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Economic Liberty in Digital Market and Digital Competition Legislation: Indian Context

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ABSTRACT

The rise of extraordinary digital platforms raised issues of monopolistic behaviours, market concentration, and digital ecosystem power balance, which complicated economic liberty protection in the digital age by compromising economic freedom, such as fair competition, innovation, and customer care. This paper focuses on the Digital Competition Bill from India 2024, a crucial piece of legislation that attempts to lure the digital market monopolies from threats and culminate in a model of economic liberty in a digital economy. The bill aims to regulate "gatekeeper" platforms, those huge digital companies that lead access to markets and services across the Internet, against a number of anti-competitive practices, including self-preferencing, exploitation of data, and restrictive business terms brought into the picture for the benefit of another party. Such an act of practice mostly cuts off the competition, disallows minimum market access for small entities, and hampers the overall consumer experience. The Digital Competition Bill, therefore, seeks to create a level regulatory field for large and small representatives in the marketplace so that innovation and abuse of access to digital opportunities are promoted. The paper will also examine in detail how this

particular law on digital competition, the Digital Competition Bill, mentioned above, helps create a conducive digital market environment to realize economic liberty for companies, small and big. This study argues that a Digital Competition Bill can change the country's approach to regulating digital market competition, provide an adequate framework for fostering economic liberty in digital markets.

INTRODUCTION

Economic freedom is one of the basic pillars of democratic capitalism and expresses the principles of free markets, whereby individuals and businesses are unhindered in their economic pursuits without excessive government interference.[1] Economic liberty rests on the belief that people are allowed to pursue their own interest in the marketplace, which will, in turn, create competition that gives rise to desirable outcomes starting from innovation, efficiency down to the satisfaction of consumers.[2] Traditionally, it has been understood that economic liberty applies to national economies, where businesses are seen as standing in competition with each other in relatively transparent and open markets and with minimum government intervention.[3] However, as world economies rose, digital-age innovations thoroughly rearranged the commercial architecture. On the one hand, the new digital platforms led by Amazon, Google, Facebook, and Apple etc. have thrown opportunity after opportunity into the fray. The alternative is that these companies have changed the landscape of buyers and sellers' interaction with markets; they have practically ruled a few sectors of the global economy by exploiting massive amounts of data and controlling crucial infrastructure locations.[4] Accordingly, this has complicated the understanding of the economic liberty paradigm. How far is the economic liberty visa when a handful of tech giants dominate so much of the marketplace? How far do these platforms balance the scales against economic freedom for smaller entities and consumers alike?[5]

In India, a rapidly digitizing economy, such questions assume acute proportions. In relatively recent times, India has witnessed a technological revolution whereby millions of people came online, and digital platforms have formed a block of everyday life.[6] With the acknowledgement of heightened concentrations of power in the hands of a few dominant players in the digital economy, the Government is proposing the introduction of new regulatory measures. The Digital Competition Bill of 2024, which aims at addressing the dominance of "gatekeeper" platforms, constitutes a major legislative step intended to secure economic liberty in the digital marketplace.[7] The bill aims to create a com-

1 Smith, A. (1776). An inquiry into the nature and causes of the wealth of nations. Strahan, W., Cadell T.

2 Friedman, M. (1962). Capitalism and Freedom. Chicago: University of Chicago Press. Available at: <https://press.uchicago.edu/ucp/books/book/chicago/C/bo68666099.html>

3 Hayek, F. (2007, March) The Road to Serfdom. University of Chicago Press, Chicago, pp. 27-31.

4 Cohen, J. E. (2020). Digital Platforms Regulation: New Age for Economic Freedom. Oxford University Press.

5 Stigler, G. J. (2018). Digital monopolies and the limits of competition law. Journal of Economic Perspectives, 32(1), pp. 45-60.

6 Mishra, D., Kedia, M., Reddy, A., Kanwar, S., Das, B., Gupta, S., Sharma, D. (2023). State of India's Digital Economy (SIDE) Report. Indian Council for Research on International Economic Relations (ICRIER). Available at: < https://icrier.org/publications/state-of-indias-digital-economy-report-2023/> (Last access: 15 January, 2025).

7 Ministry of Electronics and Information Technology. (2024). Digital Competition Bill of India. Government of India. (Last access: 25 January, 2025).

petitive and transparent digital marketplace by regulating the behavior of dominant digital platforms so that they do not impede competition, decrease consumer choice, or misuse consumer data.[8] This paper discusses economic liberty and digital competition law in the Indian context, thus enabling such regulatory frameworks to provide equilibrium between innovation and free and competitive market environments. The main argument revolves around the idea that digital competition laws, such as the Digital Competition Bill, are key to curbing monopolistic behavior while also having the potential to further economic liberty by ensuring that smaller businesses and consumers are not overly restricted by the maximum market operations possible from big tech monopolies.[9]

METHODOLOGY

This study employs a doctrinal and comparative legal research approach. The doctrinal method is applied through an analysis of the Digital Competition Bill 2024, together with official reports of the Ministry of Corporate Affairs, the Competition Commission of India, and documents of international organizations such as UNCTAD and ICRIER. These sources provide the normative basis for assessing how the proposed legislation addresses issues of economic liberty in digital markets.

The comparative legal method is used to contextualize India's approach against major international models, including the United States' antitrust practice, the European Union's regulatory framework (e.g., the GDPR), and China's state-controlled regulatory model. Such cross-jurisdictional analysis highlights both the strengths and the limitations of India's evolving digital competition law.

The theoretical foundation of the research draws upon classical and modern doctrines of economic freedom, including the works of Berlin, Hayek, Friedman, and Rawls. These perspectives provide an interpretive framework for evaluating how the Digital Competition Bill 2024 redefines economic liberty within the rapidly expanding Indian digital economy.

1. NOTION OF LIBERTY: A CONCEPTUAL FRAMEWORK

A classical concept that denotes the absence of external restrictions on the action of an individual. It has many philosophical definitions, two of which are negative liberty and positive liberty, and both of these principles have different views on the economy.[10] As stated by Isaiah Berlin, 'negative liberty' indicates freedom from external interference, particularly from the government. In terms of economics, this is that laissez-faire capitalism, wherein individuals and businesses act in a sort of free market with minimal regulation from the state, is to be expected.[11] With the advent of electronic markets, however, the assertions look twisted because such corporative monopolies could frequently exercise just as much repressive power as governments.[12] In 'positive liberty', on the other hand, the ability to act or act independently in any aspect of decision-making is what an economically independent person should enjoy. By extension, it indicates that institutional and protective frameworks are thus required to permit individuals the chance to be meaningfully free and to participate in economic activities rather than forging ahead under the force of a monopolistic economy or under predatory market conditions.[13]

8 Ibid.

9 Gouri, G. (2025). The Competition Commission of India and Digital Markets. Competition Policy International. Available at: <https://www.pymnts.com/cpi-posts/unpacking-america-first-antitrust-for-europeans/> (Last access: 01 May, 2025).

10 Berlin, I. (1969). Two Concepts of Liberty. Four Essays on Liberty. Oxford University Press, pp. 118-172.

11 Ibid.

12 Stigler, G. J. (2018). Digital monopolies and the limits of competition law. Journal of Economic Perspectives, 32(1), pp. 45-60.

13 Rawls, J. (1971). A theory of justice. Harvard University Press. Available at: <https://doi.org/10.2307/j.ctvjf9z6v>

Thus, understanding economic freedom in digital markets will mean different things to these two perspectives. Whereas unrestricted markets confer freedom to innovate to entrepreneurs, excessive concentration on the part of corporations paradoxically reduces the economic liberty of individuals by limiting their choices or market entry opportunities. Well-designed competition legislation can promote positive economic liberty, though, in that it assures fair market access to all actors.[14] Unique to the digital economy are many of the challenges that affect economic liberty, but which were absent in the previous market form. One major challenge is platform monopolization, where companies, by definition, sell direct to consumers but, in many cases, use barriers to entry to limit competition from smaller players in the industry.[15] Then there is algorithmic bias and market manipulation, much of which is created by the data generated by artificial intelligence-trained algorithms, as it may augment the market competitiveness of certain businesses at the expense of other businesses, thus undermining fairness.[16] Further, at the heart of economic liberty in digital market discourse are concerns over data privacy. Information about consumers has become a commodity that, in many cases, major corporations abuse their privilege and extort against individual privacy rights, which undermines the freedoms of individuals in a digital space.[17] Countries have different experiences and approaches to regulating digital competition. The United States, for example, focuses on antitrust laws, yet tends to be lenient toward tech monopolies by allowing large firms to acquire monopolistic power without significant interventions. The European Union is much stricter with regulations; for example, it has the General Data Protection Regulation (GDPR), which mainly focuses on consumer rights and data protection while at the same time limiting the power of tech giants.[18] Much of China's position on digital market regulation can be seen as balancing two opposite terms: government versus economic regulation. While the Chinese government plows a posture toward intervention in regulating digital platforms, it also seeks economic growth and innovation, albeit through a relatively controlled approach.[19] Each of these regulations represents a tiny aspect of the much broader dilemma of how to preserve economic liberty while ensuring strong, competitive, fair, and accessible digital markets.

2. ECONOMIC LIBERTY IN THE DIGITAL MARKET

Economic liberty and competition are understood by many as the right of free individuals within a market and free-moving businesses to sell their merchandise. But they have increasingly come under threat in a digital age. Till now, economic liberty has been given as much weight in granting businesses the freedom to innovate and compete under conditions of their choice dictated by supply and demand, which is the core of the market.[20] Digital platforms are altering this paradigm, that trade, consumer behavior, and market affiliation are way beyond what was possible from their early beginnings due to extreme influence. Fundamentally, open competition forms a vital part of economic freedom. In a traditional environment, competition

14 Acemoglu, D., Robinson, J. A., Woren, D. (2012). Why nations fail: the origins of power, prosperity and poverty. Crown Publishing Group, a division of Random House, Inc., New York.

15 UNCTAD. (2021). Digital Economy Report.

16 Pasquale, F. (2015). The black box society: the secret algorithms that control money and information. Cambridge, Massachusetts; London, England: Harvard University Press.

17 Shoshana, Z. (2019). The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power. New York: Public Affairs.

18 Bradford, A. (2020). The Brussels Effect: How the European Union Rules the World. Oxford University Press.

19 Creemers, R. (2018). China's Regulatory Approach to the Digital Economy. Journal of Comparative Law, 13(2), pp. 87–110.

20 Schumpeter, J. A. (1942). Capitalism, Socialism and Democracy. Vol. 36, Harper & Row, New York, pp. 132-145.

presses prices down, provides choice in product lines, and stimulates entrepreneurs to act differently to differentiate themselves. This mechanism supports capitalist economies wherein resources are consensually directed toward their efficient use by that invisible hand.[21] The digital economy, in contrast, on the opposite end, tends to pervert this idea by concentrating power on huge platforms like Amazon, Google, or Meta. These companies have now emerged as the gatekeepers to the digital marketplaces, search engines, and social media ecosystems, all essential arteries for modern economic life.[22]

They can nonchalantly decide which digital entrants will live or die. They influence price structures, gate consumers, and control the flow of information.[23] While this level of control may enhance efficiencies, it puts up colossal hurdles for small businesses that do not possess corresponding resources or technical expertise. Other terms that the platforms impose are exploitative, for instance, exorbitant commission fees on goods sold via Amazon or inflated ad costs charged on platforms like Google and Meta-which correlates to the unfair competition in the marketplace.[24] One particularly troubling dynamic relates to algorithms whereby decisions through which market outcomes are affected are apparently neutral. In actual practice, algorithms often embed systemic biases that advantage the platform's own products or services effectively, thereby undermining fair competition.[25] For example, Amazon's algorithm might unconsciously prefer Amazon-branded products over third-party sellers' products that are better or cheaper. This self-preferencing reduces consumer choice, deepens market power, and stands in direct opposition to the concept of economic liberty. Such opaqueness raises great ethical and regulatory issues. Most consumers remain blissfully ignorant of the fact that their digital interactions are being engineered towards certain ends, reducing transparency and denying the possibility of informed decision-making.[26] The situation is especially acute regarding this question in India. Rapid digitization has taken place in India, but platforms have rendered many SMEs worse off. Small and medium enterprises are compelled to accept terms that restrict their operations to be able to access marketplaces like Amazon or Flipkart; failing to do so would mean being denied access to major advertising platforms such as Facebook and Instagram.

The extent to which this concentration of power restricts competition hampers the development of the truly inclusive digital economy within India. A large number of entrepreneurs and start-ups lack the voice and influence to participate in digital marketplaces on an equal footing. This imbalance is further reinforced by technologies that aid in the absence of infrastructure, the lack of access to data that directly inhibits local companies' efficient functioning, and the economic power to operate an advanced business. In order to correct these disparities, in 2024, the Digital Competition Bill in India was passed. It affords a robust regulatory framework to deal with the monopolistic behavior of Systemically Significant Digital Enterprises. The Bill aims to create an enabling environment where businesses, big and small, will have equally fair opportunities to grow and compete in the digital marketplace.[27]

Key provisions of the Bill speak directly to the economic liberty concerns just mentioned, such as preventing self-preferencing, exclusive tying advantages, and access on discriminatory terms,

21 Smith, A. (1776). An inquiry into the nature and causes of the wealth of nations. Strahan, W., Cadell T.

22 Cohen, J. E. (2020). Digital Platforms Regulation: New Age for Economic Freedom. Oxford University Press.

23 Binns, R. (2021). Algorithmic Bias and Fairness in the Digital Economy. Indian Journal of Law and Technology, 17(3), pp. 111–138.

24 Stigler, G. J. (2018). Digital monopolies and the limits of competition law. Journal of Economic Perspectives, 32(1), pp. 45-60.

25 Binns, R. (2021). Algorithmic Bias and Fairness in the Digital Economy. *Indian Journal of Law and Technology*, 17(3), pp. 111–138.

26 Cohen, J. E. (2020). Digital Platforms Regulation: New Age for Economic Freedom. Oxford University Press.

27 Ministry of Corporate Affairs. (2024). Report of the Committee on Digital Competition Law. (Last access: 01 February, 2025).

thereby protecting small businesses against being squeezed out. Additionally, it imposes transparency requirements providing for the disclosure of algorithms and decision-making criteria affecting market exposure. This allows for a greater level playing field upon which SMEs can make rational decisions and compete fairly. Further seeks stakeholder consultation, thereby giving SMEs and start-ups a voice in the regulation of digital markets. This participative approach reflects, indeed, the spirit of inclusive economic liberty, bringing forth the different demands of the vast entrepreneurial landscape in India.

Very importantly, the Digital Competition Bill will also encourage innovation by preventing anti-competitive mergers and acquisitions that may suppress emerging businesses. The bill further aims to prevent any kill zone effect where large firms acquire the start-ups to neutralize future competition by imposing an advance notice regime and pre-merger review of acquisitions by SSDEs.[28] The implications are that the Digital Competition Bill is a necessary evolution for India's economic regulation framework. It redefines economic liberty in the digital age as more than just state non-interference; it is about algorithmic transparency and equally fair access that protects against digital monopolies. The Bill, thus, creates the foundation for a more inclusive, vibrant, and just digital economy in India.

3. THE ROLE OF DIGITAL COMPETITION LAW IN PROMOTING ECONOMIC LIBERTY

Market contestability measures such as India's Digital Competition Bill of 2024 seek to promote fairness in the market, given that the same measures challenge the essence of economic liberty. The very existence of digital platforms often creates discrimination among the constituents nurtured in their environment, where power becomes concentrated in the hands of a select few dominant players. Such concentration raises legitimate fears of monopolistic tendencies, barriers to market entry for smaller enterprises, and exploitation of consumers. The regulation of such dominant operators would restore economic liberty as constituting the core of competition, fair market access, and capping unfair business practices.[29] The Digital Competition Bill focuses primarily on "gatekeeping" digital platform companies that determine market access and marketplace intermediation between businesses and consumers. It highlights certain conduct of these platforms, including self-preferencing, data appropriation, and predatory pricing behavior, primarily responsible for disquiet in the minds of businesses and consumers. Such gatekeepers as Amazon, Google, and Facebook heavily influence the workings of digital markets. They set the rules of engagement for countless businesses that depend on their platforms for visibility, sales, and interaction with consumers.[30]

India's digital economy is flourishing, with billions of active internet users and a proliferation of e-commerce businesses. It is the ideal ecosystem for new digital platforms to flourish.[31] Conversely, this also implies a challenging ground for small businesses that cannot match such big players. For a good number of small businesses, platforms like Amazon or Flipkart become a wider base of consumers, quantifying these terms for larger commissions, which in turn become extractive and foreign to enlarge their earnings and maneuverability in the market. And, not to mention, this control of the platforms as 'gatekeepers' might bury them deep in search result pages or actually eliminate them for certain lucrative opportunities.

28 Digital Competition Act 2024. Available at: <https://prsindia.org/policy/report-summaries/digital-competition-law> (Last access: 11 February, 2025).

29 Schneider, (2022). Competition and innovation in digital markets: a balancing act. Law and Economics Journal, 28(1), pp. 134-150.

30 Cohen, J. E. (2020). Digital Platforms Regulation: New Age for Economic Freedom. Oxford University Press.

31 IBEF. (2025). E-commerce Industry in India. Available at: <https://www.ibef.org/industry/ecommerce> (Last access: 11 February, 2025).

Thus, during the year 2024, the Digital Competition Bill emerged as a regulatory answer to tackle the problems cited above. By assuring that the competitive integrity of the digital marketplace is preserved, it addresses a range of issues through transparency requirements, curbing anti-competitive behaviors, and safeguarding small businesses from any disadvantages. For example, the Bill mandates that gatekeepers disclose the criteria upon which they base product or service rankings, which transparency will help businesses understand how to compete for consumer attention and take steps to minimize discrimination risk and maximize chances for success.[32]

It also defines regulations for fair use of data that the platforms must uphold. Under current affairs, the powerful platforms enjoy fencing off and collecting data in huge volumes of business and user data for the improvement of their own services, turning the information into assets in competition with others, and consequently profiting from their products.[33] For example, Amazon is a platform that uses the above data to promote its items over the goods sold by third-party sellers, thus tilting the field. The Digital Competition Bill will regulate such practices, establishing regulations for the use of business data with a focus on transparency of data sharing and fairness.[34] Thus, the Bill upholds the economic liberty of small players in the market against being wiped off under the competition barriers exerted by the mighty. The measure shall also build a level playing field against the conduct of the dominant firms in the market, to foster a competitive environment conducive to small business resorts. With this consequence, the Digital Competition Bill assures the liberty of corporate players alongside those of consumers for the preservation of competition as a functional efficiency in promoting fairness and innovation in the digital economy. Moreover, the Bill addresses pressing concerns regarding platform transparency and the requirement for digital platforms to disclose their ranking and promotion of products. The larger implications of this transparency will be that smaller businesses will be able to maneuver within the pale of the digital marketplace and come up with strategies to counter larger, more established competitors. Being able to understand ranking algorithms will allow small businesses to set up their practices and adapt to fast-moving market dynamics.[35]

Thus, with the above provisions, the need for such rules in the Indian context arises as digital businesses will continue to grow in the country and remain under the heavy influence of global giants like Google and Amazon. The enforcement of these laws will propel India to secure those small businesses do not lose out on digital opportunities, securing the economic liberty of every participant in the market, for such an emergence of forward players. The Digital Competition Bill not only looks to adopt regulation but also toward the establishment of an ecosystem conducive to fostering entrepreneurship, deterring anti-competitive conduct, and ensuring a fair chance of success for all participating market players, irrespective of size.[36] Legitimate commercial activity of this nature would go further toward preserving the integrity of India's entrepreneurial landscape, where enterprises both big and small can all thrive and actively contribute to the growth of the digital economy. Therefore, the Digital Competition Bill is a watershed moment in securing the economic liberty of all players in the digital marketplace from being a mere theoretical concept.

32 Binns, R. (2021). *Algorithmic Bias and Fairness in the Digital Economy*. Indian Journal of Law and Technology, 17(3), pp. 111–138.

33 Schneider, (2022). Competition and innovation in digital markets: a balancing act. Law and Economics Journal, 28(1), pp. 134-150.

34 Cohen, J. E. (2020). Digital Platforms Regulation: New Age for Economic Freedom. Oxford University Press.

35 Binns, R. (2021). Algorithmic Bias and Fairness in the Digital Economy. Indian Journal of Law and Technology, 17(3), pp. 111–138.

36 India Briefing. (2025). India's Digital Competition Bill Advances with Industry Insights. Available at: <https://www.india-briefing.com/news/indias-digital-competition-bill-advances-with-industry-insights-36536.html/> (Last access: 18 February, 2025).

4. IMPLICATIONS OF ECONOMIC LIBERTY

Innovation, alongside consumer welfare, presents a broader impact that emanates from competition laws, with monopolistic behavior and fair competition always shielding digital competition law. If a competition law really intends to rigidly establish a level playing ground where it will recreate just as well the fertile grounds for innovation, then one of the harshest conditions that must exist will be competitive environments that constantly compel companies to innovate as a means of differentiation and improve newer and better products and services for consumers.[37] Provided that no dominant firm threatens to outdo them, they may invest in innovative forms or technologies or construct new business models to encourage innovation because they are willing to take that risk.[38] The Digital Competition Bill is particularly important for digital markets because it tends to enable multiple businesses to enter the market. The rules are on the conduct of firms within market space, while other smaller competitors are allowed to develop and launch new offerings for the betterment of consumer welfare. When the Bill restricts big companies from monopolizing segments of consumer interests, welfare is guaranteed, and competition dynamism is retained.[39] Competitive markets yield benefits like increased variety, lower prices, and higher quality.[40]

However, just as much through the Digital Competition Bill, regulation must show a flexible balance while encouraging economic liberty and consumer welfare. A regime without balance, through its overly regulatory measures of impeding innovation, will only limit those platforms and companies that have been the engines of the digital age development.[41] The burden on legislators, then, becomes how to frame a regulation that will deter monopoly practice without hindrance to the aesthetic development of such digital platforms, creating huge value for consumerism and businesses. For instance, the Digital Competition Bill has to make that limitation on self-preference and data mining such that it does not become a disincentive to investments in technologies that transform digital ecosystems.[42] This means that in prohibiting blanket prohibitions, a nuanced standard will have to be put in place that distinguishes harmful from benign practices. This balance is all the more pressing for the Indian context. India's 63 million-plus MSMEs are now transitioning to digital operations, and a regulation that is too rigid may curtail their growth or deter foreign direct investment. Regulation must be fit for the local business environment, tailored to apply different compliance obligations according to size and systemic impact.[43] The obligations imposed on a digital vendor at home would not be the same as those imposed on Amazon. Besides, the Bill should recognize and reward pro-competitive behaviors such as demonstrating interoperability among platforms, promoting open-source technologies, and mandating transparency in algorithms. Such provisions would encourage innovation but would never breed dependency or monopolistic control. Public-private partnerships in digital infrastructure would also promote access to SMEs located in less than served or remote areas. It will finally condense into a well-balanced application of the Digital Competition Bill towards fostering an inclusive and dynamic digital ecosystem. It would thus protect con-

37 Hayek, F. A. (2007, March). The road to serfdom. University of Chicago Press.

38 Smith, A. (1776). An inquiry into the nature and causes of the wealth of nations. Strahan, W., Cadell, T.

39 Schumpeter, J. A. (1942) Capitalism, Socialism and Democracy. Vol. 36, Harper & Row, New York, pp. 132-145.

40 Stigler, G. J. (2018). Digital monopolies and the limits of competition law. Journal of Economic Perspectives, 32(1), pp. 45-60.

41 Hayek, F. A. (2007, March). The road to serfdom. University of Chicago Press.

42 Binns, R. (2021). Algorithmic Bias and Fairness in the Digital Economy. Indian Journal of Law and Technology, 17(3), pp. 111–138.

43 Government of India. (2024). Report of the Committee on Digital Markets and Competition. Ministry of Corporate Affairs.

sumer liberties and stimulate innovation – all fundamental pillars that strengthen and further nourish genuine economic freedom in the 21st Indian digital economy.

CONCLUSION

The law that is today – the Digital Competition Bill, 2024-is set to amalgamate the economic and free in digital markets of India. In India, this groundbreaking piece of legislation heralds an entirely new epoch in the country's benign evolution in regulation-where the country now enters the world's forefront towards realizing a more equitable and inclusive digital economy. This Bill addresses the core gaps in the existing antitrust laws; therefore, it acts as a crucial tool for promoting competitive parity in the digital space, dismantling monopolistic structures, and upholding principles of economic liberty and democratic access within the digital sphere. Most importantly, the Bill is the structural transformation of digital markets by introducing measures towards transparency, the end of exploitative practices, and, most importantly, fair participation by all players. It specifically mentions gatekeeper platforms-those institutions in the digital ecosystem that hold disproportionate power-to prevent them from these practices, like preference to their products, unfair use of user data, and constraining terms on business users. Such measures, which in most need apply in India's rapidly burgeoning e-commerce and digital services environment, mark a decisive step towards the empowerment of start-ups, MSEs, as well as any individual entrepreneur, for they will have a fair chance to compete and innovate on their merit.

Above all, it addresses the very future, not only present inequities. Nowhere in history has there been more serious consideration of what unchecked dominion by a few could mean for all valuable markets when digital infrastructures find themselves, regardless of usage, becoming the essential backbone of commerce, communication, and services. This legislation fortifies India's commitment to shaping digital market competition among data monopolies, algorithmic discrimination, and network effects, which are silent to prevent new entrants, toward inclusive and accessible as well as long-term benefits of economic growth. The proactive nature of this regulatory position typifies the government's way forward in enhancing and promoting economic liberty while building a resilient digital economy. The law creates, moreover, an extra level of accountability in the governance of the digital state through procedural fairness and control of institutions. Transparency in ranking algorithms, terms of service, and grievance redress mechanisms demystifies the kinds of operational opacity that often characterize powerful digital platforms and empowers businesses and consumers to act with greater confidence and trust in market operations. Such trust is what the Bill promotes as being more than healthy for the operation of digital markets, but also desirable as the foundation for sustainable investment.

Another outcome worth remarkable mention from the Bill is the indirect benefit that it brings to the consumers. Competition naturally promotes innovation and higher service quality when smaller enterprises flourish. This translates to choosing more, better-quality options at lower prices for end users. Thus, not only do the producers of the digital economy are benefitted, but this Bill consequently appeals to the consumer crowd, so that the digital economy grows in a balanced, inclusive, and responsive manner to the needs of India's varied population. The potential for the Bill's success lies, however, very much in the ability of regulators to administer it wisely. There will be no exception to the rule that one fights for the rights of the innovation capacity of digital platforms. As in many cases, overregulation with little contextual flexibility could create inertia in bureaucracy or discourage investment in new, developing technology. Thus, then, the Bill must be termed a living document that develops with technological advancement and market dynamics. The Competition Commission of India (CCI), along

with industry bodies and civil society, has to carry out continuous review, adaptation, and fine-tuning of enforcement strategies to strike a healthy balance between oversight and entrepreneurial freedom.

Strengthening provisions around data portability, user consent, and interoperability can further increase the Bill's effectiveness. These mechanisms will greatly lower informational asymmetry and prevent lock-in of consumers, inducing healthy competition and allowing companies to compete on innovation rather than on fenced-off access to data. Government-green initiatives for awareness, regulatory support to actualize startup ideas, and proliferation in digital literacy will collectively add to the goals of this legislation by enabling workforce-wide participation in digital markets. The Digital Competition Bill of 2024 is not a law but a vision for a future digital India. It once again embodies the promise for a market where innovation, merit, and consumer interest trump power concentration and exploitative practices. It would restore opportunity balance, decrease dependence on digital oligarchs, and guarantee that economic liberty in the digital era is not an exclusive privilege, but a universal right. While world economies are grappling with similar issues concerning the concentration of their digital markets, India's bold and preventative approach could serve as a beacon. If executed insightfully, with inclusivity and integrity, the Digital Competition Bill could pave the way for a more competitive, transparent, and equitable digital economy-not just in India but as a model for the world.

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The Global Implications of South Africa's Transformative Constitutionalism on Private Law Systems

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ABSTRACT

This paper examines the global impact of South Africa's model of transformative constitutionalism on private law systems. It explores how the South African Constitution's mandate for systemic social change has reshaped the structure, function, and underlying assumptions of private law, both domestically and transnationally. Using a critical-comparative approach, the study analyses South African case law alongside developments in Germany, Colombia, and Canada. The central argument is that South Africa's experience challenges the classical liberal view of private law as autonomous from public law values, revealing a constitutionalised private sphere in which rights, duties, and remedies are interpreted through the lens of substantive justice. The paper also cautions against naïve universalism: the transplantation of transformative constitutionalism is neither linear nor frictionless, as it interacts with diverse legal cultures, political economies, and institutional capacities. South Africa's experience thus serves both as a template and a provocation—encouraging private law systems worldwide to rethink their normative commitments, while highlighting the complexities and contestations inherent in juridical transformation.

INTRODUCTION

The constitutional transition that South Africa underwent in 1994 is often hailed as one of the most ambitious legal and social projects of the modern era. At its core was not merely the replacement of one political regime with another, but a profound reimagination of the role of law itself as an instrument of societal transformation. Emerging from a history of systemic oppression, the South African Constitution of 1996 enshrines values such as dignity, equality, and freedom, not as abstract ideals but as actionable mandates to reconstruct the social and economic fabric of society. Central to this project is the concept of transformative constitutionalism, first articulated by Karl Klare, who described it as a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming political and social institutions in a democratic, participatory, and egalitarian direction.[1]

Key to this philosophy is a purposive and value-laden approach to legal interpretation, which insists that the Constitution is a dynamic instrument designed to guide society towards substantive justice. As Chief Justice Pius Langa explained, transformative constitutionalism requires a judiciary that is sensitive to context, history, and the material conditions of society, and willing to engage creatively with legal principles to achieve the Constitution's normative goals.[2] The Constitution's Bill of Rights (Chapter 2) extends horizontally, binding not only the state but also, where appropriate, private actors. This signals a decisive break with the classical liberal model of private law, where autonomy and formal equality were assumed to operate in isolation from constitutional values.

While much scholarship has focused on the transformative impact of the Constitution on public law domains – such as administrative law, criminal justice, and human rights – the implications for private law systems are no less revolutionary. South African courts have progressively recognised that concepts such as good faith, fairness, and public policy must be interpreted in light of constitutional rights.[3] In doing so, private law is no longer a neutral sphere insulated from constitutional scrutiny, but an arena through which values of equality, dignity, and justice are actively realised.

This paper investigates the global reverberations of South Africa's transformative constitutionalism on private law systems. It critically examines how South Africa's experience challenges the entrenched liberal distinction between public and private law and catalyses new debates about the constitutionalisation of private relations across jurisdictions. Landmark South African cases such as *Barkhuizen v Napier* and *Daniels v Scribante* are analysed against the backdrop of broader international debates. The central argument is that while South Africa's model cannot be mechanically transplanted into foreign jurisdictions, it nevertheless provides a compelling normative vision for reimagining private law as an active participant in the pursuit of social justice. In a world grappling with rising inequality and systemic injustice, the South African experience compels a reconsideration of private law's role in fostering democratic, inclusive societies.

METHODOLOGY

This study adopts a critical-comparative methodology, combining doctrinal analysis of South African case law with theoretical insights from global constitutionalism and private law theory. The doctrinal component focuses on landmark Constitutional Court decisions, including *Barkhuizen v Napier*, *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*, and *Daniels v Scribante*, which collectively il-

1 Klare, K. E. (1998). Legal culture and transformative constitutionalism. *South African Journal on Human Rights*, 14(1).

2 Langa, P. (2006). Transformative constitutionalism. *Stellenbosch Law Review*, 17(3).

3 See *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Daniels v Scribante* 2017 (4) SA 341 (CC).

lustrate the constitutionalisation of private law doctrines relating to contract, good faith, and property.[4] These cases are examined to demonstrate how constitutional imperatives such as dignity, equality, and fairness "radiate" into private relationships and reshape foundational legal concepts.

The comparative dimension juxtaposes South Africa's jurisprudential innovations with developments in jurisdictions grappling with the horizontal application of constitutional rights, notably Germany, Canada, and Colombia. Germany's doctrine of *Drittwirkung* illustrates how constitutional rights influence private law through interpretive principles; Canada's "Charter values" approach reflects a more cautious infusion of constitutional principles into private disputes; while Colombia demonstrates a transformative judicial role in reconfiguring private legal relations in the pursuit of social justice.[5] This comparative framework highlights both convergences and divergences, enabling a critical assessment of the global transposability of South Africa's transformative model.

Finally, the methodology is informed by critical legal theory, which challenges the supposed neutrality of private law and exposes its role in entrenching systemic inequalities.[6] By integrating doctrinal, comparative, and critical approaches, the study situates South Africa's transformative constitutionalism within broader debates on global constitutionalism and the future of private law.

1. CONCEPTUAL FOUNDATIONS OF TRANSFORMATIVE CONSTITUTIONALISM

The concept of transformative constitutionalism emerged as a central jurisprudential philosophy in South Africa's post-apartheid era. First articulated by Karl Klare,[7] transformative constitutionalism is defined as a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions, and its relations of power and hierarchy, in a democratic, participatory, and egalitarian direction. It moves beyond traditional understandings of constitutional supremacy as merely a framework for limiting state power; instead, it demands the active restructuring of society itself to redress historical injustices and entrenched inequalities.[8]

Key features of transformative constitutionalism include the promotion of substantive – rather than merely formal – equality, the protection and realisation of socio-economic rights, and a purposive, value-laden approach to legal interpretation.[9] It insists that the Constitution is not a static text but a dynamic instrument intended to guide social evolution towards greater justice. As Chief Justice Pius Langa[10] explained, transformative constitutionalism requires a judiciary that is sensitive to context, history, and the material conditions of society, and willing to engage creatively with legal principles to achieve the Constitution's normative goals.

Central to South Africa's transformative vision is the constitutional mandate to restructure both the public and private spheres. The Constitution, particularly through its Bill of

4 *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2011 (3) SA 1 (CC); *Daniels v Scribante* 2017 (4) SA 341 (CC).

5 See *Lüth* BVerfGE 7, 198 (1958); *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 S.C.R. 573; Colombian Constitutional Court decisions *T-406/92* and *T-881/02*.

6 Kennedy, D. (1976). Form and substance in private law adjudication. *Harvard Law Review*, 89; Klare, K. E. (1998). *Legal culture and transformative constitutionalism*.

7 Klare, K. E. (1998). Legal culture and transformative constitutionalism. South African Journal on Human Rights, 14(1), pp. 146–188.

8 Ibid; Langa, P. (2006). Transformative constitutionalism. Stellenbosch Law Review, 17(3), pp. 351–360.

9 Ibid.

10 Constitution of the Republic of South Africa. (1996). (Hereafter referred as the Constitution).

Rights (Chapter 2), binds not only the state but also, where appropriate, private persons.[11] This horizontal application signals a fundamental shift: private law domains such as contract, property, and delicts must now be interpreted and developed in line with constitutional values. The historic insulation of the private sphere – where relationships between individuals were governed solely by classical doctrines of autonomy and formal equality – was thus deliberately dismantled to allow constitutional imperatives like dignity, freedom, and substantive equality to infuse private relations.[12]

This reorientation of private law challenges the classical liberal model that has historically dominated Western legal thought. Under the liberal tradition, private law was conceived as a neutral framework within which free and rational individuals could autonomously pursue their interests, largely free from state interference.[13] Rights and duties were framed in formalist terms, prioritising certainty, predictability, and individualism. However, transformative constitutionalism exposes the myth of neutrality in private law, revealing how supposedly neutral doctrines often mask and perpetuate systemic power imbalances.[14] By compelling courts to interrogate the substantive fairness of private relations and to align private law rules with constitutional values, South Africa's constitutional project disrupts long-standing assumptions about the autonomy of private law and its insulation from broader societal concerns.

In sum, transformative constitutionalism represents both a theoretical and practical shift in how law is understood and deployed: it transforms private law from a mechanism of private ordering into a normative tool for achieving collective justice. This foundational shift forms the bedrock for South Africa's influence on global debates about the constitutionalisation of private law, as explored in subsequent sections.

2. TRANSFORMATIVE CONSTITUTIONALISM IN SOUTH AFRICAN PRIVATE LAW

The influence of transformative constitutionalism is perhaps most vividly seen in the reshaping of South African private law. Through landmark decisions, South African courts have demonstrated that constitutional values are not confined to public law but must actively inform and restructure private legal relationships. This section examines three pivotal cases – *Barkhuizen v Napier*,[15] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,[16] and *Daniels v Scribante*[17] – which collectively illustrate the courts' evolving approach to contractual freedom, good faith, and property rights within a transformative constitutional framework.

3. BARKHUIZEN V NAPIER: BALANCING CONTRACTUAL FREEDOM WITH CONSTITUTIONAL FAIRNESS

In *Barkhuizen v Napier*[18], the Constitutional Court addressed the enforceability of a time-limitation clause in an insurance contract. The Court recognised the importance of contractual freedom as a fundamental principle underpinning private law, rooted in individual autonomy and the right to self-determination.[19] However, it also insisted that this freedom is not absolute; all contractual terms must conform to public policy, which is now determined

11 Ibid., Section 8(2).

12 Currie, I., De Waal, J. (2013). The Bill of Rights handbook (6th ed.), Juta.

13 Pistor, K. (2019). The code of capital: How the law creates wealth and inequality. Princeton University Press.

14 Klare, K. E. (1998). Legal culture and transformative constitutionalism. South African Journal on Human Rights, 14(1), pp. 146–188; Langa, P. (2006). Transformative constitutionalism. Stellenbosch Law Review, 17(3), pp. 351–360; Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

15 Barkhuizen v Napier. (2007). (5) SA 323 (CC).

16 Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (2011).

17 Daniels v Scribante. (2017). (4) SA 341 (CC)

18 Ibid.

19 Barkhuizen. (2007), para. 57.

with reference to constitutional values, including fairness, reasonableness, and equality.[20]

The Court introduced a two-stage inquiry: first, whether the clause itself is contrary to public policy; and second, whether enforcement of the clause in the particular circumstances would be unreasonable or unfair.[21] This nuanced balancing act demonstrates how transformative constitutionalism reshapes private law – contractual autonomy is respected but not at the expense of substantive justice.[22]

4. GOOD FAITH AND CONSTITUTIONAL VALUES IN CONTRACT LAW

The Constitutional Court further advanced transformative constitutionalism in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[23] at issue was whether the court should enforce an obligation to negotiate the renewal of a lease agreement in good faith. Although the majority refrained from definitively constitutionalising the doctrine of good faith, the judgment suggested that common law doctrines must be developed in line with constitutional values, particularly the commitment to fairness, dignity, and Ubuntu.[24]

Justice Yacoob's judgment emphasised that private law should not operate in a constitutional vacuum and that the duty to develop common law principles in line with Section 39(2) of the Constitution is both a power and an obligation.[25] The Court thus opened the door for a more robust incorporation of good faith as a constitutional value capable of reshaping contractual relationships.[26]

This case signals a doctrinal shift away from rigid, formalistic interpretations of contracts towards a relational, justice-oriented approach, where the spirit of cooperation and fairness guides contractual enforcement.[27]

5. DANIELS V SCRIBANTE: PROPERTY RIGHTS REINTERPRETED TO ACHIEVE DIGNITY AND EQUALITY

In Daniels v Scribante,[28] the Constitutional Court confronted the tension between private property rights and the rights of occupiers to live with dignity. The applicant, a farmworker, sought to make improvements to her dwelling without the consent of the landowner, arguing that her constitutional right to adequate housing entitled her to do so.

The Court held that the Extension of Security of Tenure Act (ESTA) must be interpreted in light of the Constitution's commitment to dignity, equality, and housing rights.[29] The judgment recognised that the traditional understanding of property as an exclusive, dominion-based right had to yield to a more relational, socially embedded conception aligned with constitutional norms.[30]

Chief Justice Mogoeng, writing for the majority, declared that property rights must be exercised consistently with the values of dignity and equality, and that ownership can no longer be conceived as an absolute entitlement divorced from social obligations.[31] This decision represents a profound constitutionalisation of property law, where historical hierarchies embedded in ownership structures are actively

20 Ibid., para. 29.
21 Ibid., para. 56.
22 Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.
23 Everfresh (2011), para. 71.
24 Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (2011).
25 Ibid., para. 23; Constitution. (1996), s 39(2).
26 Bilchitz, D. (2011). Constitutionalism, the rule of law and the adjudication of private disputes: A view from South Africa. International Journal of Constitutional Law, 9(1), pp. 153–179.
27 Ibid.
28 Daniels v Scribante. (2017). (4) SA 341 (CC). (Daniels (2017), para. 37).
29 Ibid., Daniels. (2017), para. 37.
30 Fagan, A. (2010). Dignity and unfair discrimination: A value misplaced and a right misunderstood. South African Journal on Human Rights, 26(2), pp. 220–247.
31 Daniels. (2017), para. 47.

dismantled through purposive interpretation.

These landmark decisions not only illustrate the judiciary's commitment to infusing private law with constitutional values but also reflect a deeper normative shift toward relational conceptions of rights and duties. Central to this shift is the constitutional recognition of Ubuntu – a distinctly African philosophy of justice – which increasingly informs the development of private legal doctrines. A fuller engagement with Ubuntu reveals how it challenges liberal individualism and redefines private law's foundational assumptions in line with South Africa's transformative constitutional vision.

6. UBUNTU AND THE CONSTITUTIONAL TRANSFORMATION OF PRIVATE LAW

As South Africa's transformative constitutionalism reconfigures the foundations of private law, Ubuntu emerges as a critical normative resource that offers an alternative to liberal individualism.

By emphasizing relationality, human dignity, and communal responsibility, Ubuntu provides a uniquely African jurisprudential framework for interpreting and developing private legal doctrines in ways that advance the Constitution's transformative aims.

As South Africa's transformative constitutionalism reconfigures the foundations of private law, Ubuntu emerges as a critical normative resource that offers an alternative to liberal individualism.

7. KEY DOCTRINAL SHIFTS: PUBLIC POLICY, UBUNTU, AND CONSTITUTIONAL VALUES

Collectively, these cases illustrate transformative constitutionalism's radical impact on the doctrinal landscape of private law. First, the meaning of public policy has been constitutionalised: it now demands compliance with the Bill of Rights and broader constitutional values rather than merely reflecting prevailing social norms.[32] African philosophical notions emphasising interconnectedness, respect, and communal solidarity have been increasingly recognised as a normative guide within private law.[33]

Ubuntu informs not only the duties of fairness and good faith in contractual relations but also challenges the adversarial individualism historically embedded in private legal doctrines.

Third, the horizontal application of constitutional rights has cemented the idea that constitutional norms permeate all areas of law, requiring courts to develop and interpret private law in ways that advance the Constitution's transformative project.[34]

Thus, South African private law is no longer a neutral domain insulated from constitutional scrutiny; it is an active site for achieving societal transformation, embodying the values of equality, dignity, and social justice in everyday legal relations.

8. COMPARATIVE ANALYSIS: GLOBAL RESONANCES AND DIVERGENCES

South Africa's model of transformative constitutionalism has inspired and provoked comparative reflection in various jurisdictions. While its constitutionalisation of private law is distinctive in origin and scope, there are noteworthy resonances in other systems, particularly those that recognise the horizontal application of constitutional rights. This section undertakes a comparative analysis of three

32 Barkhuizen. (2007), para. 29; Everfresh. (2011), para. 23. Second, the principle of *Ubuntu* – a distinctly.

33 Metz, T. (2011). Ubuntu as a moral theory and human rights in South Africa. African Human Rights Law Journal, 11(2), pp. 532–559.

34 Constitution. (1996), s 8(2); Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

such jurisdictions – Germany, Canada, and Colombia, highlighting points of convergence with South Africa, while also critically engaging with the contextual factors that enable or inhibit the transformative use of constitutional norms in private law.

8.1 Germany: Horizontal effect (Drittwirkung) of fundamental rights

Germany presents a compelling example of how constitutional rights can influence private law through the doctrine of *Drittwirkung* (third-party effect). Under German constitutional jurisprudence, the Basic Law (*Grundgesetz*) primarily binds state actors. However, the Federal Constitutional Court has developed both *mittelbare Drittwirkung* (indirect horizontal effect) and *unmittelbare Drittwirkung* (direct horizontal effect), enabling constitutional rights to shape private legal relationships.[35]

In Lüth,[36] the Court famously held that all branches of the law – including civil law – must be interpreted in light of the values enshrined in the Basic Law, especially the dignity clause in Article 1. This interpretive principle mirrors South Africa's Section 39(2) of the Constitution, which requires that "every court... must promote the spirit, purport and objects of the Bill of Rights" when developing the common law.[37]

However, while German courts remain more restrained in directly invalidating private contracts or altering substantive private law norms, their indirect influence on legal interpretation closely resembles South Africa's purposive approach to adjudication[38]

The German model demonstrates how constitutional rights can seep into private relations through a systemic interpretive mandate, yet it remains more cautious in challenging the structural norms of private law than South Africa's explicitly transformative project.

8.2 Canada: Charter values and private law – Dolphin Delivery and beyond

Canada provides another instructive comparative example, albeit with a more limited horizontal application of constitutional rights. In Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd,[39] the Supreme Court of Canada held that the Canadian Charter of Rights and Freedoms does not apply directly to private litigation between non-state actors. However, it affirmed that Charter values – such as freedom of expression, equality, and dignity – may influence the development of the common law in disputes involving private parties.[40]

Subsequent cases, including Hill v Church of Scientology of Toronto,[41] confirmed that courts must interpret private law in a manner consistent with the "values and principles" underlying the Charter, even if the Charter itself does not directly bind the parties.[42] This value-based influence is conceptually akin to the South African court's use of constitutional values to shape doctrines of contract, delicts, and property law.[43] However, the Canadian model stops short of the transformative ambition characterising the South African Constitution. There is a continued reluctance in Canadian courts to

35 Currie, I. (2008). Balancing constitutional rights: The German and South African experience. Law, Democracy and Development, 12(2), pp. 1–22; Alexy, R. (2002). A theory of constitutional rights (Rivers, J., Trans.). Oxford University Press.

36 Lüth BVerfGE 7, 198, 1958.

37 The Constitution.

38 Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

39 In Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd. (1986). 2 S.C.R. 573.

40 Dolphin Delivery. (1986).

41 Hill v Church of Scientology of Toronto. (1995). 2 S.C.R. 1130.

42 Roach, K. (2001). The Supreme Court on trial: Judicial activism or democratic dialogue. Irwin Law.

43 Bilchitz, D. (2011). Constitutionalism, the rule of law and the adjudication of private disputes: A view from South Africa. International Journal of Constitutional Law, 9(1), pp. 153–179.

fully reconfigure private law rules in pursuit of social justice, revealing a more restrained, incrementalist tradition.[44]

8.3 Colombia: Transformative constitutionalism and private relations

Colombia offers perhaps the most striking example, outside South Africa, of the judicial application of transformative constitutionalism in private law. Following the adoption of the Colombian Constitution of 1991, which declared Colombia a "social state under the rule of law", the Constitutional Court began using constitutional values to directly influence private legal relationships.[45]

In decisions such as Sentencia T-406/92 and T-881/02,[46] the Colombian Constitutional Court recognised that private actors, particularly in asymmetrical relationships such as employment or tenancy, may be constitutionally obligated to respect the dignity and fundamental rights of weaker parties.[47] The Court has explicitly acknowledged the need to reinterpret private law in light of constitutional principles, particularly in socio-economic contexts where the formal equality of contracting parties is fictional.

Colombia's socio-political context – marked by extreme inequality, historical violence, and weak state capacity – has necessitated a robust judicial role in promoting social justice. Much like in South Africa, the Colombian judiciary sees itself as an active participant in societal transformation, empowered to reshape legal norms where the legislature or executive may be ineffective.[48]

9. CRITICAL COMPARISON: CONTEXTUAL ENABLERS AND INHIBITORS

The global diffusion of constitutional norms into private law is neither uniform nor universally accepted. The divergences among Germany, Canada, and Colombia – despite shared constitutional commitments – illustrate the importance of contextual factors in shaping the trajectory of constitutional private law.

Institutional design, legal tradition, political history, and judicial philosophy all influence how transformative constitutionalism is implemented.[49] For instance, Germany's civil law tradition and strong private law formalism temper the direct influence of constitutional norms, while Canada's common law heritage fosters doctrinal flexibility but retains a cautious posture due to the Charter's limited horizontal reach. In contrast, South Africa and Colombia, both emerging from deeply unequal and violent pasts, have embraced a more interventionist judiciary capable of using constitutional values to reconfigure private legal relations.

Yet, such a transformation is not without critique. Scholars warn that the over-judicialisation of social reform may strain judicial legitimacy or usurp legislative authority.[50] Others point out that, absent real changes in economic and institutional structures, judicial interventions in private law may yield symbolic rather than substantive transformation.[51]

Nonetheless, South Africa's transformative constitutionalism offers a bold, normatively compelling model for jurisdictions grappling with structural inequality and systemic exclusion. Its influence abroad – while adapted to

44 Gardbaum, S. (2003). The new commonwealth model of constitutionalism: Theory and practice. Cambridge University Press.

45 Uprimny, R. (2006). The enforcement of social rights by the Colombian Constitutional Court: Cases and debates.

46 Sentencia T-406/92 and T-881/02.

47 Uprimny, R. (2006). The enforcement of social rights by the Colombian Constitutional Court: Cases and debates.

48 In Gargarella, R., Domingo, P., Roux, T. (Eds.). Courts and social transformation in new democracies. Routledge, pp. 127–151.

49 Klare, K. E. (1998). Legal culture and transformative constitutionalism. South African Journal on Human Rights, 14(1), pp. 146–188.

50 Gardbaum, 2003; Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

51 Pistor, K. (2019). The code of capital: How the law creates wealth and inequality. Princeton University Press.

local contexts – signals a growing recognition that private law cannot remain a bastion of formalism if constitutional democracies are to be truly inclusive and just.

10. CHALLENGES AND LIMITS OF GLOBAL INFLUENCE

While South Africa's model of transformative constitutionalism has inspired significant global interest, its influence on private law systems across different jurisdictions is neither automatic nor unproblematic. Efforts to constitutionalise private legal relationships face several critical challenges, particularly concerning judicial legitimacy, the difficulties of legal transplantation, and tensions inherent between the demands for legal certainty and the imperatives of social transformation.

10.1 Risks of judicial overreach and democratic legitimacy concerns

A persistent concern surrounding transformative constitutionalism is the risk of judicial overreach. When courts actively reconfigure private law in pursuit of constitutional goals, they may encroach upon domains traditionally reserved for democratic legislatures. This concern is particularly acute in pluralistic societies where competing conceptions of justice must be negotiated through inclusive political processes rather than imposed through judicial fiat.[52]

Critics argue that expansive judicial interpretations may undermine democratic legitimacy by concentrating transformative decision-making power in unelected bodies.[53] In the South African context, while the judiciary's role has been largely celebrated for advancing rights and correcting systemic injustices, scholars caution that the courts must remain attentive to the limits of their institutional competence and defer, where appropriate, to legislative processes better equipped to manage complex socio-economic reforms.[54] The legitimacy of transformative constitutionalism thus depends on maintaining a delicate balance between the courts' duty to enforce constitutional rights and the need to respect democratic self-government.

10.2 The problem of legal transplantation: Socio-political and institutional contingencies

The global appeal of South Africa's transformative model also encounters the problem of legal transplantation – the challenges of transplanting legal doctrines or practices from one socio-political context to another. As Watson[55] famously argued, legal transplants are rarely straightforward because legal rules are deeply embedded in specific historical, cultural, and institutional settings. Attempting to impose South African-style constitutionalisation of private law onto other jurisdictions without accounting for local conditions risks superficial adoption without meaningful integration.

For instance, while Germany's constitutional jurisprudence reflects sophisticated mechanisms for integrating human rights into private law, its formalistic legal tradition and entrenched legal culture of Rechtsstaatlichkeit (the rule of law) impose inherent limits on transformative ambitions.[56] Similarly, Canadian courts, grounded in a tradition of judicial restraint and respect for parliamentary sovereignty, have been cautious in allowing Charter values to disrupt private law doctrines significantly.[57]

52 Gardbaum, S. (2003). The New Commonwealth Model of Constitutionalism: Theory and Practice. Cambridge University Press, Cambridge.

53 Tushnet, M. (1999). Taking the Constitution away from the courts. Princeton University Press.

54 Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

55 Watson, A. (1974). Legal transplants: An approach to comparative law. Scottish Academic Press.

56 Currie. (2008).

57 Uprimny, R. (2006). The enforcement of social rights

Thus, transformative constitutionalism cannot be mechanically replicated across jurisdictions. Success depends on the institutional capacity of the judiciary, the political culture, the level of rights consciousness, and the historical context of inequality and exclusion that the legal system seeks to address.[58] Without these enabling conditions, efforts to constitutionalise private law risk ineffectiveness or unintended counterproductive consequences.

10.3 Tensions between legal certainty and transformative demands

Finally, transformative constitutionalism inevitably generates tensions between the values of legal certainty and the demands of social transformation. Private law traditionally values predictability, consistency, and stability – features essential for enabling individuals and businesses to plan their affairs with confidence.[59] The introduction of broad constitutional values such as fairness, dignity, and Ubuntu into private law adjudication can introduce elements of indeterminacy and uncertainty, as courts may re-evaluate established doctrines in light of evolving social norms.[60]

For instance, in Barkhuizen v Napier,[61] the Constitutional Court's approach to assessing contractual clauses against constitutional values introduced a more flexible but less predictable standard based on fairness and public policy considerations. While such flexibility promotes substantive justice, it may also erode the clarity and reliability traditionally associated with private agreements.[62]

This tension is not easily resolved. Striking an appropriate balance requires courts to develop nuanced, context-sensitive standards that remain faithful to constitutional values without sacrificing the coherence and internal logic of private law.[63] Failure to manage this balance risks alienating key sectors of society, undermining economic development, or fostering perceptions of judicial arbitrariness.

11. EXPANDING THE COMPARATIVE DIMENSION: RESISTANCE AND CHALLENGES TO CONSTITUTIONALISATION

While South Africa's transformative constitutionalism has found resonance in jurisdictions such as Germany, Canada, and Colombia, other legal systems have demonstrated significant resistance to the constitutionalisation of private law. For example, in the United States, despite a robust constitutional culture, private law remains largely insulated from constitutional norms. The entrenched commitment to classical liberalism and the sanctity of contract doctrine reinforces a formalist approach, where private law is treated as a separate domain governed primarily by market logic rather than constitutional values.[64] Courts have been reluctant to permit constitutional rights to intrude upon private relationships, maintaining a sharp distinction between state action and private conduct.

Similarly, efforts within Europe to integrate human rights into private law through instruments like the Draft Common Frame of Reference (DCFR) reveal both promise and difficulty.

by the Colombian Constitutional Court: Cases and debates. In Gargarella, R., Domingo, P., Roux, T. (Eds.), Courts and social transformation in new democracies, Routledge, pp. 127–151.

58 Ibid.

59 Luhmann, N. (2004). Law as a social system (Ziegert, K., Trans.). Oxford University Press.

60 Klare. (1998).

61 Barkhuizen. (2007). (5) SA 323 (CC).

62 Ibid., para. 57.

63 Bilchitz, D. (2011). Constitutionalism, the rule of law and the adjudication of private disputes: A view from South Africa. International Journal of Constitutional Law, 9(1), pp. 153–179.

64 Horwitz, M. J. (1977). The transformation of American law, 1780–1860. Harvard University Press, Cambridge, MA; Kennedy, D. (1976). Form and substance in private law adjudication. Harvard Law Review, 89, pp. 1685–1778.

While the DCFR explicitly acknowledges fundamental rights and aims to promote values such as human dignity and non-discrimination within European contract and property law, it struggles to reconcile these commitments with the internal demands of market integration, legal certainty, and doctrinal autonomy.[65] The tension between harmonizing private law for economic purposes and embedding substantive social values mirrors broader global challenges in reimagining private law as a vehicle for constitutional transformation.

These examples highlight that the constitutionalisation of private law is neither inevitable nor uncontested. Instead, it depends on a complex interplay of historical, cultural, and institutional factors that shape each jurisdiction's willingness and ability to infuse private legal relationships with public law values.

12. UBUNTU AS A DISTINCTIVE JURISPRUDENTIAL RESOURCE IN TRANSFORMATIVE PRIVATE LAW

Ubuntu offers a distinctively African normative foundation that challenges the classical liberal assumptions underlying traditional private law. Centering relationality, community, and solidarity, Ubuntu reimagines justice not as the protection of atomistic individuals but as the promotion of harmonious social relationships.[66]

In South African constitutional jurisprudence, Ubuntu has moved beyond cultural rhetoric to serve as a substantive constitutional value capable of reshaping private legal relations. Justice Mokgoro emphasizes Ubuntu's role in advancing human dignity, equality, and restorative justice,[67] while Metz frames it as a coherent moral theory that prioritizes communal flourishing over adversarial individualism.[68]

Judicial decisions increasingly reflect Ubuntu's influence. In Everfresh Market Virginia (Pty) Ltd,[69] the Constitutional Court underscored that principles of good faith and fairness, deeply resonant with Ubuntu, must inform contract law development.[70] Likewise, in Daniels v Scribante,[71] the Court reinterpreted property rights to prioritize dignity and equality over exclusionary ownership models, aligning property law with Ubuntu's relational ethic.[72]

Thus, Ubuntu grounds a transformative reorientation of South African private law, embedding constitutional values into everyday legal relations and offering a jurisprudential model that foregrounds communal responsibility, social justice, and substantive equality.

As South Africa's transformative constitutionalism reconfigures the foundations of private law, Ubuntu emerges as a critical normative resource that offers an alternative to liberal individualism. By emphasising relationality, human dignity, and communal responsibility, Ubuntu provides a uniquely African jurisprudential framework for interpreting and developing private legal doctrines in ways that advance the Constitution's transformative aims.

13. EMPIRICAL AND POLICY RECOMMENDATIONS

While this paper has primarily offered a theoretical and comparative analysis, the practical success of transformative constitutionalism in private law also depends on targeted policy interventions and empirical engagement with the realities of legal practice. Several concrete recommendations emerge.

65 Micklitz, H. W. (2011). Social justice and access justice in private law (EUI Working Paper Law No. 2011/02). European University Institute.

66 Mokgoro, Y. (1998). Ubuntu and the Law in South Africa. Buffalo Human Rights Law Review 4: 15–23.

67 Ibid.

68 Metz, T. (2011). Ubuntu as a Moral Theory and Human Rights in South Africa. African Human Rights Law Journal 11 (2): 532–559.

69 In Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd. (2011).

70 Ibid., para. 71.

71 Daniels v Scribante. (2017). (4) SA 341 (CC).

72 Ibid., para. 47.

First, there is a pressing need for legislative reform to consolidate and clarify the constitutional principles that have begun to reshape South African private law. In particular, the Common Law of Contract remains heavily rooted in classical liberal assumptions about freedom of contract and autonomy, despite judicial efforts to infuse it with constitutional values. Parliament, in collaboration with the South African Law Reform Commission, should consider initiating a comprehensive review of contract law to explicitly incorporate principles of fairness, good faith, and substantive equality. Codifying these constitutional commitments would provide greater clarity and consistency, particularly for lower courts and litigants lacking access to sophisticated legal resources.

Second, empirical research is needed to assess how constitutional values are being applied in lower courts, particularly in Magistrates' Courts, where most ordinary South Africans experience the legal system. Existing jurisprudence from the Constitutional Court and the Supreme Court of Appeal offers guidance at a high doctrinal level, but little is known about how, or whether, lower court judges interpret and apply constitutional norms in everyday private disputes involving tenancy, employment, small contracts, or property use. Empirical studies – including court file reviews, judicial interviews, and analysis of reported decisions could reveal whether transformative constitutionalism is genuinely penetrating the grassroots of the legal system or whether it remains largely aspirational.

Third, legal education and judicial training programmes must be recalibrated to support the deepening of constitutional culture within private law. Universities and professional bodies should prioritize curricula that integrate constitutional analysis across all private law subjects, while judicial education programmes should equip magistrates and other judicial officers with the tools to engage meaningfully with constitutional values in their adjudication of private disputes.

Ultimately, for transformative constitutionalism to realize its full potential within the domain of private law, reform efforts must move beyond high-level jurisprudence toward systemic changes in legislation, legal practice, education, and empirical understanding. Without such efforts, the constitutional promise risks remaining an elite project, distant from the everyday legal experiences of the majority of South Africans.

CONCLUSION

This paper has argued that South Africa's transformative constitutionalism profoundly reshapes the relationship between constitutional rights and private law, offering both a catalyst for innovation and a cautionary template for global legal reform. Through a deliberate constitutional mandate, South African courts have sought not merely to protect individual rights in public law, but to infuse private legal relations with substantive values of dignity, equality, and freedom.[73] In doing so, South Africa challenges the classical liberal model that insulated private law from constitutional scrutiny, advancing a jurisprudential model where justice permeates all spheres of social life.

Comparative analysis reveals that while South Africa's approach resonates with developments in Germany's doctrine of Drittwirkung, Canada's infusion of Charter values into common law, and Colombia's socio-economic rights adjudication, each jurisdiction's experience reflects distinct institutional, cultural, and political contingencies.[74] The South African example thus acts as both inspiration and caution: it demonstrates the emancipatory potential of constitutionalising private law while simultaneously exposing risks of judicial overreach, legitimacy deficits, and tensions between transformation and legal certainty.[75]

73 Klare, K. E. (1998). Legal culture and transformative constitutionalism. South African Journal on Human Rights, 14(1), pp. 146–188.

74 Currie (2008); Roach (2001); Uprimny (2006).

75 Gardbaum (2003); Watson (1974).

The broader implications of this study are profound. In an era where rising inequality, global constitutionalism, and demands for social justice increasingly challenge the traditional neutrality of private law, South Africa's experience compels a rethinking of foundational assumptions. Private law systems worldwide must confront whether adherence to formalistic traditions can remain viable in the face of constitutional commitments to human dignity, equality, and social transformation.[76] However, successful adaptation requires sensitive attention to local contexts, institutional capacities, and the preservation of democratic legitimacy.[77]

Ultimately, South Africa's transformative constitutionalism invites jurists, scholars, and policymakers to envision private law not as a static repository of rules but as a dynamic tool for realising constitutional ideals. Its lessons caution against naïve transplantation, yet they affirm that in reimagining private legal relations, law can become an instrument of genuine, inclusive transformation – fulfilling the constitutional promise of a more just and humane society.

76 Bilchitz, D. (2011). Constitutionalism, the rule of law and the adjudication of private disputes: A view from South Africa. International Journal of Constitutional Law, 9(1), pp. 153–179.

77 Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

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Securing Electronic Data and Safeguarding Personal Privacy in the Digital Environment *(Pursuant to the Provisions of Algerian Law No. 18-07 on the Protection of Personal Data)*

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ABSTRACT

In the context of rapid digital advancement, securing data has become a central concern for both individuals and institutions. Data security refers to a broad set of technical and organizational practices aimed at preventing unauthorized access, alteration, or destruction of information. Rather than relying solely on encryption or access control tools, effective data protection involves a multilayered approach that includes user awareness, preventive policy frameworks, and continuous monitoring.

Modern challenges to data security are increasingly complex due to the exponential growth of digital information and the evolving nature of cyber threats. Attackers now exploit vulnerabilities using sophisticated techniques, often bypassing traditional defenses. This highlights the urgent need for proactive strategies that combine technological safeguards with human-centered practices such as employee training and ethical data handling.

Furthermore, the legal dimension of data security has gained prominence, with many jurisdictions enforcing stricter regulations to protect individuals' rights. Legal compliance—particularly with frameworks like the General Data Protection Regulation (GDPR)—is no longer optional but essential for

maintaining organizational credibility and avoiding penalties.

Ultimately, securing data in today's interconnected world requires an ongoing commitment. It is not a fixed goal but a dynamic process that evolves with technological, legal, and social developments. Ensuring data security strengthens public trust, reinforces privacy principles, and lays a solid foundation for sustainable digital transformation.

INTRODUCTION

Data and information constitute one of the most critical pillars of any company, often regarded as its most valuable assets. In the event of a breach, a company is bound to incur substantial losses, with its reputation inevitably damaged. Failure to address such breaches and their consequences effectively could result in the leakage of client data and information, ultimately leading to the company's collapse. Therefore, protecting the IT infrastructure that houses this data becomes imperative.

With the global escalation of cyber-attacks, the demand for security products and services has risen significantly, driven by persistent threats and the evolving nature of cyber-attack patterns.

Data security encompasses the protective strategies implemented to shield data from unauthorized access, ensuring the confidentiality, integrity, and availability of databases. Optimal methodologies in data security include techniques such as data encryption, key management, data masking, data subsetting, and data redaction, alongside controls for privileged user access, auditing, and monitoring.

Data, being a vital asset of any firm, must be safeguarded against unwanted access. Data breaches, unsuccessful audits, and non-adherence to regulatory mandates can lead to reputational harm, forfeiture of corporate ownership rights, compromised intellectual property, and penalties for regulatory non-compliance.

Under the General Data Protection Regulation (GDPR) of the European Union, data breaches may incur fines of up to 4% of an organization's global annual turnover, frequently resulting in significant financial losses. Financial information, medical records, intellectual property, and personally identifiable information (PII) are all considered sensitive data. Safeguarding this data is crucial to avert breaches and maintain regulatory compliance.

Databases function as essential storage of sensitive information, rendering them a primary target for data thieves. Data intruders are often classified into two categories: external users and internal users.

External users include various entities, such as individual hackers and cybercriminals, that seek to disrupt business operations or attain financial profit. They encompass organized crime syndicates and state-sponsored organizations aiming to perpetrate fraud or instigate disruptions on a national or global level.

Internal users may encompass current or former workers, inquisitive persons, clients, or partners who misuse their position of trust to appropriate data or whose mistakes accidentally result in security breaches. Both external and internal users present threats to the security of personal data, financial information, trade secrets, and regulated data.

The safeguarding of personal data has become increasingly crucial in the contemporary digital age. Due to swift technological improvements and the pervasive usage of the internet, individuals frequently disclose their personal information online. Personal data is collected,

kept, and utilized by multiple entities across social media platforms and e-commerce websites, frequently without explicit consent or awareness. This engenders significant privacy issues and underscores the necessity for robust safeguards to protect personal information.

In the contemporary digital era, data functions as the essential resource for enterprises, governments, and individuals. Data, encompassing sensitive consumer information and intellectual property, constitutes the foundation upon which institutions function and make pivotal decisions. Nonetheless, due to the increasing dependence on technology and a continuously changing threat environment, the significance of data security is paramount. It is no longer solely about safeguarding sensitive information; it has become a strategic necessity that can influence an organization's reputation, financial viability, and potentially its survival.

To address the increasing risks to the privacy and confidentiality of personal data in the digital realm, a number of international organizations have put forward and implemented policies. The Organization for Economic Co-operation and Development (OECD) has underlined the necessity of bolstering the right to privacy in order to facilitate the unrestricted flow of personal data. Similarly, the UN General Assembly established rules for the control of personal data files in its Resolution 45/95.

The European Union established regulations to safeguard individuals against the processing of digital data. Numerous countries have also enacted legal provisions to safeguard personal data. Algeria, like other nations, has prioritized the establishment of a legal framework to protect individuals' personal data.

STUDY PROBLEM

This study seeks to analyze the procedures and techniques for safeguarding personal data under Algerian law by evaluating the principal aspects and clauses of Law No. 07/18, enacted on June 10, 2018, about safeguarding people when processing their personal information.

This leads us to the following key question: **How has the Algerian legislator secured digital data to protect individuals' personal privacy?**

We have structured this article as follows:

- The conceptual framework for personal data;
- The legal framework of the National Authority for the Protection of Personal Data;
- Procedures for processing personal data.

METHODOLOGY

The research employs a doctrinal legal methodology, centered on the analysis of primary and secondary legal sources, including the Algerian Constitution, Law No. 18-07 on the protection of personal data, and related legislative acts. This approach is complemented by the examination of international instruments such as the GDPR, OECD guidelines, and UN resolutions, which provide a comparative framework for situating Algerian law within broader international standards. The study also incorporates a critical interpretative dimension by evaluating the institutional independence and effectiveness of the National Authority for the Protection of Personal Data. This combined approach ensures both descriptive and analytical insights, allowing the research to highlight legal strengths while identifying potential gaps in implementation.

1. THE CONCEPTUAL FRAMEWORK FOR PERSONAL DATA

1.1 Definition of personal data

Maintaining a person's right to privacy depends critically on the protection of their personal information. National legislatures have therefore quickly passed legislation to protect individuals while collecting personal data. The Algerian lawmaker who passed Law No. 18-07 on June 10, 2018, regarding the protection of natural

persons in the use of personal data is one example. This law established the "National Authority for the Protection of Personal Data", a crucial organization to protect the handling of personal data while respecting people's right to privacy.

Any information, regardless of type, that directly or indirectly relates to an identifiable individual is referred to as personal data. An identifying number or other components of a person's physical, physiological, genetic, biometric, psychological, economic, cultural, or social identity can be used as the primary means of identification.

Based on this definition, personal data is categorized into two main types:

- Direct Personal Data: This includes data of an explicit personal nature, such as names, surnames, postal and email addresses, genetic data, health records, criminal records, personal photographs, civil status, résumés, birth dates, places of residence, and workplaces;
- Indirectly identifiable information includes things like phone numbers, social security numbers, national identity card numbers, passwords, bank account numbers, fingerprints, genetic profiles, and biological and biometric data.

1.2 Enshrining the protection of personal data in Algerian law

In compliance with Article 46 of the 2016 amended Algerian Constitution, the National Authority for the Protection of Personal Data was established by the Algerian parliament. This was aimed at striking a balance between the requirements of public security on the one hand and the rights and freedoms of individuals on the other.[1] This principle was reaffirmed in Article 47 of the 2020 Algerian Constitution.[2]

The National Authority is an independent administrative body in charge of safeguarding personal information. It operates without administrative or hierarchical oversight and has legal individuality as well as financial and administrative autonomy.[3] The President of the Republic appoints the "National Authority", an independent administrative body for the protection of personal data, as specified in Article 22 of Law No. 18-07. The Authority, which has its headquarters in Algiers, is financially and administratively independent in addition to having legal individuality. The budget is subject to the relevant financial control regulations and is part of the state budget.

In the framework of processing personal data, the law created a number of measures to protect persons. The establishment of the National Authority for the Protection of Personal Data is among the most crucial mechanisms. The Authority is designated as an autonomous administrative entity, possessing legal identity, as well as financial and administrative autonomy.

This study's significance pertains to the regulations governing the Authority's autonomy, which constitute a key feature distinguishing it from other traditional administrative bodies in the state. However, despite the formal aspects of independence reflected in various provisions, this independence is, in practice, relative and closer to a theoretical ideal than a tangible reality.

1 Official Gazette of the People's Democratic Republic of Algeria. (2016, March 7). Issue No. 14. "The law protects the inviolability of a citizen's private life and honor, which cannot be compromised. All private communications and correspondence are guaranteed to remain confidential. Only a well-reasoned order from the legal authority may violate these rights in any manner. Violations of this provision are punishable by law. A fundamental right protected by law is the protection of natural persons in the processing of personal data; infractions of this right can result in legal repercussions".

2 Official Gazette of the People's Democratic Republic of Algeria. (2020, December 30). Issue No. 82. "Every person is entitled to the protection of their personal honor and private life. Regardless of the format, everyone has the right to keep their private communications and correspondence private. Only a well-reasoned order from the judicial authority may violate the rights outlined in the first and second paragraphs. One fundamental right is the protection of individuals when personal data is processed. The law punishes any infringement of these rights".

3 Ghazal, N. (2019). The protection of natural persons in the field of personal data. Algerian Journal of Legal and Political Sciences, p. 125.

2. THE LEGISLATIVE FRAMEWORK FOR THE NATIONAL AUTHORITY FOR THE PROTECTION OF PERSONAL DATA

2.1 The legal framework for the protection of personal data

A successful legislative framework for personal data protection necessitates the presence of procedures and resources for proper implementation and oversight to ensure the correct application of the law. Personal data protection cannot be achieved without establishing an administrative body responsible for enforcing the rules and provisions of the law.

Article 23 of Law No. 18-07 stipulates the formation of this administrative body, consisting of 16 members, appointed by presidential decree. While the president is responsible for appointing the chairperson of the authority, the members are selected by their peers from within the councils to which they belong. The composition is as follows:

Six advisors, including:

- Two current or former members of the Council of State, with a rank no less than that of an advisor;
- Two current or former members of the Court of Cassation, with a rank no less than that of an advisor;
- Two current or former members of the Court of Auditors, with a rank no less than that of an advisor;
- The general assembly of each distinct institution elects these members.

2.2 Composition of the National Authority for the Protection of Personal Data

Regarding the nomination process for each member, the Algerian legislator specifies that the composition of the Authority includes:

- The President of the Republic nominated three people, including the president, from among specialists in the operations of the National Authority;
- The High Judicial Council selected three Supreme Court and Council of State judges.[4]

The Authority is also empowered to seek assistance from any qualified individual for consultation and support in carrying out its duties. Additionally, it includes an executive secretariat and personnel employed to assist the executive body in fulfilling its responsibilities.[5]

Referring to the composition of the National Authority, the Algerian legislator required that the Authority be supported by specialists. While the legislation allows for external consultation, it would have been preferable to explicitly include university professors and researchers specializing in rights, freedoms, and information technology. Their expertise, particularly in comparative legislation and studies conducted in this field, could greatly enhance the Authority's effectiveness.

The Algerian legislator specified the appointment of three experts in the Authority's field of work, reflecting the multidisciplinary nature of its jurisdiction, which encompasses judicial, quasi-judicial, and administrative domains. Notably, in some legislations, bodies tasked with protecting personal data are granted extensive regulatory and executive powers, including criminal penalties for non-compliance with the Authority's orders.[6,7]

Under the Algerian legal system, the President of the Republic is given the power to choose the Authority's president. This central-

4 Ordinary Law No. 18-07. (2018, June 10). Concerning the protection of natural persons in the processing of personal data. Official Gazette of the People's Democratic Republic of Algeria, No. 34, Art. 23(3).

5 Ordinary Law No. 18-07. (2018, June 10). Concerning the protection of natural persons in the processing of personal data. Official Gazette of the People's Democratic Republic of Algeria, No. 34, Art. 23.

6 This is consistent with the approach taken by the British legislator in Law No. 98 on the Protection of Personal Data in the digital environment, which established a personal data protection authority known as the Office of the Information Commissioner.

7 Khalawi, A., Ben Zitah, A. (2022). The independent administrative authority for the Protection of Personal Data: A study in French and Algerian law. Algerian Journal of Legal and Political Sciences, p. 125.

ization of appointment authority risks undermining the independence of the Authority in implementing its decisions. The legislator limited the President's role to appointing, renewing membership, and terminating appointments through a presidential decree, requiring the Authority to submit an annual report to the Republic's President.[8]

The Authority is tasked with issuing opinions on the data processing activities referenced in Articles 31 and 32 of Law No. 18-07. Additionally, it develops and publishes guidelines, recommendations, and standards to facilitate compliance with personal data protection regulations. It is also responsible for conducting preliminary risk assessments related to data processing activities by data controllers and their contractors.

It is primarily an ethical rather than a legal requirement for members of the National Authority for the Protection of Personal Data to take an oath. This reinforces their commitment to exercising their legal powers with impartiality, objectivity, and integrity, particularly regarding confidential information. Such an approach ensures that all members of the Authority remain independent and are not subject to any oversight or external control.

Before beginning their duties, members of the National Authority are sworn in at the Algiers Court of Justice.[9] However, it is noteworthy that the process of election is absent in determining membership within the Authority. The Algerian legislator established a five-year term for membership, subject to renewal,[10] comprising people chosen for their legal or technical proficiency in personal data protection.[11]

The concept of competence underpins membership in the National Authority for the Protection of Personal Data.[12]

3. PROCEDURES FOR PROCESSING PERSONAL DATA

3.1 Processing of personal data

All grievances and inquiries submitted by data subjects, organizations, associations, or entities are addressed through the examination and verification of the complaint's subject matter. The complainant is informed of the investigation's progress and results within a designated timeframe. The Authority addresses requests for opinions from public bodies and courts as needed and offers consultations to persons and organizations engaged in or intending to engage in automated personal data processing.

In accordance with Article 40 of the Code of Illegal Procedure, the Authority promptly informs the Public Prosecutor of any illegal activities or violations. Moreover, under Article 19 of Law No. 87-17, the Authority may issue a special decision assigning one or more of its members or the Secretary-General to carry out investigations or delegate its agents and departments to conduct verification procedures. When required, it may also obtain copies of all relevant documents and informational materials necessary for its mission.

The Authority may create a list of data processing operations that are anticipated to pose major risks, which must undergo prior consultation as mandated by Article 90 of Law No. 87-17. Furthermore, Article 25, paragraph 1, of Law No. 18-07 mandates that the National Authority for the Protection of Personal Data ensure compli-

8 Bala, A. (2021). The national authority for the protection of personal data: Between independence and subordination. Algerian Journal of Human Security, p. 783.

9 Before assuming their duties, members of the National Authority take an oath before the Court of Algiers in the following form: "I swear by Almighty God to perform my duties as a member of the National Authority for the Protection of Personal Data with full independence, impartiality, honor, and integrity, and to maintain the confidentiality of deliberations".

10 Ordinary Law No. 18-07. (2018, June 10). Concerning the protection of natural persons in the processing of personal data. Official Gazette of the People's Democratic Republic of Algeria, No. 34, Art. 23(4).

11 Ordinary Law No. 18-07. (2018, June 10). Concerning the protection of natural persons in the processing of personal data. Official Gazette of the People's Democratic Republic of Algeria, No. 34, Art. 23 (2).

12 Wataba, K. (2019). The legal nature of independent administrative authorities in Algeria and comparative systems. Journal of Legal and Political Sciences, April, p. 7.

ance with the legislation pertaining to personal data processing as specified in Law No. 18-07. It also ensures that the utilization of information and communication technology does not jeopardize individual rights, public liberties, or personal privacy.

The Authority may offer recommendations and adopt individual or regulatory decisions as mandated by law in the execution of its responsibilities. Furthermore, the Authority presents an annual public report to the President of the Republic and the Prime Minister, outlining the fulfillment of its purpose.

3.2 Role of the data controller

The National Authority for the Protection of Personal Data and the data controller must collaborate. The Authority's operations are considered to be hampered by any interference with its operations, such as preventing on-site investigations, denying its members or agents access to necessary documents, giving information that conflicts with records that were already in existence at the time of the request, or failing to provide clear and straightforward information. Additionally, submitting incomplete or intentionally erroneous documents to obscure the truth constitutes an offense punishable under Article 61 of Law No. 18-07.

Furthermore, the Authority's operations are governed by a set of regulations. The president of the National Authority must respond expeditiously and guarantee the confidentiality of personal data accessible in the course of their responsibilities, even after their term ends. The president and members of the Authority are prohibited from holding any interests in organizations that operate within the domain of personal data processing.

The Authority is responsible for the construction and maintenance of a National Register for the Protection of Personal Data. This register contains all statements made to the National Authority, authorizations granted, regulatory texts pertaining to public records, and other pertinent information. The register is accessible to individuals in accordance with legal and regulatory procedures.

The National Authority for the Protection of Personal Data is authorized by Law No. 18-07 to allow data controllers to transfer personal data to other countries, provided that the Authority determines that the recipient country offers a sufficient degree of protection for people's privacy, fundamental freedoms, and rights, along with appropriate security measures. Additionally, the Authority must confirm that neither public safety nor the state's fundamental interests are jeopardized by the transfer.

But there are exceptions to every rule. In certain circumstances, data controllers may transmit personal data to a nation that does not fit the above-listed requirements, including:

- The specific agreement of the person in question;
- Situations in which the transfer is essential to safeguard an individual's life or uphold the public interest;
- The execution or conclusion of contracts;
- The execution of initiatives pertaining to international judicial collaboration;
- Identifying, diagnosing, or treating illnesses;
- Adherence to bilateral or multilateral agreements in which Algeria has participated.[13]

Law No. 18-07 offers essential safeguards for national data that was once available to foreign entities operating in Algeria, including telecommunications firms, internet service providers, and embassies managing several visa applications daily. Without laws that forbid such actions, these apps frequently include private information that may be readily exported to other nations.[14]

Monitoring the post-processing operations is

13 Ashkar-Jabbour, M., Jabbour, M. (2018). Personal data and Arab laws: Security concerns and individual rights. Arab Center for Legal and Judicial Research, p. 81.

14 Ordinary Law No. 18-07. (2018, June 10). Concerning the protection of natural persons in the processing of personal data. Official Gazette of the People's Democratic Republic of Algeria, No. 34, Art. 44.

one of the responsibilities given to the National Authority. The National Authority is tasked with a number of duties under Article 25 of Law No. 18-07, including consulting with people and organizations that process personal data or carrying out research or trials that could result in such processing. It also manages complaints, appeals, and objections pertaining to the processing of personal data, making sure that people are aware of the results.[15]

The Authority instructs persons and data controllers regarding their rights and responsibilities. This includes the right to be informed in advance of the data controller's identity and the reason for processing. Additionally, it guarantees that all pertinent information is conveyed, including the data's recipient, the requirement to reply, the repercussions of non-compliance, and concerns about data transfers to foreign nations.

In cases where information is used in an open network, individuals must be informed that their data may circulate in such networks without safety guarantees and could be subject to unauthorized access and use by third parties.[16]

Ordering the required modifications to safeguard personal data and mandating the closure, withdrawal, or destruction of poorly processed personal data are among the Authority's other responsibilities.[17]

The Algerian legislator sought to provide criminal protection for personal data under the Electronic Commerce Law No. 18-05 through the regulation of "direct prospecting" as defined in Law No. 18-07.[18] This practice involves accessing personal data without the prior consent of the individual concerned, typically for purposes such as research, inspection, or prospecting for potential customers. This is achieved by compiling informational files containing personal data, including names, addresses, phone numbers, and consumption patterns or customer opinions obtained through electronic communications. Such data is used to categorize customers and generate targeted commercial offers specific to each category.[19]

The Electronic Commerce Law empowers customers to manage their personal data by requiring prior notification before data processing, enabling them to consent to or decline such processing. Law No. 18-07 establishes an exception to the prerequisite of prior consent when processing is essential to fulfill a legitimate interest of the data controller or recipient, contingent upon the respect for the interests, rights, and fundamental freedoms of the individual involved.[20]

Under these conditions, the right to object functions as a protective measure for consumers, balancing the individual's right to privacy with the legitimate interests of the data controller.

Regarding electronic certification, the Algerian legislator, under Law No. 15-04, regulated the activities of service providers by establishing authorities such as the National Authority for Electronic Certification, the Governmental Authority for Electronic Certification, and the Economic Authority for Electronic Certification. Articles 20(2)[21] and 27[22] of the Electronic Certification Law

15 Ordinary Law No. 18-07. (2018, June 10). Concerning the protection of natural persons in the processing of personal data. Official Gazette of the People's Democratic Republic of Algeria, No. 34, Art. 25.

16 Aidani, M., Rizk, Y. (2018). The Protection of Personal Data in Algeria in light of Law No. 18-07. Ma'alam Journal of Legal and Political Studies, 5, p. 127.

17 Ordinary Law No. 18-07. (2018, June 10). Concerning the protection of natural persons in the processing of personal data (as amended and supplemented). Official Gazette of the People's Democratic Republic of Algeria, No. 34, Art. 28

18 Ibid., Article 3 defines "direct prospecting" as: "The sending of any message, regardless of its medium or nature, aimed at the direct or indirect promotion of goods or services or the reputation of a person who sells goods or provides services".

19 Khalil, W. (2016). The role of direct marketing in achieving customer loyalty (Master's thesis, Ferhat Abbas University, Setif, Faculty of Economic, Commercial, and Management Sciences). p. 8.

20 Ordinary Law No. 18-07. (2018, June 10). Concerning the protection of natural persons in the processing of personal data (as amended and supplemented). *Official Gazette of the People's Democratic Republic of Algeria*, No. 34, Art. 7 (final paragraph).

21 Ordinary Law No. 15-04. (2015, February 1). Establishing general rules regarding electronic signatures and certification. Official Gazette of the People's Democratic Republic of Algeria, Art. 20(2).

22 The nature, composition, organization, and functioning of this governmental authority for electronic certi-

delegate the organization of the governmental and economic authorities to executive decrees.

CONCLUSION

In conclusion, securing digital data and safeguarding the privacy of personal information requires establishing boundaries that subject violators to criminal liability. This protection, while relative, necessitates heightened awareness and vigilance from individuals, particularly regarding these boundaries, to avoid infringing on others' privacy. Legislators in Tunisia and Algeria have both sought to protect the private lives of natural and legal persons in a restricted but consistent manner. The establishment of organizations devoted to protecting personal data—which is directly related to individual privacy—has reflected this protection.

Through the establishment of the National Authority for the Protection of Personal Data pursuant to Law No. 18-07, the Algerian legislators have formalized this protection, which gives the Authority certain responsibilities. These efforts are particularly significant in light of the rapid technological advancements and the proliferation of information technology. The Authority supports data controllers by helping them comply with the law and assists data subjects in exercising their rights as prescribed by legal provisions.

The National Authority's role in personal data processing highlights the importance of ensuring data security, which can be summarized as follows:

- Privacy Protection: Information security safeguards individuals' and organizations' data against unauthorized access, thereby preserving their privacy;
- Reputation Preservation: Failure to protect information can result in significant losses for companies and organizations, as well as damage to their reputation;
- Legal Compliance: Numerous regulations and laws mandate organizations to protect sensitive information and adhere to security requirements;
- Countering Cyber Threats: In a world facing escalating cyber threats, information security is essential for combating these risks and ensuring system stability.

Key Findings:

- Data security is a dynamic and multifaceted challenge in our digital age. Organizations and individuals must invest in robust security measures and treat threats with seriousness. By educating users, employing advanced technologies, and complying with legal requirements, we can safeguard our information and ensure the sustainability of a progressive digital world;
- In response to technological problems, the Algerian legislator established the National Authority for the Protection of Personal Data to ensure the protection of personal information;
- Law No. 18-07 strengthens Algeria's legislative framework to protect freedoms and rights. It mandates the prior and explicit consent of the data subject before processing their data, even if the processing is authorized. The right to revoke consent is always available to the data subject. This legal framework aims to curb the prevailing chaos in the field, particularly as individuals routinely provide their data to public entities, private organizations, telecommunications companies, or foreign embassies in Algeria without knowing its ultimate fate;
- A National Authority, known as the "National Authority", was also established under the law, and its main responsibility is to supervise its enforcement. The Authority is responsible for granting permits and licenses to entities wishing to process personal data, conducting investigations, and imposing sanctions on violators of the law.

fication shall be determined through regulation.

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Alternative Dispute Resolution as a Viable Template for the Settlement of Family Disputes in Nigeria

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ABSTRACT

In recent times, the various Alternative Dispute Resolution (ADR) mechanisms are fast becoming the best means of resolving family disputes. This is because family disputes are often confidential, and these ADR mechanisms encourage confidentiality. This paper analysed the viability of ADR as a means of resolving family disputes in Nigeria. It emphasised litigation's limitations in resolving emotionally charged family matters and investigates how alternative dispute resolution can encourage confidentiality, party autonomy, and relationship maintenance. Using a comparative and doctrinal methodology, this study examined the acceptance and effectiveness of ADR in nations including the United Kingdom, the United States, and Finland. It also assessed Nigeria's legislative framework governing matrimonial disputes, specifically the Matrimonial Causes Act (MCA) of 1970, as well as the feasibility of incorporating ADR into it. The study concluded that, while ADR has the potential to resolve marital maintenance, child custody, and property

conflicts, statutory and cultural hurdles persist. The study concluded by recommending amendments to improve the legal recognition of ADR in family law and making practical recommendations to boost its usage in Nigeria.

INTRODUCTION

Alternative Dispute Resolution (ADR) proffers the easiest and fastest mechanisms of resolving disputes.[1] All its mechanisms encourage parties to dictate how their dispute should be resolved and also ensure that parties can maintain a relationship even after the dispute has been settled. Family relationships are complicated, and by extension, family disputes. Unlike business-related disputes, where parties do not necessarily have to be friends to work together, family disputes are usually emotional, and there is usually a need for parties to keep relating with one another even after the dispute settlement. Therefore, family disputes require a dispute resolution mechanism that can help parties preserve relationships, and ADR has suitable mechanisms for this.

The Matrimonial Causes Act 1970[2] is the law enacted for the purpose of dealing with matters relating to legal marriages in Nigeria. It makes provision for matters such as dissolution of marriage, spousal maintenance, property rights, and child custody, among others. The law provides that all matters emanating from the provisions of the Act must be resolved at the High Court.[3] This provision poses a great problem to the possibility of resolving family disputes using ADR mechanisms.

This paper discusses ADR and its different mechanisms, and it discusses extensively the way ADR mechanisms have been used to resolve family disputes in countries like the United States of America, Finland, and the United Kingdom. It explores the effectiveness of ADR in resolving family disputes in these jurisdictions. Furthermore, this paper examines the possibilities of resolving family disputes with ADR mechanisms in Nigeria with particular attention to the benefits and challenges that may be attached. As a result, this paper seeks to answer the following questions: Are ADR mechanisms suitable for the resolution of family disputes in Nigeria? What are the challenges of using ADR mechanisms to resolve family disputes in Nigeria? How can the identified challenges be resolved to ensure effective use of ADR for settling family disputes in Nigeria?

This paper is divided into three sections. The first part will discuss ADR mechanisms and Family Disputes. The second part will examine the use of ADR for resolving Family disputes in other Jurisdictions. Lastly, the third section will discuss the prospects and challenges of using ADR mechanisms to resolve family disputes in Nigeria.

METHODOLOGY

This paper adopts a mixed-methods approach, combining doctrinal and comparative methods to provide a comprehensive analysis of the subject matter. The doctrinal methodology is employed to examine primary and secondary legal sources such as statutes, case law, and scholarly writings. In particular, the Matrimonial Causes Act (1970) and the Arbitration and Mediation Act (2023) are analysed to understand the extent to which Nigerian law currently accommodates or restricts the use of ADR in family disputes. Judicial precedents and scholarly

1 Maurya, A. (2021). Alternative Dispute Resolution. Indian Journal of Law and Legal Research, 2(1), pp. 1, 2.
2 Matrimonial Causes Act (MCA). (1970). Cap 220, LFN 1990.
3 Ibid. Section 2(1).

commentaries are also examined to assess the legal reasoning that underpins the acceptance or rejection of ADR in family matters.

The comparative methodology is used to evaluate how ADR has been effectively utilised in resolving family disputes in other jurisdictions, including the United Kingdom, the United States, and Finland. These jurisdictions were deliberately selected because of their distinct yet relevant experiences: the UK, due to its historical influence on Nigerian law; the US, as a jurisdiction with innovative ADR practices across states; and Finland, for its advanced institutionalisation of family mediation. By comparing Nigeria's legal framework with those of these jurisdictions, this paper identifies both best practices and potential challenges for transplanting ADR mechanisms into the Nigerian family law system.

The combination of doctrinal and comparative methods ensures that the analysis is not only grounded in Nigerian statutory and judicial frameworks but also enriched by insights drawn from international experience. This dual approach allows for a deeper understanding of the viability, benefits, and possible limitations of introducing ADR into the settlement of family disputes in Nigeria.

1. ALTERNATIVE DISPUTE RESOLUTION IN NIGERIA

Alternative Dispute Resolution (ADR) can be defined as 'an encompassing all legally permitted process of dispute resolution other than litigation'.[4] Nolan-Haley defined it as 'an umbrella term that refers generally to alternatives to the court adjudication of disputes...'.[5] ADR is 'a collective description of methods of resolving disputes otherwise than the normal trial process'.[6] These definitions suggest that any mechanisms for settling disputes other than litigation are ADR. There are several mechanisms of ADR, such as negotiation, mediation, conciliation, arbitration, early-neutral evaluation, facilitation, mini-trials, expert appraisal, summary jury trials, and mediation-arbitration, among others. For this paper, negotiation, mediation, and arbitration will be examined extensively.

1.1. Negotiation

In layman's parlance, negotiation involves a form of bargaining between parties to reach a common settlement.[7] However, in legal parlance, negotiation is the resolution of disputes through a consensual settlement by the parties to a dispute. It forms the basis of dispute resolution. In this ADR process, the parties do not need to introduce a neutral third party, and if one is introduced, it would be for the making of a representation on behalf of the parties to the contract. Negotiation involves a direct interaction between disputing parties wherein one makes an offer to the other based on the objective assessment of the other party.[8] It involves parties to a dispute having discussions with one another with the intent to settle their differences while ensuring that the decisions reached are beneficial to all parties.[9] The stages involved in a negotiation process are: the preparation and orientation stage; the opening discussion stage; the bargaining stage; the closing stage; and the post-negotiation stage.[10]

4 Ware, S. J. (2001). Alternative Dispute Resolution. St. Paul, p. 5.

5 Nolan-Haley, J. M. (2008). Alternative Dispute Resolution in a Nutshell, St. Paul, p. 2.

6 Halsey v. Milton Keynes General NHS Trust. (2004). ECWQ IV 576.

7 Wertheim, E. Negotiations and Resolving Conflicts: An Overview. College of Business Administration Northeastern University. Available at: <https://www.europarc.org/communication-skills/pdf/Negotiation%20Skills.pdf> (Last access: 01 May, 2025).

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9 Alobo, E. E. (2021). Commercial Law and Practice. Princeton & Associate Publishing Co. Ltd., p. 2.

10 Ajetumobi, A. (2017). Alternative Dispute Resolution and Arbitration in Nigeria in Nigeria, Law, Theory and Practice. Princeton & Associates Publishing Co. Ltd.,

1.2. Mediation

This is the resolution of disputes by reference of the dispute to a neutral third party called the mediator.[11] In mediation, the parties may agree that the mediators be appointed by a body, person, or institution in the event of disputes between them. Also, the parties may specify the qualities which the mediators must possess before he can have the jurisdiction to resolve disputes between the parties using mediation. For example, the parties may decide that the chief judge of a state should appoint a mediator who must be a Nigerian and be trained in marine law in the event of disputes between them. Mediation involves the intervention of a neutral third party, who is referred to as a mediator, to help disputing parties resolve their dispute.[12] The stages of mediation are: the Introduction stage; the opening stage; the private caucus session; the joint session; and the settlement stage.[13]

The Nigerian Arbitration and Mediation Act 2023 defines mediation as:

> *A process, whether referred to by the expression mediation, conciliation or an expression of similar import, where parties request a third person "the mediator" to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship but the mediator does not have the authority to impose upon the parties a solution to the parties.*[14]

From this definition, it can be noted that, unlike an arbitrator, a mediator does not have the power to give a binding decision; he can only facilitate the process. Also, in terms of flexibility, mediation has a more flexible approach towards the resolution of a dispute. In the course of resolution, the parties in mediation may choose to state facts throughout the proceedings, but there is a point in arbitration where claims must be made in arbitration.

1.3. Arbitration

Arbitration means, 'a commercial arbitration whether or not administered by a permanent arbitral institution'. Arbitration is 'a process of ADR in which a neutral third party, called an arbitrator or neutral, renders a decision after a hearing at which both parties have an opportunity to be heard'.[15] It was defined in the case of *Commercial Insurance v. Alli*[16] as a mechanism by which parties agree to have their dispute settled by a neutral third party[17] and to be bound by the decision that such third party makes. Therefore, when the arbitrator makes his award, it is final, binding, and cannot be challenged based on law or evidence unless that is reasonable. It has also been judicially decided in the case of *C.N. Onuselongu International Enterprises v Afribank Nig. Ltd.*[18] that arbitration is a voluntary agreement between the parties to resolve their dispute, which is recognised by the court. Hence, the court will give its support to see to its smooth administration. Arbitration is commonly known in Nigeria as a mechanism for settling commercial disputes.

2. FAMILY AND FAMILY DISPUTES

To understand the definition and dynamics of family disputes, it is important to define what a family is. A family is:

> *a group of closely related people, known by a common name and consisting usually*

p. 75.

11 Malemi, E. (2010). The Nigerian Legal Method (1st edition). Princeton Publishing Company.

12 Alobo, E. E. (2021). Commercial Law and Practice. Princeton & Associate Publishing Co. Ltd.

13 Blake, S. Browne, J., Sime, S. (2021). The Jackson Alternative Dispute Resolution Handbook (3rd edition). Oxford University Press.

14 Arbitration and Mediation Act. (2023). (AMA). Section 91.

15 Alobo, (n 9).

16 (1992). 3 NWLR (Pt 232).

17 Disinterested party.

18 (2005). LCN/1790 (CA).

of a man and his wives and children, his son's wives and children, his brothers and half-brothers and wives and children, and probably near relations.[19]

Simply put, a family is made up of people who are related by blood or by marriage. Although in some other countries, marriage now occurs between people of the same sex, in Nigeria, Legal marriage can only exist between a man and a woman. The only type of marriage recognised under the MCA is the monogamous marriage. Therefore, a standard family in the Nigerian legal parlance is that consisting of a man and a woman and their children. For this paper, a family will be considered as stemming from a legal marriage between a man and a woman, with or without children.

As in any form of human relationship where disputes arise, so do family disputes arise among family members. Family disputes have been defined as 'any conflicts that occur within a family-between husbands and wives, parents and children, between siblings, or with extended families (grandparents, aunts, uncles, etc.)'.[20] Hence, family disputes may be in the form of couples seeking dissolution of marriage, or separated couples fighting over custody of children, or fights over ownership of property, or spousal maintenance. It can also be extended family members fighting over family properties.

Family dispute is a very distinct form of conflict because family members involved in the conflict are emotionally attached, their relationships are usually on a long-term basis, and each family has its own uniqueness and peculiarity.[21] These uniqueness and peculiarity need to be put into consideration when resolving family conflicts. Dispute resolution mechanisms that take into consideration the unique features of families having disputes will be more effective in resolving the dispute. The strict rule of the court system may not address the entire issue causing the dispute effectively. There are some family issues that are the core basis of the dispute that should never be made public, and that family members will not openly discuss in the courtroom.

Types of Family Conflict – Conflicts between husband and wife include: divorce, property rights, maintenance, and child custody; Sibling rivalry: this type of family dispute deals mainly with children of the same parents fighting; and Parent-Child conflict: this can be a dispute between a child and his or her father or mother or both parents.

For this article, the type of family dispute that will be focused on is the conflict between husband and wife. The causes of this type of family dispute vary depending on each circumstance. Issues like infertility, financial problems, poor communication, infidelity, opposing parenting styles, and the need for independence, among others.[22] Some of the issues which emanate from conflicts between husbands and wives are divorce, determination of property rights ownership, spousal maintenance, and child custody. These issues are delicate legal issues that ought to be determined with care.

3. SETTLEMENT OF FAMILY DISPUTES IN NIGERIA

In Nigeria, the family is considered a sacred unit built on the sacred institution of marriage.[23] Traditionally, it is considered a union between two families – the bride's and the groom's families. Therefore, based on the importance at-

19 See Green, M. M. (1941). Land Tenure in Ibo Village in South Eastern Nigeria. Routledge; see also, Nwogugu, E. I. (2014). Family Law in Nigeria (3rd edition). HEBN Publishers Plc.

20 Malek, C. (2013). International Conflict. Available at: <https://www.beyondintractability.org/coreknowledge/international-conflict> (Last access: 1 May, 2025).

21 Malek, C. (2013). Family Conflict. Available at: <https://www.beyondintractabiity.org/coreknowledge/family-conflict> (Last access: 1 May, 2025).

22 Aye, E. N. and others. (2016). Family Conflict and Managing Strategies: Implication for Understanding Emotion and Power Struggles. Global Journal of Psychology Research: New Trends and Issues, 6(3), p. 156.

23 Ugwu, N. V., Okoye, K. M., Agbo C. O. (2024). Moral Challenges of Marriage Institution in the Contemporary Igbo Christian Society. Nsukka Journal of Religion and Cultural Studies, 12(1), pp. 62, 63.

tached to marriage by society, a couple cannot decide to change their marital status by themselves. It is on this basis that the MCA provides that disputes emanating from a marriage under the MCA that falls into the category of matrimonial causes may be resolved through litigation at the State High Court. Section 2 (1) of the MCA states that:

> *A person may institute matrimonial causes under this Act in the High Court of any state of the Federation, and for that purpose, the High Court of each State of the Federation shall have jurisdiction to hear and determine . . . matrimonial causes under this Act.*

Section 114 of the MCA defines matrimonial causes as proceedings for a decree of dissolution of marriage, nullity of marriage, judicial separation, restitution of conjugal rights, and jactitation of marriage;[24] decisions on spousal maintenance, custody, and maintenance of children in matters resulting from a case instituted for any of the aforementioned decrees.[25] With these provisions, it is clear that most matters relating to family that emanate from marriage under the MCA in Nigeria may be resolved in a High Court in Nigeria.

The phrase, 'may institute matrimonial causes under this Act in the High Court of any state of the Federation' suggests that it is not a compulsory provision, and if there are other settlement options, the party may explore them. Although the use of 'may' in a statute generally makes a provision discretionary, there are instances where such provisions are mandatory. For instance, the Court of Appeal in the case of Sino-Afric Agriculture & Ind Company Ltd & Ors v. Ministry of Finance Incorporation & Anor held that the 'may' in an arbitration Clause does not render the agreement by the parties to resolve the dispute through arbitration useless. Rather, it allows the parties to decide to forgive the contractual right if they so please, but where the contractual right is not forgiven, it is mandatory for them to arbitrate.[26] That is, a party can decide to forgive the other party and not approach arbitration when a dispute arises, but if he decides not to forgive, he must resolve the dispute through arbitration. Bringing this argument to Section 2 of the MCA, the 'may' refers to the right of the party to decide not to approach the Court that is litigation when matrimonial causes arise. It, however, compels the parties to ensure that if they ever decide to approach the court, they should approach a State High Court. The 'may' there pertains to the question of the exercise of your rights, not the destination. Therefore, a party can decide to resolve their matrimonial causes outside the courtroom.

The question that now comes up is whether all matrimonial causes can be resolved using other mechanisms chosen by the parties. The answer is No. The general rule of interpretation that a provision of a law should not be interpreted in isolation applies. The MCA should be interpreted in consideration of its entire provisions. Section 56 of the MCA provides that the dissolution of a marriage can only be done by an order of *Decree Nissi* and *Decree Absolute* granted by a court of competent jurisdiction.[27] Thus, dissolution of marriage, also known as divorce, can only be done by the court. This is because the marital status of the couple does not affect only the couple; it affects society as well. Therefore, dissolution is not about the parties alone, and they cannot decide their status by themselves because the public, which was aware of their marriage, must be aware of its dissolution.[28]

Nonetheless, other matrimonial causes that only affect the couple, such as spousal maintenance, property rights, and child custody, can be resolved by mechanisms chosen by the parties. There is no strict provision in the MCA for these to be resolved in the High Court. Par-

24 MCA. (1970). Section 114(1)(a).

25 Ibid., 114(1)(c).

26 (2013). LPELR-22370 (CA).

27 MCA. (1970). Section 56.

28 Adepoju, A. A. (2024). Dissolution of Marriage and the Choice of Law: Matters Arising. PPLRUNLAW Review, Vol. 3, no. 1. Available at: <https://runlawjournals.com/index.php/pplrunlaw/article/view/93> (Last access: 4 May 2025).

ties are at liberty to decide how they want to resolve their disputes, provided their decision to do so will not be injurious to public interest. The Supreme Court in *Abey v Alex*[29] per Uwaifo JSC stated that, 'it would appear that it can be argued that the power to settle or compromise at any stage of a pending proceeding extends even to those compromising judgments in certain situations'. This decision suggests that the power of the parties to resolve their dispute is infinite. Where parties agree to do something other than what the court has decided, the parties are superior to the court for their own dispute. In *Offor v Leaders & Co Ltd,*[30] the Court of Appeal held that, 'it is settled law that parties are entitled to settle or compromise a dispute at any stage of pending proceedings... this right has been held to extend even to that of compromising judgments in civil actions'. A combined interpretation of these decisions is that parties can decide to handle their disputes however they choose to, provided their decision does not affect a third party negatively. As such, parties can decide to resolve their matrimonial causes other than dissolution of marriage using any resolution mechanism they so desire.

The MCA recognises the need for parties to matrimonial causes to try to resolve their disputes without court intervention. This explains why Section 11 provides that parties who have filed for dissolution of marriage must attempt to resolve the dispute outside the court before proceedings can commence. Evidence of such a reconciliatory process must be presented in court and must have been unsuccessful before the court can proceed with the hearing of the petitions. Although in the instance of this Section, their lawyer is the neutral third party helping them to resolve the dispute. This paper opines that if the Courts have taken judicial notice of the possibility of resolving matrimonial causes outside the courtroom with a lawyer acting as the neutral third party, then it should be possible to use ADR to resolve family disputes without instituting action in court. ADR mechanisms should be explored more by parties to family disputes in order to resolve their disputes amicably and more satisfactorily.

4. POSSIBILITY OF MEDIATING FAMILY DISPUTES IN NIGERIA

The Arbitration and Mediation Act 2023 (AMA 2023) repealed the Arbitration and Conciliation Act 1988 and became the first Act on Mediation in Nigeria. AMA 2023 makes provision for different kinds of mediation. In particular, it recognises domestic civil mediation.[31] That is, AMA 2023 encourages mediation of civil matters in Nigeria. Family disputes are a civil matter and, as such, can be subjected to mediation for their resolution. Section 70 (4) of AMA 2023 provides that cases can be referred to mediation from arbitration, litigation, and other similar proceedings. This means that the court can refer certain matters to mediation where it deems it appropriate to do so. Therefore, civil matters involving family disputes other than divorce can be referred to mediation. Permission to have a virtual mediation process. Section 82 (2), the settlement agreement resulting from a mediation shall be binding on the parties and enforceable in court as a contract, consent judgment, or consent award. The Act makes provision for mediation in Sections 67 and 87 of the Act.

5. THE EXTENT OF USE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS TO RESOLVE FAMILY DISPUTES IN OTHER JURISDICTIONS

In most countries, mediation and arbitration are the major ADR mechanisms used to resolve family disputes. Some of the jurisdictions that will be examined are the United Kingdom, because of the close relationship of our legal systems as a result of colonialism, the United

29 (1999). 14 NWLR (Pt 637) 148 at 159.

30 (2007). 7 NWLR (Pt 1032) 1.

31 Arbitration and Mediation Act. (2023). Section 67(1) (c).

States, because it is a world-class society that is known for being at the forefront of several legal innovations, and Finland, for its robust practice of family arbitration.

5.1. The United Kingdom

Mediation is often used in the United Kingdom to resolve child custody and care disputes.[32] 'Family mediation remains an increasingly popular option for many separating couples and a priority of the United Kingdom government'.[33] The fact that ADR enables parties to a dispute to decide how they want their disputes to be resolved has made ADR a more likeable dispute resolution option for parties to family disputes.[34] ADR mechanisms used mainly in the UK are mediation, collaborative law, arbitration, and negotiation through lawyers.

5.1.1. Collaborative practice

This is also known as collaborative law. It was established by Stuart Webb, a Minnesota family lawyer, and has been widely received in countries like the United States, Europe, Canada, Australia, and was launched in England in 2003.[35] It is a voluntary and facilitates the family law process, enabling couples who have decided to end their marriage to work with their lawyers and other family professionals, in order to achieve a settlement that best meets the specific needs of both parties and their children, thus avoiding the uncertain outcome of the court.[36] Parties are expected to have signed a participation agreement, which binds them to the process and also provides that the lawyers who represent them in the process cannot represent them in litigation if they later decide to go to court.

The Participation Agreement provides for the following: parties should not go to court during the process; parties should disclose all documents and information relating to the dispute; the experts will be neutral, and who will be hired will be decided by both parties; it will be a win-win situation; and their children will not be involved in the process. It addresses legal, emotional, and financial issues through a team made up of lawyers, mental health professionals, or child specialist, and a financial specialist.[37] The agreement reached is submitted to the court for approval.[38]

5.1.2. Mediation

It is a process a neutral third party helps couples identify their issues and foster solutions. The mediator, after the introductory stage, holds a private session called a caucus through which he tries to understand the demands, interests, positions, and oppositions of the parties, before proceeding to hold a joint session with them to reconcile their differences.[39] At the joint session, the mediator focuses on the interests of the parties. In the case of mediation relating to family issues, such interests include budget, parenting schedules, financial obligations, and properties, among others. The mediation ends when parties have agreed on all the issues and the mediator has sent the terms to the judge to sign.

There are various techniques of mediation that have been put in place to ensure that par-

32 Macroberts, F. (2024). Mediation: The Path to Resolving Child Disputes. Available at: <https://www.lexology.com/library/detail.aspx?g=67e5b694-7f61-4209-b005-8533d0b6eb5f> (Last access: 14 February, 2025).

33 Lexology. (2024). The UK Government has Rejected Mandatory Mediation for Family Disputes in England and Wales. Available at: <https://www.lexology.com/library/detail.aspx?g=abbcd3d1-20fb-40f7-9953-a24edf247563> (Last access: 4 May 2025).

34 Tyler, L. (2021). Alternative Dispute Resolution in Family Law. Weightmans. Available at: <https://www.weightmans.com/insights/alternative-dispute-resolution-in-family-law/> (Last access: 4 May 2025).

35 International Academy of Collaborative Professionals (IACP). (2023). What is collaborative practice? Available at: <https://www.collaborativepractice.com> (Last access: 14 June 2025).

36 Ibid.

37 Ibid.

38 Texas Family Law Code. Section 6.603(b) 148.

39 International Academy of Collaborative Professionals (IACP). (2023). What is collaborative practice? Available at: <https://www.collaborativepractice.com> (Last access: 14 June 2025).

ties to a family dispute utilize mediation before approaching the court. There is the Compulsory Mediation Information and Assessment Meeting (MIAM), which parties must attend before they can approach the family court. At this meeting, the parties meet with the mediator to determine if their dispute is suitable for mediation.

Parties to family disputes involving the following are exempted from attending MIAM: a party who has evidence of domestic violence against the other part; the application involves a child; the party already attended an MIAM; the party has applied for an exemption from MIAM within the last four months preceding the case; and if the application needs urgent attention because failure to do so may: lead to risk to life of a party, a party suffering significant hardship, cause risk to the life of a child and so on. There is a legal aid option for parties to a dispute who are not working or on a low income. In the United Kingdom, there is the Family Mediation Council. People who want to utilize mediation in the UK are advised to pick the mediators from those registered with this council.[40]

5.1.3. Arbitration

Arbitration is an ADR mechanism where divorcing couples select a neutral third party, called an arbitrator with family law experience, to hear their case and give a final decision after having heard from both parties.

5.1.4. Private financial dispute resolution

Private Financial Dispute Resolution is a negotiation that takes place during the hearing of a financial remedy court application. This process is led by a judge, and the judge guides the parties on the best way to resolve their disputes.[41] The judge is not allowed to impose a decision on the parties. This mechanism is used to resolve the financial aspect of a family dispute. Parties are expected to focus on reaching a compromise and settling their dispute. Hence, parties do not give evidence at FDR.

5.1.5. Mediation voucher scheme

As a response to COVID-19, the UK government launched a 'Time-limited Mediation Voucher Scheme' to help people resolve their family disputes. This scheme was also launched to encourage people to utilize mediation in resolving their family disputes. The UK government contributes 500 Euros towards the cost of mediation to encourage people who are eligible to use the scheme.

5.2. The United States of America

Family disputes in the United States encompass a wide range of issues that can arise within a family, including divorce, child custody, visitation rights, child support, and spousal support, among others. These disputes are inherently sensitive and can have a lasting impact on the well-being of family members, particularly children, and can lead to prolonged conflicts and emotional trauma if it is not addressed effectively. Due to the sensitivity involved in family disputes, the use of Alternative Dispute Resolution is encouraged as a mechanism for settling disputes.

In family law cases, courts in the United States often encourage parties to consider ADR processes before attempting traditional litigation. Some States have specific rules that require parties in family law disputes to participate in mediation or other ADR processes before going to court. For example, Texas Statutes Civil Practice and Remedies Code in Section 154 provides that:

> *It is the policy of this State to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving*

40 Family Mediation Council. (2023). Code of Practice for Family Mediators. Available at: <https://www.family-mediationcouncil.org.uk/code-of-practice/> (Last access: 1 June, 2025).

41 Ministry of Justice. (2023). Financial Dispute Resolution (FDR): A Guide for Parties S. Available at: <https://www.gov.uk/government/publications/financial-dispute-resolution-fdr> (Last access: 1 June, 2025).

conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.[42]

Title 9 of the US Code establishes federal law supporting arbitration.[43] These requirements are often aimed at promoting cooperative solutions, reducing conflict, and easing the burden on the court system. The United States offers a wide range of Alternative Dispute Resolution mechanisms for family law disputes, such as: Mediation, Arbitration, Early Neutral Evaluation, Collaborative law, and Parenting Coordination.[44]

5.2.1. Mediation

Mediation allows families to address issues such as divorce, child custody, visitation, and financial matters in a more collaborative and private setting. During a mediation session, each party is allowed to express their concerns and interests while the mediator helps guide the conversation toward finding common ground. The mediator does not make decisions for the parties but instead helps them explore options and come up with creative solutions that meet everyone's needs. There is no specific federal legislation governing mediation in the United States. However, many states have adopted the Uniform Mediation Act[45] to provide a consistent framework for mediation.

5.2.2. Arbitration

Arbitration is a more formal process in which a neutral third party, known as the arbitrator, acts as a decision-maker. The arbitrator's decisions are legally enforceable and act as a replacement for a trial. In family law matters, you can use arbitration to resolve most kinds of disputes. The North Carolina Family Law Arbitration Act states that one can agree to arbitrate all issues arising from a marital separation or divorce, except for the divorce itself, while preserving a right of modification based on a substantial change of circumstances related to alimony, child custody, and child support.[46] Forty-nine states have adopted the 1956 version of the Uniform Arbitration Act as state law.[47]

5.2.3. Early Neutral Evaluation

Early Neutral Evaluation (ENE) in family disputes in the United States involves a process where a neutral third party assesses the case and gives evaluative feedback and recommendations to help parties resolve without going to trial. Early Neutral Evaluation was first adopted to deal with the rising demand for custody evaluations and initially used only for child custody and parenting time (visitation) cases. This is known as Social Early Neutral Evaluation (SENE). Early Neutral Evaluation has subsequently evolved to include a separate second program known as Financial Early Neutral Evaluation (FENE), which focuses on child support, alimony, and property division.[48]

42 Texas Statutes Civil Practice and Remedies Code. Available at: <https://statutes.capitol.texas.gov/Docs/CP/htm/CP.154.htm#:~:text=It%20is%20the%20policy%20of,settlement%20of%20pending%20litigation%20through> (Last access: 22 May 2025).

43 Cornell Law School. (2025). Alternative Dispute Resolution. Available at: <https://www.law.cornell.edu/wex/alternative_dispute_resolution#:~:text=For%20national%20arbitration%2C%20Title%209,numerous%20state%20laws%20on%20ADR> (Last access: 22 May, 2025).

44 Swartz, H. (2025). What is Alternative Dispute Resolution? Available at: <https://highswartz.com/services/adr-alternative-dispute-resolution/family-law-adr/> (Last access: 22 May, 2025).

45 Uniform Mediation Act. Available at: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=-9b33a118-841a-478c-e884-f3bf68b2b12c&forceDialog=0> (Last access: 22 May, 2025).

46 New Direction. (2021). Arbitration as an Alternative to Family Court. Available at: <https://newdirectionfamilylaw.com/blog/separation-divorce/arbitration-as-an-alternative-to-family-court/#:~:text=The%20North%20Carolina%20Family%20Law,%2C%20and%20child%20support.%E2%80%9D%20In> (Last access: 22 May, 2025).

47 Cornell Law School, (n 42).

48 Shaw, E. Family Law, Exploring Early Neutral Evaluation in Family Cases. Available at: <https://www.google.com/url?q=https://erinshawfamilylaw.ca/wp-content/uploads/Exploring-ENE-in-Family-Cases-Final-April 28.pdf&sa=U&sqi=2&ved=2ahUKEwi2p53Fw6OGAxWcWkEAHVyDD1YQFnoECB8QAQ&usg=AOvVaw3CY8lmlbKaRkD6EQPJSqKJ> (Last access: 22 November, 2025).

5.2.4. Collaborative law

Collaborative law was originally developed in the United States of America.[49] Collaborative law is a relatively new method of alternative dispute resolution primarily used in divorce and family cases. In this process, each party hires a lawyer, and professionals like financial experts or divorce coaches may be involved. The parties come together to negotiate agreements. It is similar to mediation; a key difference is that in collaborative law, the parties agree not to involve the court system. If a lawsuit is threatened, the lawyers must withdraw from the process. Although it is more cost-effective than going to court, collaborative law can be more expensive and time-consuming than mediation due to the involvement of lawyers and specialists.[50]

5.2.5. Parenting coordination

Parenting coordination is a specialized form of family law Alternative Dispute Resolution (ADR) in the USA that focuses on resolving parenting disputes. A parenting coordinator (PC) assists parents in creating and adhering to parenting plans. This process helps parents resolve disagreements concerning their children in a structured and cooperative manner, aiming to reach agreements that prioritize the well-being of the children involved.[51]

ADR is prevalent for resolving family disputes in the United States. It provides a conducive environment for respectful communication, compromise, and understanding. Using ADR instead of traditional litigation can help families achieve faster, more cost-effective, and less adversarial resolutions that prioritize the well-being of the children and the family as a whole. ADR methods emphasize confidentiality, which is beneficial in sensitive family matters where privacy is crucial. It is also more flexible, allowing families to tailor solutions to their unique circumstances.

5.3. Finland

Finland is a country with a great model for family dispute mediation. Family mediation in Finland is divided into three different stages, and each stage deals with a distinct aspect of family law. The three stages are:

1. Out of court mediation: This stage is handled by social services and family mediators. It deals with disputes relating to child care and custody;
2. Court mediation: this deals with disputes relating to custody, housing, right of access, and financial support of children;
3. Mediation to implement a decision: Mediation in Finland is voluntary, confidential, and free. The mediator is usually a judge, assisted by an expert such as a social worker or a psychologist. The decision ordering mediation does not require the consent of the parties.

The Finnish legal system recognizes the importance of ADR as a means to achieve efficient and amicable resolution of disputes, particularly in family law disputes where maintaining relationships is a priority. Due to the financial costs, lengthy process, and adversarial nature of litigation, individuals often prefer alternative dispute resolution methods when it comes to matters in family law.[52]

In Finland, there are several Alternative Dispute Resolution mechanisms available to dis-

49 MacDonald, N. (2023). Alternative Dispute Resolution Options in Family Matters. Available at: <https://www.newtons.co.uk/news/alternative-dispute-resolution-options-in-family-matters/> (Last access: 23 May, 2025).

50 Cornell Law School. (2025). Collaborative Law. Available at: <https://www.google.com/url?q=https://erinshawfamilylaw.ca/wp-content/uploads/Exploring-ENE-in-Family-Cases-Final-April28.pdf&sa=U&sqi=2&ved=2ahUKEwi2p53F-w6OGAxWcWkEAHVyDD1YQFnoECB8QAQ&usg=AOv-Vaw3CY8lmlbKaRkD6EQPJSqKJ> (Last access: 23 May, 2025).

51 Swartz, H. (2025). What is Alternative Dispute Resolution? Available at: <https://highswartz.com/services/adr-alternative-dispute-resolution/family-law-adr/> (Last access: 22 May, 2025).

52 Liakka, A. (2023). Child Custody Disputes in Finland: The Primacy of Mediation. Lawyermonthly. Available at: <https://www.lawyer-monthly.com/2023/09/child-custody-disputes-in-finland-the-primacy-of-mediation/> (Last access: 14 May, 2025).

putants including arbitration, mediation, and collaborative law.

5.3.1. Arbitration

Arbitration is a dispute resolution mechanism where parties agree to have their case heard and settled by one or more independent and impartial individuals called arbitrators, rather than going through traditional court processes. Arbitration in Finland is governed by the Finnish Arbitration Act of 1992. This Act establishes the procedures and guidelines for arbitration proceedings in Finland, ensuring that parties have a fair and efficient process for resolving their disputes.[53]

In addition to the Finnish Arbitration Act, the Rules of the Arbitration Institute of the Finnish Chambers of Commerce play a significant role in shaping arbitration in Finland.[54] The Institute, also known as the Finland Arbitration Institute (FAI), is a leading arbitration institution in Finland that offers a range of services to facilitate arbitration proceedings.

5.3.2. Mediation

Mediation is a process where a trained mediator facilitates discussions between parties to help them reach a mutually acceptable resolution to their dispute. It focuses on communication, understanding, and finding a common ground to achieve a peaceful and voluntary agreement. Mediation in Finland is governed by the Finnish Bar Association Mediation rules[55] and the Finnish Act on Mediation,[56] among others. The Finnish Bar Association provides a standard mediation service where a trained mediator, who is an impartial and independent member of the Finnish Bar registered with the Mediation Board, assists parties in peacefully resolving their disputes.

5.3.3. Collaborative law

Collaborative law is a cooperative approach to resolving legal disputes, typically used in family law matters, where the parties and their lawyers work together to find mutually satisfactory solutions without going to court. The process involves the use of experts such as psychologists who serve as child development experts, and in some cases, divorce coaches, mental health professionals who help the parties in reaching a resolution.[57] In Finland, Collaborative Law is governed by the Collaborative Law Act, which outlines the rules and procedures for the process.[58]

Family mediation in Finland aims to help separated or divorcing couples resolve conflicts related to child custody, visitation rights, and financial support in a peaceful and collaborative manner. The primary goal is to promote communication, cooperation, and co-parenting agreements that are in the best interests of the children involved. Family mediation in Finland seeks to reduce the emotional and financial costs of litigation, while empowering families to create sustainable solutions that work for everyone involved. Mediation can help families address sensitive issues, improve communication, and work towards a positive and respectful co-parenting relationship after separation.

53 Cupore. (2016). Availability of Alternative Dispute Resolution Mechanisms. Available at: <https://www.cupore.fi/images/tiedostot/pilottitutkimusraportit/pilotreport_ds10_availabilityofalternativedisputeresolutionmechanisms.pdf> (Last access: 19 May, 2025).

54 Salsa, P. (2021). IP Litigation and Alternative Dispute Resolution Options in Finland. Berggren. Available at: <https://www.berggren.eu/en/blog/ip-litigation-and-alternative-dispute-resolution-options-in-finland#amp_tf=From%20%251%24s&aoh=17162924200167&referrer=https%3A%2F%2Fwww.google.com&amp-share=https%3A%2F%2Fwww.berggren.eu%2Fen%2Fblog%2Fip-litigation-and-alternative-dispute-resolution-options-in-finland> (Last access: 19 May, 2025).

55 Cupore, (n 52).

56 Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts. Available at: <https://www.finlex.fi/en/laki/kaannokset/2011/en20110394.pdf> (Last access: 20 May, 2025).

57 Hechtman, S. B. S. (2023). ADR in Family Law: When is it Suitable? Lawyermonthly. Available at: <https://www.lawyer-monthly.com/2023/07/adr-in-family-law-when-is-it-suitable/> (Last access: 20 May, 2025).

58 Lawzana. (2025). About Collaborative law in Finland. Available at: <https://lawzana.com/collaborative-law-lawyers/finland> (Last access: 20 May 2025).

6. BENEFITS OF RESOLVING FAMILY DISPUTES THROUGH AN ADR MECHANISM:

- It is confidential and devoid of publicity: as a result of the peculiarity of family relationships and family disputes, resolution of family disputes in most instances requires a very confidential mechanism. ADR is a settlement mechanism that offers confidentiality as a major attribute. This major attribute will encourage parties in family disputes to utilize it, as in most instances, they do not want their family issues to be public;
- It encourages party autonomy: another unique attribute of ADR is party autonomy. Parties are at liberty to decide how they want their disputes to be resolved. They can choose the venue for the disputes, the language, and the person who will help them resolve the dispute;
- It is a speedy means of dispute resolution: ADR affords parties a swift resolution of their disputes;
- It can help to foster communication between parties: the neutral third parties are trained facilitators who aim at helping parties to relate the cause of their disputes with minimal emotional outburst;
- Its process can be tailored towards the needs and concerns of the parties: party autonomy encourages party-based dispute resolution, so parties can have the resolution tailored towards a win-win situation. In that way, all the parties gain from the resolution, and the dispute is resolved amicably.

7. THE CHALLENGES OF USING ALTERNATIVE DISPUTE RESOLUTION TO RESOLVE FAMILY DISPUTES IN NIGERIA

- Lack of rules: a potent question that arises for determination is the extent to which ADR is applicable in Nigeria. In order to make this determination, recourse must be had to the Nigerian legislation, Case Laws, and also reviews by scholars. ADR as a mechanism for resolving family disputes does not have enough legal backing in Nigeria. Whether through statutes or case laws;
- Lack of Awareness: In a country like Nigeria, it has become a settled practice that disputes must be resolved in court. Several people are not aware of the possibility of resolving their disputes out of court. Even when the options are presented, it seems implausible for them to do so. Hence, awareness of ADR is a great impediment to the use of ADR to resolve all kinds of disputes in Nigeria, including family disputes;
- Unenforceability and non-recognition of decisions emanating from some ADR mechanisms: one of the reasons parties to a dispute prefer to go to court is because of the belief that judgments of the courts are more enforceable than decisions reached amongst themselves. The fact that most ADR mechanisms safe for arbitration are not binding is an impediment to the utilization of ADR for resolving disputes, such as family disputes whose resolution would have a permanent effect on the status of a person;
- Uncooperative parties: Some parties are not aware of the possibility of resolving their disputes outside the courtroom. Hence, when the option to do so comes in, they refuse to participate. For them, it is either a settlement in court or nothing. These types of people make it difficult for ADR to be utilized in settling family disputes. This is because all ADR mechanisms are built on the fundamental principle of party autonomy. Parties must agree to resolve their disputes through ADR. Where a party is unwilling to utilize ADR in resolving a dispute, the other party cannot forcefully ensure participation.

- The tendency for ADR to be expensive: parties to ADR are saddled with the responsibility of paying the cost of whatever mechanism of ADR they have chosen to utilize. They have to provide the venue and pay the neutral third party that would help with the settlement of the disputes. Sometimes these costs can become unbearable for one or both of the parties to the dispute. For instance, a partner who has been abandoned and is already finding it difficult to feed may not be able to afford mediation as a mechanism to seek spousal maintenance.

8. RECOMMENDATIONS

8.1. Public awareness and sensitization campaigns

The National Orientation Agency (NOA), the Nigerian Bar Association (NBA), and civil society organisations should initiate coordinated media efforts (radio, television, and social media) to educate the public about the benefits of ADR for resolving family-related disputes. Community outreach through traditional and religious institutions should also be employed.

8.2. Institutionalization of ADR training

Legal practitioners, court officials, and social workers should undergo continuous professional development in family mediation and arbitration through statutory institutions like the Chartered Institute of Arbitrators (CIArb), Nigerian Institute of Chartered Arbitrators (NICArb), and legal education bodies. Certification and regulatory frameworks should be developed to ensure professionalism and accountability.

8.3. Enactment of a family ADR framework

Nigeria should develop a standalone Family Mediation and Arbitration Act to govern non-litigation family dispute resolution processes. This would ensure procedural clarity and promote the enforceability of agreements arising from ADR processes in family law.

8.4. Amendment of the Matrimonial Causes Act (MCA)

The MCA should be amended to explicitly permit the use of ADR mechanisms, particularly for spousal maintenance, child custody, visitation rights, and property settlement, before and during litigation. Mandatory mediation sessions (similar to MIAMs in the UK) should be introduced as a prerequisite to filing family disputes in court.

8.5. Legal aid for ADR

ADR services should be included within the scope of legal aid for indigent parties. A government-funded mediation voucher scheme (as piloted in the UK) could be introduced to lower the cost barrier for vulnerable individuals, especially in matters of child custody and maintenance.

CONCLUSION

The application of ADR mechanisms in the resolution of disputes has long aided in the administration of the justice system. Some factions no longer regard ADR as an alternative but an appropriate resolution process since it provides the most veritable and flexible means of resolving disputes. Although its application is limited due to ADR being particularly unapplicable in the resolution of family disputes.

Several legislations limit the resolution of

disputes arising under them to litigation. This limitation includes family disputes. The inevitability of disputes in every human relationship or interaction requires a corresponding development of the means through which these disputes can be resolved when they arise.

Family disputes remain a type of dispute that ought to be settled timely manner to curb damages, destruction, and to breed peace and development. In view of this, there should be the establishment of Family courts to hear and determine matters relating to children which emanates under a marriage. The High Courts have also made efforts to develop court rules and procedures that will see to the efficient and effective resolution of family disputes. The role of the legislature cannot be underemphasised. They have helped and assisted in the enactment of laws that will assist in the resolution or guide in the determination of issues relating to family disputes.

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The Impact of Intelligent Systems on the Future of Criminal Justice: Between the Right to Privacy and the Imperative of Modernization

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ABSTRACT

Constitutional principles have enshrined individual rights in accordance with the guarantees imposed by the rules of a fair trial. However, modern judicial systems are increasingly incorporating technologies driven by artificial intelligence (AI), which has sparked considerable debate. Some argue that the absolute implementation of such technologies poses a serious threat to fundamental constitutional rights—particularly the right to privacy and the guarantees of due process. Others view their adoption as a transformative development in the justice sector.

Among the key outcomes of AI integration into the justice system is the emergence of electronic litigation technologies, notably remote or virtual trials. While these mechanisms have significantly expedited judicial proceedings—especially by resolving disputes more quickly and reducing trial delays—they have also faced criticism. Objections have been raised at both national and international levels due to the potential challenges these mechanisms may present, especially in terms of their impact on fundamental procedural guarantees, such as the principle of adversarial proceedings and the right to a defense.

INTRODUCTION

Constitutional principles have been emphasized at both the international and national levels, historically and in modern times, on the rights of individuals to seek redress through judicial processes safeguarded by the rules of efficient and fair justice. However, modern judicial systems are now witnessing the introduction of technologies driven by artificial intelligence, which has sparked controversy between opponents and proponents. Critics argue that the unrestricted application of such technologies constitutes a violation of fundamental constitutional rights of individuals, whether during the pre-trial phase, particularly the right to privacy, or during the trial itself, especially when proceedings are conducted remotely via video, raising concerns about the extent to which fair trial guarantees are upheld. Conversely, supporters see the adoption of these technologies as a qualitative leap forward for the justice sector, elevating its systems to align with the most advanced judicial frameworks worldwide in delivering justice.

Moreover, the inevitability of artificial intelligence has cast its influence across all sectors amid the rise of what is now known as digital administration or e-governance. Among its manifestations within the justice sector is the mechanism of electronic litigation. The mechanism of electronic litigation, which constitutes one of the newly introduced instruments at the international level, has also been adopted by many countries, including Algeria, in recent years following the enactment of Law No. 15-03 dated February 1, 2015, concerning the modernization of the judiciary. This law institutionalized the use of electronic means as a method for conducting remote litigation procedures. This mechanism has significantly accelerated litigation processes, particularly in expediting dispute resolution.

However, certain jurists and courts have expressed opposition to this mechanism, arguing that it may encounter significant challenges, particularly in guaranteeing essential procedural safeguards and in upholding the core principles of due process, notably the principle of in-person hearings and respect for the right of defense.

The significance of this topic lies in examining the legal dimension regarding the necessity of implementing artificial intelligence technologies in the judicial field in a manner that does not infringe upon individuals' constitutional rights, primarily the right to privacy and fundamental procedural safeguards in litigation.

Moreover, this study aims to clarify the impact of AI systems on the right to digital privacy, particularly during the pre-trial phase, namely the investigation stage, as well as on constitutional rights throughout electronic trial proceedings.

Accordingly, the question arises: **To what extent have AI systems succeeded in balancing an individual's right to privacy and procedural guarantees on one hand, and the demands imposed by the modernization of justice on the other?**

In response, we adopted two main methodologies: the descriptive approach, considering AI systems as a phenomenon requiring a detailed description of their key characteristics and legal framework to identify their advantages and disadvantages; and the analytical approach, which involves scrutinizing the relevant legislative texts regulating the application mechanisms of AI tools, aiming to assess their effectiveness in the judicial domain and their compliance with the protection of individual privacy.

To achieve the objectives of this study, the research paper is divided into two main sections:

- The impact of intelligent systems on the right to privacy;
- The impact of intelligent systems on the constitutional principles protecting litigants (In the French and Algerian experiences).

1. THE IMPACT OF INTELLIGENT SYSTEMS ON THE RIGHT TO PRIVACY

Despite the positive outcomes that can arise from the digitalization of administration in general, most notably the enhancement of public services and the acceleration of fulfilling individuals' needs, this process simultaneously generates a range of challenges. Among these is the issue commonly referred to as the right to privacy, which has evolved into what is now known as digital privacy. Therefore, this section will first address the general concept of privacy before discussing the legal safeguards designed to protect the right to digital privacy.

1.1 The concept of the right to privacy

Privacy, in general, refers to an individual's right to protect their personal information and to secure their life and private affairs from any form of intrusion, violation, or exploitation by others. Disclosing aspects of private life without consent is generally regarded as a violation of the right to privacy.[1] One manifestation of this right is the protection of an individual's personal life from violations such as intrusion into the sanctity of their home.

While traditionally this concept was limited to safeguarding an individual's private life from interference, its scope has expanded alongside advancements in information and communication technologies, particularly with the emergence of artificial intelligence technologies. Today, individuals' lives and all related information and data are integrally embedded within complex information systems and digitized platforms, as opposed to being confined to physical, paper-based records. Consequently, the right to privacy has evolved into what is now known as digital privacy, which primarily concerns the protection of data generated or transmitted by users during web browsing via mobile devices or desktops.[2]

Digital privacy can be defined as the ability of an individual to control the collection, processing, storage, and dissemination of personal information in cyberspace, and to be protected against unlawful access, surveillance, or misuse of such data.[3] Modern legal scholarship highlights that digital privacy goes beyond safeguarding against intrusion; it reflects broader principles of transparency, accountability, and fairness in data processing.[4] In addition, comparative legal research demonstrates a progressive recognition of digital privacy as an autonomous right, one that imposes positive obligations on states and institutions to establish effective technical and regulatory safeguards.[5]

1.2 Legal safeguards for the protection of digital privacy

Below, we examine aspects of the legislative frameworks established by the Algerian legislator to safeguard digital privacy, followed by an analysis of the impact of investigation and inquiry into crimes on the right to digital privacy.

1 Saidani, N. (2021). Criminal protection of the right to privacy in the field of informatics. Doctoral dissertation, University of Batna 1, p. 14. Available at: <https://dspace.univ-batna.dz/items/fe9fbbdb-ee56-4c1e-b68f-36ab7b404b58>.

2 Al-Sharif, Y., Mizghish, A. (2022). Legal mechanisms established to protect the right to digital privacy in Algerian legislation. Journal of Research and Business Law, 7(2), pp. 192-213. Available at: <https://asjp.cerist.dz/en/article/192238>.

3 Finck, M., Pallas, F. (2021). They who must not be identified—Distinguishing personal from non-personal data under the GDPR. *Computer Law & Security Review, 40,* 105523. p. 3. Available at: <https://doi.org/10.1016/j.clsr.2020.105523>.

4 Edwards, L., Veale, M. (2022). Slave to the algorithm? Why a "right to explanation" is probably not the remedy you are looking for. *International Data Privacy Law, 12*(1), p. 77. Available at: <https://doi.org/10.1093/idpl/ipab020>.

5 De Gregorio, G. (2022). Digital Constitutionalism and Privacy and Data Protection. In G. De Gregorio (Ed.), Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society (p. 216). Cambridge University Press, Cambridge, p. 216. Available at: <https://doi.org/10.1017/9781009071215>.

1.2.1 Selected legislative frameworks for protecting digital privacy

Successive constitutions have enshrined the protection of the right to privacy, the most recent being the 2020[6] constitutional amendment. Article 47 states: "The protection of natural persons in the processing of personal data is a fundamental right".

This right has also been reinforced through various specific laws. For instance, Article 59 of the Postal and Telecommunications Law mandates that:[7] "Operators holding licenses, as well as their users, under the penalties outlined in Article 127 of this law, must respect the confidentiality of correspondence transmitted via wired and wireless communications, and uphold the conditions for protecting private life and the personal information of subscribers".

Additionally, Article 15 of Law No. 06-01 concerning the prevention and combating of corruption specifies,[8] in the context of preventive measures against corruption: "Enabling the media and the public to access information related to corruption, while respecting privacy, personal honor and dignity, as well as the provisions related to national security, public order, and judicial neutrality".

1.2.2 The impact of investigation and inquiry into crimes on the right to digital privacy:

One of the key legal protections of the right to privacy acknowledged by the legislator involves the limitations imposed even when certain crimes specified below occur. These limitations consist of two substantive conditions: first, the necessity of investigation in flagrante delicto crimes; second, the requirement of a preliminary investigation for crimes of a serious criminal nature. In addition to these substantive conditions, there is a procedural requirement, which is judicial authorization.

A. The necessity of conducting investigations into caught-in-the-act offenses and preliminary inquiries into high-risk crimes

Article 65 bis 5 of the Criminal Procedure Code addresses certain crimes that require immediate investigative and investigative actions due to their high criminal risk.[9] Examples include drug-related offenses, terrorism, transnational organized crime, offenses affecting automated data processing systems, and money laundering and currency crimes.

When the necessity outlined in the article is established, authorization may be granted to initiate investigative procedures, which include intercepting correspondence, recording audio and video communications, and entering residential premises without requiring the consent or approval of the individuals involved.

B. Judicial authorization

The mere necessity to initiate electronic surveillance, investigation, and monitoring procedures, even in cases involving offenses listed under Article 65 bis 5, is insufficient. It is imperative to obtain judicial authorization from the Public Prosecutor. Furthermore, when a judicial investigation is opened concerning these procedures, authorization must be secured from the investigating judge. These powers granted to the latter were established through the amendment to the Code of Criminal Procedure under Law No. 06-22.[10]

6 Presidential Decree No. 20-442 promulgating the constitutional amendment approved by referendum on November 1, 2020. (December 30, 2020). Official Gazette 82. Available at: <https://www.joradp.dz/FTP/JO-FRANCAIS/2020/F2020082.pdf>.

7 Law No. 2000-03 on the general rules relating to postal and telecommunications services. (August 5, 2000). Official Gazette 48. Available at: <https://www.joradp.dz/FTP/jo-arabe/2000/A2000048.pdf>.

8 Law No. 06-01 on the prevention and fight against corruption. (February 20, 2006). Official Gazette 14. Available at: <https://www.joradp.dz/FTP/JO-ARABE/2006/A2006014.pd>.

9 Ordinance No. 15-02 amending and supplementing Ordinance No. 66-155 of 8 June 1966 (Code of Criminal Procedure). (July 23, 2015). Official Gazette 40. Available at: <https://www.joradp.dz/FTP/JO-FRANCAIS/2015/F2015040.pdf>.

10 Law No. 06-22 amending and supplementing Ordinance No. 66-155 of 8 June 1966 (Code of Criminal Procedure). (December 20, 2006). Official Gazette

2. THE IMPACT OF INTELLIGENT SYSTEMS ON CONSTITUTIONAL PRINCIPLES IN LITIGATION

Intelligent systems have not only affected individuals' lives by digitizing their data and privacy but have also extended to their judicial rights, placing these rights at the center of a dispute between opponents and proponents, for reasons we will outline. With Reference to the French Experience in Comparison to the Algerian Experience:

2.1 The nature of remote electronic litigation

Some define the electronic judicial system as: "The authority of a specialized judicial court to electronically adjudicate disputes presented before it via the Internet or a private external communication network (Extranet), using technical electronic mechanisms aimed at expediting dispute resolution and facilitating access for the parties involved"[11]. Accordingly, litigation procedures occur simultaneously despite the physical distance between the parties[12], allowing for the hearing of testimonies, the exchange of pleadings between the parties or their representatives, and the examination of witnesses or interrogation of the defendants.[13]

From this definition, it is clear that electronic litigation procedures are conducted through the transmission and receipt of documents and evidence via electronic platforms, eliminating the need for the parties to physically appear repeatedly at the courthouse, as traditionally required in conventional judicial systems. Opponents are also interrogated, their statements are heard, memoranda are exchanged between them or their representatives, and witness statements are heard, all via electronic means.[14] After that, the judge then only needs to ask a few straightforward questions before issuing a ruling promptly, without the need to postpone due to case backlog.

This contributes to saving time, reducing effort, and minimizing expenses, thereby alleviating the issue of overcrowding in courts and striving to improve the quality of services provided to litigants.[15]

2.2 The legislative foundations of electronic litigation in Algeria

Electronic litigation, or remote video conferencing, which the Algerian legislator refers to using the French term "Vidéo-conférence" in the context of investigations and witness hearings, derives its terminology from the United Nations Convention against Transnational Organized Crime, ratified by Presidential Decree No. 02-55 issued in 2002.[16] However, its practical application only began to emerge in 2007, specifically with the inauguration of the 2007-2008 judicial year, when the electronic litigation bill was introduced for parliamentary discussion. The bill received implicit approval from parliament members, but further debate was postponed until 2014, during the nineteenth public session held on Monday, November 24, 2014. These developments ultimately culminated in the enactment of Law No. 15-03 concerning the modernization of justice.[17]

84. Available at: <https://www.joradp.dz/FTP/jo-arabe/2006/A2006084.pdf>.

11 Jayyashi, A. F. M. (2014). Remote litigation: A legal study. Kufa Journal of Legal and Political Sciences, 1(21), pp. 100-129. Available at: <https://journal.uokufa.edu.iq/index.php/kjlps/article/view/9644>.

12 Osmani, L. (2016). The electronic litigation system as a mechanism for achieving development plans. Elmofaker Review, 11(1), pp. 215-225. Available at: <https://asjp.cerist.dz/en/article/62437>.

13 Mahmoud, S. A. (2007). The role of the computer in front of the Egyptian and Kuwaiti judiciary: Towards judicial e-process and electronic judiciary. Dar al-Nahda al-Arabiya, Cairo, p. 30.

14 Mahmoud, op. cit., p. 30.

15 Osmani, op. cit., p. 218.

16 Presidential Decree No. 02-55 ratifying, with reservation, the United Nations Convention against Transnational Organized Crime. (February 5, 2002). Official Gazette, No. 9. Available at: <https://www.joradp.dz/FTP/JO-FRANCAIS/2002/F2002009.pdf>.

17 Law No. 15-03 on the modernization of the justice

Although this law represents a modest and somewhat delayed step, considering the timeline from the ratification of the United Nations Convention against Transnational Organized Crime,[18] it can nonetheless be regarded as a positive advancement towards embracing technology, specifically what has come to be known as the electronic administration system.

Article 1 of this law articulates three fundamental objectives it aims to achieve:

- Establishing a centralized information system for the Ministry of Justice;
- Transmitting judicial documents and records electronically;
- Utilizing remote video conferencing technology in judicial proceedings.

2.2.1 Applications of electronic litigation in Algeria

Since the enactment of the Justice Modernization Law, the majority of courts across the country have seen significant uptake in utilizing its provisions, with 153 remote video trials recorded within the first year of implementation. The inaugural session took place on October 7, 2015, at the Court of El Kalaa in the misdemeanor division. Officials involved in this initiative emphasized that this technology aims to alleviate courtroom overcrowding, reduce the burden of travel for defendants, security personnel, prison administrations, and witnesses, while also accelerating the pace of case processing.[19]

Regarding remote international trials, it was the first of these pleadings on July 11, 2016, between the Court of Msila in Algeria and the Court of Nanterre in France. Many legal scholars and attorneys who participated in these remote hearings praised the process for its numerous advantages, including the provision of simultaneous interpretation from Arabic to French, and for projecting a positive image internationally regarding the integrity of the Algerian judiciary, highlighting respect for the right of defense and adherence to fundamental trial principles. Furthermore, this form of trial eliminates the need for physical presence in court, especially for individuals unable to travel due to health conditions. Overall, the use of remote video trial technology offers significant savings in effort, cost, and time.[20]

2.2.2 The position of legal doctrine and judicial practice on the digitalization of justice

An examination of the implementation of justice digitalization laws and their impact on various international judicial systems, as well as the reactions they have provoked, reveals the existence of two opposing trends. The first trend expresses satisfaction, relying on the advantages demonstrated through judicial practices conducted via electronic platforms. The second trend, however, is not entirely opposed to these technologies but raises reservations concerning certain aspects, particularly those touching upon the fundamental principles of due process.[21]

In order to assess the legal value and broader implications of these laws, it is necessary to analyze the arguments and justifications advanced by both positions, with the aim of reaching practical outcomes that may contribute to the harmonization of diverse legal and judicial systems at the international level.

A. Perspectives of the supportive approach to judicial digitalization

- This perspective is grounded in the principle of synchronizing technological ad-

sector. (February 1, 2015). Official Gazette 6. Available at: <https://www.joradp.dz/FTP/JO-ARABE/2015/A2015006.pdf>.

18 notably since the issuance of Presidential Decree No. 02-55 in 2002, its discussion in 2007, and its eventual enactment in 2014.

19 Radio Algeria. (October 8, 2015). Conducting the first remote visual trial at Kolea Court. Radio Algeria. Available at: <https://radioalgerie.dz/news/ar/article/20151008/54527.html>.

20 Echorouk Online. (July 11, 2016). Hearing of a French witness in the first remote trial in the history of Algerian justice. Echorouk Online Newspaper. Available at: <https://www.echoroukonline.com/عام-شاهدة-سماع-أول-محاكمة-عن-بعد-بين-الجزائر-وفرنسا/>.

21 Selçuk, S., Konca, N. K., Kaya, S. (2025). *AI-driven civil litigation: Navigating the right to a fair trial. Computer Law & Security Review, 57*, p. 106136. Available at: <https://doi.org/10.1016/j.clsr.2025.106136>.

vancement with the evolution of crime. Since offenders have developed sophisticated technical methods relying on electronic means to commit crimes, it is only logical to respond by updating laws and electronic tools to counter this phenomenon effectively.[22]

- The rapid completion and execution of litigation procedures through the electronic exchange of pleadings and documents, unlike traditional correspondence and postal communications,[23] which often result in case adjournments, thus fulfilling the principle of procedural economy.
- Empirical evidence suggests that the adoption of electronic litigation and digital case management systems has led to a tangible reduction in court backlogs and a decrease in the frequency of adjournments. For instance, in England and Wales, the shift from paper-based to digital processes in criminal and family courts has resulted in improved accuracy—error rates dropping below 1%—expedited case progression, and fewer delays caused by clerical inefficiencies.[24]
- Facilitating the categorization of cases which streamlines their processing and automated storage while reducing the physical storage space required in courts. This also helps prevent the loss or haphazard filing of case files.
- Preserving electronic documents of all kinds from the initial complaint, records, session minutes, to all case-related papers, thereby ensuring the protection of rights.
- Alleviating the pressure and workload on judges and sparing them from confrontations with litigants, particularly in cases where judges personally oversee proceedings without legal representation.
- Allowing electronic access to case files and enabling review of all procedures taken without the necessity of physically attending court.[25]

B. The viewpoints of those opposing electronic litigation, on the grounds that it conflicts with constitutional principles

At the international level, the attitude towards remote litigation between countries appears to oscillate between relative rejection and conditional acceptance. There is no dispute that digitization and artificial intelligence have contributed to the development of the judicial system. However, studies have shown that the lack of technology in some judicial systems in some countries has negatively impacted the effectiveness of digital justice, while other systems have adapted well.[26]

We will limit our analysis to the French model in comparison with the Algerian experience, in consideration of the scope of this research paper:

One of the most notable recent decisions of the French Constitutional Council[27] provided

22 Al-Badaynah, D. M. (September 2-4, 2014). Cybercrimes: Concept and causes. Paper presented at the Scientific Symposium "Emerging Crimes in Light of Regional and International Changes", College of Strategic Sciences, Amman, Jordan, p. 6. Available at: <https://www.researchgate.net/profile/Diab-Al-Badayneh/publication/328064682_aljraym_alalktrwnyt_almfhwm_walasbab/links/5bb5be4392851ca9ed37abf3/al-jraym-alalktrwnyt-almfhwm-walasbab.pdf>.

23 Al-Zahrani, N. S. (October 15, 2008). The electronic court in the information technology era. Al-Riyadh Newspaper. Available at: <https://www.alriyadh.com/380971>.

24 Bhatt, H., Bahuguna, R., Swami, S., Singh, R., Gehlot, A., Akram, S. V., Gupta, L. R., Thakur, A. K., Priyadarshi, N., Twala, B. (2024). Integrating industry 4.0 technologies for the administration of courts and justice dispensation – a systematic review. *Humanities and Social Sciences Communications, 11*(1), Article 1076, p. 15. Available at: <https://doi.org/10.1057/s41599-024-03587-0>.

25 Utani, S. (2012). The electronic court: Concept and application. Damascus University Journal for Economic and Legal Sciences, 28(1), pp. 165-208. Available at: <https://www.damascusuniversity.edu.sy/mag/law/images/stories/1-2012/a/165-208.pdf>.

26 Gaffar, H. (2024). Implications of Digitalization and AI in the Justice System: A Glance at the Socio-legal Angle, Law and World, vol. 10, no. 31: 154. Available at: <https://lawandworld.ge/index.php/law/article/view/585>.

27 Decision No. 2020-872 QPC of the French Con-

that: "While technological progress necessitates the digitization of courts and trials, this must not come at the expense of the right to physical presence and the right to respond during the various stages of the trial. While this may not affect the judicial panel, it is fundamentally different for the accused and their defense".

This ruling followed the legislative measures adopted by the French Parliament in response to the COVID-19 pandemic, which resulted in a considerable expansion of remote trial hearings through video conferencing technologies. The practice provoked substantial debate, particularly after the French Constitutional Council, on 16 October 2020, was seized of a decision delivered by the Criminal Division of the Court of Cassation.[28] The ruling of the French Council of State (Conseil d'État), Judgment No. 2351 of 13 October 2020, concerned a constitutional matter regarding the protection of rights and freedoms guaranteed by Article 5 of Ordinance No. 2020-303, which amended the Code of Criminal Procedure in response to the COVID-19 pandemic on the basis of Law No. 2020-290 adopted to address the spread of COVID-19.[29]

Article 5 of the aforementioned Ordinance No. 2020-303 provides that: *"By way of derogation from Article 706-71 of the Code of Criminal Procedure, audiovisual communication may be used before all criminal courts, with the exception of the Cour d'assises, without the need to obtain the consent of the parties... while respecting the rights of the defense and ensuring the adversarial principle in the proceedings".*

In this regard, the French Constitutional Council issued two consecutive decisions. The first was rendered on January 15, 2021 (*Decision No. 2020-872 QPC*), in which the Council ruled against the legitimacy of using audiovisual communication technology in criminal proceedings without the consent of both parties, as provided for in Article 5, even in the context of the health emergency. The Council held that the substance of this measure "undermines the rights of the defense", particularly the right of the accused to be physically present before the judge.[30]

In its second decision, issued on 4 June 2021 (*2021-911/919 QPC*), the French Constitutional Council reaffirmed the same position, emphasizing that the use of videoconferencing in criminal proceedings without the defendant's consent undermines the right to physical confrontation, particularly during pre-trial detention. The Council therefore rejected the request to remove the requirement of the defendant's consent for trial by video in detention cases, considering that such a measure could deprive the defendant of appearing before a judge. This, according to the Council, constitutes an infringement of defense rights that cannot be justified by the health emergency context, despite acknowledging the importance of protecting public health and ensuring the continuity of justice.[31]

Indeed, the Constitutional Council declared the first paragraph of Article 5 of the aforementioned Ordinance No. 2020-303 unconstitutional.[32]

stitutional Council. (January 15, 2021). Available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042993586>.

28 *Judgment No. 2351: Use of videoconferencing before criminal courts in the context of the state of health emergency.* (October 13, 2020). Conseil d'État (France). Légifrance. Available at: <https://www.legifrance.gouv.fr>.

29 Ordinance No. 2020-303 of 25 March 2020 adapting the criminal procedure rules under the Emergency Law No. 2020-290 of 23 March 2020. (March 26, 2020). *Official Journal of the French Republic,* JORF No. 0074, p. 5809. Available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041755529/>.

30 Décision n° 2020-872 QPC. (January 15, 2021). Invalidating video hearings without consent as violating rights of defense. Constitutional Council. Available at: <https://www.conseil-constitutionnel.fr/decision/2021/2020872QPC.htm>.

31 Décision n° 2021-911/919 QPC (June 4, 2021). Censuring unrestricted use of videoconferencing without legal safeguards. Constitutional Council. Available at: <https://www.conseil-constitutionnel.fr/decision/2021/2021911_919QPC.htm>.

32 Al-Qadi, R. M. (2022). *Comment on the Decision of the French Constitutional Council on the Unconstitutionality of the Use of Audio-Visual Communication before the Criminal Judiciary in the Context of a State of Health Necessity. Journal of Legal and Economic Research*, Faculty of Law, Mansoura University, 12 (79),

An analysis of these two decisions reveals that the Constitutional Council does not reject digitization per se, but rather requires clear safeguards and conditions to ensure respect for the rights of the defense and the legitimacy of proceedings. It reflects a delicate constitutional balance between the protection of litigants' fundamental rights and the flexibility of the judicial system in times of crises such as the COVID-19 pandemic. On the one hand, it allows the use of video trial technologies, but only within a narrow and temporary scope, linked to the circumstance of the 'health emergency', rather than as a permanent generalization, while observing defense guarantees in particular: legal representation and the defendant's consent to video hearings, especially in cases of pre-trial detention.

After this analytical presentation of the decision of the French Constitutional Council, it is particularly important to highlight the most recent studies that have addressed the management of procedures in France, including the applicable technical and legal standards as well as their practical outcomes:

The ELI-Mount report emphasizes that remote trials must respect the European standards for judicial independence, ensuring that geographical, economic, and procedural factors do not hinder access to justice. The report recommends that all countries, including France, adopt technical and legal safeguards for remote hearings. These safeguards include secure communication channels, verification of participants' identity, and measures to prevent technological bias or interference. The report also highlights that training of judicial personnel and continuous monitoring of the effectiveness of remote hearings are essential to maintain fairness and public trust in the judicial system.[33]

The aforementioned principles have been reinforced by Article 706-71 of the French Code of Criminal Procedure,[34] as well as by the French Code of Civil Procedure,[35] particularly through its relevant provisions Articles 748-1 to 748-9, which set forth requirements to ensure parties' identity, the integrity and confidentiality of exchanged files, and the extension of procedural deadlines to mitigate technical risks. One of the main tools employed is the Lawyers' Private Virtual Network (RPVA), which allows attorneys to submit documents electronically and communicate directly with courts, thus accelerating procedures and reducing the need for physical appearances.[36]

Technologies such as artificial intelligence (AI) and data analytics are increasingly used to improve the effectiveness of e-litigation. For instance, natural language processing (NLP) techniques have been applied to extract legal indicators from court judgments, helping reduce information asymmetry between parties and enhancing access to justice.[37]

All of these studies suggest that remote litigation may affect the dynamics of courtroom interactions, which calls for the development of new protocols to ensure procedural effectiveness and protect the rights of the parties involved.[38]

p. 177 ff. Available at: <https://mjle.journals.ekb.eg/article_235640.html?lang=en>.

33 ELI-Mount. (2023). European standards of judicial independence. Institut Européen du Droit, pp. 12-15. Available at: <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI-Mount_Scopus_European_Standards_of_Judicial_Independence.pdf>.

34 French *Code of Criminal Procedure, Articles 706-71.* Légifrance. Available at: <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000051751938>.

35 *French Code of Civil Procedure.* (2024). Légifrance. Available at: <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070716/>.

36 CMS. (n.d.). CMS Expert Guide to Digital Litigation in France. Available at: <https://cms.law/en/int/expert-guides/cms-expert-guide-to-digital-litigation/france?utm_source=chatgpt.com>.

37 Boniol, P., Panagopoulos, G., Xypolopoulos, C., El Hamdani, R., Restrepo Amariles, D., Vazirgiannis, M. (2020). Performance in the Courtroom: Automated Processing and Visualization of Appeal Court Decisions in France, p. 1. Available at: <https://arxiv.org/pdf/2006.06251>.

38 European Law Institute. (2024). European standards of judicial independence. Institut Européen du Droit, pp. 1-62. Available at: <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI-Mount_Scopus_European_Standards_of_Judicial_Independence.pdf>.

In Algeria, some legal professionals have expressed objections to electronic litigation for the following reasons:[39]

- It allows for the remote trial of defendants who are fugitives abroad, particularly in countries that lack extradition agreements with Algeria, thereby enabling such defendants to remain free and avoid punishment;
- Although the use of video sessions is a promising tool to mitigate the issue of trial postponements, trying defendants through this technology conflicts with the procedural system currently practiced before the courts;
- Moreover, this approach infringes upon defense rights and undermines fundamental litigation principles. This is because existing legislation assumes the principle of public hearings and trials, as well as the mandatory presence of the defendant during the session. Without the defendant's presence, the defense is deprived of the right to advocate, which could lead to significant legal complications under this system.

2.3 An assessment of the digitalization of justice and the extent to which it upholds the fundamental principles of litigation

2.3.1 The Advantages of Judicial Digitalization

- In our assessment, the adoption of remote litigation technology has the potential to provide substantial procedural safeguards related to the proper administration of justice, provided it is implemented in a manner consistent with the spirit of the law and guarantees the parties' rights to a fair trial.
- Regarding documentation, evidence, electronic preservation and notification, as well as access to case files via the court's website, we believe that replacing traditional paper-based methods with electronic means does not undermine the fundamental principles of litigation. Rather, it contributes to better documentation of trial procedures, ensures speed, accuracy, and reliability, and introduces greater flexibility to judicial processes compared to classical methods.
- What proves our previous point, Studies have demonstrated that the use of artificial intelligence in criminal cases significantly enhances judicial efficiency while incurring relatively lower costs compared to traditional justice systems.[40]
- Digital platforms, such as the Lawyers' Private Virtual Network (RPVA), allow for the electronic submission of documents and direct communication with courts. This facilitates the acceleration of judicial procedures and reduces the necessity of physical presence in court hearings.[41]
- The digitalization of justice enables the online publication of court records, thereby increasing transparency and allowing citizens to monitor judicial proceedings. Nevertheless, it remains essential to strike a balance between digital openness and the protection of privacy.[42]

39 Boumediene, B. (2021). The law of modernizing justice and its impact on achieving basic principles in litigation: Read in project Law No. 15/03 issued on 01/02/2015 related to modernization of justice. Journal of Legal and Social Sciences, 6(4), p. 1261. Available at: <https://asjp.cerist.dz/en/article/170253>.

40 Nouri, Z., Ben Salah, W., & Al Omrane, N. (2024). *Artificial Intelligence and Administrative Justice: An Analysis of Predictive Justice in France*. Hasanuddin Law Review, 10(2), p. 119. Available at: <https://doi.org/10.20956/halrev.v10i2.5541>.

41 Singh, M., Upadhyay, S. N. (2024). Digitization of Legal Aid Services and Criminal Justice. Law and World, p. 5. Available at: <https://lawandworld.ge/index.php/law/article/view/471>.

42 Allard, T., Béziaud, L., Gambs, S. (2020). Online publication of court records: Circumventing the privacy-transparency trade-off. arXiv, p. 2. Available at: <https://arxiv.org/pdf/2007.01688>.

2.3.2 The disadvantages of judicial digitalization:

- Digitalization raises serious concerns regarding the protection of personal data, as digital systems may be vulnerable to breaches or misuse. Strong and effective security measures are therefore indispensable.[43]
- Algorithms employed in digital justice may contain embedded biases that influence judicial decisions, potentially leading to unjust outcomes. Hence, transparent and fair algorithmic design is necessary to minimize these risks.[44]
- Certain jurisdictions face challenges in adopting modern technology due to limited resources and weak digital infrastructure, which undermines the effectiveness of e-litigation and the broader process of judicial digitalization.[45]
- Although remote video trials have become a necessity driven by technological advancement, the manner in which these trials are conducted does not provide a comprehensive and accurate view of courtroom proceedings in terms of parties, witnesses, and the public. This hinders the realization of the principles of publicity and orality required by a fair trial,[46] particularly when technical failures occur that prevent communication with the parties and their ability to be questioned remotely.

CONCLUSION

In concluding this discussion, it is important to present some key findings and, correspondingly, propose certain solutions and recommendations, particularly given the challenges facing the new government amid the rapid development of artificial intelligence technologies. The aim is to enhance the effectiveness of the legal framework governing AI applications within the judicial system.

Study Findings:

- The most critical phase in criminal proceedings is the pre-trial stage, during which the legislator has enshrined safeguards to protect the life and privacy of the individual under investigation.
- Even amid investigative and criminal inquiry procedures, the legislator has maintained the protection of individuals' rights to privacy and private life by imposing stringent restrictions on the use of electronic surveillance when necessary.
- It has been established that AI systems exert significant influence both during the pre-trial phase, particularly in crime investigations, which impact the right to digital privacy, and during the electronic trial phase, affecting constitutional guarantees in litigation, especially the principles of the right to defense and the principle of oral proceedings.
- Based on both the French and Algerian experiences, it appears that artificial intelligence systems have had a positive impact in accelerating judicial procedures and reducing financial burdens on litigants, particularly in cases involving parties located in different geographical areas.
- The technical standards applied in this context demonstrate that the digital infrastructure constitutes a decisive factor for the success of remote trials; however, disparities in the technological readiness of courts significantly affect the effectiveness of implementation.
- Furthermore, practical experience shows that procedural safeguards—such as prior consent of the parties, the reliability of au-

43 Allard, op. cit., p. 2.
44 Ibid., p. 2.
45 Allard, op. cit., p. 2.
46 Amarah, A. H. (2018). The use of videoconferencing technique in the investigation and criminal procedures. Dirāsāt wa Abḥāth: The Arab Journal of Human and Social Sciences, 10(3), p. 68. Available at: <https://asjp.cerist.dz/en/article/59930>.

dio-visual transmission, and the possibility of appeal—remain a fundamental challenge to ensuring the right to a fair trial.

Study Recommendations:

- Similar to the French and Algerian experiences, states should adopt a comprehensive legislative reform that guarantees full recognition of electronic documents and digitally rendered judgments, while ensuring harmonization between criminal and civil procedural codes;
- There is a critical need for the genuine implementation of artificial intelligence applications, which requires the development of algorithms that ensure a delicate balance between protecting the right to privacy and safeguarding the rights of litigants on one hand, and meeting the demands of judicial modernization on the other;
- All jurisdictions should invest in a unified digital infrastructure, including secure platforms for document exchange and data protection, while also benefiting from successful comparative experiences;
- Mandatory continuous training should be imposed on judges and lawyers in digital technologies to ensure the effective and fair conduct of remote trials;
- Strengthening appeal mechanisms and judicial oversight over electronically issued decisions is essential to guarantee that the rights of defense and constitutional safeguards are not compromised;
- Clear procedural protocols should be developed for the management of virtual hearings, taking into account the dynamics of communication between judges, parties, and witnesses, whether in domestic or international trials.

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The Arab Copyright Convention of 1981 – The Necessity of Amendment to Accommodate Digital Rights

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ABSTRACT

The growing digital challenges accompanying the rise of digital creativity, alongside the efforts of Arab countries to enhance legal frameworks for protecting authors' rights and literary works, have exposed a misalignment between the provisions of the 1981 Arab Copyright Convention and the evolving national objectives. This discrepancy necessitates revising the Convention to align with the fundamental standards for copyright protection in the digital environment, as set out in the WIPO Copyright Treaty of 1996 – the first international treaty to address copyright in the context of the internet.

This paper explores the necessary revisions to the 1981 Convention to incorporate digital copyright protections. It examines the legal foundations required for recognizing such rights, including the originality and fixation of digital works, presumptions of ownership, the scope and limitations of rights, applicable legal protections, and enforcement mechanisms suited to the digital context.

The study offers significant academic value by addressing a key gap in comparative legal analysis between the Arab Copyright Convention and the WIPO Copyright Treaty. It integrates relevant international instruments and judicial precedents to propose practical legislative amendments compatible

with the demands of the digital age. The findings contribute to the development of intellectual property scholarship and offer a concrete basis for legal reform. Ultimately, this study aims to strengthen the rights of Arab authors and promote the harmonization of regional copyright frameworks with established international standards.

INTRODUCTION

The enactment of international and regional treaties related to copyright is an expression of the necessity to regulate and protect authors' rights at both international and regional levels, given their paramount importance in the age of technology and cross-cultural exchange among nations, as this imperative has manifested in the adoption of various agreements, most notably the Berne Convention for the Protection of Literary and Artistic Works (1886) and its subsequent amendments – Stockholm (1967), Paris (1971), and 1979 – which reinforced copyright protections; additionally, the TRIPS Agreement and the WIPO Copyright Treaty (1996) emerged as critical responses to a pivotal challenge in copyright protection: the digital dissemination of creative works.

The motivation behind subjecting copyright to international and regional regulatory frameworks lies in the widespread proliferation of creativity across the globe, transcending national boundaries, as the profound economic, social, and cultural impact of copyright protection on individuals and societies has driven Arab nations to adopt the Arab Copyright Convention (Baghdad, 1981), through which signatories expressed their commitment to establishing an effective and unified legal framework, where this framework aims to safeguard authors' rights, incentivize Arab creators,[1] and promote the advancement of literature, arts, and sciences.

However, the evolution of publishing methods – marked by the ease of reproducing works infinitely at minimal cost and their instantaneous global dissemination via the internet – has rendered the Arab Copyright Convention inadequate in addressing these rapid and transformative developments; consequently, there is a pressing need to revisit and adapt its provisions to align with contemporary creative and distribution methods, as well as the resulting shifts in copyright paradigms – much like the updates seen in relevant international treaties.

This paper seeks to establish a foundational critique by examining the shortcomings of the Arab Copyright Convention and proposing amendments to align it with developments in international copyright law, particularly the WIPO Copyright Treaty (1996), as this treaty serves as the benchmark for proposed revisions, being the first international agreement to address copyright in the digital environment and the pioneering "Internet Treaty".

Based on the above, this paper will seek to answer the following question: What provisions must be incorporated into the Arab Copyright Convention to keep pace with evolving digital copyright norms?

To address this question, the study relied on the comparative legal approach in addition to citing relevant case law and was divided into two parts.

Part One: Analyzes key provisions of the WIPO Copyright Treaty (1996) as the basis for proposed amendments.

Part Two: Identifies gaps in the Arab Copyright Convention and outlines necessary additions to ensure its relevance in the digital age.

1 Arab Convention for the Protection of Copyright. (1981). Preamble.

1. THE PROTECTION FRAMEWORK ESTABLISHED UNDER THE WIPO COPYRIGHT TREATY OF 1996

The 1990s witnessed a fundamental transformation, driven by the tremendous advancements in communication technologies and the widespread adoption of the internet and digital tools, as the field of intellectual property, particularly copyright law, was not immune to these changes, where the intersection of copyright with digital technology and the internet gave rise to new forms of artistic creations, distinct from traditional works in terms of their creation and distribution methods, which prompted nations to actively seek solutions by enacting treaties that keep pace with these developments, aiming to safeguard the moral and economic rights of authors.

To achieve this, and to harmonize global copyright norms[2], the World Intellectual Property Organization (WIPO) Copyright Treaty of 1996 was concluded and adopted by the Diplomatic Conference on December 20, 1996. The treaty consists of a preamble and 25 articles, clarifying its relationship with the Berne Convention (the foundational copyright treaty), establishing rights for computer programs and databases, and addressing distribution rights, rental rights, obligations concerning technological measures, rights management information, as well as enforcement provisions and administrative clauses.

The WIPO Copyright Treaty of 1996[3] is regarded as the first international treaty to address digital copyrights, extending protection to works emerging from digital technology and internet connectivity while ensuring the safeguards provided by prior relevant treaties, hence, it is commonly referred to as the "First Internet Treaty", where this treaty is classified as a special agreement under Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, it neither derogates from any obligations nor diminishes any rights established by the Berne Convention; rather, it maintains a close connection with it, as the treaty seeks to address the gaps in protecting digital works under the Berne Convention, as emphasized in its preamble, which states that the treaty was formulated in response to the parties' recognition of the need for new international rules and the clarification of interpretations of existing provisions to provide appropriate solutions to issues arising from recent economic, social, cultural, and technological developments[4] – particularly the profound impact of the latter on the creation and dissemination of literary and artistic works due to their integration with the internet.

1.1 Protected works

Article 2 of the 1996 WIPO Copyright Treaty (WCT) stipulates that the granted protection covers forms of expression, not ideas, procedures, methods of operation, or mathematical concepts as such; however, it refers, in defining the scope of protection, to Articles 2 through 6 of the Berne Convention[5], which address protect-

2 Sheinblatt, J. S. (1998). The WIPO Copyright Treaty. Berkeley Technology Law Journal, (13) 535, p 550.

3 See: Hawi, F. H. (2014). Web Sites and Intellectual Property Rights. Jordan: Dar Al Thaqafa, p. 118. Elbadraoui, H. (2007). The International Legal Framework for the Protection of Copyright and Related Rights, p. 9. Available at: <www.wipo/lip/dipl/met/05/3>.

4 Gami, H. (2004). International protection of copyright and related rights, WIPO national symposum on intellectual property for organization. The International Protection of Copyright and Related Rights: From the Berne Convention and the TRIPS Agreement to the WIPO Copyright Treaty-WIPO Performances and Phonograms Treaty, WIPO National Seminar on Intellectual Property for Government Officials, World Intellectual Property Organization, Manama, p. 20.

5 Article 2: Protected Works: 1. Literary and Artistic Works; 2. Possibility of Claiming Identification; 3. Derivative Works; 4. Official Texts; 5. Collections; 6. Protection obligation, beneficiaries of protection; 7. Works of applied arts, drawings and industrial models; 8. Daily news.
Article 3: Protection criteria: 1. Nationality of the author; Place of publication of the work; 2. Author's residence; 3. Published works; 4. Simultaneously

ed works, the possibility of limiting protection for certain works, the criteria for protection, the standards for protecting cinematographic and architectural works, as well as certain works of graphic and plastic arts, the guaranteed rights, the possibility of restricting protection for works of nationals from non-Union countries, and the determination of moral rights; In contrast, the WIPO Treaty introduced additional works necessitated by digital technology, emphasizing the need for their protection, primarily including:

1.1.1 Computer programs

It is noteworthy that the first agreement to include specific provisions regarding computer programs and classify them as protected works was the TRIPS Agreement,[6] unlike the Berne Convention and its subsequent amendments, and before the 1996 WIPO Copyright Treaty, as Article 10(1) of TRIPS affirmed that computer programs, whether in source or object code, are protected as literary works under the Berne Convention, and the 1996 WIPO Treaty reaffirmed this in Article 4, stating that computer programs are protected as literary works under Article 2 of the Berne Convention, irrespective of their mode or form of expression.

The European Court has supported this, stating in Case C 393/09 – Bezpečnostní softwarová asociace (BSA) that protection includes any form of expression of a computer program that allows replication in different computer languages, such as source code and object code. Preparatory design work, from which a program is later formed, is also included in the protection if the design is of this nature.[7]

It is pertinent to highlight several concepts closely related to computer programs and their legal study:[8]

Source Programs: The initial form of program writing in a programming language, varying in simplicity, complexity, and effectiveness in achieving the program's purpose.

Object Programs (Machine Code): The form executable by computers.

Algorithms: A set of necessary steps to accomplish a task or calculation, either detailed initially or left for later elaboration; also defined as a sequence of instructions composed of logical and arithmetic structures representing numerous operations to achieve a specific result.

Programming Languages: A set of programs that convert high-level programming languages or assembly languages into machine code, generally categorized into three types: assemblers, compilers, and interpreters.[9]

1.1.2 Digital databases

The inclusion of databases as protected works under the 1996 WIPO Copyright Treaty necessitates reference to the TRIPS Agreement as the first to incorporate specific provisions for databases,[10] classifying them as protected works, as Article 10(2) of TRIPS states that databases, whether machine-readable or in any

published works.
Article 4: Protection criteria for cinematographic works, architectural works, and certain works of graphic and plastic arts.
Article 5: Rights guaranteed: 1. and 2. Outside the country of origin; 3. In the country of origin; 4. In the country of origin.
Article 6: Possibility of restricting protection for certain works of nationals of certain countries outside the Union: 1. In the country of first publication and in other countries; 2. Non-retroactivity of restrictions; 3. Notification.

6 Article 10/1 of the TRIPS Agreement states: "1. Computer programs, whether in source or machine language, shall be protected as literary works under the Berne Convention of 1971".

7 Bsa v Ministert vo Kultury. (2010). Crc (Third Chamber), c393/9. Available at: <https://op.europa.eu/en/publication-detail/-/publication/3851211e-aaaf-47a0-96e0-b5e5fccb41bf#>.

8 Issa, M. A. (2020). The Protection of Intellectual Propety Rights for Digital Works under International Law. King Abdulaziz University Journal, Arts and Humanities, 30 (7), p. 73.

9 Ibid., p. 74.

10 Article 10/2 of the TRIPS Agreement states: "2. Compilations of data or other material, whether in machine-readable or other form, which constitute an intellectual creation as a result of the selection or arrangement of their contents shall be protected. This protection does not extend to the data or material as such and is without prejudice to the copyright in respect of such data or material".

other form, constitute protected works if their content selection or arrangement represents intellectual creativity, under the Berne Convention's provisions for literary and artistic works; however, this protection does not extend to the data or materials themselves and does not affect any pre-existing copyrights on such data, which was reaffirmed in Article 5 of the WCT, which clarified that databases or compilations of data enjoy the same protection as works under the Berne Convention if they constitute intellectual creations due to their content selection or arrangement; nonetheless, the constituent materials are excluded from protection, and the article emphasizes that such protection must not prejudice any copyrights applicable to the data or materials within the database. This was confirmed by the European Court in Football Dataco Ltd v Yahoo! UK Ltd (Case C 604/10), stating that the standard for copyright protection of a database depends on whether the selection and arrangement of the data within the database demonstrates the author's intellectual creation, through freedom of choice and creative arrangement.[11]

1.2 Special provisions

To address the need for regulating copyright in the digital environment, the WIPO Copyright Treaty, in addition to the newly included works, established rules tailored to the intangible nature of digitally published works,[12] primarily encompassing the right of rental, the right of communication to the public, the comprehensive solution, limitations on rights in the digital environment, and technological protection measures and rights management information.

1.2.1 Right of rental

The Treaty includes a provision granting the right to rent digitally published works, as authors of literary and artistic works hold the exclusive right to authorize the public availability of the original or copies of their works; additionally, the Treaty grants authors of computer programs, cinematographic works, and works embodied in sound recordings (as defined by national laws of contracting parties) the exclusive right to authorize commercial rental of their works;[13] however, an exception applies if the computer program itself is not the essential object of the rental, or if the rental of a cinematographic work does not materially impair the exclusive reproduction right.[14]

1.2.2 Right of communication to the public

Article 8 of the WCT grants authors the exclusive right to authorize the communication of their works to the public by any means, including making them available in a way that allows access at a time and place have individually chosen, which aligns with the electronic publi-

11 Football Dataco Ltd and Others v Yahoo UK Ltd and Others. (2012). CJEU, C-604/10. Available at: <https://curia.europa.eu/juris/document/document.jsf?cid=1199&dir=&docid=147582&doclang=en&mode=req&occ=first&pageIndex=0&part=1&text=&utm>.

12 It is worth noting that some jurists consider the first Internet Treaty to be of no importance. In fact, they consider it a modest agreement, and this will not change in the future, given that it cannot replace the Berne Convention, the Copyright Convention, or replace the TRIPS Agreement. Furthermore, they believe that it does not serve the interests of some countries that desire to be subject to lower-level obligations in the field of international copyright, in addition to the desire of countries to join the World Trade Organization. See in this regard: Lewinski, S. V. (2006). The role and future of the Universal Copyright convention. E-Copyright Bulletin, p. 18. Abdullah, A. A. (2009). The Legal Protection of intellectual Property Right on the internet. Egypt: New University House, p. 260.

13 Hawi, F. H., ibid., p. 124.

14 Article 7 of the Convention states: "Right of rental. 1. Authors of the following works: a. Computer programs, b. Cinematographic works, c. Works embodied in sound recordings, as defined in the national law of the Contracting Parties, shall enjoy the exclusive right of authorizing the public rental of the original or copies of their works for commercial purposes. 2. Paragraph (1) shall not apply in the following two cases: "a. If the subject matter is a computer program and the program itself is not the principal subject of the rental. b. If the subject matter is a cinematographic work, unless such rental has resulted in widespread copies of that work that materially prejudice the exclusive right of reproduction...".

cation of digital works on the internet, enabling public access per the user's discretion;[15] nevertheless, the article underscores that this must not conflict with relevant Berne Convention provisions.[16]

1.2.3 The comprehensive solution

The 1996 WIPO Copyright Treaty adopted the "comprehensive solution" for digitally published works, granting authors the exclusive right to authorize the transmission and dissemination of their works by wire or wireless means, including digital transmissions, ensuring public access at any chosen time and place. National legislators retain the authority to define its legal nature, scope, and liability for infringement.[17] The European Court has upheld the provisions of the 1996 WIPO Copyright Treaty, in case C 306/05, SGAE v Rafael Hoteles S.A., brought by SGAE (a Spanish copyright management association) against Rafael Hoteles S.A., a hotel chain, because the hotel provided broadcasts of audiovisual works (such as films and music) via televisions in its guest rooms, on the basis that this constituted "communication to the public" and therefore required the authorization of the rights holders. The court upheld this view, as it was in line with Article 8 of the WIPO Copyright Treaty (WCT), which states that an author has "the exclusive right to authorize communication to the public of his works by any means, including making them available to individuals at a place and time of their choosing".[18]

1.2.4 Limitations on rights in the digital environment

Article 10(2) permits member states to adopt exceptions and limitations for digitally published works, provided they align with the Berne Convention's three-step test (no conflict with normal exploitation or unreasonable prejudice to authors' rights).[19]

1.2.5 Technological Protection Measures and Rights Management Information

Negotiating parties agreed on the necessity of technological safeguards[20] complementing legal protections for digitally published works, as effective legal enforcement relies on such measures,[21] as the Treaty mandates member states to implement legal protections against the circumvention of technological measures and the removal or alteration of rights management information, deeming such acts copyright infringements.[22] This is what the European Court explicitly stated in the case of C 355/12, "Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl", dated January 23, 2014, where it stated that technological measures protected under Article 6 must be designed to prevent or restrict unauthorized acts (reproduction, communication to the public, distribution, etc.) that require the right holder's permission.[23]

15 Elsaghir, H. E. (2005). Emerging Global Issues in Intellectual Property. p. 3. Available at: <www.wipo-las/jiuru/cai/5/2>.

16 Article 8, last paragraph, states: "...without prejudice to the provisions of Articles 11(1), 11(2), 11(1), 1(2), 11(1), 1(2), 14(1), 1(2), and 14(1), 1(1) of the Berne Convention".

17 Hawi, F. H., ibid. p. 124.

18 SGAE v Rafael Hoteles S.A. (2006). CJEU, C306/05. Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=64884&doclang=EN>.

19 Article 10/2 of the Convention states: "2. In applying the Berne Convention, the Contracting Parties shall limit any limitations or exceptions to the rights provided for in that Convention to certain special cases that do not conflict with the normal exploitation of the work, and do not cause unreasonable harm to the legitimate interests of the author"; see: Elganbihi, M. (2005). International Coperation in the Protection of Intellectual Property Rights. Alexandria. Dar Al fikr Al jam'i, p. 128.

20 Although digitization poses a clear challenge to copyright principles, it can also reinforcing existing rights or establishing others. Burchardt, D. (2023). Does Digitalization Change International Law Structurally? German Law Journal, Special Issue: International Law and Digitalization, 24(3), p. 441.

21 Hawi, F. H., ibid. p. 126.

22 Articles 11 and 12 of the First Internet Convention. Talhouni, B. A. (2004). The internet and digital rights management. Muscat. p. 8.

23 Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl. (2014). CJEU, C-355/12, Available at: <https://app.livv.eu/decisions/LawLex201400000076JBJ>.

2. THE RULES TO BE INCLUDED IN THE ARAB AGREEMENT

The WIPO Copyright Treaty of 1996 stands as one of the most prominent international treaties that established new rules for the protection of authors' rights in the digital age, making it a benchmark for amending and adapting the Arab Copyright Agreement. A meticulous review of its provisions is essential to integrate the substantive norms introduced by the 1996 WIPO Treaty, particularly concerning the conditions for granting protection, digital rights, the presumption of ownership, protected works, exceptions and limitations, and technological protection measures.

2.1. Conditions for granting protection

International copyright treaties unanimously agree that any creative work meeting the formal and substantive conditions for protection deserves safeguarding,[24] including the 1981 Arab Copyright Agreement. However, its regulatory provisions fall short of encompassing newly emerging forms of creativity and their means of dissemination.

2.1.1. Originality

The 1981 Arab Copyright Agreement adopted the same foundational principle as relevant international copyright treaties – the criterion of originality, as it stipulated that intellectual creations must fulfill the condition of originality to qualify for protection, expressed through the term "innovation", where the Agreement also embraced the broad approach of the Berne Convention by employing flexible terminology[25] capable of accommodating evolving developments, including digitally published works; In contrast, the 1996 WIPO Copyright Treaty implicitly addressed digitally published works under Article 8, which discusses the author's exclusive right to exploit their work by any means, including electronic publication.[26]

The Arab Copyright Agreement relies on flexible wording to accommodate new intellectual creations, this does not exempt it from the need to adapt to emerging standards of originality for digitally published works, as adopting an expansive interpretation of originality – an example of disputes over computer programs brought before courts – is advisable; these rulings favored a broad understanding of originality,[27] shifting from the traditional notion of "intellectual effort" to "intellectual contribution", as the former proved inadequate for new digital creations, which are characterized more by intellectual or mental contribution than sheer intellectual labor.[28]

Parallel to this, legal scholars, led by Counselor M. Jorqueres, argue that applying the classical standard of originality fails to protect works originating in the digital sphere, particularly those generated by machines; consequently, they advocate abandoning the classical criterion in favor of an impersonal standard, incorporating principles akin to those in indus-

24 It is worth noting that some jurisprudence calls for the re-Reinstatement of formalities, given that technological developments enable the adoption of a "register once, register everywhere" regime. The argument is that different national implementations of official procedures result in incompatible records, which increases the costs of searching for information rather than reducing them. This necessitates a review of the international agreement on this subject. Samuelson, P. (2013). Is Copyright Reform Possible? A critical evaluation of two major contributions to the copyright reform literature. Harv. L. Rev, (126)3, p. 748.

25 Issa, M. A., ibid. p. 67.

26 Ibid. p. 68.

27 The French Court of Cassation's decision of March 7, 1986, in the Pachot/Babolat case, was considered a development in the concept of originality in the field of computer software protection. It defined what could be protected in a software program and provided a definition of originality by stating: "The author has demonstrated the existence of a special intellectual effort that goes beyond simple, automatic, and binding implementation, and that the embodiment of this effort exists within an independent variable". See: Lucas, A. (1998). Droit d'auteur et Numerique. Litec. Paris. pp. 32-35.

28 Wansa, D. I. (2002). The protection of copyright on the internet, a comparative study. Sader, Lebanon, p. 28.

trial property law, as M. Jorqueres contends that the intellectual effort must surpass mere selection by the creator and incorporate an element of novelty or original work. In other words, objective concepts from industrial property law should be integrated with the notion of originality.[29]

In light of the above, it is advisable to reformulate Article 1 of the Arab Copyright Agreement as follows: *"The authors of original intellectual creations shall enjoy full moral and artistic rights over their intellectual contributions..."*.

2.1.2 The tangible embodiment of the work

The formal or tangible embodiment of a work is considered a prerequisite for granting legal protection under copyright law, as it signifies the transition of the work from the realm of thought into reality, acquiring a perceptible form,[30] as copyright law aims to protect the formal aspect of works rather than their content, leaving ideas[31] outside the scope of the literary and artistic property, which applies solely to the form ideas take and how they are expressed,[32] consequently, an author's rights pertain to the tangible medium in which creativity manifests.

The Arab Copyright Agreement, in Article 1(c), stipulates that a work must have a tangible embodiment to qualify for protection; however, the agreement uses the term "material publicity", which is likely a typographical error, with the intended term being "material support", where an adopting the former term deviates from the objective of emphasizing the work's tangible embodiment.

Assuming the correct legal wording of Article 1(c) is "material support," influenced by the Berne Convention (Article 2(2)), this does not exempt it from the need for an amendment to align with contemporary copyright realities, as the emergence of an idea into existence is not limited to material existence but extends to perceptible existence, as the term "material existence" unduly narrows the scope of legal protection for certain works, such as the public recitation of the Holy Quran, which some copyright laws explicitly protect, because recitation lacks a material existence consistent with the internationally established interpretation of the term "expression of a work", which refers to the means enabling a work to be perceived, whether physically or intellectually, including performance, recitation, fixation, material formation, or any other suitable method;[33] this interpretation was adopted by the WIPO Copyright Treaty of 1996, which, in Article 2, uses the term "expressions of works" to encompass all forms of creative manifestation; similarly, the Berne Convention (Article 2(2)) references this in the context of protecting works like publicly delivered speeches and lectures.

Moreover, the tangible embodiment of a digital work entails its occupation of a specific space in the digital medium, whether online (on the internet) or offline[34] (such as CDs, floppy disks, or hard drives); thus, the embodiment of a digital work poses no issue, as it remains perceivable by the public, therefore, it would be preferable to draft Article 1 of the Arab Copyright Agreement as follows:

"Authors of original creations shall enjoy full moral and artistic rights over their intellectual contributions from the moment of creation, regardless of their merit, purpose, type, or mode of expression, and whether or not they are fixed on any medium that allows their communication to the public", where the phrase *"any medium that allows the work to be communicated to the public"*, accommodates the electronic publication of works, whether online or offline.

29 The European Union has adopted this principle in determining the authenticity of computer software in Article 1 of the Directive on the Protection of Computer Software.

30 Lucas, A. Ibid., p. 24.

31 Maskus, K. (2024). Intellectual Property Rights And Knowledge Diffusion In The Global Economy, Review of Economic Research on Copyright Issues, vol. 21. p. 10.

32 Wansa, D. I., Ibid., p. 23.

33 Kanaan, N. (2009). Copyright, Contemporary Models of Author's Rights. Dar Al Thaqufa, Jordan, p. 206.

34 Issa, M. A. Ibid., p. 71.

2.2 Digital rights

The Arab Copyright Convention recognizes the rights of authors of intellectual creations in Article 1/A, which states: "Authors of original works in literature, the arts, and sciences shall enjoy protection, regardless of the value, type, purpose, or method of expression of these works", as despite the Convention's reliance on broad terminology, which could potentially include any new creations, and its stipulation of a set of rights inherent to the author in Articles 4/A, 6/A, and 6/B, and its adoption of the phrase "or any other means" in Article 7, Paragraph 3, which can be relied upon to encompass any new developments in the means of creativity or its dissemination, the Convention is therefore considered to be inclusive of new developments and does not require amendment; however, to keep pace with developments in electronic creativity and publishing, it is advisable to refer to the digital rights applicable to digital works published electronically; the text of the aforementioned article should read as follows: *"Authors of original creations shall enjoy full moral and artistic rights..."*.

The adoption of the broad term "full rights" allows for the inclusion of digital rights generated by digital creations published electronically, such as rental rights, the right to communicate the work to the public, and the comprehensive solution adopted by the 1996 WIPO Copyright Treaty in Articles 6, 7, and 8, which also recognizes the obligations imposed by electronic publishing on the publisher or electronic distributor, in addition to what is established in the context of the publishing contract.

In parallel, it is necessary to point out the necessity of the Arab Copyright Convention stipulating that digital reproduction of protected works is a right granted to the author, similar to what was adopted by the 1996 WIPO Copyright Convention, as Article 4/1 states that the right of reproduction stipulated in Article 9 of the Berne Convention applies fully to the digital medium, whether it concerns the exploitation or storage of the digital work; accordingly, this can be referred to in the first paragraph of Article 7 of the Convention by stating: *"The author, or his direct representative, shall have the following rights: 1. Reproduction of the work in all forms that permit public access to or perception of the work, whether by photography, cinematography, or any other electronic means"*.

In contrast, and in connection with discussing copyright within the Arab Copyright Convention, it is worth noting that the Convention extends protection for only 25 years after the author's death, which is in contrast to the Berne Convention, which explicitly states in Article 7/1 that protection extends for the lifetime of the author and 50 years after his death, which is also the position taken by the 1996 WIPO Copyright Convention in Article 1/4; this requires the Arab Copyright Convention to keep pace with this by amending Article 19 and stating that the term of protection extends for the lifetime of the author and 50 years after his death.

Amending Article 1/A of the Arab Convention is an urgent necessity to keep pace with the development in human creativity, which has created rights for authors over their digital works, which jurisprudence has agreed to call digital exploitation rights,[35] and which has been approved by relevant international legislation, most importantly the first Internet Convention, or the WIPO Copyright Convention of 1996, as these rights have also seeped into most national copyright legislation, and therefore, the amendment is considered to be keeping pace with electronic publishing in Article 1/A, and to restore the status of the Convention within international and regional legislation concerned with copyright, where it is also part of its efforts announced in its preamble,[36] which seeks to encourage Arab authors to innovate, create, and develop literature, science, and the arts.

35 Passa, J. (2001). Internet et Droit d'auteur. Juris-Classeur. LexisNexis. France, p. 29.

36 See the preamble to the 1981 Arab Convention for the Protection of Copyright, p. 1.

2.3 Presumption of ownership of rights

It is self-evident to state that the author is the creator of the work; however, the focus must be on how to establish proof of this creator's identity, as typically, work is published under the name of a specific individual, with that name appearing on the cover and the first page of the work, indicating authorship, which constitutes a legal presumption that the person named is indeed the author, and the burden of proof falls on anyone who claims otherwise to substantiate their claim by all available means, as they are contesting a factual matter,[37] where the author may also choose to place a distinctive mark on their work, in which case they must prove – through all possible methods – that this mark is uniquely theirs and leaves no doubt as to their identity; alternatively, an author may publish under a pseudonym or anonymously.[38]

The Arab Copyright Agreement aligns with the presumption that ownership rights over a work belong to the person under whose name it was published or broadcast, as Article 4(a) clarifies that the author of a work enjoys copyright protection, and authorship is presumed in favor of the person who published,[39] broadcast, or is recognized as the work's creator, which mirrors the approach of the Berne Convention (Article 15(1)).

However, digital works present challenges in attributing authorship, necessitating explicit provisions in the Agreement – even if broadly worded – to acknowledge technological methods that establish ownership rights over digital works; alternatively, civil and criminal penalties could be imposed for tampering with electronic rights management information, following the model of the 1996 WIPO Copyright Treaty, as Articles 12(1)(1) and 12(2) of the WIPO Treaty stipulate that any interference with information identifying the work, its author, the rights associated with it, or any data essential for its exploitation – including electronic codes or metadata attached to the work upon publication – constitutes an infringement of the author's rights under both the WIPO Treaty and the Berne Convention, given that the former defers to the latter in defining protected rights.[40]

Accordingly, it would be preferable to amend Article 4(a) of the Arab Copyright Agreement as follows: *"The author of a work shall enjoy copyright protection, and authorship shall be presumed in favor of the person under whose name the work was published, broadcast, or recognized, or whose rights are indicated by a technological mechanism attached to the work upon publication – unless proven otherwise".*

2.4 Protected works

The digital revolution has ushered in new forms of creative works and methods of dissemination, encompassing both works traditionally protected by legislation – now digitized, such as texts, images, and sounds – and works that owe their very existence to digital technology, such as digital databases, computer programs, and multimedia works, as these innovations pose practical and legal challenges, necessitating an adaptation of the Arab Copyright Convention to accommodate them, thereby fulfilling its stated objectives.

The Arab Copyright Convention adopts a non-exhaustive enumeration of protected works under Article 1(b) and Article 2(1) and (2);

37 Talabah, A. (2006). The protection of intellectuat property rights. Modern university office. Alexanderia. p. 6.

38 Al-Sanhouri, A. R. (2005). Al-Wasit fi Sharh Al-Qanun Al-Madani (Property Rights with a Detailed Explanation of Things and Property Legal Publications). Lebanon, p. 326.

39 The presumption of ownership of rights in digital works submitted electronically raises several issues. The first issue that must be taken into account is the multiplicity of authors, which makes determining the paternity of each author extremely difficult, especially if the work is created and published directly online. In addition, there is a diversity of contributions, as the adoption of digital technologies leads to the emergence of complex works that include computer programs, a phenomenon evident in database works and multimedia works.

40 WIPO Convention regarding its relationship with the Berne Convention. Article 1, para. s4.

while following the footsteps of the Berne Convention[41] by introducing its list with the phrase "Protection shall include, in particular:" – implying that the scope of protection extends beyond the explicitly mentioned works – it lacks broad terminology that could implicitly encompass digitally emerging works; consequently, its text must be amended to align with the provisions of the 1996 WIPO Copyright Treaty concerning electronically published digital works, particularly computer programs and digital databases, where it would be advisable for the Convention to adopt the inclusive language, such as adding the phrase "regardless of the mode of publication, including electronic media" to Article 1(b)(1), or introducing an additional paragraph under Article 1(b) explicitly recognizing works published on electronic media as protected under the Convention's provisions; furthermore, the Convention should explicitly state that computer programs are protected as literary works, in line with the 1996 WIPO Treaty.

Notably, while the Arab Convention acknowledges databases as protected works deriving originality from their arrangement or selection, it fails to address machine-readable or electronic databases, as to keep pace with technological advancements, these should be explicitly included in the enumeration of protected works under Article 1(b), or Article 2(a)(2) could be revised as follows:

"Protection shall also extend, and authorship shall be recognized for this Convention, to the authors of encyclopedias, anthologies, or collections of independent works, data, or other materials, systematically or methodically arranged in a way that reflects intellectual creativity or demonstrates a substantive intellectual contribution, and which may be accessed or consulted individually by electronic means or any other enabling medium"; Such a formulation would ensure that the Arab Copyright Convention comprehensively covers digitally emergent works while remaining adaptable to future innovations brought forth by the digital revolution.

41 Ibid., Article 2, para. 1.

2.5 Exceptions and limitations

The recognition of digital works and their associated rights under the Arab Copyright Convention necessitates adapting copyright exceptions and limitations to accommodate the unique nature of these rights, and while the Convention establishes restrictions on copyright in Articles 9 through 16 under the heading "Freedom of Use of Works" – laying out exceptions that align with the general principles of the Berne Convention, primarily concerning limitations and exceptions to economic rights – these provisions allow for the use of protected works without the copyright holder's authorization or remuneration, known as "free use";[42] in addition, they partially[43] adhere to the three-step[44] test enshrined in Article 9(2) of the Berne Convention, which requires that exceptions (1) apply only in certain special cases, (2) do not conflict with the normal exploitation of the work, and (3) do not unreasonably prejudice the author's legitimate interests.[45]

However, this does not exempt the Convention from the need for reassessment to ensure compatibility with digital works, as the three-step test should be explicitly incorporated into the framework of exceptions and limitations, following the model of the 1996 WIPO Copyright Treaty as articulated in Article 10; consequently, Article 9 of the Arab Copy-

42 The free use cases in the Berne Convention include reproduction in certain special cases (Article 9/2); quotation and use of works – by way of illustration – for educational purposes (Article 10); reproduction of newspapers or similar materials and use of works for the purpose of reporting current events (Article 10B); and temporary recordings for broadcasting purposes (Article 11 B.3).

43 Arab Copyright Convention. Article 12.

44 Hugenholtz, B. (2009). Conceiving a document on Limitations and Exceptions to Copyright Laws. The Bibliotheca Alexanderia. Alexanderia. p. 31.

45 Berne Convention. Article 9/2: "The legislation of the countries of the Union shall be a matter for the right to authorize the making of copies of these works in certain special cases, provided that such making does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".

right Convention should be revised as follows:

"The use of protected works in certain special cases without the author's authorization shall not constitute copyright infringement, provided such use does not conflict with the normal exploitation of the work by the author and does not unreasonably prejudice the author's legitimate interests, as the following uses shall be deemed lawful and shall not require authorization from the rights holder: ... (remainder of the article unchanged)".

Moreover, the Convention must move beyond the traditional exceptions and limitations derived from the Berne Convention and adopt provisions suited to the digital environment, such as those governing digital publishing, private digital copies, and exceptions compatible with modern educational and academic technologies, including digital libraries.

It would also be advisable for the Arab Copyright Convention to incorporate, alongside digital-specific limitations, exceptions catering to persons with disabilities – particularly recognizing accessible formats as a permissible exception for the visually impaired and individuals with physical disabilities that prevent them from handling or using printed books with ease, where this adjustment would ensure that the Convention remains responsive to both technological advancements and the needs of vulnerable groups.[46]

2.6 Technical protection measures

The technical protection measures endorsed by the 1996 WIPO Copyright Treaty aim to safeguard the rights associated with digitally published works; these measures generally encompass any digital-based technical mechanism designed to prevent any infringement of the rights granted to authors over their works, as they are primarily divided into two categories: the first facilitates the identification and designation of works by specifying rights holders,[47] while the second seeks to prevent any act that may violate authors' rights.[48]

The Arab Copyright Agreement does not include any reference to technological protection measures, necessitating a revision of its provisions to explicitly adopt these measures and recognize them as tools or mechanisms available to authors or rights holders, as such measures would reinforce the legislative protection granted to electronically published works, in line with the 1996 WIPO Treaty; accordingly, it would be advisable to amend Article 4 under the second section, titled "Authors' Rights," to read as follows: *"The author of a work shall enjoy authorship rights, and authorship shall be attributed to whoever publishes, broadcasts, or identifies the work under their name, or makes it available to the public in a manner that allows their recognition as the rights holder – including technical systems for work identification that aim to specify rights-related information".*

By incorporating this provision, the Arab Copyright Agreement would align with advancements in the field of creativity and its dissemination, while further strengthening authors' rights in the digital environment, which would establish a presumption of ownership over digital works and ensure their attribution to their creators.

To reinforce the aforementioned, the Arab Agreement – should it adopt technical systems for identifying works in the digital environment as a protective mechanism – must extend copyright protection to these systems and explicitly stipulate that any infringement upon them constitutes an infringement of the copyright in the work itself.

Concurrently, the Agreement should include an explicit provision enabling authors and rights holders to employ technological measures that prevent any unauthorized acts not permitted by the rights holders or prohibited by law, in line

46 Bouzidi, A. T. (2023). Accessible formats as an exception to copyright in Algerian legislation. The Academic journal of legal and political research, 7(1), pp. 496-476.

47 WIPO Copyright Treaty. Article 12/2.

48 Ibid., Article 11.

with Article 11 of the WIPO Copyright Treaty of 1996;[49] accordingly, Article 7 of the Arab Agreement would be amended as follows: *"Authors or rights holders shall have the right to exercise the following rights and prevent any infringement thereof by any means, including the adoption of any effective technological measure linked to the work, which restricts acts they have not authorized or that are prohibited by law..."*.

To strengthen the role of protective technological measures, the Arab Agreement should explicitly extend copyright protection to these measures, provided they meet the three conditions established by the WIPO Copyright Treaty of 1996 under Article 11, which could be incorporated into Article 25 under the sixth section titled "Means of Copyright Protection," with the addition of a second paragraph stating: *"Member states shall enact laws extending copyright protection to any technological measure that is linked to the work, effective, and implemented by the author or rights holders to exercise their rights or prevent any infringement thereof"*.

CONCLUSION

In light of escalating digital challenges and the flourishing creative economy, it has become imperative to amend the 1981 Arab Copyright Convention to incorporate the substantive provisions enshrined in the 1996 WIPO Treaty, as this legislative update does not merely represent compliance with international standards but also constitutes essential protection for Arab creators, enhances the competitiveness of Arab culture in the global digital sphere, stimulates investments in creative and digital industries, holds sway over the efficiency and innovation of the creative industries,[50] and facilitates harmonization with relevant international agreements.

Accordingly, the study proposes the following Suggestions:

1. Amending Article 1 of the Arab Copyright Convention as follows: "Authors of original creations shall enjoy full moral and material rights over their intellectual contributions from the moment of creation, regardless of their merit, purpose, form, or mode of expression, and whether or not they are fixed on a medium that allows their communication to the public";
2. Amending the first paragraph of Article 7 of the Convention as follows: "The author or their representative shall have the following exclusive rights: (1) the right to reproduce the work in all forms that enable public access or perception, whether through photographic, cinematographic, or any electronic means that facilitate such reproduction";
3. Amending Article 19 to stipulate that the term of protection shall extend throughout the author's lifetime and for 50 years after their death;
4. Revising the text of Article 4(a) of the aforementioned Arab Convention as follows: "The author of a work shall enjoy copyright, and authorship shall be attributed to the person under whose name the work was published, broadcast, or recognized, or whose name is associated with the work upon its publication through a technological mechanism that identifies their rights, unless proven otherwise...";
5. The Convention should adopt broad terminology encompassing digital works, such as adding the phrase "regardless of the mode of publication, including pub-

49 Article 11 states: "The Contracting Parties shall provide in their laws for appropriate protection and effective remedies against the circumvention of effective technological measures used by authors in the exercise of their rights under this Treaty or the Berne Convention, which prevent the performance of acts concerning their works not authorized by the authors concerned or permitted by law".

50 Muthoo, A. (2023). Some Remarks On Bargaining Power, Innovation, and 21st Century Copyright Law. Review of Economic Research on Copyright Issues, vol. 20, p 7.

lication on electronic media" in Article 1(b)(1), or introducing an additional paragraph under Article 1(b) explicitly recognizing works published on electronic media as protected under the Convention's provisions, also the Convention must expressly protect computer programs as literary works, in alignment with the 1996 WIPO Treaty;

6. Reformulating Article 9 of the Arab Convention as follows: "The use of protected works in specific, limited circumstances without the author's authorization shall not constitute an infringement, provided such use does not conflict with the normal exploitation of the work by its author and does not unreasonably prejudice their legitimate interests, where the following uses shall be deemed permissible and shall not require authorization from the rights holder: ... (the remainder of the article remains unchanged)";
7. The Arab Copyright Convention should incorporate, alongside digital limitations, specific exceptions for persons with disabilities, recognizing accessible formats as an exception tailored to the visually impaired and individuals with physical disabilities that hinder their ability to hold or use a book with ease;
8. Amending Article 4 under the second axis concerning authors' rights to read as follows: "The author of a work shall enjoy copyright, and authorship shall be attributed to the person under whose name the work was published, broadcast, or recognized, or whose name is associated with the work through any means that identifies them as the rights holder, including technical systems for work identification designed to specify rights-related information";
9. The Convention must include an explicit provision permitting authors and rights holders to employ technological measures that prevent unauthorized acts not permitted by law, identify rights holders, and extend copyright protection to such measures.

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Legal Aspects of the Emergence of Ownership Rights to the Property Acquired Throughout Marriage

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ABSTRACT

The purpose of the research is to conduct a deep study of the issue related to the origin of individual ownership of spouses over property acquired during the marriage upon the termination of marriage, and to clarify the legal or practical significance of marriage registration, starting a cohabitation, or ending a cohabitation during the registered marriage when dividing property. Specifically, when and under what conditions can property acquired during marriage be considered in co-ownership of spouses according to the Civil Code of Georgia and court practice?. According to the Constitution of Georgia, the right to own and inherit property shall be recognized and guaranteed, and marriage, as a union of a woman and a man for the purpose of founding a family, shall be based on the equality of rights and the free will of spouses. The ongoing number of disputes in courts, related to the research topic, indicates its relevance. At a glance, this issue does not seem problematic, as the relevant norms of the Civil Code of

Georgia provide a solution to it. However, through a reasonable interpretation of the norm, the registered marriage does not automatically establish a co-ownership regime over the property. The purpose of this article is to emphasize, through an analysis of judicial best practice, the importance of marriage registration and the role of a household. In certain cases, the existence of a household economy is a decisive factor in deeming property as co-owned. With the development of law, in relation to human rights, the classic exceptions given in a separate norm, by systematic, substantive definition, give a different rule for solving the issue, as the State acknowledges and protects universally recognized human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law.

INTRODUCTION

The family is a multifaceted social phenomenon that combines biological and social, economic and moral, ideological and psychological relationships. Although the family has a centuries-long history of development, the importance of the modern family and the need to define the rights and responsibilities of its members from a legal standpoint, in a way that corresponds to contemporary life, remain relevant today.[1]

Article 30 of the Constitution of Georgia provides for the concept of family. Family is a marriage, as a union, of a woman and a man to start a family, based on the legal equality and free will of the spouses.[2] In the modern sense, the family essentially has the same meaning, although it is characterized by many specific features. There is a general sociological and a special legal concept of family. From a sociological perspective, family is a union of persons based on marriage, kinship, and the upbringing of children, conditioned by the factors of living together, common interests, and mutual care. The family relationship represents a complex form of social relations, which reflects not only the multifaceted interests of a defined circle of persons but also the corresponding characteristics of the society and the state of a given era.[3] From a legal perspective, the family is the legal bond of its members. Family relations acquire a legal character through their regulation by legal norms. This is possible by establishing mandatory rules within the limits of the state's ability to influence the behavior of family members.[4]

With the legislative amendments to the Civil Code of Georgia of September 17, 2024, the concept of marriage was formulated in a new edition. Specifically, marriage is a voluntary union of a woman and a man to create a family, which is registered at the territorial office of the legal entity of public law, the Public Service Development Agency operating under the governance of the Ministry of Justice of Georgia (hereinafter, the territorial office of the Agency). For this ar-

1 Japaridze, K. (2015). Personal and Property Relations of Parents and Children. Dissertation, Tbilisi, p. 27.

2 Constitution of Georgia. (24.08.1995). No. 786-RS. Article 30. Available at: <https://matsne.gov.ge/ka/document/view/30346?publication=36> (Last access: 07.09.2025).

3 Shengelia, R., Shengelia, E. (2011). Family Law. Meridiani, p. 10.

4 Ibid., p. 11.

ticle, a woman is a person identified as female based on hereditary genetic characteristics, and a man is a person identified as male based on hereditary genetic characteristics.[5] Other contractual relations may undergo changes, be restricted or expanded, or fully altered by the consent of the parties, but this cannot occur with marriage. As soon as the parties express their consent to marriage, legislative regulation immediately takes effect, creating various obligations for the parties.[6] Marriage is the foundation of the family. It primarily reflects the unity of spiritual, moral, as well as personal and property relations.[7] After the dissolution of a marriage, the issue of dividing property acquired during cohabitation arises. When considering this issue, the court is guided by such criteria as marriage registration, household economy, and the statute of limitations.

METHODOLOGY

The research is based on the doctrinal legal method; the relevant norms of the Constitution of Georgia, of the Civil Code of Georgia, and the Civil Procedural Code of Georgia are analysed within the framework of the mentioned method. A case analysis approach has been used to identify interpretations related to marital property relations, especially based on the practice of the Supreme and Constitutional Courts, as well as lower instances.

The legal comparative method is used to analyse the foreign jurisdictions (Turkey, Belgium, the Netherlands, Italy, the USA) and decisions of the European Court of Human Rights to see the place of Georgian regulations in a broader international context.

Based on doctrinal and scientific sources, Georgian and foreign family and property law is discussed in the research. The interpretation of norms is carried out using systematic and teleological approaches to ensure compliance with constitutional principles and human rights standards.

The research is done through the analysis of normative-legal and judicial practice and does not include empirical or sociological research.

1. THE IMPORTANCE OF MARRIAGE REGISTRATION

Being in a registered marriage is a personal right of an individual. Many couples cohabitate without registration. The law does not create a family; the law creates the structure through which the family is recognized and protected.[8] According to the firmly established practice of the European Court of Human Rights, marriage has gone beyond formal relationships; the existence or non-existence of family life significantly depends on the actual existence of a close personal relationship.[9] In its 1994 decision, the European Court clarified that "the concept of family relationships is not limited only to relationships based on marriage and may include other *de facto* family ties where the parties live together without marriage".

In the modern world, interest in family law is mainly determined by the social and economic aspects of the relationships between family members, including the financial consequences following the dissolution of marriage, among others.[10] Theoretically, the significance of mar-

5 Law of Georgia On Amendments to the Civil Code of Georgia. (17.09.2024). No. 4438-XVIMS-XMP. Available at: <https://matsne.gov.ge/ka/document/view/6283255?publication=0#DOCUMENT:1;> (Last access: 07.09.2025).

6 Maynard v. Hill. 125 U.S. 190, 2011 (1888). Available at: <https://supreme.justia.com/cases/federal/us/125/190/> (Last access: 02.03.2025).

7 Civil Cases Chamber of the Supreme Court of Georgia. (25.03.2021). Decision in the case No. ას-1226-2020, para 69.

8 Duncan, W. C. (2004). The State Interests in Marriage. Ave Maria Law Review, Vol. 2, No. 1, p. 173. Available at: <https://ssrn.com/abstract=2233190> (Last access: 02.03.2025).

9 ECtHR, Kroon and Others v. The Netherlands. (Case No. 18535/91; 27.10.1994). Decision. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57904%22]}> (Last access: 02.03.2025).

10 Boele-Woelki, K. (2005). Common Core and Better Law in European Family Law. Antwerp-Oxford, p. 5.

riage registration is limited to the fact that spouses acquire rights and obligations established by law toward each other. Marriage gives rise to mutual personal and property rights and obligations of the spouses.[11] In the United Kingdom, when a marriage is dissolved and the parties cannot agree on the distribution of property, they apply to the court, and the court decides on the distribution of property, including its sale.[12]

Article 1151 of the Civil Code of Georgia links the emergence of spouses' rights and obligations exclusively to the registration, and concerning the moment of the emergence of spouses' rights and obligations, any different interpretation of this provision contradicts its normative content.[13] An unregistered marriage does not grant any rights over acquired property.[14,15] Determining *de facto* "family life" may have legal significance in other cases, for example, in establishing paternity or in cases concerning relationships between parents and children.[16] Hence, Georgian legislation does not provide for equating the legal consequences of cohabitation with those of marriage.[17]

The Cassation Court explained that Article 1158 of the Civil Code contains the legal regulation of property acquired by spouses during marriage. Practically, the norm determines the ownership of property acquired by spouses within a specific time frame (during marriage). However, the mere registration of marriage is not decisive for extending the legal regime of a registered spouse's ownership of property, in cases where it has been established that, at the time of acquiring the disputed property, the spouses no longer maintained a common household and the marriage, despite being still registered, was factually terminated. The legislator is guided by the presumption that, as per rule, common property, for Article 1158 of the Civil Code, is created through the spouses' joint funds, joint management of the household, and joint labor.[18]

The factual termination of marriage may also serve as grounds for deprivation of inheritance rights. Specifically, according to Article 1341 of the Civil Code of Georgia, by a court decision, a spouse may be deprived of the legal right of inheritance if it is confirmed that the marriage with the decedent was factually terminated at least three years before the opening of the estate and the spouses were living separately.[19]

Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees everyone the right to respect for his or her family life. According to the precedent of the European Court of Human Rights, this provision is subject to broad interpretation and encompasses all aspects of family life that are established in a democratic society and

Cited in Meladze, G. (2022). Property Obligations of Spouses. Law Journal, (2), p. 77. Available at: <https://doi.org/10.60131/jlaw.2.2022.7021>; <https://jlaw.tsu.ge/index.php/JLaw/article/view/7021>.

11 Civil Cases Panel of the Batumi City Court. (29.09.2023). Decision in the case No. 010210023006933423, para. 6.4.

12 Luthra, S. (2022). The Right to Property - Tracing the Women's Right to Property Across USA, UK & India. Indian Journal of Law and Legal Research, p. 9. Available at: <https://ssrn.com/abstract=4209214> (Last access: 02.03.2025).

13 Civil Cases Chamber of the Supreme Court of Georgia. (16.03.2016). Decision in the cases: No. ას-7-7-2016; (14.02.2022) in the case No. ას-1760-2018; (15.05.2008) in the case No. ას-968-1269-07.

14 Civil Cases Chamber of the Supreme Court of Georgia. (08.10.2018). Decision in the case No. ას-1160-2018.

15 According to Article 1158 of the Civil Code of Georgia: 1. Property acquired by spouses during marriage constitutes their common property (co-ownership), unless otherwise stipulated by the marriage contract between them. 2. The right of co-ownership of spouses to such property arises even if one of them was engaged in household activities, took care of children, or did not have an independent income for another valid reason.

16 ECtHR, Kroon and Others v. The Netherlands. (Case No. 18535/91; 27.10.1994). Decision. See Civil Cases Chamber of the Supreme Court of Georgia. (24.10.2019). Decision in the case No. ას-205-2019.

17 Civil Cases Chamber of the Supreme Court of Georgia. (28.03.2024). Decision in the Case No. ას-1159-2023, para. 22.

18 Ibid. (25.03.2021) Decision in the case No. 1226-2020, para. 71.

19 Ibid. (22.07.2015). Decision in the case No. ას-187-174-2015.

serve the well-being of that society.[20] Among the categories protected by this norm are the inviolability of a person's family life, every individual's legitimate possibility to freely choose as a spouse the person with whom they wish to establish family relations, as well as the right to terminate family life.[21] In the case of Şerife Yiğit v. Turkey, the European Court of Human Rights established that the respondent state had not violated Articles 8 and 14 of the European Convention for the applicant. The Grand Chamber of the European Court compared the case with Muñoz Díaz v. Spain and explained that, unlike it, Şerife Yiğit could not have had a legitimate expectation for the recognition of the legal consequences of cohabitation by the state. The Court emphasized the clarity and accessibility of the civil marriage regulatory norms in the Republic of Turkey and confirmed the state's right to require the registration of civil marriage.[22] The second book of the Turkish Civil Code is dedicated to family law. Articles 134-144 of the third section regulate the procedure for submitting and registering a marriage application. Article 134 of the Turkish Civil Code defines that, man and a woman to marry each other apply together to the marriage registry office in the domicile of one of the parties. The following articles determine the form of application submission, the list of required documents, deadlines, and other procedures related to registration.[23] On this issue, the legislation is so clear that it cannot be interpreted in other way.

2. THE IMPORTANCE OF THE ESSENCE OF HOUSEHOLD ECONOMY IN PROPERTY DIVISION

Similar to the legislative regulation in Belgium,[24] for property acquired during cohabitation to be considered jointly owned, the first and essential prerequisite is the existence of a registered marriage. A marriage certificate is *prima facie* evidence of the existence of marriage.[25] There are countries where, despite an unregistered marriage, couples still have rights. For example, in the Kingdom of the Netherlands, citizens are given the freedom to choose between civil partnerships and marriage, and a special municipal service establishes and maintains a register for persons in unregistered marriages.[26] As for the American approach, it differs from state to state. In some states, a religious certificate is sufficient for marriage, but in some states do not recognize de facto cohabitation and require registration for the validity of the marriage. Israeli law chooses a religious nature for marriage, and its authority is exercised by the relevant hierarchy. Based on the example of Italy, it can be said that this is a hybrid model where both religious and civil marriages operate. According to the current legislation in Georgia, no lever would legally equate a de facto (unregistered marriage) with a registered marriage.[27]

20 Ibid. (15.07.2016). Decision of the case No. ას-458-440-2016.

21 Ibid. (15.02.2019). Decision in the case No. ას-1753-2018.

22 See ECtHR, Şerife Yiğit v. Turkey. (Case No. 3976/05; 02.11.2010). Available at: <https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-101579%22]}> Cited in the Supreme Court of Georgia case No. ას-1760-2018. (14.02.2022).

23 Civil Code of Turkey. Articles 134-144. Available at: <https://rm.coe.int/turkish-civil-code-family-law-book/1680a3bcd4> (Last access: 14.08.2025).

24 Verbeke, A. P. G. (2013). A New Deal for Belgian Family Property Law; Verbeke, A.-L. (2013). A new deal for Belgian family property law, in Alofs, E., Byttebier, K., Michielsens, A., Verbeke, A.-L. (eds.). (2013). Liber Amicorum Hélène Casman, Antwerp/Cambridge, Intersentia, p. 471. Available at: <https://ssrn.com/abstract=2312659> (Last access: March 02, 2025).

25 Barker, R. A., Alexander, V. C. (2006). Hearsay Exceptions Where Availability of the Declarant is Immaterial. In 5 N.Y. Prac., Evidence in New York State and Federal Courts § 8:56.

26 Sumner, I., Warendolf, H. (2003). Family law legislation of the Netherlands, p. 245; See Misabishvili, G. (2025). Issues of Perfecting the Ranks of Legal Heirs in Georgian Legislation. Law and World, 11(33), pp. 60-80. Available at: <https://doi.org/10.36475/11.1.5>.

27 Misabishvili G. (2025). Issues of Perfecting the Ranks of Legal Heirs in Georgian Legislation. (2025). Law and

If there is no registered marriage, then persons in an unregistered domestic cohabitation, as per the general rule, initiate a dispute over ownership of the acquired property[28] under the regulatory norms of unjust enrichment.[29]

Property and marriage are both ancient and almost universal social institutions.[30] Under family law, the property of spouses is divided into two parts: individual (i.e., separate) and common property. Individual property is the property that belongs to one of the spouses and is disposed of exclusively by them. This rule is regulated by Articles 1161 and 1162 of the Civil Code. Joint property is considered to be all property (movable and immovable) acquired during the spouses' cohabitation, which was acquired (or created) through the joint labor and funds of both spouses, as well as property acquired by one of the spouses, even if one of them was engaged in household activities, took care of children, or, for another valid reason, did not have an independent income.[31]

The Supreme Court of Georgia provided an important interpretation in one of the cases.[32] Specifically, the Cassation Court did not uphold the claimant's (cassator's) argument and noted that although the disputed immovable property had been purchased by the respondent with money gifted by his father, it could not be considered the respondent's individual property. The Cassation Court explained that, in determining the ownership form (personal or joint) of an item received as a gift by a spouse during marriage, the donor's intent is of essential importance. In the present case, the intent of the respondent's father was directed toward ensuring the well-being of the respondent's family and serving the family's common interests. This is confirmed by the fact that the respondent lived in the disputed immovable property together with his spouse and child. The claimant himself confirmed that the location of the disputed house was chosen at the request of the plaintiff, close to the mother's house (see subparagraph 11.3 of this ruling). Based on all the above, the disputed residential house, which the claimant purchased during marriage with money gifted by his father, was intended for the entire family and, as a gift, lacked the character of individual use.[33]

Each spouse's personal property includes: a) property that belonged to them before marriage; b) property received as a gift or by inheritance. The spouses' personal property also includes items of personal use (clothing, footwear, etc.), even if they were acquired during the marriage with the spouses' common funds, except for jewelry. A spouse's individual property may be recognized as the spouses' joint property if it is established that, as a result of expenses incurred during marriage, the value of this property significantly increased (capital repairs, completion of construction, reconstruc-

World, 11(33), pp. 60-80. Available at: <https://doi.org/10.36475/11.1.5>.

28 In general, the purpose of the legal institution of unjust enrichment is to reclaim unjustly and unjustifiably acquired property and thus restore the balance and justice of property circulation. For this purpose, the benefit must be returned to the person at whose expense the property of another person was increased, i.e. their unjust enrichment. The main purpose of this institution is not to fill the property deficit, i.e. compensation for damage, but to recover the property increase, restore the person to their original property-legal status, i.e. equalization of enrichment. Restoring a person to their original property-legal status and equalization of enrichment arising from unjust enrichment is not a form of civil legal liability. See Civil Cases Chamber of the Tbilisi City Court. (19.12.2022). Decision in the case No. 330210021005025429.

29 Persons in an unregistered cohabitation may purchase property with common funds and register the property not as joint ownership, but as the individual property of one of the persons.

30 McCormack, J. L. (2008). Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage. Valparaiso University Law Review, Vol. 42, No. 2, Loyola University Chicago School of Law Research Paper No. 2011-012. Available at: <https://ssrn.com/abstract=1885811> (Last access: March 02, 2025).

31 Civil Cases Chamber of the Supreme Court of Georgia. (16.03.2016). Decision in the case No. ას-7-7-2016, 16·03·2016; (24.11.2017) Decision in the case No. ას-1169-1089-2017.

32 Civil Cases Chamber of the Supreme Court of Georgia. (23.04.2019). Decision in the case No. ას-963-2018, para· 22·

33 Dzlierishvili, Z. (2018). Gifting and Life Annuity. Publishing House "Meridiani", Tbilisi, p. 306.

tion, etc.). A similar regulation is also found in Belgian family law.[34]

Property acquired by spouses during marriage refers to all types of property (immovable and movable) acquired (or created) through the joint labor and funds of both spouses during the marriage period. Joint marital property includes salaries and other monetary income, regardless of whose name they are registered under. Marital common property is property jointly acquired by the spouses. Acquisition does not mean merely the payment of money, but also that both spouses expressed their will for the property to become their joint ownership. Hence, when determining whether immovable property should be considered as spouses' common property, the decisive factor is the acquisition of the property jointly, with common funds, during a registered marriage.[35]

In one of the cases, the court rejected the respondent's claim and stated that, although the disputed immovable property was purchased by the respondent with money received from selling an agricultural land plot (cadastral code ....., area 2,052 sq. m.), it constitutes the spouses' common property. By combining the undisputed and determined facts, the court concluded that, on 28 May 2008, the Municipal Council of Khelvachauri recognized the respondent's ownership of a 2,052 sq. m. agricultural land plot, which was registered in the Public Registry as the respondent's property on 22 February 2012 and was sold on April 13, 2017, for USD 143,780.

The same decision further elaborates that the disputed apartments purchased on 27 October 2017 cannot be considered the respondent's personal property. The court explained that, in determining the ownership form of acquired property (personal or common), the purpose of the acquisition is of essential significance. In the case at hand, the respondent's purchase of the property was aimed at ensuring the family's well-being and served the family's common goals, which is confirmed by the fact that the respondent lived in the disputed immovable property with his spouse and child. Before moving in, the apartments were rented out, and the income was used for the family. It was also an undisputed fact that the plaintiff was employed during the marriage, had an income, and raised the child. The respondent's purpose in purchasing the disputed apartments was directed toward the family. The court could not accept the statement of the respondent's mother (one of the respondents) that the land, the proceeds from the sale of which were used to purchase the disputed apartments, was ancestral property. The court noted that, at the time of purchasing the disputed apartments, the respondent was in a registered marriage; therefore, the property acquired during that period is considered the spouses' joint property.[36]

The decisions of the common courts of Georgia confirm how essential a household economy is.

3. LEGAL CONSEQUENCES OF THE DISPOSAL OF PROPERTY ACQUIRED DURING MARRIAGE BY ONE SPOUSE

It happens rarely that the property acquired during marriage is registered in the joint ownership of both spouses. Once problems arise in the personal relationship, the spouse in whose name the property is registered often attempts to hinder the other by formally transferring the property to another person. Judicial practice is also abundant in this regard.

Article 1160.1 of the Civil Code of Georgia requires mutual consent of spouses for the

34 Verbeke, A. P. G. (2013). A New Deal for Belgian Family Property Law. Verbeke, A.-L. (2013). A new deal for Belgian family property law, in Alofs, E., Byttebier, K., Michielsens, A., Verbeke, A.-L. (eds.). (2013). Liber Amicorum Hélène Casman. Antwerp/Cambridge, Intersentia, p. 466. Availabl at: <https://ssrn.com/abstract=2312659> (Last access: March 02, 2025).

35 Civil Cases Chamber of the Supreme Court of Georgia. (25.04.2019). Decision in the case No. ას-963-2018.

36 Civil Cases Board of the Batumi City Court. (02.09.2022). Decision in the case No. 010210122005629412, para. 6.7.

disposal of common marital property, regardless of which spouse disposes of it. Therefore, the disposal of the co-ownership share by the registered owner is relatively voidable, and its validity depends on the consent of the other spouse. However, under the second paragraph of the same article, the interests of the acquirer are protected against claims by a spouse who is not registered as the owner in the Public Registry but has such a right by virtue of property acquisition during a registered marriage. This legislative framework demonstrates that the right of the unregistered spouse to property acquired during marriage is not absolute. In the event of the disposal of spouses' co-owned property (including the other spouse's share) by the registered owner, the realization of the unregistered spouse's proprietary rights depends on specific circumstances, particularly on proving the bad faith of the acquirer. Analysing the provisions of Article 1160.2 and Articles 312.3 and 312.4 of the same Code ("3. If an owner disposes of immovable property or encumbers it with a right, it is inadmissible to require the consent of a co-owner for concluding the transaction (or registering the right), if the co-owner is not registered as such in the Public Registry. In the situation as described in paragraph 3 of this article, in the interests of the acquirer, the transferor shall be deemed the sole owner if registered as such in the Public Registry, except when the acquirer knew that, apart from the transferor, there was another co-owner"), the court reckons that, when disposing of jointly owned property, the dispute raised by a spouse who is not registered as an owner will result in the invalidation of the transaction only if it is proven that the acquirer not only knew about the existence of another co-owner but was also aware that the unregistered spouse objected to the disposal of the property.[37] In all other cases, it is presumed that the registered owner acts in agreement with the spouse, and the acquirer is believed to have acted in good faith regarding the acquisition. It is also noteworthy that, in the competition of interests between a good-faith acquirer and a spouse unregistered as a co-owner, the legislation, based on the formulation of the above-mentioned norms, gives priority to the good-faith acquirer.[38]

The parties enjoy the principle of freedom of contract and have the right, within the scope of the law, to freely conclude contracts and determine their content (Article 319 of the Civil Code of Georgia). A contractual term is not predetermined; parties may agree on any matter. For this, they do not require any special permission or adherence to a specific content. The main requirement is that their agreement must not contradict the law, must comply with moral standards, and must not violate public order. To evaluate a transaction, the features of the transaction must be analysed. According to Article 56(1) of the Civil Code of Georgia: "A transaction made only for appearance, without the intention of producing the corresponding legal consequences, shall be void (a simulated transaction)". Paragraph 2 of the same article stipulates that "If the parties wish to cover up another transaction with a simulated one, then the rules applicable to the concealed transaction shall apply (a sham transaction)".

A transaction is simulated when both the declarant and the recipient of the will agree that the declared will shall not take effect and shall not produce the legal consequences typical of the transaction; in other words, they simulate the achievement of an outwardly expressed intention. For a transaction to be deemed simulated, the decisive fact is that the parties did not intend to bring about the legal consequences indicated in the transaction. A simulated transaction is void because the agreement between the parties lacks authenticity. Unlike a simulated transaction, a sham transaction is valid. The burden of proof, in both simulated and sham transactions, lies with the person who asserts that such a transaction exists. According to the judicial practice, in the case of simulated transactions, the bur-

37 Civil Cases Chamber of the Supreme Court of Georgia. (30.04.2010). Decision in the case No. **ას-571-879-09**.

38 Civil Cases Chamber of the Supreme Court of Georgia. (22.01.2020). Decision in the case No. **ას-1432-2019**.

den of proving the inauthenticity of the parties' will be upon the person who believes that the simulated transaction has violated their right. The court must establish the circumstances that indicate a defect in the expression of will, an agreement on a fictitious transaction, and a shared purpose inconsistent with the expression of the parties' will.[39] When discussing the invalidity of a transaction, the court pays attention to the time of transfer, as well as the relationship between the transferor and the acquirer, and decides based on this. If the court determines that the disposal of the property was simulated, the plaintiff's claim will be upheld, and the property will be recognised as a part of the plaintiff's co-ownership.

4. STATUTE OF LIMITATIONS

According to Article 133 of the Civil Code of Georgia, as long as the marriage exists, the statute of limitations is suspended for claims between spouses. The same rule applies to claims between parents and children until the children reach adulthood, as well as to claims between guardians (custodians) and their wards throughout the entire guardianship period. Under Article 1171, a three-year statute of limitations is established for claims regarding the division of jointly owned property of divorced spouses. According to Article 128.1 of the same Code, the statute of limitations applies to the right to demand that another person perform an act or refrain from performing an act. Article 130 further provides that the statute of limitations begins from the moment the claim arises. The moment of the claim's origin is considered to be the time when the person became aware or should have become aware of the violation of their right. The purpose of establishing a statute of limitations is to eliminate the risk of disproportionate or abusive exercise of rights by the creditor. In addition, a) The statute of limitations facilitates the process of establishing and examining facts in court, thereby contributing to well-reasoned decisions; b) It promotes stability in civil turnover; c) It strengthens mutual control among subjects of civil law relations and creates an incentive for the prompt restoration of violated rights.[40]

The statute of limitations for the claim refers to a specific period during which a person whose right has been violated has the opportunity to demand the enforcement or protection of their rights through legal (coercive) means. Once this period expires, the person loses the right to exercise such an opportunity; the right is invalid. "The litigation opportunities of the parties are often limited by time. In civil law, after the expiration of the statute of limitations, a person loses the opportunity to protect their right through the court".[41] According to Article 1171 of the Civil Code of Georgia, the objective moment for the commencement of the statute of limitations is the registration of the divorce. This is because divorced spouses are presumed to be immediately aware of the existence of their right to claim, especially given that the existence or absence of a property dispute between the parties is one of the criteria determining the procedure for resolving the issue of divorce.[42] After the termination of the joint household, the parties may register the divorce after a certain period; however, the statute of limitations begins to run only from the moment of the official registration of the divorce. Therefore, a person still has the right to claim ownership of property acquired during cohabitation, provided that the claim is filed within three years.

39 Chanturia, L. (2017). Commentary on the Civil Code. Book I, Article 56, fields 4, 7, 8, 19, 21, 22.

40 Supreme Court of Georgia. (2007). Recommendations on problematic issues of civil law judicial practice. Tbilisi, p. 63, cf. Supreme Court of Georgia. (11.06.2012). Decision in the case No. ას-547-515-2012.

41 Constitutional Court of Georgia. (30.04.2003). Decision in the case No. 1/3/161, "Citizens of Georgia – Olga Sumbatashvili and Igor Khaprov vs. the Parliament of Georgia".

42 Civil Cases Chamber of the Supreme Court of Georgia. (09.12.2013). Decision in the case No. ას-531-505-2013.

5. THE DISTRIBUTION OF THE BURDEN OF PROOF

In a civil case, the only way to reach a reasoned decision is through assertion, which establishes the factual circumstances significant for the case. The process of proof implies the activities of the parties and the court, aimed at determining the existence or non-existence of facts relevant to resolving the case. The evidentiary activities of the parties and the court include the following stages: determination of the subject of proof; collection of evidence (disclosure of evidence, its gathering, and submission to the court); examination of evidence in court; evaluation of evidence. The circumstances that require proof are those that substantiate the claim and the factual grounds of the lawsuit, the denial of the factual grounds and the claim by the opposing party, as well as the circumstances essential for the substantive resolution of the case.[43]

The judicial process of assertion is an activity carried out by the parties and the court within the framework and according to the rules established by law. The parties present evidence to the court to prove the facts on which they base their claims and defence. The court, complying with the principles of admissibility and relevance of evidence, accepts such evidence and evaluates it according to its inner conviction. In other words, although different participants in the judicial process of proof perform different functions, their actions are directed toward one common goal: to establish the truth and determine the circumstances crucial for the correct resolution of the case.

In civil proceedings, the process of assertion, as a mediated notion, is sufficiently regulated by law. For example, according to Article 102 of the Civil Procedure Code (CPC), each party must prove the circumstances on which they base their claims and defence. The law determines which party must prove which factual circumstances; it also establishes which party bears the burden of stating and proving facts, which facts do not require proof, what means of proof are admissible or inadmissible, as well as how evidence is collected, verified, and assessed. Civil law follows the principle of *"affirmanti, non neganti incumbit probatio"* (the burden of proof lies on the one who asserts, not on the one who denies).

The plaintiff can achieve a favourable outcome and have their claim granted only based on certain facts to which the law links the granting of the plaintiff's substantive legal claim. The same applies to determining the range of facts relevant for substantiating the parties' claims or defence. It is the obligation of the parties themselves to indicate the facts supporting their claims and defence.

The Cassation Chamber clarified that Article 1158 of the Civil Code establishes the presumption that property acquired by spouses during marriage constitutes their joint property (co-ownership). This norm defines the co-ownership regime of spouses, which determines their rights regarding property acquired during marriage and serves the purpose of protecting family interests. Specifically, it is presumed that property acquired during marriage is obtained for managing the household and achieving common family goals. Therefore, in case of a dispute, the fact of acquiring property during marriage (except in cases explicitly provided by law) is sufficient to consider such property as co-owned by the spouses. Within the framework of this presumption, the burden of proving the contrary lies with the party disputing this circumstance.[44]

CONCLUSION

The analysis of court decisions, various dissertations, academic articles, and literature in this field of law once again confirms that family

43 Civil Cases Chamber of the Supreme Court of Georgia. (24.02.2017). Decision in the case No. ას-1206-1166-2016.

44 Civil Cases Chamber of the Supreme Court of Georgia. (02.03.2018). Decision in the case No. ას-1426-1346-2017.

law is directly linked to the customs and traditions of society. Unlike other branches of law, which can be unified relatively easily, family law is so deeply intertwined with a country's values that any changes in this area require great precaution.

According to legislative provisions, for property acquired during marriage to be considered joint marital property, the registration of the marriage is the primary prerequisite. Only after this does the court examine the existence of a household. If the court establishes that the property was acquired within a household and served the interests of the family, the property must be considered joint marital property, regardless of the source of the funds used for its acquisition. However, once the household is dissolved, the regime of co-ownership no longer applies to property acquired within the scope of a registered marriage.

Court decisions in this field must be timely and responsive to the challenges of contemporary society. When interpreting legal norms, the court applies the principle of reasonable judgment. Through such interpretation, even laws enacted decades ago gain vitality and practical applicability in modern judicial practice.

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სუფლების განხორციელებისას ხალხი და სახელმწიფო შეზღუდული არიან ამ უფლებებითა და თავისუფლებებით, როგორც უშუალოდ მოქმედი სამართლით.

საკვანძო სიტყვები:
ეგისტრირებული ქორწინება, ოჯახი, თანაცხოვრება, საოჯახო მეურნეობა, თანასაკუთრება, ინდივიდუალური საკუთრება

შესავალი

ოჯახი მრავალწახნაგოვანი სოციალური მოვლენაა, რომელიც აერთიანებს ბიოლოგიურ და საზოგადოებრივ, ეკონომიკურ და ზნეობრივ, იდეოლოგიურ თუ ფსიქოლოგიურ ურთიერთობებს. მიუხედავად იმისა, რომ ოჯახს განვითარების მრავალსაუკუნოვანი ისტორია აქვს, დღესაც აქტუალურია თანამედროვე ოჯახის მნიშვნელობა და მისი წევრების უფლება-მოვალეობების განსაზღვრა საკანონმდებლო კუთხით, რომელიც უნდა შეესაბამებოდეს თანამედროვე ცხოვრებას.[1]

საქართველოს კონსტიტუციის 30-ე მუხლი განმარტავს ოჯახის ცნებას. ოჯახი – ეს არის ქორწინება, როგორც ქალისა და მამაკაცის კავშირი ოჯახის შექმნის მიზნით და იგი ემყარება მეუღლეთა უფლებრივ თანასწორობასა და ნებაყოფლობას.[2] თანამედროვე გაგებით, ოჯახი არსებითად იგივე შინაარსისაა, თუმცა ხასიათდება ბევრი სპეციფიკური თავისებურებით. არსებობს ოჯახის ზოგადსოციოლოგიური და სპეციალურ-სამართლებრივი ცნება. სოციოლოგიური გაგებით ოჯახი არის პირთა ქორწინებაზე, ნათესაობასა და ბავშვების აღზრდაზე დაფუძნებული კავშირი, რომელიც განპირობებულია ერთად ცხოვრების, ინტერესთა ერთიანობისა და ურთიერთზრუნვის ფაქტორით. ოჯახური კავშირი წარმოადგენს მეტად რთულ საზოგადოებრივ ურთიერთობათა ნაირსახეობას, რომელშიც აისახება არა მარტო პირთა განსაზღვრული წრის მრავალწახნაგოვანი ინტერესები, არამედ ამა თუ იმ ეპოქის საზოგადოებისა და სახელმწიფოს შესაბამისი თავისებურებები.[3] სამართლებრივი გაგებით, ოჯახი მისი წევრების იურიდიული კავშირია. საოჯახო ურთიერთობებს იურიდიულ ხასიათს ანიჭებს მათი რეგულირება სამართლებრივი ნორმებით. ეს კი შესაძლებელია ოჯახის წევრთა ქცევაზე სახელმწიფოს მხრივ ზემოქმედების შესაძლებლობისა და საზღვრების ფარგლებში სავალდებულო წესების ზემოქმედების დადგენით.[4]

საქართველოს სამოქალაქო კოდექსში 2024 წლის 17 სექტემბრის საკანონმდებლო ცვლილებებით, ახალი რედაქციით, ჩამოყალიბდა ქორწინების ცნება, კერძოდ ქორწინება არის ოჯახის შექმნის მიზნით ქალისა და მამაკაცის ნებაყოფლობითი კავშირი, რომელიც რეგისტრირებულია საქართველოს იუსტიციის სამინისტროს მმართველობის სფეროში მოქმედი საჯარო სამართლის იურიდიული პირის – სახელმწიფო სერვისების განვითარების სააგენტოს ტერიტორიულ სამსახურში (შემდგომ – სააგენტოს ტერიტორიული სამსახური). ამ მუხლის მიზნებისთვის ქალი არის მემკვიდრეობითი გენეტიკური მახასიათებლების მიხედვით იდენტიფიცირებული მდედრობითი სქესის ადამიანი, ხოლო მამაკაცი – მემკვიდრეობითი გენეტიკური მახასიათებლების მიხედვით იდენტიფიცირებული მამრობითი სქესის ადამიანი.[5] სხვა სახელშეკრულებო ურთიერთობებმა შეიძლება

1 *ჯაფარიძე, ქ.,* მშობლებისა და შვილების პირადი და ქონებრივი ურთიერთობები, სადისერტაციო ნაშრომი, თბ. 2015, გვ. 27.

2 საქართველოს რესპუბლიკის კონსტიტუციური კანონი „საქართველოს კონსტიტუცია“ N786, 24/08/1995, მუხლი 30, <https://matsne.gov.ge/ka/document/view/30346?publication=36> [7 სექტემბერი, 2025 წელი].

3 *შენგელია რ., შენგელია ე.,* (2011) საოჯახო სამართალი, თბილისი, მერიდიანი, გვ. 10.

4 იქვე, გვ 11.

5 საქართველოს კანონი ,,საქართველოს სამოქალაქო კოდექსში ცვლილების შეტანის შესახებ'', 2024 წლის 17 სექტემბერი, N4438-XVIმს-Xმპ, <https://matsne.gov.ge/ka/document/view/6283255?publication=0#DOCUMENT:1;> [7 სექტემბერი, 2025].

განიცადოს სახეცვლილება, შეიზღუდოს ან გაფართოვდეს, ან სრულად შეიცვალოს მხარეთა თანხმობით, მაგრამ აღნიშნული ვერ მოხდება ქორწინებასთან დაკავშირებით. როგორც კი მხარეები გამოთქვამენ თანხმობას ქორწინებაზე, მაშინვე მოქმედებას იწყებს საკანონმდებლო რეგულირება, რაც წარმოშობს მხარეთა სხვადასხვა ვალდებულებებს.[6] ქორწინება ოჯახის საფუძველია. ქორწინება წარმოშობს მეუღლეთა ორმხრივ, პირად და ქონებრივ უფლებებს და მოვალეობებს. სწორედ ამიტომ მეუღლეთა შორის დავის გადაწყვეტისას მნიშვნელოვანია შევეხოთ იმ საკითხის გადაწყვეტას, რაც შეეხება ქორწინებიდან გამომდინარე თანასაკუთრებას.[7] ქორწინების შეწყვეტის შემდეგ დღის წესრიგში დგება თანაცხოვრების დროს შეძენილი ქონების გაყოფის საკითხი. აღნიშნული საკითხის განხილვისას კი სასამართლო ხელმძღვანელობის ისეთი კრიტერიუმებით, როგორიც არის ქორწინების რეგისტრაცია, საოჯახო მეურნეობა და ხანდაზმულობის ვადა.

მეთოდოლოგია

კვლევა ეფუძნება დოქტრინულ სამართლებრივ მეთოდს, რომლის ფარგლებშიც გაანალიზებულია საქართველოს კონსტიტუცია, სამოქალაქო კოდექსი და სამოქალაქო საპროცესო კოდექსის შესაბამისი ნორმები. მეუღლეთა ქონებრივ ურთიერთობებთან დაკავშირებული ინტერპრეტაციების გამოსავლენად გამოყენებულია საქმის ანალიზის მიდგომა, განსაკუთრებით უზენაესი და საკონსტიტუციო სასამართლოს, ასევე ქვემდგომი ინსტანციების პრაქტიკის მაგალითებზე.

გამოყენებულია შედარებითი სამართლის მეთოდი, რომელშიც შესწავლილია უცხო ქვეყნის იურისდიქციები (თურქეთი, ბელგია, ნიდერლანდები, იტალია, აშშ) და ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილებები, რათა ქართული რეგულაცია განთავსდეს ფართო საერთაშორისო კონტექსტში. კვლევა, ასევე, ეყრდნობა დოქტრინულ და სამეცნიერო წყაროებს როგორც ქართულ, ისე უცხოურ ოჯახურ და ქონებით სამართალში. ნორმების ინტერპრეტაცია განხორციელებულია სისტემური და ტელეოლოგიური მიდგომებით, კონსტიტუციურ პრინციპებსა და ადამიანის უფლებათა სტანდარტებთან შესაბამისობის უზრუნველსაყოფად. კვლევა შემოიფარგლება ნორმატიულ-სამართლებრივი და სასამართლო პრაქტიკის ანალიზით და არ მოიცავს ემპირიულ ან სოციოლოგიურ კვლევას.

1. ქორწინების რეგისტრაციის ფაქტის მნიშვნელობა

რეგისტრირებულ ქორწინებაში ყოფნა ადამიანის პირადი უფლებაა. უამრავი წყვილი ეწევა თანაცხოვრებას რეგისტრაციის ფაქტის გარეშე. კანონი არ ქმნის ოჯახს, კანონი ქმნის სტრუქტურას, რომლითაც ოჯახი არის აღიარებული და დაცული.[8] ადამიანის უფლებათა და თავისუფლებათა ევროპული სასამართლოს მყარად დადგენილი პრაქტიკის თანახმად, ქორწინება გასცდა ფორმალურ ურთიერთობებს, ოჯახური ცხოვრების არსებობა-არარსებობის საკითხი მნიშვნელოვნად დამოკიდებულია მჭიდრო პირადი ურთიერთობის რეალურად არსებობის ფაქტზე.[9] ევროპულმა სასამართლომ 1994 წლის გადაწყვეტილებაში განმარტა, რომ „ოჯახური ურთიერთობების ცნება არ იზღუდება მხოლოდ ქორწინებაზე დამყა-

6 Maynard v. Hill, 125 U.S. 190, 2011 (1888), <https://supreme.justia.com/cases/federal/us/125/190/> [02 მარტი, 2025].

7 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2021 წლის 25 მარტის გადაწყვეტილება საქმეზე №ას-1226-2020, პარაგ 69.

8 *Duncan C William,* The State Interests in Marriage (March 14, 2013). Ave Maria Law Review, Vol. 2, No. 1, p. 173, 2004, <https://ssrn.com/abstract=2233190> [02 მარტი, 2025].

9 ადამიანის უფლებათა ევროპული სასამართლოს 1994 წლის 27 ოქტომბრის #18535/91 გადაწყვეტილება საქმეზე Kroon and others v. The Netherlands. <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57904%22]}> [02 მარტი, 2025].

რებული ურთიერთობით და შეიძლება მოიცავდეს სხვა დე ფაქტო ოჯახურ კავშირებს, როდესაც მხარეები ერთად ცხოვრობენ ქორწინების გარეშე“.

თანამედროვე მსოფლიოში ინტერესის საგანი საოჯახო სამართლის მიმართ, ძირითადად, განპირობებულია ოჯახის წევრთა ურთიერთობების სოციალური და ეკონომიკური ასპექტებით, მათ შორის, ქორწინების შეწყვეტის შემდგომი ფინანსური შედეგებით თუ სხვა.[10] თეორიულად, ქორწინების რეგისტრაციის მნიშვნელობა იმით შემოიფარგლება, რომ მეუღლეებს ერთმანეთის მიმართ წარმოეშობათ კანონმდებლობით დადგენილი უფლებები და მოვალეობები. ქორწინება წარმოშობს მეუღლეთა ორმხრივ, პირად და ქონებრივ უფლებებს და მოვალეობებს.[11] გაერთიანებულ სამეფოში ქორწინების შეწყვეტის დროს თუ მხარეები ვერ თანხმდებიან ქონების განაწილებაზე, ისინი მიმართავენ სასამართლოს და სასამართლო იღებს გადაწყვეტილებას ქონების განაწილებაზე და, მათ შორის, ქონების რეალიზაციაზეც.[12]

საქართველოს სამოქალაქო კოდექსის 1151-ე მუხლი მხოლოდ რეგისტრირებული ქორწინების ფაქტს უკავშირებს მეუღლეთა უფლება-მოვალეობების წარმოშობას. მეუღლეთა უფლება-მოვალეობების წარმოშობის მომენტთან მიმართებაში, მითითებული ნორმის სხვაგვარი განმარტება ეწინააღმდეგება მის ნორმატიულ შინაარსს.[13] არარეგისტრირებული ქორწინება არ წარმოშობს შეძენილ ქონებაზე რაიმე სახის უფლებას.[14,15] დე ფაქტო „ოჯახური ცხოვრების“ დადგენას სხვა (მაგალითად, მამობის დადგენის, ან მშობლებსა და შვილებს შორის ურთიერთობის) საქმეებზე შეიძლება ჰქონდეს სამართლებრივი დატვირთვა.[16] ამდენად, საქართველოს კანონმდებლობა ქორწინებასთან თანაცხოვრების სამართლებრივი შედეგების გათანაბრებას არ ითვალისწინებს.[17]

საკასაციო სასამართლომ ერთ-ერთ საქმეში განმარტა, რომ სამოქალაქო კოდექსის 1158-ე მუხლი შეიცავს მეუღლეთა მიერ ქორწინების განმავლობაში შეძენილი ქონების სამართლებრივ რეგულირებას. პრაქტიკულად, ნორმით განისაზღვრება დროის განსაზღვრულ მონაკვეთში (ქორწინების განმავლობაში) მეუღლეთა მიერ შეძენილ ქონებაზე საკუთრების საკითხი, თუმცა, მხოლოდ ქორწინების რეგისტრაცია არ არის განმსაზღვრელი საკუთრებაზე რეგისტრირებულ ქორწინებაში მყოფი მეუღლის უფლებრივი რეჟიმის გასავრცელებლად, ისეთ შემთხვევაში, როდესაც დადგენილია, რომ სადავო ნივთების შეძენისას მეუღლეები აღარ აწარმოებდნენ

10 *Boele-Woelki K.,* Common Core and Better Law in European Family Law, Antwerp-Oxford, 2005, 5. მითითებულია *მელაძე გ.* (2022). მეუღლეთა ქონებრივი ვალდებულებები. *სამართლის ჟურნალი*, (2), 84–98 (Geo) 77. <https://doi.org/10.60131/jlaw.2.2022.7021>.

11 ბათუმის საქალაქო სასამართლოს სამოქალაქო საქმეთა კოლეგიის 2023 წლის 29 სექტემბრის გადაწყვეტილება, საქმე N 010210023006933423, პარაგ 6.4.

12 *Luthra Somya,* The Right to Property – Tracing the Women's Right to Property Across USA, UK & India, p.9 (September 3, 2022). Indian Journal of Law and Legal Research 2022, <https://ssrn.com/abstract=4209214> [02 მარტი, 2025].

13 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2016 წლის 16 მარტის გადაწყვეტილება საქმეზე საქმე №ას-7-7-2016, 2022 წლის 14 თებერვლის საქმე №ას-1760-2018, 2008 წლის 15 მაისის საქმე №ას-968-1269-07.

14 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2018 წლის 08 ოქტომბრის გადაწყვეტილება საქმეზე №ას-1160-2018.

15 საქართველოს სამოქალაქო კოდექსის 1158-ე მუხლის თანახმად *1. მეუღლეთა მიერ ქორწინების განმავლობაში შეძენილი ქონება წარმოადგენს მათ საერთო ქონებას (თანასაკუთრებას), თუ მათ შორის საქორწინო ხელშეკრულებით სხვა რამ არ არის დადგენილი. / 2. ასეთ ქონებაზე მეუღლეთა თანასაკუთრების უფლება წარმოიშობა მაშინაც, თუ ერთ-ერთი მათგანი ეწეოდა საოჯახო საქმიანობას, უვლიდა შვილებს ან სხვა საპატიო მიზეზის გამო არ ჰქონია დამოუკიდებელი შემოსავალი.*

16 ადამიანის უფლებათა ევროპული სასამართლოს 1994 წლის 27 ოქტომბრის #18535/91 გადაწყვეტილება საქმეზე Kroon and others v. The Netherlands, იხ. საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა 2019 წლის 24 ოქტომბრის გადაწყვეტილება საქმეზე №ას-205-2019.

17 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2024 წლის 28 მარტის გადაწყვეტილება საქმეზე Nას-1159-2023, პარაგ 22.

საერთო მეურნეობას და ქორწინება, მიუხედავად რეგისტრაციის არსებობისა, ფაქტობრივად იყო შეწყვეტილი. კანონმდებელი ხელმძღვანელობს იმ ვარაუდით, რომ როგორც წესი, საერთო ქონება სსკ-ის 1158-ე მუხლის მიზნებისათვის იქმნება მეუღლეთა ერთობლივი სახსრებით, საოჯახო მეურნეობის ერთობლივი გაძღოლითა და ერთობლივი შრომით.[18]

ქორწინების ფაქტობრივად შეწყვეტა შეიძლება გახდეს, ასევე, მემკვიდრეობის უფლების ჩამორთმევის საფუძველიც, კერძოდ, სსკ-ის 1341-ე მუხლის თანახმად, სასამართლო გადაწყვეტილებით შეიძლება მეუღლეს ჩამოერთვას კანონით მემკვიდრეობის უფლება, თუ დადასტურებული იქნება, რომ ქორწინება მამკვიდრებელთან ფაქტობრივად სამკვიდროს გახსნამდე არანაკლებ სამი წლისა შეწყვეტილი იყო და მეუღლეები ცალ-ცალკე ცხოვრობდნენ.[19]

„ადამიანის უფლებათა და ძირითად თავისუფლებათა დაცვის კონვენციის“ მე-8 მუხლით გარანტირებულია ყველას უფლება, პატივი სცენ მის ოჯახურ ცხოვრებას. ადამიანის უფლებათა ევროპული სასამართლოს პრეცედენტული გადაწყვეტილებების მიხედვით, მითითებული დებულება ფართო განმარტებას ექვემდებარება და მასში მოიაზრება ოჯახური ცხოვრების ყველა ის ასპექტი, რომელიც დამკვიდრებულია დემოკრატიულ საზოგადოებაში და ემსახურება ამ საზოგადოების კეთილდღეობას.[20] მითითებული ნორმით დაცვად კატეგორიათა რიგს მიეკუთვნება პირის ოჯახური ცხოვრების ხელშეუხებლობა, ყოველი პირის ლეგიტიმური შესაძლებლობა, თავად აირჩიოს მეუღლედ პირი, რომელთანაც სურს საოჯახო ურთიერთობის დამყარება, ასევე, დაცულია ოჯახური ცხოვრების შეწყვეტის უფლება[21] ადამიანის უფლებათა ევროპულმა სასამართლომ საქმეში „შერიფე იითი თურქეთის წინააღმდეგ“ დაადგინა, რომ მოპასუხე სახელმწიფოს მომჩივანის მიმართ ევროპული კონვენციის მე-8 და მე-14 მუხლები არ დაურღვევია. ადამიანის უფლებათა ევროპული სასამართლოს დიდმა პალატამ განსახილველი საქმე შეადარა საქმეს – „მუნოს დიაზი ესპანეთის წინააღმდეგ“ და განმარტა, რომ ამ შემთხვევისგან განსხვავებით, შერიფე იითს ვერ ექნებოდა სახელმწიფოსგან თანაცხოვრების სამართლებრივი შედეგების აღიარების მართლზომიერი მოლოდინი. სასამართლომ ხაზი გაუსვა თურქეთის რესპუბლიკაში სამოქალაქო ქორწინების მარეგულირებელი ნორმების სიცხადესა და ხელმისაწვდომობას და სახელმწიფოს მიერ სამოქალაქო ქორწინების რეგისტრაციის მოთხოვნის უფლება დაადასტურა.[22] თურქეთის სამოქალაქო კოდექსის მეორე წიგნი ეძღვნება საოჯახო სამართალს. მესამე სექციის 134-144 მუხლები არეგულირებენ ქორწინების განაცხადის წარდგენისა და რეგისტრაციის წესს. თურქეთის სამოქალაქო კოდექსის 134-ე მუხლი განმარტავს, რომ ქალმა და მამაკაცმა ქორწინებისათვის ერთობლივი განცხადებით უნდა მიმართონ ქორწინების მარეგისტრირებელ ორგანოს, რომელი მათგანის საცხოვრებელი ადგილის მიხედვით. შემდგომი მუხლები განსაზღვრავენ განაცხადის წარდგენის ფორმას, თანდართული საბუთების ნუსხას, ვადებს და რეგისტრაციასთან დაკავშირებულ სხვა პროცედურებს.[23] კანონმდებლობა იმდენად ნათელია აღნიშნულ საკითხთან დაკავშირებით, რომ მისი სხვაგვარად განმარტება შეუძლებელია.

18 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2021 წლის 25 მარტის გადაწყვეტილება საქმეზე №ას-1226-2020 25 მარტი, 2021 წელი, პარაგ 71.

19 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2015 წლის 22 ივლისის გადაწყვეტილება საქმეზე Nას-187-174-2015.

20 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2016 წლის 15 ივლისის გადაწყვეტილება საქმეზე №ას-458-440-2016.

21 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2019 წლის 15 თებერვლის გადაწყვეტილება საქმეზე №ას-1753-2018.

22 იხ. ŞERİFE YİĞİT v. TURKEY, no. 3976/05, 2010 წლის 02 ნოემბერი, https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],% 22itemid%22:[%22001-101579%22]}} მითითებულია სუსგ საქმე №ას-1760-2018, 14 თებერვალი, 2022 წელი.

23 თურქეთის სამოქალაქო კოდექსი მუხლი 134-144 https://rm.coe.int/turkish-civil-code-family-law-book/1680a3bcd4 [14 აგვისტო, 2025].

2. ქონების გაყოფისას საოჯახო მეურნეობის არსის მნიშვნელობა

ბელგიის საკანონმდებლო რეგულირების თანახმად,[24] თანაცხოვრების დროს შეძენილი ქონების თანასაკუთრებად მიჩნევისათვის პირველი და აუცილებელი წინაპირობაა ქორწინების რეგისტრაციის ფაქტის არსებობა. ქორწინების მოწმობა არის prima facie მტკიცებულება, რომ ქორწინება არსებობს.[25] არიან ქვეყნები, სადაც, მიუხედავად არარეგისტრირებული ქორწინებისა, წყვილებს მაინც ეძლევათ უფლებები, მაგალითად: ნიდერლანდების სამეფოში მოქალაქეებს ენიჭებათ არჩევანის თავისუფლება სამოქალაქო პარტნიორობასა და ქორწინებას შორის, არარეგისტრირებულ ქორწინებაში მყოფი პირებისათვის რეესტრს ადგენს და აწარმოებს მუნიციპალიტეტის სპეციალური სამსახური.[26] რაც შეეხება ამერიკულ მიდგომას, იგი განსხვავებულია შტატების მიხედვით – ზოგიერთ შტატში ქორწინებისათვის რელიგიური მოწმობით გაფორმება საკმარისია, თუმცა ზოგიერთი შტატი არ ცნობს ფაქტობრივ თანაცხოვრებას და ქორწინების ნამდვილობისათვის რეგისტრაციას ითხოვს. ისრაელის კანონმდებლობა ქორწინებისას რელიგიურ ხასიათს ირჩევს და მისი ძალმოსილება უფლებამოსილია განახორციელოს შესაბამისმა იერარქმა. იტალიის მაგალითზე შეიძლება ითქვას, რომ ეს არის ჰიბრიდული მოდელი, სადაც მოქმედებს როგორც რელიგიური, ასევე, სამოქალაქო ქორწინება. საქართველოში, მოქმედი კანონმდებლობის თანახმად, არ არსებობს ისეთი ბერკეტი, რომელიც უფლებრივად გაუთანაბრებს ფაქტობრივ (არარეგისტრირებულ ქორწინებას) რეგისტრირებულ ქორწინებას.[27]

თუ სახეზე არ არის რეგისტრირებული ქორწინება მაშინ, არარეგისტრირებულ საოჯახო თანაცხოვრებაში მყოფი პირები, საერთო წესით, კერძოდ, უსაფუძვლო გამდიდრების ინსტიტუტის[28] მარეგულირებელი ნორმებით, იწყებენ დავას შეძენილ ქონებაზე[29] საკუთრების უფლების მოპოვებისათვის.

ქონება და ქორწინება ორივე უძველესი და თითქმის უნივერსალური სოციალური ინსტიტუტია.[30] საოჯახო კანონმდებ-

24 *Verbeke A. P. G.,* A New Deal for Belgian Family Property Law (April 19, 2013). Verbeke, A.-L. (2013), A new deal for Belgian family property law, in Alofs, E., Byttebier, K., Michielsens, A., Verbeke, A.-L. (eds.), Liber Amicorum Hélène Casman, Antwerp/ Cambridge, Intersentia, 2013, p. 471, <https://ssrn.com/abstract=2312659> [02 მარტი, 2025].

25 *Robert A. Barker & Vincent C. Alexander,* Hearsay Exceptions Where Availability of the Declarant is Immaterial, in 5 N.Y. PRAC., EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 8:56 (2006).

26 *Sumner, I.,& Warendolf, H.(2003).* Family law legislation of the Netherlands. p. 245. მითითებულია მისაბიშვილი გ., კანონისმიერი მემკვიდრეების რიგების სრულყოფის საკითხები ქართულ კანონმდებლობაში. (2025). *სამართალი და მსოფლიო*, *11*(33), 60-80. https://doi.org/10.36475/11.1.5

27 *მისაბიშვილი გ.,* კანონისმიერი მემკვიდრეების რიგების სრულყოფის საკითხები ქართულ კანონმდებლობაში. (2025). *სამართალი და მსოფლიო*, *11*(33), 60-80. https://doi.org/10.36475/11.1.5

28 *ზოგადად, უსაფუძვლო გამდიდრების სამართლებრივი ინსტიტუტის მიზანი არის უსაფუძვლოდ და გაუმართლებლად შეძენილი ქონების ამოღება და ამგვარად ქონებრივი მიმოქცევის წონასწორობისა და სამართლიანობის აღდგენა. ამ მიზნით ქონებრივი შეღავათი იმ პირს უნდა დაუბრუნდეს, რომლის ხარჯზეც მოხდა სხვა პირის ქონების გაზრდა, ანუ მისი უსაფუძვლო გამდიდრება. ამ ინსტიტუტის უმთავრესი დანიშნულება არის არა ქონებრივი დანაკლისის შევსება, მაგ. ზიანის ანაზღაურება, არამედ ქონებრივი ნამატის ამოღება, პირის თავდაპირველ ქონებრივ-სამართლებრივ მდგომარეობაში აღდგენა, ანუ გამდიდრების გათანაბრება. უსაფუძვლო გამდიდრებიდან გამომდინარე, პირის თავდაპირველ ქონებრივ-სამართლებრივ მდგომარეობაში აღდგენა და გამდიდრების გათანაბრება არ არის სამოქალაქო სამართლებრივი პასუხისმგებლობის სახე.* იხ. თბილისის საქალაქო სასამართლოს სამოქალაქო საქმეთა პალატის 2022 წლის 19 დეკემბრის გადაწყვეტილება საქმე N330210021005025429.

29 არარეგისტრირებულ თანაცხორებაში მყოფი პირების მიერ, შესაძლოა საერთო სახსრებით მოხდეს ქონების შეძენა და აღნიშნული ქონების არა თანასაკუთრებაში, არამედ რომელიმე პირის ინდივიდუალურ საკუთრებაში რეგისტრაცია.

30 *McCormack John L.,* Title to Property, Title to Marriage:

ლობით მეუღლეთა საკუთრება იყოფა ორ ნაწილად: ინდივიდუალურ ანუ განცალკევებულ და საერთო თანაზიარ საკუთრებად. ინდივიდუალურია ისეთი ქონება, რომელიც ერთ-ერთ მეუღლეს ეკუთვნის და თვითონვე განკარგავს. აღნიშნული დანაწესი რეგულირდება სსკ-ის 1161-ე-1162-ე მუხლებით. თანაზიარ ქონებად ჩაითვლება მეუღლეთა ერთად ცხოვრების პერიოდში შეძენილი ყოველგვარი ქონება (უძრავი და მოძრავი), რომელიც შეძენილია (ან შექმნილია) ორივე მეუღლის ერთობლივი შრომითა და სახსრებით, ასევე ის ქონება, რომელიც შეძენილია ერთ-ერთი მეუღლის მიერ იმ შემთხვევაშიც, თუ ერთ-ერთი მათგანი ეწეოდა საოჯახო საქმიანობას, უვლიდა შვილებს ან სხვა საპატიო მიზეზის გამო არ ჰქონია დამოუკიდებელი შემოსავალი.[31]

საქართველოს უზენაესმა სასამართლომ მნიშვნელოვანი განმარტება გააკეთა ერთ-ერთ საქმეში,[32] კერძოდ, საკასაციო სასამართლომ არ გაიზიარა კასატორის პრეტენზია და აღნიშნა, რომ მიუხედავად იმისა, რომ სადავო უძრავი ქონება მოპასუხემ მამის ნაჩუქარი ფულით შეიძინა, იგი მოპასუხის ინდივიდუალურ საკუთრებად ვერ იქნება მიჩნეული. საკასაციო სასამართლო განმარტა, რომ ქორწინებაში მყოფი მეუღლის მიერ საჩუქრად მიღებული ნივთის საკუთრების ფორმის (ინდივიდუალური თუ საერთო) განსაზღვრისათვის, არსებითი მნიშვნელობისაა, დადგინდეს მჩუქებლის ნება. განსახილველ შემთხვევაში, მოპასუხის მამის ნება მოპასუხის ოჯახის კეთილდღეობისათვის ზრუნვისაკენ იყო მიმართული და ოჯახის საერთო მიზნებს ემსახურებოდა, რაც დასტურდება იმ გარემოებით, რომ სადავო უძრავ ქონებაში მოპასუხე თავის მეუღლესთან და შვილთან ერთად ცხოვრობდა. კასატორი თავად ადასტურებს, რომ სადავო სახლის ადგილმდებარეობა მოსარჩელის სურვილით შეირჩა, დედის სახლთან ახლოს (იხ. ამ განჩინების 11.3 ქვეპუნქტი). ყოველივე ზემოაღნიშნულიდან გამომდინარე, სადავო საცხოვრებელი სახლი, რომელიც კასატორმა, ქორწინების განმავლობაში, მამის ნაჩუქარი ფულით შეიძინა, მთლიანი ოჯახისათვის იყო განკუთვნილი და როგორც საჩუქარი, მოკლებული იყო ინდივიდუალური მოხმარების ხასიათს.[33]

თითოეული მეუღლის პირად საკუთრებას წარმოადგენს: ა) ქონება, რომელიც თითოეულ მათგანს ეკუთვნოდა დაქორწინებამდე; ბ) ჩუქების ან მემკვიდრეობის წესით მიღებული ქონება. მეუღლეთა პირად საკუთრებად ითვლება აგრეთვე, პირადი მოხმარების ნივთები (ტანსაცმელი, ფეხსაცმელი და ა. შ), თუნდაც ისინი შეძენილი იყოს ქორწინებაში ყოფნის დროს მეუღლეთა საერთო სახსრებით, გარდა ძვირფასეულობისა. თითოეული მეუღლის ქონება შეიძლება, ცნობილი იქნას მეუღლეთა საერთო თანასაკუთრებად, თუ დადგენილი იქნება, რომ ქორწინების განმავლობაში დახარჯული თანხების შედეგად ამ ქონების ღირებულება მნიშვნელოვნად გადიდდა (კაპიტალური რემონტი, მშენებლობის დასრულება, გადაკეთება და სხვ). ანალოგიურ რეგულირებას ვხვდებით ბელგიის საოჯახო სამართალშიც.[34]

მეუღლეთა მიერ ქორწინების განმავლობაში შეძენილი ქონება გულისხმობს

The Social Foundation of Adverse Possession and Common Law Marriage (Winter 2008). Valparaiso University Law Review, Vol. 42, No. 2, 2008, Loyola University Chicago School of Law Research Paper No. 2011-012, < https://ssrn.com/abstract=1885811> [02 მარტი, 2025].

31 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2016 წლის 16 მარტის გადაწყვეტილება საქმეზე №ას-7-7-2016, *16.03.2016 წ., 2017 წლის 24 ნოემბრის გადაწყვეტილება საქმეზე №ას-1169-1089-2017.*

32 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2019 წლის 23 აპრილის გადაწვეტილება საქმეზე №ას-963-2018, პარაგ 22.

33 *ძლიერიშვილი ზ.,* (2018), ჩუქება და სამისდღეშიო რჩენა, თბილისი, „მერიდიანი“, გვ: 306.

34 *Verbeke, A.P. G.,* A New Deal for Belgian Family Property Law (April 19, 2013). Verbeke, A.-L. (2013), A new deal for Belgian family property law, in Alofs, E., Byttebier, K., Michielsens, A., Verbeke, A.-L. (eds.), Liber Amicorum Hélène Casman, Antwerp/ Cambridge, Intersentia, 2013, p. 466, <https://ssrn.com/abstract=2312659> [02 მარტი, 2025].

ქორწინების პერიოდში შეძენილ ყოველგვარ ქონებას (უძრავი და მოძრავი), რომელიც შეძენილია (ან შექმნილია) ორივე მეუღლის ერთობლივი შრომითა და სახსრებით. მეუღლეთა საერთო თანასაკუთრებას განეკუთვნება ხელფასი და სხვა ფულადი შემოსავლები, მიუხედავად იმისა, თუ ვის სახელზეა რიცხული. მეუღლეთა საერთო ქონება არის ქონება, რომელიც მეუღლეებმა ერთობლივად შეიძინეს. შეძენაში, რა თქმა უნდა, არ იგულისხმება მხოლოდ ფულადი თანხის გადახდა, არამედ ორივე მეუღლის ნება მიმართულია ქონების მათ საკუთრებაში გადასვლაზე. ამდენად, უძრავი ქონების მეუღლეთა თანასაკუთრებად მიჩნევის საკითხის დადგენისას განმსაზღვრელია უძრავი ქონების მეუღლეების მიერ ერთობლივად, რეგისტრირებული ქორწინების განმავლობაში საერთო სახსრებით შეძენის ფაქტი.[35]

ერთ-ერთ საქმეში სასამართლომ არ გაიზიარა მოპასუხის პრეტენზია და აღნიშნა, რომ მიუხედავად იმისა, რომ სადავო უძრავი ქონებები მოპასუხემ შეიძინა იმ თანხით რომელიც მიიღო სასოფლო-სამეურნეო დანიშნულების მიწის ნაკვეთის *(საკადასტრო კოდით ....., ფასითობით 2052 კვ. მ.)* რეალიზაციის შედეგად, წარმოადგენს მეუღლეთა თანასაკუთრებას. სასამართლო უდავო და სადავო დადგენილი ფაქტობრივი გარემოებების შეჯერების საფუძველზე მივიდა დასკვნამდე, რომ მოპასუხეს 2008 წლის 28 მაისს ხელვაჩაურის მუნიციპალიტეტის საკრებულომ საკუთრებაში უღიარა 2052 კვ. მ. სასოფლო-სამეურნეო დანიშნულების მიწის ნაკვეთი, რომელიც 2012 წლის 22 თებერვალს საჯარო რეესტრში დაირეგისტრირა საკუთრების უფლებით და 143 780 აშშ დოლარად გაასხვისა 2017 წლის 13 აპრილს.

ამავე გადაწყვეტილებაში ვხვდებით შემდეგ მსჯელობას, რომ 2017 წლის 27 ოქტომბერს შეძენილი სადავო ბინები, მოპასუხის ინდივიდუალურ საკუთრებად ვერ იქნება მიჩნეული. სასამართლო განმარტავს, რომ შეძენილი ქონების საკუთრების ფორმის (ინდივიდუალური თუ საერთო) განსაზღვრისათვის არსებითი მნიშვნელობისაა, დადგინდეს შეძენის მიზანი. განსახილველ შემთხვევაში, მოპასუხის მიერ ქონების შეძენა ოჯახის კეთილდღეობისათვის ზრუნვისაკენ იყო მიმართული და ოჯახის საერთო მიზნებს ემსახურებოდა, რაც დასტურდება იმ გარემოებით, რომ სადავო უძრავ ქონებაში მოპასუხე თავის მეუღლესთან და შვილთან ერთად ცხოვრობდა. საცხოვრებლად გადასვლამდე კი ხდებოდა ბინების გაქირავება და მიღებული თანხა ხმარდებოდა ოჯახს. ასევე, უდავოდ დადგენილი გარემოებაა, რომ მოსარჩელე ქორწინების პერიოდში დასაქმებული იყო, გააჩნდა შემოსავალი, ზრდიდა შვილს. მოპასუხის მიერ სადავო ბინების შეძენის მიზანი იყო მიმართული ოჯახისკენ. სასამართლო ვერ გაიზიარებს მოპასუხის დედის (ერთ-ერთი მოპასუხე) მითითებას, რომ მიწა, რომლის რეალიზაციიდან მიღებული თანხით მოხდა სადავო ბინების შეძენა, იყო საგვარეულო. სასამართლო მიუთითებს, რომ სადავო ბინების შეძენის პერიოდში, მოპასუხე რეგისტრირებულ ქორწინებაში იმყოფებოდა, შესაბამისად აღიშნულ პერიოდში შეძენილი ქონება ითვლება მეუღლეთა თანასაკუთრებად.[36]

საქართველოს საერთო სასამართლოების მიერ მიღებული გადაწყვეტილებები მოწმობს, თუ რაოდენ მნიშვნელოვანია საოჯახო მეურნეობის არსებობა.

3. ერთ-ერთი მეუღლის მიერ ქორწინებაში შეძენილი ქონების განკარგვის სამართლებრივი შედეგები

იშვიათია შემთხვევა, როდესაც ქორწინების პერიოდში შეძენილ ქონებას მეუღლეები თანასაკუთრებაში არეგისტრირებენ.

35 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2019 წლის 25 აპრილის გადაწყვეტილება საქმეზე №ას-963-2018.

36 ბათუმის საქალაქო სასამართლოს სამოქალაქო საქმეთა კოლეგიის 2022 წლის 02 სექტემბრის გადაწყვეტილება, საქმე N 010210122005629412, პარაგ 6.7.

პირადი ურთიერთობაში პრობლემების გაჩენისთანავე პირი, რომლის სახელზეც რეგისტრირებულია ქონება, ცდილობს ქონების სხვა პირზე ფორმალურად გასხვისების გზით დაბრკოლებები შეუქმნას მეუღლეს. სასამართლო პრაქტიკა ამ კუთხითაც უხვია.

საქართველოს სამოქალაქო კოდექსის 1160.1 მუხლი, მეუღლეთა საერთო ქონების განკარგვისათვის აუცილებლად მიიჩნევს მეუღლეთა ურთიერთშეთანხმებას, მიუხედავად იმისა, თუ რომელი მეუღლე განკარგავს ამ ქონებას. ამდენად, მესაკუთრედ რეგისტრირებული მეუღლის მიერ მეორე მეუღლის თანასაკუთრების წილის განკარგვა მერყევად ბათილია და მისი ნამდვილობა ამ უკანასკნელის თანხმობაზეა დამოკიდებული, თუმცა ამავე მუხლის მეორე ნაწილის დანაწესით, დაცულია შემძენის ინტერესი იმ მეუღლის პრეტენზიისაგან, რომელიც საჯარო რეესტრში ქონების მესაკუთრედ რეგისტრირებული არ არის, მაგრამ მას აღნიშნული უფლება რეგისტრირებული ქორწინების პირობებში ქონების შეძენის საფუძვლით ჰქონდა. ამგვარი საკანონმდებლო მოწესრიგება ცხადყოფს, რომ ქორწინების პერიოდში შეძენილ ქონებაზე მესაკუთრედ დაურეგისტრირებელი მეუღლის უფლება აბსოლუტური არ არის და ქონებაზე მესაკუთრედ დარეგისტრირებული პირის მიერ მეუღლეთა თანასაკუთრების (მათ შორის, მეორე მეუღლის წილის) გასხვისებისას, მეორე მეუღლის საკუთრებითი უფლებამოსილების რეალიზაცია განსაზღვრულ გარემოებაზე, კერძოდ, შემძენის არაკეთილსინდისიერების ფაქტის დადგენაზეა დამოკიდებული. სსკ-ის 1160-ე მუხლის მეორე ნაწილისა და ამავე კოდექსის 312-ე მუხლის მე-3 და მე-4 ნაწილების დანაწესთა (“3. თუ მესაკუთრე ახდენს უძრავი ქონების გასხვისებას ან უფლებრივად დატვირთვას, დაუშვებელია გარიგების დადებისას (უფლების რეგისტრაციისას) თანამესაკუთრის თანხმობის მოთხოვნა, თუ იგი ასეთად არ არის რეგისტრირებული საჯარო რეესტრში. ამ მუხლის მე-3 ნაწილით გათვალისწინებულ შემთხვევაში, შემძენის ინტერესებიდან გამომდინარე, გამსხვისებელი ითვლება ერთადერთ მესაკუთრედ, თუ იგი ასეთად არის რეგისტრირებული საჯარო რეესტრში, გარდა იმ შემთხვევებისა, როდესაც შემძენმა იცოდა, რომ გამსხვისებლის გარდა არსებობს სხვა თანამესაკუთრეც) გაანალიზებით სასამართლო მიიჩნევს, რომ მეუღლეთა თანასაკუთრების განკარგვის დროს სადავო ქონებაზე მესაკუთრედ დაურეგისტრირებელი მეუღლის შედავება, ქონების გასხვისების გარიგების ბათილობას მხოლოდ იმ შემთხვევაში განაპირობებს, თუ დადგინდება, შემძენმა არა მხოლოდ იცოდა ჩუქების საგანზე სხვა მესაკუთრის არსებობის თაობაზე, არამედ, ამავდროულად, ინფორმირებული იყო, რომ ქონების მესაკუთრედ დაურეგისტრირებელი მეუღლე ქონების გასხვისების წინააღმდეგი იყო.[37] სხვა შემთხვევაში პრეზუმირებულია, რომ რეგისტრირებული მესაკუთრე მოქმედებს მეუღლესთან ურთიერთშეთანხმებით, ხოლო შემძენი შეძენის ფაქტის მიმართ კეთილსინდისიერია. ამასთან, აქვე აღსანიშნავია, რომ კეთილსინდისიერი შემძენისა და თანასაკუთრებაზე დაურეგისტრირებელი მეუღლის ინტერესთა კონკურენციისას კანონმდებლობა ზემოთ მითითებულ ნორმათა ფორმულირების გათვალისწინებით, უპირატესობას კეთილსინდისიერ შემძენს ანიჭებს.[38]

მხარეები სარგებლობენ ხელშეკრულების დადების თავისუფლების პრინციპით და მათ უფლება აქვთ კანონის ფარგლებში თავისუფლად დადონ ხელშეკრულებები და განსაზღვრონ ამ ხელშეკრულებათა შინაარსი (სსკ-ის 319-ე მუხლი). ხელშეკრულების პირობა წინასწარ შემუშავებულ ხასიათს არ ატარებს, მხარეებს შეუძლიათ ნებისმიერ საკითხზე შეთანხმდნენ. ამისათვის მათ არ სჭირდებათ რაიმე ნებართვა ან შინაარსის დაცვა. მთავარია, მათი შეთანხმება არ ეწინააღმდეგებოდეს კანონს, აკმაყოფილებდეს მორალის

37 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2010 წლის 30 აპრილის გადაწყვეტილება საქმეზე №ას-571-879-09.

38 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2020 წლის 22 იანვრის გადაწყვეტილება საქმეზე №ას-1432-2019.

ფარგლებს და არ არღვევდეს საჯარო წესრიგს. გარიგების შეფასებისათვის უნდა გაანალიზდეს ამ გარიგების მახასიათებლები. საქართველოს სამოქალაქო კოდექსის 56-ე მუხლის პირველი ნაწილის თანახმად „ბათილია გარიგება, რომელიც დადებულია მხოლოდ მოსაჩვენებლად, იმ განზრახვის გარეშე, რომ მას შესაბამისი იურიდიული შედეგები მოჰყვეს (მოჩვენებითი გარიგება). ამავე მუხლის მეორე ნაწილი კი განმარტავს, რომ თუ მოსაჩვენებლად დადებული გარიგებით მხარეებს სურთ სხვა გარიგების დაფარვა, მაშინ გამოიყენება დაფარული გარიგების მიმართ მოქმედი წესები (თვალთმაქცური გარიგება)“.

„მოჩვენებითია გარიგება, როცა ნების გამომვლენი და ნების მიმღები თანხმდებიან იმაზე, რომ მათ მიერ გამოვლენილ ნებას არ მიეცეს მსვლელობა და არ მოჰყვეს ამ გარიგებისათვის დამახასიათებელი სამართლებრივი შედეგი, ე.ი. ახდენენ გარეგნულად გამოხატულის მიღწევის სიმულაციას. მოჩვენებით გარიგებად მიჩნევისათვის გადამწყვეტია ფაქტი, რომ მხარეებს არა აქვთ გარიგებაში მითითებული შედეგის დადგომის განზრახვა. მოჩვენებითი გარიგება ბათილია, რადგან მხარეთა შეთანხმება მოკლებულია ნამდვილობას. მოჩვენებითი გარიგებისაგან განსხვავებით, თვალთმაქცური გარიგება ნამდვილია. მტკიცებითი ტვირთი (როგორც მოჩვენებითი, ისე თვალთმაქცური გარიგებების შემთხვევაში) აწევს იმ პირს, ვინც ამტკიცებს, რომ არსებობს მოჩვენებითი და თვალთმაქცური გარიგებები. სასამართლო პრაქტიკის მიხედვით მოჩვენებითი გარიგებების დროს მხარეთა ნების გამოვლენის არანამდვილობის მტკიცების ტვირთი აკისრია მას, ვისაც მიაჩნია, რომ მოსაჩვენებლად დადებული გარიგებით შეილახა მისი უფლება. სასამართლოსათვის აუცილებელია ისეთი ფაქტობრივი გარემოებების არსებობა, რომლებიც მიუთითებენ ნების გამოვლენის ნაკლზე, ფიქციური გარიგების შესახებ შეთანხმებაზე, საერთო მიზანზე, რაც არ შეესაბამება მათ მიერ გარეგანი ნების გამოვლენას“.[39] გარიგების ბათილობაზე მსჯელობის დროს სასამართლო ყურადღებას აქცევს გასხვისების პერიოდს, ასევე კავშირს გამსხვისებელსა და შემძენს შორის, რის საფუძველზეც იღებს გადაწყვეტილებას: თუ სასამართლო დაადგენს, რომ ქონების განკარგვა მოჩვენებითია, მოსარჩელის მოთხოვნა დაკმაყოფილდება და ქონება აღირიცხება მოსარჩელის თანასაკუთრებაში.

4. სასარჩელო ხანდაზმულობის ვადა

საქართველოს სამოქალაქო კოდექსის 133-ე მუხლის თანახმად, სანამ ქორწინება არსებობს, მეუღლეთა შორის მოთხოვნებზე ხანდაზმულობის ვადის დენა ჩერდება. იგივე წესი მოქმედებს მშობლებსა და შვილებს შორის მოთხოვნებზე ბავშვების სრულწლოვანების დადგომამდე, აგრეთვე მეურვეებსა (მზრუნველებსა) და სამეურვეო პირებს შორის მოთხოვნებზე მეურვეობის მთელი პერიოდის განმავლობაში. 1171 მუხლის მიხედვით, განქორწინებულ მეუღლეთა თანასაკუთრების ქონების გაყოფის თაობაზე მოთხოვნებისათვის დადგენილია ხანდაზმულობის სამწლიანი ვადა. საქართველოს სამოქალაქო კოდექსის 128-ე მუხლის პირველი ნაწილის თანახმად, სხვა პირისაგან რაიმე მოქმედების შესრულების ან მოქმედებისაგან თავის შეკავების მოთხოვნის უფლებაზე ვრცელდება ხანდაზმულობა. ამავე კოდექსის 130-ე მუხლის თანახმად, ხანდაზმულობა იწყება მოთხოვნის წარმოშობის მომენტიდან. მოთხოვნის წარმოშობის მომენტად ჩაითვლება დრო, როცა პირმა შეიტყო ან უნდა შეეტყო უფლების დარღვევის შესახებ.

ხანდაზმულობის ვადების დაწესებით, კანონმდებლის მიზანია გამორიცხოს კრედიტორის უფლების განხორციელების არათანაზომიერად ან ბოროტად გამოყენების

39 *ჭანტურია ლ.*, სამოქალაქო კოდექსის კომენტარი, წიგნი I, ჭანტურია (რედ.), 2017, მუხლი 56, ველი 4, 7, 8, 19, 21, 22.

საფრთხე. გარდა ამისა: ა) ხანდაზმულობის ვადა სასამართლოს უმსუბუქებს ფაქტების დადგენისა და შესწავლის პროცესს და ამ გზით ხელს უწყობს დასაბუთებული გადაწყვეტილების გამოტანას; ბ) ხელს უწყობს სამოქალაქო ბრუნვის სტაბილიზაციას; გ) აძლიერებს სამოქალაქო სამართლებრივი ურთიერთობის სუბიექტების ურთიერთკონტროლსა და დარღვეული უფლების დაუყოვნებლივ აღდგენის სტიმულს იძლევა.[40]

სასარჩელო ხანდაზმულობის ვადა გულისხმობს დროის გარკვეულ მონაკვეთს, რომლის განმავლობაშიც პირს, რომლის უფლებაც დაირღვა, შესაძლებლობა აქვს, მოითხოვოს საკუთარი უფლებების სამართლებრივი გზით (იძულებით) განხორციელება ან დაცვა. ამ ვადის გაცდენა კი გულისხმობს ამ პირთა მიერ ასეთი შესაძლებლობის გამოყენების უფლების მოსპობას, გაქარწყლებას. „მხარეთა სასარჩელო შესაძლებლობები ხშირად არის ვადით შეზღუდული. სამოქალაქო სამართალში სასარჩელო ხანდაზმულობის ვადის გასვლის შემდეგ პირი კარგავს უფლების სასამართლო გზით დაცვის შესაძლებლობას".[41] საქართველოს სამოქალაქო კოდექსის 1171-ე მუხლის საფუძველზე, ხანდაზმულობის ვადის დენის დაწყების ობიექტური მომენტი განქორწინების რეგისტრაციაა, ვინაიდან, განქორწინებული მეუღლეებისათვის იმთავითვე ცნობილი უნდა იყოს მოთხოვნის უფლების არსებობის თაობაზე, მით უფრო იმ პირობებში, როდესაც მხარეებს შორის ქონებრივი დავის არსებობა-არარსებობა ერთ-ერთი კრიტერიუმია, რაც განსაზღვრავს განქორწინების საკითხის გადაწყვეტის წესს.[42] ერთობლივი საოჯახო მეურნეობის შეწყვეტის შემდეგ, მხარეებმა შესაძლოა განქორწინების რეგისტრაცია გარკვეული პერიოდის შემდეგ მოახდინონ, მაგრამ ხანდაზმულობის ვადის ათვლა დაიწყება უშუალოდ განქორწინების რეგისტრაციის შემდეგ და თანაცხოვრების პერიოდში შეძენილ ქონებაზე საკუთრების უფლების მოპოვება სამწლიანი ხანდაზმულობის ვადის დაცვით კვლავ შეეძლება პირს.

5. მტკიცების ტვირთის განაწილება

სამოქალაქო საქმეზე დასაბუთებული გადაწყვეტილების მიღების ერთადერთი გზა მტკიცებაა, რომლითაც დგინდება საქმისათვის მნიშვნელობის მქონე ფაქტობრივი გარემოებები. მტკიცების პროცესში იგულისხმება პროცესის მონაწილე სუბიექტების საქმიანობა, მიმართული საქმის გადაწყვეტისათვის მნიშვნელობის მქონე ფაქტების არსებობის ან არარსებობის დასადგენად. პროცესის მონაწილე მხარეთა და სასამართლოს მტკიცებითი საქმიანობა მოიცავს შემდეგ სტადიებს: მტკიცების საგნის განსაზღვრა; მტკიცებულებათა შეგროვება (მტკიცებულებათა გამოვლენა, მათი შეკრება და სასამართლოში წარდგენა); მტკიცებულებათა სასამართლოში გამოკვლევა; მტკიცებულებათა შეფასება. დამტკიცებას საჭიროებს ის გარემოებები, რომლებიც ასაბუთებს სასარჩელო მოთხოვნასა და სარჩელის ფაქტობრივ გარემოებებს, მოწინააღმდეგე მხარის მიერ სარჩელის ფაქტობრივი გარემოებებისა და სასარჩელო მოთხოვნის უარყოფას, ასევე, საქმის არსებითი გადაწყვეტისათვის მნიშვნელობის მქონე გარემოებები.[43]

სამოქალაქო სამართალწარმოებაში მტკიცების პროცესი, როგორც გაშუალებული შემეცნება, საკმაო სისრულითაა მოწეს-

40 საქართველოს უზენაესი სასამართლოს რეკომენდაციები სამოქალაქო სამართლის სასამართლო პრაქტიკის პრობლემატურ საკითხებზე, თბილისი, 2007, გვ.63; შდრ. სუსგ 11.06.2012 საქმე №ას-547-515-2012).

41 საქართველოს საკონსტიტუციო სასამართლოს 2003 წლის 30 აპრილის გადაწყვეტილება №1/3/161 საქმეზე „საქართველოს მოქალაქეები – ოლღა სუმბათაშვილი და იგორ ხაპროვი საქართველოს პარლამენტის წინააღმდეგ''.

42 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2013 წლის 9 დეკემბრის გადაწყვეტილება საქმეზე №ას-531-505-2013.

43 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2017 წლის 24 თებერვლის გადაწყვეტილება საქმეზე №ას-1206-1166-2016 წელი.

რიგებული კანონით. მაგალითად, სსსკ-ის 102–ე მუხლის თანახმად, თითოეულმა მხარემ უნდა დაამტკიცოს გარემოებანი, რომლებზეც იგი ამყარებს თავის მოთხოვნებსა და შესაგებელს. კანონი განსაზღვრავს, თუ რომელმა მხარემ რომელი ფაქტობრივივ გარემოებები უნდა დაამტკიცოს. კანონი განსაზღვრავს აგრეთვე, თუ რომელ მხარეს ეკისრება ფაქტების მითითებისა და ამ ფაქტების დამტკიცების ტვირთი, რომელი ფაქტები არ საჭიროებენ დამტკიცებას, მტკიცების რა საშუალებები დაიშვება და რა არ დაიშვება, როგორ და რა წესით ხდება მტკიცებულებათა შეგროვება, შემოწმება და შეფასება და ა.შ. სამოქალაქო სამართალში მოქმედებს პრინციპი „affirmanti, non negati, incumbit probatio“ (მტკიცების ტვირთი ეკისრება მას, ვინც ამტკიცებს და არა მას, ვინც უარყოფს).

მოსარჩელისათვის სასურველი შედეგის დადგომა, მისი სასარჩელო მოთხოვნის დაკმაყოფილება შესაძლებელია მხოლოდ გარკვეული ფაქტების საფუძველზე, რომლებსაც კანონი უკავშირებს მოსარჩელის მატერიალურ-სამართლებრივი მოთხოვნის დაკმაყოფილებას. ზუსტად იგივენაირად უნდა განსაზღვროს იმ ფაქტების წრე, რომლებსაც უკავშირდება მხარეთა მოთხოვნის (შესაგებლის) ფაქტობრივი დასაბუთებულობა. მიუთითონ ფაქტებზე, რომლებიც ასაბუთებენ მხარეთა მოთხოვნებს და შესაგებელს, არის თვითონ მხარეთა მოვალეობა.

საკასაციო პალატამ ერთ-ერთ საქმეში განმარტა, რომ სსკ-ის 1158-ე მუხლი ადგენს მეუღლეთა მიერ ქორწინების განმავლობაში შეძენილი ქონების მათ საერთო ქონებად, თანასაკუთრებად არსებობის პრეზუმფციას. ნორმა განსაზღვრავს მეუღლეთა თანასაკუთრების რეჟიმს, რომლითაც დადგენილია მათი უფლებები ქორწინების პერიოდში შეძენილი ქონების მიმართ და ემსახურება ოჯახის ინტერესების დაცვის მიზანს, კერძოდ, ივარაუდება, რომ ქორწინების პერიოდში შეძენილი ქონება შეძენილია ოჯახის გაძღოლის, საერთო მიზნების უზრუნველსაყოფად, ამდენად, დავის შემთხვევაში ქორწინების განმავლობაში ქონების შეძენის ფაქტი (კანონით დადგენილი გამონაკლისების გარდა) საკმარისი საფუძველია ქონების მეუღლეთა თანასაკუთრებად მიჩნევისათვის. სადავო ქონების თანასაკუთრებად პრეზუმირების ფარგლებში, საწინააღმდეგოს მტკიცების ტვირთი ეკისრება იმ მხარეს, რომელიც სადავოდ ხდის ამ გარემოებას.[44]

დასკვნა

სასამართლოს გადაწყვეტილებების, სხვადასხვა სადისერტაციო ნაშრომის, სამეცნიერო სტატიების და სამართლის ამ სფეროში არსებული ლიტერატურის ანალიზის შედეგად, კიდევ ერთხელ დადასტურდა გარემოება მასზედ, რომ საოჯახო სამართალი პირდაპირ კავშირშია საზოგადოების წეს-ჩვეულებებთან. სამართლის სხვა დარგების უნიფიკაცია მარტივად შესაძლებელია, თუმცა საოჯახო სამართალი იმდენად ერწყმის ერის ღირებულებებს, რომ ამ დარგში ნებისმიერ ცვლილებების განხორციელებისას დიდი სიფრთხილეა საჭირო.

საკანონმდებლო დანაწესიდან გამომდინარე, ქორწინების დროს შეძენილი ქონება რომ თანასაკუთრებად იქნას მიჩნეული, პირველ ყოვლისა აუცილებელია ქორწინების რეგისტრაციის ფაქტი, მხოლოდ ამის შემდეგ იკვლევს სასამართლო საოჯახო მეურნეობის არსებობას. თუ სასამართლო დაადგენს ფაქტს, რომ ქონების შეძენა მოხდა საოჯახო მეურნეობის ფარგლებში და ემსახურებოდა ოჯახის ინტერესს, მიუხედავად ქონების შესაძენად განკუთვნილი თანხის წარმომავლობისა, ქონება მეუღლეთა თანასაკუთრებად უნდა იქნას მიჩნეული. საოჯახო მეურნეობის მოშლის შემდეგ, რეგისტრირებული ქორწინების ფარგლებში შეძენილ ქონებაზე კი თანასაკუთრების რეჟიმის გავრცელება გამორიცხულია.

44 საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2018 წლის 02 მარტის გადაწყვეტილება საქმეზე №ას-1426-1346-2017

სასამართლოს გადაწყვეტილება უნდა იყოს ეპოქალური და პასუხობდეს საზოგადოების მიმდინარე გამოწვევებს. ნორმის განმარტებისას სასამართლო მოქმედებს გონივრული განსჯის პრინციპით. ნორმის განმარტების შედეგად სასამართლო გადაწყვეტილებებში იძენს სიცოცხლისუნარიანობას ათეულობით წლის წინ მიღებული კანონი.

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საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2024 წლის 28 მარტის გადაწყვეტილება საქმეზე Nას-1159-2023, პარაგ. 22.

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საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2019 წლის 25 აპრილის გადაწყვეტილება საქმეზე Nას-963-2018.

საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2019 წლის 15 თებერვლის გადაწყვეტილება საქმეზე №ას-1753-2018.

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საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა პალატის 2018 წლის 02 მარტის გადაწყვეტილება საქმეზე №ას-1426-1346-2017.

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ადამიანის უფლებათა ევროპული სასამართლოს 1994 წლის 27 ოქტომბრის #18535/91 გადაწყვეტილება საქმეზე Kroon and others v. The Netherlands, იხ. საქართველოს უზენაესი სასამართლოს სამოქალაქო საქმეთა 2019 წლის 24 ოქტომბრის გადაწყვეტილება საქმეზე №ას-205-2019.

ŞERİFE YİĞİT v. TURKEY, no. 3976/05, 2010 წლის 02 ნოემბერი, https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],% 22itemid%22:[%22001-101579%22]}) მითითებულია სუსგ საქმე №ას-1760-2018, 14 თებერვალი, 2022 წელი.

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Cybersecurity in the Digital Era: Between Digital Transformation and Protection Challenges

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ABSTRACT

The enhancement of cybersecurity represents a cornerstone for the successful implementation of digital transformaion initiatives across various sectors. It plays a critical role in safeguarding digital systems against cyber threats and attacks that could disrupt operations and compromise continuity. As reliance on technology grows and smart systems become increasingly integrated into service delivery, the demand for a resilient and trustworthy cybersecurity infrastructure has become indispensable.

Cybersecurity serves as a fundamental enabler of trust in the integrity and confidentiality of data, protecting it from manipulation, breaches, or unauthorized disclosure. This, in turn, fosters a secure and transparent digital environment for information exchange, which enhances institutional performance and reduces operational costs arising from security breaches or technical failures.

The findings of this study indicate that nations and organizations possessing advanced cybersecurity capabilities — and investing proactively in emerging technologies — are more equipped to assert effective control over cyberspace. Such capacity ensures the realization of digital security and

strengthens national sovereignty. Cybersecurity thus emerges as a strategic instrument for digital defense and the protection of national interests at both domestic and international levels, positioning it as a vital element in achieving comprehensive and sustainable digital transformation.

INTRODUCTION

Contemporary society is situated at the core of the knowledge and information era, an era defined by the ubiquity of the web and pervasive networked communication, where the flow of information now surpasses any previously known form of exchange in human history. The transformations that characterize this phase represent a qualitative leap that far surpasses previous stages of human development, particularly in terms of scope, speed, capacity, and informational richness.

This evolving reality has shifted the world from geographical proximity to a condition of spatial convergence, transcending even Marshall McLuhan's seminal notion of a "global village". The unprecedented velocity and volume of information circulation have resulted in what is often termed the "information explosion", a phenomenon that carries profound positive and negative implications for the global community.

Simultaneously, this explosion has engendered a spectrum of security challenges of varying magnitude and impact, affecting both individuals and nation-states. These challenges increasingly necessitate intervention to protect sensitive information, especially that which pertains to national sovereignty and state security, within the framework of what is now understood as "cybersecurity".

In today's increasingly digital societies, information functions as a core axis across economic, political, and social dimensions, rendering it highly susceptible to threats and attacks. This underscores the urgent need to implement robust safeguards against cybercrime in its many forms. The imperative becomes all the more acute as information continues to serve as a primary source of both wealth and intellectual capital.

The deepening interconnectivity among institutions worldwide compounds the risk: a single breach within one entity's digital infrastructure can rapidly cascade into broader systemic vulnerabilities due to the intricate web of informational dependencies that now characterize global institutional operations.

Moreover, cyberattacks have evolved into a formidable instrument within the landscape of international competition, particularly in the economic domain, where such attacks may serve espionage or sabotage functions between states. The severity of these threats escalates dramatically when critical infrastructure is targeted, as such incidents have the potential to trigger geopolitical conflict, especially in already volatile regions.

Consequently, cyberattacks now pose a direct threat to regional and global peace and security. These dynamics make it increasingly necessary to recognize cybersecurity not merely as a technical concern but as a strategic imperative, an essential dimension of national security and a cornerstone of any comprehensive digital transformation agenda. Given the strategic significance and high-stakes nature of cybersecurity risks, an increasing number of nations are integrating cybersecurity measures into their overarching national security doctrines.

In light of the foregoing, this study is guided by the following research question: **Is there a measurable correlation between the various dimensions of digital transformation**

and the level of cybersecurity implemented within institutional frameworks? Furthermore, to what extent does digital transformation contribute to reinforcing, or potentially undermining, cybersecurity?

To address this question, the research adopts an inductive approach, beginning with partial observations and analyses of real-world and contemporary cases associated with digital transformation and its implications for cybersecurity. This includes the monitoring of incidents such as cyberattacks targeting critical infrastructure, data breaches, and the implementation of modern protective strategies by specific countries and institutions. Additionally, the analytical method is applied to examine these incidents and discern the nature of the relationship between digital transformation and the increasing necessity for cybersecurity.

METHODOLOGY

This research is based on a doctrinal-analytical approach, which involves the examination of international and national legal documents, strategic frameworks, and policy acts. A comparative legal method has also been employed, entailing a systematic comparison of models from different jurisdictions. In addition, the study integrates a case study approach, focusing on detailed discussions of specific examples of legal practice. The research materials include: normative acts and official documents (international conventions, EU directives, U.S. federal standards, Algerian national legislation); reports of international organizations (current publications of ENISA, NIST, and other institutions); academic literature (scholarly works published over the past decade reflecting contemporary trends in digital transformation and cybersecurity); and practical cases (decisions of international courts and real-life cyberattack examples illustrating the issues under examination). The article relies primarily on normative and documentary sources. Quantitative analysis, including modeling or statistical processing of cybersecurity indices, does not fall within the scope of this study; however, this direction is identified as a perspective for future research.

1. DIGITAL TRANSFORMATION AS A CATALYST FOR THE EVOLUTION OF CYBERSECURITY

Amid the rapid proliferation of digital technologies and the growing dependence of institutions on intelligent solutions across a wide array of sectors, digital transformation has emerged as a foundational force in reshaping the landscape of work environments and service delivery.

Parallel to this transformation is the escalating urgency to safeguard data and protect digital infrastructure from a surge in cyber threats, rendering cybersecurity a critical and continuously evolving domain. Within this context, digital transformation can be seen not only as a driver of innovation and operational efficiency but also as a catalyst for the advancement of cybersecurity mechanisms and methodologies. These advances align with the increasing complexity of digital threats and the elevated expectations placed on institutions to secure information effectively.

1.1. Digital transformation and the variables of the digital age

Contemporary global dynamics are characterized by transformative changes spurred by the digital revolution, which has redefined economic, social, educational, and security paradigms. With the relentless acceleration of technological innovation, digital transformation has shifted from being a strategic option to becoming an imperative, imposed by the defining variables of the digital era, including artificial intelligence, big data analytics, and the Internet of Things.

These technological variables do not merely influence the nature of services and infrastructure; they also reshape fundamental notions of operational efficiency, responsiveness, and communicative interaction. As a result, both individuals and institutions are compelled to embrace innovative digital frameworks capable of adapting to the pace and demands of this transformation.

1.1.1. The concept of digital transformation

The current era is marked by an intensifying digital transformation, which has established itself as a global trend permeating all domains due to persistent technological advancement. This transformation has redefined how efficiency and effectiveness are conceptualized within institutional structures and has led to the emergence of new perspectives concerning institutional performance and excellence.

As a result, adopting digitalization has become a strategic imperative, one that enables the initiation of systemic change and the pursuit of excellence across a range of sectors. Consequently, the discussion must address the concept of digital transformation by first providing its definitions and then exploring its core dimensions.

1.1.1.1. Definition of digital transformation

Digital transformation is defined as: *"A modern business model that utilizes digital technologies to develop innovative products and services, as well as the methods through which they are delivered, with an emphasis on addressing the needs of customers or end users".*[1]

It is further defined as: *"The process of integrating digital technologies into business operations, resulting in a radical and comprehensive transformation in the way value is created and delivered to the end user, while simultaneously reflecting a cultural shift that institutions must adapt to".*

In a similar vein, it is described as: *"Innovation driven by a comprehensive transformation process that incorporates existing digital technologies into methods for generating value, conducting production, and managing business operations, particularly by redefining the underlying thought processes".*[2]

Accordingly, digital transformation can be defined as a comprehensive and strategic process aimed at the systematic integration of digital technologies across all facets of institutional operations. Its purpose is to foster the innovation of new products and services, refine the mechanisms through which value is delivered to the end user, and instigate cultural and organizational transformation. This process compels institutions to fundamentally reconsider their business models, leadership methodologies, and cognitive frameworks to align with the complex and evolving demands of the digital age.

1.1.1.2. Dimensions of digital transformation

Digital transformation represents a multifaceted phenomenon, within which two principal dimensions are particularly prominent:[3]

1.1.1.2.1. Digital technologies

At its core, digital transformation is driven by ongoing advancements in digital technologies. Scholarly literature consistently identifies three primary technologies as central to institutional digital transformation: the Internet, digital analytics, and cloud computing. These technologies are interrelated and have witnessed exceptional development in recent years. Their combined capabilities have enabled institutions to restructure and optimize their internal processes and service delivery in a digitally integrated and comprehensive manner.

1 Slaimi, D., Bouchi, Y. (2019). Digital transformation between necessity and risks. Journal of Legal and Political Sciences (2), Algeria.

2 Ferhane, F. (2017). The skills and core capabilities essential to the success of digital transformation in enterprises. Revue des Sciences Économiques, 13(15), p. 52.

3 Henriette, E., Feki, M., Boughzala, I. (2016). Digital transformation challenges. Mediterranean Conference on Information Systems (MCIS). AIS Electronic Library (AISeL), p. 3.

1.1.1.2.2. User experience

Digital transformation places the end user, be it a consumer or an employee, at the center of institutional priorities. Contemporary users increasingly demand superior quality, enhanced flexibility, and personalized engagement in the products and services they consume. They also expect immediate, context-aware responses to their shifting needs. This reality is especially pronounced among digital-native generations, who display heightened technological literacy and a pronounced inclination to share their experiences through social media platforms.

To accommodate these continually evolving expectations, institutions must reassess their operational behaviors and adopt marketing strategies that resonate with contemporary consumption patterns. Consequently, digital transformation often initiates with a reconfiguration of marketing functions through the deployment of advanced customer relationship management (CRM) tools. These systems are progressively integrated with social network analysis functionalities to enrich the interactive and participatory aspects of customer engagement.

This transformative impact extends further to human resource management, particularly through the utilization of employee relationship management (ERM) systems. Within this framework, employees are perceived as "internal customers", and significant efforts are directed toward delivering a workplace experience that mirrors the standard of service extended to external clients.

1.1.2. Requirements of digital transformation

The implementation of digital transformation spans several domains, notably technology, data, and human capital. These requirements are outlined in greater detail below:

1.1.2.1. Technologies

Digital transformation is predicated on a cohesive and sophisticated technological ecosystem encompassing hardware, data repositories, storage infrastructures, and software platforms, all of which function within advanced IT environments and data centers designed to guarantee both high performance and operational continuity. This ecosystem must be capable of delivering consistent service quality that satisfies the expectations of the organization's personnel, clients, and external partners.

To ensure these outcomes, it is essential to deploy specialized technical teams tasked with overseeing and maintaining the technological infrastructure and communication networks with precision, dependability, and efficiency.

1.1.2.2. Data

Business organizations must engage in consistent and effective data management and analysis to ensure the availability of qualitative, reliable, and comprehensive information. This requires the implementation of advanced statistical analysis tools and the development of predictive capabilities that assist in shaping future strategic orientations. Continuous monitoring of data flows, coupled with their optimal utilization, is essential for achieving institutional objectives and realizing broader strategic goals.[4]

1.1.2.3. Human resources

Human resources constitute a fundamental pillar in advancing digital transformation, as they represent one of the most critical assets for confronting the complex challenges and pressures that institutions currently face. These resources serve as a driving force for progress and development across various sectors.

Nonetheless, many countries, particularly those in the developing world, grapple with substantial obstacles stemming from the scarcity of skilled professionals equipped to navigate and adapt to the demands of the digital environment. This deficiency poses a significant barrier to the integration of advanced technologies and the effective implementation of digital transformation initiatives.

4 Chaouchi, K., Khellouf, Z. (2023). Digital transformation in Algeria. Journal of Accounting, Auditing, and Finance (01), Algeria.

Therefore, there is a pressing need to formulate strategic plans aimed at cultivating and enhancing human capacities. This includes attracting new talent with a deep understanding of the digital transformation landscape and leveraging existing technological resources to support institutional advancement in this domain.

1.2. The evolution of cybersecurity in response to digital transformation

In tandem with the accelerating momentum of digital transformation and the growing institutional dependence on intelligent systems and digital platforms, the protection of data and digital systems has assumed critical importance. This evolving reality has given rise to a complex threat landscape that demands sophisticated security solutions capable of addressing the emerging risks within cyberspace.

As a direct outcome of this transformation, the cybersecurity field has undergone notable expansion, particularly in the development of new tools and strategic approaches. Increasingly, cybersecurity operations rely on artificial intelligence, data analytics, and machine learning to anticipate, detect, and neutralize potential cyberattacks. Consequently, digital transformation has not only introduced novel security challenges but has simultaneously driven the evolution and enhancement of cybersecurity capabilities.

1.2.1. The concept of cybersecurity

This section outlines the concept of cybersecurity by presenting its definitions and identifying its principal dimensions.

1.2.1.1. Definition of cybersecurity

Cybersecurity is a relatively modern concept, first introduced in the United States during the late 1980s. However, it did not attain widespread recognition and application until the early 2000s, coinciding with the rapid acceleration of technological development and the parallel escalation of cyber threats and vulnerabilities, which have since emerged as significant global security concerns.

Cybersecurity is defined as: *"A set of technical and administrative measures used to prevent unauthorized access to computer networks or to prevent their misuse, in addition to the recovery of the electronic information they contain, with the aim of ensuring the continuous operation of information systems and safeguarding the security, confidentiality, and privacy of data for actors within cyberspace".*[5]

The American Institute of Certified Public Accountants (AICPA) defined cybersecurity as: "a set of practices and procedures designed to protect data and information from cyber threats".[6] The American Institute of Certified Public Accountants (AICPA) has established a comprehensive set of cybersecurity standards for the accounting profession, including the Statements on Standards for Accounting and Review Services (SSARS) and the Trust Services Principles and Review Services. These frameworks are intended to assist accountants in safeguarding the digital business environment through the implementation of effective data security and privacy controls, thereby reinforcing confidence in the systems and processes underpinning the delivery of professional services.[7] Conversely, the National Institute of

5 Bougrara, Y. (2018). Cybersecurity: The Algerian strategy for security and defense in cyberspace. African and Nile Basin Studies Journal (3), Democratic Center, Berlin.

6 Daoud, M. M., Serag, A. A. (2022). A proposed Framework for Studying the Impact of Cybersecurity on Accounting Information to Increase Trust in The Financial Reports in the Context of Industry 4.0: An Event, Impact and Response Approach. Trade and Finance, 42(1).

7 Through these standards, the American Institute of Certified Public Accountants (AICPA) seeks to assist organizations in protecting their data and ensuring business continuity. These standards include: 1. Risk Assessment: Identifying potential threats and evaluating the risks associated with systems and data; 2. Access Control:Regulating who can access sensitive information and how it is used; 3. Encryption: Apply-

Standards and Technology (NIST, 2024) has adopted the Cybersecurity Framework (CSF 2.0) as a key international reference for the development of protection strategies and the management of risks at the institutional level.[8]

The Securities and Exchange Commission (SEC) has defined cybersecurity as the protection of systems, networks, and digital data from cyberattacks and unauthorized access. In other words, the SEC addresses cybersecurity in the context of safeguarding sensitive information belonging to investors and registered companies.[9]

As such, cybersecurity encompasses a domain dedicated to formulating procedures and adopting standards and protective measures to address threats, prevent security breaches, and reduce the potential impact of such incidents to the lowest possible level, even in worst-case scenarios.

From an operational perspective, cybersecurity can be summarized through the following key elements:

1. Cybersecurity comprises a collection of defensive tools and mechanisms designed to detect intrusions and prevent unauthorized access;
2. It includes the safeguarding of computer networks and their associated data from infiltration, malicious tampering, or disruption attempts;
3. Cybersecurity involves the mitigation of risks posed by malicious attacks on software, hardware, and networks. This includes tools for intrusion detection, virus mitigation and removal, the application of authentication protocols, and the activation of secure, encrypted communications;[10]
4. More broadly, cybersecurity is understood as an ensemble of practices and technologies developed to defend systems, networks, and software infrastructure against all forms of digital attack, whether originating from hacking attempts, malware infections, or other cyber threats targeting the integrity of information and digital assets.

1.2.1.2. Foundations of cybersecurity

In a digital world where dependence on technology is continuously growing, cybersecurity has become an indispensable necessity for safeguarding data and systems against cyberattacks. Recognizing the true significance of cybersecurity is critical at both the individual and institutional levels. In general, cybersecurity is centered on three primary objectives:

1.2.1.2.1. Confidentiality

- ***Protection of personal data and sensitive information***: Cybersecurity offers effective mechanisms to control access to data, ensuring that only authorized individuals or entities can retrieve or manipulate it. This is essential for protecting personal data such as names, addresses, and financial records, as well as sensitive institutional information, including patents and proprietary designs.
- ***Prevention of data theft and fraud***: Cybersecurity plays a pivotal role in preventing attempts by intruders to steal data, thereby substantially lowering the risks of fraud and identity theft.

ing cryptographic methods to safeguard data during storage and transmission; 4. Awareness and Training: Educating employees on cybersecurity best practices and how to recognize potential attacks; 5. Incident Response: Establishing plans for a rapid and effective response in the event of a security breach.

8 NIST. (2024). Fiscal Year 2024 Annual Report on Cybersecurity and Privacy Program (SP 800-236). National Institute of Standards and Technology. Available at: <https://www.nist.gov/publications/fiscal-year-2024-annual-report-nist-cybersecurity-and-privacy-program>.

9 Rahmawati, M. L., Sukoharsono, E. G., Rahman, A. F., Prihatiningtias, Y. W. (2023, June). Demistifying of Triple-Entry Accounting (TEA): Integrating the Block Economics Education, In Ninth Padang International Conference on Economics, Business and Management, Accounting and Entrepreneurship (PICEEBA 2022), Atlantis Press, pp. 23-31.

10 Bara, S. (2017). Cybersecurity in Algeria: Institutions and policies. Algerian Journal of Human Security, (04), Algeria.

1.2.1.2.2. Integrity

- ***Ensuring data accuracy and completeness*:** Cybersecurity safeguards the integrity of data by preventing unauthorized alterations or damage. This function is vital for maintaining the precision and reliability of data, which directly influences operational effectiveness and the soundness of decision-making processes.
- ***Protection from destructive attacks*:** Cybersecurity counters malicious activities aimed at damaging or corrupting data, thereby preserving information reliability and supporting the continuity of business operations.

1.2.1.2.3. Availability

- ***Ensuring business and service continuity*:** Cybersecurity ensures the constant availability of systems, services, and information, thus enabling uninterrupted business functions and service delivery.
- ***Avoidance of financial losses*:** By ensuring consistent access to digital resources, cybersecurity helps minimize potential financial damages associated with service downtime or data loss.[11]

1.2.1.3. Cybersecurity legal framework

The Budapest Convention on Cybercrime (2001) is regarded as the first binding international instrument aimed at harmonizing national legislations, developing advanced investigative techniques, and enhancing international cooperation in combating cybercrime. It explicitly criminalizes acts such as illegal access to systems, data interference, system interference, and computer-related fraud, while also establishing detailed mechanisms for mutual legal assistance among member states.

In contrast, the Algerian legislator has gradually incorporated provisions related to cybersecurity within its legal framework. Law No. 04-15[12] of 2004 and Law No. 06-23[13] of 2006 amended the Penal Code to criminalize illegal access, modification, deletion, or destruction of data. Furthermore, Law No. 09-04[14] of 2009 introduced specific rules for the prevention and combating of offenses related to information and communication technologies, including measures such as electronic surveillance, cooperation with service providers, and the exchange of international judicial assistance.

Despite these efforts, Algerian legislation remains less comprehensive compared to the Budapest Convention, particularly regarding the harmonization of cybercrime definitions, the expansion of procedural powers for digital investigations, and the establishment of structured mechanisms for international cooperation.

Accordingly, aligning Algerian legislation with the standards set forth in the Budapest Convention would significantly enhance its effectiveness in addressing cross-border cyber threats and strengthen its capacity for international collaboration in this critical field.

Practical case study: Microsoft v. United States (2016)

In 2013, a U.S. federal court issued a warrant to Microsoft under the Stored Communications Act (SCA) compelling the company to disclose the contents of an email account belonging to a suspect in a narcotics trafficking case. While Microsoft provided the non-content data stored within the United States, it refused to release the email content stored on its servers in Dublin, Ireland, arguing that U.S. warrants could not extend beyond national borders. The government, on the other hand, insisted that Microsoft

11 Hamidi, H., Taileb, N. (2022). A conceptual introduction to cybersecurity. Madar Journal for Digital Communication Studies (Issue unspecified), Algeria.

12 People's Democratic Republic of Algeria. (2015). Law No. 15-04 of 11 Rabi' al-Thani 1436 AH establishing the general rules relating to electronic signature and certification (Official Gazette, No. 6).

13 Ibid. (2006). Law No. 06-23 of 29 Dhu al-Qi'dah 1427 AH amending and supplementing Ordinance No. 66-156 of 18 Safar 1386 AH (June 8, 1966) relating to the Penal Code (Official Gazette, No. 84).

14 Ibid. (2009). Law No. 09-04 of 14 Sha'ban 1430 AH containing the specific rules for the prevention of crimes related to information and communication technologies and their combating (Official Gazette, No. 43).

retained control over the data regardless of its physical location. After prolonged litigation, the Court of Appeals for the Second Circuit ruled in July 2016 that the SCA does not authorize U.S. courts to issue warrants for data stored abroad, thereby overturning the lower court's decision and vacating the contempt order against Microsoft.[15]

In conclusion, the judgment affirmed that U.S. warrants are territorially limited and cannot be applied to data stored overseas. This outcome reinforced the principle of data sovereignty and highlighted the pressing need for coherent international legal frameworks, such as the Budapest Convention, to effectively address cross-border cybercrime.

1.2.2. Cybersecurity requirements in the context of digital transformation

In light of ongoing technological advancements and the acceleration of digital transformation, cybersecurity has become one of the most critical and urgent concerns. It functions as the primary defense mechanism for protecting digital systems and networks, with the core objective of securing sensitive data and information from unauthorized access and potential cyber threats.

Ensuring effective cybersecurity necessitates the adoption of comprehensive, multi-layered strategies encompassing prevention, real-time monitoring, and robust threat response mechanisms. These include the deployment of advanced technologies such as encryption and software-based defense systems, along with the promotion of digital security awareness through user education and training on best practices.

A major challenge confronting the field lies in the ever-evolving nature of cyber threats. Malicious actors continuously seek innovative techniques to breach digital infrastructures. As a result, cybersecurity specialists must remain informed about the latest developments and threat vectors to effectively counter these risks.

Despite the complexity of these challenges, robust cybersecurity can be achieved through strategic investment in modern technologies, widespread promotion of digital security awareness, and reinforced cooperation between institutions and relevant governmental authorities.

Thus, cybersecurity constitutes a shared responsibility involving individuals, organizations, and state institutions. Heightened awareness and collaborative action form the essential foundation for protecting and securing digital ecosystems.

2. CYBER CHALLENGES IN THE DIGITAL ERA AND RESPONSE STRATEGIES

In light of the massive expansion in the use of digital technology, cyberspaces have become arenas for increasing challenges that threaten the security of individuals, institutions, and states alike. The digital age, despite its advantages in terms of speed and information exchange, has simultaneously generated new forms of complex and advanced cyberattacks, ranging from data theft and cyber extortion to threats targeting critical infrastructure.

In the face of these growing challenges, it has become imperative to adopt comprehensive and flexible cybersecurity strategies that combine technical, human, and organizational dimensions to ensure business continuity and protect sensitive information from any potential breach.

2.1. Key cyber threats in the digital age

With the growing reliance on digital systems and the expansion of IT infrastructure, advanced cyber threats have emerged that align with the nature of the digital era. These threats have become a growing concern for both institutions and governments, making it essential to identify the most prominent ones and analyze

15 Microsoft v. United States, No. 14-2985 (2d Cir. 2016).

their impact within the context of accelerating digital transformation.

2.1.1. Cyberattacks

Cyberattacks are among the most significant challenges facing cybersecurity, as they can lead to the leakage of sensitive information and financial data, causing severe damage to governmental institutions, companies, and even individuals. Addressing these threats requires strengthening protection against cybercrimes by securing computer systems and networks against malicious attacks, including viruses, malware, ransomware, and denial-of-service (DoS) attacks.[16]

In this regard, the European Union Agency for Cybersecurity (ENISA, 2024) underscores that ransomware and supply chain attacks constitute some of the most severe threats confronting states and organizations in the digital era.[17]

2.1.2. Phishing

This involves attempts to deceive users into providing sensitive data, such as passwords or bank card information, often through fake email messages.

2.1.3. Social engineering

Social engineering is one of the techniques employed by cybercriminals, who impersonate influential individuals to deceive the victim and manipulate them into revealing sensitive information that serves specific purposes. This often includes requests for financial payments or access to confidential data. Attackers use various tools to breach computers and gain unauthorized access to service providers, enabling them to steal credit card numbers, passwords, and other personal information from network users.[18]

2.1.4. Attacks on the Internet of Things (IoT)

The Internet of Things (IoT) is considered an emerging technology that connects billions of computing devices to the Internet. Sensors and computing devices communicate through Internet protocols to exchange information and share data.[19]

IoT devices face several security risks due to their vulnerabilities:

- Device weaknesses: IoT devices are designed with limited processors and memory, making them susceptible to vulnerabilities. Weak default configurations, outdated software, and a lack of security updates make these devices ideal targets for attacks;
- Data privacy: IoT devices collect massive amounts of sensitive data, including personal information. Insecure storage, weak encryption, or poor data management can lead to unauthorized access;[20]
- Network security: Devices rely on wireless protocols such as Wi-Fi, Bluetooth, and cellular networks. Attackers may target these channels for eavesdropping or data tampering. Insecure configurations and weak encryption compromise network security.[21]

16 Manasra, Y. (2023). Reconciling internet governance and state cybersecurity. Voice of Law Journal (2), Algeria.

17 ENISA. (2024). ENISA Threat Landscape 2024. European Union Agency for Cybersecurity. Available at: <https://www.enisa.europa.eu/publications/enisa-threat-landscape-2024>.

18 Hamidi, H., Taileb, N. (2022). A conceptual introduction to cybersecurity. Madar Journal for Digital Communication Studies (Issue unspecified), Algeria.

19 Gunduz, M. Z., Das, R. (2020). Cyber-security on smart grid: Threats and potential solutions. Computer Networks, 169, 107094. Available at: <https://doi.org/10.1016/j.comnet.2019.107094](https://doi.org/10.1016/j.comnet.2019.107094)>.

20 Admass, W. S., Munaye, Y. Y., Diro, A. A. (2024). Cyber security: State of the art, challenges and future directions. Cyber Security and Applications, 2, 100031, p. 5. Available at: <https://doi.org/10.1016/j.csa.2024.100031](https://doi.org/10.1016/j.csa.2024.100031>.

21 AsSadhan, B., Moura, J. M. F. (2014). An efficient method to detect periodic behavior in botnet traffic by analyzing control plane traffic. Journal of Advanced Research, 5 (4), pp. 435–448. Available at: <https://doi.org/10.1016/j.jare.2013.11.005>; <https://doi.org/10.1016/j.jare.2013.11.005>.

2.1.5. Cloud computing

The increasing reliance on cloud computing services exposes organizations to new risks such as data breaches, unauthorized access, insecure APIs, and shared infrastructures, which can lead to data loss and disruption of critical services.[22]

2.2. Protection and response strategies against digital threats

Amid the escalating cyber threats and the continuous evolution of attack techniques, the adoption of effective strategies has become imperative for safeguarding digital infrastructure, securing information, and ensuring the continuity of business operations. The most prominent among these strategies include:

2.2.1. Enhancing security awareness

Fostering a cybersecurity-oriented culture among all users within institutions through continuous training sessions and workshops is essential. These initiatives focus on raising awareness regarding the identification of phishing attacks, social engineering tactics, and malware threats.

2.2.2. Regularly updating systems and software

Routine security updates constitute a primary defense mechanism against vulnerabilities that may be exploited by malicious actors. The implementation of patch management systems is necessary to ensure that software remains consistently updated and resilient against known threats.

2.2.3. Using advanced protection tools

It is crucial to deploy integrated security solutions that encompass firewalls, antivirus programs, intrusion detection and prevention systems (IDS/IPS), and robust encryption protocols to safeguard data during both transmission and storage.

2.2.4. Implementing access control policies

Access to sensitive information must be restricted based on the principle of "least privilege", with strong enforcement of user authentication procedures through multi-factor authentication systems.

2.2.5. Backup and emergency response

The establishment of a comprehensive data recovery and emergency response strategy is vital. This should include routine data backup processes and the execution of simulated cyberattack exercises to assess readiness and ensure swift response capabilities.

2.2.6. System monitoring and log analysis

The use of network monitoring tools and log analysis facilitates the detection of abnormal activities and supports the early identification of potential intrusion attempts.

2.2.7. Compliance with standards and regulations

Adherence to international security standards and regulatory frameworks such as ISO/IEC 27001 and the General Data Protection Regulation (GDPR) significantly enhances the overall security posture and reduces legal and compliance-related risks.

2.2.8. Behavior-based security

This approach involves the detection of threats by monitoring and analyzing communication patterns between users and devices on a network. Any deviation from established behav-

22 Thakur, K., Qiu, M., Gai, K., Ali, M. L. (2016). An investigation on cyber security threats and security models. InProceedings of the 2nd IEEE International Conference on Cyber Security and Cloud Computing (CSCloud 2015) – IEEE International Symposium on Smart Cloud, IEEE, pp. 307-311. Available at: <https://doi.org/10.1109/CSCloud.2015.71>; <https://doi.org/10.1109/CSCloud.2015.71>.

ioral norms is flagged as an anomaly, potentially signaling the presence of an attack in progress.

NetFlow technology

NetFlow is employed to gather metadata on network traffic, including information about users, devices, and communication flows. This data is instrumental in identifying and analyzing irregular network behavior indicative of security threats.

Penetration testing (also known as Pen Testing)

Penetration testing involves evaluating security vulnerabilities in systems and networks by simulating attacks. Testers attempt to exploit identified weaknesses, and the findings are used to strengthen system defenses and improve security effectiveness.

While institutions dedicate significant efforts to prevent cybersecurity breaches, no security system can guarantee absolute protection. Therefore, maintaining continuous threat awareness and persistently evolving protection strategies remains an essential component of comprehensive cybersecurity management.

The following table illustrates the impact of different digital transformation models on cybersecurity and how they address threats (**see Table 1, 2**).

Digital Transformation Models

In fact, digital transformation enhances cybersecurity management by improving threat monitoring, response, and data analysis, but it also increases complexity and poses significant challenges for data protection and privacy.

CONCLUSION

The world has witnessed remarkable technological progress, particularly in the domain of information and communication technologies. This progress has led to an unprecedented expansion of the digital sphere, reflected in the vast and diverse range of content and services now accessible via the internet, from artificial intelligence and the Internet of Things to virtual and augmented reality and cloud computing.

While these advancements have delivered immense benefits, they have also introduced serious challenges and risks, most notably the rise of increasingly sophisticated cyber threats. These include the spread of malicious viruses, data breaches, espionage operations, and even the destruction of digital infrastructure. In certain instances, such attacks have evolved to the extent that they now pose direct threats to national security, falling under the scope of what is now recognized as cyber warfare.

In light of this complex and evolving landscape, there is a pressing need to adopt both defensive and offensive cybersecurity strategies that incorporate advanced security technologies and go beyond the limitations of conventional territorial boundaries.

Cyberspace has transformed from a purely technological realm into an open and contested arena where the security of nation-states can be targeted and compromised with alarming ease. As a result, states are increasingly focused on developing comprehensive cybersecurity systems, including tools for surveillance, deterrence, and response, with the ultimate aim of securing their data and protecting their critical national interests.

Based on the preceding analysis, the following conclusions can be drawn:

- Cyberspace has introduced multifaceted and far-reaching challenges affecting all nations without exception. It has also played a pivotal role in redefining global power dynamics according to new criteria that transcend traditional frameworks;
- This domain has produced intensifying threats, compelling nations to urgently adopt robust national cybersecurity strategies, particularly in light of mounting global challenges;
- The increasing prevalence of cyberattacks, espionage activities, and recurring

electronic intrusions has necessitated a reexamination of the concept of absolute sovereignty, which has become vulnerable to digital exposure and penetration, ultimately threatening national stability and security.

In light of these findings, the following recommendations are proposed:

- It is essential to invest in the development of secure digital infrastructure that aligns with the pace of digital transformation, while allocating sufficient material and human resources to support cybersecurity operations;
- Governments and institutions should establish well-defined strategic plans that encompass binding policies, protocols, and legislative frameworks to address the intensifying digital threat landscape;
- Public awareness campaigns and continuous training initiatives should be launched to educate users across all sectors on cyber risks and preventive measures;
- Educational and training programs should be strengthened to prepare skilled national professionals in the field of cybersecurity, with particular attention to modern technological competencies;
- Artificial intelligence solutions, machine learning models, and big data analytics should be adopted to enhance threat detection capabilities and ensure rapid response to emerging risks;
- Dedicated units should be established to monitor digital networks and manage cyber incidents with professionalism and speed;
- Cooperation should be encouraged between institutions at both national and international levels to facilitate the exchange of information and expertise related to cyber threats and security strategies;
- Cybersecurity must be understood not as a standalone component, but as an integral and indispensable element of digital transformation efforts, ensuring the long-term success and resilience of digital initiatives.

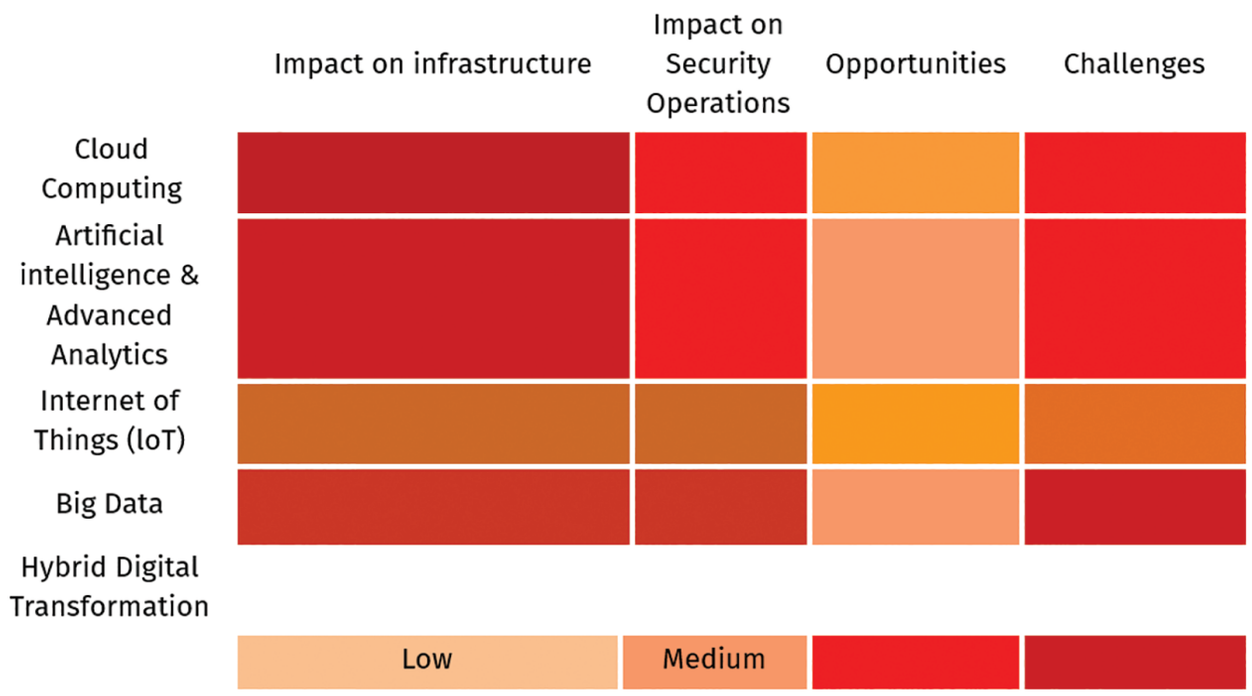
APPENDIX

TABLE 1. Impact of Digital Transformation Models on Cybersecurity

DIGITAL TRANSFORMATION MODEL	IMPACT ON INFRASTRUCTURE	IMPACT ON SECURITY OPERATIONS	OPPORTUNITIES	CHALLENGES	CYBERSECURITY IMPACT LEVEL
Cloud Computing	Centralized and Scalable Data Storage	Enhanced Update and Backup Management	Flexible Data Access and Capability Expansion	Risks of Data Breaches and Unauthorized Access	High
Artificial Intelligence and Advanced Analytics	Advanced Network and Systems Monitoring	Early Threat Detection and Behavior Analysis	Improved Attack Response and Reduced Human Errors	AI-Driven Attacks and Data Biases	High
Internet of Things (IoT)	Connectivity of Smart Devices to the Internet	Device Monitoring and Activity Logging	Mass Data Collection for Performance Analysis	Weak Device Security and Privacy Threats	Medium
Big Data	Storage and Analysis of Large Volumes of Data	Threat and Attack Pattern Analysis	Supporting Data-Driven Security Decision-Making	Challenges in Privacy Protection and Sensitive Data Storage	High

Hybrid Digital Transformation	Hybrid of On-Premises and Cloud Systems	Integration of Traditional Security Systems with Automation	Enhancing Flexibility and Threat Adaptation	Complexity in Management and Coordination of Security Policies	Medium

TABLE 2. Digital Transformation Models



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Human Safety as a New Principle of International Cooperation

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ABSTRACT

Human safety (HS) is a relatively new doctrine that emerged at the end of the 20th century. It arose from the need to address global threats and to better understand worldwide problems. Human safety is a human right; it refers to the safety of people and communities, as opposed to that of states. The concept of human security recognizes several dimensions of safety, including freedom from fear, freedom from want, and freedom from indignity.

Our study concerns the concepts of individual entitlements and individual safety, which are strongly supported in the discourse of international law. The safety of individuals has long been a central concern of the global community, first through the League of Nations and later under the United Nations. The concept of universal individual entitlements has opened the way for new rules in international law. Safeguarding these basic entitlements is no longer solely the responsibility of an individual's state; it has become a shared interest of the entire international community. From this perspective, we call for recognizing the concept of individual safety as a customary rule capable of stopping the continuous attacks on humanity.

INTRODUCTION

The ideological struggle imposed by the Cold War, along with the threat of nuclear weapon use, has given way to more fundamental but no less significant concerns. The scourges of disease, hunger, crime, political repression, natural disasters, and terrorism have become an integral part of individuals' daily realities. The focus of our research centers on two concepts that warrant clear definition: human entitlements (HR) and human safety (HS), the latter progressively emerging in the global discourse on the safeguarding of fundamental individual entitlements and individual dignity.

In this context, the concept of the "universalization of individual entitlements" has paved the way for the emergence of a new norm in international law, whereby the safeguarding of an individual's fundamental entitlements no longer rests solely with the authority of the state of which they are a national, but concerns the global community.

Thus, the question arises as to whether the emergence of the concept of human safety (HS) as a new customary rule could generate sufficient practice to curb the recurrent violations against humanity.

METHODOLOGY

The study relies on a doctrinal legal analysis of primary international instruments (UN Charter, Universal Declaration of Human Rights, ICCPR/ICESCR, Geneva Conventions and Additional Protocols) and "soft law" documents (ICISS/R2P reports, UNDP/CHS frameworks). It also applies the historical method to trace the evolution from state-centric security to the concept of human security. In addition, a comparative policy analysis is employed to assess regional frameworks (EU, AU, Arab League) and institutional practices (UN Security Council, IMF/World Bank). The article combines descriptive and analytical synthesis, drawing on primary sources (international treaties, UNGA and UNSC resolutions, ICJ jurisprudence such as the Nicaragua case) and authoritative academic and agency reports, to formulate normative recommendations on codifying and operationalizing human security. The research does not use quantitative empirical methods; its focus is on conceptual delimitation (HS–HR; HS–R2P) and policy implications.

1. Clarification of the Concepts of Human Safety (HS) and Human Entitlements (HR)

1.1 The naturalization of man and his entitlements

The notion of HS and HR stems from natural law theory as articulated by Grotius and is defined as a set of prerogatives inherent to every individual. According to Nicolas Valticos, "the concept of HR extends beyond the entitlements of individuals to encompass entitlements that man can and must enjoy either directly or through the communities to which he belongs". Furthermore,[1] Amartya Sen adds that "The concept of HR is fundamentally normative, which means that it is not clear which specific freedoms are so important that society must recognize, safeguard, and promote them as HR. This is where the idea of HS can really help by showing how important it is to not have basic factors of unsafety, both new and old".[2]

In other words, HS redirects the global safety discourse toward the core of individual dignity, the recognition of public freedoms, inherent individual entitlements, and the responsibilities of states and intergovernmental organizations to ensure the effective respect of these entitlements. Indeed, HR has historically been established with reference to the natural right to safety; therefore, all states are required by law

1 Valticos, N. (1991). The concept of human rights in global law. In International law in the service of peace, justice and development: Essays in honour of Michel Virally, Paris: A, Pedone, 483-491.

2 Sen, A. (2003). Development, rights, and human security. In Human security now: Report of the Commission on Human Security, Paris: Presses de Sciences Po.

to abide by their normative principles, whether they are in conflict or at peace.

A significant development is the emergence of a universally recognized principle, abstract in nature, yet endowed with absolute value: individual dignity. It represents the primary and fundamental intuition underlying HR and serves as the foundational reference that gives meaning to all other entitlements. It is this principle that legitimizes the very concept of HR.[3] According to Yves Madiot, HR are subjective entitlements that reflect, within the legal framework, the natural principles of justice that underpin the person.[4]

In this regard, the Universal Declaration of HR (UDHR) of 1948 rightly asserts that "All people are born free and equal in entitlements and dignity, and they all have reason and conscience".[5] It is based on this premise regarding the universal attributes of individual nature that a new understanding of a decent life has been shaped. These shared attributes translate into common needs inherent to the individual person and dignity, capable of ensuring the conditions necessary for a decent life.

Regarding these needs intrinsic to the individual being, two main categories can be distinguished, corresponding to the first two generations of HR: fundamental freedoms (linked to the respect of civil and political entitlements) and a minimum level of economic safety, or subsistence[6] (guaranteed by the respect of economic entitlements). Without the fulfillment of these universal primary needs, individual dignity is difficult to conceive.[7]

It is observed that the concept of HR encompasses a range of fundamental entitlements essential for a minimally decent life, Including, The rights to life, personal safety, including physical integrity, freedom from torture and other cruel, inhuman, or degrading treatment, equality before courts and tribunals, freedom from slavery, protection from systematic and harmful discrimination and persecution, and freedom of thought, conscience, and religion are just a few examples; and, finally, the right to property. Regarding economic entitlements,[8] it is clear that the concept of HR is dynamic and evolving,

with the list and scope of these entitlements expanding as new entitlements are frequently added to existing ones. The question then arises: can HS be considered one of these entitlements?

1.2 The concept of human safety (HS)

1.2.1 Definition of the concept

According to the Robert dictionary, safety is defined as the absence of actual danger, poverty, and any apprehension. The concept of HS is therefore founded on the principles of individual emancipation liberating individuals from fear and want, and social justice.[9] However, the initial idea of HS dates to the eighteenth century, when thinkers had already developed ideas concerning the safeguarding of individuals.

At the global level, controversy remains intense. HS may be perceived as reflecting a global willingness to intervene, potentially disregarding the principle of state sovereignty when populations are in distress.[10]

3 Lowenthal, P. (2008–2009). Ambiguities of human rights. Droits fondamentaux, (7), p. 2. Available at: <http://www.droits-fondamentaux.org>.

4 Madiot, Y. (1991). Human rights (2nd ed.). Paris: Masson, p. 26.

5 United Nations General Assembly. (1948). Universal Declaration of Human Rights, Article 1.

6 We refer here to the meaning given by Henry Shue regarding the content of subsistence, that is, having access to clean air, clean water, enough food, clothes, and shelter, as well as a basic public health preventative system. See: Vézina, L.-P. (2010). The obligation to protect and humanitarian intervention: From the reconceptualization of state sovereignty to normative individualism (master's thesis, University of Montreal, Faculty of Graduate Studies), p. 65.

7 Ibid.

8 United Nations General Assembly. (1966). International Covenant on Economic, Social and Cultural Rights, Part III.

9 Délégation for Human Rights and Democracy. (2006). Human security: Clarification of the concept and approaches by global organizations – some reference points (Information document, January), p. 4.

10 David, C. P., Rioux, J.-F. (2001). The concept of human

This issue confronted the global community in the early 1990s in response to the tragedies in Kurdistan, Somalia, Rwanda, and the former Yugoslavia. The debate on humanitarian intervention gained renewed prominence in the 1990s, particularly in the wake of crises in Rwanda and the former Yugoslavia, and was strongly advanced by French jurist Mario Bettati, who theorized the "right of intervention" as a novel transformation of the global order.[11]

The concept revitalizes and enriches this debate by providing new foundations, which have contributed to the emergence of a developing normative framework embodied in the "Obligation to Safeguard".[12] This idea says that sovereign states must safeguard their citizens from disasters that could have been avoided. If they can't or won't do this, the global community is responsible for doing so.[13] Recent scholarship reinforces this link: as Lau (2023) argues, operationalizing Human Security provides the analytical lens to detect risks to individuals, while the Responsibility to Protect supplies the political and legal duty to act upon those risks, thereby making the two concepts mutually reinforcing in both theory and practice.[14]

The reports of the Global Commission on Intervention and State Sovereignty (ICISS) in 2001 introduced an innovative approach by seeking to resolve the theoretical debate between proponents of state sovereignty and advocates of intervention for civilian protection purposes.[15] In this context, can we assert that the obligation to safeguard, a necessary complement to the concept of HS, is intrinsically linked to the exercise of state sovereignty?[16] As a corollary to this premise, what are the criteria or conditions that objectively qualify the obligation to safeguard as a guiding principle for the implementation of such safety?

1.2.2 Birth and evolution of "human safety" (HS)

The concept of safety lies at the foundation of modern state theory, particularly since the primary mission of the state is to safeguard members of the community, who, in return, owe it allegiance.[17] The right to safety is enshrined in Article 2 of the French Declaration of the Entitlements of Man and of the Citizen of 1789, affirming it as a natural and inalienable right.[18] The notion of safety was also central to a broad spectrum of philosophical discourse and to principles governing warfare.

1.3 Philosophical origins of human safety (HS)

The initial conception of HS dates to the eighteenth century, when thinkers began to focus on the safeguarding of individuals. Many fundamental principles of HS draw on the reflections of Montesquieu, Rousseau, Smith, and Condorcet. Montesquieu emphasized liberty and the subjective entitlements of individuals rather than the safety provided by the state. For Adam Smith, safety meant safeguarding against "violent and sudden attacks upon the person or property".[19] Condorcet de-

security. In Human security: A new conception of global relations (Raoul Dandurand Collection, L'Harmattan Edition), pp. 19–30.

11 Bettati, M. (1996). The right of intervention: Changes in the global order. Paris: Odile Jacob Editions.

12 International Commission on Intervention and State Sovereignty. (2001). The obligation to protect (Report of the ICISS Sovereignty, December), paras. 2.21–2.33.

13 Délégation for Human Rights and Democracy. (2006), op. cit., p. 6.

14 Lau, R. K. S. (2023). Operationalizing human security: What role for the responsibility to protect? International Social Science Journal. Available at: <https://doi.org/10.1177/00208817231154054>.

15 Agence Universitaire de la Francophonie. (n.d.). Human security and the obligation to protect: The international humanitarian order in question. Paris: Éditions des Archives Contemporaines, p. 14.

16 Ibid.

17 Addi, L. (n.d.). The concept of security tested by the new global order: The case of Algeria. Available at: <http://www.algeria-watch.org/fr>.

18 Agence Universitaire of the Francophonie. (n.d.), op. cit., p. 22.

19 Owen, T. (2004). On the difficulties and value of defining and assessing human security. In Human rights, human security, and disarmament (Disarmament Forum No. 3, UNIDIR), pp. 17–18.

scribed a social contract in which the safety of individuals was the foundational principle; in his view, if individuals live in fear, they cannot effectively participate as members of a political community.[20]

However, these liberal convictions were not universally accepted. Thinkers such as Hobbes, Kant, and Grotius argued that the state's monopoly on violence was the best means to end anarchy and prevent the law of the strongest from prevailing.

For Hobbes, safety is synonymous with civil peace, under whose safeguarding the parties to the "social contract" enjoy their natural entitlements.[21] He argued that the state of nature was essentially a form of anarchy characterized by the domination of the strong over the weak, ultimately resulting in a perpetual state of war. Everyone is driven by a desire for power and the capacity to ensure self-preservation. Indeed, the primary purpose of the social contract is to escape this anarchic condition and guarantee safety.[22] According to Rousseau, however, the state of nature is portrayed in a more peaceful light. Man enjoys perfect freedom, and the exercise of this freedom by each individual leads to equality. For Rousseau, the establishment of civil society necessarily requires the conclusion of a "social contract" that serves not only to ensure safety for individuals but also to create a political society. Moreover, the social contract represents a voluntary submission to a law to which all have consented, as everyone retains a portion of sovereignty.[23]

Kant was worried about the role of the state in keeping people safe. He imagined a higher authority: a world society based on the moral duty of the common good for its member nations. Grotius thought that the shared interests of independent states should safeguard everyone.[24]

It can be said that the influence of these philosophical currents on the notion of HS is reflected in early treaties concerning the safeguarding of individuals, particularly the Geneva Conventions of April 24, 1863, which represented the first attempts to codify the laws and customs of war.

From traditional safety to human safety (HS)

Historically, safety primarily depended on relations between groups of states. In this traditional framework, the concept of the balance of power played a critical role in ensuring the safety of populations. States were viewed as rational entities, and safety was understood chiefly as safeguarding against invading armies.[25]

These ideas were incorporated into the Covenant of the League of Nations, which further developed the concept of safety, later upheld by the United Nations. The UN legally prohibited any state from resorting to force in global relations for the first time (Articles 2 and 4). Indeed, the traditional conception of safety remained essentially military and state-centric until the 1980s.[26]

Following the fall of the Berlin Wall and the end of the Cold War, the acceleration of economic globalization prompted a reevaluation of the meaning of safety.[27] As Durand (2003) observes, this shift illustrates the coexistence of different approaches to security—state-centered, military definitions on the one hand, and human-centered, multidimensional perspectives on the other.[28] This new perspective calls for addressing not only the physical safety of individuals but also their economic and social well-being, as well as respect for their dignity and values as individual beings.[29] Con-

20 Ibid., p. 18.
21 Addi, L. (n.d.), op. cit., p. 1.
22 Letteron, R. (n.d.). The universality of human rights: Appearances and reality – The ideology of human rights in France and the United States, p. 150. Available at: <http://www.diplomatie.gouv.fr>.
23 Ibid, p.150.
24 Owen, T. (2004), op. cit., p. 18.
25 Ibid., p. 19.
26 Durand, D. (2003). The different approaches to security (February). Institut IDRP. Available at: <http://www.institutidrp.org>.
27 Ibid.
28 Durand, D. (2003), op. cit.
29 Délégation for Human Rights and Democracy. (2006),

sequently, the concept of safety is grounded in the principles of individual emancipation by "liberating from fear and want" and social justice.[30] Thus, the focus has shifted from state safety to the safety of individuals.

1.4 HUMAN SAFETY (HS) IN ITS BROAD AND NARROW SENSES

Since the last decade of the 1900s, Kofi Annan, the Secretary-General of the United Nations, has talked about making the idea of HS clearer in his Report on the Organization's Activities. He said that it is no longer enough to say that collective safety is just the absence of armed conflict, whether it is between countries or within a country. HR abuses, huge population movements, global terrorism, the AIDS pandemic, drug and arms trafficking, and environmental disasters all directly threaten our safety. This means we need to work together on a lot of different issues.[31]

Within this context, the concept of "HS" centers the individual in the analysis, focusing on threats to the individual's well-being and physical safety.[32] It makes clear that the goal of HS is to safeguard the most important parts of people's lives in a way that makes it easier for people to exercise their entitlements and grow.[33]

The broadest definition of HS was formulated in 1994 by the United Nations Development Programme (UNDP), Jorge Nef, and the Commission on Human Safety (CHS). A key point emphasized by the UNDP is the dual focus on first, safeguarding against chronic threats such as famine, disease, and repression; and second, safeguarding against sudden, violent events that disrupt everyday life.[34] In this UNDP definition, HS is linked to seven dimensions, each corresponding to specific types of threats:

- Economic stability threatened by poverty;
- Food stability, threatened by famine;
- Health safety, threatened by injury and disease;
- Environmental safety, threatened by pollution, environmental degradation, and resource depletion;
- Personal stability, threatened by various forms of violence;
- Political safety, threatened by repression;
- Community safety, threatened by instability and civil unrest.[35]

Regarding the second point, HS in its broader sense is reflected in the priority given to the "vital essentials of individuals", a fundamental element that distinguishes HS from individual development.[36] As David and Rioux (2001) argue, the notion of human safety represents a new conception of international relations, one that redefines global security by centering the individual rather than the state.[37]

It should be emphasized that HR and HS exist in a synergistic relationship. HS helps identify entitlements that are at risk in a specific context, while HR provides guidance on how HS should be safeguarded.[38] This relationship was articulated during a seminar organized in 2001 in Costa Rica by the CHS, in response to the call of the United Nations Millennium Summit by Secretary-General Kofi Annan. Addressing two major themes, the unsafety caused by conflict

op. cit., p. 4.

30 Ibid.

31 United Nations. (2000). Report of the Secretary-General on the Activities of the Organization. Official Records of the Fifty-Fifth Session of the General Assembly, Supplement No. 1 (A/55/1).

32 Krause, K. (2003). A critical and constructivist approach to security studies, p. 611. Available at: <http://www.afri-ct.org/IMG/pdf/krause2003.pdf>.

33 Boyle, K., Simonsen, S. (2004). Human security, human rights, and disarmament. In Human rights, human security, and disarmament (Disarmament Forum No. 3, UNIDIR), p. 6.

34 United Nations Development Programme. (1994). Human Development Report 1994, Chapter 2: New dimensions of human security. Paris: Economica Edition, pp. 23-26.

35 Owen, T. (2004), op. cit., p. 20.

36 Délégation for Human Rights and Democracy. (2006), op. cit., p. 8.

37 David, C. P., Rioux, J. F. (2001), op. cit.

38 Boyle, K., Simonsen, S. (2004), op. cit., p. 6.

and violence on one hand, and the connections between safety and development on the other Commission was tasked with developing a concept of HS that could serve as a practical tool for the development and implementation of policies. Based on this mandate, the Commission was asked to propose a concrete program of recommendations to address the most critical and widespread threats to HS.[39]

After this call, the CHS said that "HR and the qualities associated with individual dignity make up a conceptual reference point and a normative framework that are necessary to comprehend and implement the HS notion". Likewise, whilst recognizing that the standards and tenets of global civilian protection law are crucial elements in understanding HS, the Commission emphasized that HS cannot be confined solely to current or past armed conflict situations. Rather, HS is a concept that must be applied universally.[40]

Furthermore, recent publications by the UN Office on Human Security underscore new debates and implementation trends in Human Security, emphasizing interconnected crises—such as climate change, inequalities, displacement, health-system fragility—and reaffirming the necessity for global cooperation to address them. For instance, UNDP's 2024 informal plenary meeting highlighted how a "human security lens" can help in formulating early warning systems and structuring policy responses that integrate prevention, protection, and dignity.[41]

As highlighted by the UNDP (2022) Special Report on Human Security: New Threats to Human Security in the Anthropocene, "people's sense of safety and security is at a low in almost every country, including the richest countries, despite years of upward development success". This finding illustrates that despite decades of development progress, insecurity remains pervasive, reinforcing the urgency of embedding HS as both an analytical lens and a guiding principle of international cooperation.[42]

However, the narrow interpretation of the concept of HS focuses primarily on violent threats directed at individuals. This limited definition constrains the scope of HS to specific parameters, such as drug trafficking, small arms proliferation, landmines, ethnic conflicts, terrorism, individual trafficking, or state failure, as noted by former Canadian Foreign Minister Lloyd Axworthy. Addressing these threats relies chiefly on diplomatic resources, economic persuasion, intelligence gathering, and information technologies.[43]

In fact, most significant advancements made under the banner of HS have been based on this restricted understanding. Examples include the Mine Ban Treaty, the establishment of the Global Criminal Court (ICC), as well as recent global initiatives concerning child soldiers, small arms control, and the role of non-state actors in conflicts, all of which reflect the narrow interpretation of the HS principle.[44]

Ultimately, it is important to observe that the globalization of risks and threats, the complexity of conflicts, terrorist attacks, and mass civilian massacres have driven the global community to develop legal instruments addressing three key dimensions of the issue:

- The safety of populations as a legitimate legal concern;
- Safeguarding as an obligation that is both moral and legal;
- Obligation as a political principle intrinsically linked to the exercise of sovereignty.[45]

39 Délégation for Human Rights and Democracy. (2006), op. cit., p. 8.

40 San José Declaration. (2001). San José Declaration on Human Security. San José.

41 United Nations Office on Human Security. (2024). Publications on human security. Available at: <https://www.un.org/humansecurity/publications-on-human-security/>.

42 UNDP. (2022). Special Report on Human Security: New threats to human security in the Anthropocene. United Nations Development Programme. Available at: <https://hdr.undp.org/content/2022-special-report-human-security>.

43 Délégation for Human Rights and Democracy. (2006), op. cit., p. 10.

44 Ibid.

45 Agence Universitaire de la Francophonie. (n.d.), op. cit., p. 13.

2. THE GLOBAL SAFEGUARDING OF HUMAN ENTITLEMENTS (HR): AN OBLIGATION THAT IS BOTH MORAL AND LEGAL

2.1 Human safety (HS) in global relations

2.1.1 Human safety (HS) as a new principle of global cooperation

HS can therefore be understood as a fundamental link between the various objectives of the United Nations, creating an obligation for Member States to cooperate in advancing these goals coherently. On this basis, HS helps identify HR that may be at risk in specific situations. It provides new tools and drives significant changes in global practice.

In this regard, strengthening global peace is a universal necessity in addressing the challenges of safety and development. It follows that the participation and engagement of all members of the global community, whether states, non-governmental organizations, or other civil society actors, are essential obligations to achieve a HS framework.[46]

It is important to note that several norms, principles, and institutions are already established; for example, civilian protection assistance during natural disasters and the safeguarding of war victims are key components of enhancing HS worldwide.

Thus, it is crucial to emphasize that this concept is shaping a body of global law that will no longer regulate solely the relations between states under a neutral respect for state sovereignty but will instead defend values and solidarities that prioritize the sovereignty of individuals over that of the state.[47]

In other words, the concept of HS serves as a framework for reevaluating the contemporary meaning of sovereignty, introducing an emerging new logic within global law. According to the 1994 Individual Development Report, "the time has come to shift from a conception of safety centered on conflicts between countries over territorial integrity to one that addresses the insecurities arising from the daily concerns of the majority of the world's population".[48]

One might argue that the notion of HS reverses the traditional logic of state sovereignty, transforming governments into instruments of citizens aimed at enhancing the well-being of the population.[49] Sovereignty no longer simply denotes the imposition of power but extends to the obligation to safeguard a people within a territory through respect for the law and the effective functioning of the justice system, alongside the reconstruction of the socio-economic framework of the society concerned.

To achieve these objectives, the ICISS[50] Sovereignty encourages states to adopt the principle of the obligation to safeguard, according to which the global community may intervene to prevent mass violations of HR or to alleviate the suffering of victims in the event of conflict or natural disaster.

These ideas were already articulated by the United Nations Secretary-General in his March 2000 report, where he stated: "While civilian protection intervention constitutes an unacceptable infringement on sovereignty, how should we respond to situations such as those witnessed in Rwanda or Srebrenica, where there have been blatant, massive, and systematic violations of HR, in direct contradiction to the fundamental principles on which our shared humanity is founded?"[51]

Similarly, the 2005 World Summit Outcome Document introduced a renewed vision of HS and established a collective global obligation

46 Hussein, K., Gnisci, D., Wanjiru, J. (2004). Security and human security: Presentation of concepts and initiatives – Key implications for West Africa. Sahel and West Africa Club, p. 17.

47 Délégation for Human Rights and Democracy. (2006), op. cit., p. 11.

48 Agence Universitaire of the Francophonie. (n.d.), op. cit., p. 29.

49 Délégation for Human Rights and Democracy. (2006), op. cit., p. 11.

50 Global Commission on Intervention and State Sovereignty (ICISS). (2001). The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty. International Development Research Centre. Available at: <https://www.iciss.ca/>.

51 Ibid.

to safeguard HR in the face of genocide, ethnic cleansing, and crimes against humanity.[52] It is important to emphasize that this obligation primarily lies with states; however, in cases of unwillingness or incapacity to act, the global community may step in to address these failures and intervene to halt widespread violations of HR.[53] Thus, respect for HR and humanitarian law forms the foundational pillars of the concept of HS. "As highlighted by the Global Centre for the Responsibility to Protect, 'R2P is essentially about preventing and protecting people from the most heinous atrocity crimes – genocide, war crimes, ethnic cleansing and crimes against humanity... The grim reality of today's ongoing crises is a stark reminder of the need to redouble efforts to effectively implement the responsibility to protect".[54]

2.1.2 The legal framework of the concept of human safety (HS)

The Human Safety Network (HSN) currently lacks formal sources that would integrate the concept into positive law, but it is possible to link the concept to formal global legal instruments, such as:

A. United Nations instruments related to peace and human safety (HS)

The safety of individuals has always been a central concern for the global community. Initially through the League of Nations and now under the United Nations, which, in its preamble, explicitly identifies HS as one of its core objectives in its founding resolution. The Charter states: "We, the people of the United Nations, are determined to safeguard future generations from the horrors of war, which has brought great sadness to people twice in our lifetime, and to reaffirm our faith in basic HR and keep the peace and safety of the world..." It goes on to state that one of its main objectives is "keeping the peace and safety around the world, and to do that, taking effective collective steps to stop and remove threats to the peace, stop acts of aggression or other violations of the peace, and settle or change global disputes or situations that could lead to a breach of the peace in a way that follows the rules of justice and global law".[55] This demonstrates that HS is closely associated with global peace, as the terms "safety" and "peace" are used interchangeably in the Charter's preamble. Accordingly, HS at this level may be understood as synonymous with collective safety.

B. Global Human Entitlements (HR) Law

The globalization of HR has blurred the traditional distinction between domestic legal orders and global legal frameworks. Numerous legal instruments have been adopted for this purpose, among which the UDHR of December 10, 1948, stands as a cornerstone. Article 3 of the UDHR enshrines the notion of individual safety with the provision: "Everyone has the right to life, liberty and safety of person".

In this context, Article 28 states that "Everybody has the right to a social and global order that fully realizes the freedoms and rights outlined in this Declaration". There is a notable connection between the "social level" and the "global level", and this provision is presented as a common ideal to be achieved by all peoples and nations.

Two legally binding global agreements were made in 1966 to reaffirm the Universal Declaration. One was about civil and political entitlements, and the other was about economic, social, and cultural entitlements.[56] More than 140

52 Ubeda-Saillard, M. (2011). The limits of the obligation to protect: Natural disasters. In Chaumette, A.-L., Thouvenin, J.-M. (Eds.), The obligation to protect, ten years later. Paris: A. Pedone Editions, p. 28.

53 Thibault, J.-F. (2013). On the obligation to protect threatened populations: The use of force and the possibility of justice. Québec: Les Presses de l'Université Laval, p. 5.

54 Global Centre for the Responsibility to Protect. (2020). A Reflection on the Responsibility to Protect in 2020. Available at: <https://www.globalr2p.org/publications/a-reflection-on-the-responsibility-to-protect-in-2020/>.

55 United Nations. (1945). Charter of the United Nations, Article 1.

56 According to Article 11, paragraph 1 of the ICESCR, the "States the Covenant's parties acknowledge that

countries have signed these two agreements as of today. These documents, along with the Universal Declaration, make up the Global Bill of HR and are the basis for global HR law and many other global and regional treaties.[57]

The Global Covenant on Civil and Political Entitlements guarantees, among other entitlements, the right to life, liberty, and prohibits torture. In addition to rights to social safety, education, and other benefits, the Global Covenant on Economic, Social, and Cultural Entitlements outlines everyone's right to labor in fair and advantageous circumstances, including the ability to organize and join trade unions and go on strike.

2.1.3 Norms of global humanitarian law

Global humanitarian law (IHL), also known as the "law of war" and more recently the "law of armed conflict", is a branch of global law. It developed over centuries, initially through temporary agreements between conflicting parties and, from 1864 onward, through global conventions.[58] IHL applies during interstate armed conflicts or those occurring within the borders of a state. Its purpose is to safeguard individuals, whether they are parties to the conflict. The establishment of the Global Committee of the Red Cross (ICRC), the Hague Conventions of 1899 and 1907, the four Geneva Conventions of 1949, and the two Additional Protocols of 1977 collectively form a body of global rules, conventional and customary, primarily aimed at addressing humanitarian issues directly resulting from global or non-global armed conflicts.[59] As Biad (2006) underlines, international humanitarian law represents not only a codified system of rules governing armed conflict, but also a comprehensive framework that reflects the evolution of humanitarian values in international law.[60]

The primary objective of IHL is to safeguard persons who do not take part, or no longer take part, in hostilities (civilians). It imposes numerous obligations and, consequently, individual criminal obligation for violations of the Geneva Conventions and Additional Protocol I. As Buirette and Lagrange (2008) note, the humanitarian purpose of IHL extends beyond regulating hostilities, aiming primarily to preserve human dignity and limit suffering even amidst armed conflict.[61]

Significant differences in formulation, the essence of certain rules under IHL, and the concept of HS is fundamentally aligned. Both aim to safeguard individual life from threats to the person as well as to the essential goods necessary for survival. As Bettati (2012) observes, international humanitarian law constitutes not only a body of rules applicable in armed conflicts, but also a normative framework that directly reinforces the safeguarding of human dignity and fundamental rights.[62]

Regarding the second point on HS, it is important to emphasize that under IHL, there exists a right to humanitarian assistance. Humanitarian relief efforts that are impartial in nature cannot be condemned as interference or violations of a state's national sovereignty. In its 1986 ruling on the Military and Paramilitary Activities in and against Nicaragua case, the Global Court of Justice recognized that the provision of humanitarian aid does not constitute an unlawful intervention in the internal affairs of another state, provided it is limited to the purposes established by the practice of the Red Cross.[63]

The most significant development in humanitarian law is the recognition that the use of war

everyone has the right to a sufficient quality of living, which includes enough food, and they pledge to take the required actions to guarantee that this right is realized".

57 Boyle, K., Simonsen, S. (2004), op. cit., p. 7.

58 Buirette, P., Lagrange, P. (2008). Global humanitarian law. Paris: La Découverte Edition, p. 33.

59 Bettati, M. (2012). Humanitarian law (1st ed.). Paris: Dalloz Editions; Bélanger, M. (2002). Global humanitarian law. Paris: Gulino Éditeur;

60 Biad, A. (2006). Global humanitarian law (2nd ed.). Paris: Ellipses Editions.

61 Buirette, P., Lagrange, P. (2008), op. cit.

62 Bettati, M. (2012), op. cit.

63 International Court of Justice. (1986). Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), merits, judgment. I.C.J. Reports 1986, p. 14, para. 243.

is no longer a lawful means of resolving conflicts, and that resorting to force itself constitutes a violation of HR.[64] This principle was explicitly affirmed during the 1968 Tehran Conference on HR:

"War is the opposite of peace, and peace is the only way to fully respect HR".[65] It is clear that humanitarian law is still a good way to safeguard people during armed conflict, and this safeguarding is still needed because, unfortunately, the law that says force can't be used has not stopped armed conflicts from happening.[66]

The true turning point that initiated the convergence of humanitarian law and HR law occurred at the 1968 Global Conference on HR in Tehran. It was at this conference that the United Nations first addressed the issue of applying HR in the context of armed conflict. As Doswald-Beck and Vité (1993) emphasize, this convergence represents a complementary evolution, whereby humanitarian law and human rights law both seek to safeguard human dignity amidst the realities of armed conflict.[67]

2.2 Human safety (HS) as a rationale for the proliferation of global interventions

Given that HS encompasses multiple domains, several global institutions are involved in its implementation, notably the United Nations Security Council and global economic institutions.

2.2.1 Intervention by the UN Security Council

The broadening scope of global safety is evident in the increasingly expansive interpretation by the Safety Council of what constitutes a "threat to global peace and safety", which now includes, among other elements: the possibility of intervention in internal conflicts, reference to HR violations, and the consideration of non-state actors as targets of Safety Council resolutions imposing sanctions under Chapter VII (such as terrorist groups and rebel factions).

Interpretative practice regarding Article 39 of the UN Charter reveals a tendency to regard internal conflicts involving massive HR violations and serious breaches of IHL as conflicts that threaten global peace and safety.[68] It is important to first recall that the concept of HS embodies a global willingness to intervene in the internal affairs of states and the potential to alter the traditional framework of national sovereignty and its corollaries, the principles of non-use of force and non-intervention in the internal affairs of a sovereign state. As Conforti (1993) underlines, the Security Council retains broad discretionary power in determining what constitutes a "threat to the peace, a breach of the peace, or an act of aggression" under Article 39 of the UN Charter.[69]

This form of intervention has been codified by the UN Security Council and is grounded in the UDHR of 1948. If a state is unable or unwilling to safeguard its citizens, the global community may assume that obligation. The recognition of the imperative to safeguard the person has led to the establishment of a right to humanitarian intervention, whereby states and state organizations are authorized to provide emergency assistance to populations in distress.

In the concluding document of the 2005 World Summit, Member States explicitly recognized that "According to Chapters VI and VIII of the Charter, the United Nations is responsible for protecting people from genocide, war crimes, ethnic cleansing, and crimes against

64 Doswald-Beck, L., Vité, S. (1993). Global humanitarian law and human rights law. International Review of the Red Cross, (800), Geneva, p. 14.

65 International Conference on Human Rights. (1968). Resolution XXIII: Safeguarding of human rights in armed conflict. Tehran: United Nations.

66 Doswald-Beck, L., Vité, S. (1993), op. cit., p. 14.

67 Doswald-Beck, L., Vité, S. (1993). International humanitarian law and human rights law. International Review of the Red Cross, 33(293), pp. 94–119.

68 Conforti, B. (1993). The discretionary power of the Security Council in determining a threat to the peace, a breach of the peace, or an act of aggression. In Proceedings of the Hague Academy of International Law Colloquium (July 21–23, 1992). Dordrecht/Boston/London: Martinus Nijhoff Publishers, p. 53.

69 Ibid.

humanity by using the right diplomatic, humanitarian, and other peaceful means".

The early 1990s were marked by a sense of optimism reflected in discussions about a "new world order". For illustration, one can cite the cases of Iraq in 1991, Bosnia and Herzegovina in 1992, Somalia in 1992, Rwanda in 1994, and more recently Libya in 2011 and the Central African Republic in 2013. In all these instances, the Safety Council condemned violations of HR and humanitarian law committed during the armed conflicts and called for accountability to be established.[70]

The Safety Council also got an active role in stopping impunity for those who commit genocide, war crimes, crimes against humanity, and aggression when the Rome Statute was passed. The Rome Statute says that the Safety Council may send cases to the ICC if it seems like one or more of these crimes have been committed. This is allowed under Chapter VII of the United Nations Charter.[71] In Resolution 1593 (2005), the Security Council used its power to say that the situation in Sudan's Darfur area was a danger to global peace and safety and sent the matter to the Prosecutor. Ultimately, it can be said that the Safety Council, as the UN's executive body endowed with coercive powers, holds a central obligation in implementing the United Nations' fundamental principles, particularly the obligation to safeguard civilian populations and prevent egregious HR violations that amount to genocide, crimes against humanity, or war crimes. As Gallagher (2025) emphasizes, while the "death of R2P" narrative has gained traction in policy and academic debates, such claims are misleading: the norm continues to evolve institutionally and politically, demonstrating resilience rather than disappearance.[72] Yet, even among states that support R2P rhetorically, sustaining it under conditions of geopolitical polarization presents significant challenges. "Thus, while small states certainly can find arenas where R2P can be promoted, they cannot be seen as guarantors of the norm".[73]

2.2.2 The involvement of global economic institutions

Since 1990, the number of people suffering from persistent hunger has increased by over 80 million, alongside growing food unsafety. Meanwhile, due to emergencies triggered by conflicts and a rise in natural disasters, the demand for food aid has continued to grow.[74] Institutions such as the World Bank, the Global Monetary Fund (IMF), the Organization for Economic Co-operation and Development (OECD), and the World Trade Organization (WTO) increasingly incorporate considerations related to HS within their normative frameworks and operational activities. However, rather than using the term "HS", they tend to refer to the "social consequences of economic policies" or "individual development".[75]

The Bretton Woods institutions refer more explicitly to the concept of individual development rather than HS. They now argue that effectively combating poverty requires not only promoting economic growth but also address-

70 As an example, Security Council resolution 1019 (1995) concerning violations committed in the former Yugoslavia reads as follows: "urges that everyone involved fulfill their responsibilities in this respect and strongly condemns any abuses of human rights and global humanitarian law that have occurred on the former Yugoslavian territory. Also, S/RES/1034 (1995) resolution.

71 United Nations, Office of the High Commissioner for Human Rights. (2011). Global legal safeguarding of human rights in armed conflict. New York & Geneva: United Nations, pp. 106-107.

72 Gallagher, A. (2025). Farewell the Responsibility to Protect? International Affairs, 101(2), Oxford University Press, pp. 483–502. Available at: <https://doi.org/10.1093/ia/iiaf010>.

73 Stensrud, E. E., Mennecke, M. (2024). On the 20th anniversary of the responsibility to protect: Can small states save R2P from failure and oblivion? Nordic Journal of Human Rights, 42(4), pp. 435–444. Available at: <https://doi.org/10.1080/18918131.2024.2426404>.

74 United Nations Trust Fund for Human Security. (2009). Application of the human security concept and the United Nations Trust Fund for Human Security. United Nations Office for the Coordination of Humanitarian Affairs.

75 Ramel, F. (2001). Global economic institutions and human security: Toward a new security regime? In Human security: A new conception of global relations. Paris: L'Harmattan, p. 189.

ing the political and social inequalities that perpetuate poverty. In line with the objectives of the new generation of World Bank programs, there is a call for the participation and empowerment of poor countries.[76]

In its 2005 report on the Millennium Development Goals, the World Bank urges wealthy countries to aim higher and improve their political programs and governance measures concerning aid, trade, and debt relief for developing countries. The Bank's work focuses on identifying the everyday concerns of those classified as "poor" according to the Individual Development Index, and on examining their adherence to democratic principles and respect for civil and political entitlements.[77]

CONCLUSION

The issue of HS can therefore be seen as a fundamental linkage among the various goals of the United Nations, and as an obligation for Member States to cooperate in advancing these goals coherently. On this basis, HS helps to identify HR who are potentially at risk in a given situation.

In this regard, strengthening global peace is an essential response to the intertwined challenges of safety and development. It follows from this premise that the participation and engagement of all members of the global community – whether states, non-governmental organizations, or other civil society actors – is imperative to achieving an effective HS framework.

At the same time, more concrete commitments are required. UN Member States should reinforce the principle of Human Safety within binding international treaties and regional frameworks, such as the European Union, the African Union, and the Arab League. Specific institutional mechanisms should also be established to safeguard HS in practice, ensuring accountability and effective implementation. Moreover, Human Safety must be mainstreamed within international economic institutions, such as the IMF and the World Bank, where it should serve as a core criterion for evaluating policies and programs.

Finally, further research should focus on the legal codification of HS, the comparative analysis of regional practices, and in-depth case studies in specific contexts—particularly Africa, the Middle East, and the Caucasus—where the operationalization of Human Safety remains both urgent and contested.

76 Délégation for Human Rights and Democracy. (2006), op. cit., p. 26.

77 Ibid., p. 27.

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humanitarian law. Paris: Gulino Éditeur.

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The Capabilities and Challenges of Artificial Intelligence in the Justice System

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ABSTRACT

In the context of globalization, one of the key pillars for improving the effectiveness of a country's legal system, ensuring access to justice, and enhancing the quality of legal proceedings lies in innovative and technological advancement. The ongoing global digitization process offers a broad range of services in every field, including the judiciary, enabling improved access to justice for citizens from various social backgrounds through digital transformation. It also allows the integration of artificial intelligence tools into case review and decision-making processes, making the administration of justice faster, more flexible, and efficient. Moreover, the implementation of AI technologies helps create essential tools and mechanisms that, through an integrated approach, contribute to solving global legal challenges—such as prolonged legal proceedings, overburdened judges, limited access to justice, inefficiencies in the legal system, and more.

The primary purpose of artificial intelligence is to simplify administrative processes, increase transparency and efficiency in decision-making, and assist judges, prosecutors, and lawyers in processing documents. AI enables the analysis of legal documents, anonymization of court decisions, and comparison and compliance checks of contracts. These capabilities significantly reduce human error and save time.

This article discusses examples from various countries where AI is applied in both legal research and the modeling of judicial proceedings. It is essential to emphasize that the successful use of this technology depends not only on its technical capabilities but also on the legal and ethical frameworks that protect citizens' rights.

INTRODUCTION

The process of digitalization in the judicial system accelerated significantly following the global pandemic that began in early 2020. The swift transition to remote (online) court hearings was made possible through the integrated use of justice-oriented digital technologies. This shift posed new challenges for judicial institutions in terms of effectively managing cases, analyzing evidence, ensuring secure digital communication, maintaining data security, and delivering timely justice. The technological environment of artificial intelligence provides courts with the ability to effectively utilize automated resources, adapt them to their workflows and management systems, and thus help formulate a clearer vision and strategy for delivering fast and efficient justice.

In recent years, artificial intelligence has penetrated and fundamentally transformed many spheres of our lives.[1] Becoming a part of our daily routine. It is now used both in the private sector and across public institutions. Digital platforms and tools have become a kind of guarantee for the continuity of activities in all key sectors.[2] Consequently, AI is increasingly being applied in justice systems around the world — offering both opportunities and risks. Recently, critical scholarship has raised questions about the judiciary's ability to handle the difficulties and limitations inherent in deploying AI systems.[3] This article will specifically examine what kinds of opportunities AI creates within judicial systems where it is already in use, and what risks are associated with its implementation.

The term *artificial intelligence* was first introduced in 1956 at a seminar held at Stanford University in the United States, which focused on logical rather than computational problems.[4] Artificial intelligence can be defined as "a machine's ability to act in a way that would be considered intelligent". This definition belongs to John McCarthy, who is regarded as the creator of the term "artificial intelligence" and introduced it for AI in 1956.[5,6]

According to the Duden Dictionary, the term "artificial" describes the imitation of a natural process, while "intelligence" is defined as a human capacity for abstract thinking, reasoning, and purposeful action. Based on this definition,

1 Deutsche UNESCO-Kommission. (2022). DUK Broschüre KI-Empfehlung (Recommendation on AI (ethics)). Available at: <https://www.unesco.de/sites/default/files/2022-03/DUK_Broschuere_KI-Empfehlung_DS_web_final.pdf>.

2 Government of Georgia. (2023). Guiding principles of the national strategy of Georgia on artificial intelligence. Tbilisi: Government of Georgia.

3 Dias, S. A. de J., Sátiro, R. M. (2024). Artificial intelligence in the judiciary: A critical view. Futures, 164, Article 103493. Available at: <https://doi.org/10.1016/j.futures.2024.103493>.

4 Sidamonidze, N. (2019). Artificial intelligence as a challenge and some methodological aspects of its implementation. Tbilisi: Georgian Technical University.

5 European Commission. (2019). Ethics Guidelines for Trustworthy AI. Publications Office of the European Union. Available at: <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>.

6 Reiling, A. D. (Dory). (2020). Courts and Artificial Intelligence. International Journal for Court Administration, 11(2), Article 8. Available at: <https://doi.org/10.36745/ijca.343>.

artificial intelligence can be understood as an attempt to create a simulation of human cognitive abilities.[7]

Definitions of artificial intelligence also appear in the field of computer science. For example, the definition of AI as "an attempt to teach computers to think"[8] highlights the imitation of human cognitive processes by systems such as machines or computers. This perspective is reflected in the "Turing Test",[9] developed by British scientist Alan M. Turing, which AI can only pass if it communicates with a human in natural language, acts logically, and adapts to changing circumstances.[10]

The Council of Europe defines artificial intelligence as "a combination of sciences, theories, and technologies whose goal is to reproduce human cognitive abilities through machines. Given the current level of development, artificial intelligence refers to the delegation of complex intellectual tasks, normally performed by humans, to machines".[11]

According to the definition developed by the European Commission's High-Level Expert Group on Artificial Intelligence (AI HLEG), "artificial intelligence characterizes systems that, through environmental analysis, demonstrate intelligent behavior and, to a certain degree of autonomy, carry out actions to achieve specific objectives. AI-based systems can exist in a virtual environment as fully software-based (e.g., voice assistants, image analysis software, search engines, voice and facial recognition systems), or AI can be embedded in hardware devices (e.g., advanced robots, autonomous vehicles, drones, and Internet of Things applications)".[12]

METHODOLOGY

In the process of working on this research, I employed both comparative and qualitative analysis, focusing on the study of international practices and the possibilities for integrating artificial intelligence (AI) into Georgia's justice system. The research analyzed legal approaches and practical examples from various countries, including initiatives from the Council of Europe, the European Union, and individual member states regarding the adoption of AI in judicial systems. I also reviewed findings published in high-ranking academic journals.

The primary sources for data collection included binding international legal documents (e.g., the EU's draft AI Act), the Council of Europe's principles on the use of AI in the judiciary (CEPEJ guidelines), academic and expert analyses (including reports by the EU Agency for Fundamental Rights), and studies and public statements from organizations engaged in judicial reform. The analysis of current practices in Georgia was carried out using the Desk Research method, which involved evaluating open sources such as public policy documents, strategies, legislation, judicial reform plans, and the national AI strategy. The following areas were specifically examined: stages of digitalization in the court system, implementation and use of electronic management systems, and existing frameworks for personal data protection.

The methodological approach also included the identification of ethical risks regarding algorithmic transparency, impartiality, and the necessity of human oversight in judicial decision-making.

7 DIN/DKE. (2020). Ethik und Künstliche Intelligenz: Was können technische Normen und Standards leisten? (White paper). Berlin: DIN. Available at: <https://www.din.de/resource/blob/754724/00dcbccc21399e13872b2b6120369e74/whitepaper-ki-ethi-kaspekte-data.pdf>. (In German).

8 Haugeland, J. (1985). Artificial Intelligence: The Very Idea. s.l.: MIT Press.

9 Turing, A. (1950). Computing machinery and intelligence. s.l.: Mind.

10 Russell, S. J., Norvig, P. (2010). Artificial Intelligence. s.l.: Pearson Education Inc.

11 Council of Europe. Artificial Intelligence. Available at: <https://www.coe.int/en/web/artificial-intelligence/glossary>.

12 High-Level Expert Group on Artificial Intelligence. European Commission. Available at: <https://ec.europa.eu/futurium/en/ai-alliance-consultation>.

1. THEORETICAL AND PRACTICAL DIMENSIONS OF AI IN JUSTICE SYSTEMS

"Artificial intelligence is a complex artificial cybernetic software-hardware system (electronic, including virtual, electromechanical, bio-electromechanical, or hybrid), which possesses a cognitive functional architecture and access, either independently or in relative terms, to the needed high-speed computational power".[13]

AI systems can also be differentiated based on their performance and domain of application. A common distinction in AI research is that between so-called "strong" and "weak" AI. This distinction is philosophical in nature and hinges on two hypotheses: the weak hypothesis, which claims that a system (e.g., a machine) can behave intelligently, and the strong hypothesis, which posits that such a system may possess intelligence. Analogously, a strong AI system exhibits intelligent behavior because it genuinely thinks, whereas a weak AI system only mimics intelligent behavior[14] [1-4]. A strong AI system would operate at a level equal to or beyond the capacity of the human brain. In contrast, a weak AI system is specialized in solving individual tasks and is intended to support, not replace, human cognitive effort.[15]

It is important to distinguish between artificial intelligence (AI) and machine learning (ML), as ML is merely a subcategory of AI. Using them interchangeably is incorrect. ML is typically closely associated with statistics and data processing, enabling a system to improve through experience. Deep Learning (DL), another subcategory of AI, uses neural networks to process unstructured data.[16]

Examples of AI use:

- Navigation services (e.g., Google Maps, Apple Maps);
- Mobile applications (e.g., Siri, Alexa, Google Assistant);
- Social media platforms (e.g., Facebook, Twitter, Instagram) use AI to tailor content to user interests.[17]

1.1 AI in the justice system: Transforming courts through technology

AI offers a broad spectrum of possibilities for improving various sectors. AI systems are increasingly being used in judicial procedures and courtrooms around the world—from Australia, China, and the United States to the United Kingdom, Estonia, Mexico, and Brazil. These systems are being built, tested, developed, and adapted for use in courts and tribunals globally. AI has the potential to increase procedural efficiency, accuracy, and accessibility of justice.

Court hearings do not require in-person presence, as communication technologies facilitate remote proceedings. Solution Explorer, for example, was used 160,527 times between July 13, 2016, and March 31, 2021. In 2020/2021, the average time to resolve a dispute using this system was 85.8 days, with a median resolution time of 59 days across all case types.[18]

In China, courts use AI to warn judges if their decision deviates from precedent data in a central database.[19]

AI has also demonstrated the ability to predict rulings of the European Court of Human Rights (ECHR). This tool employs natural language processing and machine learning to fore-

13 Gabisonia, Z. (2022). Internet law and artificial intelligence. Tbilisi: World of Lawyers, p. 446.

14 Russell, S. J., Norvig, P. (2010). Artificial Intelligence. s.l.: Pearson Education Inc.

15 Nilson, N. J. (2010). The Quest for Artificial Intelligence. Cambridge: University Press.

16 Goderdzishvili, N. (2020). Artificial Intelligence: Essence, International Standards, Ethical Norms and Recommendations (policy document), Tbilisi: Information Freedom Development Institute (IDFI). Available at: <https://www.idfi.ge/public/upload/Article/1111Artificial-Intelligence-GEO_Web%20Version.pdf>. (In Georgian).

17 Geekflare Team. (2025). 10 Beispiele für Künstliche Intelligenz (KI) im täglichen Leben (Article). Geekflare. Available at: <https://geekflare.com/de/daily-life-ai-example/> (Last access: 20.09.2025).

18 AI Decision-Making and the Courts, A guide for Judges, Tribunal Members and Court Administrators. (2022).

19 Ibid.

cast whether a provision of the European Convention on Human Rights has been violated in a given case. The system bases its predictions on prior decisions and achieves a 79% accuracy rate in matching human judges' outcomes.[20]

Beyond these applications, AI is used during court proceedings to review and analyze documents for compliance with predefined criteria. For example, document review involves identifying relevant materials in a case, and AI can significantly enhance the speed, accuracy, and efficiency of this process. Another AI tool is contract analysis, which can assist with both general transactions and individual contracts. JPMorgan has used an AI-powered tool named COIN (Contract Intelligence) since June 2017 to interpret commercial loan agreements. A task that would typically require 360,000 lawyer hours can now be completed in seconds.[21]

The Higher Regional Court of Stuttgart uses an AI tool named OLGA (Assistant of the Higher Regional Court). OLGA analyzes lower court decisions, grounds for appeal, and previously set judicial parameters. It functions as an intelligent research assistant with access to judicial rules, but it does not make decisions itself.

In Bavaria, a new system will soon be tested to automate the anonymization of decisions – a task currently performed manually, and which requires significant time and human resources. Anonymization extends beyond obvious identifiers such as names and addresses to include any data that might indirectly identify an individual.[22]

In the United Kingdom, the Money Claim Online (MCOL) portal has been in use since 2002 to manage claims under £100,000 without needing to enter a courtroom or hire legal representation. A separate portal, Civil Money Claims, launched in 2018, allows claims under £10,000. For 80% of surveyed users, the portal was found to be easy to use. The system first determines whether a case qualifies for the MCOL or Civil Money Claims path. If eligible, and if automatically generated documents are uploaded, the claim can be submitted for mediation or court. If the respondent agrees to pay, the claimant enters the terms of a judgment for court approval. The portal can also be used to issue enforcement orders if payment is not made.[23]

Taken together, these examples show that AI has remarkable capabilities in the justice system. It can accelerate dispute resolution, improve document processing, and increase both efficiency and access to justice.

1.2 Ethical challenges and data protection concerns in AI development

It is worth noting that artificial intelligence offers considerable potential and benefits, but at the same time, it is accompanied by significant ethical challenges, particularly the following:

In some cases, artificial intelligence exhibits bias and discrimination, which may result in unjust outcomes. For example, in 2019, it was revealed that Apple Pay offered different credit limits for men and women. Women were granted lower credit limits and were made more vulnerable due to the algorithm Apple used. A case of algorithmic racism was also reported with Google Photos, where photos of Black individuals were just labeled "Black".[24]

20 Reiling, A. D. (2020). Courts and Artificial Intelligence.

21 Donahue, L. (2018). A primer on using artificial intelligence in the legal profession. Jolt Digest. Available at: <http://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession> (Last access: 28.09.2023).

22 Pfleger, L. Was kann KI an den Zivilgerichten. Available at: <https://www.lto.de/recht/justiz/j/justiz-ki-kuenstliche-intelligenz-e-akte-digitalisierung-zivilgerichte/> (Last access: 28.09.2023).

23 AI Decision-Making and the Courts, A guide for Judges, Tribunal Members and Court Administrators (2022).

24 CMS Germany. (2023). Wie diskriminierend ist künstliche Intelligenz? CMSHS Bloggt. Available at: <https://www.cmshs-bloggt.de/rechtsthemen/sustainability/sustainability-social-and-human-rights/wie-diskriminierend-ist-kuenstliche-intelligenz/> (Last access: 30.09.2023).

Articles 7 (prohibition of discrimination) and 12 (right to privacy) of the Universal Declaration of Human Rights, along with Articles 2, 3, and 17 of the International Covenant on Civil and Political Rights, are binding on all signatory states when it comes to the use of artificial intelligence. Guidelines highlight the necessity of algorithmic transparency and openness in decision-making processes. AI-generated decisions must be predictable and require human oversight. Transparency of databases and public accessibility to the basis of their processing are essential for the development of AI in an environment regulated by ethical, moral, and legal mechanisms.[25]

One of the key challenges also lies in the protection of personal data and privacy. Massive surveillance and data collection were observed in Amazon's "Rekognition" project, which was designed for real-time human identification but faced issues concerning privacy and surveillance.[26]

Privacy and data protection are closely related but distinct rights. Privacy is a fundamental right recognized, in some form, by nearly every country in its constitutions or legal frameworks. Additionally, privacy is recognized as a general human right, unlike data protection. The right to privacy and private life is enshrined in Article 12 of the Universal Declaration of Human Rights, Article 8 of the European Convention on Human Rights, and Article 7 of the EU Charter of Fundamental Rights.

Data protection refers to safeguarding any information related to an identified or identifiable natural person—this includes names, birthdates, photographs, video recordings, email addresses, and phone numbers. The concept of data protection has its roots in the right to privacy, and both are important instruments for the defense of fundamental rights. Data protection serves the specific purpose of ensuring that personal data are processed (collected, used, stored) in good faith by both the public and private sectors[27] [14-17].

One example of data insecurity is the case of Cambridge Analytica, a data analytics company that unlawfully used Facebook users' personal information during the 2016 U.S. presidential campaign. According to records, the company obtained and analyzed the data of 50 million users, which were then used to craft personalized political advertisements.

For data processing to be lawful, merely having a legal basis is not sufficient. The processing of data must comply with specific principles:

- **Fairness and lawfulness:** The processing of personal data must be conducted fairly and legally. This means that data must be collected and handled in a way that does not violate the rights and dignity of the person to whom the data belong.
- **Clear purpose:** Data must be collected only for specific and legitimate purposes. Further use of the data for other purposes must be prohibited.
- **Proportionality and adequacy:** Only the amount of data necessary to achieve the intended purpose should be collected. The data must be sufficient and relevant for the purpose of processing, but not excessive.
- **Truthfulness and accuracy:** Data must be true and accurate. When necessary, data must be updated, their reliability checked, and incorrect or inaccurate information corrected.
- **Storage limitation:** Personal data should only be retained for the time necessary

25 Goderdzishvili, N. (2020). Artificial Intelligence: Essence, International Standards, Ethical Norms and Recommendations (policy document), Tbilisi: Information Freedom Development Institute (IDFI). Available at: <https://www.idfi.ge/public/upload/Article/1111Artificial-Intelligence-GEO_Web%20Version.pdf>. (In Georgian).

26 Snow, J. (2018). Amazon's Face Recognition Falsely Matched 28 Members of Congress with Mugshots. American Civil Liberties Union. Available at: <https://www.aclu.org/news/privacy-technology/amazons-face-recognition-falsely-matched-28> (Last access: 30.09.2023).

27 European Data Protection Supervisor. (n.d.). Datenschutz. Available at: <https://edps.europa.eu/data-protection/data-protection_de> (Last access: 30.09.2023).

to achieve the stated purpose.

Once the purpose has been fulfilled, the data must either be deleted or stored in a form that no longer allows identification of the individual.

Another major challenge of artificial intelligence is the issue of accountability: who should be responsible for harm caused by the actions of AI – the manufacturer, the user, or the AI itself? Legally, this is a complex question. Responsibility is generally based on wrongful conduct that causes harm. Since the manufacturer is closest to the decision-making around AI development, they are typically held responsible for defects. However, there are exceptions, such as in cases involving medical harm or damage caused by autonomous vehicles. In cases involving medical harm, it is important to investigate whether the physician, who relied on AI for diagnostics, exercised the necessary level of care. In instances of damage caused by autonomous vehicle operation, liability generally falls on the driver, since they are the one who activates and uses the self-driving function. The driver is considered legally responsible for the vehicle even if they are not physically steering it.[28]

This section presents the challenges that, according to current data, may be associated with artificial intelligence. Alongside these challenges, AI also offers possibilities and potential to solve repetitive, labor-intensive tasks more quickly and efficiently. This, in turn, frees up human resources to focus on more complex and creative tasks. AI also has the capacity to play an important role in disease diagnosis and to be used in environmental protection. However, to eliminate the challenges mentioned above, it is essential that the development of artificial intelligence takes ethics into account.

1.3. Building trustworthy AI: Legal frameworks and human rights considerations

Integrating ethical principles into the development of artificial intelligence is crucial to ensuring that AI tools have a positive impact on society. For users and affected individuals, AI systems are often neither understandable nor transparent in terms of how decisions or outcomes are reached. Among other concerns, the decisions must be understandable for AI systems to be perceived as trustworthy and legally compliant. Additionally, effective safeguards must be in place to protect against discrimination, manipulation, or other harmful applications.[29]

Considering the circumstances mentioned above, a foundation has been established for ethical standards governing the use of artificial intelligence. According to these standards, the use of AI must always be based on fundamental human rights, which are legally binding under EU treaties and the EU Charter of Fundamental Rights. Above all, these include respect for human dignity, personal freedom, democracy, the rule of law, equality, non-discrimination, and solidarity.

In June 2018, the High-Level Expert Group (HLEG), established by the European Commission, published its ethical guidelines on trustworthy artificial intelligence. The goal of these guidelines is to promote trustworthy AI, which should be characterized by three components throughout its entire lifecycle:[30]

a. It must be lawful and, therefore, comply with all applicable laws and regulations.

b. It must be ethical and, therefore, respect

28 SRD Rechtsanwälte. (2024). Künstliche Intelligenz (KI) – wer haftet, wenn ein Roboter versagt? SRD Rechtsanwälte Blog. Available at: <https://www.srd-rechtsanwaelte.de/blog/kuenstliche-intelligenz-haftung> (Last access: 01.10.2023).

29 DIN/DKE. (2020). Ethik und Künstliche Intelligenz: Was können technische Normen und Standards leisten? (White paper). Berlin: DIN. Available at: <https://www.din.de/resource/blob/754724/00dcbccc21399e13872b2b6120369e74/whitepaper-ki-ethi-kaspekte-data.pdf> (In German).

30 High-Level Expert Group on Artificial Intelligence. (2019). Ethics guidelines for trustworthy AI. Brussels: European Commission. Available at: <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>.

ethical values and principles.

c. It must be robust, both from a technical and social perspective.

In this way, the HLEG provides recommendations for supporting and ensuring ethical and robust artificial intelligence, and it promotes the integration of AI systems into socio-technical environments. The 52-member expert group believes that the use of artificial intelligence has the potential to profoundly transform society: "Artificial intelligence is not an end in itself, but a promising means to enhance human flourishing and, by extension, individual and societal well-being, as well as to promote progress and innovation".

Based on the European Union's guiding principles, the Organization for Economic Co-operation and Development (OECD), an international body composed of 36 member states, primarily from Europe and North America, also developed its own set of AI principles. The OECD aims to promote innovative and trustworthy AI that respects human rights and democratic values. The group of AI experts formulated five key recommendations:[31]

a. Artificial intelligence should be beneficial to people and the planet by supporting inclusive growth, sustainable development, and the improvement of quality of life.

b. AI systems should be designed in a way that respects the rule of law, human rights, democratic values, and diversity. They must also ensure appropriate safeguards, such as human intervention where necessary, with the aim of promoting a fair and just society.

c. AI systems must ensure transparency and responsible disclosure so that individuals can understand and question outcomes produced by AI. AI systems should function securely and reliably throughout their lifecycle, with ongoing assessment and mitigation of potential risks. Organizations and individuals developing, deploying, or operating AI systems should be held accountable for their proper functioning in line with the above principles.

The OECD document encourages member governments to support both public and private investment in research and development to drive innovation in trustworthy AI, and to create policy environments that enable the safe and responsible deployment of AI systems. In principle, cross-border and cross-industry cooperation will be necessary to advance responsible AI governance.[32]

At the same time, AI systems must ensure compliance with data protection standards throughout their entire lifecycle. This includes both the information provided initially by users and the data generated about users through their interactions with the system.[33]

According to UNESCO (the United Nations Educational, Scientific and Cultural Organization), the world must harness the positive potential of artificial intelligence to achieve the Sustainable Development Goals, foster knowledge societies, and promote socio-economic progress.[34]

Based on all that has been said above, the information presented underscores the vital role of ethics in the development of artificial intelligence. It is extremely important that decisions made with the assistance of AI are transparent, understandable, and compliant with legal standards. This is essential for building trust, protecting fundamental human rights, and ensuring that the use of AI systems aligns with the real needs of society.

31 OECD. Organisation für wirtschaftliche Zusammenarbeit und Entwicklung. Artificial Intelligence. OECD Principles on AI. (Online). Available at: https://www.oecd.org/going-digital/ai/principles/.

32 Ethik und Künstliche Intelligenz: Was können technische Normen und Standards leisten. Available at: <https://www.din.de/resource/blob/754724/00dcbccc21399e13872b2b6120369e74/whitepaper-ki-ethikaspekte-data.pdf>.

33 High-Level Expert Group on Artificial Intelligence. (2019). Ethics guidelines for trustworthy AI. Brussels: European Commission. Available at: <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>.

34 UNESCO. (2019). On a Possible Standard-Setting Instrument on the Ethics of Artificial Intelligence. Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000369455>.

RESULTS AND DISCUSSION

The legal regulation of artificial intelligence is essential for introducing ethical standards and managing its impact on society. Appropriate regulations help minimize risks and maximize opportunities. This section will review existing laws, regulations, and initiatives. In October 2022, the White House released "The Blueprint for an AI Bill of Rights", which outlines five key principles intended to protect the rights of the American public in the era of artificial intelligence.

1. **Safe and effective systems:** AI systems must be protected from harmful or ineffective technologies. This includes developing systems based on broad consultations to identify and reduce potential risks. Systems should undergo pre-deployment testing and ongoing monitoring to ensure their safety and effectiveness.
2. **Protection against algorithmic discrimination:** AI systems must be designed to prevent algorithmic discrimination, meaning they should avoid unjustified disparate treatment. Designers and developers should take steps to ensure systems are fair and protect individual rights without exception.
3. **Data privacy:** Data protection must be a top priority. AI systems must be designed to safeguard privacy and obtain users' consent for data use. Proper and secure data handling and confidentiality must be guaranteed.
4. **Notice and explanation:** Users must be informed when AI systems are in use and how they influence outcomes. Systems should provide clear explanations so that individuals understand how decisions are made.
5. **Human alternatives, consideration, and fallback:** Users should have the option to decline automated systems and request human review and correction when needed. Human involvement should be ensured, especially in high-risk scenarios.[35]

Additionally, on January 6, 2023, the Council of Europe's Committee on Artificial Intelligence published a draft convention on AI, human rights, democracy, and the rule of law.

The first part of the convention covers general provisions. Article 1 defines the purpose and scope of the convention, which is to establish fundamental principles, rules, and rights to ensure that the design, development, and use of AI systems are fully aligned with human rights, the functioning of democracy, and the rule of law. Article 2 contains definitions, Article 3 outlines the principle of non-discrimination, and Article 4 defines the scope of the convention – namely, that it applies to the design, development, and use of AI systems. The second part of the draft convention concerns the use of AI tools by public authorities. Article 5 outlines the obligations of state bodies: the use of AI systems must fully respect human rights and fundamental freedoms. Any interference with these rights and freedoms by public authorities or private entities acting on their behalf, resulting from the use of AI systems, must align with the fundamental values of democratic societies, be based on law, and be necessary in a democratic country in pursuit of legitimate public interests. Article 6 addresses respect for human rights, while Article 7 covers respect for democratic institutions and the rule of law. Chapter III concerns the use of AI tools in the provision of goods and services. Chapter IV addresses the fundamental principles of AI system design, development, and deployment. Chapter V focuses on measures and safeguards that ensure accountability and redress. Chapter VI discusses the assessment and mitigation of risks and adverse impacts. Chapter VII outlines provisions for cooperation, stating that parties shall consult with each other to support or improve the effective implementation and appli-

35 The White House. (2022). Blueprint for an AI Bill of Rights: Making automated systems work for the American people. Washington, DC. Available at: <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf> (Last access: 01.10.2023).

cation of the convention. Chapter VIII contains the final provisions.[36]

The Organization for Economic Co-operation and Development (OECD) has developed 12 core principles that should guide the use of artificial intelligence tools. Specifically:

1. Openness, transparency, and inclusiveness;
2. Participation in decision-making and service delivery;
3. Development of a public sector based on data analysis;
4. Protection of personal privacy and ensuring security;
5. Clarification of the responsibilities of political leadership;
6. Consistent use of digital technologies;
7. Development of coordination mechanisms;
8. Strengthening international cooperation;
9. Support for business development;
10. Enhancement of project management capacities for modern technologies;
11. Procurement of digital technologies;
12. Establishment of an appropriate legal framework for digital technologies.[37]

On June 8, 2024, the European Union issued the first official regulation on artificial intelligence. This act aims to ensure the safety, fairness, and accountability of AI systems. The EU AI regulation is based on several core goals and principles that seek to promote the safe and ethical use of AI systems. The regulation's primary objectives include system safety and effectiveness, protection of users' health and safety, and transparency and fairness of AI-driven decisions. The regulation requires that AI systems be transparent and appropriate, and that users have full access to information about how these systems operate.[38]

CONCLUSION

Artificial intelligence is increasingly dominating the global landscape, making the integration of ethics essential for maximizing its positive impact and minimizing negative outcomes. This article has demonstrated that AI holds significant potential to improve judicial systems. However, it has also highlighted key ethical challenges, including bias, discrimination, and concerns around data protection and privacy. The future of artificial intelligence and ethics will be shaped by expanded research in ethical domains, stricter regulatory frameworks, and greater public awareness of the issues at stake. Ethics is an inseparable part of AI development, and the responsibility of developers in this regard is becoming increasingly emphasized. Ultimately, the challenge lies in harnessing the power of AI to promote human well-being and progress without compromising human ethics and dignity. This requires continuous, informed, and inclusive dialogue about the ethical questions AI raises to ensure a just and responsible AI future. According to recent studies, as of today, the Georgian justice system does not yet incorporate AI tools, nor does it have the necessary ethical or legal frameworks in place. Therefore, it is essential for the country to prioritize the development of an ethical framework that ensures the protection of fundamental human rights in the use of AI. At the same time, it is necessary to gradually introduce AI technologies into the justice system, which would contribute to streamlining processes, increasing transparency in decision-making, and alleviating pressure on an overburdened system.

36 Committee on Artificial Intelligence (CAI). Available at: <https://rm.coe.int/cai-2023-01-revised-zero-draft-framework-convention-public/1680aa193f>. (Last access: 01.10.2023).

37 OECD. Available at: <https://www.oecd.org/governance/digital-government/toolkit/12principles/> (Last access: 01.10.2023).

38 European Parliament. (2023). EU AI Act: First regulation on artificial intelligence. Available at: <https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>.

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