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IVANE JAVAKHISHVILI TBILISI STATE UNIVERSITY

GRIGOL ROBAKIDZE UNIVERSITY

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IVANE JAVAKHISHVILI TBILISI STATE UNIVERSITY

GRIGOL ROBAKIDZE UNIVERSITY

8/10 K. Gamsakhurdia str. | 16/18 M. Abashidze str. Batumi 6010, Georgia
E-MAIL: JCL@CONSTCOURT.GE

FOREWORD

As legal processes develop dynamically, there is a need for its in-depth discernment, academic analysis, which, in turn, contributes to the realisation of the goals of law and helps to increase its effectiveness. Comprehension of the findings based on any research methodology, data and public perceptions, rational analysis of legislative regulation and judicial practice leads to an irreversible increase in legal awareness. This, in turn, helps policymakers, decision-makers or bodies to choose substantiated, reasonably sensible and result-oriented solutions.

The "Journal of Constitutional Law" is an accessible academic platform open to both young researchers and acclaimed scholars. It is an internationally-refereed publication that provides legal practitioners and researchers with the opportunity to present their work to the wider public and establish a place in the field of research. In addition, the publication is a valuable source for students and legal professionals to obtain information and deepen their knowledge on current, topical legal issues.

This present issue of the "Journal of Constitutional Law" brings together five academic pieces by Georgian authors. In particular, the journal combines work by Georgian researchers on the following interesting legal issues: constitutional analysis of the legal phenomenon of migration from the perspective of a "third country", namely, in the legal context of those states in which an asylum seeker temporarily remains until the determination is made whether to grant an asylum in the country of destination (authored by Professor Anna Phirtskhalashvili), the consideration of the provision of criminal procedural legislation on establishing a guilty verdict (Part 5 of Article 269 of the Criminal Procedure Code of Georgia), according to which the court is authorised, if appropriate conditions exist, to pronounce a guilty verdict against a person, assign a sentence and subsequently discharge him/her from serving it (authored by Associate Professor Lavrenti Maghlakelidze), the scope of a lawyer's freedom of expression (authored by Jamlat Gvidiani), discussion of the jurisprudence of the European Convention on Human Rights in relation to the prohibition of human trafficking (authored by Associate Professor Marina Meskhi), analysis of the procedural status of the accused and the witness in light of the judgement of the Plenum of the Constitutional Court of 28 December 2021 (authored by Maia Akhvlediani).

In addition, this publication provides a review of three landmark judgements issued by the Constitutional Court of Georgia in 2023 and 2024. In particular, the journal presents a review of the judgements of the Constitutional Court of 22 November 2023, No. 2/8/1444 ("Nikoloz Akopov vs. the Parliament of Georgia"), 14 December 2023, No. 3/3/1635 ("Public Defender of Georgia vs. the Parliament of Georgia"), and 12 July 2024 ("Constitutional submission of the Telavi District Court on the constitutionality of Part 3 of Article 34 of the Criminal Code of Georgia and Part 3 of Article 191 of the Criminal Procedure Code of Georgia").

In its judgements No. 2/8/1444 ("Nikoloz Akopov v. Parliament of Georgia") of 22 November 2023, the Constitutional Court considered the constitutionality of the regulation established by the Imprisonment Code, which granted the investigator/ prosecutor the authority to restrict the rights of a defendant placed in a detention facility to brief visits, correspondence, and telephone conversations. In its judgement No. 3/3/1635 ("Public Defender of Georgia v. Parliament of Georgia") of 14 December 2023, the Constitutional Court assessed the constitutionality of the provision of the Law of Georgia "On Assemblies and Manifestations" that established the obligation to submit a notice to the executive body of the municipality regarding the organisation and holding of an assembly or manifestation no later than 5 days before its holding. In its judgement of 12 July 2024 ("Constitutional submission of the Telavi District Court on the constitutionality of Article 34, Part 3 of the Criminal Code of Georgia and Article 191, Part 3 of the Criminal Procedure Code of Georgia"), the Constitutional Court assessed the constitutionality of the norms provided for by the Criminal Code of Georgia, which, on the one hand, established that if a sane person committed a crime, but became mentally ill before the verdict was delivered, he/she shall serve the sentence imposed by the court in an appropriate medical (treatment) institution until he/she recovers; On the other hand, the disputed norms stipulated that the court would pronounce a guilty verdict against a defendant who was sane at the time of committing the crime and then became insane, and the convicted person would serve his/her sentence in an appropriate medical (treatment) institution until he/she recovered, and in case of recovery, the sentence would continue to be served according to the general rules.

I hope that this edition of the "Journal of Constitutional Law" will help representatives of the legal profession to deepen their knowledge of current, topical legal issues.

Professor **Merab Turava**

President of the Constitutional Court of Georgia

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*Anna Phirtskhalashvili**

MIGRATION AS SEEN FROM THE PERSPECTIVE OF A "THIRD COUNTRY": A CHALLENGE FOR GLOBAL AND CLASSICAL CONSTITUTIONALISM

ABSTRACT

With the rise in migratory movements, two key issues have become increasingly relevant: on the one hand, the protection of migrants' rights and the regulation of migration processes by states; and on the other hand, questions concerning state sovereignty, national security, and internal socio-political tensions. Considering that there are currently around 102 million migrants worldwide - including refugees, (internally) displaced persons and asylum seekers, the relevance of this issue becomes evident. With the rise in global mobility over the past decade, foreigners in host countries have often become particularly vulnerable - legally, socio-economically, politically, culturally, and in other aspects.[2]

While there are individual academic works on this topic and intense scholarly debates are ongoing across Europe, the proposed article offers a new perspective on the issue - namely, from the viewpoint of so-called third countries.[3] These are states that, based on intergovernmental agreements with the countries where asylum is sought (so-called destination countries)[4] allow individuals to remain temporarily on their territory while their asylum claims are being processed in the destination country.

By addressing this and other related issues, the present article offers a contribution to the scholarly debate on migration as a global challenge.

* Doctor of Law, Professor at Georgian University [a.phirtskhalashvili@ug.edu.ge]

[1] UN Global forced displacement statistics (2022) <https://www.unhcr.org/dach/de/services/statistiken> [last accessed on 19 April 2024].

[2] Janina Söhn and Kai Marquardsen, 'Erfolgsfaktoren für die Integration von Flüchtlingen' (2017) Für Bundesamt für Migration und Flüchtlinge, Forschungsbericht 484, Soziologisches Forschungsinstitut Göttingen (SOFI) an der Georg-August-Universität, 4, 14.

[3] This research was conducted at the Berlin Social Science Center (WZB) within the Global Constitutionalism research program, as part of the GRMP project supported by the European Union and DAAD.

[4] Country of origin - the country of a foreign national's citizenship, or, in the case of a stateless person, their country of permanent residence; host country / country of destination - the state to which a person travels in order to seek asylum; transit country - a state through which a person passes en route to the destination/ host country; third country - a country which, based on intergovernmental agreements, grants individuals the right to remain temporarily on its territory while their asylum application is being considered in the destination country.

I. INTRODUCTION

In the context of globalization, law is gradually undergoing social transformation. The transformation of law, as one of the subsystems of society, is driven both by its internal logic and external interactions with other social subsystems.[5] Reality shows us how difficult it is to respond to global social challenges; yet in this context, it is hard to envision a better solution than the limitation of power through global and/or national constitutional order - serving, ultimately, to protect the human being, the individual. Since classical constitutionalism is primarily aimed at precisely this purpose, a logical question, perhaps even a hope, arises as to whether global constitutionalism might be better equipped to address global and transnational challenges, at the very least. Migration is precisely such a phenomenon. It has acquired a new and significantly broader dimension[6] in recent years, making its relevance particularly compelling for the theory of global constitutionalism.

Law, like other social subsystems, is obligated to fulfill a specific social function,[7] which must first and foremost be reflected in constitutionalism. While the concept of constitutionalism has traditionally been examined at the national level, the dynamic processes of globalization have given it an entirely new meaning. Global constitutionalism is less associated with a legal order established solely by the state, and its development is instead driven by transnational phenomena unfolding at the global level.

The discussion presented in this article aims to examine the paradigm of constitutionalism in the context of the constitutional-legal understanding of migration and to clearly demonstrate its global transformation. Without reflecting on or rethinking the new social order and legal space shaped by migration, it is impossible to fulfil the classical function of law - namely, the just and functional regulation of social relations.

The migration policy is undoubtedly one of the most pressing political issues worldwide. Developments in this field have led to intense debates on both national and international levels, which makes its academic examination all the more important. Scholars are striving to address the challenges of migration from an interdisciplinary perspective. Notably, within the social sciences and the theory of constitutionalism, a range of insightful and valuable approaches has been developed. Of particular significance is the theory of the so-called liberal paradox,[8] along with other key theoretical

[5] Lasha Bregvadze, Theory of Autopoietic Legal Culture: Legal Transfers and Legal Self-Regulation in Global Society, Doctoral Dissertation (Ivane Javakhishvili Tbilisi State University Press 2016).

[6] Ana Pirtskhalaishvili, 'Dilemma of Equality of Rights between Nationals and Foreigners' in Konstantine Korkelia (ed.), Human Rights Protection and Legal Reform in Georgia (Legal and Judicial Reform Consultation in the South Caucasus 2020) 257-294.

[7] Lasha Bregvadze, 'Genealogy of Transnational Law: Fragmented Normative Orders of the Global Society' in Bessarion Zoidze (ed.), Collected Volume 60 (Prince David Institute of Law 2013).

[8] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal,

frameworks[9] such as Niklas Luhmann's systems theory,[10] Gunther Teubner's theory of societal constitutionalism,[11] Jürgen Habermas's concept of a political constitution for a pluralistic world society,[12] and Immanuel Kant's vision of universal cosmopolitanism.[13] These theoretical developments are complemented by the ongoing political and public discourses on migration both within the EU and at the national level.

The aim of this paper is to present a multidimensional perspective on migration against the backdrop of the idea of global constitutionalism. However, it is equally important for the academic discourse to remain two-sided, so that that the article also addresses the opposing viewpoint - one that views migration as a threat and seeks to manage it exclusively through the lens of the classical nation-state.

II. MIGRATION AND GLOBAL CONSTITUTIONALISM

1. THE PATH TO GLOBAL CONSTITUTIONALISM

In the literature on constitutional theory it is widely accepted that constitutionalism is undergoing a comprehensive transformation, namely, a shift from classical constitutionalism to global constitutionalism. The latter recognizes the existence of significant legal orders beyond, and above - the nation-state. These changes are undeniable when viewed in the context of developments over the past century, particularly in the post-World War II period. This primarily refers to the international legal recognition of the fundamental rights of the human being as an individual; the formation of the European Union as a supranational organization, and the unprecedented growth of its role at the international stage.

The Concept of Legalization (The IO Foundation and the Massachusetts Institute of Technology 2000) 401-419; David Beetham, Democracy and Human Rights: Contrast and Convergence (Expert paper presented at the Seminar on the Interdependence between Democracy and Human Rights at the UNHCHR 2002); David Beetham, Democracy and Human Rights (Polity Press 1999) 9-14; Jürgen Habermas, Faktizität und Geltung (Beiträge zur Diskurstheorie des Rechts und des demokratischen Verfassungsstaates 1992).

[9] John Rawls, Die Idee des politischen Liberalismus (Suhrkamp Verlag 1992); John Rawls, Nochmals die Idee der öffentlichen Vernunft' in John Rawls, Das Recht der Völker (de Gruyter 2000); Jürgen Habermas, Die Einbeziehung des Anderen (Suhrkamp Verlag 1996); Georg Nolte, 'Strukturwandel der internationalen Beziehungen und Völkerrechtspolitik' in Giovanni Biaggini, Oliver Diggelmann und Christine Kaufmann (Hrsg.), Polis und Kosmopolis – Festschrift für Daniel Thürer (Nomos 2015) 557-563; Jürgen Habermas, Eine politische Verfassung für die pluralistische Weltgesellschaft (Die Kritische Justiz 2005) 222-247.

[10] Niklas Luhmann, 'Einführung in die Systemtheorie' <https://luhmann.ir/wp-content/uploads/2021/07/Einfuhrung-in-die-Systemtheorie.pdf> [last accessed on 15 February 2024].

[11] Günther Teubner, 'Societal Constitutionalism: An Alternative to State-Centred Constitutionalism?' (2018) 1 Journal of Law 311-342 (translated from English into Georgian by Lasha Bregvadze).

[12] Habermas, supra note 9.

[13] Immanuel Kant, Toward Perpetual Peace: A Philosophical Sketch (F. Nicolovius 1795).

While the recognition of these changes is undisputed, scholarly opinions in the legal literature are divided into two main perspectives when it comes to evaluating their implications. According to the first view, the concept of "constitutionalism"- as a doctrine of a state's fundamental legal order - has degenerated, losing its (traditional) meaning[14] and being reduced to an empty phrase. This view takes a negative stance toward the transformation of classical constitutionalism. It refers to the current state as a "shadow of constitutionalism."[15]

The second group of scholars views the transformation of constitutionalism from its classical form to a global one as an inevitable and natural development, and assesses it positively. According to this perspective, traditional constitutionalism no longer aligns with the practices of international, European, and national jurisdictions. Its transformation is seen as necessary, as it contributes to overcoming what is referred to as "national parochialism."[16] It is precisely from this parochial outlook that migration processes are often inadequately analyzed, as they continue to be perceived solely through the lens of the nation-state.

The distinction between the nation-state and global constitutionalism is undoubtedly one of the central issues in ongoing constitutional debates. The positions are clearly divided: constitutionalism based on the idea of the nation or the state embodies the centuries-old doctrine of the constitution as the fundamental constitutional order of the state. Global constitutionalism, on the other hand, represents a new and emerging constitutional paradigm that originated in England and the United States and has, over the past decade, been gaining increasing support in Europe, particularly in Germany.[17] According to some German scholars, the idea of global constitutionalism has spread through constitutional studies like an "academic pandemic."[18]

[14] Ming-Sung Kuo, 'The End of Constitutionalism As We Know It?' (2010) 1 Transnational Legal Theory 329-369.

[15] Martin Loughlin, TP. McCormick and Neil Walker (eds), The Twilight of Constitutionalism? (Oxford University Press 2010).

[16] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), Ruling the World? Constitutionalism, International Law, and Global Governance (Cambridge University Press 2009) 258-324, 307.

[17] Oliviero Angeli, 'Von der Gründung zur Begründung. Über die Rolle der Imagination im globalen Konstitutionalismus' in Hans Vorländer (Hrsg.), Demokratie und Transzendenz. Die Begründung politischer Ordnungen (2013) 509-525; Oliviero Angeli, 'Der globale Konstitutionalismus (2014) 24 fiph-Journal 24-25.

[18] Joseph Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts' in ders. und Gráinne de Búrca (Hrsg), The Worlds of European Constitutionalism (2012) 8-18, 8.

2. THE IDEA OF GLOBAL CONSTITUTIONALISM

Global constitutionalism is a theory that seeks to bring constitutional law and international law closer together, but only on the premise that the starting point of the discourse is not state power or sovereignty, but rather the individual, the human being, and their rights. Accordingly, from the perspective of this theory, addressing the challenges of migration must be based first and foremost in human dignity; an only thereafter may state interests such as security, the prioritization of its own citizens, and their preferential treatment over migrants - be taken into consideration. It is also noteworthy that the theory of global constitutionalism, similar to national constitutionalism, does not seek to establish a "constitutional order." The complexity and multidimensionality arising from the interconnection of various legal systems (national, continental, and international) may also be interpreted as a form of a "unified constitutional order"- but only under the condition that such an interpretation is understood as part of the so-called interpretive turn.[19] The latter implies that legal scholars, judges, and practitioners, regardless of their national legal systems, ultimately engage in reasoning guided by common principles and approaches.

An example of the above-mentioned is demonstrated by Mattias Kumm[20] in his well-known publication "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review.*"* He builds on the fact that, globally, in liberal democracies, the principle of proportionality constitutes a central structural feature[21] in the adjudication of rights. According to Kumm, the challenge posed by such practice[22] is primarily institutional rather than ideological, since, from

[19] Angeli, supra note 17.

[20] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4.2 Law & Ethics of Human Rights 142-175.

[21] Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law; David M. Beatty, The Ultimate Rule of Law (Oxford University Press 2005); Evelyn Ellis, The Principle of Proportionality in the Laws of Europe (Hart Publishing 1999); Wojciech Sadursk, Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (Springer 2005). On Applying Proportionality Principle, see Lorraine Weinrib, 'The Postwar Paradigm and American Exceptionality' in Sujit Choudhry (ed), The Migration of Constitutional Ideas (Cambridge University Press 2006) 84; Explanations are provided by Frederick Schauer, 'Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture' in Georg Nolte (ed), European and US constitutionalism (Cambridge University Press 2005) 49; Vicki C. Jackson, 'Ambivalence, Resistance and Comparative Constitutionalism: Opening up the Conversation on Proportionality Rights and Federalism' (1999) 1 University of Pennsylvania Journal of Constitutional Law 583; See also: Stephen Gardbaum, 'A Democratic Defense of Constitutional Balancing' (2010) 4 Law & Ethics of Human Rights 79.

[22] Another question is whether proportionality analysis truly justifies the idea of the primacy of rights, which lies at the core of the liberal tradition. For a more in-depth discussion of these issues, see: Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed), Law, Rights and Discourse: The Legal Philosophy of Robert Alexy (Legal Theory Today) (Hart Publishing 2007).

a broader perspective, the principle of proportionality applies uniformly to all forms of legal reasoning, regardless of national regulations. The author concludes that the proportionality test functions as an analytical framework grounded in the "common principles" of liberal democracy.[23] While in the aftermath of World War II, the concept of proportionality was not generally embedded in constitutional limitation clauses, over time, courts have effectively articulated the criteria necessary for proportionality analysis through their jurisprudence.[24] In addition to national jurisdiction, it is noteworthy that Article 52 (1) of Chapter VII of the Charter of Fundamental Rights of the European Union, as recently codified by consensus, affirms: "Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."[25] The same is affirmed by the text of the Constitution of Georgia, Article 34 of which sets forth the general principles for the protection of fundamental human rights. According to its second paragraph, the exercise of fundamental human rights must not infringe upon the rights of others; while the third paragraph states that "any restriction of a fundamental human right shall be proportionate to the importance of the legitimate aim."

The relationship between rights and the proportionality test was analyzed by Robert Alexy.[26] According to Alexy, the abstract rights listed in constitutional catalogues are principles. Principles, as understood by Alexy, require realization to the greatest extent possible, given that they inherently involve competing interests. Principles are structurally equivalent to values. Assertions about values may be formulated as assertions about principles, and vice versa.

Assertions of principles express an "ideal must." Similar to assertions of values, as Alexy states, they are not "bound by the possibilities of the factual and normative world." [27] The proportionality test serves as the means through which values are linked to the possibilities of the normative and factual world. When we encounter a conflict between principles and countervailing considerations, the proportionality test provides a criterion for determining which interest should prevail in a given situation. It offers an analytical framework for assessing whether limitations imposed on a given principle are justified within a specific context.

The proportionality test is not merely a convenient pragmatic tool that assists in providing a doctrinal structure for legal analysis. If rights, as principles, are akin to assertions of values, then the structure of proportionality offers an analytical framework

[23] ibid, 134.
[24] ibid.
[25] Charter of Fundamental Rights of the European Union (2007) O.J. C 303/01.
[26] Robert Alexy, A Theory of Constitutional Rights (Oxford University Press 2002).
[27] ibid, 60.

for evaluating the necessary and sufficient conditions under which a right prevails over a competing good. Reasoning about rights entails reasoning about how a particular value relates to the urgent demands of specific circumstances. It requires both general and, at the same time, practically oriented reasoning.[28]

This line of reasoning leads us to two core insights of the theory of global constitutionalism:

I. The staring premise is the deep normative interconnectedness between legal orders at all levels - national (particularly within liberal democracies) and international, which, for the most part, dissolves national boundaries and becomes global in nature;

II. The normative primacy of constitutionalism does not imply justification of a legal norm by a specific authority; rather, the justification or limitation of human rights depends on their interpretation - an interpretation that, in turn, is grounded in the principle of proportionality.

Despite its Universalist aspirations, global constitutionalism is not a political project aimed at establishing a world state grounded in a global constitutional order. Nor is it an attempt to equate existing structures of international law with domestic constitutional regimes, either as an equivalent or analogue. While global constitutionalism is not bound to the concept of statehood, it nonetheless recognizes the role of the state in people's lives and within the framework of international law.[29]

While some scholars challenge the theory of global constitutionalism with substantial arguments, it is worth exploring, given the ambition of the universality of the given theory - what kind of response it may offer to the challenges of migration. The connection between global constitutionalism and migration stems from the global nature of both phenomena. Therefore, the following chapter will examine the approaches of global constitutionalism to the issue of regulation of migration.

III. MIGRATION AS A CHALLENGE AND A DILEMMA FOR THE NATION-STATE

The modern world is undergoing political and ideological transformation, which has a significant impact on the understanding of constitutionalism. The driving force behind these changes stems from globalization and centers around two main phenomena: on the one hand, the strengthening of national sentiment and the defense of the idea of state sovereignty; and on the other hand, the protection of the "human being" as an

[28] Robert Alexy, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Oxford University Press 1989).

[29] Mattias Kumm, 'Zur Geschichte und Theorie des Globalen Konstitutionalismus. Gegenwärtige Herausforderungen des Globalen Konstitutionalismus' in Internationale Gerechtigkeit und institutionelle Verantwortung (De Gruyter 2019).

individual, regardless of citizenship - an approach that some view as leading to the so-called dilution of the concept of citizenship.

The central question is what kind of legal regulation can be considered optimal for achieving both objectives: protecting the rights of foreigners in host countries, while at the same time preserving the institution of citizenship, thus safeguarding the identity of the state, its cultural values, constitutional order and principles.

1. THE GLOBALIST APPROACH TO THE CHALLENGES OF MIGRATION

As previously noted, global constitutionalism is less focused on state authority and more centered on the protection of individual rights - in this case, the rights of migrants. By its very nature, any response to the challenges of migration must come through international cooperation. It is a fact that both globally and within the EU, serious efforts have been underway for several years to establish a unified migration policy.

One of the most recent attempts to regulate migration stems directly from the idea of global constitutionalism, which is embedded in the United Nations' 2018 Global Compact for Safe, Orderly and Regular Migration (GCM).[30] The Global Compact views the phenomenon of migration in a positive context: "Migration has been part of the human experience throughout history, and we recognize that it is a source of prosperity, innovation and sustainable development in our globalized world, and that these positive impacts can be optimized by improving migration governance."[31] It is only briefly acknowledged that migration may affect countries "in very different and sometimes unpredictable ways."

It is apparent that migration is not confined to the territory of a single country but rather intersects easily with the interests of multiple states that logically, makes migration a matter most appropriately addressed through the framework of international law. It must be taken into account that migration affects all states to a greater or lesser extent, while at the same time, "no state can address migration alone."[32] This is precisely the foundational idea of the aforementioned Global Compact, which seeks to establish a comprehensive international regime for cross-border migration - one that requires close cooperation among all states.

The Global Compact on Migration was adopted at an international conference held in Marrakech, Morocco, in December 2018. It was endorsed by a resolution of the United Nations General Assembly with a majority of 152 votes. However, the fact that five countries voted against it (Israel, Hungary, the Czech Republic, Poland, and the United

[30] The United Nations Global Compact for Safe, Orderly and Regular Migration (2018).
[31] GCM No. 8, UN Doc. A/CONF.231/3 (2018); UN Doc. A/RES/73/195 (2018).
[32] GCM Nos. 7, 11 and 15.

States), twelve abstained, and twenty-four did not participate equally highlights the challenges and unresolved issues associated with the Compact.

The Global Compact on Migration is grounded in the 2030 Agenda for Sustainable Development[33] and is based on the 2016 New York Declaration for Refugees and Migrants.[34] Alongside the 2018 Global Compact on Refugees,[35] it provides signatory states with a solid foundation for implementing shared principles and commitments. Although refugees, as defined by the 1951 Geneva Convention and its 1967 Protocol, are also migrants who often face similar challenges and vulnerabilities and in practice, benefit from equal protection under universal human rights, migrants and refugees are nevertheless considered two distinct groups, governed by different legal frameworks.[36] However, this issue falls outside the scope of the present article.

Moreover, the Global Compact on Migration does not contain an explicit provision regarding the forced removal of individuals from host countries. On the contrary, the parties commit to "ensure effective respect for, protection of, and fulfillment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle"[37] through the implementation of the Compact. This commitment is underscored by the assertion that the Compact is "people-centered" and possesses a "strong human rights dimension."[38]

All stages of the migration cycle include, among others, the point of departure; namely, the territory of a given state. This implies the individual's right to leave that territory for the purpose of migration. This principle is also affirmed in Objectives 5 and 21 of the Global Compact, which call for enhancing the "availability and flexibility of pathways for regular migration."

At the same time, it should be noted that the Global Compact calls on states to cooperate in minimizing the adverse drivers and structural factors that compel people to leave their place of residence. This includes the obligation of states to reduce the risk of natural disasters, mitigate the effects of climate change, decrease youth unemployment, and prevent brain drain.[39]

From the perspective of international law, individuals are protected from forced migration, as no one should be compelled to leave their own country. This, in turn, corresponds to every person's right to freely and lawfully choose their place of residence within the territory of their country.[40]

[33] UN Doc. A/RES/70/1 (2015); GCM Nos 6 and 18.
[34] UN Doc. A/RES/ 71/1 (2016); GCM No. 3 GCM.
[35] UN Doc. A/RES/73/151 (2018).
[36] GCM Nos. 3 and 4.
[37] GCM No. 15.
[38] Markus Kotzur, Migrationsbewegungen als Herausforderungen an das Völkerrecht, 49 Berichte der deutschen Gesellschaft für Internationales Recht (C.F. Müller 2018) 295-319.
[39] GCM No. 18.
[40] Article 12, paragraph 1, International Covenant on Civil and Political Rights of 1966.

On their way to destination countries, migrants face numerous difficulties and dangers. In addition to domestic regulations of individual states, they are protected by international human rights law during this journey. To safeguard the lives of migrants, the Global Compact on Migration obligates signatory states to engage in "international cooperation to prevent migrant deaths and injuries, protect their lives, and, to this end, conduct search and rescue operations individually or jointly."[41]

In this context, two decisions made by the United Nations Human Rights Committee in 2020 are of particular interest. Both decisions concern the same incident. In October 2013, a group of Syrians and Palestinians seeking to enter Italy irregularly boarded a fishing vessel at a port in Libya. The boat was carrying approximately 400 people, including many children. After several hours at sea, the vessel began to sink. A distress call was made to the relevant Italian authorities, who redirected the alert to Malta's border forces. However, due to the delayed response, more than 200 people died, including relatives of the complainants.

The application against Malta was declared inadmissible by the Committee on formal grounds.[42] In response to the second application, directed against Italy, the Committee concluded that the state had violated the right to life of more than 200 individuals (Article 6, Paragraph 1 of the ICCPR) and determined that Italy must provide full reparation for the harm suffered. The Committee reasoned that Italy failed to respond in a timely manner to the emergency situation and did not act "with all possible speed to save persons in distress," thereby failing to protect the lives of numerous individuals.

The responsibility of states to prevent threats to the life and physical integrity of migrants has also been emphasized by the European Court of Human Rights. In one of its well-known cases, *Hirsi Jamaa and Others v. Italy*, [43] the applicants, who had left Libya and were traveling by boat toward Italy, were intercepted by Italian border police patrol vessels. They were transferred onto military ships and returned to Tripoli. Despite the existence of a bilateral agreement between Italy and Libya, the Court, in its 2012 judgment, unanimously held that Italy had violated Article 3 of the European Convention on Human Rights. The Court found that returning the applicants to Libya exposed them to a real risk of inhuman and degrading treatment, and, at the same time, to the danger of arbitrary deportation to Eritrea and Somalia.[44]

However, in another case similar to *Hirsi Jamaa and Others v. Italy,* the Court developed a different approach. In the *Melilla* case, some individuals managed to climb over the

[41] GCM Objective 8, No. 24.

[42] The Decision of the Human Rights Committee in Case Communication N3043/2017 "A.S. et al. v. Malta", 13 March 2020. UN Doc. CCPR/C/128/D/3043/2017, paragraphs 1-7.

[43] Judgment of the European Court of Human Rights N27765/09 "Hirsi Jamaa and others v. Italy", 23 February 2012 (rectified 16 November 2016).

[44] ibid, paragraphs 85 et. seq.

border fence between Spain and Morocco, but Spain immediately returned them to Morocco.[45] The Court found that this action did not constitute collective expulsion, as the applicants themselves had placed the state in that situation and had created a "disruptive scenario" despite the availability of legal means to enter the country. If a legal entry route exists, individuals who enter the territory irregularly and in large numbers may be returned immediately to their country of origin.[46] The Court based this conclusion on the state's international obligation to register all asylum seekers at its border.[47]

The EU acquis, which regulates migration processes can be categorized into three groups, based on the types of persons it aims to protect. The right to asylum is guaranteed by Article 18 of the EU Charter of Fundamental Rights. The legal framework established in accordance with the Geneva Refugee Convention and the two treaties of the European Union is highly developed and further enriched by the case law of the European Court of Justice in Luxembourg. [48] Based on this framework, three distinct groups of individuals benefiting from international protection can be identified: The first group consists of refugees within the meaning of the Geneva Convention; the second group includes individuals who do not qualify as refugees but who would face a real risk of execution, torture, inhuman or degrading treatment, or serious threat to their lives due to armed conflict in their home country if returned. These individuals are granted so-called subsidiary protection. The third group comprises persons who may apply for "temporary protection"- a status established for exceptional situations involving the mass influx of people forced to flee their country due to armed conflict or widespread violations of human rights.[49]

All three categories of individuals are entitled to remain in the EU for a limited period of time, although the duration of stay varies depending on the category. The EU's 2001 Directive on mass influx of displaced persons[50] allows such individuals to remain in the EU for up to three years. However, in many cases, even after a court denies their right to remain, individuals continue to stay illegally within EU territory that presents a challenge to the effective implementation of the rule of law in practice. Despite court judgments denying an individual the right to asylum, enforcement of such judgments

[45] Judgment of the European Court of Human Rights N8675/15 and N8697/15 N.D. and "N.T. v. Spain", 13 February 2020. Paragraph 213.

[46] Eckart Klein, 'Migration and Public International Law' (2023) 3 Vectors of Social Science 5-16.

[47] Diana Schmalz, 'The Disparate State of Refugee Protection in the European Union' (2022) 82 Heidelberg Journal of International Law, 529-539.

[48] See note 45 supra.

[49] Jean-Francois Durieux and Agnès Hurwitz, 'How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees' (2004) 47 German Yearbook of International Law 105-159; Walter Kälin, 'Temporary Protection in the EC: Refugee Law, Human Rights and the Temptations of Pragmatism' (2001) 44 German Yearbook of International Law 202-236.

[50] Directive 2001/55/EC of the Council (20 July 2001), O. J. No. L 2001 (7 August 2001) 12.

often fails, thereby undermining the overall credibility of the process. As a result, the authority of the state and the justice system is compromised. For this reason, it is essential to develop a legal framework that, based precisely on clear and enforceable regulations, can ensure better protection of migrants' rights and guarantee their life and physical integrity.

At the same time, it must be acknowledged that in the context of global developments such as climate change, wars, and conflicts, the natural end or reduction of migration flows is unrealistic. Therefore, migration must be regulated. However, under the existing international legal frameworks, largely guided by humanitarian principles, many challenges remain unresolved, particularly considering that the resources of host countries are not unlimited. These resources are exhaustible and must, therefore, be managed within clearly defined legal frameworks.

Despite repeated efforts to address the challenges of migration, it remains a phenomenon accompanied by numerous unresolved problems. Most notably, countless human lives are lost in the pursuit of a better life. According to UN data from 2023, since 2014, up to 10,000 migrants have died each year, the majority of whom drown at sea/in the ocean.[51] In 2023 alone, a record-high 8,565 migrant deaths were recorded.[52] This underscores the fact that the existing protection mechanisms offered by international law have proven insufficient. Greater effort is required, along with the adoption of more effective policies for regulating migration at the global level.

2. A NATION-STATE-BASED APPROACH TO ADDRESSING MIGRATION

Equally noteworthy is the perspective of the opposing approach, which places state sovereignty and security at the forefront and considers the rights of the migrant as an individual only thereafter.

A regulatory model of this kind can be exemplified by the typical ideological approach of Europe's conservative wing in responding to the challenges of migration. One such example is Professor Ruud Koopmans, a Dutch sociologist and migration scholar, who heads the migration research group at the Berlin Social Science Center and is also a professor at Humboldt University of Berlin. His views often spark intense debate, not only among migration scholars but also within the broader public, frequently leading to sharp polarization and conflicting opinions.[53]

[51] Missing Migrants Project <https://missingmigrants.iom.int/> [last accessed on 15 February 2024].
[52] ibid.
[53] Statement by the Student Council of Humboldt University <https://www.refrat.de/article/pmrechtelehre.html> [last accessed on 15 February 2024].

In 2023, Koopmans published his well-known work "Asylum Lottery: A Review of Refugee Policy from 2015 to the War in Ukraine."[54] In his work, Koopmans harshly criticizes the EU's liberal approach to asylum policy and, more broadly, to migration regulation. According to the author, "Europe must urgently change its asylum policy, as the current system costs thousands of lives and poisons the political climate." Koopmans argues that a compromise between the political left and conservatives is needed - one that allows for a numerically equal level of migration, but prioritizes those who are in genuine need of protection and willing to work."[55]

A key issue is how the scholar envisions achieving this goal. According to him, it is a tragedy that hundreds of thousands of people apply for asylum in Europe each year, with many dying along the way. Only half of those who arrive in Europe ultimately receive asylum legally. Given the high risks and costs associated with reaching Europe, many poor individuals - especially women, children, the elderly, and the sick - are left behind. On the other hand, the author argues that young people from relatively better-off families, particularly healthy men - have the best chance of obtaining a winning ticket in what he refers to as the "lottery" titled "the European Asylum Law". According to him, the current asylum policy is accompanied by serious integration challenges and security risks for European societies; therefore the promise that migration of refugees would address the skill shortages and demographic problems in Europe, remains far from being fulfilled. For instance, in Germany, by the end of 2020 nearly two-thirds of the population from the eight most significant countries of origin were reliant on state benefits to cover their living expenses.[56] The author claims that refugees committed sexual assaults against nearly 3,000 women, and that the majority of fatal Islamist terrorist attacks over the past decade were carried out by perpetrators who were either recognized as refugees or posed as such. In Germany alone, between 2017 and 2020, approximately 300 people were killed and over 1,600 were victims of attempted murder by individuals who had entered the country under refugee status. According to the author, this is the price paid by both refugees and host societies for the humanitarian principles underpinning asylum law. However, such consequences are inevitable unless the needs of asylum seekers are reconciled with the capacities and security interests of host societies.[57] Although efforts to reform asylum law have been ongoing for decades, the core problems remain unresolved. According to Koopmans, the way out of this deadlock lies in what he sees as the greatest challenge: finding a compromise between progressive and conservative political camps.[58]

[54] Ruud Koopmans, Die Asyl-Lotterie, Bilanz der Flüchtlingspolitik von 2015 bis zum Ukrainekrieg (C.H. Beck 2023).

[55] Ruud Koopmans, Europa muss das Asylsystem dringend reformieren (2023) 16/2 Neue Zürcher Zeitung 30-32.

[56] See note 53 supra.

[57] See note 54 supra.

[58] ibid.

It is worth examining the model Ruud Koopmans proposes to the public as a compromise - and why it appears to appeal primarily to a conservative perspective. Under his new "compromise" model, he outlines a six-point system based on the following cumulative conditions:

1. The asylum-granting country should accept the same number of refugees/migrants annually as it has done in previous years.
2. To prevent migrant flows from resulting in deaths along the journey, host countries should establish processing centers directly in countries of origin, where applications would be assessed locally and migrants selected on humanitarian grounds.
3. If uncontrolled migration from such countries continues to occur, migrants arriving by land or sea will not have the right to choose the country in which they seek asylum. Instead, they will be resettled to "third countries," where they will remain for the duration of the asylum application process. If granted protection, they will receive asylum in the country determined by the host state - not by their own preference.
4. The "temporary host third countries" would be selected on the basis of their ability to ensure the protection of migrants' rights. As examples, Koopmans mentions Albania, Moldova, Tunisia, and Senegal, and does not rule out Georgia as a potential option as well. A specific quota would be agreed upon in advance, determining how many asylum seekers each country could accommodate temporarily. The author is critical of certain cases, such as Rwanda - currently in negotiations with the United Kingdom, implying that migrants' rights may be violated there.
5. It is essential that negotiations with temporary host countries be conducted on the basis of equality and fairness. Under such agreements, these states would receive a defined financial contribution (which would be channeled for their economic development) and their citizens would be granted facilitated access to the EU's labor market. This would also benefit the EU, as these countries possess significantly better-prepared human capital compared to that within the EU. In addition, the financial gains from such cooperation would stimulate local economies and contribute to the broader development of these partner countries.
6. The fact that refugees would no longer have the opportunity to claim asylum in a specific European country would act as a deterrent and lead to a reduction or halt in the large migration flows currently affecting the EU.

According to the author, this approach, on the one hand, would reduce irregular migration, and on the other hand, ensure that asylum is granted to those who are genuinely vulnerable, rather than to those who are able to apply in Europe simply in search of better living conditions. In addition, it would allow migration to be regulated in such a way that individuals eligible for asylum are selected outside the EU, thereby

preventing the irregular stay of asylum seekers within the Union and, in turn, reducing the negative impact associated with rising crime rates.

In addition, transferring asylum seekers to third countries would lead to a decrease in migration to the EU, which at the same time, would benefit from the influx of highly or moderately skilled labor from these third countries.[59]

This concept raises significant concerns for several reasons. First and foremost, it is discriminatory and relies on numerical manipulation by linking rising crime and security threats in the EU countries to migrants. While it is true that refugees do commit criminal offenses, a closer look at statistical data reveals that the claim that refugees or foreigners commit more crimes than the native population is misleading. Recent statistics show that in 2021, only 7.1% of criminal offenses committed in Germany were attributed to non-citizens, [60] even though foreigners made up 32% of the population.[61]

It is also worth noting that foreign nationals are more likely than citizens to be accused of crimes without eventual conviction, which points to a potential stigmatization. Germany experienced a particularly large influx of refugees in 2015-2016. According to criminologist Walburg, while this may have played a role in increased crime rates, its impact was likely marginal rather than substantial.[62]

Moreover, the concept presents several internal contradictions when compared to Koopmans's own theoretical framework. For instance, as mentioned earlier, Koopmans' argument begins by portraying the majority of refugees as criminals, yet later he envisions the transfer of these same individuals to "third, temporary host countries" as a path to those countries' development. At the same time, he presents citizens of these temporary host countries as valuable human capital and proposes their facilitated employment in the EU's labor market. The scholar also argues that semi-democratic countries would benefit economically from the EU's financial contributions in exchange for temporarily hosting asylum seekers. However, he simultaneously acknowledges that these "third countries" are governed by semi-democratic regimes, where, in practice, financial resources are often not invested in public welfare but instead become sources of corruption. Therefore, Koopmans's argument regarding the development and prosperity of these third countries is weak and insufficiently substantiated.

In various academic and political discussions, the possibility of assigning Georgia the status of a "temporary host country" has also been raised.[63] This debate may gain renewed

[59] See note 53 supra.

[60] This number has been steadily decreasing since 2018.

[61] See statistics in German newspaper Tagesspiegel <https://www.tagesspiegel.de/politik/gefluchtete-und-kriminalitat-was-hinter-den-zahlen-steckt-9602333.html> [last accessed on 15 February 2024].

[62] ibid.

[63] See statistics <https://idfi.ge/ge/statistics_of_internally_displaced_persons_in_georgia_by_income> [last accessed on 15 February 2024].

relevance following the EU's designation of Georgia as a "safe country of origin."[64] However, in Georgia's case, the contradictions outlined above are further exacerbated by the challenges the country faces in relation to its internally displaced persons. As is well known, the conflicts with Russia have resulted in the internal displacement of nearly 280,000 people within Georgia. This situation imposes a considerable economic burden on the state, making the prospect of designating Georgia as a "temporary host country" even more problematic.

In addition to its discriminatory nature, the above-mentioned concept stands in contradiction to the United Nations Sustainable Development Goals,[65] which frames global development within a common context. The concept, by contrast, deepens and exacerbates inequalities between countries; since, rather than addressing the "discomfort" caused by migration, it seeks to externalize it - pushing the issue beyond the European borders. It should also be noted that the departure of citizens from third countries (individuals who would be competitive even in the European labor market) may lead to brain drain in those countries. Preventing this outcome is precisely one of the aims of the above-mentioned UN Global Compact.[66]

To date, a similar model has been in place in several countries. For example, Australia implements the so-called deterrence policy, under which refugees are sent not to the target country, but to Papua New Guinea and Nauru. The United Kingdom has also adopted a comparable approach: since 2023, a special regime has been applied to refugees arriving by boat, with Rwanda selected as the designated third country under a bilateral agreement. Under the "Illegal Migration Act," the question of granting asylum to a refugee is considered only after they have been deported. This regulation has been strongly criticized by the UN Human Rights Committee, which has stated that the United Kingdom is in direct violation of international law (specifically, the Geneva Convention relating to the Status of Refugees) and in particular, the prohibition of collective expulsion. According to UN High Commissioner for Human Rights Volker Türk, "This law not only raises serious legal concerns from an international perspective, but also sets a troubling precedent. The dismantling of asylum-related obligations may be followed by other countries, including in Europe, which could have a negative impact on the international system for the protection of refugees and human rights as a whole." [67] He also calls the UK Government to take the initiative to repeal the law and to ensure that the rights of all migrants, refugees, and asylum seekers are respected, protected,

[64] Georgia and Moldova were designated as safe countries of origin since December 23, 2023.

[65] Department of Economic and Social Affairs Sustainable Development <https://sdgs.un.org/goals> [last accessed on 15 February 2024].

[66] GCM No. 18.

[67] United Nations High Commissioner for Refugees, 'UK, UN Warn of Profound Impacts on Human Rights and International Refugee Protection System' (2023) <https://www.unhcr.org/dach/at/94755-uk-un-warnen-vor-tiefgreifenden-auswirkungen-auf-die-menschenrechte-und-das-internationale-fluchtlingsschutzsystem.html> [last accessed on 15 February 2024].

and fulfilled without discrimination. “To this end, efforts must also be made to ensure the prompt and fair processing of asylum and human rights claims.”[68]

In Germany, a similar model is currently under discussion at the federal government level. The government is exploring whether it would be feasible to transfer asylum procedures to third countries, following the example of other states that have adopted comparable schemes. The United Nations High Commissioner for Refugees (UNHCR) holds the position that, in principle, transferring asylum procedures to third countries is possible, but emphasizes that it must be approached with great caution and implemented only under strict conditions. As is commonly practiced in existing models, asylum seekers who have already arrived are transferred to a designated third country, where they are required to await the outcome of their asylum application process.

Strict conditions imply that the countries to which asylum seekers are transferred must respect human rights and be signatories to, and compliant with, the Geneva Convention relating to the Status of Refugees, thereby upholding their obligations in the protection of human rights. According to UNHCR,[69] such arrangements must be based on appropriate agreements between states to ensure the “fair sharing of responsibility for refugees”. The designated country must retain primary responsibility for assessing asylum applications. Moreover, international protection must be granted by the state in which the asylum seeker arrives and submits their request for asylum.

In Germany, as of November 2023,[70] an assessment is underway to determine the feasibility of conducting asylum procedures in third countries on a transit basis - that is, outside the territory of the European Union.

IV. CONCLUSION: TO WHAT EXTENT IS IT POSSIBLE TO ADDRESS THE CHALLENGES OF MIGRATION THROUGH THE APPROACHES OF GLOBAL CONSTITUTIONALISM?

When discussing two opposing ideas, the central issue identified by both sides is irregular migration. This implies that, from a legal standpoint, migration must be shifted as much as possible from the irregular to the legal sphere in accordance with national and international law. Despite ongoing initiatives, the effective regulation of migration remains as a challenge. As outlined above in the article, fundamentally different approaches exist depending on the underlying ideological foundations. However, both lines of reasoning possess their respective strengths and weaknesses to varying degrees.

[68] ibid.

[69] Statement of Katharina Lumpp, the UNHCR Germany <https://www.tagesschau.de/inland/migration-asylverfahren-drittstaaten-100.html> [last accessed on 15 February 2024].

[70] ibid.

Especially after alternative approaches to addressing the challenges of migration were discussed in the article, it has become increasingly clear that migration-related problems can only be effectively addressed within the framework of global constitutionalism - drawing from its core ideas, principles, and underlying worldview. While it is true that for decades the international community has struggled to agree on a unified policy, it is equally evident that individual states, acting independently and driven solely by their national interests, are unable to solve global problems. From the perspective of a particular state, a migration issue may appear to be resolved within its territory, but in reality, this often amounts to shifting the problem elsewhere rather than resolving it. This is precisely why the United Nations Sustainable Development Goals are of equal relevance and importance to all countries, regardless of their level of development.

It is important that efforts to address migration-related issues begin with those aspects of the challenge that are most manageable. One such entry point could be the simplification, refinement, and proper legal regulation of labor migration. This would primarily serve to protect the rights of migrants who are working illegally in Europe and are often subjected to exploitation as a result. Such individuals should be given the opportunity to transition into legal employment as swiftly as possible. In turn, this would generate greater tax revenues for the host states.

In general, all challenges can be overcome only if states are willing to cooperate and regard international migration as a shared responsibility. Although current prospects may not be particularly promising, the Compact rightly calls on all states to enhance cooperation in the interest of all.[71]

According to Article 8 of the Global Compact on Migration, "no state can address migration alone." Only solidarity, now established as a core principle of international public law, can generate the conditions necessary to respond to the challenges of international migration.[72] At the same time, it is essential that such cooperation be carried out by states on the basis of reasoned judgment and inclusive participation by all relevant countries - those of origin,[73] transit, and destination. In order to ensure a reasonable balance, the responsibility of migrants themselves must also be taken into account - a dimension that still receives insufficient attention in discussions surrounding the adoption of international instruments.[74]

[71] Eckart Klein, 'Migration and Public International Law' (2023) 3 Vectors of Social Sciences 14.

[72] Rüdiger Wolfrum and Chie Kojima (eds), Solidarity: A Structural Principle of International Law (Springer 2010).

[73] Country of origin – the country of which a foreign national is a citizen, or, in the case of a stateless person, the country of their permanent residence.

[74] Christian Tomuschat, 'Der UN-Migrationspakt' in ÖVerfassungsrecht, Völkerrecht, Menschenrechte – Vom Recht im Zentrum der Internationalen Beziehungen' in Festschrift für Ulrich Fastenrath (C.F. Müller 2019).

The key merit of global constitutionalism lies in its recognition of migration as a positive phenomenon and its attempt to regulate it from this perspective. Starting from this premise, it becomes easier to focus on the protection of migrants' rights and to concentrate specifically on the rights of individuals.

At the beginning of the 21st century, in light of the growing significance of migration, both the international community and individual states must approach this phenomenon through a new, more deliberate and scientifically grounded discourse. Such a compromise should be sought within the framework of the third pillar of classical global constitutionalism - democracy, the rule of law, and human rights. Moreover, in the pursuit of a compromise-based solution, equal consideration must be given to the well-being and interests of each individual as well as those of each state and society.

*Lavrenti Maghlakelidze**

ISSUING A GUILTY VERDICT WITH THE IMPOSITION OF A PENALTY AND CERTAIN LEGAL ASPECTS OF EXEMPTION FROM ITS EXECUTION

ABSTRACT

The criminal procedural legislation exhaustively defines the legal grounds under which a court can issue a guilty verdict, impose a penalty, and later grant release from serving the sentence. Specifically, within the system of general courts, issuing a guilty verdict, with imposing a penalty and exemption from its execution can occur, for instance, if the statute of limitations for criminal prosecution has expired, or if the person voluntarily renounced the crime or made an active repentance.

This position of the legislator raises several questions from both the practical and doctrinal perspectives. The present article provides a legal analysis of whether it is lawful for the court to issue a guilty verdict against a person who voluntarily renounced the crime, made an active repentance for the committed crime, or if the statute of limitations for criminal prosecution in the case has expired.

Accordingly, the article examines the normative content of Article 269, paragraph 5 of the Criminal Procedure Code of Georgia that provides for the provision in question. The issue is studied from both the procedural-legal and substantive-legal perspective; and the respective analysis is presented through the prism of the national and international court judgments.

I. INTRODUCTION

Rendering of a final verdict in court is the conclusive stage of case adjudication. It constitutes a judgment, adopted institutionally, which the court delivers solely based on the examination of a criminal case. The legal nature of a judgment is manifested in the fact that an individual may be found guilty and subjected to a respective penalty. A guilty verdict can generally be categorized into three types: (1) a guilty verdict with

* Doctor of Law, Associated Professor at Ivane Javakhishvili Tbilisi State University, Judge of Tbilisi Court of Appeals. [lavrenti.maghlakelidze@ tsu.ge]

the imposition of a penalty; (2) a guilty verdict with the imposition of a penalty and exemption from its execution; (3) a guilty verdict without the imposition of a penalty.[1]

The aim of this article is to provide a legal analysis of the second type of guilty verdict; i.e. when the court issues a guilty verdict involving the imposition of a penalty and exemption from its execution. The aforementioned legal grounds are outlined in Article 269, paragraph 5 of the Criminal Procedure Code of Georgia[2], where the legislator elaborates in detail the circumstances under which a judge may render a guilty verdict for the accused/convicted individual with the imposition of a penalty and subsequent release from serving a sentence. More specifically, the said provision stipulates the following: a guilty verdict with the imposition of a penalty and exemption from its execution shall be determined by the court if, at the time of issuing the judgment: a) an amnesty act has been issued, which exempts the individual from serving the penalty imposed by the judgment; b) the statute of limitations for criminal prosecution for this offense has expired; c) a person voluntarily renounced the crime; d) a person has demonstrated active repentance for the committed crime; e) the act provided for under Articles 286[2], 322[1], 344, or 362 of the Criminal Code of Georgia[3] has been committed by a person due to being a victim of an offense under Articles 143[1] and/or 143[2] of the CCG.

As it turns out, criminal procedural legislation exhaustively defines the legal grounds under which a court can issue a guilty verdict, impose a penalty, and later exempt a person from serving the sentence. However, this position of the legislator raises several questions from both the practical and doctrinal perspectives. The question is – on what legal basis can the court issue a guilty verdict for a person who has voluntarily renounced the crime, demonstrated active repentance, or when the statute of limitations for criminal prosecution has expired? Hence, the article examines the normative content of Article 269, paragraph 5 of the CPCG from both the procedural-legal and substantive-legal perspectives, and provides a legal analysis of this norm through the prism of the judgements issued by the national and international courts.

[1] It is noteworthy that a similar provision was also included in the old version of the Criminal Procedure Code (the 1998 edition, which is now repealed). Specifically, Article 503, paragraph 3 of the Code stated: "A convicting sentence may be issued: a) with the imposition of a penalty to be served; b) with the imposition of a penalty and release from serving it; c) without the imposition of a penalty". Cf. the collective authors, Georgian Criminal Procedure Law, Private Part (2017) 675.

[2] Hereinafter also referred to as CPCG.

[3] Hereinafter also referred to as CCG.

II. ISSUING A GUILTY VERDICT WHEN THE STATUTE OF LIMITATIONS FOR CRIMINAL PROSECUTION HAS EXPIRED

The court issues a guilty verdict with the imposition of a penalty and exemption from its execution, if, at the time of pronouncing the sentence, the statute of limitations for criminal prosecution for the offense has expired.

In legal literature, the statute of limitations is defined as the result of the expiration of a period established by the CCG, during which, as a general rule, criminal prosecution is barred, and the convicted person is exempted from serving the sentence.[4]

The legislation of some countries considers the statute of limitations as a substantive legal institution, while in other countries, it is viewed as a procedural legal institution,[5] which, from the standpoint of legislative technique, is placed in the general part of the Criminal Code.[6] The main subject of debate surrounding this institution arises both in academic circles and in legal practice, particularly regarding its retroactivity.[7] Specifically, the issue is whether it is possible to resolve the question of an individual's criminal liability when the statute of limitations established by the old law has expired.[8] Indeed, the Constitutional Court has provided an exhaustive answer to these questions in its judgment. However, the issue to be discussed below has not become a subject of dispute in court. The given context is that according to Article 269, paragraph 5b of the CPCG, if the statute of limitations for criminal prosecution for the offense has expired at the time of issuing the verdict, the court issues a guilty verdict with the imposition of a penalty and exemption from serving it. Based on the same reasoning, under Article 105, paragraph 1e of CPCG, criminal prosecution against an individual is terminated at the investigation stage.

[4] Shota Bichia, The Statute of Limitations in Criminal Law (Meridiani Press 2010) 200-201.

[5] For example, in German legal literature some authors argue that the norm regarding the statute of limitations has a procedural-legal nature and is not covered by the protection of Article 103, paragraph 2 of the German Basic Law. It is considered that the statute of limitations is related to criminal prosecution rather than to punishment. See Claus Roxin, Strafrecht, Allgemeiner Teil I (4 Auflage, Beck 2006) 167-168; Rudolf Rengier, Strafrecht, Allgemeiner Teil (2 Auflage, Beck 2010) 18.

[6] Cf. Merab Turava, Criminal Law, Review of General Part (9th edition, Meridiani Press 2013) 34; Merab Turava, Criminal Law, General Part, Doctrine of Crime (Volume 1, Meridiani Press 2011) 111-123; also, see Judgment of the First Board of the Constitutional Court of Georgia N1/1/428, 447, 459 "The Public Defender of Georgia, the Citizen of Georgia Elguja Sabauri, and the Citizen of the Russian Federation Zviad Mania v. the Parliament of Georgia", 13 May 2009. Paragraph 24.

[7] For more details, see Lavrenti Maghlakelidze, 'The Problem of the Prohibition of Retroactivity in Substantive Criminal Law' (Analysis of the Court Practice) (2022) 2 Journal of Constitutional Law 145-168.

[8] Judgement of the First Board of the Constitutional Court of Georgia N1/1/428, 447, 459 "The Public Defender of Georgia, the Citizen of Georgia Elguja Sabauri, and the Citizen of the Russian Federation Zviad Mania v. the Parliament of Georgia", 13 May 2009.

Therefore, in the first case, when a criminal case is substantively reviewed and it is confirmed that the statute of limitations for the offense has expired (as substantiated by the evidence examined in the case), the court issues a guilty verdict with the imposition of a penalty and exemption from serving it.

In the second case, following the same reasoning, when the criminal case is at the investigation stage, criminal prosecution is terminated based on the prosecutor's ordinance. Through this approach, the legislator protects the person from the negative consequences of the expectation of negative responsibility, as the persons undergo certain legal restrictions already during the criminal prosecution process. Meanwhile, at the substantive review stage of the case, a guilty verdict has its own negative consequences, such as imposing civil liability on the person; not to mention the damage to their reputation and the violation of the presumption of innocence.

As for the person's criminal record at this point, according to Article 79, paragraph 2 of the CCG, "A person exempted from punishment shall be deemed not to have a criminal record." This means that if convicted and sentenced for a new offense, the individual will not have a prior criminal record. Hence, the absence of a criminal record protects the individual from negative and undesirable legal restrictions, which usually arise from having a criminal record in various fields of life (such as employment in public service, for instance). Clearing the criminal record in this case eliminates the risk of increased liability if the individual commits certain offenses in the future.[9]

However, on the other hand, according to Article 3, paragraph 8 of the CPCG, a person against whom a guilty verdict has been issued is a convict, which means that the subject of the act, who is found guilty and sentenced based on the law, will still be regarded as a convict, even though they are exempted from serving the sentence. Moreover, it is noteworthy that private part of the CCG includes several articles, according to which the fact of committing a crime by a person convicted for a crime under the relevant article is a constitutive element of the act (Articles 273, 238[1] of the CCG, etc.). All of this indicates that the convicting of an individual and the imposition of a sentence, along with their subsequent release from serving it, is not a formal act without real legal consequences. The fact that a person has previously been convicted may lead to an increased and more severe liability if they commit certain offenses in the future.[10]

Based on the above reasoning, the logical question arises: why is the court unable to terminate criminal prosecution in case the party requests it during the trial? As the judicial practice confirms, there are several court judgments on this issue.

[9] Cf. Judgment of the Plenary Session of the Constitutional Court of Georgia N3/1/633/634 on "The Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 269, paragraph 5c of the Criminal Procedure Code of Georgia and the Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 306, paragraph 4 and of Article 269, paragraph 5c of the Criminal Procedure Code of Georgia", 13 April 2016. Paragraph 25.

[10] ibid, paragraph 26.

1. ANALYSIS OF THE ISSUE BASED ON GEORGIAN COURT PRACTICE

1.1. JUDICIAL PRACTICE UNDER THE OLD VERSION OF THE CRIMINAL PROCEDURE CODE

The practice of general courts regarding the termination of a criminal case based on the expiration of the statute of limitations is inconsistent. In the current Criminal Code, as mentioned above, two different norms (Articles 105 and 269) apply when the statute of limitations for a crime has expired. The first relates to the grounds for termination the investigation and/or non-initiation of termination of criminal prosecution, while the second establishes the rule on when a court may render a guilty verdict, allowing for the imposition of a sentence and subsequent exemption from its execution.

It is noteworthy that a similar provision was included in the old (1998) edition of the CPCG. Specifically, the basis for terminating criminal prosecution due to the expiration of the statute of limitations was provided by Article 28, paragraph 1e of the Code; while the subsequent action of the judge, issuing a guilty verdict under such circumstances upon closing of the substantive review of the case would be regulated by Article 503, paragraph 6a. Namely, a judge (in accordance with the current procedural law as well), would impose a penalty on the convicted person and subsequently exempt them from serving the sentence. However, this provision of the law was repealed by the Law of December 16, 2005, and only the obligation to continue the proceedings under exceptional circumstances remained in the CPCG, applying when the accused - and only they - opposed the termination of criminal prosecution. The proceedings would accordingly continue in standard manner according to Article 28, paragraph 6 of the CPCG, until the court issued either an acquittal or a conviction. In the case of a conviction, the judge would impose a penalty and simultaneously exempt the convicted person from its execution.[11] In other cases, criminal prosecution would be terminated at any stage of the investigation or trial.

The judge was able to issue a guilty verdict, imposing a penalty while also exempting the convicted person from its execution in one more case (Article 503 of the CPCG): if, at the time of issuing the verdict, an amnesty act had been issued, which exempted the person from serving the penalty imposed by the guilty verdict.

[11] More specifically, the content of the mentioned norm was as follows: "...criminal prosecution and/or the termination of the preliminary investigation is not allowed if the accused objects to it. In such a case, criminal prosecution and/or the preliminary investigation continues in ordinary manner and ends with either an acquittal or a convicting sentence, with the convicted individual being released from serving the sentence."

Hence, in the old CPCG, due to the expiration of the statute of limitations, the basis for terminating a criminal case during the investigation and trial stages, from the year 2006 and onwards, was regulated by Article 28. In this regard, the judicial practice related to this norm is worth examining.

The Supreme Court correctly applied Article 28 of the Code (old version) in one case, terminating criminal prosecution against the individual.[12] The factual circumstances of the case were as follows: On November 9, 2006, the Criminal Chamber of Kutaisi Court of Appeals sentenced T. for committing armed robbery as part of a group, illegally entering an apartment, unlawfully taking of a vehicle without the intent to possess it, and committing violence dangerous to life and health – the crime defined under Article 179 of the CCG (April 28, 2006 edition) and Article 184 of the CCG (July 22, 1999 edition).

The convicted person, through an appeal, requested the alignment of the issued and legally binding sentence with the current Criminal Code of Georgia, based on the amendments and additions made to the Code on May 23, 2007. Specifically, the convicted person filed a motion before the court to terminate criminal prosecution against them for committing the offense provided under Article 184 of the Criminal Code, as this article had already been repealed at that time.[13]

The Chamber of Cassation reviewed the case materials, the grounds for the appeal, and concluded that the appeal should have been granted. Namely, the court, in its judgment, pointed out that the convict committed the offenses on June 10, 1993; a criminal case was initiated against them on March 29, 2004, and charges were officially announced on May 24, 2005, i.e., 10 years after the commission of the crime.

The Chamber of Cassation referred to Article 71, paragraph 1c of the CCG, according to which a person is exempted from criminal liability if 10 years have passed since the commission of a serious crime. The crime outlined in Article 184, paragraph 3 of the CCG was categorized as a serious crime, and the 10-year statute of limitations applied to it. Based on this, the Chamber concluded that criminal prosecution against T. should have been terminated for the crime specified under Article 184, paragraph 3 of the CCG, and, accordingly, the final sentence should have been determined solely by the penalty imposed under Article 179 of the Code.

The Supreme Court of Georgia issued a different judgment on another case. As indicated by the factual circumstances, the convicted individual requested the continuation of the

[12] See Judgment of the Criminal Chamber of the Supreme Court of Georgia N194/saz, 26 September 2007. Similarly, the Supreme Court terminated criminal prosecution on the same grounds in other criminal cases: E.g. Judgment of the Criminal Chamber of the Supreme Court of Georgia N304-ap, 13 January 2004; and the Ruling of the Criminal Chamber of the Supreme Court of Georgia N37-dad, 25 February 2003.

[13] For more details see Lavrenti Maghlakelidze, 'Determining the Purpose of Obtaining Ownership in Crimes Involving Motor Vehicles (Analysis of Judicial Practice)' (2022) 2 German-Georgian Criminal Law Electronic Journal 27-32 <http://www.dgstz.de/> [last accessed on 19 April 2024].

substantive review of the case. The court, based on Article 28, paragraph 6 of the CPCG, resumed the examination of the case and, ultimately, reclassified the initial charge to the lighter one. As a result, the court issued a guilty verdict, and, due to the expiration of the statute of limitations, exempted the convicted individual from serving the sentence.[14]

Based on the above, both the old edition of the CPCG and the prevailing judicial practice at the time defined the rules for how the issue of an individual's liability should be decided when it concerned the commission of a crime due to the expiration of the statute of limitations. Specifically, if the accused requested the termination of criminal prosecution at any stage of the proceedings, the court would resolve the termination of prosecution by issuing a ruling; while if they requested the continuation of the case at either the investigation or trial stage, the court, motivated by the possibility of an acquittal, would continue the criminal case in standard manner. In such a case, if a guilty verdict was issued, the judge would exempt the person committing a criminal act from its execution.

1.2. JUDICIAL PRACTICE ACCORDING TO THE CURRENT EDITION OF THE CRIMINAL PROCEDURE CODE

As mentioned above, under the current Criminal Code, the legal consequences of the expiration of the statute of limitations on an individual's legal status are defined by Articles 105 and 269 of the CPCG. The formulation of these norms by the legislator, at first glance, corresponds to the provisions of the CPCG in force before 2006. However, besides the substantive differences, there is also a more significant institutional difference: the current procedure is purely adversarial, whereas the previously applicable criminal procedural legislation represented a form of the so-called mixed system (both adversarial and inquisitorial/investigative system).

In this regard, the judicial practice under the current CPCG is interesting. Specifically, in one criminal case the Supreme Court terminated criminal prosecution against the convicted individual on the grounds that the statute of limitations for the crime expired.

The factual circumstances of the case were as follows: In 2005, M. (a fugitive) planned to unlawfully acquire the estate property of N., the only heir of I., through deception. M. submitted false information to the Tbilisi City Court, claiming that in 1987 his family had purchased real estate (a land plot) in Tbilisi directly from I. On August 1, 2005, the Tbilisi City Court ruled in favor of M., granting them ownership rights over the real estate, including the land plot and the buildings located on it. Consequently, M. unlawfully acquired property rights. Before N., the only heir of I., could obtain

[14] The Ruling of the Chamber of Criminal Cases of the Supreme Court of Georgia N34-kol, 25 February 2005.

the inheritance certificate for their father's estate, M. applied to the National Agency of Public Registry, and based on the Tbilisi City Court's judgment of August 1, 2005, became the owner of the part of I.'s real estate, as confirmed by the National Agency's decision of April 6, 2009. Through this action, M. unlawfully took possession of N.'s inherited property through deception and unlawful appropriation. Four days later, on April 10, 2009, M. sold the property for 90,000 Georgian Lari to a third party, resulting in significant material damage to the victim.

The Tbilisi City Court determined that M. committed fraud, namely, unlawfully appropriating another person's property through deception, in a large amount, as defined by Article 180, paragraph b3 of the CCG. This ruling was upheld by the Court of Appeals.

The convicted person's attorneys appealed the judgment of the Court of Appeals to the Supreme Court, requesting that the guilty verdict be replaced by acquittal. The Chamber of Cassation of the Supreme Court terminated the criminal prosecution against the convicted individual, as statute of limitations under CCG had expired. The court applied Article 105, paragraph 1e of the CPCG, according to which an investigation must be terminated, and criminal prosecution should not be initiated or should be terminated if the statute of limitations for criminal prosecution, as established by the CCG, has expired.[15]

The Supreme Court reached a different decision in another criminal case. The court reclassified the initial, more severe charge against the convicted persons - an offense under Article 194 of the CCG (Money Laundering) - to a relatively lighter charge, an offense under Article 180 of the CCG (Fraud).[16] However, since this latter offense constituted a statute-barred crime, the court did not terminate the criminal prosecution but issued a guilty verdict, imposing an appropriate penalty on the perpetrators and subsequently exempting them from serving the sentence.[17]

In this case, the court applied Article 269, paragraph 5b of the CPCG, according to which a guilty verdict - with imposing a penalty and simultaneously exempting a convicted person from serving it - is issued by the court if, at the time of issuing a verdict, the statute of limitations for criminal prosecution for the offense has expired.[18]

Therefore, it appears that judicial practice regarding this issue is inconsistent. In one case, the court terminated criminal prosecution against the individual, while in the other

[15] Judgment of Criminal Chamber of the Supreme Court of Georgia, N1075ap-22, 20 April 2023.

[16] Notably, the defense also contested the fact that, in this case, a so-called the principle of the invariability of the charges was violated. This was because the first- and second-instance courts reclassified the initial charge under an article that had not been brought against the defendants by the prosecution during the investigation stage. For more details on invariability of charges see Lavrenti Maglakhelidze, 'Understanding the Principle of Invariability of Charges in Georgian and European Judicial Practice' (2017) 3 German-Georgian Criminal Law Electronic Journal 75-79 <http://www.dgstz.de/> [last accessed on 19 April 2024].

[17] Judgment of the Crimnal Chamber of the Supreme Court of Georgia N243ap-23, 15 September 2023.

[18] ibid.

case, the court issued a guilty verdict, imposing an appropriate penalty and subsequently exempting the convicted persons from its execution. It is noteworthy that in both cases the defense requested the acquittal of the convicted individuals, yet the legal outcomes differed: in the first case, criminal prosecution was terminated; in the second case, upon issuing the guilty verdict, the subjects of the act were declared convicted persons.

In addition to the analysis of the different practices established by national courts, the precedents set by international courts are also noteworthy. A recent judgment issued by the European Court of Human Rights stands out in this regard.

2. REVIEWING THE ISSUE ACCORDING TO THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights (ECtHR) issued an important judgment against Georgia on the case *Antia and Khupenia v. Georgia.*[19]

The case concerned the conviction of the claimants for official negligence (Article 342, paragraph 1 of the CCG). In October 2006, the claimants were charged with official negligence related to their work as inspectors in the Unified State Social Insurance Fund in years 1995-2004. They were responsible for identifying pensioners who simultaneously were employed in paid work, and were tasked with ensuring the return of illegally received pensions by placing them on the bank account of the official Fund. According to the case materials, it was found that between 1995 and 2004, several individuals were simultaneously employed and unlawfully received social benefits in the form of pensions from the Fund.[20]

Thus, based on Article 342, paragraph 1 of the CCG, an investigation was initiated against several employees of the Fund, including the claimants. In 2008, the Zugdidi District Court found the claimants guilty and imposed a fine of 500 Georgian Lari on each of them.[21]

The claimants appealed the first-instance court's judgment to a higher court. Among other issues, they argued that criminal liability was not foreseeable, as the employees of the Fund became subjects of Article 342 of the CCG only as a result of the legislative amendments of 2006. These amendments expanded the definition of a civil servant. Thus, at the time of committing the offense, the individuals were not considered civil servants or equivalent persons under Article 342 of the CCG; hence, they could not have foreseen that their neglectful actions would lead to criminal responsibility. Moreover,

[19] Judgment of the European Court of Human Rights N7523/10 "Antia and Khupenia v. Georgia", 18 June 2020.
[20] ibid.
[21] ibid.

the action defined by Article 342, paragraph 1 was considered a less severe offense, subject to a two-year statute of limitations that had already expired by October 2006, as the charges concerned the events, which occurred before January 2004.[22]

In November 2008, the Kutaisi Court of Appeals rejected the claimants' appeal and upheld the judgment of the lower court. In May 2009, the Supreme Court also upheld the conviction, concluding that the applicants were subjects of the crime, as they worked for the Legal Entity of Public Law (LEPL). However, the Supreme Court accepted the claimants' argument regarding the expiration of the statute of limitations and exempted them from the imposed penalty, with the future outcome being that the claimants would be considered as individuals without a criminal record in relation to this offense.[23]

As for the subject of their dispute before the ECtHR, the applicants argued that their conviction was based on a statute-barred offense; applying Article 7 of the European Convention ("No punishment without law").[24]

The ECtHR thoroughly examined the normative content of the above-mentioned provision of the Convention and rightly pointed out that Article 7 of the Convention is not limited to prohibiting the retroactive application of criminal law to the detriment of the accused. According to this principle, a crime must also be clearly defined by law, whether national or international. This requirement is met when a person, through the formulation of the relevant provision (and, if necessary, with the assistance of a court interpreter or legal aid) is able to understand what actions or omissions incur criminal liability.[25]

The main issue for the court to consider was whether the claimants' conviction had a legal basis, taking into account the expiration of the statute of limitations for the respective crime. It is also noteworthy that the European Court did not overlook the fact that the claimants in all national instances requested the continuation of the case and the issuance of an acquittal, rather than its termination.

Specifically, the Strasbourg Court stated: "As far as the legal consequences of the Supreme Court's judgment is concerned, the Strasbourg Court notes that the national legislation in force at the time, namely, Article 28, paragraph 1e of the CPCG, stipulated that criminal prosecution should have been terminated if the statute of limitations for

[22] See note 19 supra.

[23] ibid.

[24] According to the paragraph 1 of this Article, "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed;" while according to the paragraph 2: "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[25] Judgment of the European Court of Human Rights N35343/05 "Vasiliauskas v. Lithuania" (GC) 2015. Paragraph 154.

the relevant crime, as established by the CCG, had expired. However, if the accused opposes the termination of the case, the criminal proceedings will continue as usual and will conclude either with an acquittal or a conviction, with the accused being released from serving the sentence. Therefore, the Strasbourg Court will assess whether the applicants explicitly requested not to terminate proceedings, in order to justify the decisions of the national courts to continue the case despite the expiration of the statute of limitations for the crime in question."[26]

Following the analysis of Article 7 of the Convention and the assessment of the factual circumstances of the case, the Strasbourg Court unequivocally stated that the claimants were convicted for actions that were no longer punishable due to the expiration of the statute of limitations as provided by the relevant national legislation. Furthermore, according to the ECtHR's position, the national courts failed to provide an adequate explanation for why they applied such an approach. Additionally, the Strasbourg Court pointed out that, despite the fact that the Supreme Court had exempted the claimants from serving the sentence, the national courts treated the applicants as if they were still convicted under the previous proceedings.

The aforementioned conclusions were sufficient for the Strasbourg Court to determine a violation of Article 7 of the Convention ("No punishment without law") in the claimants' favor.[27]

Thus, the position of the ECtHR regarding the issue raised in the article is categorical and clear: it is inadmissible to convict an individual for an offense for which the statute of limitations had expired at the time the act was committed, regardless of the fact that the individual may oppose the termination of the case in the national courts. In such cases, according to the European Court's approach, it is unacceptable to issue a guilty verdict and to impose legal consequences typically associated with a conviction, whether it involves the restriction of individual rights or other forms of legal liability.

III. THE INADMISSIBILITY OF ISSUING A CONVICTING SENTENCE WHEN THE INDIVIDUAL VOLUNTARILY RENOUNCED THE CRIME OR MADE ACTIVE REPENTANCE

1. BRIEF OVERVIEW OF THE ISSUE

From the outset, it should be noted that the Criminal Code of Georgia distinguishes between the grounds for exemption from criminal liability (Chapter XIII) and the grounds for exemption from execution of the sentence (Chapter XIV). The grounds for

[26] See note 19 supra.
[27] ibid.

exemption from criminal liability include: voluntary renunciation of the crime, active repentance, changes in circumstances, cooperation of the accused with investigative authorities, and the expiration of the statute of limitations for criminal liability. The forms of exemption from execution of the sentence, on the other hand, include parole, substitution of the unserved part of the sentence with a lighter penalty, review of the sentence due to the convicted person's cooperation with the investigation, exemption from serving the sentence due to illness or old age, deferral of sentence due to pregnancy, and exemption from serving the sentence due to the expiration of the statute of limitations for guilty verdict.

The fundamental distinction between these two groups of grounds lies in the fact that exemption from criminal liability occurs before the court establishes a person's guilt and renders a conviction. If a person's guilt is established and a sentence is imposed, they may be exempted from serving the sentence either before its enforcement or after its commencement. However, under the CCG, this will be considered as exemption from serving the sentence rather than an exemption from criminal liability.[28]

It should also be emphasized that the basis for criminal liability is a crime, meaning an unlawful and culpable act as defined by criminal law. The requirement that a crime must be a culpable act signifies that it must be subject to judicial condemnation.[29] The recognition of a person as culpable by a court implies their condemnation for violating the law and making the choice to commit an unlawful act. In this sense, culpability serves as the basis for finding a person guilty and imposing a penalty. The essence of criminal prosecution lies not only in the imposition of a penalty, but above all, in the judicial condemnation of the individual for committing an unlawful act.[30]

The conclusion regarding a person's guilt and, even more, the imposition of a penalty - which reflects the court's opinion of what the offender deserves - inevitably contains an element of condemnation. In the context of criminal proceedings, a conviction and the implicit condemnation that accompanies it have a direct impact on the individual's reputation and the way they are perceived by other members of society.[31]

A more detailed analysis of voluntary renunciation of the crime, active repentance, and the related legal conclusions will be provided below.

[28] Cf. Judgment of the Plenary Session of the Constitutional Court of Georgia N3/1/633/634 on "The Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 269, paragraph 5c of the Criminal Procedure Code of Georgia and the Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 306, paragraph 4 and of Article 269, paragraph 5c of the Criminal Procedure Code of Georgia", 13 April 2016. Paragraph 30.

[29] ibid, paragraph 28.

[30] ibid.

[31] ibid.

2. VOLUNTARY RENUNCIATION AS THE GROUNDS FOR EXEMPTION FROM CRIMINAL LIABILITY

A person shall not be held criminally liable if they voluntarily and definitively renounce the completion of a crime. This is explicitly stated in Article 21, paragraph 1 of the CCG, which provides that "a person shall not be held criminally liable if they voluntarily and definitively renounce the completion of a crime."

According to the criminal doctrine, the voluntary renunciation of the crime can occur at both the preparation stage and during either a completed or an incomplete attempt.[32] Accordingly, the conditions and limits of voluntary renunciation can be formulated as follows: 1) The criminal outcome must be prevented; 2) The renunciation must be voluntary (whether through an active action or deliberate inaction); 3) The renunciation must be final and definitive, and not temporary.[33]

The institution of voluntary renunciation applies equally to sole perpetrators, co-perpetrators, and accomplices.[34] This issue is also regulated by Article 21, paragraphs 3, 4 of the CCG, which establish that in cases of co-perpetration,[35] a person who voluntarily renounces the crime must take active steps to prevent its completion and avert the criminal outcome.[36]

The Supreme Court of Georgia, in one of its criminal cases, exempted the perpetrator from criminal liability on the grounds that a perpetrator voluntary renounced the crime. More specifically, the court stated in its judgment: "based on a thorough analysis and objective assessment of the credibly established factual circumstances of the case, the Chamber of Cassation finds that, although the defendant attempted to commit the rape of the victim, they voluntarily and definitively renounced the completion of the crime they had initiated. Therefore, they must be exempted from criminal liability for this offense, which directly follows from Article 21, paragraph 1 of the CCG."[37]

[32] Cf. Merab Turava, Criminal Law, Overview of Genral Part (9th Edition, Meridiani Press 2013) 316-317; Otar Gamrkrelidze, Explaining Georgian Criminal Code (Meridiani Press 2008) 170-177; Levan Kharanauli, Criminal Liability for an Incomplete Crime According to the German and Georgian Criminal Law (Meridiani Press 2014) 321-338; Ketevan Mchedlishvili-Hadrich, Criminal Law, General Part II, Various Forms of Crime Manifestation (Meridiani Press 2011) 94-95.

[33] Merab Turava, Criminal Law, Overview of General Part (9th Edition, Meridiani Press 2013) 317, also Cf. Günther Jakobs, Strafrecht, Allgemeiner Teil (2 Auflage, Beck 1993) 748-749; Rudolf Rengier, Strafrecht, Allgemeiner Teil (3 Auflage, Beck 2011) 324, also Cf. Judgment of Supreme Court of Georgia #980ap-22, 10 November 2022.

[34] Cf. Ketevan Mchedlishvili-Hadrich, Criminal Law, General Part II, Various Forms of Crime Manifestation (Meridiani Press 2011) 102-115.

[35] The case of accomplice is an exception, see 2nd sentence of Article 21, paragraph 3 of CCG.

[36] Mchedlishvili-Hadrich, supra note 35, 114-116; Ketevan Mchedlishvili-Hadrich, Criminal Law, General Part (3rd Edition, Meridiani Press 2018) 287.

[37] See the Ruling of the Criminal Chamber of the Supreme Court of Georgia N1129ap-06, 14 May, 2007. Also Cf. Judgment of the Supreme Court of Georgia N14kol-2001, 1 March 2001. The Supreme Court

Hence, in this particular case, the court applied the provision provided for in Article 21 of the CCG and exempted the individual from criminal liability.

However, judicial practice has also seen cases where a subject of the act in initial charge, although exempted from criminal liability due to voluntary renunciation, was still found guilty due to finding, based on the factual circumstances, the elements of another offense in their act. Such qualification is entirely permissible because, under the voluntary renunciation, if the perpetrator's actual conduct contains the elements of different offense, they will be held liable and punished for that offense.[38] This principle is explicitly stated in Article 21, paragraph 2 of the CCG, which provides that a person who voluntarily renounces the completion of a crime shall be held criminally liable only if their actual conduct constitutes a different criminal offense.

3. ACTIVE REPENTANCE AS A GROUND FOR EXEMPTION FROM CRIMINAL LIABILITY

Exemption from criminal liability due to active repentance entails the commission of several proactive actions by the person, which must include the following: 1) the subject of the act must, without external coercion, voluntarily report to law enforcement authorities, make a statement on committing the crime, and assist in the investigation; 2) The crime must be the first offense committed by the individual; 3) The offense committed must not have a maximum penalty exceeding three years of imprisonment; 4) The offender must fully compensate the damage caused by the crime.[39] This principle is explicitly stated in Article 68, paragraph 1 of the CCG, which provides that: "A person who has committed a crime for the first time, for which the maximum penalty prescribed by the relevant article or part of the article of the Special Part of this Code does not exceed three years of imprisonment, may be exempted from criminal liability if, after committing the crime, they voluntarily reported to the law-enforcement institution, confessed, facilitated the resolution of the crime, and compensated for the damage."

Thus, the exemption from criminal liability due to active repentance primarily serves a practical purpose. Although the relevant legal provision does not explicitly state it, in practice, this norm can only be applied at the investigative stage of criminal proceedings.

of Georgia similarly assessed the factual circumstances of the case in another criminal proceeding and determined that the case should be remanded to the lower court for reconsideration.

[38] Cf. The Judgment of the Supreme Court of Georgia N861ap-20, April 22, 2021.

[39] Cf. Maia Ivanidze, Collective of authors, Criminal Law, General Part (3rd Edition, Meridiani Press 2018) 603; Irakli Dvalidze, General Part of Criminal Law, Penalty and other Penal Consequencies of Crime (Meridiani Press 2013) 149-150; Ketevan Mechdlishvili-Hadrich, Criminal Law, General Part II, Varioues Forms of Crime Manifestation (Meridiani Press 2011) 117-119; Ioseb Vardzelahsvili, 'Exemption from criminal liability due to Active Repentance' (Meridiani Press 2018) 3 German-Georgian Criminal Law Electronic Journal 31-36 <http://www.dgstz.de/> [last accessed on 19 April 2024].

Furthermore, this provision is not imperative in nature and its application is left to the discretion of the competent authority.[40]

As for Article 68, paragraph 2 of the CCG, which states that "a person who has committed another category of crime may be exempted from criminal liability if this is provided for by the relevant article of the Special Part of this Code," this provision constitutes a so-called post-criminal incentivizing norm that may apply to any category of crime.[41] From this legal provision, it can be concluded that the legislator has established general preconditions for exemption from criminal liability, the application of which depends on the fulfillment of specific conditions outlined in the notes to the relevant article in the Special Part of the Criminal Code of Georgia. In one case, this norm may serve to facilitate the timely detection of crime, in another case, it may function as a form of 'forgiveness' for the perpetrator's actions. [42] For example, the note to Article 236 of the CCG states that: "A person who voluntarily surrenders the items listed in this article shall be exempted from criminal liability, provided that their actions do not constitute another offense."

It can be conlucded that in this case the legislator, on the one hand, seeks to prevent the commission of new crime through the offender's positive actions, while, on the other hand, aims to 'forgive' the already committed act (such as the illegal acquisition, possession, or carrying of firearms) and exempt the person from criminal liability.

Judicial practice on this legal issue is quite limited. However, there is a precedent involving the appeal of a decision issued by the official body based on active repentance (under the old version of the CPCG). Specifically, a prosecutorial ordinance on non-initiation of criminal proceedings due to active repentance was appealed initially in lower court and later before the Supreme Court. The Supreme Court, in its judgment stated that the prosecutorial ordinance on refusing to initiate criminal proceedings on the grounds of active repentance was lawful and there was no legal basis for its annulment.[43]

As for the distinction between active repentance and voluntary renunciation of a crime, it is essential to highlight that active repentance can occur only after the commission of a crime, whereas voluntary renunciation can take place only before its completion[44] - either at the stage of crime preparation or attempt. Moreover, as previously noted, in

[40] Cf. Irakli Dvalidze, General Part of Ciminal Law, Penalty and other Penal Consequences of Crime (Meridiani Press 2013) 150.
[41] ibid, 152.
[42] ibid, 150.
[43] See Ruling of the Criminal Chamber of the Supreme Court of Georgia N233-dad, 31 October 2002.
[44] For more details, see Udo Ebert, Strafrecht, Allgemeiner Teil (3 Auflage, UTB Uni-Taschenbücher Verlag 2001) 130; Hans-Heinrich Jescheck, Thomas Weigend, Lehrbuch des Strafrechts, Allgemeiner Teil (5 Auflage, Duncker & Humblot 1995) 548.

cases of voluntary renunciation, the committed act must not contain elements of another crime. With regard to exemption from criminal liability in case of active repentance, this is not a mandatory legal provision, but rather depends on the discretionary authority of the competent official to determine whether to apply this mitigating circumstance to the offender; while, on the other hand, the voluntary renunciation requires the prosecutor/judge to immediately exempt the accused from criminal liability. However, as mentioned above, the applicable procedural legislation addresses this issue differently at the stages of investigation and judicial proceedings.

4. VOLUNTARY RENUNCIATION AND ACTIVE REPENTANCE UNDER THE APPLICABLE PROCEDURAL LEGISLATION

The criminal procedural legislation addresses the issues of voluntary renunciation of a crime and active repentance through Articles 105 and 269 of the Criminal Procedure Code. Specifically, Article 105, paragraphs 1j, k sets out the circumstances under which the prosecutor must terminate the investigation/prosecution or and should not initiate criminal proceedings.

More precisely, the essence of this provision is that if a person voluntarily renounces the crime or actively repents, the state prosecutor is required to immediately terminate the investigation, and not to initiate (and if already initiated, to discontinue) criminal prosecution.

The mandatory provision of Article 105 of the Criminal Procedure Code is logical and justified, as it is based on material grounds for excluding criminal liability. A similar legal outcome also arises when evidence confirms the existence of circumstances that exclude unlawfulness, such as necessary defense (Article 105, paragraph 1b of the Criminal Procedure Code).

Given that the clarity of the substantive part of the norm, it is legally illogical and unjustifiable that Article 269, paragraph 5 of the Criminal Procedure Code allows for the possibility of rendering a guilty verdict, imposing a sentence, and subsequently exempting the person from serving it in cases where the individual has voluntarily renounced the crime or has demonstrated active repentance.

The legislator's position is not only unclear and ambiguous, but it can be confidently stated that it explicitly contradicts substantive criminal law. It is inconsistent for one provision of the law to fully exempt a person from liability, while another provision of same legal rank establishes their punishability. It is unclear why a judge should issue a guilty verdict after the completion of a substantive hearing, when the defendant has voluntarily renounced the crime, has not completed the initiated act, or has sincerely and actively repented for the committed act.

It is noteworthy that the old version of the Criminal Procedure Code did not include such a provision; so it remains unclear what the legislator's intent was at the time when this provision was introduced into Article 269, paragraph 5 of the current CPCG. Moreover, as mentioned above, this provision contradicts not only the relevant norms of the Criminal Code but also creates a differentiated legal outcome for the subject of the act due to this legislative approach (one could say that such an approach is discriminatory). Specifically, Articles 105 and 269 of the CPCG determine a person's legal status differently despite the existence of the same grounds (voluntary renunciation of a crime or active repentance): in one case, criminal prosecution is terminated and the person is fully exempted from all legal liability, whereas in another case, the court delivers a guilty verdict against the defendant, imposing various forms of legal liability, not to mention the damage to their future reputation and the violation of the presumption of innocence.[45]

When, during the investigative stage, it is established that a person has voluntarily renounced a crime under Article 105 of the Criminal Procedure Code, the investigation losses both material and legal procedurcal basis. The legislator explicitly states that "investigation must be terminated; criminal prosecution must not be initiated or must be discontinued"; hence, this legal norm does not allow the prosecutor any discretion in making such a decision, rather, it obligates them to terminate the ongoing investigation and criminal prosecution. Accordingly, it is highly ambiguous why a circumstance that prevents the initiation or continuation of an investigation and criminal prosecution should not also prevent the continuation of substantive judicial proceedings or the conviction of a person when, during trial, it is established that the defendant voluntarily renounced the crime or engaged in active repentance. Since Article 105 of the Criminal Procedure Code explicitly mandates that criminal prosecution must be discontinued in such circumstances, this logically implies that prosecution must also be discontinued during the substantive stage of proceedings; this is because the criminal prosecution begins at the investigative stage and continues in court until a verdict is rendered. Therefore, it is indisputable that Paragraph 5 of Article 269 of the Criminal Procedure Code contains a systemic flaw and is in direct contradiction with both criminal procedure law and substantive criminal law. It is unclear how a material legal ground that excludes criminal liability should not also be considered a procedural obstacle to issuing a guilty verdict. If a fact nullifies the basis for criminal prosecution and prevents the continuation of criminal proceedings, how can it not affect the final conviction of a person?

[45] Cf. Ioseb Vardzelashvili, 'Exemption from ctriminal liability due to Active Repentance' (2018) 3 German-Georgian Criminal Law Electronic Journal 31-36 <http://www.dgstz.de/> [last accessed on 19 April 2024].

In addition to the above, it is also important to note that, according to Article 274, paragraph 1j of the Criminal Procedure Code, a guilty verdict may include a decision to revoke a state award, military, honorary, or special rank. [46] Since this coercive measure does not constitute a penalty within the meaning of Article 40 of the CCG, exemption from serving a sentence does not exempt a person from such coercive measures, which would still be imposed in such cases. The same logic applies to certain coercive measures prescribed for specific crimes, which, according to criminal legislation, are not classified as penalties. As a result, exemption from execution of a penalty does not protect a person from such coercive measures. A notable example of such a coercive measure is the revocation of certain rights under Article 3 of the Law of Georgia on Combating Drug Related Crime, which may impose significant restrictions on a person who have been exempted from penalty. The Constitution of Georgia goes even further. Article 39, paragraph 5 of the Constitution establishes the procedure for recognizing or prematurely terminating the powers of a Member of Parliament. According to this provision, if a legally binding court verdict finds a person guilty, Parliament may terminate their mandate on this basis.[47]

IV. CONCLUSION

As it turns out, the normative content of Article 269, paragraph 5 of the Criminal Procedure Code of Georgia, which explicitly defines the circumstances under which a judge may issue a guilty verdict with the imposition of a sentence and subsequent exemption from serving it, is deficient and contradictory. It can be stated that this provision not only contradicts the internal norms of the same code but also violates the case law of the European Court of Human Rights as well as the substantive norms of the Criminal Code of Georgia.

The fact that a defendant's reputation is one of their key interests within criminal proceedings is particularly evident in international and national case law concerning the presumption of innocence. A violation of the presumption of innocence may occur even when criminal prosecution is terminated without a guilty verdict or without the imposition of a penalty, if a court or other state authority treats a person as if their guilt in the alleged offense has already been established.[48]

[46] Cf. Judgment of the Plenary Session of the Constitutional Court of Georgia N3/1/633/634 on "The Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 269, paragraph 5c of the Criminal Procedure Code of Georgia and the Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 306, paragraph 4 and of Article 269, paragraph 5c of the Criminal Procedure Code of Georgia", 13 April 2016. Paragraph 27.

[47] Cf. Judgment of the Plenary Session of the Constitutional Court of Georgia N3/2/1473 "Nikanor Melia v. The Parliament of Georgia", 25 September 2020.

[48] Cf. Judgment of the Plenary Session of the Constitutional Court of Georgia N3/1/633/634 on "The

As the Constitutional Court of Georgia stated in one of its decisions: "The presumption of innocence is not only a 'result-oriented' guarantee aimed at ensuring a fair trial free from bias and preconceived opinions, but it also serves to protect a person's reputation after legal proceedings have concluded in their favor. This ensures that the person is not perceived as guilty by other members of society when their guilt has not been established by a court's guilty verdict."[49]

Based on the above, the analysis of the legislation allows us to conclude that exemption from serving an imposed sentence does not constitute an exemption from criminal liability for the purposes of the Criminal Code. Exemption from penalty does not mean that a person is freed from all coercive measures that form part of criminal liability, nor does it protect them from future negative legal consequences associated with their convicted status.

As a result of the substantive and procedural legal analysis of these provisions, the following logical conclusion can be drawn:

(1) Based on Article 269, paragraph 5b of the Criminal Procedure Code, if the court continues the substantive hearing of the case, upon delivering the final decision, the judge should not be authorized to issue a guilty verdict against the defendant. Instead, in such a case, under Article 105, paragraph 1e of the Criminal Procedure Code, which also provides for the termination of criminal prosecution at the investigative stage due to the expiration of the statute of limitations, the court should terminate the criminal prosecution. This position is also supported and endorsed by recent judgment of the European Court of Human Rights.[50]

(2) In cases of voluntary renunciation of a crime or active repentance, it is also impossible for the court to issue a guilty verdict, as such a legal outcome not only contradicts the principles and spirit of substantive criminal law but also raises questions about the constitutionality (discriminatory nature) of the aforementioned legal provision itself, potentially leading to its review by the Constitutional Court in the future.[51] In such cases, general courts are obligated either to issue an

Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 269, paragraph 5c of the Criminal Procedure Code of Georgia and the Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 306, paragraph 4 and of Article 269, paragraph 5c of the Criminal Procedure Code of Georgia", 13 April 2016. Paragraph 31.

[49] Cf. ibid.

[50] Judgment of the Eupean Court of Human Rights N7523/10 "Antia and Khupenia v. Georgia", 18 June 2020.

[51] The Constitutional Court of Georgia similarly ruled on the issue concerning Article 269, Paragraph 5c of the CPCG, which relates to the possibility of a judge issuing a guilty verdict when a new law decriminalizes the act. The Constitutional Court of Georgia declared unconstitutional Article 269, Paragraph 5c of the CPCG, referred to in constitutional submissions N633 and N634 made by Supreme Court of Georgia in relation to the 2nd sentence of Article 42, Paragraph 5 of the Georgian Constitution

acquittal or, as a last resort, to terminate criminal prosecution based on Article 105, paragraph 1j, k of the Criminal Procedure Code, either with or without a motion presented by the party.[52]

(old edition). See Judgment of the Plenary Session of the Constitutional Court of Georgia N3/1/633/634 on "The Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 269, paragraph 5c of the Criminal Procedure Code of Georgia and the Constitutional Submission of the Supreme Court of Georgia on the Constitutionality of Article 306, paragraph 4 and of Article 269, paragraph 5c of the Criminal Procedure Code of Georgia", 13 April 2016.

[52] Article 395 of the CPCG (1998 edition) explicitly provided for the obligation of the judge/prosecutor to terminate criminal prosecution without requiring a motion from the parties, if any of the circumstances listed in Article 28 of the same Code arose. More specifically, the article stated the following: "The court (judge) or the prosecutor is required to terminate criminal prosecution and/or preliminary investigation as soon as any of the grounds specified in Article 28 of this Code arise".

*Jamlat Gvidiani**

THE BOUNDARIES OF A LAWYER'S FREEDOM OF EXPRESSION

ABSTRACT

In a democratic society, the restriction of a lawyer's freedom of expression may be justified only in exceptional cases, accompanied by adequate procedural safeguards and subject to a number of necessary preconditions.

The paper examines the scope of lawyer's freedom of expression in view of its key principles and within the prism of the case-law of the European Court of Human Rights in terms of its content, form of expression, purpose, the circumstances of the case, and the overall context. The focus is placed on the challenges present in Georgian law, particularly on the deficiencies concerning the qualitative standards of the legal provisions used as a basis for interfering with a lawyer's freedom of expression, the shortcomings in judicial practice, and the lack of adequate procedural safeguards.

The conclusion outlines the measures to be undertaken to ensure effective legal practice in Georgia, in light of the growing risks to the lawyer's role in the administration of justice and the erosion of public trust in the legal profession.

I. INTRODUCTION

Democracy, together with the principles of subsidiarity and shared responsibility enshrined in the ECHR, constitutes a fundamental basis of the modern European public order.[2] In a democratic state, freedom of expression plays a fundamental role in the full realization of numerous other human rights. At the same time, it serves as both an indicator and a driving force of progress for individuals and society as a whole.[3]

* Doctoral Student at Sulkhan-Saba Orbeliani University, Guest researcher at the Academy for the Protection of Human Rights in Europe at the University of Cologne, Master of Laws [LL.M. zu Köln] [j.gvidiani@sabauni.edu.ge]

1 The Convention for the Protection of Human Rights and Fundamental Freedoms, hereafter "the ECHR" (1950).

2 Judgment of the European Court of Human Rights N53600/20 "Verein Klimaseniorinnen Schweiz and Others v. Switzerland", 9 April 2024. Paragraph 411.

3 Judgment of the European Court of Human Rights N56925/08 "Bédat v. Switzerland", 29 March 2016. Paragraph 48.

The legal creation of the modern understanding of freedom of expression in continental Europe was established as early as the French Revolution, notably embodied in one of its most significant achievements - the Declaration of the Rights of Man and of the Citizen.[4] This stands as clear evidence of the profound importance of freedom of speech, rooted in events centuries past. It is noteworthy that the Georgian Constitution 1921 already guaranteed the right to freedom of expression and thought, including the right to disseminate those; hence, it can be confidently stated that the Constitution of the Democratic Republic of Georgia, in terms of the regulation of rights and other characteristics, was equal to the constitutions of its contemporaries and, in essence, aligned with the legal evolution and constitutional standards of Europe.[5]

In a democratic state, freedom of expression is an indicator,[6] motivator,[7] a clear manifestation of individuality, and one of the most essential rights in the pursuit of perfection.[8] The exercise of the right to express opinions fosters pluralism, encourages public and informed debate on matters of societal importance, and promotes individual participation in public life - where everyone, including lawyer,[9] is ensured the freedom to express opinions, regardless of citizenship or any other status.[10] At the same time, a differentiated standard is justified in relation to representatives of public institutions,[11] as their relationship with the state is of a specific nature and, in addition to general responsibilities, they are also expected to uphold the authority of the public service.[12]

Freedom of expression protects a lawyer's right to free speech in the course of professional activity,[13] including the intention to exert intellectual influence and shape

[4] Article 11, Declaration of the Rights of Man and of the Citizen, National Constituent Assembly of France, 26 August 1789.

[5] Besik Loladze and Ana Pirtskhalashvili, Fundamental Rights, Commentary (Georgian National Univrrsity 2023) 12-13, Article 32, Georgian Constitution, 21 February 1921.

[6] See note 3, paragraph 48.

[7] Jamlat Gvidiani, 'The Constitutional-Legal Standard of Freedom of Expression: Georgian and European Perspective' in Dimitri Gegenava (ed.), Giorgi Kverenchkhiladze 50 (Sulkhan-Saba Orbeliani University Press 2022) 96-97.

[8] ibid, 99.

[9] Judgment of the European Court of Human Rights, N51000/11 "Radobuljac v. Croatia", 28 June 2016. Paragraph 51; Tamar Avaliani, "Restriction of Freedom of Expression to Protect the Authority and Impartiality of the Judiciary: Compatibility of the Georgian Model with the Standards of the European Court of Human Rights" in Konstantine Korkelia (ed.), Human Rights Protection, the Pandemic, and the Rule of Law (Collected Articles) (Office of the United Nations High Commissioner for Human Rights 2021) 61; Judgment of the Constitutional Court of Georgia N1/1/468 "Public Defender of Georgia v. the Parliament of Georgia", 11 April 2012. Paragraph II-26.

[10] Autorenkollektiv, Hans Hofmann und Hans-Günter Henneke (Hrsg.), Grundgesetz Kommentar zum Grundgesetz (CarlHeymannsVerlag 2022) Art.5, Rn.11.

[11] Rolf Schmidt, Grundrechte-sowie Grundzüge der Verfassungsbeschwerde (16. Auflage, Grasberg bei Bremen 2014) 184.

[12] Autorenkollektiv, supra note 10, Rn.11.

[13] Judgment of the European Court of Human Rights N29369/10 "Morice v. France", 23 April 2015. Paragraph 134.

common opinion through value-based judgments without coercion upon others.[14] In addition to information that is received positively or indifferently, protection also extends to expressions that may be shocking, disturbing, or even offensive to society, and such characteristics do not diminish the value or weight of the expression.[15]

The aim of this paper is to review the prerequisites for justifying interference with the right to freedom of expression, in the context of emphasizing the importance of the lawyer's role in the administration of justice and the significance of the extent of freedom of expression in a democratic society. It seeks to identify the challenges existing in Georgian law concerning the exercise of a lawyer's freedom of expression, propose possible solutions to these issues, and raise awareness of the topic within professional circles.

II. THE LAWYER'S ROLE IN THE ADMINISTRATION OF JUSTICE

The duty to uphold the rule of law and ensure the fair administration of justice, as well as the lawyer's freedom, independence, and the obligation to perform professional functions both competently[16] and in good faith[17]constitutes the fundamental principles of legal profession.[18]

Legal practice serves the public goal of upholding justice and protecting human rights, which primarily entails the practical implementation of the principle of the rule of law.[19] In this process, the lawyer plays a significant role as a guardian of the public legal order, as they can make a decisive contribution to the delivery of quality justice and to building public trust in the system.[20] The formation of trust in the justice system is directly linked to the existence of trust in the lawyer's ability to provide effective representation, [21] since the lawyer essentially acts as an intermediary between society and the court.[22]

[14] BVerfG Urteil vom 15. Januar 1958, 1 BvR 400/51, Rn. 36.
[15] Barbara Rox, Schutz religiöser Gefühle im freiheitlichen Verfassungsstaat? (Mohr Siebeck 2012) 281.
[16] Article 3, paragraph c, Law of Georgia on Lawyers, 20 June 2001, Legislative Herald of Georgia, 22, 06.07.2001.
[17] ibid, Article 5, paragraph a.
[18] ibid, Article 3, paragraphs b, d, e, g, h.
[19] Judgment of the Constitutional Court of Georgia N1/5/323 "The Georgian Citizens George Vacharadze, Artur Kazarov, Levan Chkheidze, George Berishvili, Shorena Oskopeli and Nino Archvadze v the Parliament of Georgia", 30 November 2005. Paragraph II-2.
[20] Judgment of the Constitutional Court of Georgia N1/6/1424,1490 "The Georgian Citizen Lasha Janibegashvili v the Parliament of Georgia", 04 November 2016. Paragraph II-19.
[21] See note 13 supra, paragraph 132.
[22] Judgment of the European Court of Human Rights N31611/96 "Nikula v. Finland", 21 March 2002. Paragraph 45.

The degree of a lawyer's freedom is of utmost importance for the proper administration of justice.[23] Therefore, the state has an obligation to act in a balanced manner when restricting a lawyer's expression and to create a legal environment in which the lawyer is protected from disproportionate restrictions, inadequate sanctions, and persecution.[24] All of the above clearly confirms that in ensuring the fair and effective functioning of the justice system as a whole, the lawyer - and consequently, their freedom of speech and opinion - plays a pivotal role.

III. FREEDOM OF EXPRESSION OF A LAWYER

The degree of a lawyer's freedom in a democratic, rule-of-law state is one of the key indicators of both the credibility of the legal system and the overall standard of justice.[25] A lawyer has the right to use all means not prohibited by law or professional ethics in order to protect the interests of their client.[26]

In general, freedom of expression promotes openness to new ideas within society and strengthens the capacity for critical thinking. It protects all forms of opinion and encompasses the processes of discussion, judgment, and ideological debate[27] - including, in some cases, the dissemination of untrue information made without intent.[28] Engaging with opposing viewpoints has a positive impact on the essence of the right to freedom of expression and plays a significant role in the formation of objective truth.[29]

A lawyer's freedom of expression extends not only to the content of a statement but also to the manner in which it is conveyed, and includes the duty to protect the client's rights to the fullest extent, including through criticism of the court. However, expressions aimed solely at insulting the court fall outside the scope of protection.[30] Freedom of expression also encompasses the right to subjectively perceive and emotionally present certain events, especially when such expression serves as a response to an emotional attack and/or perceived injustice. In order to determine the objective content and purpose of an expression, the assessment must take into account the overall context of the case

[23] Judgment of the European Court of Human Rights N8932/05 "Siałkowska v. Poland", 22 March 2007. Paragraph 111.
[24] Cf. ibid, paragraph 112. The Legal Acts and Regulations Concerning the Profession of Lawyer, Council of Europe / GBA 107 <https://rm.coe.int/-/1680788226> [last accessed on 19 April 2024].
[25] See note 20 supra, paragraph II-30.
[26] See note 16 supra, Article 6, paragraph 1.
[27] Michael Lotharund Martin Morlok, Grundrechte (4. Auflage, NomosLehrbuch 2014) Rn. 133, 205-210.
[28] Judgment of the Constitutional Court of Georgia N1/6/561, 568 "The Georgian Citizen Yuri Vazagashvili v the Parliament of Georgia", 30 September 2016. Paragraph 52.
[29] ibid, paragraph II-51.
[30] Judgment of the European Court of Human Rights N40975/08 "Čeferin v. Slovenia", 16 January 2018. Paragraph 44. See note 9 supra, paragraph 61.

and the factual circumstances,[31] particularly in instances involving the imposition of criminal responsibility.[32]

A lawyer is entitled to make negative public statements about individuals involved in the administration of justice,[33] as well as criticize the courts and the functioning of the justice system.[34] The permissible limits of such criticism are defined by adherence to the general norms of conduct for lawyers and the principles established by the European Lawyers' Association and the European Convention of the Profession of Lawyer.[35]

In cases involving criticism of the judicial system and the functioning of legal proceedings, a lawyer enjoys a heightened standard of protection under the right to freedom of expression,[36] even when the criticism is sharp or potentially serious. In such contexts, the scope of the state's discretion to interfere is narrower than usual.[37] A judge, as a representative of a fundamental state institution, is subject to a greater degree of personal criticism than an ordinary citizen, but to a lesser extent than a politician.[38] At the same time, compared to representatives of the executive and legislative branches, judges require a higher level of protection against offensive attacks.[39]

A differentiated approach is justified depending on whether the lawyer exercises their freedom of expression inside the courtroom, within the court building, or outside it. During court proceedings, the lawyer is obliged to vigorously represent the client's position, including through sharp criticism, which state representatives must tolerate, provided that personal insults are excluded.[40] In proceedings before a court, the lawyer benefits from a high standard of protection under freedom of expression, and any restriction of this right may negatively impact both the lawyer's and the client's interests. At the same time, in order to ensure effective proceedings, it is essential that public officials involved in the process are protected and shielded from unjustified pressure.[41]

Despite the admissibility of criticism directed at the court, the institution and its members must be protected from entirely unfounded, deliberate, and offensive attacks, including through the imposition of strict sanctions if necessary.[42] This necessity is

[31] BVerfG, Beschluss vom 10 März 2016, 1 BvR 2844/13, Rn. 24.BVerfG Beschluss vom 10 Oktober 1995, 1 BvR 1476/91, Rn. 125.
[32] ibid, Rn. 127.
[33] See note 22 supra, paragraph 46.
[34] See note 30 supra, paragraphs 56, 58.
[35] See note 13 supra, paragraph 134.
[36] ibid, paragraph 125.
[37] See note 3 supra, paragraph 48 (ii).
[38] See note 9 supra, paragraph 59. Cf. See note 22 supra, paragraph 48.
[39] Judgment of the Constitutional Court of Georgia N1/4/1394 "Zviad Kuprava v the Parliament of Georgia", 27 July 2023. Paragraph II-9.
[40] See note 13 supra, paragraphs 136-137.
[41] Cf. note 22 supra, paragraphs 48-50.
[42] Judgment of the European Court of Human Rights N68924/12 "Słomka v. Poland", 6 December 2018. Paragraph 64.

further heightened by the fact that judges operate within a framework of discretionary powers and, due to the nature of their judicial functions, have limited opportunities to respond to such criticism.[43]

A lawyer is authorized to comment on judicial proceedings and procedural shortcomings outside the courtroom and to provide information to the public through the media (television, press, etc.), which should also be assessed in the context of the freedom of press. The greater the public interest in the case or in the functioning of a public institution, the higher the level of protection afforded to the lawyer's statements and the narrower the scope for state interference. At the same time, a lawyer's statement must not constitute a mere personal attack or insult, and serious allegations must not be devoid of a reasonable connection to factual circumstances.[44]

A lawyer cannot benefit from the protection of freedom of speech if the expression is solely aimed at defamation, personal insult, or a targeted attack on an individual's dignity.[45] Each case must be assessed within its overall context, without interpreting offensive language in the abstract, as excessive or offensive criticism alone does not constitute sufficient grounds to classify the expression as defamatory and/or to justify interference.[46]

It can be said that a lawyer's exercise of freedom of expression requires the highest level of protection when appearing before the court, as well as when commenting on matters of significant public interest outside the courtroom. In contrast, such a necessity does not arise in situations involving the court premises or surrounding areas, and/or within a limited circle of persons, even when offensive statements are made, as such expressions are unlikely to have a substantial negative impact on either the independence of the judiciary or the effectiveness of justice.

Alongside freedom of expression, the Constitution of Georgia guarantees "the unhindered exercise of a lawyer's rights",[47] which includes protection against unjustified state interference in legal practice, such as the imposition of unwarranted conditions, and ensures that lawyers are able to freely perform their professional duties and responsibilities.[48]

[43] See note 13 supra, paragraph 128.
[44] ibid, paragraphs 125, 138, 139, 153.
[45] Bverf Gbeschluss vom 19 Mai 2020, 1 BvR 362/18, Rn. 14-16.
[46] ibid, Rn. 17.
[47] See note 7 supra, 99. Article 31, paragraph 3, The Georgian Constitution, 24 August 199. Official Gazette of the Parliament of Georgia, 31-33, 24.08.1995.
[48] See note 20 supra, paragraphs II-29, 35.

IV. RESTRICTION ON A LAWYER'S FREEDOM OF EXPRESSION AND ITS LEGITIMATE AIMS

Freedom of expression is not an absolute right and is accompanied by certain responsibilities and duties, placing a moral burden on those who exercise it.[49] A lawyer's freedom of expression - whether exercised inside the courtroom, outside of it, or through public statements - may be subject to proportionate restriction in pursuit of a legitimate aim.[50] Sanctioning a lawyer for contempt of court, suspending legal practice,[51] or imposing any form of penalty for critical commentary or offensive expression[52] constitutes an interference with the right to freedom of expression. [53]

The exercise of freedom of expression is accompanied by the duty to respect the constitutional rights of others, which, in combination with the prohibition of the abuse of human rights,[54] provides a legitimate basis for restricting this right.[55] In addition, a clear legitimate aim for restricting a lawyer's expression may be the protection of the independence and impartiality of the judiciary.[56]

Imposing a fine on a lawyer for contempt of court serves to uphold the proper conduct of judicial proceedings, to promptly address and deter violations, to sanction specific misconduct, and to protect the authority of the court from unfounded and offensive attacks.[57] Moreover, the imposition of criminal liability may be justified as a legitimate aim for protecting the authority of the court, maintaining public confidence in the judiciary, and ensuring the unobstructed and proper administration of justice. The Constitutional Court of Georgia deems it necessary to restrict offensive expressions directed at a judge within the courthouse through the use of criminal sanctions; however, it avoids assessing the constitutionality of imposing criminal liability for the same conduct when it occurs outside the court premises.[58]

Under Georgian legislation, a lawyer may be subjected to sanctions for disrupting order in the courtroom, including a fine, removal from the courtroom, or, in extreme cases,

[49] Canadar Arslan, Meinungs- und Kunstfreiheit gegen die Religionsfreiheit: wie viel Schutz für religiöse Empfindlichkeiten (Verlag Dr. Kovač 2015) 67-68. See note 9 supra, paragraph 58.

[50] Judgment of the European Court of Human Rights N31611/96 "Nikula v. Finland", 21 March 2002. Dissenting Opinion of Judges Caflisch and Pastor Ridruejo. Paragraph 3.

[51] Judgment of the European Court of Human Rights N81024/12 "Bagirov v. Azerbaijan", 25 June 2020. Paragraph 52.

[52] See note 31 supra, Rn. 109-110.

[53] See note 30 supra, paragraph 45.

[54] Articles 7 and 10, ECHR (1950).

[55] Rox, supra note 15, 266.

[56] Article 17, paragraph 5, the Georgian Constitution, 24 August 1995. Official Gazette of the Parliament of Georgia 31-33, 24.08.1995.

[57] Judgment of the Constitutional Court of Georgia N2/2/558 "The Georgian Citizen Ilia Chanturaia v the Parliament of Georgia", 27 February 2014. Paragraphs II-12-13, 23.

[58] See note 39 supra, paragraphs II-20, II-30, II-36, II-49.

detention for up to 60 days.[59] These sanctions may be imposed if the lawyer disrupts the court proceedings, disobeys a judge's order, displays disrespect towards the court, or demonstrates clear and/or gross disrespect toward a participant in the proceedings or the court/judge, as well as if their actions are aimed at obstructing the proceedings.[60] In cases of inappropriate conduct by a lawyer, the court's ruling is additionally forwarded to the Association of Lawyers.[61] Contempt of court that involves insulting a participant in the proceedings, including a judge, is subject to criminal liability and may result in a sentence of imprisonment for up to two years.[62]

It is evident that in Georgia, for the restriction or sanctioning of a lawyer's expression to be justified, the expression must be assessed as contempt of court, gross contempt, and/or insult - offenses that may carry significant penalties, including imprisonment. Accordingly, legitimate questions arise: Where is the line drawn between these concepts? Can such sanctions be applied equally to conduct occurring during court proceedings and to conduct outside of them? How should these terms be clearly distinguished and exhaustively defined? How should the application of sanctions be regulated to avoid arbitrariness and does the vagueness of these terms risk enabling discretionary abuse by public officials?

Considering that an offensive position expressed in insulting language - whether outside the courtroom proceedings but within the court building or outside it - has a similar impact on the effectiveness of justice, and that such impact is unlikely to be critically harmful, the imposition of equally severe criminal sanctions under identical provisions of criminal law for contempt shown during a hearing and outside of it cannot be considered equivalent.

[59] Article 212, Law of Georgia on "the Civil Procedure Code of Georgia", 14 November 1997, Official Gazette of the Parliament of Georgia, 47–48, 31/12/1997. Cf. Article 366, Law of Georgia on "the Criminal Code of Georgia", 22 July 1999, Legislative Herald of Georgia 41 (48), 13.08.1999.

[60] Georgian Civil Procedure Code, supra note 59, Article 212, paragraphs 3 and 7.

[61] ibid, Article 212, paragraph 4.

[62] Article 366, paragraph 2, Law of Georgia on "the Criminal Code of Georgia", 22 July 1999, Legislative Herald of Georgia, 41 (48) 13.08.1999.

V. PREREQUISITES FOR INTERFERENCE WITH THE EXERCISE OF FREEDOM OF EXPRESSION

1. GENERAL REQUIREMENTS AND PROCEDURAL SAFEGUARDS IN THE GEORGIAN CONTEXT

For the purposes of the ECHR, any interference with a lawyer's freedom of expression constitutes a violation of that freedom if the conditions of the interference are not defined by an applicable law, do not pursue a legitimate aim, and/or are not necessary in a democratic society, and cannot be justified by "relevant" and "sufficient" reasons.[63] In order to justify such interference, the applied law must be interpreted within the framework of a reasonable interpretation of the Constitution, taking into account the degree of impact of the restriction on the right and the necessity of preserving the value-based standard of the essence of freedom of expression.[64] It is essential to maintain a fair balance between competing interests, ensuring that the severity and extent of the sanction are proportionate to the legitimate aim pursued.[65] Equally important is the clear demonstration of the relevance and sufficiency of the reasons for the interference.[66] The assessment must consider not only the use of insulting or offensive language but also its connection to the factual circumstances of the case and the overall context of the proceedings.[67]

At the same time, it is crucial to ensure procedural safeguards that uphold the fundamental principle of the rule of law, guarantee the right to a fair trial, and protect the lawyer from arbitrary interference by the authorities.[68] The absence of such safeguards renders the interference illegitimate and undermines the process of building and maintaining trust in the justice system.

In this context, the guarantees of a fair trial, the degree of judicial impartiality, and the reasonableness of the time limit for appeal appear problematic under Georgian law, since in cases of contempt of court, it is the very same judge who felt personally offended who imposes a fine on the lawyer under civil legislation, often without even granting the lawyer an opportunity to present a defense.[69] Moreover, there is no clearly defined procedure for appealing such decisions. As a result, the court, by referring to the analogy of law, sets a 48-hour time limit for appeal,[70] which, considering the importance

[63] See note 22 supra, paragraphs 31,47.
[64] See note 31 supra, Rn. 111-117.
[65] See note 30 supra, paragraph 47, 67.
[66] See note 9 supra, paragraph 57.
[67] ibid, paragraphs 62-63.
[68] See note 42 supra, paragraphs 64-66, 70.
[69] Ruling of Tbilisi Court of Appeals, N2b/sp-03-23, 17 March 2023.
[70] Ruling of Supreme Court of Georgia, Nas-855-805-2015, 4 April 2016, 35.

of a lawyer's freedom of expression and their role in the administration of justice, is an unreasonably short period for preparing a qualified appeal and is substantially shorter than the 12-day period prescribed for submitting a private complaint.[71]

2. THE REQUIREMENT OF LEGAL QUALITY

For the purposes of the ECHR and in light of the autonomous interpretation of its terms, any law used to restrict a lawyer's freedom of expression must meet the requirement of legal quality, meaning that it must be accessible to the public and foreseeable in terms of its scope and consequences.[72] The legal norm must be formulated with sufficient clarity to enable individuals to regulate their behavior accordingly and to clearly anticipate the potential legal consequences of their actions. Since it is practically impossible to formulate a norm with absolute clarity - and, at the same time, it is even desirable for it to be adaptable to varying circumstances[73] - the practice of its application and the interpretation provided by the court become decisive.[74]

It is notable that despite the existence of sanctions for contempt of court and insults, Georgian legislation does not provide a unified definition of "contempt of court". Its general and vague character therefore creates the risk that, in specific situations, a person's involuntary or inappropriate behavior, potentially caused by stress and/or emotional strain, or even a legitimate tactic used in the defense of a client and their position may be interpreted as contempt of court.[75] Moreover, in the absence of a comprehensive and unified definition of "insult," the criminalization of insulting a judge grants state officials, acting in the name of the state, an unlimited power and creates fertile ground for arbitrariness; while prohibiting certain vulgar or offensive words further increases the risk of unjustified restrictions on the very essence of freedom of expression.[76]

Based on Georgian judicial law, contempt of court is understood to include failure to appear at a court hearing without a valid excuse,[77] violation of courtroom conduct rules, unethical or disruptive behavior by lawyers aimed at obstructing proceedings,[78] and the use of obscene language and/or non-verbal forms of expression to insult the judge,

[71] Civil Procedure Code of Georgia, supra note 59, Article 416.
[72] Judgment of the European Court of Human Rights N17224/11 "Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina", 27 June 2017. Paragraph 68.
[73] ibid, 70.
[74] See note 51 supra, paragraph 54.
[75] See note 57 supra, paragraph II-39.
[76] Dissenting opinion of Giorgi Kverenchkhiladze, Judge of the Constitutional Court of Georgia, concerning the Judgment N1/4/1394 of the Constitutional Court of Georgia, 27 July 2023. Paragraph III-26.
[77] Ruling of the Supreme Court of Georgia Nas-6-2023, 4 May 2023.
[78] Judgment of the Grand Chamber of the Supreme Court of Georgia Nas-664-635-2016, 2 March 2017. Paragraph 245.

parties, victim, expert, specialist, witness, or other participant[79] in the proceedings.[80] Even "heated verbal disputes or arguments" between lawyers during the hearing may be regarded as contempt of court.[81]

It should be noted that the court itself also avoids providing a clear definition of "contempt" and/or "insult," and when attempting to interpret these concepts, it relies on the aforementioned general and rather unforeseeable supplementary terms, which further blur the boundaries of a lawyer's freedom of expression.

Georgian legislation and judicial practice do not provide a clear definition of (gross) contempt of court or insult. This uncertainty is further exacerbated by the fact that factually identical conduct may lead to a sanction of imprisonment under both criminal and civil legislation, by the radical disparity[82] between the applicable sanctions, and by the possibility of imposing criminal liability even for the use of vulgar language, without any prior examination of the factual circumstances of the case or clarification of the underlying reasons for such inappropriate expression.

There is no doubt that the more ambiguous and undefined a concept is when used as a basis for restricting a particular right - especially the right to freedom of expression - the greater the risk to the effective exercise of constitutional rights and, ultimately, to the societal progress, which depends on essential public debate as a cornerstone of a modern democratic society.

The lack of clarity in concepts and the resulting unfavorable situation in Georgia is further exacerbated by the limited accessibility of court decisions,[83] and, at the very least, the scarcity of judicial practice in higher instances, also possibly due to the fact the possibility of appealing court orders on the imposition of fines or the expulsion of individuals from the courtroom for contempt of court has only been available since 2014.[84]

Given all of the above, the degree of the court's obligation to provide a higher standard of reasoning for its decisions is heightened in order to clarify, taking into account the context and setting of the lawyer's expression, what particular behavior, form of expression, or content may be considered contempt of court.[85]

[79] Ruling of the Supreme Court of Georgia N1134ap-22, 25 January 2023. Paragraphs 7 and 10.
[80] Ruling of the Supreme Court of Georgia N1134ap-22, 25 January 2023. Paragraphs 7 and 10.
[81] See note 69 supra.
[82] See note 63 supra.
[83] <https://courtwatch.ge/articles/judicial-acts> [last accessed on 19 April 2024].
[84] See note 57 supra, paragraph II-39.
[85] ibid, paragraph II-40.

3. THE SOCIAL NECESSITY OF INTERFERENCE WITH FREEDOM OF EXPRESSION

In a democratic society, the necessity of restricting freedom of expression arises only in the presence of a pressing social need, the final assessment of which falls within the prerogative of the court, exercised through the reasonable and good faith use of its discretionary powers.[86] It is important to maintain a fair balance between competing interests, even between the necessity of protecting the authority of the court and the protection of the lawyer's freedom of expression.[87] To justify interference, the reasons for sanctioning must be considered "relevant" and "sufficient", and the factual circumstances must be adequately assessed.[88]

The prerequisites for restricting a lawyer's freedom of expression, particularly in the courtroom, must be narrowly interpreted, and the necessity must be convincingly justified.[89] It is important to emphasize that in a democratic society, any restriction on a lawyer's freedom of expression, even involving minor criminal liability,[90] is considered necessary only in exceptional cases.[91]

4. THE "CHILLING EFFECT" OF THE LAW

The restriction of freedom of expression can have a "chilling effect" due to the risks of self-censorship.[92] When an individual fears that their fundamental message may be misunderstood and, as a result, they may face criminal or civil liability from the state, it creates a fertile ground for the unjustified limitation of the realization of freedom of expression.[93] Imposing responsibility for insult and broadly interpreting such responsibility, which may not be necessary to protect a legal interest or may leave no space for free expression, contradicts the constitutional standard of freedom itself.[94]

Criminal penalties for offensive expression, aimed at protecting the authority and reputation of the judiciary, particularly under conditions of ambiguous concepts, carry a "chilling effect".[95] Neither monetary fines nor their moderate nature are sufficient to mitigate the "chilling effect" on the exercise of freedom of expression and the potential

[86] See note 3 supra, paragraph 48 (ii).
[87] See note 30 supra, paragraph 47.
[88] ibid, 48.
[89] See note 3 supra, paragraph 48 (i).
[90] See note 22 supra, paragraph 55.
[91] See note 13 supra, paragraph 135.
[92] See note 76 supra, paragraph V-33.
[93] BverfG Beschlussvom 25. Oktober 2005, 1 BvR 1696/98, Rn. 33.
[94] See note 31 supra, Rn. 118.
[95] See note 76 supra, paragraph III-26.

risk of negative impact, especially in the case of a lawyer, whose duty is to effectively defend their clients.[96] At the same time, sanctions against a lawyer may have additional negative side effects, such as damaging the lawyer's reputation and leading to a loss of public trust in them.[97]

The "chilling effect" of norms leading to the sanctioning of a lawyer for "contempt of court" negatively impacts the lawyer's ability to freely express opinions, register protests, and effectively exercise other procedural rights and obligations. It leads to inappropriate restraint and ineffectiveness in legal practice, thus violating not only the lawyer's freedom of expression but also the defendant's right to a fair trial.

In light of this, the authorities, including the judiciary, must take into account the impact of restrictive norms on the extent to which lawyers can exercise their right to freedom of expression, to ensure that, due to the "chilling effect", the legislative provision does not exceed its intended regulatory scope or restrict the right to a greater extent than intended by the legislator[98] - a risk that is tangible under Georgia's current legal framework.

VI. CONCLUSION

The issues discussed above confirm that both the role of the lawyer and the protection of freedom of expression are essential pillars in ensuring a fair and effective functioning of the justice system.

Similar to commenting on matters of public interest in any space, the freedom of expression of a lawyer in the courtroom should be protected with high intensity, just as other participants in the proceedings should be safeguarded from unfounded and offensive attacks. In contrast, the scope for state interference in a lawyer's freedom of expression is broader outside the courtroom. However, considering the negative impact that critical expression outside the courtroom can have on the effective administration of justice, the intensity of such interference is reduced.

In Georgia, the expression of a lawyer's opinion or words as "contempt of court", "gross contempt", or "insult" may lead to both administrative liability and imprisonment; however, the definition of these terms and the clear distinction between them remain unclear. The necessity for the precise definition of these terms is highlighted by the fact that "gross contempt" under civil legislation carries a prison sentence of up to two

[96] See note 13 supra, paragraph 127.

[97] ibid, 176.

[98] Judgment of the Constitutional Court of Georgia N2/2/516,542 "Citizens of Georgia - Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze, and Vakhtang Maisaia v. the Parliament of Georgia", 23 May 2013. Paragraph II-8.

months, while "contempt of court" expressed through insult may result in imprisonment for up to two years under the Criminal Code. The ambiguity is further increased by the provision of imprisonment as a punishment under both criminal and civil legislation, as well as the inconsistent and radically different sanctions for factually identical conduct including the imposition of administrative liability without examining the overall context of the case, evaluating the facts, and clarifying the reasons for the inappropriate expression.

Due to the ambiguity, legislative norms create a "chilling effect" on freedom of expression, which negatively impacts the quality of freedom of expression, hinders the effective exercise of procedural rights, and leads to undue restraint and inefficiency in legal practice - ultimately resulting in the violation not only of the lawyer's freedom of expression but also of the defendant's right to a fair trial.

Under civil legislation, when a lawyer is sanctioned with non-custodial penalties, the issue of exercising the right to a fair trial becomes complicated. This is because the same judge who feels disrespected imposes the sanction on the lawyer, and the matter is not considered separately from the main case. The lawyer is effectively not given the opportunity to provide an explanation, nor do they have effective means to influence the final decision. At the same time, the time frame for appealing the court's decision is set unreasonably short (48 hours) and this is determined solely based on an analogy to procedural legislation.

In light of the above, the legislative framework should be refined, and the norms restricting a lawyer's freedom of expression within the scope of legal practice should be included solely in the Administrative Offenses Code of Georgia. The legislator should adopt the single term "contempt of court" and establish a clear definition for it, eliminating the use of additional, vague, and overlapping terms. The types of sanctions should be reviewed, consolidated under a single legal provision, and the judiciary should be granted broad discretion in determining the severity of the penalty.

At the same time, a higher standard of reasoning for court decisions must be ensured, whereby judges assess and resolve cases within the framework of a constitutionally consistent and reasonable interpretation, with strict adherence to procedural guarantees, not merely by identifying isolated instances of using inappropriate language or offensive words, but by evaluating the overall context of the case and determining the extent to which such expression may negatively affect the effective administration of justice. Through this approach, it should become clear what specific behavior, form of expression, or content may constitute contempt of court, and how the type and severity of the penalty should be determined.

*Marina Meskhi**

ANALYSIS OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS CONCERNING VIOLATIONS OF ARTICLE 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ABSTRACT

Trafficking in Human Beings, as a modern form of slavery and a major global challenge, remains one of the most lucrative criminal activities worldwide, surpassed only by arms and drug trafficking. The criminalization of human trafficking through national legislation, the refinement of legal frameworks, and the imposition of stricter sanctions - in accordance with the definition established by international instruments - are gaining increasing relevance. Judgments of the European Court of Human Rights play a particularly important role in shaping and reinforcing this process.

The aim of this article is to examine the judgments of the European Court of Human Rights concerning the violation of Article 4 of the European Convention on Human Rights, which provides that no one shall be held in slavery or servitude, and that no one shall be required to perform forced or compulsory labour.[2]

The violation of the aforementioned Article 4 of the Convention will be examined in the present article in the context of human trafficking, specifically involving the following forms of exploitation: labour and sexual exploitation, slavery, servitude, and trafficking in minors.

I. INTRODUCTION

Trafficking in Human Beings (hereinafter "THB/trafficking") is one of the most severe forms of human rights violations in the modern world. The first internationally recognized definition of trafficking was established by the UN Convention against Transnational Organized Crime (hereinafter "the Palermo Convention")[3] and its second supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons,

* Doctor of Law, Associate Professor at Ilia State University [marina.meskhi@iliauni.edu.ge]

1 Article 4, Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950.

2 ibid, Article 4, part 2.

3 United Nations Convention against Transnational Organized Crime, 2000.

Especially Women and Children (hereinafter "the Palermo Protocol").[4] Accordingly, the definition of trafficking, as established by the above-mentioned instruments, is as follows: "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."[5] As for exploitation, as the purpose of the crime of trafficking, it is defined as follows: "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs."[6]

Later, in 2005, the Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter "the Council of Europe Trafficking Convention") adopted a definition of trafficking that is practically identical and further clarified that: "Trafficking in human beings" means the recruitment, transportation, transfer, harbouring or receipt of persons, for the purpose of exploitation, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person."[7] As for the definition of exploitation, it is also almost identical to that provided in the Palermo Protocol, and includes sexual and labour exploitation, slavery or practices similar to slavery, servitude and removal of organs.[8]

It should also be noted that trafficking in minors, involving any of the above-mentioned forms of exploitation, carries equally serious legal consequences, and, taken together, constitutes the elements of a violation as defined under Article 4 of the European Convention of Human Rights (hereinafter "the ECHR/Convention").

In light of the above, the case law of the European Court of Human Rights (hereinafter "the ECtHR/Court) is of critical importance in relation to various forms of exploitation, such as labour and sexual exploitation, slavery, and trafficking in minors. Equally

[4] The Palermo Convention does not directly address THB, however, since trafficking itself constitutes a form of transnational organized crime, the Palermo Convention is a highly significant international instrument since it sets out the standards that legislation must meet at both the international and national levels.

[5] Article 3, subparagraph a, of the Supplementary Protocol to the United Nations Convention against Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000).

[6] ibid.

[7] Article 4, subparagraph a, the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 2005.

[8] ibid.

noteworthy is the ECtHR's interpretation of servitude as an additional component of exploitation, which holds significant relevance for the development and refinement of national legislation.

II. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN RELATION TO ARTICLE 4 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

1. SEXUAL EXPLOITATION

The ECtHR's Judgments in *Rantsev v. Cyprus and Russia*[9] and *L.E. v. Greece*[10] are regarded as landmark decisions when assessing trafficking for the purpose of sexual exploitation as a violation of Article 4 of the ECHR.

1.1. "RANTSEV V. CYPRUS AND RUSSIA"

FACTUAL CIRCUMSTANCES

In 2001, a Russian national, Rantseva, was recruited and transferred to Cyprus to work as a so-called cabaret performer, where she was forced to provide sexual services to clients. She soon left the job, leaving behind a note indicating her intention to return to Russia. Nevertheless, the cabaret manager found her at a nightclub and took her to a police station, requesting that she be detained as an illegal migrant. The police did not apprehend Rantseva but instead instructed the cabaret manager, considered responsible for her as an employee, to bring her to the immigration office at 7 a.m. The manager took Rantseva at 5:20 a.m. to the building where she had previously stayed. At 6:30 a.m., Rantseva's body was found on the street under unclear circumstances. A bedsheet was found tied to the balcony of the building where she had been detained, suggesting that she may have attempted to escape.

Despite the lack of sufficient evidence and clear grounds, the investigation conducted in Cyprus concluded that Rantseva had died as a result of an accident during an attempted escape. However, an autopsy carried out in Russia raised doubts about the Cypriot investigation's findings due to the absence of convincing evidence. Nevertheless, the

[9] Judgment of the European Court of Human Rights N25965/04 "Rantsev v. Cyprus and Russia", 7 January 2010.

[10] Judgment of the European Court of Human Rights N71545/12 "L.E. v. Greece", 21 January 2016.

Cypriot authorities refused to conduct a further investigation. In addition, neither the Russian nor the Cypriot law enforcement authorities interviewed two key witnesses who could have provided testimony regarding instances of sexual exploitation in the cabaret.

VIOLATION OF ARTICLE 4[11]

In its Judgment, the ECtHR emphasized that trafficking poses a threat to human dignity and freedom, and must be regarded as incompatible with the principles of a democratic society and the values enshrined in the Convention.

Particularly significant is the section of the judgment in which the ECtHR found that the circumstances presented in the application fell within the scope of the acts defined in Article 3, paragraph a of the Palermo Protocol and Article 4, paragraph a of the Council of Europe Trafficking Convention, and that these acts fall under the protection of Article 4, paragraph 1 of the Convention, which states: "No one shall be held in slavery or servitude."

Equally important is the ECtHR's judgment with respect to both Cyprus and Russia.

With regard to Cyprus, the ECtHR pointed to several violations of the obligations arising under Article 4 of the ECHR,[12] including: (1) the ineffective legal framework for combating trafficking, which, despite the existence of relevant legislation, failed to provide adequate protection for Rantseva. Given that the majority of individuals employed under "cabaret artist" visas had become victims of THB, as repeatedly noted in reports by the Cypriot Ombudsperson,[13] the Commissioner for Human Rights, and the U.S. Department of State, the Cypriot authorities nevertheless failed to take effective action in response. (2) The ineffectiveness of the police response, manifested in failure to fulfill the state's positive obligations and to take the necessary operative measures to protect Rantseva from trafficking. Despite the existence of sufficient grounds for suspicion, the police did not conduct appropriate operative actions to investigate whether Rantseva had been subjected to sexual exploitation.

With respect to Russia, the ECtHR did not find a violation of Article 4 of the Convention concerning the absence of a legislative framework. However, regarding the obligation to conduct an effective investigation, the Court held that the Russian authorities had failed to carry out an adequate and thorough investigation into the circumstances of

[11] In this case, the ECtHR also examined alleged violations of Articles 2, 3, 5, and 8 of the ECHR. However, for the purposes of this paper, the judgment will be considered only insofar as it relates to the violation of Article 4 of the Convention.

[12] Rantsev v. Cyprus and Russia, supra note 9, 150.

[13] ibid, 163.

Rantseva's recruitment,[14] which is considered the first phase of the crime of THB,[15] - that was followed by her departure from Russia and ultimately led to the circumstances resulting in her death.

In light of the above circumstances, the ECtHR found a violation of Article 4 of the Convention in the case of Rantseva.

An important and noteworthy aspect of this case, as mentioned above, is that the ECtHR brought the acts as defined in Article 3, paragraph a of the Palermo Protocol and Article 4, paragraph a of the Council of Europe Trafficking Convention, within the scope of Article 4 of the ECHR.

1.2. "L.E. V. GREECE"

Another important judgment concerning sexual exploitation is *L.E. v. Greece.*[16]

FACTUAL CIRCUMSTANCES

In June 2004, L.E., a Nigerian national, entered Greek territory together with an individual named K.A., who had promised her employment at a club and demanded a payment of EUR 40,000 in return. After arriving in Greece, K.A. confiscated L.E's passport and forced her into prostitution. In July 2004, L.E. contacted the Aliens and Immigration Department in Athens to apply for asylum, and she was assigned accommodation at the Red Cross Reception Center for asylum seekers. However, the case materials indicate that L.E. did not make use of the services provided by the center. Between 2004 and 2006, L.E. was arrested three times on charges of prostitution, and deportation proceedings were initiated against her due to her irregular immigration status in Greece. While being held in a detention center, L.E. filed a complaint against K.A. and his partner D.J., claiming that she was a victim of trafficking. L.E. accused them of forcing her into prostitution, along with two other Nigerian women who were also exploited by the same individuals.

In 2006, an investigation was launched against K.A. and D.J. on charges of THB. However, due to the fact that they had been declared wanted, the hearing was postponed in 2009 until their apprehension. D.J. was arrested in May 2011 and placed in pre-trial detention; however, during the investigation it was revealed that she, too, was one of K.A.'s victims and had been subjected to sexual abuse herself.

[14] ibid, 207.

[15] Recruitment is the first stage of the crime of trafficking, followed by transportation as the second stage, and exploitation as the third stage. These stages together constitute the process of the crime of THB.

[16] L.E. v. Greece, supra note 10.

In her application to the ECtHR, L.E. alleged that Greece had failed to fulfil its positive obligations under the Convention.[17]

VIOLATION OF ARTICLE 4[18]

The ECtHR emphasized that the scope of Article 4 of the Convention includes the positive obligation to protect victims of trafficking. Accordingly, Greece's existing legal framework at the time would have made it possible to provide L.E. with effective protection. A particularly significant aspect of the ECtHR's reasoning lies in its explicit observation that Article 351 of the Greek Criminal Code defined THB in line with the definition set out in the Palermo Protocol. On that basis, the Court concluded that the Greek authorities could and should have provided effective protection to L.E. under the existing national legal framework.

The ECtHR also noted that in August 2007, L.E. was officially recognized as a victim of trafficking by the Greek Public Prosecutor's Office. However, despite this recognition, she was not granted formal status of THB victim for nine months. According to the Court's assessment, this delay could not be considered as a reasonable period, and the failure to grant L.E. the relevant status in a timely manner constituted a failure to provide her with the necessary protective measures by the Greek law enforcement authorities.[19]

This judgment is also significant in the ECtHR's assessment of failures during the preliminary investigation, where it pointed out that the Greek law enforcement authorities did not undertake a comprehensive search to identify and locate the perpetrators, despite L.E. having provided several possible addresses. This investigative inaction was considered one of the reasons for the delay in the proceedings. Based on the totality of these circumstances, the Court found a violation of Article 4 of the Convention.

The ECtHR's assessment of the Greek authorities' failure to conduct a prompt investigation should be regarded as an important clarification of the non-fulfilment of a procedural obligation under the Convention.

[17] ibid, 43.

[18] In this case, the ECtHR also found violations of Article 6, paragraph 1 and Article 13 of the ECHR. However, for the purposes of this paper, the judgment will be examined solely in relation to the violation of Article 4.

[19] L.E. v. Greece, supra note 10, 72.

2. LABOUR EXPLOITATION

According to the definition of exploitation established in Article 3 of the Palermo Protocol and Article 4 of the ECHR, labour exploitation constitutes one of the recognized forms of exploitation. In cases of trafficking committed through this form of exploitation, the assessment of violation of Article 4 of the Convention is particularly informed by two key Judgments of the ECtHR: *Siliadin v. France*[20] and *Chowdury and Others v. Greece*.[21]

2.1. "SILIADIN V. FRANCE" (FORCED LABOUR AND SERVITUDE)

FACTUAL CIRCUMSTANCES

In 1994, 15-year-old Siva-Akofa Siliadin, living in Togo, arrived in France with a woman of Togolese origin, identified as D., who had promised to arrange her immigration status and provide her with access to school education. In exchange for the cost of plane ticket, Siliadin was expected to perform household tasks for D. However, despite the agreed terms, D. and her husband turned Siliadin into a domestic servant; they made her work without pay, and confiscated her passport.

In 1994, D. "lent" Siliadin to the family of her friend, B.,[22] who had children and was pregnant, to help with childcare and household tasks until the child-birth. After the child was born, B.'s family kept Siliadin in their home, where she was required to perform nearly all domestic duties, working up to 15 hours a day without any days off. She slept in the children's room on an old mattress placed on the floor, wore worn-out clothes, and apart from a small amount of money occasionally given to her by B.'s mother, her work was never compensated.[23]

In July 1998, one of Siliadin's neighbors informed the Committee Against Modern Slavery about her situation. An investigation was launched against the B. family on the grounds of exploiting a dependent person through underpaid or unpaid labour, as well as subjecting her to degrading and inadequate living conditions. The court of first instance sentenced the B. family to 12 months' imprisonment and ordered them to compensate Siliadin for the harm caused.

[20] Judgment of the European Court of Human Rights N73316/01 "Siliadin v. France", 26 July 2005.
[21] Judgment of the European Court of Human Rights N21884/15 "Chowdury and others v. Greece", 30 March 2017.
[22] The term "lent" is used in the judgment. See Siliadin v. France, supra note 20, 12.
[23] ibid, 14.

VIOLATION OF ARTICLE 4

In her application submitted to the ECtHR based on Article 4 of the Convention (prohibition of forced labour), Siliadin argued that French legislation had been ineffective and that she had been subjected to servitude, as well as forced and compulsory labour, which resulted in her being held in conditions akin to slavery for years, starting from her minor age.

Regarding admissibility, the ECtHR held that in the case of Siliadin, the democratic values protected under Article 4 of the Convention had been violated. Particularly, the Court found that the French state failed to provide effective protection to Siliadin against a violation of Article 4, and underlined that the state has a positive obligation to ensure the effective application of criminal prosecution and to recognize violations of the rights protected by Article 4 of the ECHR as criminal offence.[24]

With regard to forced labour, the ECtHR provided an important clarification by referring to the International Labour Organization's Convention No. 29,[25] which defines forced labour as any work or service that is not performed voluntarily by the individual concerned.[26] The ECtHR recalled that under the ECHR, "No one shall be required to perform forced or compulsory labour."[27] In applying this provision, the Court found that the conditions in the presented case amounted to forced labour, emphasizing that Siliadin's work was not performed of her own free will but rather resulted from the absence of any other real alternative or choice.

As to slavery, the ECtHR found that the acts committed against Siliadin did not amount to slavery. In this part of the judgment, the Court relied on the definition provided by the Slavery Convention,[28] which states: "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." Although the restriction of Siliadin's personal autonomy was clear, the B. family could not be regarded as her "owners." Consequently, the ECtHR concluded that the acts committed against Siliadin could not be equated with a state of slavery.

Equally noteworthy is the ECtHR's interpretation of the concept of servitude. Taking into account the fact that Siliadin was under the control of the B. family, worked seven days a week for 15 hours a day, was denied access to education despite the prior agreement before her arrival in France, had her passport confiscated, and was repeatedly

[24] ibid, 64-66.

[25] Forced Labour Convention (No. 29) 1930.

[26] "The term "forced or compulsory labour" shall mean "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". See supra note 20, 116.

[27] Article 4, part 1, supra note 25.

[28] Article 1, Slavery Convention (1926).

threatened with arrest by the police, the Court held that this amounted to a restriction of the freedom of movement. The totality of these circumstances confirmed that Siliadin was entirely dependent on the B. family. Accordingly, the ECtHR found that a situation of servitude existed, amounting to a violation of Article 4 of the Convention.[29]

Beyond the definitions of slavery and servitude, this case is also significant in that, for the first time, the ECtHR explicitly acknowledged the positive obligations of the state.

2.2. "CHOWDURY AND OTHERS V. GREECE" (PROHIBITION OF FORCED LABOUR)

The ECtHR's 2017 judgment is notable for classifying forced labour in the agricultural sector as a form of labour exploitation.

FACTUAL CIRCUMSTANCES

In October 2012 and February 2013, 32 Bangladeshi nationals were recruited and transferred to Greece to work on a strawberry farm. According to the initial agreement, their working hours were set at 7 hours per day, with a wage of EUR22 per hour and an additional EUR3 for each extra hour. However, while in Greece, they were made to work 12-hour shifts under the supervision of armed guards, and lived in inhumane conditions - without access to running water or toilet facilities.

Between February and April 2013, the workers demanded their wages. The employers promised payment only on the condition that they continued working.

In April 2013, the employers recruited a new group of migrant workers. When the workers demanded payment for the work they had performed during the 2012-2013 season, the guards opened fire on them, as a result of which 30 individuals were seriously injured. Following the interrogation of the hospitalized workers, two employers and a security guard were arrested on charges of attempted murder; however, the charges were later reclassified as causing serious bodily harm and THB.

VIOLATION OF ARTICLE 4

The ECtHR clarified that the scope of Article 4, paragraph a of the European Council Trafficking Convention includes trafficking, as labour exploitation constitutes one of the forms through which this crime is committed.[30] In the Chowdury case, all three stages

[29] Article 4, ECHR, supra note 1; Siliadin v. France, supra note 20, 129.

[30] In the Chowdury case, the ECtHR once again referred to the definition provided in ILO Convention No.

of THB were clearly present: recruitment, transfer, and exploitation. Accordingly, the exploitation (in this case, in the form of labour exploitation) was found to constitute a violation of Article 4 of the Convention.

In addition, the Court referred to the ILO Convention No. 29, defining forced or compulsory labour as: "All work or service which is exacted from any person under the menace of any penalty and for which the person has not offered himself voluntarily."[31]

Based on the above circumstances, the ECtHR found a violation of Article 4 of the Convention concerning the prohibition of forced labour. However, the Court did not consider the acts committed against the workers to amount to servitude.[32] The Chowdury case is also notable for the ECtHR's clarification of the distinction between servitude and forced labour. The Court explained that servitude is generally characterized by a situation of permanence, in which the victim has no real prospect of changing their condition.[33] In contrast, the applicants in Chowdury were seasonal workers, and the acts committed against them were therefore classified as forced labour rather than servitude.[34]

3. TRAFFICKING IN MINORS "C.N. AND V. V. FRANCE" (FORCED LABOUR AND SERVITUDE)

In addition to sexual and labour exploitation, the exploitation of minors constitutes one of the forms through which the crime of THB is committed. This is most commonly manifested in: labour exploitation of minors, where the child has no possibility of leaving the work; sexual exploitation of minors; and illegal adoption of minors for the purpose of organ transplantation. One of the most common forms of child trafficking involves the use of minors as domestic servants by relatives or guardians, where they are denied freedom of movement, forbidden from using transportation, restricted in access to food, etc. In cases where trafficking is committed in this form, the ECtHR Judgment in the case *C.N. and V. v. France* is particularly significant with regard to the violation of Article 4 of the Convention.[35]

29, which had also been applied in the Siliadin case. Siliadin v. France, supra note 20, 12; Chowdury and others v. Greece, supra note 21, 90.

[31] Article 2, paragraph 1, supra note 25.

[32] Chowdury and others v. Greece, supra note 21, 99.

[33] ibid, "The fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of Article 4 of the Convention lies in the victim's feeling that his or her condition is permanent and that the situation is unlikely to change".

[34] Unlike in the Siliadin case, where the situation was permanent and she had no choice whatsoever.

[35] Judgment of the European Court of Human Rights N67724/09 "C.N. and V. v. France", 11 January 2013.

FACTUAL CIRCUMSTANCES

C.N. (born in 1978) and V. (born in 1984), two sisters from Burundi, left their country following the outbreak of civil war in 1993 and the murder of their parents. They went to France, to their aunt and uncle, the M. family - Burundian nationals residing in France. The M. family had seven children, one of whom had a disability. The sisters were accommodated in the basement and were required to carry out household tasks without any rest days or holidays. C.N. was also responsible for caring for the child with disability, including during nighttime hours. Both sisters lived without access to a bathroom or toilet, had limited access to the family's food, and were subjected to constant physical and psychological abuse.

Beginning in 1995, V. attended school and, despite language difficulties, achieved good academic results. After school, she helped her sister with household tasks.

As noted, the sisters were constantly subjected to verbal abuse and threats by their aunt, including repeated threats of being sent back to Burundi. Despite their case was included in a 1995 report by the social services department and an investigation was initiated by the police child protection unit, the case did not result in any further action.

VIOLATION OF ARTICLE 4

The ECtHR emphasized that the right protected under Article 4 of the Convention is a fundamental right in a democratic society. As in the cases of Siliadin and Chowdury, the ECtHR reiterated that, under Article 4, paragraph 2 of the ECHR,[36] forced or compulsory labour refers to work performed against the person's will, under threat or coercion.[37]

The Court found that, in the case of C.N., the circumstances clearly amounted to forced labour, as she was compelled to work without pay and under conditions of threat and coercion. The ECtHR also highlighted that the repeated threats made by M. to send the sisters back to Burundi, emphasizing that, for C.N., this threat was associated with abandoning her sister and a fear of death.[38] Accordingly, the Court held that this constituted a form of coercion within the meaning of Article 4, paragraph 2 of the Convention.[39]

With regard to servitude, the ECtHR considered C.N.'s situation amounted to a state of servitude, as it reflected the permanence and absence of any real possibility of change inherent in the concept of servitude. This was evidenced by C.N.'s fear that she had

[36] "No one shall be required to perform forced or compulsory labour," Article 4, paragraph 2, ECHR, supra note 2.

[37] C.N. and V. V. France, supra note 35, 71.

[38] ibid, 78.

[39] In the case of V., despite the evidence of systematic verbal abuse and degrading treatment, the ECHR did not consider these acts to fall within the scope of Article 4 of the ECHR.

nowhere to go, and that leaving her aunt's home would mean losing guardianship and becoming an illegal migrant - circumstances that, in the ECtHR's view, effectively placed her in a situation of servitude.[40]

In light of the above circumstances, the ECtHR found a violation of Article 4 of the Convention in respect of C.N. In this case, the Court also emphasized the state's failure to fulfil its positive obligations, particularly the lack of adequate legislation and the absence of effective mechanisms to combat servitude and forced labour.

III. CONCLUSION

The judgments of the European Court of Human Rights serve as an important instrument in the fight against Trafficking in Human Beings. In the above-mentioned judgments, when establishing violations of Article 4 of the Convention by states, the ECtHR also provides significant clarifications regarding key terms such as slavery, forced and compulsory labour, and servitude, including the distinctions between them.

When the ECtHR finds a violation of Article 4 of the Convention, its observations regarding legislative shortcomings, ineffective law enforcement, and related factors should be effectively utilized by states - both to improve national legislation and to strengthen the protection of fundamental human rights and freedoms.

[40] Unlike V., who attended school, was able to do her homework, and was less isolated.

*Maia Akhvlediani**

COMPARISON OF THE WITNESS'S AND THE DEFENDANT'S TESTIMONIES IN LEGAL DISCOURSE

ABSTRACT

The Georgian criminal procedure system has existed for several years. Initially, the Criminal Procedure Code of February 20, 1998 attempted to regulate the criminal procedure; however, taking into account contemporary developments, the Criminal Procedure Code of 2009 - which remains in force – was adopted to address the criminal justice issues prevailing at the time. Since the criminal procedure is not static, over time, alongside new challenges, it has been shaped by the decisions of the legislative body and the Constitutional Court. It is worth exploring whether the Judgment of the Plenum of the Constitutional Court of Georgia dated December 28, 2021 imposed limitations on the defendant's internationally recognized right against self-incrimination, and whether it effectively equated the defendant with a standard witness. This article specifically addresses the common and distinguishing features of the procedural status of the defendant and the witness, and the peculiarities of their testimonies.

I. INTRODUCTION

The existence of the Georgian criminal procedure dates back several decades. Initially, the Criminal Procedure Code of February 20, 1998 attempted to regulate the criminal procedure; later, taking into account contemporary developments, the currently applicable Criminal Procedure Code was adopted in 2009 to address the criminal law issues that existed at that time. Some problematic issues, however, remain unresolved to this day. Accordingly, in parallel with the development of society, the lawmaking role - traditionally held by the Parliament of Georgia - has also been shaped by the Constitutional Court of Georgia.

Since, alongside the formation of a democratic state, vigilante justice was rejected and the monopoly on punishment of offenders was assumed by the state, the defendant/ convict has become the central focus of both the substantive and procedural criminal codes. In an adversarial process, the defendant is provided with specific legal safeguards to protect themselves from unlawful restrictions of their rights and freedoms, unfounded

* Doctoral Student, Ivane Javakhishvili Tbilisi State University [maia.akhvlediani472@law.tsu.edu.ge]

and unsubstantiated accusations, as well as unlawful and unfair judgments. Moreover, the defendant must have the opportunity to choose their own defense strategy and present their version of events to the judge without any restrictions.

Until December 28, 2021, both the substantive and procedural parts of criminal law had left open the issue of imposing criminal liability on a defendant for giving false testimony. However, according to the Judgment No. 3/2/1478 of the Plenum of the Constitutional Court of Georgia, the establishment of truth and the protection of the public interest were prioritized over the defendant's protection from self-incrimination.

It is worth examining the common and distinguishing features of the procedural status of the defendant and the witness, the particularities of the testimonies they give, and the dilemma faced by the defendant - whether to exercise the right to remain silent or to tell the truth.

II. LEGAL ANALYSIS OF WITNESS TESTIMONY ACCORDING TO THE CRIMINAL PROCEDURE CODE OF GEORGIA

The witness is of vital importance to the criminal justice system. They constitute the fuel of justice, contributing to the strengthening of fairness. The witness is also referred to as the backbone of the criminal justice system, as they are often the person who possesses the most information about the events of the crime and, in many cases, represent direct evidence of the offense. A witness's testimony assists the court in delivering a fair verdict; therefore, the truthful testimony of a witness is the cornerstone of justice, and the witness is regarded as the "eyes and ears" of the incident.[1] Hence, witness testimonies are of great importance and high value, as they help establish the probable cause of the crime and verify various versions of the events.[2]

As a rule, any witness is willing to present their perspective on the incident. The witness is one of the key factors considered by the investigation during the examination of the case.[3]

The legal definition of a witness is provided in Article 3, paragraph 20 of the Criminal Procedure Code of Georgia, according to which a witness is a person who may have knowledge relevant to establishing the circumstances of a criminal case. They acquire the status, rights, and obligations of a witness after being informed about their criminal liability and taking an oath. Accordingly, it is of interest at which stage - investigative or judicial - a person acquires the status of a witness, that is, when the person is warned

[1] Rahul Jaggi, 'Witness Protection' (2020) 18 Supremo Amicus 1.
[2] Jessica Ward, 'Do the Clothes Make the Man - Implications of a Witness' Status in the Determination of Probable Cause' (2001) 28 (6) Fordham Urban Law Journal 2012.
[3] Ward, supra note 2, 2006.

about criminal liability and takes the oath. In practice, a person acquires the status, rights, and obligations of a witness in court[4] after taking a religious or non-religious oath, or making a civil affirmation in lieu of an oath,[5] and after being warned by the judge about criminal liability.[6] Article 48, paragraph 2 of the Criminal Procedure Code of Georgia obliges the court, prior to administering the oath, to explain to the witness the significance of the oath and to inform them about the criminal liability provided for under Articles 370 (false information; false testimony) and 373 (false accusation) of the Criminal Code of Georgia. The purpose of the oath, in turn, has always been to promote the reliability of witness testimonies.[7]

Article 47 of the Criminal Procedure Code of Georgia additionally defines the range of persons who may be summoned and subsequently questioned in court as witnesses. Such persons include the parties to the criminal proceedings as well as other participants in the process. More specifically, according to the above-mentioned article, when giving testimony in court, the following persons also hold the status of a witness, are granted the rights of a witness, and bear the corresponding obligations: the investigator, the prosecutor, the defendant, the victim, the expert, and the interpreter.

As for the information provided by the witness, according to Article 3, paragraph 24 of the Criminal Procedure Code of Georgia, witness testimony is the information given by a witness in court concerning the circumstances of a criminal case; while, giving testimony, according to the interpretation of the Constitutional Court of Georgia, implies the expression or realization of one's willful element through verbal (oral), written, or any other form of action.[8] If a witness wishes to testify in court, no one can prevent them from doing so, not even the defendant.[9]

It is important to note that the witness must be aware of their rights and obligations in the criminal proceedings.[10] Article 49 of the Criminal Procedure Code of Georgia defines the rights and obligations of a witness. On the one hand, the witness has the right to: know the reason for their summons; if they do not know or properly understand the language of the criminal proceedings, or if they have a limitation that prevents

[4] Collective of authors, George Giorgadze (ed.), Commentary to the Criminal Procedure Code of Georgia (Meridiani Publishing 2015) 36.

[5] George Tumanishvili, Overview of the General Part of Criminal Procedure (Lawyers' World Publishing 2014) 151.

[6] Collective of authors, supra note 4, 36.

[7] Svjetlana Dragovic, 'Witness Oath in Criminal Proceedings' (2023) 3-4 Criminal Justice Issues - Journal of Criminal Justice, Criminology and Security Studies 80.

[8] Judgment of the Constitutional Court of Georgia N1/4/809 "Citizen of Georgia Titiko Chorgoliani v. the Parliament of Georgia", 14 December 2018, paragraph 42.

[9] Mitchell Caldwell and Carlo Spiga, 'Crippling the Defense of an Accused: The Constitutionality of the Criminal Defendant's Right to Testify', (2006) 6 (1) Wyoming Law Review 311.

[10] Julia Muraszkiewicz, 'The Role of Witness, Expertise, and Testimony' (2016) 28 (1) International Journal of Refugee Law 165.

communication without sign language, to testify in their native language or any other language of their choice, and to use the services of an interpreter at the state's expense; to review the record of the investigative action conducted with their participation and request that remarks, additions, or amendments be made to it; to refuse to testify if such testimony would incriminate themselves or a close relative in the commission of a crime; to participate in the conduct of an investigative action; and to request the application of a special protection measure. It is noteworthy that the above-mentioned rights are not exhaustive, and additional rights of the witness are provided in various articles of the Criminal Procedure Code.[11] E.g., the witness has the right to use the services of a witness and victim coordinator;[12] the right to benefit from a special protection measure; [13] the possibility of a closed hearing ordered by the judge based on the right to privacy;[14] and, in cases provided by the Criminal Procedure Code, the possibility to be questioned remotely.[15] On the other hand, the witness is required to: appear upon the summons of the court; answer the questions posed; not disclose any case-related information known to them if the court has warned them about it; maintain order during the court hearing; and not leave the courtroom without the permission of the presiding judge.

The Criminal Procedure Code defines the criteria for the admissibility of a witness's testimony as evidence.[16] The witness must be able to accurately perceive, retain, and recall the facts, and when giving testimony, they must indicate the source of the information provided.[17] Since the information has been obtained from an unknown source and its verification is difficult, in this case, the evidence should serve to establish the specific circumstances of the case, rather than rely on assumptions.[18]

It should be noted that the Criminal Procedure Code distinguishes between direct testimony and indirect (hearsay) testimony of a witness. The direct testimony of a witness can be considered as the testimony of a person who "personally saw, heard, or otherwise became aware of" information relevant to the case.[19] Hearsay evidence constitutes a testimony of a witness that is based on information conveyed by another

[11] Collective of authors, supra note 4, 209.

[12] Article 581, the Criminal Procedure Code of Georgia <https://matsne.gov.ge/ka/document/view/90034?publication=163> [last accessed on 11 March 2024].

[13] Articles 67-68, the Criminal Procedure Code of Georgia <https://matsne.gov.ge/ka/document/view/90034?publication=163> [last accessed on 11 March 2024].

[14] Article 182, the Criminal Procedure Code of Georgia <https://matsne.gov.ge/ka/document/view/90034?publication=163> [last accessed on 11 March 2024].

[15] Article 243, the Criminal Procedure Code of Georgia <https://matsne.gov.ge/ka/document/view/90034?publication=163> [last accessed on 11 March 2024].

[16] Tumanishvili, supra note 5, 159.

[17] Article 75, the Criminal Procedure Code of Georgia <https://matsne.gov.ge/ka/document/view/90034?publication=163> [last accessed on 11 March 2024].

[18] Mikheil Mamniashvili, 'Classification of Evidence and Its Types', Collection of Works Dedicated to the 80th Anniversary of Professor Shota Papiashvili (Lawyers' World Publishing 2015) 235.

[19] Tumanishvili, supra note 5, 212.

person,[20] i.e., the information became known to the witness through another individual.[21] As of today, hearsay evidence can be regarded as admissible only if the person providing the testimony indicates the source of the information in such a way that the source can be identified and its actual existence verified. Furthermore, during the substantive hearing of the case in court, hearsay evidence is admissible only if it is corroborated by other evidence that does not constitute hearsay.[22] Prior to June 14, 2013, during the substantive hearing of a case in court, hearsay evidence could be corroborated by any other piece of evidence. However, following the legislative amendment, hearsay is corroborated by other evidence that is not itself hearsay.[23] By its decision of January 22, 2015, the Constitutional Court of Georgia declared it unconstitutional to render a conviction or to recognize a person as an accused solely on the basis of hearsay evidence.[24]

The Criminal Procedure Code provides for exceptions to the obligation to testify, which are set out in Articles 49 and 115 of the Criminal Procedure Code of Georgia. According to these provisions, a witness has the right to refuse to give testimony that would incriminate themselves or their close relatives. Article 50 of the Criminal Procedure Code of Georgia lists the persons who, on the one hand, are not under the obligation to testify, and, on the other hand, grants the court the authority to release a witness from the duty to testify.

Based on all of the above, witness immunity, as a criminal procedure law institution, is a set of legal (exceptional) norms that grants certain categories of witnesses the right to refuse to testify. These categories of persons are divided as follows: Persons who, as a rule, cannot be questioned as witnesses in criminal proceedings; 2. Persons who, as a rule, may be questioned as witnesses but have the right to refuse to testify; 3. Persons whom the court may exempt from the obligation to testify.

The objective and subjective understanding of witness immunity is limited to its division into two groups: a) the right not to incriminate oneself; b) the right to refuse to testify. According to the right against self-incrimination, witness immunity can be classified as either absolute (imperative) immunity or relative (dispositive) immunity. In the case of absolute immunity, the witness has a legal right to refuse to testify. A person with a physical or mental disability who is unable to properly comprehend and retain

[20] Irine Urushadze, Hearsay Testimony as Evidence in Criminal Proceedings - A Study of the Practice of General Courts (2015) 8.

[21] Collective of authors, supra note 4, 265.

[22] Article 76, The Criminal Procedure Code of Georgia <https://matsne.gov.ge/ka/document/view/90034?publication=163> [last accessed on 11 March 2024].

[23] Article 73, the Law of Georgia "On Making Amendment to the Criminal Procedure Code of Georgia", 14 June 2013. Legislative Herald of Georgia, 741-IIs.

[24] Judgment of the Constitutional Court of Georgia N1/1/548 "Citizen of Georgia Zurab Mikadze v. the Parliament of Georgia", 22 January 2015. Paragraph III.

the essential circumstances of the case may not be questioned as a witness. Relative (dispositive) immunity applies when the witness has the option to choose, specifically, the right to refuse to testify. This type of immunity extends to the defendant.[25]

It is noteworthy that Article 47 of the Criminal Procedure Code of Georgia grants the status of a witness to the victim as well as to the defendant when giving testimony; however, Article 370 of the same Code refers separately to the victim and the witness. Therefore, substantive criminal law distinguishes between a witness (the so-called witness in the narrow sense) and a victim-witness (the so-called witness in the broad sense). The opposite reasoning is developed in the Judgment of the Plenum of the Constitutional Court of Georgia dated 28 December 2021. The Constitutional Court of Georgia interprets the term "witness" to also encompass the defendant when providing testimony in the interest of self-defense. Consequently, the defendant is faced with a choice between exercising the right to remain silent or giving self-incriminating testimony under the risk of criminal liability.[26] In such a case, the question arises as to why the legislator chose to distinguish the victim-witness from the "classical" witness. It is noteworthy that Article 370 of the Criminal Code of Georgia, while referring to the witness and the victim, does not mention the giving of false testimony by the defendant.[27] Moreover, Article 74 of the Criminal Procedure Code of Georgia clearly differentiates the testimony given by the defendant from that of other witnesses and treats the conduct of the defendant during testimony in a different manner.[28] Due to this conduct, there is no legal basis for holding the defendant criminally liable, nor for equating their legal status with that of other participants.

Accordingly, due to the procedural status of the defendant and the witness, they are participants in the proceedings with distinctly different legal positions.[29]

III. LEGAL ANALYSIS OF THE DEFENDANT'S TESTIMONY UNDER THE CRIMINAL PROCEDURE CODE OF GEORGIA

The defendant is the cornerstone of criminal proceedings. According to Article 3, paragraph 19 of the Criminal Procedure Code of Georgia, a defendant is a person against whom there is a reasonable presumption that they have committed a crime defined by the Criminal Code of Georgia. The status of the defendant implies a special procedural position, as the acquisition of this status grants the defendant specific rights

[25] Magda Tatishvili, 'Witness Immunity in Criminal Procedure' (2019) 1 Journal of Law (TSU) 157-158.
[26] George Tumanishvili, 'False Testimony as a Ground for the Defendant's Criminal Liability' (2023) 1 German-Georgian Criminal Law Journal 13-14.
[27] Tumanishvili, supra note 5, 208.
[28] ibid, 14.
[29] Lili Mskhiladze, 'The Defendant's Right to Testify' (2016) 4 (52) 16 Justice and Law 7.

and obligations. It is noteworthy that Article 38 of the Criminal Procedure Code of Georgia concerns the rights and obligations of the defendant; however, in practice, it addresses only the rights, with no mention of obligations.[30] A person acquires the status of a defendant upon the initiation of criminal prosecution. According to Article 167, paragraph 1 of the Criminal Procedure Code of Georgia, criminal prosecution commences either upon the detention of a person or upon their recognition as a defendant (if the person has not been detained). Accordingly, a person acquires the status of a defendant either through detention or by being formally recognized as an accused.

In criminal law, it remains of utmost importance that the defendant is properly and lawfully informed of the accusation - specifically, what charges are brought against them, what rights they have, and how those rights may be exercised. The defendant must always have the opportunity to defend themselves in court - whether by remaining silent or by giving testimony. They have this right, and it must never be taken away. This also includes, at a minimum, the right to question witnesses testifying against them, to give testimony, and to be represented by a lawyer.[31] No person is obligated to give testimony against themselves in a criminal case during proceedings held in the courtroom.[32] The right to remain silent is a fundamental right of the defendant; however, it is also their right to testify, even if the testimony is self-incriminating.[33]

According to Article 74 of the Criminal Procedure Code of Georgia, the testimony of the defendant is the information provided by them in court regarding the circumstances of the criminal case. According to Paragraphs 2 and 3 of the same article, giving testimony is the defendant's right. The defendant's refusal to testify or the act of giving false testimony may not be considered as evidence confirming their guilt.

The rights of the defendant are guaranteed by the Constitution of Georgia. According to Article 31, paragraph 4, the defendant has the right to summon witnesses in their defense and to question them under the same conditions as the prosecution's witnesses; while according to Paragraph 11 of the same article, no one is obligated to testify against themselves or against their relatives, the scope of whom is defined by law.

The fundamental rights of the defendant are further reinforced by the Convention for the Protection of Human Rights and Fundamental Freedoms. According to Article 6, paragraph 1 of the Convention, any person, in the determination of their civil rights and obligations or of any criminal charge against them, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The court judgment is pronounced publicly; however, the press and public may

[30] Badri Niparishvili, 'The Defendant's Choice between the Right to Testify and the Right to Remain Silent' (2020) 1 (65) 20 Justice and Law 10.

[31] Caldwell and Spiga, supra note 9, 212.

[32] Dianne K. LeVerrier, 'Self Incrimination' (2000) 16 (2) Touro Law Review 701.

[33] Caldwell and Spiga, supra note 9, 311.

be excluded from all or part of the trial in the interests of morality, public order or national security in a democratic society; also, where the interests of minors or the protection of the private life of the parties require so, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

According to Article 6, paragraph 3d of the Convention, everyone charged with a criminal offence has, as a minimum, the following rights: to examine or have examined witnesses against them and to require the attendance and examination of witnesses on their behalf under the same conditions as witnesses for the prosecution.

Professor G. Tumanishvili considers the defendant not only as an active subject of the proceedings but also as a source of evidence in both the narrow and broad sense. He attributes the defendant's testimony to the narrow understanding of evidence, while the samples obtained through investigative actions conducted in relation to the defendant, in professor's opinion, are associated with the broad understanding of evidence.[34] Generally, the information provided by the defendant serves as a basis for the thorough examination and assessment of the relevant circumstances.[35] It is important to note that "the defendant's testimony depends on their subjective will and does not constitute mandatory or indispensable evidence in a criminal case."[36] The status of the defendant releases them from the obligation to actively cooperate with criminal justice authorities. Furthermore, any discussion of the defendant naturally brings up the right to remain silent. According to Article 38, paragraph 4 of the Criminal Procedure Code of Georgia, the defendant may exercise the right to remain silent at any time; and if the defendant chooses to do so, this may not be considered as evidence of their guilt.

It is important to note that the defendant may choose to refuse to testify without providing any reason or logical explanation. In such cases, no assumptions should be made as to why the defendant decided to exercise the right to remain silent. There are defendants whose silence genuinely defies logic and appears entirely inexplicable and out of context. If the defendant cannot be questioned, their silence may be the result of a sense of guilt. It's noteworthy that the defendant's silence may under no circumstances be used against them as evidence of having committed the crime. Even the defendant's own confession cannot serve as the sole basis for a conviction unless it is corroborated by other supporting evidence in the case. It would be incorrect to claim that everyone who exercises the right to remain silent should be considered guilty. The right to remain silent is an important safeguard of liberty. The conclusion that a person who remains silent is guilty is logical only when other specific circumstances of the case point to the same.[37]

[34] Tumanishvili, supra note 5, 206-207.
[35] Mamniashvili, supra note 18, 234.
[36] Collective of authors, supra note 4, 256.
[37] Helga Zandberg, 'The Right to Avoid Self-Incrimination and the Concealment of a Defendant's Criminal Past' (2010) 8 (1) Dartmouth Law Journal 3.

Legal systems determine whether silence may be interpreted as indicative of guilt in each respective country. In various legal systems that conceal the defendant's criminal record or prior convictions, the question of whether the defendant's refusal to testify indicates guilt must be determined individually in each case. In general, three main reasons are cited to explain a defendant's silence: first, the defendant is guilty and does not wish to commit perjury; second, the defendant rejects the court, does not recognize its jurisdiction, and refuses to testify on principle; third, the defendant intends to protect a guilty third party who would be exposed by their testimony. It is evident that the defendant is guilty if the second and third motivations do not apply. In such a case, the defendant may choose to testify only after hearing all the prosecution witnesses and concluding that remaining silent is pointless and ineffective. Moreover, the defendant does not experience pressure when testifying in court, as might be the case during police interrogation. In court, the defendant has a final opportunity to explain themselves, and the refusal to make use of this opportunity may, in a sense, indicate a sense of guilt. If the defendant refuses to testify because they reject the authority of the court or wish to protect a third party who is guilty, such a decision does not necessarily indicate guilt; however, such situations are exceptional.[38]

According to Article 47 of the Criminal Procedure Code of Georgia, when giving testimony in court, the status of a witness - along with the corresponding rights and obligations - also applies to the investigator, the prosecutor, the defendant, the victim, the expert, and the interpreter. The above may, for the purpose of giving testimony, place the defendant within the rights and obligations of a witness and, accordingly, may require the application of the warning procedure regarding criminal liability for giving false testimony, as provided by Article 48, paragraph 2 of the same Code. Although the same section also provides for the obligation to issue a warning regarding liability for refusal to testify, this does not constitute the subject of the present dispute. There is no doubt that the Criminal Procedure Code prohibits drawing negative conclusions from the exercise of the right to remain silent; still, the issue remains problematic.[39] It is worth considering whether the dilemma "either remain silent or tell the truth" imposes a limitation on the rights of a witness, especially those of the defendant.[40]

When the defendant is questioned as a witness in court, they are subject to the obligation to take an oath;[41] however, treating the defendant's testimony in the same manner as that of other witnesses is incorrect. The defendant's testimony is often unique and singular, as there may be no eyewitnesses to the commission of the crime and no one to contradict the defendant's account. The defendant is the only witness in criminal proceedings

[38] Zandberg, supra note 37, 2.
[39] Niparishvili, supra note 30, 11.
[40] Patricia J Kerrigan, 'Witness Preparation' (1999) 30 (4) Texas Tech Law Review 1367.
[41] Mskhiladze, supra note 29, 7.

who has an absolute right to testify. Moreover, the defendant must not be denied the right to influence the judge and the jury, to create a certain impression regarding a particular event or circumstance.[42] Imposing liability on the defendant for giving false testimony as a witness to some extent restricts their ability to choose a defense strategy and to develop a version of events that may ultimately lead to an acquittal. The Criminal Procedure Code grants the defense the authority to determine what type of evidence to present. Under such conditions, the defendant must be given the opportunity to provide the court with only such information, and in such a form, as is beneficial to their case, and should not be obligated to give exhaustive and precise testimony on all factual circumstances.[43]

No one should be obligated to testify against themselves, and the deprivation of this right is impermissible under the law.[44] There is an opinion that the defendant should not be subjected even to cross-examination.[45] In 1866, at the initiative of the Massachusetts legislature, the defendant was granted the opportunity to preserve their own "secrets." The only obligation of the defendant is to remain passive. With regard to false testimony, the defendant may give false statements at any time in the course of their defense.[46]

On the other hand, there is a view that allowing false testimony would lead to an accumulation of false and useless statements in criminal proceedings that also creates the risk that jurors may cease to believe any testimony given by defendants in general.[47]

The right to testify is a repeatedly recognized right of the defendant. Therefore, restricting the defendant to testifying solely in the capacity of a witness and within that limited framework, during the substantive hearing of a case in court, must be regarded as an impermissible restriction of the defendant's universally recognized right.[48] If an individual is deprived of their rights, and the state is, conversely, given the opportunity to use the right to remain silent against the defendant - thereby unjustly causing harm through its own actions - such a trial should never be allowed to proceed, even to the slightest degree.[49]

A number of courts have emphasized that the right to remain silent, similar to the right to testify, is one of the essential rights within a fair trial. A fair trial encompasses the rights of a person deprived of liberty to be heard and to give testimony. The restriction of these rights constitutes a grave violation of the European Convention on Human

[42] Caldwell and Spiga, supra note 9, 126.
[43] Niparishvili, supra note 30, 11.
[44] Calvert, 'Testimony of the Accused' (1887) 11 (4) Virginia Law Journal 194.
[45] ibid, 195.
[46] 'Testimony of Person Accused of Crime' (1867) 1 (3) American Law Review 443-449.
[47] ibid, 450.
[48] Niparishvili, supra note 30, 11.
[49] Brian Kurbjeweit, 'The Privilege against Self-Incrimination: Is the Court Chipping Away at our Most Precious Right' (2000) 9 (2) Widener Journal of Public Law 195.

Rights. Moreover, it is universally recognized that no piece of evidence presented by the defense, including the testimony of a defense witness, carries the same weight as the testimony of the defendant themselves.[50]

In conclusion, it can be stated that, due to their respective legal statuses, the defendant and the witness are fundamentally distinct procedural figures, and equating the testimony of the defendant with that of a witness (unless it reflects the defendant's own will) must be regarded as a violation of the defendant's rights.[51] The doctrinal analysis of the rights and obligations of the defendant and the witness makes it clear that the procedure established by the Criminal Procedure Code of Georgia for questioning the defendant in the capacity of a witness restricts the defendant's rights[52] - a position that was further reinforced by the Judgment of the Plenum of the Constitutional Court of Georgia dated 28 December 2021.[53]

IV. CONCLUSION

In conclusion, one may state that, due to their respective legal statuses, the defendant and the witness are fundamentally distinct procedural figures, and equating the testimony of the defendant with that of a witness (unless it reflects the defendant's own will) must be regarded as a violation of the defendant's rights. With issuing the Judgement of the Plenum of the Constitutional Court of Georgia on 28 December 2021, the defendant's internationally recognized right against self-incrimination was further restricted. This demonstrates that the Constitutional Court has established a new legal reality, leaving numerous issues in judicial practice unresolved. By equating the defendant with an ordinary witness, the Court has placed the defendant in a constrained position, offering only two options: to remain silent or to tell the truth. However, even the exercise of the right to remain silent risks being interpreted as a concealed response.

One of the Constitutional Court's key responsibilities is to eliminate procedural deficiencies within the justice system instead of creating new, artificial barriers - an approach that contradicts the universally recognized international principles and standards. Ultimately, it can be said that the privilege against self-incrimination is one of the most fundamental rights in criminal proceedings, based on the presumption of innocence. The privilege against self-incrimination specifically prohibits exerting pressure on an individual to provide testimony, in any form, against themselves. The defendant, due to their special legal status, must not be equated with a witness and must not be placed in the position of having to choose between exercising the right to remain silent or telling the truth.

[50] Caldwell and Spiga, supra note 9, 115.
[51] Niparishvili, supra note 30, 11.
[52] Mskhiladze, supra note 29, 7.
[53] Judgment of the Plenum of the Constitution Court of Georgia N3/2/1478, 28 December 2021.

OVERVIEW OF JUDGMENTS OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

The Journal of Constitutional Law continues to provide readers with an overview of the recent case law of the Constitutional Court of Georgia. For the current issue, three landmark judgments of the Constitutional Court have been selected for publication. The editorial board of the journal hopes that this overview of the Court's practice will enhance the level of legal debates concerning the Court's activities.

I. "NIKOLOZ AKOFOVI V. THE PARLIAMENT OF GEORGIA"

On 22 November 2023, the Second Board of the Constitutional Court of Georgia issued a judgment in the case *Nikoloz Akofovi v. the Parliament of Georgia* (Constitutional Complaint No. 1444[1]). The disputed provision of the Imprisonment Code granted the investigator/prosecutor the authority to restrict a defendant placed in a penitentiary facility from exercising the rights to short visits, correspondence, and telephone communication.

According to the complainant, the unconstitutionality of the disputed provisions stemmed from the absence of clear criteria defining the investigator's/prosecutor's authority to restrict the defendant's rights, that in turn, gave rise to the risk of errors or arbitrary use of discretionary powers by the investigator/prosecutor. As a result, the defendant's right to private and family life was violated.

According to the respondent, the restriction of the defendant's right to private and family life under the disputed provisions served important and legitimate public interests, such as the effective administration of justice, the protection of state and public security, and the safeguarding of the interests of the investigation. At the same time, according to the respondent's position, despite the existence of important legitimate objectives, the absence of appropriate guiding criteria granted the investigator/prosecutor unjustifiably broad discretion to restrict the communication of a defendant held in a penitentiary facility with the outside world, which in turn, created a risk of unjustified and disproportionately prolonged interference with the defendant's right to private and

[1] Judgement of the Constitutional Court of Georgia N2/8/1444 "Nikoloz Akofovi v. the Parliament of Georgia", 22 November 2023.

family life. In light of all the above, the respondent fully acknowledged Constitutional Complaint No. 1444.

The Constitutional Court held that the restriction established by the disputed provisions constituted a suitable means for achieving the legitimate objectives identified by the respondent. At the same time, the case did not reveal the existence of an alternative legal mechanism that would be less restrictive of the right while ensuring the achievement of the legitimate objectives with the same level of effectiveness as the current legal framework. Therefore, in addition to being suitable, the disputed regulation also meets the necessity criterion of the principle of proportionality.

The Constitutional Court of Georgia explained that short visits, correspondence, and telephone communication for a defendant placed in a penitentiary facility constitute essential mechanisms of communication for maintaining and nurturing private and family life. Accordingly, the legislation regulating the restriction of these rights must provide clear criteria, be sufficiently precise, and be formulated in a manner that prevents the risk of unjustified interference with the defendant's right to private and family life by the decision-making person/institution.

Based on the analysis of the applicable legislation, the Court concluded that neither the disputed provisions nor other articles of the Imprisonment Code, nor the relevant adjacent legislation, provided any mechanism or guiding criteria to limit the discretion of the investigator/prosecutor when deciding to restrict a defendant held in a penitentiary facility from short visits, correspondence, and/or telephone communication. The applicable legislation also did not provide a mechanism for the mandatory periodic review of the restrictions imposed on the defendant, nor did it oblige the investigator/prosecutor to lift the restrictive measure in the event of a decrease or absence of the necessity for its continued application.

In light of all the above, the Court held that the existing legal framework failed to prevent the risk of abuse of power by the decision-making authority and created a real threat of excessive restriction of the defendant's right to private and family life. Specifically, it allowed for the restriction of the defendant's right to short visits, correspondence, and/or telephone communication even in cases where the objectives pursued by the restriction and the risks to be prevented did not outweigh the defendant's interest in maintaining and nurturing private and family life and the prohibition against complete isolation or exclusion from society. On this basis, the Constitutional Court found that the disputed provisions unjustifiably restricted the right to private and family life protected under Article 15, paragraph 1 of the Constitution of Georgia and declared them unconstitutional.

Alongside declaring the disputed provisions unconstitutional, the Constitutional Court of Georgia referred to Article 199, paragraph 2 of the Criminal Procedure Code

of Georgia and clarified that, based on this provision, if relevant circumstances are present, it is still possible - by a judge's decision - to impose short-term restrictions on a defendant's visits, correspondence, and/or telephone communication in order to achieve the legitimate aims previously served by the challenged restriction. In light of the above, the Constitutional Court considered that there was no need to postpone the enforcement of the judgment.

II. PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA

On December 14, 2023, the Plenum of the Constitutional Court of Georgia issued a judgment in the case *The Public Defender of Georgia v. the Parliament of Georgia* (Constitutional Complaint No.1635[2]). The subject of the dispute was Paragraph 1 of Article 8 of the Law of Georgia "On Assemblies and Manifestations", which established an obligation to notify the executive body of the municipality about the organization and conduct of an assembly or manifestation no later than 5 days before the event.

he author of the constitutional complaint argued that, in many cases, when expressing protest, the public's immediate reaction held decisive importance, as a delay of 5 days could significantly undermine the effectiveness of the assembly or render it entirely meaningless. Moreover, the claimant pointed out that the real possibility of holding a spontaneous assembly is a fundamental component of the right to freedom of assembly, while the disputed provision imposed an unreasonable restriction on this freedom.

According to the respondent's position, the notification requirement served to inform the relevant authority, enabling the state to fulfill its positive obligation - namely, to protect the rights of others on the one hand, and to ensure the safety of the participants of the assembly or manifestation on the other. The respondent further explained that failure to comply with the advance notification requirement did not constitute grounds for terminating the assembly or manifestation, nor for imposing liability.

The Constitutional Court of Georgia explained that the timeliness and immediacy of an assembly or manifestation are of decisive importance for its effectiveness, as the intensity of public reaction, the strength of the social momentum characteristic of such gatherings, and, consequently, the potential to influence the issue at hand, often depend precisely on these factors. A delay or postponement in expressing a specific reaction may significantly hinder or entirely prevent the realization of the objectives of the protest. The constitutional guarantee of the freedom of assembly will remain merely declaratory in nature unless its substance is simultaneously equipped with effective

[2] Judgement of the Constitutional Court of Georgia N3/3/1635 "Public Defender of Georgia v. the Parliament of Georgia", 14 December 2023.

and accessible means for the full enjoyment of this freedom. In light of the above, the Constitutional Court of Georgia held that the freedom of assembly protected under Article 21 of the Constitution of Georgia encompasses the right to hold both pre-organized and spontaneous assemblies and manifestations.

At the same time, the Court accepted the claimant's argument and explained that the disputed provision explicitly imposed an obligation to notify the relevant authority 5 days prior to holding an assembly or manifestation, thereby restricting the freedom of assembly and manifestation guaranteed by Article 21 of the Constitution of Georgia.

The Constitutional Court of Georgia assessed whether the disputed regulation constituted a proportionate means for achieving the legitimate aim of protecting the rights of others, as well as the rights of the participants of the assembly or manifestation themselves. According to the Constitutional Court, the competing interests involved were, on the one hand, the right to effectively and unhindered exercise the freedom of spontaneous assembly, and on the other hand, individual and public interests, which include both the rights of the participants themselves to peacefully enjoy the freedom of assembly/manifestation, and the interests of others not to be adversely affected by disruptions to transportation or by the challenges associated with unplanned, spontaneous gatherings and manifestations.

The Constitutional Court also held that there was a logical and rational connection between the restriction imposed by the disputed provision and the legitimate public aims cited by the respondent, and conclude that the regulation established by the disputed norm met the requirement of suitability.

Specifically, the Court found that the 5-day preparation period granted state authorities an adequate opportunity to plan and adjust transportation routes to avoid significant disruption to third parties' movement, to mobilize the necessary number of law enforcement and medical personnel, to assess and properly plan for potential risks to public order during the assembly, and to determine appropriate measures for ensuring the safety of individuals in case those risks materialize. Accordingly, notifying the relevant authority 5 days in advance significantly facilitates the protection of the rights of others as well as the rights of the participants of the assembly or manifestation, allowing for the anticipation and prevention of potential risks.

The Constitutional Court held that spontaneous assemblies may disproportionately affect the interests of third parties until the assembly ends or the state responds appropriately. As for the participants, the disputed provision makes it impossible to effectively exercise the freedom of spontaneous assembly or manifestation, rendering that right meaningless. The Court determined that, given the importance of spontaneous assembly, the protection of the rights of a part of the public from potential harm caused by full or partial disruption of traffic for a certain period cannot outweigh the right of

numerous participants to effectively exercise their constitutionally protected freedom of assembly and manifestation - a right that constitutes an essential precondition for the functioning of a free and democratic society. In light of all the above, the Constitutional Court found that the restriction established by the contested provision disrupted the fair balance between the restricted and protected interests and failed to ensure the effective enjoyment of the fundamental right to assembly and manifestation.

At the same time, the Constitutional Court did not rule out the possibility of establishing a notification requirement to the competent authority, for the purpose of achieving legitimate aims, in cases where there is an objective possibility to do so.

With this decision, the Plenum of the Constitutional Court of Georgia overturned the standard established by the Court Judgment N2/2/180-183 of 5 November, 2002 and by the Record of Proceedings N4/482,483,487,502 of 10 November, 2010, which, according to the Georgian Constitution, deemed the disputed provision constitutional and consequently, had not recognized the right to hold a spontaneous protest manifestation, without prior notification, in public and traffic-accessible areas as part of the scope protected under Paragraph 1 of Article 21 of the Constitution, even in cases where the participants occupied, blocked, or impeded such public or traffic routes.

III. CONSTITUTIONAL SUBMISSION OF THE TELAVI DISTRICT COURT REGARDING THE CONSTITUTIONALITY OF PART 3 OF ARTICLE 34 OF THE CRIMINAL CODE OF GEORGIA AND PART 3 OF ARTICLE 191 OF THE CRIMINAL PROCEDURE CODE OF GEORGIA

On 12 July 2024, the Plenum of the Constitutional Court of Georgia issued a judgment in the case *Constitutional Submission of the Telavi District Court regarding the constitutionality of Part 3 of Article 34 of the Criminal Code of Georgia and Part 3 of Article 191 of the Criminal Procedure Code of Georgia* (Constitutional Submission No. 1543).

According to Part 3 of Article 34 of the Criminal Code of Georgia, if a crime was committed by a person who was legally sane at the time of the act but developed a mental illness before the verdict was delivered, they shall serve the sentence imposed by the court in an appropriate medical (treatment) facility until recovery. According to Part 3 of Article 191 of the Criminal Procedure Code of Georgia, in the case of a defendant who was legally sane at the time of committing the crime but later became legally insane, the court issues a guilty verdict, and the convicted person shall serve the sentence in an appropriate medical (treatment) facility until recovery. Upon recovery, the sentence shall continue to be served under the general procedure.

According to the position of the author of Constitutional Submission No. 1543, a defendant must have the opportunity to fully exercise the procedural rights defined by the Constitution, which include giving testimony, participating in procedural actions, effectively communicating with a defense attorney, examining witnesses, reviewing evidence, and more. A defendant who has developed a mental illness is unable to exercise these rights, yet the disputed provisions still allow for their prosecution and the issuance of a guilty verdict. The author of the submission argued that in cases where the defendant has developed a mental illness, there should be a mechanism for suspending the proceedings. Issuing a guilty verdict against such a person leads to violations of several components of the right to a fair trial.

In the case at hand, the Constitutional Court explained that the purpose of the constitutional right to a fair trial is to prevent the conviction of an innocent person and to ensure that criminal proceedings are conducted fairly. According to the Constitutional Court's assessment, the fairness and adversarial nature of the proceedings require that the defendant not only formally possess certain rights and procedural means, but also be practically able to exercise them. For this, it is essential that the defendant be competent to stand trial - that is, have the capacity to adequately understand the nature of the charges, the substance of the legal proceedings against them, and be able to establish effective communication with their defense attorney.

According to the Constitutional Court's position, although the protection of rights through a defense attorney is an important constitutional guarantee, it cannot replace the necessity of the defendant's direct participation in the proceedings, as it is the defendant who must personally make key procedural decisions such as admitting guilt, choosing whether or not to testify, entering into a plea agreement, etc. Moreover, the effective protection of an individual's rights by a defense attorney is closely dependent on the information provided by the defendant, as the defendant obviously is the one who best knows the factual circumstances of the case. Hence, the communication with the attorney may be critically important for obtaining exonerating evidence/refuting the prosecution's evidence. Accordingly, the Constitutional Court pointed out that issuing a guilty verdict against a convicted person who, for the purposes of the Constitution of Georgia, is not competent to stand trial, is effectively equivalent to convicting an individual without granting them the opportunity to participate in the proceedings.

The Constitutional Court additionally clarified that, in certain exceptional cases, it may be permissible to issue a guilty verdict without the direct participation of the defendant or in relation to a person who is legally incompetent to stand trial - for example, when the defendant is abusing procedural rights or when the conduct of the defense amounts, in essence, to a waiver of the right to exercise those rights. Such a situation may arise

when the defendant simulates incompetence, engages in certain actions to become mentally unfit in order to evade justice, or fails to appear before the court.

The Constitutional Court determined that Part 3 of Article 191 of the Criminal Procedure Code allows for the possibility of issuing a guilty verdict against any person, including one who is incompetent to stand trial, even in cases where the individual is not at fault for their condition. According to the Constitutional Court, recognizing as guilty a person who, through no fault of their own, has been deprived of the opportunity for effective defense violates the constitutional requirement for a fair trial in criminal proceedings.

In light of all the above, the Constitutional Court held Part 3 of Article 191 of the Criminal Procedure Code of Georgia to be unconstitutional in relation to Paragraph 1, the first and second sentences of Part 3, and Paragraph 4 of Article 31 of the Constitution of Georgia. In addition, the Constitutional Court postponed the annulment of the disputed provision until December 1, 2025, in order to grant the Parliament of Georgia a reasonable period to bring the matter into compliance with the Constitution and to implement the necessary legislative amendments.