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IS ARBITRATION FAIR? PERSPECTIVES FROM THE USA AND UZBEKISTAN

Sherzodbek M. Masadikov
smasadikov@uwed.uz

Doctor of Law, Chair, University of World Economy and Diplomacy, Uzbekistan
ORCID ID /0009-0007-5958-4927

ABSTRACT

This research examines the arbitration law of the USA and Uzbekistan. It will start with the analysis of the US arbitration law examining issues of policy favoring arbitration, preemption, employment disputes, class arbitration, and punitive damages, as well as measures that have been taken to limit consumer and employment arbitration, including Arbitration Fairness Act (2018) and the Forced Arbitration Injustice Repeal Act (2021) introduced in the Senate as part of the legislative efforts to curtail arbitration use albeit unsuccessfully. It will be argued that the Federal Arbitration Act (FAA) enacted in 1925 was not initially intended to cover consumer and employment disputes, which has evolved out of court interpretation of the FAA led by the US Supreme Court. It also reviews the empirical studies conducted on the use of arbitration that reveal very interesting findings. The second part of the work is devoted to examining Uzbekistan's arbitration law and practice, which was adopted recently compared to the US. Uzbek arbitration law expressly excludes labor disputes, and consumer disputes are subject to court jurisdiction according to the law on consumer protection. In the end, economic court practice on the challenged arbitration decisions is considered. Finally, it will conclude by drawing some inferences from both jurisdictions.

KEYWORDS: Arbitration, Consumer Disputes, Employment Disputes, Class Arbitration

INTRODUCTION

The use of arbitration is expanding in many jurisdictions, including in Uzbekistan. The law and practice of arbitration in developed jurisdictions such as the US is a valuable source of experience for Uzbekistan. For this purpose, the present research is organized as follows. It consists of two parts. The first part examines the US arbitration law and practice and draws conclusions based on the research findings. The second part will examine the law and practice of domestic arbitration[1] in Uzbekistan, comparing them with that of the US. It will conclude by drawing conclusions based on the research findings.

1. ARBITRATION IN THE USA

1.1. Overview

Arbitration in the US has made a remarkable transformation. It has not been recognized by courts in the early stages of its development. Courts were not supportive of enforcing the agreement of parties to arbitrate.[2] Now, the scope of arbitration has extended to encompass consumer and employment cases. US authors are puzzled whether this kind of trend was initially intended by the Federal Arbitration Act of 1925 (FAA) in the first place. The current state of US arbitration law has evolved out of the application and interpretation of the FAA by the judiciary led by the US Supreme Court.

1.2. Policy Favoring Arbitration

The US Supreme Court has been active in promoting policy favoring arbitration nationwide. In *Southland Corp. v. Keating*, it stated: *"In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."*[3] Section 2 of the FAA reads as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[4]

In *Hill v. Gateway 2000, Inc.* US Court of Appeals for the Seventh Circuit compelled the customer who had purchased a computer through a telephone order and brought action against the manufacturer. The manufacturer sought enforcement of the arbitration clause, which had been included in terms sent to the buyer in a box in which the computer was shipped. The Court held that terms sent in the box, which stated that they governed sale unless the computer was returned within 30 days, were binding on the buyer, who did not return the computer.[5]

The customer contended that the arbitration clause did not stand out. The Court stated:

> Yet an agreement to arbitrate must be enforced save upon such grounds as exist at law or in equity for the revocation of any con-

1 International arbitration is governed separately by the Law of the Republic of Uzbekistan "On International Commercial Arbitration" of 16 February 2021. <https://lex.uz/docs/5698676>. See also Snider T., Masadikov S., Dilevka S. (2021, March 24) Uzbekistan Adopts Law on International Commercial Arbitration. *Kluwer Arbitration Blog*. <https://arbitrationblog.kluwerarbitration.com/2021/03/24/uzbekistan-adopts-law-on-international-commercial-arbitration/> [Last access: 29.10.2024].

2 Overby, A. (1985-1986). "Arbitrability of Disputes under the Federal Arbitration Act." 71 *Iowa Law Review. pp.* 1137-1139.

3 *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 858, 79 L. Ed. 2d 1 (1984).

4 Federal Arbitration Act (1925). Section 2. <https://www.govinfo.gov/content/pkg/USCODE-2019-title9/html/USCODE-2019-title9.htm> [Last access: 29.10.2024].

5 *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

> tract… [P]rovision of the Federal Arbitration Act is inconsistent with any requirement that an arbitration clause be prominent. A contract need not be read to be effective; people who accept take the risk that the unread terms may, in retrospect, prove unwelcome.[6]

Thus, consumers should be vigilant in order not to be trapped in such kind of situations. Frequently, such arbitration clauses in contracts are in small print. And it takes real effort for an ordinary consumer to decipher. But do they have any other options other than acceptance? And the answer is NO in many situations.

Some states have tried to alleviate difficulties associated with consumer arbitrations. For example, section 1284.3 (b) (1) of the Code of Civil Procedure of California provides:

> All fees and costs charged to or assessed upon a consumer party by a private arbitration company in a consumer arbitration, exclusive of arbitrator fees, shall be waived for an indigent consumer. For this section, "indigent consumer" means a person having a gross monthly income that is less than 300 percent of the federal poverty guidelines. Nothing in this section shall affect the ability of a private arbitration company to shift fees that would otherwise be charged or assessed upon a consumer party to a nonconsumer party.[7]

In *Gutierrez v. Autowest, Inc.*, lessees of an automobile who brought an action against the lessor under state consumer protection statutes providing nonwaivable rights were entitled to challenge a pre-dispute arbitration clause as unconscionable on the basis that the fees required to initiate the arbitration process were unaffordable; the agreement failed to provide the consumers with an effective opportunity to seek a fee waiver, and an agreement was implied in the arbitration clause that unaffordable fees would not be allocated to the consumer at any point in the arbitration process.[8]

1.3. Preemption

It is an established rule that the FAA preempts a state law. In *Southland Corp. v. Keating*, mentioned above, individual actions and a class action by convenience store franchisees were brought against the franchisor alleging, among other things, fraud, breach of contract, and violation of disclosure requirements of the California Franchise Investment Law. The Superior Court, Alameda County, ordered arbitration of all claims except those based on the statute. The California Court of Appeal reversed as regards the statutory claim. The California Supreme Court held that statutory claims were not arbitrable.[9]

The California Franchise Investment Law provides: *"Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void."*[10]

The Supreme Court held:

> The California Supreme Court interpreted this statute to require judicial consideration of claims brought under the State statute and accordingly refused to enforce the parties' contract to arbitrate such claims. So interpreted, the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause.[11]

Justice Stevens, in a dissenting opinion, stated: *"Given the importance to the State of franchise relationships, the relative disparity in the bargaining positions between the franchisor and the franchisee, and the remedial purposes of the California Act, I believe this declaration of State policy is entitled to respect."*[12]

6 *Id.*

7 The Code of Civil Procedure of California (2002). Section 1284.3. <https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CCP&division=&title=9.&part=3.&chapter=3.&article= >

8 *Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77, 7 Cal. Rptr. 3d 267 (2003).

9 *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

10 Franchise Investment Law (1970). *Part 6. General Provisions.* Section 31512. <https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CORP&sectionNum=31512> [Last access: 29.10.2024].

11 *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 858, 79 L. Ed. 2d 1 (1984).

12 *Id*. at p. 863.

As D. Schwartz argues: *"If original congressional intent is the touchstone of a statute's preemptive effect, Southland was plainly wrong. The historical record clearly shows that the FAA was intended to be a procedural statute for the federal courts, that it was not intended to preempt state law, and that it was designed to reverse the "ouster doctrine" but otherwise preserve all applicable state contract law."*[13] He further contends:

> The preemptive effect given to the FAA as a result of Southland provides a prime example of the intrusion on state sovereignty resulting from preemption. It has done considerable violence to the notion of the states as "laboratories for experimentation" by shutting down state experiments in the regulation of arbitration agreements and inhibiting state case law development in this field.[14]

M. Weston, commenting in general about preemption, argues: *"Given the preemptive effect accorded to the FAA, the ability of the states to enact protective legislation to ensure fairness in arbitration or access to the courts has been significantly, and unduly, limited."*[15]

1.4. Measures to Limit Arbitration

Attempts are being made to curtail the use of arbitration. A clear example of this is the Motor Vehicle Franchise Contract Arbitration Fairness Act (2002), which requires consent in writing from parties to a motor vehicle franchise contract. Section 1226 (a) (2) provides:

> Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if, after such controversy arises, all parties to such controversy consent in writing to use arbitration to settle such controversy.[16]

As C. Chiappa and D. Stoelting explain, this Act was *"designed to redress an alleged disparity in bargaining power between motor vehicle dealers and manufacturers, the Act makes pre-dispute arbitration clauses in motor vehicle franchise contracts unenforceable under the FAA unless both parties consent after the dispute arises."*[17] They make a forward-looking conclusion:

> By creating an exemption for motor vehicle dealers, Congress has raised expectations among other groups that seek similar treatment. If motor vehicle dealers merit protection from mandatory arbitration, why not contracts involving consumers and employees that may well result from disparate bargaining power? Congress is now likely to come under pressure to create more exemptions from the FAA and to curtail long-standing U.S. Supreme Court precedent that broadly construes the FAA.[18]

In 2010 the Congress adopted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), section 921(f) of which entitles the Securities and Exchange Commission to restrict mandatory pre-dispute arbitration by providing the following:

> The Commission, by rule, may prohibit or impose conditions or limitations on the use of agreements that require customers or clients of any investment adviser to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or

13 Schwartz, D. (2004). Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act. *Law & Contemporary Problems*, 67(5), p.8.

14 Id. at 13.

15 Weston, M. (2007-2008). Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use. *Nevada Law Journal*, 8. pp. 385-388.

16 Motor Vehicle Franchise Contract Arbitration Fairness Act (2002). Section 1226. <https://www.congress.gov/106/bills/hr534/BILLS-106hr534eh.pdf> [Last access: 29.10.2024].

17 Chiappa, C. & Stoelting, D. (2002-2003). Tip of the Iceberg? New Law Exempts Car Dealers from Federal Arbitration Act. *Franchise Law Journal*, 22, p. 219.

18 Id. at 220.

limitations are in the public interest and for the protection of investors.

Section 1028 (a) of the Dodd-Frank Act provides that the Bureau of Consumer Financial Protection (Bureau) shall conduct a study of and shall provide a report to Congress concerning the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services. And Section 1028 (b) provides further authority to the Bureau:

> The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.

As I. Szalai, commenting on the Dodd-Frank Act, argues: *"Congress has, in effect, delegated authority to government agencies to amend the FAA through rules and regulations. When these government agencies in the near future consider adopting regulations restricting the use of arbitration agreements, there will likely be much debate and lobbying about whether the use of arbitration agreements should be limited."*[19]

In accordance with section 1028(a) of the Dodd-Frank Act, the Bureau in March 2015 announced its Arbitration Study Report to Congress.[20] According to the study, more than 75 percent of consumers surveyed in the credit card market did not know whether they were subject to an arbitration clause in their contract. Fewer than 7 percent of those consumers covered by arbitration clauses realized that the clauses restricted their ability to sue in court.[21]

In October 2015, the Bureau announced the Proposal to ban arbitration clauses in consumer credit contracts. Director of the Bureau Richard Cordray said: *"Companies are using the arbitration clause as a free pass to sidestep the courts and avoid accountability for wrongdoing. The proposals under consideration would ban arbitration clauses that block group lawsuits so that consumers can take companies to court to seek the relief they deserve."*[22]

The goal of the proposed rules can be summarized as follows:

> **A day in court for consumers:** The proposals under consideration would give consumers their day in court to hold companies accountable for wrongdoing. Often, the harm to an individual consumer may be too small to make it practical to pursue litigation, even where the overall harm to consumers is significant. Previous CFPB survey results reported that only around 2 percent of consumers surveyed would consult an attorney to pursue an individual lawsuit as a means of resolving a small-dollar dispute. In cases involving small injuries of anything less than a few thousand dollars, it can be difficult for a consumer to find a lawyer to handle their case. Congress and the courts developed class litigation procedures in part to address concerns like these. With group lawsuits, consumers have opportunities to obtain relief they otherwise might not get.
>
> **Deterrent effect:** The proposals under consideration would incentivize companies to comply with the law to avoid lawsuits. Arbitration clauses enable companies to avoid being held accountable for their conduct; that makes companies more likely to engage in conduct that could violate consumer protection laws or their contracts with customers. When companies can be called to account for their misconduct, public attention on the cases can affect or influence their individual

19 Szalai, I. (2010). An Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure. *Journal of Dispute Resolution.* pp. 391-393.

20 Consumer Financial Protection Bureau. (2015). *Arbitration study: Report to Congress*. <https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf>

21 Id.

22 Id.

business practices and the business practices of other companies more broadly.

Increased transparency: The proposals under consideration would make the individual arbitration process more transparent by requiring companies that use arbitration clauses to submit the claims filed and awards issued in arbitration to the CFPB. This would enable the CFPB to better understand and monitor arbitration cases. The proposal under consideration to publish the claims filed and awards issued on the CFPB's website would further increase transparency.[23]

The Arbitration Fairness Act was introduced in the Senate on 22 March 2018 also stresses the initial purpose of the FAA and developments in arbitration law by providing:

(1) The Federal Arbitration Act (now enacted as Chapter 1 of Title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.

(3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.

(4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.

(5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary and occurs after the dispute arises.[24]

The Forced Arbitration Injustice Repeal Act was introduced in the Senate on 1 March 2021. According to Sec. 2, the purposes of this Act are to:

(1) prohibit pre-dispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and

(2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.[25]

1.5. Employment Disputes

In *Circuit City Stores, Inc. v. Adams,* the employer brought an action under the FAA to enjoin the employee's state court employment discrimination action and to compel arbitration. The United States District Court for the Northern District of California ordered arbitration, and the employee appealed. The United States Court of Appeals for the Ninth Circuit reversed, holding that all employment contracts were beyond FAA's reach. Certiorari was granted. The Supreme Court held that only employment contracts of transportation workers were exempted from the FAA.[26] Provision of the FAA excluding from its reach *"contracts of employment of seamen, railroad employees, or any other class of workers engaged in … interstate commerce"* did not exclude all employment contracts, but rather exempted from the FAA only contracts of employment of transportation workers, and thus the FAA preempted the state employment law that restricted ability of non-transportation employees and employers to enter into arbitration agreement.[27]

As M. Weston points out: "In *Circuit City Stores, Inc. v. Adams*, the Court effectively shut down state regulatory efforts to restrict the arbitration of employment cases by reading, despite clear legislative intent otherwise, that the

23 Id.

24 Arbitration Fairness Act (2018). Section 2591. <https://www.congress.gov/bill/115th-congress/senate-bill/2591/text> [Last access: 29.10.2024].

25 Forced Arbitration Injustice Repeal Act (2021). Section 505. <https://www.congress.gov/bill/117th-congress/senate-bill/505/text> [Last access: 29.10.2024].

26 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001).

27 Id.

express exemption in section 1 of the FAA, which excludes *"contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," applies only to transportation employees."*[28]

1.6. Class Arbitration

In consumer contracts, companies tend to include a provision that excludes class arbitration. In *AT&T Mobility LLC v. Concepcion*, customers brought a class action against the telephone company, alleging that the company's offer of a free phone to anyone who signed up for its cellphone service was fraudulent to the extent that the company charged the customer sales tax on the retail value of the free phone. The United States District Court for the Southern District of California denied the company's motion to compel arbitration. Company appealed. The United States Court of Appeals for the Ninth Circuit affirmed. Certiorari was granted, and the Supreme Court held that the Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts.[29]

As H. Aragaki observes: *"State courts have set precedents, and state legislatures have passed countless measures aimed at staving off what appears to be the relentless colonization of procedure by contract. But the force of these responses is increasingly doubtful after Concepcion."*[30]

1.7. Punitive Damages

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, petitioners filed an action in the Federal District Court, alleging that their securities trading account had been mishandled by respondent brokers. An arbitration panel, convened under the arbitration provision in the parties' standard-form contract and under the FAA, awarded petitioners punitive damages and other relief. The District Court and the Court of Appeals disallowed the punitive damages award because the contract's choice-of-law provision specifies that "the laws of the State of New York" should govern, but New York law allows only courts, not arbitrators, to award punitive damages.[31] Certiorari was granted. The Supreme Court held that the contract between securities brokerage firms and customers permitted the arbitration panel to award punitive damages to customers.[32]

The Supreme Court reiterated the policy favoring arbitration and held that "if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration."[33]

E. Micheletti, commenting on *Mastrobuono*, concludes:

> While the objective application of Mastrobuono has the theoretical effect of undermining the FAA federal policy of allowing parties' intentions to control, there are some positive practical consequences. The objective application of Mastrobuono in such cases protects parties of unequal bargaining power from unfairly and unknowingly contracting away their arbitral rights. Additionally, it will promote contractual certainty by requiring parties to clearly articulate their intentions in contract provisions.[34]

28 Weston, M. (2007-2008) Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use. *Nevada Law Journal*, 8, pp. 385-387.

29 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

30 Aragaki, H. (2014). The Federal Arbitration Act as Procedural Reform. *New York University Law Review*,89. pp. 1939-1958.

31 *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 52, 115 S. Ct. 1212, 1213, 131 L. Ed. 2d 76 (1995).

32 Id. at 1212.

33 Id. at 1216.

34 Micheletti, E. (1996). Mastrobuono v. Shearson Lehman Hutton, Inc.: Another Piece of the Federal Arbitration Act Policy Puzzle. *Delaware Journal of Corporate Law*. 21, pp.1027-1064.

So, companies can include a waiver of awarding punitive damages in their standard contracts, and consumers will not have a clue that they are giving away their rights again. And following *Mastrobuono* courts will enforce such kind of arrangement, which is convenient for companies. As W. Burnham sums up the disadvantages of arbitration:

> What is being given up when someone agrees to arbitration is substantial. There is no right to trial by a jury or before a legally trained judge. And, unlike arbitration between parties on relatively equal financial footing, consumers, employees, or patients rarely have much meaningful input – not just on whether to agree to arbitration – but also on who the arbitrators will be or what rules will govern the procedure. The grounds for judicial review of arbitration decisions are limited, mainly fraud or corruption, and none of them go to the merits of the dispute. On the other hand, the winner of the arbitration can gain immediate access to a court to enforce the decision.[35]

Thus, as analyzed above, unless parties to a contract have equal bargaining power as a merchant to merchant dealings, US practice suggests that arbitration is not fair for consumers and employees who are trapped in well-drafted arbitration clauses.

1.8. Empirical Studies

A survey conducted by R. Sommers "revealed that most consumers do not pay attention to, let alone understand, arbitration clauses in their everyday lives. Over 92% of respondents report that they have never based a decision to use a product or service on whether the terms and conditions contain an arbitration agreement. When prompted, they largely endorse the following reasons: they were unaware of the arbitration clause, they did not read the terms and conditions, and they thought they had no choice but to agree to mandatory arbitration. Moreover, many respondents presume that if a dispute arises, they will still be able to access the public courts, notwithstanding that they agreed to the terms and conditions. Consumers are largely unaware of opportunities to opt out of mandatory arbitration. They generally do not pay attention to or retain information about the steps required to opt out successfully (e.g., contacting the company within a specified time period)."[36]

The results of another study establish that a strong arbitration effect exists, meaning that individuals are less likely to resort to the arbitration procedure in their contracts after a dispute arises.[37]

2. ARBITRATION IN UZBEKISTAN

2.1. Country Overview

Uzbekistan, with its over 37 million population[38] is situated in Central Asia. Tashkent is the capital city, other ancient cities of Samarkand (2750 years old) and Bukhara (2500 years old) used to be on the route of the Great Silk Road that united East and West.

Uzbekistan is a unitary nation-state, and its legal system is based on Civil (Romano-Germanic) Law. Article 10 of the Civil Code of Uzbekistan[39] provides that protection of civil rights can be carried out by the court, economic court, and arbitration court depending on jurisdiction or contract.

35 Burnham, W. (2016). *Introduction to the Law and Legal System of the United States.* West Academic Publishing. 6th ed., pp. 274-275.

36 Sommers, R. (2024) What do consumers understand about predispute arbitration agreements? an empirical investigation. *PLOS ONE*, 19(2), e0296179. <https://doi.org/10.1371/journal.pone.0296179>

37 Ghodoosi, F., & Sharif, M. (2023) Arbitration Effect. *American Business Law Journal,* 235, p. 242. <https://ssrn.com/abstract=4010102>

38 As of 1 July 2024, Statistics Agency under the President of the Republic of Uzbekistan. <https://stat.uz/ru/press-tsentr/novosti-goskomstata/55410-demograficheskaya-situatsiya-v-respublike-uzbekistan-yanvar-mart-2024-goda-2> [Last access: 29.10.2024].

39 <https://lex.uz/docs/111181>

2.2. Arbitration Law

The Law "On Arbitration Courts" of 16 October 2006, entered into force on 1 January 2007, has created the legal base for domestic arbitration. Before the adoption of this law, arbitration on the territory of Uzbekistan was governed by Annex No. 3 to the Civil Procedural Code of the Soviet Socialist Republic of Uzbekistan (23 March 1963), but arbitration was hardly used in practice during that period because of the absence of relations based on private property.

Unlike in other countries such as Germany, France, and the UK, where arbitration acts govern domestic as well as international arbitration, Uzbek Law "On Arbitration Courts" governs mainly domestic arbitration.

Most of the permanent arbitration courts are established at the Chamber of Commerce and Industry of Uzbekistan ("CCI")[40] and the Association of Arbitration Courts of Uzbekistan ("AAC"). The Ministry of Justice keeps the register[41] of the permanent arbitration courts, and its number is 252, with 908 arbitration court judges as of 1 April 2021.[42]

The number of cases considered by arbitration courts is gradually rising, and more and more commercial entities are including arbitration clauses in their contracts. From 2007 to 2017, arbitration courts at the CCI considered 8,689 cases for a total of 411.2 billion Uzbek sums ($48.8 million).[43]

Still, a lot of work needs to be done to facilitate the referral of disputes to arbitration courts in Uzbekistan, including, among others, widespread popularization and support of state courts.

The Law "On Arbitration Courts" consists of 59 Articles that regulate the establishment of an arbitration court (permanent, *ad hoc*), its jurisdiction, arbitration agreement, requirements for arbitration judges, conduction of arbitration proceedings, challenge of arbitration court decision, and its enforcement.

Arbitration is also regulated by appropriate rules of the Civil Procedure Code (CPC)[44] and the Economic Procedural Code (EPC)[45]. Court proceedings are suspended in case of the existence of a valid arbitration agreement.

According to Article 5 of the Law, a permanent or an *ad hoc* arbitration court can be established. Government bodies are not permitted to establish arbitration courts and be a party to the arbitration agreement. This means that in case of a dispute in which a party is a company with state shares, this dispute cannot be subjected to and resolved in arbitration court.

The Law states that arbitration courts are not legal persons.[46] The permanent arbitration court can be established by a legal person and functions under it. The legal person notifies the local department of justice about the establishment of a permanent arbitration court. This requirement also applies in the case of *ad hoc* arbitration and should be done by a chairman or a sole arbitration judge before commencing the proceedings.

2.3. Jurisdiction of Arbitration Courts

The jurisdiction of the arbitration courts is identified in Article 9 of the Law. They resolve disputes emerging out of civil legal relations, including commercial disputes. The arbitration courts do not consider disputes that arise out of administrative[47], family, and labor relations. There are also other exclusions to the jurisdic-

40 <https://chamber.uz/en> [Last access: 29.10.2024].

41 <https://lex.uz/docs/1405185> [Last access: 29.10.2024].

42 <https://lex.uz/docs/5386771> [Last access: 29.10.2024].

43 <https://uztag.info/ru/news/treteyskimi-sudami-uzbekistana-rassmotreny-bolee-8-5-tys-del> [Last access: 29.10.2024].

44 <https://lex.uz/docs/5535095> [Last access: 29.10.2024].

45 <https://lex.uz/docs/3523895> [Last access: 29.10.2024].

46 Article 5 of the Law "On Arbitration Courts" (2006). <https://lex.uz/docs/1072094> [Last access: 29.10.2024].

47 Tsurtsumia, S. (2021). Prospects for using arbitration for resolving the disputes arising out of administrative contracts. *Law and World, 7*(2), 130-147.

tion of the arbitration courts that can be found in different acts. For example, insolvency, corporate, investment, and competition cases are considered by the Economic Courts of Uzbekistan.[48]

As to the applicable substantive law in arbitration proceedings, the arbitration courts resolve disputes based on the legislation of Uzbekistan terms of a contract, taking into consideration customs of business relations. If the relations of parties are not directly regulated by the legislation or an agreement between the parties and there is no applicable rule of customary business relations, then the arbitration court applies the rules of the legislation that regulate similar relations (an analogy of law), or in case of a failure of this method, the rights and obligations of the parties are determined out of the purpose of the legislation and requirements of fairness, reasonableness, and justice.[49]

2.4. Consumer Disputes

Article 29 of the Law "On Protection of Consumer Rights" of 26 April 1996 provides that in case of violation of consumer rights, he has the right to go to court. Claims are filed at the location of the defendant, consumer, or at the place where the damage was caused unless otherwise established by legislative acts. Such claims are exempt from state duty.[50] However, there is no express prohibition of arbitration for consumer disputes in the legislation of Uzbekistan, and there are no available reported cases of such a category of disputes.

2.5. Arbitration Agreement

An arbitration agreement can be done as a clause in a contract or in the form of a separate agreement that should be in writing. It is considered to be concluded in written form if it is contained in a document signed by parties or concluded by way of exchange of letters or use of electronic communication means that provide fixation of such agreement. In case of failure to follow these rules, the arbitration agreement is considered to be invalid.[51]

2.6. Requirements for Arbitration Judges

A judge of the arbitration court should meet particular requirements set by Article 14 of the Law. He or she should be a citizen of Uzbekistan not younger than 25 years old who could provide impartial resolution of a dispute, directly or indirectly not interested in the outcome of a dispute, independent from the parties to the arbitration agreement, and consented to execute obligations of the arbitration judge. According to paragraph 4 of Article 14 of the Law, a person cannot be a judge of an arbitration court if he or she is incapacitated, convicted; whose powers as a judge, advocate, notary, interrogator, prosecutor, or other law enforcement personnel were ceased for committing an offense which is incompatible with his/her professional activity; and who is according to his/her official status determined by law cannot be chosen (appointed) as an arbitration judge.

An arbitration judge who is acting solely or as a chairman in the arbitration panel should be qualified in law. Except for this requirement, the law permits the parties to agree on other qualifications of the arbitration judge, or they may be determined by the rules of a permanent arbitration court.

The arbitration court rules on its jurisdiction based on the generally accepted "competence-competence" principle, including in cases when one of the parties objects to the arbitration proceeding on the ground of absence or invalidity of the arbitration agreement.

48 Art. 25 of the EPC (2018). <https://lex.uz/docs/3523895> [Last access: 29.10.2024].

49 Art. 10 of the Law "On Arbitration Courts" (2006). <https://lex.uz/docs/1072094> [Last access: 29.10.2024].

50 <https://lex.uz/docs/14643#17495> [Last access: 29.10.2024].

51 Art. 12 of the Law "On Arbitration Courts" (2006). <https://lex.uz/docs/1072094> [Last access: 29.10.2024].

2.7. Challenge to the Award

The decision of the arbitration court can be challenged by one of the parties by applying to the state court[52]. Article 47 of the Law provides the grounds for the annulment of the arbitration decision. The state court cannot review the merits of a case and annuls the arbitration decision if an interested party provides evidence that:

- the arbitration agreement is invalid on the grounds provided by the law;
- the arbitration decision is rendered on the matters that are not covered by the arbitration agreement;
- the arbitration decision was rendered with the violation of the applicable laws;
- the arbitration panel or the arbitration proceedings do not conform with requirements of the law on the qualifications of the arbitration judge, composition of the arbitration panel, challenge of an arbitration judge, and the rules of the arbitration proceeding;
- a party against whom the arbitration decision was rendered was not duly notified about the appointment of the arbitration judges or the time and place of the arbitration proceedings and, therefore, could not present their explanations to the arbitration court;
- Also, the arbitration decision is subject to annulment by the state court if a dispute is out of the arbitration court's jurisdiction according to the law.

The decision of the arbitration court is executed voluntarily according to Article 49 of the Law. In case of non-compliance with this rule, a party can apply for compulsory enforcement to the state court. The compulsory enforcement is carried out in accordance with the Law "On Enforcement of Judicial Acts and Acts of other Bodies" of 29 August 2001[53] based on the enforcement order issued by the state court.

Article 53 of the Law provides that in considering the application for compulsory enforcement, the state court is not allowed to review the merits of the case. However, the state court can reject the application for compulsory enforcement on the grounds specified in Article 47 of the Law "On Arbitration Courts", mentioned above.

Overall, the Law of Uzbekistan, "On Arbitration Courts" is based on generally acknowledged principles of arbitration oriented at the resolution of domestic disputes.

2.8. Challenged Awards

As case statistics in the Economic courts show, only a small number of arbitration court decisions are challenged. For the period of 2023-2024, only ten applications for the challenge were reported, and only 2 cases were annulled. In the first Case No. 4-2101-2303/4311 dated 20 December 2023, the regional Economic court annulled the decision of the arbitration court on the ground that the arbitration agreement was signed by the person who did not have the authority to do so.[54] In the second Case No. 4-1001-2303/29074 dated 26 December 2023, the Supreme Court annulled the arbitration court's decision because the parties referred to the non-existent arbitration court in their contract.[55]

CONCLUSION

Thus, because of the policy favoring arbitration, preemption, and other case law, the reach of the US arbitration law has extended to the parties with less bargaining power, such as consumers and employees. And tying this cate-

52 Economic Court or Civil Court depending on jurisdiction.

53 <https://lex.uz/ru/docs/13896> [Last access: 29.10.2024].

54 <https://public.sud.uz/report/ECONOMIC> [Last access: 29.10.2024].

55 <https://public.sud.uz/report/ECONOMIC> [Last access: 29.10.2024].

gory of participants with the arbitration clauses seems unfair. Instead of enacting numerous acts that include measures to limit arbitration in some way or another, it might be logical to make amendments to the FAA itself, expressly delimiting its scope of application.

As to Uzbek arbitration law, Uzbekistan is a civil law country, and the state courts do not have the power to make rules. As Uzbekistan is a unitary state, there is no issue of preemption, and class actions or an award of punitive damages are not practiced. Uzbek law on the arbitration courts expressly excludes family and labor disputes. As to consumer disputes, the rights of consumers are under judicial protection. Therefore, hopefully, Uzbekistan will not face problems with the US, like consumer and employment arbitrations.

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EUTHANASIA: A COMPREHENSIVE ANALYSIS ON INDIAN PERSPECTIVE

Mousumi Kalita
mousumianusuyakalita@gmail.com

Doctor of Law,Assistant Professor, ICFAI UniversityTripura, India

ABSTRACT

In this civilization, the sedative care and value of existence matter in enduring life-threatening illnesses like high-grade cancer-like disease and HIV/AIDS have turned out to bea significant apprehension for Doctors. Corresponding this apprehension has happened one more contentious concern, i.e., Euthanasia or "mercy–killing" of lethally ill persons. Promoters of Physician-Assisted Suicide (PAS) experience it as a personal liberty to self-rulespontaneously,leadingthem to choosea peaceful death without any pain. The rival one feels that a doctor's responsibility for the demise of someonebreaks the vitalprinciple of the therapeuticcareer. Moreover, untreated melancholia and the prospect of collective'intimidation' in publicdemanding 'euthanasia'[1] put anauxiliaryinterrogationremark overmoral attitude,which is elementary to such an act. These apprehensions have guidedus to uncompromising leading standards for executing PAS. Appraisal of the psychological condition of the human being submissive to PAS happens tobe obligatory, and also, the responsibility of the psychiatric consultation developsinto essential. Although measured asunlawful in our country, PAS has numerous lawyers in the form of willful standards and declarations like "death with dignity"[2] establishment. It has achieved desire in the Honorable Apex Court decision in the ArunaShaunbag case. It stays to be noticed is till when it is obtained by this predisposedmatterclatters the Indian government.

KEYWORDS: Euthanasia, Medical Profession, Ethics, Law

1 Sinha, V. K. (2012). *Euthanasia: An Indian perspective*. ResearchGate <https://www.researchgate.net/publication/230872039>

2 Ibid.

INTRODUCTION

Duringthe 17th century, Britishtheorist Sir Francis Bacon invented the term "euthanasia". Euthanasia originated from the Greek words "eu", which means "good" and "Thanatos", which means "death". Originally, it meant a "good" or "easy" death. Willful extermination is characterized as the organization of a noxious specialist by someone else to a patient to save the patient from terrible and untreatable misery. In typical fashion, the doctor is motivated by compassion and the expectation of curing the condition. Doctors perform euthanasia, which has been categorized as either "active" or "passive". Active euthanasia involves a general practitioner performing actions to end a patient's life. Aloof willful extermination worries about keeping or reducing activity key to maintaining life. Active euthanasia falls into one of three categories. Intentional killing is one type of dynamic willful extermination that is executed in the interest of the enduring person. Unintentional euthanasia, which is also popular as "mercy killing", is the process of endangering a patient's life to alleviate his suffering when the patient neverprayed for it. In non-willful killing, the training is completed despite the reality that the patient isn't in that frame of mind to give assent.

1. EUTHANASIA AND MORAL INTEGRITY

It is occasionally questioned that specialists have some specific moral obligations, a flat-out impulse by no means to take life, and it is only for this motive that they are never willing to contribute to willful extermination. According to this point of view, doctors are lawfullyforbidden from performing euthanasia, even when an endure has proficiently appealed it, for the reason that they infringe their most elementary professional commitment to by no means unnervingly and deliberately reason a patient's death.[3] However, as I will demonstrate, if sufficientcontemplation is provided to howphysicians'responsibilities are carried out and the ethical credence of neutralizingresponsibilities that are uniformly elemental to medicine, it is not apparent how the doctor's responsibilityby no means to execute could ever actually be unqualified — where that term is obtained to denoteunconditional or inviolable. Although it is a justifiableresponsibility, doctors do have a responsibility to refrain from deliberate murder.

The knoll of clinical science is the sole area that is recognized for the close three-sided interrelation between medication, regulation, and morals. Euthanasia is a mostly important area of medicine that sits at the intersection of law and ethics. Willful extermination question is obtained in different social orders of the world over an extensive period. The divergent legal positions pledged by the States replicate the field's never-ending dilemma. In veracity, the supported conditions of the States crossways the world have stretched out in the district of the moral planning of individuals dwelling in particular regions. Therefore, addressing the ethics of euthanasia is very important even in the modern era, when we are seeing a gradual rise in the number of populace who would like to use it because modern medical technology makes it easy to die without pain.[4]

With an outsized whole number of partners and excess of cultural hints, instances of willful extermination present amazing tackle to the general public overall and specialists specifically. The expansions in overabundance have brought forward inquiries regarding the recipe of direction, patients' independence, specialists' obligation to treat, anxieties of relatives, the job of the general public and State, and capable utilization of clinical assets to forestall wastage.[5]

More than the past few decades'integers of theorists' apprehension with medical ethics have found it progressively thornier to substan-

3 <www.tendoffline.com>

4 Bhat, B. S. (2017). *Reflection on medical law and ethics: Euthanasia in India – Is ethics in the way of law?* (2nd ed.). p. 130.

5 Ibid.

tiate the comprehensivesegregation of taking life. Harris, in his prominent work on medical ethics, "The Value of Life" talks of killing as being a caring thing to do. Tooley, whose work on abortion and infanticide has caused extensivehullabaloo, takes issues further and argues freedom to life is notinexorably a concomitant of being a human being, and it does not inevitablypull out to newly born infants. Such a position is tremendous and conspicuously a marginal one, but it is momentousneverthelessthat a prominentvoice in moral philosophy is questioning the ethics thatstringently outlaw any taking of human life.[6]

This has gone hand in hand with the increasingly significantfundamental role being given to the standard of independencenecessitates that we tolerate people as far as feasible to make their judgments, then why should the populace be denied the right to settle on something as vitallyclandestine as the mode and time of their dying.[7]

Healthcare professionals are morally obligated to appreciate life's purity and provide relief from suffering. Usefulness, independence, and equity are acknowledged moral principles directing the exercises of medical care specialists inside society. The application of these moral standards and the use of specific types of medical treatment have become at odds as a result of technological and medical advancements.

Hippocratic Oath and the International Code of Medical Ethics create moral challenges for doctors. According to the oath and the ethics, the doctor is to relieve the pain of his patient on one side and protect and prolong his life on the next side. First is the favor of Euthanasia, and second counters the doctrine.

Approaches that will result in reforms and delivery of health care are influenced by two distinct moral theories: the formalist or deontological view and the effective or significant view. According to John Stuart Mill's utilitarian perspective, ethical declarations are those that exaggerate the greatest optimistic equilibrium of worth over the least enthusiastic equilibrium of value for all individuals. Immanuel Kant articulated the normativeoutlook of ethics, which grasps that several actions are erroneous and others are right,not considering the outcome.

2. EUTHANASIAAND INTERNATIONAL PRACTICE

Analysis was done on the euthanasia experiences of other countries, where different strategies for legalizing the right to die were used. Deadly tourism is a phenomenon that has grown as a result of legislative decisions in some jurisdictions being inconsistent. A certain level of legislative harmonization or the establishment of suitable limits in the laws of those jurisdictions that have allowed euthanasia is required to prevent such a scenario. Since an interstate consensus cannot be reached, the Council of Europe handles the euthanasia issue individually at the state level.

Most states that are parties to the Convention for the Protection of Human Rights and Fundamental Freedoms have laws that criminalize aiding and abetting suicide or euthanasia. Because of this, the European Court of Human Rights (ECtHR) hears the majority of cases pertaining to the so-called "right to die". Therefore, when it comes to deciding whether a person has the right to die when and how they want, the European Court of Human Rights is the ultimate arbitrator. As a result, the Court is extremely hesitant to acknowledge the right to die. The ECtHR, however, remains impartial and acknowledges that member states have the right to make their own decisions on this complicated matter.

The formulation of Ukrainian and European legislation, national and international legal acts, and ECtHR rulings using the comparative and law technique was necessary to achieve the study's purpose. The writers processed international and legal acts in the sphere of human rights related to the exercise of the right to

6 Srivastava, L. (2013). *Euthanasia: Law and medicine*.
7 Ibid.

euthanasia and the realization of related rights using logical methods of analysis and synthesis. The comparative and legal technique is the most popular research approach for this topic. It enabled the writers to examine the right to euthanasia in detail, pinpoint similarities and differences, as well as the advantages and disadvantages of each, and spot patterns in how this phenomenon is being applied.

The experiences of other nations with euthanasia, where various approaches to granting the right to die were employed, were analyzed. The problem known as "deadly tourism" has increased as a result of conflicting state legislation. To avoid such a situation, some degree of legislative harmonization or the implementation of appropriate limits in the legislation of those jurisdictions that have allowed euthanasia is necessary. The Council of Europe addresses the euthanasia issue individually at the state level because an interstate consensus cannot be obtained.[8]

The Court does not consider the right to life to be a right to suicide or euthanasia, nor does it consider it to be a right to death. The study of the main cases that most clearly and informatively convey the ECtHR's stance on the right to die shows that the right to assisted suicide and the right to passive euthanasia may only be recognized as part of the Convention's right to respect for private life, and only if they do not contradict with the respondent state's national legislation. Before euthanasia is allowed in Ukraine, lawyers and specialists from the domains of medicine, bioethics, philosophy, sociology, and other disciplines ought to engage in a serious public discussion. To stop misuse and reduce the number of applications,[9]

The Venice Declaration on Incurable Diseases (1983) was endorsed by the 35th World Medical Assembly due to the seriousness of the subject at hand. This document states that a doctor may choose not to treat a patient who has an incurable illness with the patient's agreement (and, if the patient is incapable of expressing their wishes, with the approval of their immediate family). The aforementioned does not, however, absolve the physician of the duty to help a patient who is near death to lessen their suffering during the last stages of the illness.

Although the Declaration on Euthanasia (1987) was accepted by the 39th World Medical Assembly in Madrid, the topic of euthanasia is not specifically governed by international law. According to the Declaration, euthanasia is unethical since it involves purposefully taking a patient's life, even if the patient or their family members wish it. It does not negate the need for the doctor to respect the patient's wish to not impede their natural death process during the latter stages of their illness. Regardless of whether it is permitted by domestic or international legislation, euthanasia is practiced in many jurisdictions today. Euthanasia is legal in a number of states. Euthanasia is legal and practiced extensively in certain states. Regardless of whether it is permitted by domestic or international legislation, euthanasia is practiced in many jurisdictions today. Euthanasia is legal and practiced extensively in certain states.[10]

The Netherlands was among the first states in this regard. Both assisted suicide and direct euthanasia have been permitted in the nation since 2002. Euthanasia accounts for an average of 6.6% of all fatalities in the Netherlands. Cancer (66%), comorbid problems (12%), neurological diseases (6%), cardiovascular diseases (3.8%), respiratory diseases (3%), old age (3.3%), and the early stages of dementia (2.4%), mental disorders (1%), and other ailments are the most prevalent reasons of euthanasia. In 85% of cases, a general practitioner or family doctor performs euthanasia and is also the first person the patient turns to for assistance. Eighty percent of the time, the treatment is performed

8 Orlova, O. O., Alforova, T. M., Lezhnieva, T. M., Chernopiatov, S. V. &Kyrychenko, O. V. Euthanasia: National and international experience (based on the European Court of Human Rights practice materials). Journal of Forensic Science and Medicine.

9 Tavolzhanska, Y., Grynchak, S., Pcholkin, V. &Fedosova, O. (2020). Severe pain and suffering as effects of torture: Detection in medical and legal practice. *Georgian Medical News, 307*, pp. 185–193.

10 Supra Footnote no. 9.

at home; just three percent are performed in hospitals, various types of nursing homes, or hospices. Physicians are permitted to conduct euthanasia under tight guidelines, which call for a high level of moral preparedness and accountability. Physicians are permitted to conduct euthanasia under tight guidelines, which call for a high level of moral preparedness and accountability.[11]

Finland and Sweden do not have laws against passive euthanasia. The legalization of active euthanasia is being discussed in France, where passive euthanasia is likewise not illegal. At the same time, health officials are being forced to enhance palliative care by the French Parliament. In the UK, euthanasia is now illegal under English law as it is considered intentional murder or manslaughter. The Dutch Parliament made the practice of euthanasia lawful in 2001. Belgium approved euthanasia in 2002. Switzerland formally authorized euthanasia in 2006. Euthanasia programs for foreigners are becoming incredibly popular in this state. The expression "travel to Switzerland" has lately come to mean euthanasia in Britain. Euthanasia has been permitted in Luxembourg since 2009.

Article 27 of the Ukrainian Constitution, Article 281 of the Ukrainian Civil Code, and Article 52 of the Law of Ukraine,"Fundamentals of Health Legislation of Ukraine" all expressly forbid euthanasia in any form. Euthanasia translates as "good, easy death" from the Greek words "eu", which means nice, and tanatos, which means death. The following are characteristics of euthanasia:

a) The patient needs to endure excruciating pain brought on by an incurable illness;
b) Not everyone can end life or speed up death, but certain professionals, including medical professionals, may;
c) A medical professional engages in this activity intentionally, either by acting or by not acting, and deliberately considers the repercussions of their actions;
d) The patient should repeatedly and consistently state that they wish to die, or if they are unable to do so, their close family members should make the request;
e) Euthanasia is performed just to alleviate the patient's suffering;
f) The effects of such an intervention should be completely, impartially, and promptly communicated to the patient or their representative;
g) The patient's death is the result of euthanasia.

Judgments Delivered by the European Court of Human Rights

When states fail to recognize the right to euthanasia, the European Court of Human Rights (ECtHR) steps in to seek justice. The ECtHR has heard very few cases pertaining to this matter. These include instances like "Haas v. Switzerland", "Koch v. Germany", "Gross v. Switzerland", "SanlesSanles v. Spain", and "Pretty v. the United Kingdom". An applicant stated in the case of "SanlesSanles v. Spain"[12] that the state should not interfere with an individual's choice of how to end their life. A person wished to pass away with dignity after suffering from agony and worry due to a vehicle accident that left them disabled. Nevertheless, the Spanish national courts declined, and a criminal inquiry was launched following the death.

The applicant in "Pretty v. The United Kingdom"[13] had a condition of the motile neurons thatwas incurable. The woman wanted to end her life because she knew that in the later stages of her condition, she would be paralyzed and unable to move her muscles, which would diminish her human dignity. She sought her spouse's

11 Tkachenko, V.,Berezovska, L. (2019). The Issue of Euthanasia in the Practice of Family Physicians in the Netherlands. Fam Med.4:61-4.

12 The European Court of Human Rights. (2000). *Case of SanlesSanles v. Spain* (Application No. 48335/99). Available from <http://hudoc.echr.coe.int/eng?i=001-22151>

13 The European Court of Human Rights. (2002). *Case of Pretty v. the United Kingdom* (Application No. 2346/02). Available from <http://hudoc.echr.coe.int/fre?i=003-542432-544154>

assistance because she was physically unable to end her own life. The pair had previously requested that the police not punish her spouse for aiding suicide because it is illegal in the UK. But their plea was turned down. The woman applied to the ECtHR for infringement of the following rights after passing through the UK courts:

Article 2 of the Convention guarantees the right to life, whereas Article 3 forbids torture, Article 8 protects private and family life, Article 9 allows for freedom of speech, and Article 14 forbids discrimination. After reviewing the case, the ECtHR concluded that none of the articles cited by the applicant in "Pretty v. the United Kingdom" were violated by the conduct of the authorities.[14] The European Court of Human Rights (ECtHR) made it abundantly evident in this instance that the right to life guaranteed by Article 2 of the Convention does not imply or defend the right to die.

To put it another way, the issue of the right to euthanasia has been brought before the ECtHR. Contrary to the conventional interpretation of the right to life, the right to life takes on a negative connotation in the context of this right. Determining whether the right to life encompasses the freedom to choose when and how to pass away is the negative component of the right to life. The cases "Haas v. Switzerland" and "Koch v. Germany", which address the right to die as a component of the right to respect for private life in the context of Article 8 of the Convention, provide examples of the ECtHR's stance on euthanasia.[15]

The petitioner in the "Haas v. Switzerland" case had bipolar affective illness for 20 years, which was challenging to manage and kept them from leading a dignified life. The applicant made two suicide attempts and spent a number of times in a mental health facility throughout this period. The medicine could not be lawfully purchased. The petitioner claimed that their right to choose when they die had been violated, citing Article 8 of the Convention. In the "Koch v. Germany" case, a person with a life-threatening illness was denied permission to acquire a deadly dosage of a medication.[16]Article 8 of the Convention's criteria was broken in this case. The petitioner in the "Haas v. Switzerland" case had bipolar affective illness for 20 years, which was challenging to manage and kept them from leading a dignified life. The applicant made two suicide attempts and spent a number of times in a mental health facility throughout this period. The medicine could not be lawfully purchased. The petitioner claimed that their right to choose when they die had been violated, citing Article 8 of the Convention. In the "Koch v. Germany" case, a person with a life-threatening illness was denied permission to acquire a deadly dosage of a medication. Articles 8 of the Convention's criteria were broken in this case.

Therefore, two types of circumstances fall under the ECtHR's practice on the right to die. One category is the right to "assisted suicide", which occurs when a person requests a third party to help them end their life when they are physically unable to do so themselves or when a doctor prescribes a deadly amount of medication for voluntary death. The euthanasia of patients whose lives are artificially preserved falls under the second group of instances. In some situations, stopping therapy has the consequence of ending the patient's life (for instance, by stopping the use of specific medications or disconnecting the patient from artificial life support systems).The Council of Europe's Parliamentary Assembly adopted Recommendation No. 14/8, "On protection of the human rights and dignity of the chronically ill and the dying", on June 25, 1999.[17] The conflicts between euthanasia and the right to life guaranteed by

14 Ibid.

15 The European Court of Human Rights. (2011). *Case of Haas v. Switzerland* (Application No. 31322/07). Available from <http://hudoc.echr.coe.int/rus?i=001-102940>

16 The European Court of Human Rights. (2014). *Case of Gross v. Switzerland* (Application No. 67810/10). Available from <http://hudoc.echr.coe.int/rus?i=001-146780>

17 Council of Europe. (1999). *Recommendation No. 14/8 on the protection of human rights and the dignity of the terminally ill and the dying*. Available from <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16722>

Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms were highlighted in the text.

According to Gergeliynyk, assisted suicide and euthanasia are not "rights", therefore, the Convention on Human Rights should not enable the practice of euthanasia. According to scientists, euthanasia is a flagrant breach of Article 2 of the Convention, which established the concept that "no one can be deprived of life intentionally" and requires the state to respect and safeguard the lives of all persons without distinction. The Council of Europe's Parliamentary Assembly stated in 2005 that it opposed the legalization of euthanasia in some jurisdictions. The Council of Europe's Parliamentary Assembly stated that the development of a medication that might lessen patients' pain and palliative

3. A RELIGIOUS OUTLOOK

In the Hindu holy book, the Bhagavad Gita, it is stated that death is merely a step in the continuum of birth, life, death, and rebirth. Yudhisthir in the Mahabharata said, "It is most astonishing that man sentient of his mortality prolongs to experience that he can deceive death and does all he can accomplish this goal", which is a quote from the epic.

In contrast, Dr. Iftekhar Ali Raja began his discussion of Islam and medical ethics with a quote from Einstein. He cited the Last Address of the Prophet Mohammed, which said that no killing is allowed unless it is ordered by the courts to punish certain clearly defined crimes. This kind of murder shows no mercy.

Conversations about death are frowned upon all over the world. Although India's spiritualcustoms emphasize the decorum and piousconnotation of death, it is considered "apshagun" or unlucky, to even talk about it. However, when patients, their families, and medical professionals confront the unavoidable, it is essential to have discussions about the end of life. Without clear direction, the default choice is a pointlessly drawn-out death. Intensive care and recovery can coexist if done correctly[18].

In such a manner, it is acknowledged that the decisions made by clinical experts are, to some degree, not quite the same as those disclosed by the position concerning them and their families. Doctors and nurses valued the excellence of life and death more than the extent of life in the questionnaire-based ETHICATT study from Europe. In the expanded world, there is now a pervasivegeneralconsciousness of the ineffectiveness and encumber of seriousconcern in the rest few days of living, and the law is quickly keeping it into account. In the USA, during the mid-1970s, regulation and case regulation developed into genuinely settled lawful situations regarding impediments of treatment, mitigation, and living wills[19].

4. NON-CORRELATIVIST CONCEPTION OF DUTY OF A PHYSICIAN AND EUTHANASIA

However, owing to the reality that moral commitments have not for all time been interpreted as correlating with rights, this might not be sufficient to determine the query of whether doctors have a particular, categorical duty by no means to kill. A few hypotheses of obligation (e.g., Kant's or with the intention of the Thomistic Normal Regulation practice) are not reciprocal speculations because they don't depend primarily on taking place a connection among the freedoms of additional to make sense of what obligations are; they slightly, they prioritize their responsibilities (Citation: Finnis, 1980, Ch. 8), and extravagance rights as if they were derived from them (if rights are even treated at all). Therefore, even though a correlativetheory of this kind holds that one's moral obligations might be based on some aspect of one's associationwith other people, this feature does not happen as a consequence of their moral claim

18 Gursahani, R. & Mani, R. K. (n.d.). India not a country to die. *Indian Journal of Medical Ethics*.

19 Ibid.

but rather as a result of the incrediblescenery of the representative, for example, as her reasonableness or self-sufficiency. In the matter of particular duties, it appears obvious that moral obligations are created by the agent's community or proficient role.

Since doctors' obligations truly do have all the assigns of being extraordinary obligations, if they are likewise non-correlative, according to this sense, it might yet be feasible to contend that no less than them — the compulsion never to kill — is unrestricted, or sacred, such that gets away from any of the protests thought about up to this point. However, to make a convincing case for this, it has to be demonstrated that many things are there about medicine that require doctors to never deliberatelygive life execution to their patients. It has to be demonstrated that the division of what it means to be a doctor is to strictly prohibit killing.[20]

A patient's "right to life" means that they have the option to exercise it or not. That right, similar to any legally binding case, might be postponed. A doctor's obligation to safeguard the patient's existenceshould not be unqualified by any means, yet rather reliant upon the patient's choice regardless of whether to practice their freedom of life. According to this view of rights, it would appear that the doctor is obligated to never take the lifeof the enduringperson on purpose whenever the enduring person does not desire to be exterminated; under any circumstances, there is a highpossibility that the patient does skillfully communicate a craving to kick the bucket, under conditions anywhere it might be objective to accomplish as such, and ifso is what the person in question wants, the enduring person has postponed the freedom of life, and afterward, the doctor no longer has amoral responsibility to cease from purposefully killing that person.[21]

Therefore, it appears that the physician's responsibility not to take lifewill not be acategoricalresponsibility of themselves if the physician's ethicalresponsibilities are interpreted as correlating using the rights of patients (or others). Because the freedom to which euthanasia is correlated is either waivable or empty (relying on the notion of freedom we accept), and as a result, the duty is defeasible in situations where euthanasia would be deemed morally justifiable.

In severalmethods, this appears like a reasonable argument. But it is doubtlessly powerless against protest in one manner, for it isn't clear why a patient's trust would essentially be encouraged all the more successfully by the doctor's unqualified denial to take a life than by her severe loyalty to a patient's communicated wishes that regards his independence, on the off possibility that in attendanceof some cases in where the specialist can't notice the two standards. Even thoughwe generally esteem the existence and anticipate that our PCPs should esteem them as well, itnever is such in a few outrageous instances of horrendous, actual enduring toward the finish of living; moreover, in this instance, the patient may legitimately suppose the surgeon to honor his own decision to end his suffering sooner. In that scenario, why wouldn't the doctor's enthusiasm to endow with it be the strongest indication of her reliability? Why isn't the responsibility of reliability enhanced accomplished by respecting the patient's appeal for deliberatedynamic euthanasia if she is acquainted that the patient's prognosis is as awful as he thinks it is if all efforts at stinger have failed and if she is certain that the enduringdecided to die? Doubtlessly,in a few cases wherever, the rule of benevolence will itself be subject to regard for independence becausemany of the time,we can't realize without a doubt what is considered damage to anenduringunless we are acquainted withsomewhatconcerningthepersonalnatures.

Edmund CitationPellegrino (1992, p. 33) contributed to the Kass/Baumrinoutlook that medication is primarily about mending, however, for him, the faithmatter is just a result of double bigger worries. One argument is that allowing

20 Seay, G. (2005). Euthanasia and physicians' moral duties. *Journal of Medicine and Philosophy, 30*(5). pp. 517-533. <https://doi.org/10.1080/03605310500253071>

21 Ibid.

supported self-killing or euthanasia mighttake awayconventionalremedial prevention alongside deliberate killing. Another argument is that it will make it difficult to distinguish between deliberate and instinctive euthanasia, resulting in outlandishcircumstances in which people are euthanized against their will. In any matter, as someone has contended somewhere else (Seay, 2001), it is in no way, shape, or form clear that doctors will be caught on a dangerous slant into loathsome practices assuming the standard against purposeful use of killing is sometimes penetrated since the qualification among non-voluntary and compulsory killing is as a subject of information a brilliant line. When a patient is proficientat consenting, euthanasia is involuntary; however, whilst it is governed byanenduringwho has permanentlyvanished (or never had) the ability for proficiency, questions of consent—whether given or withheld—cannot arise. Euthanasia is non-deliberate when it is directed to a patient. At the same time as the final may be justified in some circumstances (such as when the enduring is undyinglycomatose and the relativesdesire to rescue organs that could be transplanted to put aside the lives of additional), the previous is incorrect because it infringes on the mainlyelementary aspect of the patient's autonomy.

5. INDIAN PERSPECTIVE OF EUTHANASIA

In its decision in the Common Cause Case in March 2018, the Apex Court of India made euthanasia fully legal in India. It has additionally permitted living wills and has even planned rules for this sake. However, the Indian judiciary's journey to legalize euthanasia was fraught with controversy, and there are still opinions in favor and against its legality. The query of whether the "Right to Life includes the Right to Die" has been the subject of intense debate. In this circumstance, it turns out to be exceptionally important to survey the assessments of different researchers to decide the legitimacy of the High Court's activity, particularly because of the special arrangement of Law and order in India. It may become very difficult to adequately enforce this rule in the absence of a clear law in the country. In addition, it is alleged that India has a weak rule of law. As a consequence, the vulnerable portions of the world may be exploited by euthanasia, which is why understanding the notion of euthanasia from the perspective of India is so important. As a result, the principle of this article is to investigate the notion of euthanasia in the radiance of the various legal frameworks that exist in various nations around the planet and to comprehend the Indian legal perspective on the subject. In the sense to comprehend the veracity of India's euthanasia laws, the remainder of the article will concentrate on the various arguments in favor of and against the practice.

Humans are living things that follow the rules of nature and complete the livingseries thatinitiates with their birth here on earth and ends when they die. On the other hand, for many persons, this natural life cycle may become abnormal for several reasons, making it extremely difficult for them to die in a dignified manner. Today, because of the progression of clinical innovation, it is currently conceivable to keep people alive for quite a long time, regardless of whether they are alive in an extremely terrible circumstance, not deserving of living by any stretch of the imagination. In a situation like this, the idea of euthanasia takes center stage. The word "euthanasia" comes from a Greek phrase that means "good death".[22] It implies a demonstration of killing somebody who is extremely sick or exceptionally old so they don't endure any longer, according to the English word reference. It and mercy killing are frequently used interchangeably. But mercy killing occurs when a human being takes the life ofa different person since they think the victim would benefit from it, despite the possibility that the facts exposed will reveal a different truth. On the other hand,

22 Young, R. (2019). *Voluntary euthanasia*. Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/euthanasia-voluntary/>

euthanasia is only referred to as "merciful killing" when the evidence and consensus concur that the individual should die. In India, the Jains and Hindus had traditional rituals called Santhara and Prayopavasa, respectively, in which one fasts until death.[23] Diverse countries have variantregulations regarding euthanasia. Under some conditions, voluntary euthanasia is legal in many nations. Latent willful extermination where the casualty is denied having food and water is, for the most part, lawful, while dynamic killing is legitimate in a couple of countries.[24]

5.1. The Genesis of Euthanasiain the Indian Judiciary

The majority of Indian society is religious. The vast majority of Indians adhere to and practice Hinduism. Pray-upavasa, or death by fasting, is a Hindu practice that is considered an "acceptable way for Hindus to end their life only in certain circumstances". Pray-upavasa must be non-violent and used only when the body has served its purpose and becomes a burden before it can be adopted. Different practices were showing the jokes of willful extermination, like Sati Pratha,[25]where the lady picked passing. In ancient India, it was accepted by society and religion. Samadhi and Jal Samaadhi had been obtained in other ways by saints, sages, seers, and sadhus. This custom is as yet predominant among strict and supernaturally arranged people. The update, or method of committing suicide on one's own, is associated with the tenets of IchchhaMaran, DayaMaran, and SwachchhandMrityu. These thoughts appear to be closer to the regulation of killing given under the Hindu lifestyle. The fruits of "freedom to leave" are these.

There is another branch of the Hindu religio-philosophical system with a different point of view. In Hindu strict requests, it is accepted that an individual can accomplish salvation or mukti and moksha from the pattern of resurrection if he/she passes on in a normal way. Sharad is also performed, and Tarpon is presented to the deceased person's soul if their death occurs naturally. A person's soul is not eligible for tarpon and shared if they die accidentally, by suicide, or have been killed by someone else. The soul of such a deceased person wandered throughout the universe without a destination. A Hindu cannot choose an inflicted death through suicide, assisted suicide, involuntary death, or mercy killing, according to religious traditions and customs.[26] In this way, a derivation can be drawn that willful extermination is strange to the Hindu culture and ethos.

The ancient Indian theocratic order known as the Jain religion recognizes euthanasia in the form of Santhara. "Presumed to voluntarily shunning all of life's temptations — food, water, emotions, bonds — after instinctively knowing death was imminent",[27] according to this Jain belief system. Santhara is referred to by a variety of names, including "Pandit Maran", "Sallekhana", and "Sakham-maran". It is believed to have been performed continually since Jainism was founded. The followers believe that "a person can opt for it when all purposes of life have been served, or when the body is unable to serve any more purpose". Sadhna would not be successful without Sallekhana, the center of Jainism. The Sikh religion is completely opposed to euthanasia and suicide, claiming that it is an interference in God's plan. Santhara is simply a matter of dying with dignity. This may be performed in matters of lethalinfirmity or imminent death, famine or the

23 Gandhi, K. R. (2019). *Euthanasia: A brief history and perspectives in India*. AIIMS Bhopal <https://www.researchgate.net/publication/320829903.Euthanasia.A.Brief.History.And.Perspectives.in.India>

24 Voluntary and involuntary euthanasia. (2019, January 8). BBC <https://www.bbc.co.uk/ethics/euthanasia/overview/volinvol.shtml>

25 Pawar, S. (2010). Euthanasia for death with dignity: Is it necessary? XXXVII (3-4). Indian Bar Review, at 4.

26 Sharma, P., & Ansari, S. (2015). Euthanasia in India: A historical perspective. *Dehradun Law Review, 7*(1). pp. 13–21. Retrieved from <http://www.dehradunlawreview.com>

27 Phadke, M., & Venkatraman, T. (2015, September 6). The right of death. *The Sunday Express* (Indian Express), New Delhi.

lack of food, and old age with the loss of faculties.[28] Still, if someone wants to die, the Christian religion opposes the assassination of innocent people. Christians hold the credence that "birth and death are fractions of the existenceprocedure that God has created, sowe should esteem them", as a fraction of their belief system.[29]

Euthanasia is categorically opposed in the Islamic socio-legal system. According to Islamic Sharia, human life is sacred and cannot be violated. "Do not take lives that Almightyendedconsecrated, additional than in the route of justice", it is commanded.[30] It is stated in another verse of the Quran that killing anyone, except murder or causing mischief in the land, is the same as killing the entire human race. Furthermore, it is stipulated that only Allah determines one's life expectancy, so it is forbidden to take one's own life.[31] According to Sharia, God alone, not a human being, is the one who gives and takes human life. The core of the above clarification is that Islam is against the possibility of killing in unambiguous terms.

Relevant fundamentals like the right to life, the right to die, the right to kill, and the right to be killed are addressed in euthanasia law. Consensual killing, suicide, and homicide are all legal terms for it. It is prevalently realized that willful extermination is a Greek idea that, in a real sense, implies great demise, in other words, simple passing. "It is the act of killing a person or animal without or with minimal pain for benevolent reasons, typically to end their suffering. In the strictest sense, euthanasia means actively causing death, but in a broader sense, it also means helping someone commit suicide in a specific situation. It is translated "into the Latin expression "benemortasia" meaning the benevolent or four mercy killing" by some jurists.[32] The idea that euthanasia is a way to kill someone is widespread. In some instances, it says that causing death is good or right, so there is no criminal liability for the death of a terminally ill person. These undertones have the effect that killing is a demonstration of abetment or prompting to end it all or to help self-destruction by offering guidance for finishing the existence of an at-death door 5 patient.[33]

The human and animal psyches, as a whole, are characterized by a dislike of death, whether it is untimely or not. Birth and death are always celebrated and mourned in human society. Most people want to live an extended period;however, there are instances when they wish to die to escape the pain and suffering of a long illness. In Indian culture, ethos, and history, we are familiar with the concepts of DayaMaran, SwachchhandMrityu, and IchchhaMaran. These upaye are given to free the spirit from the actual sufferings of a patient. These could have been endorsed for getting mukti from slow and horrendous delayed disease.

Jurists and historians have attempted to examine euthanasia's forms and patterns to dispel the myths surrounding the practice. The patient's intention plays a crucial role in the classification of the euthanasia concept. Active and passive euthanasia are the two types of euthanasia that are distinguished by intention and action. Active euthanasia involves injecting a powerful drug into patients six whose doctors have given up on even trying to save them with the best medical care.[34] "The doctor is enthusiasticallyengrossed in the termination of the enduring's life no matter for whatever reasons" is an attempt at active euthanasia. To put it another way, the intervention of the doctor results in death; otherwise, death might not have occurred. Another way, or at least, uninvolved killing, includes "withdrawal of life-supporting medications and additionally life emotionally sup-

28 Ibid.

29 Sharma, S. R.Euthanasia and assisted suicide. *Nyaye Deep*. p. 41.

30 Quran, XVII: 33.

31 Quran, V: 32.

32 Masoodi, G. S., & Dhar, L. (1995). Euthanasia in Western and Islamic legal systems: Trends and developments. *Islamic and Comparative Law Review, XV-XVI*.p. 1.

33 Kadish, S. H. (1983). Encyclopaedia of crime & justice, New York. p. 709.

34 Mahapatra, D. (2011, March 8). Commenting on the judgment of the Supreme Court in the Aruna Shanbaug case. *Times of India*, New Delhi.

portive network for patients" who are in an irreversible vegetative state. In the "Aruna Shanbaug case, the Apex Court allowed passive euthanasia"[35] while declaring active euthanasia a crime.

Moreover, there are three categories of euthanasia: voluntary, non-voluntary, and involuntary. In voluntary euthanasia, a terminally ill person expresses their desire to die. He declares his intention that he will no longer desire to live. The patient is supposed to beg for voluntary euthanasia if he or she asks for help dying, refuses medical treatment, requests the removal of a life support device, refuses to eat, or decides to die to avoid a painful future. Under non-intentional killing, the patient can't settle on a choice for taking his own life. This is based on the wishes of a close relative or guardian of the terminally ill person, not on the wishes of the patient.[36] This incorporates the situations where such quiet is in a trance state or extremely small kid or is under psychological sickness, which makes his daily routine hopeless and not worth experiencing. In these situations, a third party, such as a close relative, gives consent or requests that life support be removed. This third individual should be the gatekeeper or next companion of the patient. In the willful killing, the assent of the patient is fundamental. In addition, it needs to be an informed consent.

6. CHRONOLOGICAL LEGAL INTERPRETATION OF EUTHANASIA

6.1 Maruti ShripatiDubal Case[37]

In this instance, the petitioner was involved in an accident that resulted in manifoldhead injuries, which are the causeof his mental imbalance, and it was later discovered that he had schizophrenia. Because he once attempted suicide, he was even charged with the offense of attempting to consign suicide under Section 309 of the IPC. Following that, the Bombay High Court determined that a right can have both positive and negative aspects. As per the Court, the "right not to exist a strained life" falls under the explanation of the "right to life" in Article 21 of the Constitution of India. "No person shall be deprived of his life and personal liberty except under procedures established by law",[38] reads Article 21. The Court additionally went to the degree of negating Segment 309 of IPC, which endeavored to end it all as an offense, and held it unlawful as it disregarded Article 14 and Article 21 under the Constitution of India. After citing numerous scenarios in which anindividual might wish to finish their life, the Court concluded that the responsibility to die was not unconstitutional but rather unusual and unusual. In the P Rathinan case,[39] the ApexJurisdiction of India decided that "Section 309 of the Indian Penal Code was unconstitutional and held that the Right to Life includes the Right to Die".[40]

6.2 Gian Kaur Case16[41]

In the present case, the defendant and her spouse helped their daughter-in-law commit suicide. The ApexJurisdiction ruled that the Liberty to expire violates the Constitution and that anything that leads to the death of a person is against the Right to Life. In addition, it was decided that "death with dignity does not

35 Priya (2024, October 25), case summery: Aruna Shanboug v. Union of India <https://legalfly.in/aruna-shanbaug-v-union-of-india/> [Last Access Nov. 11, 2024].

36 Harma, P. & Ansari, S. (2015). Euthanasia in India: A historical perspective. *Dehradun Law Review, 7*(1). p. 13–21. Retrieved from <http://www.dehradunlawreview.com>

37 Maruti ShripathiDubal v. State of Maharashtra, Bom-CR (1986). BOMLR 589.

38 Dahiya N. (2022 June 10). Right to Life. Blog ipleader <https://blog.ipleaders.in/right-to-life-2> [Last access 20th June 2023].

39 P. Rathinam v. Union of India. (1994). AIR SCC (3) 394.

40 Dahiya N. (2022 June 10). Right to Life, Blog ipleader <https://blog.ipleaders.in/right-to-life-2> [Last access 20th June 2023].

41 Gian Kaur v. State of Punjab (1996). AIR, 946, SCC (2) 881.

in any way indicate an unnatural extermination of life that restricts a person's natural life span". Again, in the Naresh Marotrao case[42], Justice Lodha ruled that mercy killing or euthanasia constitutes homicide regardless of the circumstances. Nevertheless, in this instance, a distinction was made between euthanasia and suicide. Suicide was defined as the act of killing oneself without the support of any other human being, whereas euthanasia, also recognized as compassionassassination, is the act of killing someone through the assistance of a different human being.

Supportedby the above-mentioned few cases, it can be concluded that, previous to the Common Cause case, the Indian judiciary interpreted the Constitution of India in a range of ways supportedby the nature and conditions of the cases in matters about the right to die. However, it was unclear from the regulation whether the Indian Constitution recognized euthanasia.

Under Section 309 of the IPC,it has been deemed constitutionally valid in the Gian Kaurcase, but Parliament should remove it because it has become outdated. When a person is depressed and makes a suicide attempt, he needs help rather than punishment. In State v. Sanjay Kumar Bhatia,[43] a case brought under section 309 of the IPC, the Delhi High Court noted that there is no reason for section 309 of the Indian Penal Code to remain in force. In Maruti ShripatiDubal v. State of Maharashtra,[44] the Bombay High Court looked into the constitutionality of section 309 and concluded that it violates both Article 14 and Article 21 of the Constitution. It was determined that the Section was arbitrary, discriminatory, and violated Article 14's guarantee of equality. The right to die or have one's life taken away was interpreted to be a fraction of Article 21. As a result, it was deemed an infringement of Article 21.

As a result, eventhough the patient's close relatives, doctors, or next friend decide to end life support, they have to obtain endorsement from the High Court by the Airedale's[45] cases. This is even more important in our country because we cannot rule out the possibility that relatives or others will cause harm to inherit the patient's property.

6.3 Aruna Ramchandra Shanbaug

Aruna Ramchandra Shanbaug v. Union of India,[46] a recent Supreme Court decision, set the stage for the legalization of passive euthanasia. In this present case, anappeal was filed with the Apex Court to allow Aruna Ramchandra Shanbaug's euthanasia because she is in a Persistent Vegetative State (P.V.S.) and almost lifeless. Aruna has no consciousness, and her brain is almost dead. The Apex Court established a committee to conduct a patient's medical examination to govern the issue. Finally, the petition filed on behalf of Shanbaug was denied by the court, which noted that while vigorous euthanasia is against the law, submissive euthanasia is lawful when supervised by the law. Additionally, the court endorsed eliminating the IPC's punishment for suicide attempts to decriminalize them. In this regard, the recommendations which have been launched by the Court will continue to be the law until Parliament adopts a law on the subject. The decision to end life support must be made by the patient's parents, spouse, or other close family members, or, in the nonappearance of any of these, by anindividual or group of people acting as a next friend. It can also be obtained by the patient's medical staff. However, the decision should be based solely on the patient's best interests.

After the decision in the ArunaShanbug case, in which Aruna was a nurse working in the "King Edward Memorial Hospital, Parel, Mumbai", and

42 Naresh MarotraoSakhre v. Union of India. (1996). BomCr. 92.

43 State v. Sanjay Kumar Bhatia. 1985 Cri.L.J 931 (Del.)

44 Maruti ShripatiDubal v. State of Maharashtra. 1987 Cri.L.J 743 (Bom.)

45 Airedale's case 1993(1) All ER 821 (HL).

46 Aruna Ramchandra Shanbaug v. Union of India.2011(3) SCALE 298: MANU/SC/0176/2011.

was strangled and solemnized by SohanlalWalmiki on Nov. 27, 1973, the issue in India became highly contentious. She was in a coma-like vegetative state ever since. The Supreme Court rejected Pinki Virani's petition for the passive euthanasia of the victim because the medical support staff were not in favor of it. However, as anoutcome of the court's legalization of passive euthanasia, several guidelines were established, including the requirement that the person deciding to perform the procedure must do so in the victim's best interest and with the approval of the relevant High Court. In addition, India legalized passive euthanasia in March 2018.[47]

The Court also allowed "living wills", but only if certain conditions were met. For example, the person making the will must be of sound mind and aware of the consequences; they might not be coerced or influenced; the will had to be written; at least two witnesses had to be present when the person signed the will, which had to be countersigned by a Judicial Magistrate of First Class; and there were other requirements.

7. MEDICAL TREATMENT FOR TERMINALLY ILL PATIENTS BILL, 2016

This bill completely relies on the recommendation of the 241st Law Commission Report. The Ministry of Health and Family Welfare of India submitted this bill to the Indian Parliament, but it has not yet been passed. The purpose of passing the bill was to encourage respectable death. It makes voluntary passive euthanasia legal, and the competent patient can even make a living will to stop receiving medical care if the persons have an incurable disease. The assumption that a competent individual has the liberty to make an informed decision underpins this, Bill. However, the doctor's or the close relative's decision will not be final if the person in question was competent but did not make an informed choice. In such instances, the High Court's approval is required, and before making a decision, the High Court will have to consult three experts in the field.

This bill paves the way for the country to implement passive euthanasia by allowing patients who are of sound mind to make an educated decision about whether or not to withhold medical treatment for them.

- The bill says that anyone over the age of 16 who is terminally ill can decide to stop getting medical care and let the countryside take its course;
- Most importantly, the bill says that palliative care — also known as pain management — can continue and provides medical professionals, including doctors and nurses, with protection from legal consequences for withholding or withdrawing medical treatment;
- A patient's declaration of this decision to a medical professional is legally binding on the practitioner;
- However, the physician ought to be satisfied that the patient can make the decision and that it was made of their own free will (without any pressure);
- A panel of medical professionals would make the final determination regarding whether or not to end treatment, which would be based on each case;
- The pending bill also encompassesfacilities for the specific steps involved, such as forming the panel of medical experts and applying to the High Court for permission, among other things;
- The appropriate High Court must grant permission to withhold or withdraw treatment.

7.1. Who Should Apply for the Same?

- Any person obtaining permission from the court, including a close relative, friend, legal guardian, medical professional, or

47 Boruah, J. Euthanasia in India: A review on its constitutional validity. SSRN <https://ssrn.com/abstract=3868357>

staff member caring for the patient;
- The chief justice of the High Court is required to assign such an application to a divisional bench because it is treated as an original petition. Within a month, the petition ought to be resolved to the greatest extent possible;
- A committee consisting of three well-known doctors will nominate this bench and require a report;
- The doctor or nurse should keep track of all the patient's information and ensure that the patient makes an informed choice;
- The doctor should tell the patient whether it's best to stop taking the medication or continue it;
- The patient should inform the family if the patient is unconscious;
- Any person who regularly visits the patient should be informed if the family members are incapableof being there:
- The bill does not discuss active euthanasia but rather only passive euthanasia. The latter is still in contradiction with the regulation in the nationsince it is considered that people with ulterior motives could use it improperly;
- Medical treatment is withheld or withdrawn, and the enduring dies without life support in passive euthanasia. Active euthanasia comprises administering a lethal drug to the enduring, resulting in their death;
- The IPC stipulates penalties for active euthanasia;
- The bill says that an advanced medical directive — also recognized as a living will — is invalid and that anexisting will has no legal effect on a physician.

7.2. What is the Living Will?

If a patient becomes seriously ill and is incapableof making or communicating their own choices, will be a document that outlines their wishes regarding health care and treatment. Active declarations and advance medical directives are other names for living wills.

Concerns about the Upcoming Bill on Clinical Treatment for Incurably Ill Patients Experts have raised a few concerns about the bill. Below, we'll go over a few of them.

The bill lacks clarity regarding the perception of a living will. It is significant to communicate that the Supreme Court allowed people to make living wills in 2018.

It has been pointed out that the provision allowing minors between the ages of 16 and 17 to make this decision about withholding or withdrawing treatment is contradictory because, in India, only people over the age of 18 can marry or sign a contract.

There is a possibility that the bill's provisions will be misused. For instance, a dishonest physician may fabricate evidence to demonstrate that a patient had no chance of recovery when this was not the case. In addition, relatives or friends of a critically ill individual who is unconscious, in a coma, or incapableof giving consent may use the regulation to allow the enduring to be euthanized out of selfish interest and not in the patient's best interest.

Experts also believe that the bill's definition of "terminal illness" is subjective and ambiguous. A terminal illness is one in which a person cannot live a "meaningful life" due to a persistent and irreversible vegetative state. Additionally, disabled individuals may be disadvantaged by this definition.

8. BASIC ANALYSIS

Euthanasia is very different from murder, suicide, and attempted murder. Section 309 of the Indian Penal Code makes it illegal to attempt suicide, and Section 306 of the IPC makes it illegal to aid in suicide. People commit suicide for a variety of reasons, including marital strife, lovelessness, exam failure, unemployment, and so on. However, in euthanasia, these factors are absent. In cases of incurable

diseases or when a person's life has become meaningless or hopeless as a consequence of a mental or physical handicap, euthanasia means administering a painless death. Furthermore, it differs from homicide. The murderer intends to harm or kill in his mind when he commits the crime. However, despite the purposeof killing, euthanasia is carried out in good faith. When a patient has been in a coma for 20-30 years or more, like ArunaShanbaug, the patient has a terminal illness that cannot be treated, is in irreparable condition, or has no chance of recovery or survival[48].

As a result, it is recommended that, while voluntary euthanasia should be allowed in many occurrences as an exception to the general rule, criminal punishments for suicide attempts and aiding suicide must be kept in the public interest. As a consequence, the Indian Parliament ought to pass a euthanasia law that permits doctors to end a patient's agonizing life with the patient's consent. The subsequent are some of the conditions under which Parliament may legalize euthanasia:

a) The patient's consent must be obtained;
b) The patient has failed all medical treatments;
c) The patient or his family is in deplorable economic or financial condition;
d) The doctor's intention must not be to cause harm;
e) Proper safeguards must be taken to prevent doctors from abusing it; and
f) Any other relevant circumstances.

Euthanasia could be legalized, but the laws would need to be extremely stringent. Each circumstance will needcautious monitoring that takes into explanation the patient's, relatives', and doctors' perspectives. Given that this is a substance of life and death, it remains to be seen whether Indian society is mature enough to face this.

CONCLUSION

If we carefully examine the arguments against making euthanasia legal, we can conclude that the most significant one is that doctors will misuse it. As a result, it is argued that if a patient or his family is willing to put their lives in the hands of a doctor they trust, then why shouldn't a doctor have such discretion to decide what is best for his patient? Another question that is frequently raised is whether doctors will eventually request involuntary or non-voluntary euthanasia if they are given the discretion to perform voluntary euthanasia. However, it is respectfully proposed that distinct legislation be drafted to only permit voluntary euthanasia and not involuntary or non-voluntary euthanasia. We are obliged to take into account the limited number of medical facilities and patients in India, as was previously mentioned. The question of who ought to have access to those facilities is still unanswered, whether a patient who is in the last stages of their illness or a patient who has a chance of recovering. The physician should not permit euthanasia for the reason that the enduring is asking for his death out of pain and agony. In the Gian Kaur case, the Apex Court ruled that Article 21 does not include the right to die. However, one may attempt to interpret it by the United States and England's interpretation of the rights to privacy, autonomy, and self-determination. As a result, we can see that since the aforementioned right falls under Article 21, it can also fall under Article 21. In the previous case, this question was not brought up. Again, the question about how doctors abuse this right remains unanswered. However, appropriate safeguards can be placed on this right to prevent abuse. One safeguard is the appointment of a qualified quasi-judicial authority with relevant medical knowledge to investigate the patient's request and the doctor's actions. Two or three additional assistant officials, one of whom may come from the legal profession, may also be appointed to strengthen the evidence. This will prevent any misuse of this right, which is given to patients who are

48 Krishanu, "Euthanasia in India, the concept of euthanasia, the difference between euthanasia and suicide, kinds of euthanasia, arguments against and for euthanasia and latest SC judgment and suggestion"<https://www.legalservicesindia.com/>

terminally ill. In this case, we must consider the patient's painful situation, and reducing his pain should be our top priority. Now that we are aware that he will ultimately die today or tomorrow and that he has explicitly requested his demise, it makes no sense to deny him the right to at least live his life in the most humane manner possible. If not, his life won't be any better in that circumstance. As a result, the choice between allowing euthanasia and not allowing it is still up in the air when financial and medical considerations are taken into account.

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THE AFTERMATH OF SETTING ASIDE AN ARBITRAL AWARD IN RWANDA: THE CROSSROADS OF DOCTRINES

Pie Habimana
pihabimana@gmail.com

Doctor of Law, Senior Lecturer & Vice Dean,
School of Law, University of Rwanda, Rwanda

ABSTRACT

In recent decades, commercial arbitration has undergone substantial evolution at both international and domestic levels. The growth is primarily driven by the increasing preference of multinational corporations for arbitration, governed by trusted international rules, over domestic litigation, which may be fraught with political and legal instability risks. The practice of arbitration is anchored in fundamental principles, notably the finality and non-appealability of arbitral awards. Nonetheless, the recognized possibility to set aside defective awards enhances trust and confidence in arbitration as a reliable dispute resolution mechanism. Jurisdictions tend to follow one of three prevailing doctrines when setting aside arbitral awards: the avoidance of a denial of justice, the prioritization of party autonomy, and the "silence" doctrine. Rwanda aligns with the latter. Over a decade, arbitration has grown rapidly in Rwanda, and courts have generally been supportive of arbitration, with only a few arbitral awards being set aside. A review of these cases reveals that Rwandan courts have yet to provide clear direction on the resolution of the principal dispute after an award is set aside, leaving the substantive conflict unresolved. The absence of legal provisions on this matter contributes to uncertainty for arbitration practitioners regarding post-annulment procedures. This paper examines the current situation with a look at other jurisdictions' practices. It ultimately recommends Rwanda to adopt an approach that empha-

sizes party autonomy, with courts refraining from interfering in the original arbitration agreement, except in cases where the agreement is null, void, or incapable of performance.

Keywords: Arbitration, Set Aside, Rwanda, Aftermath, Arbitral Award

INTRODUCTION

In recent years, disputing business parties have increasingly turned to commercial arbitration as a preferred method of dispute resolution. International arbitration, in particular, is an ever-expanding field and a significant feature of modern commercial life.[1] Commercial entities often favor arbitration, governed by trusted international rules, over domestic litigation, which may be fraught with political and legal instability risks.[2] A survey reveals that 73% of multinational enterprises (MNEs) prefer arbitration over litigation, 95% include arbitration clauses in contracts, while 76% opt for institutional arbitration rather than ad hoc arbitration.[3]

The proliferation of arbitration centers, especially in developing countries, reflects the growing prominence of this form of dispute resolution. Unlike arbitration centers in developed countries, which have long-standing histories, many arbitration centers in developing nations are relatively new. For instance, the Kigali International Arbitration Centre (KIAC) was established in 2010 to become operational in 2012. Nevertheless, it has so far played a crucial role in advancing arbitration in Rwanda. To date, KIAC has administered hundreds of domestic and international cases alongside ad hoc arbitrations seated in Rwanda.

Arbitral awards are, in principle, final and not subject to appeal, consistent with the finality principle. According to this principle, courts are not permitted to substitute their judgment for that of the arbitrator or act as appellate bodies, except where the parties have expressly provided for that.[4] However, there are recognized exceptions under which an award may be set aside. This exceptionality is accepted across jurisdictions, with courts empowered to set aside awards that fall short of the minimum standards of fairness and due process.[5]

Rwanda adopted its first arbitration law in 2008,[6] and Article 47 of that law outlines the grounds for setting aside an award: invalidity of the arbitration agreement, improper notice of arbitrator appointment or defects in the tribunal's formation, violations of the right to defense, ultra vires awards, non-arbitrability of the dispute's subject matter, and awards contrary to public policy. Notably, this provision mirrors Article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration.[7]

While Rwandan law provides specific grounds for setting aside arbitral awards, it remains silent on the procedures following the annulment of an award. This issue is critical because annulling an arbitral award nullifies the award but does not resolve the underlying dispute. An analysis of other jurisdictions' practices reveals that approaches to this issue vary across jurisdictions, as scholars also remain divided on the topic.[8] Some jurisdictions base on the "will of the parties" doctrine to refer the dispute back to arbitration following the setting aside of an award, reflecting the parties' intention to have the matter resolved by arbitration

1 Wade, G. (2013). Courts and Arbitration: An Irish Perspective. *Arbitration*, 79(1), p. 41.

2 Ibid., pp. 49-50.

3 Lagerberg, G., Kus, R. (2007). Global Survey Sheds Light on Perceptions of International Arbitration, cited in Namachanja, C. (2016). The Challenges Facing Arbitral Institutions in Africa. *Arbitration*, 82(1), p. 44.

4 Nyanja, M. A. Critique of the Principle of Finality in Arbitral Proceedings under Section 39(3)(B) of the Arbitration Act, No. 4 of the Laws of Kenya, *LLM Thesis*, University of Nairobi, School of Law, p. 26.

5 Moses, L. M. (2008). The Principles and Practice of International Commercial Arbitration. *Cambridge University Press*, p. 84.

6 Law (Rwanda) No. 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters (*O.G* No. Special of 06/03/2008).

7 of 1985 with amendments as adopted in 2006.

8 Moses, L. M. (2008), p. 199.

rather than ordinary courts. Conversely, in other jurisdictions, courts that set aside an award proceed to decide the case on its merits. Each approach has advantages and disadvantages, but these are beyond the scope of this paper, which seeks to address the gap in the Rwandan legal system.

The question of what happens after an arbitral award is set aside has nowadays gained particular relevance in Rwanda than ever. Over the past decade, arbitration in Rwanda has grown substantially, both institutionally and through ad hoc arbitrations. Of the cases seated in Rwanda and arbitrated either through KIAC or ad hoc proceedings, a significant number have been challenged in court, seeking to set aside the awards. Despite this, Rwandan courts have generally demonstrated a pro-arbitration stance, with only a few arbitral awards successfully annulled to date, and these are of recent. Examples include RCOMAA 00043/2019/CA (Court of Appeal, 06/12/2019), RCOM 00026/2021/HCC (Commercial High Court, 15/07/2022), RS/INJUST/RCOM 00018/2022/CA (Court of Appeal, 29/05/2023), and RCOM 00049/2021/HCC (Commercial High Court, 12/04/2024).

In these cases, the courts merely declared the awards unenforceable. It is still too early to regard these cases as establishing a binding precedent. Nevertheless, arbitration practitioners in Rwanda remain uncertain about the legal position following the annulment of an arbitral award. In the absence of clearly established legislation or a binding precedent, Rwanda must decide which approach to adopt: should the courts decide the merits of the case, or should they refer it back to arbitration? This paper aims to contribute to this discussion and influence policymakers and legislators on the appropriate path forward, underscoring its practical relevance.

To produce this paper, a qualitative methodology was used. Data were collected through desk research, employing a doctrinal approach. This approach involves a systematic examination of legal rules, an exploration of the relationships between these rules, and the identification of problems and potential future developments.[9] The choice of the doctrinal method was motivated by its dominance in legal research.[10] Primary sources, such as legal texts and judicial decisions, and secondary sources, such as scholarly literature, formed the basis of the data collection process.

This paper is divided into four sections. After the introduction, the first section explores three competing doctrines on the treatment of cases after the annulment of an arbitral award. The second section examines the practice of setting aside arbitral awards under Rwandan law. The third section recommends the approach that Rwanda should adopt, and the last section concludes the paper.

1. THREE COMPETING DOCTRINES

The annulment of an arbitral award is a well-recognized legal practice across jurisdictions, including Rwanda, where Article 47 of Law No. 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters[11] provides for such a possibility. Similarly, various legal systems worldwide allow for the setting aside of arbitral awards. However, while this practice is generally accepted, the procedures and consequences following the annulment of an award differ significantly across jurisdictions. An investigation into jurisdictions' practices reveals three distinct doctrinal approaches: (1) the court that sets aside the award proceeds to hearing the case on its merits, which this paper terms as responding to the "denial of justice doctrine"; (2) the court sets aside the award and refers the matter back to arbitration, consistent with the "will of the parties doctrine"; and (3) the court remains silent, leaving the next steps ambiguous, a situation described here as the

9 Hutchinson, T. (2006). Researching and Writing in Law (2nd), *Thomas Lawbook Co.*, p. 7.

10 Hutchinson, T. (2015). The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law, *European Law Review* 3, p. 131.

11 *O.G* No. Special of 06/03/2008.

"silence doctrine". This section explores these three doctrines in detail.

1.1. Denial of justice doctrine

Under the denial of justice doctrine, the court that sets aside an arbitral award assumes the role of adjudicating the merits of the dispute or, more specifically, the part of the award that has been annulled. This approach is prevalent in jurisdictions such as France, where, once a court sets aside an award, it rules upon the merits of the case, adhering to the arbitrator's mandate, save where the parties agree otherwise.[12] The intuitive rationale for this approach would be rooted in the principle of avoiding a denial of justice. Historically developed to protect foreigners, the doctrine of denial of justice has evolved extensively and is now enshrined in numerous legal frameworks. For instance, Article 4 of the French Civil Code states that "*a judge who refuses to judge, on pretext of the silence, obscurity or inadequacy of the law, may be prosecuted as guilty of denial of justice*".

A similar provision exists under Rwandan law. Article 9(2) of Law No. 22/2018 of 29/04/2018 governing civil, commercial, labor, and administrative procedure,[13] provides that "*A judge cannot refuse to decide a case on any pretext of silence, obscurity or insufficiency of the law*". Under this doctrine, therefore, a judge's decision to determine the merits of an annulled arbitral award would ensure a comprehensive and timely resolution of the parties' grievances, thus fulfilling the mandate to avoid any denial of justice.

1.2. The will of the parties doctrine

Under the will of the parties doctrine, the court that sets aside an arbitral award refrains from addressing the substance of the dispute. Instead, the court respects the parties' initial agreement to resolve their disputes through arbitration. This approach is practiced in jurisdictions such as Poland, where a state court that annuls an award does not make a substantive ruling on the case.[14] Rather, it remits the case to arbitration for redetermination. The extent of the rehearing can vary, either addressing the entire dispute afresh or focusing solely on the specific aspect that was set aside.

The will of the parties doctrine is grounded in the principle of party autonomy, which is a cornerstone of contract law. This doctrine is famous in contractual matters and has been described as an axiom of contract law.[15] Scholars such as Albert van den Berg argue that even the drafters of the New York Convention intended to ensure that enforcing courts would not have the authority to reopen cases on their merits.[16] Arbitration is, after all, a contractual procedure designed to settle disputes based on the parties' agreement, and the principle of arbitration's contractual nature is and should be widely regarded as inviolable. This description is widely supported, and the principle of the contractual nature of arbitration has acquired an inviolate and sacrosanct arbitration rule.[17]

With regard to the procedure of setting aside an arbitral award, Courts in various jurisdictions have supported this doctrine by referring to the parties' autonomy. For example, in Ireland, courts have generally been reluctant to interfere in arbitration matters unless there

12 French Code of Civil Procedure, Decree No. 81-500 of 12 May 1981 (*Official Journal* of 14 May 1981, amendment JORF of 21 May 1981), Article 1485.

13 *O.G.* No. Special of 29/04/2018.

14 Linklaters, How Often are Arbitration Awards Set Aside? Analysis of Polish Case Law Shows that they Rarely Are, 24 May 2022 <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2022/may/how-often-are-arbitration-awards-set-aside#:~:-text=7.24% of Polish awards are, arbitration awards were set aside> [Last seen 27/08/2024].

15 Kottenhapen, R. J. P. (2006). From Freedom of Contract to forcing Parties to Agreement, *12 Ius Gentium: Journal of the University of Baltimore Center for International and Comparative Law*, p. 2.

16 van den Berg, A. (1981). The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation. *Kluwer Law*, p. 358.

17 Nyanja, M. A. p. 33.

is a compelling reason to do so.[18] In Hogan v St. Kevin's Co., the court affirmed that: "*Where the parties refer disputes between them to the decision of an arbitrator chosen by them … it is obviously and manifestly their intention that the issue between them should be decided …. finally by the person selected by them to adjudicate upon the matter*".[19] Similarly, in Nyutu Agrovet Limited v. Airtel Networks Kenya Limited, the Kenyan Court of Appeal emphasized that courts should respect the parties' decision to arbitrate their disputes, underscoring the contractual nature of arbitration. The Court of Appeal held as follows: "*The principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves*".[20] The Court of Appeal of Kenya added that the courts should respect the will and desire of the parties to arbitration.[21] Scholars also confirm that courts should assist in the arbitration to ensure the integrity of the arbitral process and protect the public interest but not interfere to safeguard the confidence of users of the arbitral system.[22]

Within the will of the parties doctrine, two sub-approaches exist. The first respects the parties' original will and allows for the dispute to return to arbitration. Here, it is about the past agreement of the parties that continues to govern the present and future actions. The second approach provides flexibility, allowing the parties to determine the next steps, i.e., expressing a new will. Under this model, the parties may choose to refer the dispute back to arbitration or allow the court to render a decision on the matter.

This doctrine is the practice in jurisdictions like Switzerland, where, after setting aside an arbitral award, the court remits the dispute to the arbitration to make a new award.[23] The same is true in Germany, where section 1059(4) of the German Arbitration Act provides that "*The court, when asked to set aside an award, may, where appropriate, set aside the award and remit the case to the arbitral tribunal*". This section continues in the fifth paragraph that "*Setting aside the arbitral award shall, in the absence of any indication to the contrary, result in the arbitration agreement becoming operative again in respect of the subject matter of the dispute*".[24] In South Africa, the law permits either party to request the dispute be resubmitted to a new arbitral tribunal constituted in the manner directed by the Court.[25] The United States law is in the same line but with more details: either to refer back the dispute to the same arbitrator or a new arbitrator. This is provided for in Section 23(c) of the United States Revised Uniform Arbitration Act, stating that if the court nullifies an arbitral award on grounds other than the invalidity of the arbitration agreement, "it may order a rehearing" except if the ground for setting aside the arbitral award is corruption, fraud, or arbitration misconduct or partiality. In such cases, the rehearing must be before a new arbitrator.[26] The practice in these jurisdictions is in the application of the first sub-approach described above.

The second sub-approach, which offers more flexibility, is adopted in countries like Vietnam and the Netherlands. For instance, Article 71(8) of the Vietnamese Law on Commercial Arbitration allows the parties to either arbitrate again or litigate the case in court following the annul-

18 Wade, G. (2013). p. 41.

19 Ibid.

20 Nyutu Agrovet Limited vs Airtel Networks Limited, Civil Appeal No.61 of 2012 (2015) eKLR.

21 Ibid.

22 Kayihura, D. M., Munyentwari, C. U., Rutta, J. M. (2020). Striking a Balance Between Assistance and Interventionism: The Role of Courts in Rwanda-Seated Arbitrations. *Journal of International Arbitration*, 37(1). p. 143; Wade, G. (2013). p. 50.

23 Hokhoyan, A. (2019). What Happens when an Award is Set Aside? p. 6 <https://law.aua.am/files/2019/08/AH_Research_Setting-Aside.pdf> [Last seen 27/08/2024].

24 Germany Arbitration Act, Section 1059(5), 1 January 1998, as amended by the Civil Procedure Reform Act of 27 Jul. 2001 and the Law of Contracts Reform Act of 26 Nov. 2001.

25 South Africa Arbitration Act of 1965, Article 33(4).

26 Section 23(c) of the US Revised Uniform Arbitration Act, 2000.

ment of an award. A similar approach is in the Netherlands. According to Article 1067 of the Dutch Arbitration Act, if an arbitral award is set aside for any ground other than the non-existence of a valid arbitration agreement, the arbitration agreement remains in force, and the parties are permitted to return to arbitration unless they mutually agree otherwise.[27]

In China, Article 9 of the Arbitration Law provides that once an "*arbitral award is canceled or put in void under a rule by the People's Court, the parties concerned for the dispute may reach another agreement for arbitration and apply for arbitration or bring a suit in the People's Court*". The United Kingdom also offers flexibility, and depending on the parties' preferences and specific circumstances, parties can choose to continue with arbitration or litigation in court as they settle amicably.[28]

1.3. The silence doctrine

Under the silence doctrine, the court that sets aside an arbitral award does not provide any further guidance on how the parties should proceed. The court simply declares the award unenforceable but remains silent on what steps the parties should take next. This creates uncertainty, as the parties are left without clear direction on how to resolve their dispute following the annulment.

This approach is followed in jurisdictions like Armenia, where the law does not specify the procedural steps following the setting aside of an award.[29] Rwanda similarly adopts a silence approach. As is discussed in the next section, Rwandan courts have set aside a few arbitral awards without indicating the parties' next steps, leaving them in a state of uncertainty.

2. SETTING ASIDE AN ARBITRAL AWARD UNDER RWANDAN LAW

Under Rwandan law, the setting aside of an arbitral award is governed by the 2008 Arbitration Law. Article 47 of this law provides a comprehensive list of grounds upon which an arbitral award may be annulled, either upon the application of a party or at the discretion of the Court. Four grounds are available for a party seeking to set aside an award:

a. Incapacity of a party to the arbitration agreement, or invalidity of the agreement under the law to which the parties have subjected it, or failing any such indication under Rwandan law.

b. The party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his or her case.

c. The award addresses a dispute not contemplated by, or falling outside the terms of, the submission to arbitration or includes decisions on matters beyond the scope of the submission. In such cases, if the decisions on matters submitted to arbitration can be separated from those not submitted, only the part of the award containing decisions on matters not submitted may be set aside.

d. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement unless such an agreement conflicted with provisions of the law from which the parties could not derogate or, failing such agreement, was not in accordance with the law.

For the Court, two reasons are available:

a. The subject matter of the dispute is not capable of settlement by arbitration under the Rwandan Law.

b. The award conflicts with the public security of the Republic of Rwanda.

In relation to the subject matter of this paper, a few cases are available to guide the discussions. Our research identified four available cases where arbitral awards were set aside. These cases have been publicly discussed be-

27 Dutch Arbitration Act, Article 1067.

28 Meng, C., Wang, C. (2018). Vanishing Set-Aside Authority in International Commercial Arbitration. *International and Comparative Law Review*, 18, p. 129.

29 Hokhoyan, A. (2019), p. 6.

fore the courts, rendering their contents part of the public domain. This circumstance permits a thorough examination of these cases without interfering with the principles of privacy and confidentiality ordinarily associated with arbitration proceedings.

The first case, RCOMAA 00043/2019/CA, was decided by the Court of Appeal on 06 December 2019. It involved two Chinese nationals engaged in business activities in Rwanda, including a jointly owned company. Following the arbitration proceedings, one party sought to annul the award, arguing that his right to defense had been compromised concerning certain evidence. The Commercial High Court, in RCOMA 00020/2018/CHC/HCC, set aside the award. Upon appeal, the Court of Appeal dismissed the appeal and upheld the lower court's decision. Notably, neither the Commercial High Court nor the Court of Appeal provided any indication as to the future course of action following the annulment of the award.

The second case, RCOM 00026/2021/HCC, was decided by the Commercial High Court on 15 July 2022. A dispute arose between two companies over a service agreement. The losing party applied to set aside the arbitral award, arguing that additional evidence was submitted after the deadline set by the arbitral tribunal and that the complaining party had not been granted the opportunity to respond to such evidence. The tribunal's reliance on the evidence, without affording the complaining party a chance to defend itself, was deemed to violate its constitutional right to defense. Consequently, the Commercial High Court annulled the award.

The third case, RS/INJUST/RCOM 00018/2022/CA, began in the Commercial High Court under RCOM 00034/2022/HCC. A party sought to annul an arbitral award rendered in a dispute that had already been amicably settled between the parties. On 28 October 2022, the Commercial High Court rejected the application, leading the applicant to file an appeal before the Court of Appeal via an extraordinary review procedure for manifest injustice. The Court of Appeal, in its judgment of 29 May 2023, set aside the award on the grounds of the non-arbitrability of the subject matter. As in the previous cases, the Court of Appeal did not provide guidance on the future proceedings following the annulment.

The fourth case, RCOM 00049/2021/HCC, was decided by the Commercial High Court on 12 April 2024. The applicant sought to annul an award issued by an ad hoc arbitral tribunal, citing violations of the right to defense and public policy. While the Court rejected the claim regarding the right to defense, it ruled in favor of the applicant on public policy grounds and annulled the award. The respondent applied for a review of the judgment due to manifest injustice. At the time of writing this paper, the outcome of the review had not yet been determined. As with the prior cases, the Court did not specify what procedure should follow the annulment.

In conclusion, as demonstrated by the four cases examined, the courts annulled the arbitral awards without indicating the next steps in the resolution of the principal disputes. This raises the pertinent question of whether the parties should restart the arbitration proceedings. This issue is significant not only within the context of Rwandan law but also in various other jurisdictions where similar discussions have taken place, leading to diverse views. It is therefore relevant to offer recommendations on which approach Rwanda should adopt, thus providing a modest contribution to the discussions on the issue.

3. RECOMMENDED APPROACH

Examining practices across various jurisdictions reveals a lack of universal standards regarding the post-set-aside arbitration process. Some nations opt to remand the matter back to arbitration, while others permit the court that annulled the award to adjudicate the substantive issues of the case. While acknowledging the merits of the latter approach, this author advocates for Rwanda to adopt the former method,

which involves referring the matter back to arbitration. This recommendation is underpinned by several compelling considerations.

First, it is crucial to honor the parties' original intent. The parties initially opted for arbitration, signifying their preference to resolve disputes outside of the judicial system. Therefore, when an award is annulled, this does not alter the parties' intention to settle their dispute through arbitration. Upholding this intent is vital, particularly in light of the principles of arbitration autonomy and the necessity to shield arbitration from undue judicial interference. It is important to note that annulling an arbitral award leaves the underlying dispute unresolved, thereby necessitating a realignment of the parties' initial arbitration intent to initiate a new arbitration process.[30] Engaging the court in substantive issues would, therefore, contravene the very rationale that prompted the parties to select arbitration as their preferred resolution method as several aspects of their choice would be contravened to. For instance, the limb of expertise would be destroyed.

Second, permitting the court to resolve substantive issues post-annulment may have undesirable consequences. Although empirical research in this area is lacking, it is a reasonable assumption that such an approach may encourage parties, particularly those on the losing side, to seek annulments not for legitimate reasons but as a strategic maneuver to escape their initial arbitration commitments. Such tactics would not only be against the fair practices of arbitration, such as efficiency and effectiveness but would also contradict the "law nature" of a legally concluded contract.

Third, in the absence of explicit guidance from Rwandan legislation, it is our considered view that a court exercising its authority to annul an arbitral award and subsequently adjudicate the merits of the case would be acting ultra vires. The parties' actions before the court are confined to seeking annulment based on the grounds enumerated in Article 47 of the Arbitration Law. Any attempt to adjudicate beyond the parameters established by the parties would grossly contravene Article 10 of Law No. 22/2018 of 29 April 2018, which explicitly states that "*a judge may not decide more than he/she has been asked to*".

While advocating for the revival of arbitration as the preferred approach, it is essential to acknowledge that this option is not devoid of challenges. Several issues may impact this recommendation. However, mitigative strategies can address these concerns.

One potential issue pertains to time considerations. Parties may be worried that restarting arbitration will extend the timeline for resolution. This concern may be alleviated by recognizing that the subsequent arbitration proceedings should focus exclusively on the specific issues that led to the annulment of the original award.

Another concern relates to expenses. Given that parties have already incurred costs associated with the initial arbitration, engaging in a second proceeding may impose additional financial burdens. While this concern is valid, its mitigation parallels the previous one: the new arbitration should only address the specific issues that resulted in the award's annulment. Therefore, while that specific issue may incur additional costs, it will not be the same as the total expenses associated with a comprehensive reevaluation of the entire dispute.

Additionally, there exists a concern regarding trust and confidence in the arbitrators. To preserve this vital element of arbitration, the tribunal involved in the annulled award must be distinct from the subsequent tribunal. No member of the first tribunal should serve in the second proceedings.

Lastly, when the basis for setting aside the award is rooted in a manifestly null and void arbitration agreement or one that is incapable of performance, it becomes evident that referring the dispute back to arbitration would be futile. This scenario serves as an exception that would empower the court that annulled the arbitral award to determine the substantive issues. This

30 Jean Robert, M. B. (1983). L'arbitrage: Droit Interne et Droit International Privé. 5e ed. *Dalloz*. pp. 341-342.

position mirrors practices in other jurisdictions, such as Belgium, where annulment of an award due to a void arbitration agreement forecloses the possibility of recourse to arbitration.[31]

To implement the aforementioned recommendations, two alternative courses of action are feasible: legislative action and judicial action. Both avenues are viable within the context of Rwanda's legal framework. Historically, Rwanda has adhered to a civil law system due to colonial influences, and this legacy continues to manifest in the current legal landscape, where legislation serves as a primary source of law. In this regard, the Rwandan legislature is urged to undertake legislative action to address the procedural lacuna regarding the implications of setting aside an arbitral award. Alternatively, given Rwanda's gradual incorporation of common law principles over the past three decades, a judicial approach that cements precedents related to the aftermath of arbitral award annulments is equally essential. Through this approach, the Rwandan judiciary is called upon to establish precedents that elucidate the post-annulment process in Rwanda.

CONCLUSION

The Rwandan law remains silent on the procedural steps following the annulment of an arbitral award. While the legislation provides for the possibility of setting aside such an award, it does not elaborate on the subsequent implications. In the sole instance to date where a few arbitral awards have been annulled, the judgments rendered did not address the ensuing course of action. However, a careful analysis of these judgments leads to two distinct interpretations:

First, the annulment of an award restores the parties to their original status, indicating that the underlying dispute remains unresolved. This persistence necessitates a resolution aligned with the initial intentions of the parties involved.

Second, the inclusion of an arbitration clause in the parties' agreement, followed by the actual submission of the dispute to arbitration, clearly reflects their intention to avoid judicial resolution. Their preference is for the dispute to be decided through arbitration rather than by the courts. Thus, in accordance with the well-established contractual principle of respecting the will of the parties, it is imperative that their original intent to utilize arbitration as a means of dispute resolution prevails.

In conclusion, based on the limited jurisprudence available, Rwanda aligns with the perspective that, upon setting aside an arbitral award, the court should refrain from adjudicating the matter on its merits. Instead, it is incumbent upon the parties, should they choose, to initiate a new arbitration process. This perspective is endorsed in light of the contractual principle emphasizing the autonomy and intention of the parties.

31 de Bournonville, P. (2000). Droit Judiciaire: l'Arbitrage. *Larciers*. p. 214.

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INTEGRATING THE ENVIRONMENTAL DIMENSION INTO URBAN PLANNING IN ALGERIA: TOWARDS A SUSTAINABLE FUTURE

Nacera Zoutat
Zoutat.nacera@univ-oran2.dz /nacera.zoutat@gmail.com

Doctor of Law, professor lecturer B, University Oran 2 Mohamed Ben Ahmed, Economic Law and Environment Laboratory. Algeria

Nadia Moktefi
nadiamkt1990@gmail.com

Doctoral Candidate of Law, Abedlhamid Ben Badis University, Mostaganem City, Algeria

ABSTRACT

The urgent need for reconstruction and construction imposed by rapid demographic growth has become directly or indirectly affecting the environment, given the size of the effects left by urban sprawl at the expense of the environment, in addition to the spread of tin scenery and the expansion of chaotic buildings, for these reasons, the environmental dimension has become one of the necessities that must be taken into account in all development plans, as is the case with preparation and reconstruction plans.

The latter is one of the most important legal means of protecting the environment from the risks of reconstruction and construction, and these plans mainly include the National Plan for the Development of the Territory, the Master Plan for Development and Reconstruction, and the Land Occupation scheme.

This study showed the extent to which the environmental dimension is included in these plans and the extent to which they achieve sustainable development in Algeria.

KEYWORDS: Environmental dimension, Sustainable development, Urban law, Urban planning

INTRODUCTION

At first glance, it seems that both urban law and environmental law are objectively different from each other and even contradictory, considering that urban law is based mainly on the idea of exploiting natural areas to establish buildings and urban spaces of various forms and types and extend its expansion at their expense, while the environmental law seeks to protect the three elements of the environment (land, water, and atmosphere) from various forms of environmental degradation known by the ocean and environmental environments, as it has become a threat to the lives of living organisms, which made the alarm sound strong to defend the environment and issue many legal texts to protect it.

Among the most prominent of them are the urban laws, which adopted new ideas that pay attention to some distinctive parts of the environment such as the coast region, regions with natural advantages, and natural, cultural, and historical reserves without neglecting agricultural lands, and thus the law of urbanism and the environment meet and share the subject of environmental protection, but more than that, the issue of the environment in the urban sector has become a basic requirement to devote the principle of sustainable urban development, and this is through the adoption of the Algerian legislator the idea of including the environmental dimension within the tools of reconstruction and construction to achieve the goals and objectives of development Sustainable urbanism.

Based on the above, addressing this issue requires us to raise the following problem:

To what extent has it become necessary for the urban system in Algeria to adopt the environmental dimension within the reconstruction and construction plans? What are the main effects of this to achieve the goals of sustainable urban development?

To answer this problem, we relied in our study on the analytical approach because we need to address the most important aspects related to the study of this topic.

To try to familiarize ourselves with the contents of this research, we decided to present its contents in two sections as follows:

First section: the inevitability of evoking the environmental dimension within urban plans.

Second section: the effects of integrating the environmental dimension on sustainable urban development.

1. THE INEVITABILITY OF EVOKING THE ENVIRONMENTAL DIMENSION WITHIN URBAN PLANS

If the task of reconstruction laws is to control and regulate land occupancy operations of various types and manifestations, the environment is the vessel that occupies these operations and is affected by them, which requires the necessity of developing urban choices restricted by environmental controls, taking into account the proper use and exploitation of natural and urban spaces in a balanced manner, as well as the preservation of ecosystems.

The urgent need for reconstruction and construction due to rapid demographic growth has affected the environment, whether directly or indirectly, given the magnitude of the effects created by urban sprawl at the expense of the environmental environment, in addition to the spread of tin landscapes and the expansion of chaotic buildings, which had a significant impact on the corruption and distortion of the general and aesthetic landscape of urbanization.

1.1. Preparation and Reconstruction Plans are Tools to Protect the Environment

The planning and reconstruction plans are the National Plan for the Development of the Region, the Master Plan for Development and Reconstruction, as well as the Land Occupation Plan.

The Algerian legislator has tried to integrate the environmental dimension into these three laws.

1.1.1. Environmental Dimension of the National Plan for the Development of the Territory

A. Definition of the National Plan for the Development of the Territory

Law n° 01-20 on the Law on the Development and Sustainable Development of Region[1] included the National Plan for Regional Development, which the first article of the same law defined as "a tool that works to develop the national space sustainably and harmoniously to face the great entitlements of the future".

This law sets out how the State seeks to ensure the triple balance of social equity, sustainable development, and environmental support within the framework of sustainable development at the national level for the next 20 years.[2]

The National Plan for the Development of the Region is a legal guidance document based on four guidelines, based on a set of major principles and proposals that include the implementation of a number of workshops, such as the construction of dams, through the activation of specific and precise action plans.[3]

B. Environmental Objectives National Plan for the Development of the Territory

Among the objectives stipulated in Law 01-20 and pursued by the National Plan are the following:

- Support and activate rural media, regions, regions, and regions in difficulty;
- protection and development of historical ecological heritage;
- protection, valorization, and rational use of heritage, natural and cultural resources, and their preservation for future generations;
- protection of regions and populations from hazards associated with natural variability;
- Protecting and valuing ecologically and economically fragile spaces and communities by determining the methods of preserving them, such as coastal areas, continental shelf, wetlands, mountainous heights... Etc.[4]

1.1.2. The Environmental Aspect of the Master Plan for Development and Reconstruction

A. Definition of the Urban Planning and Reconstruction Directive Plan

Article 16 of the Planning and Reconstruction Law defines the planning and reconstruction master plan as "a spatial planning and urban management tool that defines the basic guidelines for urban planning for the municipality and the municipalities concerned, taking into account the planning designs and development plans, and sets the reference for the land occupation plan".

This plan seeks to regulate housing production on the territory of one or more municipalities to confront excessive and illegal expansions, as well as to ensure a balance between urban expansions and other areas in the medium term.[5]

1 Law N° 01-20 (2001). *On the preparation and sustainable development of the territory*. Sec. 77. Official Journal. <https://www.joradp.dz/FTP/JO-FRANCAIS/2001/F2001077.pdf?znjo=77> [Last access: 29.10.2024].

2 Article 7 of Law n° 01-20.

3 Chouk, M. (2015). *Legal Means to Protect the Environment from the Risks of Reconstruction under Algerian Legislation* (master's degree in Environmental Law), Algeria. p. 35.

4 Article 4 of Law 01-20.

5 Moaifi, M. (2013). *Mechanisms of Protecting the Built Environment in Algerian Legislation* (Master's degree

Thus, it is a tool for prior control over any urban activity, and no license is granted for construction, construction, or demolition unless it is verified to the extent of its conformity with it and the land occupation plan.[6]

B. Content and Content of the Planning and Reconstruction Directive Plan

Article 19 of the Planning and Reconstruction Act defines the content of the master plan for planning and reconstruction, which is to define the types of sectors that make up any region: Perennial Sector, Programmed sector for reconstruction, Future Reconstruction Sectors, and non-reconstruction Sectors.

Executive Decree N° 91-177, amending and supplementing the contents of this scheme, namely:

- Guidance report: specifies the general directives of the urban policy after explaining the current situation, the prospects for urban development, and the real estate base that will be applied within its scope;
- Regulation: defines the rules applicable to each area covered by the sectors, for example, the predominant allocation of land, the nature of prohibited or special measures activities, as well as the areas of protection of areas and lands exposed to technological hazards... etc;
- Documents and graphic documents: It includes several plans (status plan, preparation plan, easement processing plan, and a plan specifying the areas and lands exposed to natural and technological hazards).[7]

1.1.3. Environmental Aspect of the Land Occupation Scheme

A. Definition of Land Occupation Plan

Article 31 of the Planning and Reconstruction Law defines the land occupation plan as "the land occupation plan determines in detail within the framework of the directives of the planning and reconstruction master plan the rights and use of land and construction" and is, therefore, a tool aimed at determining the urban form of each area by regulating building rights on the land.[8]

It is also defined as a reconstruction tool that often gives the territory of a whole municipality in which the rules and rights of land use and construction are defined in detail while respecting the rules contained in the planning and reconstruction master plan.[9]

B. Content of the Land Occupation Plan

The land occupation plan consists of the regulation and the documents and the graphic documents for the regulation, it represents the regulatory part embodied in a memorandum of introduction proving the compatibility of the land occupation plan with the provisions of the master plan for development and reconstruction, as well as the rules determined for each homogeneous area, taking into account the special provisions applicable to some parts of the territory, as for the graphic documents, they contain several documents that include data, such as the site indication plan.[10]

C. Environmental Objectives of the Land Occupation Plan

The land occupation plan seeks to achieve

in Environmental and Urban Law) Algeria. p. 104.

6 Drim, A. (2011). Administrative Control of Preparation and Reconstruction Works in Algerian Legislation (*First Edition*), Algeria: Dar Qala Edition. p. 16.

7 See articles of Executive Decree No. 91-177 (1991). *Laying down the procedures for the preparation and approval of the planning and reconstruction master plan and the content of the documents related thereto*. Sec. 26 (as amended and supplemented), Official Journal. <https://www.joradp.dz/HAR/Index.htm> [Last access: 29.10.2024].

8 Mejaji, M. (2007). Tools of preparation and reconstruction as a means of urban planning in Algerian legislation. *Journal of Research and Scientific Studies*, 01(01). pp. 9-31.

9 Ghawas, H. (2012). *Legal Mechanisms for Urban Management* (master's degree in Law), Algeria. p. 27.

10 Article 3 of Executive Decree 91-178 (1991). *Laying down the procedures for the preparation of land occupation plans, the approval of land, and the content of the documents related to them*. Section 26 (as amended and supplemented), Official journal. <https://www.joradp.dz/HAR/Index.htm> [Last access: 29.10.2024].

a number of objectives in accordance with the provisions of the Planning and Reconstruction Law, which are to determine the minimum and maximum amount of permissible construction, to set the rules related to the external appearance of buildings, to determine easements as well as neighborhoods, streets, monuments, sites, and areas to be protected, to identify agricultural sites to be protected and protected, and to identify green spaces and public facilities.[11]

1.2. The Effectiveness of Development and Reconstruction Plans in Protecting the Built Environment

The objectives and principles contained in the planning and reconstruction plans have a direct impact on the environment, either negatively or positively, and this is what we will try to explain as follows:

1.2.1. The Role of the National Plan for the Development of the Region in the Protection of the Built Environment

The role of the national plan in protecting the environment is reflected in the fact that it includes several environmental principles, some of which are stipulated in the law to reduce environmental pollution as much as possible, and others aim to involve all actors in the framework of environmental protection.

The principles aimed at reducing environmental pollution are dealt with in Act No. 20-01 on the development and sustainable development of the territory.

These principles are as follows:

- **Biodiversity Conservation:** The legislator requires all practitioners of activities, especially economic activities, not to harm biodiversity;[12]
- **Principle of non-degradation of natural materials:** Article 9 of the Law on the Territorial Development emphasizes the rational exploitation of national spaces, especially the distribution of the population and places of economic activities throughout the national territory;
- **The principle of information and participation:** by involving regional communities in the implementation of national planning and development projects at the local level;
- **The principle of precaution:** through the valorization of natural resources and rational exploitation of them.

This principle is considered one of the most important elements that work to implement the national plan in the implementation of regional development policies by involving regional communities, citizens, and actors to find a balance between the optimal exploitation of natural resources and their preservation for future generations.[13]

As a result, the national plan is a forward-looking, preventive, and curative instrument that makes it possible to address environmental problems and to reduce as much as possible the depletion of natural resources.[14]

1.2.2. The Role of the Master Plan for Development and Reconstruction in Protecting the Built Environment

A master plan is a tool for reference control in the field of planning and reconstruction since no person or authority can carry out a reconstruction operation except by following the legal provisions contained therein.

It also works on planning the field and organizing cities and different types of construction, thus working to strike a balance between urban

11 Article 31 of the Planning and Reconstruction Law.

12 Zakaria Issa, A. (2018). Relations between Development Policies and Environmental Protection – Inclusion of the Environmental Dimension in the National Plan for the Development of the Region. *Journal of Reconstruction and Construction Legislation*, 01 (01). p. 123.

13 Zakaria Issa, A., ibid. p. 25.

14 Ibid. p. 30.

development and various other activities.

It also expands the scope of participation of public administrations and departments, including environmental management, which works to protect the environment, combat pollution, reduce tin neighborhoods, eliminate fragile and unhealthy housing, control transport schemes, ensure public service and protect the environment, and works to achieve a balance between the necessities of economic and social development.[15]

1.2.3. The Role of the Land Occupation Scheme in Protecting the Built Environment

The role of the land occupation scheme in protecting the built environment is to:

- Achieving integration and homogeneity in the urban fabric through the economy in dealing with the field and working to protect agricultural lands and historical and cultural monuments;
- Fighting fragile and chaotic buildings and aims to create an aesthetic architecture consistent with the surrounding environment containing green spaces and necessary public facilities;
- Seeks to keep buildings away from risk-prone areas and keep them away from the streams of valleys and various networks.[16]

2. THE INEVITABILITY OF INTEGRATING THE ENVIRONMENTAL DIMENSION INTO SUSTAINABLE URBAN DEVELOPMENT

One of the requirements at present is to reconsider the policy of reconstruction and urban development through the imperative of integrating and invoking the environmental dimension to achieve a balanced and regular relationship between the citizen's right to meet his needs in the field of urbanization and environmental concerns. This is to create a sustainable urban structure and development that responds to the requirements of present and future generations in the field of reconstruction and construction in accordance with the requirements of environmental protection.

2.1. Sustainable Development Principles and their Implementation in Urban Plans

2.1.1. The Principle of Sustainable Development

The imperative of integrating the environmental element into urban decisions and policies has become a basic requirement to enshrine the principle of sustainable urban development,[17] whose concept is still unclear and accurate in some important aspects, considering that the issue of the environment in the urban field today is no longer just a perfectionist thought, but has become an important requirement and a necessary endeavor that must be interacted with and responded to its requirements.[18]

By virtue of the link between the built environment and human activity and its effects on this environment, both positively and negatively, the Algerian legislator has deliberately developed a legal system in the field of reconstruction and related and influential areas and has worked hard to enshrine the principle of sustainable development and ensure the inclusion of environmental dimensions. It is applied and applied on the other hand.[19]

Among these laws, we find in particular Law

15 Moaifi, M., ibid. p. 111.

16 Ibid. p. 115.

17 The concept of sustainable urban development first emerged at the Rio de Janeiro Conference in 1992 and was translated into practice through Agenda 21 and was also emphasized at the 21st Urbanism Conference held in Berlin in 2000, which presented examples of best practices in the application of sustainable urban development in cities around the world.

18 Chouk, M., ibid. p. 20.

19 Boudrioua, A. (2013). Environmental Considerations in Local Construction Plans. *Journal of Rights and Freed*, 01(01). p 421.

01-20 on the preparation and sustainable development of the territory[20] and the subsequent laws that emphasize the integration of environmental concerns in the framework of environmental protection and sustainable development, including Law 03-10 on environmental protection within the framework of sustainable development.[21]

Law 04-03 on the protection of mountain areas within the framework of sustainable development, Law 04-20 on the prevention of major risks and disaster management within the framework of sustainable development, as well as Law No. 11-02 on protected areas within the framework of sustainable development[22] Based on the adoption of the principle of sustainable development within urban plans and emphasizing it through the implementation of the content of these legal texts that protect the built environment as a whole and achieve the goals, principles and objectives of sustainable development as an integrated multi-dimensional, multi-sectoral and multi-party framework.

2.1.2. Mechanisms for Achieving Sustainable Urban Development

The Algerian legislator has clearly and explicitly adopted the legal arsenal related to the provisions of the protection of the built environment on the planning mechanism to ensure the protection of the environment and the achievement of sustainable development goals.[23]

Adopting a planning mechanism in the field of the built environment based on the legislation stipulated in this field will give it maximum protection, and this is by taking into account scientific studies, environmental conditions, and the requirements of health and social services.

Urban planning plays a leading role in the possibility of creating a sustainable urban environment based on scientific foundations and legal controls that protect the environment and natural and historical environments.[24]

Their protection is also a prerequisite for national sovereignty, the preservation of the living conditions of the population, and the countering of negative indicators of environmental degradation.[25]

Extrapolating legislation related to urbanization and reconstruction,[26] we find that it stressed the obligation to protect the built environment in light of the requirements of sustainable development, as there is no room to talk about sustainable development in the event of violating environmental laws or disturbing the environmental balance, and therefore urban plans aim to protect the environment, especially agricultural lands with high yields, coasts, and prominent beaches, in addition to forests, mountains, and areas with geographical, climatic and geological advantage such as mineral water and bathing, and protects urbanization by not being built in areas prone to earthquakes or natural hazards.

20 Law N° 01-20.

21 Law N° 03-10 (2003). *On the protection of the environment within the framework of sustainable development*. Sec. 43 (as amended and supplemented). <https://www.joradp.dz/HAR/Index.htm> [Last access: 29.10.2024].

22 Law N° 11-02 (2011). *On protected areas within the framework of sustainable development*. Sec. 13. <https://www.joradp.dz/HAR/Index.htm> [Last access: 29.10.2024].

23 Considering sustainable development according to Article 04 of Law N° 03-10 means reconciling viable social and economic development with environmental protection in the sense of including the environment in a development framework that guarantees present and future needs.

24 Lakhal, A. (2002). *The Role of Local Communities in the Field of Environmental Protection in Algeria* (master's degree in Financial Management), Algeria. p. 45.

25 Among these negative indicators of environmental degradation are: rapid and continuous population growth, population displacement from madness to the north, shrinking agricultural areas and desertification that affected steppe areas, and the loss of thousands of hectares of forests annually due to fires, see: Amarna, M. (2013). Mechanisms of Environmental Protection in Algeria. *Journal Al Mofakir,* 8(01). p. 389.

26 In particular, Law N° 90-29 on the Planning and Reconstruction Law, which makes urban plans tools that include general rules aimed at regulating the production of land capable of construction and balancing the needs of the population with environmental protection based on respect for the principles and objectives of the National Urban Planning Policy in light of the requirements of sustainable development. see: Boudrioua, A., ibid. p. 421.

Article 3 of Act N° 03-10 incorporates the integration of environmental protection and sustainable development arrangements into the preparation and implementation of sectoral plans and programs.

In paragraph 3 of the same article, he also stressed the principle of substitution, as it is possible to replace an age harmful to the environment with another that is less dangerous to it, even if the cost is high, and one of its applications is to replace the different destinations of buildings with destinations inspired by our Algerian heritage.

The principle of preventive activity in reconstruction work is also stipulated in Article 3, paragraph 5, of the same law by subjecting reconstruction projects to environmental impact studies and prior authorization of polluting activities.

In addition to the principle of participation and information in reconstruction work under paragraph 8 of Article 3, which stipulates the right of every person to know the environmental situation and allows him to participate in the procedures followed when making decisions that affect it.[27]

Nevertheless, the lack of coordination between the various sectors and central and decentralized bodies, the weak contribution of civil society organizations, the lack of environmental awareness, and the lack of investment in academic studies in the field of environmental protection and their field materialization prevent the effective application of these legal texts.[28]

2.2. The Impact of Sustainable Urban Planning on Achieving Environmental Sustainability

From the above, we note that the Algerian legislator paid great attention to the problems of urbanization and the environment and tried to give a kind of reconciliation and balance between urban growth on the one hand and the preservation of the environmental aspect on the other hand to achieve sustainable urban development.

2.2.1. Embodying the Process of Sustainable Urban Planning

The process of sustainable urban planning requires the need to pay attention to:

A. Taking into Account Regional and Urban Standards

All regional and urban standards must be studied to reach a sound design of the built environment, with the need to have careful coordination between all actors in this process, including planners, engineers, and designers, and it is also necessary to ensure effective coordination between these and urban site engineers and builders.

To achieve the above, planning plans and policies must be developed at the level of all regional and urban scales, as well as at the scale of neighboring residential buildings. It is necessary to study the style, quality, and construction of buildings in the proposed expansion areas in accordance with the directions of planning development.

For the urban development strategy to succeed, there must be broader urban sustainability.

As for the challenge facing sustainable urban development it is to create new areas for urban expansion and study them in a sustainable manner, which is possible if the available space is the imposed area.[29]

B. Updating Organizational Charts

Environmental sustainability in the modern urban planning process requires the need to update organizational plans, which must include social, economic, environmental, and

27 Qara Turki, I. (2022). The Legal Protector of the Beauty of Cities in Urban Legislation – Urban Administration (First Ed.). Algeria: New University Publishing House. p. 50.

28 Lakhal, A., ibid. p. 367.

29 Deeb, R., Muhanna, S. (2009). Planning for Sustainable Development, *Damascus University Journal of Engineering Sciences*, 25(1). p. 4.

urban dimensions, in addition to containing a design strategy that includes updating and developing designs.

Therefore, the organizational plan must be comprehensive of the environmental sustainability dimension and express the policies derived from the development planning strategy.[30]

One of the important topics that must be taken into account in achieving sustainable urban development is to give great importance when designing buildings, green spaces, and public parks of all kinds ... etc., as the lung that works to soften the climate and promote biodiversity, so it must be integrated with the organization of forests and planting trees... etc., in addition to that, it is also necessary to choose environmentally friendly building materials that contribute to saving energy, either through extraction from nature or manufacturing, transporting and installing them. Given the impact of pollution on the built environment, organizational charts should include sound and sustainable planning of environmentally friendly public transport.

2.2.2. Sustainable Urban Planning Results

To achieve the sustainability of the built environment, it is necessary to adopt sustainable and accurate urban planning that balances the economic, social, and environmental dimensions, considering that sustainable urban planning achieves more positive results and effects for humans and the environment on the ground, in that it is less expensive and easier to maintain, and designing buildings in an urban sustainable way makes them more active and flexible in use,[31] in addition to aestheticizing buildings, roads, sidewalks, parks and other urban spaces.

Sustainable urban planning that protects the built environment has an effective role in reducing the economic and social disparities between rural and urban areas while not neglecting the spatial dimension, which allows the use of resources and their rational exploitation through participation and collective action in determining strategies and plans appropriate to the data of the living reality, as recognized by Law N° 01-20 mentioned above.

2.3. Leading International Experiences in the Field of Sustainable Urban Planning:

Some contemporary global experiences were the first to apply sustainability concepts in the field of urbanism during the twenty-first century for establishing sustainable urban communities that meet sustainability standards and also have environmentally friendly urbanism, and we can mention, for example, but not limited to:

2.3.1. Experience of Dong Tan (People's Republic of China)

Dong Tan City is located at the southeastern tip of Chongming Island, and it is one of the best fertile lands and the area allocated for the project is 8,400 hectares to create a modern sustainable city that contributes to the development of urbanization without wasting natural environmental resources within the framework of the state's interest in applying the concepts of sustainability, raising the standard of living of citizens and increasing new urban communities.[32]

2.3.2. Masdar City Experience (UAE):

Masdar City occupies a strategic location, as it is located near the Emirate of Abu Dhabi on an area of approximately 6.5 km² and has been

30 Ibid. p. 12.

31 Bin Ghadban, F. (2014). Sustainable Cities and the Urban Project Towards Sustainable Strategic Planning (First Ed.). Amman-Jordan: Dar Al-Safa for Publishing and Distribution. p. 124.

32 Ahmed Sayed, T., Islam Soliman, N. (2015). International experiences in developing sustainable new urban communities as an entry point for the development and sustainability of new urban communities in Egypt. Journal of Urban Research, 16(02). p. 12.

connected with downtown Abu Dhabi with a vital network of roads and public transportation, and this city seeks to be the most sustainable city in the world and access to the best environment for life with the least environmental impact, and to become a global center of origin for renewable energy and clean technologies, and work began in 2008 and Masdar City is fertile land In which companies flourish and modern scientific innovations grow, and thus it is a model for sustainable urban development regionally and globally.[33]

2.3.3. Experience of Putrajaya (Malaysia):

The city of Putrajaya, the new administrative capital of Malaysia, is a model for achieving balanced sustainable development in various aspects of development, which expresses the aspirations of the leadership and the people together, including ministries and government institutions, and a huge real estate pot city project of up to 4931 hectares was allocated to accommodate the population, and it is called the smart garden city due to its availability on the information network and modern technological techniques, as it is a model environment for life and work in it.

2.3.4. Lloyd County Crossing in Portland (USA):

Lloyd County is located in Portland, Oregon, USA. This area was previously natural pine forests and then turned into an urban agglomeration that seeks to restore the biodiversity of the region and positive interaction with nature, benefit from the natural elements, and reduce the negative environmental impact to reach an urban area compatible with the natural environment.[34]

CONCLUSION

From the above, it is clear that both urbanism and the environment are linked to each other in many aspects to form a complementary and dependent relationship at the same time.

If the state of urbanization deteriorates, this has an inevitable consequence, which is the deterioration of the environmental situation, but if the construction is more harmonious and sustainable, the protection and maintenance of the environment is manifested, so the need to pay attention to urbanization and impose control over the planned reconstruction and construction is an example and a model for protecting the environment in the future. Based on this, the Algerian state needed to reconsider its urban policies to improve the management of its territorial area by controlling the rules of reconstruction and construction and the need to take into account the environmental dimension in it, which we have seen within the urban plans, which have enshrined in their contents the embodiment of the principle of sustainable development and the inclusion of environmental considerations in most legal articles.

Results:

- Sustainable urban planning is an integral part of the sustainable development system, and this is what the Algerian legislator sought to embody;
- The Algerian legislature pays great attention to the problems of urbanization and the environment and is trying, through various legal texts, to create a perfect balance between the recent growth of the phenomenon of urbanization and the preservation of ecosystems;
- Despite the exacerbation of environmental problems, urban plans remain an important legal means aimed at protecting the environment from the risks of reconstruction and construction, as they are reference documents that provide all the necessary directives to control urban activities in accordance with the subject of environmental protection and the requirements of sustainable development;
- The issue of including the environmental dimension in the urban field has become

33 Ibid. p. 5.
34 Ibid. p. 12.

inevitable, as there is no way to achieve sustainable urban development except through the re-evaluation of urban activities in accordance with the environmental perspective.

This requires redoubling efforts to establish sustainable urban development while ensuring an adequate standard of living on the one hand and meeting urban needs on the other.

The efforts made by the Algerian legislator to include the environmental dimension in urban decisions and plans are ambitious and bold, but they remain insufficient and insufficient in the face of this accelerating urban sprawl, which has become strongly imposed in many cases in the light of the urgent and increasing demand for housing, facilities, and various structures.

Recommendations:

- What is wrong with these urban plans is their shortcomings, limited effectiveness, and weak credibility in the field of environmental protection, which made them mere rigid compromise documents between the various sectors, and this requires the need to search for the most effective and effective mechanisms in the field of environmental protection through the involvement of all groups of civil society as an effective element in the process of preparation and reconstruction and the development of solid strategies to achieve sustainable development;
- The need to instill environmental culture as an awareness method within the behavior of citizens through a set of good values that must be possessed by all in thought and practice because of the great importance of these values in achieving sustainable development;
- To achieve sustainable urban development, all political, economic, social, and environmental dimensions should take into account the need to activate the complementary relationship between construction, the environment, and sustainable development;
- Effective mechanisms must be found to ensure the integration of the concept of sustainable development in the field of urban planning processes through the creation of environmentally friendly building materials, which ensures the optimal use of land and its renewable energies and resources.

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PROBLEMATICS OF REALIZATION OF ADVERSARIAL PRINCIPLE AND THE PRINCIPLE OF EQUALITY OF ARMS AT THE STAGE OF THE INVESTIGATION

Mikheil Mamniashvili
mikheil.mamniashvili@gmail.com

Doctor of Law, Professor, Georgian Technical University, Georgia

ABSTRACT

Criminal Procedure Code of Georgia tries to share the Anglo-Saxon law system model, which is based on “pure” equality of arms and adversarial principle; this can be said according to the requirements of the 9th article of the Criminal Procedure Code of Georgia regarding that at the beginning of criminal prosecution, the criminal process is being executed based on equality of arms and adversariality of the parties. The party is entitled to apply for a petition according to the rule established by Procedural Legislation, obtain via court, request, submit, and examine all the relevant evidence.

Theoretical study of equality of arms and adversariality model stipulated by Georgian criminal procedural law, regarding that at the criminal prosecution stage, equally as the prosecution (investigator, public prosecutor) – defense (the accused, lawyer) is also granted with opportunity, collect the beneficial evidence by conducting the investigative actions and for refusing the guilty (offense) the accused charged with.

Work has analyzed the problematics of the principle of equality of arms and the adversarial principle stipulated by Georgian procedural legislation, their procedural regulations, and those negative sides that hinder their complete and fair realization in investigative

practice. Attention is drawn to the necessity of legislative changes in the investigator's authority, in particular, the investigator should not represent the prosecution (party of charge), but he/she should be an independent procedural subject, being obliged to obtain both – incriminating and exculpatory evidence of prosecution (party of charge) with the same diligence, that will encourage the fair realization of equality of arms and adversarial into criminal procedural proceedings.

KEYWORDS: Equality of Arms and Adversariality, Investigator, Criminal Prosecution, Investigation

INTRODUCTION

According to applicable procedural legislation, criminal prosecution bears only public character and the public prosecutor exercises it, it is only under his / her discretionary authority to commence or/and terminate the criminal prosecution, whilst he guides with public interests and #181 order of the Minister of Justice "About assertion of the general part of criminal policy guidance principles" (dated as of 8th of October, 2010), during of which he takes into consideration as how much priority has the criminal prosecution per particular crime for the state – fewer resources of the country should be spent on crimes with minor significance. Coming out of this, a public prosecutor should analyze the gravity and nature of crime and find out how corresponds the commencement of public prosecution for a particular crime to the public interest. Even though lots of gaps are observed in the mentioned order by the minister of justice, it contradicts the applicable criminal procedure code of Georgia and other legislative acts – it remains in force, unfortunately.[1]

1 Gakhokidze, J., Gabisonia, I., Mamniashvili, M., & Moniava, P. (2018). Investigative law, Book I, Publishing House "World of Lawyers", pp. 213-229.

REGULATIONS CHARACTERIZING EQUALITY OF ARMS AND ADVERSARIALITY

Adversarial proceedings become effective since the criminal prosecution's commencement; from this stage: a) parties are entitled to apply the court for the petition under the rule established by law regarding obtaining or/and request of evidence; b) obtain the evidence independently – by themselves; c) actively participate in the examination of their or opposite party's evidence; the accused becomes an individual collecting the counter-arguments of guilt, who process the ways of evidence collection by himself/herself. Evidence obtained by the accused possesses an equal power as one – obtained by the prosecution (party of charge).

A defense party is not needed whilst applying the investigator and public prosecutor for the performance of investigative actions or the acquisition of any type of document or other materials, for this purpose, they are entitled to directly apply to the court, thus being in comparatively equal conditions with prosecution (party of charge) in this regard. Especially should be mentioned the regulation of examination of the witness at the investigation stage, whilst both – the prosecution (party of charge) and the defense party are authorized to apply to the magistrate judge for a petition regarding the examination of the person (to be examined) as a witness.

The accused and his / her lawyer (under the bounds established by the Criminal Procedure Code and according to the determined rule) are entitled to introduce to the evidence of prosecution (party of charge) and receive copies of evidence and criminal case materials. Besides, the prosecution is entitled to be aware of evidence of the defense party. Actually, during the court hearing the parties are well acquainted with the evidence, upon which their position stands and they are granted with full opportunity to prepare in a qualified manner and decently resist the opposite party.

Entitling the defense party to an indepen-

dent investigation does not imply at all that it is charged with the burden of proof to refuse the guilt. Coming out of adversariality form, an objective person may have an impression that the defense should prove its innocence, and that's why the legislator has granted it such rights related to the collection of evidence, but it is not so. The accused is charged with the burden of proof of guilt and the defense party has no legal obligation to self-justification – notwithstanding the equality of the parties, the burden of proof regarding the admissibility of the prosecution's evidence and inadmissibility of the defense's evidence is laid on the accuser. Process of equality of arms and adversariality is intended for parties to be involved in the legal dispute," – mentions Stefan Trechsel.

Equality of arms and adversariality are also guaranteed by that – 5 days before the pre-trial hearing parties are obliged to deliver to the court and each other complete information holding by that moment, which they are going to submit in the court as evidence (83rd article of Criminal Procedure Code). Besides, procedural legislation assumes the possibility to introduce the defense party to information obtained by the prosecution (party of charge) at any stage of the process, which by itself obliges the defense party (on demand) to supply the prosecution (party of charge) with that information, which it intends to submit in court as evidence; moreover – if the party violates the established rule regarding information exchange and won't deliver the opposite party information in the complete form held by that moment – this circumstance will cause the court to recognize this material as an inadmissible evidence. There is an exception from the mentioned rule, which may be counted as the supremacy of prosecution (party of charge) – whilst the prosecution (party of charge) is entitled not to assign the defense party with information acquired as a result of operative and investigational activities, but this applies only before the pre-trial hearing. There also existed exclusive rights, which were used by the defense party; in particular, not submitting one extremely important evidence to the prosecution (party of charge) that didn't cause the recognition of that evidence as inadmissible during the hearing of a case on the merits. In such a case, the defense party was charged with a fine and liability to reimburse the procedural expenses, which was unjustified, as it was unfair to grant the right and then a fine for its application. Indeed, this gap was further fixed, but this regulation (84th article of Criminal Procedure Code) was recognized as invalid by the legislator on the 1st of September, 2010.

Sign characterizing adversarial model is that evidence is only information and the subject, document, material, or other object consisting of this information submitted in the court, based on which the parties confirm or refuse the facts in the court, legally examine them, fulfill duties, protect their rights and lawful interests (23rd part of 3rd article of Criminal Procedure Code). Thus, only the evidence, those submitted during the court proceedings and examined by direct involvement of the parties may be considered as the basis of judgment.

Adoption of the standard of proof constitutes a positive legislation novation for the achievement of adversarial proceedings. The realization of the standard of proof depends on the information, evidence obtained by parties, and the positions supported by arguments. Evaluation of all four standards is performed on the adversariality basis via evidence submitted by parties; besides, only the court is entitled to evaluate the evidence obtained and submitted by parties and recognize them as inadmissible. Thus, only the submission of evidences is not essential for the resolution of the case, the role of the court is significant herein, which ultimately adopts the resolution regarding the admissibility and relatedness of the evidence.

Indeed, discussion of the problematics of equality of arms and adversariality during the court hearing is not a subject of our research, but it can be said with certainty that realization of the mentioned principle is more observed during the hearing of a case on the merits in court, whilst the judge is impartial and indiffer-

ent observer towards all having the place during the dispute discussion. He/she is obliged to fulfill only one thing – observe that prosecution and defense parties have equal opportunities for submission, examination of evidence, and grounding their positions,[2] and when the examination of evidence and discussion of the parties are over when the accused appear with his/her final word, the court should determine whether which party submitted more cogent and authentic evidence, as a result of which the judgment should be established – acquit the accused or find him / her guilty for crime and impose the measure of punishment.

CIRCUMSTANCES HINDERING THE REALIZATION OF EQUALITY OF ARMS AND ADVERSARIALITY OF THE PARTIES

As fairly is referred to in legal literature – equality of arms and adversarial of the parties in criminal proceedings is held only whilst the parties (prosecution, defense) are in equal condition. Equality implies legal and actual equality. Legal equality according to applicable legislation is formal, and actual equality is problematic on that state ground (economic hardship existing in the country is implied), on which a pure adversariality form of proceedings emerged.[3]

Realization of the principle of equality of arms and adversarial principle at the investigation stage is more hindered by incorrect and it can be said the unfair interpretation of public prosecutor's and especially investigator's status. Both of these subjects are considered as the prosecution (party of charge). The public prosecutor not only implements the criminal prosecution but he/she is the procedural head of the investigation. At the criminal prosecution's commencement, his / her activity is directed to collect the evidence proving the crime, whilst an investigator and operative and investigative services as well are considered next to him/her.

Thus, as we can see, two sides stand against each other at the criminal proceeding's commencement stage; the first side is represented by the public prosecutor and an investigator (under the duties of which is clearance of crime, investigation, implementation of criminal prosecution), which are equipped with modern criminalistic scientific-technical means for crime solution and investigation, they are entitled to apply the court with the petition, applying coercive measures (summon, arrest, imprisonment, etc.) with procedural nature towards some particular subjects and the second side is presented by accused and the lawyer, which often have no money and are unable to fund even investigation.

Besides, only the prosecution's exclusive right is to conduct a covert investigative action, monitor the bank accounts, conduct the investigative activities with urgent necessity, and implement operative and investigative activities. The prosecution (party of charge) indeed represents the state and it should have more procedural triggers, but yet all these extremely negatively reflect on the equality of the parties.

equality of arms and adversariality proceedings are hindered most by that investigator is considered as the prosecution (party of charge), even though according to the legislation he/she is not entitled to independently resolve any of the topics, which may be considered as the part of criminal prosecution. He/she is not implementing the prosecution, nor adopts the resolution about the accusation – he/she does not apply the court regarding the application of preventive measures or coercive measures, does not commence or implement the criminal prosecution, he/she is not entitled to decide the performance of investigative activities – investigator presents the party of charge and he/she is obliged to collect only the incriminating evidence about accusation, but he/she is

2 Sanders, A. (1994). From suspect to trial, Oxford handbook of criminology. p. 131.

3 Mskhiladze, L. (2015). Adversariality in criminal proceedings (Doctoral dissertation). Georgian Technical University. p. 86.

obliged to conduct the investigation completely and objectively in all aspects (2nd part of 37th article of Criminal Procedure Code).

A different belief is stated in the legal literature, for example: N. Mezvrishvili considers that 37th article of the Criminal Procedure Code charges the investigator to conduct the investigation completely and objectively in all aspects, which somehow implies that the investigator should obtain incriminating evidence and exculpatory evidence as well.[4]

We can not share the researcher's mentioned opinion due to a simple reason the word "objectivity" firstly implies the investigator's duty, to examine the evidence incriminating the accusation and exculpatory evidence and circumstances aggravating and mitigating the responsibility with the same diligence.

Objectivity is a just and moral requirement. It includes the impartiality of the investigator and excludes the subjectivism and biased approach (tendentiousness) by his / her side. Impartiality also implies that the investigator should not be interested in case outcome,[5] but according to applicable procedural code, the investigator is considered as the prosecution (party of charge) and accordingly, there's no point in discussing his "objectivity", as he/she must obtain only evidence incriminating the accusation. During the existence of such conditions, it seems impossible for the investigator to be the prosecution (party of charge) and even objective, and not be interested in case results at a time, moreover – even legislator has doubts about the investigator's "objectivity", whilst introduces the legal norm and is forced to charge the unauthorized official (head of investigative authority) to entrust the performance of investigative activities (search, seizure, etc.) by defense party satisfied by court ruling not to that investigator, which owns the current criminal case in the proceeding (or has doubts about its objectiveness), but choose another investigator; here rises a legit question: what kind of guarantee exists that other investigator would show up his / her "objectiveness", as he/she also presents the prosecution still?

A paradox situation occurs during the existence of such conditions, whilst two different investigators perform the investigative activities on the same case: one who has the current case in the proceedings and the second – who should perform the investigative activities required by the defense party, but actually, both of them represent the prosecution (party of charge).

For these purposes, we consider it expedient to strictly separate the functions of prosecution and investigation; the function of prosecution should be removed from the investigator. He/she should not represent the prosecution (party of charge), but would be an independent, impartial official, who will be charged to conduct a complete and objective investigation in all aspects, he/she should examine the evidence incriminating the accusation and exculpatory evidence and circumstances aggravating and mitigating the responsibility with the same diligence.[6]

Our insight in this regard is expressed by D. Benidze, who considers that it is better to release the investigator from the prosecution function and charge him/her only to perform the impartial, complete, and object investigation of the case: "investigator – says an author – can not be considered as the prosecution (party of charge). Because of this, term "investigator" should be removed from 6th part of 3rd article of the Code".[7]

Professor L. Mskhiladze completely agrees to concept regarding the investigator's removal

4 Commentary on the Criminal Procedure Code of Georgia. (2015). Edited by G. Giorgadze. Tbilisi, pp. 171-172.

5 Akubardia, I. (2014). Equality of arms of the parties and the role of the judge in adversarial proceedings. In M. Lekveishvili (Ed.), 85th anniversary compilation. Publishing House "World of Lawyers". p. 136.

6 Gakhokidze, J., & Mamniashvili, M. (2015). Investigator in criminal proceedings. In J. Gakhokidze, M. Mamniashvili, & I. Gabisonia (Eds.), Criminal proceedings of Georgia: General part. Publishing House "World of Lawyers". pp. 139-140.

7 Benidze, D. (2014). Transformation of adversarial principle into the Criminal Procedure Code of Georgia. Compilation of scientific works.

from the prosecution and she considers that by implementing such changes in procedural legislation, principle of equality of arms and adversarial principle in the legal proceedings will be processed in a better manner.[8]

M. Mdinaradze also has doubts about the "objectivity" of the investigative activities by other investigators required by defense party, which firstly represents the prosecution (party of charge) and constitutes the officer of the same agency as well; thus, he quite fairly considers illogical even proving that he/she (the investigator) will act against the own panel, so he supposes that any investigative activity required by defense party restricting the human rights guaranteed by constitution (search, seizure, etc.) should be performed directly by defense party (lawyer, accused).[9] This view by itself is not bad for ensuring the adversarial principle, as coming out of applicable procedural legislation, the realization of the principle of equality of arms and adversarial principle between the parties will be performed in a better manner, but still it will be best if the investigative activities will be held not by defense party but state official, investigator, as the state should be the only steady guarantor for lawfully performing these investigative activities, but provided it does not represent the prosecution (party of charge), but impartial and neutral character during the criminal legal proceedings.

It is impossible not to mention some particular negative aspects of the principle of equality of arms and adversarial principle, the realization of which will be extremely negatively expressed at the investigation stage, in particular: law does not oblige the prosecution (party of charge) to assign the exculpatory evidence already obtained. According to the 83rd article of the Criminal Procedure Code, the prosecution (party of charge) is obliged (on demand) to assign the defense party all the exculpatory evidence holding by that time. If we interpret the law, it will be obvious that in case of the absence of the relevant claim (requirement) by the defense party, the law does not oblige the prosecution (party of charge) to assign the defense party with exculpatory evidence, that should be considered as the gap of Code.

Exclusion of the victim from the composition of prosecution (party of defense), made adversariality more formal and it negatively influenced the adversariality process, as his / her role in the criminal procedural proceedings was weakened; this can be said coming out of fact, that his / her status merely encompasses the status of a witness.

At the plea bargain's conclusion, the defense party is not in equal condition as the prosecution, as an agreement between them depends on the public prosecutor's will and there exist no legislative mechanisms to control the public prosecutor's discretionary rights.

CONCLUSION

Such type of regulation of the investigator's status (we have discussed above) would undoubtedly encourage a better and real implementation of the principle of equality of arms and adversarial principle in criminal procedural proceedings. Coming out of the investigator's authority and by its means, both parties would have been granted the opportunity to receive and realize the evidence beneficial for them.

Our opinion regarding this comes out of the dictation of that imperative norm (from "d" subparagraph of the 7th article of the Constitution of Georgia), by which criminal police and investigation belong only to special management of higher state bodies of Georgia.

Exclusion of the victim from the composition of prosecution (party of defense), made adversariality more formal and it negatively influenced the adversariality process, as his / her role in the criminal procedural proceedings was weakened; probably it would be better if

8 Mskhiladze, L. (2015). Adversariality in criminal proceedings (Doctoral dissertation). Georgian Technical University. pp. 92-97.

9 Mdinaradze, M. (2015). Some particular issues caused by legislative changes during the render justice. *Law and the World*, Special issue, 1(2), pp. 94-96.

the legislator would care to increase the rights of the victim.

Thus, as we were assured, legal equality of the parties does not imply their actual equality, but we still suppose that legislator should stipulate such type of regulation into criminal procedural legislation, that will put actual inequality of the parties at its minimum, that positively reflect on adversariality as well.

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თანასწორობისა და შეჯიბრებითობის პრინციპის რეალიზაციის პრობლემატიკა გამოძიების სტადიაზე

მიხეილ მამნიაშვილი
mikheil.mamniashvili@gmail.com

სამართლის დოქტორი, პროფესორი, საქართველოს ტექნიკური უნივერსიტეტი, საქართველო

აბსტრაქტი

საქართველოს სისხლის სამართლის საპროცესო კანონმდებლობა ცდილობს გაიზიაროს ანგლოსაქსური სამართლის სისტემის მოდელი, რომელიც ეფუძნება „წმინდა“ თანასწორობისა და შეჯიბრებითობის პრინციპს. ამის თქმის საფუძველს იძლევა საქართველოს სისხლის სამართლის საპროცესო კოდექსის მე-9 მუხლის მოთხოვნები იმის შესახებ, რომ სისხლისსამართლებრივი დევნის დაწყებისთანავე სისხლის სამართლის პროცესი ხორციელდება მხარეთა თანასწორობისა და შეჯიბრებითობის საფუძველზე. მხარე უფლებამოსილია, საპროცესო კანონმდებლობით დადგენილი წესით დააყენოს შუამდგომლობა, სასამართლოს მეშვეობით მოიპოვოს, გამოითხოვოს, წარადგინოს და გამოიკვლიოს ყველა შესაბამისი მტკიცებულება.

ქართული სისხლის საპროცესო სამართლით გათვალისწინებული თანასწორობისა და შეჯიბრებითობის მოდელის საკანონმდებლო ინტერპრეტაციის თეორიული კვლევა სისხლისსამართლებრივი დევნის სტადიიდან ბრალდების მხარის (გამომძიებელი, პროკურორი) თანასწორად, დაცვის მხარესაც (ბრალდებული, ადვოკატი) აძლევს საშუალებას, საგამოძიებო მოქმედებათა ჩატარების გზით, ბრალდებულზე შერაცხული ბრალის უარსაყოფად, შეკრიბოს მათთვის სასარგებლო მტკიცებულებები.

მიხეილ მამნიაშვილი

ნაშრომში გაანალიზებულია ქართული სისხლის საპროცესო კანონმდებლობით გათვალისწინებული თანასწორობისა და შეჯიბრებითობის პრინციპი, მათი საპროცესო რეგულაციები და ის უარყოფითი მხარეები, რომლებიც ხელს უშლიან საგამოძიებო პრაქტიკაში მათ სრულყოფილ და სამართლიან რეალიზაციას. ყურადღებაა გამახვილებული გამომძიებლის უფლებამოსილების საკანონმდებლო ცვლილებების აუცილებლობაზე, კერძოდ კი, გამომძიებელი არ უნდა წარმოადგენდეს ბრალდების მხარეს, არამედ ის უნდა იყოს დამოუკიდებელი საპროცესო სუბიექტი, რომელიც ვალდებული იქნება ერთნაირი გულმოდგინებით მოიპოვოს ბრალდების როგორც გამამტყუნებელი, ასევე, გამამართლებელი მტკიცებულებები, რაც ბუნებრივია, ხელს შეუწყობს თანასწორობისა და შეჯიბრებითობის სამართლიან რეალიზაციას სისხლის საპროცესო სამართალწარმოებაში.

საკვანძო სიტყვები: თანასწორობა და შეჯიბრებითობა, გამომძიებელი, სისხლისსამართლებრივი დევნა, გამოძიება

შესავალი

მოქმედი საპროცესო კანონმდებლობით, სისხლისსამართლებრივი დევნა მხოლოდ საჯარო ხასიათისაა და მას ახორციელებს პროკურორი. მხოლოდ მისი დისკრეციული უფლებამოსილებაა, დაიწყოს ან/და შეწყვიტოს სისხლისსამართლებრივი დევნა, რა დროსაც იგი ხელმძღვანელობს საჯარო ინტერესებით, ასევე, იუსტიციის მინისტრის 2010 წლის 8 ოქტომბრის #181 ბრძანებით „სისხლის სამართლის პოლიტიკის სახელმძღვანელო პრინციპების ზოგადი ნაწილის დამტკიცების შესახებ“. ამ დროს იგი ითვალისწინებს, რამდენად პრიორიტეტულია სახელმწიფოსათვის კონკრეტული დანაშაულის სისხლისსამართლებრივი დევნა, რათა სახელმწიფო რესურსი ნაკლებად დაიხარჯოს მცირე მნიშვნელობის დანაშაულებებზე. აქედან გამომდინარე, პროკურორმა უნდა გააანალიზოს დანაშაულის სიმძიმე და ხასიათი და დაადგინოს, რამდენად შეესაბამება საჯარო ინტერესს კონკრეტულ დანაშაულზე დევნის დაწყება. მიუხედავად იმისა, რომ იუსტიციის მინისტრის აღნიშნული ბრძანება ეწინააღმდეგება საქართველოს სისხლის სამართლის საპროცესო კოდექსს, სხვა საკანონმდებლო აქტებს და მრავალ ხარვეზს შეიცავს, სამწუხაროდ, იგი დღესაც მოქმედებს.[1]

1. თანასწორობისა და შეჯიბრებითობის დამახასიათებელი რეგულაციები

შეჯიბრებითი პროცესი მოქმედებას იწყებს სისხლისსამართლებრივი დევნის დაწყებიდან. ამ ეტაპიდან: ა) მხარეებს უფლება აქვთ კანონით დადგენილი წესით სასამართლოს წინაშე დააყენონ შუამდგომლობა მტკიცებულებათა მოპოვების ან/და გამოთხოვის შესახებ; ბ) თავად, დამოუკიდებლად მოიპოვოს მტკიცებულებანი; გ) აქტიური მონაწილეობა მიიღონ თავიანთი თუ მოწინააღმდეგე მხარის მტკიცებულებათა გამოკვლევაში, ბრალდებული ხდება ბრალდების კონტრარგუმენტების შემგროვებელი დამოუკიდებელი პირი, რომელიც მტკიცებულებათა შეგროვების გზებს თავად ამუშავებს. ბრალდებულის მიერ მოპოვებულ მტკიცებულებას ბრალდების მხარის მიერ მოპოვებული მტკიცებულების თანაბარი ძალა გააჩნია.

დაცვის მხარეს აღარ სჭირდება გამომძიებლისა და პროკურორისათვის მიმართვა საგამოძიებო მოქმედებების ჩატარების ან რაიმე დოკუმენტების თუ სხვა მასალების მისაღებად, ამისათვის ისინი უფლებამოსილნი არიან უშუალოდ მიმართონ

1 გახოკიძე, ჯ., გაბისონია, ი., მამნიაშვილი, მ., მონიავა, პ. (2018). საგამოძიებო სამართალი, წიგნი I, „იურისტების სამყარო“, გვ. 213-229.

სასამართლოს, რითაც ამ მიმართულებით ბრალდების მხარესთან შედარებით თანაბარ პირობებში იმყოფებიან. განსაკუთრებით უნდა აღინიშნოს მოწმის დაკითხვის რეგულაცია გამოძიების სტადიაზე, როდესაც როგორც ბრალდების, ისე დაცვის მხარე უფლებამოსილია მაგისტრატ მოსამართლესთან დააყენოს შუამდგომლობა გამოსაკითხი პირის მოწმის სახით დაკითხვის შესახებ.

ბრალდებულს და მის ადვოკატს უფლება აქვთ, სისხლის სამართლის საპროცესო კოდექსით დადგენილ ფარგლებში და დადგენილი წესით გაეცნონ ბრალდების მხარის მტკიცებულებებს, მიიღონ მტკიცებულებისა და სისხლის სამართლის საქმის მასალების ასლები. ასევე, ბრალდებას აქვს უფლება, იცოდეს დაცვის მხარის მტკიცებულებები. ფაქტობრივად, საქმის სასამართლო განხილვისას მხარეებისთვის კარგად არის ცნობილი ის მტკიცებულებები, რომელსაც ემყარება მხარეთა პოზიციები და მათ აქვთ სრული საშუალება, კვალიფიციურად მოემზადონ და ღირსეული წინააღმდეგობა გაუწიონ მოწინააღმდეგე მხარეს.

დაცვის მხარისთვის დამოუკიდებლად გამოძიების უფლების მინიჭება სრულიადაც არ ნიშნავს იმას, რომ მას ევალება ბრალდების უარყოფის მტკიცების ტვირთი. შეჯიბრებითობის ფორმიდან გამომდინარე, შესაძლოა ობიექტურ პირს დარჩეს შთაბეჭდილება, რომ დაცვამ უნდა ამტკიცოს თავისი უდანაშაულობა და კანონმდებელმა ამიტომ მიანიჭა მას ფართო უფლებები მტკიცებულებათა შეკრების მხრივ, მაგრამ ეს ასე არ არის. ბრალდების მტკიცების ტვირთი აწევს ბრალმდებელს და დაცვის მხარეს არა აქვს თავის მართლების კანონისმიერი ვალდებულება – მიუხედავად მხარეთა თანასწორობისა, ბრალდების მხარის მტკიცებულების დასაშვებობისა და დაცვის მხარის მტკიცებულების დაუშვებლობის მტკიცების ტვირთი ეკისრება ბრალმდებელს. „თანასწორუფლებიანობისა და შეჯიბრებითობის პროცესი მოწოდებულია იმისკენ, რომ მხარეები ჩაებნენ სამართლებრივ დავაში“, – აღნიშნავს შტეფან ტრექსელი.

თანასწორობისა და შეჯიბრებითობის გარანტიას იძლევა ისიც, რომ მხარეები ვალდებულნი არიან წინასასამართლო სხდომამდე 5 დღით ადრე ერთმანეთის და სასამართლოს მიაწოდონ იმ მომენტისათვის მათ ხელთ არსებული სრული ინფორმაცია, რომლის მტკიცებულებად სასამართლო წარდგენასაც აპირებენ (სსსკ 83-ე მ). ამასთანავე, საპროცესო კანონმდებლობა უშვებს პროცესის ნებისმიერ სტადიაზე ბრალდების მხარის მიერ მოპოვებული ინფორმაციის დაცვის მხარის გაცნობის შესაძლებლობას, რაც თავის მხრივ, დაცვის მხარეს ავალდებულებს ბრალდების მხარეს (მოთხოვნის შემთხვევაში) მიაწოდოს ის ინფორმაცია, რომლის მტკიცებულებად სასამართლოში წარდგენასაც ის აპირებს, მეტიც, თუ მხარე დაარღვევს ინფორმაციის გაცვლის დადგენილ წესს და სრული მოცულობით არ გადასცემს მოწინააღმდეგე მხარეს ამ მომენტისათვის მის ხელთ არსებულ ინფორმაციას, ეს გარემოება გამოიწვევს სასამართლოში ამ მასალის დაუშვებელ მტკიცებულებად ცნობას. აღნიშნული წესიდან არსებობს გამონაკლისი შემთხვევა, რომელიც ბრალდების მხარის უპირატესობაში შეიძლება ჩაითვალოს, როდესაც ოპერატიულ-სამძებრო საქმიანობის შედეგად მოპოვებული ინფორმაცია ბრალდების მხარეს შეუძლია არ გადასცეს დაცვის მხარეს, მაგრამ მხოლოდ წინასასამართლო სხდომამდე. არსებობდა ასევე საგამონაკლისო უფლებები, რომლითაც დაცვის მხარე სარგებლობდა, კერძოდ, ერთი განსაკუთრებით მნიშვნელოვანი მტკიცებულების ბრალდების მხარისათვის წარუდგენლობის სახით, რაც არ იწვევდა სასამართლოს საქმის არსებით განხილვაზე ამ მტკიცებულების დაუშვებლად ცნობას. ასეთ დროს დაცვის მხარეს ეკისრებოდა ჯარიმა და საპროცესო ხარჯების ანაზღაურება, რაც გაუმართლებელი იყო, რადგან უფლების მინიჭება და შემდგომ ამ უფლების გამოყენებისათვის დაჯარიმება უსამართლო იყო. მართალია, ეს ხარვეზი შემდგომ გასწორდა, მაგრამ აღნიშნული რეგულაცია (სსსკ 84-ე მ.) 2010

წლის 1 სექტემბრიდან კანონმდებლის მიერ ძალადაკარგულად იქნა ცნობილი.

შეჯიბრებითი მოდელის დამახასიათებელი ნიშანია ის, რომ მტკიცებულებაა მხოლოდ სასამართლოში წარდგენილი ინფორმაცია, ამ ინფორმაციის შემცველი საგანი, დოკუმენტი, ნივთიერება ან სხვა ობიექტი, რომლის საფუძველზედაც მხარეები სასამართლოში ადასტურებენ ან უარყოფენ ფაქტებს, სამართლებრივად აფასებენ მათ, ასრულებენ მოვალეობას, იცავენ თავიანთ უფლებებსა და კანონიერ ინტერესებს (სსსკ მე-3 მუხლის 23-ე ნაწილი). ამდენად, მხოლოდ სასამართლო პროცესზე წარმოდგენილი და მხარეთა უშუალო მონაწილეობით გამოკვლეული მტკიცებულება შეიძლება დაედოს საფუძვლად განაჩენს.

შეჯიბრებითი პროცესის მისაღწევად დადებით საკანონმდებლო ნოვაციას წარმოადგენს მტკიცების სტანდარტების შემოღება. მტკიცების სტანდარტების რეალიზება დამოკიდებულია მხარეთა მიერ მოპოვებულ ინფორმაციებზე, მტკიცებულებებზე და არგუმენტირებულ პოზიციებზე. ოთხივე სტანდარტის შეფასება ხდება შეჯიბრებითობის საფუძველზე მხარეთა მიერ წარდგენილი მტკიცებულებების მეშვეობით, ამასთანავე, მხოლოდ სასამართლოა უფლებამოსილი შეაფასოს და დაუშვებლად ცნოს მხარეთა მიერ მოპოვებული და წარდგენილი მტკიცებულებები. ანუ მხოლოდ მტკიცებულების წარდგენა არ არის მთავარი საქმის გადაწყვეტისთვის, აქ მნიშვნელოვანია სასამართლოს როლი, რომელიც საბოლოოდ იღებს გადაწყვეტილებას მტკიცებულებათა დასაშვებობა დაკავშირებით.

მართალია, თანასწორობისა და შეჯიბრებითობის პრობლემატიკის განხილვა საქმის სასამართლო განხილვის დროს ჩვენი კვლევის საგანს არ წარმოადგენს, მაგრამ შეიძლება დარწმუნებით ითქვას, აღნიშნული პრინციპის რეალიზაცია უფრო მეტად შეიმჩნევა საქმის არსებითი განხილვის დროს სასამართლოში, რა დროსაც მოსამართლე მიუკერძოებელი და გულგრილი დამკვირვებელია ყველაფრის, რაც დავის განხილვისას ხდება. ის ვალდებულია, შეასრულოს მხოლოდ ერთი რამ, თვალყური ადევნოს იმას, რომ ბრალდებისა და დაცვის მხარეს შეექმნათ თანაბარი შესაძლებლობები მტკიცებულებათა წარდგენის, გამოკვლევისა და თავიანთი პოზიციების დასაბუთებისათვის[2], ხოლო როდესაც დასრულდება მტკიცებულებათა გამოკვლევა, მხარეთა კამათი და ბრალდებული საბოლოო სიტყვით გამოვა, სასამართლომ უნდა განსაზღვროს, თუ რომელმა მხარემ წარმოადგინა უფრო დამაჯერებელი და სარწმუნო მტკიცებულება, რის შედეგადაც უნდა დაადგინოს განაჩენი – ბრალდებული გაამართლოს ან დამნაშავედ ცნოს დანაშაულის ჩადენაში და შეეფარდოს სასჯელის ზომა.

2. მხარეთა თანასწორობისა და შეჯიბრებითობის რეალიზაციის ხელის შემშლელი გარემოებები

როგორც სამართლიანადაა მითითებული იურიდიულ ლიტერატურაში, მხარეთა თანასწორობას და შეჯიბრებითობას სისხლის სამართალწარმოების პროცესში ადგილი აქვს მხოლოდ იმ შემთხვევაში, როდესაც მხარეები (ბრალდება, დაცვა) არიან თანასწორ მდგომარეობაში. თანასწორობა კი გულისხმობს იურიდიულ და ფაქტობრივ თანასწორობას. იურიდიული თანასწორობა მოქმედი კანონმდებლობით ფორმალურია, ხოლო იმ სახელმწიფოებრივ ნიადაგზე (იგულისხმება ქვეყანაში არსებული ეკონომიკური სიდუხჭირე), რაზეც აღმოცენდა საქმის წარმოების წმინდა შეჯიბრებითობის ფორმა, ფაქტობრივი თანასწორობა პრობლემატურია.[3]

გამოძიების სტადიაზე თანასწორობისა და შეჯიბრებითობის პრინციპის რეალიზაციას უფრო მეტად ხელს უშლის პროკურო-

2 Sanders, A. (1994). From suspect to trial, Oxford handbook of criminology. p. 131.

3 მსხილაძე, ლ. (2015). შეჯიბრებითობა სისხლის სამართლის პროცესში (დოქტორის დისერტაცია). საქართველოს ტექნიკური უნივერსიტეტი. გვ. 86.

რისა და, განსაკუთრებით, გამომძიებლის სტატუსის არასწორი და, შეიძლება ითქვას, უსამართლო ინტერპრეტაცია. ეს ორივე სუბიექტი ბრალდების მხარედ გვევლინებიან. პროკურორი არა მარტო სისხლისსამართლებრივ დევნას ახორციელებს, არამედ ის გამოძიების საპროცესო ხელმძღვანელია. მისი საქმიანობა გამოძიებისა და სისხლისსამართლებრივი დევნის დაწყებისთანავე მიმართულია დანაშაულის დამადასტურებელი მტკიცებულებათა შეკრებისაკენ, რა დროსაც მის გვერდით მოიაზრება, ასევე, გამომძიებელი და ოპერატიული სამძებრო სამსახურები.

ამდენად, როგორც ვხედავთ, სისხლისსამართლებრივი დევნის დაწყების სტადიიდან ერთმანეთს უპირისპირდება ორი მხარე, პირველი – პროკურორი და გამომძიებელი, რომელთა ვალდებულებაში შედის დანაშაულის გახსნა, გამოძიება, სისხლისსამართლებრივი დევნის განხორციელება, ისინი აღჭურვილნი არიან დანაშაულის გახსნისა და გამოძიების თანამედროვე კრიმინალისტიკური სამეცნიერო-ტექნიკური საშუალებებით, უფლებამოსილნი არიან, მიმართონ სასამართლოს შუამდგომლობით, ცალკეული სუბიექტების მიმართ გამოიყენონ საპროცესო ხასიათის იძულებითი ღონისძიებები (მოყვანა, დაკავება, დაპატიმრება და ა.შ.) და მეორე – ბრალდებული და ადვოკატი, რომლებიც არც თუ იშვიათად არასმქონებელნი არიან და გამოძიების ჩატარების სახსრებიც კი არ გააჩნიათ.

ამასთანავე, მხოლოდ ბრალდების მხარის ექსკლუზიური უფლებაა ჩაატაროს ფარული საგამოძიებო მოქმედება, საბანკო ანგარიშების მონიტორინგი, გადაუდებელი აუცილებლობით ჩაატაროს საგამოძიებო მოქმედება, განახორციელოს ოპერატიულ-სამძებრო საქმიანობა. მართალია, ბრალდების მხარე სახელმწიფოა და მას პროცესუალურად მეტი ბერკეტი უნდა გააჩნდეს, მაგრამ ყოველივე ეს მაინც მხარეთა თანასწორობაზე უკიდურესად უარყოფითად აისახება.

ყველაზე უფრო მეტად თანასწორობისა და შეჯიბრებითობის სამართალწარმოებას ხელს უშლის ის, რომ გამომძიებელი ბრალდების მხარედ გვევლინება, მიუხედავად იმისა, რომ მას კანონმდებლობით არა აქვს არც ერთი საკითხის დამოუკიდებლად გადაწყვეტის უფლება, რომელიც სისხლისსამართლებრივი დევნის შემადგენელ ნაწილად შეიძლება ჩაითვალოს. ის არ ახორციელებს დევნას, მას არ გამოაქვს დადგენილება ბრალდების შესახებ – იგი არ მიმართავს სასამართლოს რომელიმე სახის აღკვეთის ღონისძიების ან იძულებითი ხასიათის ღონისძიების გამოყენებაზე, არ იწყებს და არ აწარმოებს სისხლისსამართლებრივ დევნას, მას არც ფარული საგამოძიებო მოქმედების ჩატარებაზე გადაწყვეტილების მიღების უფლება გააჩნია, გამომძიებელი ბრალდების მხარეს წარმოადგენს და ვალდებულია, შეკრიბოს მხოლოდ ბრალდების გამამტყუნებელი მტკიცებულებები, მაგრამ ის ვალდებულია, გამოძიება აწარმოოს სრულად და ობიექტურად, ყოველმხრივ (სსსკ 37-ე მუხლის მე-2 ნაწილი).

იურიდიულ ლიტერატურაში გამოთქმულია განსხვავებული შეხედულება, მაგალითად, ნ. მეზვრიშვილს მიაჩნია, რომ სსსკ 37-ე მუხლი გამომძიებელს გამოძიების ყოველმხრივ, სრულად და ობიექტურ ჩატარებას აკისრებს, რაც გარკვეულწილად მის მიერ, როგორც პირის ბრალეულობის დამადასტურებელ, ასევე გამამართლებელ მტკიცებულების მოპოვებას გულისხმობს.[4]

ჩვენ ვერ გავიზიარებთ მკვლევრის აღნიშნულ მოსაზრებას იმ უბრალო მიზეზის გამო, რომ სიტყვა „ობიექტურობა“ უპირველეს ყოვლისა, გულისხმობს გამომძიებლის ვალდებულებას, ერთნაირი გულმოდგინებით შეამოწმოს როგორც ბრალდების გამამტყუნებელი, ასევე, გამამართლებელი მტკიცებულებები, პასუხისმგებლობის როგორც დამამძიმებელი, ასევე, შემამსუბუქებელი გარემოებები.

ობიექტურობა სამართლებრივი და ზნეობრივი მოთხოვნაა. იგი მოიცავს გა-

4 საქართველოს სისხლის სამართლის საპროცესო კოდექსის კომენტარი. (2015). გ.გიორგაძის რედაქტორობით, თბილისი. გვ. 171-172.

მომძიებლის მიუკერძოებლობას, გამორიცხავს მისი მხრიდან სუბიექტივიზმს, ტენდენციურობას. მიუკერძოებლობა იმასაც გულისხმობს, რომ გამომძიებელი არ უნდა იყოს დაინტერესებული საქმის შედეგით,[5] მაგრამ მოქმედი საპროცესო კოდექსით გამომძიებელი ბრალდების მხარედ გვევლინება და შესაბამისად, სრულიად ზედმეტია საუბარი მის `ობიექტურობაზე~, რადგანაც მის ვალდებულებაში მხოლოდ ბრალდების მტკიცებულებათა მოპოვება შედის. ასეთი პირობების არსებობისას წარმოუდგენლად გვეჩვენება გამომძიებელი იყოს ბრალდების მხარე და თანაც – ობიექტური, და თან არ იყოს დაინტერესებული საქმის შედეგებით, კიდევ მეტი, გამომძიებლის `ობიექტურობაში~ ეჭვი თვით კანონმდებელსაც კი შეაქვს, როდესაც შემოაქვს სამართლებრივი ნორმა და იძულებულია, არაუფლებამოსილ სახელმწიფო მოხელეს – `საგამოძიებო ორგანოს ხელმძღვანელს~ – დაავალოს დაცვის მხარის მიერ სასამართლოს განჩინებით დაკმაყოფილებული საგამოძიებო მოქმედების (ჩხრეკა, ამოღება და ა.შ.) ჩატარება მიანდოს არა იმ გამომძიებელს, ვისაც წარმოებაში აქვს მოცემული სისხლის სამართლის საქმე (ანუ ეჭვი ეპარება მის ობიექტურობაში), არამედ შეარჩიოს სხვა გამომძიებელი. აქვე იბადება ლეგიტიმური შეკითხვა, რა გარანტია არსებობს იმისა, რომ სხვა გამომძიებელი „ობიექტურობას“ გამოიჩენს, ისიც ხომ ბრალდების მხარეს წარმოადგენს?

ასეთი პირობების არსებობისას წარმოიქმნება პარადოქსული სიტუაცია, როდესაც ერთსა და იგივე საქმეზე სხვადასხვა საგამოძიებო მოქმედებებს ატარებს ორი გამომძიებელი, ერთი, ვისაც საქმე აქვს წარმოებაში და მეორე, რომელმაც უნდა შეასრულოს დაცვის მხარის მიერ მოთხოვნილი საგამოძიებო მოქმედებები, თუმცა ორივე მათგანი რეალურად ბრალდების მხარეს წარმოადგენს.

ამის გამო მიზანშეწონილად მიგვაჩნია ბრალდებისა და გამოძიების ფუნქციების მკვეთრად გამიჯვნა; გამომძიებელს უნდა ჩამოსცილდეს ბრალდების ფუნქცია. ის არ უნდა წარმოადგენდეს ბრალდების მხარეს, არამედ უნდა იყოს დამოუკიდებელი, მიუკერძოებელი სახელმწიფო მოხელე, რომელსაც დაეკისრება საქმის ყოველმხრივი, სრული და ობიექტური გამოძიების ჩატარება, ერთნაირი გულმოდგინებით უნდა შეამოწმოს ბრალდების როგორც გამამტყუნებელი, ასევე, გამამართლებელი მტკიცებულებები, პასუხისმგებლობის როგორც დამამძიმებელი, ასევე, შემამსუბუქებელი გარემოებები.[6]

ჩვენეულ ხედვას ამ მიმართულებით გამოთქვამს დ. ბენიძე, რომელსაც მიაჩნია, რომ უმჯობესია გამომძიებელს ჩამოცილდეს ბრალდების ფუნქცია და მას დაეკისროს მხოლოდ საქმის მიუკერძოებელი, სრული და ობიექტური გამოძიება:P „გამომძიებელი, – წერს ავტორი, – არ შეიძლება ჩაითვალოს ბრალდების მხარედ. ამის გამო კოდექსის მე-3 მუხლის მე-6 ნაწილიდან სიტყვა „გამომძიებელი“ ამოღებული უნდა იქნეს“.[7]

პროფ. ლ. მსხილაძეც სავსებით ეთანხმება გამომძიებლის ბრალდების მხარისაგან ჩამოცილების კონცეფციას და მიაჩნია, რომ საპროცესო კანონმდებლობაში განხორციელებული ამგვარი ცვლილებების განხორციელებით უკეთ მოხდება სამართალწარმოების პროცესში თანასწორობისა და შეჯიბრებითობის პრინციპის წარმოება.[8]

მ. მდინარაძესაც ეჭვი შეაქვს სხვა გა-

5 აქუბარდია, ი. (2014). მხარეთა თანასწორობა და მოსამართლის როლი შეჯიბრებით სამართალწარმოებაში. წიგნში: მზია ლეკვეიშვილი-85 (საიუბილეო კრებული), „იურისტების სამყარო“. გვ.136.

6 გახოკიძე, ჯ., მამნიაშვილი, მ. (2015). გამომძიებელი სისხლის სამართლის პროცესში. წიგნში: ჯ. გახოკიძე, მ. მამნიაშვილი, ი. გაბისონია., საქართველოს სისხლის სამართლის პროცესი (ზოგადი ნაწილი), „იურისტების სამყარო“, გვ. 139-140.

7 ბენიძე, დ. (2014). შეჯიბრებითობის პრინციპის ტრანსფორმაცია საქართველოს სისხლის სამართლის საპროცესო კანონმდებლობაში. სამეცნიერო შრომების კრებული. https://www.nplg.gov

8 მსხილაძე, ლ. (2015). *შეჯიბრებითობა სისხლის სამართლის პროცესში* (დოქტორის დისერტაცია). საქართველოს ტექნიკური უნივერსიტეტი. გვ. 92-97.

მომძიებლის მიერ დაცვის მხარის მიერ მოთხოვნილ საგამოძიებო მოქმედებათა ჩატარების „ობიექტურობაში“, რომელიც, ჯერ ერთი, ბრალდების მხარეს წარმოადგენს და, მეორეც, იმავე უწყების თანამშრომელია და სავსებით სამართლიანად არალოგიკურად მიაჩნია იმის მტკიცებაც, რომ ის საკუთარი კოლეგიის საწინააღმდეგოდ იმოქმედებს, ამიტომ ის ფიქრობს, რომ დაცვის მხარის მიერ მოთხოვნილი ნებისმიერი საგამოძიებო მოქმედება, რომელიც ზღუდავს ადამიანისათვის კონსტიტუციით გარანტირებულ უფლებას (ჩხრეკა, ამოღება და ა.შ.), უნდა ჩაატაროს უშუალოდ დაცვის მხარემ (ადვოკატმა, ბრალდებულმა).[9] ეს შეხედულება შეჯიბრებითობის პრინციპის უზრუნველსაყოფად თავისთავად ცუდი არ არის, რადგანაც მოქმედი საპროცესო კანონმდებლობიდან გამომდინარე, უკეთ მოხდება მხარეთა შორის თანასწორობისა და შეჯიბრებითობის პრინციპის რეალიზაცია, მაგრამ მაინც უმჯობესია იძულებითი სახის საგამოძიებო მოქმედება ჩაატაროს არა დაცვის მხარემ, არამედ სახელმწიფო მოხელემ, გამომძიებელმა, რადგანაც სახელმწიფო უნდა იყოს ამ საგამოძიებო მოქმედებათა კანონიერად ჩატარების ერთადერთი მყარი გარანტი, მაგრამ ერთი პირობით: თუ ის არ წარმოადგენს ბრალდების მხარეს, არამედ იქნება მიუკერძოებელი და ნეიტრალური ფიგურა სისხლის სამართალწარმოების პროცესში.

შეუძლებელია, არ შევეხოთ თანასწორობისა და შეჯიბრებითობის პრინციპის ცალკეულ უარყოფით ასპექტებს, რომელთა რეალიზაციაც გამოძიების სტადიაზე უკიდურესად უარყოფითად აისახება, კერძოდ: კანონი ბრალდების მხარეს არ ავალდებულებს უკვე მოპოვებული გამამართლებელი მტკიცებულებების გადაცემასაც. სსსკ-ის 83-ე მუხლის თანახმად, ბრალდების მხარე ვალდებულია, დაცვის მხარეს, მისი მოთხოვნის საფუძველზე, გადასცეს მის ხელთ არსებული გამამართლებელი მტკიცებულებები. თუ კანონს სიტყვასიტყვით განვმარტავთ, ცხადი ხდება, რომ თუ არ იქნება დაცვის მხარის მოთხოვნა, კანონი ბრალდების მხარეს არ ავალდებულებს დაცვის მხარისთვის გამამართლებელი მტკიცებულებების გადაცემას, რაც კოდექსის ნაკლად უნდა ჩაითვალოს.

დაზარალებულის ბრალდების მხარის შემადგენლობიდან ამორიცხვამ შეჯიბრებითობა გახადა უფრო ფორმალური და უარყოფითი გავლენა იქონია შეჯიბრებითობის პროცესზე, რადგანაც შესუსტდა მისი როლი სისხლის სამართალწარმოების პროცესში. ამის თქმის საშუალებას იძლევა ის, რომ მისი სტატუსი მხოლოდ და მხოლოდ მოწმის სტატუსით შემოიფარგლება.

დაცვის მხარე არ არის ბრალდების თანაბარ პირობებში საპროცესო შეთანხმების დადებისას, რადგან მხარეთა შორის შეთანხმების მიღწევა პროკურორის ნებაზეა დამოკიდებული და მისი დისკრეციული უფლების არანაირი კონტროლის საკანონმდებლო მექანიზმები არ არსებობს.

დასკვნა

გამომძიებლის სტატუსის ამგვარი რეგულაცია, როგორც ზემოთ ვისაუბრეთ, ეჭვგარეშეა, ხელს შეუწყობდა სისხლის საპროცესო სამართალწარმოებაში თანასწორობისა და შეჯიბრებითობის პრინციპის უკეთ და რეალურ განხორციელებას. გამომძიებლის უფლებამოსილებიდან გამომდინარე და მისივე მეშვეობით, ორივე მხარეს თანაბრად მიეცემოდა მათთვის სასარგებლო მტკიცებულებების მიღებისა და რეალიზაციის შესაძლებლობა.

ჩვენი ეს მოსაზრება გამომდინარეობს, ასევე, საქართველოს კონსტიტუციის მე-7 მუხლის „დ“ ქვეპუნქტის იმ იმპერატიული ნორმის დანაწესიდან, რომლითაც მხოლოდ საქართველოს უმაღლეს სახელმწიფო ორგანოთა განსაკუთრებულ გამგებლობას განეკუთვნება კრიმინალური პოლიცია და გამოძიება.

9 მდინარაძე, მ. (2015). *საკანონმდებლო ცვლილებებით გამოწვეული ზოგიერთი პრობლემა მართლმსაჯულების განხორციელებისას*. სამართალი და მსოფლიო, სპეციალური გამოცემა, 1(2), 94-96.

დაზარალებულის ბრალდების მხარის შემადგენლობიდან ამორიცხვამ შეჯიბრებითობა გახადა უფრო ფორმალური და უარყოფითი გავლენა იქონია შეჯიბრებითობის პროცესზე, რადგანაც შესუსტდა მისი როლი სისხლის საპროცესო სამართალწარმოებაში. ალბათ, უმჯობესი იქნება, თუ კანონმდებელი იზრუნებს დაზარალებულის უფლებების გაზრდაზე.

ამდენად, როგორც დავრწმუნდით, მხარეთა იურიდიული თანასწორობა არ ნიშნავს მათ ფაქტობრივ თანასწორობას, მაგრამ მაინც ვფიქრობთ, კანონმდებელმა ისეთი სახის რეგულაცია უნდა გაითვალისწინოს სისხლის სამართლის საპროცესო კანონმდებლობაში, რომ მინიმუმამდე მაინც იქნეს დაყვანილი მხარეთა ფაქტობრივი უთანასწორობა, რაც ბუნებრივია, შეჯიბრებითობაზეც დადებითად აისახება.

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LEGAL NATURE AND ESSENTIAL FEATURES OF LOTTERIES

Sophio Dughashvili
sdughashvili@newvision.ge

Doctoral Candidate of Law, New Vision University, Practicing Lawyer, Accredited Mediator, Certified Trainer, Invited Lecturer, and Chair of the Ethics Commission of the Mediators' Association of Georgia (LEPL), Georgia

ABSTRACT

The paper targets the legal framework, signing features of lotteries, their development and regulation across various jurisdictions. It underlines the defining characteristics of lotteries, such as voluntary participation, public engagement, random determination of the results, and prize distribution, which set them apart from other gaming activities, such as gambling. While many legal contexts include lotteries within the broader term of gambling, they reflect a singular social purpose and bring considerable benefits. By studying some of the subtleties of regulation that make lotteries different from gambling, this research can also speak to the general public's hazy concept of truth regarding what lottery perception is. Additional examination in this study of the legal environment within Georgia and elsewhere for weaknesses in that regulatory framework is done, and recommendations are made on how it can be improved. Ultimately, the paper extends the understanding of the lotteries' role in society and provides a background for their legal classification and regulation improvement.

KEYWORDS: Lottery, Law, Social, Gambling, Welfare

INTRODUCTION

The gambling industry has attracted huge interest in recent years. This very profitable market of gaming is constantly growing and developing rapidly; thus, the interests and participation of players grow proportionally.[1]

Among these lucrative games, an important place is occupied by lotteries since they significantly differ in their nature from gambling and other games. Lotteries do not develop harmful addictions in people and, according to historical and traditional practices, fulfil quite different social functions.

This research is also towards the study of legal regulation of lotteries within a social perspective and interpreting their implication in divining social equity. The method of comparing the laws gives this paper the lottery regulatory norms of the United States, England, and several European countries. In general, the main goal of comparison analysis is to provide some understanding of the defining elements, concepts, and key characteristics of lotteries.

Countries that have had a long development of the lottery were chosen for this research; therefore, the analysis of international practice has a special meaning. The legislators of most countries classify lotteries and gambling as belonging to the wider category of profitable games. This is evident from the UK Gambling Act 2005, in which the collected regulatory norms of the gaming industry were brought together and viewed as one document where the lotteries are looked at as a form of prizewinning games alongside gambling.[2] The case is similar in Georgia, which has the gaming industry ruled by one combined legal act: The Law of Georgia – "On organizing lotteries, games of chance and other prize games".

Whereas lotteries within the gaming business, for most countries' legislators, are presented as such; partially, there is a part of the public that still perceives it as gambling, but lotteries, per se, are non-gambling and harmless social games bringing considerable benefits within society.

The objective of this paper will be the attempt to describe the distinguishing features of the lottery, to create a general concept of the lottery, and to indicate its main characteristics in accordance with its legal definition. This research is theoretically and practically meaningful. Based on the comparative analysis of relevant countries, it will provide a detailed understanding of the regulatory norms in Georgia, identify the challenges and help further study and development in this field.

1. HISTORY OF LOTTERIES

Lotteries have a rich history. Early historical evidence points out that the first public lottery with corresponding tickets and prizes was instituted during the reign of Emperor Augustus Caesar in the Roman Empire and was intended to raise funds for the municipal repairs of the city. The prizes were not monetary, other than in goods, and the proceeds were used for a large part of civil projects, one of the priorities of Rome at that time being road construction.[3]

In Europe, they first appeared in the 15th century, mostly to provide a source of increased revenue for states.[4] Certainly, one of the earliest lotteries with a declared prize fund took place in Bruges, Belgium, for the relief of the poor.[5]

Italy was another center of many early large-scale lotteries in the 15th century. The first Italian

1 Towfigh, E. V., Glockener, A., & Reid, R. M. (2012). Dangerous games: The psychological case for regulating gambling. USA, New York university school of law. p.1.

2 Egerer, M., Marionneau,V., & Nikkinen, J. (2018). Gambling policies in European welfare states. Current challenges and future perspectives. Palgrave Macmillan publishing. p.135.

3 Historical figures who used the lottery to their advantage. (2016). <https://www.forres-gazette.co.uk/news/historical-figures-who-used-the-lottery-to-their-advantage-152090/> [Last access: 05.11.2024].

4 Willmann, G. (1999). The history of lotteries. Department of economics, Stanford university, p.1.

5 National gambling impact study. Lotteries. <https://govinfo.library.unt.edu/ngisc/research/lotteries.html> [Last access: 05.11.2024].

lottery, known as *"Bianca Carta"*, which translates to "blank paper", received such a name from the appearance of the lottery tickets.[6]

In France, the first lottery, called *"blanque"* echoing the Italian name, took place in May 1539 during the reign of Francis I.[7] This is indicative that Italy became a model for France on how to operate large-scale lotteries.[8]

The first city lottery was held in Augsburg, Germany, in the 15th century. A large number of prizes was subjected to goods later replaced by cash, and from 1610, cities like Frankfurt and Hamburg actively conducted lotteries.[9]

Queen Elizabeth I set up the first lottery in England in the year 1567. At the time, England was trying to increase its presence in export markets located around the world. Funds collected through this lottery were meant for building ships and ports.[10]

In Spain, the lottery has also existed and has been running since 1763.[11] Spanish citizens were allowed to participate in one of the biggest lotteries in the world at that time, with pretty big prizes.[12] The first royal lottery was founded by King Charles III in Madrid, and it had the aim of bringing social benefits through this lottery.[13]

The Dutch lottery was established on a nationwide basis in 1726; the proceeds were to flow to the state treasury. In 1848 it received the formal name of Dutch National Lottery, and thereby became one of the oldest operating lotteries in the world.[14]

The modern lottery in the United States began on March 12, 1964, in New Hampshire, under the official name of "New Hampshire Sweepstakes" – nowadays more popular as "New Hampshire Lottery".[15] Based on the results of horse racing, which included some element of a sports betting pool, it became nevertheless a lottery because gross proceeds from its ticket sales went to public education,[16] which attained once again the social purpose of the lottery.

The first lottery in Georgia was also a welfare one and was titled the National Lottery. All its proceeds went to Tbilisi University and the Georgian theater.[17] The council of the lottery was chaired by Ivane Javakhishvili. Holding a lottery was a thing which first came into his mind back in 1917 when the idea of gathering money to found the first Georgian University appeared.

Due to the important goal, the tickets were sold in all the cities and towns of Georgia. The lottery was promoted by such famous Georgian writers as Giorgi Leonidze, Sargey Mdivani, and other famous actors and public figures of that time. Lottery tickets with a nominal value of 25 "Maneti"[18] were issued in that period. The random selection of the lucky tickets took place on November 1, 1919, in the Tbilisi State Theater (now Shota Rustaveli State Academic Theater). On account of the proceeds from the lottery, 1,077,677 "Maneti" were assigned to Tbilisi University.[19]

6 Willmann, G. (1999). The history of lotteries. USA. Department of economics, Stanford university, p.6.

7 From Francis I to online betting: The history of gambling in France (2012). <https://shs.cairn.info/article/E_POUV_139_0005?lang=en> [Last access: 05.11.2024].

8 Ibid.

9 Willmann, G. (1999). The history of lotteries. USA. Department of Economics, Stanford university, p.17.

10 It Could Be Ye: England's first lottery. (2017). <https://thehistorypress.co.uk/article/it-could-be-ye-englands-first-lottery/> [Last access: 05.11.2024].

11 Spain la primitiva. <https://www.thelotter.com/spanish-lotteries-guide/> [Last access: 05.11.2024].

12 Ibid.

13 History. <https://www.selae.es/en/web-corporativa/quienes-somos/la-empresa/historia> [Last access: 05.11.2024].

14 Lottery in Netherlands – Overview. <http://www.global-lottery-review.com/staatsloterij.html> [Last access: 05.11.2024].

15 National gambling impact study commission. Lotteries. <https://govinfo.library.unt.edu/ngisc/research/lotteries.html> [Last access: 05.11.2024].

16 State of new Hampshire 1st sweepstakes race, 1964 September (2016). <https://www.nhhistory.org/object/351096/state-of-new-hampshire-1st-sweepstakes-race-1964-september> [Last access: 05.11.2024].

17 1918: Lottery to support the Georgian university and theater. <https://civil.ge/ka/archives/250425> [Last access: 05.11.2024].

18 Maneti – The currency of the democratic republic of Georgia till 1921.

19 Javakhishvili, N. (2002). The First Georgian Lottery, Encyclopedia, Tbilisi. P.1.

The development of lotteries from a historical perspective has revealed that they have always been designed to serve the public and social interests, as opposed to gambling, which contains quite a number of high risks to society. In other words, the major purpose of lotteries is supposed to be fundraising for varied public or welfare projects.

2. THE LEGAL DEFINITION OF A LOTTERY

In modern life, there does not exist a single, universally recognized definition of "lottery" since every country defines it according to its legal system. This is so for the Georgian law too-it has its own, special definition. Namely, Article 3, Paragraph "T" of the Law of Georgia "On organizing lotteries, games of chance and other prize games" states: *"A Lottery is a voluntary group or mass game in which the organizer of the lottery, in accordance with publicly announced rules and terms, carries out a draw of a prize fund. The result of winning on a lottery ticket depends exclusively upon case, and it cannot be subject to the will or action of the organizer or any other subject and to falsification".*

While this legal definition gave a possibility not only to identify the key characteristics of a lottery but also to open one more discussion concerning additional traits which should be included in its definition according to the nature of lotteries, at the same time, Georgian law cannot define the notion of a lottery relying exclusively on the definition provided, which is why it is also necessary to understand the international practice and characteristics provided in the legislation of other countries. Comparison in how other countries define a lottery is interesting. The definition of a lottery can then be synthesized through comparison to devise a more rational common definition.

In England, a lottery is classified as gaming and possesses three key components,[20] which are further explained in the following paragraph. These involve monetary participation, which essentially means paying money to receive a ticket, there has to be a certain minimum prize awarded as well as the element of chance in prize distribution.[21]

According to the UK Gambling Act 2005, even though the act classifies lottery as a form of gambling, nevertheless, lotteries that come under national lottery are excluded from classification and are considered to be something entirely different from the rest of gambling.[22]

There are also other lotteries allowed in England apart from the national lottery. These are lotteries organized by private members, community or workplace lotteries for employees, one-time event lotteries, and consumer lotteries that try to promote products or services, whereby there is no extra cost necessary from those who participate in the lotteries. Most importantly, consumer lotteries must not be run to raise more money or provide an extra profit to the people conducting it.[23]

Another strange feature of Italian legislation on gaming is the fact that there is no single legislative document regulating both lotteries and gambling. Thereby, the norms and official definitions regulating the sphere can be found in different sources. In Italy, lotteries are a kind of gaming, and the general definition of lotteries is given in the criminal code. Namely, according to Article 721, any game which yields profit shall be regarded as gaming if winning or losing in it depends exclusively on luck. Italian gambling organization is based upon the territorial principle, with every type of game corresponding to a separate legal act.

20 Lotteries, prize competitions and free draws. <https://www.fundraisingregulator.org.uk/code/specific-fundraising-methods/lotteries-prize-competitions-and-free-draws> [Last access: 05.11.2024].

21 Ibid.

22 Gambling Act (2005), Part I, UK. Public General Acts, c. 19, § 15(1). <https://www.legislation.gov.uk/ukpga/2005/19/contents> [Last access: 05.11.2024].

23 Lotteries, prize competitions and free draws. <https://www.fundraisingregulator.org.uk/code/specific-fundraising-methods/lotteries-prize-competitions-and-free-draws> [Last access: 05.11.2024].

In France, gambling gains an inclusive definition that includes lotteries within a single category. According to the law, profitable games are any operation devised for large-scale participation by the public, regardless of the name under which the game is organized.[24]

The focus, therefore, is to offer the hope of winning to participants, which through the principle of chance is attained and involves financial participation on behalf of players.[25] Still, the law draws a line between profitable games in which the players' knowledge or skills come into play. A game, therefore, in which victory depends on the participant's skills shall not be regarded as a lottery.[26]

Lottery in Germany is regarded as a certain form of gaming directed towards the majority of the population. The public game scheme provides that, to take part in such a game, players must pay for it, and prizes can either be monetary or non-monetary.[27] However, the German legislation provides exemptions on issues concerning organized lotteries in accordance with territorial principles, covering those large countries characterized by huge populations.[28] That is, if a lottery is organized on the national scale with one prize fund, then that's a national lottery. Besides that, it is allowed to organize local lotteries in every separate city, provided a proper license has been given out, including only the participation of residents.[29]

In the country of Belgium, like in many other countries, lotteries are regarded as gambling. Article 301 of the Belgian Criminal Code was engaged in a separate definition of a lottery as a game offered to the public in which the participant may win, with a risk of losing, dependent entirely on chance.

However, in Spain, the similarity to the Georgian model of regulation can be distinguished due to the availability of one legal act, the Gambling Law, in which the bases for the organization of gambling and profitable games are enthralls Lotteries and gambling are defined independently: Articles 3(a) and (b) of this very law are similar to the Georgian law. The definition states that a lottery is an instant and raffled game, the tickets might be tangible or in electronic form, and the award depends on just luck.[30] Gambling, on the other hand, is closely related to the involvement of a bet and increasing risk during the game.[31]

In the Netherlands, the legislative framework concerning gambling is set out in the "Betting and Gaming" Act. Article 1.1(a) explains what gambling and profitable games, within which lotteries are classified, are.[32] Gambling shall be understood to mean a contest for prizes and winnings, whereby winners are determined on grounds of chance, and wherein participants are unable to exert any influence whatsoever on the outcome.[33] Furthermore, it is interesting to notice that the definition covers social games, for the participation in which no bets are placed.[34]

In the United States – as in Germany – lotteries are organized based on territorial principles. In each of the states, its own kind of prof-

24 Code of Internal Security, France, (2005), c. 19, Article L320-1 (repealed), August 26, 2021. <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000025505692/> [Last access: 05.11.2024].

25 Ibid.

26 Ibid.

27 General Introduction of gambling law in Germany. (2023). <https://www.lexology.com/library/detail.aspx?g=a586d86a-41bc-443a-af92-099351ffd1af> [Last access: 05.11.2024].

28 The WLA global lottery data compendium. (2023). <https://publications.world-lotteries.org/blog-posts/wla-publishes-10th-edition-of-the-global-lottery-data-compendium> [Last access: 05.11.2024].

29 State Treaty on Gambling (2021) of 29 October 2020 Germany (SächsGVBl. 2021 p. 367).12 § 12 (3)1. <https://www.gesetze-bayern.de/Content/Document/StVGlueStV2021> [Last access: 05.11.2024].

30 Law of Spain on Gambling Regulation. 13/2011, of May 27, Article (B) BOE Num 127, (2013). <https://www.boe.es/buscar/act.php?id=BOE-A-2011-9280> [Last access: 05.11.2024].

31 Ibid.

32 Gambling Act, Netherlands, Article 1, Section 1 (a) (2021). <https://wetten.overheid.nl/BWBR0002469/2021-10-01> [Last access: 05.11.2024].

33 Litter, A. (2020). The gambling law review – Netherlands. Law Business Research Ltd. UK. London. Chapter 23. p. 290.

34 Ibid.

itable and gambling games are hosted. These games are regulated either under the federal or under the state laws. In the U.S. model, lotteries have not been regarded as gambling but an independent type of games.[35]

The lottery, according to federal law, is defined as an open game in which participation is possible by paying a certain amount, whereas prizes can equally be in money and material and their winners are selected purely per hap.[36]

Federal law also demands that for a game to qualify as a lottery, there must be three essential elements: monetary entry, chance of winning, and prize payout.[37] This can be comprehended to mean that the operator running the lottery will definitely do the declared distribution of the prize to the ticket holder in case there is a random win.[38] While the organization of lotteries dictates that states follow federal law, they also create internal regulatory norms. Specially created entities manage that the model of lottery chosen by them is within the purview of the set regulations right from the licensing stage to its distribution and retailing.[39]

The research done with the use of the methods of comparative law allows the formulating of the unified concept of a lottery in the following way: A lottery is a public game designated for a wide circle of people. The participants take part in it by buying a ticket, and the organizer holds a draw for receiving a prize fund preliminarily declared. The winning depends on chance and is not subject to the will and abilities of the participants. This definition underlines those very basic attributes setting the tangible nature of lotteries.

3. FUNDAMENTAL CHARACTERISTICS OF A LOTTERY

3.1. Voluntary Participation

As one of the defining characteristics of lotteries, voluntary participation is the sole entity with which the game takes off. Nobody has the right to oblige an individual to take part in a lottery against their free will.

The principle of voluntariness is expressed in the free choice of the participant who decides whether to take part in such a draw or not, and in case of a positive decision, to realize it by purchasing a ticket. This protects the voluntary and independent nature of the lottery, free of any pressure or mandatory factors from outside.

As described above, English law defines lottery underlining the key attribute describing it, one of which is the player's monetary involvement in the form of the payment for the ticket.[40]

In its turn, U.S. federal law also requires some features to be present for a game to be a lottery, and these features include voluntary monetary participation expressed as the purchase of a ticket.[41]

German law also conditions the paying of money by participants as one of the requirements for granting cash and non-cash prizes, by which this tradition was also aligned with voluntary participation as one of the fundamental characteristics of any lottery.[42]

35 Dayanim, B., Flynn, H., & Harris, K. (2020). The gambling law review – Overview of US federal gaming Law. Law Business Research Ltd. UK. London. Chapter 3. p. 30.

36 Lotteries Law and Legal Definition. <https://definitions.uslegal.com/l/lotteries/> [Last access: 05.11.2024].

37 12 U.S. Code § 25a (2018). Participation by national banks in lotteries and related activities <https://uscode.house.gov/view.xhtml?req=granuleid:USC-2010-title12-section25a&num=0&edition=2010> [Last access: 05.11.2024].

38 Ibid.

39 Federal lottery laws explained. (2020). <http://www.mardenkane.com/articles/federal-lottery-laws-explained.html> [Last access: 05.11.2024].

40 Lotteries, prize competitions and free draws. <https://www.fundraisingregulator.org.uk/code/specific-fundraising-methods/lotteries-prize-competitions-and-free-draws> [Last access: 05.11.2024].

41 12 U.S. Code § 25a (2018). Participation by national banks in lotteries and related activities <https://uscode.house.gov/view.xhtml?req=granuleid:USC-2010-title12-section25a&num=0&edition=2010> [Last access: 05.11.2024].

42 General Introduction of gambling law in Germany. (2023). <https://www.lexology.com/library/detail.aspx?g=a586d86a-41bc-443a-af92-099351ffd1af> [Last

3.2. Public Engagement

Therein, this feature was based on the definitions of lotteries and profitable games discussed by various countries. In German law, for example, the objective of lotteries is directed at a large number of people.[43] Of the many elements that comprise that definition is Germany's Territorial Principle whereby local lotteries are organized by each city with licenses such that only the residents in that area may participate in it.[44]

Likewise, the U.S. model functions in territorial words, yet even there, the component of mass cooperation doesn't disappear.[45]

Similarly, French law characterizes lucrative games and lotteries as those which accrue huge participation from the public.[46]

3.3. Random Determination of the Results

An attempt to shed light on this aspect of organizing lotteries is to underline that a lottery is, in fact, a game dependent on pure chance. This is about winning or losing, which nonethird party organizer can influence.[47] This is absolutely randomized, and therefore nothing can be predicted or influenced by anyone. It is categorical from the examples of the countries discussed that lotteries can never exist devoid of the element of chance. The organization of the game is done to enhance the hope of participation since randomness increases that hope.[48]

It is useful to underscore that French legislation distinguishes between profitable games in which results depend on players' knowledge or skills and lotteries.[49]

Regulatory norms in English classify a lottery by three elements, one of which implies randomness.[50] Also, U.S. federal legislation enumerates three constituents of a lottery, randomness of outcomes among them.[51] As mentioned above Italian criminal code defines chance as the constitutive element of a lottery both in winning or losing, whereas Spanish law determines that the winnings in profitable games are obtained through chance.[52]

Finally, Art. 301 of the Belgian criminal code stipulates that a lottery should tend only to the distribution of prizes by the principle of chance.[53]

Since no causal linkage between any internal or external action with the outcome of the draw exists in the above discussion, it goes without saying that one of the defining features is the randomness in a lottery. Following this, then, randomness perhaps defines it as one of the most important features of a lottery.

access: 05.11.2024].

43 General Introduction of gambling law in Germany. (2023). <https://www.lexology.com/library/detail.aspx?g=a586d86a-41bc-443a-af92-099351ffd1af> [Last access: 05.11.2024].

44 State Treaty on Gambling (2021) of 29 October 2020 Germany (SächsGVBl. 2021 p. 367).12 § 12 (3)1. <https://www.gesetze-bayern.de/Content/Document/StVGlueStV2021> [Last access: 05.11.2024].

45 12 U.S. Code § 25a (2018). Participation by national banks in lotteries and related activities <https://uscode.house.gov/view.xhtml?req=granuleid:USC-2010-title12-section25a&num=0&edition=2010> [Last access: 05.11.2024].

46 Code of Internal Security, France, (2005), c. 19, Article L320-1 (repealed), August 26, 2021. <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000025505692/> [Last access: 05.11.2024].

47 Law of Georgia – "On organizing lotteries, games of chance and other prize games". (2005). <https://matsne.gov.ge/ka/document/view/30988?publication=45> [Last access: 05.11.2024].

48 Code of Internal Security, France, (2005). c. 19, Article L320-1 (repealed), August 26, 2021. <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000025505692/> [Last access: 05.11.2024].

49 Ibid.

50 Lotteries, prize competitions and free draws. <https://www.fundraisingregulator.org.uk/code/specific-fundraising-methods/lotteries-prize-competitions-and-free-draws> [Last access: 05.11.2024].

51 12 U.S. Code § 25a (2018). Participation by national banks in lotteries and related activities <https://uscode.house.gov/view.xhtml?req=granuleid:USC-2010-title12-section25a&num=0&edition=2010> [Last access: 05.11.2024].

52 Law of Spain on Gambling Regulation. 13/2011, of May 27, Article (B) BOE Num 127, (2013). <https://www.boe.es/buscar/act.php?id=BOE-A-2011-9280> [Last access: 05.11.2024].

53 Code of Criminal Procedure Belgium, Art. 301. (2020). <https://www.ejustice.just.fgov.be/cgi/welcome.pl> [Last access: 05.11.2024].

3.4. Prize Distribution

The collection of money for raising funds and financing the prize pool is organized through lotteries and profitable games. So, there cannot be a lottery without a result because a ticket bought may be either winning or losing. Prize distribution is included in several countries as core in the working circles of the above-mentioned definitions. If a lottery does not include prize distribution, then it is not a game in the eyes of the law.

England lists three elements that are necessary to operate a lottery, one of which is the prize.[54]

The same structure is in place in the U.S., where federal law lists three elements necessary for something to be considered a lottery, one of which is the prize. This prize is given out by the promoter based on the rules to the winner of the game. Any type of lottery without this element is forbidden by U.S. federal law and hence illegal and prohibited.[55]

CONCLUSION

The purpose of the study was to try and arrive at a unified definition of a lottery and find its accompanying characteristics. The paper analyzed the differing definitions of a lottery against the backdrop of regulatory laws determined by countries with wide experience on the subject matter using a comparative legal methodology. In fact, the present study revealed that there exists no single and unified definition of what exactly a lottery is. A definition of a lottery was identified, based on the official definitions of the word provided by the legislation of various countries; as well as key common features that represent the essential elements of organizing a lottery.

According to the sources, though in some countries, lotteries are put in the category of gambling, they should not be considered to cause damage to society, just like gambling, which directly involves high risks.

The examples given in the corresponding part of the current paper proved that most of the countries try to enhance the social destination of lotteries through legislative control.

It found that a lottery differs from other forms of wagering in that lotteries may be characterized as games of chance in which a very small loss by a player offers the possibility of winning a very large prize; the net revenues are used for the public good.[56] Lotteries have had, and continue to have a social function. No one loses in a lottery because the only “loss” is the value of the ticket play.

The state should try to enlighten its citizens regarding the nature of lotteries and their social aspects. This fact that money paid for tickets by players has been used for beneficial causes and helping others, will further encourage people to participate. That is why the social nature of lotteries should be considered one of the defining features. The extension of social tolerance is a prerogative of the state.

54 Lotteries, prize competitions and free draws. <https://www.fundraisingregulator.org.uk/code/specific-fundraising-methods/lotteries-prize-competitions-and-free-draws> [Last access: 05.11.2024].

55 12 U.S. Code § 25a (2018). Participation by national banks in lotteries and related activities <https://uscode.house.gov/view.xhtml?req=granuleid:USC-2010-title12-section25a&num=0&edition=2010> [Last access: 05.11.2024].

56 Buchstein, H. (2019). Democracy and lottery: Revisited. Constellations. p. 361–377.

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THE SCOPE OF MANUFACTURER CIVIL LIABILITY EXEMPTION DUE TO RISKS OF SCIENTIFIC ADVANCEMENT

Khadidj Elhamel
elhamel.khadidja@univ-oran2.dz

Doctoral Candidate in Law, University of Oran 2 Mohamed Ben Ahmed, Economic Law and Environment Laboratory, Algeria

Fatiha Naceur
f.naceur.24@gmail.com

Doctor of Law, Professor, University of Oran 2 Mohamed Ben Ahmed, Algeria

ABSTRACT

Manufacturers may, under certain conditions, avoid civil liability by invoking the risks associated with scientific advancement as grounds for exemption. This defense requires proof that at the time the product was introduced into the market, prevailing scientific knowledge did not permit the identification of the defect. Originally introduced through the 1985 European Directive and later incorporated into French legislation via Law No. 98-389 on defective products (subsequently amended by Order No. 2016-131 concerning the reform of contract law, general regime, and proof of obligations), this provision has not yet been adopted in Algerian civil law. Even after the 2005 amendment to Algeria's civil code, which introduced Article 140 bis on manufacturer liability, the Algerian legal framework, including its consumer protection laws, makes only implicit references to this exemption. Accordingly, The Algerian legislator should determine whether scientific advancements

justify exemption, Accordingly, the Algerian legislator should adopt a stance on the risks posed by scientific advancements and the extent to which they can be considered grounds for exemption from liability. This is in line with modern legislations that substantiate this defense, as well as French jurisprudence, which has emphasized the necessity of relying on the risks of scientific advancement to absolve the producer from liability. This is based on the premise that disregarding this defense would hinder development and progress, ultimately obstructing industry, given the relativity and continuous evolution of scientific knowledge. To address these various risks, a comprehensive compensation system supported by insurance companies should be established.

KEYWORDS: Scientific Development Risks, Manufacturer Liability, State of Scientific Knowledge, Duty of Traceability

INTRODUCTION

Technological advancements have catalyzed substantial transformations across industrial sectors, leading to increased consumer reliance on a wide range of products. While these products aim to enhance the quality of life, they also carry potential risks—both apparent and latent—that can directly endanger consumers' health and financial stability. In response, legislators have enacted civil liability frameworks aimed at balancing the interests of manufacturers and consumers. However, as these liability frameworks have occasionally proven insufficient in providing robust protection to affected parties, supplementary civil liability principles have emerged. These principles, tailored specifically for defective products, strive to ensure adequate recourse for affected consumers, with compensation remaining a central objective.

Despite these evolving frameworks, manufacturers still retain the right to mitigate liability through established defenses under general principles of law. Among these is the scientific development risk defense, which allows manufacturers to argue that, at the time of distribution, scientific and technical knowledge did not allow for the identification of product defects. This defense has become increasingly significant as technological advancements integrate scientific knowledge into production processes across diverse industries. While these advancements have undeniably enhanced convenience and efficiency, they have also introduced unforeseen risks that manufacturers cannot entirely predict, even when fulfilling all legal obligations. Consequently, legal scholars and courts have recognized the need to institutionalize this defense within legislative frameworks, thereby acknowledging the limitations posed by scientific unpredictability.

This study seeks to examine an evolving aspect of civil liability—namely, the exemptions and limitations on liability imposed due to the uncontrollable risks arising from continuous scientific progress. The central research question investigates the extent to which manufacturers can invoke scientific development risks to negate civil liability.

The methodological approach of this study is analytical, focusing on an examination of relevant legal texts and a comparative analysis of French and Algerian law, recognizing that many of the statutes governing this type of liability have origins in French legal precedents.

1. THE CONCEPT OF SCIENTIFIC DEVELOPMENT RISKS

This section elucidates the concept of scientific development risks, structuring the analysis into two parts: first, a definitional framework for scientific development risks, and second, an exploration of relevant legislative perspectives.

1.1. Definition of Scientific Development Risks

The invocation of scientific development risks as a defense to negate civil liability is a relatively recent defense within product liability law. This defense is predicated on the manufacturer's inability to foresee certain defects due to the prevailing limitations of scientific and technical knowledge at the time of the product's circulation. To delineate this concept, this part is divided into two subsections: the doctrinal interpretation of scientific development risks and the legal definition.

1.1.1. Jurisprudential Definition of Scientific Development Risks

In legal scholarship, multiple terms have been employed to characterize this defense, including "developmental risks," "technological advancement risks," and "scientific development risks".[1] Hassan Abdelrahman Quddous conceptualizes these risks as stemming from a deficiency in scientific and technical knowledge that precludes the manufacturer from identifying a product's latent defects at the time of distribution, thereby obstructing an anticipatory understanding of its inherent risks.[2] In contrast, Ph. Le Tourneau critiques the nomenclature "development risks," arguing that it is not the risk itself that constitutes a defense but rather the latent defect undetectable at the point of market introduction.[3]

Further academic definitions regard scientific development risks as those potential hazards that remain indiscernible until after the product has been commercialized—a situation exacerbated by the accelerated evolution of scientific and technological knowledge. This rapid innovation frequently results in products or treatments with delayed adverse effects that only become evident in subsequent stages of use.[4] Notably, "scientific development risks" do not imply the inherent hazards of innovation per se; rather, they refer to the subsequent discovery of risks through advancements in scientific understanding.[5]

1.1.2. Legal definition

The legal foundation of scientific development risks as an exculpatory defense first emerged in the 1985 European Product Liability Directive, where Article 7 states that "the producer shall not be liable if it proves that the state of scientific and technical knowledge at the time the product was put into circulation was insufficient to detect the defect". French civil law enshrines this defense under Article 1245-10 of the Civil Code, which specifies that "the producer is strictly liable unless it proves... that the scientific and technical knowledge available at the time of marketing was inadequate to reveal the defect".

Several legislative initiatives have subsequently institutionalized this defense. For example, J. Ghestin's 1988 proposal and the 1993 CATALA project supported this exculpatory principle, highlighting the necessity for a post-market traceability obligation, requiring manufacturers to monitor potential latent defects and notify consumers should such risks be identified.

The European Court of Justice (ECJ) further refined the scope of this definition in a 1997 ruling, stipulating that scientific development risks should be assessed based on global scientific

1 Boumediene, F. Z. (2017). Development Risks as a Ground for Exemption from Liability for Defective Products. (Doctoral degree in Law), Algeria. p. 20.

2 Quddous H. A. (2002). The Extent of the Manufacturer's Obligation to Ensure Safety in the Face of Scientific Development Risks, (1st Ed.). Cairo: Dar Al-Nahda Al-Arabiya. p. 11.

3 Le tourneau, Ph. (2000). Liability for Defective Products. *The Weekly Law Journal J.C.P*. 5(2). p. 121.

4 Zoghbi, A. M. (2013). *Scientific Development Risks as a Basis for Exempting Manufacturers from Consumer Damages*, Paper presented at the Study Day on Manufacturer Liability for Defective Products as a Means of Consumer Protection, Faculty of Law and Political Science, Mouloud Mammeri University, Tizi Ouzou-Algeria. p. 179.

5 Abou Akil, A. M., Said, M. (2023). State Liability for Damages Arising from Scientific Development Risks (COVID-19 Vaccines as a Case Study). *Journal of Jurisprudential and Legal Research of King Abdulaziz University*, 35(40). p. 754.

and technical knowledge rather than being confined to national or sector-specific standards. German jurisprudence also addresses scientific development risks, particularly in the context of pharmaceuticals, under the Pharmaceutical Products Act of August 24, 1976, mandating safeguards against undiscovered adverse effects in medicinal products.

The concept of "scientific development risks" holds particular pertinence in the pharmaceutical sector, where medicinal products—despite their regulatory compliance and adherence to pharmacovigilance requirements—may later be discovered to have unforeseen side effects. The thalidomide tragedy is a paradigmatic case: marketed initially by a German pharmaceutical company as a safe anti-nausea drug for pregnant women, thalidomide was later found to cause severe congenital disabilities. Although initially compliant with scientific safety standards, its latent risks only became apparent through post-market surveillance and continued scientific evaluation. This incident led to the drug's withdrawal from the market and prompted amendments in German law, excluding pharmaceutical products from the scientific development risk exemption under the Pharmaceutical Products Act of August 24, 1976.

1.2. Legislative Stances on Scientific Development Risks

The debate surrounding the inclusion of scientific development risks as a defense within the framework of the European Directive has been extensive, with Germany leading in its adoption and other legal systems subsequently following suit. This section provides a comparative analysis of the French and Algerian legislative responses to scientific development risks.

1.2.1. The French Legislative Stance

France initially hesitated to recognize scientific development risks as grounds for exemption from manufacturer liability, which delayed its incorporation of the European Directive until 1998[6]. The French Parliament expressed reservations, particularly after the Bovine Spongiform Encephalopathy (BSE) crisis, or "mad cow disease," raised public concerns about product safety. Nevertheless, economic and scientific pressures, combined with significant lobbying from insurance companies, ultimately swayed the government to adopt this exemption. As a result, Article 1386-11-4[7] of the French Civil Code now provides manufacturers the opportunity to evade liability by demonstrating that, at the time of the product's release, the state of scientific and technical knowledge did not allow for defect detection. This provision, however, has not been without controversy, as some critics argue it undermines the objective nature of product liability.[8]

Article 1386-11-4 specifically stipulates: "*The producer shall be liable by law unless it proves that the state of scientific and technical knowledge at the time of the product's release did not permit the discovery of the defect*". This provision closely mirrors Article 7 of the European Directive. Notably, this defense cannot be invoked in cases involving damage to human organs or products derived from human tissue, as clarified by Article 1386-12,[9] a distinction that will be discussed in greater detail in Section Two.

Through this legislative move, the French legislator introduces an innovative foreign cause for liability exemption, diverging from traditional conceptions of exonerative causes.

6 Boulenouar, A. (2018). Development Risks as Grounds for Exemption from Liability for Defective Products. *Al-Manar Journal for Legal and Political Research and Studies*, 2(2), Algeria. p. 322.

7 Article 1386-11, para. 4, of the French Civil Code states: "The state of scientific and technical knowledge at the time the product was put into circulation did not allow for the detection of the defect".

8 Flour J., Jean-Luc A. (1999). Obligations: The Legal Fact. Paris: Armand Colin. p. 284.

9 Article 1386-12, as amended by Article 29 of Law No. 2004-1343 of December 9, 2004, J. O. R. F., December 10, 2004, states: "The producer cannot invoke the exemption cause provided in paragraph 4 of Article 1386-11 when the damage is caused by an element of the human body or by-products derived from it", further modified by Article 1245-11 of Ordinance No. 2016-131.

This exemption is accessible to any "producer" as defined in Article 1386-6 of the French Civil Code, encompassing manufacturers of final products, component manufacturers, and other professionals in the supply chain. Conversely, entities outside the scope of "producers," as specified in Article 1386-3—such as real estate developers and sellers of construction real Estate, cannot invoke scientific development risks as a defense, as their liability is governed by Articles 1792-6 and 1386-1.

Under Article 1386-12-2 of the French Civil Code.[10] manufacturers are precluded from using scientific development risks as a defense if they fail to notify consumers, by all possible means, about latent product risks once advancements in technical knowledge enable the identification of such risks or necessitate a product recall. Additionally, Article 1386-12-1[11] mandates that the defense is void if the manufacturer has not taken sufficient measures within ten years of the product's release to mitigate potential adverse effects.

These provisions impose an obligation of traceability on manufacturers, requiring continuous monitoring of scientific developments relevant to their products. This obligation reflects the precautionary principle increasingly prevalent in contemporary liability law, underscoring the duty of vigilance and proactive risk management expected of modern manufacturers.[12]

Therefore, the rationale for the French legislator's adoption of this provision and the distinction made between defects that appear subsequently is aimed at clarifying whether scientific development risks constitute valid grounds for liability exemption. However, this approach appears to lack soundness.[13]

1.2.2. The Algerian Legislative Stance

The Algerian legal code does not expressly incorporate the defense of scientific development risks within its civil liability provisions, as amended in 2005. However, the acknowledgment of such risks is implied within certain executive decrees. Specifically, Article 9 of Executive Decree No. 97-37[14] articulates that *"considerations related to technical and/or technological advancement may necessitate adjustments to the list of substances authorized for use in cosmetics manufacturing"*.

This stipulation suggests that Algerian legislation recognizes the impacts of scientific and technological advances on regulatory frameworks, albeit with certain limitations:

- The regulation is confined to the cosmetics and personal hygiene sectors.
- It specifically addresses the list of substances authorized or prohibited in the production of cosmetics, thus not extending as a universal principle applicable across all product categories.[15]

Further legislative nuances regarding the acknowledgment of scientific and technological risks are delineated in Article 6[16] of Executive Decree No. 12-203, dated May 6, 2012, which sets forth safety standards for consumer products. This article mandates that *"the conformity of a good or service with mandatory safety requirements must be assessed against the potential risks to consumer health and safety"*. This assessment must account for:

10 In 2004, the legislator repealed para. 2 of Article 1386-12 following France's condemnation by the European Court of Justice in 2002. This was enacted through Law No. 2004-1343 of December 9, 2004, which amended and supplemented Law No. 98-389 of May 19, 1998.

11 Barakat, K. (2014). *Consumer Safety Protection in a Market Economy: A Comparative Study* (These), Algeria. p. 375.

12 Bouddali, M. (2005). Liability of the Manufacturer for Defective Products: A Comparative Study (1st Edition). Algeria: Al-Fajr publishing house. pp. 47-48.

13 Saidi, S. (2015). *Civil Liability of the Manufacturer in Algerian and Comparative Law* (These), Algeria. p. 219.

14 Executive Decree No. 97-37. (1997). Establishing the conditions and modalities for the manufacture, packaging, importation, and marketing of cosmetics and personal hygiene products in the national market. Official journal. Sec. 4. <https://www.joradp.dz/FTP/jo-francais/1997/F1997004.PDF> [Lass access: 11/12/2024].

15 Fattak, A. (2007). The Impact of Competition on the Obligation to Ensure Product Safety (1st Edition). Algeria: University Publishing House. pp. 470-471.

16 Executive Decree No. 12-203 (2012). Concerning the regulations applied to product safety. Official journal. Sec. 28. <www.joradp.dz> [Lass access 11/12/2024].

- Applicable regulations and standards,
- The prevailing state of knowledge and technology.

Additionally, Article 12 of Executive Decree No. 91-04[17] enforces that *"the sale of any materials intended for contact with food is prohibited unless manufactured according to good manufacturing practices"*.

These provisions underscore that the term "good" in the context of manufacturing practices implies a requirement for compliance with sophisticated scientific standards, not merely conventional norms.

2. LIMITATIONS ON LIABILITY EXEMPTION DUE TO SCIENTIFIC DEVELOPMENT RISKS

The adoption of scientific development risks as grounds for negating a manufacturer's civil liability is constrained by key legislative exceptions aimed at protecting consumer welfare, especially with regard to products posing substantial health risks. Germany was a pioneer in articulating these limitations through a landmark ruling by the Federal Court of Justice, most notably encapsulated in the Hühnerpest decision.[18] This section examines these specific exceptions in detail.

2.1. Products Related to the Human Body and Derivatives

Liability exemptions for products associated with the human body or derived from it are strictly defined, reflecting a legal doctrine that mitigates risks associated with these biologically sensitive products. This part first outlines the scope and definition of such products and then analyzes the applicability of the exemptions in this context.

2.1.1. Definition of Human Body Products and Derivatives

The French legislator delineates products related to the human body in Article 793, paragraph one of the French Public Health Code.[19] However, this legislation does not offer an exhaustive list, leading to interpretive challenges regarding which components are included under the definition of human body elements. Under French law, such products encompass all anatomical components, including cells, bones, tissues, and blood.[20]

Derivatives of human body products generally consist of genetically engineered materials produced through biotechnological processes, primarily utilized in pharmaceutical manufacturing. Within the broader legal framework, these derivatives are effectively treated as medications.[21]

2.1.2. Scope of the Exemption

Article 1245-11 of the French Civil Code explicitly provides that *"the producer cannot invoke the exemption provided in clause four of Article 1245-10 when the damage arises from an element of the human body or its derivatives"*.[22] This framework was first institutionalized in Germany and reaffirmed in the **Contargan case** (Thalidomide), where a pharmaceutical caused congenital deformities in unborn children. Initially, the teratogenic effects of the drug were not evident, but as adverse effects emerged,

17 Executive Decree No. 91-04 (1991). Concerning materials intended to come into contact with food and substances used to clean these materials. Official journal, Sec. 4. <www.joradp.dz> [Lass access 11/12/2024].

18 Dehrib, I., Naceur, F, (2022). The Impact of Scientific Development Risks on Civil Liability Rules. *Journal of the Voice of Law*, 9(1). p. 934.

19 Khamis, S., (2015). *Strict Liability of the Manufacturer as a Compensation Mechanism for Victims of Defective Product Accidents: A Comparative Study*, (Master's thesis), Algeria. p. 148.

20 Rahmani, M. M. (2016). Civil Liability for Defective Products, Algeria: Houma Publishing and Distribution. p. 252.

21 Dehrib, I., Naceur, F., ibid. p. 936.

22 Article 1245-11 of the French Civil Code: "The producer cannot invoke the exemption cause provided in paragraph 4 of Article 1245-10 when the damage is caused by an element of the human body or by products derived from it".

the manufacturer was legally compelled to compensate the affected parties.[23]

In addition, Article 16, paragraph one, of the French Civil Code underscores that the human body and its elements are not subject to proprietary rights. This principle was reinforced by the French Court of Cassation in its ruling following the contaminated blood scandal,[24] where it held that an intrinsic defect in blood, even if undetectable, does not justify an exemption from liability.[25]

French legislation makes no distinction between products directly extracted from the human body (e.g., blood, tissues, and cells) and those subject to laboratory modification. Certain biologically derived products, such as insulin,[26] are classified as medications, raising questions regarding whether these products qualify as human body derivatives, thereby excluding manufacturers from invoking scientific development risks as grounds for exemption.

The enactment of the Law of February 26, 2007, and Directive of April 26, 2007, classified various human-derived products as pharmaceuticals under Article 5121-3 of the French Public Health Code. Exceptions were established for organs, tissues, cells, and labile blood products—defined as those with a shelf life not exceeding one year.[27]

In its jurisprudence related to the contaminated blood case, the French Court of Cassation upheld that *"an internal defect in blood, even if undetectable, does not constitute grounds for liability exemption"*. Nevertheless, pharmaceutical producers continue to benefit from liability exemptions. Article 1386-12-1 further specifies that producers cannot absolve themselves of liability by invoking scientific development risks if the damage arises from an element of the human body or its derivatives. This clause applies, for instance, to cases involving the removal and use of human organs by blood transfusion centers, sperm banks, and organ transplant centers, a principle affirmed by the French Court of Cassation on July 9, 1996.

The French Minister of Justice presented a proposal to the National Assembly advocating for the exclusion of pharmaceutical products from the scientific development risk exemption. Although this proposal initially passed in the preliminary voting stage, it was ultimately rejected in the final vote. Nonetheless, the Assembly approved the exclusion of human body components and their derivatives from the scope of the scientific development risk exemption.

2.2. The Obligation of Traceability

The legislation mandates a traceability obligation for manufacturers, compelling them to monitor their products post-distribution when subsequent scientific and technical knowledge uncovers emergent risks that could harm consumers. Failure to fulfill this obligation triggers manufacturer liability. This responsibility, known as *l'obligation de suivi*, is integral to modern product liability law.

2.2.1. Definition of Traceability Obligation

The **French legislator** has established a continuous monitoring duty[28] for manufacturers, which is an extension of the **precautionary principle** articulated in the Algerian law. Specifically, Article 3, paragraph 6 of Algeria's Law No. 06-

23 Bouddali, M., ibid. p. 46.

24 Laroumet, Ch. (2000). The Concept of Development Risk, Paris: Dalloz. p. 1589.

25 Bouddali, M. ibid. pp. 47-48.

26 Tiguerine, S., *Consumer Protection Against the Risks of Scientific and Technological, Development: A Comparative*, (Master's degree), Algeria. p. 102.

27 Khamis, S., ibid. p. 150.

28 German Court Rulings on Traceability Obligation: The German judiciary introduced the traceability obligation in decisions issued on May 17, 1981, in two cases concerning a pesticide used for spraying apple trees. According to this obligation, the producer remains responsible for monitoring the product post-market, ensuring oversight in light of scientific and technical advancements at both national and international levels. See Abdel-Moati Khayal M.-S. (2003). Liability for Defective Products and Development Risks, (1st Ed.). Cairo: Arabic Renaissance Publishing House. p. 53.

10[29] states: *"The precautionary principle obliges that the absence of current technologies, due to the state of scientific and technical knowledge, should not delay the implementation of cost-effective, proportionate measures to prevent significant environmental damage"*. This principle, although primarily applied in environmental protection contexts in Algeria, has broader implications in product safety under French law.

This traceability obligation compels manufacturers to keep track of their products post-market in light of evolving scientific and technical information that may reveal new risks.

The Algerian legislator provides a comprehensive definition of traceability in Article 5 of Executive Decree No. 12-203,[30] which states: *"Traceability is the process that enables the tracking of a product's movement through production, packaging, and importation, while also identifying the producer, importer, intermediaries in distribution, and final purchasers through documentation"*. In the service sector, traceability is similarly defined as *"the documentation of each stage of service provision for the consumer benefiting from it"*.

2.2.2. The Traceability Obligation in French Lawtainable Urban Planning Results

The approach of the French legislator to the traceability obligation can be understood in two distinct stages:

- Pre-2004 amendments under Law No. 98-389 addressing defective products.
- Post-2004 amendments to the French Civil Code.[31]

A. Traceability Obligation under Law No. 98-389 on Defective Products

Law No. 98-389 established an early form of the traceability obligation in Article 1386-12, paragraph 2, stipulating that *"the producer cannot invoke the exemptions provided in paragraphs 4 and 5 of Article 11 if, despite the defect becoming evident within ten years of the product's entry to the market, the producer fails to implement necessary preventive measures against potential harm"*. This provision mandates that manufacturers take all reasonable measures to avert risks emerging from their products once released into circulation, particularly when evolving scientific and technical knowledge reveals defects that were initially undetectable.

B. Traceability Obligation Post-2004 Amendments

Significant revisions were made to Article 1386-12 through Law No. 04-1343, enacted on December 9, 2004, which repealed the specific traceability clause in paragraph 2. In its place, a regulatory mandate under Article 221-1-2 of the French Consumer Code, established by Ordinance No. 2004-670[32], now governs traceability obligations. Article L. 221-1-2 of the Consumer Code provides that:

"Producers, importers, and service providers must make available to consumers all necessary information to avoid potential risks associated with the consumption and/or use of the product or service throughout its normal or reasonably expected lifespan. In this regard, they are obligated to implement measures commensurate with the characteristics of the goods or services they provide, specifically to:

- *Identify risks associated with their products or services upon entry to the market or during usage;*

29 Law No. 03-10 (2003). On environmental protection within the framework of sustainable development. Sec. 43. <https://www.joradp.dz/FTP/JO-ARABE/2003/A2003043.pdf?znjo=43> [Lass access: 12/12/2024].

30 Executive Decree No. 12-203 (2012). Concerning the Rules Applied to Products. Official journal. Sec. 28. <https://www.joradp.dz/FTP/JO-ARABE/2012/A2012028.pdf?znjo=28> [Lass access: 12/12/2024].

31 Law No. 2004-1343 (2004). On the Simplification of Law. Official Journal of the French Republic (J.O.R.F), Sec. 278. <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000256180> [Lass access: 12/12/2024].

32 Decree No. 2004-670 (2004). Transposing Directive 2001/95/EC on the general safety of products and adapting national legislation to Community law in the field of product safety and conformity, Official Journal of the French Republic. Sec. 159 <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000256180> [Lass access: 12/12/2024].

- *Undertake preventive actions to mitigate these risks, including product recalls, issuing effective consumer warnings, retrieving products from consumers, or suspending services as necessary".*

This mandate, known as the obligation of traceability (*obligation de traçabilité*), entails the systematic tracking of a product's lifecycle, from initial production to final consumer use, to ensure that any newly identified risks are promptly managed.[33]

German jurisprudence also emphasizes the ongoing nature of the traceability obligation, indicating that it does not conclude after a fixed period post-distribution. German law requires that manufacturers continually monitor their products, even post-marketing, to keep abreast of technological advancements in their sector. This comprehensive duty includes alerting consumers about potential risks from defective products and, in certain cases, removing products from the market or monitoring them to control risks.[34]

Thus, the traceability obligation detailed in the French Consumer Code offers a more expansive approach than that previously outlined in the Civil Code, covering all potential risks, whether stemming from scientific advancements or other sources.

CONCLUSION

This study elucidates that the invocation of scientific development risks serves as a contemporary defensive strategy for manufacturers to eschew their civil liability. There remains, however, a significant contention regarding the appropriateness of scientific development risks as a valid basis for absolving civil liability. A faction within the scholarly community supports this recognition, advocating that failure to acknowledge such risks stifles scientific progress and industrial innovation. They argue that the absence of this defense translates into manufacturers bearing prohibitive costs related to compensations and insurance premiums for unforeseeable risks, potentially stymieing industrial development.

Conversely, the application of this defense is not absolute, as manufacturers cannot employ it in exceptional cases, notably with products inherently linked to the human body. Additionally, manufacturers are obligated to maintain vigilance over their products once they enter the market, adhering to the traceability obligation.

Recommendations and Suggestions: It is proposed to establish compensation funds aimed at providing redress for victims of defective products, especially when subsequent scientific advancements post-market reveal that these products lack requisite safety features.

In summation, while Algerian legislation has not yet explicitly acknowledged scientific development risks as a viable ground for civil liability exemption—unlike comparative jurisdictions that have codified it among specific exculpatory causes—there is a pressing need for legislative integration. The Algerian legislator should incorporate scientific development risks as a formal exemption within product liability rules, supplemented by additional provisions that elucidate Articles 140 bis and 140 bis 1. Furthermore, it is imperative to introduce legislative measures aimed at addressing the complexities introduced by scientific development risks.

33 Khamis, S., ibid. p. 153.

34 Rivasi, M. (2000, Oct. 19). Information Report No. 2669 on the European Commission Green Paper on Civil Liability for Defective Products. Submitted to the President of the National Assembly. p. 96. <https://www.assemblee-nationale.fr/europe/rap-info/i2669.pdf > [Lass access: 12/12/2024].

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COMPULSORY REGISTRATION OF PROPERTY RIGHTS IN THE NAME OF THE NON-DEBTOR OWNER BY THE CREDITOR'S LEGALLY BINDING DECISION ACCORDING TO GEORGIAN LEGISLATION (Obligation to Register Real Estate – Review of a Specific Court Decision)

Nikoloz Pkhaladze
nikushapkhaladzelawyer@gmail.com

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

ABSTRACT

The enforcement of a legally valid court decision is the right of the person who has restored his violated right through the court, and the enforcement of this right by the interested person (creditor) through coercion (registration of the property right in the public register) also requires a new court decision. Court proceedings and judicial practice have long known the legal interest of the party and the claim of appropriation based on this interest, at which time the interested party applies to the court with the request for forced registration of the defendant as the owner of the item, and this happens in the case when the person (the true debtor) avoids registering his ownership right with the Civil Registry Office in the National Public Registry Agency. Employees of administrative authorities often do not investigate certain circumstances in administrative proceedings, which in themselves violate the rights of individual persons, and this leads to provoking disputes in Georgian courts, which are sometimes fairly or sometimes

unfairly carried out against the circle of persons whose constitutionally recognized rights have been violated. The purpose of this article is to develop critical thinking in the reader based on a specific court decision so that he or she can conduct a broad analysis of the content of the court's decision that has entered into legal force and the features of its execution.

KEYWORDS: Non-debtor owner, Creditor, Public Registry

INTRODUCTION

N.P. filed a civil lawsuit in the Tbilisi City Court. The subject of the dispute was recognition as the owner of the immovable object, invalidation of the mortgage agreement, and cancellation of the enforcement document by the notary. The lawsuit was based on the criminal verdict according to which the following circumstances were established: J.B. using a fake power of attorney in the National Public Registry Agency, N.P., self-registration of the owned immovable object and then loading it with the right of a mortgage in favor of the creditor.[1]

After the end of the dispute, N.P.'s right of ownership was restored to the disputed real estate, however, based on the fact that Articles 312 and 185 of the Civil Code of Georgia serve to protect the interests of the bona fide purchaser, N.P.'s right of mortgage remained on the property in favor of the creditor.[2]

Based on the fact that N.P. was not a real debtor and the loss of his property rights resulted from an illegal decision of the public registry, N.P. filed an administrative lawsuit in the Administrative Affairs Board of the Tbilisi City Court, with a request to impose material damages against the defendant – administrative body.[3]

ADMINISTRATIVE CLAIM AGAINST THE LEPL NATIONAL AGENCY OF PUBLIC REGISTRY FOR THE IMPOSITION OF COMPENSATION FOR DAMAGES

During the dispute between N.P. and the National Agency of Public Registry, the creditor applied to the National Public Registry Agency and demanded the enforcement of the claim settled by N.P. in the civil dispute. As we mentioned in the introductory part, the lawsuit of N.P. was partially satisfied, namely in the part of the owner's certificate, although N.P. did not register this right in the public registry agency. The creditor indicated in his statement that his legal interest was the sale of the mortgaged real estate,[4] although based on the fact that N.P.'s mortgaged immovable property was not registered, for this reason, the enforcement proceedings could not continue, which hindered the enforcement process. The creditor submitted a legally binding decision to the public register, according to one of the clauses of which N.P. was known as the owner, however, as you know, the creditor did not have a writ of execution and was not authorized to execute such a decision for one simple reason: N.P.'s claim related to recognition of the real estate as its owner, the creditor was not a party in this dispute.

REVIEW OF THE COURT DECISION RELATED TO THE FORCED EXECUTION OF THE DECISION THAT ENTERED INTO LEGAL FORCE BY THE LEPL NATIONAL AGENCY OF PUBLIC REGISTRY

The National Agency of the Public Register, without considering N.P.'s legal interest, against his will, registered the right of ownership and issued the relevant extract. After that, the enforcement proceedings were resumed. N.P. filed an administrative lawsuit in the Tbilisi City Court

1 Tbilisi City Court. (2017, May 31). Judgment on the criminal case, N 1/630-17.

2 Tbilisi Court of Appeal, Civil Affairs Chamber. (2019, April 15). Decision, N 2b/298-18.

3 Tbilisi City Court, Administrative Affairs Board. (2021, September 21). Decision, N 3/4312-20.

4 Tbilisi City Court, Civil Affairs Board. (2017, November 30). Decision, N 2/15811-17.

and demanded the annulment of the individual administrative-legal act, according to which the property right was registered in his name without showing his will. The lawsuit was based on several circumstances, namely:

The first and second parts of Article 95[5] of the General Administrative Code of Georgia – "Participation of interested parties in administrative proceedings":

1. The administrative body has the right to involve the interested party in the administrative proceedings based on his request, and in the case defined by the law, he is obliged to ensure his participation in the administrative proceedings;
2. The administrative body is obliged to inform the interested party about the initiation of administrative proceedings if an individual administrative-legal act may worsen his legal situation and to ensure his participation in the administrative proceedings.

In the case under consideration, it is established that the creditor applied to the National Agency of Public Registry and requested N.P.'s registration as the owner; the administrative body started administrative proceedings based on this application. It is obvious and indisputable that according to Article 95 of the General Administrative Code of Georgia, the most accountable person in this administrative proceeding – N.P. was invited to the discussion. It should have been, however, that the National Agency of Public Registry violated the norms of the above-mentioned article and decided compulsory, without N.P.'s participation.

The first and second parts of Article 96[6] of the General Administrative Code of Georgia – "Investigation of the circumstances of the case":

1. During the administrative proceedings, the administrative body is obliged to investigate all the circumstances that are important for the case and to decide based on the evaluation and mutual reconciliation of these circumstances;
2. It is not allowed to base the issuance of an individual administrative-legal act on a circumstance or fact that has not been investigated by the administrative body in accordance with the law.

Based on the above, it is unequivocally confirmed that during the lawsuit proceedings, the creditor was not a party to the claim for the restoration of ownership rights. Based on the above, the legally binding decision of the Tbilisi City Court and the writ of execution were not issued to the creditor. The party interested in the execution of the said request is N.P., based on whose request a legally binding decision and an enforcement document will be issued. It is N.P. The person who, based on the existing legal situation, has the right to demand the execution of a legally effective decision within the time specified by the legislation and by coercion between them.

JUDICIAL PRACTICE

Georgian litigation and court practice have long known the legal interest of the party and the claim based on this interest (attribution), where the interested party applies to the court with the request to register the defendant as the forced owner of the item. To substantiate this reasoning, we will refer to the practice of the Supreme Court of Georgia,[7] Case N As-1154-1299-08 (subject of clarification): Obligation to register property rights in the public register. The mentioned decision is a clear example of how the creditor should act to register the N.P.'s defective real estate. The creditor is obliged to file a claim in the Tbilisi City Court and justify his legal interest in the Registration of the real estate in his name.

5 Article 95 of the General Administrative Code of Georgia.

6 Ibid., Article 96.

7 Nachkebia, A. (2000-2013). *Definitions of civil legal norms in the practice of the Supreme Court* (Case N As-1154-1299-08, Vol., p. 111).

SUBSTANTIATION OF THE DECISION OF THE ADMINISTRATIVE COURT

The court of first instance did not satisfy N.P.'s administrative lawsuit, and the aforementioned was substantiated by the fact that the civil decision submitted for registration was legally binding, and the legally binding decision is binding on the entire territory of the country, and it must be enforced, although the panel ignored the fact that the legally binding decision was submitted by an unauthorized person, who, as already mentioned above, did not represent a party in that civil dispute.[8]

ENFORCEMENT WRIT AND THE ESSENCE OF THE ATTRIBUTIVE CLAIM

Given that in this article, we are talking about the registration of property rights, it is necessary to correctly explain the essence of the writ of execution and its need at the stage of registration. Immediately after the legally effective decision in favor of the plaintiff, the person can receive a copy of the same decision certified with a seal and an enforcement sheet, which is the resolution part of the same decision, in which it is unequivocally indicated in what part the person's claim requirements were satisfied. By submitting the two above-mentioned documents, and based on the relevant application, the National Agency of the Public Registry, starts administrative proceedings, after which it approves or rejects the application of the person. It should be noted that if the claimant has recovered his damaged property right by the force of the court, the enforcement of this decision is only the right of the claimant and not of any other third party. If the third "interested person" believes that his right is violated by the non-enforcement of the legally effective decision (the enforcement process is suspended, and he cannot meet his requirements), then he must request the assignment of the ownership right to the non-debtor owner with an independent lawsuit to indicate his legal interest as well. The attributed lawsuit is also called an enforcement lawsuit,[9] since the court decision issued in connection with it is the basis for issuing a writ of execution and can be enforced if the defendant does not voluntarily fulfill the obligations imposed on him by the court. For example, the debtor has a debt to a creditor that he does not pay, the debtor inherits real estate, which he does not register because he believes that the creditor will make it enforceable as soon as it becomes a civil turnover. If the creditor finds out about the existence of the inheritance certificate, does the creditor have the right to bypass the court and register the inheritance property in the name of the debtor by applying the registration authority? In this case, the creditor is obliged to file a claim in court and demand the obligation to register the right of ownership and to indicate the existence of his overdue claims against the debtor as a legal interest was not a personal debtor of the creditor, and that is why the court had to judge whether the National Agency of the Public Registry of Public Registry had the right to carry out this type of registration, especially at a time when the National Agency of Public Registry represented the defendant in a dispute over compensation for damages initiated by N.P.

CONCLUSION

In conclusion, I would like to mention that the National Agency of Public Registry of Georgia under the Ministry of Justice of Georgia cannot fulfill the fundamental tasks assigned to it. The Ministry of Justice of Georgia is the guarantee of legal security in our state; it is obliged to correctly reflect the rights recognized by the

8 Administrative Affairs Board of the Tbilisi City Court. (2023, March 2). *Decision No. 3/6202-21*.

9 Kurdadze, Sh., Khunashvili, N. (2015). Civil Procedural Law of Georgia, Second Completed and Revised Edition, "Meridian" Publishing House, p. 355.

constitution in its actions, which is a necessary condition in a democratic state. There are positive signs in the Georgian judicial system in this regard since individual judges appointed to the Chamber of Administrative Affairs are very carefully and thoughtfully considering administrative disputes, which is welcomed.

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კრედიტორის მიერ კანონიერ ძალაში შესული გადაწყვეტილებით არამოვალე მესაკუთრის სახელზე საკუთრების უფლების იძულებითი რეგისტრაცია ქართული კანონმდებლობის მაგალითზე

(უძრავი ქონების რეგისტრაციის დავალდებულება – კონკრეტული სასამართლო გადაწყვეტილების მიმოხილვა)

ნიკოლოზ ფხალაძე
nikushapkhaladzelawyer@gmail.com

სამართლის დოქტორანტი, კავკასიის საერთაშორისო უნივერსიტეტი, ხელმძღვანელი ადვოკატი, საადვოკატო ბიურო „ფხალაძე და პარტნიორები“, საქართველო

აბსტრაქტი

კანონიერ ძალაში შესული სასამართლო გადაწყვეტილების აღსრულება სწორედ იმ პირის უფლებაა, რომელმაც სასამართლოს მეშვეობით მისი დარღვეული უფლება აღიდგინა, ხოლო დაინტერესებული პირის (კრედიტორის) მიერ ამ უფლების იძულების გზით აღსრულება (საჯარო რეესტრში საკუთრების უფლების აღრიცხვა), ასევე, საჭიროებს ახალ სასამართლო გადაწყვეტილებას. სასამართლოს სამართალწარმოება და სასამართლო პრაქტიკა დიდი ხანია იცნობს მხარის იურიდიულ ინტერესს და ამ ინტერესის საფუძველზე დაფუძნებულ მიკუთვნებით სარჩელს, რა დროსაც დაინტერესებული მხარე მიმართავს სასამართლოს უძრავ ნივთთან დაკავშირებით მოპასუხის იძულებით მესაკუთრედ რეგისტრაციის მოთხოვნით, ეს კი ისეთ შემთხვევაში ხდება, როდესაც პირი (ნამდვილი მოვალე) თავს არიდებს მისი

საკუთრების უფლების რეგისტრაციას სსიპ საჯარო რეესტრის ეროვნულ სააგენტოში. ადმინისტრაციული ორგანოს თანამშრომლები ხშირად არ იკვლევენ გარკვეულ გარემოებებს ადმინისტრაციულ წარმოებაში, რაც თავისთავად ცალკეულ პირთა უფლებებს ლახავს, ეს კი იწვევს ქართულ სასამართლოებში დავის პროვოცირებას, რაც ხან სამართლიანად და ხან უსამართლოდ სრულდება იმ პირთა წრის მიმართ, რომელთაც კონსტიტუციით აღიარებული უფლებები დაერღვათ. ამ სტატიის მიზანია კონკრეტული სასამართლოს გადაწყვეტილების მიხედვით მკითხველს კრიტიკული აზროვნება ჩამოუყალიბოს, რათა მან ფართო ანალიზი გაუკეთოს სასამართლოს კანონიერ ძალაში შესული გადაწყვეტილების შინაარს და მისი აღსრულების თავისებურებებს.

საკვანძო სიტყვები: არამოვალე მესაკუთრე, კრედიტორი, საჯარო რეესტრი

შესავალი

ნ.ფ.-მ სამოქალაქო სარჩელი აღძრა თბილისის საქალაქო სასამართლოში. დავის საგანს წარმოადგენდა: უძრავი ნივთის მესაკუთრედ აღიარება, იპოთეკის ხელშეკრულების ბათილად ცნობა და ნოტარიუსის მიერ სააღსრულებო ფურცლის გაუქმება. სარჩელი ეფუძნებოდა სისხლის სამართლის განაჩენს, რომლის მიხედვითაც დადგენილი იყო შემდეგი გარემოებები: ჯ.ბ.-მ ყალბი მინდობილობის გამოყენებით საჯარო რეესტრის ეროვნულ სააგენტოში მოახდინა ნ.ფ.-ს საკუთრებაში არსებული უძრავი ნივთის თავის თავზე რეგისტრაცია, ხოლო შემდგომ, კრედიტორის სასარგებლოდ, იპოთეკის უფლებით დატვირთვა[1].

დავის დასრულების შემდეგ ნ.ფ.-მ საკუთრების უფლება აღიდგინა სადავო უძრავ ქონებაზე, თუმცა, იქიდან გამომდინარე, რომ საქართველოს სამოქალაქო კოდექსის 312-ე და 185-ე მუხლები კეთილსინდისიერი შემძენის ინტერესების დაცვას ემსახურება, ნ.ფ.-ს საკუთრებაზე დარჩა იპოთეკის უფლება კრედიტორის სასარგებლოდ[2].

იქიდან გამომდინარე, რომ ნ.ფ. არ წარმოადგენდა ნამდვილ მოვალეს, ხოლო მისი საკუთრების უფლების დაკარგვა გამოიწვია საჯარო რეესტრის უკანონო გადაწყვეტილებამ, ნ.ფ.-მ ადმინისტრაციული სარჩელი აღძრა თბილისის საქალაქო სასამართლოს ადმინისტრაციულ საქმეთა კოლეგიაში, მოპასუხე ადმინისტრაციული ორგანოს მიმართ მატერიალური ზიანის ანაზღაურების დაკისრების მოთხოვნით[3].

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ნ.ფ.-სა და საჯარო რეესტრის ეროვნული სააგენტოს შორის დავის მიმდინარეობისას, კრედიტორმა სსიპ საჯარო რეესტრის ეროვნულ სააგენტოს განცხადებით მიმართა და მოითხოვა ნ.ფ.-ს მიერ სამოქალაქო დავაში დაკმაყოფილებული სარჩელის აღსრულება. როგორც შესავალ ნაწილში აღვნიშნეთ, ნ.ფ.-ს სარჩელი ნაწილობრივ იქნა დაკმაყოფილებული[4], კერძოდ: მესაკუთრედ ცნობის ნაწილში, თუმცა ამ უფლების რეგისტრაცია ნ.ფ.-ს საჯარო რეესტრის სააგენტოში არ ჰქონდა განხორციელებული. კრედიტორი თავის განცხადებაში უთითებდა, რომ მის იურიდიულ ინტერესს წარმოადგენდა იპოთეკით დატვირთული უძრავი

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3 თბილისის საქალაქო სასამართლო, ადმინისტრაციულ საქმეების კოლეგია. (2021, 21 სექტემბერი). გადაწყვეტილება, *N 3/4312-20*.

4 თბილისის საქალაქო სასამართლო, სამოქალაქო საქმეების კოლეგია. (2017, 30 ნოემბერი). გადაწყვეტილება, *N 2/15811-17*.

ნივთის რეალიზაცია, თუმცა, იქიდან გამომდინარე, რომ ნ.ფ. არ ირეგისტრირებდა იპოთეკით დატვირთულ უძრავ ნივთს, ამ მიზეზით სააღსრულებო წარმოება ვეღარ გრძელდებოდა, რაც ხელს უშლიდა აღსრულების პროცესს. კრედიტორმა საჯარო რეესტრში წარადგინა კანონიერ ძალაში შესული გადაწყვეტილება, რომლის ერთ-ერთი პუნქტის მიხედვით ნ.ფ. მესაკუთრედ იყო ცნობილი, თუმცა, როგორც მოგეხსენებათ, კრედიტორს არ ჰქონდა სააღსრულებო ფურცელი და არ იყო უფლებამოსილი ამგვარი გადაწყვეტილება აღესრულებინა ერთი უბრალო მიზეზით – ნ.ფ.-ს სასარჩელო მოთხოვნა, რომელიც ეხებოდა უძრავი ნივთის მის მესაკუთრედ ცნობას, ამ დავაში კრედიტორი მხარე არ გახლდათ.

2. სსიპ საჯარო რეესტრის ეროვნული სააგენტოს მიერ კანონიერ ძალაში შესული გადაწყვეტილების იძულებით აღსრულებასთან დაკავშირებული სასამართლო გადაწყვეტილების მიმოხილვა

სსიპ საჯარო რეესტრის ეროვნულმა სააგენტომ ნ.ფ.-ს იურიდიული ინტერესის გათვალისწინებით გარეშე, მისი ნების საწინააღმდეგოდ საკუთრების უფლება დაურეგისტრირა მას და გასცა შესაბამისი ამონაწერი. ამის შემდეგ სააღსრულებო წარმოებაც განახლდა. ნ.ფ.-მ ადმინისტრაციული სარჩელი აღძრა თბილისის საქალაქო სასამართლოში და მოითხოვა ინდივიდუალური ადმინისტრაციული სამართლებრივი აქტის ბათილად ცნობა, რომლის მიხედვითაც მისი ნების გამოუხატავად მოხდა მის სახელზე საკუთრების უფლების რეგისტრაცია. სარჩელი ეფუძნებოდა რამდენიმე გარემოებას, კერძოდ: საქართველოს ზოგადი ადმინისტრაციული კოდექსის 95-ე მუხლის პირველი და მეორე ნაწილი[5], „დაინტერესებული მხარის მონაწილეობა ადმინისტრაციულ წარმოებაში“.

1. ადმინისტრაციული ორგანო უფლებამოსილია ადმინისტრაციულ წარმოებაში ჩააბას დაინტერესებული მხარე მისი მოთხოვნის საფუძველზე, ხოლო კანონით განსაზღვრულ შემთხვევაში ვალდებულია უზრუნველყოს მისი მონაწილეობა ადმინისტრაციულ წარმოებაში;
2. ადმინისტრაციული ორგანო ვალდებულია ადმინისტრაციული წარმოების დაწყების შესახებ აცნობოს დაინტერესებულ მხარეს, თუ ინდივიდუალური ადმინისტრაციული სამართლებრივი აქტით შეიძლება გაუარესდეს მისი სამართლებრივი მდგომარეობა, და უზრუნველყოს მისი მონაწილეობა ადმინისტრაციულ წარმოებაში.

განსახილველ შემთხვევაში დადგენილია, რომ კრედიტორმა განცხადებით მიმართა საჯარო რეესტრის ეროვნულ სააგენტოს და მოითხოვა უძრავ ქონებაზე ნ.ფ.-ს მესაკუთრედ რეგისტრაცია. ადმინისტრაციულმა ორგანომ ამ განცხადების საფუძველზე დაიწყო ადმინისტრაციული წარმოება. აშკარა და უდავოა, რომ საქართველოს ზოგადი ადმინისტრაციული კოდექსის 95-ე მუხლის მიხედვით ამ ადმინისტრაციულ წარმოებაში ყველაზე ანგარიშგასაწევი და განხილვაში მოსაწვევი დაინტერესებული პირი ნ.ფ. უნდა ყოფილიყო, თუმცა საჯარო რეესტრის ეროვნულმა სააგენტომ დაარღვია ზემოაღნიშნული მუხლის ნორმები და გადაწყვეტილება იძულებით აღასრულა ნ.ფ.-ს მონაწილეობის გარეშე.

საქართველოს ზოგადი ადმინისტრაციული კოდექსის 96-ე[6] მუხლის პირველი და მეორე ნაწილის („საქმის გარემოებათა გამოკვლევა“) მიხედვით:

1. ადმინისტრაციული ორგანო ვალდებულია ადმინისტრაციული წარმოებისას გამოიკვლიოს საქმისათვის

5 საქართველოს ზოგადი ადმინისტრაციული კოდექსი, 95-ე მუხლი. (2023). *გამომცემლობა „ბონა კაუზა“*, ქ. თბილისი.

6 საქართველოს ზოგადი ადმინისტრაციული კოდექსი, 96-ე მუხლი. (2023). *გამომცემლობა „ბონა კაუზა“*, ქ. თბილისი.

მნიშვნელობის მქონე ყველა გარემოება და გადაწყვეტილება მიიღოს ამ გარემოებათა შეფასებისა და ურთიერთშეჯერების საფუძველზე;

2. დაუშვებელია, ინდივიდუალურ ადმინისტრაციულ-სამართლებრივი აქტის გამოცემას საფუძვლად დაედოს ისეთი გარემოება ან ფაქტი, რომელიც კანონით დადგენილი წესით არ არის გამოკვლეული ადმინისტრაციული ორგანოს მიერ.

ზემოაღნიშნულიდან გამომდინარე, ერთმნიშვნელოვნად დასტურდება, რომ სასარჩელო წარმოებისას საკუთრების უფლების აღდგენის სასარჩელო მოთხოვნაზე კრედიტორი მხარე არ გახლდათ. სწორედ აღნიშნულიდან გამომდინარე კრედიტორზე არ გაცემულა თბილისის საქალაქო სასამართლოს კანონიერ ძალაში შესული გადაწყვეტილება და სააღსრულებო ფურცელი. აღნიშნული მოთხოვნის აღსრულების დაინტერესებული მხარე არის ნ.ფ., რომლის მოთხოვნის საფუძველზეც გაიცემა კანონიერ ძალაში შესული გადაწყვეტილება და სააღსრულებო ფურცელი. სწორედ ნ.ფ. არის ის პირი, რომელსაც არსებული სამართლებრივი მდგომარეობიდან გამომდინარე ხელეწიფება კანონმდებლობით განსაზღვრულ დროში მოითხოვოს კანონიერ ძალაში შესული გადაწყვეტილების აღსრულება, მათ შორის, იძულებით.

სასამართლო პრაქტიკა

საქართველოს სამართალწარმოება და სასამართლო პრაქტიკა დიდი ხანია იცნობს მხარის იურიდიულ ინტერესს და ამ ინტერესის საფუძველზე დაფუძნებულ (მიკუთვნებით) სარჩელს, სადაც დაინტერესებული მხარე მიმართავს სასამართლოს ნივთთან დაკავშირებით მოპასუხის იძულებით მესაკუთრედ რეგისტრაციის მოთხოვნით. ამ მსჯელობის დასაბუთების მიზნით მოვიხმობთ საქართველოს უზენაესი სასამართლოს პრაქტიკას საქმე N ას – 1154-1299-08 – განმარტების საგანი: საკუთრების უფლების საჯარო რეესტრში რეგისტრაციის დავალდებულება[7]. აღნიშნული გადაწყვეტილება ნათელი მაგალითია იმისა, თუ როგორ უნდა მოიქცეს კრედიტორი იმისთვის, რომ საკუთრების უფლებით დაურეგისტრიროს ნ.ფ.-ს უფლებრივად ნაკლიანი უძრავი ნივთი. კრედიტორი ვალდებულია მიკუთვნებითი სარჩელი აღძრას თბილისის საქალაქო სასამართლოში და დაასაბუთოს თავისი იურიდიული ინტერესი. სწორედ ასეთი ფორმით უნდა მოხდეს ნ.ფ.-ს სახელზე უძრავი ქონების რეგისტრაცია.

ადმინისტრაციული სასამართლოს გადაწყვეტილების დასაბუთება

პირველი ინსტანციის სასამართლომ არ დააკმაყოფილა ნ.ფ.-ს ადმინისტრაციული სარჩელი, რაც დაასაბუთა იმით, რომ სარეგისტრაციოდ წარდგენილი სამოქალაქო გადაწყვეტილება კანონიერ ძალაში იყო შესული, ხოლო კანონიერ ძალაში შესული გადაწყვეტილება სავალდებულოა ქვეყნის მთელ ტერიტორიაზე და იგი უნდა აღსრულდეს. თუმცა კოლეგიამ ყურადღების მიღმა დატოვა ის ფაქტი, რომ კანონიერ ძალაში შესული გადაწყვეტილება არაუფლებამოსილი პირის მიერ იყო წარდგენილი, რომელიც, როგორც უკვე ზემოთ აღინიშნა, მხარეს არ წარმოადგენდა იმ სამოქალაქო დავაში[8].

სააღსრულებო ფურცელი და მიკუთვნებითი სარჩელის არსი

იქიდან გამომდინარე, რომ ამ სტატია-

7 ნაჭყებია, ა. (2000-2013). *სამოქალაქოსამართლებრივი ნორმების განმარტებები უზენაესი სასამართლოს პრაქტიკაში*, საქმე N ას-1154-1299-08, გვ. 111.

8 თბილისის საქალაქო სასამართლოს ადმინისტრაციულ საქმეთა კოლეგია. (2023, მარტი 2). *გადაწყვეტილება N 3/6202-21*.

ში საკუთრების უფლების რეგისტრაციაზე ვსაუბრობთ, საჭიროა სწორად აიხსნას სააღსრულებო ფურცლის არსი და მისი საჭიროება რეგისტრაციის ეტაპზე. მოსარჩელის სასარგებლოდ მიღებული კანონიერ ძალაში შესული გადაწყვეტილებისთანავე, პირს შეუძლია მიიღოს ამავე გადაწყვეტილების გერბიანი ბეჭდით დამოწმებული ასლი და სააღსრულებო ფურცელი, რომელიც ამავე გადაწყვეტილების სარეზოლუციო ნაწილია, სადაც ცალსახად არის მითითებული – თუ რა ნაწილში დაკმაყოფილდა პირის სასარჩელო მოთხოვნები. ზემოაღნიშნული ორი დოკუმენტის წარდგენით და შესაბამისი განცხადების საფუძველზე, სსიპ საჯარო რეესტრის ეროვნული სააგენტო იწყებს ადმინისტრაციულ წარმოებას, რის შემდეგაც იგი აკმაყოფილებს ან არ აკმაყოფილებს პირის განცხადებას. უნდა აღინიშნოს, რომ თუ მოსარჩელემ მისი დარღვეული საკუთრების უფლება სასამართლოს ძალით აღიდგინა, ამ გადაწყვეტილების აღსრულებაც მხოლოდ მოსარჩელის უფლებაა და არა სხვა, მესამე პირის. თუ მესამე „დაინტერესებული პირი“ თვლის, რომ კანონიერ ძალაში შესული გადაწყვეტილების არაღსრულებით მისი უფლება ირღვევა (შეჩერებულია სააღსრულებო პროცესი და ვერ იკმაყოფილებს მის მოთხოვნებს), მაშინ მან დამოუკიდებელი სასარჩელო წარმოებით მიკუთვნებითი სარჩელით უნდა მოითხოვოს საკუთრების უფლების დავალდებულება არამოვალე მესაკუთრეზე და, ასევე, მკაფიოდ და ნათლად უნდა მიუთითოს მისი იურიდიული ინტერესიც. მიკუთვნებით სარჩელს აგრეთვე უწოდებენ სააღსრულებო სარჩელსაც[9], ვინაიდან მასთან დაკავშირებით გამოტანილი სასამართლოს გადაწყვეტილება სააღსრულებო ფურცლის გამოწერის საფუძველია და შეიძლება იძულებით აღსრულდეს, თუ მოპასუხე ნებაყოფლობით არ შეასრულებს სასამართლოს მიერ მასზე დაკისრებულ ვალდებულებებს.

მაგალითად, მოვალეს აქვს კრედიტორის ვალი, რომელსაც არ უხდის. მოვალემ მემკვიდრეობით მიიღო უძრავი ქონება, რომელსაც არ ირეგისტრირებს, ვინაიდან თვლის, რომ სამოქალაქო ბრუნვაში მოქცევისთანავე კრედიტორი მას აღსასრულებლად მიაქცევს. იმ შემთხვევაში, თუ სამკვიდრო მოწმობის არსებობის შესახებ კრედიტორი შეიტყობს, აქვს თუ არა კრედიტორს იმის უფლება, რომ სასამართლოს გვერდის ავლით, მარეგისტრირებელ ორგანოში განცხადების შეტანით მოახდინოს სამკვიდრო ქონების აღრიცხვა/რეგისტრაცია მოვალის სახელზე? მოცემულ შემთხვევაში კრედიტორი ვალდებულია მიკუთვნებითი სარჩელი აღძრას სასამართლოში და მოითხოვოს საკუთრების უფლების რეგისტრაციის დავალდებულება, ხოლო იურიდიულ ინტერესად მიუთითოს მისი ვადამოსული მოთხოვნების არსებობა მოვალის მიმართ.

სწორედ ეს არის ის სამართლებრივი გზა, რომელიც კრედიტორმა უნდა გაიაროს, თუმცა, როგორც ზემოთ მოყვანილ კონკრეტულ სასამართლო გადაწყვეტილებაში ვისაუბრეთ, მოსარჩელე ნ.ფ. არ წარმოადგენდა კრედიტორის პირად მოვალეს და სწორედ ამიტომ სასამართლოს უნდა ემსჯელა – ჰქონდა თუ არა უფლება სსიპ საჯარო რეესტრის ეროვნულ სააგენტოს ასეთი ტიპის რეგისტრაცია განეხორციელებინა, მით უმეტეს მაშინ, როდესაც იმავე სააგენტო მოპასუხე მხარე იყო მოსარჩელე ნ.ფ.-ს წინააღმდეგ ზიანის ანაზღაურების დაკისრების მოთხოვნის შესახებ დავაში[10].

დასკვნა

დასკვნის სახით მინდა აღვნიშნო, რომ საქართველოს იუსტიციის სამინისტროში შემავალი სსიპ საჯარო რეესტრის ეროვნული სააგენტო ვერ წყვეტს იმ ფუნდამენტურ ამოცანებს, რომლებიც მას აკისრია. საქართველოს იუსტიციის სამინისტრო სა-

9 ქურდაძე, შ., ხუნაშვილი, ნ. (2015) საქართველოს სამოქალაქო საპროცესო სამართალი, მეორე შევსებული და გადამუშავებული გამოცემა., გამომცემლობა „მერიდიანი“ თბ., გვ. 355.

10 თბილისის სააპელაციო სასამართლოს ადმინისტრაციულ საქმეთა პალატა. (2022, თებერვალი 14). გადაწყვეტილება N 3ბ/2410-21.

მართლებრივი უზრუნველყოფის გარანტია ჩვენს სახელმწიფოში. იგი ვალდებულია კონსტიტუციით აღიარებული უფლებები სწორად და მკაფიოდ ასახოს მის ქმედებებში, რაც დემოკრატიულ სახელმწიფოში აუცილებელი პირობაა. ამ კუთხით ქართულ სასამართლო სისტემაში პოზიტიური წინსვლა შეინიშნება, ვინაიდან ადმინისტრაციულ საქმეთა პალატაში დანიშნული ცალკეული მოსამართლეები ძალიან ყურადღებით და გულისხმიერებით განიხილავენ ადმინისტრაციულ დავებს, რაც მისასალმებელია.

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CONSIDERING AI-GENERATED PAINTINGS AS ARTWORKS IN THE EU FOR THE PURPOSES OF MUSEUM EXHIBITIONS

Goga Kikilashvili
gkikilashvili@ibsu.edu.ge

Doctor of Law, Professor, International Black Sea University,
Accredited Trainer of Mediation of LEPL Mediators Association of Georgia, Georgia

ABSTRACT

The presented article represents an attempt to assess the possibility and perspectives of considering AI-generated works as artworks and objects of museum exhibitions in the European Union. The purpose of the work is to assess whether AI-generated works can be recognized as artwork and if such works can be placed at museums or, on the contrary, if museums are eligible to exhibit and protect works that do not match the definition of the artwork.

For the purposes of the article, legal definitions of the artwork and AI are primarily explored to detect possible authorship and legal subjectivity of the artificial intelligence. Accordingly, the next core topic of discussion is the capacity of museums to maintain ai-generated works explored from the perspective of the definition and purpose of museums as institutions.

The article contains reasoning and assumptions regarding possible scenarios of the authorship of AI and prognoses about awaited legal challenges in the near future. Not all questions raised by the author are met with unambiguous answers, and they are left open for discussion until further development of legal frameworks and case law acquires a certain direction.

KEYWORDS: Artificial Intelligence, AI-generated works, Artwork, AI and copyright, AI as the subject of law, Museums, and AI

INTRODUCTION

The development of Artificial Intelligence (AI) and the dynamic of increasing the realistic character of artworks created using AI gives the basis to expect that besides obtaining popularity among lovers of reproductions, in the nearest future, the issue of considering AI-generated works as artworks will become a topic of frequent discussions. Consequently, the discussion about the legal and ethical aspects of exhibiting such works acquires further relevance. This issue can be especially vulnerable for the museums and galleries, as they set their reputation at risk in case of providing wrong data about the legal status of the item and related copyright, and such actions may also contradict their essential objectives.

The article is drafted based on the hypothesis that AI-generated works should not be considered artworks, accordingly, they should not be objects of the same legal protection and not safeguarded by the museums.

The presented article aims to explore the challenges of detecting the legal nature of AI-generated works to draft effective recommendations based on the Common European legal framework for museums to tackle the challenge efficiently. Accordingly, the final product will serve as material for further scientific research and as a guideline for corresponding art institutions or lawyers in the field.

The article will primarily concentrate on doctrinal methods of research, especially on exploring the caselaw of the Court of Justice of the European Union (CJEU) and corresponding legal frameworks or policy documents. Besides, the methods of analysis and synthesis will also be applied to draft some assumptions and recommendations. Additionally, comparative analysis will serve for a diverse and comprehensive exploration of the topic.

1. AI AS SUBJECT OF LAW REGARDING COPYRIGHT

Detection of the legal status of AI-generated works is directly connected to defining the legal notion of the artwork itself and the probability of considering AI as the subject of legal transactions.

1.1. The Notion of Art and Artwork in the EU

Defining the legal notion of the artwork and art is a key pre-step of effective detection of the legal status of the creator of the artwork. The terms “art” and “artwork” do not have universal legal definitions in the EU, but their essence can be detected in various legal acts. For example (f.e.), the early Directive 2001/84/EC under the term “original work of art” considers works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware, and photographs, provided they are made by the artist himself or are copies considered to be original works of art.[1] The same directive also defines that those copies of works of art covered by this Directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art for the purposes of this Directive. Such copies will normally have been numbered, signed, or otherwise duly authorized by the artist.[2]

It is worth noting that Directive 2001/29 also admits and protects reproduction rights but considers works created by human authors under the field of protection (“Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in

1 European Parliament & Council. (2001). *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art,* EU, Article 2 (Clause 1).

2 Ibid, Art. 2, Cl. 2.

any form, in whole or in part"... for participants of the legal transaction described by the directive),[3] and grants the authors with exclusive rights related to the exhibition of their works (Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them (§1). Member States shall provide for the exclusive right to authorize or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them... (§2)).[4]

Artwork may also belong to the category of cultural goods, as according to the Regulation (EU) 2019/880, "cultural goods" means any item which is of importance for archaeology, prehistory, history, literature, art, or science (art. 2, cl. 1), particularly objects of artistic interest, such as pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); original works of statuary art and sculpture in any material; original engravings, prints and lithographs; original artistic assemblages and montages in any material.[5]

The interesting reasoning is provided by the CJEU in the judgment Infopaq International A/S v. Danske Dagblades Forening, declaring that "Copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject matter which is original in the sense that it is its author's intellectual creation. As regards the parts of a work, they are protected by copyright since, as such, they share the originality of the whole work. The various parts of a work thus enjoy protection under that provision, provided that they contain elements which are the expression of the intellectual creation of the author of the work".[6] The Court derived from the provisions of the Berne Convention and mentioned that the protection of certain subject matters as artistic or literary works presupposes that they are intellectual creations.[7] According to the judgment, the Berne Convention declares that the expression "literary and artistic works" shall include every production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression, such as ... works of drawing, painting, architecture, sculpture, engraving, and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.[8] Later, in 2019, the court mentioned that the original artworks reflect the personality of its author as an expression of the author's free and creative choices.[9]

Some answers and interpretations can be found in the relevant caselaw of the CJEU. In the judgment Levola Hengelo BV v. Smilde Foods BV. (2018), the court evolved reasoning that two cumulative conditions must be satisfied for subject matter to be classified as a work within the meaning of Directive 2001/29 (§35). First, the subject matter concerned must be original in the sense that it is the author's intellectual creation... (§36), secondly, only something that is the expression of the author's intellectual

3 European Parliament & Council. (2001). *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, EU,* Art. 2.

4 Ibid, Art. 3, §§1-2.

5 European Parliament & Council. (2019). *Regulation 2019/880 of the European Parliament and of the Council of 17 April 2019 on the Introduction and the Import of Cultural Goods, EU,* Art. 2, Cl. 1 & Annex 1, cl. "g".

6 Court of Justice of the European Union. (2009, June 16). *Infopaq International A/S v. Danske Dagblades Forening,* No. C-5/08, Summary of the Judgement, §1.

7 Ibid, §34.

8 Berne Convention for the Protection of Literary and Artistic Works, Paris. (1971). Art. 2, § 1.

9 Court of Justice of the European Union. (2019, September 12). *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV,* No. C-683/17, §30.

creation may be classified as a 'work' within the meaning of Directive 2001/29 (§37).[10]

Using creatures of technology by the authors does not exclude them from the circle of artworks. F.e., CJEU admits that a photograph may be protected by copyright if it is the intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph.[11]

The identic approach is formed by the courts of Common Law countries. F.e., in Case Thaler v. Perlmutter, the District Court of Columbia formed a reasoning that "Copyright is designed to adapt with the times. Underlying that adaptability, however, has been a consistent understanding that human creativity is the sine qua non at the core of copyrightability, even as that human creativity is channeled through new tools or into new media... for example, the photographs amounted to copyrightable creations of "authors," despite issuing from a mechanical device that merely reproduced an image of what is in front of the device because the photographic result nonetheless "represent[ed]" the "original intellectual conceptions of the author." A camera may generate only a "mechanical reproduction" of a scene but does so only after the photographer develops a "mental conception" of the photograph, which is given its final form by that photographer's decisions like "posing the [subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories in the said photograph, arranging the subject to present graceful outlines, arranging and disposing of the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation" crafting the overall image".[12]

High-presented legal notions define art and artworks as a materialized expression of human consciousness and feelings that can describe the personal attitude of the artist to various aspects of social life.

The social value and function of the artwork are wider than is prescribed by various legal acts, and it is primarily determined by the purpose and the main idea of the artwork that the author aimed to express via the artwork directly or using allegories. In the "Manifesto on the Freedom of Expression of Arts and Culture in the Digital Era" it is mentioned that "...experts and cultural professionals who hint at problems, spell out uncomfortable truths, speak the unspoken and make the unseen visible – using their artistic and cultural means and creating spaces for societal debate within and beyond the mainstream bodies of political discourse and in social media".[13]

1.2. AI as a Potential Creator of the Artwork

From the perspective of a comprehensive analysis of the topic, the definition of AI is also worth being distinguished. It can be found in various legal acts. For example, the CoE Framework Convention on AI and Human Rights and Democracy and the Rule of Law defines an "artificial intelligence system" as a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that may influence physical or virtual environments".[14]

Deriving from the legal notion of "artwork", the opportunity of considering AI as a creator of the artwork practically equals zero, but such a condition may be changed, as the existing legal point of view is determined by various cir-

10 Court of Justice of the European Union. (2018, November 13). *Levola Hengelo BV v. Smilde Foods BV,* No. C-310/17, §§35-37.

11 Court of Justice of the European Union. (2018, August 7). *Land Nordrhein-Westfalen v Dirk Renckhoff,* No. C-161/17, §14.

12 U.S. District Court for the District of Columbia. (2023, August 18). *Thaler v. Perlmutter*, No. 22-CV-384-1564-BAH, p. 8.

13 European Union. (2020). *Manifesto on the Freedom of Expression of Arts and Culture in the Digital Era,* §3.

14 Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, 2024, CETS 225, EU, Art. 2.

cumstances, including the fact that the legal notion of the "artwork" represents a traditional, conservative approach formed in the era, when gadgets could not have been believed to be self-governing performers of some tasks. Additionally, it can be affected by the extremely cautious attitude of the judiciary to restrain from evolving such reasoning, where AI can be described as a potential participant in legal transactions.

However, an overview of legal history contains epochs when different subjects or objects were considered to be participants of legal transactions or, on the contrary, excluded from such a group. F.e., in the early development of human society, objects and animals used to be "found guilty" and sentenced to various penalties, while representatives of certain classes of the society were considered to be equal to things and deprived of their rights. Quite a lot of such examples can be found in the legal history of ancient Rome, Greece, Egypt, etc. On the contrary, the development of economic relations caused the creation of legal entities, but such news was widely rejected by distinguished representatives of legal society as they could not imagine non-human beings as legal actors, even though even Ulpian used to be an author of the first concepts of legal entities in the II-III centuries A.C., already used to write unions like legal entities. Currently, legal entities represent almost full-fledged participants in legal transactions and subjects of essential human rights according to their applicability. F.e., Sunday Times v. the United Kingdom was the first case where the European Court of Human Rights (ECHR) found a violation of the Freedom of Expression (Art. 10) against the legal entity. In later judgments, the Court referred to issues of protecting dissemination systems, including oral, printed form, radio broadcast, painting, and other forms of expression.[15]

Recognition of AI as a subject of law is more challenging, especially when AI-governed machines in an existing form lack the component of personality,[16] but besides the existence of the uniform case law, the discussion about the legal subject status of AI demonstrates growing interest from legal scientists. According to one of the viewpoints detected in legal literature, „personality is established when a legal assumption is updated in reality as long as it is foreseen in a general norm of law that describes a determined situation of fact where the subject or undetermined person is, with the purpose to individualize it as a holder of determined rights or certain obligations in a specific juridical relationship".

Besides, the modern challenge of discussing AI-powered gadgets as "participants" of legal transactions keeps being an upcoming topic of discussion, some more circumstances may be revealed to assess the possibility of declaring AI as a potential creator of the artwork.

The uniform case law of the CJEU set the tendency that an intellectual creation should reflect the author's personality (§88). So, the author should be able to express his creative abilities in the production of the work by making free and creative choices (§89).[17]

So far, unless a unified caselaw develops clear reasoning about possible scenarios of acknowledging AI as a potential subject of law, evolving an unambiguous hypothesis is quite difficult, especially if considering the point of view of various scientists, who highlight the impossibility of the creation of fluent artificial intelligence, as the essence intelligence cannot be understood

15 Mendel, T. (2016). *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights.* P. 6; and European Court of Human Rights. (1979, April 26). *Sunday Times v. the United Kingdom*, No. 6538/74, §§42-68.

16 Adriano, E. A. Q. (2015). The Natural Person, Legal Entity or Juridical Person and Juridical Personality, *Penn State Journal of Law & International Affairs*, 4(1). P. 384.

17 Court of Justice of the European Union. (2011, December 1). Eva-Maria Painer v. Standard VerlagsGmbH and Others, No. C-145/10, §§87-89 with further reference on Court of Justice of the European Union. (2011, October 4). Football Association Premier League LTD and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd, No. C-429/08.

completely.[18] However, the modern approach is reasonably different, and signs of possible recognition of AI as a subject of law are detected in some legal provisions. Primarily should be distinguished two legal acts within the jurisdiction of the EU they are the so-called Resolution on Civil Law Rules of Robotics and the so-called AI Act,[19] which was adopted recently. The first legal act calls on the Commission to create a specific legal status for robots that make autonomous decisions or otherwise interact with third parties independently. According to the act, the European Parliament calls on the Commission, when carrying out an impact assessment of its future legislative instrument, to explore, analyze, and consider the implications of all possible legal solutions, such as creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently.[20] The second and the newest international legal act is the so-called AI Act, which represents a combination of several legal acts and creates a general legal platform. According to the interview with Secretary General of the Council of Europe Marija Pejčinović, expectations towards the AI Act are quite high as this should serve as the first universal legal framework regulating the sphere. According to the words of the Secretary General of the Council of Europe, "the text strikes the right regulatory balance precisely because it has benefitted from the input of governments and experts, and industry and civil society... After its adoption by the Committee of Ministers in the coming weeks, countries from all over the world will be eligible to join it and meet the high ethical standards it sets".[21]

Considering the arguments enumerated by the courts and the specifics of the creation of works by AI comes a legitimate expectation that in the near future, the issue will acquire a more problematic character. European Parliament's 2020 Report on AI and Intellectual Property Rights also admits that AI challenges the traditional understanding of artwork, and it may be the object of further discussions.[22]

The supporters of declaring AI-generated work as artwork may base their opinion on the argument that creating objects by AI also needs human participation, as humans are the ones who draft a description of the product expected from the AI-governed machine. In such a composition of the circumstances, AI creates a work based on a human mindset.

The potential object of discussion may become cases when AI with a certain level of autonomy of the software generates a painting according to the instructions of a human. Like the case with photography, when a managing human can have a theoretical opportunity to use software to administer the process of generating works by AI. The question is how the level of human involvement in the process of forming the final work should be measured and if such outcomes can be predicted by the humans while forming the instructions for the AI-powered gadget.

18 Davies, C. R. (2011). An Evolutionary Step in Intellectual Property Rights – Artificial Intelligence and Intellectual Property, *Computer Law & Security Review*, 27(6). P. 619.

19 Regulation 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance), EU. (2024].

20 European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), (2018/C 252/25), EU, (2017), §59, Cl. "f".

21 Pejčinović, M. (2024, March 15). Interview with Secretary General of the Council of Europe. *Artificial Intelligence, Human Rights, Democracy, and the Rule of Law Framework Convention*. Council of Europe <https://www.coe.int/en/web/artificial-intelligence/-/artificial-intelligence-human-rights-democracy-and-the-rule-of-law-framework-convention> [Last access: 30.11.2024].

22 European Union. (2020). *Report on intellectual property rights for the development of artificial intelligence technologies*, Explanatory statement.

The above-mentioned topic should also be left open unless the corresponding political will of developing such legal institutes becomes relevant and the ability of humans to predict features of AI-generated products can be assessed by corresponding technical inspection. From the perspective of museums, such theoretical reasoning is less important at the moment but represents an issue of raising relevance, so it is worth mentioning.

2. CAPACITY OF THE MUSEUMS TO EXHIBIT AI-GENERATED WORKS

Finding solutions for modern legal problems requires up-to-date solutions. Legislation may lack the existence of provisions designed in a manner that newly raised circumstances could be foreseen. Such a situation is detected regarding the exhibition and protection of AI-generated works by the museums.

The existing legal framework of the EU does not contain direct provisions referring to the high-distinguished issue, but certain norms could be interpreted regarding the question.

First of all, the term "museum" should be defined because besides the traditional understanding of museums, so-called digital display museums also do exist, and the concept of their work is reasonably different from the classic understanding. Such museums represent organizations that provide 2D or 3D shows for the customers and display the works in digital reality. As a rule, such museums exist independently, but the combinations of traditional and digital display museums are also quite frequent.

According to the definition of a museum formed by the Museums Association in 1998, "Museums enable people to explore collections for inspiration, learning, and enjoyment. They are institutions that collect, safeguard and make accessible artifacts and specimens, which they hold in trust for society".[23] In 2022, the International Council of Museums (ICOM) approved the proposal for the new definition of a museum. It defines that "A museum is a not-for-profit, permanent institution in the service of society that researches, collects, conserves, interprets and exhibits tangible and intangible heritage. Open to the public, accessible, and inclusive, museums foster diversity and sustainability. They operate and communicate ethically, professionally and with the participation of communities, offering varied experiences for education, enjoyment, reflection and knowledge sharing".[24] It deserves mentioning that ICOM was one of the first organizations that raised an issue of the need for a legal definition of a museum because that seemed relevant both from the perspectives of law and ethics.[25]

According to the definition and corresponding legal framework, museums are eligible to organize not only physical but also digital and online exhibitions. Directive (EU) 2019/790, also known as (the DSM Directive), states that "an online content-sharing service provider shall therefore obtain authorization from the rightsholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, to communicate to the public or make available to the public works or other subject matter".[26] The directive determines authorization of an online content-sharing service provider as a mandatory part of their activities. Such authorization can be done in various ways, including by concluding a licensing agreement.[27]

23 EEIG EU Standard for Museums and Galleries, EU. (2012). P. 1.

24 Information on the official webpage of ICOM <https://icom.museum/en/resources/standards-guidelines/museum-definition/> [Last access: 30.11.2024].

25 Cornu, M. (2020). Thinking of the Museum as a Legal Category: What are the Issues Around Definition? <https://www.icom-musees.fr/sites/default/files/media/document/2020-05/Traduction%20Marie%20Cornu_reluCLS.pdf> [Last access: 30.11.2024].

26 Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, (2019), EU, Art. 17, §1.

27 Ibid, Art. 17, §2.

While discussing the purposes of museums, two basic aspects should be distinguished: the role of a museum in safeguarding artworks and the mission of connecting society to art. From the perspective of the second objective, the opinion is that AI-generated works may be placed in museums to serve as an attraction for society and encourage them to see real masterpieces of art. This kind of reasoning may seem admissible, but it meets the ethical dilemma and a threat of promoting works that do not represent artworks, respectively, it contradicts the fundamental purpose of the museum and may lead to increasing interest in works that miss the main component of the artwork – a cultural value.

The issue of so-called AI museums also requires attention, and it may be an object of separate research, but the presented article cannot fully bypass this topic. Despite having similar names, so-called AI museums do not necessarily describe identic institutions, accordingly, they do not necessarily serve the same purpose and values as museums do. Duplication of terms in various legal relations with different meanings is quite frequent, but such a mix of terms should not lead society to misrepresentation.

To make an interim summary, museums, as not-for-profit organizations, represent institutions first of all serving values. They are not prohibited from using AI for achieving their purposes, but in such a manner that it supports the accomplishment of the main objectives of museums, not distancing from them.

CONCLUSION AND RECOMMENDATIONS

The fundamental purpose of the museums and museum-kind galleries should be formulated based on the core characteristic feature of ensuring the safety and accessibility of the examples of cultural heritage, fine arts, and distinguished creatures of contemporary art. Respectively, derived from the legal, historical, and social contest, museums represent institutions responsible for keeping the advanced creatures of human creativity and granting society access to such masterpieces.

The highly-discussed precedents and related reasonings demonstrated that the allowance of safeguarding and exhibiting artworks created using artificial intelligence represents an issue combining legal and ethical challenges.

As discussed in Chapter 1, the unified legislative approach excludes the possibility of authorship by the objects of law, including AI, and such a point of view is shared by the courts worldwide while interpreting the legal notion of artwork.

However, the number of mentions in legislation, official reports, and several precedents where certain general reasonings leave space for further expectations create an impression that the attitude could be changed.

In the context of museums, so far, no legal framework directly prohibits exhibiting artworks created by AI if the corresponding information is properly delivered to the target society. Besides the fact that the universal legal acts set legal frameworks for the museums, the EU member states keep the right to design further local regulations, but they should not contradict international standards.

In such a configuration of legal provisions and related legitimate interest towards museums, so far, I consider that the conservative approach should be supported, at least unless the legal definition of the artwork gets modified and AI-made products appear in the circle of artworks and fruits of intellectual property.

Additionally, the specifics of the creation of the artworks and specific characteristics of products made by the AI should be highlighted. The artwork itself represents a fruit of human creativity; it is a unique product, and even in the case of re-production, it keeps its unique character, as reproduction is also a visual demonstration of the creator's mind.

The AI-generated products should be considered as items of serial production with an option of making exact copies, so unless a work

is a single item and done by human engagement, it shouldn't be accepted as an artwork.

The abovementioned attitude should not be assessed as a reduction of accessibility of works made by AI to the market, but the segmental division is a necessity. The artworks, with the traditional understanding of this term, as manifestations of human creativity should keep their place in cultural surroundings and be objects of special care by the museums.

In my personal belief, the same regard should not be extended to AI-generated works. Primarily because they simply do not match the legal definition of the artwork, and as it is already formulated above, it lacks the essential component of uniqueness and demonstration of human creativity.

Finally, AI-generated products as objects of potential massive production with the ability to create exact copies drop out of the concept of artworks and objects with cultural value so that despite the level of attractiveness and quality, they still cannot be accepted as artworks.

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THE ISSUE OF INDIVIDUALIZATION IN JUSTIFYING THE USE OF IMPRISONMENT AS A MEASURE OF RESTRAINT IN CRIMINAL PROCEEDINGS (in the Context of Georgia)

Eka Kaveliidze
kavelidze.eka@eu.edu.ge
Doctor of Law, Professor, European University, Georgia
ORCID ID /0000-0003-0071-2385

Khatia Kherkheulidze
kherkheulidzekhatia07@gtu.ge
Doctoral Candidate of Law, Caucasus University,
Assistant, Georgian Technical University, Georgia

ABSTRACT

The European Court of Human Rights has made it clear in many rulings that the rule under the European Convention on Human Rights is that jail, as a way to hold someone back, should only be used in rare situations when no less harsh choice can meet the goals of the criminal process. The law about criminal procedures in Georgia shows this idea and way. But, a look at court cases and official numbers reveals that jail is the most used way to hold someone back. This might point to an issue with how well judges explain using jail in criminal cases. The problem might be tied to gaps in the laws for criminal procedures or wrong understandings of the law by judges also to missing need for judges to clearly show why they decided on jail use.

It is important to highlight that the Constitution dedicates a separate article to the issues of detention and imprisonment. This un-

derscores that the right to personal freedom is a constitutional right. "The Constitution protects individual freedom, which is guaranteed not only by substantive legal norms but also by procedural norms elevated to a constitutional level, emphasizing its special place within the system of fundamental rights".[1] In this context, Georgian courts do not infrequently use blanket justifications, which undoubtedly presents a problem.

KEYWORDS: Imprisonment, Detention, Constitution, European Court, European Convention

INTRODUCTION

Detention, which holds a special place in the Criminal Procedure Code (hereinafter CPC), represents a procedural coercive measure.[2] Its proper selection is a crucial issue to ensure the protection of both society's and the defendant's rights and interests. Accordingly, the use of imprisonment has a "preventive-protective nature".[3] The issue of applying imprisonment as a detention measure is of critical importance, particularly when the court must decide whether to impose it. In such cases, it is essential that both the prosecutor, in their motion, and the judge, in their ruling, provide an individual justification for the unavoidable necessity of imprisonment in each specific case.

The justification for the use of imprisonment as a detention measure is a significant topic in both criminal law theory and judicial practice. Existing statistical data on the application of imprisonment further underscores the relevance of this issue. The focus of our research is to explore the importance of providing individual justification when imposing imprisonment. Furthermore, the study and analysis of both national and international practices concerning this matter are integral to our work.

The objective of this article is to review and synthesize scientific literature, national court practices, and decisions of the European Court of Human Rights (hereinafter: European Court) while seeking potential solutions to the underlying problem.

The research methodology employed includes theoretical analysis, drawing on data from scientific literature and the practical activities of Georgian and European courts. Relevant research methods used in this study are comparative-legal, logical, and statistical analysis.

1. CONSTITUTIONAL AND EUROPEAN STANDARDS FOR THE USE OF DETENTION AS A MEASURE OF RESTRAINT

The relevance and importance of the issue discussed in this article as a significant problem in Georgia is highlighted by the statistical data for the years 2022-2023 published on the official website of the Supreme Court of Georgia.[4] In 2023, the form of detention requested by the prosecution in 6,494 cases was imprisonment, and in 4,479 of these cases, the court granted the request. This means that in nearly 70% of cases, the court applied the most severe detention measure. In 2022, out of the 6,864 requests for imprisonment submitted by the prosecution, the court approved 4,830, which accounts for over 70%.

The Constitution of Georgia (hereinafter referred to as the Constitution) guarantees the protection of individual freedom.[5] "This means that it protects the freedom of each individual from any unlawful or arbitrary interference by

1 Decision of the Constitutional Court of Georgia of April 6, 2009, No. 2/1/415, II-1.

2 Authors' Group. (2012). Criminal Procedure of Georgia, Private Part, Tbilisi, p. 215.

3 Authors' Group. (2015). G. Giorgadze (ed.). Commentary on the Criminal Procedure Code of Georgia, Tbilisi, p. 558.

4 Statistical data posted on the website of the Supreme Court of Georgia (last accessed on December 1, 2024). <https://www.supremecourt.ge/uploads/files/1/statistics/sisxli2023.pdf>

5 Article 13 of the Constitution of Georgia, Article 18 of the old version of the Constitution.

the state".[6] This guarantee of protection should apply when imprisonment is imposed on an individual. The mere existence of grounds for this measure should not, in itself, negate the individual's right to freedom. "The inviolability of a person implies freedom from physical and psychological harm, that is, from both physical and mental injury".[7] According to the Constitutional Court of Georgia, the purpose of applying a detention measure is not to prove the individual's guilt; rather, it serves as "a means of preventing the obstruction of the proper administration of justice".[8] By restricting the right to freedom, an individual is deprived of the ability to exercise other rights. Therefore, any interference with this right must be subject to strict control, and the standards for such interference should be exceptionally high. The Constitution, in Article 13, refers to various legal forms of interference with the right to freedom. However, the constitutional and legal guarantees for the protection of these forms of interference differ.[9]

As part of Georgian legislation, the recognition of the European Convention on Human Rights has made it legally binding at the national level.[10] The term "freedom" is interpreted similarly for the Convention as it is in Article 13 of the Constitution. The concept of "inviolability of the person" can be equated with the obligation to prohibit the arbitrary deprivation of liberty.[11]

In the case of Nikolaishvili v. Georgia, the European Court clearly outlined the elements of personal inviolability:

a) "Freedom" and "personal inviolability" form a unified basic right, in which personal inviolability relates to the circumstances of deprivation of liberty; b) "Personal inviolability" essentially means the adherence to legal and state principles during the deprivation of liberty; c) As a result, deprivation of liberty must be carried out based on pre-determined, verifiable rules and in good faith.[12]

The European evidentiary standard for the application of detention measures does not significantly differ from the standard established in Georgian legislation. When applying detention measures, there must be reasonable doubt throughout their application that the individual has committed a crime. According to the European Convention on Human Rights (hereinafter: the Convention), reasonable doubt does not imply the same standard of proof required for convictions.

As explained by the European Court, the existence of a well-founded suspicion that the detained individual has committed a crime is a necessary condition for the initial lawfulness of the deprivation of liberty. However, there must also be other "relevant" and "sufficient" circumstances that justify the individual's continued detention.[13] The Convention explicitly states that the use of imprisonment by the court should occur only when no other measure can achieve the objectives of detention. "Under Article 5.3, the national judiciary is obliged to consider alternative measures to ensure the defendant's appearance at trial".[14]

6 Commentary on the Constitution of Georgia. Part Two. (2013). Under Paata Turava's editorship, Publisher: "Petiti" LLC, Tbilisi, p. 130.

7 CCPR/C/GC/35, General Comment No35 – Article 9 (Liberty and Security of Person), 28.10.2014, I-3, I-5, I-6.

8 Organizational Record No. 646 of the Constitutional Court of Georgia, June 26, 2015, II-40.

9 Tugushi, T., Burjanadze, G., Mshvenieradze, G., Gotsiridze, G., Menabde, V. (2013). Human Rights and the Practice of the Constitutional Court of Georgia, Tbilisi, pp. 106, 109-110.

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13 See: Stögmüller v. Austria, ECtHR, application no. 1602/62, Para. 4. November 10, 1969; Sulaoja v. Estonia, ECtHR, application no. 55939/00, Para. 64, February 15, 2005.

14 McKhedlidze, N., Standards of the Use of the European Convention on Human Rights by the Common Courts of Georgia, Tbilisi, 2017, p. 50. In relation to this, the court discusses the case Puncelt v. Czech Re-

CPC provides for alternative measures to imprisonment: bail, an agreement on non-leaving and appropriate conduct, personal surety, supervision by military command over the behavior of a serviceman, and imprisonment. In addition to the detention measure, supplementary measures may also be applied to the defendant.[15]

2. THE OBJECTIVES AND GROUNDS FOR THE USE OF IMPRISONMENT AS A MEASURE OF RESTRAINT

CPC establishes the same objectives and grounds for imprisonment as those generally defined for measures of restraint. The objectives of measures of restraint are ensuring the defendant's appearance in court, preventing further criminal conduct by the defendant, and securing the enforcement of the judgment.[16] The legislator leaves it to the court to determine the extent of the threat presented. If the threat is of a high degree, imprisonment may be applied; otherwise, it is mandatory to impose a less severe measure.

The European Court has repeatedly stated that the use of each objective "in abstracto" for justifying a measure of restraint is inadmissible and must be based on specific factual grounds. The court has clarified that such grounds cannot be "general and abstract". CPC outlines three specific grounds for measures of restraint: a well-founded suspicion that the defendant will flee or fail to appear in court will destroy important information related to the case, or will commit a new crime.[17] The use of any particular type of measure of restraint requires the existence of at least one of the procedural grounds listed above.

2.1. The Risk of the Defendant Committing a New Crime as a Ground for Imprisonment

Any decision in which the court cites the existence of a threat without any supporting evidence and uses imprisonment solely on this basis is inconsistent with the Constitution, the CPC, and international standards. "The prosecuting body must prove the actual existence of a specific, objectively identifiable threat". According to the European Court, there must be specific facts indicating the risk of committing a new crime. Although these circumstances are important, each of them, taken individually, remains an insufficient basis for a well-founded suspicion that the individual may commit a new crime.[18] The argument that a violent crime is an "infallible indicator" of the likelihood of committing a new offense does not align with the approach of the European Court, according to which reference to the nature of the alleged offense is abstract and does not justify the threat of committing a new crime or interfering with justice as grounds for imprisonment.[19]

The national court, to some extent, considers that, on the one hand, the defendant and, on the other hand, the victim and other individuals, such as family members and partners, represent opposing parties. Due to this, the court may determine that if the defendant remains at liberty, they may continue engaging in criminal activity.[20]

public (2000), ECtHR, no. 31315/96.

15 Criminal Procedure Code of Georgia – Articles 199-205, 199 Part 2.

16 Ibid. Article 198, Part 1.

17 Ibid. Article 198, Part 2; a relevant case on this matter is: Boicenco v. Moldova (2006), ECtHR, §§142-143.

18 Georgian Young Lawyers' Association (GYLA). (2012). Deficiencies and Recommendations in Criminal Justice, Tbilisi, p. 50; a relevant case on this matter is: Aleksandr Makarov v. Russia (2009), ECtHR, no. 15217/07, §134.

19 Relevant European Court decisions on this matter include: Bykov v. Russia (2009), ECtHR, no. 4378/02, §64; Lakatoš and Others v. Serbia (2014), ECtHR, no. 3363/08 §97; A. B. v. Hungary (2013), ECtHR, no. 33292/09 §§23-26.

20 Mchedlidze, N. (2017). Standards of Application of the European Convention on Human Rights by the Common Courts of Georgia, Tbilisi, p. 69; a relevant case on this matter is: Tbilisi City Court's ruling of May 5, 2014, on the first presentation of the defendant in court and the application of preventive measures, case no. 10a/3042-14.

2.2. The Risk of the Defendant Fleeing as a Ground for Imprisonment

One of the grounds for the application of a measure of restraint is a well-founded suspicion that the defendant will flee or fail to appear in court. To determine the risk of flight, it is important to consider all the circumstances of the specific case and the nature of the expected punishment. Furthermore, it must be assessed whether "the severity of the punishment could create a desire to flee, as well as the existence of objective circumstances that could lead to the defendant's such desire being realized".[21]

We will examine the circumstances that pose a risk of flight within the context of both national and European law, including the following:[22]

1. In justifying the risk of the defendant's failure to appear in court, the personal characteristics of the defendant must be taken into account.[23] Proper attention must be given to the defendant's voluntary appearance before law enforcement authorities, as well as to all other factual circumstances and past experiences that either support or exclude the reality of such a risk;
2. As a rule, the common courts of Georgia align with the European Court's practice, which holds that the severity of the charge and the harshness of the punishment are relevant but insufficient factors, and taken alone, they do not justify the application of imprisonment. In one case, the court explained that the fact that the expected punishment is severe and that the defendant is charged with committing serious or particularly serious crimes does not, on its own, constitute a valid justification for the risk of flight;[24]
3. In the case, Sopin v. Russia (Sopin v. Russia, [2013], ECtHR, no. 57319/10), the European Court assessed the factors that the applicant held a passport, had relatives living permanently outside Russia, frequently traveled, and had significant financial resources, as examples of the existence of a real risk of flight;
4. The European Court considers a person's connections to the state where they are detained and their international contacts as important factors. Additionally, the absence of employment and family cannot be assessed as a threat of committing a new crime;[25]
5. The European Court places significant emphasis on the defendant's characteristics, including their criminal record. It also focuses on the defendant's character and moral standing. The risk of flight should be assessed in light of all circumstances that connect the individual to the country conducting the criminal prosecution.[26]

21 Georgian Young Lawyers' Association (GYLA). (2012). Deficiencies and Recommendations in Criminal Justice, Tbilisi, p. 49.

22 A relevant case on this matter are: Yagci and Sargin v. Turkey (1995), ECtHR, no.16419/90, 16426/90 and Letellier v. France (1991), ECtHR, no. 12369/86. Papashvili, L. (2010). Legal Grounds for the Use of Detention and Imprisonment in Criminal Procedure, Collection of Articles. Tbilisi, pp. 176-177.

23 Georgian Young Lawyers' Association (GYLA). (2012). Deficiencies and Recommendations in Criminal Justice, Tbilisi, pp. 48-49.

24 Mikhalchuk v. Russia (2015), ECtHR, no. 33803/04, §§53-59; Ahmet Ozkan and Others v. Turkey (2004), ECtHR, no. 21689/93, §§397-398; Belchev v. Bulgaria (2004), ECtHR, no. 39270/98, §82; Kostadinov v. Bulgaria (2008), ECtHR, no. 55712/00, §§78-80; Tbilisi City Court Decision of 22 July 2013 on the Change of the Measure of Restraint, Case no. 1/953-13, p. 2.

25 Guide on Article 5 of the European Convention on Human Rights. Updated on 30 April (2018), p. 36, §203, Regarding this issue, it is interesting to consider the reasoning of the European Court of Human Rights in the case of W. v. Switzerland (1993) ECtHR, no. 14379/88.

26 Mchedlidze, N. (2017). Standards for the Application of the European Convention on Human Rights by Georgian Common Courts, Tbilisi, p. 58; see also, e.g.: Becciev v. Republic of Moldova (2005), ECtHR no. 9190/03, §58; W. v. Switzerland (1993), ECtHR, no. 14379/88 §33.

2.3. The Risk of Destruction of Evidence as a Ground for Imprisonment

One of the grounds for applying a measure of restraint is a well-founded suspicion that the defendant will destroy evidence crucial to the case. The risk of the defendant destroying evidence and/or obstructing the collection of evidence cannot be considered relevant at every stage of the proceedings. The specific factual circumstances of the case must be taken into account.[27] It is important for the prosecution to substantiate, based on specific data, the defendant's ability to influence the quality of the administration of justice. National courts often generally refer to the fact that a number of investigative actions still need to be carried out in the case, such as questioning witnesses and others. Justifying imprisonment based on the necessity of conducting investigative actions is not acceptable according to European Court practice. In the case Miminoshvili v. Russia (Miminoshvili v. Russia, [2011], ECtHR no. 20197/03 §86), the European Court clarified that imprisonment to ensure investigative actions is inadmissible, as conducting investigative actions typically does not require the defendant's immediate detention.[28]

If a person is accused of committing a crime related to the destruction of evidence, document forgery, falsification of materials, and other similar actions, there is a high likelihood of evidence destruction or an attempt to destroy evidence. For example, cases of fraud and document forgery may involve such risks.[29]

The European Court did not find a violation in the case Kolevi v. Bulgaria (28.07.2005). The applicant committed fraud, which involved the creation of false identity documents and other paperwork, which he presented to the bank, thereby withdrawing a large sum of money.

The risk of evidence destruction or obstruction of evidence collection may exist if the defendant has certain connections with the participants in the proceedings. As the European Court explains, the defendant's professional status is relevant to justifying the risk of influencing witnesses. However, at the same time, the court questions the relevance of this argument when the defendant has been dismissed from their position.[30] In cases involving allegations of official misconduct, when deciding on the imposition of measures of restraint, the prosecution should consider that the destruction of evidence could potentially be prevented by removing the defendant from their position. The court believes that, in such instances, it is important to assess the progress of the investigation and court proceedings, the defendant's character, their behavior before and after arrest, as well as specific actions that may indicate an intent to destroy or falsify evidence or influence witnesses.

3. THE IMPORTANCE OF PROVIDING THE COURT WITH INFORMATION REGARDING THE DEFENDANT'S CIRCUMSTANCES

Under the current version of the CPC of Georgia, the court is required to establish the defendant's identity at the first appearance hearing. However, there is no strict obligation in the law for the court to determine the individual circumstances of the defendant at this stage.[31] The legislator should explicitly require the judge to determine the defendant's personal and individual circumstances during the

27 A relevant case on this matter is: Letellier v. France, 26 June 1991; Yagci and Sargin v. Turkey, 8 June 1995. Papashvili, L. (2010). Legal Basis for the Use of Arrest and Detention in Criminal Proceedings, Collection of Articles, Tbilisi, p. 176.

28 Mchedlidze, N. (2017). Standards of Application of the European Convention on Human Rights by the Common Courts of Georgia, Tbilisi, p. 83.

29 In the case W. v. Switzerland, January 26, 1993.

30 A relevant decision in this context is also the European Court's ruling in the case Contrada v. Italy, Case no. 92/1997/876/1088, August 24, 1998, where no violation of Article 5(3) was found.

31 Criminal Procedure Code of Georgia – Article 197.

proceedings. While the legislator acknowledges that the judge must take into account the defendant's personal data when deciding on the type of restrictive measure to apply, as practice and statistics show, this provision alone is insufficient.

The legislator does not obligate the court to provide a specific justification for the threats when applying imprisonment, which contradicts the approaches of the European Court of Human Rights. We believe that the obligation to individually justify the high degree of threat should be stipulated at the legislative level. Moreover, the court should individually explain why less severe measures of restraint cannot achieve the procedural objectives.[32]

The current version of the Code stipulates that when deciding on the application of a measure of restraint and its specific type, the "judge takes into account" the defendant's personality, occupation, age, health, compensation for property damage, etc.[33]

This provision does not establish the judge's obligation to consider these circumstances, which leads to the misinterpretation of the article in practice. We believe that the law should directly obligate the judge to take individual circumstances into account when deciding on imprisonment.

The European Court explains that the court must prioritize the consideration of alternative measures of restraint. However, under Georgian legislation, this obligation is not explicitly imposed on the court. This issue is particularly important, and if the criminal procedural law does not impose a direct obligation on the judge, the quasi-judicial practice will continue.

4. THE SIGNIFICANCE OF THE DEFENDANT'S EXERCISE OF THE RIGHT TO DEFENSE IN THE INDIVIDUALIZED JUSTIFICATION OF IMPRISONMENT

In Georgia's criminal procedural legislation, the principle of adversariality is upheld, meaning that only the parties involved in the case have the right to collect evidence. The court cannot collect evidence or conduct investigations. A defendant in pre-trial detention is physically unable to conduct a thorough investigation into their case. We believe that if the court decides to impose detention, the involvement of a defense attorney should become mandatory. Only if the detained defendant has a lawyer will they be able to exercise their right to defense effectively.

5. THE SIGNIFICANCE OF THE PROSECUTOR SUBMITTING INFORMATION ABOUT THE DEFENDANT'S CIRCUMSTANCES TO THE COURT

According to the CPC, when presenting a motion for the application of a measure of restraint, the prosecutor is obligated to justify the appropriateness of the requested measure and to demonstrate the impracticality of using other, less severe measures of restraint.[34] This statement does not specify individual justification, which is often interpreted by prosecutors and judges as sufficient to provide a general rationale. This leads to formulaic court decisions regarding the imposition of imprisonment. We believe that both prosecutors and courts should approach the issue of individuality with greater consideration.

In discussing this issue, we would highlight the principle of objectivity, under which the prosecution is obligated to assess the defen-

32 See: Rulings of the Tbilisi City Court, January 12, 2024, regarding the application of preventive measures (r.a.p.m.), Case no. N10a/110; March 6, 2024 (r.a.p.m.), Case no. N10a/1388; February 22, 2024 (r.a.p.m.), Case No. N10a/973; February 27, 2024, (r.a.p.m.), Case No. N10a/1101-24; February 20, 2024 (r.a.p.m.), Case No. N10a/910; October 18, 2024, (r.a.p.m), Case No. N10a/6165.

33 Criminal Procedure Code of Georgia – Article 198, Part 5.

34 Criminal Procedure Code of Georgia – Article 198, Part 3.

dant's actions honestly and objectively.[35] The activities of the prosecution should be based on the highest standards of legal ethics.[36]

Since the legislation does not obligate the prosecution to present individual circumstances of the defendant to the court, prosecutors typically do not focus on such circumstances. If the defendant does not speak about their circumstances, the court is often left in a complete informational vacuum in most cases.

6. THE ISSUE OF APPEALING THE COURT'S RULING ON THE IMPOSITION OF IMPRISONMENT IN LEGISLATION AND PRACTICE

The criminal procedural legislation provides for a one-time opportunity to appeal the first-instance court's ruling on imprisonment to the appellate court's investigative chamber.[37] However, it is important to note that the law establishes a precondition for the admissibility of such an appeal, which in practice effectively means that there is no existing case law on the matter of changing imprisonment. It is crucial that the defense is allowed to genuinely challenge the decision on the imposition of imprisonment. For this to be possible, the appellate court should accept the case for review without any admissibility criteria.[38] The current provision effectively hinders the actual functioning of the appeal mechanism, as the admissibility criterion explicitly requires the presence of "new circumstances" in the case. This requirement is practically impossible to meet, as in most cases, the defense will not be able to gather information about new circumstances within 24 hours.

35 This requirement is emphasized in the UN principles, UN Guidelines for Prosecutors (1990), p. 34.

36 European Guidelines on Prosecutorial Ethics (2018).

37 Criminal Procedure Code of Georgia – Article 206, Part 8.

38 Decision of the Tbilisi Court of Appeal of December 28, 2017, regarding the inadmissibility of the appeal, case No. N1g/1483-17; Decision of the Tbilisi Court of Appeal of April 6, 2017, in case No. N1g/465.

According to the Criminal Procedure Code, an appeal against a detention order must specify which requirements were violated during the issuance of the contested decision and how the provisions of the contested decision were incorrect. The term "material importance" set by the legislator in the article essentially determines the fate of the case and the current practice in Georgia. We believe that the parties should have the ability to challenge a detention order in any case.

RECOMMENDATIONS

For the court to take the defendant's circumstances into account as fully as possible when deciding on the application of measures of restraint, we believe that legislative amendments to the Criminal Procedure Code are necessary. Specifically:

1. It is recommended that Article 197, paragraph 1 of the Criminal Procedure Code be amended to include the following point "a": "[The judge] will examine the defendant's activities, health, family and property status, compensation for any property damage, and other individual circumstances";
2. It is recommended that the word "considers" in Article 198, paragraph 5 of the Criminal Procedure Code be replaced with the phrase "is obliged to consider". Accordingly, paragraph 5 should be amended as follows: "When deciding on the application of a measure of restraint and its specific form, the court is obliged to consider the defendant's personality, activities, age, health, family and property status, compensation for property damage, any prior violations of previous measures of restraint, and other individual circumstances";
3. It is important that Article 199 of the Criminal Procedure Code be supplemented with a new paragraph 2.1 as follows: "The court is obliged to prioritize

the consideration of non-custodial measures of restraint and, where necessary, the use of additional measures alongside them";

4. Concerning mandatory defense, it is recommended that the amendment be reflected in Article 45 of the Criminal Procedure Code, with the current subparagraph "m" being replaced by subparagraph "l", and subparagraph "l" being amended as follows: "If a ruling has been made on the use of detention or detention-secured bail";
5. It is recommended that paragraph 3 of Article 198 of the Criminal Procedure Code be amended as follows: "When presenting a motion for the application of a measure of restraint, the prosecutor is obliged to individually justify the appropriateness of the requested measure and the inadmissibility of using a less severe measure of restraint";
6. It is recommended that Article 198 of the Criminal Procedure Code be supplemented with a new paragraph 3.1 as follows: "In the case of a request for detention as a measure of restraint, the prosecutor is obliged to present a report to the court regarding the individual circumstances of the defendant";
7. It is recommended that Article 206 of the Criminal Procedure Code be supplemented with a new paragraph 8.1 as follows: "The party is entitled to file a motion with the magistrate judge at the location of the investigation for the change or cancellation of the detention measure when detention is applied as a measure of restraint";
8. The possibility to appeal a detention order should be available to the party in all cases. Therefore, Article 207 of the Criminal Procedure Code should be amended to include the following new paragraph 4, first subparagraph: "The judge of the appellate court's investigative panel shall consider the appeal regarding the application, modification, or cancellation of detention individually, within no more than 72 hours from its submission. The judge shall consider the appeal in a hearing, in accordance with the procedures established by this Code".

CONCLUSION

This article addresses the challenges associated with the individual justification of detention as a measure of restraint within Georgian judicial practice. It further examines the relevant case law of the European Court of Human Rights, highlighting the criteria it deems fair when determining the use of detention. The article underscores the necessity for each detention decision to be based on a real, individualized assessment of the circumstances. The use of detention as a measure of restraint cannot be justified by abstract threats alone. If the inevitability of detention is not individually substantiated, the court must resort to other, less severe measures of restraint.

The recommendations put forward in this article aim to facilitate legislative amendments that would strengthen the fairness and transparency of judicial practices. We believe these proposed changes will contribute to the development of a more just and democratic legal system in Georgia and support the country's European future.

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პატიმრობის, როგორც აღკვეთის ღონისძიების გამოყენების დასაბუთების ინდივიდუალურობის პრობლემა სისხლის სამართლის პროცესში (საქართველოს მაგალითზე)

ეკა კაველიძე
kavelidze.eka@eu.edu.ge

სამართლის დოქტორი, პროფესორი, ევროპის უნივერსიტეტი, საქართველო
ORCID ID /0000-0003-0071-2385

ხატია ხერხეულიძე
kherkheulidzekhatia07@gtu.ge

სამართლის დოქტორანტი, კავკასიის უნივერსიტეტი, საქართველოს ტექნიკური უნივერსიტეტის ასისტენტი, საქართველო

აბსტრაქტი

ადამიანის უფლებათა ევროპულმა სასამართლომ არაერთ გადაწყვეტილებაში განმარტა ადამიანის უფლებათა ევროპული კონვენციის მოთხოვნა, რომ პატიმრობა, როგორც აღკვეთის ღონისძიება, უნდა გამოიყენებოდეს უკიდურეს შემთხვევებში, როდესაც სხვა, ნაკლებად მკაცრი აღკვეთის ღონისძიების სახე ვერ უზრუნველყოფს სისხლის სამართლის პროცესის მიზნების მიღწევას. საქართველოს სისხლის სამართლის საპროცესო კანონმდებლობა ასახავს ამ პრინციპსა და მიდგომას. თუმცა, სასამართლო პრაქტიკის კვლევა და ოფიციალური სტატისტიკუ-

რი მონაცემები აჩვენებს, რომ პატიმრობა აღკვეთის ღონისძიების ყველაზე ხშირად გამოყენებული სახეა. აღნიშნული, შესაძლოა, მიუთითებდეს პატიმრობის, როგორც აღკვეთის ღონისძიების გამოყენების დასაბუთების ინდივიდუალურობის პრობლემის არსებობაზე სისხლის სამართლის პროცესში. ეს საკითხი შესაძლოა დაკავშირებული იყოს სისხლის სამართლის საპროცესო კანონმდებლობის ხარვეზებთან ან/და მოსამართლეთა მიერ კანონის არასწორ ინტერპრეტაციასა და მათთვის პატიმრობის საფუძვლების ინდივიდუალური დასაბუთების ვალდებულების ნაკლებობასთან.

საქართველოს კონსტიტუციაში პირის დაკავების და პატიმრობის საკითხებს ცალკე მუხლი ეთმობა, ე.ი ადამიანის თავისუფლების უფლება კონსტიტუციური უფლებაა. *„კონსტიტუცია იცავს ადამიანის თავისუფლებას და გახანტრიებულია ახა მახტო მატეხიაღური სამახთღის ნოხმით, ახამედ კონსტიტუციუხ ხანგში აყვანიღი პხოცესუაღუხი ნოხმებით, ხაც ხაზს უსვამს მის განსაკუთხებულ ადგიღს ძიხითად უფღებათა სისტემაში“.*[1] ამ ფონზე, საქართველოს სასამართლოები არცთუ იშვიათად იყენებენ ბლანკეტურ დასაბუთებას, რაც ცალსახად წარმოადგენს პრობლემას.

საკვანძო სიტყვები: პატიმრობა, აღკვეთი, კონსტიტუცია, ევროსასამართლო, ევროკონვენცია

შესავალი

აღკვეთის ღონისძიება, რომელსაც განსაკუთრებული ადგილი უკავია სისხლის სამართლის საპროცესო კოდექსში (შემდგომში სსსკ), წარმოადგენს საპროცესო იძულების ღონისძიებას.[2] მისი სწორად შერჩევა უმნიშვნელოვანესი საკითხია, რათა დაცული იქნეს როგორც საზოგადოების, ისე ბრალდებულის უფლებები და ინტერესები. შესაბამისად, პატიმრობის გამოყენებას აქვს „პრევენციულ-უზრუნველმყოფელი ხასიათი“.[3] განსაკუთრებით მაშინ, როდესაც სასამართლომ უნდა გადაწყვიტოს აღკვეთის ღონისძიების სახედ პატიმრობის გამოყენების საკითხი, კრიტიკულად მნიშვნელოვანია, რომ ყველა კონკრეტულ საქმეზე პროკურორმა შუამდგომლობაში, ხოლო მოსამართლემ განჩინებაში, ინდივიდუალურად დაასაბუთოს პატიმრობის გამოყენების გარდაუვალი საჭიროება.

აღკვეთის ღონისძიების სახით პატიმრობის შეფარდების დასაბუთების საკითხი აქტუალურია როგორც სისხლის სამართლის მეცნიერებაში, ისე სასამართლო პრაქტიკაში. არსებული სტატისტიკური მონაცემები, პატიმრობის შეფარდებასთან დაკავშირებით, საკითხს კიდევ უფრო მეტ აქტუალობას სძენს. ჩვენი კვლევის საგანია ინდივიდუალურად დასაბუთების მნიშვნელობის დადგენა პატიმრობის გამოყენების დროს. ასევე, ამ საკითხთან დაკავშირებული ეროვნული და საერთაშორისო პრაქტიკის შესწავლა-ანალიზი. სტატიის მიზანია სამეცნიერო ლიტერატურის, ეროვნული სასამართლოს პრაქტიკისა და ადამიანის უფლებათა ევროპული სასამართლოს (შემდგომში: ევროსასამართლო) გადაწყვეტილებების შესწავლა-დამუშავება და პრობლემის გადაწყვეტის გზების მოძიება.

კვლევის მეთოდს წარმოადგენს თეორიული ანალიზი, სამეცნიერო ლიტერატურის, ქართული და ევროპული სასამართლოს პრაქტიკული საქმიანობის შესწავლის შედეგად მიღებული მონაცემების განზოგადება. ჩვენს მიერ გამოყენებულია იურიდიული მეცნიერებისათვის რელევანტური შემდეგი სახის კვლევის მეთოდები: შედარებით-სამართლებრივი, ლოგიკური, სტატისტიკური.

1 საქართველოს საკონსტიტუციო სასამართლოს 2009 წლის 6 აპრილის №2/1/415 გადაწყვეტილება, II-1.

2 საქართველოს სისხლის სამართლის პროცესი, კერძო ნაწილი, ავტორთა ჯგუფი, თბილისი, 2012, 215.

3 საქართველოს სისხლის სამართლის საპროცესო კოდექსის კომენტარი, ავტორთა ჯგუფი, თბილისი, 2015, 558.

1. კონსტიტუციური და ევროპული სტანდარტები აღკვეთის ღონისძიების სახედ პატიმრობის გამოყენებისათვის

სტატიაში განხილული საკითხი რომ აქტუალურია და მნიშვნელოვან პრობლემას წარმოადგენს საქართველოში, ამაზე მიუთითებს საქართველოს უზენაესი სასამართლოს ვებგვერდზე გამოქვეყნებული 2022-2023 წლის სტატისტიკური მონაცემები.[4] პირველი ინსტანციის სასამართლოებში 2023 წელს პროკურატურის მიერ მოთხოვნილი აღკვეთის ღონისძიების სახე 6 494 შემთხვევაში იყო პატიმრობა. სასამართლოს მიერ 4 479 შემთხვევაში პატიმრობის მოთხოვნა დაკმაყოფილდა. ე.ი თითქმის 70% შემთხვევაში სასამართლომ გამოიყენა ყველაზე მკაცრი აღკვეთის ღონისძიება. 2022 წელს პროკურატურის მიერ წარდგენილი 6 864 პატიმრობის შუამდგომლობიდან, სასამართლომ დააკმაყოფილა 4 830 (ე.ი 70%-ზე მეტი).

საქართველოს კონსტიტუციით *(შემდგომში კონსტიტუცია)* დაცულია ადამიანის თავისუფლება.[5] *„ეს ნიშნავს, რომ იგი იცავს თითოეული ადამიანის თავისუფლებას სახელმწიფოს მხრიდან ყოვლგვარი ან ძალიან ზომიერი ან თვითნებური ხელყოფისაგან“.*[6] სწორედ ეს დაცვის გარანტია უნდა მოქმედებდეს მაშინ, როდესაც პირის მიმართ გამოიყენება პატიმრობა. ამ ღონისძიების საფუძვლების არსებობამ, თავისთავად, არ უნდა შთანთქოს ადამიანის თავისუფლების უფლება. *„ადამიანის ხელშეუხებლობა გულისხმობს თავისუფლებას ფიზიკური და ფსიქოლოგიური დაზიანებისაგან, ანუ ფიზიკუი და სულიერ სიმთლეს“.*[7] საქართველოს საკონსტიტუციო სასამართლოს განმარტებით, აღკვეთის ღონისძიების გამოყენების მიზანი არ არის პირის ბრალეულობის მტკიცება, იგი წარმოადგენს *„მახთღმსაჯულების ჯეროვანი განხორციელების ხელშეშლის პრევენციის საშუალებას“.*[8] თავისუფლების უფლების შეზღუდვით ადამიანი მოკლებული რჩება სხვა უფლებების განხორციელების შესაძლებლობას. ამიტომ, ამ უფლებაში ჩარევა მკაცრად უნდა კონტროლდებოდეს და ჩარევის სტანდარტები უნდა იყოს ძალიან მაღალი. არსებობს თავისუფლების უფლებაზე ზემოქმედების სამართლებრივი ფორმები, რომლებზეც კონსტიტუციის მე-13 მუხლის სხვადასხვა პუნქტებიც მიუთითებს. განსხვავებულია მათგან დაცვის კონსტიტუციურ სამართლებრივი გარანტიები.[9]

საქართველოს კანონმდებლობის ნაწილად მისი აღიარების შედეგად, ადამიანის უფლებათა ევროპული კონვენცია იურიდიულად სავალდებულო გახდა ეროვნულ დონეზე.[10] ტერმინი „თავისუფლება“ კონსტიტუციის მე-13 მუხლის ანალოგიურად განიმარტება კონვენციის მიზნებისთვისაც. „პიროვნების ხელშეუხებლობის“ ცნება შეიძლება გაიგივებული იქნეს თავისუფლების თვითნებური აღკვეთის დაუშვებლობის ვალდებულებასთან.[11]

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4 საქართველოს უზენაესი სასამართლოს ვებგვერდზე განთავსებული სტატისტიკური მონაცემები; https://www.supremecourt.ge/uploads/files/1/statistics/sisxli2023.pdf (გადამოწმების თარიღი 1.12.2024);

5 საქართველოს კონსტიტუციის მე-13 მუხლი, კონსტიტუციის ძველი რედაქციის მე-18 მუხლი.

6 საქართველოს კონსტიტუციის კომენტარი. თავი მეორე. (2013). პაატა ტურავას რედაქტორობით, გამომცემლობა შპს „პეტიტი“, თბილისი, 130.

7 CCPR/C/GC/35, General Comment No35 – article 9 (Liberty and Security of Person), 28.10.2014, I-3, I-5, I-6.

8 საქართველოს საკონსტიტუციო სასამართლოს 2015 წლის 26 ივნისის საოქმო ჩანაწერი #646, II-40.

9 ტუღუში თ., ბურჯანაძე გ., მშვენიერაძე გ., გოცირიძე გ., მენაბდე ვ., ადამიანის უფლებები და საქართველოს საკონსტიტუციო სასამართლოს სამართალწარმოების პრაქტიკა, თბილისი, 2013, 106, 109-110.

10 კორკელია კ., ქურდაძე ი., ადამიანის უფლებათა საერთაშორისო სამართალი ადამიანის უფლებათა ევროპული კონვენციის მიხედვით, თბილისი, 2004, 42.

11 ლიჩი ფ., ლევის-ენტონი ს., სტრაისტეანუ დ. და სხვ., თავისუფლებისა და ხელშეუხებლობის უფლება ადამიანის უფლებათა ევროპული კონვენციის მიხედვით (მე-5 მუხლი), თბილისი, 2009, 13.

საქმეზე „ნიკოლაიშვილი საქართველოს წინააღმდეგ“ ევროპულმა სასამართლომ ნათლად ჩამოაყალიბა პირადი ხელშეუხებლობის ელემენტი: ა) „თავისუფლება“ და „პირადი ხელშეუხებლობა“ ქმნის ერთიანი ძირითადი უფლების შემადგენლობას, რომელშიც პირადი ხელშეუხებლობა შეეხება თავისუფლების აღკვეთის გარემოებებს; ბ) „პირადი ხელშეუხებლობა“ არსებითად გულისხმობს თავისუფლების აღკვეთის დროს სამართლებრივ-სახელმწიფოებრივი პრინციპების დაცვას; გ) ამის შედეგად, თავისუფლების აღკვეთა უნდა ხორციელდებოდეს წინასწარ განჭვრეტადი, გადამოწმებადი წესების საფუძველზე და კეთილსინდისიერად.[12]

ევროპული მტკიცებულებითი სტანდარტი აღკვეთის ღონისძიების შეფარდებისათვის მნიშვნელოვნად არ განსხვავდება ქართულ კანონმდებლობაში დადგენილი სტანდარტისაგან. როცა ხდება აღკვეთის ღონისძიებების გამოყენება, მისი შეფარდების, ისევე როგორც მთელი მისი გამოყენების პერიოდის განმავლობაში, უნდა არსებობდეს საფუძვლიანი ეჭვი, რომ პირმა ჩაიდინა დანაშაული. ადამიანის უფლებათა ევროპული კონვენციის *(შემდგომში: კონვენცია)* შესაბამისად საფუძვლიანი ეჭვი არ მოიაზრებს მტკიცების იგივე სტანდარტს, რაც მსჯავრდებისთვის მოითხოვება.

ევროპული სასამართლოს განმარტებით, დასაბუთებული ვარაუდის არსებობა, რომ დაკავებულმა პირმა ჩაიდინა დანაშაული, თავისუფლების თავდაპირველი შეზღუდვის მართლზომიერების აუცილებელი პირობაა. მაგრამ, ასევე უნდა არსებობდეს კიდევ სხვა „რელევანტური“ და „საკმარისი“ გარემოებები, რომლებიც ამართლებენ პირის პატიმრობაში ყოფნას.[13] კონვენცია პირდაპირ მიუთითებს, რომ პატიმრობის გამოყენება სასამართლოს მიერ უნდა მოხდეს ისეთ შემთხვევაში, როდესაც სხვა ვერცერთი ღონისძიება ვერ უზრუნველყოფს აღკვეთის ღონისძიების მიზნების მიღწევას. *„ეროვნული სასამართლო ხელისუფლება, მე-5.3 მუხლის ძალით, ვალდებულია, განიხილოს ბრალდებულის სასამართლო პროცესზე გამოცხადების უზრუნველყოფის ალტერნატიული ღონისძიებები“.*[14]

სსსკ ითვალისწინებს პატიმრობის ალტერნატიულ ღონისძიებებს: გირაო, შეთანხმება გაუსვლელობისა და სათანადო ქცევის შესახებ, პირადი თავდებობა, სამხედრო მოსამსახურის ქცევისადმი სარდლობის მეთვალყურეობა და პატიმრობა. აღკვეთის ღონისძიებასთან ერთად ბრალდებულის მიმართ შეიძლება აგრეთვე გამოყენებულ იქნეს დამატებითი აღკვეთის ღონისძიებები.[15]

2. აღკვეთის ღონისძიების სახედ პატიმრობის გამოყენების მიზნები და საფუძვლები

სსსკ-ის პატიმრობისთვის ადგენს ისეთივე მიზნებს და საფუძვლებს, რაც ზოგადად აღკვეთის ღონისძიებისთვის არის განსაზღვრული. აღკვეთის ღონისძიების მიზნებია: ბრალდებულის სასამართლოში გამოცხადების უზრუნველყოფა, ბრალდებულის შემდგომი დანაშაულებრივი ქმე-

12 საქართველოს კონსტიტუციის კომენტარი. თავი მეორე. (2013). პაატა ტურავას რედაქტორობით, გამომცემლობა შპს „პეტიტი”, თბილისი, 132; NikolaiSvili v. Georgia,[2009], ECHR, no. 37048/04 §52-53.

13 იხ., შტოგმიულერი ავსტრიის წინააღმდეგ (Stögmüller v. Austria), განაცხადი no. 1602/62, ადამიანის უფლებათა ევროპული სასამართლოს 1969 წლის 10 ნოემბრის გადაწყვეტილების პუნქტი 4); სულაოია ესტონეთის წინააღმდეგ (Sulaoja v. Estonia), განაცხადი no. 55939/00, ადამიანის უფლებათა ევროპული სასამართლოს 2005 წლის 15 თებერვლის გადაწყვეტილება, პუნქტი 64.

14 მჭედლიძე ნ., საქართველოს საერთო სასამართლოების მიერ ადამიანის უფლებათა ევროპული კონვენციის გამოყენების სტანდარტები, თბილისი, 2017, 50, აღნიშნულთან დაკავშირებით სასამართლო მსჯელობს საქმეზე „პუნცელტი ჩეხეთის რესპუბლიკის წინააღმდეგ“ [2000] ECHR, no. 31315/96.

15 დეტალურად იხ. „საქართველოს სისხლის სამართლის საპროცესო კოდექსი” (2024 წლის 1 დეკემბრის მდგომარეობით, გამოქვეყნებული საიტზე: matsne.gov.ge) 199-205-ე მუხლები, 199-ე მუხლის მეორე ნაწილი.

დების აღკვეთა, განაჩენის აღსრულების უზრუნველყოფა.[16] კანონმდებელი სასამართლოს უტოვებს შესაძლებლობას, თავად განსაზღვროს - რა ხარისხით არის წარმოდგენილი საფრთხე. თუ საფრთხე მაღალი ხარისხით არსებობს, შესაძლებელია პატიმრობის გამოყენება, ხოლო სხვა შემთხვევაში სავალდებულოა სხვა, ნაკლებად მკაცრი ღონისძიების შეფარდება.

ევროპულმა სასამართლომ არაერთხელ განაცხადა, რომ თითოეული მიზნის in abstracto გამოყენება აღკვეთის ღონისძიების დასაბუთებისათვის დაუშვებელია და იგი უნდა ემყარებოდეს კონკრეტულ ფაქტობრივ საფუძველს. სასამართლომ განმარტა, რომ აღნიშნული საფუძველი არ შეიძლება იყოს „ზოგადი და აბსტრაქტული". სსსკ-ი ითვალისწინებს აღკვეთის ღონისძიების სამ კონკრეტულ საფუძველს: დასაბუთებული ვარაუდი, რომ ბრალდებული მიიმალება ან არ გამოცხადდება სასამართლოში, გაანადგურებს საქმისათვის მნიშვნელოვან ინფორმაციას ან ჩაიდენს ახალ დანაშაულს.[17] ამა თუ იმ ტიპის აღკვეთის ღონისძიების გამოსაყენებლად აუცილებელია ზემოთ ჩამოთვლილი საპროცესო საფუძვლებიდან, მინიმუმ, ერთის არსებობა.

2.1. ბრალდებულის მიერ ახალი დანაშაულის ჩადენის საფრთხე, როგორც პატიმრობის საფუძველი

ყველა გადაწყვეტილება, სადაც სასამართლო მიუთითებს საფრთხის არსებობაზე ყოველგვარი მტკიცებულების გარეშე და მხოლოდ ამ საფუძვლით იყენებს პატიმრობას, შეუსაბამოა კონსტიტუციასთან, სსსკ-თან და საერთაშორისო სტანდარტებთან. „პროცესის მწარმოებელმა ორგანომ უნდა ამტკიცოს კონკრეტული, ობიექტურად იდენტიფიცირებადი საფრთხის რეალურად არსებობა". ევროპული სასამართლოს განმარტებით, უნდა არსებობდეს კონკრეტული ფაქტები, რომლებიც მიუთითებენ ახალი დანაშაულის ჩადენის საფრთხეზე. მიუხედავად იმისა, რომ ეს გარემოებები მნიშვნელოვანია, ცალკე აღებული თითოეული მათგანი მაინც არასაკმარისი საფუძველია დასაბუთებული ვარაუდისათვის, რომ პირმა შესაძლოა კვლავ ჩაიდინოს ახალი დანაშაული.[18] მსჯელობა იმაზე, რომ ძალადობრივი დანაშაული „უტყუარი გარემოებაა", რომელიც ახალი დანაშაულის ჩადენის მომასწავებელია, არ შეესაბამება ევროპული სასამართლოს მიდგომას, რომლის თანახმადაც, ბრალად შერაცხული ქმედების ბუნებაზე მითითება აბსტრაქტულია და არ ამართლებს ახალი დანაშაულის ჩადენისა თუ მართლმსაჯულებაში ჩარევის საფრთხეს, როგორც პატიმრობის საფუძველს.[19]

ეროვნული სასამართლო ასე თუ ისე ითვალისწინებს, რომ ერთის მხრივ, ბრალდებული და მეორეს მხრივ, დაზარალებული და სხვა პირები ოჯახის წევრების და პარტნიორების სახით, წარმოადგენენ დაპირისპირებულ მხარეებს. აღნიშნულის გამო, სასამართლომ შესაძლოა მიიჩნიოს, რომ ბრალდებულს თავისუფლებაში ყოფნის შემთხვევაში გააგრძელებს დანაშაულებრივ საქმიანობას.[20]

16 „საქართველოს სისხლის სამართლის საპროცესო კოდექსი" (2024 წლის 1 დეკემბრის მდგომარეობით, გამოქვეყნებული საიტზე: matsne.gov.ge) 198-ე მუხლის 1 ნაწილი.

17 „საქართველოს სისხლის სამართლის საპროცესო კოდექსი" (2024 წლის 1 დეკემბრის მდგომარეობით, გამოქვეყნებული საიტზე: matsne.gov.ge) 198-ე მუხლის მეორე ნაწილი; ამ საკითხზე იხ,: Boicenco v. Moldova, [2006], ECHR, § 142-143.

18 ხარვეზები და რეკომენდაციები სისხლის სამართლის მართლმსაჯულებაში, საია, თბილისი, 2012, 50; ამ საკითხზე საინტერესო საქმეა: Aleksandr Makarov v. Russia, [2009], ECtHR, no. 15217/07, §134.

19 ამ საკითხზე საინტერესოა ევროპული სასამართლოს გადაწყვეტილებები: Bykov v. Russia, (2009) ECHR, no. 4378/02, §64; Lakatoš and Others v. Serbia, (2014) ECHR, no. 3363/08 §97 და A.B. v. Hungary, (2013) ECHR, no. 33292/09 § 23-26.

20 მჭედლიძე ნ., საქართველოს საერთო სასამართლოების მიერ ადამიანის უფლებათა ევროპული კონვენციის გამოყენების სტანდარტები, თბილისი, 2017, 69; თბილისის საქალაქო სასამართლოს 2014 წლის 5 მაისის განჩინება ბრალდებულის სასამართლოში პირველი წარდგენისა და აღკვეთის ღონისძიების გამოყენების თაობაზე,

2.2. ბრალდებულის მიმალვის საფრთხე, როგორც პატიმრობის საფუძველი

აღკვეთის ღონისძიების გამოყენების ერთ-ერთი საფუძველია დასაბუთებული ვარაუდი, რომ ბრალდებული მიიმალება ან არ გამოცხადდება სასამართლოში. მიმალვის საფრთხის არსებობის დასადგენად მნიშვნელოვანია, განხილულ იქნეს კონკრეტული საქმის ყველა გარემოება და მოსალოდნელი სასჯელის ხასიათი. ამასთან, უნდა შეფასდეს, „სასჯელის სიმძიმემ შეიძლება თუ არა წარმოშვას მიმალვის სურვილი და ამასთან, იმ ობიექტური გარემოებების არსებობა, რამაც შეიძლება სისრულეში მოიყვანოს ბრალდებულის ასეთი სურვილი“.[21]

მიმალვის საფრთხესთან დაკავშირებით განვიხილავთ საფრთხის შემცველ გარემოებებს ეროვნული და ევროპული სამართლის ჭრილში. მათ შორის:[22]

1. პირის სასამართლოში გამოუცხადებლობის საფრთხის დასაბუთებისას მხედველობაში უნდა იქნეს მიღებული ბრალდებულის პიროვნული მახასიათებლები.[23] სათანადო ყურადღება უნდა მიექცეს პირის საკუთარი ინიციატივით გამოცხადებას სამართალდამცავ ორგანოში. ასევე, ყველა სხვა ფაქტობრივ გარემოებას და წარსულ გამოცდილებას, რაც ამყარებს ან გამორიცხავს ასეთი საფრთხის რეალურობას;
2. საქართველოს საერთო სასამართლოები, როგორც წესი. იზიარებენ ევროპული სასამართლოს პრაქტიკას, რომ ბრალდების სიმძიმე და სასჯელის სიმკაცრე რელევანტური, მაგრამ არასაკმარისი გარემოებაა და, ცალკე აღებული, ვერ ამართლებს პატიმრობის გამოყენებას. ერთ-ერთ საქმეზე სასამართლო განმარტავს, რომ ის გარემოება კი, რომ მოსალოდნელი სასჯელი მკაცრია, ბრალდებულს ბრალი ედება მძიმე და განსაკუთრებით მძიმე კატეგორიის დანაშაულთა ჩადენაში, მარტო აღებული არ წარმოადგენს მიმალვის საფრთხის გამართლების საშუალებას;[24]
3. ევროპულმა სასამართლომ საქმეში „სოფინი რუსეთის წინააღმდეგ“ (Sopin v. Russia, [2013], ECHR, no. 57319/10) ის ფაქტორები, რომ განმცხადებელს ჰქონდა პასპორტი, ჰყავდა ნათესავები, რომლებიც მუდმივად ცხოვრობდნენ რუსეთის საზღვრებს გარეთ, ხშირად მოგზაურობდა და ჰქონდა დიდი ფინანსური რესურსები, შეაფასა როგორც მიმალვის რეალური რისკების არსებობის მაგალითი;
4. ევროპული სასამართლო პირის კავშირებს იმ სახელმწიფოსთან, სადაც ის არის დაპატიმრებული და მის საერთაშორისო კონტაქტებს მიიჩნევს მნიშვნელოვან გარემოებებად. ასევე, სამსახურის არარსებობა და ოჯახის არქონა არ შეიძლება შეფასდეს, როგორც ახალი დანაშაულის ჩადენის საფრთხე;[25]
5. ევროპული სასამართლო მნიშვნე-

საქმე no. 10ა/3042-14.

21 ხარვეზები და რეკომენდაციები სისხლის სამართლის მართლმსაჯულებაში, საია, თბილისი, 2012, 49.

22 ამ საკითხზე საინტერესოა შემდეგი საქმეები: Yagci and Sargin v. Turkey, [1995] ECHR, no.16419/90; 16426/90 და Letellier v. France, [1991], ECHR, no. 12369/86. ფაფიაშვილი ლ., დაკავების და დაპატიმრების გამოყენების სამართლებრივი საფუძვლები სისხლის სამართლის პროცესში, სტატიათა კრებული. თბილისი, 2010, 176-177.

23 ხარვეზები და რეკომენდაციები სისხლის სამართლის მართლმსაჯულებაში, საია, თბილისი, 2012, 48-49.

24 Mikhalchuk v. Russia, [2015], ECHR, no. 33803/04, §53-59; Ahmet Ozkan and other v. Turkey, [2004], ECHR, no. 21689/93, §397-398; Belchev v. Bulgaria, [2004], ECHR, no. 39270/98 §82; Kostadinov v. Bulgaria [2008], ECHR, no. 55712/00 §78-80; თბილისის საქალაქო სასამართლოს 2013 წლის 22 ივლისის განჩინება აღკვეთის ღონისძიების შეცვლის შესახებ, საქმე no. 1/953-13, გვ. 2.

25 Guide on Article 5 of the European Convention on Human Rights, Updated on 30 April 2018, pg. 36, § 203, ამ საკითხთან დაკავშირებით საინტერესოა ევროსასამართლოს მსჯელობა საქმეში „ვ შვეიცარიის წინააღმდეგ“ (W. v. Switzerland, [1993], ECHR, no. 14379/88).

ლოვან ყურადღებას უთმობს ბრალდებულის პიროვნულ თვისებებს, მათ შორის, ნასამართლობას. ასევე, ყურადღებას ამახვილებს ბრალდებულის ხასიათსა და მორალზე. მიმალვის საფრთხე უნდა შეფასდეს ყველა იმ გარემოების ჭრილში, რომელიც პირს სისხლის სამართლებრივი დევნის ქვეყანასთან აკავშირებს.[26]

2.3. მტკიცებულებების განადგურების საფრთხე, როგორც პატიმრობის საფუძველი

აღკვეთის ღონისძიების გამოყენების ერთ-ერთი საფუძველია დასაბუთებული ვარაუდი, რომ ბრალდებული გაანადგურებს საქმისთვის მნიშვნელოვან ინფორმაციას. ბრალდებულის მიერ მტკიცებულებების განადგურების ან/და მტკიცებულებების მოპოვებისათვის ხელის შეშლის საფრთხე არ შეიძლება რელევანტური იყოს პროცესის წარმოების ყველა ეტაპზე. მხედველობაშია მისაღები კონკრეტული საქმის ფაქტობრივი გარემოებები.[27] მნიშვნელოვანია, რომ ბრალდების მხარემ კონკრეტულ მონაცემებზე დაყრდნობით დაასაბუთოს ბრალდებულის შესაძლებლობა გავლენა მოახდინოს მართლმსაჯულების განხორციელების ხარისხზე.

ეროვნული სასამართლო ხშირად ზოგადად უთითებს იმ ფაქტზე, რომ სამართლის საქმეზე ჩასატარებელია კიდევ მთელი რიგი საგამოძიებო მოქმედებები. დასაკითხია მოწმეები და სხვა. საგამოძიებო მოქმედებების ჩატარების აუცილებლობით პატიმრობის დასაბუთება მიუღებელია ევროპული სასამართლოს პრაქტიკით. საქმეზე „მიმინოშვილი რუსეთის წინააღმდეგ“ (Miminoshvili v. Russia, [2011], ECHR no. 20197/03 §86), სადაც ევროპულმა სასამართლომ განმარტა, რომ საგამოძიებო მოქმედებების ჩატარების უზრუნველყოფის მიზნით პირის პატიმრობა დაუშვებელია გამართლდეს, ვინაიდან საგამოძიებო მოქმედების ჩატარება, როგორც წესი, ბრალდებულის აუცილებლად დაპატიმრებას არ მოითხოვს.[28]

თუ პირი ბრალდებულია ისეთი დანაშაულის ჩადენაში, რომელიც დაკავშირებულია მტკიცებულებების განადგურებასთან, დოკუმენტების გაყალბებასთან, მასალების ფალსიფიკაციასთან და სხვა მსგავს ქმედებასთან, არსებობს მტკიცებულებების განადგურების ან განადგურების მცდელობის მაღალი ხარისხი, მაგ. თაღლითობის და დოკუმენტის გაყალბების საქმეები.[29] ევროპულმა სასამართლომ არ დაადგინა დარღვევა საქმეზე „კოლევი ბულგარეთის წინააღმდეგ“ (28.07.2005). განმცხადებელმა ჩაიდინა თაღლითობა, რაც გამოიხატა ყალბი პირადობის დამადასტურებელი მოწმობისა და სხვა დოკუმენტაციის დამზადებასა და ბანკში წარდგენაში, რის მეშვეობითაც, მან ბანკიდან გამოიტანა დიდი თანხა.

ბრალდებულის მიერ მტკიცებულებების განადგურების ანდა მტკიცებულებების მოპოვებისათვის ხელის შეშლის საფრთხე შეიძლება არსებობდეს, თუ ბრალდებულს აქვს გარკვეული სახის კავშირები პროცესის მონაწილეებთან. როგორც ევროპული სასამართლო განმარტავს, ბრალდებულის სამსახურებრივი სტატუსი რელევანტურია მოწმეებზე ზემოქმედების საფრთხის დასასაბუთებლად, თუმცა ამავდროულად, სასამართლო ეჭვქვეშ აყენებს ამ არგუმენტის რელევანტურობას, მაშინ როდესაც ბრალდებული გაანთავისუფლეს სამსახუ-

26 მჭედლიძე ნ., საქართველოს საერთო სასამართლოების მიერ ადამიანის უფლებათა ევროპული კონვენციის გამოყენების სტანდარტები, თბილისი, 2017, 58; იხ. მაგ.: Becciev v. Republic of Moldova [2005], ECHR no. 9190/03, §58; W. v. Switzerland, [1993], ECHR, no. 14379/88 §33.

27 იხ. Letellier v. France, 26 June, 1991; Yagci and Sargin v. Turkey, 8 June, 1995. ფაფაიშვილი ლ., დაკავების და დაპატიმრების გამოყენების სამართლებრივი საფუძვლები სისხლის სამართლის პროცესში, სტატიათა კრებული, თბილისი, 2010, 176.

28 მჭედლიძე ნ., საქართველოს საერთო სასამართლოების მიერ ადამიანის უფლებათა ევროპული კონვენციის გამოყენების სტანდარტები, თბილისი, 2017 წ. 83.

29 საქმეში „3 შვეიცარიის წინააღმდეგ“ (26·01·1993).

რიდან.[30] თანამდებობრივ დანაშაულებში ბრალდებული პირების მიმართ აღკვეთის ღონისძიების შეფარდებისას, ბრალდების მხარემ უნდა გაითვალისწინოს, რომ მტკიცებულებათა განადგურება შესაძლოა თავიდან იქნეს აცილებული ბრალდებულის თანამდებობიდან გადაყენებითაც. სასამართლო მიიჩნევს, რომ ამ დროს უნდა შეფასდეს გამოძიების და სასამართლო პროცესის წინსვლა, ბრალდებულის პიროვნება, მისი ქცევა დაკავებამდე და დაკავების შემდეგ, კონკრეტული ქმედებები, რომლებიც მის განზრახვაზე მიუთითებს გაანადგუროს ან გააყალბოს მტკიცებულებები ან მოწმეებზე მოახდინოს ზეგავლენა.

3. ბრალდებულის ინდივიდუალური გარემოებების შესახებ სასამართლოსთვის ინფორმაციის მიწოდების მნიშვნელობა

ბრალდებულის სასამართლოში პირველი წარდგენის სხდომაზე სასამართლოს კანონით უნდა დაევალოს დაადგინოს ბრალდებულის ინდივიდუალური გარემოებები. სსსკ-ის მოქმედი რედაქციის შესაბამისად, მოსამართლეს ევალება მხოლოდ ბრალდებულის ვინაობის დადგენა და არ არის მკაცრი მითითება მისი ინდივიდუალური გარემოებების დადგენის შესახებ.[31] მოსამართლეს კანონმდებელმა პირდაპირ უნდა დაავალოს, რომ პროცესზე დაადგინოს ბრალდებულის პიროვნული და ინდივიდუალური გარემოებები. კანონმდებელი ითვალისწინებს, რომ აღკვეთის ღონისძიებისა და მისი კონკრეტული სახის გამოყენების საკითხის გადაწყვეტისას მოსამართლემ უნდა გაითვალისწინოს ბრალდებულის პირადი მონაცემები, მაგრამ როგორც პრაქტიკა და სტატისტიკა აჩვენებს, მხოლოდ ეს ჩანაწერი საკმარისი არ არის.

კანონმდებელი არ ავალდებულებს სასამართლოს საფრთხეების განსაკუთრებული დასაბუთება მოახდინოს პატიმრობის გამოყენებისას. აღნიშნული ეწინააღმდეგება ევროსასამართლოს მიდგომებს. მიგვაჩნია, რომ საფრთხის მაღალი ხარისხის ინდივიდუალურად დასაბუთების ვალდებულება საკანონმდებლო დონეზე უნდა გაიწეროს. ასევე, სასამართლომ ინდივიდუალურად უნდა დაასაბუთოს, თუ რატომ ვერ უზრუნველყოფს ნაკლებად მკაცრი აღკვეთის ღონისძიება საპროცესო მიზნების მიღწევას.[32]

კოდექსის მოქმედი რედაქცია ადგენს, რომ აღკვეთის ღონისძიებისა და მისი კონკრეტული სახის გამოყენების საკითხის გადაწყვეტისას „მოსამართლე ითვალისწინებს“ ბრალდებულის პიროვნების, მის საქმიანობას, ასაკს, ჯანმრთელობას, მიყენებული ქონებრივი ზიანის ანაზღაურებას და ა.შ.[33] აღნიშნული ჩანაწერი მკაფიოდ არ ადგენს მოსამართლის ვალდებულებას, რომ მან გაითვალისწინოს ეს გარემოებები, რაც ქმნის მუხლის არასწორად განმარტების პრაქტიკას. მიგვაჩნია, რომ კანონი მოსამართლეს პირდაპირ უნდა ავალდებულებდეს ინდივიდუალური გარემოებების გათვალისწინებას პატიმრობის შესახებ გადაწყვეტილების მიღებისას.

ევროპული სასამართლო განმარტავს, რომ სასამართლომ პრიორიტეტულად უნდა გაითვალისწინოს პატიმრობის ალტერნატიული ღონისძიებების გამოყენების საკითხი. თუმცა, საქართველოს კანონმდებლობით ეს ვალდებულება სასამართლოს პირდაპირ დაკისრებული არ აქვს. ეს საკითხი განსაკუთრებულად მნიშვნელოვანია და თუ სისხლის საპროცესო კანონმდებლობით მოსამართლეს არ ექნება პირდაპირი ვალდებულება, კვლავ გაგრძელდება

30 ამ საფუძველთან დაკავშირებით საინტერესოა ასევე, ევროსასამართლოს გადაწყვეტილება საქმეზე „კონტრადა იტალიის წინააღმდეგ“ (საქმე N92/1997/876/1088 (24.08.1998) სადაც არ დაადგინა მე-5 (3) მუხლის დარღვევა.

31 სსსკ-ის 197-ე მუხლი.

32 იხილეთ: თბილისის საქალაქო სასამართლოს 2024 წლის გადაწყვეტილებები აღკვეთის ღონისძიების გამოყენების თაობაზე: N10ა/110, N10ა/1388, N10ა/973, N10ა/1101-24, N10ა/910, N10ა/6165.

33 სსსკ-ის 198-ე მუხლის მეხუთე ნაწილი.

კვაზი სასამართლო პრაქტიკა.

4. ბრალდებულის მიერ დაცვის უფლების რეალიზების მნიშვნელობა პატიმრობის ინდივიდუალური დასაბუთებისას

საქართველოს სისხლის სამართლის საპროცესო კანონმდებლობაში მოქმედებს შეჯიბრებითობის პრინციპი, რომლის შესაბამისად, საქმეზე მტკიცებულებების მოპოვების უფლება აქვთ მხოლოდ მხარეებს. სასამართლოს არ შეუძლია მოიპოვოს მტკიცებულებები ან აწარმოოს გამოძიება. პატიმრობაში მყოფი ბრალდებული, ფიზიკურად ვერ შეძლებს საკუთარ საქმეზე სრულყოფილი გამოძიების ჩატარებას. მიგვაჩნია, რომ თუ სასამართლო გამოიყენებს პატიმრობას, ადვოკატის ჩართვა საქმეზე სავალდებულო უნდა გახდეს. მხოლოდ იმ შემთხვევაში, თუ პატიმრობაში მყოფ ბრალდებულს ეყოლება ადვოკატი, ის შეძლებს დაცვის უფლებია რეალიზებას.

5. პროკურორის მიერ ბრალდებულის ინდივიდუალური გარემოებების შესახებ სასამართლოსთვის ინფორმაციის მიწოდების მნიშვნელობა

სსსკ-ის შესაბამისად, აღკვეთის ღონისძიების გამოყენების შესახებ შუამდგომლობის სასამართლოში წარდგენისას პროკურორი ვალდებულია დაასაბუთოს მის მიერ მოთხოვნილი აღკვეთის ღონისძიების მიზანშეწონილობა და სხვა, ნაკლებად მკაცრი აღკვეთის ღონისძიების გამოყენების მიზანშეუწონლობა.[34] ამ ჩანაწერში არ არის მითითება ინდივიდუალური დასაბუთების შესახებ, რაც პროკურორებისა და მოსამართლეების მიერ ძირითად შემთხვევაში განიმარტება ისე, თითქოს ზოგადი დასაბუთება საკმარისია. აღნიშნული იწვევს ტრაფარეტულ სასამართლოს გადაწყვეტილებებს პატიმრობის შეფარდებასთან დაკავშირებით. მიგვაჩნია, რომ პროკურორიც და სასამართლოც მეტი გულისხმიერებით უნდა უდგებოდნენ ინდივიდუალურობის საკითხს.

საკითხზე მსჯელობისას გამოვყოფდით ობიექტურობის პრინციპს, რომლის მიხედვითაც პროკურატურა ვალდებულია, პატიოსნად და ობიექტურად შეაფასოს ბრალდებულის ქმედებები.[35] პროკურატურის საქმიანობა უნდა ეფუძნებოდეს სამართლებრივი ეთიკის უმაღლეს სტანდარტებს.[36]

გამომდინარე იქიდან, რომ კანონმდებლობა არ ავალდებულებს ბრალდების მხარეს სასამართლოს წარუდგინოს ინდივიდუალური გარემოებები ბრალდებულთან დაკავშირებით, პროკურორი ძირითადად არ ამახვილებს ყურადღებას ასეთ გარემოებებზე. თუ ინდივიდუალური გარემოებების შესახებ თავად ბრალდებულმა არ ისაუბრა, სასამართლო ძირითად შემთხვევებში სრულ ინფორმაციულ ვაკუუმშია.

6. პატიმრობის შეფარდების შესახებ სასამართლოს განჩინების გასაჩივრების პრობლემა კანონმდებლობასა და პრაქტიკაში

სისხლის საპროცესო კანონმდებლობა ითვალისწინებს პატიმრობის შესახებ პირველი ინსტანციის სასამართლოს განჩინების გასაჩივრების ერთჯერად შესაძლებლობას სააპელაციო სასამართლოს საგამოძიებო პალატაში.[37] თუმცა, აღსანიშნავია, რომ კანონი აწესებს ასეთი საჩივრის

34 სსსკ-ის 198-ე მუხლის მესამე ნაწილი.

35 ეს მოთხოვნა ხაზგასმულია გაეროს პრინციპებში, UN Guidelines for Prosecutors, 1990, 34.

36 European Guidelines on Prosecutorial Ethics", 2018.

37 სსსკ-ის 206-ე მუხლის მე-8 ნაწილი.

დაშვების წინაპირობას, რის გამოც, ფაქტობრივად, არ არსებობს პრაქტიკა, რომლის შესწავლასაც შევძლებდით პატიმრობის შეცვლასთან დაკავშირებით. მნიშვნელოვანია დაცვის მხარეს მიეცეს შესაძლებლობა - რეალურად ჰქონდეს პატიმრობის შეფარდების გადაწყვეტილების გასაჩივრების შანსი. ამისათვის კი, სააპელაციო სასამართლომ საქმე უნდა მიიღოს განსახილველად დასაშვებობის კრიტერიუმის გარეშე.[38] მოქმედი ჩანაწერით ფაქტიურად შეუძლებელია გასაჩივრების მექანიზმის რეალური მოქმედება, რადგან დასაშვებობის კრიტერიუმი პირდაპირ ითვალისწინებს „ახალი გარემოების“ არსებობას საქმეზე. ამ მოთხოვნის შესრულება, ფაქტობრივად, შეუძლებელია, რადგან 24 საათში დაცვის მხარე უმეტეს შემთხვევებში ვერ შეძლებს ახალი გარემოების შესახებ ინფორმაციის მოპოვებასაც კი.

სსსკ-ის მიხედვით, პატიმრობის განჩინებასთან დაკავშირებულ საჩივარში უნდა აღინიშნოს, რა მოთხოვნები დაირღვა გასაჩივრებული გადაწყვეტილების მიღებისას და რით გამოიხატა გასაჩივრებული გადაწყვეტილების დებულებათა მცდარობა. მუხლში კანონმდებლის მიერ დადგენილი სიტყვები „არსებითი მნიშვნელობის მქონე“ განსაზღვრავს, ფაქტობრივად, მთლიანად საქმის ბედს და იმ პრაქტიკას, რომელიც დღესდღეობით არის დამკვიდრებული საქართველოში. მიგვაჩნია, რომ მხარეს უნდა ჰქონდეს შესაძლებლობა - ნებისმიერ შემთხვევაში გაასაჩივროს შეფარდებული პატიმრობა.

რეკომენდაციები

იმისათვის, რომ სასამართლომ მაქსიმალურად მოახდინოს ბრალდებულის ინდივიდუალური გარემოებების გათვალისწინება აღკვეთის ღონისძიების შეფარდებისას, მიგვაჩნია, რომ აუცილებელია საკანონმდებლო ცვლილებების განხორციელება სისხლის სამართლის საპროცესო კოდექსში. კერძოდ:

- რეკომენდებულია, სსსკ-ის 197-ე მუხლის პირველ ნაწილს დაემატოს შემდეგი შინაარსის „ა“ პუნქტი: [მოსამართლე] „არკვევს ბრალდებულის საქმიანობას, ჯანმრთელობას, ოჯახურ და ქონებრივ მდგომარეობას, მიყენებული ქონებრივი ზიანის ანაზღაურებას და სხვა ინდივიდუალურ გარემოებებს“;
- რეკომენდებულია, სსსკ-ის 198-ე მუხლის მეხუთე ნაწილში სიტყვა „ითვალისწინებს“ შეიცვალოს სიტყვებით „ვალდებულია გაითვალისწინოს“. შესაბამისად, მეხუთე ნაწილი უნდა ჩამოყალიბდეს შემდეგი რედაქციით: „აღკვეთის ღონისძიებისა და მისი კონკრეტული სახის გამოყენების საკითხის გადაწყვეტისას სასამართლო ვალდებულია გაითვალისწინოს ბრალდებულის პიროვნება, მისი საქმიანობა, ასაკი, ჯანმრთელობა, ოჯახური და ქონებრივი მდგომარეობა, მიყენებული ქონებრივი ზიანის ანაზღაურება, ადრე შეფარდებული რომელიმე აღკვეთის ღონისძიების დარღვევის ფაქტი და სხვა ინდივიდუალური გარემოებები“;
- მნიშვნელოვანია, სსსკ-ის 199-ე მუხლს დაემატოს შემდეგი შინაარსის 2.1 ნაწილი: „სასამართლო ვალდებულია პრიორიტეტულად განიხილოს არასაპატიმრო აღკვეთის ღონისძიების და საჭიროების შემთხვევაში მათთან ერთად დამატებითი ღონისძიებების გამოყენების საკითხი“;
- მიგვაჩნია, რომ სავალდებულო დაცვასთან დაკავშირებით განსახორციელებელი ცვლილება უნდა აისახოს სსსკ-ის 45-ე მუხლში და „ლ“ ქვეპუნქტის მოქმედმა რედაქციამ უნდა ჩაანაცვლოს „მ“ ქვეპუნქტი, ხოლო „ლ“ ქვეპუნქტი ჩამოყალიბ-

38 თბილისის სააპელაციო სასამართლოს 2017 წლის 28 დეკემბრის განჩინება საჩივრის დაუშვებლად ცნობის შესახებ, საქმეზე N1გ/1483-17; თბილისის სააპელაციო სასამართლოს 2017 წლის 06 აპრილის განჩინება საქმეზე N1გ/465.

დეს შემდეგნაირად: „თუ გამოტანილია განჩინება პატიმრობის ან პატიმრობით უზრუნველყოფილი გირაოს გამოყენების შესახებ“;

- რეკომენდებულია, სსსკ-ის 198-ე მუხლის მესამე ნაწილი ჩამოყალიბდეს შემდეგი რედაქციით: „აღკვეთის ღონისძიების გამოყენების შესახებ შუამდგომლობის წარდგენისას პროკურორი ვალდებულია ინდივიდუალურად დაასაბუთოს მის მიერ მოთხოვნილი აღკვეთის ღონისძიების მიზანშეწონილობა და სხვა, ნაკლებად მკაცრი აღკვეთის ღონისძიების გამოყენების მიზანშეუწონლობა“;
- მიგვაჩნია, რომ სსსკ-ის 198-ე მუხლს უნდა დაემატოს შემდეგი შინაარსის 3.1 ნაწილი: „აღკვეთის ღონისძიების სახედ პატიმრობის მოთხოვნის შემთხვევაში პროკურორი ვალდებულია სასამართლოს წარუდგინოს ანგარიში ბრალდებულის ინდივიდუალური გარემოებების შესახებ“;
- რეკომენდებულია, სსსკ-ის 206-ე მუხლს დაემატოს შემდეგი შინაარსის 8.1 პუნქტი: „მხარე უფლებამოსილია ბრალდებულის მიმართ აღკვეთის ღონისძიების სახედ პატიმრობის გამოყენების შემთხვევაში, პატიმრობის შეცვლის ან გაუქმების შესახებ შუამდგომლობით მიმართოს მაგისტრატ მოსამართლეს გამოძიების ადგილის მიხედვით“;
- პატიმრობის გასაჩივრების შესაძლებლობა მხარეს უნდა ჰქონდეს ნებისმიერ შემთხვევაში. შესაბამისად, სსსკ-ის 207-ე მუხლს უნდა დაემატოს შემდეგი შინაარსის მე-4 პირველი პრიმა ნაწილი: „სააპელაციო სასამართლოს საგამოძიებო კოლეგიის მოსამართლე საჩივარს, რომელიც ეხება პატიმრობის გამოყენებას, შეცვლას ან გაუქმებას, განიხილავს ერთპიროვნულად, მისი შეტანიდან არაუგვიანეს 72 საათისა. მოსამართლე საჩივარს განიხილავს ზეპირი მოსმენით, ამ კოდექსით დადგენილი წესით“.

დასკვნა

სტატიაში გამოიკვეთა ქართულ სასამართლო პრაქტიკაში პატიმრობის გამოყენებისას, მისი ინდივიდუალურად დასაბუთების პრობლემატური საკითხები. გამოიკვეთა - თუ რა საფუძვლებს მიიჩნევს სამართლიანად ევროპული სასამართლოს პრაქტიკა აღკვეთის ღონისძიების სახედ პატიმრობის გამოყენებისას. ამასთან, ხაზი გაესვა იმ ფაქტს, რომ პატიმრობის ნებისმიერი საფუძველი უნდა იყოს რეალური და ინდივიდუალურად დასაბუთებული. გაუმართლებელია აბსტრაქტულ საფრთხეზე მითითებით ბრალდებულის მიმართ გამოყენებული იქნას პატიმრობა. თუ პატიმრობის გამოყენების გარდაუვალობა ინდივიდუალურად დასაბუთებული არ იქნება, სასამართლომ უნდა გამოიყენოს სხვა, ნაკლებად მკაცრი აღკვეთის ღონისძიება. ჩვენ მიერ შემოთავაზებული იქნა რეკომენდაციები, რომლებიც მიმართულია საკანონმდებლო ცვლილებების განხორციელებისკენ. მიგვაჩნია, რომ აღნიშნული ცვლილებები ხელს შეუწყობს სამართლიანი, დემოკრატიული ქვეყნის განვითარებას და საქართველოს ევროპული მომავლის შექმნას.

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1. საქართველოს უზენაესი სასამართლოს ვებ-გვერდზე განთავსებული სტატისტიკური მონაცემები (ბოლო გადამოწმების თარიღი 1 დეკემბერი, 2024 წ.) https://www.supremecourt.ge/uploads/files/1/statistics/sisxli2023.pdf

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ტელეფონი: (+995 32) 2 000 171 (120); (+995 596) 171 171

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