

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 Georgia², 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 286², 322¹, 344, or 362 of the Criminal Code of Georgia³ has been committed by a person due to being a victim of an offense under Articles 143¹ and/or 143² 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, 238¹ 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 Criminal 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 voluntarily 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 N86lap-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 Consequences of Crime* (Meridiani Press 2013) 149-150; Ketevan Mechdlisvili-Hadrich, *Criminal Law, General Part II, Various 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 concluded 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 completion⁴⁴ - either at the stage of crime preparation or attempt. Moreover, as previously noted, in

⁴⁰ Cf. Irakli Dvalidze, *General Part of Criminal 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 loses both material and legal procedural 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 criminal 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 European 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”.