური უთანასწორობის ზოგად კონტექსტს, სტატისტიკებს დასაქმებისა და უთანასწორო ანაზღაურების თაობაზე, ასევე, სოციალურ კონსტრუქტებს და ა.შ.²² სწორედ ამიტომაც, მათთვის პროსტიტუცია ექსპლუატაციის ფორმაა, რადგან მიაჩნიათ, რომ მისთვის დამახასიათებელია ქალის საგნად აღქმა.²³ ასეთი მიდგომით, სექსუალური ძალადობისგან დაცული სიკეთეა ქალების, როგორც ჯგუფის, ღირსება და თანასწორობა.²⁴ ამავე მიდგომით, უნდა იკრძალებოდეს პორნოგრაფიაც, როგო-

რც ქალზე ძალადობის „ნორმალიზების ინსტრუმენტი“ და, ასევე, BDSM, რომელიც პატრიარქალური წესრიგის „რომანტიზებაა“.²⁵ ამასთან, ზემოთ აღნიშნული ზოგადი კონტექსტის გათვალისწინებით, ისინი ჩამოთვლილ სექსუალურ ძალადობასთან დაკავშირებით არ ენდობიან ქალის თანხმობას, ქალს არ მიიჩნევენ ავტონომიური გადაწყვეტილების მიმღებად. ფემინიზმის ეს რადიკალური მიდგომა პატერნალისტურია და იგი ქალს ბავშვად წარმოაჩენს, რომელსაც სახელმწიფოსგან სპეციალური დაცვა სჭირდება.²⁶ მსგავსი მკაცრი პატერნალიზმი მიუღებელია პერსონალური ავტონომიის ლიბერალური გაგებისთვის, რომელსაც ქვემოთ განვიხილავ.

ინდივიდის ავტონომიის ორი გავრცელებული გაგება არსებობს, ესენია: ავტონომიის ლიბერალური გაგება – ინდივიდუალური ავტონომია; და ურთიერთობითი ავტონომია (Relational autonomy). სწორედ ეს უკანასკნელი მიდგომაა პოპულარული ზემოთ აღნიშნული ე.წ. რადიკალი ფემინისტების ტექსტებში. ურთიერთობითი ავტონომიის მხარდამჭერია ბრიტანელი მეცნიერი ჯ. ჰერინგი.²⁷ მისი მტკიცებით, ავტონომიის ლიბერალური გაგება მხედველობაში არ იღებს იმას, რომ ადამიანი სოციალური არსებაა და სწორედ საზოგადოების გავლენით იღებს გადაწყვეტილებებს. სწორედ ამიტომაც გვთავაზობს ავტონომიის გასაგე-

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ბად მხედველობაში მივიღოთ კონტექსტი – კერძოც და ზოგადიც.²⁸ ჯ. ნედელსკი, ასევე, ურთიერთდამოკიდებულებით განმარტავს ავტონომიას.²⁹ ამ მიდგომით, ადამიანის გადაწყვეტილება არ უნდა შეფასდეს საზოგადოების მოთხოვნისგან განყენებულად.³⁰ ამოსავალი ამ ტიპის ავტონომიურობისა არის ინდივიდის ურთიერთობიდან მომდინარე ზიანისგან დაცვა, რომელიც ძალადობრივია.³¹ აქ უნდა აღინიშნოს, რომ ძალადობრივი ურთიერთობიდან ინდივიდის დაცვა არათუ არ ეწინააღმდეგება ლიბერალურ მიდგომას, არამედ ის ამ პრინციპის მკაცრი მიმდევარია. ჰერიგნი, ლიბერალი ავტორების დასახელების გარეშე, წერს, რომ თითქოს ისინი მხედველობაში არ იღებენ ძალადობრივ გამოცდილებას, რომელიც სექსს წინ უძღოდა, რაც გავლენას ახდენს ნების თავისუფლებაზე. ვფიქრობ, ეს ლიბერალი მეცნიერების დაუმსახურებელი კრიტიკაა.³² ლიბერალებისთვის პრობლემას წარმოადგენს სისხლის სამართლის მიზნებისთვის „ძალადობრივი გარემოს“ ძალიან ფართო განმარტება, რომელსაც ჰერიგნი და რადიკალი ფემინისტები ზოგადი უთანასწორო სოციალური კონტექსტის მხედველობაში

მიღებით განმარტავენ, რაც მათთვის საკმარისია გაცემული თანხმობის ნებაყოფლობითობის გამოსარიცხად,³³ აღნიშნული საკმარისი არაა ლიბერალური მიდგომისთვის, სისხლის სამართლის მიზნებიდან გამომდინარე, ის ბალანსის დაცვას ცდილობს და, ამასთანავე, პოზიტიური სექსუალური ავტონომიის დაცვის მიზნებიდან გამომდინარე, სიფრთხილეს იჩენს.³⁴ ჰერიგნი ამიტომაც თანხმობის „ძლიერ“ ფორმას უჭერს მხარს, რაც გულისხმობს თანხმობის ვალდებულებისთვის ყველა გარეშე ზეწოლისგან თავისუფლებას.³⁵ თანხმობის და სექსუალური ავტონომიის ლიბერალური გაგება სწორედ იმიტომ არ მოსწონთ ურთიერთობითი ავტონომიის მომხრეებს, რომ ის თანხმობის ნებაყოფლობითობას ასე მკაცრად არ განმარტავს.³⁶ ამიტომაც, ბევრი შემთხვევა, რაც ლიბერალისთვის დაშვებული სექსია, ურთიერთდამოკიდებულებით გაგებული ავტონომიის მომხრესთვის, სექსუალური ძალადობაა. ამის მაგალითია პროსტიტუცია.³⁷ ასევე, უსამართლო ბრალდებაა ლიბერალების მიმართ, რომ თითქოს ისინი გენდერულ სტერეოტიპებსა და გაუპატიურებასთან დაკავშირებულ მითებს მხედვე-

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თამარ გემელია

ლობაში არ იღებენ.³⁸ კულტურული ფაქტორი და სოციალური დასწავლულობა გავლენას ახდენს ადამიანზე ზოგადად, ეს აუცილებლად ლიბერალიზმთან არაა ბმაში.³⁹

ლიბერალური გეგმა

რაც შეეხება პერსონალური ავტონომიის ლიბერალურ გაგებას, ის ინდივიდს, როგორც რაციონალურ არსებას ისე უყურებს, მას მიანდობს საკუთარი ცხოვრების წარმართვის სადავეებს.⁴⁰ გრინი გამოყოფს ავტონომიის ნორმატიულ და დესკრიფციულ გაგებას. პირველი უფლებასთანაა კავშირში – იმოქმედო საკუთარი სურვილით და ნების შესაბამისად,⁴¹ რომლის შეზღუდვაც გამართლებულია მხოლოდ მაშინ, როდესაც მისი რეალიზება სხვა ადამიანის უფლებას უქმნის საფრთხეს.⁴² სექსუალური ავტონომია გულისხმობს, ასევე, უფლებას – გამოიყენო შენი სექსუალობა, როგორც საშუალება საკუთარი საჭიროებებისთვის.⁴³ ავტონომიის დესკრიფციული ასპექტი დაკავშირებულია ადამიანის შესაძლებლობასთან – თავად განკარგოს საკუთარი ცხოვრება, რომელიც ნაკარნახევი იქნება საკუთარი მოტივებით და არა სხვისი მხრიდან ექსპლუატაციით.⁴⁴

სექსუალურ ავტონომიას მრავალფეროვანი გამოხატულება აქვს, ზუსტად იმდენივე, რამდენი ადამიანიცაა და როგორიცაა მისი ინდივიდუალური არჩევანი და დამოკიდებულება სექსუალობასთან დაკავშირებით. სექსუალური ავტონომია მოიცავს ადამიანის უფლებას – ჰქონდეს სექსი, ვისთანაც სურს და რა ფორმითაც სურს, ან არ ჰქონდეს სექსი საერთოდ; დაკავდეს სექსით საკუთარ თავთან; ფლობდეს და იყენებდეს სექსსათამაშოს სექსუალური მიზნებისთვის; ისარგებლოს ლეგალური პორნოგრაფიული მასალით; იყიდოს ან გაყიდოს სექსუალური მომსახურება; მონაწილეობა მიიღოს ბიდი-ესემში (BDSM: დაბმა/დისციპლია, დომინაცია/მორჩილება, სადიზმი/მაზოხიზმი); ჰქონდეს სექსი ჯგუფურად და სხვა.⁴⁵ ლიბერალური მიდგომისთვის მთავარია ყველა ეს აქტივობა მოხდეს მასში მონაწილეთა თანხმობით, ხოლო გაცხადებული თანხმობა იყოს ინფორმირებული და თავისუფალი. ლიბერალური სისხლის სამართალი პატერნალისტურ მზრუნველობას ადგენს მხოლოდ გარკვეული ჯგუფებისთვის, რომელთაც მაგალითად, ასაკის ან ჯანმრთელობის მდგომარეობის გამო არ შეუძლიათ თავისუფალი გადაწყვეტილების მიღება.

38 Herring, J. (2009). Relational Autonomy and Rape. In Sclater, S. D. (ed.), *Regulating Autonomy: Sex, Reproduction and Family*, Oxford Legal Studies, 67
39 გენდერული მითებისა და ცრურწმენების ნეგატიურ გავლენაზე მართლმსაჯულების შედეგებზე განხილული მაქვს სტატიაში რომელიც მალე გამოქვეყნდება: გეგელია, თ. (2024). სექსუალური ძალადობაგამოვლილი ქალი და ეპისტემური უსამართლობა, საკონსტიტუციო სამართლის ჟურნალი..
40 nb. Raz, J. (1988). Autonomy, toleration, and the harm principle. In Mendus, S. *Justifying Toleration: Conceptual and Historical Perspectives*, Cambridge University Press, 156; Dworkin, R. (1997). *Taking Rights Seriously*, Harvard University Press, 272-273.
41 Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*, Oxford University Press, 19.
42 Mill, J. S. (1859). *On Liberty*, Batoche Books Limited 2001 edition).
43 Jenkins, S. (2009). Exploitation: The Role of Law in Regulating Prostitution. In Shelley Day Sclater (ed.), *Regulating autonomy: sex, reproduction and family*, 32
44 Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*, Oxford University Press, 19.

1.2. განსხვავებული მიდგომების გავლენა სისხლის სამართლის გამოყენებაზე

სისხლის სამართლის გამოყენება განსხვავებული მოცულობით ხდება, იმისდა მიხედვით – ის ლიბერალურად თუ რომელიმე სხვა სახის ფილოსოფიითაა გაგებული. სისხლის სამართლის მეცნიერებაში ჩამოთვლიან ხოლმე ურთიერთობის სახეებს, რომლისთვისაც დამახასიათებელია სუბორდინაცია და ძალაუფლების დისბალანსი. ამ ტიპის ურთიერთობაში და კონტექსტში მომხდარი სექსუალური კავშირი სამართლის ყურადღებას იწვევს. ამ ტიპის ურთიერთობებს მიეკუთვნება კავში-

45 იქვე. 20.

რები შემდეგ სუბიექტებს შორის: პატიმარი და ციხის ზედამხედველი, დაკავებული და პოლიციელი, სტუდენტი და ლექტორი,, მღვდელი და მრევლი, პაციენტი და ექიმი, და მრავალი სხვა.⁴⁶

აბსოლუტური მიდგომით, ამ ტიპის ურთიერთობაში ძალაუფლების ვერტიკალში მყოფ პირთან სექსუალური აქტი ძალადობრივია და კრიმინალიზებული უნდა იყოს ყოველგვარი კონტექსტუალური ანალიზის გარეშე. კონტექსტუალური მიდგომა კი ამ ტიპის ურთიერთობებში (რალაც ნაწილთან მიმართებით) დიფერენცირებული მიდგომის მომხრეა.

სისხლის სამართლის ლიბერალი მეცნიერი ს. გრინი გამოყოფს დაკავებულისა და პოლიციელის ურთიერთობას, სადაც უშვებს აბსოლუტურ მიდგომას. ის ყურადღებას ამახვილებს პოლიციელის ძალაუფლებაზე, მის სპეციალურ მომზადებაზე, შეიარაღებასა და შესაძლებლობაზე – სიცოცხლისთვის სახიფათო ზიანი მიაყენოს დაკავებულს, თავისუფლება აღკვეთილ ადამიანს, რომელიც სრულიად დაუცველი და მთლიანად სახელმწიფოს კონტროლის ქვეშაა, ძალაუფლების ასეთი დისბალანსი მას საკმარისად მიაჩნია, რომ სექსი ასეთ ურთიერთობაში აიკრძალოს აბსოლუტური მიდგომით. აქ გრინი მიიჩნევს, რომ თუნდაც იდეაში რომ დავუშვათ ამ ტიპის ურთიერთობაში „ნებაყოფლობითი“ სექსი, მისთვის მისაღებია აბსოლუტური აკრძალვა იმ დაშვებით, რომ ძალიან მაღალია ძალაუფლების ბოროტად გამოყენების რისკი. მოქნილი კანონი გაართულებდა გამოძიებას, გაზრდიდა ცრუ გამამართლებელ განაჩენებს ბრალდებული პოლიციელების საქმეებში.⁴⁷ ამდენად, ლიბერალური თვალსაზრისისთვის უცხო არაა აბსოლუტური მიდგომები, სწორედ კონტექსტიდან გამომდინარე. გრინი აბსოლუტურ დასჯას ემხრობა, მათ შორის, ინსტიტუციური საკითხის გამოც, რომ საჯარო მოხელე, რომელიც საქმეში

მონშეა (პოლიციელი), გამომძიებელი ან პროკურორი, ყველას ინტერესშია იყოს მიუკერძოებელი.⁴⁸

ლიბერალური ხედვა კონტექსტუალურ მიდგომას ამჯობინებს ისეთი ტიპის ურთიერთობებში, როგორცაა ლექტორსა და სტუდენტს შორის ურთიერთობა, სამსახურებრივი ურთიერთობები და სხვა.

როგორც ზემოთ აღინიშნა, რადიკალი ფემინისტები მხედველობაში იღებენ ზოგად სიტუაციას, სოციალურ კონსტრუქციებს. სწორედ აქედან მოდის იერარქიულ სოციალურ ურთიერთობებში სექსთან დაკავშირებით მხარეთა სექსუალური ურთიერთობის სწორხაზოვანი შეფასებები. ასეთი მიდგომით, სივრცე არ რჩება აზრისთვის ნებაყოფლობით სექსთან დაკავშირებით. ლიბერალური მიდგომით, სამსახურებრივ ურთიერთობაში სექსის კრიმინალიზება გამართლებული იქნება კონკრეტული კონტექსტის ანალიზისა და ნების დათრგუნვის გამოვლენის შემთხვევაში.

2. სექსუალური ავტონომია, თანხმობა, ნებაყოფლობითობა

2.1. სექსუალური ავტონომია

სექსუალური ძალადობისგან დაცული ინტერესია სექსუალური ავტონომია. სსკ-ის 22-ე თავი, რომელიც სექსუალური ხასიათის ძალადობრივ ქმედებებს აერთიანებს, სწორედ სექსუალური თავისუფლებისა და ხელშეუხებლობით არის დასათაურებული, ასევე, ინდივიდის სექსუალურ ავტონომიაზე თავდასხმა ადამიანის ღირსების შემლახვად სამართლიანადაა მიჩნეული.⁴⁹

ადამიანის სექსუალურ ავტონომიას ორი

46 ჩამონათვალისთვის იხ. Green, S. (2022). Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position. In Hörnle, T. (ed). Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 84.

47 იხ. იქვე. 87.

48 იქვე. 88.

49 იხ. Hörnle, T. (2024). The Challenges of Designing Sexual Assault Law, Current Legal Problems, Vol. XX, 4; Green, S. (2022). Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position. In Hörnle, T. (ed). Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 77; Gardner, J. And Shute, S. The Wrongness of Rape, Oxford Essays in Jurisprudence, Oxford 2002, 205.

ასპექტი აქვს, პოზიტიური (უფლება – გქონდეს სექსი საკუთარი მოტივების შესაბამისად) და ნეგატიური (უფლება – არ დაექვემდებარო არასასურველ სექსუალურ ქცევას).⁵⁰ ინდივიდის პოზიტიური უფლება – ჰქონდეს სექსი, ვისთანაც სურს, გადაიწონება იმ მეორე ადამიანის ნეგატიური უფლებით, დაცული იყოს არასასურველი სექსუალური ქმედებისგან.⁵¹ სექსუალური ქცევის კრიმინალიზების მიზანია ადამიანის ნეგატიური სექსუალური უფლების დაცვა, თუმცა აქვე მხედველობის მიღმა არ უნდა დარჩეს იმავე ადამიანის პოზიტიური უფლებაც. მაგალითად, სექსუალური ავტონომიის ნეგატიური და პოზიტიური ასპექტების გადაკვეთები ყველაზე კარგად მაშინ ჩანს, როდესაც კანონმდებლობა აბსოლუტურად კრძალავს სქესობრივ კავშირს ინტელექტუალური ჩამორჩენის მქონე ინდივიდთან.⁵² ასეთი აბსოლუტური მიდგომა არღვევს ადამიანის უფლებას – ჰქონდეს სექსუალური ურთიერთობა.⁵³ ამიტომაც ყოველთვის მნიშვნელოვანია, მხედველობაში იქნეს მიღებული შეზღუდული შესაძლებლობის ხარისხი, კონტექსტი და ურთიერთობის ხასიათი ინდივიდებს შორის. თანამედროვე ლიბერალი მეცნიერები, მაგალითად, ს. გრინი და ტ. ჰორნლე, ასეთ შემთხვევაში აბსოლუტურ აკრძალვას ეწინააღმდეგებიან⁵⁴, რადგან იქ, სადაც ადამიანის თანხმობა არსებობს, მას სახელმწიფომ პატივი უნდა სცეს და არ ჩაერიოს ურთიერთობაში, რადგან დასაცავი ინტერესი არ არსებობს.

50 იხ. Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*, Oxford University Press, 21.

51 იხ. იქვე. 23; ასევე იხ. Hörnle, T. (2024). *The Challenges of Designing Sexual Assault Law*, *Current Legal Problems*, Vol. XX.

52 იხ. Hörnle, T. (2024). *The Challenges of Designing Sexual Assault Law*, *Current Legal Problems*, Vol. XX, 4

53 იხ. Green, S. (2022). *Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position*. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*, Oxford University Press, 79.

54 იხ. Hörnle, T. (2024). *The Challenges of Designing Sexual Assault Law*, *Current Legal Problems*, Vol. XX; ასევე Green, S. (2022). *Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position*. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*, Oxford University Press.

2.2. ნებაყოფლობითობა

ლიბერალური გაგება სექსუალურ ურთიერთობაში მონაწილეობის ნებაყოფლობითობის შეფასებას ობიექტურ კრიტერიუმებს ამყარებს.⁵⁵ სექსში ნებაყოფლობითი მონაწილეობა ნიშნავს მონაწილეთა თავისუფალ არჩევანს და გადაწყვეტილებას. სექსთან დაკავშირებით წინადადება, რომელიც გამოიხატება არა ადრესატისთვის თავისუფლების შეზღუდვაში და ამ გზით მისი მდგომარეობის გაუარესებაში (freedom-restricting), არამედ მისთვის არჩევანის გაზრდაში (freedom-enhancing coercive offer⁵⁶), წარმოადგენს თუ არა სექსთან გაცემული თანხმობის ნებაყოფლობითობის გამომრიცხავს, საკამათოდ მიიჩნევა სამართლის ფილოსოფიაში⁵⁷ და სისხლის სამართლის დოქტრინაშიც.⁵⁸ ფაინბერგს ამის მაგალითად მოჰყავს მილიონერის მხრიდან დედისთვის მძიმედ დაავადებული შვილის გადასარჩენად ქირურგიული ოპერაციის დაფინანსების წინადადება, თუ ის მასთან სექსუალურ კავშირს დათანხმდება.⁵⁹ ფაინბერგი ამ წინადადებას, შექმნილი სიტუაციიდან გამომდინარე, „მაიძულებელს“ უწოდებს, რადგან ადამიანი გამოუვალ მდგომარეობაშია – წინადადებას თუკი არ დათანხმდება, შვილი შეიძლება დაიღუპოს. ამიტომაც, ფაინბერგი ეთანხმება ასეთი კონტრაქტის ბათილობას, თუმცა ასეთი თანხმობა სექსთან დაკავშირებით „საკმარისად ნებაყოფლობითად“ მიაჩნია სისხლის

55 იხ. Feinberg, J. (1986). *Harm to Self. The Moral Limits of Criminal Law*, Oxford University Press, 211-212. Green, S. P. (2020). *Criminalizing Sex: A Unified Liberal Theory*, Oxford University Press, 23.

56 Feinberg, J. (1986). *Harm to Self. The Moral Limits of Criminal Law*, Oxford University Press, 233.

57 იხ. Feinberg, J. (1986). *Harm to Self. The Moral Limits of Criminal Law*, Oxford University Press.

58 იხ. ბახტაძე, უ. (2020). წიგნში: დეკანოსიძე, თ. და პატარია, ბ. (რედ.), სქესობრივი თავისუფლებისა და ხელშეუხლებლობის წინააღმდეგ მიმართული დანაშაულების კომენტარი, საფარი, 65. ასევე იხ. ჯიშკარიანი, ბ. (2022). სისხლის სამართლის კერძო ნაწილი. დანაშაული ადამიანის წინააღმდეგ, იურისტების სამყარო, 214-215.

59 იხ. Feinberg, J. (1986). *Harm to Self. The Moral Limits of Criminal Law*, Oxford University Press, 231-233.

სამართლის მიზნებისთვის, შესაბამისად, არ ამართლებს მის გამოყენებას.⁶⁰ რადგან არავის აქვს ვალდებულება სხვას ფული გადაუხადოს არაფრისთვის. ამ წინადადებით კი ბავშვის დედას შანსი ეზრდება, თუ არ დათანხმდება, ისევ იმ მდგომარეობაში რჩება, რაშიც მანამდე იყო, რაზეც მილიონერი პასუხისმგებელი არაა.⁶¹ ადამიანის მდგომარეობით მანიპულაცია და სექსუალური წინადადების შეთავაზება მასზე თანხმობის გამომრიცხველი და, შესაბამისად, სექსუალური ძალადობადაა მიჩნეული ქართულ სისხლის სამართლის მეცნიერებაში. ერთი მიდგომა მხედველობაში იღებს დაზარალებულის ასაკს. მანიპულაციურ წინადადებას, თუკი სრულწლოვანთან მიმართებით გაუპატიურებად არ აფასებს არასრულწლოვანთან მიმართებით, პატერნალიზმის მომხრეა.⁶² ეს მიდგომა თავსებადია სისხლის სამართლის მიზნებთან. მეორე მიდგომა, ზეწოლის განსაკუთრებულ ინტენსივობაზე ამახვილებს ყურადღებას, მიუხედავად იმისა, წინადადება თავისუფლების შემზღუდავია, თუ, არა.⁶³ სხვა მოსაზრება ყურადღებას ამახვილებს დაზარალებულის მიმართ მზრუნველობის საჭიროებაზე, მის შეზღუდულ შესაძლებლობაზე, როდესაც პირი ამ სიტუაციის მანიპულაციით აღწევს სასურველ შედეგს.⁶⁴ წინადადებას, რომელიც არასახარბიელო მდგომარეობაში მყოფ ადამიანს მიემართება და რომელიც მისი მდგომარეობის გაუმჯობესების შესაძლებლობას ზრდის, უფრო ფრთხილი

მიდგომა სჭირდება სისხლის სამართლის მიზნებისთვის,⁶⁵ რადგან ასეთ დროს ყურადღება უნდა მიექცეს სექსზე წინადადების მიმღების პოზიტიურ უფლებას სექსუალურ ავტონომიაზე. როგორც ზემოთ აღინიშნა, სექსუალური ავტონომიის ნაწილია სექსის გამოყენება რაიმე საჭიროებისთვის და არა მხოლოდ სიამოვნებისთვის.

თავისუფლების შემზღუდავი მაიძულებელი ზემოქმედება გავლენას ახდენს თანხმობის ნებაყოფლობითობაზე და საბოლოოდ ვალიდურობაზე.⁶⁶ იძულებისა და ნებაყოფლობითობის შეფასება უნდა მოხდეს სწორედ კონკრეტული კონტექსტის ანალიზით, გამოყენებული იძულების ხარისხისა და ინტენსივობის მიხედვით.⁶⁷ გარემოება შესაძლოა ისეთი იყოს, რომ თანხმობის ვალიდურობა გამორიცხოს, ამის მაგალითია საქმე, რომელიც ქვემოთ იქნება განხილული.

ქართული სასამართლო პრაქტიკა პრობლემურია სქესობრივ აქტში მონაწილეობის ნებაყოფლობითობის შეფასებისას. ამის დამადასტურებელი ასეულობით განაჩენი არსებობს როგორც ძველი, ისე თანამედროვე პერიოდიდან.⁶⁸ ამის ცხადი მტკიცებულებაა ერთ-ერთი ბოლო საქმეც, რომელმაც სხვა მსგავს საქმეებთან ერთად საქართველოს სახალხო დამცველის ყურადღება მიიქცია.⁶⁹ მოსამართლე მხედველობაში არ

60 იქვე. 253.

61 თუკი ადამიანი თავად შექუმნის სხვა ადამიანს უმწეო მდგომარეობის პირობებს და შემდეგ ექსპლუატაციას გაუწევს მას, ფაინბერგი ეთანხმება სისხლის სამართლის გამოყენებას. იხ. Feinberg, J. (1986). Harm to Self. The Moral Limits of Criminal Law, Oxford University Press, 263.

62 ჯიშკარიანი, ბ. (2020). 139-ე მუხლის კომენტარი წიგნში: ჯიშკარიანი, ბ. (რედ.), სქესობრივი დანაშაულები, იურისტების სამყარო, 72.

63 ბახტაძე, უ. (2020). წიგნში: დეკანოსიძე, თ. და პატარაია, ბ. (რედ.), სქესობრივი თავისუფლებისა და ხელშეუხებლობის წინააღმდეგ მიმართული დანაშაულების კომენტარი, საფარი, 67.

64 იხ. ლეკვიშვილი, მ., მამულაშვილი, გ. და თოდუა, ნ. (2019). სისხლის სამართლის კერძო ნაწილი, წიგნი 1, მერიდიანი, 255.

65 Feinberg, J. (1986). Harm to Self. The Moral Limits of Criminal Law, Oxford University Press, 255.

66 იქვე. 254.

67 იქვე.

68 იხ. საქართველოს უზენაესი სასამართლოს სისხლის სამართლის საქმეთა პალატის გადაწყვეტილება N 2კ-207აპ.-04; სიღნაღის რაიონული სასამართლოს განაჩენი, 26 ნოემბერი 2014, N 1/67-14. ასევე იხ. სახალხო დამცველის სპეციალური ანგარიში (2021). ბავშვზე სექსუალური ძალადობისა და სექსუალური ექსპლუატაციის დანაშაულზე მართლმსაჯულების განხორციელება, 21-23. ასევე იხ. 2022 წლის ანგარიში: აღრეული/ბავშვობის ასაკში ქორწინების საზიანო პრაქტიკა საქართველოში – არსებული გამოწვევები და გადაჭრის გზები, 32-33.

69 სახალხო დამცველის სპეციალური ანგარიში. (2022). აღრეული/ბავშვობის ასაკში ქორწინების საზიანო პრაქტიკა საქართველოში – არსებული გამოწვევები და გადაჭრის გზები.

იღებს ძალადობრივ გარემოს, რომელშიც დაზარალებული იმყოფება, ის გაუპატიურების დასადგენად დაზარალებულის სხეულზე ლუპით ეძებს ფიზიკური დაზიანებების კვალს და ხელჩართული ბრძოლის სხვა ნიშნებს, რაც გაუპატიურების შეფასების ძალზე პრიმიტიული ხედვაა. საქმეში, რომელიც ქვემოთ არის განხილული, მოძალადე დაისაჯა თანხმობის ასაკს მიუღწეველთან (დაზარალებული 15 წლის იყო) „ნებაყოფლობით“ სქესობრივი კავშირისთვის. მართალია, პროკურატურამ მას ბრალი გაუპატიურებისთვის წაუყენა, მაგრამ სასამართლომ შეცვალა უფრო მსუბუქი დანაშაულით (მუხლი 140).⁷⁰ სასამართლოს თქმით, გაუპატიურების დაზარალებული ვერ იქნები, თუკი სხეულზე ფიზიკური კვალი არ გაქვს, ასეთის არარსებობის შემთხვევაში, დაზარალებულს მართლმსაჯულების სისტემა ეუბნება, რომ მან ის მიიღო, რაც უნდოდა – "asking for it".⁷¹

აღნიშნული საქმის მიხედვით, სამმა ზრდასრულმა მამაკაცმა 15 წლის გოგონა მოიტაცა, ამათგან ერთს თითქოსდა მისი „ცოლად მოყვანა სურდა“. სასამართლოს ეჭვქვეშ არ დაუყენებია მოტაცებისა და თავისუფლების უკანონოდ აღკვეთის ფაქტი. მისი თქმით, ბავშვს სამი კაცის წინააღმდეგობის გადალახვა გაუჭირდებოდა, მაგრამ მისთვის დამაჯერებელი არ აღმოჩნდა გაუპატიურების ბრალდება. მოსამართლის თქმით, სექსუალური კავშირი განმარტობით მოხდა, სადაც ოთახში მხოლოდ ბავშვი და ბრალდებული იმყოფებოდნენ და ასეთ ვითარებაში ფიზიკური წინააღმდეგობის განევა ბავშვს დაავალდებულა. მოსამართლემ ყურადღება გაამახვილა იმაზე, რომ ბავშვს სხეულზე არ ჰქონია ფიზიკური დაზიანებები და არც ტანსაცმელი ჰქონდა შემოხეული.⁷² ფაქტი, რომ ბავშვზე იძალადეს,

გამომწყვდიეს სახლში, სადაც დახმარების არანაირი შანსი არ ჰქონდა, ამასთან, მოძალადე ფიზიკურად მასზე ძლიერი იყო, მოსამართლისთვის საკმარისი არ აღმოჩნდა, რომ ასეთ ძალადობრივ გარემოში სექსი გაუპატიურებად შეეფასებინა. მეტიც, ასეთ გარემოში ბავშვის „თანხმობა“ ვალიდური ვერ იქნებოდა. მოსამართლემ დაავიწროვა გაუპატიურება ფიზიკური ზიანით, ხოლო მისი ვერ აღმოჩენა საკმარისი აღმოჩნდა სექსის ნებაყოფლობითობის დასადგენად. ეს არის უკიდურესი გამარტივება იმისა, თუ რას წარმოადგენს სექსუალური ძალადობა და, ასევე, კონტექსტისა, სადაც ის მოხდა, სწორედ ასეთ პრიმიტიულ საზომს იყენებენ მართლმსაჯულების აგენტები ძალადობის დასადგენად. იგივე სიტუაციაში ბავშვი რომ 16 წლის ყოფილიყო, მოძალადე სისხლის სამართლის პასუხისმგებლობას დაუსხლტებოდა. სექსუალური ძალადობის არსი, თანხმობა და ნებაყოფლობითობა პატრიარქალური პერსპექტივიდან არის გაგებულიქართული სისხლის სამართალი მორალურ-პატრიარქალური ლოგიკით ფუნქციონირებს.

2.3. თანხმობა

თანხმობის ელემენტი ქართული სისხლის სამართლისთვის არახალია. მიუხედავად იმისა, რომ გაუპატიურების დეფინიციაში თანხმობის არარსებობა სიტყვებით არაა განწერილი, ის მასში მოაზრებულია, ისევე, როგორც ის მოიზრება სხვა მსგავს დელიქტებში, მაგალითად – თავისუფლების უკანონო აღკვეთა(მუხ. 143). თანხმობა, როგორც გაუპატიურების ობიექტური ელემენტი, მის actus reus გამორიცხავს, ისევე, როგორც თავისუფლების უკანონო აღკვეთასთან მიმართებით, ხოლო ძალადობასთან მიმართებით არა ქმედების შემადგენლობას, არამედ მართლწინააღმდეგობას. გრინის სწორი შენიშვნით ასეთი დაყოფა სწორია თეორიული და პრაქტიკული მიზეზებით.⁷³ გაუპატიურების დეფინიციაში თა-

70 ბოლნისის რაიონული სასამართლოს სისხლის სამართლის საქმეთა კოლეგიის განაჩენი, 22 აპრილი 2021, N1/322-20.

71 გაუპატიურების მითების ანალიზისთვის იხ. Harding, K. (2015). Asking for It. The Alarming Rise of Rape Culture – and What We Can Do About It, Da Capo Press.

72 ბოლნისის რაიონული სასამართლოს სისხლის სამართლის საქმეთა კოლეგიის განაჩენი, 22

აპრილი 2021, N1/322-20, პარ. 3.83-3.94.

73 იხ. Green, S. P. (2020). Criminalizing Sex: A Unified

ნხმობის არარსებობის ობიექტურ მხარედ არმოაზრება გამოიწვევდა ფორმალურად ნებისმიერი სექსის დანაშაულად გამოცხადებას,⁷⁴ რაც წარმოუდგენელია, ხოლო პრინციპი – არ დააზიანო სხვა, სისხლის სამართლის გამოყენებას ამართლებს. ამიტომ სხვისი ჯანმრთელობის დაზიანება იკრძალება თანხმობის მიუხედავად, ხოლო კონკრეტული კონტექსტის მხედველობაში მიღებით, ის, შესაძლოა, გამართლდეს. ეს ორგვარი მიდგომა განასხვავებს ამ დანაშაულებს მტკიცების ტვირთის თვალსაზრისითაც. პირველ შემთხვევაში (სექსუალური ძალადობა), პროკურორი ამტკიცებს თანხმობის არარსებობას, ხოლო მეორე შემთხვევაში (ძალადობა) ის, რომ თანხმობით მოხდა ჯანმრთელობის დაზიანება, ბრალდებულის სამტკიცებელია.⁷⁵

სტამბოლის კონვენციის 36-ე მუხლის მიხედვით, გაუპატიურების დეფინიცია ასეა ჩამოყალიბებული: „სხვა ადამიანის სხეულში, მისი თანხმობის გარეშე, სექსუალური ხასიათის ვაგინალური, ანალური ან ორალური შეღწევის განხორციელება სხეულის ნებისმიერი ნაწილის ან საგნის გამოყენებით“.⁷⁶

ამ დეფინიციის მიხედვით გაუპატიურების აუცილებელი ობიექტური ელემენტია **თანხმობის გარეშე** სხვის სხეულში სექსუალური ხასიათის შეღწევა. ფიზიკური ძალადობა ან მუქარა არაა აუცილებელი ელემენტი. სწორედ თანხმობაა ის, რაც ერთ ადამიანს აძლევს უფლებას თანხმობის გამცემის სხეულში სექსუალურად შეაღწი-

ოს, თანხმობის უკან წაღების შემთხვევაში კი ვალდებული ხდება შეწყვიტოს სექსუალური აქტი. ადამიანის სხეული ხელშეუხებელია სხვისთვის იქამდე, სანამ თანხმობა არ ექნება, უკანასკნელის არსებობის შემთხვევაში თავშეკავების ვალდებულება ისპობა, ხოლო თანხმობის გამცემს პრეტენზია ვეღარ ექნება, გარდა იმ შემთხვევისა, როდესაც თანხმობაზე უარის თქმის მიუხედავად, გაგრძელდა მის სხეულზე სექსუალური ზემოქმედება. თანხმობა თან უნდა გასდევდეს მთელ პროცესს, დაწყებიდან დასრულებამდე, წინააღმდეგ შემთხვევაში ქმედება გადაიქცევა ძალადობად.

ძალადობით განსაზღვრული გაუპატიურების პარადიგმა ძალიან გავრცელებულია სხვადასხვა იურისდიქციებში და მას, პრაქტიკულად, ჯერ კიდევ ებრძვიან ის ქვეყნებიც, სადაც გაუპატიურების დეფინიცია თანხმობის არარსებობით დიდ ხნის წინ რეფორმირდა, მათ შორის ალსანიშნავია გერმანია⁷⁷ და ინგლისი/უელსი.⁷⁸

პარადიგმის დეკონსტრუქცია საერთაშორისო სისხლის სამართლის ტრიბუნალებმა დაიწყეს ომის კონტექსტებში ჩადენილი სექსუალური ძალადობის სამართლებრივი შეფასებისას.⁷⁹ ამას მოგვიანებით მოჰყვა სტრასბურგის სასამართლოს 2003 წლის საქმე,⁸⁰ სადაც სასამართლომ უკიდურესად მარტივი ნარატივი გაუპატიურებისა გააკრიტიკა, რომელიც ყოველთვის ვერ მოიცავს იმას, რაც სინამდვილეში მოხდა, შედეგად სექსუალური ავტონომია დაუცველი რჩებოდა. სასამართლომ დარღვევა დაადგინა გაუპატიურების ერთგანზომილებიანი გამოძიების გამო, რომელიც დავინროებულია სხეულზე ფიზიკური დაზიანებების კვალით

Liberal Theory, Oxford University Press, 34-35. სხვადასხვა დანაშაულებთან მიმართებით თანხმობის ელემენტის მოქმედების დიფერენცირებისთვის ასევე იხ. Weigend, T. (2022). Consent and Sexual Offenses Germany. In Hoven E. & Weigend, T. (eds.). Consent and Sexual Offenses, Comparative Perspectives, Nomos, 186.

74 იხ. Green, S. P. (2020). Criminalizing Sex: A Unified Liberal Theory, Oxford University Press, 34-35.

75 იქვე. 34.

76 ქალთა მიმართ ძალადობისა და ოჯახში ძალადობის პრევენციისა და აღკვეთის შესახებ ევროპის საბჭოს კონვენცია. იხ. მითითებულ ბმულზე: <<https://matsne.gov.ge/ka/document/view/3789678?publication=0>>

77 იხ. Hörnle, T. (2024). The Challenges of Designing Sexual Assault Law, Current Legal Problems, Vol. XX.

78 See Smith, O. (2018). Rape Trials in England and Wales Observing Justice and Rethinking Rape Myths, Palgrave Macmillan.

79 E.g. see PROSECUTOR V DRAGOLJUB KUNARAC Appeal Judgement, 12 June 2002; Katanga Judgment. THE PROSECUTOR v. GERMAIN KATANGA, No.: ICC-01/04-01/07 Date: 7 March 2014; The Prosecutor v. Dominic Ongwen (2021), ICC-02/04-01/15.

80 M.C. v. Bulgaria (Application no. 39272/98) 04/03/2004.

და არ იღებს მხედველობაში სრულ სურათს, სადაც არაერთი სხვა მტკიცებულება შეიძლება ცხადყოფდეს, თუ რა მოხდა სინამდვილეში. სტრასბურგის სასამართლომ მითითებული საქმის შემდეგ კიდევ ათეულობით სხვა გადაწყვეტილება გამოიტანა რუმინეთის, მოლდოვას, სლოვაკეთის და სხვათა წინააღმდეგ და სახელმწიფოს მხრიდან, იგივე არგუმენტებით, ადამიანის ფუნდამენტური უფლებების დარღვევა დაადგინა.⁸¹ სტრასბურგის სასამართლო დარღვევას დაუდგენს საქართველოსაც, თუ ასეთი სარჩელი შევიდა, რადგან ქართულ სისხლის სამართლის მართლმსაჯულებაში ეს სისტემური პრობლემაა, გენდერული ცრურწმენები პროკურორებს და მოსამართლეებს ძვალსა და რბილში აქვთ გამჭდარი. საერთაშორისო სამართლის ინსტრუმენტებიდან, ასევე, აღსანიშნავია CEDAW კომიტეტი, მისი 2008 წლის გადაწყვეტილება *Tayag Vertido v. Philippines*,⁸² სადაც კომიტეტმა გენდერული ცრურწმენებით გაჟღერებული მართლმსაჯულება და გაუპატიურების პრიმიტიული პარადიგმა ადამიანის უფლებების დარღვევად მიიჩნია.

ამდენად, ადამიანის უფლებათა დაცვის საერთაშორისო სამართლის თანახმად, ცალსახად იკვეთება შემდეგი მდგომარეობა, რომ გაუპატიურების არაყოფის მომცველობა ადამიანის ფუნდამენტური უფლების დარღვევაა.

გაუპატიურება რიგ შემთხვევაში და კონტექსტში წარმოადგენს გენოციდის და ადამიანურობის წინააღმდეგ მიმართული დანაშაულებს. ასევე, შესაბამისი მიზნისა და მოტივის არსებობისას ის ქმნის წამების შემადგენლობას. ერთ-ერთი მიზეზი იმისა, თუ რატომ მიაკუთვნებენ მას *jus cogens* ნორმას, სწორედ ესაა.⁸³

თანხმობის მოდელები

გაუპატიურების თანხმობის არარსებობით შეცვლისთვის საჭირო რეფორმა მრავალ ქვეყანაში გატარდა, მათ შორისაა: აშშ-ის რამდენიმე შტატი, დიდი ბრიტანეთი, გერმანია, ესპანეთი, შვედეთი, დანია, ისლანდია და სხვა. მრავალი აკადემიური ტექსტი შეიმუშავეს და ბევრიც მიმდინარე პროექტებია სხვადასხვა კვლევით ცენტრებში თანხმობის არსის გასაგებად.

სქესობრივ პენეტრაციასთან დაკავშირებით თანხმობის მრავალი გაგება დაგროვდა. ამათგან „ნავარაუდები“ და „კომუნიკაციის“ მოდელებია ყველაზე გავრცელებული. პირველი აქცენტს აკეთებს დაზარალებულის პერსპექტივაზე და მის უფლებებზე,⁸⁴ მთავარია, მას რა უნდოდა, ხოლო მოძალადეს რა ეგონა – ირელევანტურია. კომუნიკაციის თეორიისთვის კი მნიშვნელოვანია, მოძალადემ როგორ გაიგო მხარის თანხმობა.⁸⁵ აქ მთავარია, რომ თანხმობა ობიექტურად იყოს გაცხადებული, რადგან მხოლოდ ამის შემდეგ არის ნებადართული სექსუალური შეხება. თუკი პასიურ ადამიანთან მოძალადე სექსუალურ კავშირს დაამყარებს, რადგან მისი განზრახვა გაუპატიურებაა, ხოლო პოსტ ფაქტუმ აღმოჩნდება, რომ მხარე თანახმა ყოფილა მასთან სექსზე, ეს გაუპატიურება არაა „ნაგულისხმევი“ თეორიის მიხედვით. კომუნიკაციის თეორიის მიხედვით კი, დასჯადი უნდა იყოს, რადგან სექსთან დაკავშირებით თანხმობა ობიექტურად გაცხადებული არ ყოფილა.⁸⁶

„ნაგულისხმევი თეორიის“ ერთ-ერთი მხარდამჭერია ამერიკელი მეცნიერი ვ. ბერგელსონი, მისი მთავარი კრიტიკა კომუნიკაციის თეორიისა მიემართება მის ყოვლისმომცველობას, ასევე, აკრიტიკებს

ons for States under International Law? Källered.

81 See I.G. v. Moldova (Application no. 53519/07), 15.03. 2012; Y. v. SLOVENIA (Application no. 41107/10), 28.08.2015; I.C. v. Romania (Application no. 36934/08), 24.08.2016; C.A.S. and C.S. v. Romania – 26692/05 30.03. 2012; M.G.C. v. Romania (appl. 61495), 11. 15. 03. 2016; E.B. v. Romania (appl. 49089/10), 19.03.2019.

82 Tayag Vertido v. Philippines CEDAW/C/46/D/18/2008.

83 Eriksson, M. (2010). Defining Rape, Emerging Obligati-

84 ამ თეორიის მხარდამჭერია ვერა ბერგელსონი. იხ. Sex and Sensibility. The Meaning of Sexual Consent. In Hörnle T. (ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 36

85 ამ თეორიის მხარდამჭერები არიან: T. Hörnle and S. Green. იხ. Hörnle, T. (ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press.

86 იხ. Green, S. P. (2020). Criminalizing Sex: A Unified Liberal Theory, Oxford University Press, 26.

პატერნალიზმს ქალებთან მიმართებით, იმას, რომ ქალის ნებას – ჰქონდეს სექსი, იქამდე არ ენდობა სახელმწიფო, სანამ ეს უკანასკნელი აქტიურად და ხმამაღლა არ იტყვის ამის შესახებ.⁸⁷ კრიტიკა მიემართება პერსონალური ავტონომიის შეზღუდვასაც, რომ პასურობაც მისი ნაწილია და პატივი უნდა სცეს სახელმწიფომ.⁸⁸

თანხმობის კომუნიკაციის თეორიაა გასაზიარებელი რადგან ადამიანი რას ფიქრობს სხვანაირად ვერ გახდება ცნობილი, ეს მიდგომა სისხლის სამართლის მიზნებისთვის ყველაზე სწორია.

ზოგადად, თანხმობის მოდელთან დაკავშირებით კრიტიკული შენიშვნები დაგროვდა, მათ შორის აღსანიშნავია ტ. პალმერის შენიშვნები, რომლებიც სექსს მხარეებს შორის თავისუფალი მოლაპარაკებით განსაზღვრავს და სექსუალური ძალადობის საკანონმდებლო დეფინიციის ამგვარად ჩამოყალიბება მიაჩნია სწორი.⁸⁹ ყველა პრაქტიკული პრობლემის მიზეზად, რომელიც გაუპატიურების გამოძიებას და მსჯავრდებას ახლავს თავს, ავტორს „თანხმობის“ მოდელი მიაჩნია, რაც არაა გასაზიარებელი. პრობლემა სექსისტური კულტურაა და არც მის მიერ შემოთავაზებული დეფინიცია იქნება პანაცეა ასეთ კულტურაში. თანხმობის მოდელის შემოღების დროს და პარალელურად არ უნდა დაგვაზინყდეს, რომ გენდერული სტერეოტიპებისა და გაუპატიურების მითების წინააღმდეგ ბრძოლაა აუცილებელი.

No means No vs Yes means Yes

„არა“ მოდელი

არსებობს თანხმობის ფორმულირების ორი მოდელი: „არა ნიშნავს არას“ და „მხოლოდ კი ნიშნავს კის“. ორივე მოდელი გაკ-

რიტიკებულია. „არა“ მოდელი ძირითადად გაკრიტიკებულია არაყოვლისმომცველობის გამო.⁹⁰ გრინის შენიშვნით, ეს მოდელი გაუპატიურების არქაულ მოდელს ჰგავს, რადგან სექსთან დაკავშირებით უარის თქმა – „არა“ დამატებით ძალადობის გამოყენებით განიმართება.⁹¹ ასევე უნდა ითქვას, რომ „არა“ მოდელი, რომელიც დაზარალებულისგან აქტიურობას ითხოვს, არათუ „გაშეშების“ (tonic immobility) შემთხვევას,⁹² რასაც თანამედროვე მეცნიერება მიუთითებს ხოლმე ძალადობრივი გაუპატიურების არაყოვლისმომცველობის საჩვენებლად,⁹³ არამედ უმწეობის კლასიკურ შემთხვევებსაც ვერ უმკლავდება.⁹⁴ „არა“ მოდელს აკრიტიკებენ ძველი მიდგომის შენარჩუნებისთვის, კერძოდ, დაზარალებულისთვის მტკიცების ტვირთის დაკისრებისთვის, რომ მან გასაგები ფორმით უარი უნდა ითქვას სექსზე.⁹⁵ კრიტიკა სამართლიანია, რადგან „არა“ მოდელი ქმნის ნოყიერ ნიადაგს ძველი ნარატივის შენარჩუნებისთვის, რომ დუმილი თანხმობის ნიშანია. „კი“ მოდელი მხარეებს ეუბნება, რომ, სანამ წამოიწყებ სექსუალურ ქცევას, უნდა დარწმუნდე, რომ მეორე მხარესაც სურს ეს, წინააღმდეგ შემთხვევაში, ძალადობაა და დაისჯები.

„კი“ მოდელი

მიიჩნევა, რომ „კი“ მოდელს საგანმანათლებლო ფუნქცია აქვს.⁹⁶ იგი სისხლის სამა-

87 Bergelson, V. (2022). Sex and Sensibility. The Meaning of Sexual Consent. In Hörnle T. (ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 41.
88 იქვე.
89 Plamer, T. (2017). Distinguishing sex from sexual violation: Consent, negotiation and freedom to negotiate. In Reed, A. & Bohlander, M. Consent Domestic and Comparative Perspectives, Routledge.

90 Green, S. P. (2020). Criminalizing Sex: A Unified Liberal Theory, Oxford University Press, 80.
91 იქვე.
92 ამ აზრს ეთანხმება გრინიც. Green, S. P. (2020). Criminalizing Sex: A Unified Liberal Theory, Oxford University Press, 81.
93 იხ. Möller, A., Søndergaard, H.P. & Helström, L. (2017). Tonic immobility during sexual assault: A common reaction predicting post-traumatic stress disorder and severe depression, Acta Obstetrica et Gynecologica Scandinavica; de Heer B. A. & Jones, L. C. (2023). 'Tonic Immobility as a Defensive Trauma Response to Rape: Bridging Public Health and Law' Violence Against Women.
94 შუად. Green, S. P. (2020). Criminalizing Sex: A Unified Liberal Theory, Oxford University Press, 81.
95 Torenz, R. (2021). The Politics of Affirmative Consent: Considerations from a Gender and Sexuality Studies Perspective. German Law Journal., 2(5), 724.
96 „კი“ მოდელის მიმართ კრიტიკა გამოითქვა იმ

როლის მიზნებისთვისაც უფრო გასაგები კონცეფციაა⁹⁷ და გაუპატიურების მხარდამჭერ სიგნალს არ შეიცავს, როგორც ეს „არა“ მოდელის შემთხვევაშია.

„კი“ მოდელიც გაკრიტიკებულია სხვადასხვა კუთხით, მათ შორის, ყოვლისმომცველობისთვის და ინტერპერსონალურ ურთიერთობაში ხისტი გაიდლაინებისთვის.

აღსანიშნავია, რომ „კი“ მოდელსაც აკრიტიკებენ გაუპატიურების მითის მხარდამჭერისთვის. კერძოდ, იმ მითის მხარდამჭერისთვის, რომ თითქოს გაუპატიურება მხარეებს შორის არასათანადო კომუნიკაციის გამო ხდება, რაშიც ქალებს ედებათ ბრალი.⁹⁸ ეს კრიტიკა არაა გასაზიარებელი, რადგან თანხმობის არარსებობით ფორმულირებული გაუპატიურების დეფინიციის შეტყობინება ის კი არაა, რომ მანამდე კანონი ბუნდოვანი იყო, ადამიანებს ერთმანეთის კომუნიკაციის არ ესმოდათ და გაუპატიურებაც ამიტომ ხდებოდა, არამედ როგორც ყველა ახალი ნორმის მიზანი, ამ ცვლილების მიზანიც ისაა, რომ სათქმელი უფრო ხმამაღლა თქვას, რომ რაც ადრე იგნორირებული იყო საზოგადოების მხრიდან და სოციალურ ნორმად იქცა, დღეს ეს მისაღები არაა და ამას ნორმის ახალი ფორმულირებით აკეთებს.

„კი“ მოდელს აკრიტიკებენ კომუნიკაციის ერთი სტანდარტის დადგენის თვალსაზრისითაც, როცა ადამიანების შესაძლებლობები სხვადასხვანაირია,⁹⁹ ასევე

თვალსაზრისითაც, რომ ის რეალურად კულტურასაც არ ცვლის რადგან ის კვლავ აცოცხლებს ჰეტერონორმატიულ ცნებებს გენდერზე და სექსუალობაზე. იხ. Torenz, R. (2021). The Politics of Affirmative Consent: Considerations from a Gender and Sexuality Studies Perspective. *German Law Journal*, 2(5), 719, 721, 725.

97 Valentiner, D-S. (2021). The Human Right to Sexual Autonomy. *German Law Journal*. 22(5), 703-717.

98 Torenz, R. (2021). The Politics of Affirmative Consent: Considerations from a Gender and Sexuality Studies Perspective. *German Law Journal*, 2(5), 721; Lockwood Harris, K. (2018). Yes means yes and no means no, but both these mantras need to go: communication myths in consent education and anti-rape activism, *Journal of Applied Communication Researcher*, vol. 46(2), 159.

99 Lockwood Harris, K. (2018). Yes means yes and no means no, but both these mantras need to go: commu-

მხარეთა აბსოლუტური დავალდებულება – აქტიურად გამოხატონ თანხმობა სექსზე, როცა მონაწილეს შესაძლოა პასიურობა უნდოდეს.¹⁰⁰ კრიტიკის საპასუხოდ უნდა ითქვას, რომ კონტექსტს აქვს მნიშვნელობა, თუ ადამიანები ერთმანეთს აგებინებენ, რა უნდათ, ისეთი ნიშნებით, რომელიც შესაძლოა სხვას არ ესმოდეს, ეს არაა „კი“ მოდელით გაგებულ გაუპატიურების აკრძალვის დარღვევა.¹⁰¹ კანონის მიზანია სექსუალური ექსპლუატაციის არდაშვება, სადაც უკანასკნელს ადგილი არ ჰქონია, ქმედება გაუპატიურებად არ შეფასდება. გადაჭარბებული კრიმინალიზებისგან დამცავი მექანიზმი mens rea-ც არის.

საგულისხმოა ს. გრინის მოსაზრება, რომ „კი“ მოდელი გენდერულ სტერეოტიპებს ძლევს, უპირისპირდება დამკვიდრებულ აზრს, რომ თითქოს ქალი ყოველთვის პასიურია, ხოლო სექსის წამომწყებად კი ყოველთვის მამაკაცი გვევლინება. ეს მოდელი სექსის მონაწილეებს ეუბნება – თუ სექსი გინდა, მაშინ თქვი კიდეც.¹⁰² გრინს გაუპატიურების ყოვლისმომცველობის თავიდან აცილების გზად მიაჩნია, ერთი მხრივ, actus reus-ის ბევრი სიტუაციით განწერა¹⁰³ და mens rea-ს გონივრული შეცდომის სტანდარტით განსაზღვრა.¹⁰⁴ როდესაც ადამიანს გონი-

nication myths in consent education and anti-rape activism, *Journal of Applied Communication Researcher*, vol. 46(2), 170.

100 Bergelson, V. (2022). Sex and Sensibility. The Meaning of Sexual Consent. In Hörnle T. (ed), *Sexual Assault Law Reform in a Comparative Perspective*, Oxford University Press.

101 Schulhofer, S. J. (2022). What Does ‘Consent’ Mean? In Hörnle T. (ed), *Sexual Assault Law Reform in a Comparative Perspective*, Oxford University Press.

102 Green, S. (2022). Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*, Oxford University Press, 87. ამ აზრს იზიარებს და კომუნიკაციის თეორიას ეთანხმება ასევე ნედელსკი. იხ. Nedelsky, J. (2012). *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, Oxford Academic, 224

103 Green, S. (2022). Presuming Nonconsent to Sex in Cases of Incapacity and Abuse of Position. In Hörnle, T. (ed). *Sexual Assault Law Reform in a Comparative Perspective*, Oxford University Press, 75

104 იქვე. 98.

ვრული რწმენა აქვს თანხმობაზე, ეს უნდა გამორიცხავდეს სისხლის სამართლის პასუხისმგებლობას. ამასთან, უნდა ითქვას, რომ ძალიან ახლო და ინტერპერსონალურ ურთიერთობაში სექსთან დაკავშირებით თანხმობის ათასი ფორმა და ნიშანი არსებობს. ამიტომ თუკი ასეთ ურთიერთობაში თანხმობა სადაო გახდა, mens rea იქნება ფარი, დაისაჯოს თუ არა ის, ვინც შეცდომა დაუშვა თანხმობის გაგებაში.

კომუნიკაციის თეორიის და ამასთან „კი“ მოდელის მხარდამჭერია შულჰოფერი,¹⁰⁵ რომელიც ზემოთ აღნიშნული კრიტიკის დასაძლევად, რომ „კი“ მოდელი სექსის გადაჭარბებულ კრიმინალიზებას იწვევს, „კი“ მოდელის კონტექსტუალურ მოდელს უჭერს მხარს, რაც კონტექსტის მხედველობაში მიღებით, ძალიან სპეციფიკურ შემთხვევებში გამორიცხავს პასუხისმგებლობას პასიურ პარტნიორთან სექსუალური კავშირისთვის.¹⁰⁶ „არა“ მოდელისგან განსხვავებით, ეს უფრო ვიწრო შემთხვევებზე გავრცელდება და კანონი თანხმობის პოზიტიურ ფორმულირებას დაემყარება.¹⁰⁷ აღსანიშნავია, რომ თანხმობის კონტექსტუალური გაგებაა მხარდამჭერილი სტამბოლის კონვენციითაც.

ამ თვალსაზრისით საინტერესოა შვედური მოდელიც, რომელიც თანხმობას კომუნიკაციით განმარტავს – სიტყვით ან ქმედებით და, ასევე, სხვა ნებისმიერი ფორმით. კანონის ტექსტში სიტყვა – „თანხმობა“ საერთოდ არაა ნახსენები და სექსუალურ აქტში მონაწილეობის **ნებაყოფლობითობაზე** ხაზგასმა, ესაა გაუპატიურების actus reus ელემენტი. ნებაყოფლობითობა შესაძლოა გამოიხატოს ვერბალურად ან არავერბალურად და ნებისმიერი ფორმით. კანონის განმარტებით ბარათზე დაყრდნობით,

მკვლევრები ხაზს უსვამენ, რომ შვედური მოდელი ჰიბრიდულია.¹⁰⁸ ის კომუნიკაციის და ნაგულისხმევი თანხმობის სინთეზია.¹⁰⁹ გარკვეულ კონტექსტებში ქალის პასიურობა სექსუალურ ავტონომიადაა მიჩნეული. მაგალითად, შვედური კანონის განმარტებითი ბარათის მიხედვით, ჩაძინებულ პარტნიორთან სექსუალური პენეტრაცია არაა გაუპატიურება.¹¹⁰

კომუნიკაციის თეორიის კიდევ ერთი მხარდამჭერია ტ. ჰიორნლე, თუმცა სისხლის სამართლის ultima ratio პრინციპის მხედველობაში მიღებით ის მხარს უჭერს კომუნიკაციის გერმანულ „არა“ მოდელს.¹¹¹ განსხვავება ისაა, რომ თუკი „კი“ მოდელის მიხედვით სექსის ნამოწყებამდე აუცილებლად გჭირდება მეორე ადამიანისგან აქტიური თანხმობა, „არა“ მოდელისთვის პასიურობა თანხმობის ნიშანია სიტუაციაში, რომელიც არაა დამაშინებელი. თუ პირმა, შესაძლებლობის მიუხედავად, უარი არ თქვა, სექსუალური პენეტრაცია გაუპატიურებად არ შეფასდება.¹¹² ეს მოდელი აღიარებულია გერმანიის სისხლის სამართლის კანონმდებლობით (ასევე, შვეიცარია¹¹³), სა-

105 Schulhofer, S. J. (2022). What Does ‘Consent’ Mean? In Hörnle T. (ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 63.
 106 იქვე. 63.
 107 კომუნიკაციის თეორიას ემყარება კანადური მოდელიც. ანალიზისთვის იხ. Thornburn, M. (2022). Sexual Assault Law in Canada In Hörnle T. (ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 100.

108 იხ. Bladini, Moa & Andersson, W. S. (2020). Swedish rape legislation from use of force to voluntariness – critical reflections from an everyday life perspective, Bergen Journal of Criminal Law and Criminal Justice, vol. 8(2).
 109 შვედური მოდელის ანალიზისთვის იხ. Lernestedt, C. & Kagrell, M. (2022). The Swedish Move Towards (In)Voluntariness. In Hörnle, T. (ed.), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 174-175. შეად. Hörnle, T. (2024). The Challenges of Designing Sexual Assault Law, Current Legal Problems, Vol. XX, 9.
 110 კრიტიკისთვის იხ. Bladini, Moa & Andersson, W. S. (2020). Swedish rape legislation from use of force to voluntariness – critical reflections from an everyday life perspective, Bergen Journal of Criminal Law and Criminal Justice, vol. 8(2).
 111 იხ. Hörnle, T. (2022). The New German Law on Sexual Assault in Tatjana Hörnle(ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 146.
 112 Weigend, T. (2022). Consent and Sexual Offenses Germany. In Hoven E. & Weigend, T. (eds.). Consent and Sexual Offenses, Comparative Perspectives, Nomos, 189-90.
 113 შვეიცარიის „არა“ მოდელის ანალიზისთვის იხ. Scheidegger, N. (2022). Switzerland. In Hoven E. &

თამარ გემელია

დაც გაუპატიურების დეფინიცია ფორმულირებულია, როგორც ადამიანის აშკარა უარის მიუხედავად¹¹⁴ სექსის წამოწყება.¹¹⁵ ამდენად, ამ მოდელით, უარის თქმის ტვირთი დაზარალებულზეა გადატანილი. ტ. ჰიორნლე სიტუაციაში, რომელიც ნების დამთრგუნველი არ არის, უარის თქმის ტვირთის დაზარალებულზე გადმოტანაში პრობლემას ვერ ხედავს იმასთან შედარებით, თუ რამხელა სასჯელი შეიძლება დაეკისროს მეორე მხარეს.¹¹⁶ ვერ ვიტყვი, რომ ეს მოდელი არაყოველთაოდ მსოფლიო და ამიტომ ცუდია, მითუმეტეს, რომ გერმანიის სსკ-ით ბევრი სიტუაციაა განსაზღვრული, სადაც უარის თქმა არ ევალდება დაზარალებულს, მათ შორისაა უმწეობისა და დამაშინებელი გარემოებების შემთხვევები.¹¹⁷ თუმცა, სიმბოლურ დონეზე, იმ ძველ, არქაულ სტერეოტიპებს აღვიძებს, რომ უარი თანხმობის ნიშანია, აღნიშნულმა კი შესაძლოა ბევრ სიტუაციაში, კულტურული ფაქტორის მოხმობით, სექსსა და გაუპატიურებას შორის ზღვარი ისევ ნაშალოს.¹¹⁸ მითუმეტეს, თუ *mens rea* სტანდარტი ისეთი სუსტი

იქნება, როგორც გერმანიაშია. ამიტომ „კი“ მოდელით ფორმულირებული კანონმდებლობა უფრო მოსაწონია. აქვე აღსანიშნავია, რომ გენდერული დანაშაულების პრაქტიკულმა განმარტებამ აჩვენა სისხლის სამართლის არაკეთილსინდისიერად გამოყენების ტენდენციები. მაგალითად, გენდერის ნიშნით მკვლელობის მიუხედავად, ფაქტის პროვოცირებულ მკვლელობად შეფასება;¹¹⁹ არა-ფატალური დახრჩობა პარტნიორი ქალის როგორც ჩვეულებრივი ძალადობა;¹²⁰ იძულებითი ქორწინებისა და გაუპატიურების მსუბუქად დასჯა „ოჯახის შექმნის“ სახელით და ა.შ.¹²¹ ამიტომ სასურველიცაა ასეთი ინტეგრეტაციების სრულად პრევენციის მიზნით კანონის მკაცრი მიდგომა, რომ თუ სექსი გინდა, თქვი ამის შესახებ. ხოლო მეორე მხარისთვის იმის წინასწარ შეტყობინება, რომ ქალის სხეული ხელშეუხებელია იქამდე, სანამ ნებას არ დაგრთავს, სამართლიანია. კანადელი მეცნიერი ნაგულისხმევი თანხმობის მხოლოდ ძალიან ახლო ურთიერთობაში და არაპენეტრაციულ სექსუალურ ქცევებზე დაშვებას ეთანხმება.¹²² ამასთან, როდესაც სექსზე გაცემულ ნებართვაზე ვსაუბრობთ, აქ მხოლოდ ვერბალიზებული „კი“ არ იგულისხმება. „კი“ შესაძლებელია გამოიხატოს სხვადასხვა ნიშნით, როდესაც ეს ნიშნები პარტნიორებისთვის ნაცნობია, პრობლემა არ იქმნება. როცა ადამიანები ერთმანე-

Weigend, T. (eds.). *Consent and Sexual Offenses, Comparative Perspectives*, Nomos, 271.

114 ის თუ რამდენად აშკარა იყო უარი მოწმდება ობიექტური დამკვირვებლის პერსპექტივიდან რომელიც საქმის კურსშია რელევანტური ფაქტების თაობაზე. Weigend, T. (2022). *Consent and Sexual Offenses Germany*. In Hoven E. & Weigend, T. (eds.). *Consent and Sexual Offenses, Comparative Perspectives*, Nomos, 190.

115 გერმანიის სსკ-ის 177 პარაგრაფის განმარტებისთვის იხ. Weigend, T. (2022). *Consent and Sexual Offenses Germany*. In Hoven E. & Weigend, T. (eds.). *Consent and Sexual Offenses, Comparative Perspectives*, Nomos.

116 Hörnle, T. (2024). *The Challenges of Designing Sexual Assault Law, Current Legal Problems*, Vol. XX.

117 იხ. Weigend, T. (2022). *Consent and Sexual Offenses Germany*. In Hoven E. & Weigend, T. (eds.). *Consent and Sexual Offenses, Comparative Perspectives*, Nomos, 185-186.

118 მსგავსი აზრისთვის იხ. Schulhofer, S. J. (2022). *What Does 'Consent' Mean?* In Hörnle T. (ed), *Sexual Assault Law Reform in a Comparative Perspective*, Oxford University Press, 65-66. და ასევე იხ. Bladini, Moa & Andersson, W. S. (2020). *Swedish rape legislation from use of force to voluntariness – critical reflections from an everyday life perspective*, *Bergen Journal of Criminal Law and Criminal Justice*, vol. 8(2), 122.

119 ქართული სასამართლო პრაქტიკის კრიტიკული ანალიზისთვის იხ. გეგელია, თ. (2021). *დალატით პროვოცირებული მკვლელობა, კავკასიის უნივერსიტეტის პერიოდული გამოცემა, სასამართლო გადაწყვეტილებათა ანალიზი*, N1.

120 ქართული და სხვა იურისდიქციების მაგალითზე სასამართლო პრაქტიკის კრიტიკული ანალიზისთვის იხ. გეგელია, თ. (2021). *არა-ფატალური დახრჩობა ოჯახური ძალადობის კონტექსტში, კავკასიის უნივერსიტეტის პერიოდული გამოცემა, სასამართლო გადაწყვეტილებათა ანალიზი* N2.

121 ასევე იხ. გეგელია, თ. (2022). *აგრესიის საპასუხოდ ინტიმურ პარტნიორზე აუცილებელი მოგერიებით ძალადობის კრიმინალიზება. ცუდი კანონი თუ მანკიერი სისხლის სამართლის პრაქტიკა? საერთაშორისო და მსოფლიო* 8(4).

122 Thorburn, M. (2022). *Sexual Assault Law in Canada* In Hörnle T. (ed), *Sexual Assault Law Reform in a Comparative Perspective*, Oxford University Press, 100-101.

თისთვის უცხონი არიან, აქ მეტი ძალისხმევის განწევაა საჭირო თანხმობაში დასარწმუნებლად.

3. Mens rea – უკეთესი მოდელის ძიებაში

გაუპატიურების ამკრძალავი რეფორმირებული კანონების მიხედვით, გაუპატიურების სუბიექტური შემადგენლობის (mens rea) ორი ძირითადი მიდგომა დამკვიდრდა. ორივე მოდელი არსობრივად ერთია,¹²³ რადგან სექსთან დაკავშირებით კომუნიკაციისა და გარემოების აღქმის შეფასება გონივრული ადამიანის (reasonable person) პერსპექტივიდან ხდება. პირველს შესაძლოა მივაკუთვნოთ კანადის, ამერიკის ზოგიერთი შტატი და ინგლისი/უელსი, ხოლო მეორე ჯგუფს – შვედეთი.¹²⁴ იმის შეფასებისას, თუ რა ძალისხმევა გასწია ბრალდებულმა იმ რისკის დასაზღვევად – პარტნიორი ნამდვილად თანახმა იყო თუ არა მასთან სექსუალურ კავშირზე – მოწმდება, თუ რამდენად გონივრული იყო შეცდომა იმ გარემოების მხედველობაში მიღებით, რაშიც ის მოხდა. პირველი მიდგომით, ერთი დანაშაულის შემადგენლობის ქვეშ მოწმდება თანხმობასთან დაკავშირებით დაშვებული შეცდომა, ხოლო მეორე მიდგომის შემთხვევაში, გაუპატიურება ჩადენილი განზრახვით ცალკე მუხლით ისჯება, ხოლო მისი ჩადენა გაუფრთხილებლობით ცალკე შემადგენლობაა. უკანასკნელ შემთხვევაში სასჯელი მსუბუქია.¹²⁵

პირველი მიდგომა გულისხმობს, რომ პირმა მხოლოდ იმ შემთხვევაში უნდა ნა-

მოიწყოს სექსუალური მოქმედება, თუ მეორე მხარის თანხმობაში დარწმუნებულია. მოსამართლე/ნაფიცი მსაჯულები შეამოწმებენ, თუ რა მოიმოქმედა ბრალდებულმა იმაში დასარწმუნებლად, რომ სექსში თანამონაწილემ მას ნებართვა მისცა სექსისთვის. ბრალდებულის მხრიდან იმის მტკიცება, რომ შეეშალა, „გულწრფელი შეცდომა“ დაუშვა ან „ეგონა, რომ ის თანახმა იყო“¹²⁶ არაა საკმარისი, არც მოვლენების მისეული ინტერპრეტაციები გახდება საკმარისი საფუძველი პასუხისმგებლობის გამოსარიცხად. შეცდომა და მხარის თანხმობაში დასარწმუნებლად განეული გონივრული ძალისხმევა ფასდება, თუ რა ნაბიჯები გადადგა ბრალდებულმა ამისთვის, როგორი კომუნიკაცია ჰქონდა დაზარალებულთან. კანადის კანონის მიხედვით თანხმობასთან დაკავშირებით სუბიექტური მხარე, წინდაუხედაობა (recklessness) არის.¹²⁷ თუმცა, სამოსამართლო განმარტებებით, როგორც ამას მეცნიერები უთითებენ, არაა საკმარისი ბრალდებულის მხრიდან იმაზე მითითება, რომ „გულწრფელი შეცდომა“ დაუშვა ანდა ქალის „არა“ სექსთან დაკავშირებით „კი“ ეგონა და სხვა მსგავსი კულტურული ფაქტორებით განპირობებული ნებაყოფლობითი სიბრმავე, რომლის მიზანი პასუხისმგებლობის თავიდან არიდებაა.¹²⁸ ვ. მუნროს სწორი შენიშვნით, გაუპატიურების mens rea მაღალი ხარისხი პატრიარქალური კულტურული ფაქტორის გამოყენების შესაძლებლობას ქმნის.¹²⁹ ამიტომაც კანონი არ უნდა იძლეოდეს იმის საშუალებას, რომ პირმა უბრალო სიტყვებით თავის გამართლება შეძლოს

123 იხ. Green, S. P. (2020). Criminalizing Sex: A Unified Liberal Theory, Oxford University Press. 97; ასევე იხ. Herring, J. (2020). Criminal Law: Text, Cases, and Materials, Oxford University Press, 505-509.
124 შვედური მოდელის ანალიზისთვის იხ. Lernestedt, C. & Kagrell, M. (2022). The Swedish Move Towards (In)Voluntariness in Hörnle, T. (ed.), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press.
125 მაგ. იხ. Wegerstad, L. Negligent Rape Law. In Hoven E. & Weigend, T. (eds.). Consent and Sexual Offenses, Comparative Perspectives, Nomos, 125-126.

126 კანადური მოდელის განმარტებისთვის იხ. Thorburn, M. (2022). Sexual Assault Law in Canada In Hörnle T. (ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 103-105; ასევე იხ. Nedelsky, J. (2012). Law's Relations: A Relational Theory of Self, Autonomy, and Law, Oxford Academic, 219-221.
127 ქართული სისხლის სამართლის გადმოსახედით – recklessness არაპირდაპირი განზრახვასა და შეგნებულ გაუფრთხილებლობას აერთიანებს.
128 იქვე. 103.
129 Munro, V. (2014). Sexual Autonomy. In Dubber, M. D. & Hörnle, T. (eds). The Oxford Handbook of Criminal Law, Oxford University Press, 752.

დაშვებული შეცდომის გამო.¹³⁰ პირი დაისჯება, თუკი საქმეში მტკიცებულება არ დევს იმის თაობაზე, რომ მეორე მხარე აქტიურად და ნებაყოფლობით მონაწილეობდა საქმეში.¹³¹ აღსანიშნავია, რომ გერმანული მოდელი თანხმობასთან მიმართებით mens rea-ს მინიმალურ ზღვრად ევენტუალურ განზრახვას ადგენს, თუმცა მისი ნებელობითი ელემენტი განსხვავდება ანგლოამერიკული recklessness-სგან.¹³² არაპირდაპირი განზრახვის გერმანული სამოსამართლო განმარტება ძალიან ჰგავს ინგლისისა და უელსის 2003 წლამდე მიდგომას, როცა თანხმობასთან მიმართებით mens rea-ს გამოსარიცხად საკმარისი იყო თუნდაც სულელური და დაუჯერებელი, მაგრამ „გულწრფელი შეცდომა“. აღსანიშნავია, რომ საქსუალური ძალადობის სუბიექტურ მხარეს რეფორმა არ შეხება გერმანიაში. გერმანელი მეცნიერი ტ. ჰორნლე სქესობრივ ძალადობასთან მიმართებით mens rea-ს რეფორმის მომხრეა შვედური მოდელის მიხედვით.¹³³ მან აღნიშნული იმით ახსნა, რომ ფაქტობრივი შეცდომების ობიექტური დამკვირვებლის პერსპექტივიდან შეფასების ტესტი ზოგადად არაა გერმანული სისხლის სამართალში დამკვიდრებული ინსტიტუტი.¹³⁴

მეორე მიდგომის პრაქტიკულ პრობლემებზე არაერთმა მკვლევარმა მიუთითა. საქმეების დიდი ნაწილი გაუფრთხილებლობით ჩადენილ გაუპატიურებად ფასდება და მოძალადეები მსუბუქად ისჯებიან.¹³⁵ რადგან კიდევ უფრო მანიპულაციური გახ-

და განზრახვისა და გაუფრთხილებლობის შემთხვევების გამიჯვნა.¹³⁶ ამიტომაც მხარდაჭერას იმსახურებს პირველი მოდელი. საქსთან დაკავშირებით კომუნიკაციის სირთულე გადალახვადია. თუკი დარწმუნებული არ ხარ მეორე მხარის თანხმობაში, არ უნდა წამოიწყო საქსი. თუ რისკს გასწევს ადამიანი, მაშინ მკაცრი პასუხისმგებლობაც სამართლიანია.

საინტერესოა R v Ewanchuk-ის საქმე,¹³⁷ რომელიც კანადის უზენაესმა სასამართლომ 1999 წელს გადაწყვიტა და გაამტყუნა ბრალდებული. ამ გადაწყვეტილებით სასამართლომ თანხმობის კომუნიკაციის თეორიას გაუკვალა გზა და, ამასთან, „გონივრული ნაბიჯების“ ტესტი მიიღო მხედველობაში საქსუალური ძალადობის სუბიექტურ მხარის შესაფასებლად.¹³⁸

დაზარალებული, რომელიც იმ დროს 17 წლის იყო, გასაუბრებაზე მივიდა ბრალდებულთან. ბრალდებულმა ხის ნაკეთობების საჩვენებლად მას ტრეილერში შესვლა შესთავაზა. დაზარალებულმა კარი ღია დატოვა, თუმცა ბრალდებულმა ის დახურა და თან ეს ისე გააკეთა, რომ გოგონას აფიქრებინა, თითქოს გასასვლელი ჩაკეტა. დაზარალებული ძალიან შეშინდა. მამაკაცმა მას მოფერება დაუწყო, მისი ყოველი მომდევნო შეხება უფრო ინტიმურ ადგილას და მეტი ინტენსივობით ხდებოდა. დაზარალებულმა მას რამდენჯერმე უთხრა, რომ გაჩერებულიყო. შემდეგ კაცი ჩერდებოდა, გოგონა ამ დროს ხმას აღარ იღებდა, კაცი კი საქსუალურ შეხებას განაგრძობდა.

გოგონას მოკლე შორტები (დაცვის მხარის სტრადეგიაა ბრალდებულის დასაცავად გამოიყენოს მითი, რომ ქალს გამომწვევად ეცვა და თავად გამოიწვია მოძალადე) და მომენტებში მისი პასიურობა, სასამართლომ არ განმარტა, როგორც საქსუალურ შეხებასთან მისი თანხმობა. ბრალდებულს

130 იქვე. 752

131 იქვე. 752. ასევე იხ. Thorburn, M. (2022). Sexual Assault Law in Canada In Hörnle T. (ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 103

132 Hörnle, T. (2022). The New German Law on Sexual Assault in Tatjana Hörnle(ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 149.

133 Hörnle, T. (2022). The New German Law on Sexual Assault in Tatjana Hörnle(ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press, 149.

134 იხ. იქვე.

135 Wegerstad, L. Negligent Rape Law. In Hoven E. & Weigend, T. (eds.). Consent and Sexual Offenses, Comparative Perspectives, Nomos, 125-126.

136 იქვე.

137 R v Ewanchuk [1999] 1 SCR 330 საქმე ციტირებულია და გაანალიზებულია სტატიაში: Thorburn, M. (2022). Sexual Assault Law in Canada In Hörnle T. (ed), Sexual Assault Law Reform in a Comparative Perspective, Oxford University Press.

138 იქვე. 104.

მოლოდინი, რომ გოგონას მისი შეხება მოსწონდა და მასთან სექსი უნდოდა, ყოველგვარი გონივრულობის მიღმაა. მსგავსი გენდერული ცრურწმენებით თანხმობის განმარტება უზენაესმა სასამართლომ გააკრიტიკა. მოცემულ სიტუაციაში, ერთი, რომ გოგონამ რამდენჯერმე გამოხატა უარი შეხებაზე, ამასთან ის შეშინებული იყო, სიტუაციაზე არ ჰქონდა კონტროლი. შეხება არ უნდა დაეწყო მოძალადეს, მას ამისთვის თანხმობა არ ჰქონია. ქალის „არა“ ნამდვილად „არას“ ნიშნავს, მისი თანხმობად გადმოთარგმნა მოძალადის სიჯიუტეა და სხვა არაფერი.

დასკვნითი შენიშვნები

კვლევამ აჩვენა, რომ ქართული სისხლის სამართლით გათვალისწინებული გაუპატიურების შემადგენლობა პატრიარქალურ-მორალისტურ იდეოლოგიას ემყარება, ეს განსაკუთრებით კარგად ჩანს ნორმის სასამართლო განმარტებების დროს, ის, თუ როგორ განიმარტება ნებაყოფლობითი მონაწილეობა სექსში. აშკარაა, რომ კანონით გაცხადებული ნება – დაიცვას ინდივიდის სექსუალური ავტონომია, პრაქტიკულად კვლავ მორალის ლინზებიდან ფასდება. ძალადობაგამოვლილ ქალებს გამადიდებ-

ბელი ლინზით უყურებს მართლმსაჯულება, მათგან მოითხოვენ „იდეალური დაზარალებულის“ კონსტრუქტში დარჩენას, წინააღმდეგ შემთხვევაში მათ სისტემა დაცვის მიღმა ტოვებს.

ნაშრომში მხარდაჭერილია სექსუალური ავტონომიისა და მასთან დაკავშირებული კონცეფციების ლიბერალური გაგება, რაც, ერთი მხრივ, მკაცრ მიდგომას მოითხოვს, დაისაჯოს ყველა ის ქმედება, რომელიც შესრულდა სხვა ადამიანის ნამდვილი ნების უგულებელყოფით და, მეორე მხრივ, შეზღუდოს დასჯა იქ, სადაც თავისუფალი თანხმობაა სექსზე, ინდივიდის სექსუალურ ავტონომიაზე პოზიტიური უფლების დაცვის მიზნებით.

თანხმობის მოდელებს შორის, კვლევამ გაიზიარა კომუნიკაციით გაგებული თანხმობა, „კი ნიშნავს კი“ მოდელის სახით. ეს მოდელი ყველაზე მეტად აზღვევს კულტურულ მითებს, რომ როგორც ფარი, არ იქნეს გამოყენებული მოძალადეების დასაცავად. იგივე არგუმენტით მხარდაჭერილია გაუპატიურების mens rea სტანდარტი, რომელიც ფაქტში შეცდომის მხოლოდ გონივრულ შეცდომას მიიჩნევს პასუხისმგებლობის გამომრიცხველად, რაც დგინდება იმაზე დაკვირვებით, თუ რა გონივრული ნაბიჯები გადადგა ბრალდებულმა მეორე პირის თანხმობაში დასარწმუნებლად.

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THE FORMS OF ACCELERATION OF JUSTICE

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ABSTRACT

Plea bargaining is one of the most important institutions of criminal law not only in Georgia but also in other countries. The said procedural institution was also introduced into the Georgian system and has not lost its relevance since its introduction. It is also obvious that this procedural-legal institution is the cornerstone of Anglo-American law, and it is impossible to discuss it outside the context of the said legal system.

Our research includes an in-depth study of the plea bargaining as a basic legal institution. In particular, the formation and development of plea bargaining in England and America is presented. Among them, the case law in the part of plea bargaining is discussed. The article presents the process of implementing plea bargaining in the countries of continental Europe. The work contains a comparative legal analysis of different countries and the Georgian system.

Historically, there are two types of bargaining: explicit and implied. Explicit plea bargaining is an open offer from a judge to a victim during a trial or a judge's advice to a defense attorney about the "best reasonable solution".

The rules of expedited justice in the countries of the continental European system (Germany, France, Italy) are characterized by certain features, the features of which are discussed in this article.

The study reveals the main essence of plea bargaining in Georgia, the practice of its use, and the main problems. The author's conclusions and recommendations are presented at the end of the study.

KEYWORDS: Plea bargaining, Justice, Court, Evaluation of the evidence

INTRODUCTION

The strategic direction of accelerated justice, which originated from the Anglo-Saxon model of law, is highly relevant today for the procedural laws of Georgian and foreign countries.

Long before on September 17, 1987, the Committee of Ministers of the Council of Europe specially adopted the recommendation, which offered its member states to introduce simplified forms of proceedings and to introduce accelerated forms of resolution of “criminal law disputes”¹

In the countries of the continental European legal system, where the proceedings were very long in time,² they began to perfect the existing models and simplify traditional mechanisms; many procedural regulations were introduced that accelerated the time of litigation and simplified procedural actions, which is why today in various forms of procedural legislation, these requirements are implemented and function successfully in most European countries (Belgium, Italy, France, Greece, etc.). This idea is based on the principles of competition, equality and constant control of the investigative stage by judicial authorities.

Article 8 of the Criminal Procedure Code of Georgia, as a principle, guarantees a fair process and provision of accelerated justice, where it is indicated that the accused has the right to speedy justice within the time limits established by the Procedural Code. A person has the right to refuse this right if necessary for the proper defence preparation. The court must prioritise the criminal case in which imprisonment is used as a preventive measure against the accused.

Before we talk directly about the Georgian model of accelerated justice and its problems, it is probably better to first consider the features that characterize the procedural laws of

Anglo-Saxon and continental European countries in the implementation of speedy justice.

1. A FORMAL PLEA OR DEAL

This plea is a statement by one party in a criminal proceeding to admit the fact on which the other party bases its claim or counter-opinion; it relieves the other party from further necessary substantiation of the mentioned fact, which in this case is deemed to be proved.³ There are several types of formal guilty pleas. Historically, plea bargaining originated in the United States. Currently, up to 90% of criminal cases are considered in this way.⁴ In the American legal literature, we can find the following definition of a plea bargain: it is a case where the accused pleads guilty (plea guilty) in exchange for a less severe sentence (plea guilty) or exchange for other interests. A deal is made between the accused and the prosecutor. Rule 11(c)(1) of the Federal Rules of Criminal Procedure states that a judge is prohibited from participating in a plea bargain.⁵ The US Supreme Court held in the Missouri⁶ and Laffer⁷ cases that a defendant has a constitutional right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution when entering into a plea bargain. It should be noted that the prosecutor has the right to use threats to force the accused to make a deal, but this influence should be related only to the qualification of the crime and the amount of the punishment.

1 Recommendation No. R (87) 18 of the Committee of Ministers to Member States concerning the Simplification of Criminal Justice <[http://www.antonioacasella.eu/restorative/Rec\(87\)18.pdf](http://www.antonioacasella.eu/restorative/Rec(87)18.pdf)>.

2 Pradel, J. (1999). Comparative Criminal Law. Tbilisi, p. 393.

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4 Langer, M. (2004). From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure. Vol. 45, №1, pp.1-64.

5 Federal Rules of Criminal Procedure <<https://www.law.cornell.edu/rules/frcrmp/>>.

6 Missouri v. Frye. (132 S. Ct. 1399 (2012)) <<https://legaldictionary.net/missouri-v-frye/>>.

7 Lafler v. Cooper. (2012) <<https://www.law.cornell.edu/supremecourt/text/10-209>>.

This provision was confirmed in the *Bordenkircher*⁸ case. But if there are no reasons to impose a more strict sentence, and the prosecutor still uses threats, this is a violation.

In the case of *Santobello*,⁹ the Supreme Court ascertained that if the accused agrees to a deal with the prosecutor in exchange for a recommendation but then the prosecutor does not fulfill this promise, another prosecutor is appointed with whom the agreement was not signed, then, in this case, the procedural rights of the accused are violated. But if the court disagrees with the prosecutor regarding the amount of the sentence and imposes a heavier sentence than what was specified in the deal, then the accused cannot claim a violation of the constitutional right. Many US states have instituted plea bargaining (plea guilty) to achieve this goal. The accused has the right to initiate an agreement with the prosecutor before the sentencing if there are valid reasons for doing so.

The court is authorized to share a plea bargain and include this provision in the final decision. The judge may also refuse to accept such a deal if the evidence in the criminal case does not point to the defendant's guilt. The parties will be notified of the court's decision at the court session. Thus, the court does not automatically recognize the plea agreement but analyzes the evidence received from the parties in the criminal case.

In Great Britain, the institution of plea bargaining appeared much later than in the United States. Long before 1970, the Court of Appeal expressed a negative position regarding the institution of plea bargaining, stating that this practice is unacceptable in criminal proceedings. However, the lower courts did not hold the Court of Appeal's instructions and continued the bargaining practice. The High Judiciary had no choice but to adopt the established practice

of using this institution.¹⁰ The emergence of established plea agreements, Contrary to the direct instructions of the superior courts in the case law country, suggests that the criterion of efficiency has prevailed over the tradition of judicial resolution of criminal cases on the merits.

Historically, there are two types of bargains: expressed and implied.¹¹ An expressed bargain (later prohibited in *R v. Turner's* case¹²) is an open offer by the judge to the damaged person during the trial (*R. v. Barnes*¹³) or advice from the judge to the defense lawyer as to the "best reasonable solution" (*R. v. Inns*¹⁴).

An implied bargain can be of three forms. The first form – within the client-advocate relationship – the advocate, based on his procedural status, advises that alleviates the responsibility of the accused (*R. v. Turner*). The second form – within the judge-defense relationship – is based on the freedom of communication between the judge and the lawyer in the absence of the accused in the judge's room, and this communication must be directed to the defense of the client. For example, the defendant has cancer, but he does not know about it; this circumstance may affect the decision made by the judge (*R. v. Cain*¹⁵). The third form is in the form of mitigation of punishment due to active repentance.

The prosecutor's role gradually increases, and he decides whether to make a deal. This is because the Crown Prosecution Service was created in 1986, and the Criminal Justice Act gave the power to lay the final charge to the public prosecutor (previously, the police had the said right) in 2003. The difference between the American and English institutions of guilty pleas lies in the historical role of the prosecutor. To clarify

8 *Bordenkircher v. Hayes*. (434 U.S. 357 (1978)) <<https://supreme.justia.com/cases/federal/us/434/357/>>.

9 *Santobello v. New York* (404 U.S. 257 (1971)) <<https://supreme.justia.com/cases/federal/us/404/257/>>.

10 Rauxloh, R. (2012). *Plea Bargaining in National and International Law*. Routledge, London, p. 285.

11 Thomas, P. (1978). *Plea Bargaining in England*.

12 *R. v. Turner*. (1 All ER 70 (1975)) <<https://vlex.co.uk/vid/r-v-turner-794008705>>.

13 *R. v. Barnes*. (55 Crim App. 100 (1970)) <<https://vlex.co.uk/vid/r-v-barnes-793401041>>.

14 *R. v. Inns*. (60 Crim. App. 231 (1974)) <<https://vlex.co.uk/vid/r-v-inns-793111617>>.

15 *R. v. Cain*. (Crim LR 464 (1976)) <<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/17086/index.do>>.

the place of prosecutors in a new function for them – the parties to the plea agreement – the rule¹⁶ of the procedure for confession of guilt was developed in 2009.

A plea bargain in English criminal law is a case between the prosecutor and the defense where the accused pleads guilty to the charge, in which case the prosecution does not proceed with the indication. There is another option of a deal, when the accused pleads guilty to a less serious crime (i.e. burglary is reclassified to theft, theft to handling stolen goods), this institution can be used in all categories of criminal cases.

The accused must initiate the plea bargain at any stage of the proceedings before entering the courtroom. *R v. The Goodyear* case established the rule that a maximum penalty¹⁷ should be considered when agreeing to a sentence.

In continental Europe, plea bargaining was introduced much later, in the early 21st century. In France, the plea agreement (*Comparution sur reconnaissance préalable de culpabilité*) creates a way to avoid prosecution if a person admits to the charges brought against him (Section¹⁸ 8 of the French Code of Criminal Procedure). As a rule, this procedure is carried out at the prosecutor's initiative. The accused himself or his lawyer can also request a deal; the prosecutor can accept or reject the request. In addition, the investigating judge may request a plea bargain and forward the case to the prosecutor. The deal is made only with an adult defendant and is used only in the case of a misdemeanor (*delict*). In addition, the investigating judge may request a plea bargain and forward the case to the prosecutor. The deal is made only with an adult defendant and is used only for a misdemeanor (*delict*). Article 111-1 of the French Pe-

nal Code divides criminal acts into three categories: felonies (most serious, only intentional, punishable by imprisonment for more than ten years), misdemeanors (less serious, intentional or negligent, imprisonment for up to 10 years), violations (minor action, imprisonment is not imposed). However, not all crimes fall within the scope of plea bargaining. Exceptions are the following types of crimes: violence, threats of violence, aggressive sexual crimes and reckless body harm if they are punishable by imprisonment for more than five years; manslaughter; media activity related to crimes (insult, defamation); political crimes (terrorism, etc.).

If the prosecutor decides that a plea deal is the preferred option in the given case, then he calls the defendant. Mandatory participation of a lawyer during the conclusion of a transaction is established. The prosecutor offers the accused: 1) a fine, the amount of which cannot exceed the amount of the imposed fine; 2) Imprisonment, the term of which cannot exceed one year and half of the sentence served. The accused can accept the offer, refuse it or ask for additional time to think for a maximum of 10 days. In an open trial, the judge recognizes or rejects the bargain (*ordonnance d'homologation*). It should be noted that the judge cannot change or supplement the terms of the bargain.

The French Ministry of Justice notes that the purpose of the plea agreement is to free up the courts, significantly speed up the processing of cases and increase the effectiveness of the punishment because the accused confesses to the crime. The European Court of Human Rights recognized France as a violator of unjustified delays in the consideration of cases.¹⁹ In addition, a deal can also be made by a legal entity through its representative (Article 706-43 of the French Criminal Procedure Code). In addition, it is emphasized that the use of coercive measures against the representative of a legal en-

16 The acceptance of pleas and the prosecutor's role in the sentencing exercise <<https://www.gov.uk/guidance/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercise>>.

17 *R. v. Goodyear*. (All ER (D) 266 (Apr (2005))) <<https://vlex.co.uk/vid/r-v-goodyear-karl-793793697>>.

18 Code de Procédure Pénale. (Version en vigueur au 09 décembre 2023) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/>

19 Circulaires de la Direction des Affaires Criminelles et des Grâces Signalisation des Circulaires du 1er Juillet au 30 Septembre 2004 <<https://www.justice.gouv.fr/sites/default/files/migrations/portail/bulletin-officiel/3-dacg95e.htm>>.

tity is prohibited, except for the summons for trying the case.

In Germany, the institution of plea bargaining (Abshprachen) was introduced in 2009 and provides for a reduced sentence or exemption from serving if the accused pleads guilty. According to Article 153 of the German Code of Criminal Procedure, the prosecutor's office can drop the case at the preliminary investigation stage due to the minor nature of the action if the accused pays a fine. The deal is concluded at a court session with the participation of both parties.²⁰

The bargaining process can be divided into three stages. The first is that the prosecutor offers a plea bargain that involves a reduced sentence in exchange for a guilty plea. The second stage is when the defense admits guilt or the crime committed by the accused. As a result, the prosecution is not required to prove the accused person's guilt. The peculiarity of the German model lies in the fact that, before the plea bargaining, i.e. before the case is tried in court, the accused can familiarize himself with the materials of the criminal case and all the evidence.

When comparing plea agreement institutions in foreign countries, it is worth noting that procedural conditions share the following common features:

1. A deal is concluded between the defense and prosecution parties without the participation of a judge;
2. The terms of the deal usually contain a condition about the maximum term of the sentence, which the court's judgment can later determine;
3. The participation of a lawyer during the conclusion of the plea bargain is mandatory.

2. ACCELERATED DEAL

Accelerated (lat. celerantes – fast, the fastest) deal is a deal about simplifying justice procedures. If the American plea bargain is formally related to representations, the truth of the judicial decision, i.e. It is assumed that the admission of guilt by the accused is trustworthy, in the criminal proceedings of a number of European countries (Spain, Italy and others) from the 80s of the last century, they began to use a plea deal, the object of which was not only the guilt itself but also the formal consent of the accused to the indictment (conformidad – Articles 655, 589 of the Criminal Code of Spain) or “sentencing” (the so-called patteggiamento – Articles 444-448 of the Criminal Code of Italy, as amended in 1988). In both cases, the accused agrees to such deals to plead not guilty. In response to this action, the law provides for a lighter sentence (no more than six years in Spain) or a reduction of the specified term of the sentence (reduction of imprisonment by one-third in Italy). In addition, no judicial investigation is conducted. In practice, such a deal is perceived as an agreement between the parties to plead guilty, earning it the unofficial name “zero plea”.²¹

Article 40 (Part 10) of the Criminal Procedure Code of the Russian Federation also provides for the trial of the case using an accelerated bargain. In such a case, an agreement is made between the prosecutor, the victim, and the accused on the appointment of punishment for crimes of medium severity (which provides up to 10 years of imprisonment). No judicial investigation is conducted, and the court, with its verdict, confirms the sentence agreed upon by the parties in advance.

As we mentioned above, Article 8 of the Criminal Procedure Code of Georgia, as a principle, guarantees a fair process and provision

20 German Code of Criminal Procedure (Strafprozeßordnung – StPO) <https://www.gesetze-iminternet.de/englisch_stpo/englisch_stpo.html>.

21 Mamniashvili, M. (2015). Recognition of Formal Guilt (in the book: Criminal Law Process of Georgia (General Part)). Eds.: Ghakhokidze, J., Mamniashvili, M., Gabisonia, I. Publishing house “World of Lawyers”, pp. 249-258;

of speedy justice, where it is indicated that the accused has the right to speedy justice within the time limits established by the Procedural Code. A person has the right to refuse this right if it is necessary for the proper preparation of the defense. The court is obliged to consider as a priority the criminal case in which imprisonment is used as a preventive measure against the accused.²² Moreover, according to the procedural legislation of Georgia, the plea agreement is used in two directions: first, it helps to speed up the justice process, and second, it is one of the best ways to reveal the participants in organized crime because even in a special case, when the perpetrator of the crime is revealed as a result of the cooperation of the accused/sentenced person with the investigative authorities. The identity of an official and/or a person who commits a serious or particularly serious crime and his direct assistance creates essential conditions for solving this crime; such a person may be reduced in punishment and/or fully exempted from criminal liability or punishment.

3. THE GEORGIAN MODEL OF PLEA BARGAIN

It should be noted from the beginning that the plea agreement in force in Georgia is not a complete copy of the “plea bargain” in the USA. It was not directly copied from the procedural legislation of other countries of Europe or the former Soviet Union. In each state, the institution of the plea agreement has its characteristics, which, in many cases, quite distinguish it from the American one.²³

The institution of the plea agreement in Georgia was introduced in the previously effective Criminal Procedure Code by the law of February 13, 2004. It has passed a certain his-

torical path before taking place in the Georgian justice system with some important changes in the current Criminal Procedure Code.

Chapter 64¹ of the previous Criminal Procedure Code, where the plea agreement was stipulated since its adoption (February 13, 2004), including its effect, especially since March 2005, has undergone systematic and significant changes, reaching 27. The title of Chapter 64¹ of the previous Criminal Procedure Code has been changed. If it was called a “Plea Agreement” when it was accepted, it was later titled a “Plea Agreement and Full Release from Sentence”.

Moreover, in accordance with Article 15¹ of the Code of Criminal Procedure, the first part of Article 679¹ of the same Code determined that the plea agreement is the basis for the judgment to be determined by the court without considering the merits of the case. In contrast to the previous (February 13, 2004) edition, the legislator did not consider mandatory the issue of the accused person’s cooperation with the prosecution, which is manifested in the confession of the crime and the provision to the investigative bodies of such trustworthy information or evidence or information about the crime committed by the official, which contributes to solving this crime. According to the first edition of the law, the consent of the accused to help and cooperate with the investigation was a necessary condition of the plea agreement. Cooperation with the investigation, as indicated in the legal literature, meant that the accused would provide the investigation with truthful information about a more serious crime or a crime committed by a higher-ranking official, or based on the confession of a less serious crime, a criminal prosecution would be carried out against the emperor who committed a more serious crime.²⁴

In case of fulfillment of such conditions, the prosecutor had the right to request a reduction of the sentence for the accused or, in the case of a combination of crimes, to decide on re-

22 Criminal Procedure Code of Georgia, Article 8 (18.09.2023) <<https://matsne.gov.ge/ka/document/view/90034?publication=157>>.

23 Gogshelidze, R. (2007). Plea Agreement – for All Categories of Crime? Journal “Profession Lawyer”, №2, pp. 84-92.

24 Gabrichidze, N. (2004). Plea Agreement. Journal, “Human and the Constitution”, №3. p. 55; Journal “Law”, №5-6, pp. 57-63.

ducing the charge to partial removal. But, a few months after the enactment of the law (Law of July 24, 2004), the procedural legislation underwent changes, from the first part of Article 679¹ of the previous Code of Criminal Procedure, the obligation of the accused to confess and agree to cooperate with the investigation, to provide trustworthy information or evidence of a serious crime committed by a person, which would contribute to the opening of such a category of crime. In addition, the terms of the plea agreement were divided into two and were indicated as a “plea bargain” or “sentence agreement”.²⁵ In the case of a plea bargain, the confession of the crime by the accused was considered mandatory, while the requirement to cooperate with the investigation was maintained. As for the sentence agreement, at such time, the accused was not required to confess the crime, and cooperation with the investigation remained a mandatory requirement for the accused to agree on the punishment with the prosecutor.

In the previous criminal procedural legislation, in the last period (except for the revision of the law of March 25, 2005), a number of substantial changes were made in Chapter 64¹ of the Criminal Procedure Code. Article 15¹ of the previous Criminal Procedure Code indicated that the plea bargain was carried out in compliance with the principle of judicial independence, the purpose of the plea bargain is to provide quick and effective justice, and special chapter 64¹ of the same code provides for the plea agreement and the conditions and procedural rules for full exemption from punishment. In addition, if offering a plea bargain to the accused represented the prosecutor’s power with the amendments, the plea bargain could be offered to the accused (defendant) and the prosecutor during the substantive discussion of the case before the court argument. The court (judge) was authorized to offer the parties to conclude a written plea agreement within the framework of the procedural legislation.

It should be noted that on April 28, 2006, the amendments to Article 679¹, Part 2 of the Criminal Procedure Code gave a different interpretation to the plea bargain when agreeing on the sentence because the non-confession in the part of the charge was completely removed and it is indicated that “while plea-bargaining, the accused (defendant) does not contradict the charges to the accusation, although he agrees with the prosecutor on the size of the punishment or complete release from it”. Thus, whether the accused confessed or did not confess to the charges was no longer important for the plea bargain.²⁶

In the current Procedural Code, the institution in question is titled a “Procedural Agreement”, and in the last period, the legislator made a number of changes. First of all, it should be noted that Section 11¹ was added to Article 3 of the Criminal Procedure Code of Georgia, the definition of the concept of evidence sufficient to issue a verdict without considering the merits of the case, the standard of evidence evaluation. That is, evidence that would convince an objective person that the accused committed a crime, given that the accused confesses to the crime, does not make the evidence presented by the prosecution indisputable and denies the court the right to consider the merits of his case.

At present, with the amendments made to the Code of Procedure, the division of the basis of the plea agreement into two parts was canceled, and it was determined that the basis for the court’s sentencing without considering the merits of the case is the plea bargain, according to which the accused admits the crime and agrees with the prosecutor on the punishment, reduction of the charge and partial dismissal.

When entering a plea agreement, the accused may agree to cooperate and/or pay damages to the prosecutor along with the above conditions.

A plea bargain is concluded by a prior agreement with the superior prosecutor.

25 Criminal Procedure Code of Georgia. (2004). Amendments and additions as of October 2004. Tbilisi, pp. 377-378.

26 Mamniashvili, M. (2021). The Georgian model of Plea Agreement and the Separate Problems of its Completion, Journal “Themida”, №14 (16).

Both the accused (convicted) and the prosecutor can offer plea agreements. During the trial of the case, the court is authorized to find out the possibility of concluding a plea agreement between the parties.

When entering into a plea bargain, the prosecutor is obliged to warn the accused about the consequences of the plea agreement and to explain to him that in case of entering into a plea bargain, the court brings out the incriminating evidence without direct and oral examination of the evidence, and that entering into a plea agreement does not release the accused from civil and other types of responsibility.

In special cases, the Prosecutor General of Georgia or his deputy has the right to apply to the court for the full or partial release of the accused from civil liability. In this case, civil responsibility rests with the state. It is true that the procedural legislation does not indicate in what cases the Prosecutor General has the right to release a person from civil liability because, in such a case, the state has the obligation to compensate for the damage caused.

A protocol is drawn up regarding the plea bargain, which describes the negotiation process between the accused and the prosecutor (protocol of the plea bargain). A copy of the minutes of the plea agreement will be given to the accused and his lawyer. The accused and his lawyer have the right to comment on the plea bargain protocol attached to the protocol. The prosecutor signs the protocol of the plea agreement, the accused and his lawyer, as well as the legal representative of the accused, if any.

CONCLUSION

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