№ 30 2024 ივნისი JUNE

სამართალი და მსოფლიო

ევროპის უნივერსიტეტის
სამართლის ინსტიტუტის
საერთაშორისო სამეცნიერო
რეფერირებადი ჟურნალი

LAW AND WORLD

INTERNATIONAL SCIENTIFIC
PEER-REVIEWED JOURNAL
OF THE EUROPEAN UNIVERSITY
INSTITUTE OF LAW

სამართალი და მსოფლიო – თქვენი გზამკვლევი სამართლის სამყაროში

LAW AND WORLD – Your Guide in Legal World

თბილისი
Tbilisi
www.lawandworld.ge

ჟურნალის საერთაშორისო აღიარება
International Recognition of Journal

მთავარი რედაქტორი:	იოსებ კელენჯერიძე
ტექნიკური რედაქტორი:	სესილი ქუთელია
ინგლისური ტექსტის კორექტორი:	კახა გოშაძე
დაკაბადონება:	თამარ ქავშარაძე

Chief Editor:	IOSEB KELENJERIDZE
Technical Editor:	SESILI KUTELIA
Proof-reader of English text:	KAKHA GOSHADZE
Imposer:	TAMAR QAVZHARADZE

გამომცემლობა „დანი“
Publishing „Dani“
ISSN 2346-7916

ჟურნალის ელექტრონული ვერსია შეგიძლიათ იხილოთ ჟურნალის ვებგვერდზე:
The online version of the journal is available on the website:

www.lawandworld.ge
E-mail: info@lawandworld.ge

სარედაქციო კოლეგია

უცხოელი წევრები

EDITORIAL BOARD

FOREIGNER MEMBERS

WOMEN'S POLITICAL RIGHTS IN INTERNATIONAL LAW AND PRACTICE IN VIETNAM

Mac Thi Hoai Thuong

Doctor of International Law, Hanoi Law University, Vietnam

ABSTRACT

As one of the fundamental human rights, political rights guarantee that persons can equally participate in socio-political life or management of the state and society without any unreasonable restriction. Ensuring women's political rights is an important basis for improving women's status in society. Although ensuring women's political rights has gained many achievements in Vietnam, there are still many limitations. Through a systematic analysis of the provisions of the International Conventions on Human Rights, the article explains the content of women's political rights and defines the obligations that must be complied with by the member states to ensure the political rights of women. In addition to practical analysis, the data about the exercise of political rights of women, such as the percentage of female deputies to the National Assembly, the percentage of women participating in the People's Council, female cadres and civil servants participating in the political processes are collected, thereby the article makes some comments on the achievements and limitations in performing national obligations of Vietnam to ensure political rights of women. The article points out the causes of the limitations and proposes solutions to improve the effectiveness of ensuring women's political rights in Vietnam.

KEYWORDS: Political rights, International conventions, Women, Human rights, Vietnam

INTRODUCTION

To understand the concept of women's political rights, it is necessary to clarify the concept of politics. Politics is an objective phenomenon of social life, an important part of the superstructure in society that forms the state; it is expressed through class, national, and international relations in gaining, retaining, and exercising state power and people's participation in state affairs. There are many different definitions of political rights. According to Black's Law Dictionary, political rights are the rights that can be exercised during the establishment or management of government. The rights of citizens are established or recognized by the Constitution so that they can participate directly or indirectly in the establishment or management of government. According to the Law Dictionary (1999), political rights are defined as the rights of citizens to participate in state management. It is considered the most important right of citizens in their lives by which they exercise their rights to master the country and society. Political rights are exercised in many different ways, such as the rights to vote or stand for election to state agencies, to participate and contribute opinions in the development of social policies, to participate in building and developing the laws, to monitor the activities of state agencies and social organizations, to make recommendations to state agencies, and to vote when the state conducts a referendum.

Human rights generally include civil-political rights and economic-social-cultural rights. In particular, women's political rights are important human rights of women, including the right to vote, the right to stand for election, and the right to participate in state management, etc. These rights are guaranteed by the constitution and the law, establishing equality between women and men in their legal capacity to participate directly or indirectly in state and social management. In the global development trend, women's rights attract more attention from society. Enhancing the position of women in politics plays a particularly important role in enhancing the position of women in society, as how women exercise their political rights is one of the best measurements for evaluating the role of women in political life in particular and society in general. Women's political rights have the following main characteristics:

Firstly, women's political rights are a factor that positions women's and men's equality in political and social life. Thereby, the participation of women in the decision-making process associated with their rights and obligations in all fields is ensured. This is equality, in essence.

Secondly, women's political rights are a legal form demonstrating the democratic and equal nature of society. Women's participation in the decision-making process at all levels ensures that state policies take gender equality into account and reflect democracy in society. According to the United Nations Charter on the Elimination of All Forms of Discrimination against Women, the exercise of women's political rights must be guaranteed by three principles: equality, non-discrimination, and responsibility of member states, in which responsibility of member states ensure the social democracy concerning to women's political rights.

Thirdly, the exercise of women's political rights is the condition for the full realization of women's economic, cultural, and social rights, as human rights are the unification of two groups of rights: political-civil rights and economic-cultural-social rights. It has practically been proven that women only have the opportunity to exercise their rights when they are involved in leadership and management in society. Therefore, political rights are the most basic and important rights to achieve gender equality.[1]

The exercise of political rights is a measure of gender equality. However, a gap still exists between the rights stipulated by the law and practice. The average proportion of women participating in national legislatures is only 16%, in the United Nations embassies is 9%, and in cabinets is 7%. The number of countries with women serving as the head of government (president or

1 Uyen N.T. T. (2018). The exercises of women's political rights in Vietnam today, *Journal of Political Theory Ho Chi Minh National Academy of Politics*, (4) pp. 10-17.

prime minister) is just 7 of the 190 countries in the world. The proportion of women serving in parliaments is a criterion for evaluating women's participation in the political system. As of 2009, only 23 countries in the world achieve a rate of 30% or more of women serving parliament.[2]

1. METHODOLOGIES

The article uses the method of synthesizing and generalizing the content of international instruments on women's political rights to point out the national obligations of Vietnam to ensure women's political rights. By data collection and analysis methods, the article evaluates women's participation in international commitments and assesses the practical exercise of women's political rights in Vietnam concerning the exercise of men's political rights. Moreover, using historical methods, the article points out the formation and development of Vietnamese law on women's rights. Based on the current practice in Vietnam, the article proposes several recommendations to strengthen the exercise of women's political rights in Vietnam.

2. STUDY RESULTS

2.1. Women's Political Rights in International Instruments and the Participation of Vietnam

Women's political rights are recognized in many international instruments. The instruments on women's political rights include two main groups: (1) international instruments recognizing political rights for humans in general based on promoting equality in dignity, such as the Universal Declaration of Human Rights 1948, Convention on Civil and Political Rights 1966; and (2) international instruments recognizing women's rights, including Convention on the Political Rights of Women 1952, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted by the United Nations General Assembly in 1979; The Beijing Declaration and the Platform for Action adopted at the Fourth World Conference on Women held in Beijing (China) in 1995; Millennium Declaration at the Millennium Summit held by the United Nations in 2000 in New York (USA). Specifically:

The preamble to the 1945 Charter of the United Nations (UN) emphasized the equality of rights between men and women. On that basis, the Universal Declaration of Human Rights (1948) established the fundamental principle to ensure the equal rights of men and women in Articles 1 and 2: "All human beings are born free and equal in dignity and rights, have reason and conscience and should treat each other in a spirit of brotherhood. Everyone is entitled to the freedoms outlined in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political opinion or belief, national or social origin, property, birth or any other status".[3]

Article 3 of the International Covenant on Civil and Political Rights (ICCPR) also specifically protects the equal right of women to participate in political and civil life.[4] The Human Rights Committee emphasizes that state parties to ICCPR must "take effective and positive measures to promote and ensure the participation of women in the conduct of public affairs and public authorities, including appropriate affirmative action".[5] Vietnam became a state party of ICCPR on September 24, 1982. According to the provisions of Article 40 of this Convention, Vietnam has fulfilled the obligation to submit three reports on the implementation of ICCPR in 1989, 2002, and 2019.

Convention on the Political Rights of Women 1952 stipulates that women have the right to

2 Hanh N.T.V, (2015). Women's participation in the political system in Vietnam today, *Journal of Political Theory Ho Chi Minh National Academy of Politics*, (10) pp. 8-17.

3 United Nation General Assembly. (1948). *Universal declaration of human rights* (217 [III] A). Paris.

4 United Nation Human Rights Committee. (March 29, 2000). *General Comment No. 28: Article 3 (The equality of rights between men and women)*, HRI/Gen/1/Rev.9 (Vol I).

5 Human Rights Committee. (2000), *Ibid*. Section 29.

vote in all elections on an equal basis with men, without any discrimination (Article 1). Women have the right to be elected to all public bodies established by national laws on an equal basis with men, without discrimination (Article 2). Women have the right to work in public agencies and perform all public functions established by national law on an equal basis with men, without discrimination (Article 3). Unfortunately, Vietnam has not joined this Convention.

The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognizes the principle of equality between men and women in all fields. The preamble to the Convention stresses that: "The full and comprehensive development of a country, the welfare of the world, and the cause of peace require the maximum participation of women in all fields on equal terms with men". Articles 7 and 8 of CEDAW stipulate that States Parties to the Convention must apply all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, ensure that women, on an equal basis with men, enjoy the following rights:[6] (a) to vote in all elections and referenda, to be eligible for election in all elected bodies; (b) to participate in developing and formulating government policies, to serve in the power structures and all public functions at all levels of government; (c)to participate in non-governmental organizations and social associations related to the public and political life of the country (Article 7). States Parties to the Convention must take all appropriate measures to ensure that women can represent their Governments in international forums and participate in the work of international organizations on equal terms with men and without any discrimination (Article 8). Article 11 of CEDAW and Article 14 of the Convention eliminate all forms of discrimination against women in labour and employment. Article 10 of CEDAW specifies that women and men are equal in terms of culture and society (school age, training, professional education, choice of study, access to training, and enjoyment of education and training policies). To implement this provision, the CEDAW Committee discusses and gives general recommendation No. 23 on measures that should be taken by state parties to support and encourage women to exercise their right to participate in politics, including three groups of measures.

- To ensure women's right to vote and stand for election, the state parties shall: (i) ensure a balanced ratio between women and men in holding publicly elected positions; (ii) help women understand the importance and ways to exercise their right to vote; (iii) overcome the barriers such as illiteracy, language, poverty, and other obstacles to exercising women's political rights; (iv) Help women overcome those barriers to exercise their right to vote and stand for election;
- To ensure women's right to participate in developing policies and laws and hold positions in government, the state parties shall (i) ensure women's representation in the policy-making process of government; (ii) ensure that women have actual and equal rights to holding positions; (iii) ensure women-targeted recruitment processes are open and attractive;
- To ensure women's right to participate in social organizations, the state parties shall (1) enact effective laws prohibiting discrimination against women and (2) encourage non-governmental organizations, political associations, and communities to agree on strategies encouraging the representation and participation of women. In addition, Recommendation No. 23 also requires state parties, in case of necessity, to take special temporary measures by each period to increase the rate of women's participation in socio-political activities by training, educating, encouraging, and providing financial support for female officials, to set certain targets on the ratio of women serving in all levels of government as long as such a measure is appropriate and motivating.

6 Vietnam was one of the first countries in the world to sign and join the Convention on July 29, 1980, and was ratified on November 27, 1981.

CEDAW is one of the most widely and internationally recognized conventions on human rights, aiming to eliminate all forms of discrimination against women and help women have equal opportunities, develop their capacity, and participate in and benefit from various activities. According to the CEDAW Committee, 186 countries in the world ratify or sign the Convention, accounting for more than 90% of United Nations members. Vietnam was one of the first countries in the world to sign and join the Convention on July 29, 1980, and it was ratified on November 27, 1981. Since joining the Convention, Vietnam has made many efforts to internalize CEDAW, developed laws on gender equality, and actively conducted and completed periodic reports on the implementation of the Convention to the Secretary General of the United Nations. The CEDAW Committee has appreciated the achievements and efforts of Vietnam in implementing CEDAW since the Committee reviewed the 5th and 6th periodic reports of Vietnam in 2006.

Convention on the Political Rights of Women 1952, taking effect on July 7, 1954, specifies the obligation of state parties to adopt measures to equalize the enjoyment and exercise of political rights of men and women in accordance with the provisions of the United Nations Charter and Declaration of Universal Declaration of Human Rights. The political rights mentioned in the Convention include voting or standing for election, holding in state agencies, and performing all public functions in accordance with the law. The Convention now has 123 state members, while Vietnam is not a member of this Convention.[7]

According to the Beijing Declaration and Platform for Action (1995), women's empowerment and decision-making positions are important in its 12 Strategic Goals. Specifically, the Declaration instructs state parties to "take measures to encourage political parties to include women in elected and non-elected public positions in the same proportion and at the same levels as men" (Strategic objective G.1.b) (the Fourth World Conference on Women, 1995).[8] Resolution 66/130 on women and women's political participation was adopted by the General Assembly (2011) and called on state parties to "increase women's political participation"[9] (paragraph 3). SDG target 5.5 explicitly calls on States to "guarantee women's full and effective participation and equal opportunities for leadership at all decision-making levels in political, economic, and public life".[10] Beijing Declaration and Platform for Action adopted at the Fourth World Conference on Women in Beijing (China) in 1995 affirmed its determination to advance the goals of equality, development, and peace for all women everywhere in the world for the benefit of all humanity. Vietnam adopted and committed to implementing the Beijing Declaration and Platform for Action 1995 with 12 goals, including decision-making and power structures and other goals such as poverty, education and training, health, violence, armed conflict, economics, human rights, media, environment, and girls.

The above analysis indicates that international human rights instruments commonly recognize women's political rights. Most of the instruments affirmed that women have the right to fully enjoy human rights on equal terms with men. Particularly, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 and Convention on Women's Political Rights 1952 stipulate and directly address women's political rights and the obligation of state members to adopt specific measures to ensure and promote

7 United Nation (1953), *Convention on the Political Rights of Women*, New York. https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVI-1&chapter=16&clang=_en [Last accessed: 21 Jun, 2023].

8 United Nations Specialised Conferences (1995), *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women,* https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf [Last accessed: 21 Jun, 2023].

9 United Nations (2012). *Women and political participation, A/RES/66/130,* https://undocs.org/en/A/RES/66/130 [Last accessed: 20 February, 2023].

10 United Nations Department of Economic and Social Affairs. (2023). *The Sustainable Development Goals Report 2023: Special Edition* p. 23. New York, USA: UN DESA. © UN DESA. https://unstats.un.org/sdgs/report/2023/ [Last accessed: 20 February, 2023].

women's political rights, such as promulgating and developing the laws prohibiting discrimination against women, ensuring a balanced proportion between women and men in holding elected positions, enhance education to help women understand the importance and ways to exercise the right to vote, apply temporary measures to increase the proportion of women participating in political life. As a state member of the above international commitments, Vietnam must apply measures to ensure and promote women's political rights.

2.2. Vietnamese Law on Women's Political Rights

The Women in Politics 2009 map, created by the Inter-Parliamentary Union (IPU) and UN, Women shows that women in the world tend to participate more deeply in political-social life. In Vietnam, women participated in leadership a long time ago. In the 1st century, Ba Trung and Ba Trieu led the people to fight for independence and freedom of the country. With a tradition of patriotism, hard work, and creativity, women have played an important role in the history of building and defending the country and have been an indispensable driving force for the comprehensive development of Vietnamese society. As a result, even though Vietnam is one of the Southeast Asian countries heavily influenced by male chauvinism, the Vietnamese legal system recognized and protected women's political rights from early times.

Women's political rights are recognized throughout the Vietnamese Constitution. The 1946 Constitution stipulates two basic and general rights of Vietnamese citizens: "All Vietnamese citizens have equal rights in all aspects including politics, economy, and culture" (Article 6) and "All Vietnamese citizens are equal before the law" (Article 7). In particular, the most important political right of citizens specified by the Constitution is "the right to participate in the government and national development depending on your talents and virtues" (Article 7). Moreover, the 1946 Constitution also states that such participation is encouraged "regardless of race, sex, class, or religion" (Preamble to the 1946 Constitution). The 1959 Constitution inherits and supplements more detailed articles on political rights and emphasizes the legality of political rights. Vietnamese citizens, thereby, have equal rights to vote and stand for election, recall, complain, and denounce. The 1980 Constitution continues to reaffirm the principle of equality before the law of all citizens as a constitutional principle of establishing citizens' rights. The Constitution also stipulates that political right is the right to participate in managing the affairs of the State and society. According to the 1992 Constitution, "Female and male citizens have equal rights in all aspects of politics, economics, culture, society, and family". It provides more specific and detailed regulations on political rights and emphasizes the guarantee of the entire political system for the implementation of citizens' political rights by the most serious and equal approach. The 2013 Constitution states that male and female citizens are equal in all aspects; the State, society, and family shall help women develop comprehensively and promote their societal role. The 2013 Constitution has many groundbreaking provisions that positively impact women's political rights. These provisions are expressed not only in Chapter II but also throughout the whole Constitution. Everyone, thereby, must respect the rights of others. Everyone is equal before the law. No one shall be discriminated against in political, civil, economic, cultural, and social life. Male and female citizens are equal in all aspects. The State, society, and family shall help women develop comprehensively and promote their societal role. Gender discrimination is strictly prohibited.

Inheriting the Constitution, Vietnamese Gender Equality Law 2006 directly and comprehensively regulates the issues of both women's and women's political rights. To internalize the spirit of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Clause 3, Article 5 of Gender Equality Law provides that "Gender equality means that men and women have equal positions and roles,

are given equal opportunities and conditions to develop their abilities for the development of the community, family, and equally enjoy the achievements of that development. Moreover, to ensure compliance with regulations on the political equality of women, Article 40 of Gender Equality Law 2006 provides the behaviours considered as violations of gender equality law in many fields. Particularly, the behaviours that violate the law on gender equality in the field of politics include: (i) Obstructing men or women from self-nominating or nominating candidates to the National Assembly, People's Councils, to lead the political organizations, socio-political organizations, socio-political and professional organizations due to gender prejudice; (ii) Not implementing or hindering the appointment of men and women to managers, leaders or professional positions due to gender bias; (iii) Applying and implement discriminatory regulations in village codes, community regulations or in regulations and rules of agencies and organizations. Furthermore, the Labor Code 2012, Civil Code 2015, Penal Code 2015, Criminal Procedure Code 2015, Law on Domestic Violence Prevention and Control 2007, Law on Marriage and Family 2014, etc, also provide regulations to protect women's and women's political rights.

By studying the content of Vietnamese law, it can be seen that the content of women's political rights in Vietnam focuses on the following contents:

Right to vote and stand for election: Decree No. 14 on General Elections to the National Assembly of Vietnam, issued on September 8, 1945, stipulates that "All Vietnamese citizens, both men and women, aged from 18 and above have the right to vote and stand for election, except for those who have been deprived of their citizenship rights and those with abnormal minds". That was considered a progressive provision of Vietnam compared to many countries in the world at that time. Particularly, in the first Constitution of Vietnam in 1946, Article 9 states, "Women and men have equal rights in all aspects". Inheriting and developing the provisions of the Constitution 1946, the Constitutions 1992 and 2013 deeply constitute women's rights. The Constitution 2013 provides detailed provisions on women's rights by inheriting and developing the provisions of the 1992 and previous constitutions. In Chapter II of the Constitution 2013, human rights in general and women's rights, in particular, are constituted, in which women's rights are stipulated from Article 14 to Article 49. Specifically, Article 27 provides that citizens aged 18 and above have the right to vote, and citizens aged 21 and above have the right to stand for election in the National Assembly and People's Councils. The exercise of these rights is prescribed by law. In addition to the above rights, women also have the right to (1) be given conditions by the State, society, and family to develop comprehensively and promote their role in society (Clause 2, Article 26); (2) be protected by the State in term of marriage and family, the rights of mothers and children (Clause 2, Article 36); and (3) the State, society and family shall protect and care for the health of mothers and children, and family planning (Clause 2, Article 58).

Women's right to participate in developing policies and laws and hold positions in Government: In Article 11 of Vietnamese Gender Equality Law, gender equality in the political field is prescribed as follows: (1) Men and women are equal in participating in state management and social activities; (2) Men and women are equal in participating in building and implementing village codes, community regulations or rules and regulations of agencies and organizations; (3) Men and women are equal in vote or to be voted as National Assembly and People's Councils deputies,are equal in self-nominating as candidates and in nominating candidates to leaders of political organizations, socio-political organizations, socio-political-professional organizations; (4) Men and women are equal in professional qualifications and age for promotion and appointment to the same positions of manager and leader of agencies and organizations; and (5) Measures to promote gender equality in the field of politics include: Ensuring an appropriate proportion of female deputies inNational Assembly and People's Councils in accordance

with national goals on gender equality; Ensure an appropriate proportion of women in appointing officials in state agencies in accordance with the national goal of gender equality. Vietnamese Law on the Election of Deputies to the National Assembly and People's Councils provides that the number of female deputies in the National Assembly and People's Councils at all levels must ensure at least 35% of the total number of candidates on the official list. Targets of resolution No. 26-NQ/TW of the Party in 2018 are that the proportion of female Party members at all levels reaches 20-25% and the rate of female deputies to the National Assembly and People's Councils at all levels is over 35%. Moreover, according to the gender equality strategy for 2021-2030, the proportion of female managers in state agencies and local authorities at all levels will reach 60% by 2025 and 75% by 2030.

To facilitate women to participate in state management and define the responsibilities of administrative agencies at all levels in creating favourable conditions for women to participate in state management, on March 7, 2003, the Government issued Decree No. 19/2003/ND-CP regulating the responsibilities of state administrative agencies at all levels in ensuring that the Vietnam Women's Union at all levels participates in management. Women's Union at all levels, thereby, shall (1) participate in state management by discussing and providing comments on the construction, amendment, and supplementation of legal documents, economic and social development programs and plans, and policies related to women and children; (2) be an official member of the organizations consulting the state administrative agencies at all levels about the issues related to women and children; (3) participate in the meetings to collect opinions on the implementation of guidelines, laws, and policies, to detect the violations of the legal and legitimate rights and interests of women and children; and (4) join the delegations to inspect the issues related to the legal rights and interests of women and children. Moreover, state administrative agencies at all levels are responsible for creating favourable conditions for the activities of the Women's Union at all levels by funding, creating good working conditions, providing equipment, and assisting women in solving social issues related to the advancement and equality of women in accordance with laws and state policies.

In addition to developing and promulgating national laws, Vietnam make efforts to implement policies and solutions to promote women's political rights, such as National Action Plan for the Progress of Women to the year 2000, National Strategy on Gender Equality for the period 2011-2020, National Program on Gender Equality for the period 2011-2015, projects and programs on prevention and response to gender-based violence, communication on gender equality, etc and National Strategy on Gender Equality for the period 2021-2030. Thus, Vietnam has a relatively comprehensive legal framework and policies to promote gender equality, including regulations to promote women's political rights.

2.3. Practice of Women's Political Rights in Vietnam

Thanks to the provisions of the law, the role and status of Vietnamese women in all the fields of economy, politics, and society are increasingly enhanced for them to have more opportunities to contribute to the family, and society. Vietnamese women prove their extremely important roles. They participate in management and hold important positions in most areas of social life. The female officials prove their significant improvement. The number and qualifications of female officials are constantly growing. Specifically:

Women participate in management and work as senior leaders, such as Politburo members, Standing Party Central Secretariat Committee members, and Vice President. There are currently five female Provincial Party Secretaries. The proportion of female deputies in the 15th National Assembly of Vietnam is 30.26%, ranking 51st globally and 4th in Asia. According to statistics, as of December 2022, 15 of the 30 ministries, ministerial-level agencies, and Government agencies have key female leaders. It increases

by 3.4% compared to 2021. The number of ministries and ministerial-level agencies having key female leaders is 13 of the 22, increasing by 6% compared to 2021. In addition, 2 of the 8 Government agencies have key female leaders, accounting for 25%. Compared to 2021, the number and proportion of ministries, ministerial-level agencies, and Government agencies with key female leaders increased significantly. The proportion of ministries and ministerial-level agencies with key female leaders now reaches 60% of the total target until 2025. As of early March 2023, 19 female officials (accounting for 9.5%) participated in the 13th Party Central Committee. Compared to the previous term, the proportion of women participating in elected bodies also increased, with 151 female deputies participating in the 15th National Assembly, accounting for 30.2% (3.5% higher than the previous term and 30% higher than the target). The proportion of women participating in People's Councils at provincial and district levels reaches 29% (higher than the previous term)[11]. The educational background and professional qualifications of female National Assembly deputies have gradually improved, with 100% having bachelor's, master's, and higher degrees. The status and role of female National Assembly deputies in the activities of the National Assembly are recognized and highly appreciated. Female National Assembly deputies promote their talents and work experience, spend a lot of time and make constant effort on research, actively and responsibly contribute to developing the law, and participate in supreme supervision and decision-making process to solve important issues of the country.

Women participate not only in state agencies, such as legislative, executive, and judicial bodies, but also in political, socio-political, and political-social-professional organizations. Particularly, the Vietnam Women's Union is a large political organization of women working for the equality and development of women, as well as the legal and legitimate rights and interests of women. The organization operates widely across the country from central to local and grassroots levels with women's branches.

At the Party committee levels, the participation of Vietnamese women in the political system has improved. In 2010, the proportion of female party members was 32.8%, a significant increase compared to 2005 with just 20.9%. The qualifications of women participating in politics are higher in terms of professional and management capacity. Many women become leaders and managers and hold key positions in the agencies for which they work. With the superior personalities of Vietnamese women, many of them have become excellent leaders.

More and more women participate in economic development. Female entrepreneurs account for 26.5% of the total number of businessmen. Many women are awarded noble titles by the State, such as professor, associate professor, people's artist/teacher/physician/meritorious artist/teacher/physician.

Besides the initial achievements, the implementation of gender equality policies adopted by the Party and State still faces many difficulties in creating conditions for women to participate in political activities in quantity and quality. In most fields, the status of women does not commensurate with their potential and actual contributions. The gap between men and women in participating in political activities is still large in Vietnam.

With about 25% of women in the National Assembly, Vietnam has a higher proportion of women participating in politics than other countries in the region. However, the proportion of women accounts for just 12% of ministerial positions, 7% of deputy ministerial positions, 12% of directors, and 8% of deputy directors in civil fields. The proportion of women holding senior positions in key sectors, such as education, judiciary, and even industries where women are the majority, is quite low.[12] The number of female

11 Government of Vietnam. (2022). *Report on the results of implementing gender equality goals in 2022*, at https://datafiles.chinhphu.vn/cpp/files/vbpq/2023/4/95bc.signed.pdf [Last accessed: 21 December, 2023].

12 CEDAW Committee (2023), *Women's Rights and Retirement Age in Vietnam*, Electronic information

members accounts for one-third of total Party members, a very low proportion that results in fewer women being promoted and elected to important management positions in the Government. The proportion of women holding key management positions is about 10% at all levels. Furthermore, despite participating in managing committees, most female committee members are merely in charge of administrative tasks, with little connection to strategic tasks.[13] The proportion of women in the National Assembly is higher than regional standards, but it is not stable over terms. At the provincial level, the number of women serving as leaders in all sectors is low, if there are any, in the health, education, and social policy sectors. According to the study "The role, activities and contributions of Vietnamese female elected representatives in the period 2016-2021", female deputies mostly work for public policies in fields such as education, health care, and employment, while their participation in other important fields, such as public finance, national security, security, and economic policy is very limited.[14]

3. DISCUSSION

The above analysis shows that Vietnam actively participates in international commitments on human rights, including commitments on women's rights. Although Vietnam is a Southeast Asian country heavily influenced by male chauvinism, the idea of equality between men and women was formed and recognized quite early in Vietnamese law. Along with the development of society, by implementing international commitments to ensuring women's political rights, especially CEDAW, Vietnamese law on ensuring political rights is increasingly improved and comprehensive. However, in practice, the exercise of women's political rights in Vietnam still faces many difficulties and limitations. This comes from several reasons, as below:

The first reasons are cultural-social prejudices and traditional roles of gender. Vietnam is a Southeast Asian country greatly influenced by Confucian ideology and "respecting men over women" or male chauvinism that prevents women from participating in socio-political activities, proving their talents, and having opportunities to strive and achieve the desired goals. Even though the socioeconomic context and social values in Vietnam changed, gender prejudice persists in society. When children are born, they are taught by their parents and relatives how to become a boy and a girl, then society always expects men to be "extroverted", men's role is "cultural" while women are "introverted", women's role is a "natural".[15] This is why the image of women is often associated with a "natural job", being the one who "keeps the fire burning" in the family; their activities are merely in a "narrow space" of their houses and families. Women are expected to do simple and gentle activities. Meanwhile, men are often associated with external activities and are expected to be the "breadwinners" with strong and intellectual activities. Therefore, the scope of activities of women and men are divided separately. On the one hand, the notion that women are only suitable for housework is why husbands do not allow their wives to work or participate in social activities. On the other hand, as women have less freedom to choose a division of labour, they are forced to focus on just some specific

portal of the Ministry of Justice of Vietnam. https://moj.gov.vn/tctccl/tintuc/Lists/KinhNghiemQuocTe/Attachments/10/CEDAW.pdf [Last accessed: 21 December, 2023].

13 Quy.L.T., & Nga. N.T. (2008), Women in Our Country Participating in Leadership and Management, *Vietnam communist Journal*, https://tapchicongsan.org.vn/web/guest/nghien-cu/-/2018/3412/phu-nu-nuoc-ta-trong-viec-tham-gia-lanh-dao-va-quan-ly.aspx [Last accessed: 18 December, 2023].

14 Khalidi, R. (2022). *The path toward gender parity in politics in Viet Nam*, UNDP Vietnam at https://www.undp.org/vi/vietnam/blog/vi-the-vai-tro-phu-nu-viet-nam-trong-doi-song-chinh-tri-xa-hoi [Last accessed: 18 December, 2023].

15 Thuy, M. T. D. (2023). Gender prejudice on the issue of women participating in leadership and management in Vietnam today, *Vietnam Industry and Trade Journal*, at https://tapchicongthuong.vn/bai-viet/dinh-kien-ve-gioi-voi-van-de-phu-nu-tham-gia-lanh-dao-quan-ly-o-viet-nam-hien-nay-106530.htm [Last accessed: 21 December, 2023].

occupations and face difficulties in new occupational groups or occupations dominated by men. The social tendency to evaluate men or women by gender prejudice creates unfair opportunities and conditions for both genders to participate in leadership and management positions and deprives women of equal opportunities in pursuing their self-development. This reason is responsible for the absence of women in strategic positions and the differences in expectations and potential development of men and women. Specifically, there is a conservative and traditional viewpoint that "*ambition, braveness and determination*" are positive and respectful characteristics of men that should be encouraged and create favourable conditions for "*advancement and promotion*". On the contrary, for women, these characteristics are considered negative. As a result of gender bias, the evaluation of women leaders and managers is harsher than men. Women are often undervalued by society when they participate in positions that men usually hold. Therefore, men often do not like their leaders to be women, and women even do not like their leaders to be the same gender as them. This stereotype of leadership is why the image of female leaders is more blurred than men's in the political system at all levels, this asserts a serious impact on their political careers and becomes the first barrier for women candidates when gender is one of the criteria for choosing personnel.

The second reason is the economy. In the economy, women are an important labour force in Vietnam. Accounting for 47.7% of the urban workforce and 47.2% of the rural workforce,[16] women work in all fields and dominate in some industries and occupations. However, in Vietnam, due to gender prejudice, as analyzed above, the specific jobs of women are often devaluated. Women are more likely than men to work in low-wage occupations and have less access to education, skills development, and employment opportunities. Although the number of the female labour force is high, the rate of qualified female workers is too low to meet the requirements of accelerated industrialization, modernization, and deep international integration. Female workers without professional qualifications account for 49.4%, mostly female workers in rural areas, middle-aged women, and ethnic minority women. The proportion of women working as housekeepers accounts for 94.7% of the total hired workers.[17] The gap in income by gender also tends to widen. In 2021, the average monthly income of male workers is 7.7 million VND while the average monthly income of female workers is 5.7 million VND.[18] Thus, the average monthly salary of male workers is about 2.0 million VND higher than that of female workers. As a result, many women are still economically dependent on their husbands, so their voices carry almost no weight in the family. Economic dependence leads to dependence on the division of jobs, obligations, and responsibilities. Moreover, as women have no economic autonomy, they have almost no opportunity to participate in socio-political activities.

The third reason comes from legal policies on labour and social security for women. The analysis of the second reason shows that female workers concentrate in the informal sectors outside the scope of labour law, so they rarely benefit from pensions, maternity allowances, unemployment allowances, and health insurance. The difference in retirement age of men and women leads to age discrimination in planning, appointment, and promotion, which negatively affects the exercise of women's political rights.

16 General Statistics Office Vietnam. (2021). *Report on Labor and Employment Survey in 2020*, Statistical publisher at https://www.gso.gov.vn/wp-content/uploads/2022/02/sach_laodong_2020_b6.pdf [Last accessed: 20 October, 2023].

17 General Statistics Office Vietnam. (2021). *Report on Labor and Employment Survey 2020,* Statistical publisher https://www.gso.gov.vn/wp-content/uploads/2022/02/sach_laodong_2020_b6.pdf retrieved on December 26/2023 [Last accessed: 20 February, 2023].

18 General Statistics Office of Vietnam. (2023). *Press release results of the 2023 residential living standard survey*, at https://www.gso.gov.vn/tin-tuc-thong-ke/2024/04/thong-cao-bao-chi-ket-qua-khao-sat-muc-song-dan-cu-nam-2023/ [Last accessed: 20 February, 2023].

CONCLUSION AND RECOMMENDATIONS

Vietnamese women always play an important role and make great contributions to the cause of socio-economic development, building and developing the country, as shown by the proportion of women's participation in all fields, especially politics. Women's participation in leadership and management is a basic measure of women's role in modern politics. International human rights instruments recognize the principle of equality between men and women and directly or indirectly affirm the need to protect and promote women's political rights and the obligations of state members in this issue. In Vietnam, the equality between men and women in protecting and promoting women's rights is consistent with the views expressed throughout the Constitution and laws. Vietnam now has a relatively complete legal and policy system to ensure women's political rights. These regulations help Vietnamese women better exercise their political rights. However, due to objective barriers, such as awareness, traditions, customs, and economic situation, exercising women's political rights is difficult and limited. To overcome these limitations, Vietnam shall continue to apply many positive solutions simultaneously to ensure better political rights for women. According to the author, shortly, Vietnam should pay special attention to the following solutions:

Solutions to raise awareness for women: it is necessary to build and establish a mechanism to ensure fair and equal education for both men and women, enhance adequate and comprehensive access to education and learning for female students, and set priority and mandatory policies for women in education. By learning and equipping themselves with enough knowledge and skills, women know their roles, status, and values to confidently participate in socio-political activities, fight for their legitimate rights, and, step by step, eliminate the inequality between men and women in all fields.

Solutions to improve the law: Vietnam should focus on (1) developing and adopting many appropriate and effective guidelines, policies, and measures for female workers; (2) establishing sanctions that are reasonable and strong enough to deter and handle the violations hindering the development of women, depriving women of opportunities to work and female officials of participating in socio-political activities, promotion, and development; (3) create favourable conditions for women to actively participate in production and business, and (4) eliminate the gap in retirement ages of men and women. These solutions not only contribute to improving economic capacity and reducing women's economic dependence on men but also create conditions for women to participate in production on a large scale, reducing the burden of housework. With economic autonomy and improved knowledge, women will pay more attention to politics and proactively exercise their political rights.

Solutions to propaganda and advocacy: As analyzed, gender prejudice and cultural traditions in Vietnam are major barriers to the exercise of women's political rights. Therefore, it is necessary to strengthen education and propaganda about women's rights in general and women's political rights in particular to criticize, combat, and eliminate outdated concepts about the role of women in politics. Moreover, Vietnam should enhance propaganda and education for women to be aware of their rights, overcome outdated prejudices, and actively participate in social and political activities to affirm their status and roles.

BIBLIOGRAPHY

1. CEDAW Committee. (2023). Women's Rights and Retirement Age in Vietnam, *Electronic information portal of the Ministry of Justice of Vietnam* https://moj.gov.vn/tctccl/tintuc/Lists/KinhNghiemQuocTe/Attachments/10/CEDAW.pdf [Last accessed: 21 December, 2023].
2. General Statistics Office of Vietnam. (2023). *Press release results of the 2023 residential living standard survey*, at https://www.gso.gov.vn/tin-tuc-thong-ke/2024/04/thong-cao-bao-chi-ket-qua-khao-sat-muc-song-dan-cu-nam-2023/ [Last accessed: 20 February, 2023].
3. General Statistics Office Vietnam. (2021). *Report on Labor and Employment Survey in 2020*, Statistical publisher at https://www.gso.gov.vn/wp-content/uploads/2022/02/sach_laodong_2020_b6.pdf [Last accessed: 20 October, 2023].
4. General Statistics Office Vietnam. (2021). *Report on Labor and Employment Survey 2020*, Statistical publisher https://www.gso.gov.vn/wp-content/uploads/2022/02/sach_laodong_2020_b6.pdf retrieved on December 26/ 2023 [Last accessed: 20 February, 2023].
5. Hanh, N.T.V. (2015). Women's participation in the political system in Vietnam today, *Journal of Political Theory Ho Chi Minh National Academy of Politics*, (10) pp. 8-17.
6. Khalidi, R. (2022). *The path toward gender parity in politics in Viet Nam*, UNDP Vietnam at https://www.undp.org/vi/vietnam/blog/vi-the-vai-tro-phu-nu-viet-nam-trong-doi-song-chinh-tri-xa-hoi [Last accessed: 18 December, 2023].
7. Quy, L. T., Nga. N. T. (2008). Women in Our Country Participating in Leadership and Management, *Vietnam communist Journal*, https://tapchicongsan.org.vn/web/guest/nghien-cu/-/2018/3412/phu-nu-nuoc-ta-trong-viec-tham-gia-lanh-dao-va-quan-ly.aspx [Last accessed: 18 December, 2023].
8. Thuy, M. T. D. (2023). Gender prejudice on the issue of women participating in leadership and management in Vietnam today, *Vietnam Industry and Trade Journal*, at https://tapchicongthuong.vn/bai-viet/dinh-kien-ve-gioi-voi-van-de-phu-nu-tham-gia-lanh-dao-quan-ly-o-viet-nam-hien-nay-106530.htm [Last accessed: 21 December, 2023].
9. United Nations. (1953). *Convention on the Political Rights of Women*, New York. https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVI-1&chapter=16&clang=_en [Last accessed: 21 Jun, 2023].
10. United Nations Department of Economic and Social Affairs. (2023). *The Sustainable Development Goals Report 2023: Special Edition* p. 23. New York, USA: UN DESA. © UN DESA at https://unstats.un-

.org/sdgs/report/2023/ [Last accessed: 20 February, 2023].

11. United Nations General Assembly. (1948). *Universal declaration of human rights* (217 [III] A). Paris.
12. United Nations Human Rights Committee. (March 29, 2000). *General Comment No. 28: Article 3 (The equality of rights between men and women)*, HRI/Gen/1/Rev.9 (Vol I).
13. United Nations Specialised Conferences. (1995). *Beijing Declaration and Platform of Action*, *adopted at the Fourth World Conference on Women*, https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf [Last accessed: 20 February, 2023].
14. Uyen, N. T. T. (2018). The exercises of women's political rights in Vietnam today, *Journal of Political Theory Ho Chi Minh National Academy of Politics*, (4), pp. 10-17.
15. Vietnamese Government. (2022). *Report on the results of implementing gender equality goals in 2022*, at https://datafiles.chinhphu.vn/cpp/files/vbpq/2023/4/95bc.signed.pdf [Last accessed: 21 December, 2023].

DOES THE LEGAL FRAMEWORK GOVERNING EMERGING INSTITUTIONS IN ALGERIA DIFFER FROM THAT OF TRADITIONAL PROJECTS?

Abdellaoui Khadidja

Doctor of Law, Professor Lecturer A,
University of Ain Temouchent, Algeria

ABSTRACT

Emerging institutions have garnered significant worldwide attention due to their unique characteristics and pivotal roles in fostering economic development. These institutions represent innovative economic models that have gained prominence in numerous countries, aiming to nurture emerging ventures and empower innovators.

Like many nations, Algeria has adopted an alternative economic approach to achieve sustainable development and elevate the national economy. This approach prioritizes fostering creativity and innovation, enabling economic diversification, and encouraging the establishing of emerging institutions. Algeria aims to drive the desired development and investment momentum by expanding business opportunities within a sound economic environment. This strategy is a viable alternative to wealth creation and economic expansion beyond the hydrocarbon sector and traditional economic rents.

Hence, Algeria issued an arsenal of legal texts to encourage these institutions and open the door for those with innovative ideas to implement their ideas on the ground. Therefore, supporting emerging enterprises has become a priority for Algerian economic decision-makers to contribute to advancing development and enhancing local production.

KEYWORDS: Innovation, Startups, Economics, Finance, Support

INTRODUCTION

The interest of decision-makers has recently emerged in emerging institutions and business incubators, as they are the main axis for advancing development in Algeria and moving away from the oil-rentier economy that has been relied upon for decades. Perhaps this interest stems from the Algerian state's conviction that there is no escape from creating a new economic model based on Technology and knowledge and giving young people an opportunity to embody their ideas on the ground, realizing that emerging institutions are the engine of tomorrow's economy.

Hence, the Algerian state attached great importance to emerging institutions, as it allocated to the latter an entire ministry called the Ministry of Knowledge Economy and Emerging and Small Enterprises. It also harnessed all circumstances and wrote laws that would support institutions and open the way for young people to enter the world of investment through the new investment law after... Several amendments touched on its contents, including facilities that would stimulate those wishing to establish emerging, small and medium enterprises.

Several regulatory decrees were also published in 2020 related to emerging institutions, to be the regulatory framework that sets out the methods, conditions, and procedures followed regarding them, as well as everything that benefits the level of the tool of these institutions, to achieve the economic goals set by the state.

Given the importance of the topic, we find ourselves faced with several questions, including:

What is the concept of emerging enterprises? What is the legal framework for emerging enterprises?

To answer these questions, which were one of the motivations for choosing this topic, we addressed the nature of emerging institutions in Algerian law (first axis) and the legal texts regulating emerging institutions (second axis).

1. THE NATURE OF THE EMERGING INSTITUTIONS IN ALGERIAN LAW

The term "emerging enterprises" has often been used in academic circles and the world of finance and business without agreeing on a single definition due to its connection to law, economics, and business activities. Hence, the definitions have varied.

1.1. The jurisprudential and legal definition of emerging institutions

Before we discuss the definition of emerging institutions under Algerian legislation, we must address the definition of emerging institutions in general

1.1.1. General definition of emerging enterprises

In the English lexicon, the term "startup" refers to a small project that has just begun. The word itself originates from a combination of "start", indicating the initiation of a project, and "up", signifying upward growth and expansion. This term gained widespread usage immediately following World War II, coinciding with the emergence of venture capital firms (venture capital). Today, the term is recognized by dictionaries like Le Robert in French, defining startups as young, innovative companies operating in the sector of modern technologies (la Rousse).

Further elaborating on the concept, Paul Graham, founder of the renowned startup accelerator Y Combinator, defines the startup in his essay on growth as "a company designed to grow fast". Its business is to create and market new technology.

Some define a startup organization as: "an entity designed to create a new product or service under conditions of extreme uncertainty".[1]

1 Graham, P., Want to start up? Get funded by Y Combinator, available at https://paulgraham.com/start.html [Last access 03/16/2024].

It has also been defined as: "A small, newly established project that aims to innovate and develop a new product or service in any sector. This type of enterprise is characterized by high degrees of risk".[2]

Through the previous definitions, it can be said that emerging institutions are newly established institutions that started from the idea of a project, seeking to produce goods and services in the market, and have the potential for very rapid growth and may be active in any sector, but mostly in the field of modern technology, and they take risks in exchange for achieving. Strong and rapid growth with the potential for huge profits if successful.[3]

1.1.2. Legal definition of emerging enterprises

It is common knowledge that the legislator does not usually go into providing definitions of legal terms and has no business doing so, leaving jurisprudence and specialists in the field to undertake the appropriate definition of these terms.

However, in this matter, the legislator addressed the definition of the emerging innovative institution in the text of Article 6 of Law No. 15-21, which includes the directive law on scientific research and technological development.[4] The legislator also tried to refer to the emerging institution in several laws, including:

1. Law No. 17-02 relates to the guiding law for small and medium-sized enterprises. The provisions of this law referred to emerging enterprises as a promising sector that must be developed and promoted, as Article 21 stipulates that: "Loan guarantee funds and launch funds shall be established by the Ministry in charge of small and medium-sized enterprises under the applicable regulation". "To guarantee loans to small and medium enterprises and promote emerging enterprises within the framework of innovative projects".[5]
2. Law No. 19-14 containing the Finance Law of 2020 Article 69 stipulates: "Emerging companies are exempted from the tax on corporate profits and the value-added tax for commercial transactions".
3. Executive Decree No. 20-254. It includes establishing a national committee to grant the label "emerging enterprise", "innovative project", and "business incubator", and defining its tasks, composition, and functioning.[6]

Through this decree, we find that the Algerian legislator no longer has a precise definition, but rather specified in Article 11 of the aforementioned executive decree in Chapter Four, entitled: "Conditions for granting a mark" to an emerging institution, a set of standards, including but not limited to, as follows:

- The institution is subject to Algerian law;
- The institution must not exceed eight (08) years old;
- The organization's business model should be based on innovative products, services, business models, or any idea;
- The annual turnover must not exceed the amount determined by the National Committee;
- The company's capital must be owned at least 50%, by natural persons or investment funds accredited by other institutions that have the "Emerging Institution" label;
- The growth potential of the enterprise must be large enough;
- The number of workers must not exceed 250 workers.

2 Othmania, A., Belabed, M., Emerging Institutions in Algeria between Organization Efforts and Support Structures, Journal of Annals in Economic Sciences, Bashar University, Volume 7, Issue 3, p. 369.

3 Blood, O. (2022). The legal framework for emerging institutions in Algeria – Obstacles and prospects, Les Cahiers du Mecas magazine, Volume 18, Issue 2, p. 754.

4 Article 6 of Law No. 15-21, (2015, December 30), containing the Directive Law on Scientific Research and Technological Development, 2015, No. 71.

5 Law No. 17-02, (2017, January 11), relating to the Directive Law for Small and Medium Enterprises, c. R Issue 02.

6 Executive Decree No. 20-245 (2020, September 15), includes the establishment of a national committee to grant the label "emerging enterprise", "innovative project", and "business incubator", and determine its tasks, composition, and functioning, c. R. Issue 55.

From the above, we note that the Algerian legislator relied on several standards while neglecting several basic standards, such as the technology standard among the criteria for classifying emerging institutions, and this is contrary to what is approved in most countries of the world, and the risk standard is that these institutions start from nothing to risk either success or failure.

1.2. Characteristics and importance of emerging institutions

1.2.1. Characteristics of emerging institutions

Emerging institutions are distinguished by several characteristics that distinguish them from other institutions, which can be summarized in the following points:

- New companies are characterized by being young institutions, and they have two options: either to develop and transform into successful institutions or close their doors and lose;
- The speed of growth of emerging enterprises through the ability to quickly advance their business, i.e. increase production and sales without increasing costs;
- Start-ups rely on technology to grow, advance, and find funding through online platforms, and by winning help and support from business incubators.

The difference between emerging institutions and classic institutions:

Being a start-up is a temporary situation, either because the business model is not achieved, and therefore the start-up fails or disappears, or because it succeeds, is absorbed or transformed into a classic or almost traditional institution, and the transition from a large start-up expresses the moment in which it is decided to grow. That is the future of the emerging enterprise. Therefore, the most important element that makes the difference between emerging and classic enterprises is significant growth.[7]

1.2.2. The importance of startups

Emerging organizations derive their importance from being able to achieve the following:

- Contributing to the gross domestic product and thus diversifying the country's economic resources. It also enables the optimal exploitation of available local resources;
- Meeting the requirements of major institutions for semi-finished products and others;
- Creating wealth by relying on modern technologies and the ability to innovate and create;
- Ease of achieving innovative methods in emerging institutions;
- Effective contribution to creating new job opportunities and increasing competitiveness;
- Excellence in quick decision-making and automatic flexibility, as well as the willingness to take risks and develop team spirit, makes it capable of absorbing economic crises with ease and smoothness.[8]

2. LEGAL TEXTS GOVERNING EMERGING ENTERPRISES

Building any economic project, regardless of its nature or effectiveness, will not be successful in the absence of the legal and regulatory basis accompanying it. The same applies to emerging institutions adopted by the Algerian state as an alternative economic model for the advancement of the national economy.

7 Beljazia, O., Bouznit, K., Boukrit, F. (2024(. Artificial Intelligence and emerging institutions in Algeria: a conceptual introduction, an intervention delivered at the activities of the National Forum on the applications of artificial intelligence in emerging institutions – a field study and pioneering experiences, Djelfa, p. 14, available at: https://www.researchgate.net/publication/378549836_aldhka_alastnay_walmwssat_alnashyt_fy_aljzayr_mdkhl_mfahymy.

8 Zaidi, H., Abdelaoui, M. (2023). Emerging Institutions in Algeria, An Analytical View of Legal Frameworks and Economic Impacts, Journal of Legal Studies, Volume 9, Issue 3, p. 6.

From this standpoint, the issuance of texts regulating emerging institutions is considered the first initiative by the state, to embody its efforts to encourage this type of institutions, and in recognition of the necessity to organize them and determining their work, functioning, and methods for their promotion.

2.1. Executive Decree No. 20-254

- This decree is the legal basis for organizing the work of emerging institutions by defining their tasks and composition by creating a central committee mission of a national nature through which institutions are granted either the label of a business incubator, an innovative project, or an emerging institution, to develop and promote them and granting them investment opportunities and prospects, according to what is stated in the text of Article 1 thereof;
- We cannot fail to point out the conditions for awarding each of the previous marks through the following:

2.1.1. Conditions for granting the "Emerging Enterprise" label

In addition to the previous conditions mentioned in the previous definition of emerging enterprises, the applicant for this mark must register in the national electronic portal for emerging enterprises and attach the following documents:

- A copy of the commercial register and tax and statistical identification card;
- A copy of the company's bylaws;
- CNAS Certificate of Affiliation with a List of Employees Attached
- Certificate of Affiliation for Non-Employees CASNOS;
- A copy of the financial statements for the current year;
- A detailed business plan of the organization;
- Scientific and technical qualifications and experience of the organization's users;
- Where applicable, every intellectual property document and any award or reward obtained.[9]

It should also be noted that the committee is responsible for responding after studying the file within a maximum period of 30 days starting from the date of application. The deadlines will stop if the file is incomplete, provided that the requesting party completes the file within 15 days starting from the date of notification by the National Committee.

If the committee rejects the application, it must justify this and notify the applicant electronically. The committee may reconsider the application based on a justified request from the institution, and it will be notified of the final response within a period not exceeding thirty days from the date of its submission.

Finally, if the committee accepts the application, the Emerging Enterprise Mark is granted for a period of 4 years, renewable once, based on a decision published on the main portal for emerging enterprises, and renewal takes the same procedures.[10]

2.1.2. Conditions for granting the "Innovative Project" label

Every natural person or group of natural persons can request the "Innovative Project" mark on any project related to innovation, and must register in the National Portal for Start-ups and submit the following documents:

- A presentation about the project and its innovations;
- Elements that demonstrate the great potential for economic growth;
- Scientific and/or technical qualifications and experience of the team in charge of the project;

9 Article 12 of Executive Decree No. 20-254 includes the establishment of a national committee to grant the label "emerging enterprise," "innovative project," and "business incubator," and determine its tasks, composition, and functioning. *Ibid*.

10 Articles 13, 14, and 15 of Executive Decree No. 20-254 include the establishment of a national committee to grant the label "emerging enterprise", "innovative project", and "business incubator", and determine its tasks, composition, and functioning. *Ibid*.

- Where applicable, every intellectual property document and any award or reward obtained.

Every application to obtain the "Innovative Project" label will be responded to within a maximum period of 30 days from the date of its submission.

The "Innovative Project" label is granted to a natural person or group of natural persons, for a period of two years, renewable twice according to the same forms. Decisions to grant the "Innovative Project" label must be published in the national electronic portal for emerging enterprises.[11]

2.1.3. Conditions for granting the "Business Incubator" label

Every structure affiliated with the public sector, the private sector, or a partnership between them, is eligible to obtain the "business incubator" label, which proposes support for emerging enterprises and innovative project holders in terms of accommodation, training, counseling, and financing. Applications are submitted through the electronic portal accompanied by the following documents:

- A detailed setup plan for the business incubator;
- A list of the equipment you have at the disposal of incubated start-ups;
- Providing various training and supervision programs proposed by the business incubator;
- CV of business incubator users, constituents, and facilitators;
- List of startups that have been incubated, if any.

Article 23 of Executive Decree No. 20-254 mentioned above also specified the structures for specific documents that must be added when submitting the file, which are:

- A copy of the commercial register and tax and statistical identification card;
- Certificate of the company by-laws;
- CNAS Certificate of Affiliation with a List of Employees Attached;
- Certificate of enrollment in the National Social Insurance Fund for non-wage workers CASNOS;
- A copy of the financial statements for the current year.

As for the procedures for obtaining an incubator institution mark, they do not differ from the procedures for obtaining a start-up institution mark, as the application is made through the electronic portal accompanied by specific documents following the legal texts. The committee is responsible for studying them and responding to the application within a maximum of 30 days. If the committee accepts the application The committee grants the business incubator mark to the structure for 5 years, renewable according to the same forms. The committee publishes the decision to grant the mark on the national electronic portal.[12]

2.2. Executive Decree No. 20-356 of November 30, 2020, which includes the establishment of an institution for the promotion and management of support structures for emerging enterprises and defines its tasks, organization and operation

Executive Decree No. 20-356 relating to the establishment of an institution for the promotion and management of support structures for emerging enterprises and defining its tasks, organization, and functioning is a complementary decree to the previous decree, as after the Al-

11 Articles 16 to 20 of Executive Decree No. 20-254 include the establishment of a national committee to grant the label "emerging enterprise", "innovative project", and "business incubator", and determine its tasks, composition, and functioning. *Ibid*.

12 Articles 21 to 31 of Executive Decree No. 20-254 include the establishment of a national committee to grant the label "emerging enterprise", "innovative project", and "business incubator", and determine its tasks, composition, and functioning. *Ibid*.

gerian legislator gave the concept of emerging enterprises and mechanisms for incubating them, as well as the conditions for obtaining the emerging enterprise mark, the Algerian legislator comes in; the decree announces the establishment of an institution whose mission is to promote and manage these structures.

2.2.1. Definition of the Agency for the Promotion and Management of Support Structures for Emerging Enterprises

The institution was created for the promotion and management of support structures for emerging institutions under Executive Decree No. 20-356, which was named "Allegria Vantur", as it is considered a public institution of a commercial and industrial nature. In its relations with the state, it is subject to administrative law, and in its relations with third parties, it is subject to commercial law. The institution is placed Under the supervision of the Minister in charge of emerging enterprises, it has legal personality and financial independence, and its headquarters are in Algeria.[13]

2.2.2. Tasks of the Foundation for Promoting and Managing Support Structures for Emerging Enterprises

The Foundation is considered a tool for public authorities to implement the national policy to promote and manage support structures for emerging enterprises, especially incubators, accelerators, and innovation development. The Foundation undertakes the following tasks:

- Participate in implementing the national strategy in the field of promoting and managing support structures for emerging enterprises according to each field of activity;
- Participate in establishing new structures to enhance national capabilities in the field of accompanying innovation, stimulate the creation of emerging institutions, and contribute to economic and social development;
- Preparing and implementing annual and multi-year programs to develop incubators and accelerators for emerging institutions in cooperation with various relevant stakeholders and ensuring their follow-up and evaluation;
- Preparing and implementing acceleration approaches that ensure the follow-up of institutions bearing the "Emerging Enterprise" label and innovative projects bearing the "Innovative Project" label, as well as assessing their needs and approving that;
- Encouraging and supporting every initiative aimed at promoting and developing innovation and support structures in consultation with various sectors of activity;
- Contributing to technological vigilance and ensuring the publication and distribution on various media of all information related to technological innovation and entrepreneurship;
- Managing the properties allocated to it and acquired for exploitation;
- Preparing and following up on efficiency contracts for the services provided by the support structures placed under its responsibility, ensuring their respect and ensuring harmony and coordination among them.[14]

CONCLUSION

Emerging institutions are one of the new concepts in the Algerian legal system, as Algeria has shown, since 2020, a new trend that appears promising through the establishment of emerg-

13 Executive Decree No. 20-356 (2020, November 30), which includes the establishment of an institution for the promotion and management of support structures for emerging enterprises and defines its tasks, organization and functioning, G.R. No. 73.

14 Article 4 of Executive Decree No. 20-356, which includes the establishment of an institution for the promotion and management of support structures for emerging enterprises and defines its tasks, organization, and operation, op. cit.

ing institutions, starting with the development of a new legal and legislative framework, to creating a new economic model away from the rentierism on which the country's economy has relied for decades, and thus investment and startups have become priorities for Algerian economic decision-makers, to contribute to advancing development and strengthening the local production machine.

Accordingly, after studying the legal system for emerging enterprises, this study produced a set of results and recommendations as follows:

- Emerging institutions are considered an essential pillar for building the national economy;
- It is necessary to reconsider the legal definition of startup companies so that it is more precise and clearer, especially concerning what is meant by an innovative project and high growth, and also to make it more comprehensive and expansive and not ration it with a specific size of business number and number of users;
- Providing appropriate infrastructure and assistance in establishing these projects;
- Creating a digital platform to eliminate the obsession with bureaucracy and the like;
- Providing a suitable climate in the government's strategies to attract emerging Algerian enterprises located abroad to develop the national economy.

BIBLIOGRAPHY

Articles

1. Blood, O. (2022). The legal framework for emerging institutions in Algeria – Obstacles and prospects, Les Cahiers du Mecas magazine, Volume 18, Issue 2.
2. Graham, P., Want to start up? Get funded by Y Combinator, available at: https://paulgraham.com/start.html [Last access 03/16/2024].
3. Othmania, A. Belabed, M., Emerging Institutions in Algeria between Organization Efforts and Support Structures, Journal of Annals in Economic Sciences, Bashar University, Volume 7, Issue 3.
4. Zaidi, H., Abdelaoui, M. (2023). Emerging Institutions in Algeria, An Analytical View of Legal Frameworks and Economic Impacts, Journal of Legal Studies, Volume 9, Issue 3.

Conferences

1. Beljazia, O., Bouznit, K., Boukrit, F. (2024(. Artificial Intelligence and emerging institutions in Algeria: a conceptual introduction, an intervention delivered at the activities of the National Forum on the applications of artificial intelligence in emerging institutions – a field study and pioneering experiences, Djelfa, available at: https://www.researchgate.net/publication/378549836_aldhka_alastnay_walmwsat_alnashyt_fy_aljzayr_mdkhl_mfahymy

Algerian Laws and Regulations

1. Law No. 15-21, (2015, December 30(, containing the Directive Law on Scientific Research and Technological Development, 2015, No. 71.
2. Law No. 17-02, (2017, January 11(, relating to the Directive Law for Small and Medium Enterprises, c. R Issue 02.

3. Executive Decree No. 20-245(2020, September 15), includes the establishment of a national committee to grant the label “emerging enterprise,” “innovative project,” and “business incubator,” and determine its tasks, composition, and functioning, c. R Issue 55.
4. Executive Decree No. 20-356 (2020, November 30), which includes the establishment of an institution for the promotion and management of support structures for emerging enterprises and defines its tasks, organization and functioning, G.R. No. 73.
5. Law No. 19-14 containing the Finance Law of 2020 (2019, December 30), c. R Issue 81.

Website

1. Graham,P, Want to start up? Get funded by YCombinator, available at: https://paulgraham.com/start.html

THE RULE OF LAW THROUGH JUDICIAL ACTIVISM IN SOUTH AFRICA

Paul S. Masumbe

Doctor of Law, Senior Lecturer and Research Supervisor, Walter Sisulu University, Mthatha, South Africa

Siphokazi Qikani

Master of Law, Lecturer, Walter Sisulu University, Mthatha, South Africa

ABSTRACT

The South African Courts frequently juggle different roles within the country's governance. This causes discomfort among some of the role players within the polity as it is seen as judicial encroachment in matters outside the court's role. In the South African context of separation of powers, the role of each branch of government is not always clearly defined, and now and again, it gains perspective as courts interpret parliamentary legislation and executive policies. The court's role and limitations often come under scrutiny. This causes conflicts between the respective branches of government regarding the extent of judicial intervention concerning other branches of government, namely the legislature and executive. This article examines the role and limits of judicial intervention in the terrain of other branches of government within the context of separation of powers as envisaged by the South African Constitution. The doctrine of separation of powers entails the establishment of a trilateral government. The envisaged government consists of the legislature, which enacts laws, an executive that recognises and executes the law and an independent judiciary to regulate public power when all else fails. The article attempts to clarify the place and role of the judiciary in upholding the rule of law in a constitutional state such as South Africa amid rampant complaints of judicial overreach.

KEYWORDS: Separation of powers, Constitutional supremacy, Rule of law, Legislature, Executive, Judiciary, Judicial role, Ultimate guardians of the Constitution

INTRODUCTION

South Africa is a constitutional state founded on, among other things, the supremacy of the Constitution[1] and the rule of law.[2] The government consists of three branches of government within each sphere, namely: the legislature, the executive, and the judiciary. The legislative authority is vested in Parliament.[3] Section 44[4] confers on the National Assembly the power to amend the Constitution and pass legislation in harmony with and within the limits of the Constitution. Section 55[5] gives power to the National Assembly to consider, pass, amend or reject any legislation before the Assembly. The National Assembly is further obligated to provide mechanisms to hold the executive accountable and to maintain oversight on the exercise of the executive functions.[6] In this way, each branch will be a check to the others.[7]

The executive authority is vested in the President, Deputy President, and cabinet members, consisting of Ministers and Deputy Ministers. Their function is to implement the law, develop and implement national policy and any other functions conferred to them by the law and the Constitution.[8]

Judicial authority is vested in the courts. Courts are constitutionally obliged to be impartial in their interpretation and application of the law, which is subject only to the law and the Constitution. No person or organ of the state shall interfere with the functions of the judiciary.[9] Organs of the state must, at all costs, protect the independence and dignity of the courts. Decisions and orders issued by courts are binding to all persons or organs of state to which they apply.[10]

The Constitutional Court is the highest in the land[11] and holds exclusive jurisdiction on certain matters.[12] Section 172 of the Constitution provides for judicial review and empowers competent courts to declare invalid any law or conduct that conflicts with the Constitution.[13] At the heart of this article is testing the perceptions of judicial overreach within the context of South Africa's separation of powers structure in an attempt to clarify its role in a constitutional democracy. There is an introduction, part one tackles judicial encroachment, part two discusses judicial role and review powers, part three addresses upholding the rule of law, part four discusses judicial activism and constraints, and the last part is the conclusion.

1. JUDICIAL ENCROACHMENT OR A MATURING DEMOCRACY

South Africa may, arguably, be the most litigious state. This has been profoundly experienced throughout the last decade, and the trend does not seem to be declining to date. As the country's democracy matures, there has been an increase in litigants approaching courts to have their grievances resolved. These cases range from intergovernmental disputes to private individuals approaching courts to seek different remedies against the government. This right is, of course, constitutionally granted by section 34 of the Constitution, which reads as follows:

> Everyone has the right to have any disputes that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, an-

1 The Constitution of the Republic of South Africa. (1996). (Hereinafter referred to as the Constitution).
2 *Ibid*. Section 1(c).
3 *Ibid*. Section 42 states that Parliament consists of the National Assembly and the National Council of Provinces.
4 *Ibid*. Section 44 provides for National Legislative Authority.
5 *Ibid*. Section 55 provides for powers of the National Assembly.
6 *Ibid*. Section 55 (2).
7 Vile, M.J.C. (1967). Constitutionalism and the separation of powers (2nd ed.) Oxford University Press Liberty Fund (hereinafter referred to as Vile, 1967), 13. ISBN: 0865971749, 9780865971745.
8 Constitution. Section 85 provides for executive authority of the Republic.
9 *Ibid*. Section 165 (3).
10 *Ibid*. Section 165 provides for Judicial Authority.
11 *Ibid*. Section 167 (3) (a).
12 *Ibid*. Section 167 (4).
13 *Ibid*. Section 172 (1) (a).

other independent and impartial tribunal or forum.[14]

The access to courts and enforcement of rights is further entrenched, to the extent of approaching the courts in the interests of other persons, in section 38 of the Constitution.[15] It is, therefore, on this basis that people are becoming more inclined to approach the courts whenever an infringement of rights or the law seems imminent.

The governance of South Africa, over the past decade, seems to be heavily reliant on courts. This trend has been evident in the range of court cases brought by various political parties represented in Parliament against the different government institutions. The most notable one was the *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another.*[16] The court was approached to review the conduct of the legislature, which was alleged to be failing its constitutional obligation of holding the executive accountable, particularly the President.[17] This was the peak in the series of various litigations that concerned the governance of South Africa, to the extent that even the then Head of the Judiciary, Chief Justice Mogoeng Mogoeng, criticised the extent of judicial involvement in matters of the politically elected arms of the state. In this matter, he referred to the judgement as a 'textbook case of judicial overreach' that cannot be permissible in a constitutional state like South Africa.[18] This criticism fuelled an already ripe public outcry about judicial overreach within the country's governance. This is conspicuous among politicians who hold public offices whenever litigation is imminent.[19]

In *New Nation Movement NPC and Others v President of the Republic of South Africa and Others,*[20] the Constitutional Court had to pronounce on the constitutional validity of the Electoral Commission Act.[21] The Electoral Act was declared unconstitutional to the extent that it required candidates to be elected to the National Assembly and provincial legislatures only through their membership to political parties and not as independent candidates without party affiliations.[22] It was further held that the right to contest the National Assemble and provincial legislature as independent candidates existed from the time the Constitution took effect. Although it was initially not exercisable, there was a 'sunset to that bar', and there is no reason not to allow individual adult citizens to exercise the right that has always been there but initially dormant and not exercisable because of the restriction.[23] The Constitutional Court, in its order, suspended the operation of invalidity for twenty-four months to allow the opportunity for Parliament to remedy the deficiency which gave rise to the unconstitutionality. The court is thus testing parliamenta-

14 *Ibid*. Section 34.

15 Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

16 Economic Freedom Fighters and Others v. Speaker of the National Assembly and Another (2017) ZACC 47 (hereinafter referred to as EFF2).

17 This case is about Parliamentary mechanisms for holding the President of the Republic accountable and the constitutional obligation of the National Assembly to hold him to account. It is not about holding any President of the Republic accountable as such but about the National Assembly holding the current President of the Republic, President Jacob Zuma, accountable for his failure to implement the Public Protector's remedial action contained in the Public Protector's report dated 19 March 2014, EFF 2, para. 1.

18 EFF 2, para. 223 (dissenting).

19 'Abuse of courts or the last line of defence? As the judiciary is asked to make decisions about the nation's direction, some accuse it of meddling in politics' Genevieve Quintal, see https://www.businesslive.co.za/bd/opinion/2017-05-12-abuse-of-courts-or-the-last-line-of-defence [last accessed in 5 April 2024].

20 New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC), (hereinafter referred to as NPC v President).

21 Act 73 of 1998 (hereinafter referred to as the Electoral Act).

22 NPC v. President, para. 128.

23 NPC v. President, para. 104 and 105.

ry legislation for possible violation of rights and declaring invalid provisions found wanting to refer the matter back to the legislature to remedy the constitutional defect.

Judicial intervention in the legislative process concerning the Electoral Act facilitated a progressive step towards advancing South Africa's democracy in that, as a result of its pronouncement in *NPC v President*, the legislature affected an amendment. Thus, the Electoral Amendment Act[24] was enacted by the legislature and signed into law by the President of the Republic of South Africa. Among other things, the object of this Act is to:

> To amend the Electoral Act, 1998...insert certain definitions consequential to the expansion of this Act to include independent candidates as contesters to elections in the National Assembly and provincial legislatures;...to provide for the nomination of independent candidates to contest elections in the National Assembly and provincial legislatures; to provide for the requirements which must be met by persons who wish to be nominated as independent candidates; to provide for the inspection of copies of lists of independent candidates and accompanying documents; to provide for objections to independent candidates; to provide for the inclusion of a list of independent candidates entitled to contest elections; to provide for the appointment of agents by independent candidates; to provide that independent candidates are bound by the Electoral Code of Conduct; to provide for the return of a deposit to independent candidates in certain circumstances...[25]

This was a significant milestone in South African democracy as it broadened the pool of participation of candidates outside partisan lines. This means that those who have been aggrieved by the conduct of political parties for the past thirty years of constitutional democracy now have a wider choice of independent candidates. One cannot help but be optimistic about the future of the South African Parliament. The seventh general election will take place in May 2024.

The South African context of separation of powers incorporates an element of checks and balances through the provisions of the Constitution. This demands that notwithstanding the separation of powers between the different government institutions, these institutions must still maintain an oversight role over one another. This constitutional system requires the legislature to hold the executive accountable for its exercise of public power, while the executive has a role in the enactment of legislation and the ultimate signing of bills into law in terms of section 79 of the Constitution. On the other hand, the courts are constitutionally empowered to review, declare and set aside any conduct that violates the Constitution. This also extends to the review of the conduct of any government institution or organs of state. Therefore, the checks and balances embodied in the South African Constitutional model of separation of powers doctrine anticipate the inevitable intrusion of one branch of government into the terrain of another. The doctrine's main objective is to control government by separating powers, however, the interaction between the respective branches of government occurs in a manner that avoids separating power so completely that the government is unable to take appropriate measures in the public interest.[26]

In United Democratic Movement v Speaker of the National Assembly and Others,[27] the Constitutional Court reiterated the constitutionally entrenched oversight role over the conduct of the executive by the legislature and held that "Parliament's scrutiny and oversight role blends well with the obligations imposed on the Executive by section 92; it is provided for in section 55 of the Constitution".[28] In this case, Parliament

24 Electoral Amendment Act 1 of 2023 (hereinafter referred to as the Electoral Amendment Act).

25 See the preamble of the Electoral Amendment Act.

26 S v. Dodo [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC), (hereinafter referred to as S v. Dodo), para 16.

27 United Democratic Movement v. Speaker of the National Assembly and Others [2017] ZACC 21 (hereinafter referred to as UDM 2017).

28 UDM 2017, para. 39.

was not clear about the extent of its powers to prescribe a vote by secret ballot when its members had to fulfil their constitutional mandate of holding the President to account; thus, removing him from office. This secret ballot vote may have been necessitated by the fact that the majority of the legislature were members of the ruling party, which was led by the President, and were simultaneously members of the Cabinet, which the President also headed. The Constitutional Court unanimously declared that the Speaker of the National Assembly has powers to prescribe vote by secret ballot, and this is a choice best left to the National Assembly through the Speaker to make in terms of section 57 (1) of the Constitution.

2. JUDICIAL ROLE AND REVIEW POWERS

Judicial review is the power conferred on courts by the Constitution to scrutinise and declare unconstitutional any legislation or any conduct that infringes on the rights enshrined in the Bill of Rights or otherwise offends against the provisions of the Constitution.[29] The fundamental nature of judicial review is that it empowers courts to declare invalid any law or conduct that is found to be in contravention of the Constitution; if declared invalid such legislation or action will have no legal force or effect.[30] Courts are tasked with an enormous role of checking the exercise of power and averting any abuse of power by the other two branches of government.[31] However, the constitutional mandate of judicial review, placed upon the courts occasionally comes under public scrutiny. In *Doctors for Life International v Speaker of the National Assembly,*[32] the Constitutional Court held that courts are given the responsibility of being the ultimate guardians of the Constitution and its values.[33] It was further held that judicial interference must only occur when mandated by the Constitution; the Constitution requires courts to ensure that all branches of government act within the law and fulfil their constitutional obligations.[34]

The judiciary is one branch that exists and functions alongside politically elected legislative and executive branches of government within the whole structure of the separation of powers doctrine. When exercising its judicial review powers, the judiciary must maintain independence as it has to uphold a constitutional state and its proper governance. When all political accountability-ensuring measures provided for by the Constitution prove to be ineffective, courts are usually called upon to pronounce the right steps best suited to uphold and enforce the Constitution.[35] In re: Certification of the Constitution of the Republic of South Africa[36] it was held that "as the separation of powers doctrine is not a fixed or rigid constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds".[37]

3. UPHOLDING THE RULE OF LAW

Section 2 of the Constitution states that "this constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".[38] The rule of law, on the other hand, entrenches the principle of legality and abolishes arbitrary actions.[39] Therefore, the country is governed in

29 Hoexter, C. (2012). Administrative Law in South Africa (2nd ed.) Juta & Co. (Hereinafter referred to as Hoexter 2012) 113.

30 De Vos. (2017). The South African Constitutional Law in Context (8th impression). Oxford University Press (hereinafter referred to as De Vos 2017), 69. ISBN: 9780195991376

31 De Vos. (2017), 69.

32 Doctors for Life International v. Speaker of the National Assembly 2006 6 SA 416 (CC), (hereinafter referred to as Doctors for life).

33 Doctors for life, para. 38.

34 Doctors for life, para. 37 and 38.

35 UDM 2017, para. 10.

36 Re: Certification of the Constitution of the Republic of South Africa [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), (hereinafter referred to as Certification case).

37 Certification case, para. 111.

38 Constitution. Section 2 (the supremacy clause).

39 "It is a requirement of the rule of law that the exercise of public power by the executive and other function-

accordance with the Constitution and whatever action is taken within the Republic must conform to the Constitution.

Two theories of constitutionalism emerge from the debate on judicial review, namely political and legal constitutionalism.[40] The former is premised on the notion that political decisions should be taken by politicians, in that political matters require political remedies and there is no room for the judiciary to adjudicate on such matters. Judicial intervention would take political matters out of the hands of politicians to the hands of judges.[41] Legal constitutionalism, on the other hand, is premised on the notion that judicial review should be the tool for holding those exercising political power into account as the judiciary can isolate itself from public pressure.[42] Political constitutionalism seems to be more popular among some politicians, however, such constitutionalism remains, nothing more than a theory. South Africa is a constitutional democratic state founded on constitutional supremacy and the rule of law.[43]

All the South African government branches have one common goal, which is to uphold the Constitution. This should not be perceived as a competition between the branches; it requires all branches to work independently and collectively to give effect to the provisions of the Constitution.[44] The constitutional principles of cooperative government reiterate the nature of independence and interdependence between the three branches of government, and this is evident throughout the text of the Constitution. It demonstrates the kind of South African model of separation of power based on checks and balances, informed by the country's realities.

Judicial intervention on matters of other branches is a 'constitutional dialogue', where the court strikes down legislation and the legislature responds by amending it, or when the court invalidates executive decisions, and the executive responds by formulating new policy.[45] Indeed, the courts will and are still crafting a distinctively South African separation of powers.[46]

4. JUDICIAL ACTIVISM AND CONSTRAINTS

In S v Makwanyane and Another,[47] the Constitutional Court was approached to test the constitutional validity of the death penalty provided for in Section 277(1) (a) of the Criminal Procedure Act No. 51 of 1977. The provisions of this section were declared unconstitutional, as they were in contravention of, *inter alia*, the right to life enshrined in section 9 of the Interim Constitution.[48] This landmark case marks the first opportunity for the judiciary to test parliamentary legislation for constitutional validity. It further illustrates the critical role of courts in exercising judicial review on laws that may be inconsistent with the Constitution and protecting the rights of individuals.

In Mazibuko v Sisulu and Another,[49] the courts pronounced judicial restraint and held that courts should not be drawn into political disputes, resolutions of which properly fall on another institution established under the Constitution; political issues should be resolved at the

aries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given". See: Pharmaceutical Manufacturers Association of SA and Another in re: The Ex Parte Application of the President of the Republic of South Africa and Others 2000 (2) SA 674 (CC), (hereinafter referred to as Pharmaceutical Manufacturers Association) para. 85.

40 Kawadza, H. (2018). PER / PELJ (21) Attacks on the Judiciary: Undercurrents of a Political versus Legal Constitutionalism Dilemma? (Hereinafter referred to as Kawadza 2018), 3. http://dx.doi.org/10.17159/1727-3781/2018/v1i0a1696.

41 Kawadza. (2018). fn. 23, above 4.

42 Kawadza. (2018). 4.

43 Constitution. Section 1 (c) (the founding values).

44 Ngcobo, J. (2011). 40.

45 Ngcobo, (2011). 42.

46 De Lange v. Smuts 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC), (hereinafter referred to as De Lange) para. 60.

47 S v. Makwanyane and Another [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRLD 164, 1995 (2) SACR 1 (CC), (hereinafter referred to as Makwanyane).

48 Makwanyane, para. 154.

49 Mazibuko v. Sisulu and Another [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC), (hereinafter referred to as Mazibuko).

political level.[50] From this, it may be deduced that courts are constitutionally mandated to ensure their judicial oversight over other branches of government within the constitutional boundaries. This demonstrates reluctance on the side of the judiciary not to allow other organs to favour litigation over internal settlement procedures.[51]

The exercise of public power by government functionaries must be rationally connected to the purpose of that power and not be arbitrarily exercised.[52] It follows then that if, when viewed objectively, the exercise of power is rational and within the authority of such functionary a court cannot intervene.[53] In the exercise of their powers, courts need to pay due regard to the role of the executive and the legislature in a democracy, and when it is appropriate to do so, must make orders that affect policy as well as legislation.[54] However, courts must always bear in mind that policy should be flexible and can be changed whenever the executive deems it fit to do so, as long as such change is consistent with the Constitution and the law. Therefore, court orders affecting policy choices should not be formulated in a manner that precludes the executive from exercising such legitimate choices.[55] Courts are mandated by the Constitution to be impartial arbiters who must apply the law without fear, favour or prejudice, subject only to the law and the Constitution.[56] The doctrine of separation of powers should not be construed as rendering courts ineffective when confronted with a constitutional challenge concerning executive action or legislation enacted by parliament.[57]

Judicial independence is central to the constitutional arrangement of South Africa and is implicit in the rule of law and separation of powers, which are both foundational to the Constitution. The independence of courts is reinforced by the provisions of sections 165(3) and (4) of the Constitution.[58] Section 165 (3) states that "no person or organ of state may interfere with the functioning of the courts" and subsection four states that "organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts".[59] Institutional independence of the judiciary is a constitutional norm and principle that goes beyond the Bill of Rights and therefore not subject to limitation.[60] Judicial independence is fundamental and indispensable to the effective functioning of courts in a constitutional democracy based on the rule of law.[61]

In Matatiele Municipality and Others v President of the Republic of South Africa and Others,[62] it was held that the provisions of the Constitution must be construed purposively and in the light of the Constitution as a whole, taking into account fundamental principles of the country's democracy.[63] Courts should be less emphatic about the doctrine of separation of powers and more about how the judiciary should work within the boundaries of the doctrine to promote a better dialogue between the legislature, the executive and the judiciary. Furthermore, this mission should be aimed at advancing the principle of democratic accountability of public institutions

50 Mazibuko, fn. 35, above para. 83.

51 O'Regan, J. (2005). Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution PER/PELJ (8)1, (hereinafter referred to as O'Regan 2005), 131. ISSN 1727-3781.

52 Pharmaceutical Manufacturers Association, para. 85.

53 Pharmaceutical Manufacturers Association, para. 90.

54 Minister of Health and Others v. Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033, (hereinafter referred to as TAC) para. 113.

55 TAC, fn. 63, above para. 114.

56 Constitution. Section 165.

57 The Relationship between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What About Separation of Powers? DM Davis, PER / PELJ 2012(15)5 at 2 (hereinafter referred to as Davis (2012) 9). http://dx.doi.org/10.4314/pelj.v1515.20.

58 Van Rooyen and Others v. The State and Others 2002 (8) BCLR 810 (CC), (hereinafter referred to as Van Rooyen) para. 17.

59 Constitution. Section 165 (3) and (4).

60 Van rooyen, para. 35.

61 De Lange, para. 59.

62 Matatiele Municipality and Others v. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC), (hereinafter referred to as Matatiele 2).

63 Matatiele 2, para. 36.

and their commitment to constitutional rights.[64]

The judiciary's role is not to 'second guess' the legislative and executive branches of government or interfere in matters that are not their concern. Their task is to give meaning to the Constitution and, where possible, to carry this task in a manner that is not detrimental to effective governance.[65] This role extends to helping those who are constitutionally incapable of helping themselves; if the solution has already been provided by a branch of government concerned, and it is within their obligation to address their problem effectively, the judiciary is duty-bound to let them do it themselves. The running of state affairs is a trilateral responsibility shared by the executive, the legislature, and the judiciary.[66]

CONCLUSION

The Constitution entrenches functional independence and interdependence for the various branches of government, accompanied by checks and balances. All branches of government and organs of state ought to acknowledge and respect this constitutional arrangement. All three branches of government have a common mission of upholding the Constitution; they need not be at war with each other but independently and collectively work towards giving effect to the provisions of the Constitution.[67] The judicial branch is tasked with the responsibility of safeguarding the Constitution as courts are dubbed as 'the ultimate guardians of the Constitution'.[68] The courts must ensure that the other two branches of government fulfil the obligations imposed by the Constitution.[69] In the same vein, the judiciary must apply judicial restraint and have a proper conception of their constitutional limits.[70] This is the only manner in which South Africa's constitutional democracy can be preserved.

South Africa has come a long way since the abolition of apartheid in 1994, and everyone should learn from the mistakes that have been experienced throughout its democratic development. The past decade has been the epitome of a truly developing democracy, one with many mistakes from which lessons must have been learnt. The institutions created by the Constitution to establish and maintain this democracy must be protected at all costs, of course, within the constraints of the Constitution. Public office bearers must always promote the spirit, objects, and purports of the Constitution. No person, from whatever social or professional status, must attempt to weaken government institutions to advance their ulterior motives. The sovereignty of every state depends on a functioning and independent judiciary that functions within the boundaries of the Constitution.

64 Davis. (2012). 10.

65 Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others 1995 (10) BCLR 1289; 1995 (4) SA 877, (hereinafter referred to as Executive Council Western Cape v. President) para. 99.

66 EFF 2, para. 236.

67 Ngocobo, J. (2011). 40.

68 In Glenister v. President of the Republic of South Africa and Others [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC), (hereinafter referred to as Glenister) para. 33.

69 Doctors for life, fn. 9, above para. 38.

70 Doctors for life, para. 37.

BIBLIOGRAPHY

Books:

1. De Vos. (2017). The South African Constitutional Law in Context (8th impression) Oxford University. ISBN: 9780195991376.
2. Vile, M. J. C. (1967). Constitutionalism and the separation of powers (2nd ed.) Oxford University Press Liberty Fund. ISBN: 0865971749, 9780865971745.
3. Hoexter, C. (2012). Administrative Law in South Africa (2nd ed.) Juta & Co. ISBN: 0702194271, 9780702194276.

Journal articles:

1. Davis, D.M. (2012). The Relationship between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What About Separation of Powers? PER / PELJ, (15)5. http://dx.doi.org/10.4314/pelj.v1515.20.
2. Ngcobo, S. (Former Chief Justice of the Republic of South Africa). (2010). South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers, Annual Human Rights Africa, STELL LR 2011 1. DOI:10.25159/2522-6800/3572.
3. Kawadza, H. (2018). PER /PELJ (21) Attacks on the Judiciary: Undercurrents of a Political versus Legal Constitutionalism Dilemma? http://dx.doi.org/10.17159/1727-3781/2018/v1i0a1696.
4. O'Regan, J. (2005). Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution. PER/PELJ (8)1. ISSN 1727-3781.

Legislation:

1. The Constitution of the Republic of South Africa [1996].
2. Electoral Amendment Act [2023].

Cases:

1. Glenister v. President of the Republic of South Africa and Others [2008] ZACC 19; 2009 (1) SA 287 (CC).
2. De Lange v. Smuts [1998] (7) BCLR 779 (CC); 1998 (3) SA 785 (CC).
3. S v. Makwanyane and Another [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRLD 164, 1995 (2) SACR 1 (CC).
4. Van Rooyen and Others v. The State and Others [2002] (8) BCLR 810 (CC).
5. Matatiele Municipality and Others v. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC).
6. Mazibuko v. Sisulu and Another [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC).
7. Minister of Health and Others v. Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033.
8. Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others [1995] (10) BCLR 1289; 1995 (4) SA 877.
9. Doctors for Life International v. Speaker of the National Assembly [2006] 6 SA 416 (CC)
10. United Democratic Movement v. Speaker of the National Assembly and Others [2017] ZACC 21.

11. Pharmaceutical Manufacturers Association of SA and Another in re: The Ex Parte Application of the President of the Republic of South Africa and Others [2000] (2) SA 674 (CC).
12. S v. Dodo [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC).
13. Re: Certification of the Constitution of the Republic of South Africa [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).
14. Economic Freedom Fighters and Others v. Speaker of the National Assembly and Another [2017] ZACC 47.

Internet sources:

1. https://www.businesslive.co.za/bd/opinion/2017-05-12-abuse-of-courts-or-the-last-line-of-defence [Last accessed: 15 March 2024].

THE MECHANISM OF COMMITMENT TO DISCLOSURE IN THE CONSUMER AND MEDICAL FIELDS ACCORDING TO ALGERIAN LEGISLATION

Amine Benguerdi

Doctor of Law, University Center of Illizi, Algeria

Abbes Sadki

Doctor of Law, University Center of Illizi, Algeria

ABSTRACT

This study addresses the mechanism of the commitment to disclosure. Both professionals and physicians bear the crucial responsibility of providing information that is not only accurate but also understandable and appropriate for the intended patient or consumer. By mirroring its international counterparts, Algerian law mandates this duty, attaching legal consequences for its breach. Before any medical intervention, a doctor must obtain the patient's consent, fulfilling an essential preliminary step. Likewise, before initiating a sales process, a professional must inform the consumer about all necessary details regarding the product or goods.

This paper delineates the extensive aspects of this obligation, including its defining features, evidentiary requirements, and the nature of the resultant damages from non-adherence. The aim is to recalibrate the balance of power within medical and consumer interactions, thereby augmenting the safeguarding of patients and consumers. This duty is considered one of the fundamental rights of patients and consumers, linked to ethical and humanitarian responsibilities, and is a precursor to obtaining consent.

KEYWORDS: Commitment to Disclosure, Physician, Professional, Patient, Consumer, Liability

INTRODUCTION

The rapid pace of scientific and technological advancements across various sectors necessitates keeping up-to-date, particularly in the health and consumer domains. This urgency has underscored the obsolescence of antiquated legislative texts, which are inadequate in addressing contemporary risks and innovations. Consequently, legislative bodies have periodically intervened to enact specialized regulations, embedding constraints and protective measures.

The commitment to disclosure is central to these protective measures, which is paramount in the medical and consumer sectors. This principle garners attention from international and national entities, representing a pivotal right for patients and consumers, underpinned by ethical and humanitarian obligations and forming the cornerstone of informed consent.

The legal and judicial landscape of the commitment to disclosure has evolved significantly, particularly since the landmark Teyssier ruling on January 28, 1942,[1] which asserted that consent must be sufficiently informed to be considered valid. Before any medical procedure, obtaining the patient's informed consent is a prerequisite and a critical component of the process.

Neglecting this duty is deemed negligence, leading to medical accountability. Algerian legislation has encapsulated this requirement in Law No. 18-11, pertaining to health care.[2] Similarly, professionals are obligated to furnish consumers with comprehensive information about products or services before concluding a transaction, as mandated by Algerian Law No. 09-03 on consumer protection and fraud prevention.[3]

Consequently, this study raises the following query:

- How has Algerian legislation orchestrated the commitment to disclosure within the ambit of consumer protection and health law?

1. COMMITMENT TO DISCLOSURE IN THE CONSUMER FIELD

The origins of consumer protection can be traced back to the United States in 1962, following a seminal speech by President John F. Kennedy to the Senate on March 15, 1962. In this address, he delineated four fundamental consumer rights: the right to safety, the right to be informed, the right to choose, and the right to be heard.[4]

1.1 Definition of Commitment to Disclosure

The commitment to disclosure is designed to empower consumers, enabling them to make informed and judicious decisions regarding acquiring products or services. This obligation emerges from legal statutes, similar to other duties borne out of legislative mandates.

The obsolescence of Law No. 89-02 in addressing contemporary consumer needs led to its replacement by Law No. 09-03 on consumer protection and fraud suppression. This newer legislation accentuates the importance of disclosure, specifically dedicating a section to "mandatory consumer information." Algerian legislation has thus developed a framework of statutes governing this disclosure commitment.

Effective disclosure equips consumers with the knowledge to make enlightened choices, steering them towards products and services that balance quality and price harmoniously.[5] Recognized nationally and internationally, this commitment is a pivotal instrument that aids consumers in forming a comprehensive understanding of market offerings before their purchase decisions.

1 Civil Court (1942, January 28). Civil Court Ruling.

2 Law No. 18-11 (2018, July 2). "Law related to health".

3 Law No. 09-03 (2009, February 25). "Law on consumer protection and fraud suppression".

4 Boulaheya, A. B. B. (2002). General Rules for Consumer Protection and the Resulting Liability in Algerian Legislation. Algiers. p. 14.

5 Calais, J. & Steinmetz, F. (2006). Consumer Law. (7th ed.). Dalloz, Paris. p. 44.

1.2 Conditions of the Commitment to Disclosure

1.2.1 Information to be disclosed

The commitment to disclosure encompasses all information pertinent to the contract's critical elements. Nevertheless, the breadth of information required under this commitment varies across different sectors, presenting a challenge in specifying the information to be disclosed. Scholars and legal authorities have debated the criteria for determining necessary disclosure. French jurisprudence, for example, suggests a broad criterion that encompasses any facts significant enough to influence the creditor's decision to the degree that their prior knowledge might have prevented the contract's formation.[6]

According to Article 17 of Law No. 09-03, all parties must provide consumers with comprehensive product information. The data and information relayed to consumers must be exhaustive and detailed, highlighting the product's characteristics, components, and potential risks.

1.2.2 Conditions specific to the parties involved in the commitment

These conditions include:

Conditions pertinent to the debtor: A party bound by the commitment to disclose must be aware of the information related to the contract and its importance to the creditor. Common understanding holds that information should be reciprocally exchanged in a sales agreement, as dialogues regarding the product's attributes and qualities are crucial for securing the buyer's informed consent.

The creditor's unawareness of the contract-related information: Legal consensus maintains that a contracting creditor cannot assume a passive stance based on presumed ignorance. In practice, each party is expected to seek information to the extent of their capability. A creditor's plea of ignorance is deemed valid only when rooted in legitimate and insurmountable reasons.[7]

Although Algerian legislation broadly asserts the consumer's right to information, it remains ambiguous whether this right extends to pre-contractual or contractual phases, as indicated in Article 17 of Law No. 09-03 on consumer protection and fraud suppression.

1.3 Nature of the Commitment to Disclosure

In consumer law, many scholars view the commitment to disclosure as a duty to produce a specific outcome. It is not enough for a producer to simply demonstrate that they have attempted to convey the necessary information and data to the consumer; these are mandatory disclosures enforced by legislative and regulatory provisions.

Yet, this is not an absolute principle; if a professional must ensure a particular result, they must exert the utmost effort to shield consumers from potential harm. Despite being aware of the legal repercussions, many professionals overlook this obligation. Conversely, a producer's responsibility may also encompass due care, which entails facilitating the consumer's ability to purchase products and services safely, thereby offering goods that align with established standards and expectations.[8]

The consumer's right to information has been solidified in international legislation, often underscoring the imperative to honour this right, thus empowering consumers to protect their interests more effectively, free from the producer's influence.[9]

6 Hadouch, K. (2011-2012). The Commitment to Disclosure within the Framework of Law 09-03 on Consumer Protection and Fraud Suppression. Master's Thesis, Faculty of Law, University of Boumerdes. pp. 18-19.

7 *Ibid*.

8 Arezki, Z. (2011). Consumer Protection under Free Competition. Master's Thesis in Law, Professional Liability, Faculty of Law and Political Science, University of Tizi Ouzou. p. 121.

9 Guyon, Y. (1996). Business Law. (9th ed.). Economica, Paris. p. 949.

1.4 Means of Implementing the Commitment to Disclosure

According to Article 17 of the Consumer Protection and Fraud Suppression Law, the execution of the commitment to disclosure is achieved through:

1.4.1 Labeling:

This encompasses all forms of data, inscriptions, signals, emblems, characteristics, images, figures, or symbols related to a product, which may appear on its packaging, documents, signs, features, stickers, cards, seals, or any indicative element of the product's nature, irrespective of its format or basis. [10]

Per Article 18 of the same law, labelling information must primarily be in Arabic, with the option to include more easily understandable languages. The purpose of Labeling is twofold: to ensure consumers are adequately informed, as Labeling is often the first aspect noticed by consumers, and to facilitate sales, as mandated by Article 2/2 of Executive Decree No. 90-367 regarding the labeling of food products, as amended and supplemented.[11]

Concerning the general regulations or principles related to Labeling, Article 13 of Law No.09-03 mandates that no sign, mark, or fictitious designation should be employed in a manner that unjustly differentiates a particular product from its counterparts. It also forbids preventive or therapeutic benefits claims, except for natural mineral water and specific dietary products. For instance, IFRI mineral water is labeled as appropriate for low-sodium diets and is recommended for pregnant women and for preparing infant formula.[12]

1.4.2 Price Disclosure and Sale Conditions:

Article 4 of Law No. 04-02 outlines the rules governing commercial practices, stipulating that "sellers are obligated to inform customers of the prices and rates for goods and services, along with the conditions of sale".

The prices disclosed must correspond to the total amount consumers are expected to pay to acquire a product or service, as delineated in Article 06 of the same law. With respect to sale conditions, Algerian regulations require professionals to provide consumers with detailed information about these terms, as per Article 8 of Law No. 04-02.

This provision mandates that sellers must, prior to completing a sale, furnish consumers with accurate and truthful information regarding the product or service characteristics, applicable sale conditions, and the expected scope of contractual liability related to the sale or service.

1.4.3. Advertising:

Advertising encompasses all forms of communication designed to directly or indirectly promote the sale of goods or services, irrespective of the medium or location used[13]. The goal of advertising extends beyond merely satisfying consumer expectations to influence their purchase decisions; it also aims to safeguard the interests of the involved parties by promoting products and stimulating increased consumer consumption.[14]

1.5. Liability Arising from Non-Compliance with the Commitment to Disclosure

The Algerian legal framework holds individuals accountable for failing to adhere to the obligation of disclosure. The professional's neg-

10 Article 17 of Law No. 09-03.

11 Chaabani, N. H. (2012). The Stakeholder's Commitment to Ensuring Consumer Safety in the Light of the Consumer Protection and Fraud Suppression Law. Master's in Legal Sciences, Faculty of Law and Political Sciences, University of Tizi Ouzou. p. 79.

12 Kalem, H. (n.d). Consumer Protection. Master's Thesis, Faculty of Law, University of Algiers. pp. 22-23.

13 Article 3/3 of Law No. 04-02.

14 Jebali, W. (2006). Diet of Consumer Consent through Information. Critical Journal of Law and Political Science, Issue 02, Faculty of Law, University of Tizi Ouzou, Algeria. p. 25.

ligence in this regard incurs various forms of liability, which can be:

1.5.1 Civil Liability:

This encompasses contractual liability emanating from violating a contractual duty, such as failing to deliver pre-contractual information. The sanctions for such breaches focus on clarifying the consumer's intent during the contracting process, influencing the party's consent, and potentially leading to the annulment of the contract.[15]

This may result from errors, where misconceptions distort the individual's understanding of reality, or deceit, characterized by employing fraudulent tactics to persuade the consumer into a contract agreement. Additionally, if the disclosure obligation is breached during the contractual phase, it entitles the consumer to insist on fulfilling the contract as originally stipulated.

Often, in commercial advertising, consumers initiate legal action for specific performances to compel advertisers to honour the promises made in their promotional campaigns. Besides contractual liability, civil liability also encompasses tort liability, stemming from the breach of a legal duty, which arises among individuals who lack a direct contractual relationship.[16]

When the prerequisites for civil liability, including fault, damage, and a causal link, are established, the consumer is entitled to reparation for the injuries incurred due to the debtor's non-fulfilment of the disclosure duty.[17]

This restitution encompasses compensation for physical harm, such as fatalities, illnesses, and injuries, as well as material damage, which impairs one's legal rights, assets, or vested interests. The tort liability of the producer is invoked when the aggrieved party is a third entity, not engaged in a contractual relationship with the professional (producer), yet they are still entitled to compensation. Examples include family members, friends, and guests of the purchaser.[18]

1.5.2 Criminal Liability:

In line with prevailing legal standards, the Algerian legal framework provides for criminal sanctions to supplement civil penalties, obliging professionals to disclose pricing information as dictated by Articles 4 and 5 of Law No. 04-02 on commercial practices, with the failure to disclose prices being a misdemeanour as per Article 31 of the same statute.

Moreover, the omission of sale conditions constitutes a punishable act under Article 32 of Law No. 04-02. Supplementary penalties, such as confiscation, are delineated under Law No. 09-03, where commodities confiscated due to breaches of commercial practice regulations are transferred to the state property administration for disposition.

2. THE COMMITMENT TO DISCLOSURE IN THE MEDICAL FIELD

Article 23 of Law No. 18-11[19] on health stipulates that every individual must be apprised of their health condition, requisite treatments, and associated risks. This obligation is further emphasized in Law No. 18-11 concerning health, as elaborated and supplemented by Articles 23, 25, and Article 343, which pertains to organ transfer and transplantation.

Additionally, the commitment to medical disclosure is underscored in Algerian decree No. 92-276, embodying the code of medical ethics, with Article 43 explicitly stating that a physician or dentist is compelled to furnish clear and accurate information to their patient regarding the rationale behind each medical procedure.

The imperative for medical disclosure, a right endorsed by French jurisprudence and codified into law, seeks to legally uphold human dignity, especially following its infringement. The ethos of medical disclosure is anchored in the principle

15 Hadouch, K. (2011-2012). Op. cit. p. 113.

16 Boudali, M. (2005). Product Liability for Defective Products: A Comparative Study. Al-Fajr Publishing and Distribution, Egypt. p. 40.

17 Civil Court (1983, October 11). Civil Court Ruling.

18 Hadouch, K. (2011-2012). The Commitment to Disclosure within the Framework of Law 09-03 on Consumer Protection and Fraud Suppression. Master's Thesis, Faculty of Law, University of Boumerdes. pp. 18-19.

19 Law No. 18-11 related to health.

of bodily sanctity, safeguarded by the Algerian constitution, which forbids any form of physical or psychological abuse, penalizes torture, cruel, inhumane, or degrading treatment, and outlaws human trafficking, as per Article 39.

2.1 Concept of Patient Information Commitment

The obligation to inform encompasses the provision of a comprehensive and accurate account of the patient's health status, empowering them to make an enlightened choice regarding treatment acceptance or refusal. It is incumbent upon the physician to elucidate the nature of the ailment, the proposed therapeutic measures, alternative treatment options, and the financial implications of each, employing clear and simple language. [20]

Furthermore, the physician is obligated to delineate the potential risks involved. The terminology to describe this obligation varies among academics, with some preferring "disclosure" while others opt for "enlightenment."

2.2 Content of the Commitment to Disclosure:

Disclosure of Diagnosis: This duty is incumbent upon the physician from the outset of the medical assessment, whether it involves physical examination or the application of various imaging modalities.

Disclosure of Treatment: Informed consent for treatment is predicated on the patient's understanding and agreement to the therapeutic approach, necessitating the physician to provide comprehensive details about the treatment, its nature, and its objectives.

Post-treatment Disclosure: Physicians are mandated to apprise patients of any occurrences during the treatment and subsequent outcomes, in addition to advising on preventive measures to avert future complications.[21]

Obligation to Disclose Medical Risks: It is crucial for the physician to alert the patient about the potential risks associated with the proposed treatment.[22]

2.3 Forms of Disclosure:

Verbal Disclosure: The intrinsic trust in the physician-patient relationship typically facilitates the conveyance of information verbally, leveraging the established rapport between the two parties.

Written Disclosure: The necessity for written disclosure is underscored in Article 49 of the medical ethics code, particularly when a patient opts against treatment after being apprised of the associated risks by the physician. The law mandates that the patient provide a written declaration of their refusal.[23]

2.4 Liability for Failing to Fulfill the Commitment to Disclosure

The essence of the commitment to disclosure lies in providing patients with a truthful and comprehensive understanding of their health condition, enabling them to make informed decisions about accepting or declining treatment while fully aware of the potential repercussions.[24]

This commitment forms part of the contractual obligation arising from the professional rela-

20 Abbachi, K. (2011). Medical Damage in the Medical Field. Master's Thesis in Professional Liability Law, Faculty of Law and Political Sciences, Mouloud Mammeri University of Tizi Ouzou. p. 60.

21 Jerboua, M. (n.d). Modern Obligations of the Doctor in Medical Practice. Doctoral Thesis in Law Sciences, Faculty of Law, University of Algiers 1, Youssef Ben Khedda. pp. 267-268.

22 Mamoun, A. (2008). Patient Consent in Medical and Surgical Acts. University Publications House, Alexandria, Egypt. p. 130.

23 Jerboua, M. (n.d). Modern Obligations of the Doctor in Medical Practice. Doctoral Thesis in Law Sciences, Faculty of Law, University of Algiers 1, Youssef Ben Khedda. pp. 267-268.

24 Mamoun, A. (2006). The Right to Consent to Medical Acts. Renaissance Publishing, Cairo. p. 140.

tionship between the patient and the physician, marked by a disparity of knowledge, as it juxtaposes a patient, often unacquainted with medical intricacies, against a professionally qualified physician.

The onus is on the physician to bridge this knowledge gap, thereby fortifying the trust endowed by the patient. This obligation is legally and professionally mandated by the regulatory and guiding frameworks governing the medical profession.[25]

Pursuant to Article 267 of Law No. 90-17, as revised by Law No. 85-05, non-compliance with the disclosure obligation by the physician results in:

2.4.1 Civil Liability:

In medical disclosure, the physician must furnish all pertinent information to the patient, facilitating well-informed and voluntary consent at the onset of the medical engagement.

French legal precedents underscore the importance of patient information to assure voluntary, informed, and enlightened consent. The physician's liability may be contractual, anchored in the medical contract between the patient and the physician, or tortious in cases devoid of a contractual nexus:

Contractual liability:

Contractual liability necessitates the presence of fault, damage, and a causal connection between them. The physician's negligence in fulfilling the informational duty manifests in two distinct manners:

- The physician's failure to inform the patient results in a breach, triggering their contractual liability to the patient.
- The physician imparts information to the patient, who then consents; however, this consent is marred by a lack of free and enlightened will, often compromised by misunderstanding, deceit, coercion, or exploitation.[26]

An interpretation of Article 23 of the Health Law suggests that the Algerian legislature acknowledges the contractual dynamic between the patient and the physician. Typically, when a physician treats a patient under conventional circumstances, it is predicated on a tacit agreement, establishing a contractual bond between them, usually not formalized in writing.[27]

Tortious Liability:

The physician's liability under tort law emerges from breaching a legal duty to avoid causing harm to others. Article 124 of the Civil Law states, "Any act, irrespective of its nature, if executed by a person through their fault that inflicts harm upon another, compels the wrongdoer to compensate for the resultant damage." The negligence associated with the physician's failure to fulfil the information obligation can manifest in two ways:

- The physician neglects to inform the patient.
- The physician provides information but fails to meet the necessary conditions, such as delivering inaccurate information, leading the patient to consent to the medical procedure.[28] Should this result in harm, the patient is entitled to pursue legal action and demand compensation.

2.4.2 Criminal Liability:

The act of withholding information from the patient may be construed as an infringement on their physical integrity, subjecting the physician to potential criminal prosecution under Article 264 of the Penal Code, which venerates human sanctity, dignity, and the right to physical integrity. This article prescribes penalties for anyone who deliberately causes injuries or perpetrates acts of violence or assault.

25 Boukhers, B. (2011). Physician Error During Medical Intervention. Master's Thesis in Law, Faculty of Law and Political Sciences, Mouloud Mammeri University, Tizi Ouzou. p. 58.

26 Jerboua, M. (n.d). Modern Obligations of the Doctor in Medical Practice. Doctoral Thesis in Law Sciences, Faculty of Law, University of Algiers 1, Youssef Ben Khedda. pp. 267-268.

27 Aichaoui, H. & Aichaoui, W. (2021). Doctor's Breach of the Medical Information Obligation. Annals of the University of Algiers 1, Volume 35, Issue 02/2021. p. 1111.

28 Abdel Ghaffar, A. M. (2010). Civil Liability in the Medical Field (Comparative Study between Sharia and Law). Legal Books House. p. 241.

2.5 Circumstances in Which the Physician's Liability is Exempted:

Considering the Patient's Psychological State: Per Article 34 of the medical ethics code, a physician may withhold information regarding the patient's health status or necessary treatments if revealing such information is likely to cause harm to the patient.

Emergency Situations: In exigent circumstances, such as when the patient's condition is rapidly deteriorating, in cases of accidents necessitating immediate medical intervention, or when the patient is unconscious, the physician's urgent action becomes indispensable to saving the patient's life. Under these emergency conditions,[29] the physician is relieved from the liability of non-disclosure, confronted with the critical choice between the paramount duty to administer treatment and the secondary duty to inform.[30]

Patient's Waiver of the Right to Information: The obligation to inform is lifted if the patient consciously relinquishes their right to information, entrusting the physician with decision-making regarding their treatment. In such instances, it is the responsibility of the physician to substantiate that the patient has declined to be fully informed or to provide explicit consent, particularly after being informed of the consequences of such a waiver. This exemption permits the physician to undertake the necessary medical treatment without the need for further consent.[31]

29 Gheish, A. & Boulnouar, A. (2008, April 09-10). The Doctor's Obligation to Inform the Patient. National Symposium on Medical Liability, organized by the Faculty of Law, Mouloud Mammeri University, Tizi Ouzou. p. 87.

30 Najida, A. H. (1994). General Theory of Obligations According to the Civil Transactions Law. Renaissance Arab, Cairo. p. 37.

31 Ali, J. M. (2000). The Role of Will in Medical Acts – A Comparative Study. Scientific Publishing Council, Kuwait. p. 177.

CONCLUSION

The commitment to disclosure represents a critical issue that has been progressively addressed by numerous legal frameworks, including Algeria's, which have evolved swiftly to adapt to the practical and economic shifts in society. Despite the passage of considerable time since the inception of the first Algerian laws aimed at safeguarding consumers in 1989 and patients in 1985, the discourse on this matter continues to advance. Our findings are as follows:

- The Algerian legislature has been proactive in formulating regulatory texts to safeguard the interests of both consumers, through Law No. 09-03, and patients, via Law No. 18-11.
- Information conveyed to patients and consumers should be transparent, straightforward, and comprehensible.
- Physicians have a legal mandate to enlighten patients about the medical procedures they must undergo, a requirement underscored by the legal statutes regulating medical practice. Physicians must apprise patients of their health status and the possible benefits and drawbacks of any treatment, with the risk of facing disciplinary, civil, or criminal repercussions for non-compliance. Nevertheless, there are specific, well-defined scenarios in which physicians can be exempted from this informational duty without incurring legal liability, such as in emergencies, considering the patient's psychological well-being, or when the patient voluntarily relinquishes their right to be informed.
- Professionals in the consumer sector must provide consumers with accurate and forthright information before finalizing a sale, including details about the product and service features, pricing, instructions for use, and cautions regarding potential hazards or intrinsically dangerous goods.
- A robust commitment to disclosure within the consumer realm significantly mitigates many risks that endanger consum-

er safety and economic well-being. In instances of non-compliance, both civil and criminal penalties are applicable and enforceable.

In summation, it is advisable to bolster awareness among both physicians and patients by delineating the rights and obligations of each party. This should be supported by the proactive engagement of civil society through organizations, associations, and conferences dedicated to fostering understanding in this field of knowledge.Haut du formulaire

BIBLIOGRARHY

Normative material:

1. Law of Algeria "Law related to health", (2018, July 2), No. 18-11.
2. Law of Algeria "Law on consumer protection and fraud suppression", (2009, February 25), No. 09-03.

Scientific Literature:

1. Mamoun, A. (2008). Patient Consent in Medical and Surgical Procedures. University Publications House, Alexandria, Egypt. P. 130.
2. Mamoun, A. (2006). The Right of Consent to Medical Procedures. Renaissance Publishing House, Cairo.
3. Boulaheya, A. B. B. (2002). General Rules for Consumer Protection and the Resulting Liability in Algerian Legislation. Algiers.
4. Boudali, M. (2005). Product Liability for Defective Products: A Comparative Study. Al-Fajr Publishing and Distribution, Egypt.
5. Calais, J. & Steinmetz, F. (2006). Consumer Law. (7th ed.). Dalloz, Paris.
6. Jebali, W. (2006). Consumer Consent Diet through Information. Critical Journal of Law and Political Science, Issue 02, Faculty of Law, University of Tizi Ouzou, Algeria.
7. Guyon, Y. (1996). Business Law. (9th ed.). Economica, Paris

Doctoral Theses and Master's Dissertations:

1. Kalem, H. (n.d). Consumer Protection. Master's Thesis, Faculty of Law, University of Algiers.
2. Abbachi, K. (2011). Medical Damage in the Medical Field, a Master's Thesis for the Degree in Professional Liability Law. Faculty of Law and Political Science, Mouloud Mammeri University of Tizi Ouzou.
3. Hadouch, K. (2011-2012). The Commitment to Disclosure under Law 09-03 on Consumer Protection and Fraud Suppression. Master's Thesis, Faculty of Law, University of Boumerdes.
4. Jerboua, M. (n.d). Modern Obligations of the Doctor in Medical Practice. Doctorate in Law Sciences, Faculty of Law, University of Algiers 1, Youssef Ben Khedda.
5. Chaabani, N. H (2012). The Stakeholder's Obligation to Ensure Consumer Safety in Light of the Consumer Protection and Fraud Suppression Law. Master's in Legal Sciences, Faculty of Law and Political Science, University of Tizi Ouzou.
6. Arezki, Z. (No Year Provided). Consumer Protection under Free Competition. Master's Dissertation in Professional Liability Law, Faculty of Law and Political Science, University of Tizi Ouzou.

Court practice:

1. Civil Court (1942, January 28). Civil Court Ruling.
2. Civil Court (1983, October 11). Civil Court Ruling.

THE ROLE OF BOOT CONTRACTS IN ACHIEVING ECONOMIC DEVELOPMENT – THE CASE OF ALGERIA

Sadik Siham

Doctor of Law, lecturer, professor A,
Faculty of Law, University of Ain Temouchent, Algeria

ABSTRACT

The BOOT (Build-Own-Operate-Transfer) contract is considered one of the innovative mechanisms for managing public facilities due to its importance in implementing investment projects, particularly in construction, operation, and property transfer. Its significance emerged at the beginning of the twentieth century and was further reinforced after the Second World War, amidst the presence of war-stricken economies. Additionally, there was an ideological shift in the role of the state from being a guardian state to an intervening state, which led to the emergence of public law in business affairs. The BOOT contract became one of its cornerstones as countries resorted to international economic contracts.

Despite Algeria's adoption of the BOOT contract as one of the forms of international contracts due to its importance in attracting foreign direct investment and technology transfer, this did not prompt Algerian lawmakers to establish a specific legal framework for it. This is despite the modifications that have affected the specific system, notably Presidential Decree No. 15-247, which is considered one form of concession contracts.

KEYWORDS: BOOT contract, Investment, Development, Public facilities

INTRODUCTION

The BOOT contract has become of great importance in many countries, especially developing ones, as it represents the optimal means within the reforms witnessed by the public sector. Through it, public facilities are established and utilized without burdening the state budget excessively. Instead, it leads to the creation of infrastructure projects for economic development.

Since contracting according to this method extends over a long period and requires substantial financial resources, it exposes it to numerous risks during implementation. This necessitates considering the issue of changing circumstances during implementation and developing appropriate solutions to avoid disputes between the contract parties.

Therefore, the problem arises regarding what is meant by the BOOT contract and what is the Algerian legislator's stance on it?

To answer this, this research paper will address the nature of the BOOT contract (first chapter), followed by its applications in Algerian law (second chapter).

1. THE NATURE OF THE BOOT CONTRACT

The globalization system imposes the need to enter into contractual forms on developing countries to benefit from modern methods of managing public facilities, including the BOOT contract. Therefore, studying the nature of the BOOT contract requires addressing its concept and legal implications in the following points are addressed:

1.1. The Concept of the BOOT Contract

Studying the concept of the BOOT contract requires addressing its definition, origin, evolution, and finally its characteristics as follows:

1.1.1. Definition of the BOOT Contract

The term "BOOT" contract stands for Build, Operate, Transfer, and is abbreviated as B.O.T. These terms correspond to the Arabic terms: البناء (Build), التشغيل (Operate), ونقل الملكيّة (Transfer of Ownership). In French, it is abbreviated as "C.E.T",[1] representing Construire (Build), Exploiter (Operate), Transférer (Transfer).

It's worth noting that there is a slight variation in terminology between "BOOT" and "BOT" contracts within legal discourse, with the letter "O" standing for "Own",[2] signifying ownership.

Several attempts have been made to define this contract, not only by legal experts but also by international organizations specializing in economic and commercial affairs. The United Nations Commission on International Trade Law (UNCITRAL) defines it as follows: "It constitutes a form of project financing through which a government grants a group of investors a concession to develop, operate, and commercially exploit a specific project for a sufficient number of years to recover the construction costs as well as to achieve suitable profits from operational returns or other benefits granted to them within the contract. At the end of the project, ownership of it transfers to the government without any cost or a previously agreed-upon adequate cost during the negotiation for granting the project concession".[3]

On the other hand, the United Nations Industrial Development Organization (UNIDO) defines it as: "A contractual agreement whereby the project company undertakes to establish one of the state's essential public facilities, including the processes of design, financing, operation, and maintenance of this facility. The project company also manages the operation of the facility, along with any other fees provided they do not exceed

1 Al-Habshi, M.A.M. (2008). B.O.T contracts, published by Dar Al-Kotob Al-Qanuniyya, Egypt, p. 9.

2 Al-Bahji, E.A. (2008). B.O.T Contracts: The Road to Building Modern State Facilities, Dar Al-Jami'a Al-Jadida, Egypt, p. 18.

3 Al-Hijazi, A. F. (2008). B.O.T Contracts in Comparative Law, published by Dar Al-Kotob Al-Qanuniyya, Egypt, p. 44.

those presented in the bid and those stipulated in the contract specifications, to enable the project company to recover the invested funds, operating expenses, and maintenance costs, in addition to a reasonable return on investment. At the end of the term, this company returns the project to the administration according to prevailing legal methods and bidding procedures".[4]

Comparing these definitions, we find that the first definition emphasizes the economic aspect more than the legal aspect. Financial motivations are not the sole reasons for entering into this contract; there are other equally important motivations such as the pursuit of technology transfer, which may be monopolized by multinational companies. The second definition is more comprehensive, covering all stages of contract formation and termination.

Furthermore, the International Islamic Fiqh Council defines the BOOT contract as: "An agreement between the owner or its representative and the financier (the project company) to establish and manage a facility, collect its returns, in full or as agreed upon, over an agreed period with the aim of recovering the invested capital while achieving a reasonable return. Subsequently, the facility is handed over in a condition suitable for the intended purpose".[5]

From a jurisprudential perspective, some jurists define the BOOT contract as: "Projects involving construction, operation, and transfer of ownership, where the government assigns these projects to a company, whether national or foreign, whether it is a private or a public entity".[6]

1.1.2. Genesis and Evolution of the BOOT Contract

The United Kingdom was the first country to resort to these contracts for the construction and operation of public facilities during the reign of the Conservative Party under Prime Minister Margaret Thatcher. This was within the framework of the economic policy pursued at the time, known as the "Private Finance Initiative". One of the prominent projects completed under this contract was the Channel Tunnel linking France and Britain, with the contract being signed in 1987 between the two governments and the company Euro Tunnel.[7]

Legally, Turkey enacted the first legislation regulating these contracts during the tenure of Prime Minister Turgut Özal.[8]

1.1.3 Characteristics of the BOOT Contract

The BOOT contract possesses a set of characteristics that distinguish it from other contracts, including the following:

1.1.3.1 in terms of parties to the contract:

These contracts are concluded between two parties, with the first party representing a public legal entity, while the second party represents a private legal entity (whether natural or juridical, national or international). It is noteworthy that while the private sector has adopted this contracting method, it represents an exception to the rule applied internationally, which typically involves a public legal entity as a party to the contract.

1.1.3.2. In terms of purpose:

The purpose of resorting to the BOOT contract is to establish public economic facilities to provide a public service to the public.[9] This is due to

4 Al-Hamoud, W. M. (2010). "Construction, Operation, and Ownership Transfer Contracts", published by Dar Al-Thaqafa Lil Nashr, Jordan, p. 32.

5 Islamic Fiqh Council Decision No. (186) issued during the nineteenth session of the International Islamic Fiqh.

6 Al-Shumrani, S. B. (2012). Guarantees and Disposition in B.O.T Contracts, the periodic journal of the Islamic Fiqh Assembly, Saudi Arabia (27), p. 7.

7 Lemoine, B. (2023, October 23) the Channel Tunnel, p. 262. <documents.irevues.inist.fr>, [Last accessed: 14 January, 2024].

8 Subu, S. (2012). The Legal System of Construction, Operation, and Ownership Transfer Contracts and its Applications in Algeria, Faculty of Law and Political Science, University of Constantine – Mentouri Brothers, Algeria, p. 8.

9 Al-Ajarmah, N.A. (2003). Construction, Operation, and Ownership Transfer Contracts and their Applications in the Algerian Legal System, Sharia and Law Studies, 40 (01), p. 1053.

the financial burden imposed by the construction of public facilities on the state budget, especially concerning state infrastructure facilities such as airports, ports, and communications facilities.

1.1.3.3. State Supervision of Public Facilities

The contracting administration has the right to supervise and monitor the contracting party during the construction and operation of the public facility. This is because the executing party of the project acts on behalf of the administrative entity in providing public services to the public. Therefore, the administration has the right to ensure the interests of citizens on one hand and to safeguard the state's interests on the other.

1.1.3.4. Financing of Public Facility Construction

The financing of public facility construction is the responsibility of the party contracting with the state or one of its public entities. This party bears the responsibility of providing the necessary financing either entirely or partially.

1.1.3.5. Implementation of the BOOT Contract

The BOOT contract is implemented in the form of a concession granted for a specified period known as the "concession period". This is to cover the cost of constructing or renovating the public facility, in addition to obtaining profits from its operation. This is achieved in the form of fees collected by the project owner from the beneficiaries of the public facility in exchange for the services provided to them.[10]

1.1.3.6. Termination of the BOOT Contract

Originally, the public facility is returned to the contracting administrative entity after the end of the commitment period, typically in a usable condition and free of charge. However, it may happen that the public facility is transferred before the end of the commitment period, provided that the administrative entity pays fair compensation to the project owner. Additionally, the administrative entity may renew the concession period for the benefit of the contracting party or another party, or sell it as part of privatization.

1.2. Implications of the BOOT Contract

The implications of entering into a BOOT contract result in the creation of rights and obligations for contracting parties, which will be elucidated as follows:

1.2.1. Rights and Obligations of the Contracting Administration

The contracting administration enjoys a set of privileges concerning the contracting party in the BOOT contract, as follows:

1.2.1.1. Rights of the Contracting Administration

- Right of Inspection and Supervision:

The right of inspection refers to the authority of the administration to intervene in the execution of the contract, direct the work, and choose the method of execution within the agreed terms and conditions of the contract. Supervisory authority, on the other hand, involves ensuring that the contractor fulfills its contractual obligations as agreed upon.[11]

The administration's right to inspect and supervise the contractor is of utmost importance in a BOOT contract due to its potentially lengthy duration—up to ninety-nine years. Additionally, the commitment of the project company to transfer the public facility in good condition at the end of the contract necessitates supervision by the administration.

10 Al-Dhaiby, S.S. (2014, August 26-28), Arbitration in International Construction Contracts (B.O.T), paper presented at the nineteenth annual conference of the GCC Commercial Arbitration Center in cooperation with the Oman Chamber of Commerce and Industry, on arbitration in oil and international construction contracts, Jordan, p. 11. <www.gcac.diz>, [Last accessed: 10 April, 2017].

11 Bouziane, A. (2011). Explaining Public Procurement Regulations, Dar Al-Jisr for Publishing and Distribution, Algeria, p. 142.

- Right of the Administration to Amend the Contract:

The administration may choose to amend the contract at its sole discretion according to the needs of the public facility. However, this authority is restricted by the requirement to compensate the contracting party for any potential damage resulting from the amendment.[12] Amendments do not cover contractual terms but may include regulatory conditions related to the operation of the public facility. This authority is inherent in the general system and is exercised by the administration automatically without the need for explicit contractual provisions.

- Right of the Administration to Impose Penalties:

This authority is considered one of the privileges enjoyed by the administration over the contracting party. Imposing penalties without resorting to judicial intervention prioritizes the public interest and ensures the continuity of the public facility.

- Right to Retake the Public Facility Before the End of the Concession Period:

If it becomes evident to the administration that the management method of the public facility under the BOOT contract no longer aligns with the public interest, it has the right to change it to a method it deems more beneficial to the public interest.

1.2.1.2. Obligations of the Contracting Party:

These obligations include:

- **Providing a Suitable Legal Environment**:

It is the responsibility of the administration to create a suitable legal, administrative, and investment environment for the establishment and operation of public facilities. Political, economic, and legal stability serve as attractive incentives for booth foreign and domestic investment.

- Executing the Contract According to the Principle of Good Faith:

The principle of good faith is a fundamental legal principle that is evident in contractual relationships, whether administrative or civil. It entails executing the contract in accordance with its terms and provisions. This obligation falls on all parties to the contract, particularly on the administration, which holds a superior legal position. Therefore, this obligation requires refraining from abusing the privileges of public authority for its own benefit.[13]

1.2.2. Rights and Obligations of the Contracting Party with the Administration:

Just as the BOOT contract entails rights and obligations on the contracting authority, the contractor also enjoys rights and incurs corresponding obligations. These will be elucidated as follows:

1.2.2.1. Contracting on Personal Consideration:

This commitment involves the contractor fulfilling its obligations under the contract by itself. Therefore, personal consideration is a fundamental element in the selection of the contractor by the administration in a BOOT contract.

1.2.2.2. Commitment to Project Execution According to Contractual Terms:

Executing the BOOT contract according to the agreed specifications at its various stages is of great importance. The quality of execution ensures the continuity of the public facility and its transfer to the state in good condition.

1.2.2.3. Contractor's Commitment to Operation:

This stage in the BOOT contract is crucial for the contractor as it enables them to recover their expenses on constructing and equipping the public facility and to generate profits. Therefore, the project owner must provide a service to the public and adhere to the fundamental principles of operating the public facility.

12 Al-Jubouri, M. K. (1998). Administrative Contracts, Maktabat Al-Thaqafa for Publishing and Distribution, Jordan, p. 140.

13 Hamdi, Y. A. (1998). Encyclopedia of Administrative and International Contracts, Dar Al-Ma'arif, Egypt, p. 290.

1.2.2.4. Respect for Contract Execution Period:

The BOOT contract is an important means for the administration to manage public facilities. Therefore, respecting the contract period is the application of the principle of continuous and regular operation of the public facility.

1.2.2.5. Contractor's Commitment to Technology Transfer and Employee Training:

The BOOT contract's lengthy duration allows for technological advancements. Hence, it is the contractor's responsibility to keep pace with these developments to ensure that the administration receives a technologically advanced and economically viable facility during its operation.

1.2.2.6. Contractor's Commitment to Transferring Ownership of the Public Facility to the Granting Authority:

At the end of the BOOT contract, the contractor commits to transferring ownership of the public facility to the administrative authority in good and usable condition.

2. APPLICATIONS OF THE BOOT CONTRACT IN ALGERIAN LAW

Studying the applications of the BOOT contract in Algerian law requires understanding its legal basis, the Algerian legislature's stance on its adaptation, and its practical applications. This will be detailed in the following points are addressed:

2.1. Legal Basis for the BOOT Contract in Algerian Law

The Algerian law has not explicitly named the BOOT contract, nor has it issued specific legislation regulating this type of contracting. However, implicit references to this contract have been made in various legal texts. Additionally, the Algerian legislature has taken a position on the legal adaptations of this contract, which will be detailed as follows:

2.1.1. Legal Texts Referring to the BOOT Contract

Several legal texts have referenced this contract in various fields. These will be mentioned as follows:

2.1.1.1. In Financial Law:

Article 166 of the Financial Law of 1996[14] mentions that the construction, operation, and maintenance of highways may be subject to concession for the benefit of public or private entities.

Additionally, Article 167 of the same law states that concession holders may collect toll fees under specified conditions.[15]

2.1.1.2. In the Agricultural Sector:

The executive decree No. 97-475[16] mentions the possibility of granting concessions for the construction of small and medium-sized irrigation facilities.

2.1.1.3. In Water Law:

Article 17 of the Water Law mentions artificial[17] water properties that become state property without compensation after the concession period for construction and operation.

2.1.1.4. In Electricity and Gas Distribution Law:

The legal text regarding electricity and gas distribution through channels in Article (02/9)[18] states:

14 Official Gazette. (1995). Issue 82, <https://www.joradp.dz/HAR/Index.htm> [Last accessed: 13 May, 2024].

15 Official Gazette. (1996). Issue 55, <https://www.joradp.dz/HAR/Index.htm> [Last accessed: 13 May, 2024].

16 Official Gazette. (1997). Issue 82, <https://www.joradp.dz/HAR/Index.htm> [Last accessed: 13 May, 2024].

17 Algerian Law regarding water. (2005). Official Gazette, Issue 60, <https://www.joradp.dz/HAR/Index.htm> [Last accessed: 13 May, 2024].

18 Algerian law regarding electricity and gas distribution via channels. (2002). Official Gazette, Issue 08, February 6, 2002, <https://www.joradp.dz/HAR/Index.htm> [Last accessed: 13 May, 2024].

"Privilege is the right granted by the state to an operator, enabling them to exploit a network and develop it over a specific territory and for a specific period with the aim of selling electricity or gas distributed through channels". Additionally, Article (07) of the same law adds: "New facilities for electricity production shall be constructed and utilized by any natural or legal person subject to private or public law holding an exploitation license".

2.1.1.5. In the field of public contracts

The Algerian legislature has recognized the use of the BOOT (Build-Operate-Transfer) method in public contracts by subjecting the conclusion of agreements to delegate public facilities to the principles stipulated in Article 05 of Decree No. 15-247. While this procedure aligns with the nature of administrative contracts,[19] it may face challenges related to attracting foreign investments.

2.1.1.6. Under municipal law

Municipal Law No. 11-10 opens up the scope of BOOT contracts in several areas, including, for example, drinking water, road maintenance, public lighting, covered markets, and managing technical landfill centers.

2.1.2. The legal adaptation of the BOOT contract

There has been a legal dispute over the nature of the BOOT contract, divided into three directions. The first direction considers the BOOT contract as falling within the category of investment contracts, thus subject to civil and commercial law. The second direction[20] considers it contracts with a special nature, sometimes administrative contracts, and sometimes private contracts. The third and final direction,[21] predominant in public law jurisprudence, considers the BOOT contract, also known as the modern commitment contract, as administrative contracts subject to the general conditions applicable to such contracts.

The Algerian legislature has associated the BOOT contract with the concept of concession contracts. The term "concession" is used to refer to the BOOT contract, influenced by the opinion stating the administrative nature of the BOOT contract. For example, Article (76) of the Water Law states: "Concession to use water resources, which is a contract under public law, may be granted to any natural or legal person subject to public or private law who submits an application according to the conditions specified in this law and the procedures determined by regulation".

2.2. The role of the BOOT contract in attracting investment

BOOT contracts are considered modern contracts in domestic and international transactions, and countries have resorted to them to attract and stimulate investment. Algeria is no exception, as will be explained in this requirement as follows:

2.2.1. Conclusion of the BOOT contract according to the provisions of investment law

Algeria has resorted to BOOT contracts as a tool to attract and stimulate investment. Examples include international investment contracts concluded by the Algerian state with international companies in the field of water desalination, concluded according to the BOOT contract. Article (81) of Law No. 05-12 concerning water states: "Under this law, it is possible to grant a concession to establish and exploit desalination structures or extract salts and minerals from saline water for the public benefit, according to the provisions of Order 01-03 dated the first of Jamadi Al-Akhirah 1425 corresponding to August 20, 2001, concerning investment development."

As a result, these contracts have been con-

19 Laajal, Y. Dufan, L., Contracts by the B.O.T Method in Algerian and French Legislation, International Journal of Legal and Political Research: Faculty of Law and Political Science, University of Kasdi Merbah – Ouargla, Algeria, 01, (02), p. 119.

20 El-Roubi, M. (2006). "Construction, Operation, and Delivery Contracts", published by Dar Al-Nahda Al-Arabiya, Egypt, p. 51.

21 Ahmed, A.M.A. (2008). Arbitration in International Administrative Contract Disputes, Dar Al-Jami'a Al-Jadida, Egypt, p. 119.

cluded between the Algerian state, represented by the Algerian Energy Company (in which booth Sonatrach and Sonelgaz contribute), with a financing ratio estimated at 30%, and General Electric Ionics Hamma Holding Company, an Irish company with expertise in the construction and operation of such facilities, contributing 70% to the project to establish a water desalination facility in Hamma. This represents a form of partnership between the public and private sectors in managing water facilities. The concession period is estimated at thirty years from the date of the agreement's entry into force, with a production capacity of 200,000 cubic meters per day, and the project's value is estimated at $256 million.

Additionally, the National Energy Company concluded a BOOT contract to establish a seawater desalination facility in Skikda with a 51% contribution, with a Spanish company, Jaida, contributing 49%. The concession period extends for 30 years from the date of the agreement's entry into force.

In this context, a water desalination and electricity production facility has been established in Arzew, Oran. It was created according to an investment agreement using the BOOT method between the National Investment Development Agency, with a 5% share, and a South African company, with a 95% share. The concession period also extends for thirty years from the entry into force of this agreement.

Furthermore, a water desalination plant was constructed in Benin, Tlemcen, in partnership with a Spanish company with a 51% share of the project and the Algerian Energy Company with a 49% share. The value of this project is estimated at $230 million.

Finally, from the conclusion of these contracts, it can be inferred that the Algerian state participates relatively in financing these contracts. Some consider this to be a misapplication of the concept of BOOT contracts, which is based on the idea of full private sector financing for the construction of public facilities related to infrastructure. At the end of the concession period, the state recovers the completed structures and the designated lands without financial compensation.

2.2.2. Investment incentives obtained by the project owner

The implementation of the Build-Operate-Transfer (BOOT) model for establishing and operating public facilities has led to the emergence of financial and economic risks for these projects, including competition risks from government projects, allowing the establishment of similar projects before the expiration of the concession period, as well as risks of contract cancellation and seeking to change its terms.

To address these risks, there arose a need to provide guarantees by the state to the project owner, including subjecting the BOOT contract to the provisions of investment law, granting the project company the right to enjoy investment incentives stipulated in the investment law. These incentives include financial incentives such as tax exemptions (such as exemption from value-added tax for goods and services used in the investment, exemption from property transfer tax for all real estate acquisitions made within the investment project, exemption from profit tax, and professional activity tax), as well as customs exemptions (such as exemption from customs duties for imported goods directly used in the project).[22]

In addition to financial incentives such as state participation in project shares ownership and obtaining government insurance with preferential rates to cover certain types of risks, which may be commercial, such as exchange rate fluctuations, or non-commercial, such as nationalization and confiscation.

There is also the possibility of resorting to amicable means to resolve disputes such as conciliation, mediation, and arbitration. The latter is considered one of the most important incentives sought to be included in the BOOT contract by the contractor with the administration to avoid litigation.

22 L'Ammari, W. (2010-2011). "Incentives and Barriers to Foreign Investment in Algeria", Master's Thesis in Business Law, Faculty of Law, University of Algiers 1, p. 70.

CONCLUSION

From our study, we can conclude the following:

- The requirements of development have revealed the importance of BOOT contracts in completing infrastructure projects, especially considering that the construction and building sector is currently one of the most important areas of international trade, given the importance of infrastructure development in the economies of developing countries;
- Considering that BOOT contracts have become one of the established methods for managing and operating public facilities, it is necessary to enact specific legislation regulating all stages of this contract;
- When resorting to this contract, the state must enlist legal and technical experts to draft the contract, in order to avoid the negative consequences resulting from poor drafting, especially in the event of disputes between the parties to the contract;
- Encouraging the establishment of regional arbitration centers is necessary to avoid resorting to international arbitration centers, which often rule in favor of the foreign investor at the expense of the host state of the investment.

BIBLIOGRAPHY

Books

1. Ahmed, A.M.A. (2008). Arbitration in International Administrative Contract Disputes, Dar Al-Jami'a Al-Jadida, Egypt.
2. Al-Bahji, E.A. (2008). B.O.T Contracts: The Road to Building Modern State Facilities, Dar Al-Jami'a Al-Jadida, Egypt.
3. Al-Habshi, M.A.M. (2008). B.O.T contracts, published by Dar Al-Kotob Al-Qanuniyya, Egypt.
4. Al-Hamoud, W. M. (2010). "Construction, Operation, and Ownership Transfer Contracts", published by Dar Al-Thaqafa Lil Nashr, Jordan.
5. Al-Hijazi, A. F. (2008). B.O.T Contracts in Comparative Law, published by Dar Al-Kotob Al-Qanuniyya, Egypt.
6. Al-Jubouri, M.K. (1998). Administrative Contracts, Maktabat Al-Thaqafa for Publishing and Distribution, Jordan.
7. Bouziane, A. (2011). Explaining Public Procurement Regulations, Dar Al-Jisr for Publishing and Distribution, Algeria.
8. El-Roubi, M. (2006). "Construction, Operation, and Delivery Contracts", published by Dar Al-Nahda Al-Arabiya, Egypt.
9. Hamdi, Y. A. (1998). Encyclopedia of Administrative and International Contracts, Dar Al-Ma'arif, Egypt.

Articles

1. Al-Ajarmah, N. A. (2003). Construction, Operation, and Ownership Transfer Contracts and their Applications in the Algerian Legal System, Sharia and Law Studies, 40 (01).
2. Al-Shumrani, S. B. (2012). Guarantees and Disposition in B.O.T Contracts, the periodic journal of the Islamic Fiqh Assembly, Saudi Arabia (27).
3. Laajal, Y., Dufan, L., Contracts by the B.O.T Method in Algerian and French Legislation, International Journal of Legal and Political Research: Faculty of Law and Political Science, University of Kasdi Merbah – Ouargla, Algeria, 01 (02).

Theses

1. Subu, S. (2012). The Legal System of Construction, Operation, and Ownership Transfer Contracts and its Applications in Algeria, Faculty of Law and Political Science, University of Constantine – Mentouri Brothers, Algeria.
2. L'Ammari, W. (2010-2011). "Incentives and Barriers to Foreign Investment in Algeria", Master's Thesis in Business Law, Faculty of Law, University of Algiers 1.

Websites

1. Lemoine, B. (2023, October 23). The Channel Tunnel, <documents.ire-vues.inist.fr> [Last accessed: 14 January, 2024].

Government documents

1. Al-Dhaiby, S.S. (2014, August 26-28). Arbitration in International Construction Contracts (B.O.T), paper presented at the nineteenth annual conference of the GCC Commercial Arbitration Center in cooperation with the Oman Chamber of Commerce and Industry, on arbitration in oil and international construction contracts, Jordan, <www.gcac.diz>, [Last accessed: 10 April, 2017].

THE RIGHTS TO LAND, FOOD AND TOURISM RELATED TO AGRICULTURAL LAND CONVERSION IN BALI: HOW SUBAK PLAY A ROLE?

Ni Gusti Ayu Dyah Satyawati

Doctor of Law, Udayana University, Denpasar Bali, Indonesia

I Nyoman Suyatna

Doctor of Law, Professor, Udayana University, Denpasar Bali, Indonesia

Putu Gede Arya Sumertha Yasa

Doctor of Law, Profesor, Udayana University, Denpasar Bali, Indonesia

I Dewa Gede Palguna

Doctor of Law, Udayana University, Denpasar Bali, Indonesia

Putu Sudarma Sumadi

Doctor of Law, Profesor, Udayana University, Denpasar Bali, Indonesia

ABSTRACT

Bali, one of the world's tourism destinations, is now facing a paradoxical situation because the increasing number of tourists visiting Bali is going hand in hand with the gradual reduction in productive agricultural land due to land conversion. This paper analyzes the massive practice of converting productive farmland for tourism in Bali. It

offers a human rights law lens, particularly the rights to land, food, and tourism, to view the problem discussed in the paper. Legal research primarily reads international legal instruments, Indonesia's laws and regulations, and some secondary materials. The paper suggested that although the Bali provincial government has issued rules and policies to prevent the practice of land conversion, the government cannot fully control it because many agricultural lands have ownership status. Therefore, there is an urgent need to increase awareness of local communities as landowners to prevent such a practice. This paper also proposes using subak, a traditional farming system, as the basis for ecotourism and agrotourism activities to tackle the problem of land conversion in Bali.

KEYWORDS: Land Conversion, Human Rights, Tourism, Food Security, Subak

INTRODUCTION

Sustainable Development Goals (SDGs) encourage countries worldwide to adopt measures to achieve the 17 goals.[1] Some goals are interrelated with the issue of sustainable food. Grosso (2020) identifies nutrition in the context of the SDGs, suggesting that for Goal No. 12 on responsible consumption and production, there is a need for sustainable solutions for ensuring controllable and efficient food production while for Goal No. 15 on life on land, change of land use may reduce food production.[2] In addressing these goals, the President of Indonesia created regulations to determine national targets to achieve SDGs.[3] The Minister of National Development Planning/Head of the National Development Planning Agency established the National Action Plan for Food and Nutrition for 2021-2024 in accordance with the targets of the 2020-2024 National Medium Term Development Plan and the SDGs, taking into account the commitments made at The World Health Assembly (2012) and The UN Decade of Action on Nutrition 2016-2025.[4] Indonesia was also the host when the leaders of G20 convened in Bali on 15-16 November 2022 and called for an accelerated transformation towards sustainable and resilient agriculture and food systems and supply chains.[5] The Indonesian national policy on sustainable food is further continued by regional governments, considering the situation in the regions.

Bali is an example of a region where the food policy indicates a promising achievement. Infrastructure development, undeniable, seems to be an important factor supporting the realization of food security in Bali. Infrastructure can improve people's welfare, which their access to adequate

1 The United Nations General Assembly, (2015). A/RES/70/1: *Transforming Our World: the 2030 Agenda for Sustainable Development*, para. 59. <https://documents.un.org/doc/undoc/gen/n15/291/89/pdf/n1529189.pdf?token=ZUwW9RqSVDGzrGVMzs&fe=true> [Last accessed: 7 June, 2021].

2 Grosso, G., Mateo, A., Rangelov, N., Buzeti, T., Birt, C., (2020). Nutrition in the Context of the Sustainable Development Goals. *European Journal of Public Health,* 30 (Supplement 1), p. i20. https://doi.org/10.1093/eurpub/ckaa034

3 Presidential Regulation No. 111, (2022) concerning Implementation of the Achievement of Sustainable Development Goals. *National Sustainable Development Goals 2024 Targets*. Article 2 (1) <https://peraturan.go.id/id/perpres-no-111-tahun-2022> [Last accessed: 7 June, 2024] and Presidential Regulation No. 59 (2017) concerning Implementation of the Achievement of Sustainable Development Goals. *National Targets for the period 2017 to 2019 in the 2015-2019 National Medium Term Development Plan*. Article 2 (1) <https://peraturan.go.id/id/perpres-no-59-tahun-2017> [Last accessed: 7 June, 2024].

4 Ministry of National Development Planning/the National Development Planning Agency (2021, October 18). *Decree No. KEP 124/M.PPN/HK/10/2021 concerning Determination of the National Action Plan for Food and Nutrition for 2021-2024,* para.1 and Attachment p. 6 <https://jdih.bappenas.go.id/peraturan/detail-peraturan/2804> [Last accessed: 7 June, 2024].

5 G20 (2022, November 15-16). *The G20 Bali Leaders' Declaration,* para. 6. Ministry of Foreign Affairs of the Republic of Indonesia. <https://kemlu.go.id/download/L3NpdGVzL3B1c2F0L0RvY3VtZW50cy9TaWFyYW4lMjBQZXJzLzIwMjIvRzIwJTIwQmFsaSUyMExlYWRlcnMlMjclMjBEZWNsYXJhdGlvbiwlMjAxNS0xNiUyME-5vdmVtYmVyJTIwMjAyMiwlMjBpbmNsJTIwQW5uZXgucGRm> [Last accessed: 7 June, 2024].

food can indicate.[6] The Indonesian National Food Agency (NFA) released the 2023 Food Security and Vulnerability Atlas (FSVA), which revealed that several districts/cities have experienced improvements in the status of areas vulnerable to food insecurity, indicating positive movement in Indonesia's food security situation. The FSVA also includes a food security index (FSI), which showed that Bali is the best among other regions in Indonesia: Bali Province is designated as the Province with the best FSI (87.65%). This achievement was supported by the progress made by regencies and cities in the Bali Provinces: Gianyar Regency is the Regency with the best FSI in Indonesia (92.16%), while Denpasar City is the city with the best FSI in Indonesia (95.80%).[7] However, in terms of the status of Sustainability of Food Availability in Bali Province, both Denpasar City and Gianyar Regency are Regency/City areas that have a terrible risk score, where the land used to support food supply is very quickly affected by disasters and the condition of nutrient cycles is easily disturbed by materials. pollutants entering the soil. Therefore, based on the sustainability criteria for food providers, Denpasar City and Gianyar Regency have limited food sustainability status. Therefore, food productivity in these two regions can only improve if destructive and polluting factors are addressed and managed correctly, such as the potential for erosion, flooding, and soil pollution by waste.[8]

Despite Bali being appointed the best FSI in Indonesia, Bali faces obvious obstacles and challenges in realizing food security: the continued land conversion, especially on productive agricultural land, for non-agricultural functions. The conversion of rice fields can occur either gradually or sporadically, carried out by individuals, or instantaneously and massively on one large and concentrated area of land aiming at development projects initiated by the private sector and the government.[9] By the end of the 1980s, irrigated land and dry farmland in Bali were lost to agriculture at an annual rate of about 1,000 hectares. In 2003, the rate of land conversion increased further to about 3,000 hectares.[10] The impact of land conversion is often less recognized, so the land conversion issues are regarded as a 'small problem', and efforts to control land conversion are neglected, though it has economic, social, and environmental concerns. A tangible impact is, among others, the decline of food security,[11] a concept that conceives every human being can consume food and nutrition in a balanced manner.[12]

Conversion in agricultural land is a potential threat to the rice field in Bali.[13] The weakening of Bali's economic aspects due to tourism and the conversion of land to support development also

6 Mulyani, S., Putri, F., Andoko, B., Akbar, P., & Novalia, S., (2020). Dampak Pembangunan Infrastruktur Terhadap Kondisi Ketahanan Pangan di Indonesia (Studi Kasus Provinsi Bali), *Jurnal Ketahanan Nasional,* 26 (3), p. 426, 434. <https://doi.org/10.22146/jkn.60703>.

7 Deputy for Food and Nutrition Insecurity, National Food Agency, (2023). *Food Security Index 2023*, pp. 1, 9, 14, 18 <https://drive.google.com/file/d/1P5KIdhdmZkVL-WIpC82TaCH_3rCxQaLG6/view> [Last accessed: 8 June, 2024].

8 Handayani, C. I. M., Rahmaeni, N. K. D., Mustafa, F., & Billah, M., (2021, December). *Status Daya Dukung Pangan Pulau Bali,* Bali and Nusa Tenggara Ecoregion Development Control Center, Ministry of Environment and Forestry, pp. 86-87. <http://ppebalinusra.menlhk.go.id/wp-content/uploads/2022/11/Dokumen-Status-Pangan-Pulau-Bali-2021.pdf> [Last accessed: 7 June, 2024].

9 Sudarma, I. M., Djelantik, A. A. A. W. S., & Setiawan, I. G. B. D., (2024). Agricultural Land Conversion and Its Impact on Farmer's Welfare and Food Security in the Province of Bali. *Jurnal Ekonomi Pertanian dan Agribisnis* 8 (1), pp.114-115. <http://dx.doi.org/10.21776/ub.jepa.2024.008.01.9>

10 Reuter, T. A., (2022). Endangered Food Systems: Agriculture, Nutrition and Cultural Heritage in Bali, Indonesia. *Unisia* 40 (1): pp.153-154. <https://doi.org/10.20885/unisia.vol40.iss1.art7>

11 Suhadi, A. S., & Niravita, A., (2017). The Responsibility of Local Government on the Protection of Productive Agricultural Land in Indonesia. *South East Asia Journal of Contemporary Business, Economics and Law,* 12 (4), p.1.

12 Antara, M., & Sumarniasih, M. S., (2020). Featured Food Commodities for Food Security Support in Bali Province, Indonesia. *Agricultural Socio-Economics Journal,* 20 (2), p.148. <https://doi.org/10.21776/ub.agrise.2020.020.2.7>

13 Adnyawati, I. A. A., (2019). Land Conversion Versus Subak: How Bali's Face Gradually Changing Throughout History. *Bali Tourism Journal,* 3 (1), p. 39. <https://doi.org/10.36675/btj.v3i1.35>

affects dependence on food.[14] Rice productivity tends to decline from 2016 to 2020. In 2016, rice production reached 62.45 tons per hectare; in 2017, it fell to 59.09 tons per hectare. Even though there was an increase in 2018 and 2019, respectively, amounting to 60.11 and 60.78 tons per hectare, rice productivity in Bali Province finally experienced the most significant decline in 2020, namely 58.49 tons per hectare.[15]

Bali is a world tourist destination. Statistics revealed that the population of Bali in 2024 is 4. 433.300 persons.[16] As an illustration, there were 454,801 foreign tourists (not including domestic travellers) coming directly to Bali Province in February 2024.[17] On the one hand, development of tourism service businesses provides positive benefits for Bali's economic growth. On the other hand, it also has negative impacts, such as high levels of conversion and land ownership and damage to natural ecosystems.[18]

Badung is a regency in Bali that can be used as an example of how the tourism industry has significantly contributed to the agricultural land conversion practice, threatening its ability to ensure sustainable food. For decades, the Badung Regency area was gradually occupied by various types of tourism accommodations (luxury resorts, star hotels, private villas), food and beverages (restaurants, café, beach clubs), and leisure facilities (relaxing spa and entertainment) which require a transformation of a vast area of land, in particular agricultural land. Badung Regency relies dependently on the tourism sector (almost 95%).[19] Development of the region in the form of urban and tourism development, which goes rapidly, is threatening the sustainability of the water control system.[20] The number of farmers in Badung Regency is gradually decreasing. There were 39,303 farmers in 2015, which fell to 36,587 in 2018. It was then further declined to 32,161 in 2020. This decline occurred because the younger generation in Badung Regency was more interested in working in the tourism sectors, e.g. hotels, restaurants, tours, and travel.[21]

The above problems seem interesting to be analyzed from a human rights perspective. Indonesia is a state party to the International Covenant on Economic, Social, and Cultural Rights (ICESCR), meaning that Indonesia has an obligation to implement norms stipulated in the covenant. Article 28H of the 1945 Constitution of the Republic of Indonesia, as well as Article 36 and Article 40 of Law No. 39 of 1999 concerning Human Rights, in essence, determine that every person has the right to have private property, residence, and a decent life. In addition, Article 20 of Law

14 Suarni, N. W., (2022). Analysis of Rice Availability and Demand in Bali Province on 2020. *Jurnal Manajemen Agribisnis,* 10 (8), p. 590. <https://doi.org/10.24843/JMA.2022.v10.i01.p08>

15 Bali Province Regional Regulation No.7, (2022) concerning Amendments to Regional Regulation No. 3 of 2019 concerning the Medium Term Development Plan for the Universal Regional Plan of Bali Province for 2018-2023. *Rice Productivity.* Annex, p. 369 <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/28922> [Last accessed: 7 June, 2024].

16 Statistics of Bali Province, (2024). *Population Projection of Bali Province by Gender and Regency/Municipality (Thousand People), 2022-2024*, <https://bali.bps.go.id/indicator/12/28/1/proyeksi-penduduk-provinsi-bali-menurut-jenis-kelamin-dan-kabupaten-kota.html> [Last accessed: 7 June, 2024].

17 Statistics of Bali Province, (2024, April 1). *Bali Province Tourism Development February 2024*, <https://bali.bps.go.id/pressrelease/2024/04/01/717892/perkembangan-pariwisata-provinsi-bali-februari-2024.html> [Last accessed: 7 June, 2024].

18 Bali Provincial Regulation No. 4, (2023) concerning Bali's Future Development Directions, 100 Years of Bali New Era 2025-2125. *Introduction.* Annex, Chapter I, p. 1. <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/29176> [Last accessed: 7 June, 2024].

19 Praptika, I. P. G. E., Yusuf, M., & Heslinga, J. H., (2024). How Can Communities better Prepare for Future Disasters? Learning from the Tourism Community Resilience Model from Bali. *Indonesia Journal of Tourism Futures*, p. 2. <https://doi.org/10.1108/JTF-04-2023-0092>

20 Sriartha, I. P., Suratman, & Giyarsih, S. R., (2015). The Effect of Regional Development on the Sustainability of Local Irrigation System (A Case of Subak System in Badung Regency, Bali Province). *Forum Geografi,* 29 (1), p. 38 <https://doi.org/10.23917/forgeo.v29i1.789>

21 Wirata, G., (2022). Strategi Peningkatan Ketahanan Pangan pada Masa Pandemi COVID-19 melalui Penguatan Kearifan Lokal di Kabupaten Badung Bali. *Jurnal Kajian Bali,* 12 (1), p. 82. <https://doi.org/10.24843/JKB.2022.v12.i01.p04>

No. 5 of 1960 Concerning Basic Regulations on Agrarian Principles determines that the property right of a piece of land can be transferred and transferred to other parties. It can, therefore, be understood that someone who owns a piece of land with freehold status has the freedom to convert the land, for example, making agricultural land into a place to live or for other purposes that can improve their welfare. That person also has the right to sell it to another party to get money to be used for the benefit of his family.

Reuter (2018) carried out observatory research on the socio-cultural and economic change in Bali for many years, suggesting that the status of agriculture has adjusted in non-linear means. He gained local people's perception that agriculture, in the early 1990s, was even seen as old-fashioned. He also revealed the vital contribution of moral economies to food security in Bali, along with the negative impact agricultural "modernization" has had on them, and some recent attempts by local social movements to restore them.[22]

Therefore, the present paper aims to analyze the phenomena of agricultural land conversion for tourism purposes in Bali from the perspective of human rights law, particularly the rights to land, food, and tourism. It reflects legal research that primarily analyzes written documents from the international legal instruments and national law and regulation of the Republic of Indonesia. Besides, it reads relevant secondary sources, particularly journal articles and reports. The analysis is divided into four sub-sections. First, it discusses the right to land and the prevention of conversion of agricultural land. Second, it explores land conversion as a threat to the right to adequate food. Third, it assesses the right to participate in tourism development. Next, it analyzes the interrelated human rights issues in the context of land conversion in Bali. Lastly, it proposes subak as the basis for ecotourism and agro-tourism to tackle the problem of land conversion in Bali.

22 Reuter, T., (2018). Understanding Food System Resilience in Bali, Indonesia: A Moral Economy Approach, Culture, Agriculture, Food and Environment, 41, pp. 1, 6. <http://dx.doi.org/10.1111/cuag.12135>

1. ANALYSIS

1.1 Right to Land and the Prevention of Conversion of Agricultural Land

According to Gilbert (2013), land rights are not typically perceived as a human rights issue as they are generally under the scope of land laws, land tenure agreements, or (spatial) planning regulations. Land rights then become a central human rights issue because they constitute the basis for access to food, housing, and development.[23] The Committee on Economic, Social and Cultural Rights in 2022 adopted a General Comment on Land and Economic, Social and Cultural Rights. The Committee observed that the present situation indicates the non-conducive use and management of land to realize the rights stipulated in the ICESCR. Among other critical factors in this trend are "in rural areas, competition for arable land resulting from demographic growth, urbanization, large-scale development projects, and tourism has significantly affected the livelihoods and rights of rural populations". The Committee also considers Article 11 (2) ICESCR, which, in essence, obliges state parties to develop or reform agricultural systems to achieve the most efficient development and utilization of land. Reflecting that land is used in rural areas for food production, the Committee considers land vital to ensure the enjoyment of the right to adequate food.[24]

The Food and Agriculture Organization (FAO) adopted voluntary guidelines on the right to adequate food in November 2004. The guidelines cover economic development policies, encouraging States to pursue agriculture, land-use, and land-reform policies that will enable farmers and

23 Gilbert, J., (2013). Land Rights as Human Rights: The Case for a Specific Right to Land, *SUR. Revista Internacional de Direitos Humanos,* 10 (18), p. 115. <http://dx.doi.org/10.2139/ssrn.2401190>

24 Committee on Economic, Social and Cultural Rights., (2022). General Comment E/C.12/GC/26. *Land and Economic, Social and Cultural Rights*, paras. 2 (c) and 6. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/ec12gc26-general-comment-no-26-2022-land-and> [Last accessed: 7 June, 2024].

food producers to earn a fair return from their labor, capital, and management. The guidelines also address the land issue, guiding States to establish legal and policy mechanisms that promote conservation and sustainable land use.[25]

The number of land-related conflicts in Indonesia is due to the uncertainty of land laws. This shows that the national land management system still needs improvement. Currently, the two essential elements that become problems in various land cases in Indonesia are related to welfare and the legal certainty of its rights.[26] The National Human Rights Commission of the Republic of Indonesia adopted Standard Norms and Regulations No. 7 concerning Human Rights to Land and Natural Resources. The standard norms underline that the state is obliged to protect and guarantee the availability of productive land and prevent the conversion of agricultural land (in its broadest sense) in harmony with its ecosystem to realize sustainable and just people's food sovereignty. It also reveals that farmers, as a particular group of rights holders, face the problem of conversion of food agricultural land and around food agricultural land causes food agriculture to experience pollution and be attacked by pests.[27]

1.2. Land Conversion as the Threat to the Right to Adequate Food

Food is a basic need for the continuation of human life, which, if not available, can create conditions that threaten life. Therefore, the right to adequate food is a human right.[28] Article 11 ICESCR comprises two components of the right to food. First, the right to adequate food is a part of the right to an adequate standard of living under Article 11(1) and the fundamental right to be free from hunger under Article 11(2).[29] Article 11 (1) ICESCR ensures the right of everyone to an adequate standard of living for himself and his family, including adequate food for the continuous improvement of living conditions. Article 11 (2)(a) ICESCR further determines that the state shall take measures and programs to improve methods of production, conservation, and distribution of food, among others, by developing or reforming agrarian systems. The right to adequate food is realized when every person, whatever gender or age, alone or in a community with others, always has physical and economic access to adequate food or its procurement ways.[30] This type of right places greater emphasis on individual human beings rather than on the general term of "all people".[31] As outlined in General Com-

25 Food and Agriculture Organization of the United Nations Rome, (2004, November 22-27). *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security,* Guidelines 2.5., 8.10. <https://openknowledge.fao.org/items/6b7d9ece-1ff8-44e7-9fbacba32366dea0> [Last accessed: 7 June, 2024].

26 Yasa, P. G. A. S., Sudiarawan, K. A., Dwijayanthi, P. T., & Pranajaya, M. D., (2021). Legal Politics of Land Rights Certification in the Indonesian Context: Between Agrarian Conflicts and Demands for Legal Certainty. *International Journal of Criminology and Sociology,* 10, p. 898. <https://doi.org/10.6000/1929-4409.2021.10.106>

27 National Commission of Human Rights of the Republic of Indonesia, (2021) *Standar Norma dan Pengaturan Nomor 7 Tentang Hak Asasi Manusia atas Tanah dan Sumber Daya Alam*, Jakarta, paras. 76, 335. <https://www.komnasham.go.id/index.php/peraturan/2022/08/05/39/standar-norma-dan-pengaturan-nomor-7-tentang-hak-asasi-manusia-atas-tanah-dan-sumber-daya-alam.html> [Last accessed: 7 June, 2024].

28 UNESCO, (2017). Kerangka Analisis untuk Mengintegrasikan Tujuan Pembangunan Berkelanjutan (SDGs) dengan Kewajiban Pemenuhan Hak-Hak Asasi Manusia untuk di Indonesia (Analytical Framework for Integrating Sustainable Development Goals (SDGs) with the Obligation to Fulfill Human Rights in Indonesia). Jakarta, p. 15. <https://sdg.komnasham.go.id/sdg-content/uploads/2017/04/Analytical-Framework-for-SDGs-and-Human-Rights-in-Bahasa.pdf> [Last accessed: 8 June, 2024].

29 Domingo-Cabarrubias, L. G., (2023). The Right to Food and Substantive Equality as Complementary Frameworks in Addressing Women's Food Insecurity. *International Journal of Law in Context*, 19 (3), p. 369. <https://doi.org/10.1017/S1744552323000022> [Last accessed: 7 June, 2024].

30 Committee on Economic, Social and Cultural Rights E/C.12/1999/5, *General Comment No. 12 (1999) on the Right to Adequate Food*, para 6. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/ec1219995-general-comment-no-12-right-adequate-food> [Last accessed: 7 June, 2024].

31 Food And Agriculture Organization of The United Na-

ment No. 12, the exercise of the right to adequate food shall use sustainable means and refrain from contrasting actions with the enjoyment of other human rights, e.g. the right to water.[32]

Law No. 18 of 2012 concerning Food is the legal basis for implementing food sector activities in Indonesia. The preamble of the law stipulates that food is the most important basic human need, and its fulfilment is part of human rights guaranteed in the 1945 Constitution of the Republic of Indonesia as an essential component for creating quality human resources. In addition, it mentions that food sovereignty is the right of the state and nation to independently determine Food policies that guarantee the right to food for the people and give the community the right to determine a food system based on local resource potential. The increasing rate of conversion of agricultural land (in particular, the Islands of Java and Bali) and the increasing national food needs are some of the factors behind the development of concepts and policies for food production in central areas (food estates).[33]

1.3 Right to Participate in Tourism Development

Nurjaya (2022) assesses that despite tourism rights playing a vital role in developing sustainable tourism, it has yet to be academically deliberated. The lack of regulation of tourism rights may be because it is not regarded as a fundamental issue compared to human and ecological rights. However, this right is essential for developing sustainable tourism in the country.[34] From an instrumental aspect, the 'right to tourism' is enshrined in the Global Code of Ethics for Tourism and the Framework Convention on Tourism Ethics, reflecting an adoption of the right to rest and leisure as the second-generation rights which stipulated in the ICESCR.[35]

The existence of rights to tourism and a stand-alone right, however, is still a matter of debate in the context of third-generation Human Rights due to the lack of clarity regarding rights holders, duty bearers, and their contents.[36] The European Economic and Social Committee on Social Tourism determines three indicative conditions to understand social tourism. Two of them, in essence, are related to the right to tourism: the real-life circumstances are such that it is totally or partially impossible to exercise the right to tourism, and entities fully decide to take action to enable a person to exercise their tourism rights.[37]

Law No. 10 of 2009 concerning Tourism (Indonesian Tourism Law) recognizes that the freedom to travel and enjoy free time in the form of tourism is part of human rights.[38] Article 19 (1) of the

tions, (2008). *Methods to Monitor the Human Right to Adequate Food Volume II: An Overview of Approaches and Tools*, Rome, p. 4-5. <https://www.fao.org/4/i0351e/i0351e00.htm> [Last accessed: 7 June, 2024].

32 Sulistina, (2023). Agricultural Policy and Food Security: Challenges and Opportunities. *Proceeding International Conference on Law and Society: Agricultural Law Issues in Multicultural Societies* 1(1), p. 187. <https://law.unej.ac.id/wp-content/uploads/2023/11/PROCEEDING_ICLS_VOL_1_FINAL.pdf>

33 Ministry of Agriculture, (2021, August 26). Decree of the Minister of Agriculture No. 484/KPTS/RC.020/M/8/2021 concerning the Second Amendment to the Decree of the Minister of Agriculture No. 259/KPTS/RC.020/M/05/2020 concerning the Strategic Plan of the Ministry of Agriculture for 2020-2024, Annex, p. 50. <https://rb.pertanian.go.id/upload/file/RENSTRA%20KEMENTAN%202020-2024%20REVISI%202%20(26%20Agt%202021).pdf> [Last accessed: 8 June, 2024].

34 Nurjaya, I. N., (2023). Legal Policy of Sustainable Tourism Development: Toward Community-Based Tourism in Indonesia. *Journal of Tourism Economics and Policy,* 2 (3), p. 125 <https://doi.org/10.38142/jtep.v2i3.404>

35 Tremblay-Huet, S., & Lapointe, D., (2021). The New Responsible Tourism Paradigm: The UNWTO's Discourse Following the Spread of COVID-19. *Tourism and Hospitality,* 2 (2), p. 254. <https://doi.org/10.3390/tourhosp2020015>

36 Arsika, I. M. B., Jaya, I. B. S. D., & Satyawati, N. G. A. D., (2018). Kebijakan Travel Warning dan Pembatasan Hak Berwisata, *Pandecta Research Law Journal,* 13(1), p. 33. <https://doi.org/10.15294/pandecta.v13i1.15115>

37 Panasiuk, A., & Wszendybył-Skulska, E., (2021). Social Aspects of Tourism Policy in the European Union. The Example of Poland and Slovakia. *Economies* 9(1), p. 7. <https://doi.org/10.3390/economies9010016>

38 Dharmawan, N. K. S., (2012). Tourism and Environment: Toward Promoting Sustainable Development of Tourism: A Human Rights Perspective. *Indonesia Law Review,* 2(1), p. 34. <https://doi.org/10.15742/ilrev.

Indonesian Tourism Law recognizes the right of everyone to have the opportunity to fulfil their tourism needs; carry out tourism business; become a tourism worker/laborer; and/or; play a role in the process of tourism development.[39] Article 19 (2) of the Indonesian Tourism law emphasizes that every person and/or community in and around a tourism destination has priority rights to employment, consignment, and/or management. It, therefore, makes clear that a landowner having a land located in a tourism destination has a Right to Participate in Tourism Development.

1.4 The Interrelated Human Rights in the Context of Land Conversion in Bali

The national and regional governments have realized that uncontrolled agricultural land conversion may impact food security. They adopted some regulations to prevent the more catastrophic effect resulting from such a land conversion practice. Presidential Regulation No. 59 of 2019 concerning the Controlling of Farmland Conservation was established to accelerate the establishment of a map of protected rice fields in order to fulfill and maintain the availability of rice fields to support national food needs; control the increasingly rapid conversion of rice fields; empower farmers not to convert rice fields; and provide data and information on rice fields for determining sustainable food agricultural land.[40] Article 6 further determines a map of protected farmland to be carried out through verification of farmland, synchronization of farmland verification results, and implementation of the determination of the farmland map protected.

At the regional level, the Bali Province Regional Spatial Planning Plan for 2023-2043 underlines the need to consider Spatial Planning Plan provisions in the conversion of land to sustainable food agriculture areas and/or technically irrigated rice fields.[41] It also covers the Indication of Directions for Zoning of Agricultural Areas including a prohibition on the conversion of Sustainable Food Agricultural Land and activities that have the potential to disrupt the function of Agricultural Areas.[42] The indication also includes prevention and prohibition on the conversion of agricultural cultivation land into non-agricultural land, except for the construction of infrastructure network systems supporting agricultural areas, such as road networks, electrical energy networks, telecommunications networks, and water networks.[43]

In principle, everyone who owns land in Bali, especially land with an ownership status, has the right to use it, employ other parties to manage it, rent it out, or even transfer the ownership to someone else. The person also deserves to benefit or profit from these things. Problems arise when the land is productive agricultural land, and the owner is tempted to rent or sell the land to other parties for tourism industry interests. This is where the intersection between land ownership rights, the right to food, and the right to

v2n1.10>

39 Laheri, P. E., (2015). Tanggung Jawab Negara terhadap Kerugian Wisatawan berkaitan dengan Pelanggaran Hak Berwisata Sebagai Bagian dari Hak Asasi Manusia. *Jurnal Magister Hukum Udayana,* 4(1), pp. 126-127, <https://doi.org/10.24843/JMHU.2015.v04.i01.p10>

40 Presidential Regulation No. 59, (2019). Concerning the Controlling of Farmland Conservation. *Purpose of the Enactment of the Presidential Regulation*. Article 2. <https://peraturan.go.id/id/perpres-no-59-tahun-2019> [Last accessed: 8 June, 2024].

41 Bali Provincial Regulation No. 2, (2023). Concerning Bali Province Regional Spatial Planning Plan for 2023-2043. *Indication of Zoning Directions for Water Resources Irrigation Systems.* Article 80 (1). <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/29122> [Last accessed: 8 June, 2024].

42 Bali Provincial Regulation No. 2, (2023). Concerning Bali Province Regional Spatial Planning Plan for 2023-2043. *Indication of Agricultural Area Zoning Directions: Activities that are not Permitted.* Article 90 (c). <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/29122> [Last accessed: 8 June, 2024].

43 Bali Provincial Regulation No. 2, (2023). Concerning Bali Province Regional Spatial Planning Plan for 2023-2043. *Indication of Directions for Zoning Agricultural Areas: Prevention and Prohibition of Converting Agricultural Cultivation Land to Non-Agricultural Land.* Article 90 (e) <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/29122> [Last accessed: 8 June, 2024].

be involved in tourism development lies.

From a human rights perspective, the Vienna Declaration and Programme of Action (1993) determines that all human rights are universal, indivisible, interdependent, and interrelated, which must be treated in a fair and equal manner, on the same footing, and with the same emphasis. This basic concept must be used as a basis for analyzing the rights to land, the right to food, and the right to tourism in the context of agricultural conversion practice in Bali.

The UN Special Rapporteurs on the Right to Food repeatedly explain the tight relations between the right to food and land rights. They argued that discrimination in the access to land rights may directly impact the realization of the right to food. They also urge all stakeholders (governments, investors, and local communities) to adopt a more structured approach, placing human rights standards at the center of negotiations as well as introduce a principle outlining that transfer of land use or ownership can only take place with the free, prior and informed consent of the local communities.[44]

The 2023 Report of the Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay, titled 'Tourism and the rights of Indigenous Peoples' is an obvious example of how the right to (indigenous) land collided with the tourism activities and industry. Even though the report mentions GCET and FCTE, it does not expressly use the term 'right to tourism.' It addresses that the short-term economic benefits of tourism projects tend to lack attention on the long-term adverse impacts on Indigenous Peoples and their lands.[45]

1.5 Encouraging Subak as the Basis for Ecotourism and Agro-tourism

The right to land in this paper tends to articulate the individual rights of the land owner to use, rent, or even sell his/her land. The right to food is scoped in the context of agricultural land conversion, which may threaten the enjoyment of the right to adequate food. Whereas, the right to tourism, in this paper, is narrowly meant as the right of everyone to be involved in tourism development and enjoy the benefits resulting from the tourism industry. The next issue is how to solve the massive practice of land conversion. Therefore, this paper proposes subak, which reflects the character of collective rights of the local community, as the basis for ecotourism and agro-tourism as one of the solutions to tackle the issue of land conversion. Both ecotourism and agrotourism must uphold the principles of environmental friendliness, sustainability, balance, independence, and benefit as standards for implementing Balinese Cultural Tourism.[46]

According to Sriarta, Suratman, and Giyarsih (2015), the rapid transformation of area and life posing a threat to subak[47] sustainability are triggered, among others, by the local government's policies biased toward tourism and are not able to accommodate agricultural sectors' interest.[48]

44 Gilbert, J., (2013). Land Rights as Human Rights: The Case for a Specific Right to Land, *SUR. Revista Internacional de Direitos Humanos,* 10(18), pp.126-128 <http://dx.doi.org/10.2139/ssrn.2401190>

45 United Nations Special Rapporteur on the Rights of Indigenous Peoples. *Report on Tourism and the Rights of Indigenous Peoples* A/78/162, paras. 13-14 <https://www.ohchr.org/en/documents/thematic-reports/a78162-tourism-and-rights-indigenous-peoples-report-special-rapporteur> [Last accessed: 8 June, 2024].

46 Bali Provincial Regulation No. 5, (2020). Concerning Standards for the Implementation of Balinese Cultural Tourism. *Principles Used as a basis for Determining Standards for the Implementation of Balinese Cultural Tourism.* Article 2. <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/28583> [Last accessed: 8 June, 2024].

47 Subak is a traditional organization in the field of water use and/or crop management at the farming level in the socio-agrarian, religious, and economic indigenous Balinese communities, which has historically continued to grow and develop. Law No. 15, (2023). Concerning Bali Province. *Definition of Subak.* Explanation of Article 6 <https://peraturan.go.id/id/uu-no-15-tahun-2023> [Last accessed: 8 June, 2024]. In 2012, the UNESCO enlisted Subak in its World Heritage List. UNESCO. (2012). *Cultural Landscape of Bali Province: the Subak* System as a Manifestation of the *Tri Hita Karana* Philosophy. <https://whc.unesco.org/en/list/1194/> [Last accessed: 8 June, 2024].

48 Sriartha, I. P., Suratman, & Giyarsih, S. R., (2015). The

Sarna (2021) assesses that agricultural development is not optimal due to the practice of conversion of agricultural land, which has directly undermined the existence of the traditional irrigation system of Subak.[49] According to Sedana (2021), subak, alternatively, can combine agricultural and tourism interests by developing ecotourism and agritourism.[50] Putra (2023) reveals how the ecotourism concept is applied in Subak Teba Majelangu, Denpasar as an example of how ecotourism protects agricultural areas from land conversion. Besides, Agripina, Siswoyo, and Sumiyati (2023) assess the agrotourism irrigation system in Subak Sembung, Denpasar, which covers an area of 103 hectares and experienced a land conversion of 14 hectares.[51]

Bali Province Regional Regulation No. 4 of 2023 Concerning Bali's Future Development Directions, 100 Years of Bali New Era 2025-2125 envisions subak as a bastion to control conversion of functions and land ownership as well as supporting Bali's agrarian cultural order and food sovereignty. In the context of controlling conversion and land ownership in Bali, the directions, among other things, expecting a tightening of the land conversion process to maintain the area of agricultural land and rice fields, implementing a moratorium on the development of tourism service businesses, especially hotels in the Badung, Denpasar, and Gianyar areas; and as tightening licensing for the development of tourism service businesses in other districts in Bali.[52]

CONCLUSION

There is a prominent intersection between land ownership rights, the right to food, and the right to be involved in tourism development in the context of agricultural land conservation in Bali. Both the national and regional governments are equally aware that converting productive farmland is one factor that weakens food security. The Bali provincial government has issued regulations and policies to prevent the practice of land conversion, which is merely conducted for the sake of the tourism industry. The land conversion, however, cannot be fully controlled by the government, considering that many agricultural lands have ownership status, which means that the land owner has the right to use it, employ other people, rent it out, or even sell it to other parties. Therefore, there is an urgent need to increase awareness of local communities as landowners to prevent such a practice. Besides, stakeholders in the tourism sector should consider the type of tourism that can combine the interests of agriculture and prevent land conversion, e.g., ecotourism and agrotourism, which uphold the basic principles of *the subak* system.

Effect of Regional Development on the Sustainability of Local Irrigation System (A Case of Subak System in Badung Regency, Bali Province). *Forum Geografi,* 29 (1), p. 34 <https://doi.org/10.23917/forgeo.v29i1.789>

49 Sarna, K., (2021). The Existence of Subak in The Legal Politics of Development Program in Bali. *Kertha Patrika,* 43 (3), p. 258. <https://doi.org/10.24843/KP.2021.v43.i03.p02>

50 Sedana, G., Yastini, N. N., & Maulina, N. M. I., (2021). Roles of Local Farmers' Organization in Supporting Food Security: Case of Subak in Bali, *IOP Conf. Series: Earth and Environmental Science,* 911, p. 2. <https://iopscience.iop.org/article/10.1088/1755-1315/911/1/012083>

51 Agripina, I. G. A. W., Siswoyo, H., & Sumiyati, (2023). Performance Assessment of Agrotourism Oriented Irrigation Systems in Subak Sembung, Denpasar City (Penilaian Kinerja Sistem Irigasi Berorientasi Agrowisatadi Subak Sembung Kota Denpasar). *Berkala Sainstek,* 11(2), pp. 86, 87, 92. <https://doi.org/10.19184/bst.v11i2.36887>

52 Bali Provincial Regulation No. 4. (2023). Concerning Bali's Future Development Directions, 100 Years of Bali New Era 2025-2125, Annex, pp. 63, 75. <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/29176> [Last accessed: 8 June, 2024].

BIBLIOGRAPHY

Journals & Proceedings

1. Adnyawati, I. A. A., (2019). Land Conversion Versus Subak: How Bali's Face Gradually Changing Throughout History. Bali Tourism Journal 3(1). <https://doi.org/10.36675/btj.v3i1.35>
2. Agripina, I. G. A. W., Siswoyo, H., & Sumiyati., (2023). Performance Assessment of Agrotourism Oriented Irrigation Systems in Subak Sembung, Denpasar City (Penilaian Kinerja Sistem Irigasi Berorientasi Agrowisata di Subak Sembung Kota Denpasar). Berkala Sainstek 11(2). <https://doi.org/10.19184/bst.v11i2.36887>
3. Antara, M., & Sumarniasih, M. S., (2020). Featured Food Commodities for Food Security Support in Bali Province, Indonesia. Agricultural Socio-Economics Journal, 20(2). <https://doi.org/10.21776/ub.agrise.2020.020.2.7>
4. Arsika, I. M. B., Jaya, I. B. S. D., & Satyawati, N. G. A. D., (2018). Kebijakan Travel Warning dan Pembatasan Hak Berwisata, Pandecta Research Law Journal, 13(1). <https://doi.org/10.15294/pandecta.v13i1.15115>
5. Dharmawan, N. K. S., (2012). Tourism and Environment: Toward Promoting Sustainable Development of Tourism: A Human Rights Perspective. Indonesia Law Review, 2(1). <https://doi.org/10.15742/ilrev.v2n1.10>
6. Domingo-Cabarrubias, L. G., (2023). The Right to Food and Substantive Equality as Complementary Frameworks in Addressing Women's Food Insecurity. International Journal of Law in Context, 19 (3), 367–385 <https://doi.org/10.1017/S1744552323000022>
7. Gilbert, J. (2013). Land Rights as Human Rights: The Case for a Specific Right to Land, SUR. Revista Internacional de Direitos Humanos 10 (18) <http://dx.doi.org/10.2139/ssrn.2401190>
8. Grosso G, Mateo A, Rangelov N, Buzeti T, Birt C., (2020). Nutrition in the Context of the Sustainable Development Goals. European Journal of Public Health, 30 (Supplement 1) <https://doi.org/10.1093/eurpub/ckaa034>
9. Laheri, P.E., (2015). Tanggung Jawab Negara terhadap Kerugian Wisatawan berkaitan dengan Pelanggaran Hak Berwisata Sebagai Bagian dari Hak Asasi Manusia. Jurnal Magister Hukum Udayana 4 (1) <https://doi.org/10.24843/JMHU.2015.v04.i01.p10>
10. Mulyani, S, Putri, F, Andoko, B, Akbar, P, & Novalia, S., (2020). Dampak Pembangunan Infrastruktur Terhadap Kondisi Ketahanan Pangan di Indonesia (Studi Kasus Provinsi Bali), Jurnal Ketahanan Nasional, 26 (3) <https://doi.org/10.22146/jkn.60703>
11. Nurjaya, I. N., (2023). Legal Policy of Sustainable Tourism Development: Toward Community-Based Tourism in Indonesia. Journal of Tourism Economics and Policy 2 (3) <https://doi.org/10.38142/jtep.v2i3.404>
12. Panasiuk, A .& Wszendybył-Skulska, E. (2021). Social Aspects of Tourism Policy in the European Union. The Example of Poland and Slovakia. Economies 9 (1) <https://doi.org/10.3390/economies9010016>
13. Praptika, I.P.G.E., Yusuf, M., & Heslinga, J.H. (2024). How Can Communities better Prepare for Future Disasters? Learning from the Tourism Community Resilience Model from Bali. Indonesia Journal of Tourism Futures <https://doi.org/10.1108/JTF-04-2023-0092>
14. Reuter, T. (2018). Understanding Food System Resilience in Bali,

Indonesia: A Moral Economy Approach. Culture, Agriculture, Food and Environment 41 <https://www.researchgate.net/publication/325547706_Understanding_Food_System_Resilience_in_Bali_Indonesia_A_Moral_Economy_Approach>
15. Reuter, T.A., (2022). Endangered Food Systems: Agriculture, Nutrition and Cultural Heritage in Bali, Indonesia. Unisia 40(1) <https://doi.org/10.20885/unisia.vol40.iss1.art7>
16. Sarna, K., (2021). The Existence of Subak in the Legal Politics of Development Program in Bali. Kertha Patrika 43 (3) <https://doi.org/10.24843/KP.2021.v43.i03.p02>
17. Sedana, G., Yastini, N.N., & Maulina, N.M.I., (2021). Roles of Local Farmers' Organization in Supporting Food Security: Case of Subak in Bali, IOP Conf. Series: Earth and Environmental Science 911 <https://iopscience.iop.org/article/10.1088/1755-1315/911/1/012083>
18. Sriartha, I. P., Suratman., & Giyarsih, S. R., (2015). The Effect of Regional Development on the Sustainability of Local Irrigation System (A Case of Subak System in Badung Regency, Bali Province). Forum Geografi 29 (1) <https://doi.org/10.23917/forgeo.v29i1.789>
19. Suarni, N. W., (2022). Analysis of Rice Availability and Demand in Bali Province on 2020. Jurnal Manajemen Agribisnis 10 (8) <https://doi.org/10.24843/JMA.2022.v10.i01.p08>
20. Sudarma, I. M., Djelantik, A. A. A. W. S., & Setiawan, I. G. B. D., (2024). Agricultural Land Conversion and Its Impact on Farmer's Welfare and Food Security in the Province of Bali. Jurnal Ekonomi Pertanian dan Agribisnis 8 (1) <http://dx.doi.org/10.21776/ub.jepa.2024.008.01.9>
21. Suhadi, Arifin, S., & Niravita, A., (2017). The Responsibility of Local Government on the Protection of Productive Agricultural Land in Indonesia. South East Asia Journal of Contemporary Business, Economics and Law 12 (4) <https://seajbel.com/wp-content/uploads/2017/05/LAW-38.pdf>
22. Sulistina, (2023). Agricultural Policy and Food Security: Challenges and Opportunities. Proceeding International Conference on Law and Society: Agricultural Law Issues in Multicultural Societies 1 (1) <https://law.unej.ac.id/wp-content/uploads/2023/11/PROCEEDING_ICLS_VOL_1_FINAL.pdf>
23. Tremblay-Huet, S. & Lapointe, D., (2021). The New Responsible Tourism Paradigm: The UNWTO's Discourse Following the Spread of COVID-19. Tourism and Hospitality 2 (2) <https://doi.org/10.3390/tourhosp2020015>
24. Wirata, G., (2022). Strategi Peningkatan Ketahanan Pangan pada Masa Pandemi COVID-19 melalui Penguatan Kearifan Lokal di Kabupaten Badung Bali. Jurnal Kajian Bali 12 (1) <https://doi.org/10.24843/JKB.2022.v12.i01.p04>
25. Yasa, P. G. A. S., Sudiarawan, K.A., Dwijayanthi, P. T., & Pranajaya, M. D., (2021). Legal Politics of Land Rights Certification in the Indonesian Context: Between Agrarian Conflicts and Demands for Legal Certainty. International Journal of Criminology and Sociology 10 <https://doi.org/10.6000/1929-4409.2021.10.106>

Legal Acts and Regulations

1. The Constitution of the Republic of Indonesia, (1945) <https://www.mkri.id/public/content/infoumum/regulation/pdf/uud45%20eng.pdf> [Last accessed: 9 June, 2024].

2. Law No. 5, (1960). Concerning Basic Regulations on Agrarian Principles <https://faolex.fao.org/docs/pdf/ins3920.pdf> [Last accessed: 9 June, 2024].
3. Law No. 39, (1999). Concerning Human Rights <https://www.peraturan.go.id/files2/uu-no-39-tahun-1999_terjemah.pdf> [Last accessed: 9 June, 2024].
4. Law No. 10, (2009). Concerning Tourism <https://peraturan.go.id/id/uu-no-10-tahun-2009 >[Last accessed: 9 June, 2024].
5. Law No. 18 of 2012. Concerning Food <https://www.peraturan.go.id/files2/uu-no-18-tahun-2012_terjemah.pdf> [Last accessed: 9 June, 2024].
6. Law No 15, (2023). Concerning Bali Province <https://peraturan.go.id/id/uu-no-15-tahun-2023> [Last accessed: 8 June, 2024].
7. Presidential Regulation No. 59, (2017). Concerning Implementation of the Achievement of Sustainable Development Goals. National Targets for the period 2017 to 2019 in the 2015-2019 National Medium Term Development Plan. Article 2 (1) <https://peraturan.go.id/id/perpres-no-59-tahun-2017> [Last accessed: 7 June, 2024].
8. Presidential Regulation No 59, (2019). Concerning the Controlling of Farmland Conservation. <https://peraturan.go.id/id/perpres-no-59-tahun-2019> [Last accessed: 8 June, 2024].
9. Presidential Regulation No. 111, (2022). Concerning Implementation of the Achievement of Sustainable Development Goals <https://peraturan.go.id/id/perpres-no-111-tahun-2022> [Last accessed: 7 June, 2024].
10. Bali Provincial Regulation No. 5, (2020). concerning Standards for the Implementation of Balinese Cultural Tourism <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/28583> [Last accessed: 8 June, 2024].
11. Bali Provincial Regulation No.7, (2022). Concerning Amendments to Regional Regulation No. 3 of 2019 concerning the Medium Term Development Plan for the Universal Regional Plan of Bali Province for 2018-2023. <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/28922> [Last accessed: 7 June, 2024].
12. Bali Provincial Regulation No. 2, (2023). Concerning Bali Province Regional Spatial Planning Plan for 2023-2043 <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/29122> [Last accessed: 8 June, 2024].
13. Bali Provincial Regulation No. 4, (2023). concerning Bali's Future Development Directions, 100 Years of Bali New Era 2025-2125 <https://jdih.baliprov.go.id/produk-hukum/peraturan-perundang-undangan/perda/29176> [Last accessed: 7 June, 2024].

International Instruments

1. International Covenant on Economic, Social, and Cultural Rights, (1966) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> [Last accessed: 8 June, 2024].
2. Committee on Economic, Social and Cultural Rights E/C.12/1999/5, General Comment No. 12 (1999) on the Right to Adequate Food, para 6 <https://www.ohchr.org/en/documents/general-comments-and-recommendations/ec1219995-general-comment-no-12-right-adequate-food> [Last accessed: 7 June, 2024].
3. Committee on Economic, Social and Cultural Rights, (2022). Gen-

eral Comment E/C.12/GC/26. Land and Economic, Social and Cultural Rights <https://www.ohchr.org/en/documents/general-comments-and-recommendations/ec12gc26-general-comment-no-26-2022-land-and> [Last accessed: 7 June, 2024].
4. Food and Agriculture Organization of the United Nations Rome (2004, November 22-27). Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security <https://openknowledge.fao.org/items/6b7d9ece-1ff8-44e7-9fba-cba32366dea0> [Last accessed: 7 June, 2024].
5. Food and Agriculture Organization of the United Nations. (2008). Methods to Monitor the Human Right to Adequate Food Volume II: An Overview of Approaches and Tools, Rome <https://www.fao.org/4/i0351e/i0351e00.htm> [Last accessed: 7 June, 2024].
6. G20 (2022, November **15-16).** The G20 Bali Leaders' Declaration**. Ministry of Foreign Affairs of the Republic of Indonesia. <**https://kemlu.go.id/download/L3NpdGVzL3B1c2F0L0RvY3VtZW50cy9TaWFyYW4lMjBQZXJzLzIwMjIvRzIwJTIwQmFsaSUyMExlYWRlcnMlMjclMjBEZWNsYXJhdGlvbiwlMjAxNS0xNiUyME5vdmVtYmVyJTIwMjAyMiwlMjBpbmNsJTIwQW5uZXgucGRm**>** [Last accessed: 7 June, 2024].
7. The United Nations Special Rapporteur on the Rights of Indigenous Peoples. Report on Tourism and the Rights of Indigenous Peoples A/78/162 <https://www.ohchr.org/en/documents/thematic-reports/a78162-tourism-and-rights-indigenous-peoples-report-special-rapporteur> [Last accessed: 8 June, 2024].
8. The United Nations General Assembly (2015, 21 October). A/RES/70/1: Transforming Our World: the 2030 Agenda for Sustainable Development <https://documents.un.org/doc/undoc/gen/n15/291/89/pdf/n1529189.pdf?token=ZUwW9RqSVDGzrGVMzs&fe=true> [Last accessed: 7 June, 2021].
9. UNESCO, (2012). Cultural Landscape of Bali Province: the Subak System as a Manifestation of the Tri Hita Karana Philosophy <https://whc.unesco.org/en/list/1194/> [Last accessed: 8 June, 2024].

Documents and Website Contents

1. Deputy for Food and Nutrition Insecurity, National Food Agency of the Republic of Indonesia, (2023). Food Security Index 2023 <https://drive.google.com/file/d/1P5KIdhdmZkVLWIpC82TaCH_3rCxQaLG6/view> [Last accessed: 8 June, 2024].
2. Handayani, C. I. M., Rahmaeni, N. K. D., Mustafa, F., & Billah, M., (2021, December). Status Daya Dukung Pangan Pulau Bali, *Bali and Nusa Tenggara Ecoregion Development Control Center***,** Ministry of Environment and Forestry <http://ppebalinusra.menlhk.go.id/wp-content/uploads/2022/11/Dokumen-Status-Pangan-Pulau-Bali-2021.pdf> [Last accessed: 7 June, 2024].
3. UNESCO, (2017). Kerangka Analisis untuk Mengintegrasikan Tujuan Pembangunan Berkelanjutan (SDGs) dengan Kewajiban Pemenuhan Hak-Hak Asasi Manusia untuk di Indonesia (Analytical Framework for Integrating Sustainable Development Goals (SDGs) with the Obligation to Fulfill Human Rights in Indonesia). Jakarta. <https://sdg.komnasham.go.id/sdg-content/uploads/2017/04/Analytical-Framework-for-SDGs-and-Human-Rights-in-Bahasa.pdf> [Last accessed: 8 June, 2024].
4. Ministry of Agriculture, (2021, August 26). Decree of the Minister of

Agriculture No. 484/KPTS/RC.020/M/8/2021 concerning the Second Amendment to the Decree of the Minister of Agriculture No. 259/KPTS/RC.020/M/05/2020 concerning the Strategic Plan of the Ministry of Agriculture for 2020-2024 <https://rb.pertanian.go.id/upload/file/RENSTRA%20KEMENTAN%202020-2024%20REVISI%202%20(26%20Agt%202021).pdf > [Last accessed: 8 June, 2024].

5. Ministry of National Development Planning/the National Development Planning Agency, (2021, October 18). Decree No. KEP 124/M.PPN/HK/10/2021 concerning Determination of the National Action Plan for Food and Nutrition for 2021-2024 <https://jdih.bappenas.go.id/peraturan/detailperaturan/2804> [Last accessed: 7 June, 2024].
6. National Commission of Human Rights of the Republic of Indonesia, (2021). Standar Norma dan Pengaturan Nomor 7 Tentang Hak Asasi Manusia atas Tanah dan Sumber Daya Alam, Jakarta <https://www.komnasham.go.id/index.php/peraturan/2022/08/05/39/standar-norma-dan-pengaturan-nomor-7-tentang-hak-asasi-manusia-atas-tanah-dan-sumber-daya-alam.html> [Last accessed: 7 June, 2024].
7. Statistics of Bali Province, (2024, April 1). Bali Province Tourism Development February 2024, <https://bali.bps.go.id/pressrelease/2024/04/01/717892/perkembangan-pariwisata-provinsi-bali-februari-2024.html> [Last accessed: 7 June, 2024].
8. Statistics of Bali Province, (2024). Population Projection of Bali Province by Gender and Regency/Municipality (Thousand People), 2022-2024, <https://bali.bps.go.id/indicator/12/28/1/proyeksi-penduduk-provinsi-bali-menurut-jenis-kelamin-dan-kabupaten-kota.html> [Last accessed: 7 June, 2024].

UPDATING AND HARMONIZING LEGISLATION: A PROACTIVE STEP IN COMBATING TRANSNATIONAL ORGANIZED CRIME

Horiya Souiki

Doctor of Law, Higher Education Professor,
Faculty of Law, University of Ain Temouchent, Algeria

Mohamed Bessas

Doctoral Candidate of Law, Faculty of Law,
Laboratory of markets, employment, legislation and simulation in the Maghreb countries,
University of Ain Temouchent, Algeria

ABSTRACT

Organized crime has emerged as one of the most formidable challenges globally, existing as an unavoidable reality with such severe implications that the international community is compelled to unite efforts to counteract it. Its intricate criminal structures and the multiplicity of its criminal activities characterise it.

Owing to its pervasive influence across various crucial sectors, notably the economic, security, and social realms, many nations have been overwhelmed by their inability to tackle it independently, thus underscoring the urgent need for innovative mechanisms to mitigate its adverse impacts and ramifications.

Therefore, updating and approximating legislation is an essential proactive step to combat organized crime by providing modern legal tools that allow the security and judicial agencies to keep pace with the evolving methods of this crime, starting with formulating a comprehensive definition of organized crime that includes all its components and characteristics, and enacting laws that criminalize all

organized criminal activities, such as Drug trafficking, money laundering, and human trafficking, enacting other laws that allow the confiscation of profits from organized crime and their reuse in anti-crime programs, and establishing mechanisms to enhance cooperation between security and judicial agencies and other government bodies.

KEYWORDS: Organized crime, Preventive action, Repressive action, Updating and Harmonizing legislation

INTRODUCTION

Organized crime represents an acute threat to both national and international security and stability, effectively assaulting state sovereignty by undermining and potentially demolishing social and economic institutions. It obstructs development, misdirects economies from their intended trajectories, and inflicts harm globally.

The advent of economic globalization, coupled with advancements in communication and transportation technologies, has notably facilitated the expansion of organized crime networks across borders, enhancing the variety of criminal activities they engage in.

Organized crime is by no means a novel phenomenon; it has been acknowledged for an extensive period, originating with the mafia and organized gangs in America from the start of this century. However, since the latter half of the century, as Europe began assimilating the American socio-economic model, American influences have markedly shaped European life, bringing the organized crime scenario in Europe into closer alignment with that of post-World War II America. As a result, developing nations such as Afghanistan, India, Egypt, and Iraq have become highly susceptible arenas for the deleterious effects of organized crime.[1]

Considering the escalation of violence, corruption, bribery, and the inclination towards unlawful vengeance, the significance of addressing organized crime is apparent both theoretically and practically. Theoretically, the discourse on organized crime pertains to a global understanding of criminality and the adverse effects organized crime imposes on developing countries vulnerable to security breaches and exploitation.

From a practical and operational viewpoint, organized crime involves activities crucial to both national and global economies, potentially jeopardizing these economies through illicit associations and activities such as narcotics and arms trafficking, trade in human organs, and money laundering. The tangible increase in organized crime's magnitude has been emphatically highlighted at various United Nations summits, particularly concerning the deregulation of international trade.[2]

Organized crime has been labelled variously as predatory crime, criminal syndicates, or criminal organizations. Irrespective of the terminology used, the essence remains constant, leading to an enfeebled economy, societal disintegration, pervasive administrative corruption, and political dependence.

Such dynamics pose grave threats to state sovereignty and may even jeopardize their existence. Given its detrimental aftermath and impact across diverse sectors, especially the economic and security domains, which affect the foundational values of society, numerous countries find themselves incapable of combating it unilaterally, thus necessitating the exploration of alternative strategies to eradicate its enduring effects and residues. Consequently, this raises a pivotal question: How effective is the modernization of legislation as a preemptive strategy in combating organized crime?

To draw this study to a close in its comprehensive form, the analysis relies on a binary division structured around the following elements:

1 Laghidze, E. (2024). Seizure and confiscation as an effective means of combating transnational organized crime. Law and World, 9 (1), p. 1-19.

2 Elachawi, A. A. (2006). Research in International Criminal Law (1st edition.). Algiers: Houma for Printing, Publishing, and Distribution, p.231.

- The conceptual framework of organized crime.
- The extent of the effectiveness of approximating and updating legislation in combating organized crime.

1. THE CONCEPTUAL FRAMEWORK FOR ORGANIZED CRIME

The designation "organized crime" does not merely refer to a category of crime identifiable by name, such as bribery, but rather describes a set of criminal activities distinguished by specific attributes. These crimes share elements and conditions unique to each, unified by the gravity of their offenses and the structured manner in which their perpetrators operate. Detailed discussion of this aspect follows below.

1.1. Definition of Organized Crime

Organized crime impacts more than just the internal security and tranquility of nations; it extends its reach to affect international security and the global community's peace. Its severity is such that despite extensive scholarly discourse, a definitive and universally accepted definition has eluded consensus.[3]

This lack of agreement has spurred international organizations to propose their own definitions to encompass its various manifestations for effective criminalization and subsequent countermeasures.[4]

A pivotal definition provided by Article 2, paragraph "a", of the United Nations Convention Against Transnational Organized Crime states: "An 'organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with this Convention, to obtain, directly or indirectly, a financial or other material benefit".[5]

1.2. Characteristics of Organized Crime

The defining characteristics of organized crime include:

1.2.1. Planning and Organization

The elements of planning and organization are fundamental to organized crime, which sets it apart from simpler, opportunistic crimes that lack systematic planning ensuring success and sustainability. Organized crime is marked by a sophisticated human and material structure tailored to its perilous criminal undertakings.

1.2.2. Professionalism

Professionalism in organized crime involves adequate maturity and experience, the employment of cunning tactics, a commitment to criminal pursuits, and a willingness to make sacrifices to further these illegal activities.[6]

1.2.3. Commitment to the Internal Order of the Group

Members of organized criminal groups are expected to show unwavering loyalty to their leader or boss, adhering strictly to his commands without question. This includes demonstrating their capability to lure others into unlawful situations, thereafter isolating themselves and tackling any challenges through extensive use of harassment, defamation, and violence, potentially escalating to physical elimination. Such actions are carried out under a regime of blind obedience, devoid of any moral conflict.[7]

3 Finckenauer, J.O. (2005). Problems of definition: What is organized crime? Trends in Organized Crime, 8(2), pp. 63-83.

4 Kara, W. (2016). Fight against organized crime in international legislation (1st edition.). Jordan: Dar Al-Ayyam for Publishing and Distribution, p. 390.

5 United Nations Convention Against Trans-national Organized Crime, 2000 <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> [Last accessed: 24 March, 2024].

6 Bassiouni, M. C. (2004). Transnational Organized Crime (1st edition.). Lebanon: Dar Al Shorou, p.11.

7 Ramzi, N. (2002). Money Laundering: Crime of the

1.2.4. Complexity

The complexity of organized crime is apparent through its meticulous hierarchical structure among participants, astute manipulation of material and human resources, and the extensive array of tactics available to evade detection.

1.2.5. Substantial Profit

Organized crime operates on an international scale with the primary aim of amassing significant and swift profits, far outpacing those attainable through legitimate business operations. These illicit earnings are subsequently laundered to obscure their unlawful origins before being reintegrated into the economy as seemingly legitimate assets.[8]

1.3. Domains of Organized Crime

Organized crime spans a vast array of domains, which are extensive and diverse. These include trafficking in human beings, also known as white slavery, drug trafficking, arms trafficking, child trafficking, as well as trafficking in antiques, artifacts, cultural, and intellectual properties.

Additional areas involve human smuggling, illicit disposal of nuclear waste in developing countries, money laundering, currency forgery, car theft, credit card fraud, and various forms of cybercrimes. The scope of these activities is broad and the profits are significant, making it difficult to envision any lucrative domain that does not attract the involvement of organized crime groups.[9]

1.4. Factors Contributing to the Emergence and Spread of Organized Crime

Several factors contribute to the rise and proliferation of organized crime, which include:

1.4.1. Free Market System

The free market system provides expansive opportunities for commercial activities, presenting significant opportunities for organized crime groups to conduct operations that escape regulatory oversight. This phenomenon became particularly pronounced following the dissolution of the Soviet communist regime, which had previously imposed strict economic controls.[10]

1.4.2. Weak and Corrupt Criminal Justice System

When the criminal justice system is perceived as ineffective or corrupt, it erodes public trust in its capacity to enforce the law fairly. This disillusionment often drives individuals, especially those from unclassified or politically marginalized groups, towards seeking justice or resolution through organized crime networks, which appear more effective or accessible.[11]

1.4.3. Social Decay

A complete disintegration of social and legal norms leads to an increase in crimes such as prostitution, drug trafficking, gambling, and forgery. Contributing to this decay are the collapse of traditional values and morals, the pursuit of quick profits by any means, the deterioration of educational systems, rising rates of illiteracy and unemployment, widening gaps between social classes, and discrimination based on political, regional, ethnic, or sectarian differences.

The weakening of family bonds further exacerbates this decay, creating fertile ground for the spread of organized crime.

Age, (1st edition.). Amman: Dar Wael for Publishing, p.56.

8 Daoud, S. (2001). Money Laundering and Banking Secrecy (D.T.). Lebanon: Sader Publishers, p. 46.

9 Behnam, R. (1996). The Fight Against Crime (D.T.). Alexandria: Knowledge Establishment, p. 136.

10 Ramzi, N., op. cit, p. 61.

11 Touhami, M. R. (2018). An analytical study of the phenomenon of money laundering and the efforts made to combat it in Algeria. Al-Biban Journal for Legal and Political Studies, 7(2), pp. 85-100.

1.4.4. Administrative Corruption

When administrative systems are riddled with corruption and bribery, it enables organized crime groups to manipulate or control government bodies.

1.4.5. Wars

Wars disrupt the normal functioning of constitutional governance and legal systems, creating environments conducive to the illicit trade in weapons, intellectual property, and cultural artifacts. Such conditions are prevalent in many conflict-ridden Arab countries, where the breakdown of order provides a perfect opportunity for organized crime to flourish.[12]

1.4.6. Non-integrated Minorities

Minority groups that find themselves in conflict with prevailing political systems often strive to maintain their original national identities. In doing so, they may establish security and social barriers to protect themselves from state oppression. To support these efforts, they frequently rely on external aid, which may include alliances with organized crime groups that provide necessary resources or interventions within society.[13]

1.5. Globalization of Organized Crime

In no prior epoch has such a vast number of individuals worldwide possessed as much awareness of international events and the distinctive traits of different peoples as they do in the current era. Today, the global population can tap into an unprecedented wealth of information through a plethora of media and communication technologies, of which the Internet is a pivotal component.[14]

However, it is deeply regrettable that these platforms of knowledge, which have the potential for purely legitimate use, are increasingly commandeered by organized crime syndicates. These groups cunningly exploit these technologies for illicit purposes.[15]

The paradigm shift in criminal activity from physical to intellectual effort marks a significant evolution in the nature of crime. Today, a criminal proficient in digital technologies can remotely infiltrate bank accounts, execute transactions, and purchase goods with other people's money. They can also engage in sophisticated cybercrimes, such as credit card fraud, which poses severe risks to the economic stability and security of nations.[16]

The rapid advancements in communication technologies, notably the Internet and electronic media, have endowed organized crime with a distinctly transcontinental character. Traditional geographical and political boundaries have become virtually irrelevant as criminal enterprises operate on a multinational scale.

The orchestrators of these crimes can operate across multiple countries, coordinating actions that are executed globally. This technological prowess, combined with a regulatory environment characterized by economic and social liberties that verge on anarchic, and the generally weak oversight mechanisms, substantially facilitates the operations of organized crime.[17]

These elements enable them to achieve their nefarious objectives with little risk of detection, leaving virtually no evidence that could be traced back to them.[18]

12 Al-Lamsawi, A. (2007). Principles of International Humanitarian Law (1st edition). Cairo: National Center, p.66.

13 Jaafar, A. M. (1998). Combating Organized Crime (1st edition.). Beirut, Lebanon: University Foundation for Studies, Publishing, and Distribution, p. 149.

14 Touhami, M. R., op. cit, pp. 85-100.

15 Bassiouni, M. C. (2004). Transnational Organized Crime: Its Nature and Means of Combating it Internationally and Arabically (2nd edition.). Cairo: Dar Al Shorouk, p. 196.

16 Fattach, N. (2021). Globalization and Crime: What is the relationship? Transnational Organized Crime as a model. Journal of Legal Studies, Sovereignty and Globalization Laboratory, Faculty of Law and Political Sciences, 7(2), pp. 802-824.

17 Bassiouni, M. C., op. cit, p.198.

18 *Ibid*.

2. THE EFFECTIVENESS OF MODERNIZING AND HARMONIZING LEGISLATION IN COMBATING ORGANIZED CRIME

Organized crime entities boast international expertise, proficiency, and a criminal culture adept at crafting effective strategic plans. They exploit disparities in criminal legislation across countries, leveraging the variances spawned by diverse political, economic, and cultural systems.

Additionally, the uneven development of economic systems across nations allows the material components of crimes to be executed transnationally, thereby complicating enforcement and punishment. Assuming that punitive measures can be effectively applied, this would necessitate a minimum degree of legislative harmony among the various national laws.[19]

Thus, there is a compelling need for countries to modernize and align their legal frameworks to bolster the efficacy of both preventive and repressive measures against organized crime.

The term "legislative system" encompasses a set of written legal rules established by the relevant authorities within a state to regulate the interactions of individuals within society. This system may include constitutional, organic, ordinary, or secondary legislation enacted by legislative or executive powers and applicable across various domains such as constitutional, civil, commercial, criminal, administrative law, and more, at both international and domestic levels.[20]

Legislation is inherently advantageous because it responds dynamically to the shifting demands of society. Its ease of creation, amendment, and repeal allows it to adapt swiftly to new social and economic circumstances. Moreover, the legislation serves as a vehicle for societal reform and advancement by incorporating modern systems, embracing new principles, or adapting successful practices from other nations deemed beneficial by state reformers and thinkers.[21]

The clarity with which legislation is drafted also aids individuals in understanding their rights and responsibilities, thereby providing a level of transactional stability and security.[22]

These attributes refute any notion of legislative rigidity or sanctity and dispel concerns that prevailing authorities could manipulate it for self-serving ends. This perspective is supported by legislative reforms in numerous countries, including France, where legislation has evolved significantly to remain aligned with contemporary realities and intellectual developments.[23]

In this context, it is crucial to confront organized crime by continuously updating and harmonizing legislative frameworks to ensure the effectiveness of preventive and repressive strategies on national and international levels.

2.1. Ensuring Preventive Action Against Organized Crime

Given the diversity of causes and motivations behind organized crime, it is imperative that the evolution of legislative frameworks encompasses all facets of society.

2.1.1. In the Security Field

The security apparatus within any nation serves as the practical arm of enforcement for existing legislation and is intrinsically linked to the strategies for countering organized crime. Therefore, nations must avoid restrictive legislation that fails to evolve in response to the changing dynamics of crime, particularly organized crime.[24]

This type of crime impacts the security of all nations, threatening their integrity and sovereignty. Consequently, there is a compelling need

19 Touhami, M. R., op. cit, pp. 85-100.

20 Bassiouni, M. C., op. cit, p. 198.

21 Touhami, M. R., op. cit, pp. 85-100.

22 Jaafour, M. S. (2011). Introduction to Legal Sciences (1st edition.). Algiers: Dar Houma for Printing, Publishing, and Distribution, p. 23.

23 *Ibid*.

24 Global initiative against transnational organized crime. (2024, January 23). Time for a global strategy against organized crime, <https://globalinitiative.net/analysis/global-strategy-against-organized-crime/> [Last accessed: 3 March, 2021].

for countries to collaborate and forge new international cooperation mechanisms under the auspices of both regional and global organizations.[25]

This includes the formation of international treaties that allow for the criminalization of diverse criminal activities through specific legal provisions tailored to impose unique criminal sanctions. These agreements must clearly define the material and moral components of crimes to eliminate any ambiguity about the criminal intent and actions of the offenders.[26]

Possible security measures to enhance the level of security include:[27]

- Broadening the reach of criminal laws to combat organized crime and empowering national legislations through international treaties to pursue criminal elements across borders in collaboration with the implicated countries. This approach represents an exception to the principle of the territoriality of criminal law and applies the principle of international solidarity in combating global crime.
- Facilitating coordination between security forces and high-tech companies to ensure that security personnel are informed about the potential criminal use of technological means.
- Establishing operational units affiliated with international police that are technically and administratively equipped to conduct investigations and pursuits. Additionally, creating specialized international units focused on international crime, with interconnected branches across all member states, tasked with research, investigations, scientific analysis, and aggregating and disseminating information that can be exchanged among member nations.

Establishing governmental institutions that legislate and enforce these preventive measures will not only potentially eradicate the phenomenon of organized crime but also enhance the respect and legitimate status of these nations among their citizens and the international community.

2.1.2. In the Economic Field

The economy is a primary driver of national development and consequently influences international relations. Control over economic policy is tantamount to control over international strategic decisions.[28]

Conversely, a nation that is unable to stabilize its economic environment is susceptible to external domination, whether by foreign states, international organizations, organized crime syndicates disguised as multinational or tourist corporations, or other entities that ostensibly conduct legitimate operations but generate illicit revenues.[29]

Recognizing that reform starts from within, to combat organized crime at the economic level, nations should implement a range of measures, including:[30]

- Reducing taxes and fees for citizens to prevent the erosion of their financial resources is particularly important as most citizens have limited incomes. This measure should be counterbalanced by increasing the tax burden on wealthier and more influential individuals to lessen the pronounced economic disparities that may push the less affluent towards organized crime as a means of asserting their rights.
- Enhancing the living standards of citizens through equitable redistribution of the national wealth surplus. This approach aims to combat poverty effectively and block any exploitation of citizens' deteriorating economic conditions for recruitment into organized criminal activities

25 Boubaia, K.. Wali, A. L. (2021). Problems in Coordinating International Cooperation to Combat Transnational Organized Crime. Journal of Legal Studies and Research, 6(1), pp. 93-109.

26 *Ibid*.

27 Touhami, M. R., op. cit, pp. 85-100.

28 Zibar, C. (2020). International Criminal Policy Trends as a Legal Mechanism to Confront Transnational Organized Crime. Journal of Legal and Economic Research, 3(2), pp. 263-280.

29 Boubaia, K., Wali, A. L., op. cit, pp. 93-109.

30 Zibar, C., op. cit, pp. 263-280.

such as human trafficking or instances where individuals are compelled to sell their children for sexual exploitation or organ harvesting.

- Enabling the monitoring and tracking suspicious financial transactions and pursuing funds with unclear origins, even those within secretive digital accounts. Additionally, overseeing the economic and commercial activities of individuals associated with these accounts to deter their involvement in organized criminal endeavours.

2.1.3. In the Social Field

Social cohesion is indispensable in the battle against organized crime. Society's confidence in itself, rooted in the respect for its rights and freedoms and the earnest fulfilment of its responsibilities, is key to unlocking its potential and propelling it to higher societal levels. Several strategies can be implemented to foster this cohesion, including:[31]

- Actively combating social and moral malaises by enforcing a framework of esteemed principles. These include the "principle of reward and punishment", the "principle of responsibility", and the "principle of reciprocity between rights and duties in the relationship between individuals and the state". This framework ensures that every individual receives their due rights without bias or detriment and fulfils their obligations fully without circumvention or diminishment.
- Providing employment opportunities for all capable individuals to alleviate the unemployment crisis and offering education to eradicate illiteracy are crucial steps. Maintaining public health through accessible and affordable medical care is also vital, as these measures are among the most effective in deterring individuals from engaging in organized crime.
- Emphasizing the role of youth in society, representing both a significant majority and the driving force of societal progress, is crucial. Investing in youth is essential for economic and social development and preventing the proliferation of organized crime and corruption in all its forms—be it moral, administrative, or otherwise.

2.1.4. In the Cultural Field

Addressing organized crime from a cultural standpoint involves reinforcing societal ethical standards. This is especially pertinent given that the crisis many nations currently face is fundamentally a moral one. Measures that authorities can undertake include:[32]

- Promoting high moral standards, virtuous behaviours, and noble values across various media platforms—print, broadcast, and digital. Enhancing the cultural understanding of security issues helps citizens comprehend the risks associated with organized crime and steers them from falling into criminal networks. This approach is preferable to promoting superficial and entertainment-focused media content.
- Organizing and encouraging participation in conferences, seminars, and educational sessions across all levels of education and community gatherings, including religious venues. These events should educate all societal segments about their roles in preserving the political, economic, and primarily cultural independence of their country to prevent their involvement in organized crimes. This educational outreach should leverage the rich civilizational backdrop of the Islamic faith and the heritage of high values that underpin societal norms.
- Significantly valuing intellectuals and elevating the stature of the nation's scholars, thinkers, and innovative minds across all disciplines. These individuals are pivotal to the nation's prosperity, progress, and consciousness, both morally and materially, acting as catalysts for broader societal advancement and enlightenment.

31 Zibar, C., op. cit, pp. 263-280.

32 *Ibid*.

2.1.5. In the Political Field

Justice is foundational for establishing and developing states, fostering societies' flourishing in all aspects. Injustice and tyranny, conversely, are the bedrock of societal decline and the proliferation of criminal activities. If they aim to avoid confrontations with organized crime, it is imperative for governing bodies to cultivate and elevate the mutual trust between the governing systems and the populace. This trust must reflect genuine social realities and ongoing material conditions rather than being constituted of hollow organizational manoeuvres or deceptive media displays. For instance:[33]

- Embracing dialogue as a primary methodology and nurturing the principle of mutual good faith between the government and its citizens, founded on the assumption that all actions are initially presumed to be driven by good intentions.[34]
- Enforcing a genuine equality principle among all citizens and eschewing any form of double standards, particularly regarding minority groups. This is crucial to deter these groups from feeling compelled to engage with organized crime syndicates to influence governmental decisions in their favour or to prevent adverse governmental actions.
- Abandoning repressive methods in dealing with citizens, such as arbitrary detention and torture, and other forms of inhumane treatment that contravene basic human rights principles. These practices not only undermine the legitimacy of the state but also aggravate societal tensions and propel individuals towards criminal affiliations.

2.2. Ensuring Repressive Action in the Face of Organized Crime

The global focus on organized crime is intensifying as data reveals a significant rise in the frequency and complexity of these offences. These crimes pose a formidable threat to states' national security and underscore the urgent need for robust legislative frameworks that not only deter but also adequately penalize transgressors. This is essential to protect public safety, uphold property rights, and preserve the integrity and sovereignty of the state. This necessity becomes even more critical when existing preventive measures are insufficient to curb the tide of organized criminal activities.[35]

The most important recommendations cover three areas regarding repressive action against organized crime, which are:

2.2.1. Extradition of Criminals:

Modern scientific advancements have facilitated the rapid expansion of organized crime networks across multiple countries, thereby creating a perilous sense of impunity among criminals shielded from prosecution by affected state authorities. One of the most effective repression tactics is the adoption and enforcement of comprehensive extradition treaties to counteract this. These treaties should be designed to ensure:[36]

- Extradition to states where the crime's consequences are felt, even if the criminal acts did not occur within their territories. This approach is justified as these states are better positioned to assess the impact of the crimes and impose appropriate penalties that reflect the severity of the offences, thereby deterring similar future acts that could undermine state security or stability.
- Extradition to the jurisdiction where the crime occurred is necessary to facilitate

33 Touhami, M. R., op. cit, pp. 85-100.

34 Jassem, M. Z. (2006). The Concept of Globalization in Contemporary International Organization (3rd Edition.). Beirut, Lebanon: Halabi Legal Publications, p. 207.

35 Abdel Maati, A. K. (2022). Organized Crime and Its National and International Confrontation Methods (1st Edition.). Cairo: Dar Al-Nahda Al-Arabiya, p. 131.

36 Jassem, M. Z., op. cit. p. 213.

the gathering and evaluation of evidence and to enhance the administration of justice. Local prosecution helps ensure that penalties maintain their intended deterrent effect, as punishments meted out in the vicinity of the crime have a stronger impact on both the perpetrator and the community affected by the crime.

2.2.2. Shifting the Burden of Proof:

In organized crime, where the activities are exceptionally perilous and have widespread repercussions, adjusting the standard legal presumptions to better protect societal interests is imperative. Traditionally, the presumption of innocence, as stated in the Universal Declaration of Human Rights[37] and upheld by international and national laws, including Algerian law, affirms that an accused person is considered innocent until proven guilty.

This standard demands that the prosecution bear the burden of proof, granting the accused the right to remain silent, with any ambiguities in evidence interpreted in their favour.[38]

Given the severe impact and covert nature of organized crime, however, it is often rational to invert this presumption for specific cases associated with organized crime. This means treating the accused as guilty until proven innocent, thereby shifting the burden of proof onto the accused.

This shift requires the accused to actively demonstrate their innocence rather than the state solely proving their guilt. Such an approach also entails interpreting any doubt arising during the trial as unfavourable to the accused and considering the accused's silence as an admission of guilt. This method significantly enhances the state's ability to combat organized crime effectively, prioritizing society's collective security and welfare over individual rights when strictly necessary.

2.2.3. Intensifying Punishments for Perpetrators of Organized Crime

The rationale behind punishment within the judicial system is to safeguard the collective welfare of the community and individuals' rights. For punishment to serve its purpose effectively against organized crime, it must adhere to a comprehensive framework that encapsulates several core principles:

- The primary function of punishment should be the prevention of crime before its occurrence, the reformation of offenders, and the deterrence of potential criminals by applying strict consequences following criminal acts.
- The severity of punishment should align with the societal necessities and the overarching interests of the community. This alignment means that penalties may be adjusted, either reduced or intensified, based on the needs dictated by the community's higher interests.
- The nature of the punishment should be tailored to what will most effectively protect society, which could range from capital punishment and incarceration to exile, among other forms of legal penalties.
- The system should not be constrained to a fixed type or a limited number of punitive measures. Any punishment that fulfils the community's needs should be considered valid and legitimate, and any argument against this principle is deemed trivial when serious societal threats are at stake.

In light of the profound impact of organized crime on national and international levels, affecting security, political, economic, social, and cultural domains, there is an unmistakable need for harsher penalties. Such measures are crucial for all involved in organized crime, proportionate to each individual's involvement, the nature of their criminal activities, and the severity of the consequences of these crimes.

After evaluating the grave implications of

37 Universal Declaration of Human Rights, issued by the United Nations General Assembly, 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [Last accessed: 23 March, 2024].

38 Algerian Criminal Procedure Code (1966). In public action and civil action. Preliminary arrangements. Ministry of Justice. Joradp.dz [Last accessed: 22 March, 2024].

organized crime and its capacity to destabilize various foundational aspects of countries, it is evident that organized crime ranks among the criminal activities most deserving of escalated punitive measures. Legislators are urged to implement stringent punishments to guarantee the most comprehensive protection possible for societies and sovereign states.

CONCLUSION

Organized crime is an intricate and multifaceted issue, distinguished by its transnational nature, that affects nations' political, economic, and social equilibriums. The inherent dangers of organized crime stem from its operational modalities, committed by well-organized, specialized gangs that conduct their illicit activities with a high degree of secrecy and persistence.

This level of organization enhances their threat by employing intimidation, terrorism, violence, and bribery to amalgamate legitimate with illicit operations, thereby maximizing their illegal profits.

The global community now faces the imperative to formulate a cohesive strategy to counteract all manifestations of organized crime, particularly those that traverse national boundaries and compromise neighbouring states' ethical, economic, and political sanctity.

Addressing the challenge of organized crime on an international scale necessitates the establishment of new extraterritorial jurisdictional norms and enhanced frameworks for global cooperation in legislative, judicial, and security dimensions. The effective combat against organized crime mandates an activated international cooperation grounded in authentic and robust collaboration among nations.

Given the escalating nature of organized crime, propelled by global shifts and advancements in technology and media, a concerted effort by all nations to implement both preventative and repressive strategies, as discussed, is essential. This collective endeavour is crucial to curtail organised crime's expanding scope and fortify global security and stability.

BIBLIOGRAPHY

Books

1. Abdel Maati, A. K. (2022). Organized Crime and Its National and International Confrontation Methods (1st Edition.). Cairo: Dar Al-Nahda Al-Arabiya.
2. Al-Lamsawi, A. (2007). Principles of International Humanitarian Law (1st edition). Cairo: National Center.
3. Bassiouni, M. C. (2004). Transnational Organized Crime (1st edition.). Lebanon: Dar Al Shorouk.
4. Bassiouni, M. C. (2004). Transnational Organized Crime: Its Nature and Means of Combating It Internationally and Arabically (2nd edition.). Cairo: Dar Al Shorouk.
5. Behnam, R. (1996). The Fight Against Crime (D.T.). Alexandria: Knowledge Establishment.
6. Daoud, S. (2001). Money Laundering and Banking Secrecy (D.T.). Lebanon: Sader Publishers.
7. Elachawi, A. A. (2006). Research in International Criminal Law (1st edition.). Algiers: Houma for Printing, Publishing, and Distribution.
8. Jaafar, A. M. (1998). Combating Organized Crime (1st edition.). Beirut, Lebanon: University Foundation for Studies, Publishing, and Distribution.

9. Jaafour, M. S. (2011). Introduction to Legal Sciences (1st edition.). Algiers: Dar Houma for Printing, Publishing, and Distribution.
10. Jassem, M. Z. (2006). The Concept of Globalization in Contemporary International Organization (3rd Edition.). Beirut, Lebanon: Halabi Legal Publications.
11. Kara, W. (2016). Fight against organized crime in international legislation (1st edition.). Jordan: Dar Al-Ayyam for Publishing and Distribution.
12. Ramzi, N. (2002). Money Laundering: Crime of the Age (1st edition.). Amman: Dar Wael for Publishing.

Journals

1. Boubaia, K., Wali, A. L. (2021). Problems in Coordinating International Cooperation to Combat Transnational Organized Crime. Journal of Legal Studies and Research, 6(1).
2. Laghidze, E. (2024). Seizure and confiscation as an effective means of combating transnational organized crime. Law and World, 9(1).
3. Fattach, N. (2021). Globalization and Crime: What is the relationship? Transnational Organized Crime as a model. Journal of Legal Studies, Sovereignty and Globalization Laboratory, Faculty of Law and Political Sciences, 7(2).
4. Finckenauer, J. O. (2005). Problems of definition: What is organized crime? Trends in Organized Crime, 8(2).
5. Touhami, M. R. (2018). An analytical study of the phenomenon of money laundering and the efforts made to combat it in Algeria. Al-Biban Journal for Legal and Political Studies, 7(2).
6. Zibar, C. (2020). International Criminal Policy Trends as a Legal Mechanism to Confront Transnational Organized Crime. Journal of Legal and Economic Research, 3(2).

Websites

1. Global initiative against transnational organized crime. (2024, Janary 23). Time for a global strategy against organized crime <https://globalinitiative.net/analysis/global-strategy-against-organized-crime/> [Last accessed: 3 March, 2021].
2. United Nations Convention Against Trans-national Organized Crime, 2000, <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> [Last accessed: 24 March, 2024].
3. Universal Declaration of Human Rights, issued by the United Nations General Assembly, 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [Last accessed: 23 March, 2024].

Legal Act

1. Algerian Criminal Procedure Code. (1966). In public action and civil action. Preliminary arrangements. Ministry of Justice. Joradp.dz [Last accessed: 22 March, 2024].

BOYCOTTING PRODUCTS: A DETERRENT APPROACH BY CONSUMER PROTECTION ASSOCIATIONS

Gounane Kahina

Doctor of Law, Professor lecturer A
Universite Mouloud Mammeri Tizi, Ouzou, Algeria

ABSTRACT

Boycott is considered one of the most important means employed by consumer protection associations to deter interveners in product presentation for consumption and halt their illegitimate practices against consumers. It involves systematic refusal and voluntary abstention from consuming the products of a company or a country to pressure or compel them to respond to specific demands by urging consumers to boycott purchasing a certain product, using a particular service, or boycotting paying its price. Despite the importance and effectiveness of this method, there is a noticeable absence of regulation that precisely defines the powers of consumer protection associations to resort to it, thus its legitimacy remains a subject of debate between opponents due to social, economic, and legal considerations, and supporters for the same reasons.

Based on this premise, this study aims to investigate how consumer protection associations intervene within their deterrent role framework by advocating for boycotts to maintain a balance between consumer interests and protecting interveners, considering the economic harm that this method may inflict on their interests.

KEYWORDS: Boycott, Consumer Protection Association, Consumer, Intervener, Deterrence, Legitimacy, Legal Considerations, Economic Considerations, Social Considerations

INTRODUCTION

The evolution witnessed in the social, industrial, and technological fields has led to increased consumer fever, especially in the face of excessive advertising that has contributed to changing consumption patterns and values. Despite the benefits this evolution brings to consumers regarding comfort and life facilitation, it has not been without some drawbacks for them. Therefore, there is an urgent need for protection, which consumers cannot achieve on their own but rather by resorting to consumer protection associations as a regulatory mechanism. Algerian legislation has recognized these associations under Article 21 of Law No. 09-03 concerning consumer protection and the suppression of fraud.[1] These associations are established according to the law and aim to ensure consumer protection through informing, raising awareness, and guiding them. They are also granted public utility status as well as legal personality and civil capacity upon establishment, in accordance with the provisions of Article 07 of Law No. 12-06 concerning associations,[2] which regulates their establishment and operation.

Consumer protection associations have the authority to take proactive measures to prevent interference with consumers' material and moral interests. These measures aim to enhance their fundamental rights, particularly the right to awareness-raising, to educate and inform them about their rights. This is intended to guide and rationalize their consumption behaviour and prepare them to face potential risks. On the one hand, they work towards educating consumers and guiding their consumption behaviour, while on the other hand, they monitor market prices to ensure consumers can access goods and services that combine quality with reasonable pricing.

However, practical reality has shown the inadequacy and inefficiency of preventive measures in ensuring sufficient consumer protection against interveners who may abuse their strong position. Therefore, consumer protection associations are left with no choice but to resort to bolder mechanisms and means to defend the rights and interests of consumers.

Boycotting is considered the most important deterrent method employed by consumer protection associations in facing interveners, urging them to halt their unlawful practices against consumers. It involves a systematic refusal and voluntary abstention from consuming the products of a particular company or state to pressure them or compel them to respond to specific demands. Despite its effectiveness in curbing the defiance of professionals, it's notable that Algerian legislation does not explicitly address it.

In light of this legislative deficiency, the importance of researching the mechanism of boycott in detail becomes evident. Understanding the limits of resorting to boycott is essential to ensure its legitimacy. Therefore, the research topic raises the following problem: To what extent is it possible for consumer protection associations, within their deterrent role, to resort to the boycott method, and how can they ensure maintaining a balance between consumer interests and protecting interveners? This includes mitigating the potential economic harm this tool may inflict on their interests.

The study relied on both analytical and descriptive methodologies. The analytical approach allowed for analyzing facts and the legal texts regulating the subject, highlighting the areas of deficiency and voids. Meanwhile, the descriptive approach involved including some definitions whenever necessary, based on a plan divided into two sections as follows:

1. Boycott as an Acknowledgment of Consumer Authority in Regulating Intervener Behavior.
2. The Ongoing Debate Regarding the Viability of Resorting to the Boycott Method.

1 Law No. 09-03 of February 25, 2. (s.d.). Relating to consumer protection and the suppression of fraud. JORA No15, issued on March 8, 2009, amended and supplemented by Law No 18-09 of June 10, 2018, JORA No 35, issued on June 13, 2018.

2 Law No 12-06 of January 12, 2012R relating to associations. JORA No 02, issued on January 15, 2012.

1. BOYCOTT AS AN ACKNOWLEDGMENT OF CONSUMER AUTHORITY IN REGULATING INTERVENER BEHAVIOR

Boycott is considered an effective deterrent weapon in facing interveners and an efficient tool for influencing their will due to the economic harm it can inflict upon them, such as decreased sales volume and exports, which may lead to bankruptcy. This necessitates investigating its content (1.1) and highlighting its manifestations (1.2).

1.1. The Content of the Boycott Method

Boycott is considered an effective deterrent method against the negative practices of interveners (1.1.1), It requires public mobilization against such behaviour and care from consumer protection associations (1.1.2).

1.1.1. Boycott as a Deterrent Method against the Negative Practices of Interveners

A Boycott is a systematic refusal and voluntary abstention from consuming specific products to pressure interveners into offering products for consumption, compelling them to respond to specific demands. Therefore, it is considered a popular regulatory behaviour and a legitimate reaction that a large segment of consumers exercise whenever necessary. Through boycotts, consumers demonstrate their authority in regulating the negative practices of interveners. It serves as a method to control and prevent transgressions that may harm consumer interests, such as monopolization, speculation, and price gouging without any regulations. It is one of the strongest forms of protest and often yields results, sometimes leading interveners to apologize to consumers or reduce prices lower than they were before the increase.[3]

For boycotts to be fruitful, consumers must have alternative products or services to replace the boycotted ones, allowing them to satisfy their needs. Therefore, boycotts express a universal right, the right to choose for the consumer. This enables market regulation as consumers, when mature and aware, evaluate and choose products, making them active participants in the economic cycle.

It is noteworthy that Algerian legislation does not explicitly address the legality of this method. Hence, its legitimacy is assumed, provided it is not arbitrarily used. It becomes legitimate when it is the only remaining means after consumer protection associations have exhausted all other avenues to protect consumers.

1.1.2. Boycott as a Means of Public Mobilization by Consumer Protection Associations

The effectiveness of a boycott depends on the level of interaction and the strength of public mobilization by consumer protection associations. This is achieved by exposing the risks of goods or services to raise awareness and encourage consumers to say “no” to producer, distributor, and trader misconduct, utilizing various available media and communication channels.[4]

It should be noted that the right of consumer protection associations to call for boycotting certain products is limited to ensuring their harm to the health and safety of consumers or their overpricing, poor quality, and inferiority. Thus, any boycott campaign must be based on well-founded arguments and justifications, not arbitrary ones, to ensure the response of all segments of society. Additionally, transparency requirements dictate that these associations disclose their identity to the public on their websites, for example, to enhance

3 Mbani, N. O., & Issawi, A. L. (2021). Consumer Awareness and the Culture of Boycott in Society – Media and Social Dimensions. Journal of Media and Society. Volume 05, (01), p. 13.

4 Bouchnaf, S. A., & Ben mihoub, A. M. (2020). The role of Algerian consumer protection associations in confronting misleading marketing practices – a study of a group of consumer protection associations in Algeria. Ertiqaa Journal of Economic Research and Studies, Volume 01, (01), p. 57.

their credibility and prevent misuse. For instance, a company may intentionally launch a campaign against its competitors, presenting it as popular. Therefore, to ensure objectivity, boycotters must publicly disclose their identity and agenda alongside their call for boycott. Based on this, consumers make their own decisions.[5]

1.2. Forms of Boycott

Boycotting can take the form of encouraging consumers to boycott the purchase of a specific product or the use of a particular service (1.2.1) or boycotting the payment for it (1.2.2).

1.2.1. Purchase Boycott

Consumer protection associations sometimes resort to issuing orders or notices urging the public to refrain from purchasing certain goods or engaging with a specific project. This method is expressed through boycotting or abstaining from purchasing,[6] either for reasons related to consumer safety and interests if their danger to health is confirmed, as was the case with mineral water that the National Organization for Consumer Protection called for boycotting. This came after it was revealed through analysis that it did not comply with microbiological standards due to coliform and Pseudomonas bacteria.[7]

The call for a boycott may also be in response to unjustified price hikes. Boycotting products has become a potent weapon in the hands of consumers when prices cross certain thresholds, reacting to speculation and hoarding by professionals even during times of crisis. This was evident during the COVID-19 pandemic, where some food prices surged, leading to panic buying fueled by rumours of shortages, such as the case with semolina in Algeria, a staple food whose price reached 1700 DZD instead of 1200 DZD.[8]

Similar incidents occurred in France, where consumers boycotted buying meat following a boycott campaign launched by consumer protection associations against producers, leading them to refrain from using estrogen in livestock feed.[9]

Additionally, boycott calls may be based on political or humanitarian considerations due to cooperation or collusion with illegitimate political regimes. Examples include boycotts by Islamic and Arab nations of products from countries hostile to Muslims, those disrespectful to Islam or its sanctities, such as boycotting Chinese products due to reports of mistreatment of Muslim Uighur minorities,[10] or the boycott of Denmark and the widespread boycott campaign against French goods over the continued publication of offensive cartoons of the Prophet Muhammad,[11] as well as the Canadian boycott of American products in response to provocative and hostile rhetoric from President Donald Trump towards Canada and its Prime Minister, including trade threats with high tariffs on steel and aluminium imports from Canada,[12] in addition to the boycott campaign against many American and Western companies due to their direct support or alignment with Israel in its aggression against Gaza.[13]

5 Beck, V. A. (2024). Consumer Boycotts as Tools for Structural Change. valentin.beck@fu-berlin.de. [Last accessed: 10 February, 2024].

6 Sayyad, A. L. (2013). Consumer Protection in Light of the New Law No. 09/03 Concerning Consumer Protection and Suppression of Fraud, Faculty of Law, University of Constantine 1, Algeria, p. 140.

7 Salmi, A. B. (2020). Consumer Protection Organization publishes official documents warning against the marketing of non-conforming mineral water. <www.ennaharonline.com> [Last accessed: 16 November, 2020].

8 Hamza, K. A. (2023). Algeria: The boycott revives local drinks and cosmetics <www.alaraby.co.uk/econom> [Last accessed: 11 Aout, 2023].

9 Calais-auloy, J. E., & Steinmetz, F. R. (2006). Steinmetz, F. Droit de la consommation, Dalloz, Paris, (éd. 7). Paris: Dalloz, p. 653.

10 Buklikha, A. I. (2022). Chinese policies towards the Uyghur minority/Xinjiang region. Journal of Science and Knowledge Horizons, 1(2), p. 74.

11 Yousfi, M. U. (2016). Boycott of European Goods in Light of International Trade Law and Islamic Legislation, A Case Study of Cartoons Insulting to the Messenger, may God bless him and grant him peace. Studies in Development and Society, 3(3), p. 160.

12 Xiaojun, L. I., & Adam, Y. (2021). What drives consumer activism during trade disputes? Experimental evidence from Canada? <www.ncbi.nlm.nih.gov/pmc/articles/PMC8041440/> [Last accessed: 15 November, 2024].

13 Qamas, M. U. (2024). Boycotting Israel hurts supporters... billions in losses for American brands. <alaraby.

In such cases, a boycott becomes a double-edged sword, serving as a form of protest and voluntary abstention from consuming products of a certain company or country while also expressing refusal to engage in any economic relationship or trade exchange with them, to pressure them to change their policies towards a specific issue or cause.[14]

1.2.2. Payment Boycott

Consumer protection associations may request consumers to refrain from paying for a product or service they have obtained from a specific project, known as a "payment strike" or "payment refusal". The resort to payment boycott assumes the presence of several consumers indebted with similar amounts to a single creditor, such as tenants in their relationship with a single landlord or subscribers to a telephone service. The goal of delaying payment of these debts is to pressure the creditor to reduce the amount owed or compel the intermediary to improve the quality of the product or service, or at least improve its performance.[15]

Consumer protection associations can resort to this method voluntarily or based on consumer complaints in poor or inconsistent service quality cases. This is particularly evident in services such as non-paying electricity, gas, or water bills.

2. ONGOING DEBATE REGARDING THE VIABILITY OF RESORTING TO THE BOYCOTT CALL METHOD

The absence of legal texts defining the authority of consumer protection associations to resort to the boycott call method has sparked a debate about its legitimacy between opponents (2.1) and supporters (2.2).

2.1. Opposing the boycott advocacy approach

The call for boycott did not pass without objection due to economic (2.1.1), social (2.1.2), and legal considerations (2.1.3).

2.1.1. Economic considerations for rejecting the boycott advocacy approach

The economic considerations for rejecting the boycott approach revolve around the risk this action poses to the economic interests of the boycotted entities. This includes potential negative publicity for the company or its products, creating unfavourable impressions among consumers who may subsequently prefer to purchase competitors' products. Additionally, there's the risk of significant financial losses, potentially leading to bankruptcy.[16]

2.1.2. Social considerations for rejecting the boycott advocacy approach

Social considerations used to justify the illegitimacy of the boycott approach stem from consumers' inability to do without certain essential products, particularly if there are no competitive alternatives available in terms of price and quality, such as medication.[17] Moreover, the boycott could yield adverse outcomes if competitors exploit the situation to increase prices of alternative products.

2.1.3. Legal considerations for rejecting the boycott advocacy approach

Opponents of the boycott approach argue that it violates the law and infringes upon an important principle: the contractual principle,

co.uk/economy> [Last accessed: 10 April, 2024].

14 Al-Shafi'i, A. D. (2024). Billions in losses to the Israeli economy...the boycott weapon strikes hard. <gate.ahram.org.eg/News/4693834.aspx> [Last accessed: 13 April, 2024].

15 Boudali, M. U. (2006). Consumer Protection in Comparative Law, A Comparative Study with French Law. Algeria: Dar Al-Kitab Al-Hadith, p. 685.

16 Kimosh, I. M. (2020). 1,100 juice and beverage production factories disappear from the market. <www.google.com/search?q.> [Last accessed: 10 Aout, 2023].

17 Nayel Al-Majali, Nh. (2024). Confronting Monopoly and Exploitation!!! <alanbatnews.net/article/233732> [Last accessed: 10 April, 2024].

as outlined in Article 106 of the Civil Law.[18] This principle mandates that contracting parties adhere to the terms of their agreement, which cannot be modified or annulled without their mutual consent.

Additionally, if consumers refuse to pay, creditors can insist on payment without resorting to legal action, as per Article 123 of the Civil Law. Failure by the creditor to fulfil contractual obligations is a prerequisite for resorting to such measures.

2.2. Advocating for the boycott approach

If the previous trend opposes resorting to the boycott approach, another trend supports this method for the same economic (2.2.1), social (2.2.2), and legal considerations (2.2.3).

2.2.1. The economic considerations of the legitimacy of advocating for the boycott approach

The economic considerations that make advocating for the boycott approach legitimate lie in its economic benefits, the most prominent of which is breaking free from the economic dependency and dominance of economic agents over the market. Consumer recourse to boycott will impact the market and compel companies to reduce prices, as seen in the case of the largest boycott operation in Algeria concerning the automobile market. This market experienced widespread abuses and significant price manipulation by car dealers in the country, which ended with accredited brands in Algeria succumbing to the pressure of the campaign, reducing their prices after a significant decline in citizens' purchasing, especially after the state revealed the true prices, exceeding by 25% the prices declared to the government.

Boycotting foreign products also encourages local industry. For example, by boycotting detergents like "Ariel", dozens of national companies emerged producing similar and alternative detergents. Regardless of any complaints about quality weaknesses, the high demand for these products will compel them to improve quality and satisfy the consumers and other industries.

2.2.2. The social considerations for the legitimacy of advocating for the boycott approach

As for the social benefits of boycotting, they lie in protecting public health in society, as seen in the American boycott of some products that are very harmful to health, such as boycotting cigarette products (Marlboro, Merit, LM), which are marketed to minors.

2.2.3. The legal considerations for the legitimacy of advocating for the boycott approach

The legal considerations for the legitimacy of advocating for the boycott approach stem from it being an inevitable result of legal evolution, which allows for accommodating this method as a last resort if consumers are in a weak position and have no other means than a collective refusal to pay amounts until their demands are met.[19]

Given the silence of the Algerian legislature regarding this approach, its legitimacy is assumed. However, caution is necessary in carrying out this role due to the potential effects it could have on institutions due to the rejection of their products and services. This requires ensuring certain conditions before resorting to it, considering the significant consequences it may entail for the parties involved, whose fate depends on the extent of consumers' response to the matter.[20]

18 Order N°. 75-58 of September 26, 1975, on the Civil Code, JORA N°. 78, issued on September 30, 1975, amended and supplemented.

19 Nasri, F. (2004). Consumer Protection Associations, a dissertation to obtain a master's degree, specializing in contracts and liability, Faculty of Law, Ben Youssef Ben Khedda University, Algeria, p. 81.

20 Hamdaoui, N. O. (2019). Measures taken to reduce misleading advertising, intervention at the National Forum on: Misleading advertising and its effects on the consumer and the market, held at the Faculty of Law. M'hamed Bougara Boumerdes University, Algeria, p. 5.

In this regard, the French judiciary has adopted a moderate stance, where the boycott is not considered wrongful unless the association abuses its use.[21] Some have stipulated two conditions for its legitimacy: that it aims to protect the consumer from the involved interveners and that the reasons are justified, legitimate, and serious.[22]

Therefore, it is necessary to address the boycott method, whether from the perspective of consumer protection and fraud suppression laws or competition law. It is more appropriate to enact a legal provision explicitly recognizing this action for consumer protection associations, along with its regulation, such as the obligation to notify the Competition Council before engaging in boycotting a product or economic aid, as well as specifying a certain period granted to the aid recipient who has been proven to violate either fair competition rules or consumer protection laws to cease their violation. This approach should only be resorted to as a last resort.[23]

CONCLUSION

The bloc within the framework of associations is considered the most important means of consumer protection, which adopts deterrent defensive means for this purpose, constituting what is known as the deterrent role of consumer protection associations, the most important of which is the boycott approach. Through this study, the following results were reached:

The boycott approach reflects consumer sophistication, awareness, and personal commitment, which extends to others without noise or crowds solely through the transmission of information through awareness-raising media campaigns.

The boycott approach is a pressure tactic that follows deterrent methods against interveners who violate market regulations and fair competition. However, practically, these associations face difficulties in achieving their goals as desired, which can be summarized as follows:

The legislature's silence on explicitly stating the legality of resorting to it deprives it of the necessary freedom to be adopted.

In addition, the varying levels of knowledge among consumers, who are unaware of the protection guaranteed to them by the law and lack consumer culture, make them indifferent to the efforts and activities of these associations and the advertising campaigns they launch against non-compliant products and call for their boycott.

Therefore, it is necessary to strengthen the legal system in the field of consumer protection with additional measures that enhance the deterrent role of consumer protection associations. To achieve this, the following suggestions can be made:

Explicitly state the right of consumer protection associations to resort to boycott advertising and precisely specify the conditions for its adoption and the procedures followed to give it the necessary legitimacy when resorted to. This grants them freedom and credibility and protects interveners from arbitrary use of this right.

Make various state-owned communication channels accessible to associations to convey information to the largest possible number of people.

21 Guyon, Y. V. (2003). Droit des affaires (éd. 12). Paris: economica, p. 109.

22 Ferrier, F. E. (1996). La protection des consommateurs. Paris: Dalloz, p. 67.

23 Zoubir, A. R. (2011). Consumer Protection under Free Competition, thesis for a master's degree in law, Professional Responsibility Branch. Faculty of Law and Political Science, Mouloud Mammeri University, Tizi Ouzou, Algeria, p. 67.

BIBLIOGRAPHY

Journal Articles

1. Bouchnaf, S. A., & Ben mihoub, A. M. (2020). The role of Algerian consumer protection associations in confronting misleading marketing practices – a study of a group of consumer protection associations in Algeria. *Ertiqaa Journal of Economic Research and Studie, Volume 01, (01).*
2. Buklikha, A. I. (2022). Chinese policies towards the Uyghur minority/ Xinjiang region. *Journal of Science and Knowledge Horizons, 1(2).*
3. Mbani, N. O., & Issawi, A. L. (2021). Consumer Awareness and the Culture of Boycott in Society – Media and Social Dimensions. *Journal of Media and Society. Volume 05, (01).*
4. Yousfi, M. U. (2016). Boycott of European Goods in Light of International Trade Law and Islamic Legislation, A Case Study of Cartoons Insulting to the Messenger, may God bless him and grant him peace. *Studies in Development and Society, 3*(3).

Books

1. Boudali, M. U. (2006). Consumer Protection in Comparative Law, A Comparative Study with French Law. Algeria: Dar Al-Kitab Al-Hadith.
2. Calais-auloy, J. E., & STEINMETZ, F. R. (2006). Steinmetz, F., Droit de la consommation, Dalloz, Paris, (*éd*. *7*). Paris: Dalloz.
3. Ferrier, F. E. (1996). La protection des consommateurs. Paris: Dalloz.
4. Guyon, Y. V. (2003). Droit des affaires (*éd*. *12*). Paris: economica.

Webpages

1. Al-Majali, N. H. (2024). *Confronting Monopoly and Exploitation!!!* <al-anbatnews.net/article/23373> [Last accessed: 10 April, 2024].
2. Al-Shafi'i, A. D. (2024). *Billions in losses to the Israeli economy...the boycott weapon strikes hard*. <gate.ahram.org.eg/News/4693834.aspx> [Last accessed: 13 April, 2024].
3. Beck, V. A. (2024). *Consumer Boycotts as Tools for Structural Change.* valentin.beck@fu-berlin.de. [Last accessed: 10 February, 2024].
4. Hamza, K. A. (2023). *Algeria: The boycott revives local drinks and cosmetics*. <www.alaraby.co.uk/econom> [Last accessed: 11 Aout, 2023].
5. Kimosh, I. M. (2020). *1,100 juice and beverage production factories disappear from the market*. <www.google.com/search?q.> [Last accessed: 10 Aout, 2023].
6. Qamas, M. U. (2024). *Boycotting Israel hurts supporters... billions in losses for American brands*. <alaraby.co.uk/economy> [Last accessed: 10 April, 2024].
7. Salmi, A. B. (2020). *Consumer Protection Organization publishes official documents warning against the marketing of non-conforming mineral water*. <www.ennaharonline.com> [Last accessed: 16 November, 2020].
8. Xiaojun, L. I., & Adam, Y. (2021). *What drives consumer activism during trade disputes? Experimental evidence from Canada?* <www.ncbi.nlm.nih.gov/pmc/articles/PMC8041440/> [Last accessed: 15 November, 2024].

Theses and memories

1. Hamdaoui, N. O. (2019). Measures taken to reduce misleading advertising, intervention at the National Forum on: "Misleading advertising and its effects on the consumer and the market", held at the Faculty of Law. M'hamed Bougara Boumerdes University, Algeria.
2. Nasri, F. (2004). Consumer Protection Associations, a dissertation to obtain a master's degree, specializing in contracts and liability. Faculty of Law, Ben Youssef Ben Khedda University, Algeria.
3. Sayyad, A. L. (2013). Consumer Protection in Light of the New Law No. 09/03 Concerning Consumer Protection and Suppression of Fraud, Faculty of Law, University of Constantine 1, Algeria.
4. Zoubir, A. R. (2011). Consumer Protection under Free Competition, thesis for a master's degree in law, Professional Responsibility Branch. Faculty of Law and Political Science, Mouloud Mammeri University, Tizi Ouzou, Algeria.

Legal Acts

1. Order N°. 75-58 of September 26, 1975. (s.d.). *On the Civil Code*. JORA N°. 78, issued on September 30, 1975, amended and supplemented.
2. Law N°. 09-03 of February 25, 2. (s.d.). *Relating to consumer protection and the suppression of fraud*. JORA N°15, issued on March 8, 2009, amended and supplemented by Law No 18-09 of June 10, 2018, JORA No 35, issued on June 13, 2018.
3. Law N°. 12-06 of January 12, 2. (s.d.). *Relating to associations*. JORA N° 02, issued on January 15, 2012.

COPYING AND STORING OF ELECTRONIC COMMUNICATION IDENTIFYING DATA AS ELECTRONIC EVEDENCE THE STORAGE PROBLEM IN THE GEORGIAN CRIMINAL JUSTICE PROCESS – In relation to Article 8 of the European Convention

Dodo Jugheli

Master of Criminal Law, Ivane Javakhishvili Tbilisi State University, Association of Personal Data Protection Officers of Georgia, Labor Inspection Office, Georgia

ABSTRACT

The current standard of criminal procedural law of Georgia, along with the danger of illegally copying information obtained from electronic means of communication, envisages collecting such information in the hands of a professionally interested body, which is naturally a big challenge for criminal procedural law. The reason for this is the important fact that the information obtained by the investigation in this way is used as electronic evidence during the substantive consideration of the case in court.

Accordingly, the case concerns information that the court must rely on in making a decision "beyond a reasonable doubt standard". Thus, when deciding the fate of the accused, it is especially important that there are no doubts regarding the legality, truthfulness and inviolability of such evidence. The above-mentioned is particularly noteworthy in the circumstances when the above-mentioned approach, according to European human rights jurisprudence, is incompatible with the right to respect for private life protected by Article 8 of the European Convention.

KEYWORDS: Evidence, Limitation, Copying, Storage

INTRODUCTION

Relevance of the topic. The Criminal Procedure Legislation of Georgia refers to the use of the existing norms for the purpose of obtaining electronic records, their storage and, accordingly, the legality of attaching them to the case for the implementation of secret investigative actions, which, as explained by the Constitutional Court, carries the threat of interfering with human rights and freedoms with increased intensity. In addition, the appeal to the Constitutional Court regarding compliance with the issue of copying and storage of identifying data of electronic communication obtained as a result of secret investigative activities with the Constitution of Georgia has not been stopped. There is a difference of opinion regarding the aforementioned among the judges of the Constitutional Court, some of whom consider the norms regulating the above-mentioned issue to be "overriding norms" of the norms known as unconstitutional by the decision of the Constitutional Court of Georgia dated April 14, 2016, N1/1/625,640.

In addition, the new edition of the Law of Georgia, "On Personal Data Protection," is particularly relevant in this regard, as it defines the standards in the field of personal data protection and the control of conducting secret investigative activities. It is interesting to see whether recent legislative changes are in line with the current international approach to copying and storing personally identifiable communications data. Thus, in relation to the aforementioned data copying and storage in the criminal justice process, the need for an in-depth study of the issue is particularly apparent for protecting human rights and freedoms.

Research subject. The subject of the study is the challenges related to the storage and copying of identifying communication data obtained through the implementation of undercover investigative activities in the criminal process, which are used as electronic evidence in the substantive consideration of the case in court.

The purpose and objectives of the research. The purpose of the research is to outline and analyze the separate legal problems in the storage and copying of identifying data of electronic communication in the criminal justice process. The set task will be achieved both by presenting the issue in terms of historical precedents and constitutional-legal perspective, as well as by using the norms and practices of European human rights law.

Research novelty. The novelty of scientific research is expressed in the fact that the article defines "electronic evidence" as the final result of obtaining communication identifying data, as well as its nature and differences. Also, the content of the legislative changes implemented after the decision of the Constitutional Court of Georgia on April 14, 2016, N1/1/625,640 will be discussed, to what extent it is of "substantial" importance and whether it still creates a threat of interfering with the right to respect for private life.

Research stages. At the beginning of this article, the essence of electronic evidence is presented, and the purpose of obtaining identifiable communication data is defined. The main part is also devoted to sub-chapters, which refer to the existing legal threats related to the storage of information transmitted through electronic communication created under the current legislation. In particular, the issue of gathering and illegal copying of obtained information in the hands of a professionally interested body (creating the so-called "alternative bank") in relation to the right to respect for private life is discussed. The conclusion presents the author's point of view and summary to solve the problems discussed in the article.

1. NATURE AND RELATIONSHIP OF ELECTRONIC EVIDENCE AND ELECTRONIC COMMUNICATION IDENTIFIABLE DATA

The global technological progress made in the XXI century brought great change in all spheres of public life. As communication has be-

come easier, every person, state or private institution has faced so many challenges in terms of information protection. The mentioned progress also affected the criminal procedural legislation, especially from the point of view of the development of evidence.[1] The rate of use of the computer system in the process of committing a crime has increased significantly. It has become quite relevant the issue of using "digital" evidence in criminal proceedings, which has become a new type of evidence.[2]

Electronic evidence[3] is any data stored or transmitted using computer technology that supports a theory about how a crime occurred.[4] According to Article 1 of the Council of Europe Convention on "Computer Crime", a computer system means "any mechanism or a group of interconnected or interconnected mechanisms, one or more of which, through a program, performs automatic data processing.[5] Computer data itself is "any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program that ensures the functioning of a computer system".[6]

Despite the fact that electronic proof is so-called While it has similar characteristics to "traditional" proof, there are a number of aspects that make it unique.[7] First of all, it should be noted the "fragility" of digital data,[8] what makes it stand out, for example, from a document created in material form, on paper. This refers to the nature of information obtained from electronic communication, which can be easily deleted,[9] change etc. Another important circumstance is its decentralized storage. It is possible that information stored outside the country's borders can be used remotely by criminals,[10] Which makes the investigation process even more difficult. Thus, determining the reliability and authenticity of such data mining, electronic nature of evidence is quite a challenge for the criminal procedural laws of all countries.[11]

However, the Explanatory Report (N187) to the Convention on Computer Crime states that additional procedural safeguards are required for the effective collection of communications identifying data[12]. There are several reasons for this. The first is that the mentioned information is presented in an immaterial, electromagnetic form. The second reason is the different standards of its touch. In particular, computer data cannot be confiscated or seized in the same way as a paper document.

In 2016, the Constitutional Court of Georgia deliberated on the procedural guarantees of the storage of communication identifying data ob-

1 Carrera S., Stefan M., Mitsilegas V., (2020). Cross-border data access in criminal proceedings and the future of digital justice, p. 1.

2 Training of Judges on Computer Crime, (2010). France, Strasbourg, p.75 <https://rm.coe.int/16802fa028> [Last accessed: April 15, 2024].

3 In the criminal procedural legislation of Georgia, we do not find the definition of electronic evidence as an independent category of evidence, but the regulatory norms of the mentioned issue are mainly presented in the Criminal Procedure Code of Georgia, the Law of Georgia "On Operative-Search Activity", the Law of Georgia "On Electronic Communications" and others.

4 Casey E., (2004). Digital Evidence and Computer Crime, p.12. The admissibility of electronic evidence in court: fighting against high-tech crime, 2005.

5 Council of Europe Convention on Computer Crime (23.11.2001), Article 1 <https://rm.coe.int/16802fa423> [Last accessed: 15 April 2024].

6 *Ibid*.

7 Training of Judges on Computer Crime, (2010). France, Strasbourg, p.76 <https://rm.coe.int/16802fa028> [Last accessed: April 15, 2024].

8 Casey, Digital Evidence and Computer Crime, 2004, p.16; Vacca, Computer Forensics, Computer Crime Scene Investigation, Second Edition, 2005, p.39.

9 Moore, (2004). To View or not to View: Examining the Plain View Doctrine and Digital Evidence, American Journal of Criminal Justice, Vol. 29, #1, p. 58.

10 Training of Judges on Computer Crime, (2010). France, Strasbourg, p.76 <https://rm.coe.int/16802fa028> [Last accessed: April 15, 2024].

11 Stephen M., Allison S., (2017). Electronic Evidence, p. 193.

12 A striking example of the need for additional procedural norms regarding the development of electronic evidence into a "new type" of evidence and the acquisition of personally identifiable communications data is the investigation conducted by German law enforcement several decades ago, during which the identities of criminals who purchased and downloaded child pornography were established through credit card companies. from one of the websites (see: Spiegel Online, Fahnder überprüfen erstmals alle deutschen Kreditkarten, 08.01.2007).

tained by the investigation.[13] At what time should the standards be used by the state when copying and storing information from electronic means of communication were determined.[14]

On the basis of the mentioned decision, certain changes were made in the legislation of Georgia, and the issue of compliance of the contents with the Constitution of Georgia caused a difference of opinion among the judges of the Constitutional Court itself.[15]

One of the reasons for the difference of opinion was the problem of copying and storing information from modern electronic means of communication. In particular, a part of the judges of the Constitutional Court drew attention to gathering the obtained data in the hands of the professionally interested body and the so-called On the dangers of creating "alternative banks".

2. THE SO-CALLED DANGER OF CREATING "ALTERNATIVE BANKS"

As emphasized in the decision of the Constitutional Court, "it is technically possible to create the so-called "Alternative bank", the existence of which may not be known to anyone, and the personal data protection inspector may not even have access to it.[16] This implies total access to the information obtained by the investigation, without any content separation: who connected where, when, by what technical means, from which location and for how long.

It should be noted the mechanisms of supervision, which were created for the purpose of preventing the copying of the obtained information. As noted by the Constitutional Court, in the Law of Georgia "On Personal Data Protection"[17] the changes made on March 22, 2017, did not introduce any new regulation in terms of controlling the data copying process by the inspector.[18] A positive innovation was that one of the levers of existing control – the electronic system of control of the central bank of identifying data of electronic communication has already been fixed from a technical point of view, and with its help the inspector could control the actions carried out in the copied data bank.[19] As for the process of copying data from electronic communication companies by the agency, the only lever of supervision was the inspection. This type of supervision was deemed ineffective by the Constitutional Court in its decision of April 14, 2016, due to the method of its implementation, which was based on the "principle of random selection". The mentioned approach excludes absolutely all

13 Decision No. 1/1/625,640 of the Constitutional Court of Georgia dated April 14, 2016 in the case "Public Defender of Georgia, Citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, "Open Society Foundation Georgia", "Transparency International – Georgia", "Young Lawyers Association of Georgia", "International Society for Fair Elections and Democracy" and "Human Rights Center" against the Parliament of Georgia".

14 Acquisition/storage/destruction of digital evidence is carried out according to the standard established by the Constitutional Court for covert investigative actions, since according to the criminal procedural legislation, the rules established for covert investigative actions apply to investigative actions related to computer data.

15 The minutes of the Constitutional Court of Georgia dated December 29, 2017. No. 3/4/885-1231.

16 Decision No. 1/1/625,640 of the Constitutional Court of Georgia dated April 14, 2016 in the case "Public Defender of Georgia, Citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, Open Society Foundation Georgia ", AIP "Transparency International – Georgia", AIP "Young Lawyers Association of Georgia", AIP "International Society for Fair Elections and Democracy" and AIP "Human Rights Center" against the Parliament of Georgia", II-100.

17 The first law on personal data protection was adopted on 28.12.2011, and the new law on 14.06.2023, which came into effect on 01.03.2024, and after its implementation, the law of 28.12.2011 lost its force. Here, it should be noted that control over personal data processing has been implemented in Georgia since 2013. Since 2015, there has been direct supervision of covert investigative actions. In 2013-2019, the personal data protection inspector's office carried out the above-mentioned activities, in 2019-2022, its successor – the state inspector's office. From March 1, 2022, the said mandate was assigned to the Personal Data Protection Service.

18 Minutes of the Constitutional Court No. 3/4/885-1231 of December 29, 2017. II-84.

19 *Ibid*., II – 96.

data control, therefore, the possibility of detecting absolutely all violations, and such "selective control is practically impossible to produce tangible results".[20]

Regarding the regulatory norms of the above-mentioned issue, it should be emphasized that the current version of the Law of Georgia "On Personal Data Protection" does not provide provisions that are significantly different from the previous version of the law regarding the field of data protection and the control of conducting secret investigative activities. In particular, Chapter VII of the current edition of the Law of Georgia "On Personal Data Protection" textually and, accordingly, in terms of content V2 of the previous edition of the Law of Georgia "On Personal Data Protection" ("Powers of the Personal Data Protection Service in the field of data protection and control of the conduct of covert investigative actions"). It is identical to itself.

Thus, the existing lever of inspection is still the bearer of the "random selection principle", which allows the possibility that during the operation of the mentioned control mechanism, the personal data protection service will completely detect and, therefore, eliminate violations of the law in relation to the issues within its competence.

In addition, since the so-called In the presence of threat of creating "alternative banks", it is possible to copy absolutely all the obtained information without any selection, it is interesting to see what changes the legislation has undergone in this regard after the implementation of the new law "On Personal Data Protection".

As mentioned in the explanatory note of the aforementioned law, the data "should be processed only to the extent necessary to achieve the relevant legal purpose". In addition, we read here that information can be stored "only for the period necessary to achieve the purpose of data processing". The explanatory note also emphasizes the importance of the safe storage of information and that appropriate measures should be taken to prevent "unauthorized or illegal" processing of data.[21] The above-mentioned goals, elaborated in the explanatory card, were formulated in the form of principles of data processing in Article 4 of the mentioned law.

However, on the part of the legislator, in terms of information storage and protection, despite the above-mentioned clear, obvious readiness to protect human rights, the mentioned approach has little effect on the storage period of information obtained from electronic communication through covert investigative actions. After the decision of the Constitutional Court, the period of storage of identifiable data of electronic communication was reduced from two years to 12 months.[22] Despite the mentioned change, there is no periodic verification of the above term. Accordingly, there is no provision in the legislation to determine whether the obtained information is still relevant to the case and whether there is a need to keep it. Thus, everything, including information not important to the case, can be stored for the period established by law, without any selection or justification. Thus, the current legislation "provides absolutely unlimited copying and storage of such information for a period of one year depending on the circle of persons and location.[23]

20 Decision No. 1/1/625,640 of the Constitutional Court of Georgia dated April 14, 2016 in the case "Public Defender of Georgia, Citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, "Open Society Foundation Georgia", "Transparency International – Georgia", "Young Lawyers Association of Georgia", "International Society for Fair Elections and Democracy" and "Human Rights Center" against the Parliament of Georgia", II-104.

21 Parliament of Georgia. Explanatory card on the draft law "On personal data protection" <https://info.parliament.ge/file/1/BillReviewContent/222087> [Last accessed: April 15, 2024].

22 "On the Legal Entity of Public Law – Operational-Technical Agency of Georgia", Law of Georgia. Article 15. Legislative Gazette of Georgia <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [Last accessed: April 15, 2024].

23 Decision No. 1/1/625,640 of the Constitutional Court of Georgia dated April 14, 2016 in the case "Public Defender of Georgia, Citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, "Open Society Foundation Georgia", "Transparency International – Georgia", "Young Lawyers Association of

Based on all of the above, the danger of creating "alternative banks" is problematic in the sense that it is possible to store such information that is not important for the investigation, but in the absence of the law, it is not destroyed by the authorized persons.

3. COLLECTION OF DATA IN THE HANDS OF PROFESSIONALLY INTERESTED BODY

According to the Law of Georgia "About the Legal Entity of Public Law – Operative-Technical Agency of Georgia", the Operative-Technical Agency is a legal entity under public law responsible for the processing, storage, issuance and destruction of identifiable data of electronic communication.[24] Before the decision of the Constitutional Court of Georgia on April 14, 2016, the agency was represented as a department within the State Security Service. According to the position expressed by the witness at the mentioned session of the Constitutional Court, the transformation of the operational-technical department into a legal entity under public law was named as the only lever to prevent the creation of "alternative banks". In this case, the collection of obtained data in the hands of the professionally interested body, the State Security Service, of which the agency was an integral part, was excluded.

After the formation of the mentioned approach of the Constitutional Court, regardless of the transformation of the operational-technical agency into a legal entity under public law, it should be noted that it is still subject to the "effective control" of the State Security Service.[25]

According to Article 3 of the Law of Georgia, "On Legal Entity of Public Law – Operative-Technical Agency of Georgia", the agency, as a legal entity of public law, is created in the system of the State Security Service and functions in this system as a part of a unified and centralized service. In particular:

- The head of the agency "will develop proposals for the agency's material and technical support and financing (including the agency's budget) and submit the relevant projects to the head of the service"[26].
- "Before submitting the statistical and generalized report of the agency's activities to the Prime Minister of Georgia, the head of the agency will submit this report to the head of the service".[27]
- The head of the State Security Service decides on the issues of establishing a special allowance and determining bonuses for the head of a legal entity under public law.[28]
- "The state control of the agency's activities is carried out by the head of the service".[29]

It should be emphasized that by the decision of the Constitutional Court of April 14, 2016, the Operational-Technical Department was considered a professionally interested body, not because this department directly had any kind of investigative function but due to the fact that it represented the State Security Service. The unit and the functions of the service made it an investigative function.[30] The

Georgia", "International Society for Fair Elections and Democracy" and "Center for Human Rights" against the Parliament of Georgia", II-91.

24 Article 15 of the Law of Georgia "On Legal Entity of Public Law – Operational-Technical Agency of Georgia".

25 The minutes of the Constitutional Court of Georgia dated December 29, 2017. No. 3/4/885-1231.

26 "On the Legal Entity of Public Law – Operational-Technical Agency of Georgia", Law of Georgia. Article 20, Paragraph 2. Legislative Gazette of Georgia <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [Last accessed: April 15, 2024].

27 *Ibid*. Article 29, Paragraph 2.

28 *Ibid*. Article 20, Paragraph 2, subsection 1.

29 *Ibid*. Article 29, Paragraph 1. Legislative Gazette of Georgia <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [Last accessed: April 15, 2024].

30 Decision No. 1/1/625,640 of the Constitutional Court of Georgia dated April 14, 2016 in the case "Public Defender of Georgia, Citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tughushi, Zviad Koridze, "Foundation Open Society Georgia", "Transparency International – Georgia", "Young Lawyers Association of

Constitutional Court emphasized that "when the technical capabilities of direct and immediate access to personal information are at the disposal of the State Security Service (or another body with an investigative function), which, as we have already mentioned, immeasurably increases the risks of arbitrary, excessive interference with the right, it becomes objectively very difficult if not impossible, effective control of the authorities authorized to investigate"[31].

In the conditions of the current legal regulation, it is clear that the issue of the transformation of the mentioned department into a legal entity under public law is of a formal nature since the activity of the operational-technical agency depends on the decision taken by the head of the State Security Service, both in terms of financial and functional management.

The so-called possibility of creating "alternative banks" and collecting data in the hands of an interested body on a professional basis, according to the Constitutional Court, "both cumulatively and separately create a danger of excessive, groundless interference in a person's personal space, therefore, a violation of fundamental rights".[32]

Especially in circumstances where covert investigative actions are concerned, the risk of taking arbitrary action is obvious. In addition, since, in this case, we are talking about obtaining electronic evidence, the issue of authenticity of which is closely related to technological progress, the need for clear and detailed rules in this regard is even more evident.[33]

Since, both at the national and international level, great importance is attached to the inviolability of a person's intimate life, to personal connections with a certain circle of people with the intensity necessary for his personal perfection.[34], It is necessary to have such a set of legal norms at the national level that will not create doubts about the disproportionate interference with the above-mentioned rights by unauthorized persons.

Thus, since the threats that have been discussed above can have a great impact on the freedom of human behavior, it is necessary to determine whether the current legal regulation in this regard leads to the limitation of such an important right as respect for private life.

4. THE ISSUE OF COMPLIANCE WITH THE RIGHT TO RESPECT FOR PRIVATE LIFE PROTECTED BY ARTICLE 8 OF THE EUROPEAN CONVENTION

It is interesting to see what approach the European Court of Human Rights takes in terms of the right to respect for private life and whether the criminal procedural legislation of Georgia in relation to the safe storage of identifiable data of electronic communication is consistent with the above-mentioned right protected by Article 8 of the European Convention.

The Strasbourg Court explains that the concept of private life is broad and cannot be subject to an exhaustive definition.[35] The concept of respect for private life includes the right to the free development of the individual, as well as the establishment of relationships with others.[36]

In the case of A v. France,[37] the French government argued that the recorded conversations related to the commission of the murder did not

Georgia", "International Society for Fair Elections and Democracy" and "Human Rights Center" against the Parliament of Georgia", II-55.

31 *Ibid*.

32 *Ibid*., II-95.

33 Decision of the European Court of Human Rights in the case: Kopp v. Switzerland (25.03.1998), §46.

34 Decision No. 2/1/536 of the Constitutional Court of Georgia dated February 4, 2014 in the case "Citizens of Georgia Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze against the Minister of Labor, Health and Social Protection of Georgia" II-55.

35 Decision of the European Court of Human Rights in the case: Costello-Roberts v. The United Kingdom (25.03.1993), §36.

36 Kilkelly U., The Right to Respect for Private and Family Life, Human Rights Implementation of Article 8 of the European Convention, Guide, (ed.), Council of Europe, Tb., 2005, p.14.

37 Decision of the European Court of Human Rights in the case: A v. France (07.04.2022).

concern private life. The commission found the following: the fact that the conversation was a matter of public interest did not deprive it of its private character. The court shared the mentioned argument and explained that the collection of information about an individual without his consent by state officials always refers to a person's personal life and, therefore, falls within the scope of Article 8, Paragraph 1. In order to determine the compatibility of the issue of copying and storage of information obtained from electronic communication in criminal proceedings with the right to respect for private life protected by Article 8 of the European Convention, the following must be determined:

a) Was the restriction implemented in accordance with the law?

The approach of the European Court, according to which the existence of a norm at the legislative level does not mean that the restriction will be in accordance with the same law, is particularly interesting in terms of determining "compliance with the law". In the case of Bykov v. Russia [38] the European Court noted that for national legislation to comply with the "quality of law" requirement, the scope of discretion of the authorities must be taken into account. In addition, attention was drawn to the importance of the participation of an independent and impartial body and the fact that the involvement of an impartial body in the implementation of undercover investigative activities is important to the extent that, in this way, the individual will have an adequate means of protection against arbitrary interference.[39]

In addition, since "undercover surveillance or communication monitoring by government bodies does not produce public control regarding interference with the right,[40] "the law should exhaustively define the procedures for the investigation, use and storage of information obtained as a result of covert surveillance, as well as the procedures for transferring information obtained as a result of covert surveillance to third parties"[41]. The mentioned approach excludes "abuse or arbitrary use of authority by government bodies"[42].

Accordingly, interference with the right to respect for private life is not "in accordance with the law" when the national legislation does not provide adequate protection of the applicant against the interference of law enforcement officers in the aforementioned right.[43]

b) Does the restriction serve a legitimate purpose?

Regarding the legal objective, the Strasbourg Court explains that the respondent state itself is obliged to determine the objectives of the legal restriction. In most cases, the court believes that the states are acting with a proper purpose, therefore, the claimant's request in this section is rarely granted.[44]

Even in the case discussed by us, there are such legitimate goals as ensuring the necessary state or public security in a democratic society, protecting the rights of others.[45] However, it is one thing to have said legal objectives and another question is whether the existing legislation is necessary to achieve these objectives in a democratic society.

c) Is it necessary in a democratic society?

38 Decision of the European Court of Human Rights in the case: Bykov v. Russia (10.03.2009).

39 Decision of the European Court of Human Rights in the case: Huvig v. France (24.04.1990), § 29; Decision of the European Court of Human Rights in the case: Amann v. Switzerland (16.02.2000), §56.

40 Decision of the European Court of Human Rights in the case: Klass and Others v. Germany (06.09.1978), §54-56.

41 Decision of the European Court of Human Rights in the case: Weber and Saravia v. Germany (29.06.2006), § 95.

42 Decision of the European Court of Human Rights in the case: Klass and Others v. Germany (06.09.1978), § 54-56.

43 Decision of the European Court of Human Rights in the case: Halford v. the United Kingdom (25.06.1997).

44 For example, The judgment of the European Court of Human Rights in Handyside v. the United Kingdom (07.12.1976).

45 Constitution of Georgia. Article 15, Paragraph 1. Legislative Gazette of Georgia. <https://matsne.gov.ge/ka/document/view/30346?publication=36> [Last accessed: April 15, 2024].

Regarding digital data obtained through covert investigative action, the European Court of Human Rights explained that the power of secret surveillance under the European Convention is permissible only when it is strictly necessary to protect democratic institutions. However, the concept of necessity implies that the restriction must represent an urgent social necessity, in particular, it must be proportionate to the legitimate aim.[46].

In the case "Klass v. Germany",[47] German law allowed the opening of letters and wiretapping to protect national security and prevent disorder and crime. The system of state supervision of the implementation of the mentioned actions was carried out not in the court but in the Parliamentary Council, and the body called the G10 Commission, which was approved by the Council. The above-mentioned control system was acceptable to the European Court since both bodies were independent of the supervisory authorities and were given sufficient powers to carry out effective and continuous control. Accordingly, the Strasbourg Court did not find a violation of Article 8 of the European Convention in this case.

The above-mentioned decision is noteworthy in that the European Court here emphasized not only the importance of supervision by an independent body but also noted that judicial control or supervision in the implementation of the above-mentioned actions is desirable but not necessary. Therefore, it is important that the body, which will be equipped with supervisory functions, meets the standards of independence and impartiality. However, it should also be noted here that it would be inappropriate if this authority, without any criteria and in the form of unlimited discretion, is granted even to a judge.[48]

As for determining the appropriateness of storing and destroying the obtained information, in the case of Iodachi v. Moldova[49], the Moldovan legislation did not provide for the procedure for selecting secretly obtained information, which should be kept and which not, what procedure should be implemented in terms of protecting the confidentiality of said information and in what cases such information should be destroyed. The European Court found a violation of Article 8 of the European Convention in this case.

CONCLUSION

Based on all of the above, it can be said that the Criminal Procedure Legislation of Georgia cannot provide adequate protection of the right to respect for private life in the process of storing identifying data of electronic communication and, therefore, in the presentation of digital evidence during the substantive consideration of the case in court. Despite the standards established by Strasbourg and the Constitutional Court, national legislation still has norms that contain threats to protecting the right. In particular, despite the change in legal form, the operational-technical agency, which collects the identifying data of electronic communication, is still under the authority of the professionally interested body – the State Security Service, which does not correspond to the practice established by the European Court of Human Rights. In addition, the system of supervision over the obtained information has some shortcomings, which creates the danger of creating an "alternative bank" and does not determine the possibility of selecting the data obtained through covert investigative actions based on the need, which also contradicts the right to respect for private life protected by the European Convention.

Under these conditions, if there are no clear and predictable rules that exclude the collection of such information in the hands of the professionally interested body, the issue of using the obtained data for other illegal purposes by unauthorized persons will become uncontrolled un-

46 Decision of the European Court of Human Rights in the case: Olsson v. Sweden (24.03.1988).

47 Decision of the European Court of Human Rights in the case: Klass v. Germany (06.09.1978).

48 Decision of the European Court of Human Rights in the case: Silver and others v. the United Kingdom (25.03.1983).

49 Decision of the European Court of Human Rights in the case: Iodachi v. Moldova (10.02.2009).

der the threat of creating an "alternative bank". It is clear that such threats will significantly damage the fundamental right of a person to respect for private life protected by the European Convention and the Constitution of Georgia, as well as the principles, goals and interests of criminal procedural law.

BIBLIOGRAPHY

Books:

1. Carrera S., Stefan M., Mitsilegas, V., (2020). Cross-border data access in criminal proceedings and the future of digital justice.
2. Casey, Digital Evidence and Computer Crime, 2004, p.12; The admissibility of electronic evidence in court: fighting against high-tech crime, 2005, Cybex, <http://www.cybex.es/agis2005/elegir_idioma_pdf.htm> [Last accessed: April 15, 2024]
3. Casey, Digital Evidence and Computer Crime, 2004, p.16; Vacca, Computer Forensics, Computer Crime Scene Investigation, Second Edition, 2005, p.39
4. Stephen M., Allison S., (2017). Electronic Evidence.
5. Spiegel Online, (08.01.2007). Fahnder überprüfen erstmals alle deutschen Kreditkarten
6. Kilkelly U., The Right to Respect for Private and Family Life, Human Rights Implementation of Article 8 of the European Convention, Guide, (ed.), Council of Europe, Tbilisi, 2005, 117-118.

Articles:

1. Moore, To View or not to view: Examining the Plain View Doctrine and Digital Evidence, American Journal of Criminal Justice, Volume 29, #1, 2004.

Normative materials:

1. Council of Europe Convention on Computer Crime (23.11.2001), Article 1 <https://rm.coe.int/16802fa423> [Last accessed: April 15, 2024].
2. "On Personal Data Protection" of December 28, 2011, which entered into force on 14.06.2023 N3144.
3. Parliament of Georgia. Explanatory card on the draft law "On personal data protection" <https://info.parliament.ge/file/1/BillReviewContent/222087> [Last accessed: April 15, 2024].
4. "On the Legal Entity of Public Law – Operational-Technical Agency of Georgia", Law of Georgia. Legislative Gazette of Georgia <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [Last accessed: April 15, 2024].
5. Constitution of Georgia. Legislative Gazette of Georgia. <https://matsne.gov.ge/ka/document/view/30346?publication=36> [Last accessed: April 15, 2024].

Court decisions:

1. Decision No. 1/1/625,640 of the Constitutional Court of Georgia dated April 14, 2016 in the case "Public Defender of Georgia, Citizens of

Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tughushi, Zviad Koridze, “Open Foundation “Society Georgia”, “Transparency International – Georgia”, “Young Lawyers Association of Georgia”, “International Society for Fair Elections and Democracy” and “Human Rights Center” against the Parliament of Georgia.
2. The minutes of the Constitutional Court of Georgia dated December 29, 2017. No. 3/4/885-1231.
3. Decision No. 2/1/536 of the Constitutional Court of Georgia dated February 4, 2014 in the case “Georgian citizens Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze against the Minister of Labor, Health and Social Protection of Georgia”, II-55.
4. The decision of the European Court of Human Rights in the case: Kopp v. Switzerland (25.03.1998).
5. Decision of the European Court of Human Rights in the case: Costello-Roberts v. The United Kingdom (25.03.1993).
6. Decision of the European Court of Human Rights in the case: A v. France (07.04.2022).
7. Decision of the European Court of Human Rights in the case: Bykov v. Russia (10.03.2008).
8. Decision of the European Court of Human Rights in the case: Huvig v. France (24.04.1990).
9. Decision of the European Court of Human Rights in the case: Amann v. Switzerland (16.02.2000).
10. Decision of the European Court of Human Rights in the case: Klass and Others v. Germany (06.09.1978).
11. Decision of the European Court of Human Rights in the case: Weber and Saravia v. Germany (29.06.2006).
12. Decision of the European Court of Human Rights in the case: Halford v. the United Kingdom (25.06.1997).
13. Decision of the European Court of Human Rights in the case: Handyside v. the United Kingdom (07.12.1976).
14. Decision of the European Court of Human Rights in the case: Olsson v. Sweden (24.03.1988).
15. Decision of the European Court of Human Rights in the case: Klass v. Germany (06.09.1978).
16. Decision of the European Court of Human Rights in the case: Silver and others v. the United Kingdom (25.03.1983).
17. Decision of the European Court of Human Rights in the case: Iodachi v. Moldova (10.02.2009).

Additional material:

1. Training of Judges on Computer Crime, (2010). France, Strasbourg <https://rm.coe.int/16802fa028> [Last accessed: April 15, 2024].

ელექტრონული კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა კოპირებისა და შენახვის პრობლემა ქართულ სისხლის სამართლის პროცესში – ევროპული კონვენციის მე-8 მუხლთან მიმართებაში

დოდო ჯუღელი

სისხლის სამართლის მაგისტრი, ივანე ჯავახიშვილის სახელობის თბილისის სახელმწიფო უნივერსიტეტი, საქართველოს პერსონალურ მონაცემთა დაცვის ოფიცერთა ასოციაცია, სსიპ შრომის ინსპექციის სამსახური, საქართველო

აბსტრაქტი

საქართველოს სისხლის სამართლის საპროცესო სამართლის მოქმედი კანონმდებლობით არსებული სტანდარტი, რომელიც ელექტრონული კომუნიკაციის საშუალებებიდან მოპოვებული ინფორმაციის უკანონოდ კოპირების საფრთხესთან ერთად ასეთი ინფორმაციის პროფესიულად დაინტერესებული ორგანოს ხელში თავმოყრას ითვალისწინებს, ბუნებრივია, დიდი გამოწვევაა სისხლის სამართლის საპროცესო კანონმდებლობისათვის. აღნიშნულის მიზეზს წარმოადგენს ის მნიშვნელოვანი გარემოება, რომ ამ გზით გამოძიების მიერ მოპოვებულ მონაცემთა გამოყენება ხდება ელექტრონული მტკიცებულების სახით, საქმის არსებითი განხილვის დროს სასამართლოში.

შესაბამისად, საქმე ეხება ინფორმაციას, რომელსაც "გონივრულ ეჭვს მიღმა სტანდარტით" სასამართლო უნდა დაეყრდნოს გადაწყვეტილების მიღებისას. ამდენად, ბრალდებულის ბედის გადაწყვეტისას განსაკუთრებით მნიშვნელოვანია, რომ არ არსებობდეს ეჭვები ასეთ მტკიცებულებათა კანონიერებას, უტყუარობასა და ხელშეუხებლობასთან დაკავშირებით. აღნიშნული

საკითხი საყურადღებოა განსაკუთრებით იმ პირობებში, როდესაც ზემოხსენებული მიდგომა, ადამიანის უფლებათა ევროპული სასამართლო პრაქტიკის თანახმად, შეუსაბამოა ევროპული კონვენციის მე-8 მუხლით დაცული პირადი ცხოვრების პატივისცემის უფლებასთან.

საკვანძო სიტყვები: მტკიცებულება, შეზღუდვა, კოპირება, შენახვა

შესავალი

თემის აქტუალობა. საქართველოს სისხლის სამართლის საპროცესო კანონმდებლობა ელექტრონულ მტკიცებულებათა მოპოვების, მათი შენახვისა და, შესაბამისად, საქმეზე დამაგრების კანონიერების მიზნებისთვის, ფარული საგამოძიებო მოქმედებების განხორციელებისთვის არსებული ნორმების გამოყენებაზე მიუთითებს, რაც, როგორც საკონსტიტუციო სასამართლო განმარტავს, ადამიანის უფლებებსა და თავისუფლებებში მომეტებული ინტენსივობით ჩარევის საფრთხის მატარებელია. ამასთან, არ წყდება საკონსტიტუციო სასამართლოსადმი მიმართვა, ფარული საგამოძიებო მოქმედებების განხორციელების შედეგად მოპოვებული ელექტრონული კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა კოპირებისა და შენახვის საკითხის საქართველოს კონსტიტუციასთან შესაბამისობასთან დაკავშირებით. აღნიშნულის თაობაზე აზრთა სხვადასხვაობაა თავად საკონსტიტუციო სასამართლოს მოსამართლეთა შორის, რომელთა ნაწილს ზემოხსენებული საკითხის მარეგულირებელი ნორმები საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის N1/1/625,640 გადაწყვეტილებით არაკონსტიტუციურად ცნობილი ნორმების „დამძლევ ნორმებად“ მიაჩნია.

ამასთანავე, განსაკუთრებით აქტუალურია ამ კუთხით “პერსონალურ მონაცემთა დაცვის შესახებ” საქართველოს კანონის ახალი რედაქცია, რომლითაც განისაზღვრა სტანდარტი პერსონალურ მონაცემთა დაცვის სფეროსა და ფარული საგამოძიებო მოქმედებების ჩატარების კონტროლის მიმართულებით. საინტერესოა, შეესაბამება თუ არა ახლახან განხორციელებული საკანონმდებლო ცვლილებები კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა კოპირებასა და შენახვასთან დაკავშირებით არსებულ საერთაშორისო მიდგომას.

ამდენად, სისხლის სამართლის პროცესში ზემოხსენებულ მონაცემთა კოპირებასა და შენახვასთან მიმართებით, ადამიანის უფლებათა და თავისუფლებათა დაცვის მიზნებისთვის, განსაკუთრებულად იკვეთება საკითხის სიღრმისეული კვლევის საჭიროება.

კვლევის საგანი. კვლევის საგანია ფარული საგამოძიებო მოქმედებების განხორციელების გზით მოპოვებული კომუნიკაციის მაიდენტიფიცირებელი მონაცემების შენახვასთან და კოპირებასთან დაკავშირებული გამოწვევები სისხლის სამართლის პროცესში, რომელთა გამოყენება ხდება ელექტრონული მტკიცებულების სახით საქმის არსებითი განხილვისას სასამართლოში.

კვლევის მიზანი და ამოცანები. კვლევის მიზანს სისხლის სამართლის პროცესში ელექტრონული კომუნიკაციის მაიდენტიფიცირებელ მონაცემებთა შენახვისას და კოპირებისას ცალკეულ სამართლებრივ პრობლემათა გამოკვეთა და ანალიზი წარმოადგენს. დასახული ამოცანის მიღწევა მოხდება როგორც ისტორიული წინამძღვრებისა და კონსტიტუციურ-სამართლებრივ ჭრილში საკითხის წარმოდგენით, ასევე, ადამიანის უფლებათა ევროპული სამართლის ნორმებისა და პრაქტიკის მოშველიებით.

კვლევის სიახლე. მეცნიერული კვლევის სიახლე გამოიხატება იმაში, რომ სტატიაში ჩამოყალიბებულია „ელექტრონული მტკიცებულების“, როგორც კომუნიკაციის მაიდენტიფიცირებელი მონაცემის მოპოვების საბოლოო შედეგის, განმარტება, მისი ბუნება და განსხვავება ე. წ. „ტრადიციული“ სახის მტკიცებულებებისაგან. ასევე, განხილული იქნება, საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის N1/1/625,640

გადაწყვეტილების მიღების შემდგომ განხორციელებული საკანონმდებლო ცვლილებების შინაარსი, თუ რამდენად არის იგი „არსებითი“ მნიშვნელობის მქონე და კვლავ ხომ არ ქმნის პირადი ცხოვრების პატივისცემის უფლებაში ჩარევის საფრთხეს.

კვლევის ეტაპები. წინამდებარე სტატიის დასაწყისში წარმოდგენილია ელექტრონული მტკიცებულების არსი და განსაზღვრულია, თუ რა მიზანს ისახავს კომუნიკაციის მაიდენტიფიცირებელი მონაცემების მოპოვება. ძირითადი ნაწილი ეთმობა, ასევე, ქვეთავებს, რომლებიც ეხება ელექტრონული კომუნიკაციის საშუალებით გადაცემული ინფორმაციის შენახვასთან დაკავშირებით არსებულ სამართლებრივ საფრთხეებს, რაც მოქმედი კანონმდებლობის პირობებში იქმნება. კერძოდ, განხილულია მოპოვებული ინფორმაციის პროფესიულად დაინტერესებული ორგანოს ხელში თავმოყრისა და უკანონო კოპირების (ე.წ. “ალტერნატიული ბანკის” შექმნა) საკითხი პირადი ცხოვრების პატივისცემის უფლებასთან მიმართებით. დასკვნაში წარმოდგენილია ავტორის შეხედულება და შეჯამება სტატიაში განხილულ პრობლემათა გადაწყვეტის მიზნით.

1. ელექტრონული მტკიცებულებისა და ელექტრონული კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა არსი და ურთიერთმიმართება

XXI საუკუნეში განხორციელებულმა გლობალურმა ტექნოლოგიურმა პროგრესმა დიდი გარდატეხა შეიტანა საზოგადოებრივი ცხოვრების ყველა სფეროში. რამდენადაც გამარტივდა კომუნიკაცია, იმდენად დიდი გამოწვევების წინაშე დადგა თითოეული პიროვნება, სახელმწიფო თუ კერძო დაწესებულება ინფორმაციის დაცვის კუთხით. აღნიშნული პროგრესი შეეხო სისხლის სამართლის საპროცესო კანონმდებლობასაც, განსაკუთრებით, მტკიცებულებათა განვითარების თვალსაზრისით[1]. დანაშაულის ჩადენის პროცესში საგრძნობლად იმატა კომპიუტერული სისტემის გამოყენების მაჩვენებელმა. შესაბამისად, საკმაოდ აქტუალური გახდა ელექტრონული, ანუ ე. წ. „ციფრული“ მტკიცებულებების გამოყენების საკითხი სისხლის სამართალწარმოებაში, რომელიც ახალი ტიპის მტკიცებულებად ჩამოყალიბდა[2].

ელექტრონულ მტკიცებულებას წარმოადგენს[3] ნებისმიერი მონაცემი, რომელიც ინახება ან რომლის გადაცემაც ხდება კომპიუტერული ტექნოლოგიის გამოყენებით და მხარს უჭერს თეორიას იმის შესახებ, თუ როგორ მოხდა დანაშაული.[4] „კომპიუტერული დანაშაულის შესახებ“ ევროსაბჭოს კონვენციის 1-ლი მუხლის თანახმად, კომპიუტერულ სისტემაში იგულისხმება „ნებისმიერი მექანიზმი ან ერთმანეთთან დაკავშირებულ ან ურთიერთდაკავშირებულ მექანიზმთა ჯგუფი, რომელთაგან ერთი ან მეტი, პროგრამის მეშვეობით, ასრულებს მონაცემთა ავტომატურ დამუშავებას“.[5] თავად კომპიუტერული მონაცემი კი არის „ფაქტების, ინფორმაციის ან კონცეფციათა ნებისმიერი გამოსახვა კომპიუტერულ სისტემაში დამუშავებისათვის ხელსაყრელი ფორმით, მათ შორის პროგრამა,

1 Carrera S., Stefan M., Mitsilegas V., Cross-border data access in criminal proceedings and the future of digital justice, 2020, გვ. 1.

2 მოსამართლეების ტრენინგი კომპიუტერული დანაშაულის შესახებ, საფრანგეთი, სტრასბურგი, 2010 წ. გვ.75 <https://rm.coe.int/16802fa028> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

3 საქართველოს სისხლის სამართლის საპროცესო კანონმდებლობაში ელექტრონული მტკიცებულების, როგორც მტკიცებულების დამოუკიდებელი კატეგორიის განმარტებას არ ვხვდებით, მაგრამ აღნიშნული საკითხის მარეგულირებელი ნორმები ძირითადად წარმოადგენილია საქართველოს სისხლის სამართლის საპროცესო კოდექსში, „ოპერატიულ-სამძებრო საქმიანობის შესახებ“ საქართველოს კანონში, „ელექტრონული კომუნიკაციების შესახებ“ საქართველოს კანონში და სხვ.

4 Casey E., Digital Evidence and Computer Crime, 2004, გვ.12; The admissibility of Electronic evidence in court: fighting against high-tech crime, 2005.

5 ევროპის საბჭოს კონვენცია „კომპიუტერული დანაშაულის შესახებ“ (23.11.2001), მუხლი 1. <https://rm.coe.int/16802fa423> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

რომელიც უზრუნველყოფს კომპიუტერული სისტემის ფუნქციონირებას“.[6]

მიუხედავად იმისა, რომ ელექტრონულ მტკიცებულებას ე.წ. “ტრადიციული” მტკიცებულების მსგავსი მახასიათებლები აქვს, არსებობს მთელი რიგი ასპექტები, რომლებიც მას უნიკალურს ხდის.[7] პირველ რიგში, უნდა აღინიშნოს ციფრულ მონაცემთა “სიმყიფე”[8], რაც მას განსაკუთრებულად გამოარჩევს, მაგალითად, ქაღალდზე, მატერიალური სახით შექმნილი დოკუმენტისაგან. აღნიშნული გულისხმობს ელექტრონული კომუნიკაციის საშუალებიდან მოპოვებული ინფორმაციის ბუნებას, რომ იგი ადვილად შეიძლება წაიშალოს[9], შეიცვალოს და ა.შ. კიდევ ერთი მნიშვნელოვანი გარემოება მისი დეცენტრალიზებული შენახვაა. შესაძლებელია, ქვეყნის საზღვრებს გარეთ შენახული ინფორმაცია დანაშაულის ჩამდენი პირების მიერ დისტანციურად იქნეს გამოყენებული,[10] რაც უფრო მეტად ართულებს გამოძიების პროცესს. ამდენად, ასეთ მონაცემთა მოპოვების, ელექტრონულ მტკიცებულებათა ბუნების სანდოობისა და ავთენტურობის საკითხის დადგენა საკმაოდ დიდი გამოწვევაა ყველა ქვეყნის სისხლის სამართლის საპროცესო კანონმდებლობისთვის.[11]

ამასთან, კომპიუტერული დანაშაულის შესახებ კონვენციის ახსნა – განმარტებით ანგარიშში (N187) მითითებულია, რომ კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა ეფექტიანი მოპოვებისათვის საჭიროა დამატებითი პროცესუალური გარანტიები[12]. ამის რამდენიმე მიზეზი არსებობს. პირველი ის, რომ აღნიშნული ინფორმაცია არამატერიალური, ელექტრომაგნიტური ფორმითაა წარმოდგენილი. მეორე მიზეზს კი მისი შემხებლობის განსხვავებული სტანდარტი წარმოადგენს. კერძოდ, კომპიუტერული მონაცემი ვერ იქნება კონფისკირებული ან ჩამორთმეული ისე, როგორც ქაღალდზე ნაბეჭდი დოკუმენტი.

სწორედ გამოძიების მიერ მოპოვებულ, კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა შენახვის პროცესუალურ გარანტიებთან დაკავშირებით იმსჯელა საქართველოს საკონსტიტუციო სასამართლომ 2016 წელს[13], რა დროსაც განსაზღვრა ის სტანდარტები, რომელიც სახელმწიფოს მიერ ელექტრონული კომუნიკაციის საშუალებიდან ინფორმაციის კოპირებისა და შენახვისას უნდა იქნეს გამოყენებული[14].

---

6 *იქვე.*

7 მოსამართლეების ტრენინგი კომპიუტერული დანაშაულის შესახებ, საფრანგეთი, სტრასბურგი, 2010 წ. გვ.76 <https://rm.coe.int/16802fa028> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

8 Casey E., Digital Evidence and Computer Crime, 2004, გვ.16; Vacca, Computer Forensics, Computer Crime Scene Investigation, 2005.

9 Moore, To View or not to view: Examining the Plain View Doctrine and Digital Evidence, American Journal of Criminal Justice, ტომი 29, #1, 2004, გვ. 58.

10 მოსამართლეების ტრენინგი კომპიუტერული დანაშაულის შესახებ, საფრანგეთი, სტრასბურგი, 2010 წ. გვ.76 <https://rm.coe.int/16802fa028> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

11 Stephen M., Allison S., Electronic Evidence, 2017, გვ. 193

12 ელექტრონულ მტკიცებულებათა “ახალი ტიპის” მტკიცებულებებად ჩამოყალიბების და კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა მოპოვების საკითხთან დაკავშირებით დამატებითი პროცესუალური ნორმების საჭიროების თვალსაჩინო მაგალითია გერმანიის სამართალდამცავთა მიერ რამდენიმე ათეული წლის წინათ ჩატარებული გამოძიება,, რა დროსაც საკრედიტო ბარათების გამცემი კომპანიების მეშვეობით დადგინდა იმ დამნაშავეთა ვინაობა, რომლებმაც შეიძინეს და ჩამოტვირთეს ბავშვთა პორნოგრაფია ერთ-ერთი ვებგვერდიდან (იხ., Spiegel Online, Fahnder überprüfen erstmals alle deutschen Kreditkarten,08.01.2007).

13 საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო“, ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო“, ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია“, ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება“ და ააიპ „ადამიანის უფლებათა ცენტრი“ საქართველოს პარლამენტის წინააღმდეგ“

14 ციფრულ მტკიცებულებათა მოპოვება/შენახვა/განადგურება ხორციელდება ფარული საგამოძიებო მოქმედებებისთვის საკონსტიტუციო სასამართლოს მიერ დადგენილი სტანდარტით, ვინაიდან სისხლის სამართლის საპროცესო კა-

აღნიშნული გადაწყვეტილების საფუძველზე საქართველოს კანონმდებლობაში განხორციელდა გარკვეული ცვლილებები, რომელთა შინაარსის საქართველოს კონსტიტუციასთან შესაბამისობის საკითხმა აზრთა სხვადასხვაობა გამოიწვია თავად საკონსტიტუციო სასამართლოს მოსამართლეთა შორის[15].

აზრთა სხვადასხვაობის ერთ-ერთ მიზეზს თანამედროვე ელექტრონული კომუნიკაციის საშუალებებიდან ინფორმაციის კოპირებისა და შენახვის პრობლემა წარმოადგენდა. კერძოდ, საკონსტიტუციო სასამართლოს მოსამართლეთა ნაწილის მიერ ყურადღება იქნა გამახვილებული მოპოვებულ მონაცემთა პროფესიულად დაინტერესებული ორგანოს ხელში თავმოყრისა და ე.წ. "ალტერნატიული ბანკების" შექმნის საფრთხეებზე.

2. ე.წ. "ალტერნატიული ბანკების" შექმნის საფრთხე

როგორც საკონსტიტუციო სასამართლოს გადაწყვეტილებაშია ხაზგასმული, „ტექნიკურად შესაძლებელია, მაიდენტიფიცირებელი მონაცემის კოპირების და შენახვის პროცესში შეიქმნას ე.წ. „ალტერნატიული ბანკი", რომლის არსებობის შესახებ შესაძლოა არავინ იცოდეს და მასზე დაშვება არც პერსონალურ მონაცემთა დაცვის ინსპექტორს ჰქონდეს"[16]. აღნიშნული გულისხმობს ტოტალურ წვდომას გამოძიების მიერ მოპოვებულ ინფორმაციაზე, ყოველგვარი შინაარსობრივი გამიჯვნის გარეშე: ვინ სად, როდის, რა ტექნიკური საშუალებით, რომელი ლოკაციიდან და როგორი ხანგრძლივობით მოახდინა დაკავშირება.

უნდა აღინიშნოს ზედამხედველობის იმ მექანიზმებზე, რომელიც მოპოვებული ინფორმაციის კოპირების თავიდან აცილების მიზნებისთვის შეიქმნა. როგორც საკონსტიტუციო სასამართლომ აღნიშნა, "პერსონალურ მონაცემთა დაცვის შესახებ" საქართველოს კანონში[17] განხორციელებულ 2017 წლის 22 მარტის ცვლილებებს რაიმე ახლებური რეგულირება არ შემოუტანია ინსპექტორის მიერ მონაცემთა კოპირების პროცესის გაკონტროლების თვალსაზრისით.[18] დადებითი ნოვაცია იყო ის, რომ არსებული კონტროლის ერთ-ერთი ბერკეტი – ელექტრონული კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა ცენტრალური ბანკის კონტროლის ელექტრონული სისტემა – ტექნიკური თვალსაზრისით უკვე გამართულ იქნა და მისი საშუალებით ინსპექტორს შეეძლო კოპირებულ მონაცემთა ბანკში განხორციელებული ქმედებების კონტროლი.[19] რაც შეეხება ელექტრონული კომუნიკაციის კომპანიებისგან სააგენტოს მიერ მონაცემთა კოპირების პროცესს, აღნიშნულზე ზედამხედველობის

ნონმდებლობის თანახმად, კომპიუტერულ მონაცემთან დაკავშირებულ საგამოძიებო მოქმედებებზე ვრცელდება ფარული საგამოძიებო მოქმედებებისთვის დადგენილი წესები.

15 საქართველოს საკონსტიტუციო სასამართლოს 2017 წლის 29 დეკემბრის №3/4/885-1231 საოქმო ჩანაწერი.

16 საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო", ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო", ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია", ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება" და ააიპ „ადამიანის უფლებათა ცენტრი" საქართველოს პარლამენტის წინააღმდეგ", II-100.

17 საუბარია "პერსონალურ მონაცემთა დაცვის შესახებ" საქართველოს 2011 წლის 28 დეკემბრის კანონზე, რომელიც ძალადაკარგულია – 14.06.2023 N3144. აქვე, უნდა აღინიშნოს, რომ პერსონალურ მონაცემთა დამუშავების საკითხზე კონტროლი საქართველოში 2013 წლიდან ხორციელდება. 2015 წლიდან კი, ადგილი აქვს უშუალოდ ფარულ საგამოძიებო მოქმედებებზე ზედამხედველობას. ზემოთხსენებულ საქმიანობას 2013-2019 წლებში პერსონალურ მონაცემთა დაცვის ინსპექტორის აპარატი ახორციელებდა, 2019-2022 წლებში მისი უფლებამონაცვლე – სახელმწიფო ინსპექტორის სამსახური. 2022 წლის 1 მარტიდან კი აღნიშნული მანდატი პერსონალურ მონაცემთა დაცვის სამსახურს მიენიჭა.

18 საკონსტიტუციო სასამართლოს 2017 წლის 29 დეკემბრის №3/4/885-1231 საოქმო ჩანაწერი, II – 84.

19 *იქვე*, II – 96

ერთადერთ ბერკეტს ინსპექტირება წარმოადგენდა. ზედამხედველობის ეს სახე საკონსტიტუციო სასამართლომ 2016 წლის 14 აპრილის გადაწყვეტილებით არაეფექტიანად მიიჩნია მისი განხორციელების მეთოდის გამო, რაც „შემთხვევითი შერჩევის პრინციპში“ მდგომარეობდა. აღნიშნული მიდგომა გამორიცხავს აბსოლუტურად ყველა მონაცემთა კონტროლის, შესაბამისად, აბსოლუტურად ყველა დარღვევის აღმოჩენის შესაძლებლობას, ხოლო ასეთმა “შერჩევითმა კონტროლმა, ფაქტობრივად, შეუძლებელია ხელშესახები შედეგები გამოიღოს“[20].

ზემოხსენებული საკითხის მარეგულირებელ ნორმებთან დაკავშირებით ხაზგასასმელია ის გარემოება, რომ “პერსონალურ მონაცემთა დაცვის შესახებ” საქართველოს კანონის მოქმედი რედაქცია მონაცემთა დაცვის სფეროსა და ფარული საგამოძიებო მოქმედებების ჩატარების კონტროლის სფეროსთან დაკავშირებით, კანონის წინა რედაქციისგან არსებითად განმასხვავებელ დანაწესებს არ ითვალისწინებს. კერძოდ, “პერსონალურ მონაცემთა დაცვის შესახებ” საქართველოს კანონის მოქმედი რედაქციის VII თავი ტექსტობრივად და, შესაბამისად, შინაარსობრივადაც “პერსონალურ მონაცემთა დაცვის შესახებ” საქართველოს კანონის წინა რედაქციის V[2] (“პერსონალურ მონაცემთა დაცვის სამსახურის უფლებამოსილებები მონაცემთა დაცვის სფეროსა და ფარული საგამოძიებო მოქმედებების ჩატარების კონტროლის სფეროში”) თავის იდენტურია.

ამდენად, ინსპექტირების არსებული ბერკეტი კვლავ “შემთხვევითი შერჩევის პრინციპის” მატარებელია, რაც უშვებს იმის ალბათობას, რომ კონტროლის აღნიშნული მექანიზმის მოქმედებისას იმთავითვე გამორიცხულია პერსონალურ მონაცემთა დაცვის სამსახურის მიერ მის კომპეტენციას მიკუთვნებულ საკითხებთან დაკავშირებით კანონდარღვევათა სრულად აღმოჩენა და, შესაბამისად, აღმოფხვრაც.

ამასთან, ვინაიდან ე.წ. “ალტერნატიული ბანკების“ შექმნის საფრთხის არსებობის პირობებში შესაძლებელია კოპირებულ იქნას აბსოლუტურად ყველა მოპოვებული ინფორმაცია ყოველგვარი გადარჩევის გარეშე, საინტერესოა, თუ რა ცვლილებები განიცადა ამ კუთხით კანონმდებლობამ “პერსონალურ მონაცემთა დაცვის შესახებ” ახალი კანონის ამოქმედების შემდგომ.

როგორც ზემოთ ხსენებული კანონის განმარტებით ბარათშია აღნიშნული, მონაცემები “უნდა დამუშავდეს მხოლოდ იმ მოცულობით, რომელიც აუცილებელია შესაბამისი კანონიერი მიზნის მისაღწევად”. ამასთან, აქვე ვკითხულობთ, რომ ინფორმაცია შესაძლებელია შენახულ იქნას “მხოლოდ იმ ვადით, რომელიც აუცილებელია მონაცემთა დამუშავების მიზნის მისაღწევად”. განმარტებით ბარათში, ასევე, ხაზგასმულია ინფორმაციის უსაფრთხო შენახვის მნიშვნელობა, რომ მიღებულ უნდა იქნას სათანადო ზომები მონაცემთა “უნებართვო ან უკანონო” დამუშავების თავიდან ასაცილებლად.[21] განმარტებითი ბარათში განსაზღვრული ზემოთ ხსენებული მიზნები აღნიშნული კანონის მე-4 მუხლში, მონაცემთა დამუშავების პრინციპების სახით იქნა ჩამოყალიბებული.

თუმცა, კანონმდებლის მხრიდან, ინფორმაციის შენახვისა და დაცვის კუთხით, ზემოთ ხსენებული, ადამიანის უფლებათა დაცვის მკაფიო, აშკარა მზადყოფნის მიუხედავად, აღნიშნული მიდგომა ნაკლებად შეეხო ფარული საგამოძიებო მოქმედებების გზით ელექტრონული კომუნიკაციის საშუა-

20 საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო“, ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო“, ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია“, ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება“ და ააიპ „ადამიანის უფლებათა ცენტრი“ საქართველოს პარლამენტის წინააღმდეგ“, II-104.

21 საქართველოს პარლამენტი. განმარტებითი ბარათი კანონპროექტზე “პერსონალურ მონაცემთა დაცვის შესახებ” <https://info.parliament.ge/file/1/BillReviewContent/222087> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

ლებიდან მოპოვებული ინფორმაციის შენახვის ვადას. საკონსტიტუციო სასამართლოს მიერ გადაწყვეტილების მიღების შემდეგ, ელექტრონული კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა შენახვის ვადა ორი წლიდან 12 თვემდე შემცირდა[22]. მიუხედავად აღნიშნული ცვლილებისა, არ ხდება ზემოხსენებული ვადის პერიოდული გადამოწმება. შესაბამისად, არ არსებობს დანაწესი კანონმდებლობაში, რომელიც გაითვალისწინებს იმის დადგენას, კვლავ არის თუ არა მოპოვებული ინფორმაცია საქმისთვის მნიშვნელოვანი და არსებობს თუ არა მისი შენახვის საჭიროება. ამდენად, შეიძლება შენახულ იქნას ყველაფერი, მათ შორის, საქმისთვის მნიშვნელობის არმქონე ინფორმაცია, კანონით დადგენილი ვადით, ყოველგვარი გადარჩევისა და დასაბუთების გარეშე. ამდენად, მოქმედი კანონმდებლობა დღემდე ითვალისწინებს, აბსოლუტურად შეუზღუდავად, პირთა წრის და ლოკაციის მიხედვით ასეთი ინფორმაციის კოპირებასა და შენახვას[23] ერთი წლის ვადით.

ყოველივე ზემოაღნიშნულიდან გამომდინარე, ე. წ. "ალტერნატიული ბანკების" შექმნის საფრთხე პრობლემურია, იმ კუთხითაც, რომ შესაძლებელია შენახულ იქნეს ისეთი ინფორმაცია, რომელიც გამოძიებისთვის არ იყოს მნიშვნელოვანი, მაგრამ კანონის დანაწესის არარსებობის პირობებში არ ნადგურდება საამისოდ უფლებამოსილ პირთა მიერ.

3. მონაცემთა პროფესიულად დაინტერესებული ორგანოს ხელში თავმოყრა

"საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ" საქართველოს კანონის თანახმად ოპერატიულ-ტექნიკური სააგენტო არის ელექტრონული კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა დამუშავებაზე, შენახვაზე, გაცემასა და განადგურებაზე პასუხისმგებელი საჯარო სამართლის იურიდიული პირი.[24] საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის გადაწყვეტილებამდე სააგენტო დეპარტამენტის სახით იყო წარმოდგენილი სახელმწიფო უსაფრთხოების სამსახურის შემადგენლობაში. საკონსტიტუციო სასამართლოს აღნიშნულ სხდომაზე მოწმის მიერ გაჟღერებული პოზიციით, "ალტერნატიული ბანკების" შექმნის თავიდან აცილების ერთადერთ ბერკეტად ოპერატიულ-ტექნიკური დეპარტამენტის საჯარო სამართლის იურიდიულ პირად გარდაქმნა დასახელდა. ამ შემთხვევაში გამოირიცხებოდა მოპოვებულ მონაცემთა თავმოყრა პროფესიულად დაინტერესებული ორგანოს – სახელმწიფო უსაფრთხოების სამსახურის ხელში, რომლის განუყოფელ ნაწილსაც სააგენტო წარმოადგენდა.

საკონსტიტუციო სასამართლოს აღნიშნული მიდგომის ჩამოყალიბების შემდეგ, ოპერატიულ-ტექნიკური სააგენტოს საჯარო სამართლის იურიდიულ პირად გარდაქმნის მიუხედავად, უნდა აღინიშნოს, რომ იგი შინაარსობრივად დღემდე სახელმწიფო უსაფრთხოების სამსახურის "ეფექტიან კონტროლს" არის დაქვემდებარებული.[25]

22 "საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ", საქართველოს კანონი. მუხლი 15. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

23 საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო", ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო", ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია", ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება" და ააიპ „ადამიანის უფლებათა ცენტრი" საქართველოს პარლამენტის წინააღმდეგ", II-91.

24 "საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ", საქართველოს კანონი. მუხლი 15. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

25 საქართველოს საკონსტიტუციო სასამართლოს

„საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ“ საქართველოს კანონის მე-3 მუხლის თანახმად სააგენტო, როგორც საჯარო სამართლის იურიდიული პირი არის სახელმწიფო უსაფრთხოების სამსახურის სისტემაში შექმნილი და სწორედ ამ სისტემაში ფუნქციონირებს როგორც ერთიანი და ცენტრალიზებული სამსახურის ნაწილი. კერძოდ:

- სააგენტოს უფროსი „შეიმუშავებს წინადადებებს სააგენტოს მატერიალურ-ტექნიკური უზრუნველყოფისა და დაფინანსების (მათ შორის, სააგენტოს ბიუჯეტის) შესახებ და შესაბამის პროექტებს წარუდგენს სამსახურის უფროსს“[26].
- „სააგენტოს მიერ გაწეული საქმიანობის სტატისტიკური და განზოგადებული ანგარიშის საქართველოს პრემიერ-მინისტრისთვის წარდგენამდე სააგენტოს უფროსი ამ ანგარიშს წარუდგენს სამსახურის უფროსს“.[27]
- სახელმწიფო უსაფრთხოების სამსახურის უფროსი წყვეტს შემავალი საჯარო სამართლის იურიდიული პირის ხელმძღვანელისთვის სპეციალური დანამატის დაწესებისა და პრემიების განსაზღვრის საკითხებს[28]
- „სააგენტოს საქმიანობის სახელმწიფო კონტროლს ახორციელებს სამსახურის უფროსი“.[29]

ხაზი უნდა გაესვას იმ გარემოებას, რომ 2016 წლის 14 აპრილის საკონსტიტუციო სასამართლოს გადაწყვეტილებით ოპერატიულ-ტექნიკური დეპარტამენტი პროფესიულად დაინტერესებულ ორგანოდ მიჩნეულ იქნა არა იმის გამო, რომ უშუალოდ ამ დეპარტამენტს გააჩნდა რაიმე სახის საგამოძიებო ფუნქცია, არამედ იმ გარემოებიდან გამომდინარე, რომ ის წარმოადგენდა სახელმწიფო უსაფრთხოების სამსახურის სფეროში არსებულ ერთეულს და სწორედ სამსახურის ფუნქციები აქცევდა მას გამოძიების ფუნქციის მქონედ.[30] საკონსტიტუციო სასამართლომ ხაზგასმით აღნიშნა, რომ „როდესაც პირად ინფორმაციაზე პირდაპირი და უშუალო წვდომის ტექნიკური შესაძლებლობები სახელმწიფო უსაფრთხოების სამსახურის (ან გამოძიების ფუნქციის მქონე სხვა ორგანოს) ხელთაა, რაც, როგორც უკვე აღვნიშნეთ, თავისთავად განუზომლად ზრდის უფლებაში თვითნებურად, გადამეტებულად ჩარევის რისკებს, ობიექტურად ძალიან რთული ხდება, თუ შეუძლებელი არა, გამოძიებაზე უფლებამოსილი ორგანოების ეფექტიანი კონტროლი”[31].

2017 წლის 29 დეკემბრის №3/4/885-1231 საოქმო ჩანაწერი.

26 “საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ”, საქართველოს კანონი. მუხლი 20, პუნქტი 2. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

27 “საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ”, საქართველოს კანონი. მუხლი 29, პუნქტი 2. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

28 “საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ”, საქართველოს კანონი. მუხლი 20, პუნქტი 2, ქვეპუნქტი „ლ“. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

29 “საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ”, საქართველოს კანონი. მუხლი 29, პუნქტი 1. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

30 საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო“, ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო“, ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია“, ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება“ და ააიპ „ადამიანის უფლებათა ცენტრი“ საქართველოს პარლამენტის წინააღმდეგ“, II-55.

31 საქართველოს საკონსტიტუციო სასამართლოს

მოქმედი საკანონმდებლო რეგულაციის პირობებში, ნათელია, რომ აღნიშნული დეპარტამენტის საჯარო სამართლის იურიდიულ პირად გარდაქმნის საკითხი ფორმალური ხასიათის მატარებელია, ვინაიდან შინაარსობრივად ოპერატიულ-ტექნიკური სააგენტოს საქმიანობა როგორც საფინანსო, ისე ფუნქციური მმართველობის კუთხით სახელმწიფო უსაფრთხოების სამსახურის ხელმძღვანელის მიერ მიღებულ გადაწყვეტილებაზეა დამოკიდებული.

ე.წ. "ალტერნატიული ბანკების" შექმნისა და მონაცემების პროფესიული ნიშნით დაინტერესებული ორგანოს ხელში თავმოყრის შესაძლებლობა, საკონსტიტუციო სასამართლოს განმარტებით, "როგორც კუმულაციაში, ისე ცალ-ცალკე ქმნიან საფრთხეს ადამიანის პირად სივრცეში გადამეტებული, უსაფუძვლო ჩარევისთვის, შესაბამისად, ფუნდამენტური უფლებების დარღვევისთვის"[32].

განსაკუთრებით იმ პირობებში, როდესაც საქმე ეხება ფარულ საგამოძიებო მოქმედებებს, თვითნებურ ქმედებათა განხორციელების რისკი აშკარაა. ამასთანავე, ვინაიდან მოცემულ შემთხვევაში, საუბარია ელექტრონულ მტკიცებულებათა მოპოვებაზე, რომლის ავთენტურობის საკითხი მჭიდროდაა დაკავშირებული ტექნოლოგიურ პროგრესთან, კიდევ უფრო მეტად იკვეთება ამ კუთხით ნათელი და დეტალური წესების არსებობის საჭიროება[33].

ვინაიდან, როგორც ეროვნულ, ისე საერთაშორისო დონეზე დიდი მნიშვნელობა ენიჭება პიროვნების ინტიმური ცხოვრების ხელშეუვალობას, ადამიანთა გარკვეულ წრესთან პერსონალურ კავშირებს იმ ინტენსივობით, რაც აუცილებელია მისი პიროვნული სრულყოფისთვის[34], საჭიროა ეროვნულ დონეზე არსებობდეს ისეთ სამართლებრივ ნორმათა ერთობლიობა, რომელიც არ შექმნის ეჭვებს ზემოხსენებულ უფლებებში არაუფლებამოსილი პირების მიერ არაპროპორციული ჩარევის შესახებ.

ამდენად, ვინაიდან საფრთხეებმა, რომლებიც ზემოთ იქნა განხილული, დიდი გავლენა შეიძლება იქონიოს ადამიანის ქცევის თავისუფლებაზე, საჭიროა დადგინდეს – იწვევს თუ არა ამ კუთხით არსებული მოქმედი საკანონმდებლო რეგულაცია ისეთი მნიშვნელოვანი უფლების შეზღუდვას, როგორიცაა პირადი ცხოვრების პატივისცემა.

4. ევროპული კონვენციის მე-8 მუხლით დაცული პირადი ცხოვრების პატივისცემის უფლებასთან შესაბამისობის საკითხი

საინტერესოა, რა მიდგომას აყალიბებს პირადი ცხოვრების პატივისცემის უფლების კუთხით ადამიანის უფლებათა ევროპული სასამართლო და შეესაბამება თუ არა მოპოვებული ელექტრონული კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა უსაფრთხო შენახვასთან დაკავშირებით საქართველოს სისხლის სამართლის საპროცესო კანონმდებლობა ევროპული კონვენციის მე-8 მუხლით დაცულ ზემოაღნიშნულ უფლებას.

სტრასბურგის სასამართლო განმარტავს, რომ პირადი ცხოვრების ცნება არის ფართო და არ შეიძლება ექვემდებარებოდეს ამომწურავ განმარტებას.[35] პირადი ცხოვრების

2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო", ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო", ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია", ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება" და ააიპ „ადამიანის უფლებათა ცენტრი" საქართველოს პარლამენტის წინააღმდეგ", II-55.

32 *იქვე*, II-95.

33 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Kopp v. Switzerland (25.03.1998), §46.

34 საქართველოს საკონსტიტუციო სასამართლოს 2014 წლის 4 თებერვლის №2/1/536 გადაწყვეტილება საქმეზე "საქართველოს მოქალაქეები ლევან ასათიანი, ირაკლი ვაჭარაძე, ლევან ბერიანიძე, ბექა ბუჩაშვილი და გოჩა გაბოძე საქართველოს შრომის, ჯანმრთელობისა და სოციალური დაცვის მინისტრის წინააღმდეგ" II-55.

35 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Costello-Roberts v. The

პატივისცემის კონცეფცია მოიცავს პიროვნების თავისუფალი განვითარების უფლებას, ისევე როგორც ურთიერთობების დამყარებას სხვებთან.[36]

საქმეში A v. France[37] საფრანგეთის მთავრობა ამტკიცებდა, რომ ჩაწერილი საუბრები, რომლებიც დაკავშირებული იყო მკვლელობის ჩადენასთან, არ ეხებოდა პირად ცხოვრებას. კომისიამ დაადგინა შემდეგი: ის ფაქტი, რომ საუბარი წარმოადგენდა საზოგადოებრივი ინტერესის საგანს, არ უკარგავდა მას პირად ხასიათს. სასამართლომ აღნიშნული არგუმენტი გაიზიარა და განმარტა, რომ ინდივიდის თანხმობის გარეშე სახელმწიფო თანამდებობის პირთა მხრიდან მასზე ინფორმაციის შეგროვება ყოველთვის ეხება პირის პირად ცხოვრებას და, შესაბამისად, ხვდება მე-8 მუხლის 1-ლი პუნქტის მოქმედების ფარგლებში.

სისხლის სამართლის პროცესში ელექტრონული კომუნიკაციის საშუალებიდან მოპოვებული ინფორმაციის კოპირებისა და შენახვის საკითხის ევროპული კონვენციის მე-8 მუხლით დაცულ პირადი ცხოვრების პატივისცემის უფლებასთან შესაბამისობის განსაზღვრისთვის უნდა დადგინდეს შემდეგი:

ა) შეზღუდვა განხორციელდა თუ არა კანონის შესაბამისად?

“კანონის შესაბამისობის” დადგენის კუთხით განსაკუთრებით საინტერესოა ევროპული სასამართლოს მიდგომა, რომლის თანახმად, საკანონმდებლო დონეზე ნორმის არსებობა არ ნიშნავს იმას, რომ შეზღუდვა იმთავითვე კანონის შესაბამისი იქნება. საქმეში Bykov v. Russia [38] ევროპულმა სასამართლომ აღნიშნა, რომ იმისათვის, რათა ეროვნული კანონმდებლობა შეესაბამებოდეს „კანონის ხარისხის“ მოთხოვნას, ის უნდა ითვალისწინებდეს ხელისუფლების ორგანოების დისკრეციის ფარგლებს. ამასთანავე, ყურადღება იქნა გამახვილებული დამოუკიდებელი და მიუკერძოებელი ორგანოს მონაწილეობის მნიშვნელობაზე და ხაზი გაესვა იმ გარემოებას, რომ ფარული საგამოძიებო მოქმედებების განხორციელებისას მიუკერძოებელი ორგანოს ჩართვა მნიშვნელოვანია იმდენად, რამდენადაც ამ გზით ინდივიდს ექნება ადეკვატური დაცვის საშუალება თვითნებური ჩარევისაგან[39].

ამასთან, ვინაიდან “ხელისუფლების ორგანოების მხრიდან ფარული თვალთვალის ან კომუნიკაციის მონიტორინგის განხორციელებისას არ წარმოებს უფლებაში ჩარევასთან დაკავშირებით საჯარო კონტროლი,[40]” “კანონი ამომწურავად უნდა განსაზღვრავდეს ფარული თვალთვალის შედეგად მოპოვებული ინფორმაციის გამოკვლევის, გამოყენებისა და შენახვის, ისევე როგორც ფარული თვალთვალის შედეგად მოპოვებული ინფორმაციის მესამე მხარისათვის გადაცემის პროცედურებს”[41]. აღნიშნული მიდგომა გამორიცხავს “ხელისუფლების ორგანოების მხრიდან უფლებამოსილების ბოროტად ან თვითნებურად”[42] გამოყენებას.

შესაბამისად, პირადი ცხოვრების პატივისცემის უფლებაში ჩარევა არ არის “კანონის შესაბამისი მაშინ”, როდესაც ეროვნული კანონმდებლობით ზემოხსენებულ უფლებაში სამართალდამცავთა ჩარევისგან მომჩივნის ადეკვატური დაცვა არ არის უზრუნველყოფილი.[43]

United Kingdom (25.03.1993), §36.

36 კილკელი უ., პირადი და ოჯახური ცხოვრების პატივისცემის უფლება, ადამიანის უფლებათა ევროპული კონვენციის მე-8 მუხლის განხორციელება, გზამკვლევი, ლ.ჭელიძის, ბ. ბოხაშვილის, თ. მამუკელაშვილის თარგმანი, ლ. ჭელიძის რედაქტორობით, ევროპის საბჭო, 2005, გვ.14.

37 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: A v. France (07.04.2022).

38 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Bykov v. Russia (10.03.2009).

39 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Huvig v. France (24.04.1990), § 29; ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Amann v. Switzerland (16.02.2000) §56.

40 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Klass and Others v. Germany (06.09.1978), §54-56.

41 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Weber and Saravia v. Germany (29.06.2006), § 95.

42 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Klass and Others v. Germany (06.09.1978), §54-56.

43 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Halford v. the United

ბ) შეზღუდვა შეესაბამება თუ არა კანონიერ მიზანს?

კანონიერ მიზანთან დაკავშირებით სტრასბურგის სასამართლო განმარტავს, რომ თავად მოპასუხე სახელმწიფოა ვალდებული განსაზღვროს კანონიერი შეზღუდვის მიზნები. უმრავლეს საქმეებში სასამართლოს მისაღებად მიაჩნია, რომ სახელმწიფოები სათანადო მიზნით მოქმედებენ, შესაბამისად, იშვიათად კმაყოფილდება ხოლმე მოსარჩელის მოთხოვნა ამ ნაწილში. [44]

ჩვენ მიერ განხილულ შემთხვევაშიც არსებობს ისეთი ლეგიტიმური მიზნები, როგორიცაა: დემოკრატიულ საზოგადოებაში აუცილებელი სახელმწიფო ან საზოგადოებრივი უსაფრთხოების უზრუნველყოფა, სხვათა უფლებების დაცვა.[45] თუმცა ერთია ხსენებული კანონიერი მიზნების არსებობა და მეორე საკითხია ის, არის თუ არა ამ მიზნების მისაღწევად არსებული კანონმდებლობა აუცილებელი დემოკრატიულ საზოგადოებაში.

გ) აუცილებელია თუ არა დემოკრატიულ საზოგადოებაში?

ფარული საგამოძიებო მოქმედების გზით მოპოვებულ ციფრულ მონაცემებთან დაკავშირებით ადამიანის უფლებათა ევროპულმა სასამართლომ განმარტა, რომ საიდუმლო მეთვალყურეობის უფლებამოსილება ევროპული კონვენციის თანახმად დასაშვებია მხოლოდ იმ შემთხვევაში, როდესაც იგი მკაცრად აუცილებელია დემოკრატიული ინსტიტუტების დაცვის მიზნით. ამასთან, აუცილებლობის ცნება გულისხმობს იმას, რომ შეზღუდვა უნდა წარმოადგენდეს გადაუდებელ სოციალურ აუცილებლობას, განსაკუთრებით პროპორციული უნდა იყოს კანონიერ მიზანთან [46].

საქმეში "Klass v. Germany"[47] გერმანიის კანონმდებლობა ეროვნული უშიშროების დაცვის, უწესრიგობისა და დანაშაულის თავიდან აცილების მიზნით უშვებდა წერილის გახსნასა და სატელეფონო მოსმენებს. აღნიშნულ ქმედებათა განხორციელების სახელმწიფო ზედამხედველობის სისტემა ხორციელდებოდა არა სასამართლოში, არამედ საპარლამენტო საბჭოში და ორგანოში, სახელწოდებით G10 კომისია, რომელიც საბჭომ დაამტკიცა. ევროპული სასამართლოსთვის მისაღები იყო ზემოხსენებული კონტროლის სისტემა, ვინაიდან ორივე ორგანო დამოუკიდებელი იყო მეთვალყურეობის განმახორციელებელი ორგანოებისგან და მინიჭებული ჰქონდა საკმარისი უფლებამოსილებები ეფექტიანი და განგრძობადი კონტროლის განსახორციელებლად. შესაბამისად, სტრასბურგის სასამართლომ მოცემულ საქმეში ევროპული კონვენციის მე-8 მუხლის დარღვევა არ დაადგინა.

საყურადღებოა ზემოხსენებული გადაწყვეტილება იმ კუთხითაც, რომ ევროპულმა სასამართლომ აქ ხაზი გაუსვა არა მარტო დამოუკიდებელი ორგანოს მხრიდან ზედამხედველობის განხორციელების მნიშვნელობაზე, არამედ, ასევე აღნიშნა, რომ სასამართლო კონტროლი თუ ზედამხედველობა ზემოხსენებულ ქმედებათა განხორციელებისას სასურველია, მაგრამ არა აუცილებელი. შესაბამისად, მთავარია ორგანო, რომელიც საზედამხედველო ფუნქციებით იქნება აღჭურვილი, აკმაყოფილებდეს დამოუკიდებლობისა და მიუკერძოებლობის სტანდარტებს. თუმცა, აქვე ისიც უნდა აღინიშნოს, რომ შეუსაბამო იქნება, თუ ეს უფლებამოსილება, რაიმე კრიტერიუმების გარეშე და შეუზღუდავი დისკრეციის სახით, მიენიჭება თუნდაც მოსამართლეს.[48]

რაც შეეხება მოპოვებული ინფორმაციის შენახვისა და განადგურების მიზანშეწო-

---

Kingdom (25.06.1997).

44 მაგ., ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Handyside v. the United Kingdom (07.12.1976).

45 საქართველოს კონსტიტუცია. მუხლი 15, პუნქტი 1. საქართველოს საკანონმდებლო მაცნე. <https://matsne.gov.ge/ka/document/view/30346?publication=36> [ბოლო ნახვა: 15 აპრილი, 2024წ.].

46 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Olsson v. Sweden (24.03.1988).

47 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Klass v. Germany (06.09.1978).

48 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Silver and others v. the United Kingdom (25.03.1983).

ნილობის საკითხის განსაზღვრას, საქმეში Iodachi v. Moldova[49], მოლდოვის კანონმდებლობა არ ითვალისწინებდა პროცედურას თუ რა წესით უნდა გადარჩეულიყო ფარულად მოპოვებული ინფორმაცია, რომელი უნდა შენახულიყო და რომელი არა, რა პროცედურა უნდა განხორციელებულიყო აღნიშნული ინფორმაციის კონფიდენციალურობის დაცვის კუთხით და რა შემთხვევაში უნდა განადგურებულიყო ასეთი ინფორმაცია. ევროპულმა სასამართლომ მოცემულ საქმეში ევროპული კონვენციის მე-8 მუხლის დარღვევა დაადგინა.

დასკვნა

ყოველივე ზემოაღნიშნულიდან გამომდინარე, შეიძლება ითქვას, რომ საქართველოს სისხლის სამართლის საპროცესო კანონმდებლობა ვერ უზრუნველყოფს ელექტრონული კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა შენახვის პროცესში და, შესაბამისად, სასამართლოში საქმის არსებითი განხილვის დროს ციფრულ მტკიცებულებათა წარდგენისას პირადი ცხოვრების პატივისცემის უფლების ადეკვატურ დაცვას. სტრასბურგისა და საკონსტიტუციო სასამართლოს მიერ ჩამოყალიბებული სტანდარტის მიუხედავად, ეროვნულ კანონმდებლობაში კვლავ არსებობს ისეთი ნორმები, რომელიც შეიცავს საფრთხეებს აღნიშნული უფლების დაცვის კუთხით. კერძოდ, ელექტრონული კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა მომპოვებელი – ოპერატიულ-ტექნიკური სააგენტო, სამართლებრივი ფორმის ცვლილების მიუხედავად, კვლავ პროფესიულად დაინტერესებული ორგანოს – სახელმწიფო უსაფრთხოების სამსახურის დაქვემდებარებაშია, რაც არ შეესაბამება ადამიანის უფლებათა ევროპული სასამართლოს მიერ ჩამოყალიბებულ პრაქტიკას. ამასთან, მოპოვებულ ინფორმაციაზე ზედამხედველობის სისტემას აქვს გარკვეული ხარვეზები, რომელიც ქმნის "ალტერნატიული ბანკის" შექმნის საფრთხეს და არ განსაზღვრავს ფარული საგამოძიებო მოქმედებების გზით მოპოვებულ მონაცემთა საჭიროების საფუძვლით გადარჩევის შესაძლებლობას, რაც ასევე, წინააღმდეგობაში მოდის ევროპული კონვენციით დაცულ პირადი ცხოვრების პატივისცემის უფლებასთან.

იმ პირობებში, თუკი არ იარსებებს ნათელი და განჭვრეტადი წესები, რომელიც გამორიცხავს პროფესიულად დაინტერესებული ორგანოს ხელში ასეთი ინფორმაციის თავმოყრას, "ალტერნატიული ბანკის" შექმნის საფრთხის პირობებში უკონტროლო გახდება მოპოვებულ მონაცემთა სხვა, არაკანონიერი მიზნებისთვის გამოყენების საკითხი საამისოდ არაუფლებამოსილ პირთა მიერ. ცალსახაა, რომ მსგავსი საფრთხეების არსებობა მნიშვნელოვნად დააზიანებს როგორც ევროპული კონვენციითა და საქართველოს კონსტიტუციით დაცულ ადამიანის ფუნდამენტურ – პირადი ცხოვრების პატივისცემის უფლებას, ისე, სისხლის სამართლის საპროცესო სამართლის პრინციპებს, მიზნებსა და ინტერესებს.

49 ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Iodachi v. Moldova (10.02.2009).

ბიბლიოგრაფია

1. Carrera S., Stefan M., Mitsilegas V., Cross-border data access in criminal proceedings and the future of digital justice, 2020, გვ. 1.
2. მოსამართლეების ტრენინგი კომპიუტერული დანაშაულის შესახებ, საფრანგეთი, სტრასბურგი, 2010 წ. გვ.75 <https://rm.coe.int/16802fa028> [ბოლო ნახვა: 15 აპრილი, 2024წ.].
3. საქართველოს სისხლის სამართლის საპროცესო კანონმდებლობაში ელექტრონული მტკიცებულების, როგორც მტკიცებულების დამოუკიდებელი კატეგორიის განმარტებას არ ვხვდებით, მაგრამ აღნიშნული საკითხის მარეგულირებელი ნორმები ძირითადად წარმოადგენილია საქართველოს სისხლის სამართლის საპროცესო კოდექსში, „ოპერატიულ-სამძებრო საქმიანობის შესახებ“ საქართველოს კანონში, „ელექტრონული კომუნიკაციების შესახებ“ საქართველოს კანონში და სხვ.
4. Casey E., Digital Evidence and Computer Crime, 2004, გვ.12; The admissibility of Electronic evidence in court: fighting against high-tech crime, 2005.
5. ევროპის საბჭოს კონვენცია „კომპიუტერული დანაშაულის შესახებ“ (23.11.2001), მუხლი 1. <https://rm.coe.int/16802fa423> [ბოლო ნახვა: 15 აპრილი, 2024წ.].
6. *იქვე.*მოსამართლეების ტრენინგი კომპიუტერული დანაშაულის შესახებ, საფრანგეთი, სტრასბურგი, 2010 წ. გვ.76 <https://rm.coe.int/16802fa028> [ბოლო ნახვა: 15 აპრილი, 2024წ.].Casey E., Digital Evidence and Computer Crime, 2004, გვ.16; Vacca, Computer Forensics, Computer Crime Scene Investigation, 2005. Moore, To View or not to view: Examining the Plain View Doctrine and Digital Evidence, American Journal of Criminal Justice, ტომი 29, #1, 2004, გვ. 58.
7. მოსამართლეების ტრენინგი კომპიუტერული დანაშაულის შესახებ, საფრანგეთი, სტრასბურგი, 2010 წ. გვ.76 <https://rm.coe.int/16802fa028> [ბოლო ნახვა: 15 აპრილი, 2024წ.]. Stephen M., Allison S., Electronic Evidence, 2017, გვ. 193
8. ელექტრონულ მტკიცებულებათა “ახალი ტიპის” მტკიცებულებებად ჩამოყალიბების და კომუნიკაციის მაიდენტიფიცირებელ მონაცემთა მოპოვების საკითხთან დაკავშირებით დამატებითი პროცესუალური ნორმების საჭიროების თვალსაჩინო მაგალითია გერმანიის სამართალდამცავთა მიერ რამდენიმე ათეული წლის წინათ ჩატარებული გამოძიება„ რა დროსაც საკრედიტო ბარათების გამცემი კომპანიების მეშვეობით დადგინდა იმ დამნაშავეთა ვინაობა, რომლებმაც შეიძინეს და ჩამოტვირთეს ბავშვთა პორნოგრაფია ერთ-ერთი ვებ-გვერდიდან (იხ., Spiegel Online, Fahnder überprüfen erstmals alle deutschen Kreditkarten,08.01.2007).
9. საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო“, ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო“, ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია“, ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება“ და ააიპ „ადამიანის უფლებათა ცენტრი“ საქართველოს პარლამენტის წინააღმდეგ“

10. ციფრულ მტკიცებულებათა მოპოვება/შენახვა/განადგურება ხორციელდება ფარული საგამოძიებო მოქმედებებისთვის საკონსტიტუციო სასამართლოს მიერ დადგენილი სტანდარტით, ვინაიდან სისხლის სამართლის საპროცესო კანონმდებლობის თანახმად, კომპიუტერულ მონაცემთან დაკავშირებულ საგამოძიებო მოქმედებებზე ვრცელდება ფარული საგამოძიებო მოქმედებებისთვის დადგენილი წესები. საქართველოს საკონსტიტუციო სასამართლოს 2017 წლის 29 დეკემბრის №3/4/885-1231 საოქმო ჩანაწერი.
11. საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო“, ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო“, ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია“, ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება“ და ააიპ „ადამიანის უფლებათა ცენტრი“ საქართველოს პარლამენტის წინააღმდეგ, II-100
12. საუბარია “პერსონალურ მონაცემთა დაცვის შესახებ” საქართველოს 2011 წლის 28 დეკემბრის კანონზე, რომელიც ძალადაკარგულია – 14.06.2023 N3144. აქვე, უნდა აღინიშნოს, რომ პერსონალურ მონაცემთა დამუშავების საკითხზე კონტროლი საქართველოში 2013 წლიდან ხორციელდება. 2015 წლიდან კი, ადგილი აქვს უშუალოდ ფარულ საგამოძიებო მოქმედებებზე ზედამხედველობას. ზემოთხსენებულ საქმიანობას 2013-2019 წლებში პერსონალურ მონაცემთა დაცვის ინსპექტორის აპარატი ახორციელებდა, 2019-2022 წლებში მისი უფლებამონაცვლე – სახელმწიფო ინსპექტორის სამსხური. 2022 წლის 1 მარტიდან კი აღნიშნული მანდატი პერსონალურ მონაცემთა დაცვის სამსახურს მიენიჭა.საკონსტიტუციო სასამართლოს 2017 წლის 29 დეკემბრის №3/4/885-1231 საოქმო ჩანაწერი, II – 84.*იქვე*, II – 96საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო“, ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო“, ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია“, ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება“ და ააიპ „ადამიანის უფლებათა ცენტრი“ საქართველოს პარლამენტის წინააღმდეგ“, II-104.
13. საქართველოს პარლამენტი. განმარტებითი ბარათი კანონპროექტზე “პერსონალურ მონაცემთა დაცვის შესახებ” <https://info.parliament.ge/file/1/BillReviewContent/222087> [ბოლო ნახვა: 15 აპრილი, 2024წ.]. “საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ”, საქართველოს კანონი. მუხლი 15. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი

გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო“, ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო“, ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია“, ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება“ და ააიპ „ადამიანის უფლებათა ცენტრი“ საქართველოს პარლამენტის წინააღმდეგ“, II-91.

14. “საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ”, საქართველოს კანონი. მუხლი 15. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].საქართველოს საკონსტიტუციო სასამართლოს 2017 წლის 29 დეკემბრის №3/4/885-1231 საოქმო ჩანაწერი.
15. “საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ”, საქართველოს კანონი. მუხლი 20, პუნქტი 2. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].
16. “საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ”, საქართველოს კანონი. მუხლი 29, პუნქტი 2. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].“საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ”, საქართველოს კანონი. მუხლი 20, პუნქტი 2, ქვეპუნქტი „ლ“. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].
17. “საჯარო სამართლის იურიდიული პირის – საქართველოს ოპერატიულ-ტექნიკური სააგენტოს შესახებ”, საქართველოს კანონი. მუხლი 29, პუნქტი 1. საქართველოს საკანონმდებლო მაცნე <https://matsne.gov.ge/ka/document/view/3625121?publication=0> [ბოლო ნახვა: 15 აპრილი, 2024წ.].საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო“, ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო“, ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია“, ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება“ და ააიპ „ადამიანის უფლებათა ცენტრი“ საქართველოს პარლამენტის წინააღმდეგ“, II-55.საქართველოს საკონსტიტუციო სასამართლოს 2016 წლის 14 აპრილის №1/1/625,640 გადაწყვეტილება საქმეზე „საქართველოს სახალხო დამცველი, საქართველოს მოქალაქეები – გიორგი ბურჯანაძე, ლიკა საჯაია, გიორგი გოცირიძე, თათია ქინქლაძე, გიორგი ჩიტიძე, ლაშა ტუღუში, ზვიად ქორიძე, ააიპ „ფონდი ღია საზოგადოება საქართველო“, ააიპ „საერთაშორისო გამჭვირვალობა – საქართველო“, ააიპ „საქართველოს ახალგაზრდა იურისტთა ასოციაცია“, ააიპ „სამართლიანი არჩევნებისა და დემოკრატიის საერთაშორისო საზოგადოება“ და ააიპ „ადამიანის უფლებათა ცენტრი“ საქართველოს პარლამენტის წინააღმდეგ“, II-55.*იქვე*, II-95.

18. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Kopp v. Switzerland (25.03.1998), §46.საქართველოს საკონსტიტუციო სასამართლოს 2014 წლის 4 თებერვლის №2/1/536 გადაწყვეტილება საქმეზე "საქართველოს მოქალაქეები ლევან ასათიანი, ირაკლი ვაჭარაძე, ლევან ბერიანიძე, ბექა ბუჩაშვილი და გოჩა გაბოძე საქართველოს შრომის, ჯანმრთელობისა და სოციალური დაცვის მინისტრის წინააღმდეგ" II-55.
19. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Costello-Roberts v. The United Kingdom (25.03.1993), §36.კილკელი უ.,პირადი და ოჯახური ცხოვრების პატივისცემის უფლება, ადამიანის უფლებათა ევროპული კონვენციის მე-8 მუხლის განხორციელება, გზამკვლევი, ლ.ჭელიძის, ბ. ბოხაშვილის, თ. მამუკელაშვილის თარგმანი, ლ. ჭელიძის რედაქტორობით, ევროპის საბჭო, 2005, გვ.14.
20. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: A v. France (07.04.2022).
21. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Bykov v. Russia (10.03.2009).
22. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Huvig v. France (24.04.1990), § 29; ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Amann v. Switzerland (16.02.2000) §56.
23. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Klass and Others v. Germany (06.09.1978), §54-56.
24. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Weber and Saravia v. Germany (29.06.2006), § 95.
25. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Klass and Others v. Germany (06.09.1978), §54-56.
26. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Halford v. the United Kingdom(25.06.1997). მაგ., ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Handyside v. the United Kingdom (07.12.1976).საქართველოს კონსტიტუცია. მუხლი 15, პუნქტი 1. საქართველოს საკანონმდებლო მაცნე. <https://matsne.gov.ge/ka/document/view/30346?publication=36 > [ბოლო ნახვა: 15 აპრილი, 2024წ.].
27. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Olsson v. Sweden (24.03.1988).
28. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Klass v. Germany (06.09.1978).
29. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Silver and others v. the United Kingdom (25.03.1983).
30. ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილება საქმეზე: Iodachi v. Moldova (10.02.2009).

CHILD RECRUITMENT PHENOMENON BETWEEN PROHIBITION AND PRACTICE ACCORDING TO INTERNATIONAL LAW AND JURISPRUDENCE

Ouafi Hadja

Doctor of Law, Lecturer A, Faculty of Law and Political Science, University of Mostaganem, Algeria

ABSTRACT

This study aims to illuminate the alarming phenomenon of child recruitment, recognized as a profound deviation from normative societal behaviors due to its stark infringement on the rights of a vulnerable demographic. Internationally spotlighted in the 1980s, child recruitment in armed conflicts prompted global efforts aimed at curbing the induction of children into battles by both recognized and unrecognized militant factions. Despite these endeavors, the prevalence of child soldiers has escalated notably in subsequent decades, particularly amid the surge of internal armed conflicts. Such circumstances have relentlessly exposed recruited children to extreme violence and inflicted severe damage, often resulting in either mortality or permanent disability.

In response, a unified international initiative has sought to mitigate this distressing trend by establishing numerous international accords and preemptive measures. The prohibition of child recruitment has been enshrined across a spectrum of international legal instruments and endorsed by international criminal tribunals. Yet, despite rigorous legal frameworks and judicial efforts to eradicate child recruitment and preclude their participation in armed engagements, the practice persists. This ongoing issue underscores a systemic failure among nations to enforce internationally agreed standards designed to combat this grave phenomenon.

KEYWORDS: Children, Recruitment, International Law, International Criminal Court

INTRODUCTION

Wars inflict severe and destructive impacts on societies engulfed by them, subjecting individuals to various horrific forms of violence, including rape, sexual exploitation, and genocide. Children, who form a significant segment of the human community, are particularly vulnerable to these dangers due to their age and circumstances, rendering them more prone to exploitation as they lack the means to defend themselves.

Intriguingly, these victims have increasingly become actors and perpetrators in these conflicts, with the issue of child soldiers taking a drastic turn as their involvement in ongoing armed conflicts escalates, transforming child recruitment and use into a prevalent norm rather than an exception that ought to be suppressed and eradicated.

Child recruitment, however, is not a modern-day phenomenon; history records its practice by the Romans in wars, the Soviet Union, and the Nazi party, which established an organization to train children for combat, including their participation in the Vietnam War against the American army, among other instances.

The forced recruitment of children gained international attention in the 1980s, sparking initiatives to diminish their numbers and involvement in conflicts waged by both state and non-state armed factions. Yet, despite these endeavors, the incidence of child soldiers continues to climb more than a decade later, highlighting the persistent challenges in eradicating and curbing this issue.

Consequently, the dire situation of children affected by this phenomenon has propelled the international community to bolster its efforts by enhancing legal frameworks within various sectors of public international law to prevent the escalation of this grave issue, which has notably intensified in several regions, including the Middle East.

Therefore, the critical question arises:

To what extent are the mechanisms established under international law and jurisprudence effective in prohibiting the phenomenon of child recruitment and safeguarding their rights?

To address this question, our analysis will proceed along two axes: the first will elucidate the international protection afforded to recruited children under public international law, and the second will explore the role of the international criminal judiciary in preventing the recruitment of children and protecting their rights from an alternative viewpoint.

1. INTERNATIONAL LEGAL PROTECTION FOR RECRUITED CHILDREN

The widespread participation of children in hostile activities, whether directly or indirectly involved in conflicts, has compelled the international community to take action. To protect these vulnerable individuals and uphold their rights, various international charters have been enacted within the ambit of humanitarian law and international human rights law aimed at curtailing this distressing trend.

1.1 Concept and Causes of the Child Recruitment Phenomenon

Globally, the recruitment of children into warfare has emerged as a pervasive and conspicuous issue. Children are exploited by both governmental and non-governmental entities, coerced into participating in armed conflicts, trained in combat, used to transport equipment and weaponry, or to collect intelligence on adversaries, often in return for basic necessities like clothing, shelter, and food.[1]

1.1.1 Definition of a Child Soldier

As defined in the Cape Town Principles, a child soldier is “Any person under 18 years of age who is part of any kind of regular or irregular armed forces or armed group in any capacity, including but not limited to cooks, porters, mes-

1 Al-Hayad, Z. (2012). Basic Rules for the Protection of Victims of Armed Conflicts. Moroccan Ministry of Culture Publications, p. 339.

sengers, and anyone accompanying such groups other than family members. This definition also encompasses girls recruited for sexual exploitation and forced marriage".[2]

This definition highlights several key aspects:

A. It includes every child, whether forcibly or voluntarily recruited, into any form of regular or irregular armed forces or armed groups.
B. Involvement in armed conflicts, whether direct or indirect (as implied by roles like cooks and porters), falls under child recruitment.
C. The definition encompasses both genders, acknowledging that females are exploited during conflicts.

The European Commission recognizes child soldiers as individuals under eighteen who have been involved, either directly or indirectly, in armed conflicts.According to the Paris Principles, a recruited child is defined as "Any person under the age of eighteen who was recruited or used in the past or is currently used by an armed force or group, regardless of the tasks they perform, whether male or female, including but not limited to those serving as fighters, cooks, porters, couriers, spies, or for sexual purposes".[3]

The recruitment methods for children, encompassing both boys and girls, are varied and include:[4]

1. Kidnapping from homes or public spaces by armed forces and groups;
2. Voluntary enlistment driven by survival or familial protection needs, especially for those separated from their families and displaced;
3. The pursuit of revenge;
4. The significant technological advances in weapon manufacturing, increasing small and lightweight weapons, fueling the spread of this phenomenon.

1.1.2 Causes of the Child Recruitment Phenomenon

Children are often coerced into recruitment through kidnapping, threats, and coercion. Nonetheless, many join armed groups voluntarily, without external pressure, complicating efforts to combat this issue.

Irrespective of the nature of their recruitment, child soldiers are assigned a wide range of tasks, including combat, deploying mines and explosives, recon and spying, as well as serving as guards, couriers, and providing support in logistics, culinary services, domestic labor, and even sexual services.

Statistics from 2001 estimated that around 300,000 children were recruited in 30 conflicts globally, with girls constituting 40%, approximately 120,000, of this number. The integral role of girls in the survival of armed groups is underscored by their productive and reproductive contributions, including intelligence gathering, mine planting, goods and cattle theft, as well as engaging in agriculture, food preparation, and providing services to men and boys.[5]

The primary factors driving the child recruitment phenomenon can be segmented into three main categories:[6]

A. Social reasons

These include tribal affiliations and loyalty, social disparities, and the tragic loss of parents due to death or displacement from rural areas, compounded by illiteracy. The recruitment tactics of terrorist groups, such as ISIS, aimed at replenishing their ranks with children to offset combat

2 UNICEF and Working Group for Non-Governmental Organizations on the Convention on the Rights of the Child, (1997, April 27-30). The Cape Town Principles "Principles and Best Practices for Preventing the Recruitment of Children into Armed Forces and for Demobilizing and Socially Reintegrating Child Soldiers in Africa". [Seminar].

3 Guidelines. (2007, February). The Paris Principles concerning children associated with armed forces or armed groups.

4 Jafal, Z. M. S. (2017). The Role of the International Criminal Court in Preventing the Phenomenon of Child Soldiers. *Strategic Visions Magazine*, (January), pp. 10-11.

5 McKnight, J. (2010). Child Soldiers in Africa: A Global Approach to Human Rights Protection, Enforcement and Post-Conflict Reintegration. *African Journal of International and Comparative Law*, 18(2), pp. 113-142.

6 Jean-Herve. (2006). Child Soldiers in Africa: A Singular Phenomenon and the Need for a Historical Perspective. *History Review*, No. 89, (January), p. 1.

losses, remain obscure yet can be partially discerned through media-reported accounts from victims or their kin.

Typically, these children stem from impoverished backgrounds or challenging social environments characterized by low living standards. Such adversities render them susceptible to exploitation by armed factions, who enlist them into roles grossly unsuitable for their age and physical abilities, often leading to their active engagement in combat.[7]

B. Economic reasons

Dire conditions like hunger and poverty compel the offering of children for military endeavors. In some instances, children voluntarily enlist to seek better living conditions.

C. Political reasons

Political dynamics significantly influence child recruitment. The escalation of armed conflicts, rampant weaponization, internal discord, and a blatant disregard for international humanitarian norms among combatant groups have intensified this trend.

Consequently, the recruitment of children transcends mere socio-economic triggers. The burgeoning demand from armed factions, coupled with structural, psychological, and social push factors, has exacerbated the utilization of children in conflict zones.

The surge in child recruits correlates with the broader prevalence of this issue, prompting armed groups to view children as substitutes for adult combatants due to adult manpower shortages. This strategy not only aims to sustain the group's viability and bolster its operational capacity but also serves as a tactical maneuver to secure battlefield advantages.[8]

1.2 Protection of Child Soldiers in International Charters

The 1949 Geneva Convention lacks specific provisions for the protection of child recruits in armed conflicts. Hence, during the 1971-1972 expert meeting, the International Committee of the Red Cross proposed an article for inclusion in the 1977 Additional Protocol I, mandating that: "Parties to the conflict must undertake all feasible measures to prevent the involvement of children under the age of 15 in hostilities and strictly prohibit their recruitment or voluntary enlistment into their armed forces".[9]

This proposition evolved into Article 77/2 of the First Additional Protocol to the Geneva Convention, which dictates: "Parties to the conflict must exert all possible efforts to ensure that children below fifteen years of age do not directly participate in hostilities and must refrain from recruiting them into their armed forces. The parties should prioritize the older individuals for recruits aged fifteen to eighteen".[10]

This provision specifically forbids the recruitment of children under fifteen by states engaged in international armed conflicts, advocating for preference to be given to older recruits within the fifteen to eighteen age bracket.

For internal conflicts, the Second Additional Protocol stipulates: "Children under fifteen years of age should not be recruited into armed forces or groups, nor allowed to engage in hostilities", underscoring the international legal consensus against the military utilization of young children.

Article 77 of the First Additional Protocol prohibits the direct participation of children in armed conflicts, i.e., bearing arms, but the fourth article of the Second Additional Protocol provides broader protection by totally prohibiting children's participation in any war operations, directly or indirectly, such as transporting ammunition and supplies, and performing espio-

7 Al-Darwish, N. (2015). Child Recruitment by Terrorist Groups. *Al-Nahrain Journal*, Al-Nahrain Center for Strategic Studies, (Issue 01), p. 52.

8 Al-Habdan, A. M., et al. (2022). Mechanisms for Reducing the Recruitment of Children in Armed Conflicts. *Security Studies Series*, Naif University Publishing House, accessed on 22-02-2023 at 23:35, available at: https://nup.nauss.edu.sa/index.php/sr/catalog/book/223.

9 Al-Talafha, F. A.,(2011). Protection of Children in International Humanitarian Law. (1st ed.). Dar Al-Thaqafa, pp. 106-107.

10 First Additional Protocol. (1977). Article 77, paragraph 2.

nage and intelligence tasks, etc.

The 1977 Geneva Protocol set the minimum age for children's participation in hostilities at 15 years, which was a step forward and a gain for international humanitarian law at that time. However, the spread of this scourge has increased and expanded in different places around the world, a fact confirmed by the International Committee of the Red Cross, as it is the original custodial authority in monitoring the application of international humanitarian law.

In developing the Convention on the Rights of the Child, considerable emphasis was placed on defining an age limit below which children should be prohibited from engaging in hostilities, raising the threshold from fifteen to eighteen years.

Nevertheless, Article 38 of the 1989 Convention on the Rights of the Child essentially echoed the provisions of the First Additional Protocol of 1977.[11] This inclusion led to an apparent inconsistency, as Article 1 of the Convention distinctly identifies a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".[12]

This definition paradoxically allows for the recruitment of individuals between the ages of fifteen and eighteen, who are still classified as children under the Convention's initial article. Moreover, while Article 38's second paragraph explicitly bars children from serving in the armed forces (i.e., regular forces), it neglects to extend this protection to children involved with irregular forces, thereby leaving a significant loophole.[13]

Addressing the prevalent issue of child recruitment, the International Labour Organization promulgated several conventions, with Convention No. 182 regarding the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour in 1999 being particularly notable.

This convention categorically defines a child as anyone under the age of eighteen[14] and outlaws the sale and trafficking of children by prohibiting forced labor, inclusive of child recruitment. This enactment holds distinctive legal weight, elevating the child recruitment age threshold from 15 to 18 years amending the gaps identified in the two Additional Protocols of 1977 and the Convention on the Rights of the Child.

In reaction to the escalating child recruitment crisis and concerted global endeavors to eradicate it, an international symposium was convened in Berlin, attracting 22 representatives from both governmental and non-governmental bodies to deliberate on the enlistment of children below the age of 18 in both regular and irregular military factions. The assembly's chief objective was to advocate for the elevation of the minimum recruitment age from 15 to 18 years.[15]

Furthermore, the Optional Protocol of 2000, ratified by the United Nations General Assembly in May 2000, marked a pivotal enhancement in the protection of child rights, introducing critical stipulations regarding the minimum age for compulsory and voluntary military recruitment. The Protocol mandates that: "States Parties shall adopt all practicable measures to ensure that members of their armed forces who have not reached the age of eighteen years do not directly engage in hostilities".[16]

Regarding compulsory recruitment, States Parties are obligated to ensure that individuals under the age of eighteen are not forcibly conscripted into their armed forces.[17]

11 Creil, F. (1990). The United Nations Convention on the Rights of the Child: The Controversial Article 38 on Children in Armed Conflicts. *Publication Journal*, Issue 12, (August), pp. 11-12.

12 Convention on the Rights of the Child. (1989). Article 1.

13 Al-Nadi, M. (2015). Child Soldiers in International Humanitarian Law. *The Arab Future Magazine*, Arab Unity Studies Center, Beirut, Lebanon, (Issue 437), (July), p. 34.

14 International Labour Organization Convention No. 182. (1999). Article 2.

15 Malika, A. (2008). International Standards for Child Protection from Violence. *Algerian Journal of Legal, Economic, and Political Sciences*, Faculty of Law, University of Algiers, (Issue 02), p. 332.

16 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, (2000). Article 2.

17 Al-Nadi, M. (2015). Child Soldiers in International Humanitarian Law. *The Arab Future Magazine*, Arab Unity Studies Center, Beirut, Lebanon, (Issue 437), (July), p. 39.

In terms of voluntary or optional recruitment, the Optional Protocol of 2000 institutes a partial prohibition, establishing that the minimum age for voluntary recruitment is sixteen years. Article 3/1 of the Protocol dictates that "States Parties shall raise in years the minimum age of voluntary enlistment into their national armed forces from that set out in paragraph 3 of Article 38 of the Convention on the Rights of the Child..."

This elevation is conditioned upon the safeguards articulated in Article 3 of the 2000 Optional Protocol. For voluntary recruitment, states are required to submit a declaration binding them upon ratification of the Optional Protocol, ensuring adherence to the following criteria:[18]

1. The recruitment process is genuinely voluntary, stemming from the individual's own free will.
2. The child's recruitment receives explicit consent from their legal guardians or parents.
3. Comprehensive information about the responsibilities entailed in military service is provided to both the child and their guardians.
4. A legal age requirement mandates that children must furnish reliable proof of age, ensuring they are at least fifteen years old prior to recruitment.[19]

It is important to highlight that these stipulations do not extend to military schools managed or overseen by the state, which accept children not younger than fifteen years as the minimum age.

Concerning the prohibition of child recruitment by armed groups, the Optional Protocol includes a specific clause asserting that non-state armed groups shall not, under any circumstances, recruit or use individuals under the age of eighteen in hostilities.

Article 4/1 of the Protocol states:[20] "Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use persons under the age of 18 in hostilities". This clause unambiguously prohibits these groups from involving children, whether directly or indirectly, in armed conflicts.

Despite the significance of the 2000 Optional Protocol, scrutinizing its initial article reveals that the state's obligation hinges on the actions undertaken by the state rather than the outcomes and its capability to manage them. A more effective protection for children's rights could be achieved by substituting the term "take all feasible measures" with "take all necessary measures".

Additionally, the extent of protection afforded to children in armed conflicts is somewhat limited. The protocol only addresses children's direct involvement in hostilities, rendering its provisions less robust than those in the Second Additional Protocol to the Geneva Convention of 1977, which prohibits children's direct and indirect participation in armed conflicts.

The indirect involvement in conflicts, such as intelligence gathering, transmitting orders, or transporting ammunition and food, still places children at substantial risk of physical harm and psychological trauma, comparable to the risks faced by direct combatants.

A notable concern in the Optional Protocol arises from Article 3, which discusses raising the minimum age for voluntary recruitment. The practical implementation of the safeguards meant to ensure the voluntary nature of recruitment is challenging. In conflict-ridden regions, verifying age can be problematic due to the lack of established birth registration systems.

Furthermore, the protection offered in the initial paragraphs of Article 3 is undercut by a significant exception: the requirement to raise the volunteering age does not apply to military schools controlled or operated by the armed forces. This exception was made during the protocol's drafting as many state delegations deemed it essen-

18 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, (2000). Article 2.

19 Nassira, B. T. (2016/2017). The Legal Status of Children in Armed Conflicts. Master's thesis, International Law and International Political Relations, Faculty of Law and Political Sciences, University of Mostaganem, p. 61.

20 Optional Protocol to the Convention on the Rights of the Child. (2000). Article 4, paragraph 1.

tial to securing an adequate number of qualified recruits for their national armies.[21]

The preference for a voluntary service system for individuals under eighteen over compulsory recruitment for older individuals has been acknowledged. Military schools are often seen as one of the limited avenues through which young individuals in economically disadvantaged countries can access quality education.

Due to these issues in the first Optional Protocol – regarding the prevention of child recruitment – the United Nations General Assembly adopted the Third Optional Protocol on a communications procedure attached to the Convention on the Rights of the Child, under Resolution 66/138 dated December 19, 2011, which came into effect on April 14, 2014.

A key feature of this protocol is that it enabled children to access their rights through the right to lodge complaints or reports about violations they have suffered under the Convention on the Rights of the Child and the first and second Optional Protocols attached to it. It states that "an individual or group of individuals under the jurisdiction of a State Party, claiming to be victims of a violation by that State Party of any of the rights set forth in any of the following instruments to which that State is a party, or those legally acting on their behalf, may bring complaints:

A. The Convention;
B. The Optional Protocol to the Convention on the sale of children, child prostitution, and child pornography;
C. The Optional Protocol to the Convention on the involvement of children in armed conflict."[22]

This provides an excellent guarantee for protecting children's rights and addressing the suffering of children and others in many parts of the world due to early recruitment.[23]

Despite the above-mentioned Third Optional Protocol's reference to the possibility of complaints between states regarding violations of the protocol's provisions, it allows these claims to be settled between the states, which contradicts the nature of human rights as inherent rights that cannot be compromised. States often prefer their international relations over complaining or reporting against another state, especially if the victims are not their nationals.

2. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN PROTECTING THE RIGHTS OF RECRUITED CHILDREN

Despite international efforts to combat the recruitment of children in armed conflicts, the incidence of this violation continues to rise. The International Criminal Court (ICC) plays a pivotal role in addressing this issue. The ICC's approach to child recruitment, particularly in the landmark case of the Prosecutor vs Thomas Lubanga, sheds light on the legal framework and judicial mechanisms employed to counteract this grave concern. This discussion unfolds in two segments: the first elucidates the ICC's legal perspective on child recruitment, and the second delves into the ICC's adjudication in the Lubanga case.

2.1 The ICC's Characterization of Child Recruitment

The Rome Statute, which is the foundational treaty of the ICC, explicitly prohibits the recruitment and conscription of children under fifteen years of age as a war crime, detailed in Article 8, paragraph 2(b)(xxvi). This statute positions the act as a severe breach of the international laws and customs governing international armed conflicts.

Further, Article 8, paragraph 2(e)(vii) of the statute specifies that forcibly or voluntarily recruiting

21 International Review of the Red Cross, (n.d). Issue 893, pp. 797-809.

22 Third Optional Protocol to the Convention on the Rights of the Child. (2011). Paragraph 1 of Article 2.

23 Jadou, S. T. (2018, April 25-26). Research presented at the Conference on Legislative Reform towards Good Governance and Anti-Corruption. Al-Naba' Foundation for Culture and Media and University of Kufa / Faculty of Law, accessed on 24-02-2023 at 21:30, available at: https://annabaa.org/arabic/studies/17980.

children under fifteen into armed forces or groups or using them to partake actively in hostilities also amounts to a war crime. This is acknowledged as one of the grave violations of the laws and customs in non-international armed conflicts.[24]

The Rome Statute resolves the discrepancies inherent in the Additional Protocols to the 1949 Geneva Conventions, which distinguished between international and non-international armed conflicts, particularly in terms of the deployment of children under fifteen in national armies and the prohibition of such practices among rebel and opposition groups. Importantly, the Statute equalizes the legal treatment of war crimes across international and non-international conflicts, representing a critical advancement in international humanitarian law.[25]

Nonetheless, the specificity of the age limit in the Statute has attracted criticism for its narrow scope, which technically permits the involvement of children aged fifteen and older in armed engagements. This narrow age definition also inadvertently neglects the indirect use of children, particularly girls, for non-combat roles, including sexual exploitation. While Article 7 of the Rome Statute offers extensive protection against crimes against humanity, including enslavement and sexual violence, these protections are contingent upon the context of a widespread or systematic attack against a civilian population.

Consequently, if such violations occur within the dynamics of voluntary enlistment or abduction by armed entities, they may not be classified as crimes against humanity under the Statute. This legal nuance implies that individual criminal accountability is applicable when such offences are perpetrated against non-combatant girls. However, this accountability diminishes once they are integrated into armed forces or groups, effectively stripping them of the protection afforded by the Statute in such circumstances.[26]

24 Wells, S. (2004). Crimes against Child Soldiers in Armed Conflicts. *Tulane Journal of International Law*, 12(Spring), p. 28.

25 Jafal, Z. M. S. (2017). The Role of the International Criminal Court in Preventing the Phenomenon of Child Soldiers. Strategic Visions Magazine, (January), p. 17.

26 *Ibid*, p. 18.

2.2 The ICC's Judgment in the Case of the Prosecutor vs Thomas Lubanga

This case, associated with the conflict in the Democratic Republic of the Congo (DRC), stands as one of the International Criminal Court's (ICC) most pivotal early cases. Shortly after its inception, the ICC delivered a groundbreaking judgment concerning the recruitment of children and their participation in armed conflicts.

The underlying facts of the case revolve around Rwanda and Uganda's invasion of the DRC between 1996 and 1998, ostensibly to counter the rebel factions that had taken refuge there. By 2000, the conflict evolved as ethnic tensions surged in the Ituri region of the Republic, particularly between the HEMA and LENDU groups. The strife, fueled by disputes over natural resources and arms smuggling, was among the most violent and bloody conflicts since World War II, with children being disproportionately affected.

On April 11, 2002, the DRC acceded to the International Criminal Court, thereby submitting to its jurisdiction. This accession enabled President Joseph Kabila in 2004 to apprise the ICC Prosecutor of the escalating crisis in the Ituri region, leading to a formal request for an investigation. Consequently, in March 2006, the Court issued an arrest warrant for Thomas Lubanga, the founder of the Union of Congolese Patriots, who was subsequently apprehended and held until his trial's conclusion.[27]

On January 29, 2007, Lubanga was formally charged by the Court with war crimes, specifically for recruiting and enlisting children under fifteen years of age and actively deploying them in hostilities through the armed forces he commanded during the 2002-2003 Ituri conflict. Reports suggest that approximately 30,000 boys and girls were forcibly enlisted during this period.

Thomas Lubanga faced charges for the recruitment and conscription of children under the age of 15 in an international conflict, as delineated in

27 Drumbl, M. A. (2007). International Decision: Prosecutor v. Thomas Lubanga. *American Journal of Law*, 101, p. 842.

paragraph 2(b) of Article 8 and paragraph 3(a) of Article 25 of the Rome Statute, covering the period from early September 2002 to June 2, 2003.

Further charges were levied against him for the recruitment and conscription of children under 15 years old and their utilization in hostilities during an internal armed conflict, pursuant to paragraph 2(e) of Article 8, from June 2, 2003, to August 13, 2003. The demarcation between these charges reflects the nature of the conflict; the initial phase was deemed international due to the involvement of foreign nations, whereas the subsequent phase was classified as internal.[28]

In 2008, the United Nations Special Representative for Children and Armed Conflict, serving as an expert, provided a brief to the court. This document elucidated that recruitment, whether through compulsion or volunteering, should be regarded uniformly in the context of child recruitment, with no substantive legal distinction between the two forms.

On March 14, 2012, the court pronounced its sentence for Thomas Lubanga, addressing the trio of crimes for which he was found guilty:[29]

- A 13-year incarceration for recruiting children under 15 into the armed forces under his command.
- A 12-year prison term for enlisting children under 15 in those forces.
- A 14-year sentence for the active and direct involvement of children under 15 in hostilities.

Given the sentencing range from 12 to 14 years, the judiciary opted for a unified 14-year sentence, recognizing the six years Lubanga had already spent in detention. This sentencing decision ignited post-verdict debates as, notwithstanding the ruling's significance as an international criminal precedent, the approach of consolidating sentences and applying the maximum penalty under the Rome Statute was perceived as excessively harsh relative to the gravity of the offences.

CONCLUSION

Safeguarding children in conflict zones remains a paramount concern for the global community, as reflected in the extensive legal frameworks of public international law, encompassing international humanitarian law, human rights law, and international criminal law. These frameworks are principally designed to eradicate the malpractice of child recruitment and utilization in conflicts, whether directly or indirectly.

Despite the comprehensive legal measures in place, infringements continue to surface, particularly in the tumultuous regions of the Middle East and Africa. Alarming reports from the United Nations highlight the grim prospect of losing an entire generation to the recruitment drives of extremist entities such as ISIS, Boko Haram, and the Houthis.

In light of the persistent conflicts and the unabated employment of children in combat roles, there is an urgent need to pivot the discourse on child recruitment towards a more nuanced understanding of the security implications engendered by their exploitation in warfare. Acknowledging this issue as a security imperative, rather than solely a moral or ethical quandary, is crucial for formulating effective deterrents. To this end, we advocate for the following strategic recommendations:

- Instituting a uniform recruitment age threshold of 18 in all legal frameworks, with a particular emphasis on amending the Rome Statute of the International Criminal Court, to categorically ban the recruitment of individuals aged between 15 and 18 years.
- Aligning national laws with international standards to efficaciously tackle this issue.
- Creating a global mechanism for child recruits' demobilization and societal reintegration.
- Providing unwavering support for both national and international laws that endeavor to prevent and eliminate the scourge of child recruitment and exploitation in conflicts.

28 Jafal, Z. M. S. (2017). The Role of the International Criminal Court in Preventing the Phenomenon of Child Soldiers. StrategicVisions Magazine, (January), pp. 19-20.

29 *Ibid*, pp. 19-20.

- Refining the sentencing paradigm of the International Criminal Court to introduce a methodology that cumulates the penalties for multiple offences, as opposed to consolidating them into the most severe penalty, thus ensuring that the adjudicated sentences are commensurate with the seriousness of the war crimes committed.

BIBLIOGRAPHY

Normative material:

1. International Labour Organization. (1999). Convention No. 182.
2. The Convention on the Rights of the Child. (1989).
3. The First Additional Protocol to the Geneva Conventions. (1977).
4. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. (2000).

Scientific literature:

1. Al-Habdan, A. M., Shawky, M. M., & Al-Talhi, I. M. (2022). Mechanisms for Reducing the Recruitment of Children in Armed Conflicts. (1st ed.). Naif University Publishing House. Available at: Naif University Publishing House.
2. Al-Talafha, F. A. (2011). Protection of Children in International Humanitarian Law. (1st ed.). Dar Al-Thaqafa.
3. Al-Hayad, Z. (2012). Basic Rules for the Protection of Victims of Armed Conflicts. Moroccan Ministry of Culture Publications.
4. Nassira, B. T. (2016/2017). The Legal Status of Children in Armed Conflicts. Master's thesis, International Law and International Political Relations, Faculty of Law and Political Science, University of Mostaganem.
5. 5. Malika, A. (2008). International Standards for Child Protection from Violence. *Algerian Journal of Legal, Economic and Political Sciences*, Faculty of Law, University of Algiers, Issue 02.
6. Creil, F. (1990). The United Nations Convention on the Rights of the Child: The Controversial Article 38 on Children in Armed Conflict. *Publication Journal*, Issue 12, (August).
7. International Review of the Red Cross, (No Year Provided). Issue 893.
8. Jean-Herve. (2006). Les enfants soldats d'Afrique: un phénomène singulier sur la nécessité du regard historique. *History Review*, No. 89, (January).
9. Drumbl, M. A. (2007). International Decision: Prosecutor v. Thomas Lubanga. *American Journal of Law*, 101.
10. McKnight, J. (2010). Child Soldiers in Africa: A Global Approach to Human Rights Protection, Enforcement and Post-Conflict Reintegration. *African Journal of International and Comparative Law*, 18(2).
11. Al-Nadi, M. (2015). Child Soldiers in International Humanitarian Law. *The Arab Future Magazine*, Arab Unity Studies Center, Beirut, Lebanon, Issue 437, (July).
12. Al-Darwish, N. (2015). Child Recruitment by Terrorist Groups. *Al-Nahrain Journal*, Al-Nahrain Center for Strategic Studies, Issue 01.
13. Wells, S. (2004). Crimes against Child Soldiers in Armed Conflicts. *Tulane Journal of International Law*, 12(Spring).
14. Jadou, S. T. (2018). Paper presented at the Conference on Legislative Reform towards Good Governance and Anti-Corruption. Al-Naba' Foundation for Culture and Media and University of Kufa / Faculty of Law, April 25-26, 2018. Available at: Al-Naba' Foundation.
15. Jafal, Z. M. S. (2017). The Role of the International Criminal Court in Preventing the Phenomenon of Child Soldiers. *Strategic Visions Magazine*, United Arab Emirates, (January).

EU AI REGULATION: A STEP FORWARD OR AN ATTEMPT TO HALT PROGRESS?

Beka Khitiri

Doctor of Law, Ivane Javakhishvili Tbilisi State University, Associate Professor, European University, Georgia

Nazi Varazashvili

Doctoral Candidate of Law, New Vision University, Georgia

ABSTRACT

On March 13, 2024, the European Parliament approved the draft "Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence", and on May 21 of the same year, the Council of the European Union endorsed the said act as well. As a result, the regulation will enter into force in July 2024. It will become the world's first legislative act to regulate all types of artificial intelligence available in the private sector.

Artificial intelligence remains one of the most important challenges of the modern world. Technologies related to it are developing at a high speed, affecting all industries and individuals. As a result, it is necessary to regulate the field as effectively as possible; however, before the aforementioned regulation, there was practically no legal framework, which especially increased its importance. It is necessary to conduct an effective analysis of the given regulation to develop an even more effective regulatory framework in the future.

KEYWORDS: Artificial Intelligence, AI, EU Law, Regulation, New Regulation

INTRODUCTION

On March 13, 2024, the European Parliament approved, by a majority vote, the draft "Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence", and on May 21 of the same year, the Council of the European Union unanimously approved the said act.[1] As a result, the regulation will enter into force in July 2024 and will become the world's first legislative act that aims to regulate all types of artificial intelligence available in the private sector.[2]

Artificial intelligence remains one of the most important challenges of the modern world.[3] Technologies related to it are developing at a high speed,[4] which affects almost all industries[5] and even the life of an average person.[6] As a result, it is necessary to regulate the field as effectively as possible, however, before the aforementioned regulation, there was practically no legal framework, which especially increases its importance.

The draft regulation was first presented by the European Union Commission on April 21, 2021.[7] As a result, during the following 3 years, many different kinds of opinions were expressed about it, both with positive and negative evaluations.[8] However, despite the polarized reaction, the regulation was adopted without radical content changes.[9]

Considering the above, it can be said that despite the newness of the regulation, there are available academic studies related to it that have been conducted in the last three years. Using these papers and primary research, the purpose of the present paper is to evaluate the adopted regulation and provide a critical analysis of its text and potential implications.

1. THE PRIMARY STIPULATIONS OF THE REGULATION

Considering that the EU regulation is, in fact, the first attempt to regulate the new field, it is natural that many new provisions are gathered in it.[10] This means that there are various question marks regarding the text of the regulation, to which it is not possible to give a firm answer so far, given the lack of practical application thereof.[11]

First, it should be noted that the scope of the regulation includes the use of artificial intelligence both in the private sector and for public purposes.[12] At the same time, several exceptions are allowed in the normative act, which includes the use of artificial intelligence in the military

1 Gornet, M. Maxwell, W. The European approach to regulating AI through technical standards. (2024) The HAL Open Science Journal, 24. pp. 1-25.

2 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024].

3 Voss, W.G. AI Act: The European Union's Proposed Framework Regulation for Artificial Intelligence Governance. (2021) Journal of Internet Law, 25(4). pp. 8-17.

4 Alon-Barkat, S. Busuioc, M. Human–AI Interactions in Public Sector Decision Making: "Automation Bias" and "Selective Adherence" to Algorithmic Advice. (2023) Journal of Public Administration Research and Theory, 33(1). pp. 153-169.

5 Hacker, P. A Legal Framework for AI Training Data – from First Principles to the Artificial Intelligence Act. (2021) Law, Innovation and Technology Journal, 13(2). pp. 257-301.

6 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. pp. 463-474.

7 Voss, W.G. AI Act: The European Union's Proposed Framework Regulation for Artificial Intelligence Governance. (2021) Journal of Internet Law, 25(4). pp. 8-17.

8 Laux, J. Wachter, S. Mittelstadt, B. Three Pathways for Standardisation and Ethical Disclosure by Default under the European Union Artificial Intelligence Act. (2024) Computer Law & Security Review, 53. pp. 1-11.

9 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024].

10 Hacker, P. A Legal Framework for AI Training Data – from First Principles to the Artificial Intelligence Act. (2021) Law, Innovation and Technology Journal, 13(2). pp. 257-301.

11 Laux, J. Wachter, S. Mittelstadt, B. Three Pathways for Standardisation and Ethical Disclosure by Default under the European Union Artificial Intelligence Act. (2024) Computer Law & Security Review, 53. pp. 1-11.

12 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52021PC0206 [Last accessed: 29.05.2024]. Article 2.1.

and defence fields, as well as its use exclusively for research and scientific purposes.[13]

As for the content of the regulation, it has introduced the so-called A "risk-based" approach, in which the greater the risk arising from artificial intelligence, the stricter the rules that apply to it.[14] According to the regulation, artificial intelligence was divided into three categories based on the risk arising from the relevant AI:

Unacceptable risk – systems that are perceived as a threat to humanity. Among them, according to the examples given in the regulation, are cognitive behavioural manipulation (both of the entire population and any of its vulnerable parts), social assessment (categorizing people and/or scoring them according to their behaviour, social status or personal characteristics), as well as biometric identification and artificial intelligence focused on determining the location of people. The creation or use of artificial intelligence that includes any type of such unacceptable risk is fully prohibited throughout the EU.[15]

High risk – according to the regulation's text, all artificial intelligence that negatively affects the basic rights of people or their safety is considered high risk. These include all types of artificial intelligence used in aviation, medical devices, automobiles, elevators, toys, infrastructure operations, education, labour and employee management, utilities, policing, migration, and legal aid. All types of high-risk artificial intelligence, before they become available to the public, must be evaluated by the relevant authority and, subsequently, subject to periodic inspection.[16]

Low risk – Every AI that does not fall into the above two categories is considered low risk. Among them is, for example, generative artificial intelligence (for example, ChatGPT).[17] Low-risk artificial intelligence is not subject to additional regulation, although it is still subject to transparency requirements.[18]

According to the regulation, when any kind of product is created using artificial intelligence, it must be identified as having been created by artificial intelligence. In addition, the manufacturer is obliged to ensure that it is impossible to create any illegal product using artificial intelligence.[19] It is also worth noting that the regulation introduces mandatory rules of conduct for all persons developing artificial intelligence, the purpose of which is to further increase the level of security.[20]

Another important issue regulated by the regulation is the creation of relevant bodies related to artificial intelligence issues. An artificial intelligence office and a scientific panel of independent experts will be created within the commission. Additionally, an Artificial Intelligence Council formed by representatives of the member states will be created, with which a forum of interested parties will work, which will periodically submit recommendations to the Council.[21]

If an AI producer violates the rules set out by the regulation, it will be subject to a fine, the amount of which will be determined by the Commission's

13 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. Article 2.2, Preamble Article 16.

14 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. Preamble Article 14.

15 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. Chapter II.

16 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52021PC0206 [Last accessed: 29.05.2024]. Chapter III.

17 Pirozzoli, A. The Human-centric Perspective in the Regulation of Artificial Intelligence. (2024) Insight European Papers, 9(1). pp. 105-116.

18 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. pp. 463-474.

19 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52021PC0206 [Last accessed: 29.05.2024]. Chapter IV.

20 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52021PC0206 [Last accessed: 29.05.2024]. Chapter IX.

21 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52021PC0206 [Last accessed: 29.05.2024]. Chapter VI-VIII.

Artificial Intelligence Office,[22] which may represent a set percentage of the company's global turnover, which in some cases may be an exceptionally large amount, increasing the Office's Probability of successful enforcement of decisions and the regulation requirements in practice.[23]

Finally, it should be noted that the regulation also aims to promote innovation. According to the regulation, member states are obliged to support independent businesses and start-ups, as well as private individuals, in researching and creating artificial intelligence in such an environment that it can be presented to the general public only after it is confirmed that the risks associated with it are minimized.[24]

The regulation enters into force gradually and will be fully effective within 24 months after its publication. However, there are special provisions related to high-risk artificial intelligence, which will enter into force within 36 months after publication.[25]

2. THE SET PURPOSE AND THE FULFILLMENT THEREOF BY THE TEXT OF THE REGULATION

In the preamble of the regulation, it is emphasized that its purpose thereof is to ensure the protection of basic human rights and to limit as much as possible their violation using artificial intelligence.[26] However, it is important to highlight that the regulation deals only with some issues related to artificial intelligence and cannot be considered a normative act that regulates all topics associated with the creation and use of artificial intelligence.[27]

Today, there is an active debate on the creation of artificial intelligence and the so-called "training" thereof.[28] According to the current standard practice, when programming artificial intelligence, it is provided with a particularly large amount of information to skim over, as a result of which artificial intelligence develops and acquires new capabilities due to the processing thereof.[29] For example, an artificial intelligence, the function of which is to create paintings, learns by "reading" pictures drawn by humans, as a result of which it can create a similar painting itself.[30] Therefore, the artists whose works are used by artificial intelligence created by various companies believe that their copyrights are being infringed.[31] The situation is essentially identical in all other fields of art, in which artificial intelligence is utilized.[32] This issue appears to be one of the most important parts of the academic and legal discussion about artificial intelligence and its impact, although the regulation does not even touch on it and leaves it beyond regulation.

22 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. Chapter X.

23 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. pp. 463-474.

24 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. Chapter V.

25 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. Article 85.

26 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. Preamble.

27 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. pp. 463-474.

28 Gibney, E. What the EU's tough AI law means for research and ChatGPT. (2024) Nature, 626. pp. 938-939.

29 Luk, A. The Relationship Between Law and Technology: Comparing Legal Responses to Creators' Rights under Copyright Law through Safe Harbor for Online Intermediaries and Generative AI Technology. (2023) Law, Innovation and Technology Journal, 16(1). pp. 148-169.

30 Sganga, C. Is There Still a Policy Agenda for EU Copyright Law? (2023) International Review of Intellectual Property and Competition Law, 54. pp. 1407-1417.

31 Gaffar, H. Albarashdi, S. Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape. (2024) Asian Journal of International Law, 24. pp. 1-25.

32 Luk, A. The Relationship Between Law and Technology: Comparing Legal Responses to Creators' Rights under Copyright Law through Safe Harbor for Online Intermediaries and Generative AI Technology. (2023) Law, Innovation and Technology Journal, 16(1). pp. 148-169.

Another topic that does not appear in the text of the regulation is crimes committed using artificial intelligence. Artificial intelligence is being used more and more frequently in the online spaces for illegal purposes,[33] although the regulation does not propose to regulate this issue either.

Hence, it can be said that, on the one hand, the steps taken by adopting this regulation are important, and that the European Union is the first to create a legislative framework to regulate this extremely important area.[34] At the same time, it should be emphasized that the issue is not exhausted, and the regulation of artificial intelligence should be continued to create a normative system that ensures that the goal defined in the preamble of the adopted regulation is truly and fully achieved.

3. POTENTIAL INFLUENCE ON THE DEVELOPMENT OF ARTIFICIAL INTELLIGENCE

As with almost all new arrangements, the EU's first submission of a draft regulation on the introduction of harmonized rules on artificial intelligence was met with a negative reaction from members of the relevant industry.[35] Opinions were expressed that by regulating the field, the European Union would only ensure that the development of the said field would be limited within its framework and that the global competitors of the European Union would be given an advantage.[36]

In connection with the above, it is necessary to emphasize that the regulation, in fact, happens to be merely a general framework.[37] The vast majority of the rules therein can be divided into two categories: the outline, within the framework of which a more detailed regulation needs to be created later, and the general rules that people working on artificial intelligence, within the framework of the principle of good faith, should already be following.[38] In fact, there are only two hard, concrete rules that would fundamentally change the situation: creating a regulatory body and prohibiting the development of artificial intelligence that poses an unacceptable risk.[39]

Due to the importance and complexity of artificial intelligence, it is virtually impossible to regulate it without the existence of a specialized body.[40] Admittedly, bad regulation can often be worse than no regulation at all,[41] but as things stand, there is no reason to believe that the yet-to-be-formed EU Artificial Intelligence Office will do its job poorly. At the same time, considering that a number of companies working in the field of artificial intelligence have already had scandals related to security and human rights,[42] it can be said that the existence of the regulation is necessary. As a result, it is not justified to say that the establishment of the Artificial Intelligence Office by the Regulation of the European Union Parliament and the Council will in any way have a negative impact on the given field.

As for artificial intelligence containing an

33 Hakan, C. Criminal Liability of Artificial Intelligence from the Perspective of Criminal Law: An Evaluation in the Context of the General Theory of Crime and Fundamental Principles. (2024) International Journal of Eurasia Social Sciences, 55(15). pp. 276-313.

34 Voss, W.G. AI Act: The European Union's Proposed Framework Regulation for Artificial Intelligence Governance. (2021) Journal of Internet Law, 25(4). pp. 8-17.

35 Laux, J. Wachter, S. Mittelstadt, B. Three Pathways for Standardisation and Ethical Disclosure by Default under the European Union Artificial Intelligence Act. (2024) Computer Law & Security Review, 53. pp. 1-11.

36 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. pp. 463-474.

37 Voss, W.G. AI Act: The European Union's Proposed Framework Regulation for Artificial Intelligence Governance. (2021) Journal of Internet Law, 25(4). pp. 8-17.

38 Pirozzoli, A. The Human-centric Perspective in the Regulation of Artificial Intelligence. (2024) Insight European Papers, 9(1). pp. 105-116.

39 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. pp. 463-474.

40 Novelli, C. Casolari, F. Rotolo, A. Taddeo, M. Floridi, L. AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act. (2024) The Digital Society Journal, 3(13). pp. 1-29.

41 Baronchelli, A. Shaping new norms for AI. (2024) Philosophical Transactions of the Royal Society, 379. pp. 1-6.

42 Mitchell, A.D. Let, D. Tang, L. AI Regulation and the Protection of Source Code. (2023) International Journal of Law and Information Technology, 31(4). pp. 183-301.

unacceptable risk, as already mentioned above, work on such tools (except for specialized parties working in the field of defense and security) has been prohibited for everyone. Critics of the regulation point out that with this step, the European Union lags behind, for example, the People's Republic of China, in which human monitoring and social classification is an important direction of the development of artificial intelligence.[43]

The preamble of the regulation explicitly states that artificial intelligence containing unacceptable risk is associated with actions that cannot be entrusted to artificial intelligence.[44] All of the areas identified as containing unacceptable risks in the regulation are related to issues that have a particularly large impact on people's daily lives.[45] Therefore, interference therein, which is often conducted via artificial intelligence,[46] can in no way be deemed acceptable.[47] Therefore, the decision taken by the European Union to ban the creation of such artificial intelligence cannot be considered an undesirable step.

As a result, it can be stated that the provisions of the regulation will not have any significant negative impact on the development of artificial intelligence. On the other hand, it can also be said that creating a legal framework can have a net positive effect on the mentioned field.

First of all, it is often desirable for businesses to establish rules of conduct and clearly define prohibited actions, as it eliminates ambiguity, which is usually considered to be a hindering factor to business.[48] In addition, provisions related to transparency will increase the number of sources available to start-ups and average businesses, which will also have a positive impact on the level of development of artificial intelligence in the future.[49]

Considering all of the above, it can be said that the criticism of the regulation from the point of view that it will hinder the development of artificial intelligence in the European Union is without foundation. On the contrary, its introduction will reduce ambiguity and provide transparency, which will positively impact the entire field both within and outside the EU.

CONCLUSION

Adopting the draft "Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence" is an important step forward in regulating the field of artificial intelligence. This is the first normative act of comparable scale to regulate the research, creation, and use of artificial intelligence by the private sector. Adopting it creates a framework within which artificial intelligence and the people working on it can evolve. The regulation does not prevent the persons working in the field from effectively performing their activities; on the contrary, it will positively affect them.

However, the mentioned regulation remains only the first step. Based on this, it is necessary to develop a more detailed set of rules that will regulate all important areas related to the use of artificial intelligence. The special bodies created within the framework of the regulation are obliged to ensure the correct application of the rules in practice. Only in this case it will be possible to develop artificial intelligence in such a way that the main goal specified in the preamble of the regulation – the well-being of humankind – is achieved.

43 Mendez-Suarez, M. Virginia, S.M. De Prat, J.M. Do Current Regulations Prevent Unethical AI Practices? (2023) Journal of Competitiveness, 15(3). pp. 207-222.

44 Novelli, C. Casolari, F. Rotolo, A. Taddeo, M. Floridi, L. AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act. (2024) The Digital Society Journal, 3(13). pp. 1-29.

45 Mendez-Suarez, M. Virginia, S.M. De Prat, J.M. Do Current Regulations Prevent Unethical AI Practices? (2023) Journal of Competitiveness, 15(3). pp. 207-222.

46 Mitchell, A.D. Let, D. Tang, L. AI Regulation and the Protection of Source Code. (2023) International Journal of Law and Information Technology, 31(4). pp. 183-301.

47 Novelli, C. Casolari, F. Rotolo, A. Taddeo, M. Floridi, L. AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act. (2024) The Digital Society Journal, 3(13). pp. 1-29.

48 Mendez-Suarez, M. Virginia, S.M. De Prat, J.M. Do Current Regulations Prevent Unethical AI Practices? (2023) Journal of Competitiveness, 15(3). pp. 207-222.

49 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. pp. 463-474.

BIBLIOGRAPHY

1. Alon-Barkat, S. Busuioc, M. Human–AI Interactions in Public Sector Decision Making: „Automation Bias" and „Selective Adherence" to Algorithmic Advice. (2023) Journal of Public Administration Research and Theory, 33(1). pp. 153-169.
2. Baronchelli, A. Shaping new norms for AI. (2024) Philosophical Transactions of the Royal Society, 379. pp. 1-6.
3. European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52021PC0206 [Last accessed: 29.05.2024].
4. Gaffar, H. Albarashdi, S. Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape. (2024) Asian Journal of International Law, 24. pp. 1-25.
5. Gibney, E. What the EU's tough AI law means for research and ChatGPT. (2024) Nature, 626. pp. 938-939.
6. Gornet, M. Maxwell, W. The European approach to regulating AI through technical standards. (2024) The HAL Open Science Journal, 24. pp. 1-25.
7. Hacker, P. A Legal Framework for AI Training Data – from First Principles to the Artificial Intelligence Act. (2021) Law, Innovation and Technology Journal, 13(2). pp. 257-301.
8. Hakan, C. Criminal Liability of Artificial Intelligence from the Perspective of Criminal Law: An Evaluation in the Context of the General Theory of Crime and Fundamental Principles. (2024) International Journal of Eurasia Social Sciences, 55(15). pp. 276-313.
9. Laux, J. Wachter, S. Mittelstadt, B. Three Pathways for Standardisation and Ethical Disclosure by Default under the European Union Artificial Intelligence Act. (2024) Computer Law & Security Review, 53. pp. 1-11.
10. Luk, A. The Relationship Between Law and Technology: Comparing Legal Responses to Creators' Rights under Copyright Law through Safe Harbor for Online Intermediaries and Generative AI Technology. (2023) Law, Innovation and Technology Journal, 16(1). pp. 148-169.
11. Mendez-Suarez, M. Virginia, S.M. De Prat, J.M. Do Current Regulations Prevent Unethical AI Practices? (2023) Journal of Competitiveness, 15(3). pp. 207-222.
12. Mitchell, A.D. Let, D. Tang, L. AI Regulation and the Protection of Source Code. (2023) International Journal of Law and Information Technology, 31(4). pp. 183-301.
13. Novelli, C. Casolari, F. Rotolo, A. Taddeo, M. Floridi, L. AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act. (2024) The Digital Society Journal, 3(13). pp. 1-29.
14. Pirozzoli, A. The Human-centric Perspective in the Regulation of Artificial Intelligence. (2024) Insight European Papers, 9(1). pp. 105-116.
15. Sganga, C. Is There Still a Policy Agenda for EU Copyright Law? (2023) International Review of Intellectual Property and Competition Law, 54. pp. 1407-1417.
16. Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. pp. 463-474.
17. Voss, W.G. AI Act: The European Union's Proposed Framework Regulation for Artificial Intelligence Governance. (2021) Journal of Internet Law, 25(4). pp. 8-17.

ევროკავშირის რეგულაცია ხელოვნური ინტელექტის შესახებ: წინ გადადგმული ნაბიჯი თუ პროგრესის შეკავების მცდელობა?

ბექა ხიტირი

სამართლის დოქტორი, ივანე ჯავახიშვილის სახელობის თბილისის სახელმწიფო უნივერსიტეტი, ასოცირებული პროფესორი, ევროპის უნივერსიტეტი, საქართველო

ნაზი ვარაზაშვილი

სამართლის დოქტორანტი, ნიუ ვიჟენ უნივერსიტეტი, საქართველო

აბსტრაქტი

2024 წლის 13 მარტს ევროპის პარლამენტმა მიიღო „ხელოვნური ინტელექტის შესახებ ჰარმონიზებული წესების შემოღების შესახებ რეგულაციის“ პროექტი, ხოლო იმავე წლის 21 მაისს ევროკავშირის საბჭომაც დაამტკიცა აღნიშნული აქტი. შედეგად, 2024 წლის ივლისიდან რეგულაცია შევა ძალაში და აამოქმედებს მსოფლიოში პირველ მოწესრიგებას, რომლის მიზანიცაა დაარეგულიროს კერძო სექტორში ხელმისაწვდომი არსებითად ყველა სახის ხელოვნური ინტელექტი.

ხელოვნური ინტელექტი თანამედროვე სამყაროს ერთ-ერთ უმნიშვნელოვანეს გამოწვევად რჩება. მასთან დაკავშირებული ტექნოლოგიები მაღალი სისწრაფით ვითარდება, რაც გავლენას ახდენს ყველა ბიზნესის ოპერირებასა და ნებისმიერი ადამიანის ცხოვრებაზე. შედეგად, აუცილებელია, რომ მოხდეს სფეროს მაქსიმალურად ეფექტიანად რეგულირება, თუმცა, ზემოთ აღნიშნულ რეგულაციამდე, პრაქტიკულად, არანაირი საკანონმდებლო

ჩარჩო არ არსებობდა, რაც განსაკუთრებით ზრდის მის მნიშვნელობას. აუცილებელია, რომ მოხდეს მოცემული რეგულაციის საფუძვლიანი ანალიზი, რათა შესაძლებელი იყოს სამომავლოდ კიდევ უფრო ეფექტიანი მოწესრიგების შემუშავება.

საკვანძო სიტყვები: ხელოვნური ინტელექტი, AI, ევროკავშირის სამართალი, რეგულაცია, ახალი რეგულაცია

შესავალი

2024 წლის 13 მარტს ევროპის პარლამენტმა ხმათა უმრავლესობით დაამტკიცა „ხელოვნური ინტელექტის შესახებ ჰარმონიზებული წესების შემოღების შესახებ რეგულაციის“ პროექტი, ხოლო იმავე წლის 21 მაისს ევროკავშირის საბჭომ ერთხმად დაამტკიცა აღნიშნული აქტი[1]. შედეგად, 2024 წლის ივლისიდან რეგულაცია შევა ძალაში და აამოქმედებს მსოფლიოში პირველ მოწესრიგებას, რომლის მიზანიცაა დაარეგულიროს კერძო სექტორში ხელმისაწვდომი არსებითად ყველა სახის ხელოვნური ინტელექტი[2].

ხელოვნური ინტელექტი თანამედროვე სამყაროს ერთ-ერთ უმნიშვნელოვანეს გამოწვევად რჩება[3]. მასთან დაკავშირებული ტექნოლოგიები მაღალი სისწრაფით ვითარდება[4], რაც გავლენას ახდენს როგორც თითქმის ყველა ინდუსტრიაზე[5], ისე საშუალო ადამიანის ცხოვრებაზეც კი[6]. შედეგად, აუცილებელია, რომ მოხდეს სფეროს მაქსიმალურად ეფექტიანად რეგულირება, თუმცა, ზემოთ აღნიშნულ რეგულაციამდე, პრაქტიკულად, არანაირი საკანონმდებლო ჩარჩო არ არსებობდა, რაც განსაკუთრებით ზრდის მის მნიშვნელობას.

რეგულაციის პროექტი პირველად ევროკავშირის კომისიამ 2021 წლის 21 აპრილს წარადგინა[7]. შედეგად, შემდგომი 3 წლის განმავლობაში, მასთან დაკავშირებით მრავალი სხვადასხვა სახის მოსაზრება გამოითქვა, როგორც პოზიტიური, ისე ნეგატიური შეფასებებით[8]. თუმცა, მიუხედავად პოლარიზებული რეაქციისა, მისი მოღება რადიკალური შინაარსობრივი ცვლილებების გარეშე მოხდა[9].

ზემოთ მოცემულის გათვალისწინებით, შეიძლება ითქვას, რომ მიუხედავად რეგულაციის სიახლისა, ხელმისაწვდომია მასთან დაკავშირებული აკადემიური კვლევები, რომლებიც ბოლო სამი წლის განმავლობაში განხორციელდა. აღნიშნული ნაშრომებისა და პირველადი კვლევის გამოყენებით, წინამდებარე ნაშრომის მიზანია, შეაფასოს მიღებული რეგულაცია და წარმოადგინოს მისი ტექსტისა და პოტენციური შედეგების კრიტიკული ანალიზი.

1 Gornet, M. Maxwell, W. The European approach to regulating AI through technical standards. (2024) The HAL Open Science Journal, 24. გვ. 1-25.

2 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]

3 Voss, W.G. AI Act: The European Union's Proposed Framework Regulation for Artificial Intelligence Governance. (2021) Journal of Internet Law, 25(4). გვ. 8-17.

4 Alon-Barkat, S. Busuioc, M. Human–AI Interactions in Public Sector Decision Making: „Automation Bias“ and „Selective Adherence“ to Algorithmic Advice. (2023) Journal of Public Administration Research and Theory, 33(1). გვ. 153-169.

5 Hacker, P. A Legal Framework for AI Training Data – from First Principles to the Artificial Intelligence Act. (2021) Law, Innovation and Technology Journal, 13(2). გვ. 257-301.

6 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. გვ. 463-474.

7 Voss, W.G. AI Act: The European Union's Proposed Framework Regulation for Artificial Intelligence Governance. (2021) Journal of Internet Law, 25(4). გვ. 8-17.

8 Laux, J. Wachter, S. Mittelstadt, B. Three Pathways for Standardisation and Ethical Disclosure by Default under the European Union Artificial Intelligence Act. (2024) Computer Law & Security Review, 53. გვ. 1-11.

9 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]

1. რეგულაციის ძირითადი დებულებები

იმის გათვალისწინებით, რომ ევროკავშირის რეგულაცია, ფაქტობრივად, ახალი სფეროს მოწესრიგების პირველ მცდელობას წარმოადგენს, ბუნებრივია, მასში ბევრი ახლებური დებულებაა თავმოყრილი[10]. ეს ნიშნავს, რომ რეგულაციის ტექსტთან დაკავშირებით არსებობს ბევრი კითხვის ნიშანი, რომლებზეც დასაბუთებული პასუხის გაცემა, ჯერჯერობით, პრაქტიკის არარსებობის გათვალისწინებით, არ არის შესაძლებელი[11].

პირველ რიგში, აღსანიშნავია, რომ რეგულაციის დაფარვის სფერო მოიცავს ხელოვნური ინტელექტის გამოყენებას როგორც კერძო, ისე საჯარო სექტორში მიზნებიდან გამომდინარე[12]. ამავდროულად, ნორმატიულ აქტში დაშვებულია რამდენიმე გამონაკლისი, რომლებშიც შედის სამხედრო და თავდაცვის სფეროებში ხელოვნური ინტელექტით სარგებლობა, ასევე, მისი გამოყენება ექსკლუზიურად კვლევითი და სამეცნიერო მიზნებით[13].

რაც შეეხება რეგულაციის შინაარს, აქ გამოყენებულია ე.წ. „რისკებზე დაფუძნებული“ მიდგომა, რომლის ფარგლებშიც, რაც უფრო მეტია რისკი, რომელიც გამომდინარეობს ხელოვნური ინტელექტიდან, მით უფრო მკაცრი წესები ვრცელდება მასზე[14]. რეგულაციის მიხედვით, ხელოვნური ინტელექტი, მისგან გამომდინარე რისკის მიხედვით, დაიყო სამ კატეგორიად:

მიუღებელი რისკი – ისეთი სისტემები, რომლებიც კაცობრიობისათვის საფრთხედ აღიქმება. მათ შორის, რეგულაციაში მოყვანილი მაგალითების მიხედვით, შედის კოგნიტური ქცევითი მანიპულაცია (როგორც სრული მოსახლეობის, ისე მისი რომელიმე მოწყვლადი ნაწილის), სოციალური შეფასება (ხალხის კატეგორიებად დაყოფა ან/და ქულათა სისტემით შეფასება მათი ქცევის, სოციალური სტატუსის ან პიროვნული მახასიათებლების მიხედვით), ასევე, ბიომეტრიულ იდენტიფიცირებაზე და ადამიანთა ადგილმდებარეობის განსაზღვრაზე ორიენტირებული ხელოვნური ინტელექტი. მიუღებელი რისკის შემცველი ყველა ხელოვნური ინტელექტის შექმნა ან გამოყენება ევროკავშირის მთელ ტერიტორიაზე სრულად იკრძალება[15].

მაღალი რისკი – რეგულაციის ტექსტით, ყველა ხელოვნური ინტელექტი, რომელიც უარყოფით გავლენას ახდენს ადამიანთა ძირითად უფლებებზე ან მათს უსაფრთხოებაზე, განიხილება მაღალი რისკის შემცველად. ასეთთა შორის შედის ყველა სახის ხელოვნური ინტელექტი, რომელიც გამოიყენება ისეთ სფეროებში, როგორიცაა ავიაცია, სამედიცინო აპარატურა, ავტომობილები, ლიფტები, სათამაშოები, ინფრასტრუქტურის ოპერირება, განათლება, შრომა და დასაქმებულთა მართვა, კომუნალური სერვისები, საპოლიციო აქტივობა, მიგრაცია და იურიდიული დახმარება. ყველა სახის მაღალი რისკის შემცველი ხელოვნური ინტელექტი, სანამ იგი ხელმისაწვდომი გახდება მოსახლეობისათვის, უნდა შეფასდეს შესაბამისი ორგანოს მიერ და, შემდგომ, დაექვემდებაროს პერიოდულ შემოწმებას[16].

10 Hacker, P. A Legal Framework for AI Training Data – from First Principles to the Artificial Intelligence Act. (2021) Law, Innovation and Technology Journal, 13(2). გვ. 257-301.

11 Laux, J. Wachter, S. Mittelstadt, B. Three Pathways for Standardisation and Ethical Disclosure by Default under the European Union Artificial Intelligence Act. (2024) Computer Law & Security Review, 53. გვ. 1-11.

12 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. მუხლი 2.1.

13 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. მუხლი 2.2, პრეამბულის პუნქტი 16.

14 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52021PC0206 [Last accessed: 29.05.2024]. პრეამბულის პუნქტი 14.

15 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. კარი II.

16 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-

მცირე რისკი – ყველა ის ხელოვნური ინტელექტი, რომელიც არ ხვდება ზემოთ მოცემულ ორ კატეგორიაში, განიხილება მცირე რისკის შემცველად. ასეთთა შორის არის, მაგალითად, მაგენერირებელი ხელოვნური ინტელექტი (მაგალითად, ChatGPT)[17]. მცირე რისკის შემცველ ხელოვნურ ინტელექტს დამატებითი მოწესრიგება არ უწესდება, თუმცა მასზე ვრცელდება გამჭვირვალობასთან დაკავშირებული მოთხოვნები[18].

რეგულაციის მიხედვით, როდესაც რაიმე სახის პროდუქტი იქმნება ხელოვნური ინტელექტის გამოყენებით, სავალდებულოა, რომ იგი აშკარად იყოს იდენტიფიცირებული, როგორც ხელოვნური ინტელექტის მიერ შექმნილი. ამასთან, მწარმოებელი ვალდებულია, უზრუნველყოს, რომ ხელოვნური ინტელექტის გამოყენებით შეუძლებელი იყოს უკანონო პროდუქტის შექმნა[19]. ასევე აღსანიშნავია, რომ რეგულაციით შემოღებულია ხელოვნური ინტელექტის შემმუშავებელი ყველა პირისათვის სავალდებულო ქცევის წესები, რომელთა მიზანია კიდევ უფრო გაზარდოს უსაფრთხოების დონე[20].

კიდევ ერთი მნიშვნელოვანი საკითხი, რომელსაც რეგულაცია აწესრიგებს, არის ხელოვნური ინტელექტის საკითხებთან დაკავშირებით შესაბამისი ორგანოების შექმნა. კომისიის ფარგლებში შეიქმნება ხელოვნური ინტელექტის ოფისი, ასევე მასთან არსებული დამოუკიდებელი ექსპერტების სამეცნიერო პანელი. დამატებით, ასევე, შეიქმნება წევრი სახელმწიფოების წარმომადგენლებით ჩამოყალიბებული ხელოვნური ინტელექტის საბჭო, რომელთან ერთად იმუშავებს დაინტერესებულ პირთა ფორუმი, რომელიც საბჭოს პერიოდულად წარუდგენს რეკომენდაციებს[21].

იმ შემთხვევაში, თუკი ხელოვნური ინტელექტის მწარმოებელი დაარღვევს რეგულაციის მიერ დადგენილ წესებს, მას დაეკისრება ჯარიმა, რომლის ოდენობასაც კომისიის ხელოვნური ინტელექტის ოფისი განსაზღვრავს[22] და რომელიც შეიძლება, წარმოადგენდეს კომპანიის გლობალური ბრუნვის დადგენილ პროცენტს, რომელიც, ზოგ შემთხვევაში, შესაძლოა, განსაკუთრებულად დიდი ოდენობის იყოს, რაც გაზრდის ოფისის გადაწყვეტილებებისა და რეგულაციის მოთხოვნების პრაქტიკაში აღსრულების ალბათობას[23].

საბოლოოდ, უნდა აღინიშნოს, რომ რეგულაცია, ასევე, მიზნად ისახავს ინოვაციის ხელშეწყობასაც. რეგულაციის მიხედვით, წევრი სახელმწიფოები ვალდებულნი არიან, ხელი შეუწყონ დამოუკიდებელ და დამწყებ კერძო პირებს, გამოიკვლიონ და შექმნან ხელოვნური ინტელექტი ისეთ გარემოში, რომ მოხდეს მისი ფართო საზოგადოებისათვის წარდგენა მხოლოდ მას შემდეგ, რაც დადასტურდება მასთან დაკავშირებული რისკების მინიმუმამდე დაყვანის ფაქტი[24].

რეგულაცია ძალაში შედის ეტაპობრივად და სრულად ძალაში იქნება მისი გა-

lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. კარი III.

17 Pirozzoli, A. The Human-centric Perspective in the Regulation of Artificial Intelligence. (2024) Insight European Papers, 9(1). გვ. 105-116.

18 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. გვ. 463-474.

19 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. კარი IV.

20 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. კარი IX.

21 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52021PC0206 [Last accessed: 29.05.2024]. კარი VI-VIII.

22 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. კარი X.

23 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. გვ. 463-474.

24 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. კარი V.

მოქვეყნებიდან 24 თვის ვადაში, თუმცა გამონაკლისად გვევლინება მაღალი რისკის შემცველ ხელოვნურ ინტელექტთან დაკავშირებული სპეციალური დებულებები, რომლებიც ძალაში გამოქვეყნებიდან 36 თვის ვადაში შევა[25].

2. დასახული მიზანი და რეგულაციის ტექსტის მასთან შესაბამისობა

რეგულაციის პრეამბულაში ხაზგასმულია, რომ მისი მიზანია, იზრუნოს ადამიანის ძირითადი უფლებების დაცვაზე და მაქსიმალურად შეზღუდოს მათი შელახვა ხელოვნური ინტელექტის გამოყენებით[26]. ამასთან, მნიშვნელოვანია იმის გამოკვეთა, რომ რეგულაცია ეხება ხელოვნურ ინტელექტთან დაკავშირებულ მხოლოდ ზოგიერთ საკითხს და ვერ ჩაითვლება ნორმატიულ აქტად, რომელიც აწესრიგებს ხელოვნური ინტელექტის შექმნასა და გამოყენებასთან ასოცირებულ ყველა თემას[27].

დღეს აქტიური მსჯელობა მიმდინარეობს ხელოვნური ინტელექტის შექმნასა და ე.წ. „წვრთნასთან“ დაკავშირებით[28]. დღეს არსებული სტანდარტული პრაქტიკით, ხელოვნური ინტელექტის პროგრამირებისას ხდება მისთვის განსაკუთრებით დიდი ოდენობის ინფორმაციის მიწოდება, რომლის გადამუშავების შედეგადაც ხელოვნური ინტელექტი ვითარდება და ახალ შესაძლებლობებს იძენს[29]. მაგალითად, ხელოვნური ინტელექტი, რომლის ფუნქციაც ფერწერული ნაშრომების შექმნაა, სწავლობს ადამიანთა მიერ დახატული ნახატების გამოყენებით და შემდეგ შეუძლია, მათი მსგავსი ნახატი თავადაც შექმნას[30]. აქედან გამომდინარე, ის მხატვრები, რომელთა ნაშრომებიც სხვადასხვა კომპანიის მიერ შექმნილი ხელოვნური ინტელექტის მიერ გამოიყენება, მიიჩნევენ, რომ მათი საავტორო უფლებები ირღვევა[31]. სიტუაცია არსებითად იდენტურია ხელოვნების ყველა სხვა სფეროშიც, რომლებშიც ხელოვნური ინტელექტი „მოღვაწეობს“[32]. მოცემული საკითხი ხელოვნური ინტელექტისა და მისი გავლენის შესახებ აკადემიური და სამართლებრივი მსჯელობის ერთ-ერთ უმთავრეს ნაწილად გვევლინება, თუმცა რეგულაცია მას არც კი ეხება და მოწესრიგების მიღმა ტოვებს.

კიდევ ერთი თემა, რომელიც რეგულაციის ტექსტში არ გვხვდება, არის ხელოვნური ინტელექტის გამოყენებით ჩადენილი დანაშაული. ინტერნეტ-სივრცეში სულ უფრო და უფრო ხშირად ხდება ხელოვნური ინტელექტის გამოყენება უკანონო მიზნებით[33], თუმცა რეგულაცია არც მოცემულ საკითხზე არ გვთავაზობს მოწესრიგებას.

შედეგად, შეიძლება იმაზე საუბარი, რომ, ერთი მხრივ, მნიშვნელოვანია ის ნაბიჯები,

25 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex-:52021PC0206 [Last accessed: 29.05.2024]. მუხლი 85.

26 European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52021PC0206 [Last accessed: 29.05.2024]. პრეამბულა.

27 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. გვ. 463-474.

28 Gibney, E. What the EU's tough AI law means for research and ChatGPT. (2024) Nature, 626. გვ. 938-939.

29 Luk, A. The Relationship Between Law and Technology: Comparing Legal Responses to Creators' Rights under Copyright Law through Safe Harbor for Online Intermediaries and Generative AI Technology. (2023) Law, Innovation and Technology Journal, 16(1). გვ. 148-169.

30 Sganga, C. Is There Still a Policy Agenda for EU Copyright Law? (2023) International Review of Intellectual Property and Competition Law, 54. გვ. 1407-1417.

31 Gaffar, H. Albarashdi, S. Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape. (2024) Asian Journal of International Law, 24. გვ. 1-25.

32 Luk, A. The Relationship Between Law and Technology: Comparing Legal Responses to Creators' Rights under Copyright Law through Safe Harbor for Online Intermediaries and Generative AI Technology. (2023) Law, Innovation and Technology Journal, 16(1). გვ. 148-169.

33 Hakan, C. Criminal Liability of Artificial Intelligence from the Perspective of Criminal Law: An Evaluation in the Context of the General Theory of Crime and Fundamental Principles. (2024) International Journal of Eurasia Social Sciences, 55(15). გვ. 276-313.

რომლებიც გადადგმულია მოცემული რეგულაციის მიღებით და რომ ევროკავშირი პირველია, რომელმაც შექმნა საკანონმდებლო ჩარჩო ამ უაღრესად მნიშვნელოვანი სფეროს მოწესრიგების მიზნით[34]. ამავდროულად კი ხაზგასასმელია, რომ საკითხი ამოწურული არ არის და ხელოვნური ინტელექტის მოწესრიგება უნდა გაგრძელდეს, რათა შეიქმნას ნორმატიული სისტემა, რომელიც უზრუნველყოფს, რომ მიღებული რეგულაციის პრეამბულაში განსაზღვრული მიზანი მართლაც მიღწეული იქნეს.

3. პოტენციური გავლენა ხელოვნური ინტელექტის განვითარებაზე

როგორც თითქმის ყველა ახალ მოწესრიგებას, ევროკავშირის მიერ ხელოვნური ინტელექტის შესახებ ჰარმონიზებული წესების შემოღების შესახებ რეგულაციის პროექტის პირველად წარდგენასაც მოჰყვა შესაბამისი ინდუსტრიის წევრების მხრიდან ნეგატიური რეაქცია[35]. გამოითქვა მოსაზრებები, რომ სფეროს რეგულირების გზით ევროკავშირი მხოლოდ იმას უზრუნველყოფდა, რომ მოხდებოდა მის ფარგლებში აღნიშნული სფეროს განვითარების შეზღუდვა და უპირატესობა მიეცემოდა ევროკავშირის გლობალურ კონკურენტებს[36].

აღნიშნულთან დაკავშირებით აუცილებელია იმის ხაზგასმა, რომ რეგულაცია, ფაქტობრივად, მხოლოდ ზოგად ჩარჩოდ გვევლინება[37]. მასში არსებული წესების დიდი უმრავლესობა ორ კატეგორიად შეიძლება დაიყოს: 1. მონახაზი, რომლის ფარგლებშიც შემდგომ უფრო დეტალური მოწესრიგება უნდა შეიქმნეს; და 2. ზოგადი წესები, რომლებსაც ხელოვნურ ინტელექტზე მომუშავე პირები, კეთილსინდისიერების პრინციპის ფარგლებში, ისედაც უნდა იცავდნენ[38]. რეალურად, მყარი, კონკრეტული წესები, რომლებიც არსებითად ცვლის მდგომარეობას, არის მხოლოდ ორი: მარეგულირებელი ორგანოს შექმნა და მიუღებელი რისკის შემცველი ხელოვნური ინტელექტის შემუშავების აკრძალვა[39].

ხელოვნური ინტელექტის მნიშვნელობიდან და კომპლექსურობიდან გამომდინარე, მისი მოწესრიგება სპეციალიზებული ორგანოს არსებობის გარეშე, ფაქტობრივად, შეუძლებელია[40]. მართალია, არასწორი რეგულირება ხშირად შეიძლება რეგულირების არარსებობაზე უარესიც კი იყოს[41], თუმცა, მოცემული მდგომარეობით, არ არსებობს მიზეზი ვივარაუდოთ, რომ ჯერ კიდევ ჩამოუყალიბებელი ევროკავშირის ხელოვნური ინტელექტის ოფისი საკუთარ საქმეს ცუდად გააკეთებს. ამასთან, იმის გათვალისწინებით, რომ ხელოვნურ ინტელექტის სფეროში მომუშავე არაერთ კომპანიას უკვე ჰქონდა უსაფრთხოებასთან და ადამიანის უფლებებთან დაკავშირებული სკანდალები[42], შეიძლება იმის თქმა, რომ რეგულაციის არსებობა

34 Voss, W.G. AI Act: The European Union's Proposed Framework Regulation for Artificial Intelligence Governance. (2021) Journal of Internet Law, 25(4). გვ. 8-17.

35 Laux, J. Wachter, S. Mittelstadt, B. Three Pathways for Standardisation and Ethical Disclosure by Default under the European Union Artificial Intelligence Act. (2024) Computer Law & Security Review, 53. გვ. 1-11.

36 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. გვ. 463-474.

37 Voss, W.G. AI Act: The European Union's Proposed Framework Regulation for Artificial Intelligence Governance. (2021) Journal of Internet Law, 25(4). გვ. 8-17.

38 Pirozzoli, A. The Human-centric Perspective in the Regulation of Artificial Intelligence. (2024) Insight European Papers, 9(1). გვ. 105-116.

39 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. გვ. 463-474.

40 Novelli, C. Casolari, F. Rotolo, A. Taddeo, M. Floridi, L. AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act. (2024) The Digital Society Journal, 3(13). გვ. 1-29.

41 Baronchelli, A. Shaping new norms for AI. (2024) Philosophical Transactions of the Royal Society, 379. გვ. 1-6.

42 Mitchell, A.D. Let, D. Tang, L. AI Regulation and the Protection of Source Code. (2023) International Journal of Law and Information Technology, 31(4). გვ. 183-301.

საჭიროა. შედეგად, იმის თქმა, რომ ევროკავშირის პარლამენტისა და საბჭოს რეგულაციის მიერ ხელოვნური ინტელექტის ოფისის შექმნა რაიმე გზით ნეგატიურ გავლენას იქონიებს მოცემულ სფეროზე, არ არის გამართლებული.

რაც შეეხება მიუღებელი რისკის შემცველ ხელოვნურ ინტელექტს, როგორც ზემოთ უკვე აღინიშნა, ასეთი სახის ინსტრუმენტებზე მუშაობა (თავდაცვისა და უსაფრთხოების სფეროში მომუშავე სპეციალიზებული პირების გარდა) ყველასათვის ბლანკეტურად აიკრძალა. რეგულაციის კრიტიკოსები აღნიშნავენ, რომ ამ ნაბიჯით ევროკავშირი ჩამორჩება, მაგალითად, ჩინეთის სახალხო რესპუბლიკას, რომელშიც ადამიანთა მონიტორინგი და სოციალური კლასიფიცირება ხელოვნური ინტელექტის განვითარების მნიშვნელოვან მიმართულებას წარმოადგენს[43].

რეგულაციის პრეამბულაში პირდაპირ აღნიშნულია, რომ მიუღებელი რისკის შემცველი ხელოვნური ინტელექტი ასოცირდება ისეთ მოქმედებებთან, რომელთა მინდობაც ხელოვნური ინტელექტისათვის არ შეიძლება[44]. ყველა ის სფერო, რომლებიც მიუღებელი რისკის შემცველად არის მოხსენიებული რეგულაციაში, უკავშირდება ისეთ საკითხებს, რომლებიც განსაკუთრებულად დიდი გავლენის მქონეა ადამიანთა ყოველდღიურ ცხოვრებაზე[45]. შესაბამისად, მათში არასწორად ჩარევა, რაც ხშირად ხდება ხელოვნური ინტელექტის გამოყენებით[46], დასაშვებად ვერ ჩაითვლება[47]. ამიტომ, ევროკავშირის მიერ მიღებული გადაწყვეტილება – აკრძალოს ასეთი სახის ხელოვნური ინტელექტის შექმნა – ნამდვილად ვერ ჩაითვლება არასასურველ ნაბიჯად.

შედეგად, შეიძლება იმის აღნიშვნა, რომ რეგულაციის დებულებები არსებით ნეგატიურ გავლენას არ მოახდენს ხელოვნური ინტელექტის განვითარებაზე. მეორე მხრივ, ასევე შეიძლება იმაზე საუბარი, რომ საკანონმდებლო ჩარჩოს შექმნამ შეიძლება პოზიტიური ეფექტი იქონიოს აღნიშნულ სფეროზე.

პირველ რიგში, ხშირად ქცევის წესების დადგენა და აკრძალული მოქმედებების აშკარად განსაზღვრა სასურველია ბიზნესისათვის, რადგანაც ეს აქრობს ბუნდოვანებას, რომელიც ხელის შემშლელ ფაქტორად გვევლინება[48]. ამასთან, გამჭვირვალობასთან დაკავშირებული დებულებები გაზრდის საშუალო ბიზნესისათვის ხელმისაწვდომი წყაროების რაოდენობას, რაც, ასევე, პოზიტიურად აისახება მომავალში ხელოვნური ინტელექტის განვითარების დონეზე[49].

ყოველივე ზემოთ მოცემულის გათვალისწინებით, შეიძლება ითქვას, რომ რეგულაციის კრიტიკა იმ თვალსაზრისით, რომ იგი ხელს შეუშლის ხელოვნური ინტელექტის განვითარებას ევროკავშირში, საფუძველს არის მოკლებული. პირიქით, მისი შემოღებით მცირდება ბუნდოვანება და უზრუნველყოფილი იქნება გამჭვირვალობა, რომელიც პოზიტიურად აისახება მთლიანად სფეროზე როგორც ევროკავშირის ფარგლებში, ისე მის გარეთ.

დასკვნა

ევროკავშირის პარლამენტისა და საბჭოს მიერ „ხელოვნური ინტელექტის შესახებ ჰარმონიზებული წესების შემოღების შესახებ

43 Mendez-Suarez, M. Virginia, S.M. De Prat, J.M. Do Current Regulations Prevent Unethical AI Practices? (2023) Journal of Competitiveness, 15(3). გვ· 207-222.

44 Novelli, C. Casolari, F. Rotolo, A. Taddeo, M. Floridi, L. AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act. (2024) The Digital Society Journal, 3(13). გვ· 1-29.

45 Mendez-Suarez, M. Virginia, S.M. De Prat, J.M. Do Current Regulations Prevent Unethical AI Practices? (2023) Journal of Competitiveness, 15(3). გვ· 207-222.

46 Mitchell, A.D. Let, D. Tang, L. AI Regulation and the Protection of Source Code. (2023) International Journal of Law and Information Technology, 31(4). გვ· 183-301.

47 Novelli, C. Casolari, F. Rotolo, A. Taddeo, M. Floridi, L. AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act. (2024) The Digital Society Journal, 3(13). გვ· 1-29.

48 Mendez-Suarez, M. Virginia, S.M. De Prat, J.M. Do Current Regulations Prevent Unethical AI Practices? (2023) Journal of Competitiveness, 15(3). გვ· 207-222.

49 Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. გვ· 463-474.

რეგულაციის“ პროექტის მიღება მნიშვნელოვანი წინგადადგმული ნაბიჯია ხელოვნური ინტელექტის სფეროს მოწესრიგებაში. ეს არის შედარებადი მასშტაბის პირველი ნორმატიული აქტი, რომელიც კერძო სექტორის მიერ ხელოვნური ინტელექტის კვლევას, შექმნასა და გამოყენებას არეგულირებს. მისი მიღებით იქმნება ჩარჩო, რომლის ფარგლებშიც შესაძლებელია, რომ ხელოვნური ინტელექტი და მასზე მომუშავე პირები განვითარდნენ. რეგულაცია ხელს არ უშლის სფეროში მოღვაწე პირების მიერ საკუთარი საქმიანობის ეფექტურად შესრულებას და, პირიქით, პოზიტიურ ეფექტს იქონიებს მათზე.

ამასთან, ხსენებული რეგულაცია რჩება მხოლოდ პირველ ნაბიჯად. მის საფუძველზე აუცილებელია, შემუშავდეს როგორც უფრო დეტალური მოწესრიგება, რომელიც ხელოვნური ინტელექტის გამოყენებასთან დაკავშირებულ ყველა მნიშვნელოვან სფეროს დაარეგულირებს. რეგულაციის ფარგლებში შექმნილი სპეციალური ორგანოები კი ვალდებულნი არიან, უზრუნველყონ წესების სწორი გამოყენების პრაქტიკაში აღსრულება. მხოლოდ ამ შემთხვევაში გახდება შესაძლებელი, რომ ხელოვნური ინტელექტის განვითარდეს ისე, რომ მიღწეული იყოს რეგულაციის პრეამბულაში მითითებული უმთავრესი მიზანი – კაცობრიობის კეთილდღეობა.

ბიბლიოგრაფია

1. Alon-Barkat, S. Busuioc, M. Human–AI Interactions in Public Sector Decision Making: „Automation Bias“ and „Selective Adherence“ to Algorithmic Advice. (2023) Journal of Public Administration Research and Theory, 33(1). გვ. 153-169.
2. Baronchelli, A. Shaping new norms for AI. (2024) Philosophical Transactions of the Royal Society, 379. გვ. 1-6.
3. European Union Law Electronic Journal (Eur-Lex). Online Database. Available online at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52021PC0206 [Last accessed: 29.05.2024]
4. Gaffar, H. Albarashdi, S. Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape. (2024) Asian Journal of International Law, 24. გვ. 1-25.
5. Gibney, E. What the EU’s tough AI law means for research and ChatGPT. (2024) Nature, 626. გვ. 938-939.
6. Gornet, M. Maxwell, W. The European approach to regulating AI through technical standards. (2024) The HAL Open Science Journal, 24. გვ. 1-25.
7. Hacker, P. A Legal Framework for AI Training Data – from First Principles to the Artificial Intelligence Act. (2021) Law, Innovation and Technology Journal, 13(2). გვ. 257-301.
8. Hakan, C. Criminal Liability of Artificial Intelligence from the Perspective of Criminal Law: An Evaluation in the Context of the General Theory of Crime and Fundamental Principles. (2024) International Journal of Eurasia Social Sciences, 55(15). გვ. 276-313.
9. Laux, J. Wachter, S. Mittelstadt, B. Three Pathways for Standardisation and Ethical Disclosure by Default under the European Union Artificial Intelligence Act. (2024) Computer Law & Security Review, 53. გვ. 1-11.
10. Luk, A. The Relationship Between Law and Technology: Comparing Legal Responses to Creators’ Rights under Copyright Law through Safe Harbor for Online Intermediaries and Generative AI

Technology. (2023) Law, Innovation and Technology Journal, 16(1). გვ. 148-169.
11. Mendez-Suarez, M. Virginia, S.M. De Prat, J.M. Do Current Regulations Prevent Unethical AI Practices? (2023) Journal of Competitiveness, 15(3). გვ. 207-222.
12. Mitchell, A.D. Let, D. Tang, L. AI Regulation and the Protection of Source Code. (2023) International Journal of Law and Information Technology, 31(4). გვ. 183-301.
13. Novelli, C. Casolari, F. Rotolo, A. Taddeo, M. Floridi, L. AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act. (2024) The Digital Society Journal, 3(13). გვ. 1-29.
14. Pirozzoli, A. The Human-centric Perspective in the Regulation of Artificial Intelligence. (2024) Insight European Papers, 9(1). გვ. 105-116.
15. Sganga, C. Is There Still a Policy Agenda for EU Copyright Law? (2023) International Review of Intellectual Property and Competition Law, 54. გვ. 1407-1417.
16. Tataru, S.R. Cretu, A.C. Decoding the EU Artificial Intelligence Act: An Analysis of Key Concepts and Provisions. (2024) Journal of Public Administration Finance and Law, 31. გვ. 463-474.
17. Voss, W.G. AI Act: The European Union's Proposed Framework Regulation for Artificial Intelligence Governance. (2021) Journal of Internet Law, 25(4). გვ. 8-17.

ANALYSIS OF THE CONCLUSION OF THE PLENUM OF THE CONSTITUTIONAL COURT IN RELATION TO THE VIOLATION OF THE CONSTITUTION BY THE PRESIDENT OF GEORGIA AND INTERNATIONAL PRACTICE

Tea Kavelidze

Doctor of Law, Visiting Lecturer at Ivane Javakhishvili Tbilisi State University, Georgia

ABSTRACT

From 2013 until the present, the dispute on the separation of competencies between the leaders of the state government has been ongoing in political life, as well as on an international scale in the field of foreign relations. The field of foreign relations is of national importance and is directly related to the state's image and foreign policy. The conclusion of the international treaties, as well as the appointment of the ambassadors and representation of the state, has become the subject of dispute at various times. State representation by the President in foreign relations has led to a Constitutional Reference submitted by the Parliament of Georgia to the Constitutional Court of Georgia, alleging a violation of the Constitution by the President for the first time in the country's history. As a result, according to the conclusion of the Constitutional Court of Georgia dated October 16, 2023, President Ms. Zurabishvili violated the Constitution of Georgia by exercising representation powers without the consent of the Government.

Based on the above, this thesis will analyze the meaning of the representation power in foreign relations, the President's constitutional status, and the President's role in foreign relations, acting as the so-called "neutral arbitrator". This thesis will include a discussion on the roles of the Parliament and the Constitutional Court of Georgia in the political-legal process of Presidential impeachment proceedings. It will also examine the conclusions and decisions of Constitutional Courts in various states regarding alleged constitutional violations by Presidents and disputes over competence.

KEYWORDS: Field of foreign relations, the President, the Parliament, Violation of the Constitution, Impeachment

INTRODUCTION

Pursuant to the Conclusion of the Constitutional Court of Georgia dated October 16, 2023, President Zurabishvili violated the Constitution of Georgia.[1] The Court found that on August 31, September 1, and September 6, 2023, during her international working visits abroad, the President of Georgia exercised her representation power in the field of foreign relations without obtaining the consent of the Government of Georgia. This action represented a violation of Article 52(1)(a) of the Constitution of Georgia, thereby resulting in a violation of Article 48 of the Constitution of Georgia.[2]

The role of the President of Georgia in the system of separation of powers shall be discussed based on the systemic analysis of the President's powers. The role of the head of state, embodied by the President, is characteristic of all models of republican governance. The powers of the head of state vary among presidential, parliamentary, and semi-presidential governance models. However, the essence of these different governance models and the separation of powers does not imply leaving any institutions without functions. As a constitutional institution, the President holds the status of head of state. Therefore, representing the President solely as the "State Notary"[3] does not correspond to the essence of the parliamentary governance model.

In relation to the alleged breach of the Constitution by the President of Albania, the Venice Commission argued that in parliamentary regimes, public authority is granted the highest status not because it represents the strongest "authority" but because the objectives it must achieve are considered of greater importance compared to party politics.[4] On the other hand, to achieve these specific objectives, Constitutions grant the President specific powers, whether formal or essential. When executing these powers, the President should not only act impartially but also be perceived as doing so.[5]

The President should benefit from institutional independence in the parliamentary governance model, where power strongly depends on the executive and legislative pillars. This allows her/him to exercise the functions of a neutral arbitrator as the head of state, simultaneously safeguarding state unity and national independence. The President is fully distanced from exercising foreign politics, whereas the Government is the sole institution for exclusively exercising foreign politics, and the Government may grant the President the power to exercise foreign politics. The President is a fully apolitical figure, and her activities are not shaped by the political interests of specific political groups, whether the ruling party or opposition powers. This stands in contrast to the executive authority, which is formed by the political party that has won the parliamentary elections in the parliamentary governance model. The President is a wholly apolitical figure, and her/his actions are not influenced by the political interests of any particular group, be it the ruling party or opposition factions. This starkly contrasts the executive authority, which is comprised of the political party that emerges victorious in parliamentary elections within the parliamentary governance model.

1. REPRESENTATION POWERS OF THE PRESIDENT OF GEORGIA

Georgian legislation does not define the meaning of representation in foreign relations. The Constitution is a dynamic document, with every reform corresponding to the existing polit-

1 The Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia <https://www.constcourt.ge/ka/judicial-acts?legal=15923> [18.05.2024].

2 *Ibid*.

3 Gvazava G., (2016). Across the Constitution – President of the Republic, in the compilation: Chronicles of the Georgian Constitutionalism, pp. 350-355.

4 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October, 2019) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [Last accessed: 18.05.2024].

5 *Ibid*.

ical-legal reality. Given its "dynamic nature", it is challenging to comprehensively define the meaning of representation and its potential scenarios, as various actions may fall under this function over time. For instance, with the advancement of communication technology and political leaders' use of social platforms to express their opinions, representation methods have evolved. Thus, when exercising representation, the head of state employs traditional means like phone calls, personal representation, or meetings and utilizes any form of virtual or written expression where the President is depicted as the head of state both domestically and internationally.

It has been subject to interpretation whether any activity of the President is related to foreign affairs. The systematic interpretation of the Constitution of Georgia and the correct interpretation of the state's existing governance model address this question. Not all powers of the President that imply the involvement of the President in the foreign affairs field require the Government's consent – only those powers shall be subject to the Government's consent related to the exercise of foreign policy. Therefore, the following powers shall be separated from one another: the powers that directly imply the foreign policy and those that do not relate to the foreign policy but correspond to the foreign policy implemented by the Government.

The representation power of the President is inherent for the head of state, therefore, the President exercises such power internally within the state, as well as abroad – the President is a state representative in the field of foreign affairs, as well as internally in the "internal field". The President's representation of the state may or may not be directly related to exercising the parliamentary governance model. It is evident that in countries with parliamentary governance models, the Government carries out foreign policy. Without an agreement with the Government, the exercise of foreign policy will violate the Constitution. The President's working visits abroad took place in those countries where such visits serve the purpose of European integration envisaged by the Constitution. To determine whether the President has violated the Constitution, it was crucial to clearly define the contextual component, as the President's representation cannot automatically be interpreted as the implementation of foreign policy.

No Constitution of a European country indicates that the President's representation requires the consent of the Government. The agreement or consent mechanism is automatically implied when exercising foreign policy, as the model of parliamentary governance does not support the existence of so-called "bicephalic" foreign affairs. If the parliamentary governance model is present in a country, it implies that the conclusion of an international treaty or the conduct of any negotiation cannot be achieved without the involvement of the Government. This is because it arises from the exercise of foreign policy, which cannot be carried out independently by the President, who is tasked with the function of a neutral arbitrator. Hereby, it is evident that the President, holding the function of a neutral arbitrator, is provided with the symbolic authority to meet the head of state, conduct communication with such persons in any form, express her opinions or make statements, meet those persons on the territory of Georgia as well as abroad within the scope of her apolitical and neutral mandate.

The meaning of representation and whether certain international visits abroad constituted the exercise of foreign policy, along with the main topics and outcomes of such meetings and their contents, should have been the subject of the Court's discussion. Pursuant to the dissenting opinion presented by the Justices of the Constitutional Court, in particular, Justice Irine Imerlishvili, Justice Giorgi Kverenchkhiladze and Justice Teimuraz Tughushi, in relation to the Conclusion of the Plenum of the Counstitutional Court of Georgia dated 16 October 2023, along with the existence of formal consent of the Government of Georgia, the Constitutional Court was required to determine the contextual nature of the working visit, particularly, whether the President had overridden the scope of her powers through such visit and/or whether she had breached the exclusive power of the Government in relation to the execution of the foreign policy.[6]

6 Dissenting Opinion of the Constituttional Court Jus-

The above issue is of crucial importance, as it is possible, for instance, that the President had carried out her working visits with the consent of the Government, although the content of such meetings could have been non-compliant with the direction of foreign policy chosen by the Government. In a scenario where formal consent had been obtained, even though the context of the meeting was not compliant with the Government's position, the President would have violated the Constitution. The Constitution of Georgia not only formally determines the requirement of the consent of the Government of Georgia for the President's exercise of her representation powers related to foreign affairs. Not only is the working visit subject to the Government's approval but also, when exercising representation powers, the position expressed by the President is of crucial importance since representation does not only imply meetings with foreign leaders and leaving the country. If the same logic is applied, it is conceivable that the President could have exercised her representation powers while in Georgia. This exercise of authority could have been directly connected to executing foreign policy duties. In such a scenario, regardless of whether the Government had given its consent, the President's actions might have led to the articulation of a stance that diverged from the official position held by the Government.

The "unauthorized" formal working visit of the President may not be related to the exercise of the foreign policy. Working visit abroad is a form of representation, but it does not constitute the only form thereof. The so-called "unauthorized working visits" were conducted by the President in the previous years as well – those visits were discussed during the President's annual hearing at the Parliament,[7] which was followed by the statement of the ruling team.[8] The President stated that on 26 February 2022 she was refused by the Government to conduct international working visits in Paris, Warsaw, Brussels and Berlin, thus, she cancelled all of the official formats and "transformed" working visits into the private meetings, whereas such restrictions were inflicting damages to the state.[9] The Government's refusal addressed to the President's visits, was not substantiated.

The dissenting opinion states that "foreign affairs constitute a complex discipline that intends ensuring various different interests of the state, which entails matters related to the state security, economic development and well-being, protection of the human rights and freedoms and etc".[10] Further, "the purpose of the foreign policy and the impact thereof on the state's foreign positioning is of essential importance, whereas the place of the exercise of the foreign policy lacks such importance".[11]

Pursuant to the opinion of the representatives of the Parliament, Article 52(1)("a") of the Constitution entails all forms of representative powers and does not leave out any scenario wherein the President can exercise such authority without the consent of the Government, the existence of the consent is mandatory, and the Constitution of Georgia entails no exceptions in this regard.[12] The representatives of the Parliament argued that the defective practice that exists in the mandatory nature of the Govern-

tices Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi on the the Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia (II-22).

7 See the Statement made by the President <https://www.facebook.com/watch/live/?ref=watch_permalink&v=273088481655263> [Last accessed: 18.05.2024].

8 See the statement made by the Political Council of the "Georgian Dream – Democratic Georgia" <https://cutt.ly/vwh0P3DU> [Last accessed: 18.05.2024].

9 See the Statement made by the President <https://www.facebook.com/watch/live/?ref=watch_permalink&v=273088481655263> [Last accessed: 18.05.2024].

10 Dissenting Opinion of the Constituttional Court Justices Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi on the the Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia (III-23).

11 *Ibid* (II-24).

12 The Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia (II-17).

ment's consent in relation to the exercise of the representation powers internally within the state is problematic, the practice of requesting and granting consent is not established and requires to be corrected.[13] Does the latter mean that the representation is divided into internal and foreign representations? Would such an approach be acceptable? We believe that it would not be acceptable. The representation lacks a definition on the legislative level, and the requirements for representing the state internally are unclear, necessitating further clarification. It is evident that throughout the years, the President did not require any approval from the Government, and such approvals were obtained only for international working visits.

The Conclusion of the Plenum states that representation by the President entails acting on behalf of the people in any form and before the subjects of international law, various countries, international organizations, their representatives, as well as "any other case, the applicability of which to the requirements of Article 52(1)(a) shall be resolved on a case-by-case basis".[14] Therefore, the Conclusion of the Plenum does not entail exhaustive list in terms of defining the representation in the field of foreign affairs and highlights that the exercise of the representation authority by the President shall be resolved on a case by case basis. Due to the fact that the legislation does not define what is meant under the representation within the scope of the Constitution, the sole body that is entitled to define this matter is the Constitutional Court itself. For example, would the refusal of the President of Georgia to engage in phone communication with the President of a foreign state be considered as intended to protect the Constitution [without the respective consent of the Government]? Furthermore, in terms of expressed politics, would the following two scenarios be assessed identically: communication with the President of a European state initiated by the respective President of such European country and phone communication between the President of Georgia and the leader of the occupying country initiated by the leader of the occupying country? How would these two scenarios be assessed without consent from the Government of Georgia? In what format should the President apply for the Government's consent regarding any statement that may be made pertaining to events taking place in the world? For example, it can be theoretically discussed that the President was also in breach of the Constitution when meeting leaders of various countries on the territory of Georgia, participating in phone communication, or disclosing information on social media channels, all of which represent forms of the President's representation provided that the President had not obtained the respective approval of the Government of Georgia.

2. STANDARD OF THE POWERS OF THE PRESIDENT IN GEORGIA IN THE FIELD OF FOREIGN AFFAIRS

Are the President's authorities in the field of foreign affairs limited to Article 52("a") of the Constitution of Georgia? The answer is no, since apart from the authorities listed in this Article, other necessities may require the President's involvement in foreign affairs that do not necessarily entail carrying out foreign policy. In the dissenting opinion, the justices discuss matters pertaining to foreign affairs but do not solely involve the execution of foreign policy. In particular, "Article 52 of the Constitution of Georgia sets forth certain exclusive authorities of the President of Georgia, the exercise of which may, among other things, require the President of Georgia's participation in the foreign affairs field. For example, when exercising these exclusive authorities, the President of Georgia may need to hear and analyze the opinions of various international organizations and communicate with different international actors in various forms, which undoubtedly requires no consent from the Government".[15]

13 *Ibid*.

14 *Ibid* (III-46).

15 Dissenting Opinion of the Constituttional Court Justices Irine Imerlishvili, Giorgi Kverenchkhiladze and

The title of Article 52 of the Constitution of Georgia reads as follows: "Powers of the President of Georgia"; therefore, the purpose of this Article is to determine the scope of the President's powers, albeit not exhaustively. Pursuant to subsection "I" of the first part of the said Article, the President of Georgia, apart from the listed and determined powers, also "exercises other powers set out in the Constitution". The latter wording is absolutely clear, as it is not possible to determine the detailed list of the President's powers, given that the Constitution reflects only general norms establishing the general framework and competencies of constitutional bodies. Subsequently, constitutional bodies may further exercise certain authorities within the scope of such general powers and the legislative framework.

It is noteworthy that pursuant to Article 52 of the Constitution of Georgia, the President "exercises other powers set forth in the Constitution" and not "the powers set out in this Chapter".[16] The latter confirms the fact that certain powers that are not exhaustively specified in Article 52 may be held by the President as immanent deriving from the status and governance model. For example, the Constitution of Georgia neither indicates that the President is a neutral arbitrator (for instance, does that one of the functions of the President is to defuse conflicts or crisis), nor does it define what is meant under the symbolic and ceremonial powers of the President. Despite the foregoing, the President acting in her capacity as the constitutional body may exercise any authority solely within the scope of the Constitution. Hence, certain powers may be derived not necessarily from Article 52 of the Constitution but from other Articles, whereas any action that exceeds the scope of Article 52 shall be derived from other provisions of the Constitution. The provisions governing various fields may be found in different chapters of the Constitution, for example, Article 78 determines the obligations not only of the President but generally the obligations of the constitutional bodies to adopt any and all measures for the purposes of ensuring integration in the European Union and the North Atlantic Treaty Organization within the scope of their respective powers.

3. REQUIREMENT TO OBTAIN THE CONSENT OF THE GOVERNMENT OF GEORGIA IN THE FIELD OF FOREIGN AFFAIRS

The powers of the President of Georgia in the field of foreign affairs that are determined under Article 52(1)("a") of the Constitution are exercised in agreement with the Government, except for the power to appoint the ambassadors (wherein instead of "consent" "reference" is indicated). Therefore, the President of Georgia requires the consent of the Government (acting in its capacity as the collegial body) to conduct negotiations with other states, international organizations, conclude international treaties. Based on the consent of the Government of Georgia, the President engages in the process of exercising foreign policy, which is reflected in the process of conducting negotiations by entering into agreements and etc. The said powers, as indicated in the dissenting opinion, cannot be arbitral and ceremonial since the exercise of these powers results in the consequences for the state.[17]

Exercise of the President's arbitral functions requires certain political independence of the head of state, as "should the President require the consent of the Government of Georgia on each occasion when the President intends to express her position on the foreign political arena, the said position would always be seen as the opinion of the Government of Georgia (in those

Teimuraz Tughushi on the the Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia (II-17).

16 Chapter IV of the Constitution of Georgia with the title "President of Georgia".

17 Dissenting Opinion of the Constituttional Court Justices Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi on the the Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia (II-15).

scenarios as well where deriving from the foreign policy strategy, the Government of Georgia prefers to have the President divulge the said position). The requirement to request formal consent of the Government of Georgia to carry out the abovementioned activity would alter the function of the President and would make the action of the President acting in her capacity as the politically unbiased head of state meaningless.[18]

The Government of Georgia is a collegial, supreme executive body, and it is responsible for certain actions or decisions resulting from the exercise of foreign policy. Therefore, all constitutional bodies shall comply with the foreign policy adopted by the Government.

It is evident that generally, there is a possibility that the President of Georgia damages, imposes a threat to the foreign policy carried out by the Government, provided, however in the particular working visit organized by Ms. Salome Zurabishvili, it cannot be determined whether and how President damaged or hindered the exercise of the foreign policy implemented by the Government of Georgia. Neither the Decision of the Constitutional Court, nor the dissenting opinion entail any evidence that „the President of Georgia has revealed certain messages that are against the foreign policy of the Government of Georgia and/or has spoken on the matters that have somehow exceeded her ceremonial role (acting in her capacity as the head of state) and/or has carried out any activity, that has damaged the foreign policy of the Government of Georgia".[19] As indicated in the dissenting opinion, throughout the above-mentioned visits the President discussed the matters related to the European integration that were provided by the Ministry of the Foreign Affairs of Georgia.[20] With respect to the content of the meeting, neither the decision of the Constitutional Court, nor the minutes of the hearing indicate that the messages disclosed by the President were contrary to the foreign policy set forth by the Parliament or executed by the Government of Georgia or contrary to the values of the Constitution.

4. OBSTRUCTION OF THE EXERCISE OF THE FOREIGN POLICY

In relation to the three disputed working visits of the President, the representative of the Government of Georgia stated that „since they are not aware of the content of the meeting, they are unable to indicate which damages could have been inflicted as a result of the actions of the President"[21]. Therefore, the content of certain meetings that should have been important evidence to the Court to render the judgment is unknown. On the basis of the general information, the position of the President and her statements evidence her support for the country's path to European integration. In this scenario, the Parliament's intention to remove the President from the position relates to the formal „objection".

Neither the question of whether the President has conducted negotiations on certain issues resulting in the conclusion of an international treaty nor whether the President has made a statement during certain international meetings that have damaged the country's interests and European integration has been confirmed. Other reasons that could have been supported by evidence have also not been confirmed. It is noteworthy that the President's working visit abroad alone should not be construed as a violation of the Constitution, but the content of the speech, which may not require the working visit abroad. When visiting Georgia, the President of a foreign country may request a meeting with the President of Georgia, wherein the President's statements and the respective messages will be relevant.

The ground for the functioning of the President of Georgia as the constitutional body is the status of a neutral arbitrator, wherein the Pres-

18 *Ibid* (III-29).

19 Dissenting Opinion of the Constituttional Court Justices Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi on the the Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia (IV-33).

20 *Ibid* (IV-34).

21 *Ibid* (IV-35).

ident should not fear that if every move is not agreed upon with the Government, such moves will be considered a violation of the Constitution. In such circumstances, the head of state will fail to be proactive and productive to protect the state interests. The Constitutional Court requires strong substantiation to prove the existence of a criminal offence or violation of the Constitution. The Court had to assess which particular violation was committed by the President and on what basis of legal argumentation.

5. DEGREE OF VIOLATION OF THE CONSTITUTION OF GEORGIA AND INTENSITY THEREOF

For the Conclusion of the Constitutional Court, is the nature of the violation, degree, intensity and severity thereof of crucial importance? The violation of the Constitution by the state official must be legally substantiated based on certain arguments and the respective authentic evidence since the final decision of the Parliament is based on political motives. Therefore, the Court is the only impartial body participating in the impeachment procedure, and its legal analysis is the sole impartial analysis on this issue. As stated by the authors of the Constitutional Reference, the President had deliberately and materially violated the Constitution.[22] The Conclusion of the Plenum reads that the authors of the Constitutional Reference expect from the Court the „confirmation of the fact that the Constitution has been violated, wherein the following aspects: intention as to the violation, severity, motivation, outcome and other factors relevant when adopting a political decision by the Parliament (if the Constitutional Court had confirmed the violation of the Constitution by the Parliament), should not have been taken into account".[23]

On the one hand, the authors of the Constitutional Reference regard the President's working visits abroad (without obtaining the consent of the Government), as a severe, serious violation, provided that, on the other hand, they urge the Constitutional Court not to take into account „the intention as to the violation of the Constitution, severity, motivation, outcome and other subjective and objective factors", since they consider it more appropriate to assess the above-mentioned during the adoption of the political decision by the Parliament. The function of the Constitutional Court is to assess whether a violation exists and whether that violation is severe and serious enough to serve as the basis for confirming a breach of the Constitution. For example, the Venice Commission, when discussing the impeachment of the President of Albania, notes in its *amicus curiae* opinion, that the President may violate the Constitution, however the „severity" of such violation shall be determined.[24]

Pursuant to the statements made during the court hearing, the working visits of the President were based on the notion of European integration enshrined in Article 78 of the Constitution of Georgia, whereas reinforcement of the European choice represents an obligation of each Constitutional body. Hence, the working visits organized by the President were derived from the policy implemented by the Government of Georgia in relation to European integration. On the other hand, the working visits may be formally held with the consent of the Government, although facts or information disclosed during the meeting may damage state interests and may be contrary to the Constitution. Therefore, the mere fact of a formal working visit

22 Dissenting Opinion of the Constituttional Court Justices Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi on the the Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia (II-11).

23 Dissenting Opinion of the Constituttional Court Justices Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi on the the Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia (II-18).

24 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, October 11-12, 2019) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [Last accessed: 18.05.2024].

should not serve as grounds for confirming a violation of the Constitution by the President.

Pursuant to Article 26(4) of the Organic Law of Georgia "on the Constitutional Court of Georgia", the Court solely assesses the activity that is considered as the reason/ground for initiating impeachment proceedings by the respective members of the Parliament. As noted by Joni Khetsuriani, "When assessing the constitutionality of the actions of the officials, the Constitutional Court shall rely on the results of examination of the characteristic aspects of the constitutional violation (delict), (such as subject, object, subjective part, objective part) and make the respective conclusion on whether the official has violated the Constitution thereafter".[25] Joni Khetsuriani also explains that the Parliament of Georgia possesses discretionary power to remove the official from the position, hence, when imposing constitutional sanction the Parliament acts based on political motives and not the legal criteria.[26]

If we examine the Constitutions of some European countries, we will notice that the impeachment procedure in relation to the President shall not be initiated in the event of a mere violation of the Constitution, but such action may only be pursued when there is a deliberate violation of the Constitution, not for less severe or minor offences. Pursuant to the Constitution of *Germany*, Bundestag and Bundesrat are entitled to carry out impeachment of the President before the Federal Constitutional Court in the event of a severe violation of the Constitution or other federal law.[27] According to the Constitution of Italy, the President is not liable for the actions carried out within the scope of the exercise of the President's authorities, save for the state treason or violation of the Constitution.[28] In the impeachment proceedings against the President, sixteen members elected by lot from the list of citizens qualified to be elected in the Senate (this list being prepared by the Parliament every nine years after the elections, using the same procedure employed when appointing the justices), shall participate alongside the regular justices of the Constitutional Court.[29] According to the Constitution of Lithuania, the President may be removed from office in the event of gross violation of the Constitution, breach of the oath or commitment of a crime.[30] Pursuant to the Constitution of Albania, the President may be removed from office on the basis of the serious violations (in plural) of the Constitution and commitment of a serious crime.[31]

6. INTERNATIONAL PRACTICE ON THE IMPEACHMENT OF THE PRESIDENT

Italy represents an example of an "unauthorized" representation of the state by the President.[32] Vice Prime Minister Luigi di Maio caused an escalation of the relationship with France since he accused the Government of France of conducting an ultra-liberal policy[33] and supported the so-called movement of yellow jackets which protested the decisions adopted by the Government of France in the economic field.[34]

25 Khetsuriani J., "Power of the Constitutional Court of Georgia in the Process of Impeachment", "Justice and Law" 2/3(45/46), 46 <https://www.supremecourt.ge/files/upload-file/pdf/martlmsajuleba-da-kanoni-2015w-n2.pdf> [Last accessed: 18.05.2024].

26 *Ibid*.

27 Basic Law for the Federal Republic of Germany, Art. 61 <https://www.btg-bestellservice.de/pdf/80201000.pdf> [Last accessed: 18.05.2024].

28 The Constitution of Italy, Art. 90 <https://www.constituteproject.org/constitution/Italy_2012.pdf?lang=en> [Last accessed: 18.05.2024].

29 The Constitution of Italy, Art. 135 <https://www.constituteproject.org/constitution/Italy_2012.pdf?lang=en> [Last accessed: 18.05.2024].

30 The Constitution of the Republic of Lithuania, Arts. 74, 86 <https://www.constituteproject.org/constitution/Lithuania_2019> [Last accessed: 18.05.2024].

31 The Constitution of Albania, Art. 90 <https://www.constituteproject.org/constitution/Albania_2012> [Last accessed: 18.05.2024].

32 For the detailed example on Italy please see Kavelidze, T., (2023). Thesis on the "Authorities of the President and the Government of Georgia in the Field of Foreign Affairs", 142-144.

33 Carminati, A., Maccabiani, N., (2022). La prassi del "primo" Mattarella nei rapporti sovranazionali e internazionali, Editoriale Scientifica, *Costituzionalismo.it*, Fascicolo 2, 44-50 <https://www.costituzionalismo.it/wp-content/uploads/2-2022-2.-Carminati.pdf> [Last accessed: 18.05.2024].

34 *Ibid*.

The Foreign Affairs Minister was asked to resolve the crisis, although the Minister's involvement was not convincing for the President Emmanuel Macron, thus, the President of Italy Mr. Sergio Mattarella made a statement which was followed by the telephone call between the Presidents of Italy and France, that was not agreed upon with the Government of Italy. The telephone call resulted in the improvement of the diplomatic relations between the countries and the deepening of the mutual relations in various aspects (such as the working visit of the French Ambassador in Italy and handing over the invitation of the President of France to the President of Italy in relation to the working visit in France).[35] The Presidents even met on several occasions, which became the ground for the conclusion of the treaty on "strengthened mutual cooperation", which was affirmed by the signatures of the Prime Minister of Italy and the tripartite signatures of the following parties: the President, Prime-Minister and Foreign Affairs Minister of France.[36] The action of Italy's President, who has been granted "ceremonial" powers based on the Constitution, has saved the country from the crisis in relation to the diplomatic relations with France.[37] "The above-mentioned is a clear example that the parliamentary governance model is also provided with a possibility to affect the foreign policy processes through the President's statements, without carrying out foreign policy".[38]

In relation to the violation of the Constitution, the Conclusion of the Constitutional Court of Lithuania refers to the violation of the Constitution by President Rolandas Paksas.[39] The violation entailed the illegal awarding of citizenship to the Russian businessman Yury Borisov, disclosure of the confidential information and usage of the office for financial gains.[40] Pursuant to the conclusion of the Constitutional Court dated March 31, 2004, not all violations of the Constitution are gross violations, as well as the Seimas (Parliament) is not entitled to decide whether the President has grossly violated the Constitution.[41]

The Court explains that the determination of the violation of the Constitution is subject to legal and not political assessment. The fact of the existence of the gross violation may be only determined by the Constitutional Court, and the interpretation that Seimas is allowed to determine the fact of the violation of the Constitution lacks legal substantiation since the legal matter of whether the President has grossly breached the Constitution, may be discussed by the judicial authority, which is constituted based on the professional characteristics, and not by Seimas which represents a political body, the decisions of which reflect the political will of the majority of the members of the Parliament.[42]

Removal of the President from her office represents a constitutional sanction for gross violation of the Constitution, and only Seimas may make such a decision. Further, the Constitution does not refer to the power of the Seimas to object to, amend or make the Conclusion of the Constitutional Court doubtful.[43] The Court explains that during the impeachment procedeeing at Seimi, the evidences are not examined, which either confirms or objects to the fact that the President has grossly breached the Constitution but it is the state's constitutional obligation to examine certain actions and asses whether these actions contradict the Constitution.[44]

35 *Ibid*.

36 *Ibid*.

37 Kavelidze, T., (2023). Thesis on the "Authorities of the President and the Government of Georgia in the Field of Foreign Affairs", 142-144.

38 Kavelidze, T., (2023). Thesis on the "Authorities of the President and the Government of Georgia in the Field of Foreign Affairs", 142-144.

39 Endzins, A., (2008). Report "The Role of the Constitutional Court in the System of the Separation of Power" the Venice Commission, 15th anniversary of the Constitutional Court of Romania Bucharest, December 6-7, 2007, CDL-JU(2007)038, Strasbourg.

40 The Constitutional Court of the Republic of Lithuania, Conclusion on The Compliance of Actions of President Rolandas Paksas of the Republic of Lithuania Against whom an Impeachment Case has been Instituted with the Constitution of The Republic of Lithuania, 31 March 2004, Vilnius, Case No. 14/04 <https://lrkt.lt/en/court-acts/search/170/ta1263/content> [Last accessed: 18.05.2024].

41 *Ibid*.

42 *Ibid*.

43 *Ibid*.

44 The Constitutional Court of the Republic of Lithuania,

Application submitted by the Chairman of the President of Albania – Gramoz Ruci, to the Venice Commission in the context of the impeachment of the President, which was derived from the fact of cancellation/postponing of the local elections by the President.[45] The President selected the date to conduct the local elections (such date being June 30, 2019), which resulted in preparation for the elections, the creation of a committee, the publication of the list of citizens allowed to participate, the commencement of the election campaign, and so forth.[46] The main opposing parties have relinquished their mandates, departed from Parliament, and boycotted the elections. According to their opinion, there was organized crime aimed at fabricating the parliamentary elections in 2017, the central elections committee was unlawfully appointed, and their rights to create investigation committees were violated.[47]

Given the crisis, the President offered to postpone the elections "in accordance with the wishes expressed by the political parties" and urged all local and international actors, whether non-governmental or international organizations, to participate in restoring dialogue. However, in the end, the President solely postponed the elections.[48] The Central Elections Commission stated that by postponing the elections the President exceeded his competency and his act was of no legal effect, although the elections were held without participation of the opposition and 21,6% of the electorate participated therein.[49] The President stated that he postponed the elections since it would be non-democratic without the participation of the opposition parties, as well as he was afraid of the violent attacks and tensions during the elections.[50] The above-mentioned processes were followed by the impeachment request in relation to the President and the creation of the special investigative committee.[51]

The Venice Commission noted that the legitimate purpose of postponing the elections was to prevent potential conflicts and defend democracy. However, despite the President pursuing a legitimate purpose, the Constitution did not determine the President's general authority to postpone the elections and appoint a new date respectively. Thus, the President had exceed his scope of competency.[52] Pursuant to Article 90 of the Constitution of Albania, the President may be removed from office via impeachment procedure if there is a gross/severe violation of the Constitution and commitment of a serious crime.[53] The Commission stated that the Constitutional Court should have determined whether the above-mentioned was a violation of the Constitution and, if determined, whether this violation was sufficiently "serious" for the purposes of justifying impeachment under Article 90 of the Constitution of Albania.[54] The Commission argued that the Parliament had to decide whether the impeachment of the President would reduce or increase the tensions in a scenario where one party was dominating in the Parliament and every municipality.[55] Ultimately, the Constitutional

Conclusion on the Compliance of Actions of President Rolandas Paksas of the Republic of Lithuania Against whom an Impeachment Case has been Instituted with the Constitution of the Republic of Lithuania, March 31, 2004, Vilnius, Case No. 14/04 <https://lrkt.lt/en/court-acts/search/170/ta1263/content> [Last accessed: 18.05.2024].

45 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, October 11-12, 2019) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [Last accessed: 18.05.2024].

46 *Ibid*.

47 *Ibid*.

48 *Ibid*.

49 *Ibid*.

50 *Ibid*.

51 *Ibid*.

52 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, October 11-12, 2019) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [Last accessed: 18.05.2024].

53 Constitution of Albania, Art. 90 <https://www.constituteproject.org/constitution/Albania_2012> [Last accessed: 15.03.2024].

54 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, October 11-12, 2019) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [Last accessed: 18.05.2024].

55 *Ibid*.

Court had to determine whether the actions of the President indicated serious breach that enabled the impeachment by the President, hence, the Venice Commission noted that even if the Court had determined the existence of the "serious violations of the Constitution", the Parliament had to refrain from this process.[56]

The Venice Commission also noted that various factors were indicating that there was no serious violation of the Constitution by the President since the President was urging the parties to have a dialogue, was trying to achieve an agreement between the parties, postponing the elections could, in fact, assist the parties in reaching a compromise, cumulative actions of the President could have been sufficient to conclude that postponing of the elections fail to meet the necessary criteria of the serious violation that would justify the impeachment.[57] Finally, the President's impeachment procedure failed to be commenced due to insufficient votes of the members of the Parliament.[58] The investigation committee determined that there was no trustworthy evidence to prove that by postponing of the elections the President violated the Constitution, as a result, the members of the Parliament supported the recommendations of the Venice Commission.[59]

The so-called "second round" of the impeachment was related to the unsuccessful procedure of the impeachment in relation to the President of Albania, provided that *at this time the accusations were concerning the statements of the President made before and during the elections*.[60] The members of the Parliament supporting the impeachment stated that the actions of Meta have resulted in the political non-stability in Albania, he made politically biased statements prior to the commencement of the election campaign, he supported violence and failed to fulfil the Constitutional obligation acting in his capacity as the head of state and the protector of the national unity.[61] Ultimately, the Court held that the evidence submitted against Meta fail to prove "gross"[62] and "severe violations"[63] of the Constitution.

Another interesting case pertains to Poland. In 2009, the Constitutional Tribunal decided in relation to Poland's representation in the European Council, in particular, President Lech Kaczyński was of the opinion that in the session of the European Council dedicated to the financial crisis, energy security etc. held in Brussels on October 15-16, 2008, whereas the Prime-Minister Donald Tusk considered this matter as the Government's competence.[64] The President was denied state fleet for the purposes of travelling to Brussels, although in the end the President participated in the hearing held at the European Council together with the Prime-Minister.[65] Thereafter the President applied to the Constitutional Tribunal in relation to the dispute on competence between the President and Prime-Minister of Poland pertaining to the representation on the sessions of the European Council.[66]

In his argument, the Prime Minister noted that the Council of Ministers is responsible for implementing both internal and external policies of Poland, whereas "representation" in various

56 *Ibid*.
57 *Ibid*.
58 See <https://www.usnews.com/news/politics/articles/2020-07-27/albanian-parliament-votes-against-presidents-impeachment> [Last accessed: 18.05.2024].
59 See <https://constitutionnet.org/news/albanian-legislators-say-president-exceeded-constitutional-powers-will-not-be-impeached> [Last accessed: 18.05.2024].
60 Albania: Impeachment of the President, Subject to the Meaning of "Serious Violation" <https://balkansgroup.org/wp-content/uploads/2021/06/Albania_Impeachment-of-the-President_Subject-to-the-meaning-of-Serious-Violation-.pdf> [Last accessed: 18.05.2024].
61 *Ibid*.
62 *Ibid*.
63 See <https://www.euronews.com/2022/02/17/ilir-meta-constitutional-court-overturns-impeachment-of-albania-s-president> [Last accessed: 18.05.2024].
64 Constitutional Tribunal of Poland, Decision of May 20, 2009, 78/5/A/2009, Ref. No. Kpt 2/08 <http://trybunal.gov.pl/fileadmin/content/omo wienia/Kpt_02_08_EN.pdf> [Last accessed: 18.05.2024].
65 *Ibid*.
66 Constitutional Tribunal of Poland, Decision of May 20, 2009, 78/5/A/2009, Ref. No. Kpt 2/08 <http://trybunal.gov.pl/fileadmin/content/omo wienia/Kpt_02_08_EN.pdf> [Last accessed: 18.05.2024].

forms may not necessarily be linked to policy implementation, although he struggled to present a scenario wherein the President was representing Poland in an international arena without it being considered an element of foreign policy, he failed to name the forms of the President's representation that would be separate from foreign policy.[67]

The analysis of the Constitution directed the Tribunal to the conclusion that the Constitution differentiates between the President's role as the "supreme representative of Poland" and his role as the "state representative in foreign affairs".[68] The President lacked the authority to exercise the foreign policy independently, since that power belonged to the Council of Ministers and the said Council had competence over the state affairs that did not belong to the authorities of other state bodies".[69] The affairs of the said category may include the relations between Poland and the European Union, which does not represent foreign policy in its classical sense and that is also not being considered as the matter of internal policy in its traditional understanding.[70] The Court has interpreted that the President may decide whether to participate in a certain session of the European Council if it considers that this might be beneficial for the purposes of exercising the President's authorities envisaged under Article 126(2) of the Constitution referring to the protection of the Constitution, state sovereignty, as well as the territorial integrity and its unity.[71] The President's participation in the sessions of the European Council requires cooperation with the Prime-Minister and the competent Minister, as well as consistent relationship with the European Union on behalf of Poland.[72]

The Court concluded that the Prime Minister was entitled to represent the European Council and express Poland's respective position, whereas, in exceptional circumstances where the European Council discusses the matters that fall within the scope of the competence of the President, the President may decide whether to represent Poland before the said institute, although the President will be obliged to present the position determined by the Government.[73]

The final conclusion of the Constitutional Tribunal may be construed as follows: pursuant to the Constitution of Poland, the cooperation obligation lies with the President, Council of Ministers and the Prime Minister when exercising Constitutional obligations and authorities.[74] Further, the Prime Minister is obliged to inform the President on the subject matter of the sessions of the European Council and the position of the Council of Ministers, the President is required to get familiarized with the said position determined by the Council of Ministers and inform the Council on the intention to participate in the certain session of the European Council, therefore, mutual readiness and adherence to the participation rules under the respective agreements shall be required.[75]

The Conclusion of the Tribunal entails dissenting opinion. Justice Teresa Liszcz states that the status of Poland's supreme representative comprises the President's right to be at any place wherein the events are surrounding Poland.[76] As the supreme representative of Poland and the guarantor of uninterrupted state authority, the President acts independently from the Council of Ministers, this independence primarily pertains to actions that lack legal effect and do not necessitate the adoption of official acts and includes participation in sessions of the political bodies of the European Union.[77] In order for the President to be able to perform the obligations set forth in the Constitution, the President shall be

67 *Ibid*.
68 *Ibid*.
69 *Ibid*.
70 *Ibid*.
71 *Ibid*.
72 *Ibid*.

73 Constitutional Tribunal of Poland, Decision of May 20, 2009, 78/5/A/2009, Ref. No. Kpt 2/08 <http://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [Last accessed: 18.05.2024].
74 Biernat, S., 'Division of Competences in the Field of Foreign Relations in the Polish Constitutional System Stanisław', 264-266.
75 *Ibid*.
76 Dissenting Opinion of Judge Teresa Liszcz to the Decision of the Constitutional Tribunal of May 20, 2009 in the case Kpt 2/08 <https://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [Last accessed: 18.05.2024].
77 *Ibid*.

made aware of the political plans of the European Union that are established during the sessions of the European Council, thus, the President is entitled to obtain information on these matters, as well as the President's status as the supreme representative excludes his participation in the sessions of the European Council with the consent of the Prime-Minister.[78] Alike the Constitutional Tribunal, Teresa Liszcz excludes the fact of presenting different positions by the President and the Government on the forum of the European Council, as well as on any other forum.[79] Pursuant to the opinion of the Justice Teresa Liszcz, for the purposes of cooperation, the President shall be regularly informed by the Council of Ministers on the dates of the sessions of the European Council and all matters to be discussed thereon, so that the President is able to participate in the session and submit the respective position to the Council of Ministers on the agenda of the session.[80]

Pursuant to the dissenting opinion of Justice Miroslav Granat, Poland's representation in the European Council requires maintaining the simplest forms of cooperation (dialogue) between the Prime-Minister, Council of Ministers and the President that belong to the so-called pre-constitutional tradition and does not necessarily require legislative regulation.[81] The President acting in his capacity as the supreme representative and the guarantor for the uninterrupted state authority that ensures to protect the unity of the Constitution, sovereignty and territorial integrity, shall be able to decide on the matter of representation in the session of the European Council without seeking approval from any other body of the state.[82]

The Venice Commission explains that it is often complicated to determine where the legal substantiation ends and the political argument begins.[83] The Conclusion of the Plenum reads that by relying on international practice, the Constitutional Court of Georgia applies the "standard of clear and convincing evidence".[84] The legal conclusion of the Constitutional Court shall indeed rely on the cumulation of the clear and convincing, trustworthy evidence and the Court itself shall discuss to what extent the violation is serious to issue positive legal opinion on the removal of the President from the office, since the Parliament indeed relies on the Court's legal conclusion.

CONCLUSION

Pursuant to the Conclusion of the Plenum of the Constitutional Court of Georgia, "exercise of the representation authority by the President without obtaining approval of the Government shall always be considered as the violation of Article 52(1)("a"), irrespective of whether the statements made or positions supported by the President, or whether public statements or actions comply with the vision or tactics of the Government of Georgia on the particular matter or do not comply with the said vision or tactics".[85] The said interpretation limits the representation authority of the President in the field of foreign affairs and the arbitral role of the President. The public statement made by the President may also be seen as a representation, whereas the statement made by the President may not be related to the execution of the foreign policy and, on the contrary, based on broad interpretation, any statement made in the field of foreign affairs may

78 *Ibid*.

79 Dissenting Opinion of Judge Teresa Liszcz to the Decision of the Constitutional Tribunal of May 20, 2009 in the case Kpt 2/08 <https://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [Last accessed: 18.05.2024].

80 *Ibid*.

81 Dissenting Opinion of Judge Mirosław Granat to the Decision of the Constitutional Tribunal of May 20, 2009 in the case Kpt 2/08 <https://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [Last accessed: 18.05.2024].

82 *Ibid*.

83 Endzins, A., (2008). Report "The Role of the Constitutional Court in the System of the Separation of Power" the Venice Commission, 15th anniversary of the Constitutional Court of Romania Bucharest, December 6-7, 2007, CDL-JU(2007)038, Strasbourg.

84 The Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia (II-2).

85 *Ibid* (II-55).

be directly or indirectly related to the execution of the foreign policy, that makes the impeachment procedure a mechanism for controlling and limiting the President. The Court's decision does not exhaustively explain the meaning of foreign representation when the Court indicates that the execution of foreign policy without obtaining the Government's prior consent constitutes a breach of the Constitution by the President. If the said logic is followed, it can be concluded that the President of Georgia has violated the Constitution of Georgia on several occasions, such as when she made a public statement that was not agreed upon with the Government of Georgia.

Convergence between formalism and content is crucial. It is possible that when obtaining formal consent from the Government of Georgia, the President might make "pro-Russian" statements instead of pursuing the European Integration path when exercising representation authority. If the content of the President's speech is not decisively considered by the Court, in a hypothetical scenario, only the formal requirement will be adhered to, and the contextual component will be disregarded and unassessed. In this particular scenario, would the President violate the Constitution? The Court's interpretation considers the following scenarios as equal: when the President exercises representation authority independently and acts within the scope of the foreign policy determined by the Government, and when the President exercises representation authority based on formal approval from the Government yet acts contrary to the foreign policy due to the position expressed, resulting in damage to state interests. We believe the aforementioned scenarios are not of the same severity and significance and cannot be considered equal.

The Court upheld the President's violation of the Constitution without determining and examining the context of those working visits, the severity of the action, and the consequences/outcome of such meetings. When assessing the violation of the Constitution, the Court, whose opinion is precedent, applied a word-by-word method of interpretation and considered the existence of the formal criterion alone sufficient for establishing a violation of the Constitution. We think that the evidence sufficient for confirming the violation of the Constitution was not examined, which is supported by the fact that the contextual nature of the President's respective meeting was left unassessed.

BIBLIOGRAPHY

Normative Acts:

1. The Constitution of Georgia.
2. Organic Law of Georgia on the "Constitutional Court of Georgia".
3. Basic Law for the Federal Republic of Germany.
4. The Constitution of Italy.
5. The Constitution of the Republic of Lithuania.
6. The Constitution of Albania.

Court Acts:

1. The Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia.
2. Dissenting Opinion of the Constituttional Court Justices Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi on the the Conclusion of the Constitutoinal Court of Georgia N N3/1/1797, dated October 16, 2023 on the Violation of the Constitution of Georgia by the President of Georgia.

3. Constitutional Tribunal Of Poland, Decision of May 20, 2009, 78/5/A/2009, Ref. No. Kpt 2/08 <http://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [Last accessed: 18.05.2024].
4. Dissenting Opinion of Judges Teresa Liszcz and Mirosław Granat to the Decision of the Constitutional Tribunal of May 20, 2009 in the case Kpt 2/08, <https://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [Last accessed: 18.05.2024].
5. The Constitutional Court of the Republic of Lithuania, Conclusion on the Compliance of Actions of President Rolandas Paksas of the Republic Of Lithuania Against whom an Impeachment Case has been Instituted with the Constitution of the Republic of Lithuania, March 31, 2004, Vilnius, Case No. 14/04 <https://lrkt.lt/en/court-acts/search/170/ta1263/content> [Last accessed: 18.05.2024].

Scientific Literature and other supporting materials:

1. Gvazava, G., (2016). Across the Constitution – President of the Republic, in the compilation: Chronicles of the Georgian Constitutionalism.
2. Kavelidze, T., (2023). Thesis on the "Authorities of the President and the Government of Georgia in the Field of Foreign Affairs".
3. The Statement made by the President <https://www.facebook.com/watch/live/?ref=watch_permalink&v=273088481655263> [Last accessed: 18.05.2024]
4. The Statement made by the Political Council of the "Georgian Dream – Democratic Georgia" <https://cutt.ly/vwh0P3DU> [Last accessed: 18.05.2024].
5. Khetsuriani J., "Power of the Constitutional Court of Georgia in the Process of Impeachment", „Justice and Law" 2/3(45/46) <https://www.supremecourt.ge/files/upload-file/pdf/martlmsajuleba-da-kanoni-2015w-n2.pdf> [Last accessed: 18.05.2024].
6. Albania: Impeachment of the President, Subject to the Meaning of "Serious Violation", <https://balkansgroup.org/wp-content/uploads/2021/06/Albania_Impeachment-of-the-President_Subject-to-the-meaning-of-Serious-Violation-.pdf> [Last accessed: 18.05.2024].
7. Biernat, S., 'Division of Competences in the Field of Foreign Relations in the Polish Constitutional System Stanisław'.
8. Carminati, A., Maccabiani, N., (2022). La prassi del "primo" Mattarella nei rapporti sovranazionali e internazionali, Editoriale Scientifica, Costituzionalismo.it, Fascicolo 2, <https://www.costituzionalismo.it/wp-content/uploads/2-2022-2.-Carminati.pdf> [Last accessed: 18.05.2024].
9. Endzins, A., (2008). Report "The Role of the Constitutional Court in the System of the Separation of Power" the Venice Commission, 15th anniversary of the Constitutional Court of Romania Bucharest, December 6-7, 2007, CDL-JU(2007)038, Strasbourg.
10. Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, October 11-12, 2019), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [18.05.2024].
11. <www.usnews.com> [Last accessed: 18.05.2024].
12. <www.constitutionnet.org> [Last accessed: 18.05.2024].
13. <www.euronews.com> [Last accessed: 18.05.2024].

საქართველოს პრეზიდენტის მიერ კონსტიტუციის დარღვევის თაობაზე საკონსტიტუციო სასამართლოს პლენუმის დასკვნის ანალიზი და საერთაშორისო პრაქტიკა

თეა კაველიძე

სამართლის დოქტორი, ივანე ჯავახიშვილის სახელობის თბილისის სახელმწიფო უნივერსიტეტის მოწვეული ლექტორი

აბსტრაქტი

საგარეო ურთიერთობების სფეროში 2013 წლიდან დღემდე, სახელმწიფოს პოლიტიკურ ცხოვრებასა თუ საერთაშორისო ასპარეზზე ადგილი ჰქონდა და აქვს ხელისუფლების პირველ პირებს შორის დავას კომპეტენციის გამიჯვნის თაობაზე. საგარეო ურთიერთობათა სფერო არის სახელმწიფო მნიშვნელობის და პირდაპირ კავშირშია ქვეყნის იმიჯთან, მის საგარეო პოლიტიკურ კურსთან. დაპირისპირების საგანს სხვადასხვა დროს წარმოადგენდა როგორც საერთაშორისო ხელშეკრულების დადების, ასევე, ელჩების დანიშვნისა და ქვეყნის წარმომადგენლობის საკითხი. საგარეო ურთიერთობათა სფეროში პრეზიდენტის წარმომადგენლობის საკითხს მთავრობის თანხმობის გარეშე, შედეგად მოჰყვა, საქართველოს ისტორიაში პირველად, საქართველოს პარლამენტის კონსტიტუციური წარდგინება საკონსტიტუციო სასამართლოში პრეზიდენტის მიერ კონსტიტუციის დარღვევის თაობაზე. შედეგად, საქართველოს საკონსტიტუციო სასამართლოს 2023 წლის 16 ოქტომბრის დასკვნის მიხედვით, პრეზიდენტ სალომე ზურაბიშვილის მიერ დაირღვა საქართველოს კონსტიტუცია წარმომადგენლობითი უფლებამოსილების მთავრობის თანხმობის გარეშე განხორციელების გამო.

ზემოაღნიშნულიდან გამომდინარე, ნაშრომში განხილული იქნება, თუ რას გულისხმობს წარმომადგენლობის ფუნქცია საგარეო ურთიერთობათა სფეროში, პრეზიდენტის კონსტიტუციური სტატუსი და მისი, როგორც ე.წ. „ნეიტრალური არბიტრის“ როლი საგარეო ურთიერთობათა სფეროში. ნაშრომში წარმოდგენილი იქნება მსჯელობა საქართველოს პარლამენტისა და საკონსტიტუციო სასამართლოს როლის შესახებ პრეზიდენტის იმპიჩმენტის პოლიტიკურ-სამართლებრივ პროცესში, ასევე სხვადასხვა ქვეყნის საკონსტიტუციო სასამართლოების დასკვნები/გადაწყვეტილებები პრეზიდენტის მიერ კონსტიტუციის შესაძლო დარღვევისა და კომპეტენციური დავის თაობაზე.

საკვანძო სიტყვები: საგარეო ურთიერთობათა სფერო, პრეზიდენტი, პარლამენტი, კონსტიტუციის დარღვევა, იმპიჩმენტი

შესავალი

საქართველოს საკონსტიტუციო სასამართლოს 2023 წლის 16 ოქტომბრის დასკვნის მიხედვით, პრეზიდენტ სალომე ზურაბიშვილის მიერ დაირღვა საქართველოს კონსტიტუცია.[1] სასამართლომ მიიჩნია, რომ საქართველოს პრეზიდენტმა 2023 წლის 31 აგვისტოს, 1 სექტემბერს და 6 სექტემბერს, საზღვარგარეთ სამუშაო ვიზიტების დროს საგარეო ურთიერთობათა სფეროში წარმომადგენლობითი უფლებამოსილება განახორციელა საქართველოს მთავრობის თანხმობის გარეშე, რითაც დაარღვია საქართველოს კონსტიტუციის 52-ე მუხლის პირველი პუნქტის „ა“ ქვეპუნქტი, აღნიშნული კი წარმოადგენდა კონსტიტუციის დარღვევას კონსტიტუციის 48-ე მუხლის მიხედვით.[2]

საქართველოს პრეზიდენტის როლი ხელისუფლების დანაწილების სისტემაში გააზრებული უნდა იყოს მისი უფლებამოსილებების სისტემური ანალიზის მიხედვით. რესპუბლიკური მმართველობის ყველა მოდელისთვის დამახასიათებელია სახელმწიფოს მეთაურის ინსტიტუტი, რომელშიც მოიაზრება ქვეყნის პრეზიდენტი. ცხადია, საპრეზიდენტო, საპარლამენტო და ნახევრად საპრეზიდენტო მმართველობის მოდელების მიხედვით, განსხვავდება სახელმწიფოს მეთაურის უფლებამოსილებები, თუმცა, სხვადასხვა მმართველობის მოდელის არსი და ხელისუფლების შტოთა შორის გადანაწილება არ გულისხმობს რომელიმე ინსტიტუტის უფუნქციოდ დატოვებას. პრეზიდენტი, როგორც კონსტიტუციური ინსტიტუტი, სარგებლობს სახელმწიფოს მეთაურის სტატუსით, შესაბამისად, მისი როგორც მხოლოდ „სახელმწიფო ნოტარიუსად“[3] წარმოჩენა არ წარმოადგენს საპარლამენტო მმართველობის მოდელის არსს.

ვენეციის კომისია ალბანეთის პრეზიდენტის მიერ კონსტიტუციის შესაძლო დარღვევის საკითხთან დაკავშირებით აღნიშნავს, რომ საპარლამენტო რეჟიმებში, საჯარო ხელისუფლებას შორის უმაღლესი სტატუსი ენიჭება პრეზიდენტს არა იმიტომ, რომ ის არის ყველაზე ძლიერი „ავტორიტეტი“, არამედ იმიტომ, რომ მიზნები, რომლებსაც მან უნდა მიაღწიოს, აღიქმება პარტიულ პოლიტიკაზე მაღლა მდგომად.[4] მეორე მხრივ, სწორედ ამ მიზნების მისაღწევად კონსტიტუციები ანიჭებენ პრეზიდენტს კონკრეტულ უფლებამოსილებებს, ფორმალურს ან არსებითს, მათი განხორციელებისას კი პრეზიდენტი არა მხოლოდ უნდა მოიქცეს მიუკერძოებლად, არამედ უნდა იგუ-

1 საქართველოს პრეზიდენტის მიერ კონსტიტუციის დარღვევის თაობაზე საქართველოს საკონსტიტუციო სასამართლოს 2023 წლის 16 ოქტომბრის N3/1/1797 დასკვნა, <https://www.constcourt.ge/ka/judicial-acts?legal=15923> [ბოლო ნახვა: 18.05.2024].

2 *იქვე.*

3 გვაზავა გ., (2016). კონსტიტუციის ირგვლივ – პრეზიდენტი რესპუბლიკისა, კრებულში: ქართული კონსტიტუციონალიზმის ქრონიკები, გვ. 350-355.

4 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [ბოლო ნახვა: 18.05.2024].

ლისხმებოდეს კიდეც, რომ ასე იქცევა.[5]

საპარლამენტო მმართველობის მოდელში, სადაც ხელისუფლება მჭიდროდ არის ურთიერთდამოკიდებული აღმასრულებელ-საკანონმდებლო შტოებზე, პრეზიდენტი ინსტიტუციური დამოუკიდებლობით უნდა სარგებლობდეს, რათა შეეძლოს ნეიტრალური არბიტრის ფუნქციის განხორციელება როგორც სახელმწიფოს მეთაურს, რომელიც, ამავდროულად, არის ქვეყნის ერთიანობისა და ეროვნული დამოუკიდებლობის გარანტი. პრეზიდენტი სრულად არის დისტანცირებული საგარეო პოლიტიკის განხორციელებისგან, საგარეო პოლიტიკის განმახორციელებელი ერთადერთი ორგანო კი ექსკლუზიურად არის მთავრობა, რომლის გადაწყვეტილებით შეიძლება მიენიჭოს საგარეო პოლიტიკის განხორციელების უფლება პრეზიდენტს. პრეზიდენტი სრულად აპოლიტიკური ფიგურაა და მისი საქმიანობა არ არის განპირობებული რომელიმე პოლიტიკური ჯგუფების ინტერესებით, იქნება ეს მმართველი პარტია თუ ოპოზიციური ძალები, განსხვავებით აღმასრულებელი ხელისუფლებისგან, რომელიც საპარლამენტო მმართველობის მოდელის პირობებში სწორედ საპარლამენტო არჩევნებში გამარჯვებული პოლიტიკური პარტიის მიერ კომპლექტდება. შესაბამისად, პრეზიდენტის პოზიცია საერთაშორისო ასპარეზსა თუ ქვეყნის შიგნით შეიძლება იყოს მისაღები ან მიუღებელი რომელიმე პოლიტიკური ძალისათვის.

1. საქართველოს პრეზიდენტის წარმომადგენლობითი ფუნქცია

საქართველოს კანონმდებლობა არ შეიცავს განმარტებას, თუ რას გულისხმობს წარმომადგენლობა საგარეო ურთიერთობათა სფეროში. კონსტიტუცია ცოცხალი დოკუმენტია და ყოველი რეფორმა მისი გადასინჯვისას ერგებოდა ქვეყანაში არსებულ პოლიტიკურ-სამართლებრივ რეალობას. მისი „ცოცხალი ბუნების“ გათვალისწინებით, რთულია ამომწურავად განმარტო წარმომადგენლობა და მისი შესაძლო შემთხვევები, ვინაიდან, დროის ცვლილებასთან ერთად, სხვადასხვა ქმედება შეიძლება მოიაზრებოდეს ამ ფუნქციაში. მაგ. დაიხვეწა კომუნიკაციის საშუალებები, პოლიტიკური ლიდერებისთვის აზრის დაფიქსირების საშუალება გახდა სოციალური პლატფორმები, შესაბამისად, არა მხოლოდ სატელეფონო კომუნიკაცია, ან პირადი წარმომადგენლობა და შეხვედრა შეიძლება იყოს სახელმწიფოს მეთაურის მიერ წარმომადგენლობის განხორციელების საშუალება, არამედ ნებისმიერი ის ვირტუალური თუ წერილობითი გამოხატვის საშუალება, სადაც პრეზიდენტი წარმოდგენილია როგორც სახელმწიფოს მეთაური, როგორც ქვეყნის შიგნით, ასევე მის ფარგლებს გარეთ.

ინტერპრეტაციის საგანია, რამდენად არის დაკავშირებული პრეზიდენტის ნებისმიერი ქმედება საგარეო პოლიტიკასთან. ამ საკითხებზე პასუხს სცემს საქართველოს კონსტიტუციის სისტემური განმარტება და ქვეყანაში არსებული მოდელის სწორი ინტერპრეტირება. პრეზიდენტის ყველა უფლებამოსილება, რაც გულისხმობს საგარეო ურთიერთობათა სფეროში პრეზიდენტის ჩართულობას, არ საჭიროებს მთავრობის თანხმობას, მთავრობის თანხმობას საჭიროებს ის უფლებამოსილებები, რაც დაკავშირებულია საგარეო პოლიტიკის განხორციელებასთან. შესაბამისად, იმიჯნება უფლებამოსილებები, რაც უშუალოდ გულისხმობს საგარეო პოლიტიკის განხორციელებას და უფლებამოსილებები, რომლებიც არ უკავშირდება საგარეო პოლიტიკას, მაგრამ შესაბამისობაშია მთავრობის საგარეო პოლიტიკასთან.

პრეზიდენტის წარმომადგენლობის ფუნქცია არის იმანენტური ქვეყნის მეთაურის სტატუსისთვის, შესაბამისად, ის ამ ფუნქციას ახორციელებს როგორც ქვეყნის შიგნით, ასევე, მის ფარგლებს გარეთ, პრეზიდენტი არის ქვეყნის წარმომადგენელი როგორც

5 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [ბოლო ნახვა: 18.05.2024].

საგარეო ურთიერთობათა სფეროში, ასევე, ქვეყნის შიგნით ე.წ. „შიდა სფეროში“. პრეზიდენტის მიერ ქვეყნის წარმომადგენლობა შეიძლება დაკავშირებული იყოს ან არ იყოს უშუალოდ საგარეო პოლიტიკის განხორციელებასთან. ცალსახაა, რომ საპარლამენტო მმართველობის მოდელის მქონე ქვეყნებში საგარეო პოლიტიკის განმახორციელებელი ორგანო არის მთავრობა, რომელთან შეთანხმების გარეშე საგარეო პოლიტიკის განხორციელება დაარღვევს კონსტიტუციას. პრეზიდენტის ვიზიტები განხორციელებული იყო იმ ქვეყნებში, რომლებთანაც ვიზიტი სწორედ ევროინტეგრაციის მიზანს ემსახურება, რაც განსაზღვრულია საქართველოს კონსტიტუციით. იმის დასადგენად, პრეზიდენტმა დაარღვია თუ არა კონსტიტუცია, მნიშვნელოვანი იყო ვიზიტის შინაარსობრივი კომპონენტის მკაფიოდ განსაზღვრა და შესაბამისი მტკიცებულებების არსებობა, რაც დაადასტურებდა ვიზიტის შინაარს, ვინაიდან პრეზიდენტის წარმომადგენლობა ვერ ჩაითვლება საგარეო პოლიტიკის განხორციელებად ავტომატურად.

არცერთი ევროპული ქვეყნის კონსტიტუციაში არ არის მითითებული, რომ პრეზიდენტის მიერ წარმომადგენლობას სჭირდება მთავრობის თანხმობა. შეთანხმების თუ თანხმობის მექანიზმი ავტომატურად იგულისხმება საგარეო პოლიტიკის განხორციელების დროს, რადგან საპარლამენტო მმართველობის მოდელში ე.წ. „ბიცეფალური“ საგარეო ურთიერთობათა სფერო ვერ იარსებებს. როდესაც ქვეყანაში საპარლამენტო მმართველობის მოდელი მოქმედებს, იგულისხმება, რომ მთავრობის გარეშე ვერ მოხდა საერთაშორისო ხელშეკრულების დადება თუ რაიმე მოლაპარაკების წარმოება, რადგან აღნიშნული არის უკვე საგარეო პოლიტიკის განხორციელების შედეგი, რასაც ნეიტრალური არბიტრის ფუნქციით აღჭურვილი პრეზიდენტი ვერ განახორციელებს დამოუკიდებლად. აქვე, ცხადია, რომ ნეიტრალური არბიტრის ფუნქციის მქონე პრეზიდენტს, აქვს სიმბოლური უფლებამოსილება შეხვდეს კოლეგა სახელმწიფოს მეთაურებს, გამართოს მათთან კომუნიკაცია ნებისმიერი ფორმით, დააფიქსიროს აზრი ან გააკეთოს განცხადება, შეხვდეს მათ საქართველოს ტერიტორიაზე თუ მის ფარგლებს გარეთ თავის აპოლიტიკური და ნეიტრალური მანდატის ფარგლებში.

რას ნიშნავს წარმომადგენლობა და კონკრეტული ვიზიტი უკავშირდებოდა თუ არა საგარეო პოლიტიკის განხორციელებას – ეს არის საკითხი, რაც მოითხოვდა მსჯელობას სასამართლოს მხრიდან, რა შედეგით დასრულდა შეხვედრა და მთავარი საკითხი – რა შინაარსის მატარებელი იყო თავად პრეზიდენტის მიერ ჩატარებული შეხვედრები. საკონსტიტუციო სასამართლოს პლენუმის 2023 წლის 16 ოქტომბრის №3/1/1797 დასკვნასთან დაკავშირებით, საკონსტიტუციო სასამართლოს მოსამართლეების – ირინე იმერლიშვილის, გიორგი კვერენჩხილაძისა და თეიმურაზ ტუღუშის განსხვავებული აზრის მიხედვით, საკონსტიტუციო სასამართლოს უნდა დაედგინა მთავრობის ფორმალური თანხმობის ფაქტთან ერთად ვიზიტის შინაარსობრივი მხარე, კერძოდ, აღნიშნული ვიზიტებით ხომ არ გასცდა სახელმწიფოს მეთაური ცერემონიულ როლს ან/და ხომ არ დაარღვია კონსტიტუციით განსაზღვრული მთავრობის მიერ საგარეო პოლიტიკის განხორციელების ექსკლუზიური უფლებამოსილება.[6]

ზემოაღნიშნულ საკითხს აქვს გადამწყვეტი მნიშვნელობა, ვინაიდან, მაგალითად, შესაძლებელია პრეზიდენტს მთავრობის თანხმობით განეხორციელებინა ვიზიტები, მაგრამ თავად ვიზიტის დროს საუბრის შინაარსი ყოფილიყო შეუსაბამო და აცდენილი მთავრობის საგარეო პოლიტიკურ კურსს. ამ შემთხვევაში, დაირღვეოდა კი პრეზიდენტის მიერ კონსტიტუცია, როდესაც ფორმალური თანხმობა იქნებოდა სახეზე, მაგრამ შინაარსი არ დაემთხვეოდა მთავრობის პოზიციას? საქართველოს კონსტიტუცია მხოლოდ ფორმალურად ხომ არ

6 საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეების – ირინე იმერლიშვილის, გიორგი კვერენჩხილაძისა და თეიმურაზ ტუღუშის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2023 წლის 16 ოქტომბრის №3/1/1797 დასკვნასთან დაკავშირებით, (II-22).

ადგენს მთავრობის თანხმობის საჭიროებას პრეზიდენტის წარმომადგენლობისთვის, რაც დაკავშირებულია საგარეო პოლიტიკას განხორციელებასთან? მხოლოდ ვიზიტი ხომ არ ექვემდებარება თანხმობას, არამედ წარმომადგენლობის განხორციელებისას მთავარია პრეზიდენტის მიერ გაჟღერებული პოზიციაა, ვინაიდან წარმომადგენლობა მხოლოდ უცხო ქვეყნის ლიდერებთან შეხვედრას და ქვეყნის დატოვებას არ გულისხმობს. ამავე ლოგიკით, შესაძლებელია საქართველოში მომხდარიყო წარმომადგენლობა პრეზიდენტის მიერ, რაც დაკავშირებული იქნებოდა უშუალოდ საგარეო პოლიტიკის განხორციელებასთან, რასაც, მიუხედავად მთავრობის თანხმობისა, შესაძლებელია მთავრობის პოლიტიკისგან განსხვავებული პოზიციის დაფიქსირება მოჰყოლოდა.

პრეზიდენტის ფორმალურად ე.წ. „უნებართვო“ ვიზიტი შესაძლებელია საერთოდ არ იყოს დაკავშირებული საგარეო პოლიტიკის განხორციელებასთან. საზღვარგარეთ ვიზიტი წარმომადგენლობის ერთ-ერთი ფორმაა, მაგრამ არა ერთადერთი. ე.წ. „უნებართვო ვიზიტები“ პრეზიდენტმა წინა წლებშიც განახორციელა, რაზეც მან პარლამენტშიც ისაუბრა 2022 წლის ყოველწლიური მოხსენების დროს,[7] რასაც მოჰყვა კიდეც მმართველი გუნდის განცხადება.[8] პრეზიდენტმა განაცხადა, რომ 2022 წლის 26 თებერვალს მას წერილობით ეთქვა უარი მთავრობის მიერ პარიზში, ვარშავაში, ბრიუსელსა და ბერლინში საერთაშორისო ვიზიტებზე, ამიტომ მან ყველა ოფიციალური ფორმატი გააუქმა და პირადი კონტაქტების გამოყენებით სამუშაო ვიზიტები პირად შეხვედრებად „გადააქცია“, ასეთი შეზღუდვები კი აზარალებდა ქვეყანას.[9] მით უფრო, რომ მთავრობის უარს პრეზიდენტის მიერ ვიზიტების განხორციელებაზე დასაბუთება არ მოჰყოლია.

განსხვავებულ აზრში ვკითხულობთ, რომ „საგარეო პოლიტიკა კომპლექსური დისციპლინაა, რომელიც მიზნად ისახავს სახელმწიფოს მრავალი, ერთმანეთისგან განსხვავებული ინტერესის უზრუნველყოფას, რაც მოიცავს სახელმწიფოს უსაფრთხოებასთან, ეკონომიკურ განვითარებასა და კეთილდღეობასთან, ადამიანის ძირითადი უფლებებისა და თავისუფლებების დაცვასთან დაკავშირებულ საკითხებს და სხვა“,[10] ამასთან, „არსებითია არა საგარეო პოლიტიკის განხორციელების ადგილი, არამედ მიზანი და გავლენა ქვეყნის საგარეო პოზიციონირებაზე.“[11]

პარლამენტის წარმომადგენლების აზრით, კონსტიტუციის 52-ე მუხლის პირველი პუნქტის „ა“ ქვეპუნქტი მოიცავს ყველა სახის წარმომადგენლობით უფლებამოსილებას და ამ მუხლის მიღმა არ ტოვებს შემთხვევებს, რომლის ფარგლებშიც საქართველოს პრეზიდენტი მთავრობის თანხმობის გარეშე განახორციელებს წარმომადგენლობას, თანხმობის არსებობა სავალდებულოა და რაიმე საგამონაკლისო წესისთვის სივრცეს საქართველოს კონსტიტუცია არ ტოვებს.[12] მათი თქმით, ასევე, პრობლემურია ხარვეზიანი პრაქტიკა, რაც არსებობს ქვეყნის შიგნით წარმომადგენლობითი უფლებამოსილების განხორციელების დროს მთავრობის თანხმობის სავალდებულობის საკითხში, თანხმობის მოთხოვნისა და მიცემის პრაქტიკა დამკვიდრებული არ არის და საჭიროებს გამოსწორებას.[13] ხომ არ გულისხმობს აღნიშნული იმას, რომ წარმომადგენლობა იყოფა ქვეყნის შიგნით და ქვეყნის ფარგლებს გარეთ წარმომადგენლობად? იქნებოდა

7 იხ. პრეზიდენტის განცხადება <https://www.facebook.com/watch/live/?ref=watch_permalink&v=273088481655263> [ბოლო ნახვა: 18.05.2024]

8 იხ. „ქართული ოცნება – დემოკრატიული საქართველოს“ პოლიტიკური საბჭოს განცხადება, <https://cutt.ly/vwh0P3DU> [18.05.2024].

9 იხ. პრეზიდენტის განცხადება <https://www.facebook.com/watch/live/?ref=watch_permalink&v=273088481655263> [ბოლო ნახვა: 18.05.2024].

10 საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეების – ირინე იმერლიშვილის, გიორგი კვერენჩხილაძისა და თეიმურაზ ტუღუშის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2023 წლის 16 ოქტომბრის №3/1/1797 დასკვნასთან დაკავშირებით, (III-23).

11 *იქვე*, (II-24).

12 საქართველოს პრეზიდენტის მიერ კონსტიტუციის დარღვევის თაობაზე საქართველოს საკონსტიტუციო სასამართლოს 2023 წლის 16 ოქტომბრის N3/1/1797 დასკვნა (II-17).

13 *იქვე.*

კი ასეთი მიდგომა სწორი? ვფიქრობთ, რომ არა. წარმომადგენლობა საკანონმდებლო დონეზე არ არის განმარტებული, ამ პირობებში კი გაუგებარი ხდება, რა დამატებითი რეგულაციებია საჭირო ქვეყნის შიგნით წარმომადგენლობისას. ფაქტია, რომ წლების განმავლობაში ქვეყნის შიგნით წარმომადგენლობისას პრეზიდენტი არ საჭიროებდა არანაირ თანხმობას მთავრობის მხრიდან და აღნიშნულ თანხმობას იღებდა მხოლოდ ქვეყნის ფარგლებს გარეთ ვიზიტის დროს.

პლენუმის დასკვნაში მითითებულია, რომ პრეზიდენტის მიერ ქვეყნის წარმომადგენლობა გულისხმობს ქვეყნის, ხალხის სახელით მოქმედებას საერთაშორისო სამართლის სუბიექტებთან, სხვადასხვა ქვეყანასთან, თუ საერთაშორისო ორგანიზაციებთან, მათ წარმომადგენლებთან, ნებისმიერი ფორმით და, ასევე, „ზოგიერთი სხვა შემთხვევა, რომელთა 52-ე მუხლის პირველი პუნქტის „ა“ ქვეპუნქტის მოთხოვნისადმი დაქვემდებარება კონკრეტული გარემოებების მიხედვით უნდა გადაწყდეს“.[14] შესაბამისად, პლენუმის დასკვნა ამომწურავ ჩამონათვალს არ ითვალისწინებს საგარეო ურთიერთობათა სფეროში წარმომადგენლობის განმარტების კუთხით და აღნიშნავს, რომ ყოველი კონკრეტული გარემოებების მიხედვით უნდა გადაწყდეს პრეზიდენტის მიერ წარმომადგენლობის განხორციელება. იმ ფაქტის გათვალისწინებით, რომ კანონმდებლობა არ განმარტავს, რა იგულისხმება საქართველოს კონსტიტუციის მიხედვით წარმომადგენლობის განხორციელებაში, ერთადერთი ორგანო, რომელსაც შეუძლია განმარტება, სწორედ საკონსტიტუციო სასამართლოა. მაგალითად, ჩაითვლება თუ არა უცხო ქვეყნის პრეზიდენტის ინიციატივით სატელეფონო კომუნიკაციაზე საქართველოს პრეზიდენტის მიერ უარის თქმა კონსტიტუციის დაცვად, მთავრობის თანხმობის გარეშე? ასევე, გაცხადებული საგარეო პოლიტიკის პირობებში, იდენტურად შეფასდება თუ არა საქართველოს პრეზიდენტის მიერ ევროპული ქვეყნის პრეზიდენტის ინიციატივით სატელეფონო კომუნიკაცია საქართველოს პრეზიდენტთან და, მაგალითად, ოკუპანტი ქვეყნის ლიდერის ინიციატივით შემდგარი სატელეფონო კომუნიკაცია? ორივე მთავრობისგან თანხმობის მიუღებლობის შემთხვევაში? ან როგორი ფორმატით უნდა შეათანხმოს პრეზიდენტმა ნებისმიერი განცხადება, რისი გაკეთებაც სურს მსოფლიოში მიმდინარე მოვლენებთან დაკავშირებით. მაგ. შეიძლება თეორიულად ვიმსჯელოთ, რომ პრეზიდენტი მაშინაც არღვევდა კონსტიტუციას, როდესაც სხვადასხვა ქვეყნის სახელმწიფო მეთაურს ხვდებოდა საქართველოს ტერიტორიაზე თანხმობის გარეშე, ამყარებდა სატელეფონო კომუნიკაციას ან სოციალურ სივრცეში ავრცელებდა სხვადასხვა განცხადებას, რაც ასევე არის პრეზიდენტის წარმომადგენლობის ფორმა.

2. საქართველოს პრეზიდენტის უფლებამოსილებების სტანდარტი საგარეო ურთიერთობათა სფეროში

შემოიფარგლება თუ არა პრეზიდენტის საგარეო უფლებამოსილებები მხოლოდ საქართველოს კონსტიტუციის 52-ე მუხლის „ა“ ქვეპუნქტით? პასუხია არა, ვინაიდან აღნიშნულ ქვეპუნქტში მითითებული უფლებამოსილებების გარდა, შესაძლოა არსებობდეს სხვადასხვა საჭიროება, რაც მოითხოვდეს პრეზიდენტის ჩართულობას საგარეო ურთიერთობათა სფეროში, რაც არ გულისხმობს უშუალოდ საგარეო პოლიტიკის განხორციელებას. განსხვავებულ აზრში მოსამართლეები მსჯელობენ სწორედ იმ საკითხთა კატეგორიაზე, რომელიც მაგალითად მოიცავს საგარეო ურთიერთობათა სფეროს, მაგრამ არ გულისხმობს უშუალოდ საგარეო პოლიტიკის განხორციელებას, კერძოდ, „საქართველოს კონსტიტუციის 52-ე მუხლი ადგენს საქართველოს პრეზიდენტის რიგ ექსკლუზიურ უფლებამოსილებებს, რომელთა განხორციელება შეიძლება, მათ შორის, მოითხოვდეს საქართველოს პრეზიდენტის საგარეო ურთიერთობებში მონაწილეობას. მაგალითად, საქართველოს პრეზიდენტს შესაძლოა ექსკლუზიური უფლებამოსილე-

14 *იქვე* (III-46).

ბის განხორციელებისას, კერძოდ, კანონზე ვეტოს დადების პროცესში, დასჭირდეს სხვადასხვა საერთაშორისო ორგანიზაციის მოსაზრების მოსმენა და გაანალიზება და საერთაშორისო აქტორებთან სხვადასხვა ფორმით კომუნიკაცია, რაც ეჭვგარეშეა, რომ არ მოითხოვს მთავრობის თანხმობას.“[15]

საქართველოს კონსტიტუციის 52-ე მუხლის სათაურია „საქართველოს პრეზიდენტის უფლებამოსილებები“, შესაბამისად, აღნიშნული ნორმის მიზანია განსაზღვროს პრეზიდენტის უფლებამოსილებათა ფარგლები, თუმცა არა ამომწურავად. აღნიშნული მუხლის პირველი პუნქტის „ი“ ქვეპუნქტის მიხედვით, საქართველოს პრეზიდენტი, გარდა ჩამოთვლილი და განსაზღვრული უფლებამოსილებებისა, ასევე „ახორციელებს კონსტიტუციით განსაზღვრულ სხვა უფლებამოსილებებს.“ აღნიშნული ჩანაწერი არის აბსოლუტურად გასაგები, ვინაიდან საქართველოს კონსტიტუცია ვერ გაითვალისწინებს დეტალურ ჩამონათვალს პრეზიდენტის უფლებამოსილებებისა იმ მარტივი მიზეზით, რომ კონსტიტუცია არის ზოგადი ნორმების ამსახველი დოკუმენტი, რომელიც ადგენს ზოგად ჩარჩოს და ზოგად უფლებამოსილებებს კონსტიტუციური ორგანოებისა. ამ ზოგადი უფლებამოსილებების და საკანონმდებლო ჩარჩოს ფარგლებში კი შესაძლებელია კონსტიტუციურმა ორგანოებმა დამატებით განახორციელონ რიგი უფლებამოსილებები, რაც თანმდევია მათი სტატუსისა.

მნიშვნელოვანია აღინიშნოს, რომ პრეზიდენტი, კონსტიტუციის 52-ე მუხლის მიხედვით, ახორციელებს „კონსტიტუციით განსაზღვრულ სხვა უფლებამოსილებებს“ და არა „ამ თავით განსაზღვრულ სხვა უფლებამოსილებებს“.[16] აღნიშნული ადასტურებს ასევე იმ ფაქტს, პრეზიდენტს, მისი სტატუსიდან და მმართველობის მოდელიდან გამომდინარე, შეიძლება ჰქონდეს რიგი იმანენტური უფლებამოსილებებისა, რაც არ არის ამომწურავად დაკონკრეტებული 52-ე მუხლში. მაგალითად, საქართველოს კონსტიტუციაში არც ის არის მითითებული, რომ პრეზიდენტი ნეიტრალური არბიტრია და, მაგალითად, მისი ერთ-ერთი ფუნქცია კონფლიქტებისა თუ კრიზისების განმუხტვაა, არც ის არის განმარტებული, რა იგულისხმება პრეზიდენტის სიმბოლურ ან ცერემონიულ უფლებამოსილებებში. თუმცა, ნებისმიერ უფლებამოსილებას, პრეზიდენტი, როგორც კონსტიტუციური ორგანო, ახორციელებს მხოლოდ კონსტიტუციით გათვალისწინებულ ფარგლებში. შესაბამისად, გარკვეული უფლებამოსილებები, შეიძლება გამომდინარეობდეს არა კონსტიტუციის 52-ე, არამედ კონსტიტუციის სხვა მუხლებიდან, ხოლო ნებისმიერი ქმედება, რომელიც 52-ე მუხლს სცდება, უნდა გამომდინარეობდეს თავად კონსტიტუციის სხვა ნორმიდან. სხვადასხვა სფეროს მომწესრიგებელი ნორმები შეიძლება იყოს კონსტიტუციის სხვადასხვა თავში, მაგალითად, 78-ე მუხლი ადგენს არა უშუალოდ პრეზიდენტის, არამედ ზოგადად კონსტიტუციური ორგანოების ვალდებულებას, უფლებამოსილების ფარგლებში, მიიღონ ყველა ზომა ევროპის კავშირსა და ჩრდილოატლანტიკური ხელშეკრულების ორგანიზაციაში საქართველოს სრული ინტეგრაციის უზრუნველსაყოფად.

3. საქართველოს მთავრობის თანხმობის საჭიროება საგარეო ურთიერთობათა სფეროში

საქართველოს პრეზიდენტის საგარეო უფლებამოსილებები, რაც გათვალისწინებულია 52-ე მუხლის პირველი პუნქტის „ა“ ქვეპუნქტით, ხორციელდება მთავრობის თანხმობით, გარდა ელჩების დანიშვნის უფლებამოსილებისა (თანხმობის ნაცვლად მითითებულია მთავრობის წარდგინება). შესაბამისად, საქართველოს პრეზიდენტს სჭირდება, მთავრობის, როგორც კოლეგიუ-

15 საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეების – ირინე იმერლიშვილის, გიორგი კვერენჩხილაძისა და თეიმურაზ ტუღუშის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2023 წლის 16 ოქტომბრის №3/1/1797 დასკვნასთან დაკავშირებით (II-17).

16 იგულისხმება საქართველოს კონსტიტუციის მეოთხე თავი სახელწოდებით „საქართველოს პრეზიდენტი“.

რი ორგანოს თანხმობა, რომ აწარმოოს მოლაპარაკებები სხვა სახელმწიფოებთან და საერთაშორისო ორგანიზაციებთან, დადოს საერთაშორისო ხელშეკრულებები. პრეზიდენტის სწორედ მთავრობის თანხმობით ერთვება საგარეო პოლიტიკის განხორციელებაში, აღნიშნული კი გამოიხატება მოლაპარაკებების წარმოებით, ხელშეკრულების დადებით და ა.შ. ეს უფლებამოსილებები კი, როგორც განსხვავებულ აზრში ვკითხულობთ, ვერ იქნება არბიტრალური და ცერემონიული, რადგან მას მოჰყვება შესაბამისი შედეგები ქვეყნისთვის.[17]

პრეზიდენტის არბიტრალური ფუნქციების განხორციელება მოითხოვს სახელმწიფოს მეთაურის გარკვეულ პოლიტიკურ დამოუკიდებლობას, რადგან „თუ ყოველ ჯერზე საგარეო პოლიტიკურ ასპარეზზე პოზიციის დასაფიქსირებლად საქართველოს პრეზიდენტს დასჭირდება საქართველოს მთავრობის თანხმობა, მაშინ ხსენებული პოზიცია მუდმივად აღიქმება, როგორც საქართველოს მთავრობის მოსაზრება (მაშინაც კი, როდესაც საგარეო პოლიტიკის სტრატეგიიდან გამომდინარე, საქართველოს მთავრობას ურჩევნია, პოზიცია საქართველოს პრეზიდენტმა გაახმოვანოს). ხსენებული ქმედების განხორციელებისთვის საქართველოს მთავრობის ფორმალური თანხმობის მოთხოვნა ფუნქციას შეუცვლის და, ფაქტობრივად, აზრს დაუკარგავს საქართველოს პრეზიდენტის, როგორც პოლიტიკურად მიუკერძოებელი სახელმწიფოს მეთაურის ქმედებას.“[18]

საქართველოს მთავრობა კოლეგიური, აღმასრულებელი ხელისუფლების უმაღლესი ორგანოა და სწორედ ის არის პასუხისმგებელი საგარეო პოლიტიკის განხორციელების შედეგად კონკრეტულ ქმედებებსა თუ გადაწყვეტილებებზე. შესაბამისად, ყველა კონსტიტუციური ორგანო უნდა იყოს შესაბამისობაში მთავრობის მიერ განხორციელებულ საგარეო პოლიტიკასთან.

ცხადია, ზოგადად არსებობს შესაძლებლობა, რომ საქართველოს პრეზიდენტმა დააზიანოს, საფრთხე შეუქმნას მთავრობის მიერ განხორციელებულ საგარეო პოლიტიკას, მაგრამ, კონკრეტულად, პრეზიდენტ სალომე ზურაბიშვილის ვიზიტით ვერ დგინდება, პრეზიდენტმა როგორ და რა ფორმით დააზიანა ან ხელი შეუშალა საქართველოს მთავრობის მიერ საგარეო პოლიტიკის განხორციელებას. სასამართლო გადაწყვეტილების, ასევე, განსხვავებული აზრის მიხედვით, არ ყოფილა წარმოდგენილი მტკიცებულება იმის შესახებ, რომ „საქართველოს პრეზიდენტმა გაახმოვანა გზავნილები, რომლებიც საქართველოს მთავრობის საგარეო პოლიტიკის საწინააღმდეგოა ან/და ისაუბრა საკითხებზე, რომლებიც რამენაირად გასცდა მის, როგორც სახელმწიფოს მეთაურის, ცერემონიულ როლს, ან/და განახორციელა ისეთი ქმედება, რომელმაც საქართველოს მთავრობის საგარეო პოლიტიკა დააზიანა.“[19] როგორც განსხვავებული აზრიდან ირკვევა, პრეზიდენტმა ზემოაღნიშნული ვიზიტების ფარგლებში იმ საკითხებზე ისაუბრა, რაც ევროინტეგრაციასთან დაკავშირებით მიწოდებული ჰქონდა საქართველოს საგარეო საქმეთა სამინისტროდან.[20] შეხვედრის შინაარსის თაობაზე არც საკონსტიტუციო სასამართლოს დასკვნიდან და არც სხდომიდან არ გამორკვეულა, რომ პრეზიდენტის მიერ შეხვედრებზე გაჟღერდა ისეთი გზავნილი, რომელიც საწინააღმდეგო იყო პარლამენტის მიერ განსაზღვრული და მთავრობის მიერ განხორციელებული საგარეო პოლიტიკისა ან კონსტიტუციური ღირებულებებისა.

17 საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეების – ირინე იმერლიშვილის, გიორგი კვერენჩხილაძისა და თეიმურაზ ტუღუშის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2023 წლის 16 ოქტომბრის №3/1/1797 დასკვნასთან დაკავშირებით (II-15).

18 *იქვე* (III-29).

19 საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეების – ირინე იმერლიშვილის, გიორგი კვერენჩხილაძისა და თეიმურაზ ტუღუშის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2023 წლის 16 ოქტომბრის №3/1/1797 დასკვნასთან დაკავშირებით (IV-33).

20 *იქვე* (IV-34).

4. საგარეო პოლიტიკის განხორციელების ხელშეშლა

პრეზიდენტის სადავო სამ ვიზიტთან მიმართებით მთავრობის წარმომადგენელმა აღნიშნა, რომ „ვინაიდან არ იცნობენ საუბრის შინაარსს, ვერ მიუთითებენ, რა ზიანი შეიძლება გამოიწვიოს საქართველოს პრეზიდენტის ქმედებებმა“[21] – შესაბამისად, უცნობია კონკრეტული ვიზიტების შედეგად პრეზიდენტის საუბრის შინაარსი, რაც სასამართლოსთვის მნიშვნელოვანი მტკიცებულება უნდა ყოფილიყო გადაწყვეტილების მისაღებად. ზოგადი ინფორმაციით კი, პრეზიდენტის დამოკიდებულება და მისი განცხადებები ცხადყოფს მის მხარდაჭერას ქვეყნის ევროინტეგრაციის გზაზე. მოცემულ შემთხვევაში სახეზეა მხოლოდ ფორმალური „უარის“ გამო პრეზიდენტის თანამდებობიდან გადაყენების სურვილი პარლამენტის მხრიდან. არ დასტურდება, რომ პრეზიდენტმა ვიზიტის დროს გამართა მოლაპარაკებები კონკრეტულ საკითხზე, რაც შედეგად ითვალისწინებს მაგ. საერთაშორისო ხელშეკრულების დადებას, ან რომ იგი გამოვიდა სიტყვით კონკრეტულ საერთაშორისო შეხვედრაზე და დააზიანა ქვეყნის ინტერესები ან უამრავი სხვა მიზეზი, რაც მტკიცებულებებით იქნებოდა გამყარებული. მნიშვნელოვანია აღინიშნოს, რომ საზღვრებს მიღმა პრეზიდენტის წასვლის ფაქტი კი არ გულისხმობს კონსტიტუციის დარღვევას, არამედ საუბრის შინაარსი, რაც შეიძლება სულ არ საჭიროებდეს საზღვარგარეთ ვიზიტს. შესაძლებელია უცხო ქვეყნის პრეზიდენტმა საქართველოში ვიზიტისას მოისურვოს პრეზიდენტთან შეხვედრა, რა დროსაც მნიშვნელოვანი იქნება პრეზიდენტის მიერ გაკეთებული განცხადებები და შესაბამისი გზავნილები.

საქართველოს პრეზიდენტის, როგორც კონსტიტუციური ორგანოს, ფუნქციონირების საფუძველია ნეიტრალური არბიტრის სტატუსი, აღნიშნულის ფარგლებში კი მას არ უნდა ჰქონდეს შიში იმისა, რომ თუ საგარეო ურთიერთობათა სფეროში მისი ყოველი ნაბიჯი არ იქნება შეთანხმებული მთავრობასთან, აღნიშნული კონსტიტუციის დარღვევად ჩაითვლება. ასეთ პირობებში, სახელმწიფოს მეთაური ვერ იქნება ქმედითი და პროდუქტიული ქვეყნის ინტერესების სადარაჯოზე. საკონსტიტუციო სასამართლოს სჭირდება მყარი დასაბუთება პრეზიდენტის ქმედებაში დანაშაულის ნიშნების ან კონსტიტუციის დარღვევის ფაქტის დასადასტურებლად. სასამართლოს უნდა შეეფასებინა, კონკრეტულად, რა დარღვევას ჰქონდა ადგილი პრეზიდენტის მხრიდან და რა სამართლებრივი დასაბუთების საფუძველზე.

5. საქართველოს კონსტიტუციის დარღვევის ხარისხი და ინტენსივობა

საკონსტიტუციო სასამართლოს დასკვნისთვის, არის კი გადამწყვეტი მნიშვნელობის დარღვევის ხასიათი, ხარისხი, ინტენსივობა და სიმძიმე? პრეზიდენტის ნებისმიერი უმნიშვნელო თუ მნიშვნელოვანი ქმედება შეიძლება იწვევდეს „კონსტიტუციის დარღვევას“? მნიშვნელოვანია, რომ სამართლებრივად იყოს დასაბუთებული არგუმენტების და შესაბამისი უტყუარი მტკიცებულებების საფუძველზე პოლიტიკური თანამდებობის პირის მიერ კონსტიტუციის დარღვევის ფაქტი. ვინაიდან პარლამენტის საბოლოო გადაწყვეტილება ეფუძნება პოლიტიკურ მოტივებს, ამიტომ ერთადერთი მიუკერძოებელი იმპიჩმენტის პროცედურაში არის სასამართლო და მისი სამართლებრივი დასკვნა. კონსტიტუციური წარდგინების ავტორთა განმარტებით, პრეზიდენტმა განზრახ და უხეშად დაარღვია კონსტიტუცია.[22] პლენუმის დასკვნაში მითითებულია, რომ წარდგინების ავტორები სასამართლოსგან ელიან „კონსტიტუციის დარღვევის ფაქტის დადასტურებას, რა დროსაც, მათი აზრით,

21 *იქვე* (IV-35).

22 საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეების – ირინე იმერლიშვილის, გიორგი კვერენჩხილაძისა და თეიმურაზ ტუღუშის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2023 წლის 16 ოქტომბრის №3/1/1797 დასკვნასთან დაკავშირებით (II-11).

მხედველობაში არ უნდა იყოს მიღებული კონსტიტუციის დარღვევის განზრახულობა, სიმძიმე, მოტივაცია, დამდგარი შედეგი და სხვა ფაქტორები, რომელთა გათვალისწინება უფრო რელევანტურია პოლიტიკური გადაწყვეტილების მიღების დროს პარლამენტში, თუკი საკონსტიტუციო სასამართლო დაადასტურებს პრეზიდენტის მიერ კონსტიტუციის დარღვევის ფაქტს.“[23]

ერთი მხრივ, კონსტიტუციური წარდგინების ავტორები თავადვე აფასებენ პრეზიდენტის მიერ საზღვარგარეთ მთავრობის თანხმობის გარეშე ვიზიტს კონსტიტუციის უხეშ, სერიოზულ დარღვევად, ხოლო, მეორე მხრივ, თავადვე მოუწოდებენ საკონსტიტუციო სასამართლოს, არ გაეთვალისწინებინა „კონსტიტუციის დარღვევის განზრახულობა, მისი სიმძიმე, მოტივაცია, დამდგარი შედეგი თუ სხვა სუბიექტური და ობიექტური ფაქტორები“, რადგან უფრო რელევანტურად მიიჩნიეს აღნიშნულის შეფასება პარლამენტის მიერ პოლიტიკური გადაწყვეტილების მიღების დროს. საკონსტიტუციო სასამართლოს ფუნქციაა, სწორედაც რომ შეაფასოს – რამდენად არსებობს დარღვევა სახეზე და თუ არსებობს – რამდენად მძიმე და სერიოზულია იგი, რომ გახდეს კონსტიტუციის დარღვევის შესახებ დასკვნის საფუძველი. მაგალითად, ვენეციის კომისია ალბანეთის პრეზიდენტის იმპიჩმენტის პროცედურის ფარგლებში, სასამართლოს მეგობრის პოზიციაში ამბობს, რომ შესაძლებელია პრეზიდენტმა დაარღვიოს კონსტიტუცია, მაგრამ მნიშვნელოვანია დადგინდეს დარღვევის „სერიოზულობა“.[24]

სასამართლო სხდომაზე გაკეთებული განცხადებების მიხედვით, საქართველოს კონსტიტუციის 78-ე მუხლიდან გამომდინარე, პრეზიდენტის ვიზიტები ეფუძნებოდა ევროინტეგრაციას, ევროპული არჩევანის განმტკიცება კი ყოველი კონსტიტუციური ორგანოს ვალდებულებაა, ამიტომ ფორმალურად პრეზიდენტის ვიზიტები გამომდინარეობდა მთავრობის იმ გაცხადებული პოლიტიკიდან, რასაც ევროინტეგრაცია ეწოდება. მეორე მხრივ, შეიძლება ვიზიტი ფორმალურად ნებართვის საფუძველზე ხორციელდებოდეს, მაგრამ უცხო ქვეყნის ლიდერთან შეხვედრისას პრეზიდენტის მიერ მოხდეს ისეთი ფაქტების ან ინფორმაციის მიწოდება, რამაც ზიანი მიაყენოს ქვეყნის ინტერესებს და იყოს კონსტიტუციის საზიანო, ამიტომ მხოლოდ ფორმალური ვიზიტი არ უნდა იყოს საფუძველი პრეზიდენტის ქმედებაში კონსტიტუციის დარღვევის დადასტურებისა.

„საქართველოს საკონსტიტუციო სასამართლოს შესახებ“ საქართველოს ორგანული კანონის 26-ე მუხლის მე-4 პუნქტის მიხედვით, საკონსტიტუციო სასამართლო აფასებს მხოლოდ იმ ქმედებას, რომელიც იმპიჩმენტის საკითხის აღმძვრელ პარლამენტის წევრთა მიერ მიჩნეულია იმპიჩმენტის საფუძვლად. როგორც *ჯონი ხეცუხიანი* განმარტავს, „თანამდებობის პირის ქმედების კონსტიტუციურობის შეფასებისას, საკონსტიტუციო სასამართლო უნდა დაეყრდნოს კონსტიტუციური სამართალდარღვევისათვის (დელიქტისათვის) დამახასიათებელი ნიშნების (სუბიექტი, ობიექტი, სუბიექტური მხარე, ობიექტური მხარე) შემოწმების შედეგებს და ამის შემდეგ გააკეთოს დასკვნა, ადგილი ჰქონდა თუ არა ამ თანამდებობის პირის მიერ კონსტიტუციის დარღვევას.“[25] *ჯონი ხეცუხიანი*, ასევე, განმარტავს, რომ პარლამენტს აქვს დისკრეციული უფლებამოსილება, გადააყენოს თანამდებობის პირი ან არა, შესაბამისად, კონსტიტუციურ-სამართლებრივი სანქციის გამოყენებისას პარლამენტის

23 საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეების – ირინე იმერლიშვილის, გიორგი კვერენჩხილაძისა და თეიმურაზ ტუღუშის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2023 წლის 16 ოქტომბრის №3/1/1797 დასკვნასთან დაკავშირებით (II-18).

24 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [ბოლო ნახვა: 18.05.2024].

25 ხეცურიანი ჯ., „საქართველოს საკონსტიტუციო სასამართლოს უფლებამოსილება იმპიჩმენტის პროცესში“, *„მართლმსაჯულება და კანონი“* 2/3(45/46), 46 <https://www.supremecourt.ge/files/upload-file/pdf/martlmsajuleba-da-kanoni-2015w-n2.pdf> [ბოლო ნახვა: 18.05.2024].

მოქმედებს პოლიტიკური მოტივებით და არა სამართლებრივი კრიტერიუმებით.[26]

თუ გადავხედავთ ზოგიერთი ევროპული ქვეყნის კონსტიტუციას, ვნახავთ, რომ პრეზიდენტის იმპიჩმენტი შესაძლებელია განხორციელდეს არა უბრალოდ კონსტიტუციის დარღვევის, არამედ კონსტიტუციის განზრახ დარღვევის ან, არა მსუბუქი ან ნაკლებად მძიმე დანაშაულის, არამედ მძიმე დანაშაულის ჩადენის გამო. *გერმანიის* კონსტიტუციის მიხედვით, ბუნდესტაგს ან ბუნდესრატს შეუძლია პრეზიდენტის იმპიჩმენტი მოახდინოს ფედერალურ საკონსტიტუციო სასამართლოში კონსტიტუციის ან სხვა ფედერალური კანონის განზრახ დარღვევისთვის.[27] *იტალიის* კონსტიტუციის მიხედვით, პრეზიდენტი არ არის პასუხისმგებელი უფლებამოსილების ფარგლებში განხორციელებულ ქმედებებზე, გარდა სახელმწიფო ღალატის ან კონსტიტუციის დარღვევის შემთხვევისა.[28] პრეზიდენტის წინააღმდეგ იმპიჩმენტის პროცედურებში, სასამართლოს რიგითი მოსამართლეების გარდა, ასევე, უნდა იყოს წილისყრით არჩეული თექვსმეტი წევრი სენატში არჩევისთვის საჭირო კვალიფიკაციის მქონე მოქალაქეთა სიიდან, რომელსაც პარლამენტი ამზადებს ყოველ ჯერზე ცხრა წლის განმავლობაში არჩევნების შემდეგ იგივე პროცედურების გამოყენებით, რაც გატარებული იყო მოსამართლეების დანიშვნისას.[29] *ლიეტუვის* კონსტიტუციის მიხედვით, პრეზიდენტის თანამდებობიდან ვადამდე გადაყენება შესაძლებელია მხოლოდ კონსტიტუციის უხეში დარღვევის ან ფიცის დარღვევის, ასევე, დანაშაულის ჩადენის გამო.[30] *აღბანეთის* კონსტიტუციის მიხედვით, პრეზიდენტი შეიძლება გადააყენონ თანამდებობიდან კონსტიტუციის მძიმე დარღვევების (მრავლობითში) და მძიმე დანაშაულის ჩადენისთვის.[31]

6. საერთაშორისო პრაქტიკა პრეზიდენტების იმპიჩმენტის საკითხზე

საპარლამენტო მმართველობის პრეზიდენტის მიერ ქვეყნის ე.წ. „უნებართვო“ წარმომადგენლობის მაგალითია იტალია.[32] საფრანგეთთან ურთიერთობის დაძაბვა გამოიწვია ვიცე-პრემიერმა ლუიჯი დი მაიომ, რადგან მან საფრანგეთის მთავრობა დაადანაშაულა ულტრალიბერალური პოლიტიკის გატარებაში[33] და მხარი დაუჭირა ე.წ. ყვითელი ჟილეტების მოძრაობას, რომელიც აპროტესტებდა საფრანგეთის მთავრობის გადაწყვეტილებებს ეკონომიკურ სფეროში.[34] კრიზისის გამოსწორება დაევალა საგარეო საქმეთა მინისტრს, რომლის ჩართულობა არ აღმოჩნდა დამაჯერებელი საფრანგეთის პრეზიდენტ ემანუელ მაკრონისთვის, ამიტომ იტალიის პრეზიდენტმა, სერჯო მატარელამ დააფიქსირა პოზიცია, რასაც მოჰყვა საფრანგეთ-იტალიის პრეზიდენტებს შორის სატელეფონო საუბარი, რაც არ იყო შეთანხმებული იტალიის მთავრობასთან, მაგრამ შედეგად გამოიწვია ქვეყნებს შორის დიპლომატიური ურთიერთობების გაუმჯობესება და ორმხრივი ურთიერთობების გაღრმავება სხვადასხვა საკითხში, ასევე, საფრანგეთის ელჩის ვიზიტი იტალიაში, რომელმაც იტალიის პრეზიდენტს გადასცა საფრანგეთის პრეზიდენტის მოწვევა საფრანგეთში

26 *იქვე.*

27 Basic Law for the Federal Republic of Germany, Art. 61, <https://www.btg-bestellservice.de/pdf/80201000.pdf> [18.05.2024].

28 The Constitution of the Italy, Art 90, <https://www.constituteproject.org/constitution/Italy_2012.pdf?lang=en> [ბოლო ნახვა: 18.05.2024].

29 *იქვე*, Art 135.

30 The Constitution of the Republic of Lithuania, Arts. 74, 86, <https://www.constituteproject.org/constitution/Lithuania_2019> [18.05.2024].

31 The Constitution of Albania, art. 90, <https://www.constituteproject.org/constitution/Albania_2012> [ბოლო ნახვა: 18.05.2024].

32 იტალიის მაგალითი დეტალურად იხ. კაველიძე თ., (2023). დისერტაცია „საქართველოს პრეზიდენტისა და მთავრობის უფლებამოსილებები საგარეო ურთიერთობების სფეროში“, 142-144.

33 Carminati A., Maccabiani N., (2022). La prassi del “primo” Mattarella nei rapporti sovranazionali e internazionali, Editoriale Scientifica, *Costituzionalismo.it*, Fascicolo 2, 44-50. <https://www.costituzionalismo.it/wp-content/uploads/2-2022-2.-Carminati.pdf> [ბოლო ნახვა: 18.05.2024].

34 *იქვე.*

ვიზიტთან დაკავშირებით.[35] პრეზიდენტებს შორის რამდენიმე შეხვედრაც კი შედგა, რაც გახდა საფუძველი „გაძლიერებული ორმხრივი თანამშრომლობის“ ხელშეკრულების დადებისა, რომელსაც იტალიის მხრიდან პრემიერ-მინისტრის მიერ მოეწერა ხელი, საფრანგეთის მხრიდან კი სამმხრივი ხელმოწერით (პრეზიდენტი, პრემიერ-მინისტრი, საგარეო საქმეთა მინისტრი) დასრულდა.[36] იტალიის პრეზიდენტის ქმედებამ, რომელსაც კონსტიტუციით აქვს „საზეიმო“ უფლებამოსილებები, ფაქტობრივად, იხსნა ქვეყანა საფრანგეთთან დიპლომატიური ურთიერთობების კრიზისისგან,[37] „აღნიშნული ნათელი მაგალითია, რომ საპარლამენტო მმართველობის პრეზიდენტსაც აქვს შესაძლებლობა, საკუთარი განცხადებებით გავლენა იქონიოს საგარეოპოლიტიკურ პროცესებზე ისე, რომ არ ახორციელებდეს საგარეო პოლიტიკას.“[38]

კონსტიტუციის დარღვევის საკითხთან დაკავშირებით, საინტერესოა ლიეტუვის საკონსტიტუციო სასამართლოს დასკვნა, რომელიც ეხება პრეზიდენტის როლანდას პაქსასის მიერ კონსტიტუციის უხეშად დარღვევას.[39] დარღვევა მოიცავდა რუსი ბიზნესმენის, იური ბორისოვისთვის მოქალაქეობის უკანონო მინიჭებას, საიდუმლო ინფორმაციის გაჟონვასა და პრეზიდენტის ოფისის ფინანსური სარგებლობისთვის გამოყენებას.[40] სასამართლოს 2004 წლის 31 მარტის დასკვნის მიხედვით, კონსტიტუციის ყველა დარღვევა არ არის კონსტიტუციის უხეში დარღვევა, ამასთან სეიმს (პარლამენტს) არ აქვს უფლებამოსილება გადაწყვიტოს, დაარღვია თუ არა პრეზიდენტმა კონსტიტუცია უხეშად.[41]

სასამართლო განმარტავს, რომ კონსტიტუციის დარღვევის დადგენა არის სამართლებრივი და არა პოლიტიკური შეფასების საკითხი, უხეში დარღვევის ფაქტი კი შეიძლება დადგინდეს მხოლოდ საკონსტიტუციო სასამართლოს მიერ და ინტერპრეტაცია, რომ სეიმმა შეიძლება დაადგინოს კონსტიტუციის უხეში დარღვევა, უსაფუძვლოა, რადგან სამართლებრივი საკითხი, დაარღვია თუ არა პრეზიდენტმა კონსტიტუცია უხეშად, შეიძლება გადაწყვიტოს სასამართლო ხელისუფლებამ, რომელიც დაკომპლექტებულია პროფესიული ნიშნით და არა სეიმმა, რომელიც არის პოლიტიკური ორგანო, რომლის გადაწყვეტილებებშიც აისახება პარლამენტის წევრების უმრავლესობის პოლიტიკური ნება.[42]

პრეზიდენტის თანამდებობიდან გადაყენება არის კონსტიტუციური სანქცია კონსტიტუციის უხეში დარღვევისთვის და მხოლოდ სეიმს შეუძლია მიიღოს აღნიშნული გადაწყვეტილება, ამასთან, კონსტიტუცია არ ითვალისწინებს სეიმის უფლებამოსილებას, უარყოს, შეცვალოს ან ეჭვქვეშ დააყენოს საკონსტიტუციო სასამართლოს დასკვნა.[43] სასამართლო განმარტავს, რომ სეიმში იმპიჩმენტის პროცესის დროს არ ხდება მტკიცებულებების გამოკვლევა, რომელიც ადასტურებს ან უარყოფს იმ ფაქტს, რომ პრეზიდენტის ქმედებამ უხეშად დაარღვია კონსტიტუცია, არამედ სასამართლოს კონსტიტუციური მოვალეობაა, პრეზიდენტის მიმართ წარდგენილ კონკრეტულ „ბრალდე-

35 *იქვე.*

36 *იქვე.*

37 კაველიძე თ., (2023). დისერტაცია „საქართველოს პრეზიდენტისა და მთავრობის უფლებამოსილებები საგარეო ურთიერთობების სფეროში“, 142-144.

38 *იქვე.*

39 Endzins A., (2008). Report “The Role of the Constitutional Court in the System of the Separation of Power” the Venice Commission, 15th anniversary of the Constitutional Court of Romania Bucharest, 6-7 December 2007, CDL-JU(2007)038, Strasbourg.

40 The Constitutional Court Of The Republic of Lithuania, Conclusion On The Compliance Of Actions of President Rolandas Paksas Of The Republic Of Lithuania Against Whom an Impeachment Case Has Been Instituted With The Constitution Of The Republic Of Lithuania, 31 March 2004, Vilnius, Case No. 14/04 <https://lrkt.lt/en/court-acts/search/170/ta1263/content> [ბოლო ნახვა: 18.05.2024].

41 *იქვე.*

42 *იქვე.*

43 The Constitutional Court Of The Republic of Lithuania, Conclusion On The Compliance Of Actions of President Rolandas Paksas Of The Republic Of Lithuania Against Whom an Impeachment Case Has Been Instituted With The Constitution Of The Republic Of Lithuania, 31 March 2004, Vilnius, Case No. 14/04 <https://lrkt.lt/en/court-acts/search/170/ta1263/content> [ბოლო ნახვა: 18.05.2024].

ბაში“ გამოიკვლიოს კონკრეტული ქმედებები და შეაფასოს, ეწინააღმდეგება თუ არა ეს ქმედებები კონსტიტუციას.[44]

საინტერესო მაგალითია, ასევე, ალბანეთის პარლამენტის თავმჯდომარის გრამოზ რუჩის მიმართვა ვენეციის კომისიისადმი, პრეზიდენტის იმპიჩმენტის მიმდინარე პროცედურის კონტექსტში, რისი საფუძველიც პრეზიდენტის მიერ ადგილობრივი არჩევნების გაუქმება/გადადება გახდა.[45] პრეზიდენტმა ადგილობრივი თვითმმართველობის არჩევნების თარიღად განისაზღვრა 2019 წლის 30 ივნისი, რასაც შედეგად მოჰყვა არჩევნებისთვის მზადება, შეიქმნა კომისია, გამოქვეყნდა ამომრჩეველთა სიები, დაიწყო საარჩევნო კამპანია და ა.შ.[46] ძირითადი ოპოზიციური პარტიების უმეტესობამ კი დათმო მანდატები, დატოვა პარლამენტი და ბოიკოტი გამოუცხადა არჩევნებს, რადგან, მათი აზრით, ადგილი ჰქონდა ორგანიზებულ დანაშაულს 2017 წლის საპარლამენტო არჩევნების გაყალბების მიზნით, ცენტრალური საარჩევნო კომისია უკანონოდ იყო დაკომპლექტებული და დაირღვა მათი უფლებები საგამოძიებო კომისიების შექმნის შესახებ.[47]

კრიზისის გათვალისწინებით, პრეზიდენტმა შესთავაზა არჩევნების გადადება „პოლიტიკური პარტიების მიერ გამოთქმული სურვილის შესაბამისად“ და მოუწოდა ყველა ადგილობრივ და საერთაშორისო აქტორს (არასამთავრობო თუ საერთაშორისო ორგანიზაციებს) წვლილი შეეტანათ დიალოგის აღდგენაში, საბოლოოდ კი, პრეზიდენტმა უბრალოდ გადადო არჩევნები.[48] ცესკომ განაცხადა, რომ არჩევნების გადადებით პრეზიდენტმა გადააჭარბა კომპეტენციას და მისი აქტი იყო ძალადაკარგული, თუმცა, არჩევნები მაინც ჩატარდა ოპოზიციის მონაწილეობის გარეშე და მასში ამომრჩეველთა 21,6%-მა მიიღო მონაწილეობა.[49] პრეზიდენტი აცხადებდა, რომ მან გადადო არჩევნები, რადგან იგი არადემოკრატიული იქნებოდა ოპოზიციური პარტიების მონაწილეობის გარეშე, ამასთან, ეშინოდა კენჭისყრის დროს შესაძლო ძალადობრივი შეტაკებებისა და დაძაბულობის.[50] აღნიშნულ პროცესებს მოჰყვა პარლამენტის მიერ პრეზიდენტის იმპიჩმენტის მოთხოვნა და შეიქმნა სპეციალური საგამოძიებო კომისია.[51]

ვენეციის კომისიამ აღნიშნა, რომ არჩევნების გადადების ლეგიტიმურ მიზნად ჩაითვლებოდა შესაძლო კონფლიქტების თავიდან აცილება და დემოკრატიის დაცვა, თუმცა, მიუხედავად იმისა, რომ პრეზიდენტი ლეგიტიმურ მიზანს ესწრაფოდა, კონსტიტუცია არ ადგენდა პრეზიდენტის მიერ არჩევნების გადადების და ახალი თარიღის დანიშვნის ზოგად უფლებამოსილებას, შესაბამისად, პრეზიდენტმა გადააჭარბა კომპეტენციას.[52] ალბანეთის კონსტიტუციის 90-ე მუხლის მიხედვით, პრეზიდენტი იმპიჩმენტის წესით თანამდებობიდან გადაყენებას ექვემდებარება კონსტიტუციის სერიოზული/მძიმე დარღვევისთვის და მძიმე დანაშაულის ჩადენისთვის.[53] კომისიამ აღნიშნა, რომ საკონსტიტუციო სასამართლოს უნდა დაედგინა, იყო თუ არა ეს კონსტიტუციის დარღვევა და ამ შემთხვევაში, რამდენად იყო საკმარისად „სერიოზული“ ალბანეთის კონსტიტუციის 90-ე მუხლის გაგებით იმპიჩმენტის გამართლებისთვის.[54] კომისია აღნიშ-

44 *იქვე.*

45 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [ბოლო ნახვა: 18.05.2024].

46 *იქვე.*

47 *იქვე.*

48 *იქვე.*

49 *იქვე.*

50 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [ბოლო ნახვა: 18.05.2024].

51 *იქვე.*

52 *იქვე.*

53 Constitution of Albania, art. 90, <https://www.constituteproject.org/constitution/Albania_2012> [ბოლო ნახვა: 15.03.2024].

54 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=C-

ნავდა, რომ პარლამენტს უნდა გადაეწყვიტა, შეამცირებდა თუ გაზრდიდა დაძაბულობას პრეზიდენტის იმპიჩმენტი იმ სიტუაციაში, როდესაც პარლამენტსა და ყველა მუნიციპალიტეტში დომინირებდა ერთი პარტია.[55] საბოლოოდ, საკონსტიტუციო სასამართლოს უნდა დაედგინა, პრეზიდენტის ქმედება იყო თუ არა სერიოზული ხასიათის დარღვევა, რაც პრეზიდენტის იმპიჩმენტის საშუალებას იძლეოდა, ამრიგად, ვენეციის კომისია აღნიშნავდა, რომ მაშინაც კი, თუ სასამართლოს მიერ დადგინდებოდა „კონსტიტუციის სერიოზული დარღვევები“, პარლამენტს თავი უნდა შეეკავებინა ამ პროცესისგან.[56]

ვენეციის კომისია, ასევე, აღნიშნავდა, მთელი რიგი ფაქტორები მიუთითებდა იმ გარემოებას, რომ სახეზე არ იყო პრეზიდენტის მხრიდან კონსტიტუციის სერიოზული დარღვევა, ვინაიდან პრეზიდენტი მოუწოდებდა მხარეებს დიალოგისკენ, ცდილობდა მხარეებს შორის შეთანხმების მიღწევას, არჩევნების გადადება რეალურად ხელს უწყობდა მხარეებს შორის კომპრომისის მიღწევას, ერთად აღებული პრეზიდენტის ქმედებები კი შეიძლება საფუძველი ყოფილიყო დასკვნისათვის, რომ არჩევნების გადადება შესაძლოა არ აკმაყოფილებდეს სერიოზულობის აუცილებელ კრიტერიუმებს იმ გარემოებებში, რომ მოხდეს პრეზიდენტის იმპიჩმენტის გამართლება.[57] საბოლოოდ, პრეზიდენტის იმპიჩმენტის პროცედურა არ დაწყებულა დეპუტატთა საკმარისი ხმების არარსებობის გამო.[58] საგამოძიებო კომისიამ დაადგინა, რომ მყარი მტკიცებულებები არ არსებობდა ქვეყნის მეთაურის გადაყენებისთვის ადგილობრივი არჩევნების გადადების გამო კონსტიტუციის სავარაუდო დარღვევის ფაქტზე, შედეგად, დეპუტატებმა მხარი დაუჭირეს ვენეციის კომისიის რეკომენდაციებს.[59]

იმპიჩმენტის ე.წ. „მეორე რაუნდი“ დაკავშირებულია ალბანეთის პრეზიდენტის მიმართ არშემდგარ იმპიჩმენტის პროცედურასთან, *ამჯერად ბრალდებები ეხებოდა პრეზიდენტის სხვადასხვა განცხადებას არჩევნებამდე და არჩევნების დროს.*[60] იმპიჩმენტის მომხრე დეპუტატები ამბობენ, რომ მეტას ქმედებებმა გამოიწვია პოლიტიკური არასტაბილურობა ალბანეთში, მან გააკეთა პოლიტიკურად მიკერძოებული განცხადებები საარჩევნო კამპანიის დაწყებამდე, წაახალისა ძალადობა და ვერ შეასრულა კონსტიტუციური ვალდებულება, როგორც სახელმწიფოს მეთაურმა და ეროვნული ერთიანობის გარანტმა.[61] საბოლოოდ, სასამართლომ განაცხადა, რომ მეტას წინააღმდეგ წარმოდგენილი მტკიცებულებებით არ დასტურდებოდა „კონსტიტუციის მძიმე“[62] და „სერიოზული დარღვევები“.[63]

კიდევ ერთი საინტერესო შემთხვევა უკავშირდება პოლონეთს. 2009 წელს საკონსტიტუციო ტრიბუნალმა მიიღო გადაწყვეტილება პოლონეთის ევროპულ საბჭოში წარმომადგენლობასთან დაკავშირებით, კერძოდ, პრეზიდენტი ლეხ კაჩინსკი ფიქრობდა, რომ 2008 წლის 15-16 ოქტომბერს ბრიუსელში გამართულ ევროსაბჭოს სესიაზე, რომელიც მიეძღვნა ფინანსურ კრიზისს, ენერგეტიკულ უსაფრთხოებას და ა.შ. მონაწილეობა მისი პასუხისმგებლობა იყო, ხოლო პრემიერ-მინისტრმა დონალდ ტუსკმა ეს

DL-AD(2019)019-e> [ბოლო ნახვა: 18.05.2024].

55 *იქვე.*

56 *იქვე.*

57 Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [ბოლო ნახვა: 18.05.2024].

58 იხ. <https://www.usnews.com/news/politics/articles/2020-07-27/albanian-parliament-votes-against-presidents-impeachment> [ბოლო ნახვა: 18.05.2024].

59 იხ. <https://constitutionnet.org/news/albanian-legislators-say-president-exceeded-constitutional-powers-will-not-be-impeached> [ბოლო ნახვა: 18.05.2024].

60 Albania: Impeachment Of The President, Subject To The Meaning Of “Serious Violation”, <https://balkansgroup.org/wp-content/uploads/2021/06/Albania_Impeachment-of-the-President_Subject-to-the-meaning-of-Serious-Violation-.pdf> [ბოლო ნახვა: 18.05.2024].

61 *იქვე.*

62 *იქვე.*

63 იხ, <https://www.euronews.com/2022/02/17/ilir-meta-constitutional-court-overturns-impeachment-of-albania-s-president> [ბოლო ნახვა: 18.05.2024].

მთავრობის კომპეტენციად მიიჩნია.[64] პრეზიდენტს ბრიუსელში გასამგზავრებლად სამთავრობო თვითმფრინავზეც კი უარი ეთქვა, თუმცა, საბოლოოდ, ევროპის საბჭოს სხდომაში პრეზიდენტმა პრემიერ-მინისტრთან ერთად მიიღო მონაწილეობა.[65] ამის შემდეგ, პოლონეთის პრემიერ-მინისტრმა მიმართა საკონსტიტუციო ტრიბუნალს კომპეტენციური დავის თაობაზე პოლონეთის პრეზიდენტსა და პრემიერ-მინისტრს შორის უფლებამოსილებების გამიჯვნის შესახებ ევროპის საბჭოს სესიებზე წარმომადგენლობასთან დაკავშირებით.[66]

პრემიერ-მინისტრი დასაბუთებაში აღნიშნავდა, რომ პოლონეთის საშინაო და საგარეო პოლიტიკას ახორციელებს მინისტრთა საბჭო, „წარმომადგენლობა“ კი, ზოგიერთი ფორმით, შესაძლოა არ იყოს პოლიტიკის განხორციელება, თუმცა, მას გაუჭირდა სიტუაციის წარმოდგენა, როდესაც პრეზიდენტი წარმოადგენდა პოლონეთს საერთაშორისო ასპარეზზე და ეს არ განიხილებოდა საგარეო პოლიტიკის ელემენტად და ვერ მიუთითებდა პრეზიდენტის წარმომადგენლობის ისეთ ფორმებს, რომლებიც განცალკევებული იქნებოდა საგარეო პოლიტიკისგან.[67]

კონსტიტუციის ანალიზმა ტრიბუნალი მიიყვანა დასკვნამდე, რომ კონსტიტუცია განასხვავებდა პრეზიდენტის, როგორც „პოლონეთის უმაღლესი წარმომადგენლის“ პოზიციას მისი „საგარეო საქმეებში სახელმწიფოს წარმომადგენლის“ როლისგან.[68] პრეზიდენტს არ გააჩნდა საგარეო პოლიტიკის დამოუკიდებლად განხორციელების უფლებამოსილება, ვინაიდან აღნიშნული მინისტრთა საბჭოს კომპეტენციას განეკუთვნებოდა და მისივე კომპეტენციაში შედიოდა სახელმწიფოს საქმეები, რომლებიც არ მიეკუთვნებოდა სხვა სახელმწიფო ორგანოების უფლებამოსილებებს.[69] აღნიშნული კატეგორიის საქმეები კი შეიძლება მოიცავდეს ურთიერთობებს პოლონეთისა და ევროკავშირს შორის, რომელიც არ წარმოადგენს კლასიკურ საგარეო პოლიტიკას და რომელიც, ასევე, არ განიხილება ტრადიციულად გაგებული შიდა პოლიტიკის სფეროდ.[70] სასამართლომ განმარტა, რომ პრეზიდენტს შეუძლია გადაწყვიტოს, მონაწილეობა მიიღოს ევროსაბჭოს კონკრეტულ სესიაში, თუ ის მიიჩნევს, რომ ეს სასარგებლო იქნება კონსტიტუციის 126-ე მუხლის მე-2 პუნქტით განსაზღვრული მისი მოვალეობების შესასრულებლად, რაც გულისხმობს კონსტიტუციის, სახელმწიფოს სუვერენიტეტსა და უსაფრთხოების დაცვას, აგრეთვე, მისი ტერიტორიის ხელშეუხებლობას და მთლიანობას.[71] პრეზიდენტის მონაწილეობა ევროსაბჭოს სესიაში მოითხოვს თანამშრომლობას პრემიერ-მინისტრსა და კომპეტენტურ მინისტრთან და პოლონეთის სახელით ევროკავშირთან ურთიერთობაში ერთგვაროვან დამოკიდებულებას.[72]

სასამართლომ დაადგინა, რომ პრემიერ-მინისტრი უფლებამოსილია, წარმოადგინოს პოლონეთი ევროპულ საბჭოში და გამოხატოს პოლონეთის პოზიცია, ხოლო გამონაკლის შემთხვევებში, როდესაც ევროპის საბჭო განიხილავს საკითხებს, რომლებიც მიეკუთვნება პრეზიდენტის ამოცანებს, მას შეუძლია გადაწყვიტოს წარმოადგინოს პოლონეთი ევროკავშირის ამ ინსტიტუტში, თუმცა პრეზიდენტი იქნება ვალდებული წარმოადგინოს მთავრობის მიერ განსაზღვრული პოზიცია.[73]

საკონსტიტუციო ტრიბუნალის საბოლოო დასკვნა შეიძლება ასე ჩამოყალიბდეს: პოლონეთის კონსტიტუციის მიხედვით, თანამშრომლობის ვალდებულება ეკისრება პრეზიდენტს, მინისტრთა საბჭოს და პრემიერ-მინისტრს, კონსტიტუციური მოვალეობე-

64 Constitutional Tribunal Of Poland, Decision of 20 May 2009, 78/5/A/2009, Ref. No. Kpt 2/08, <http://trybunal.gov.pl/fileadmin/content/omo wienia/Kpt_02_08_EN.pdf> [ბოლო ნახვა: 18.05.2024].
65 *იქვე.*
66 *იქვე.*
67 *იქვე.*
68 *იქვე.*
69 *იქვე.*
70 *იქვე.*
71 Constitutional Tribunal Of Poland, Decision of 20 May 2009, 78/5/A/2009, Ref. No. Kpt 2/08, <http://trybunal.gov.pl/fileadmin/content/omo wienia/Kpt_02_08_EN.pdf> [ბოლო ნახვა: 18.05.2024].
72 *იქვე.*
73 *იქვე.*

ბისა და უფლებამოსილებების განხორციელებისას,[74] ასევე, პრემიერ-მინისტრს აქვს ვალდებულება, აცნობოს პრეზიდენტს ევროპის საბჭოს სესიების საგანი და მინისტრთა საბჭოს მიერ განსაზღვრული პოზიცია, პრეზიდენტის ვალდებულია, გაეცნოს მინისტრთა საბჭოს მიერ განსაზღვრულ პოზიციას და აცნობოს მას ევროპის საბჭოს კონკრეტულ სესიაში მონაწილეობის განზრახვის შესახებ, შესაბამისად, აუცილებელია ორმხრივი მზადყოფნა და მონაწილეობის წესთან დაკავშირებით შეთანხმებების დაცვის ვალდებულება.[75]

ტრიბუნალის დასკვნას ახლავს განსხვავებული აზრიც. მოსამართლე ტერეზა ლისჩისი აღნიშნავს, რომ პოლონეთის უმაღლესი წარმომადგენლის სტატუსი გულისხმობს პრეზიდენტის უფლებას, იმყოფებოდეს ნებისმიერ ადგილას, სადაც ვითარდება პოლონეთისთვის მნიშვნელოვანი მოვლენები.[76] პრეზიდენტი არის პოლონეთის უმაღლესი წარმომადგენელი და სახელმწიფო ხელისუფლების უწყვეტობის გარანტი, შესაბამისად, ის მოქმედებს მინისტრთა საბჭოსგან დამოუკიდებლად, რაც, უპირველეს ყოვლისა, ეხება ქმედებებს, რომლებსაც არ გააჩნიათ სამართლებრივი ეფექტი და რომლებიც არ გულისხმობს ოფიციალური აქტების გამოცემას, რაც უდავოდ მოიცავს ევროკავშირის პოლიტიკური ორგანოს სესიებში მონაწილეობას.[77] იმისათვის, რომ პრეზიდენტმა შეძლოს კონსტიტუციით განსაზღვრული მოვალეობების შესრულება, უნდა იცოდეს ევროკავშირის პოლიტიკური გეგმები, რომლებიც განისაზღვრება ევროპული საბჭოს სესიებზე, ამიტომ მას აქვს უფლება მიიღოს ინფორმაცია ამ საკითხებთან დაკავშირებით, ასევე, პრეზიდენტის უმაღლესი წარმომადგენლის სტატუსი გამორიცხავს ევროპის საბჭოს სესიებზე მისი მონაწილეობის უფლებას პრემიერ-მინისტრის თანხმობით.[78] ტერეზა ლისჩისი, საკონსტიტუციო ტრიბუნალის მსგავსად, გამორიცხავს პრეზიდენტისა და მთავრობის მეთაურის განსხვავებული პოზიციების წარმოდგენას ევროპული საბჭოს ფორუმზე ისევე, როგორც ნებისმიერ სხვა უცხოურ ფორუმზე.[79] მისი აზრით, თანამშრომლობისთვის აუცილებელია პრეზიდენტს რეგულარულად ეცნობოს მინისტრთა საბჭოსგან ევროპის საბჭოს სესიების თარიღებისა და ყველა საკითხის შესახებ, რათა მას შეძლოს სესიაზე მონაწილეობა და მინისტრთა საბჭოსთვის პოზიცია წარდგენა სესიის დღის წესრიგთან დაკავშირებით.[80]

მოსამართლე მიროსლავ გრანატის განსხვავებული აზრის მიხედვით, პოლონეთის წარმომადგენლობა ევროპულ საბჭოში მოითხოვს პრემიერ-მინისტრს, მინისტრთა საბჭოსა და პრეზიდენტს შორის თანამშრომლობის (დიალოგის) უმარტივესი ფორმების შენარჩუნებას, რომლებიც მიეკუთვნება ე.წ. წინარესაკონსტიტუციო ტრადიციას და აუცილებლად არ საჭიროებს საკანონმდებლო რეგულაციას.[81] პრეზიდენტი, როგორც უმაღლესი წარმომადგენელი და ხელისუფლების უწყვეტობის გარანტი, რომელიც უზრუნველყოფს კონსტიტუციის, სუვერენიტეტისა და ტერიტორიული მთლიანობის დაცვას, თავად უნდა წყვეტდეს ევროპის საბჭოს სესიაში მონაწილეობის საკითხს, სახელმწიფოს ნებისმიერი სხვა ორგანოს თანხმობის გარეშე.[82]

ვენეციის კომისიის განმარტავს, რომ ხშირად ძნელია იმის დადგენა, თუ სად მთავრდება სამართლებრივი არგუმენტები და

74 Biernat S., 'Division of Competences in the Field of Foreign Relations in the Polish Constitutional System Stanisław', pp. 264-266.

75 *იქვე.*

76 Dissenting Opinion of Judge Teresa Liszcz to the Decision of the Constitutional Tribunal of 20 May 2009 in the case Kpt 2/08, <https://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [ბოლო ნახვა: 18.05.2024].

77 Dissenting Opinion of Judge Teresa Liszcz to the Decision of the Constitutional Tribunal of 20 May 2009 in the case Kpt 2/08, <https://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [ბოლო ნახვა: 18.05.2024].

78 *იქვე.*

79 *იქვე.*

80 *იქვე.*

81 Dissenting Opinion of Judge Mirosław Granat to the Decision of the Constitutional Tribunal of 20 May 2009 in the case Kpt 2/08, <https://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [ბოლო ნახვა: 18.05.2024].

82 *იქვე.*

იწყება პოლიტიკური კამათი.[83] პლენუმის დასკვნაში აღნიშნულია, რომ საქართველოს საკონსტიტუციო სასამართლო, საერთაშორისო პრაქტიკის მიხედვით, იყენებს „ცხადი და დამაჯერებელი“ („clear and convincing”) მტკიცებულების სტანდარტს.“[84] საკონსტიტუციო სასამართლოს სამართლებრივი დასკვნა მართლაც უნდა ეფუძნებოდეს ცხადი და დამაჯერებელი, უტყუარი მტკიცებულებების ერთობლიობას და სწორედ სასამართლომ უნდა იმსჯელოს, რამდენად სერიოზულია დარღვევა პრეზიდენტის თანამდებობიდან გადაყენების შესახებ დადებითი სამართლებრივი დასკვნის გაცემისთვის, რადგან პარლამენტი სწორედ სასამართლოს სამართლებრივ დასკვნას ეყრდნობა.

დასკვნა

საკონსტიტუციო სასამართლოს პლენუმის დასკვნის მიხედვით, პრეზიდენტის მიერ „მთავრობის თანხმობის გარეშე წარმომადგენლობითი უფლებამოსილების განხორციელება ყოველთვის დაარღვევს კონსტიტუციის 52-ე მუხლის პირველი პუნქტის „ა“ ქვეპუნქტს იმის მიუხედავად, პრეზიდენტის მიერ გამოთქმული თუ დაკავებული პოზიციები, საჯარო განცხადებები თუ ქმედებები შეესაბამება საგარეო ურთიერთობების კონკრეტულ საკითხებზე საქართველოს მთავრობის ხედვასა და ტაქტიკას, თუ მათგან განსხვავებულია”.[85] აღნიშნული განმარტება შეიძლება ზღუდავდეს საგარეო ურთიერთობათა სფეროში პრეზიდენტის წარმომადგენლობით ფუნქციას და არბიტრალურ როლს. პრეზიდენტის საჯარო განცხადებაც კი შეიძლება ჩაითვალოს წარმომადგენლობად, როდესაც მის განცხადებას საგარეო პოლიტიკის განხორციელებასთან შეიძლება საერთოდ არ ჰქონდეს კავშირი და პირიქით, ფართო განმარტებით, ნებისმიერი განცხადება, რაც საგარეო ურთიერთობათა სფეროში კეთდება, შეიძლება, პირდაპირ თუ ირიბად, დააკავშირონ საგარეო პოლიტიკის განხორციელებასთან, რაც იმპიჩმენტის პროცედურას ხდის კონტროლისა და შეზღუდვის მექანიზმად პრეზიდენტისთვის. სასამართლო დასკვნაში ამომწურავად არ არის განმარტებული, რას ნიშნავს საგარეო წარმომადგენლობა იმ პირობებში, როდესაც წინასწარვე უთითებს, რომ თანხმობის გარეშე ნებისმიერი წარმომადგენლობითი უფლებამოსილების განხორციელება არის კონსტიტუციის დარღვევა პრეზიდენტის მხრიდან. ამ ლოგიკას თუ გავყვებით, გამოდის, რომ საქართველოს პრეზიდენტს მანამდეც არაერთხელ დაურღვევია საქართველოს კონსტიტუცია, როდესაც, მაგალითად, საჯარო განცხადება გაუკეთებია, რომელიც არ ყოფილა შეთანხმებული მთავრობასთან.

მნიშვნელოვანია ფორმალიზმისა და შინაარსის თანხვედრა. შესაძლებელია, პრეზიდენტმა მთავრობის ფორმალური თანხმობის შემთხვევაში, წარმომადგენლობისას ევროინტეგრაციის ნაცვლად, მაგ. პრორუსული განცხადებები გააკეთოს. თუ პრეზიდენტის საუბრის შინაარსი არ არის სასამართლოსთვის მნიშვნელოვანი დარღვევის დადგენისას, ჰიპოთეტურ მაგალითში მხოლოდ ფორმალური მოთხოვნა იქნება დაცული, შინაარსობრივი კომპონენტი კი შეუფასებელი დარჩება. ასეთ შემთხვევაში დაარღვევს თუ არა პრეზიდენტი კონსტიტუციას? სასამართლოს განმარტება ათანაბრებს შემთხვევებს, როდესაც პრეზიდენტი დამოუკიდებლად ახორციელებს წარმომადგენლობით ფუნქციას და მოქმედებს მთავრობის მიერ განსაზღვრული საგარეო პოლიტიკის ფარგლებში და იმ შემთხვევებს, როდესაც პრეზიდენტი მთავრობისგან ფორმალური თანხმობის მიღების პირობებში ახორციელებს წარმომადგენლობით უფლებამოსილებებს, თუმცა მოქმედებს საგარეო პოლიტიკის საწინააღმდეგოდ მის მიერ დაფიქსირებული

83 Endzins A., (2008). Report “The Role of the Constitutional Court in the System of the Separation of Power” the Venice Commission, 15th anniversary of the Constitutional Court of Romania Bucharest, 6-7 December 2007, CDL-JU(2007)038, Strasbourg.

84 საქართველოს პრეზიდენტის მიერ კონსტიტუციის დარღვევის თაობაზე საქართველოს საკონსტიტუციო სასამართლოს 2023 წლის 16 ოქტომბრის N3/1/1797 დასკვნა (II-2).

85 *იქვე* (II-55).

პოზიციის გამო, რითიც აზიანებს ქვეყნის ინტერესებს. ვფიქრობთ, რომ ზემოაღნიშნული ორი შემთხვევა იდენტური სიმძიმის და დატვირთვის მატარებელი არ არის და ამ ორი შემთხვევის წინ ტოლობის ნიშნის დასმა არ შეიძლება.

სასამართლოს მიერ პრეზიდენტის მხრიდან კონსტიტუციის დარღვევა დადასტურდა ვიზიტების შინაარსის დადგენისა და გამოკვლევის, ქმედების სიმძიმის შეფასებისა და ვიზიტების შედეგების მხედველობაში მიღების გარეშე. კონსტიტუციის დარღვევის შეფასებისას, სასამართლომ, რომლის დასკვნაც პრეცედენტულია, სიტყვა-სიტყვითი განმარტების მეთოდის გამოყენებით, საკმარისად მიიჩნია მხოლოდ ფორმალური კრიტერიუმის არსებობა. ვფიქრობთ, პრეზიდენტის მიერ კონსტიტუციის დარღვევის დადასტურების მიზნებისთვის საკმარისი მტკიცებულებები არ ყოფილა გამოკვლეული, რასაც თუნდაც ის ფაქტი მოწმობს, რომ სასამართლოსთვის, ფაქტობრივად, შეუფასებელი დარჩა პრეზიდენტის ვიზიტის შინაარსობრივი მხარე.

ბიბლიოგრაფია

ნორმატიული მასალა:

1. საქართველოს კონსტიტუცია.
2. „საქართველოს საკონსტიტუციო სასამართლოს შესახებ“ საქართველოს ორგანული კანონი.
3. Basic Law for the Federal Republic of Germany.
4. The Constitution of the Italy.
5. The Constitution of the Republic of Lithuania.
6. The Constitution of Albania.

სასამართლო აქტები:

1. საქართველოს პრეზიდენტის მიერ კონსტიტუციის დარღვევის თაობაზე საკონსტიტუციო სასამართლოს 2023 წლის 16 ოქტომბრის N3/1/1797 დასკვნა და
2. საქართველოს საკონსტიტუციო სასამართლოს მოსამართლეების – ირინე იმერლიშვილის, გიორგი კვერენჩხილაძისა და თეიმურაზ ტუღუშის განსხვავებული აზრი საქართველოს საკონსტიტუციო სასამართლოს პლენუმის 2023 წლის 16 ოქტომბრის №3/1/1797 დასკვნასთან დაკავშირებით.
3. Constitutional Tribunal Of Poland, Decision of 20 May 2009, 78/5/A/2009, Ref. No. Kpt 2/08, <http://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [18.05.2024].
4. Dissenting Opinion of Judges Teresa Liszcz and Mirosław Granat to the Decision of the Constitutional Tribunal of 20 May 2009 in the case Kpt 2/08, <https://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf> [18.05.2024].
5. The Constitutional Court Of The Republic of Lithuania, Conclusion On The Compliance Of Actions of President Rolandas Paksas Of The Republic Of Lithuania Against Whom an Impeachment Case Has Been Instituted With The Constitution Of The Republic Of Lithuania, 31 March 2004, Vilnius, Case No. 14/04 <https://lrkt.lt/en/court-acts/search/170/ta1263/content> [ბოლო ნახვა: 18.05.2024].

სამეცნიერო ლიტერატურა და სხვა დამხმარე მასალები:

1. გვაზავა გ., (2016). კონსტიტუციის ირგვლივ – პრეზიდენტი რესპუბლიკისა, კრებულში: ქართული კონსტიტუციონალიზმის ქრონიკები.
2. კაველიძე თ., (2023). დისერტაცია „საქართველოს პრეზიდენტისა და მთავრობის უფლებამოსილებები საგარეო ურთიერთობების სფეროში“.
3. პრეზიდენტის განცხადება <https://www.facebook.com/watch/live/?ref=watch_permalink&v=273088481655263> [ბოლო ნახვა: 18.05.2024]
4. „ქართული ოცნება – დემოკრატიული საქართველოს“ პოლიტიკური საბჭოს განცხადება <https://cutt.ly/vwh0P3DU> [ბოლო ნახვა: 18.05.2024].
5. ხეცურიანი ჯ., „საქართველოს საკონსტიტუციო სასამართლოს უფლებამოსილება იმპიჩმენტის პროცესში“, „მართლმსაჯულება და კანონი“ 2/3(45/46), <https://www.supremecourt.ge/files/upload-file/pdf/martlmsajuleba-da-kanoni-2015w-n2.pdf> [ბოლო ნახვა: 18.05.2024].
6. Albania: Impeachment Of The President, Subject To The Meaning Of “Serious Violation”, <https://balkansgroup.org/wp-content/uploads/2021/06/Albania_Impeachment-of-the-President_Subject-to-the-meaning-of-Serious-Violation-.pdf> [18.05.2024].
7. Biernat S., ‘Division of Competences in the Field of Foreign Relations in the Polish Constitutional System Stanisław’.
8. Carminati A., Maccabiani N., (2022). La prassi del “primo” Mattarella nei rapporti sovranazionali e internazionali, Editoriale Scientifica, Costituzionalismo.it, Fascicolo 2, <https://www.costituzionalismo.it/wp-content/uploads/2-2022-2.-Carminati.pdf> [ბოლო ნახვა: 18.05.2024].
9. Endzins A., (2008). Report “The Role of the Constitutional Court in the System of the Separation of Power” the Venice Commission, 15th anniversary of the Constitutional Court of Romania Bucharest, 6-7 December 2007, CDL-JU(2007)038, Strasbourg.
10. Opinion on the Score of the Power of the President to set the Dates of Elections Adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019), <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e> [ბოლო ნახვა: 18.05.2024].
11. <www.usnews.com> [ბოლო ნახვა: 8.05.2024].
12. <www.constitutionnet.org> [ბოლო ნახვა: 18.05.2024].
13. <www.euronews.com> [ბოლო ნახვა: 18.05.2024].

MEDIATION – THE OFTEN-MISSED OPPORTUNITY!

Irina Batiashvili

Doctoral Candidate of Law, Caucasus International University, Researcher of Analytical Department of Ministry of Justice of Georgia on the rights of old persons, Mediator, Consultant (expert) to the Director General of LLC "Tbilisi Energy" on Gender Issues, Georgia

ABSTRACT

Parties have the opportunity to regulate the dispute, and during mediation, an acceptable solution for the dispute resolution can be seen, which will strengthen the personal or business relationship between the parties in the future. One of the key functions of a mediator to successfully mediate business disputes is to focus on the interests of the parties and be able to separate them from the positions of the parties. International mediation is seen as the amicable process of the resolution of cross-border commercial disputes, which helps parties to preserve commercial relationships. The mediator should individually analyze every case before a mediation meeting is planned. The mediator should decide whether to start with a general joint meeting or conduct individual meetings. The above-mentioned has a great impact on future processes and results. The implementation of general mediation standards in national law is a big challenge. Standards on applying enforcement and refusal mechanisms in International business disputes are general, vague, and more evaluative. States should work on the development of national guidelines and case law regarding the evaluation process of mediation by court. Digital assets from Blockchain Technology can be inherited, and because of the specificities (different territories, internet space, and different tech companies) of currency, disputes may arise in transacting inheritance. It is debatable why the Singapore Convention should not apply to settlement agreements raised from cryptocurrency.

KEYWORDS: Business Dispute Settlements, International Mediation, Singapore Convention

INTRODUCTION

First, I want to mention the prehistory of mediation in Georgia and, afterwards, the existing Normative Regulation of the mediation process in Georgia regarding the Singapore Convention, which is essential for international business disputes. Also, the article will mention the essential ingredients for a successful mediation process.

When we mention introducing and establishing a culture of mediation in Georgia, the role of Ilia Chavchavadze in 19 century is essential in creating a modern concept of a mediator – a conciliator. First of all, Ilia Chavchavadze connects the need for conciliation judges in modern language with the development of life, globalization and capitalization (the relationship between people, which is related to giving and receiving), the alternative of unloading the justice system, economic existence, and, finally, it is related to resolving the disputed issue quickly and easily.[1]

Of course, the modernist and eclectic world adds to mediation new functionalities, renews, and prepares for new challenges.[2] The parties become the main participants in the process, trying to find out what their main interests are, so mediation is based on the interests of the parties and not on their rights.[3] Covid 19 Pandemic showed the world of business how it is essential to have efficient and flexible tools for resolving disputes by non-traditional and out of court way, but with enforceable document and executable result.

In collective disputes, the right of the Minister of Labor, Health and Social Affairs to receive a report from a mediator comes in collision with the requirement of the normative act to the mediator to keep confidential all information entrusted to him during the mediation process. In my opinion, in the future, it would be better to add another paragraph to Article 63 of the Labor Code of Georgia, which will clearly define what kind of information/report the mediator is obliged to provide to the Minister of Labor, Health, and Social Affairs.[4] It should also be considered to what extent the information obtained during the mediation process should be reflected in the report, so as not to violate the principle of confidentiality.[5] The rules which regulate collective disputes is noteworthy for private sector.

For parties, one of the attractions of mediating business disputes is the principle of confidentiality. However, mediation does not enjoy absolute confidentiality protection, and there are legitimate grounds for breach of confidentiality. According to the general rule, information can be disclosed only in the amount and proportion necessary to achieve a legitimate aim pursued, and at the same time, in the process of disclosure, it is better to observe the principle of proportionality. The obligation to disclose information to an adequate and proportionate extent should also be respected, and the legislation requires maximum protection of the disclosed information from third parties.

1. BUSINESS DISPUTES

Maintaining business relationships is one of the major benefits of the mediation process. It does not matter what kind of the result the mediation will be completed, as the dispute will remain psycho-emotionally relaxed and in addition the disputing parties will already be informed of the real causes of the dispute. On the contrary to this advantage, we can even consider the phenomenon of the insincere[6] party.[7] Negotiations in the media-

1 Batiashvili, I. (2022). The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), pp. 25-38, <https://doi.org/10.60131/adr.1.2022.6162>

2 *Ibid*.

3 Bichia M. (2021). The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, N3, p. 12.

4 Batiashvili, I. (2022). The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), pp. 25-38, <https://doi.org/10.60131/adr.1.2022.6162>

5 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116, <https://doi.org/10.36475/8.1.6>

6 Party not acting in good faith.

7 Batiashvili, I. (2022). The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute

tion format are completely based on the principle of voluntariness, which means that initiation and participation in mediation depends on the opinion of the parties, while the content and purpose of the negotiations are determined by the parties and the mediation process is completed by their decision.[8]

It should be noted that from 2013 to December 10, 2021, 422 cases were transferred to the Mediation Center of the Tbilisi City Court. According to the statistics of 2021, there are 28 legal disputes related to business disputes; Labor Law – 27 disputes; Also, 33 current loan and microfinance disputes are recorded in the mediation center.[9] The settlement rate is 60-70%, and disputes arising from microfinance, labor, commercial, and family relations have particularly successful results.[10]

According to commercialization, it has been suggested that in the focus of the broader concept of privacy, personal data may be considered part of property rights, which increases the probability that this data will be more effectively protected.[11] From this point of view, we can conclude that the personal information obtained during the mediation process enjoys maximum protection, and also it can be seen in the context of property rights, moreover, in conditions of the individual characteristics[12] of business relations.

Recommendations for successful completion of business mediation are: A) Creativity of the mediation process.[13] For example, the invitation of experts in the presence of the parties. This can support building trust; B) to have fun in the mediation process. The mediation process is mostly tense, and emotional background prevails, especially tiring when this process takes hours. Therefore, a little humor and laughter will help the mediation process; C) Patience, listening carefully to the problems of the disputing parties. The glacial pace of offer and demand can be frustrating and can lead to a worsening of the situation, so it is best when the parties continue a productive discussion; D) realistic evaluation of the case and flexibility – For example, parties should sit on each other chairs (not in direct meaning). They should try to see picture form the different corner. Mediators can use the mirror effect. During the whole process parties should think about the best outcome, acceptable outcome and absolutely non acceptable outcome. At last, progress can be made when the parties understand that an intersection point exists; E) mediation is not a trial. Subject to the variances due to case complexity, very little is gained, and much might be lost than would be possible through court. The goal of mediation is to reach a compromise, not establish victory.[14] F) Design a process that works for your client. In multi-party business disputes, it may be essential that the process be segmented. It is necessary to listen to all parties separately if the emotional background prevails; G) The mediator should individually analyze every case before a mediation meeting is planned. This includes case information, emotional background, predicted sensitive issues, the roots of the problem, and the main aspects of the dispute. Afterwards, the mediator should decide whether to start with a general joint meeting or conduct individual meetings. The above-mentioned has a great impact on future processes and results. (This recommendation might be very useful for the mediation process in labor disputes). H) Identification of goals – The mediator should be able to assist the party representative or the party itself in planning a wide range of settlement options and finding ways to resolve them, as well as in determining the predicted outcomes of the mediation process.[15]

Resolution Yearbook, 11(1), pp. 25-38, <https://doi.org/10.60131/adr.1.2022.6162>

8 Kandashvili I. (2023). Negotiation and representation in mediation, house of publication Cezanne, p. 156.

9 Tbilisi City Court, N2-4118 / 4363203, 13/12/2021.

10 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116.

11 Bichia M. (2021). The danger of the privacy "disappearance" during a pandemic in the context of globalization and the grounds for its legitimacy: an institutional analysis. Globalization and Business, 6(11), p 45.

12 Peculiarities.

13 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116,<https://doi.org/10.36475/8.1.6>

14 *Ibid*.

15 Batiashvili I. (2022). Confidentiality in Mediation in

2. INTERNATIONAL AGREEMENTS AND GEORGIA

2.1 The Singapore Convention on Mediation

The United Nations Commission on International Trade Law (UNCITRAL) was established for the facilitation of international trade, as well as to modernize and unify it.[16] UNCITRAL plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.[17] In 2018, the UN General Assembly adopted a resolution emphasizing the importance of mediation.[18] The UN Assembly Resolution on the Model Law mentions the benefits of mediation, which are related to the unloading of justice system, the elimination of tensions, and the chance to continue commercial relations as opposed to litigation. Under Paragraph 3 of Article 1 of Model law on international commercial conciliation, the conciliator assists the disputing parties in settling the dispute amicably, although the conciliator does not have the authority to impose upon the parties a solution to the dispute.[19] Articles 8 and 9 of the Model Law are noteworthy.[20] Article 8 regulates the disclosure of information provided specifically by a party, according to which when the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.[21] Article 9 regulates the issue of privacy in general.[22]

The Singapore Convention on Mediation (also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation) is a new multilateral treaty developed by the U.N. Commission on International Trade Law (UNCITRAL) which was open for signatures from August 7, 2019.[23] "The primary goal of the Convention is to promote the use of mediation for the resolution of cross-border commercial disputes, as mediation is seen as not only a faster, less expensive form of dispute resolution but also as more likely to preserve commercial relationships. The lack of a cross-border mechanism for giving legal effect to mediated settlement agreements is said to be a significant barrier to the willingness of some companies to use mediation; a significant amount of time and

Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116. (Holzberg R. (2013), 10 tips for a successful mediation, Connecticut law tribune, Pullman&Comley, 1-4).

16 Tsuladze A. (2017). Comparative Analysis of Georgian Judicial Mediation, Tb., Publishing World of Lawyers, pp. 51-52.

17 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116. (United Nations Office at Vienna, A guide to UNCITRAL (basic facts about the United Nations Commission on International Trade Law), English, Publishing and Library Section, January 2013.

18 United Nations General Assembly, Resolution on Model law on international commercial mediation and international settlement agreements resulting from medation of the united nations commission on international law, Seventy-third session, Distr: General, 3 January 2019, A/RES/73/199).

19 United Nations, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002, New York, 2004, United Nations Publication, Sales No. E.05.V.4, ISBN 92-1-133730-5.

20 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116, <https://doi.org/10.36475/8.1.6>

21 Resolution of United Nations General Assembly, Model law on international commercial conciliation of the united nations commission on international trade law, Annex model law on international commercial conciliation of the united nations commission on international trade law, fifty-seventh session, distr: General, 24 January 2003, A/RES/57/18, Article 6. <https://undocs.org/A/RES/57/18>, [28.11.2021].

22 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, N8, pp. 76-116.

23 Schnabel, T. (2019). The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements. Pepperdine Dispute Resolution Law Journal, 19(1), p. 1.

energy might be needed to reach an agreement, and if the other party later fails to perform, the company seeking compliance would essentially have to start over in litigation or arbitration".[24]

United Nations Convention on International Settlement Agreements Resulting from Mediation lacks international legitimacy that was granted to arbitration by the New York Convention.[25]

Also establishment of mediation in the field of cryptocurrency and blockchain technology subparagraphs (a) and (b) of paragraph 2 of the Singapore Convention can be seen as an artificial and negative obstacle. According to Convention:

"This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions

engaged in by one of the parties (a consumer) for personal, family

or household purposes;

(b) Relating to family, inheritance or employment law".

Digital assets from Blockchain Technology can be inherited, and because of the specificities of currency, disputes may arise in transacting inheritance. It is debatable why mediation cannot be introduced in this part if Blockchain Technology and cryptocurrency can be seen as nontraditional tools of business relations in the 21st century.

2.2 Recognition and Enforcement of International Mediation Settlement Agreements in Georgia

Now, about ratification of the Singapore Convention in Georgia. The Singapore Convention was approved by the United Nations General Assembly Resolution N73/198 on December 20, 2018. Georgia has signed the Convention and recognized it as binding, as it will contribute to the expansion and development of mediation as an alternative dispute resolution mechanism in Georgia. In addition, Georgia will become a party to settlement agreements and Participant in the Unified International Instrument on Use and Enforcement. Georgia was one of the first countries to join the Convention. On 7 August (2019) 46 countries signed the Convention together. For the democratic development and economic growth of the country, the state must take care of the issues of the rule of law and a fair court, and along with this, the importance of alternative dispute-resolution mechanisms is highlighted.

After the signing of the Singapore Convention by the Minister of Justice of Georgia in 2019, a period of harmonizing Georgia's legislation for ratification started. In Georgia, the Convention came into force from the 2020 year. I will mention some of the changes made to the Law of Georgia on mediation and the Civil Procedure Code of Georgia.

In both laws, we have a new term: International mediation.

Present time by Article 38 of the Civil Procedure Code State fees shall be applied to an application for a measure to secure the mediation settlement agreement, an application for enforcing the mediation settlement agreement, or an application for recognising and enforcing the international mediation settlement agreement. Article 39 declares state fees amount to GEL 150 for an application for executing the mediation settlement agreement or for recognising and executing the international mediation agreement.

In 2021, changes to the Civil Procedure Code of Georgia and Section 7[9] were added, which defined the participation of the Court in the Recognition and Enforcement of International Mediation Settlement Agreements Concluded in accordance with the United Nations Convention of 7 August 2019 on International Settlement Agreements Resulting from Mediation. In this section, international mediation is defined as a process, however, named or referred to, which takes place outside Georgia and whereby two or more parties to a dispute attempt to reach an agreement on the settlement of their dispute with the assistance of a foreign mediator. The Court that is empowered to recognize and enforce interna-

24 *Ibid,* p. 2.

25 *Ibid,* p. 3.

tional mediation settlement agreements shall be the Supreme Court of Georgia. One or both parties to an international mediation settlement agreement may apply to the Court with an application for the recognition and enforcement of an international mediation settlement agreement. A party to an international mediation settlement agreement submitting a request to recognize and enforce the international mediation settlement agreement as provided for by paragraph 1 of this article shall submit the court relevant documents. The types of document are written in Article 363^{43}.[26]

The Court shall check the completeness of documents submitted in accordance with Article 363^{43}(3) of this Code within five days after the receipt of an application for the recognition and enforcement of an international mediation settlement agreement. The Court shall establish/point to the deficiency, the correction of which is necessary for the completeness of the said documents, and shall give an applicant reasonable time to correct it. The Court shall leave the application unheard if the deficiency is not corrected within the set time limits.

The Court shall decide on the recognition and enforcement of an international mediation settlement agreement in the form of a ruling. A writ of execution shall be handed over to a party to an international mediation settlement agreement along with the ruling. A ruling recognizing and enforcing an international mediation settlement agreement shall be final and may not be appealed. International mediation settlement agreements shall be enforced in accordance with the Law of Georgia on Enforcement Proceedings.

According to the Law of Georgia on Enforcement Proceedings, Article 91 – Enforcement of foreign court judgements: a decision recognized in the territory of Georgia, as provided by the legislation of Georgia, in accordance with international private law and the mutual legal assistance treaties between states, and the writ of execution copied out by a Georgian court of appropriate jurisdiction shall be forwarded for enforcement to the National Bureau of Enforcement through the Ministry of Justice of Georgia.

Finally, I will briefly review the amendments made to the Law on Mediation.

Article 13^{1} regulates Recognition and enforcement of international mediation settlements, which states:

1. With the agreement of the parties to the international mediation settlement, it can be recognized and enforced by the court. The court with the authority to recognize and enforce international mediation settlements is the Supreme Court of Georgia.
2. The Supreme Court of Georgia considers the issue of recognition and enforcement of international mediation settlement in accordance with the rules established by this law and the Civil Procedure Code of Georgia.

Article 13^{2} regulate International mediation settlement, which is not subject to recognition and enforcement. I will mention some of situation by which an international mediation settlement is not subject to recognition and enforcement. These are:

- Mediation settlement which is concluded for the settlement of a dispute arising from a transaction concluded by one of the parties to an international mediation settlement (the consumer) for personal, family or household purposes;
- Mediation settlement which has been published by a court or entered into in a pending court proceeding and is enforceable as a judgment in the State of the court issuing the judgment;
- Mediation settlement which was signed and subject to enforcement as an arbitration award.
- Also it is essential that The rules of recognition and enforcement of the mediation settlement are applied only within the limits agreed upon by the parties to the international mediation settlement.
- Reservation – Also Noteworthy that The rules for the recognition and enforcement of international mediation settlements

26 Civil Procedure Code of Georgia, 14/11/1997, 1106, Book 79, Section XLIV16.

established by the Law on Mediation and the Civil Procedure Code of Georgia are not applicable to those international mediation settlements, one of the parties of which is the state or any state agency or any person acting on behalf of this state agency.

The old version of the law of Georgia "On Mediation", as well as the Code of Civil Procedure of Georgia, provided for mechanisms for the enforcement of mediation settlements reached as a result of mediation, however, it did not include the enforcement of international agreements reached as a result of mediation, to which the Convention appeals. Thus, after the implementation of the legislative changes, the concept of "international mediation settlement" and the rules for its recognition and enforcement appear in the legislation, as well as a list of circumstances in which the international mediation settlement is not subject to recognition and enforcement.

But What is difference between Article 363[45] of Civil Procedure Code of Georgia and Article 5 of the Singapore Convention regarding refusal of granting?

The wording of Article 363[45] of Civil Procedure Code of Georgia is different from Paragraph 2 of Article 5 of the Singapore Convention regarding refusal of granting relief.

Article 5 (2) Singapore Convention States that the courts may also *sua sponte* refuse to grant the requested relief if they find that:

(a) Doing so "*would be contrary to the public policy*" of that State; or

(b) "*The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.*

Convention mentions lex fori as a ground for ineffectiveness.

Contrary to this, in Georgia Article 363[45] of Civil Procedure Code of Georgia refers to situations mentioned in subparagraphs when court has power to refuse enforcement of international mediation settlement agreements and also Code notes a general rule/standard on the refusal of the satisfaction of the motion for recognition and enforcement of the international mediation settlement. It do not explain what it means through wording: "According to the legislation of Georgia, the dispute cannot be resolved through mediation".

Finally, I will mention that The European Court of Justice has granted the legal right to legal protection the status of a general principle of European Community law, and this principle is enshrined in Article 47 of The Charter of Fundamental Rights of the European Union.[27]

The development of mediation within the EU operates on the background of the following legal principles: access to justice for all is a fundamental right enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; The legal right to legal protection is enshrined in Article 47 of the EU Charter of Fundamental Rights. As for the national legislation of Georgia, Article 31 of the Constitution of Georgia regulates procedural rights, according to which the possibility to appeal to the court and, at the same time, the right to a fair, timely hearing is provided. Justice is a feature of mediation.[28]

CONCLUSION

During the amicable dispute resolution process, the parties to the conflict are allowed to regulate the dispute and find the correct solution for the dispute resolution, which will strengthen the personal or business relationship between the parties in the future. Mediation is not only focused on the resolution of the dispute. One of the key functions of a mediator to successfully mediate business disputes is to focus on the interests of the parties and be able to separate them from the positions of the parties.[29] A mediator must be able to remove the emotional

27 Brady A. 2020. Mediation Developments in Civil and Commercial Matters within the European Union. "Arbitration: The International Journal of Arbitration, Mediation and Dispute Management", 86(2), p. 390.

28 Batiashvili, I. (2022). The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), pp. 25-38.

29 *Ibid*.

background in business relations and transform it into an interest-based mediation process. Also, the mediator should create an environment tailored to the clients and be able to identify the main goals. It is a fact that through a properly prepared, neutral third party (mediator), citizens and business representatives are allowed to end expensive civil disputes that have been going on for a long time in court by mutual agreement, quickly, in a short time and with satisfactory results for both parties.

Based on the above, implementing general mediation standards in national law is a big challenge. Standards on applying enforcement and refusal mechanisms in International business disputes are general, vague, and more evaluative. National Legislation should have standards regulating the evaluation of a "serious breach by the mediator of standards applicable to the mediator". Also noteworthy, how will it be asserted that without a breach of standards by the mediator that party would not have entered into the settlement agreement? In my opinion, evaluation should consist of three steps: the evaluation of facts, the evaluation of the process of mediation from beginning to end as a whole process, and the assessment of the separated moments. This is necessary to ensure that no breach of standards by the mediator occurs before the parties enter into a settlement agreement.

The court has the right to refuse to grant a motion for recognition and enforcement of an international mediation settlement, if:

- Obligations stipulated by the international mediation settlement have been fulfilled or are not clear or understandable;
- Satisfaction of the request raised in the motion contradicts the terms of the international mediation settlement;
- There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement.

As we can see, a breach should be "serious," which means that the Supreme Court should have the ability to evaluate and appreciate the severity of the violation. Also, It is doubtful if the regulation on refusal needs an additional general rule when rather rich normative standards for refusal on enforcement of mediation settlements exist.

Noteworthy that the ruling on the recognition and enforcement of the international mediation settlement is final and not subject to appeal.[30] This is beneficial from the view of business entities. It reserves the time, the financial resources, the image of business entities and relations and also plays as a guarantee of not entering the same river after a while.

A party may live in another country, and the benefit or business share (digital asset) inherited from the blockchain may be in a completely different territory, internet space, and from different tech companies. In this hypothetical reality, introducing international mediation will be an effective mechanism.

We can assume that international mediation can be an alternative to legal action in court to settle disagreements and avoid escalations.

In conclusion, mediation is the often-missed effective opportunity!

30 Parliament of Georgia, Civil Procedural Code of Georgia, N1106, 14/11/1997, Seventh Section (9), Chapter XLIV16, Article 363[44]. Decision on recognition and enforcement of international mediation settlement.

BIBLIOGRAPHY

1. Batiashvili, I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), <https://doi.org/10.36475/8.1.6>
2. Batiashvili, I. (2022). The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), <https://doi.org/10.60131/adr.1.2022.6162>
3. Bichia, M. (2021). The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, N3.
4. Bichia, M. (2021). The danger of the privacy "disappearance" during a pandemic in the context of globalization and the grounds for its legitimacy: an institutional analysis. Globalization and Business, 6(11).
5. Tbilisi City Court, N2-4118 / 4363203, 13/12/2021.
6. Holzberg, R. (2013). 10 tips for a successful mediation, Connecticut law tribune, Pullman&Comley.
7. Kandashvili, I. (2023). Negotiation and representation in mediation, house of publication Cezanne.
8. Resolution of United Nations General Assembly, Model law on international commercial conciliation of the united nations commission on international trade law, Annex model law on international commercial conciliation of the united nations commission on international trade law, fifty-seventh session, distr: General, 24 January 2003, A/RES/57/18, article 6. <https://undocs.org/A/RES/57/18> [28.11.2021].
9. Schnabel T. (2019). The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements. Pepperdine Dispute Resolution Law Journal, 19(1).
10. Tsuladze, A. (2017) Comparative Analysis of Georgian Judicial Mediation, Tb., Publishing World of Lawyers.
11. United Nations, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002, New York, 2004, United Nations Publication, Sales No. E.05.V.4, ISBN 92-1-133730-5.
12. United Nations Office at Vienna, A guide to UNCITRAL (basic facts about the United Nations Commission on International Trade Law), English, Publishing and Library Section, January 2013.
13. United Nations General Assembly, Resolution on Model law on international commercial mediation and international settlement agreements resulting from medation of the united nations commission on international law, Seventy-third session, Distr: General, 3 January 2019, A/RES/73/199.
14. Civil Procedure Code of Georgia, 14/11/1997, 1106, Book 79, Section XLIV16.

COMMERCE IN THE SHADOWS: EXPLORING DARK WEB BLACK MARKETS

Anri Nishnianidze

Doctoral Candidate of Law, Grigol Robakidze University, Georgia

ABSTRACT

In the twenty-first century, several negative moments have accompanied many positive technological progress events. With the development of the digital world, criminals with special knowledge – cybercriminals have become active and have developed many means in the depths of cyberspace, with the help of which they achieve their criminal and illegal goals.

The presented paper aims to analyze in detail and in-depth the system and working principles of digital black markets created by cybercriminals on the dark side of the Internet. The paper also looks at what tools and products are available on the digital black market and why digital black markets are hazardous to operate successfully.

The paper analyzes practical cases, legal studies, and other interdisciplinary studies to present the problems in the legal struggle against digital black markets as of the day it was written. The paper's primary purpose is to show why the unimpeded functioning of digital black markets on the dark web is dangerous – both for the ordinary citizen and the state structures.

In the final part of the article, based on the analysis of the processed literature and practical cases, recommendations will be presented, the use of which is of particular importance to make the legal fight against digital black markets successful and to prevent such a dangerous phenomenon as digital black markets from existing in any part of the digital world.

KEYWORDS: Cybercrime, Dark Web, E-Commerce, Darknet, Cybercriminal

INTRODUCTION

Technological progress has made everyday life easier for many people in the twenty-first century. Today, it is easier for people to connect because the development of technology has created many tools that have made it possible to perform previously tricky actions efficiently. One of the best results of progress is the development of the digital world. Today, if a person owns even one electronic device, be it a computer system or a mobile phone, and the device is connected to the Internet, individuals can perform almost any activity without leaving their homes. People use such systems for personal purposes, e.g. Reading an e-book, getting an education, or deepening personal relationships, as well as for other professional or commercial purposes – e.g. Remote work in various fields, be it remote court hearings or lecturing at a university. One of the areas that has developed in the digital world is online stores. At any part of the day, a person can remotely view what products the store offers him, select the desired product, pay the amount electronically, and wait for him to receive the desired item.[1] Of course, such possibilities greatly simplify a person's daily life.

The development of technological progress, as mentioned, has made life easier for many people and created many opportunities. But, as in the case of any progress, in the case of technological progress, along with positive events, many adverse events have become its concomitants, in particular, a new type of criminals – cybercriminals[2] – have appeared in the digital world, whose goal has become to use the opportunities arising from the progress of the digital world to achieve their own criminal goals, e.g. Cyber extortionists,[3] cyber fraudsters,[4] and other kinds of cybercriminals. The mentioned cybercrimes look similar to crimes in the real world; however, in reality, they are entirely different from each other, both in terms of methods and ways of execution.[5]

Most people use computer devices such as digital banks, social platforms, and many other websites and applications for daily activities. However, most of the users do not know that the part of the digital world that they use every day is the smallest and does not even reflect the actual scale of the digital world.[6] When using the Google search engine (or any other traditional search engine), much of the data in cyberspace is not accessible because traditional search engines perform strict filtering so that various types of irrelevant data are not available to everyone.[7] The second part of the digital world, which the everyday ordinary user does not use and does not know, is the deep web,[8] and the part of the deep web where cybercriminals mainly operate is the dark web.[9]

In connecting to the dark web, anonymity, privacy, and other ways are especially protected, so it is challenging to identify the person who uses it. It is because of the mentioned opportunities that the dark web is the best place for cybercriminals and the so-called shelter.[10] It should be noted here that access to the dark web is not only used by cybercriminals. It is used by researchers,[11] and

1 Jain, V., Malviya, B., Arya, S., (2021). An overview of electronic commerce (e-Commerce). *Journal of Contemporary Issues in Business and Government,* 27(3). p. 665.

2 Sabillon, R., Cavaller, V., Cano, J., Serra-Ruiz, J., (2016). Cybercriminals, cyberattacks and cybercrime. *In 2016 IEEE International Conference on Cybercrime and Computer Forensic*. pp. 1-2.

3 Salvi, M.H.U., Kerkar, M.R.V., (2016). Ransomware: A cyber extortion. *Asian Journal For Convergence In Technology,* 2. p. 1.

4 Banerjee, A., Barman, D., Faloutsos, M., Bhuyan, L.N., (2008). Cyber fraud is one typo away. *In IEEE INFOCOM 2008*. p. 66.

5 Wall, D., (2007). Cybercrime: The transformation of crime in the information age. *Polity.* (Vol. 4). p. 31.

6 Ciancaglini, V., Balduzzi, M., McArdle, R., Rösler, M., (2015). the Deep Web. *Trend Micro.* pp. 35-38.

7 Supra.

8 He, B., Patel, M., Zhang, Z., Chang, K.C.C., (2007). Accessing the deep web. *Communications of the ACM,* 50(5). p. 95.

9 Omar, Z.M., Ibrahim, J., (2020). An overview of Darknet, rise and challenges and its assumptions. *Int. J. Comput. Sci. Inf. Technol,* 8. pp. 110-111.

10 Ciancaglini, V., Balduzzi, M., Goncharov, M., McArdle, R., (2013). Deepweb and cybercrime. *Trend Micro report,* 9. pp. 5-6.

11 Dalvi, A., Ankamwar, L., Sargar, O., Kazi, F., Bhirud, S.G., (2021). From Hidden Wiki 2020 to Hidden Wiki 2021: What Dark Web Researchers Comprehend with Tor Directory Services? *In 2021 5th International Conference on Information Systems and Computer Networks*. p. 1.

whistleblowers working in various government agencies so that if the agency violates the laws, they can inform the world about the case.[12] Of course, such actions are essential. However, the fact is that the majority of Dark Web users want to carry out their criminal activities anonymously and achieve specific criminal results.

In the early stages of the development of the digital world, cybercriminals, in the process of carrying out their criminal activities, were mostly in possession of the personal data of ordinary users, whether it was data about bank accounts, personal life data, or other kinds of information.[13] As a result of such criminal activities, which had a daily character, it is logical that cybercriminals accumulated a lot of data that they could no longer use personally, so it was on the agenda for criminals to create a system where they could sell such data or exchange it for other data they wanted. They imitated the so-called real-world black market system, where it is possible to buy any desired means illegally,[14] and cybercriminals in the dark web created a digital black market, the pace and scale of which has exceeded all expectations.[15] As of today, in the digital black market, it is possible to buy any digital or real-life products: a person can buy firearms,[16] drugs,[17] and prohibited pornographic material.[18] The list is not exhaustive – the digital black market offers users much more opportunities than one can imagine.

In this paper, the author will delve deep into the world of the dark web and the digital black market. The analysis will highlight the intricacies of how these markets work and their impact on society. The author will also discuss the dangers that come with the successful functioning of these black markets and why it is crucial to wage an unrelenting struggle against them. The existence of black markets in the digital world poses a significant threat to the safety and security of individuals, businesses, and even governments. Therefore, it is of utmost importance to take appropriate measures to eliminate them once and for all.

In the final part of this article, recommendations to implement to make the fight against cybercriminals successful will be provided. These recommendations will be practical, actionable and aimed at ensuring that the digital world is a safe and secure place for everyone.

The twenty-first century has given humanity many gifts – one of the greatest gifts is the development of the digital world because people's lives have become much easier, and citizens can perform previously unimaginable actions or be associated with particular difficulties. If earlier it was challenging to connect with someone on the other side of the planet, today it is enough for two people to have access to any social network, and they will be in touch with each other in a few seconds. However, as mentioned, there are not only positive moments that accompany progress. In the early stages of the development of the digital world, more people have decided to use cyberspace for criminal purposes rather than to take care of its security. It can be said that cybercriminals have recognized the potential of cyberspace, while security experts have ignored it at the initial stage. This is one of the reasons why digital black markets exist and why it is easier for cybercriminals to engage in criminal activities on the dark web. Nevertheless, giving up is not an option. More people must understand what the dark web is to understand what the digital black market is so that more people are digitally armed so that the fight against cybercriminals becomes

12 Pender, K., Cherkasova, S., Yamaoka-Enkerlin, A., (2019). Compliance and whistleblowing: How technology will replace, empower and change whistleblowers. *In FinTech, Edward Elgar Publishing.* pp. 379-380.

13 Babanina, V., Tkachenko, I., Matiushenko, O., Krutevych, M., (2021). Cybercrime: History of formation, current state and ways of counteraction. *Amazonia Investiga,* 10(38). p.114.

14 Boulding, K.E., (1947). A Note on the Theory of the Black Market. Canadian Journal of Economics and Political Science. *Revue canadienne de economiques et science politique,* 13(1). p. 115.

15 Spagnoletti, P., Ceci, F., Bygstad, B., (2021). Online black-markets: An investigation of a digital infrastructure in the dark. *Information Systems Frontiers.* pp. 1811-1812.

16 Liggett, R., Lee, J.R., Roddy, A.L., Wallin, M.A., (2020). The dark web as a platform for crime: An exploration of illicit drug, firearm, CSAM, and cybercrime markets. *The Palgrave handbook of international cybercrime and cyberdeviance.* p. 94.

17 Supra, p. 97.

18 Supra, p. 104.

stronger and digital black markets disappear from the space of the digital world forever.[19]

1. DARK WEB AND BLACK MARKET

According to specialists in the field, the modern Internet can be likened to an iceberg, with the visible tip representing the part of the Internet that everyday users have access to and use on a regular basis.[20] However, this visible part only accounts for a small fraction of the total information available on the Internet. This is because traditional search engines like Google, Yahoo, and Bing are designed to filter out a large portion of the information available to ordinary users.[21]

In reality, the vast majority of the Internet lies beneath the surface, in what is commonly referred to as the "deep web". This includes everything from private databases and password-protected websites to academic research and government records. However, there is also a subset of the deep web known as the "dark web", which is intentionally hidden and requires special software to access.[22] Within the dark web, there exists a subset known as the "Black Market". This is a hidden network of websites where users can buy and sell illegal goods and services, such as drugs, weapons, and stolen personal information. These sites are often accessed using specialized software that allows users to browse anonymously and avoid detection.

It is important to note that while the terms "deep web", "dark web", and "Black Market" are often used interchangeably, they actually refer to distinct parts of the Internet with different levels of accessibility and content. Understanding these terms is crucial for anyone who wants to navigate the Internet safely and responsibly, as it can help users avoid potentially dangerous or illegal activities.

1.1. Dark Web

The deep web is a vast and complex network that comprises all the information on the internet that is not indexed by conventional search engines. This includes various types of online content that are not easily accessible to the average user. However, the dark web, a segment of the deep web, is notorious for being a hub for cybercriminals.[23] The dark web is home to a range of confidential data, password-protected websites, and databases that are hidden from the public eye. Unfortunately, the dark web has become increasingly popular among cybercriminals, making it a significant cybersecurity threat. Therefore, taking necessary precautions while accessing the deep and dark web is essential to avoid any potential risks. It is where malicious users can conduct illegal activities such as trading stolen data, selling illegal goods, and planning cyberattacks. On the dark web, it is possible to find data that cybercriminals have illegally obtained and distributed e.g.

a) In 2019, cyber attackers spread the personal data of users of one of the banking systems of the Cayman Islands.[24]

b) In 2020, the personal data of the population of Georgia, which cybercriminals obtained by attacking the database of personal data protected in the Central Election Commission, was distributed.[25]

c) In 2021, cybercriminals spread the personal data of Washington Metropolitan Police officers.[26]

19 Sviatun, O., Goncharuk, O., Roman, C., Kuzmenko, O., Kozych, I.V., (2021). Combating cybercrime: economic and legal aspects. *WSEAS Transactions on Business and Economics,* 18. pp. 751-752.

20 Kavallieros, D., Myttas, D., Kermitsis, E., Lissaris, E., Giataganas, G., Darra, E., (2021). Understanding the dark web. *Dark web investigation.* p. 6.

21 Supra, p. 8.

22 Finklea, K.M., (2015). Dark web. *Congressional Research Service*. p. 2.

23 Supra, pp. 1-3.

24 BBC News. 'Cayman National Suffers Manx Bank 'Data Hack' [Online] Available at: <https://www.bbc.com/news/world-europe-isle-of-man-50475734> [Last Accessed: June 11, 2024].

25 Cimpanu C., Personal Details for the Entire Country of Georgia Published Online [Online] Available at: <https://www.zdnet.com/article/personal-details-for-the-entire-country-of-georgia-published-online> [Last Accessed: June 11, 2024].

26 Rose R., LeBlanc P. and Fung B., DC Police Personnel

One cannot rely on traditional web browsers like Google Chrome, Firefox, or Microsoft Edge to access the dark web. Instead, they must use specialized software that provides high anonymity and security. One such software is Tor (The Onion Router), an open-source and free-to-use software that allows users to connect to the dark web securely and anonymously. Essentially, Tor routes internet traffic through several different servers worldwide, making it difficult for anyone to trace a person's online activity or physical location. Moreover, Tor provides access to hidden websites that cannot be found through traditional search engines like Google or Bing. However, it's important to note that the dark web can be dangerous, and users must exercise caution while browsing it. Several illegal activities take place on the dark web, including drug trafficking, human trafficking, and cybercrime. Therefore, users must be careful while accessing the dark web and avoid clicking on suspicious links or downloading files from unknown sources. Additionally, it's recommended to use a VPN (Virtual Private Network) along with Tor to further enhance your anonymity and protect your privacy. By using Tor and following safe browsing practices, one can access the dark web and explore its content without compromising their security or privacy.[27]

The software mentioned in the text is designed to give users anonymity when they connect to the dark web. This is because anonymity is fundamental to the dark web's existence. However, even users who are well-versed in security protocols are aware that relying solely on this software may not be enough to guarantee their anonymity. As a result, many users employ additional security measures to further reduce the risk of their anonymity being compromised and their identity being exposed.[28]

Despite the risks involved, the dark web remains a popular destination for cybercriminals due to its anonymity and lack of oversight. This has led to the development of a thriving digital black market, where users can buy and sell illegal goods and services without fear of being caught by law enforcement agencies.[29]

1.2. The Digital Black Market

When discussing the topic of black markets, many people tend to conjure up images of shady street corners or dimly lit alleyways where individuals can purchase illegal or hard-to-find goods. However, the reality of black markets in the modern world is vastly different, particularly when it comes to the digital realm. Digital black markets offer a far greater range of products and services to consumers than their real-world counterparts ever could, and as such, it has become crucial to examine the extent and significance of these markets. To fully understand the implications of digital black markets, it is important to analyze their scope, how they operate, and their potential consequences on society. By doing so, citizens can better equip themselves to combat the negative effects that these markets can have and ensure that our society remains safe and secure in the digital age. Furthermore, it is important to investigate the motivations of those who engage in the digital black market and the methods they use to navigate these online spaces. This can help us to better understand the factors that contribute to the growth of these markets and how people can work to prevent them from becoming a more significant threat in the future.

In the early 2000s, the concept of a digital black market began to emerge, driven by increased internet use for commerce. However, it wasn't until 2011 that the black market truly reached new

Files Obtained by Hackers in Recent Ransomware Attack, Acting Police Chief Says [Online] Available at: <https://www.cnn.com/2021/04/29/politics/dc-police-ransomware-attack-personnel-files/index.html> [Last Accessed: June 11, 2024].

27 Macrina, A., Phetteplace, E., (2015). The Tor browser and intellectual freedom in the digital age. *Reference and User Services Quarterly,* 54(4). pp. 18-19.

28 Jadoon, A.K., Iqbal, W., Amjad, M.F., Afzal, H., Bangash, Y.A., (2019). Forensic analysis of Tor browser: a case study for privacy and anonymity on the web. *Forensic science international,* 299. p. 3.

29 Zhang, H., Zou, F., (2020). A survey of the dark web and dark market research. *In 2020 IEEE 6th international conference on computer and communications*. p. 1695.

heights with the launch of Silk Road. This online marketplace allowed users to anonymously buy and sell illegal goods and services, including drugs, weapons, and stolen personal information.

Silk Road quickly gained notoriety and became a hub for criminal activity. It operated on the dark web, a part of the internet that is not easily accessible to the general public and is often used for illicit purposes. Despite attempts by law enforcement to shut it down, Silk Road continued to thrive, earning an estimated 183 million USD during its period of operation.[30]

In 2013, the Federal Bureau of Investigation (FBI) finally managed to shut down Silk Road and arrest its founder, Ross Ulbricht.[31] This was a significant victory for law enforcement, but it didn't take long for other cybercriminals to see the financial potential of running a digital black market.

Soon after Silk Road's demise, Silk Road 2.0 emerged, promising to be even bigger and better than its predecessor. However, its functionality was short-lived, as it was also shut down by law enforcement soon after its launch.[32] Nevertheless, the success of the Silk Road had already set a precedent, and other black markets such as Hansa[33] and Alpha Bay[34] surfaced to take its place.

The rise of digital black markets has posed a significant challenge to law enforcement agencies worldwide in recent years. One of the key factors driving the growth of these markets is the emergence of cryptocurrency as a payment method. Cryptocurrency, by its very nature, is designed to be anonymous and decentralized, making it an ideal payment method for people who want to remain hidden while engaging in illegal activities.

When a person purchases a product from a digital black market using cryptocurrency, they can do so without leaving a trace. Authorities can easily trace traditional payment methods like credit cards or bank transfers, but cryptocurrency transactions are much harder to track. This makes it difficult for law enforcement agencies to identify the seller and the buyer,[35] allowing these markets to operate with impunity for extended periods.

While it is technically possible to trace cryptocurrency transactions, doing so is time-consuming and labour-intensive, requiring specialized knowledge and resources. As a result, individual buyers who use cryptocurrency to purchase illegal goods or services often go unpunished, and digital black markets can continue to operate for years before they are finally shut down by law enforcement agencies.[36]

The use of cryptocurrency in digital black markets has raised many concerns among governments and policymakers, who worry that it will make it much harder to combat illegal activities such as drug trafficking, money laundering, and terrorism financing. Some countries have taken steps to regulate cryptocurrency more closely, while others have banned it outright.

Despite these efforts, digital black markets continue to thrive, and the use of cryptocurrency as a payment method is likely to remain a significant challenge for law enforcement agencies in the years to come. As new forms of cryptocurrency emerge and technology evolves, tracking transactions will be even harder, making it easier for criminals to engage in illegal activities.

The rise of cryptocurrency has made it easier for people to engage in black market trading by providing an anonymous payment method that is difficult to trace. While it is possible to track cryptocurrency transactions, doing so is time-consum-

30 Mullin, J., (2015). Silk Road prosecutors complete the bizarre DPR murder-for-hire story. *Ars Technica.* pp. 1-3.

31 Minnaar, A., (2017). Online'underground'marketplaces for illicit drugs: the prototype case of the dark web website'Silk Road. *Acta Criminologica: African Journal of Criminology & Victimology, 30(1).* p. 30.

32 Dolliver, D.S., (2015). Evaluating drug trafficking on the Tor Network: Silk Road 2, the sequel. *International Journal of Drug Policy, 26(11).* p. 1115.

33 Tavabi, N., Bartley, N., Abeliuk, A., Soni, S., Ferrara, E., Lerman, K., (2019). Characterizing activity on the deep and dark web. *In Companion proceedings of the 2019 world wide web conference*. p. 209.

34 Baravalle, A., Sin Wee Lee, (2018). Dark web markets: Turning the lights on AlphaBqay. *In Web Information Systems Engineering–WISE 2018, Springer.* p. 503.

35 Mukhopadhyay, U., Skjellum, A., Hambolu, O., Oakley, J., Yu, L., Brooks, R., (2016). A brief survey of cryptocurrency systems. *In 2016 14th annual conference on privacy, security and trust.* p. 745.

36 Dyson, S., Buchanan, W.J., Bell, L., (2019). The challenges of investigating cryptocurrencies and blockchain related crime. *arXiv, 1907.12221.* pp. 1-2.

ing and resource-intensive, often yielding little results. As a result, digital black markets continue to operate, posing a significant challenge to law enforcement agencies worldwide.

It's important to note that the digital black market is not limited to just those abovementioned platforms. Countless other black markets exist on the dark web.[37] To help readers understand the breadth of this underground economy, it's important to look beyond just listing the marketplaces themselves. It's also important to examine the available products and services on these platforms. From stolen personal information, counterfeit goods, and illicit drugs to hacking services, malware, and firearms, the digital black market offers consumers a wide range of illegal products and services. By understanding this market's scope, individuals can protect themselves and their personal information online.

2. PRODUCTS ON THE DIGITAL BLACK MARKET

The preceding sections of the article have extensively discussed the topic of the digital black market and its exponential growth. It has been emphasized multiple times that the digital black market has become a massive enterprise, and its operations have reached unprecedented dimensions. To fully comprehend the extent of the dangers posed by the digital black market and understand why it is challenging to combat it, it is essential to have a clear understanding of the various products and services readily available on digital black market platforms. The digital black market is a clandestine platform that facilitates the trading of illicit goods and services, which include but are not limited to drugs, weapons, counterfeit products, stolen data, and hacking tools. The platform also offers various services like money laundering, identity theft, and hacking. The anonymity provided by the platform enables the buyers and sellers to operate with impunity, making it difficult for law enforcement agencies to track down the perpetrators. It is crucial to have a comprehensive knowledge of the workings of the digital black market and the range of illicit goods and services traded on these platforms. The digital black market is a hub for cybercriminals, who use it to sell and purchase illegal items, significantly contributing to the global cybercrime economy. The products and services traded on these platforms are harmful to individuals and pose significant threats to national security. For instance, cybercriminals can use the data stolen from individuals to launch targeted attacks on government agencies or corporations, leading to significant financial losses and reputational damage. Therefore, it is crucial to have a comprehensive understanding of the workings of the digital black market and the range of illicit goods and services traded on these platforms to combat this growing threat.[38]

2.1. Drugs

The digital black market is primarily fueled by the demand for drugs, making it one of the most common products found there. Every type of drug imaginable, including those that have never been heard of before, can be found in this unregulated market. Some of these drugs are newly invented and created by amateur chemists in their basements.[39] This widespread availability of drugs poses a significant problem for many countries, as cybercriminals operate the buying and selling process without any regulation or control.[40]

In the process of using social networks, almost every user has received a message from a stranger offering him many types of drugs, be it

37 Kermitsis, E., Kavallieros, D., Myttas, D., Lissaris, E., Giataganas, G., (2021). Dark web markets. *Dark Web Investigation.* pp. 88-89.

38 Lacson, W., Jones, B., (2016). The 21st century darknet market: lessons from the fall of Silk Road. *International Journal of Cyber Criminology, 10(1).* p. 40.

39 Rhumorbarbe, D., Staehli, L., Broséus, J., Rossy, Q., Esseiva, P., (2016). Buying drugs on a Darknet market: A better deal? Studying the online illicit drug market through the analysis of digital, physical and chemical data. *Forensic science international,* 267. pp. 173-175.

40 Buxton, J., Bingham, T., (2015). The rise and challenge of dark net drug markets. *Policy brief, 7(2).* p. 3.

cocaine, heroin, MDMA or any other. For this, the user only needs to transfer the amount of money to the designated account of a "friendly stranger", indicate in which city he lives, and wait for instructions on where he can take the drug (often a similar place is a cemetery, forest and other uninhabited areas).[41]

Illegal drug trafficking on the internet is a serious problem that has been plaguing the world for quite some time now. The dark web is the go-to place for digital black market narcotics syndicates as it provides them with complete anonymity, making it almost impossible for law enforcement agencies to identify and prosecute them. These cybercriminals use various methods to conceal their identity and location so that they cannot be traced back to their illegal activities. The reason why it is so difficult to prevent the activities of these cybercriminals is due to the nature of the dark web. Accessing the dark web without special software that masks your IP address and encrypts your communication is almost impossible. This makes it very difficult for law enforcement agencies to monitor or intercept communications between the buyers and sellers of illegal drugs.[42]

Moreover, if a law enforcement representative were to purchase drugs during a special police operation, they would not be able to identify the seller during the purchase process. This is because the seller would be using sophisticated methods to conceal their identity, such as using cryptocurrency to receive payment and shipping the drugs through anonymous postal services. These methods make it almost impossible for law enforcement agencies to track down the seller.

In the world of the dark web, the absence of a centralized system or empire of digital black markets poses a significant challenge to the state's power structures. With many markets operating independently, the government's task of controlling illicit activities becomes increasingly difficult. Even if the government successfully shuts down one digital black market, it does not guarantee that the drug trade in the dark web will cease entirely. For instance, even after the infamous "Silk Road" was taken down, the drug trade continued to thrive on the dark web through other independent markets. This decentralized nature of the dark web's digital black markets makes it challenging for authorities to curb illegal activities effectively.[43]

The drug trade in the digital black market, like the other types of trade presented in this chapter, due to the possibilities of the digital world, is an event of an international nature because a person from any country can purchase the desired drug, both in his native country and in any other foreign country.[44]

2.2. Illegal Arms

Firearms have been around for centuries, and with them, the illegal trade of these lethal weapons. This illegal market has been present since the early days of firearms, but it has become more sophisticated and widespread over time. The twentieth century was a turning point for the illegal trade in firearms, as it reached exceptional heights. This was partly due to the proliferation of guns and ammunition after World War II, which led to the establishment of large-scale smuggling networks across the globe. Moreover, the beginning of the twenty-first century saw a continuation of this trend, with the emergence of new technologies and the increasing availability of weapons in conflict zones.[45] Despite the efforts of governments and international organizations to curb this trade, it remains a persistent and dangerous problem that threatens public safety and security.

41 Demant, J., Bakken, S.A., Oksanen, A., Gunnlaugsson, H., (2019). Drug dealing on Facebook, Snapchat and Instagram: A qualitative analysis of novel drug markets in the Nordic countries. *Drug and alcohol review, 38(4).* p. 380.

42 Jardine, E., (2015). The Dark Web dilemma: Tor, anonymity and online policing. *Global Commission on Internet Governance Paper Series, (21).* pp. 2-3.

43 Spalevic, Z., Ilic, M., (2017). The use of dark web for the purpose of illegal activity spreading. *Ekonomika, 63(1).* p. 76.

44 Holland, B.J., (2020). Transnational cybercrime: The dark web. *Encyclopedia of Criminal Activities and the Deep Web*. p. 109.

45 Stohl, R., Grillot, S., (2009). *The international arms trade. Polity, (Vol.7).* pp. 15-16.

As the digital world continues to evolve, cybercrime syndicates have found new opportunities to expand their illicit activities. One of these opportunities is the digital black market, where not only drugs but also firearms can be sold. This has made their business process much easier, as they no longer have to meet with the buyer in the real world, thus reducing the risks associated with such transactions. Today, it is possible to purchase firearms in both individual and bulk quantities, posing unimaginable dangers for civilians.[46] The digital black market offers a wide range of firearms, from simple pistols to weapons of mass destruction, along with information about them or their parts.

This alarming trend has raised concerns among governments and ordinary citizens, as the availability of such dangerous weapons in the digital black market seriously threatens public safety and security and calls for urgent action to curb this growing problem.[47]

2.3. Personal and Confidential Information

In today's world, people rely heavily on electronic devices for both personal and professional use. They use these devices to store and access various personal information, ranging from photographs and videos to banking information and social media accounts. Additionally, many individuals store sensitive work-related data on their devices, such as confidential documents and intellectual property, intending to access these materials from the comfort of their homes.

However, despite the convenience and efficiency of these devices, it is crucial to recognize that there is no such thing as absolute security in the digital world.[48] Hackers and cybercriminals are always on the lookout for vulnerabilities in electronic devices and software, and they continue to develop new and sophisticated methods to gain unauthorized access to personal and confidential information.

Furthermore, even if an individual takes all the necessary precautions to secure their device, there is always a risk of physical theft or damage to the device, which can result in the loss of valuable data. Moreover, many people also tend to overlook the risk of unintentionally sharing sensitive information through their digital activities, such as downloading apps or opening email attachments from untrusted sources.

Therefore, it is essential to acknowledge these risks and take appropriate measures to protect personal and confidential information. This includes implementing strong passwords, using two-factor authentication, regularly updating software and security settings, and being vigilant about phishing scams and other forms of cyber-attacks.

While electronic devices have undoubtedly revolutionized the way people live and work, it is critical to recognize that they also pose significant security risks. By being proactive and taking the necessary steps to protect personal and confidential information, individuals can enjoy the benefits of technology while minimizing the associated risks.

The paper discusses a specific type of cybercriminals who operate in the digital black market. Unlike traditional criminals who engage in physical activities to obtain drugs and weapons, these cybercriminals do not have to leave their comfort zone to achieve their goals. However, it must be emphasized that an ordinary person cannot carry out these actions, as it requires special knowledge and equipment to gain access to personal or confidential information from another person's computer or device.[49]

The subsection of the paper will delve deeper

46 Jiang, C., Foye, J., Broadhurst, R., Ball, M., (2021). Illicit firearms and other weapons on darknet markets. *Trends and Issues in Crime and Criminal Justice, (622).* pp. 3-4.

47 Chen, H., Chen, H., (2012). Weapons of Mass Destruction (WMD) on Dark Web. *Dark Web: Exploring and Data Mining the Dark Side of the Web.* pp. 341-342.

48 Trabelsi, S., (2019). Monitoring leaked confidential data. *In 2019 10th IFIP International Conference on New Technologies, Mobility and Security.* p. 1.

49 Belmabrouk, K., (2023). Cyber Criminals and Data Privacy Measures. *In Contemporary Challenges for Cyber Security and Data Privacy, IGI Global.* p. 199.

into the techniques these cybercriminals use to infiltrate digital systems. They might use phishing scams or malware attacks to access sensitive information, which they can auction off on digital black markets. These markets offer a platform for cybercriminals to sell their ill-gotten gains to the highest bidder.[50]

The digital black market has become a lucrative business for cybercriminals specializing in stealing and selling personal information, credit card details, and other confidential data. They can sell this information to other criminals who use it to commit fraud, identity theft, or other illegal activities.

Trade-in personal information is one of the most significant threats law enforcement agencies face today. The danger lies not in the information itself but in the potential consequences of its misuse. Personal information can be extremely harmful to one's dignity and reputation, especially when it falls into the wrong hands. The extent of the damage, however, depends on who the person is and what information is obtained.[51]

For instance, if cybercriminals gain access to sensitive information about the head of a country's intelligence service, they could potentially blackmail him into doing something against his principles or the interests of his country. The implications of such an action could be catastrophic since the intelligence chief is responsible for safeguarding the country's national security. If he were to succumb to the cybercriminals' demands, the consequences could be severe for him and the entire nation.

Cybercriminals' possession of state confidential material can have serious consequences. Such material may contain information crucial for the state's functioning, which can significantly damage the country's security and interests if it falls into the wrong hands. In addition to state secrets, such material may contain personal data of individuals employed in various state structures. The release of such data can put their lives in danger, making them vulnerable to blackmail and other forms of exploitation.[52]

Government agencies and employees need to be aware of the risks associated with cyberattacks, including phishing and social engineering scams, which are often used by cybercriminals to gain access to sensitive information. Regular training and awareness programs can help to educate employees about these risks and help them to identify and report any suspicious activity.

It is important to note that cybercriminals are not necessarily interested in the content of the documents they steal. Instead, their primary objective is to obtain such material and then advertise the fact that they have it. They often wait for a buyer to come forward who is willing to pay a high price for the information.[53] This makes it crucial for the government to take necessary measures to protect its confidential material and ensure that it is not compromised by cybercriminals. This includes implementing robust security measures, such as encryption and access controls, to prevent unauthorized access to sensitive data.

2.4. Counterfeit Products

It's important to know that digital black market sites exist where counterfeit products can be purchased. These sites offer a vast range of fake items, including electronic devices, watches, lighters, and other goods with real-world value. Unfortunately, individuals who purchase such items from the digital black market may mistake them

50 Pantelis, G., Petrou, P., Karagiorgou, S., Alexandrou, D., (2021). On strengthening smes and mes threat intelligence and awareness by identifying data breaches, stolen credentials and illegal activities on the dark web. *In Proceedings of the 16th International Conference on Availability, Reliability and Security.* p. 3.

51 Al Amro, S., (2020). How safe is governmental infrastructure: A cyber extortion and increasing ransomware attacks perspective. *International Journal of Computer Science and Information Security (IJCSIS), 18(6).* p. 81.

52 Sharma, N., Oriaku, E.A., Oriaku, N., (2020). Cost and effects of data breaches, precautions, and disclosure laws. *International Journal of Emerging Trends in Social Sciences, 8(1).* p. 39.

53 Howell, C.J., Fisher, T., Muniz, C.N., Maimon, D., Rotzinger, Y., (2023). A Depiction and Classification of the Stolen Data Market Ecosystem and Comprising Darknet Markets: A Multidisciplinary Approach. *Journal of Contemporary Criminal Justice, 39(2).* p. 299.

for authentic items in the real world. In many cases, the forgeries are so well-made that even a seasoned user might find it challenging to differentiate between the fake and the genuine piece.[54] It is crucial to exercise caution and verify the authenticity of any item you intend to purchase, especially if it is from an online source.

Counterfeit products available on digital black market pages have the potential to cause significant harm, not just to individuals but to entire states. While some fake products may only be harmful to individuals, other counterfeit items like fake currencies,[55] passports, and other documents can be bought and sold on the pages of the digital black market.[56] Cybercriminals with unique knowledge can use these fake documents to penetrate various state systems, making it difficult for specific state agencies to determine which documents are real and which are fake. In fact, after verifying the fake passport data in the electronic database, the agencies may receive information that the submitted passport data is stored in the database and, therefore, is real.[57] This poses a significant threat to national security and requires the attention and action of law enforcement agencies to curb the activities of cyber criminals and crack down on the digital black market.

It can be quite challenging to determine the potential consequences of engaging in activities that involve fake passports, forged documents, and counterfeit money banknotes. The outcome of such actions is highly dependent on the specific case at hand. For instance, the severity of the consequences can vary greatly based on who is using the fake passport and for what purpose. If a person is using a fake passport to enter a desired country, it could lead to issues such as immigration problems or even legal troubles. Similarly, the consequences of using forged documents to access a protected building can range from minor security breaches to serious security threats.

When it comes to counterfeit money banknotes, the outcome can depend on several factors. The amount of money being counterfeited plays a significant role in determining the potential consequences. Counterfeiting a small amount of money may not have a significant impact on the economy of a state. However, if a large number of fake banknotes are being used, it can cause irreparable damage to the economy. This is because counterfeit money can lead to inflation, which can result in the devaluation of the currency and a decline in the purchasing power of the citizens. It can also lead to a loss of confidence in the financial system, which can have a ripple effect on the economy as a whole.

2.5. Other Types of Services on the Digital Black Market

Upon careful analysis of the products presented in this particular chapter of the article, the sheer extent of the digital black market becomes abundantly clear to the researcher. However, it is vital to note that this particular market is not limited to only the products mentioned here. There are many other types of services and products available in the digital black market, including but not limited to:

A. Cybercrime has become a common phenomenon in today's fast-paced digital world. It is no longer uncommon for users to hire the services of cybercriminals to achieve their desired objectives. For instance, a user may hire a cybercriminal to break into another person's computer device to obtain confidential information or acquire a large company's sensitive data. This can be done through various means, such as hacking, phishing, social engineering, or other cyber-attack forms. Cybercrime is a serious offence and can lead to grave consequences. Therefore, users need to be cautious and take necessary measures to protect themselves and their organizations from cyber threats.[58]

54 Chaudhry, P.E., (2017). The looming shadow of illicit trade on the Internet. *Business Horizons,* 60(1). p. 81.

55 Spalevic, Z., Ilic, M., (2017). The use of dark web for the purpose of illegal activity spreading. *Ekonomika,* 63(1). p. 78.

56 Vargas, V.M., (2019). The new economic good: Your own personal data. An integrative analysis of the Dark Web. *In Proceedings of the International Conference on Business Excellence,* Vol. 13, No. 1. p. 1221.

57 Zhang, Y., Xiao, Y., Ghaboosi, K., Zhang, J., Deng, H., (2012). A survey of cyber crimes. *Security and Communication Networks, 5(4).* p. 423.

58 Manky, D., (2013). Cybercrime as a service: a very

B. The user is presented with various options for obtaining hacking software, which can be used to achieve specific objectives. However, it is important to understand that these programs are not authorized by law and using them can lead to severe legal consequences. Additionally, the use of such software can pose a significant risk to the security of the user's computer system and personal data.[59]

C. The deep web markets are notorious for being a hub of illegal activities. In these markets, users can access a wide range of illicit goods and services, including drugs, fake IDs, hacking tools, and more. Shockingly, some of these markets even offer the service of hiring an assassin to carry out a murder. This dangerous and illegal activity is highly condemned by society and law enforcement agencies worldwide. It is important to stay away from such activities as they can lead to severe consequences and put one's life at risk.[60]

D. In the deep web, individuals with malicious intent can purchase access from cybercriminals to gain unauthorized access to cameras to monitor people illegally. This activity seriously violates privacy and security measures to protect individuals and their personal information. The perpetrators of such crimes use advanced hacking techniques to bypass security systems and gain access to cameras, which can be located in private homes, businesses, or other public places. The consequences of such actions can be severe, including identity theft, blackmail, and other forms of cybercrime. Individuals and organizations need to take proactive steps to protect their privacy and security online, including using strong passwords, regularly updating security software, and being vigilant about suspicious activity.[61]

E. It is possible to find a wide range of illegal services and products on the deep web, including the ability to hire individuals with specialized knowledge to assist with money laundering. These individuals typically operate under the radar, using cryptocurrencies to avoid detection and maintain anonymity. With their expertise in the field, they can help clients navigate the complex world of financial crime, offering advice on how to launder money safely and effectively. This is just one of many illegal services that can be found on the deep web, making it a dangerous and illicit place to explore.[62]

The digital black market has been growing at an unprecedented rate in recent years, with its vast scale and far-reaching operations expanding every year. The idea of a cyber black market may have started small, but with the growing consumer demand for illegal goods and services, it has become a lucrative venture for cybercriminals to exploit. Today, the digital black market has become a hub for the buying and selling of all kinds of illicit products, including drugs, weapons, counterfeit money, and stolen personal information. The increasing accessibility of the internet and the rise of cryptocurrency have made it easier for cybercriminals to operate anonymously and evade law enforcement agencies. As a result, the digital black market is now a major threat to online security and a challenge for law enforcement agencies worldwide.

3. DIGITAL BLACK MARKET TRADING AND CONSUMERS

3.1. Trading in the Digital Black Market

In the previous chapter of the paper, a comprehensive analysis was presented on the various products and types of services that exist in the

modern business. *Computer Fraud & Security,* 2013(6). p. 9.

59 Basheer, R., Alkhatib, B., (2021). Threats from the dark: A review over dark web investigation research for cyber threat intelligence. *Journal of Computer Networks and Communications,* 2021. p. 3.

60 Akintaro, M., Pare, T., Dissanayaka, A.M., (2019). Darknet and black market activities against the cybersecurity: a survey. *In The Midwest Instruction and Computing Symposium, North Dakota State University, Fargo,* ND. p. 5.

61 Jones, A.S., Gagneja, K., (2016). Preventing covert webcam hacking in the civilian and governmental sectors. *In 2016 International Conference on Computational Science and Computational Intelligence.* p. 993.

62 De Sanctis, F.M., (2023). Cyber Risks, Dark Web, and Money Laundering. *Regulating Cyber Technologies: Privacy Vs Security*. p. 283.

digital black market. However, this analysis raises a completely logical question as to how cybercriminals can continue to carry out their criminal activities and why it is so challenging to eliminate their operations.[63] As mentioned, technology is advancing at an unprecedented pace, and many opportunities are becoming available not only to ordinary citizens but also to cybercriminals. This means that these criminals are constantly adapting and improving their tactics to evade detection and continue their illegal activities. Additionally, the anonymity provided by the internet and the ease of communication and exchange of information has made it difficult for law enforcement agencies to track and apprehend cybercriminals. As a result, it becomes increasingly important to develop more advanced and effective strategies to combat cybercrime.

In the world of cybercrime, achieving complete anonymity is one of the primary objectives for criminals to continue their illegal activities. Cybercriminals use various software and tools to hide their identities, making it challenging for law enforcement agencies to track them down. But it's not just about identifying the culprit; determining their physical location and the location of the digital black market servers is equally challenging.[64] The digital black market is often spread across multiple countries, with servers located in one country, cybercriminals in another, and users in a different country altogether. This complex web of operations makes it nearly impossible to track down the criminals involved.

As opposed to traditional online shopping, where customers are required to provide their personal information,[65] in the digital black market, both the seller and the buyer use only pseudonyms, and no personal information is collected.[66] This anonymity provides a safe haven for cybercriminals to operate without being detected. However, the question arises as to how financial transactions are made in such an environment. While personal information is not collected, financial transactions still take place. Cybercriminals use various means to transfer funds, such as digital currencies, which are difficult to trace. Using digital currencies allows cybercriminals to operate without leaving a paper trail, making it challenging for law enforcement agencies to track financial transactions. Furthermore, cybercriminals often use money laundering techniques to make it even more difficult to trace transactions. This complex system of operations is designed to make it extremely difficult to detect and prosecute cybercriminals.

In the modern era, one of the most rapidly developing technologies is that of cryptocurrencies. Cryptocurrencies are digital currencies that can be used by anyone.[67] Unlike traditional bank payments, where a person typically uses a plastic card registered in their name, cryptocurrencies offer a level of anonymity and security that many find appealing.

When using a cryptocurrency, a person does not need to identify themselves, unlike traditional banking methods where personal data is recorded. During a cryptocurrency transfer, both the sender and the recipient can remain completely anonymous.[68] While this anonymity is attractive for many, it also raises questions about how buyers can be protected from fraud and scams.

On the digital black market, groups of individuals operate with their own "wallets" in pursuit of their goals.[69] To purchase a product, a user does not directly send payment to the seller. Instead,

63 Ablon, L., Libicki, M., (2015). Hacker's Bazaar: The markets for cybercrime tools and stolen data. *Def. Counsel,* 82. p. 143.

64 Biddle, P., England, P., Peinado, M., Willman, B., (2002). The Darknet and the future of content distribution. *In ACM Workshop on digital rights management,* Vol. 6. p. 54.

65 Nanehkaran, Y.A., (2013). An introduction to electronic commerce. *International journal of scientific & technology research,* 2(4). p. 190.

66 Hämäläinen, L., (2019). User names of illegal drug vendors on a darknet cryptomarket. *Onoma,* 50. pp. 62-63.

67 Mukhopadhyay, U., Skjellum, A., Hambolu, O., Oakley, J., Yu, L., Brooks, R., (2016). A brief survey of cryptocurrency systems. *In 2016 14th annual conference on privacy, security and trust.* p. 745.

68 Tewari, S.H., (2020). Abuses of cryptocurrency in dark web and ways to regulate them. *SSRN 3794374*. p. 3.

69 White, R., Kakkar, P.V., Chou, V., (2019). Prosecuting darknet marketplaces: Challenges and approaches. *Dep't of Just. J. Fed. L. & Prac.,* 67. pp. 65-66.

the payment is made to a third-party account. This third party acts as an intermediary between the buyer and seller, ensuring that the transaction is safe and secure. Once the customer receives the product and confirms that it is what they ordered, the third party credits the seller's account.[70] This system provides a layer of protection for users, eliminating the fear of transferring money and not receiving the desired product.

While this system may create some difficulties for cybercriminals, it ultimately benefits users by increasing the number of people willing to participate in the digital black market. Although the payment process has become more complex, introducing this intermediary system has helped reduce fraudulent activities and increase the trust between buyers and sellers.

It is worth noting that introducing this intermediary system has made the payment process more secure and reliable, but it has also led to an increase in the number of users on the digital black market. This is because people who were previously hesitant to engage in online transactions due to the fear of being scammed can now rely on a third party to ensure the safety of their transactions.

In conclusion, while the payment process on the digital black market has become more complicated, introducing this intermediary system has helped protect users' interests and increase their confidence in online transactions. Despite the challenges that come with operating in the digital black market, the use of intermediaries has made it a safer and more reliable space for buyers and sellers alike.

3.2. Digital Black Market Users

In today's digital age, it is becoming increasingly important to identify who is connected to the digital black market. However, when it comes to digital black market users, no clear-cut profile can be used to identify them. This is because the existing theories in the science of criminology around the profile of criminals are not sufficient to respond to the challenges posed by the development of the digital world.[71] It is widely accepted among criminological scientists that a new type of criminal has emerged in cyberspace, which does not fit the current criminal profiles in the science of criminology.

Unlike the members of criminal syndicates in the real world, a member of a criminal syndicate in the digital world could be anyone. Cybercriminals may not fit a particular age group, nationality, gender, or origin. They could be simple, ordinary citizens who interact with society daily. This makes it impossible to determine who can be a cybercriminal.[72]

It is important to understand that the digital world has opened up a new avenue for criminal activities, and it is difficult to predict who would be attracted to this illegal activity. The anonymity offered by the internet can make it easier for people to engage in criminal activities without being caught. Some people may even be unaware they are involved in illegal activities when browsing the digital black market.

Therefore, law enforcement agencies must stay up-to-date with the latest trends in cybercrime and work towards developing a comprehensive understanding of the digital black market. This can help them identify and prevent criminal activities in the digital world and protect innocent citizens from the harms of cybercrime.

The digital black market is a notorious platform where individuals can purchase products or services that are not legally available. Those who enter this market usually have a variety of motivations, with the most common being criminal goals. These goals may include the acquisition of illegal substances, weapons, and other prohibited items that are not readily available through traditional channels.[73]

70 Evangelista, A., Allodi, L., Cremonini, M., (2018). Darknet Markets: Competitive Strategies in the Underground of Illicit Goods. *The Eindhoven University of Technology.* pp. 13-14.

71 Jaishankar, K., (2018). Cyber criminology as an academic discipline: history, contribution and impact. *International Journal of Cyber Criminology,* 12(1). p. 1.

72 Kwan, L., Ray, P., Stephens, G., (2008). Towards a methodology for profiling cyber criminals. *In Proceedings of the 41st Annual Hawaii International Conference on System Sciences.* p. 264.

73 Wang, M., Wang, X., Shi, J., Tan, Q., Gao, Y., Chen,

The one type of consumer motivation refers to individuals driven by specific goals that may not align with societal norms and values. Such buyers aim to purchase products that can potentially harm society or state structures. For instance, extremists who gather around a particular ideology may seek to acquire firearms or other types of weapons to cause large-scale damage. These consumers are often motivated by a sense of purpose that is rooted in their belief system and may be willing to go to extreme lengths to achieve their objectives.[74]

It is worth noting that law enforcement officials often have connections to the digital black market. These connections are established to help track down cybercriminals and buyers within the digital black market. By keeping tabs on these illegal activities, law enforcement officials can take timely legal action to prevent the criminal activities of these individuals. This is particularly important in cases where security norms are violated, and it becomes possible to identify the perpetrators. By quickly identifying and apprehending these individuals, law enforcement officials can help safeguard the public against the harmful effects of cybercrime and keep our digital world safe and secure.[75]

To gain a deeper understanding of the practices and operations of the digital black market, researchers need to establish a connection with this elusive marketplace. This entails accessing and analyzing the vast amounts of data generated by this underground economy, including the types of goods and services sold, the prices charged, the payment methods used, and the communication channels employed by its participants. Through careful analysis of this data, researchers can identify patterns and trends that can help shed light on the inner workings of the digital black market. This information can then be shared with the general public to increase awareness of the dangers of the digital black market and develop effective strategies to combat its illicit activities. By gaining a better understanding of the digital black market, researchers can help law enforcement agencies and policymakers prevent cybercrime, protect consumers, and safeguard the integrity of digital systems.[76]

Overall, the digital black market is a complex and multifaceted space that attracts users with diverse interests and motives. While some users seek to exploit it for illegal activities, others use it to promote justice and prevent crime. Understanding the different types of users and their objectives is essential in devising effective strategies to combat the digital black market and ensure the safety and security of individuals and communities worldwide.

As people move forward with technological advancements, they witness the emergence of new opportunities every day. However, alongside the benefits, there is a growing concern about the increasing number of cybercriminals taking advantage of technological progress results. They continue to develop the digital black market system, which poses a significant challenge for law enforcement agencies worldwide. This system enables cybercriminals to conduct illicit activities such as selling stolen data, malware, hacking services, and other illegal products on the dark web. The anonymity and encryption offered by the dark web make it difficult for law enforcement to track the perpetrators and bring them to justice. As a result, the fight against cybercrime has become more complex and requires a collaborative effort from governments, law enforcement agencies, and private organizations to mitigate the risks of cyber threats.[77]

M., Jiang, X., (2018). What is in the Darknet? Measurement and analysis of darknet person attributes. *In 2018 IEEE Third International Conference on Data Science in Cyberspace*. pp. 948-949.

74 Weimann, G., (2016). Going dark: Terrorism on the dark web. *Studies in Conflict & Terrorism,* 39(3). p. 195.

75 Heidenreich, S., Westbrooks, D.A., (2017). Darknet markets: A modern day enigma for law enforcement and the intelligence community. *American Intelligence Journal,* 34(1). p. 38.

76 Benjamin, V., Valacich, J.S., Chen, H., (2019). DICE-E: A Framework for Conducting Darknet Identification, Collection, Evaluation with Ethics. *MIS Quarterly,* 43(1). pp. 1-2.

77 Ajayi, E.F.G., (2016). Challenges to enforcement of cyber-crimes laws and policy. *Journal of Internet and Information Systems,* 6(1). p. 4.

4. THE PROBLEM OF COMBATING THE DIGITAL BLACK MARKET

At the turn of the twenty-first century, numerous experts predicted that the digital world, driven by the proliferation of the internet, would grow to a level that would dominate every aspect of people's lives.[78] However, sceptics dismissed these predictions, believing that the digital world would never attain the level of development it has today. As it has now appeared, the proponents of the first opinion were right. Nonetheless, criminals were not oblivious to the potential of the digital world and its opportunities. They shifted their focus to the digital world, where they could operate without needing firearms and other tools, instead relying solely on their specialized knowledge and appropriate technical equipment. The fact that cybercriminals have mastered the digital world better than security professionals reflects their expertise in exploiting digital vulnerabilities and weaknesses often unnoticed by security professionals. As a result, cybercrime has become a significant challenge for law enforcement and security agencies, who must stay ahead of the criminals to maintain a secure digital world.[79]

One of the greatest challenges law enforcement agencies face in their fight against digital black markets is that the very nature of these markets is international. The black market is not limited to a specific geographic location; rather, it operates across borders and jurisdictions, making it incredibly difficult for authorities to track and prosecute offenders.[80]

In addition, the complexity of these markets makes it difficult for law enforcement agencies to effectively investigate and prosecute those involved in illicit activities. This is because the server of the digital black market can be located in one country, while the customer and seller can be located in different countries, and the products can be stored in other countries altogether.

Moreover, the lack of international legal frameworks, codes, and bases to govern the fight against digital black markets further complicates the efforts of law enforcement agencies. This means that there are no established international laws to facilitate cooperation among national investigative units in their efforts to combat these markets.

The absence of an international legal framework creates legal barriers that make it difficult for countries to work together and exchange information, which is critical in the fight against digital black markets. Hence, the absence of international cooperation and legal frameworks makes it challenging for law enforcement agencies to effectively combat digital black markets.[81]

In the digital world, black markets are a growing concern, and one of the significant challenges is anonymity.[82] While it is true that no one can be entirely anonymous in the digital world, law enforcement agencies can identify a person's identity if necessary. However, this raises a severe ethical dilemma for any democratic state. The state must identify the person responsible for illegal activities without compromising fundamental human rights and freedoms.[83]

The fight against digital black markets is crucial to protect society from the harms of illegal activities. However, if the state violates its citizens' fundamental rights and freedoms in the process, the fight will lose its significance. Protecting one legal good should not come at the expense of other legal rights. The systematic violation of human rights and freedoms will undermine the

78 Krämer, N.C., Neubaum, G., Eimler, S.C., (2017). A brief history of (social) cyberspace. *Cyberemotions: Collective emotions in cyberspace.* pp. 11-12.

79 Ramdinmawii, E., Ghisingh, S., Sharma, U.M., (2014). A study on the cyber-crime and cyber criminals: A global problem. *International Journal of Web Technology,* 3. p. 53.

80 Goodman, M., (2010). International dimensions of cybercrime. *In Cybercrimes: A multidisciplinary analysis, Springer.* pp. 311-312.

81 Chang, W., Chung, W., Chen, H., Chou, S., (2003). An international perspective on fighting cybercrime. *In Intelligence and Security Informatics: First NSF/NIJ Symposium, ISI 2003, Springer.* p. 379.

82 Saleem, J., Islam, R., Kabir, M.A., (2022). The anonymity of the dark web: A survey. *IEEE Access,* 10. p. 628.

83 Herschel, R.T., 2021. Privacy, ethics, and the Dark Web. *In Research anthology on privatizing and securing data, IGI Global*. p. 2066.

very existence of democracy. In such a society, the democratic state will eventually crumble, turning into a totalitarian regime where the rulers justify their complete control and surveillance by claiming to protect human rights.[84]

Therefore, balancing the need to identify and prosecute those responsible for illegal activities is essential while protecting fundamental human rights and freedoms. The state must use legal and ethical means to identify and prosecute those involved in illegal activities. A democratic state should never compromise its citizens' basic rights and freedoms in the name of fighting against digital black markets or any other illegal activities.

One of the pressing issues that is currently being discussed is the widespread use of cryptocurrency. Cybercriminals have increasingly used this digital currency, as it offers an anonymous and untraceable method of transferring funds. The article highlights that due to the decentralized nature of cryptocurrencies, it is often difficult to track the financial transactions conducted using them. Moreover, the lack of regulatory oversight and a central authority makes it easier for cybercriminals to evade detection and prosecution. As a result, these criminals can profit from their illegal activities without fear of being caught.[85] This has become a major concern for law enforcement agencies worldwide, struggling to keep up with the constantly evolving methods of cybercrime and the use of cryptocurrencies.

The issue of cybercrime is growing more and more pressing as the world continues to digitize. While it may be tempting to believe that existing legal frameworks will be sufficient to deal with future threats from cyberspace, the reality is that fighting crimes in the digital world requires a different set of strategies and mechanisms.[86] While some illegal activities, such as drug trafficking or document forgery, can be punished under existing criminal law regulations, the unique challenges posed by the digital world require updated legal bases that are tailored to the specific needs of this new domain.

One of the most significant challenges is the issue of jurisdiction. For example, if someone from one country sells a drug in another country, and the drug itself is located in a third country, which existing legal basis should be used to effectively fight against this crime? The answer is far from clear and highlights the need for a new way of thinking when it comes to cybercrime.

The digital world is a new phenomenon, and the digital black market is a new side effect of this new phenomenon. As such, a new kind of approach is required to address the unique challenges that it presents. Without a new way of thinking, the digital black market will continue to expand, and it will be increasingly difficult to control the flow of illegal products and activities. This unacceptable outcome requires urgent attention from lawmakers and law enforcement agencies worldwide.

CONCLUSION

The twenty-first century is often called the era of technological progress, evolution, and revolution. The article highlights that this century has brought about unprecedented opportunities that were once unimaginable. One area that has been significantly developed is the digital world, commonly known as cyberspace. This space's development has simplified how people connect and their daily lives. It has brought numerous benefits, such as enhancing communication, facilitating online transactions, and making knowledge accessible to people across the globe.

However, as the paper highlights, technological progress has also presented certain challenges. Cybercriminals have found it easier to commit crimes thanks to technological advancements. They can now exploit computer network and system vulnerabilities to gain unauthorized access

84 Mc Manamon, C., Mtenzi, F., (2010). Defending privacy: The development and deployment of a darknet. *In 2010 International Conference for Internet Technology and Secured Transactions.* p. 5.

85 Reddy, E., Minnaar, A., (2018). Cryptocurrency: A tool and target for cybercrime. *Acta Criminologica: African Journal of Criminology & Victimology*, 31(3). pp. 74-75.

86 Sviatun, O., Goncharuk, O., Roman, C., Kuzmenko, O., Kozych, I.V., (2021). Combating cybercrime: economic and legal aspects. *WSEAS Transactions on Business and Economics,* 18. p. 759.

to sensitive information, steal identities, and infiltrate financial systems. This has led to an increase in cybercrime cases, which pose a threat to individuals, organizations, and governments. Therefore, while technology has brought numerous benefits, it is crucial to ensure that it is used responsibly and ethically to prevent misuse and safeguard our digital lives.

The article analyses the deep web, the dark web, and the digital black market. It explains what these terms mean and sheds light on the dangers associated with the unimpeded functioning of digital black markets. The article highlights why their existence poses a significant threat to individuals and states alike.

To support its claims, the article draws upon a detailed study of the researched materials, which reveal the comprehensive nature of the digital black market. It highlights the fact that users of the dark web have access to a wide range of illegal goods and services, from drugs and firearms to the possibility of purchasing parts for weapons of mass destruction.

The paper strives to provide a comprehensive understanding of the digital black market and the risks associated with its existence. By doing so, it aims to educate readers on the dangers of the dark web and the importance of taking steps to curb the unimpeded functioning of digital black markets. Digital black markets on the dark web pose a significant threat to ordinary citizens who use cyberspace for various purposes. Therefore, it is crucial to take necessary measures to eliminate the functioning of these illegal marketplaces.

Upon analyzing the problems presented in the article, the author has developed some essential recommendations that must be implemented in reality. These measures aim to stop the functioning of digital black markets and ensure a safer online environment for everyone.

It is imperative to analyze the recommendations given below and implement them, in reality, to ensure that ordinary citizens can use cyberspace freely without any fear of being targeted by illegal activities, in particular:

A. International cooperation. Digital black markets are a growing concern, and their existence is not limited to a particular country or region. These markets pose a significant threat to the global economy, as they operate clandestinely and are often involved in illegal activities. Therefore, it is crucial to establish international organizations and communities whose primary objective is to combat digital black markets. One of the key strategies that can help in the fight against digital black markets is the quick and efficient exchange of information. This will increase the chances of detecting digital black market servers on time and arresting those responsible for running them. By doing so, cooperation can effectively end the digital black market. Without such international communities, tracking the movement of digital black market servers will be difficult. The people running these servers can quickly relocate them to another location and erase all traces of their existence. Consequently, the fight against digital black markets must start from scratch. Therefore, it is essential to establish robust international partnerships where the sharing of intelligence and resources is a priority. This will enable the authorities to stay ahead of the game and take down digital black markets before they can cause significant damage. By working together, international cooperation can create a safer and more secure digital landscape free from the threat of digital black markets.

B. Updating legal bases. It is crucial to follow the law when fighting crime, even in the face of criminal activity. This means that law enforcement officers must adhere to the latest legal acts, which provide them with the necessary tools to combat criminal activity. Adopting these legal acts is essential because it streamlines identifying, investigating, and prosecuting criminal activity. In today's digital age, international legal acts are particularly important. This is because digital black markets often operate across international borders, making it challenging for law enforcement agencies to take quick and effective action. Having international legal acts in place enables law enforcement agencies to work together to fight crime and bring criminals to justice, regardless of location. However, time is of the essence in combating cybercrime. Every second that law

enforcement agencies spend on legal matters is a second that cybercriminals can use to cover their tracks. For this reason, it is essential to have streamlined legal procedures to ensure that law enforcement agencies can take swift and decisive action against criminals. By doing so, relevant state structures can make the Internet safer for everyone.

C. Cyber security experts. States must establish dedicated departments specializing in this area to effectively combat the growing threat of digital black markets. These departments should focus solely on studying and combating the threat posed by digital black markets rather than dealing with cybercrime in general. One of the key tasks of these specialized units should be to conduct a detailed analysis of the organization and functioning of digital black markets. This is a complex and time-consuming task that requires a great deal of expertise and experience. By having dedicated experts in the field of cybersecurity working within these units, states can take a significant step forward in the fight against the digital black market. Overall, establishing specialized departments to combat digital black markets is a crucial step governments should take to protect their citizens from the various threats these illicit online marketplaces pose.

D. Interdisciplinary studies. To effectively combat cybercriminals in the digital black market, law enforcement agencies must comprehensively understand the various factors involved. It is not enough to view the issue from a single professional perspective. Instead, a multidisciplinary approach is needed, incorporating insights from law, cyber security, programming, and psychology. To truly comprehend the complexities of the digital black market, it is essential to examine the problems from various angles. This includes analyzing the psychological profile of cybercriminals, identifying security norms and best practices, and establishing a solid legal foundation for addressing these issues. Law enforcement agencies can gain a more objective and nuanced understanding of the digital black market by taking a holistic approach. This will enable them to better identify and respond to cybercriminal activities, ultimately helping to protect individuals and organizations from the damaging effects of cybercrime.

E. Strategies and mechanisms. To effectively combat the growing threat of digital black markets, developing comprehensive strategies and mechanisms is imperative. These should be designed to equip relevant department representatives with the necessary tools and knowledge to tackle individual cases head-on. It is also important to ensure that these strategies and mechanisms are constantly updated to stay ahead of the latest challenges and threats. To achieve this, it is necessary to incorporate cutting-edge technologies such as artificial intelligence, machine learning, and data analytics. By leveraging these advanced technologies, patterns and trends can be analyzed, and it will be possible to predict potential threats before they occur. Furthermore, educating the public about the dangers of digital black markets and promoting awareness of the risks associated with engaging in illegal activities online is important. This can be achieved through targeted campaigns that aim to inform and educate people about the consequences of their actions. Combating digital black markets requires a multi-pronged approach incorporating the latest technologies, ongoing education and awareness campaigns, and a commitment to constantly updating strategies and mechanisms to stay ahead of the ever-evolving threat landscape.

The dark web, a part of the Internet that is not indexed by search engines and requires specific software to access, is expanding at an alarming rate. This growth is largely fueled by the constant development and innovation of new digital tools by cybercriminals. These tools are designed to facilitate illegal activities such as hacking, identity theft, drug trafficking, and other illicit activities. Unfortunately, this trend shows no signs of slowing down, posing a significant threat to online security and privacy. Therefore, individuals and organizations must take necessary precautions to protect their sensitive information from falling into the wrong hands.

In today's digital age, it is crucial to have international cooperation, updated legal frameworks, practical strategies and mechanisms, and people

with appropriate expertise and education to prevent the rapid growth of cybercrime and eliminate black markets from the digital space. With the increasing reliance on technology, it has become easier for cybercriminals to carry out their illegal activities, and law enforcement agencies need to be equipped with the necessary tools to combat these crimes effectively.

International cooperation is essential in this regard, as cybercrime is a global issue requiring coordinated effort from all nations. Updated legal frameworks should be implemented to ensure that cybercriminals are brought to justice and that victims are adequately protected. Moreover, practical strategies and mechanisms, such as robust cybersecurity measures and data protection laws, should be implemented to prevent cyber-attacks and safeguard sensitive information.

However, having updated legal frameworks, practical strategies, and mechanisms alone may not be enough to combat cybercrime. People with appropriate expertise and education are the key to preventing and fighting cybercrime effectively. It is essential to have a skilled workforce that can understand the nature of cybercrime and develop innovative solutions to counter it. This requires proper training, education, and awareness programs to equip individuals with the necessary knowledge and skills.

Cybercrime is a significant threat to the digital world, and unless appropriate changes are made and proper training and education are in place, cybercriminals will ultimately win, and law enforcement will lose control of the digital world forever. A concerted effort from all stakeholders is required to address this issue and ensure a safe and secure digital environment for all.

BIBLIOGRAPHY

1. Ablon, L., Libicki, M., (2015). Hacker's bazaar: The markets for cybercrime tools and stolen data. *Def. Counsel,* 82.
2. Ajayi, E.F.G., (2016). Challenges to enforcement of cyber-crimes laws and policy. *Journal of Internet and Information Systems*, 6(1).
3. Akintaro, M., Pare, T., Dissanayaka, A.M., (2019). Darknet and black market activities against the cybersecurity: a survey. *In The Midwest Instruction and Computing Symposium. (MICS),* North Dakota State University, Fargo, ND.
4. Al Amro, S., (2020). How safe is governmental infrastructure: A cyber extortion and increasing ransomware attacks perspective. *International Journal of Computer Science and Information Security,* 18(6).
5. Babanina, V., Tkachenko, I., Matiushenko, O., Krutevych, M., (2021). Cybercrime: History of formation, current state and ways of counteraction. *Amazonia Investiga,* 10(38).
6. Banerjee, A., Barman, D., Faloutsos, M., Bhuyan, L.N., (2008). Cyber-fraud is one typo away. *In IEEE INFOCOM*.
7. Baravalle, A., Sin Wee Lee, (2018). Dark web markets: Turning the lights on AlphaBay. *In Web Information Systems Engineering–WISE 2018.* Springer.
8. Basheer, R., Alkhatib, B., (2021). Threats from the dark: A review over dark web investigation research for cyber threat intelligence. *Journal of Computer Networks and Communications*.
9. BBC News."Cayman National Suffers Manx Bank 'Data Hack'" BBC (November 19, 2019) <https://www.bbc.com/news/world-europe-isle-of-man-50475734> [Last accessed: June 11, 2024].
10. Belmabrouk, K., (2023). Cyber Criminals and Data Privacy Measures.

In Contemporary Challenges for Cyber Security and Data Privacy. IGI Global.
11. Benjamin, V., Valacich, J.S., Chen, H., (2019). DICE-E: A Framework for Conducting Darknet Identification, Collection, Evaluation with Ethics. *MIS Quarterly,* 43(1).
12. Biddle, P., England, P., Peinado, M., Willman, B., (2002). The Darknet and the future of content distribution. *In ACM Workshop on digital rights management,* Vol. 6.
13. Boulding, K.E., (1947). A Note on the Theory of the Black Market. Canadian Journal of Economics and Political Science. *Revue canadienne de economiques et science politique,* 13(1).
14. Buxton, J., Bingham, T., (2015). The rise and challenge of dark net drug markets. *Policy brief,* 7(2).
15. Chang, W., Chung, W., Chen, H., Chou, S., (2003). An international perspective on fighting cybercrime. *In Intelligence and Security Informatics: First NSF/NIJ Symposium,* Springer.
16. Chaudhry, P.E., (2017). The looming shadow of illicit trade on the Internet. *Business Horizons,* 60(1).
17. Chen, H., Chen, H., (2012). Weapons of Mass Destruction (WMD) on Dark Web. *Dark Web: Exploring and Data Mining the Dark Side of the Web*.
18. Ciancaglini, V., Balduzzi, M., Goncharov, M., McArdle, R., (2013). Deepweb and cybercrime. *Trend micro report,* 9.
19. Ciancaglini, V., Balduzzi, M., McArdle, R., Rösler, M., (2015). the Deep Web. *Trend Micro.*
20. Cimpanu C, Personal Details for the Entire Country of Georgia Published Online [Online] Available at: <https://www.zdnet.com/article/personal-details-for-the-entire-country-of-georgia-published-online> [Last Accessed: June 11, 2024].
21. Dalvi, A., Ankamwar, L., Sargar, O., Kazi, F., Bhirud, S.G., (2021). From Hidden Wiki 2020 to Hidden Wiki 2021: What Dark Web Researchers Comprehend with Tor Directory Services?. *In 2021 5th International Conference on Information Systems and Computer Networks*.
22. De Sanctis, F.M., (2023). Cyber Risks, Dark Web, and Money Laundering. Regulating Cyber Technologies: *Privacy Vs Security.*
23. Demant, J., Bakken, S.A., Oksanen, A., Gunnlaugsson, H., (2019). Drug dealing on Facebook, Snapchat and Instagram: A qualitative analysis of novel drug markets in the Nordic countries. *Drug and alcohol review,* 38(4).
24. Dolliver, D.S., (2015). Evaluating drug trafficking on the Tor Network: Silk Road 2, the sequel. *International Journal of Drug Policy,* 26(11).
25. Dyson, S., Buchanan, W.J., Bell, L., (2019). The challenges of investigating cryptocurrencies and blockchain related crime. *arXiv.* 1907.12221.
26. Evangelista, A., Allodi, L., Cremonini, M., (2018). Darknet Markets: Competitive Strategies in the Underground of Illicit Goods. *Eindhoven University of Technology,* 13.
27. Finklea, K.M., (2015). Dark web. *Congressional Research Service.*
28. Goodman, M., (2010). International dimensions of cybercrime. *In Cybercrimes: A multidisciplinary analysis, Springer.*
29. Hämäläinen, L., (2019). User names of illegal drug vendors on a darknet cryptomarket. *Onoma,* 50.
30. He, B., Patel, M., Zhang, Z., Chang, K.C.C., (2007). Accessing the deep web. *Communications of the ACM,* 50(5).
31. Heidenreich, S., Westbrooks, D.A., (2017). Darknet markets: A modern

day enigma for law enforcement and the intelligence community. *American Intelligence Journal,* 34(1).
32. Herschel, R.T., (2021). Privacy, ethics, and the Dark Web. *In Research anthology on privatizing and securing data.* IGI Global.
33. Holland, B.J., (2020). Transnational cybercrime: The dark web. *Encyclopedia of Criminal Activities and the Deep Web.*
34. Howell, C.J., Fisher, T., Muniz, C.N., Maimon, D., Rotzinger, Y., (2023). A Depiction and Classification of the Stolen Data Market Ecosystem and Comprising Darknet Markets: A Multidisciplinary Approach. *Journal of Contemporary Criminal Justice,* 39(2).
35. Jadoon, A.K., Iqbal, W., Amjad, M.F., Afzal, H., Bangash, Y.A., (2019). Forensic analysis of Tor browser: a case study for privacy and anonymity on the web. *Forensic science international,* 299.
36. Jain, V., Malviya, B., Arya, S., (2021). An overview of electronic commerce (e-Commerce). *Journal of Contemporary Issues in Business and Government,* 27(3).
37. Jaishankar, K., (2018). Cyber criminology as an academic discipline: history, contribution and impact. *International Journal of Cyber Criminology,* 12(1).
38. Jardine, E., (2015). The Dark Web dilemma: Tor, anonymity and online policing. *Global Commission on Internet Governance Paper Series,* (21).
39. Jiang, C., Foye, J., Broadhurst, R., Ball, M., (2021). Illicit firearms and other weapons on darknet markets. *Trends and Issues in Crime and Criminal Justice,* (622).
40. Jones, A.S., Gagneja, K., (2016). Preventing covert webcam hacking in the civilian and governmental sectors. *In 2016 International Conference on Computational Science and Computational Intelligence.*
41. Kavallieros, D., Myttas, D., Kermitsis, E., Lissaris, E., Giataganas, G., Darra, E., (2021). Understanding the dark web. *Dark web investigation.*
42. Kermitsis, E., Kavallieros, D., Myttas, D., Lissaris, E., Giataganas, G., (2021). Dark web markets. *Dark Web Investigation.*
43. Krämer, N.C., Neubaum, G., Eimler, S.C., (2017). A brief history of (social) cyberspace. *Cyberemotions: Collective emotions in cyberspace.*
44. Kwan, L., Ray, P., Stephens, G., (2008). Towards a methodology for profiling cyber criminals. *In Proceedings of the 41st Annual Hawaii International Conference on System Sciences.*
45. Lacson, W., Jones, B., (2016). The 21st century darknet market: lessons from the fall of Silk Road. *International Journal of Cyber Criminology,* 10(1).
46. Liggett, R., Lee, J.R., Roddy, A.L., Wallin, M.A., (2020). The dark web as a platform for crime: An exploration of illicit drug, firearm, CSAM, and cybercrime markets. *The Palgrave handbook of international cybercrime and cyberdeviance.*
47. Macrina, A., Phetteplace, E., (2015). The Tor browser and intellectual freedom in the digital age. *Reference and User Services Quarterly,* 54(4).
48. Manky, D., (2013). Cybercrime as a service: a very modern business. *Computer Fraud & Security,* 2013(6).
49. Mc Manamon, C., Mtenzi, F., (2010). Defending privacy: The development and deployment of a darknet. *In 2010 International Conference for Internet Technology and Secured Transactions.*
50. Minnaar, A., (2017). Online'underground'marketplaces for illicit drugs: the prototype case of the dark web website'Silk Road. *Acta Crimino-*

logica: African Journal of Criminology & Victimology, 30(1).
51. Mukhopadhyay, U., Skjellum, A., Hambolu, O., Oakley, J., Yu, L., Brooks, R., (2016). A brief survey of cryptocurrency systems. *In 2016 14th annual conference on privacy, security and trust*.
52. Mullin, J., (2015). Silk Road prosecutors complete the bizarre DPR murder-for-hire story. *Ars Technica.*
53. Nanehkaran, Y.A., (2013). An introduction to electronic commerce. *International journal of scientific & technology research,* 2(4).
54. Omar, Z.M., Ibrahim, J., (2020). An overview of Darknet, rise and challenges and its assumptions. *Int. J. Comput. Sci. Inf. Technol,* 8.
55. Pantelis, G., Petrou, P., Karagiorgou, S., Alexandrou, D., (2021). On strengthening smes and mes threat intelligence and awareness by identifying data breaches, stolen credentials and illegal activities on the dark web. *In Proceedings of the 16th International Conference on Availability, Reliability and Security*.
56. Pender, K., Cherkasova, S., Yamaoka-Enkerlin, A., (2019). Compliance and whistleblowing: How technology will replace, empower and change whistleblowers. *In FinTech*. Edward Elgar Publishing.
57. Ramdinmawii, E., Ghisingh, S., Sharma, U.M., (2014). A study on the cyber-crime and cyber criminals: A global problem. *International Journal of Web Technology,* 3.
58. Reddy, E., Minnaar, A., (2018). Cryptocurrency: A tool and target for cybercrime. Acta Criminologica: *African Journal of Criminology & Victimology,* 31(3).
59. Rhumorbarbe, D., Staehli, L., Broséus, J., Rossy, Q., Esseiva, P., (2016). Buying drugs on a Darknet market: A better deal? Studying the online illicit drug market through the analysis of digital, physical and chemical data. *Forensic science international,* 267.
60. Rose R., LeBlanc P., Fung B., DC Police Personnel Files Obtained by Hackers in Recent Ransomware Attack, Acting Police Chief Says [Online] Available at: <https://www.cnn.com/2021/04/29/politics/dc-police-ransomware-attack-personnel-files/index.html> [Last Accessed: June 11, 2024].
61. Sabillon, R., Cavaller, V., Cano, J., Serra-Ruiz, J., (2016). Cybercriminals, cyberattacks and cybercrime. *In 2016 IEEE International Conference on Cybercrime and Computer Forensic*.
62. Saleem, J., Islam, R., Kabir, M.A., (2022). The anonymity of the dark web: A survey. *IEEE Access, 10*.
63. Salvi, M.H.U., Kerkar, M.R.V., (2016). Ransomware: A cyber extortion. *Asian Journal For Convergence In Technology*, 2.
64. Sharma, N., Oriaku, E.A., Oriaku, N., (2020). Cost and effects of data breaches, precautions, and disclosure laws. *International Journal of Emerging Trends in Social Sciences,* 8(1).
65. Spagnoletti, P., Ceci, F., Bygstad, B., (2021). Online black-markets: An investigation of a digital infrastructure in the dark. *Information Systems Frontiers.*
66. Spalevic, Z., Ilic, M., (2017). The use of dark web for the purpose of illegal activity spreading. *Ekonomika,* 63(1).
67. Stohl, R., Grillot, S., (2009). The international arms trade. *Polity.* (Vol.7).
68. Sviatun, O., Goncharuk, O., Roman, C., Kuzmenko, O., Kozych, I.V., (2021). Combating cybercrime: economic and legal aspects. *WSEAS Transactions on Business and Economics,* 18.
69. Tavabi, N., Bartley, N., Abeliuk, A., Soni, S., Ferrara, E., Lerman, K., (2019). Characterizing activity on the deep and dark web. *In Compan-*

ion proceedings of the 2019 world wide web conference.

70. Tewari, S.H., (2020). Abuses of cryptocurrency in dark web and ways to regulate them. *SSRN 3794374*.
71. Trabelsi, S., (2019). Monitoring leaked confidential data. *In 2019 10th IFIP International Conference on New Technologies, Mobility and Security*.
72. Vargas, V.M., (2019). The new economic good: Your own personal data. An integrative analysis of the Dark Web. *In Proceedings of the International Conference on Business Excellence*. Vol. 13, No. 1.
73. Wang, M., Wang, X., Shi, J., Tan, Q., Gao, Y., Chen, M., Jiang, X., (2018). Who are in the Darknet? Measurement and analysis of darknet person attributes. *In 2018 IEEE Third International Conference on Data Science in Cyberspace*.
74. Wall, D., (2007). Cybercrime: The transformation of crime in the information age. *Polity,* (Vol. 4).
75. Weimann, G., (2016). Going dark: Terrorism on the dark web. *Studies in Conflict & Terrorism,* 39(3).
76. White, R., Kakkar, P.V., Chou, V., (2019). Prosecuting darknet marketplaces: Challenges and approaches. *Dep't of Just. J. Fed. L. & Prac.*, 67.
77. Zhang, H., Zou, F., (2020). A survey of the dark web and dark market research. *In 2020 IEEE 6th international conference on computer and communications*.
78. Zhang, Y., Xiao, Y., Ghaboosi, K., Zhang, J., Deng, H., (2012). A survey of cyber crimes. *Security and Communication Networks,* 5(4).

The research was carried out with the support of "Shota Rustaveli National Science Foundation of Georgia" (FR – 22-4466)

GEORGIAN COMPETITION LAW IN THE DIGITAL AGE – GEORGIAN PRACTICE AND EXISTING CHALLENGES

Giorgi Parulava

PhD student, Stockholm University, Faculty of Law, Stockholm, Sweden

Gvantsa Chaduneli

PhD student, University Paris-Panthéon-Assassie, Faculty of Law, Paris, France

Abstract

The article identifies, systematizes the decisions taken by the Georgian Competition and Consumer Agency regarding digital markets/ competition and reviews the practices established by the Agency based on the said decisions. The introduction of the article highlights the significant challenge of modern competition law, which implies that competition law does not exist independently of era and context, and it is important that competition law and its enforcement mechanisms function effectively in the conditions of the modern digital economy. The article then defines the digital economy and describes two of its key features, (big) data and digital platforms. A number of theoretical problems are then mentioned which may hinder the effective enforcement of competition law in relation to similar economic agents/markets.

The main part of the article will concern the review of the decisions made by the Competition Agency in relation to online markets and digital platforms. Since there are currently no special legislative or by-law norms necessary for the effective enforcement of competition law in the digital age, the Competition Agency is guided by the general legislative

framework regulating competition law to resolve similar issues. The analysis of the decisions revealed that the practice of the Agency develops in the direction of only two: (I) unfair competition (II) agreements restricting competition, and currently there is no, for example, a decision of the Competition Agency regarding the abuse of a dominant position by digital platforms.

KEYWORDS: Competition, Competition law, Digital, Economic, Virtual

INTRODUCTION

With the development of data-driven, digital and online technologies/services, financial transactions have gradually shifted from real space to virtual one. Consequently, the competition between economic agents has become virtual. The development and enforcement of competition law has historically been formed in relation to traditional markets, however, considering the new technological reality, competition law and its executive bodies, like many other areas of law and public administration, have to adapt to virtual reality, so that competition law does not fall behind the times and ensure its effective enforcement.

Georgian competition law and its main executive body – Georgian Competition and Consumer Agency (hereinafter – Competition Agency, Agency) are facing this challenge, which is a young organization compared to European or American competition enforcement institutions and has relatively limited legislative, technical or human resources. Despite the aforementioned, the mission of the Agency is to successfully respond to the mentioned challenges so that on the one hand Georgian consumers are not affected and various markets (traditional, virtual or mixed) continue to function in accordance with the competition legislation, and on the other hand, to ensure the performance of the indirect function assigned to it by the EU-Georgia Association Agreement, that means the development of Georgian competition law in accordance with the law of the European Union, whether it is harmonization of legislation or considering the practice of European courts. Naturally, this also applies to digital competition, which also is an important challenge for the competition law of the European Union.

Considering the above, the purpose of the article is to identify, systematize and analyze the decisions taken by the Agency on digital competition issues. To achieve the goals of the research, the traditional (dogmatic) method of legal research will be used, which means the processing of legislation, by-laws, decisions of the Agency or relevant academic literature.

The next part of the article is devoted to the definition of the digital economy and especially to the following important factors – data and online platforms. Then the substantive and enforcement issues that may hinder the effective regulation of the digital economy by the competition law are discussed. The fourth chapter of the article reviews the legal framework of Georgia in relation to digital markets, and the fifth chapter is devoted to the analysis of the decisions of the Agency. The discussed issues are summarized at the end of the article.

1. DIGITAL ECONOMICS – BUSINESS MODELS AND OTHER CHARACTERISTICS

With the rapid development of technologies, new means or business models have become available to economic agents that can be used to save resources, gain competitive advantage or market power, and/or create value for consumers/markets. In this part of the article, a definition of the digital economy is proposed. Its two important features are also discussed: 1. Data-based economic activity 2. Digital platforms. It is the unique characteristics of the digital economy that have led to the development of new forms of competition, which, in turn, have presented new challenges to the effective enforcement of competition law.

The digital economy refers to economic ac-

tivity that is produced entirely or substantially through digital technologies and the business model is based on digital products or services.[1] The digital economy usually functions using technologies such as the Internet, cloud technologies, smart algorithms, etc. The terms "information economy" or "internet economy" are sometimes also used to denote the digital economy. Sometimes it is difficult to distinguish between the traditional economy and digital products/services, because the business model combines both, and such cases are sometimes referred to by the name of "mixed economy". With the development of technologies and computing power, new digital products or services are rapidly developing, therefore it is impossible to present all the driving characteristics of the digital economy, but we can distinguish the following two characteristics: (big) data and digital platforms.

1.1. (Big) Data

The business model of companies in the digital economy is often based on the acquisition and processing of data by economic agents. This can be personal data of individuals and any other type of data. Considering the volume and other characteristics, we may be dealing with the so-called "big data" or as it is sometimes called, "big data analytics". Companies collect, process and analyze large sets of data to gain insights, optimize processes and make data-driven decisions. Data-driven business models span a variety of industries, including technology, finance, healthcare, and retail. Companies with access to huge data sets can have significant market power and create "data monopolies". Having such data advantage, as well as the high cost of acquiring and processing large sets of such data, may create barriers to entry for smaller competitors in relevant markets, which may ultimately have a negative impact on competition, innovation and consumer welfare.

1.2. Digital Platforms

Digital platforms are online ecosystems that facilitate interactions and transactions between users. These platforms typically offer different services such as search engines (Google), social networks (Facebook), e-commerce (Amazon) and app stores (Apple). Similar platforms usually create the so-called "Two-sided markets", where, for example, service providers (one market) are connected with end users (the other market). The mentioned model is based on the so-called "network effects", meaning that the value of the platform increases as more users join both markets. For example, on the one hand, increase in the number of end users on the platform makes the use of said platform more attractive for service providers. On the other hand, a large number of service providers usually increase competition, improve quality and offer end users a better choice of products/services. Similar platforms usually also use the personal or big data discussed in the previous subsection, which allows them to study consumer behavior and implement accurate and customized (personalized) offers. Despite significant value creation, online platforms create risks in terms of competition and consumer welfare, which may include vertical integration and abuse of market power, offering discriminatory personalized prices to end users, creating barriers to market entry, high costs of switching to an alternative market, etc.

2. COMPETITION LAW CHALLENGES FOR THE DIGITAL ECONOMY

Development of the digital economy, on the one hand, has helped economic agents to place their own services or products, through the Internet or various platforms, consumers have access to more information and therefore better choices

1 Bukht, R., & Heeks, R.. (August 3, 2017). Defining, Conceptualising, and Measuring the Digital Economy. Development Informatics Working Paper no. 68. p. 13. Available at SSRN: https://ssrn.com/abstract=3431732 or http://dx.doi.org/10.2139/ssrn.3431732

to compare the quality or price of different products. Despite significant positive effects, the Internet economy has also created significant challenges for competition law and policy. Such risks are increasing and should be assessed individually in relation to each individual case, although conceptually, they can be divided into "substantive" and "enforcement" challenges.

In the background of the development of modern technologies and digital economy, the so-called big technological companies ("Big Tech") were formed. Also, the so-called American super-firms Facebook, Amazon, Apple, Netflix and Google, which are also referred to by the acronym 'FAANG', are often singled out.[2] The mentioned organizations possess unprecedented market power, financial, technical and political power and create unprecedented challenges for competition law and policy. Naturally, given such a powerful market situation, FAANG economic agents are also under special attention, pressure and sanctions from competition law enforcement bodies. For example, Apple was fined 1.8 billion Euros by the European Commission in one of the cases for violation of competition law.[3]

The main objective of competition law/policy is to ensure effective competition in various markets and to protect the welfare of consumers, so that, for example, anti-competitive agreements by companies do not harm the end consumer. In the digital economy, it is sometimes difficult to achieve the main objectives of competition law. In particular, on the part of online platforms, it is possible to restrict competition for service/product supplying firms, create artificial barriers to the market, fix prices by means of smart algorithms, worsen the quality of products/services for the end user, increase the cost, etc.

As for the enforcement challenges, this includes the difficulty of applying and effective enforcement of competition law specifically for the digital economy, directly from the enforcement authorities of competition law, based on the available resources and legal framework. When assessing individual actions, determining anti-competitive actions and imposing sanctions on relevant economic agents, competition enforcement agencies act based on the legal or theoretical grounds that was formed along with the development of competition law and relevant judicial practice, although this may not be sufficient in cases related to the digital economy. In particular, it is possible to complicate the definition of the relevant market, and/or to determine the market power of the relevant agent in the said market,[4] the traditional economic theory of damage may not work in relation to digital markets,[5] there may be non-price competition (for example based on data), or the ex-post enforcement of competition legislation may be delayed.

3. DIGITAL MARKETS AND GEORGIAN LEGAL REGULATION

The Law of Georgia "On Competition" (hereinafter "the Law") establishes the standards of protection and enforcement of free and fair competition in Georgia.

The Agency detects anti-competitive activities in four main areas: anti-competitive agreements,[6] abuse of dominant position,[7] unfair competition[8] and restriction of competition by state/administrative bodies.[9]

2 Young, R. and Crews, W. (April 17, 2019). "The Case against Antitrust Law: Ten Areas Where Antitrust Policy Can Move on from the Smokestack Era". Competitive Enterprise Institute. (2019). Available at SSRN: https://ssrn.com/abstract=3458540

3 Please, see the press release of the European Commission, March 4, 2024, regarding the fining of Apple. Available (checked: March 12, 2024) at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161

4 Graef, I. (September 8, 2015). "Market Definition and Market Power in Data: The Case of Online Platforms". World Competition: Law and Economics Review, Vol. 38, No. 4. (2015), pp. 473-506. Available at SSRN: https://ssrn.com/abstract=2657732

5 Zelger, B. (2023). "Restrictions of EU Competition Law in the Digital Age: The Meaning of 'Effects' in a Digital Economy". In Studies in European Economic Law and Regulation, Volume 25. Springer. Chapter.

6 Law of Georgia "On Competition", Article 7.

7 *Ibid*., Article 6.

8 *Ibid*., Article 11^3.

9 *Ibid*., Article 10.

In recent years, important changes have been made in the competition legislation of Georgia in the direction of the policy and enforcement of competition law, where the changes introduced in the competition legislation in 2020 should be especially noted,[10] as a result of which the powers of the Agency have increased, a number of provisions have been refined and harmonized with the legislation of the European Union. However, today's Georgian legislation regulating competition does not include regulations on the standards of compliance with competition rules on electronic/digital markets, which, on the one hand, should be a guide for competition executive bodies,[11] and on the other hand, for all economic agents operating in the relevant market, and in case of violation of which appropriate sanctions should be imposed.

4. GEORGIAN PRACTICE OF ENFORCEMENT OF COMPETITION RULES ON DIGITAL MARKETS

Although the competition legislation, including the Law "On Competition", does not contain a direct reference to the enforcement of competition in digital markets, the authority of the Agency applies equally to the enforcement of competition in traditional and online markets, and despite the absence of special legal regulation on digital markets, the Agency in practice Investigates possible facts of violation of competition rules on digital markets or restrictions of competition by participants of the electronic platform based on general regulations, including unfair competition and restrictive agreements.

4.1. Unfair Competition on Online Platforms

In 2016 and 2017, after the establishment of the agency, one of the first investigations was related to cases considering possible facts of unfair competition on the online platform, in particular, on the online social platform. Among the mentioned cases are the so-called the case of the "Institute of Parasitology",[12] the case of "iTechnic",[13] as well as the case of "Design House".[14]

Article 11^3 of the Law prohibits unfair competition and considers as unfair competition the action of an economic agent that contradicts the norms of business ethics and harms the interests of competitors and consumers. At the same time, this article also defines the specific components of the actions, which in accordance with the amendments to the law implemented on November 4, 2020, is an exemplary (and not exhaustive) list.

For the purposes of Article 11^3 of the Law, to qualify the action of an economic agent as unfair competition, the following conditions must be present together: a) the action must be contrary to the norms of business ethics; b) the action must harm the interests of competitors; c) the action must harm the interests of the user.

The aforementioned cases discussed by the agency within the framework of unfair competition on online markets, were related to the actions taken by economic agents on the online social network, namely Facebook (Meta) platform. The core service offered by Facebook[15] is its on-

10 Law of Georgia N 7126 of September 16, 2020.

11 The enforcement body of the competition policy is not only the Competition Agency, but also the court, in particular, according to the first paragraph of Article 28 of the Law of Georgia "On Competition", a person has the right to apply to the court for violation of the Law "On Competition" without applying to the Agency.

12 The decision approved by the order of the Chairman of the Competition Agency of Georgia N 152 of September 14, 2016. Available at: https://gcca.gov.ge/uploads_script/decisions/tmp/7ff474e39c874d1a859636e3a7b004a1.pdf

13 The decision approved by the order of the Chairman of the Competition Agency of Georgia N 04/186 of July 19, 2017. Aavailable at: https://gcca.gov.ge/uploads_script/decisions/tmp/558d09388bf64de78446e681f928dd62.pdf

14 The decision approved by the order of the Chairman of the Competition Agency of Georgia N 04/132 of May 30, 2018. Available at: https://gcca.gov.ge/uploads_script/decisions/tmp/338c58ca9dca4499953a4175a8d97584.pdf

15 A number of national competition authorities have also found that Facebook has significant market power in relation to digital advertising services and social networking services. (Autorité de la concurrence, 2018[95]; Bundeskartellamt, 2018[96]; ACCC, 2019[93]; CMA, 2020[76]), see OECD (2020), Compe-

line social networking platform.[16]

Social media, i.e. social networking platforms are [W]eb-based services that allow individuals to (1) create a public or semi-public profile within a limited forum, (2) establish a list of other users with whom they share a connection, and (3) view and browse the network list of connections made by yourself and others.[17]

If the primary purpose of creating Facebook was limited to connecting users with other users, later on, another aspect emerged that makes Facebook a two-way market again, and no longer a platform for private user-to-user. Facebook is currently used as a point of contact between private users and professionals who advertise their products and services.[18]

While, on the one hand, an entrepreneurial entity/economic agent uses the Facebook platform as a means of contact, information exchange and direct connection with customers and potential customers, and on the other hand, as a means of disseminating information about their products and services, advertising and attracting customers, at the same time, any economic agent's conduct on a social network may be subject to competition law control.

"Institute of Parasitology" Case

The so-called "Institute of Parasitology" case concerned, among other circumstances, actions taken in the market for online social networking services, the use by the Institute of Parasitology of the logo of its competitor – the Scientific Research Institute of Tropical Medicine, as its trademark before registration, and especially after registration. In particular, the defendant placed the trademark of the complainant economic agent on its official Facebook page, which, from the agency's point of view, created a false impression to the customer by providing false information/advertisement, moreover, it caused confusion between these two institutions, which ultimately provided the basis for qualification of the act as an unfair competition. Accordingly, in this case, Article 11^3, Second Paragraph, Sub-paragraph "a" was violated, which prohibits the transmission of such information about the goods using any means of communication (including improper, dishonest, unreliable or clearly false advertising) that creates a false impression on the consumer and prompts him to take certain economic actions.[19]

"iTechnic" Case

In the "iTechnic" case, the appellant iTechnic LLC argued with the competing defendant company iPlus LLC, inter alia, the cancellation of their official page by the Facebook administration as a result of mass reporting of the Facebook page owned by iTechnic LLC, and on the other hand, creation and administration of the websites – iTechnic Georgia and "Fake iTechnic" – on the social network Facebook. The complainant believed that the representatives of iPlus LLC were behind the mentioned Facebook pages and they were publishing misleading and damaging information on behalf of iTechnic LLC.

Despite the fact that the agency established the participation of iPlus LLC in sending so-called "reports" to the page owned by iTechnic LLC, it pointed out that the cancellation of the page is not within the competence and possibility of iPlus, since the Facebook administration itself takes the decision on this matter in accordance with its own internal regulations. The act of canceling the page, according to the agency, is the result of the existing private legal relationship between the social network and its users and was related to the unauthorized use of the name and logo of the Apple company. Accordingly, the implementation of the action cannot be attributed to the defendant, which in itself excludes the violation of the law.[20]

tition in digital advertising markets, http://www.oecd.org/daf/competition/competition-in-digital-advertising-markets-2020.pdf

16 Case no. COMP/M.7217, Facebook/WhatsApp.

17 Boyd, D., M. & Ellison, N., B. (2007). Social Network Sites: Definition, History, and Scholarship, 13 J. Computer-Mediated Comm, 210, 211.

18 Gebicka, A., Heinemann, A. (2014). Social Media & Competition Law. World Competition, 37(2):155.

19 Decision approved by the order of the Chairman of the Competition Agency of Georgia N 152 of September 14, 2016, p. 47.

20 Decision approved by the order of the Chairman of

Another disputed circumstance was related to the cancellation of the page of the social network of the applicant by Facebook Inc. by iPlus LLC. after publishing posts indicating that iPlus has taken it upon itself to take down the page, that iPlus is a future partner of Apple Inc, iPlus with the support of Apple Inc. has launched a campaign of "Fake Apple Stores", i.e. of cancellation of fake Apple Inc. stores in Georgia, the reason for which was mentioned the manipulation of the name of the representative of Apple Inc. and the name of the "Apple Store" on the part of such pages.

In this regard, the agency considered that the information disseminated was not incorrect, different from reality, and the use of the term "Fake Apple Store", especially the word "fake", was within the freedom of expression protected by the constitution and may be used in cases of unauthorized use of the trademark, which in this case was no false information regarding iTechnic LLC. Accordingly, the Agency considered that there were no grounds established by law necessary to determine unfair competition, and there was no violation of Article 11^3, Part two, Sub-paragraph "c" of the Law.[21]

"Design House" Case

Another investigation that the agency conducted into the digital social network service sector is the Design House case concluded in 2018,[22] where Design House LLC sued the actions of DNA LLC and Dimplex Georgia LLC as unfair competition.

The complaint was related to the dissemination of information by the defendant companies through Facebook posts, which related to the illegal activities of Design House LLC, the suspension of its activities and the impossibility of providing warranty services by it.

The Agency discussed the extent to which the information disseminated through the post on the Facebook page represented a fact that harmed the reputation of the complainant. According to the agency, discrediting and harming the reputation of a company or its product can be done in several ways, including by spreading false and negative information about the company's products, or by damaging the company's image. The information in the Facebook post, which concerns the suspension of the company's activities, its illegal activities or non-issue of guarantees, is not confirmed and represents a negative action damaging the competitor's reputation. However, considering the general nature of the post, the information is directed not only to specific products, but also to the company's activities in general. Thus, it leads to the creation of a wrong view on the activities of Design House LLC and its discreditation – which, in turn, was a violation of Article 11^3, Paragraph 2, Sub-paragraph "c" of the Law.[23]

4.2. Agreements Restricting Competition in Online Markets

The practice of the Competition Agency in relation to agreements restricting competition includes three cases, two of which have been completed – the so-called Booking.com case[24] and the Online Sale of Cinema Tickets case.[25] As for the third, it concerns the investigation of the case started by the agency in February 2024 in the electronic commerce market.[26]

the Competition Agency of Georgia N 04/186 of July 19, 2017, p. 58.

21 *Ibid*., p. 62.

22 The decision approved by the order of the Chairman of Competition Agency of Georgia N 04/132 of May 30, 2018. Available at: https://gcca.gov.ge/uploads_script/decisions/tmp/338c58ca9dca4499953a4175a8d97584.pdf

23 Decision approved by the order of the Chairman of the Competition Agency of Georgia N 04/132 of May 30, 2018, p. 21.

24 The decision of the Chairman of the Competition Agency of Georgia, N 5 of January 9, 2017. Available at: https://gcca.gov.ge/uploads_script/decisions/tmp/bab070eafe7a4cfb824dddeaaa0d1b81.pdf

25 The decision approved by the order of the Chairman of the Competition Agency of Georgia N 04/1031 of December 29, 2023. Available at: https://gcca.gov.ge/uploads_script/decisions/tmp/phpdai1UR.pdf

26 Please, see the information published on the Agency's website on February 20, 2024, about the initiation of the investigation. Available (checked: March 12, 2024)

Booking.com Case

In the decision of January 9, 2017, the Agency discussed the statement of the Competition Law and Consumer Protection Center regarding the alleged violation of Article 7 of the law by Booking.com B.V., namely, the so-called Application of Parity (MFN) contractual conditions.[27]

Despite the fact that the Agency left the application inadmissible, the decision is interesting in several circumstances. The Agency discussed the relevant market and considered it to be the market for online hotel booking platforms. Regarding the product boundaries of the relevant market, the Agency noted that it does not include ordinary travel agencies and various means of booking hotels outside the Internet space (offline). In addition, metasearch engines, which are similar to online booking platforms (Online Travel Agencies/OTA), are search engines that can be used to find and identify other search engines. In addition, the agency explained that online booking platforms create so-called two sided market.[28]

Regarding the disputed contractual condition, Most Favored Nation (MFN) or the same Parity Clauses in the hotel reservation sector is one of the important constituent parts of the existing agreement between hotels and Online Booking Platforms (OTA). Two categories of MFN conditions are distinguished – "narrow" and "broad".[29]

The broad MFN clause of the agreement obliges the hotel to ensure the availability of the best room at the lowest price on its counterparty's online booking platform. This means that the price posted on this online booking platform should be lower than other (both online and offline) channels for selling one's own services.

In contrast to the above, in the case of a narrow MFN condition of the contract, the hotel has a defined obligation not to offer the customer a price lower than the price fixed on the relevant platform on its website. However, it does not restrict the hotel from offering the displayed price to the customer through other platforms or online or offline channels.[30]

At the stage of admissibility of the application, the competition agency studied the compatibility of the agreements concluded by Booking.com B.V. with hotels located in the territory of Georgia with the Georgian competition legislation. At the stage of admissibility of the submitted application, Booking.com B.V. expressed readiness to extend the contractual conditions established in the European Union to the territory of Georgia as well, which implies the use of narrow MFN conditions.[31] [32]

Finally, the agency did not recognize the application as admissible, although it started moni-

at: https://gcca.gov.ge/index.php?m=372&news_id=1455

27 The essence of the MFN condition is discussed in detail in Chapter 2 of this document.

28 See the Agency's Market Monitoring Report of Online Hotel Reservation Platforms, 2019, pp. 4-5. https://gcca.gov.ge/uploads_script/decisions/tmp/ba93e69448d1440f806dd21c5a19edd9.pdf

29 In this regard, see: COMP/2020/OP/0002 – Market Study on the Distribution of Hotel Accommodation in the EU, available at: https://competition-policy.ec.europa.eu/system/files/2023-01/kd0722783enn_hotel_accomodation_market_study.pdf

30 See the decision approved by the order of the Chairman of the Competition Agency of Georgia N 5 of January 9, 2017, p. 13.

31 Notably, since 2010, several EU national competition authorities (NCAs) have investigated parity clauses in agreements between OTAs (notably Booking.com, Expedia and HRS) and hotels. However, the manner in which national competition authorities, national courts and legislators have intervened against these clauses has varied considerably and has led to some legal ambiguity for the business sector across the EU. In 2015, the competition authorities of France, Italy and Sweden accepted the conditional commitments offered by Booking.com to replace the broad parity clauses with narrow parity clauses in the agreements concluded with hotels operating in these countries. However, the German Competition Authority's decision of December, 2013, against HRS and decision of December, 2015, against Booking.com prohibited the use of all parity clauses (broad and narrow) by these two platforms, finding that Booking.com's narrow Parity Clauses also limited competition. See: French Competition Authority, Decision 15-D-06 of April 21, 2015; Italian Competition Authority, Decision of April 21, 2015; and Swedish Competition Authority Decision 596/2013 of April, 15 2015. German Competition Authority, Decision B 9 – 66/10 of December 20, 2013 and Decision B 9 – 121/13 of December 22, 2015.

32 The Agency's decision of January 09, 2017 on the refusal to start an investigation based on the application of the Competition Law and Consumer Protection Center N01/1090 of November 15, 2016, p. 25.

toring the mentioned market in 2017 and finished it in 2019.[33]

"Online Sale of Cinema Tickets" Case

At the end of 2023, the Agency issued a decision regarding the market for retail electronic/online sale of cinema theater tickets in Georgia.

Although the disputed action indicated by the appellant E.Biletebi LLC was not committed directly in the online market, the direct impact was on the online/electronic sale market of cinema tickets.

More specifically, the appellant E.Biletebi LLC (biletebi.ge) appealed, among other circumstances, to the violation of Article 6 (abuse of a dominant position) and Article 7 (anti-competitive agreement) of the Law, while pointing to the subject of the dispute the agreement containing the provision of "exclusive delivery" of cinema tickets signed in 2022 between Distribution Company LLC and Tnet LLC, as a result of which access to the market of online sale of cinema tickets was limited.

As a result of the research, the special role of the Distribution Company in the market structure was confirmed, because it is the only importing company of movies in the territory of Georgia, and at the same time, it was the only authorized entity for the sale and distribution of tickets for attending the movie screenings of the main cinemas (Cavea City Mall Saburtalo, Cavea Tbilisi Mall, Cavea East-Point, Cavea Gallery, Amirani, Apollo together as Cavea Group) operating in the territory of Georgia.[34]

The applicant company E.Biletebi LLC and one of the defendants Tnet LLC operate in the field of electronic commerce through their own online platforms, in this case, E.Biletebi LLC – biletebi.ge, and Tnet LLC – through tkt.ge and represent competing economic agents in the field of selling tickets for attending various types of events organized on the territory of Georgia.

The mentioned case was outstanding in the practice of the Agency in several aspects. First of all, based on the circumstances revealed at the initial stage of the investigation. After 2017,[35] for the first time, the agency applied to the mechanism of the so-called temporary measures (interim measures)[36] provided for by Subsection "n" of the first paragraph of Article 18 of the law, since it considered that there were clear evidences of a significant restriction of competition.[37] In accordance with Article 18, Paragraph 1, Sub-paragraph "m" of the Law and Chapter VII[20] of the Code of Administrative Procedure, within the scope of the granted powers, the Agency applied to the court and requested the suspension of the "exclusive clause" of the contract concluded between Distribution Company LLC and Tnet LLC, and of the rights and obligations related to the exclusive until the completion of the investigation by the Agency, which was satisfied by the order of the Court of Appeal. It should be noted that the suspension effect of the so-called temporary measure had its consequences in the mentioned case, when after the suspension of the controversial "exclusive" contractual provision by the court order, Distribution Company LLC resumed the supply of tickets to E.Biletebi LLC, signed an

33 See the Agency's Online Hotel Booking Platforms Market Monitoring Report, 2019.

34 The decision approved by the order of the Chairman of the Competition Agency of Georgia N 04/1031 of December 29, 2023, p. 55. Available at: https://gcca.gov.ge/uploads_script/decisions/tmp/phpdai1UR.pdf

35 The Agency used the "temporary measure" mechanism for the first time in the decision approved by the order of the Chairman of the Agency N04/91 of April 21, 2017, the so-called "Port of Poti" case, see: https://gcca.gov.ge/uploads_script/decisions/tmp/def47d73b32b4cf0a9538ce94addd593.pdf

36 In most jurisdictions, the first condition for the application of an interim measure is the need to establish a likelihood of infringement (fumus boni iuris), see OECD (2022), Interim Measures in Antitrust Investigations, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations2022.pdf

37 The European Commission first received the authority to apply a temporary measure by a court decision, Case 792/79 R., Camera Care, par. 14, and later – by Regulation 1/2003. According to Article 8 (1) of the said Regulation, in "emergency cases" caused by the threat of serious and irreparable damage to competition, the Commission may, on its own initiative, issue a decision on interim measures, if a prima facie violation is established. see Decision approved by the order of the Chairman of the National Competition Agency of Georgia dated December 29, 2023 N04/1031, pp. 17-19.

agreement with it, on the basis of which the latter was able to penetrate the relevant market.[38]

In addition, during the investigation, the Agency revealed that Distribution Company LLC and the main cinemas operating in Georgia (so-called Cavea Group cinemas) represent a single informal holding, therefore, Distribution Company LLC and Cavea Group cinemas were considered as a single economic entity.[39]

According to the Agency's research, from 2016 until the signing of the controversial exclusive agreement, a number of economic agents operated in the market of online sale of cinema tickets, including the complainant, and after the "exclusive supply" agreement, Distribution Company LLC operated in the market of sale of cinema tickets through its own channels – kinoafisha.ge, cavea.ge, online application – through Cavea cinemas and cinema box office and the platform selected by him – tkt.ge (Tnet LLC) – exclusively.[40]

The Agency considered that Distribution Company LLC was a counterparty with no alternative for E.Biletebi LLC and other economic agents in a similar situation, and therefore a "necessary trade partner". Accordingly, its provision of services, i.e. delivery of tickets, was a necessary prerequisite for entering the market, and the refusal to provide the mentioned service created an insurmountable barrier for the applicant economic agent to enter the ticket sales market.[41]

As for the qualification of the action, the Agency paid particular attention to the stage of the pre-contractual negotiations of the disputed contract, where, as it turned out, Distribution Company LLC was simultaneously conducting negotiations with both the appellant "E.Biletebi LLC and the defendant Tnet LLC. Accordingly, the latter actively carried out various actions to obtain the "exclusive contract".[42]

According to the Agency's position, the agreement revealed between "Distribution Company" LLC and Tnet LLC, as well as between Distribution Company LLC and E.Biletebi LLC, contained a purpose-determined action, which per se (by itself) represents an action against the law and in assessing its severity, it is not necessary to additionally examine the consequences of the agreement.[43] The Agency indicated that a concurrence of wills to remove and exclude economic agents of the existing competitor or potential competitor in the cinema ticketing market and to close it, represented an agreement that eventually was aimed to limit the market, that constitutes anti-competition agreement.[44]

Although at such a time, it is no longer necessary to evaluate and assert the restrictive effect of competition, since, finally, the exclusive vertical coordination was signed in appropriate written form between Distribution Company LLC and Tnet LLC, the Agency additionally discussed the restrictive effect of exclusive vertical reservation on competition, at which time the Agency used and was guided by the following criteria: "extent and duration of exclusive supply", counterbalancing market power of the supplier, level of trade and nature of the product/service, presence of barriers to entry at the supply/supplier level. In addition, the Agency considered relevant and discussed the content, subject matter and the actual result of the "exclusive supply" reservation of the contested contract.[45]

In the end, the Agency established a violation of Article 7 of the law and imposed a fine of 1,120,562 GEL on the single economic entity Distribution Company LLC and Cavea Group cinemas, 544,328 GEL – on Tinet LLC, and on E.Biletebi LLC – a fine in the amount of 5,368 GEL was imposed.

It should be emphasized that this is the first precedent in the practice of the Agency, when the complainant was also found to be a party violating the competition legislation, and the corresponding sanction was imposed.

In addition, to generalize the results of the research and improve the online ticket sales market, the agency issued mandatory recommendations for consideration towards ticket dis-

38 *Ibid.*
39 *Ibid.*, p. 16, 68-69.
40 *Ibid.*, p. 150.
41 *Ibid.*, pp. 57, 116.
42 *Ibid.*, pp. 114-118.
43 *Ibid.*, p. 170.
44 *Ibid.*, pp. 115, 118.
45 *Ibid.*, pp. 118-151.

tributors/organizers of cultural, entertainment, creative, sports, leisure and tourism, educational, transport or other types events/products/services, so that the selection process of the online ticket seller platform and the management of the contractual relationship with it are carried out in such a way as not to cause unreasonable restriction of competition.

"Mastercard" Case

The latest investigation, which will affect the e-commerce market, was initiated by the Agency on its own initiative in February, 2024, on the alleged violation of Article 7 (anti-competition agreement) of the Law. The matter concerns the offer of exclusive discounts for Mastercard card holders only on the web-portal belonging to Tnet LLC – www.swoop.ge, when selling specific products.

It should be noted that the information about the alleged violation was provided to the Agency by the company Rational Solutions (www.hotsale.ge). Later, the company withdrew its complaint, however, based on the factual circumstances described in it and the attached evidence, reasonable doubt arose regarding the fact of the alleged violation. Accordingly, the agency, on its own initiative, started investigating the case.[46]

CONCLUSION

The study of the decisions of the Agency showed that the application and enforcement of the Georgian competition law in relation to the digital economy/markets is not very frequent up to this stage, and the main part concerns the facts of unfair competition through social platforms, although it is not problematic in terms of the enforcement of the competition law for the digital economy, because he actions of the relevant agents did not involve any complex or technological strategies to gain a competitive advantage.

Also, practices regarding restrictive agreements on competition in electronic markets began to take shape. The case of booking.com is significant because the relevant digital market's productive boundaries have been determined, separating it from the real market. As for the case of online ticket sales, it is important that the Agency used the so-called temporary mechanism before the final decision, which was a very effective way for the Agency to quickly respond and restore balance in the electronic market, which, in the end, allowed the economic agent to return to the electronic market for ticket sales before the Agency made the appropriate decision based on the investigation.

It is also worth noting that the Agency recently started research on its own initiative in the field of electronic commerce, which is the first case in the Agency's practice. Accordingly, the final decision on the mentioned case will be significant for the further study of the enforcement of Georgian competition law on digital markets.

46 Georgian Competition and Consumer Protection Agency. (10.03.2024). https://gcca.gov.ge/index.php?m=372&news_id=1455

BIBLIOGRAPHY

Laws and Bylaws:

1. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 2014.
2. Law of Georgia On Competition, 6148-Ib, 08/05/2012.
3. Law of Georgia On Amendments of the Law of Georgia on Competition, 7126-Ib, 16/09/2020.
4. "Methodology Guidelines on Market Research" issued by the Order N37 of October 23, 2020, of the Chairman of the Georgian Competition and Consumer Agency.
5. "Case Investigation Rules and Procedures" issued by the Order N40 of October 28, 2020, of the Chairman of the Georgian Competition and Consumer Agency.
6. Treaty on the Functioning of the European Union, 2008.

Handbooks/Articles:

1. Bukht, R., & Heeks, R. (2017, August 3). Defining, Conceptualising, and Measuring the Digital Economy. Development Informatics Working Paper.
2. Young, R., and Crews, W. (April 17, 2019). "The Case against Antitrust Law: Ten Areas Where Antitrust Policy Can Move on from the Smokestack Era". Competitive Enterprise Institute, 2019.
3. Graef, I. (September 8, 2015). "Market Definition and Market Power in Data: The Case of Online Platforms" World Competition: Law and Economics Review, Vol. 38, No. 4 (2015).
4. Zelger, B. (2023). "Restrictions of EU Competition Law in the Digital Age: The Meaning of 'Effects' in a Digital Economy". In Studies in European Economic Law and Regulation, Volume 25. Springer.
5. Boyd, D. M. & Ellison, B. E. (2007). Social Network Sites: Definition, History, and Scholarship, 13 J. COMPUTER-MEDIATED COMM. 210,211.
6. Gebicka, A., Heinemann, A. (2014). Social Media & Competition Law. World Competition, 37(2):155.

Decisions:

1. Decision issued by the Order N152 of September 14, 2016, of the Chairman of Georgian Competition and Consumer Agency.
2. Decision issued by the Order 04/186 of July 19, 2017, of the Chairman of Georgian Competition and Consumer Agency.
3. Decision issued by the Order N04/132 of May 30, 2018, of the Chairman of Georgian Competition and Consumer Agency.
4. Decision issued by the Order N5 of January 9, 2017, of the Chairman of Georgian Competition and Consumer Agency.
5. Decision issued by the Order N04/1031 of December 29, 2023, of the Chairman of Georgian Competition and Consumer Agency.
6. Decision issued by the Order N04/91 of April 21, 2017, of the Chairman of the Agency.
7. Decision of the Agency of Janyary 09, 2017, on the rejection to start an investigation based on the application N01/1090 of November 15, 2016, of the NNLE "Center for Competition Law and Consumer Protection".

8. Online Hotel Booking Platforms Market Monitoring Report of the Georgian Competition and Consumer Agency, 2019.

Decisions Adopted by Foreign Agencies

1. Case no. COMP/M.7217, Facebook/WhatsApp.
2. French Competition Authority, Decision 15-D-06 dated 21 April 2015; Italian Competition Authority, Decision dated 21 April 2015.
3. Swedish Competition Authority Decision 596/2013 dated 15 April 2015.
4. German Competition Authority, Decision B 9 – 66/10 dated 20 December 2013 and Decision B 9 – 121/13 dated 22 December 2015.

Other Foreign Sources:

1. Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645).
2. COMP/2020/OP/0002 – Market Study on the Distribution of Hotel Accommodation in the EU.
3. OECD (2022), Interim Measures in Antitrust Investigations, OECD Competition Policy Roundtable Background Note.

Other Sources:

1. Guideline document on the evaluation of the impact of the decisions taken by the agency on the competitive environment and the monitoring of the implementation of the mandatory recommendations for consideration, 2023.

გიორგი ფარულავა, გვანცა ჩადუნელი

კვლევა განხორციელდა „შოთა რუსთაველის საქართველოს ეროვნული სამეცნიერო ფონდის“ მხარდაჭერით (FR – 22-4466)

საქართველოს კონკურენციის სამართალი ციფრულ ეპოქაში – ქართული პრაქტიკა და არსებული გამოწვევები

გიორგი ფარულავა

დოქტორანტი, სტოკჰოლმის უნივერსიტეტი, სამართლის ფაკულტეტი, სტოკჰოლმი, შვედეთი

გვანცა ჩადუნელი

დოქტორანტი, უნივერსიტეტი პარიზი-პანთეონ-ასასი, სამართლის ფაკულტეტი, პარიზი, საფრანგეთი

აბსტრაქტი

სტატია ახდენს საქართველოს კონკურენციის და მომხმარებლის დაცვის სააგენტოს მიერ ციფრულ ბაზრებთან/კონკურენციასთან დაკავშირებით მიღებული გადაწყვეტილებების იდენტიფიკაციას, სისტემატიზაციას და აღნიშნული გადაწყვეტილებების საფუძველზე სააგენტოს მიერ დამკვიდრებული პრაქტიკის მიმოხილვას. სტატიის შესავალში ხაზგასმულია თანამედროვე კონკურენციის სამართლის მნიშვნელოვანი გამოწვევა, რაც გულისხმობს, რომ კონკურენციის სამართალი არ არსებობს ეპოქისა და კონტექსტისაგან დამოუკიდებლად და მნიშვნელოვანია, რომ კონკურენციის სამართალი და მისი აღსრულების მექანიზმები ეფექტიანად ფუნქციონირებდეს თანამედროვე ციფრული ეკონომიკის პირობებში. ამის შემდეგ, სტატია ახდენს ციფრული ეკონომიკის დეფინიციას და აღწერს მის

ორ მნიშვნელოვან მახასიათებელს: (დიდ) მონაცემებს და ციფრულ პლატფორმებს. შემდეგ ნახსენებია რამდენიმე თეორიული პრობლემა, რამაც შესაძლოა შეაფერხოს კონკურენციის სამართლის ეფექტიანი აღსრულება მსგავს ეკონომიკურ აგენტებთან/ბაზრებთან მიმართებით.

სტატიის ძირითადი ნაწილი შეეხება, ონლაინ ბაზრებზე თუ ციფრულ პლატფორმებთან მიმართებით, კონკურენციის საagენტოს მიერ მიღებული გადაწყვეტილებების მიმოხილვას. ვინაიდან ჯერჯერობით არ არსებობს ციფრულ ეპოქაში კონკურენციის სამართლის ეფექტიანად აღსრულებისათვის საჭირო სპეციალური საკანონმდებლო ან კანონქვემდებარე ნორმები, კონკურენციის სააგენტო მსგავსი საკითხების გადასაწყვეტად კონკურენციის სამართლის მარეგულირებელი ზოგადი საკანონმდებლო ჩარჩოთი ხელმძღვანელობს. გადაწყვეტილებების ანალიზმა ცხადყო, რომ სააგენტოს პრაქტიკა მხოლოდ ორი: (I) არაკეთილსინდისიერი კონკურენციისა და (II) კონკურენციის შემზღუდველი შეთანხმებების მიმართულებით ვითარდება და ამ დროისათვის არ არსებობს, მაგალითად, სააგენტოს გადაწყვეტილება ციფრული პლატფორმების მიერ, დომინირებული მდგომარეობის ბოროტად გამოყენებასთან დაკავშირებით.

საკვანძო სიტყვები: კონკურენცია, კონკურენციის სამართალი, ციფრული, ეკონომიკა, ვირტუალური

შესავალი

ციფრული და ონლაინ ტექნოლოგიების/სერვისების განვითარებასთან ერთად, მონაცემებზე დაფუძნებულმა ფინანსურმა ტრანზაქციებმა თანდათან რეალური სივრციდან ვირტუალურში გადაინაცვლა. შესაბამისად, ვირტუალური გახდა კონკურენციაც ეკონომიკურ აგენტებს შორის. კონკურენციის სამართლის განვითარება და აღსრულება, ისტორიულად, ტრადიციულ ბაზრებთან მიმართებით ჩამოყალიბდა, თუმცა ახალი ტექნოლოგიური რეალობის გათვალისწინებით, კონკურენციის სამართალსა და მის აღმასრულებელ ორგანოებს, სამართლისა და საჯარო მმართველობის ბევრი სხვა მიმართულების მსგავსად, უწევთ ვირტუალურ რეალობასთან ადაპტაცია, რათა კონკურენციის სამართალი არ ჩამორჩეს დროს და უზრუნველყოფილ იქნეს მისი ეფექტიანი აღსრულება.

აღნიშნული გამოწვევის წინაშე დგას ქართული კონკურენციის სამართალიც და მისი აღმასრულებელი მთავარი ორგანო – საქართველოს კონკურენციის და მომხმარებელთა დაცვის სააგენტოც (შემდგომში – კონკურენციის სააგენტო, სააგენტო), რომელიც კონკურენციის აღმასრულებელ ევროპულ თუ ამერიკულ ინსტიტუციებთან შედარებით ახალგაზრდა ორგანიზაციაა და ციფრული ეპოქის გამოწვევებზე საპასუხოდ აქვს შედარებით შეზღუდული საკანონმდებლო, ტექნიკური თუ ადამიანური რესურსები. მიუხედავად ზემოთქმულია, კონკურენციის სააგენტოს მისიაა, წარმატებით უპასუხოს აღნიშნულ გამოწვევებს, რათა, ერთი მხრივ, არ დაზარალდნენ ქართველი მომხმარებლები და სხვადასხვა ბაზრებმა (ტრადიციულმა, ვირტუალურმა თუ შერეულმა) განაგრძონ კონკურენციის კანონმდებლობის შესაბამისად ფუნქციონირება, ხოლო მეორე მხრივ, უზრუნველყოს იმ არაპირდაპირი ფუნქციის შესრულება, რაც მას ევროკავშირ-საქართველოს ასოცირების შეთანხმების კონტექსტში აქვს და რაც გულისხმობს ქართული კონკურენციის სამართლის ევროკავშირის სამართლის შესაბამისად განვითარებას, იქნება ეს კანონმდებლობის ჰარმონიზება თუ ევროპული სასამართლოების პრაქტიკის გათვალისწინება. აღნიშნული ბუნებრივია, შეეხება ციფრულ კონკურენციასაც, რაც ევროკავშირის კონკურენციის სამართლისთვისაც მნიშვნელოვან გამოწვევას წარმოადგენს.

ზემოაღნიშნულის გათვალისწინებით, სტატიის მიზანია, მოახდინოს ციფრული კონკურენციის საკითხებზე კონკურენციის სააგენტოს მიერ მიღებული გადაწყვეტილებე-

ბის იდენტიფიცირება, სისტემატიზაცია და ანალიზი. კვლევის მიზნების მისაღწევად გამოყენებული იქნება სამართლის კვლევის ტრადიციული (დოგმატური) მეთოდი, რაც გულისხმობს კანონმდებლობის, კანონქვემდებარე აქტების, კონკურენციის სააგენტოს გადაწყვეტილებების თუ შესაბამისი აკადემიური ლიტერატურის დამუშავებას.

სტატიის მომდევნო ნაწილი დაეთმობა ციფრული ეკონომიკის დეფინიციას და, განსაკუთრებით, შემდეგ მნიშვნელოვან ფაქტორებს – მონაცემებსა და ონლაინ პლატფორმებს. შემდეგ განხილული იქნება ის შინაარსობრივი თუ სააღსრულებო საკითხები, რომლებმაც შესაძლოა შეაფერხოს კონკურენციის სამართლის მიერ ციფრული ეკონომიკის ეფექტიანი რეგულირება. სტატის მეოთხე თავი მიმოიხილავს ციფრულ ბაზრებთან მიმართებით საქართველოს საკანონმდებლო ჩარჩოს, ხოლო მეხუთე თავი დაეთმობა კონკურენციის სააგენტოს გადაწყვეტილებების ანალიზს. სტატიის ბოლოს შეჯამდება განხილული საკითხები.

1. ციფრული ეკონონომიკა – ბიზნეს მოდელები და სხვა მახასიათებლები

ტექნოლოგიების სწრაფ განვითარებასთან ერთად, ეკონომიკური აგენტებისათვის ხელმისაწვდომი გახდა ახალი საშუალებები თუ ბიზნეს მოდელები, რომლებიც შესაძლებელია გამოყენებულ იქნეს რესურსების დაზოგვის, კონკურენტული უპირატესობის თუ საბაზრო ძალაუფლების მოპოვების, ან/და მომხმარებლებისათვის/ბაზრისთვის ღირებულების შექმნის მიზნით. სტატიის ამ ნაწილში შემოთავაზებული იქნება ციფრული ეკონომიკის დეფინიცია, ასევე, განხილული იქნება მისი ორი მნიშვნელოვანი მახასიათებელი: 1. მონაცემებზე დაფუძნებული ეკონომიკური საქმიანობა და 2. ციფრული პლატფორმები. სწორედ ციფრული ეკონომიკის უნიკალურმა მახასიათებლებმა გამოიწვია კონკურენციის ახალი ფორმების განვითარება, რამაც, თავის მხრივ, ახალი გამოწვევების წინაშე დააყენა კონკურენციის სამართლის ეფექტიანი აღსრულება.

ციფრული ეკონომიკა გულისხმობს ეკონომიკურ აქტივობას, რომელიც ნაწარმოებია სრულად ან მნიშვნელოვნად ციფრული ტექნოლოგიების საშუალებით და ბიზნეს მოდელი ეფუძნება ციფრულ პროდუქტებს ან სერვისებს.[1] ციფრული ეკონომიკა, როგორც წესი, ფუნქციონირებს ისეთი ტექნოლოგიების გამოყენებით, როგორებიცაა: ინტერნეტი, ღრუბლოვანი ტექნოლოგიები, ჭკვიანი ალგორითმები და ა.შ. ციფრული ეკონომიკის აღსანიშნავად ზოგჯერ, ასევე, გამოიყენება ტერმინები „ინფორმაციის ეკონომიკა“ ან „ინტერნეტის ეკონომიკა“. ხანდახან რთულია გამიჯვნა ტრადიციულ ეკონომიკასა და ციფრულ პროდუქციას/სერვისებს შორის, რადგანაც ბიზნეს მოდელი ორივეს აერთიანებს და ამგვარ შემთხვევებს ზოგჯერ „შერეული ეკონომიკის“ სახელითაც მოიხსენიებენ. ტექნოლოგიების და კომპიუტერული სიმძლავრეების განვითარებასთან ერთად სწრაფად ვითარდება ახალი ციფრული პროდუქტები თუ სერვისები, შესაბამისად, შეუძლებელია ციფრული ეკონომიკის მამოძრავებელი ყველა მახასიათებლის წარმოჩენა, თუმცა შეგვიძლია გამოვყოთ შემდეგი ორი მახასიათებელი: (დიდი) მონაცემები და ციფრული პლატფორმები.

1.1 (დიდი) მონაცემები

ციფრულ ეკონომიკაში კომპანიების ბიზნეს მოდელი ხშირად ეფუძნება ეკონომიკური აგენტების მხრიდან მონაცემების მოპოვებას და დამუშავებას. აღნიშნული შეიძლება იყოს როგორც ინდივიდების პირადი (პერსონალური) მონაცემები, ასევე, ნებისმიერი სხვა სახის მონაცემი. მოცულობის და სხვა მახასიათებლების გათვალისწინებით, საქმე შეიძლება გვქონდეს ე.წ. „დიდ მონა-

1 Bukht, Rumana, & Heeks, Richard. (2017, August 3). Defining, Conceptualising, and Measuring the Digital Economy. Development Informatics Working Paper no. 68. p.13 Available at SSRN: https://ssrn.com/abstract=3431732 or http://dx.doi.org/10.2139/ssrn.3431732

ცემებთან“ ან, როგორც ზოგჯერ მას უწოდებენ, „დიდი მონაცემების ანალიტიკასთან“. კომპანიები აგროვებენ, ამუშავებენ და აანალიზებენ მონაცემთა დიდ ნაკრებებს, რათა მიიღონ ინფორმაცია, ოპტიმიზაცია გაუწიონ პროცესებს და მონაცემების საფუძველზე მიიღონ გადაწყვეტილებები. მონაცემებზე დაფუძნებული ბიზნეს მოდელები მოიცავს სხვადასხვა ინდუსტრიებს, მათ შორის: ტექნოლოგიას, ფინანსებს, ჯანდაცვას და საცალო ვაჭრობას. კომპანიებს, რომლებსაც აქვთ წვდომა მონაცემთა უზარმაზარ ნაკრებებზე, შეიძლება ჰქონდეთ მნიშვნელოვანი საბაზრო ძალა და შექმნან „მონაცემთა მონოპოლიები“. მონაცემების მხრივ ამგვარი უპირატესობის ქონამ, აგრეთვე, ამგვარი მონაცემების დიდი ნაკრების შეძენისა და დამუშავების მაღალმა ღირებულებამ შეიძლება მცირე კონკურენტებისათვის შექმნას ბარიერები შესაბამის ბაზრებზე შესასვლელად, რამაც, საბოლოო ჯამში, შესაძლოა ნეგატიური გავლენა მოახდინოს კონკურენციაზე, ინოვაციასა და მომხმარებელთა კეთილდღეობაზე.

1.2 ციფრული პლატფორმები

ციფრული პლატფორმები არის ონლაინ ეკოსისტემები, რომლებიც ხელს უწყობენ მომხმარებელთა შორის ურთიერთქმედებას და ტრანზაქციებს. ეს პლატფორმები, როგორც წესი, გვთავაზობენ სხვადასხვა სერვისებს, როგორიცაა: საძიებო სისტემები (Google), სოციალური ქსელები (Facebook), ელექტრონული კომერცია (Amazon) და აპლიკაციების მაღაზიები (Apple). მსგავსი პლატფორმები, როგორც წესი, ქმნიან ე.წ. „ორმხრივ ბაზრებს“ (Two-sided Market), სადაც, მაგალითად, სერვისის მიმწოდებელ კომპანიებს (ერთი ბაზარი) აკავშირებენ საბოლოო მომხმარებლებთან (მეორე ბაზარი). აღნიშნული მოდელი დაფუძნებულია ე.წ. „ქსელის ეფექტებზე“, რაც გულისხმობს იმას, რომ პლატფორმის ღირებულება იზრდება, როცა მეტი მომხმარებელი უერთდება ორივე ბაზარს. მაგალითად, ერთი მხრივ, პლატფორმაზე საბოლოო მომხმარებლების რაოდენობის ზრდა უფრო მიმზიდველს ხდის აღნიშნული პლატფორმის გამოყენებას სერვისის მიმწოდებელი კომპანიებისთვის. მეორე მხრივ, სერვისის მიმწოდებელი კომპანიების დიდი რაოდენობა, როგორც წესი, ზრდის კონკურენციას, ამაღლებს ხარისხს და საბოლოო მომხმარებლებს სთავაზობს უკეთეს არჩევანს სასურველი პროდუქციის/სერვისის მისაღებად. მსგავსი პლატფორმები, როგორც წესი, ასევე იყენებენ წინა ქვეთავში განხილულ პირად თუ დიდ მონაცემებს, რაც მათ საშუალებას აძლევს, შეისწავლონ მომხმარებელთა ქცევა და განახორციელონ ზუსტი და მორგებული (პერსონალიზებული) შეთავაზებები. მიუხედავად მნიშვნელოვანი ღირებულების შექმნისა, ონლაინ პლატფორმები ქმნიან რისკებს კონკურენციის და მომხმარებელთა კეთილდღეობის კუთხით, რაც შეიძლება მოიცავდეს ვერტიკალურ ინტეგრაციას და საბაზრო ძალაუფლების ბოროტად გამოყენებას, საბოლოო მომხმარებლისთვის დისკრიმინაციული პერსონალიზებული ფასების შეთავაზებას, ბაზარზე შესვლის ბარიერების შექმნას, ალტერნატიულ ბაზარზე გადასვლის მაღალ ხარჯებს და ა.შ.

2. კონკურენციის სამართლის გამოწვევები ციფრული ეკონომიკისათვის

ციფრული ეკონომიკის განვითარებამ, ერთი მხრივ, ხელი შეუწყო ეკონომიკურ აგენტებს საკუთარი სერვისების თუ პროდუქციის განთავსებაში, ინტერნეტისა თუ სხვადასხვა პლატფორმების საშუალებით მომხმარებლებს გაუჩნდათ წვდომა მეტ ინფორმაციაზე და, შესაბამისად, უკეთესი არჩევანი, რათა მოახდინონ სხვადასხვა პროდუქციის ხარისხისა თუ ფასის შედარება. მიუხედავად მნიშვნელოვანი პოზიტიური ეფექტებისა, ინტერნეტის ეკონომიკამ, ასევე, შექმნა მნიშვნელოვანი პრობლემები კონკურენციის სამართლისა და პოლიტიკისათვის. მსგავსი რისკები მზარდია და ყოველ ინდივიდუალურ შემთხვევასთან მიმართებით ინდივიდუა-

ლურად უნდა შეფასდეს, თუმცა კონცეპტუალურად შეიძლება დაიყოს „შინაარსობრივ“ და „სააღსრულებო“ გამოწვევებად.

თანამედროვე ტექნოლოგიების და ციფრული ეკონომიკის განვითარების ფონზე ჩამოყალიბდნენ ე.წ. დიდი ტექნოლოგიური კომპანიები (“Big Tech“). აგრეთვე, ხშირად გამოყოფენ ე.წ. ამერიკულ სუპერფირმებს Facebook, Amazon, Apple, Netflix and Google, რომლებსაც ასევე აკრონიმით ‘FAANG’ მოიხსენიებენ[2]. აღნიშნული ორგანიზაციები უპრეცედენტო საბაზრო ძალაუფლებას, ფინანსურ, ტექნიკურ თუ პოლიტიკურ ძალაუფლებას ფლობენ და კონკურენციის სამართლისა და პოლიტიკისთვისაც უპრეცედენტო გამოწვევებს ქმნიან. ბუნებრივია, ამგვარად მძლავრი საბაზრო მდგომარეობის გათვალისწინებით, FAANG ეკონომიკური აგენტები კონკურენციის სამართლის აღმასრულებელი ორგანოების მხრიდანაც განსაკუთრებული ყურადღების, წნეხის და სანქციების ქვეშ არიან. მაგალითად, კონკურენციის კანონმდებლობის დარღვევისათვის ერთ-ერთ საქმეზე Apple-ს ევროკომისიის მიერ 1.8. მილიარდი ევროს ოდენობით ჯარიმა დაეკისრა[3].

კონკურენციის კანონმდებლობის/პოლიტიკის მთავარი მიზანი სხვადასხვა ბაზრებზე ეფექტიანი კონკურენციის არსებობა და მომხმარებელთა კეთილდღეობის დაცვაა, რათა, მაგალითად, კომპანიების მხრიდან კონკურენციის საწინააღმდეგო შეთანხმებებმა არ დააზარალოს საბოლოო მომხმარებელი. ციფრული ეკონომიკის პირობებში ზოგჯერ რთულდება კონკურენციის კანონმდებლობის მთავარი მიზნების მიღწევა. კერძოდ, ონლაინ პლატფორმების მხრიდან შესაძლოა განხორციელდეს კონკურენციის შეზღუდვა სერვისის/პროდუქტის მიმწოდებელი ფირმებისათვის, შეიქმნას ბაზარზე შექმნის ხელოვნური ბარიერები, მოხდეს ფასების ჭკვიანური ალგორითმების საშუალებით ფიქსაცია, საბოლოო მომხმარებლისთვის გაუარესდეს პროდუქციის/სერვისის ხარისხი, გაიზარდოს ღირებულება და ა.შ.

რაც შეეხება სააღსრულებო გამოწვევებს, აქ მოიაზრება უშუალოდ კონკურენციის სამართლის აღმასრულებელი ორგანოების მხრიდან, მათ ხელთ არსებული რესურსებისა და სამართლებრივი ჩარჩოს საფუძველზე, კონკურენციის სამართლის შეფარდების და ეფექტიანი აღსრულების სირთულე კონკრეტულად ციფრული ეკონომიკისათვის. ცალკეული ქმედებების შეფასების, კონკურენციის საწინააღმდეგო ქმედებების დადგენის და შესაბამისი ეკონომიკური აგენტების მიმართ სანქციების დაწესებისას, კონკურენციის აღმასრულებელი უწყებები მოქმედენ იმ საკანონმდებლო თუ თეორიული საფუძვლით, რაც კონკურენციის სამართლის და შესაბამისი სასამართლო პრაქტიკის განვითარებასთან ერთად ჩამოყალიბდა, თუმცა აღნიშნული შესაძლოა არ აღმოჩნდეს საკმარისი ციფრულ ეკონომიკასთან დაკავშირებულ შემთხვევებში. კერძოდ, შესაძლებელია გართულდეს შესაბამისი ბაზრის განსაზღვრა, ან/და აღნიშნულ ბაზარზე შესაბამისი აგენტის საბაზრო ძალაუფლების დადგენა[4], ტრადიციულმა ზიანის ეკონომიკურმა თეორიამ არ იმუშაოს ციფრულ ბაზრებთან მიმართებით[5], ადგილი ჰქონდეს არაფასობრივ კონკურენციას (მაგალითად მონაცემებზე დაფუძნებულს), ან დაგვიანებული იყოს კონკურენციის კანონმდებლობის ex-post აღსრულება.

2 Young, Ryan, and Wayne Crews. "The Case against Antitrust Law: Ten Areas Where Antitrust Policy Can Move on from the Smokestack Era" (April 17, 2019). Competitive Enterprise Institute, 2019. Available at SSRN: https://ssrn.com/abstract=3458540

3 გთხოვთ იხილეთ ევროკომისიის, 2024 წლის 4 მარტის პრეს-რელიზი, კომპანია apple-ის დაჯარიმებასთან დაკავშირებით. ხელმისაწვდომია (შემოწმებულია 12/03/24) შემდეგ მისამართზე: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161

4 Graef, Inge. "Market Definition and Market Power in Data: The Case of Online Platforms" (September 8, 2015). World Competition: Law and Economics Review, Vol. 38, No. 4 (2015), pp. 473-506. Available at SSRN: https://ssrn.com/abstract=2657732

5 Zelger, Bernadette. "Restrictions of EU Competition Law in the Digital Age: The Meaning of 'Effects' in a Digital Economy." In Studies in European Economic Law and Regulation, Volume 25. Springer, 2023, Chapter.

3. ციფრული ბაზრები და ქართული სამართლებრივი რეგულირება

საქართველოში თავისუფალი და სამართლიანი კონკურენციის დაცვისა და აღსრულების სტანდარტებს „კონკურენციის შესახებ“ საქართველოს კანონი (შემდგომში „კანონი“) ადგენს.

სააგენტო კონკურენციის საწინააღმდეგო ქმედებების გამოვლენას ოთხი ძირითადი მიმართულებით ახდენს: კონკურენციის საწინააღმდეგო შეთანხმებები,[6] დომინანტური მდგომარეობის ბოროტად გამოყენება,[7] არაკეთილსინდისიერი კონკურენცია[8] და სახელმწიფო/ადმინისტრაციული ორგანოების მიერ კონკურენციის შეზღუდვა.[9]

ბოლო წლებში საქართველოს კონკურენციის კანონმდებლობაში განხორციელდა მნიშვნელოვანი ცვლილებები კონკურენციის სამართლის პოლიტიკისა და აღსრულების მიმართულებით, სადაც განსაკუთრებით უნდა აღინიშნოს კონკურენციის კანონმდებლობაში 2020 წელს შესული ცვლილებები,[10] რის შედეგადაც გაიზარდა სააგენტოს უფლებამოსილებები, დაიხვეწა და ევროკავშირის კანონმდებლობასთან ჰარმონიზებაში მოვიდა რიგი დებულებები. თუმცაღა, კონკურენციის მარეგულირებელი დღევანდელი ქართული კანონმდებლობა არ მოიცავს დანაწესებს ელექტრონულ/ციფრულ ბაზრებზე კონკურენციის წესების დაცვის სტანდარტების შესახებ, რომელიც, ერთი მხრივ, სახელმძღვანელო უნდა იყოს კონკურენციის აღმასრულებელი ორგანოებისათვის[11], მეორე მხრივ კი, შესაბამის ბაზარზე ოპერირებადი ყველა ეკონომიკური აგენტისათვის და რომელთა დარღვევის შემთხვევაში უნდა დაწესდეს შესაბამისი სანქცია.

4. ციფრულ ბაზრებზე კონკურენციის წესების აღსრულების ქართული პრაქტიკა

მიუხედავად იმისა, რომ კონკურენციის კანონმდებლობა, მათ შორის, არც „კონკურენციის შესახებ“ კანონი არ შეიცავს პირდაპირ მითითებას ციფრულ ბაზრებზე კონკურენციის აღსრულების შესახებ, სააგენტოს უფლებამოსილება როგორც ტრადიციულ, ისე ონლაინ ბაზრებზე კონკურენციის აღსრულების კუთხით თანაბრად ვრცელდება და მიუხედავად ციფრულ ბაზრებზე სპეციალური სამართლებრივი მოწესრიგების არარსებობისა, სააგენტო პრაქტიკაში ციფრულ ბაზრებზე კონკურენციის წესების დარღვევის ანდა ელექტრონული პლატფორმის მონაწილეების მიერ კონკურენციის შეზღუდვის შესაძლო ფაქტების მოკვლევას ზოგად რეგულაციაზე დაყრდნობით ახორციელებს, მათ შორის, არაკეთილსინდისიერი კონკურენციისა და კონკურენციის შემზღუდველი შეთანხმებების კუთხით.

4.1. არაკეთილსინდისიერი კონკურენცია ონლაინ პლატფორმებზე

2016 და 2017 წლებში სააგენტოს დაარსების შემდეგ ერთ-ერთი პირველი მოკვლევები შეეხებოდა სწორედ ონლაინ პლატფორმაზე, კერძოდ, ონლაინ სოციალურ პლატფორმაზე განხორციელებული არაკეთილსინდისიერი კონკურენციის შესაძლო ფაქტებთან დაკავშირებულ საქმეებს. აღნიშნულ საქმეებს შორისაა ე.წ. „პარაზიტოლოგიის ინსტიტუტის

6 «კონკურენციის შესახებ“ საქართველოს კანონის მე-7 მუხლი.

7 *იქვე*, მე-6 მუხლი.

8 *იქვე*, მე-11[3] მუხლი.

9 *იქვე*, მე-10 მუხლი.

10 საქართველოს 2020 წლის 16 სექტემბრის კანონი №7126.

11 კონკურენციის პოლიტიკის აღმასრულებელი ორგანო არ არის მხოლოდ კონკურენციის სააგენტო, არამედ, ამავდროულად სასამართლოც, კერძოდ, „კონკურენციის შესახებ“ საქართველოს კანონის 28-ე მუხლის პირველი პუნქტის მიხედვით, პირს უფლება აქვს, მიმართოს სასამართლოს „კონკუნციის შესახებ“ კანონის დარღვევის თაობაზე საა-

გენტოსათვის მიმართვის გარეშე.

საქმე“[12], „აიტექნიკის" საქმე“[13], ასევე „დიზაინ ჰაუსის“[14] საქმე.

კანონის მე-11[3] მუხლი კრძალავს არაკეთილსინდისიერ კონკურენციას და არაკეთილსინდისიერ კონკურენციად მიიჩნევს ეკონომიკური აგენტის ქმედებას, რომელიც ეწინააღმდეგება საქმიანი ეთიკის ნორმებს და ლახავს კონკურენტთა და მომხმარებელთა ინტერესებს. ამავდროულად, ეს მუხლი განსაზღვრავს ქმედებების კონკრეტულ შემადგენლობებსაც, რომელიც კანონში 2020 წლის 4 ნოემბრიდან ამოქმედებული ცვლილებების შესაბამისად წარმოადგენს სამაგალითო (და არა ამომწურავ) ჩამონათვალს.

კანონის მე-11[3] მუხლის მიზნებისათვის, ეკონომიკური აგენტის ქმედების არაკეთილსინდისიერ კონკურენციად დაკვალიფიცირებისთვის საჭიროა შემდეგი პირობების ერთობლივად არსებობა: ა) ქმედება უნდა ეწინააღმდეგებოდეს საქმიანი ეთიკის ნორმებს; ბ) ქმედება უნდა ლახავდეს კონკურენტთა ინტერესებს; გ) ქმედება უნდა ლახავდეს მომხმარებლის ინტერესებს.

სააგენტოს მიერ ონლაინ ბაზრებზე არაკეთილსინდისიერი კონკურენციის ფარგლებში განხილული ზემოხსენებული საქმეები შეეხებოდა ონლაინ სოციალურ ქსელში, კერძოდ facebook (Meta) პლატფორმაზე ეკონომიკური აგენტების მიერ განხორციელებულ ქმედებებს. Facebook-ის მიერ შემოთავაზებული ძირითადი სერვისი[15] არის მისი ონლაინ სოციალური ქსელის პლატფორმა[16].

სოციალური მედია, ე.ი. სოციალური ქსელის პლატფორმები არის [W]eb-ზე დაფუძნებული სერვისები, რომლებიც საშუალებას აძლევს ინდივიდებს (1) შექმნან საჯარო ან ნახევრად საჯარო პროფილი შეზღუდული ფორუმის ფარგლებში, (2) ჩამოაყალიბონ სხვა მომხმარებლების სია, რომლებთანაც ისინი იზიარებენ კავშირს და (3) ნახონ და დაათვალიერონ ქსელში საკუთარი და სხვების მიერ დამყარებული კავშირების სია.[17]

თუ Facebook-ის შექმნის პირველადი მიზანი შემოიფარგლებოდა მომხმარებლების სხვა მომხმარებლებთან დაკავშირების მიზნით. შემდგომში გაჩნდა მეორე ასპექტიც, რომელიც ფეისბუკს კვლავ ორმხრივ ბაზრად აქცევს და ის აღარ არის პლატფორმა მხოლოდ კერძო მომხმარებელი კერძო მომხმარებლისთვის. ფეისბუქი ამჟამად გამოიყენება, როგორც საკონტაქტო პუნქტი კერძო მომხმარებლებსა და პროფესიონალებს შორის, რომლებიც აქვეყნებენ თავიანთ პროდუქტებისა და სერვისების რეკლამას.[18]

მაშინ როცა, ერთი მხრივ, მეწარმე სუბიექტი/ეკონომიკური აგენტი ფეისბუქ პლატფორმას იყენებს, როგორც მომხმარებელთან და პოტენციურ მომხმარებელთან კონტაქტის, ინფორმაციის გაცვლისა და პირდაპირი კავშირის საშუალებას, ხოლო მეორე მხრივ, საკუთარი პროდუქტისა და მომსახურების შესახებ ინფორმაციის გავრცელების, რეკლამისა და მომხმარებლის მოზიდვის საშუალებად, ამავდროულად, ნებისმიერი ეკონომიკური აგენტის ქცევა სოციალურ ქსელში

12 საქართველოს კონკურენციის სააგენტოს თავმჯდომარის 2016 წლის 14 სექტემბრის N152 ბრძანებით დამტკიცებული გადაწყვეტილება, ხელმისწავდომია: https://gcca.gov.ge/uploads_script/decisions/tmp/7ff474e39c874d1a859636e3a7b004a1.pdf

13 საქართველოს კონკურენციის სააგენტოს თავმჯდომარის 2017 წლის 19 ივლისის 04/186 ბრძანებით დამტკიცებული გადაწყვეტილება, ხელმისაწვდომია: https://gcca.gov.ge/uploads_script/decisions/tmp/558d09388bf64de78446e681f928dd62.pdf

14 საქართველოს კონკურენციის სააგენტოს თავმჯდომარის 2018 წლის 30 მაისის N 04/132 ბრძანებით დამტკიცებული გადაწყვეტილება, ხელმისაწვდომია: https://gcca.gov.ge/uploads_script/decisions/tmp/338c58ca9dca4499953a4175a8d97584.pdf

15 კონკურენციის არაერთმა ეროვნულმა უწყებამ ასევე დაადგინა, რომ Facebook-ს აქვს მნიშვნელოვანი საბაზრო ძალა ციფრულ სარეკლამო სერვისებთან და სოციალურ ქსელის სერვისებთან მიმართებაში. (Autorité de la concurrence, 2018[95]; Bundeskartellamt, 2018[96]; ACCC, 2019[93]; CMA, 2020[76]), იხ. OECD (2020), Competition in digital advertising markets, http://www.oecd.org/daf/competition/competition-in-digital-advertising-markets-2020.pdf

16 Case no. COMP/M.7217, Facebook/WhatsApp.

17 danah m. boyd & Nicole B. Ellison, Social Network Sites: Definition, History, and Scholarship, 13 J. COMPUTER-MEDIATED COMM. 210,211 (2007).

18 Gebicka, Aleksandra; Heinemann, Andreas (2014). Social Media & Competition Law. World Competition, 37(2):155.

შეიძლება დაექვემდებაროს კონკურენციის სამართლებრივ კონტროლს.

„პარაზიტოლოგიის ინსტიტუტის საქმე“

ე.წ. „პარაზიტოლოგიის ინსტიტუტის საქმე“ სხვა გარემოებებთან ერთად შეეხებოდა ონლაინ სოციალური ქსელის მომსახურების ბაზარზე განხორციელებულ ქმედებებს, პარაზიტოლოგიის ინსტიტუტის მიერ ხდებოდა მისი კონკურენტი – ტროპიკული მედიცინის სამეცნიერო კვლევითი ინსტიტუტის ლოგოს გამოყენება, როგორც მის სასაქონლო ნიშნად რეგისტრაციამდე, განსაკუთრებით კი რეგისტრაციის შემდეგ. კერძოდ, მოპასუხე მის კუთვნილ ოფიციალურ facebook გვერდზე ათავსებდა მომჩივანი ეკონომიკური აგენტის კუთვნილ სასაქონლო ნიშანს, რაც, სააგენტო პოზიციით, ყალბი ინფორმაციის/რეკლამის მიწოდების გზით მომხმარებელს არასწორ წარმოდგენას უქმნიდა, უფრო მეტიც, იწვევდა ამ ორი დაწესებულების ერთმანეთში აღრევას, რაც საბოლოო ჯამში, ქმედების არაკეთილსინდისიერი კონკურენციის ფაქტად კვალიფიკაციის საფუძველს იძლეოდა. შესაბამისად, ამ შემთხვევაში, ირღვეოდა კანონის 11[3] მუხლის მეორე პუნქტის „ა“ ქვეპუნქტი, რომელიც კრძალავს კომუნიკაციის ნებისმიერი საშუალების გამოყენებით (მათ შორის, არასათანადო, არაკეთილსინდისიერი, არასარწმუნო ან აშკარად ყალბი რეკლამის მეშვეობით) საქონლის თაობაზე ისეთი ინფორმაციის გადაცემას, რომელიც მომხმარებელს არასწორ წარმოდგენას უქმნის და გარკვეული ეკონომიკური ქმედებისკენ უბიძგებს.[19]

„აიტექნიკის" საქმე“

„აიტექნიკის" საქმეში“ მომჩივანი შპს „აიტექნიკი“ კონკურენტ მოპასუხე კომპანია შპს „აიპლუსს“,ედავებოდა შპს „აიტექნიკის“ მფლობელობაში არსებული facebook გვერდის მასობრივი დარეპორტების შედეგად facebook ადმინისტრაციის მიერ მათი ოფიციალური გვერდის გაუქმებასა და მეორე მხრივ, სოციალურ ქსელ – facebook-ზე „iTechnics Georgia“ და „მატყუარა ITechnics” ვეგვერდების შექმნასა და ადმინისტრირებას. მომჩივანი მიიჩნევდა, რომ აღნიშნული ფეისბუქგვერდების უკან სწორედ შპს „აიპლუსის“ წარმომადგენლები იდგნენ და ისინი აქვეყნებდნენ შეცდომაში შემყვან და ზიანის მომტან ინფორმაციას შპს „აიტექნიკის“ სახელით.

სააგენტომ, მიუხედავად იმისა, რომ დაადგინა შპს „აიპლუსის“ მონაწილეობა შპს „აიტექნიკის“ საკუთრებაში არსებული გვერდის მიმართ ე.წ. „რეპორტების“ გაგზავნაში, მიუთითა, რომ გვერდის გაუქმება არ შედის „აიპლუსის“ კომპეტენციისა და შესაძლებლობის სფეროში, ვინაიდან აღნიშნულზე გადაწყვეტილებას იღებს თავად ფეისბუქის ადმინისტრაცია, საკუთარი შიდა რეგულაციების შესაბამისად. გვერდის გაუქმების აქტი, სააგენტოს შეფასებით სოციალურ ქსელსა და მის მომხმარებელს შორის არსებული კერძოსამართლებრივი ურთიერთობის შედეგია და უკავშირდებოდა კომპანია Apple-ის სახელითა და ლოგოთი არაავტორიზებულ სარგებლობას. შესაბამისად, ქმედება განხორციელებად ვერ შეერაცხება მოპასუხეს, რაც თავისთავად გამორიცხავს კანონდარღვევას.[20]

კიდევ ერთი სადავო გარემოება შეეხებოდა facebook Inc.-ის მიერ მომჩივანის სოციალური ქსელის გვერდის გაუქმების შემდეგ შპს „აიპლუსის“ მიერ საკუთარი ფეისბუქგვერდზე ე.წ. პოსტების გამოქვეყნებას, სადაც მითითებული იყო, რომ „აიპლუსმა“ საკუთარი თავზე აიღო გვერდის გაუქმება, რომ „აიპლუსი“ არის Apple Inc.-ის მომავალი პარტნიორი, „აიპლუსმა“ კომპანია „ეფლის“ მხარდაჭერით დაიწყო „Fake Apple Store-ების, ანუ კომპანია Apple Inc.-ის ყალბი მაღაზიების გაუქმება საქართველოში, რის მიზეზადაც ასახელებდა ასეთი გვერდების მხრიდან Apple Inc.-ის წარმომადგენლობის სახელითა და Apple Store” („ეფლის მაღაზია“) სახელით მანიპულირებს.

აღნიშნულთან დაკავშირებით, სააგენ-

19 კონკურენციის სააგენტოს თავმჯდომარის 2016 წლის 14 სექტემბრის N152 ბრძანებით დამტკიცებული გადაწყვეტილება, გვ.47.

20 საქართველოს კონკურენციის სააგენტოს თავმჯდომარის 2017 წლის 19 ივლისის 04/186 ბრძანებით დამტკიცებული გადაწყვეტილება, გვ.58

ტომ მიიჩნია, რომ გავრცელებული ინფორმაცია არ იყო არასწორი, რეალობისაგან განსხვავებული, ხოლო ტერმინ „Fake Apple Store“ გამოყენება, განსაკუთრებით კი სიტყვა „ყალბი“ ჯდებოდა კონსტიტუციით დაცულ გამოხატვის თავისუფლებაში და შესაძლოა, გამოყენებულ იყოს სავაჭრო ნიშნის არაავტორიზებული გამოყენების შემთხვევებშიც, რაც ამ შემთხვევაში შპს „აიტექნიკის“ მიმართ არ იყო ცრუ ინფორმაცია. შესაბამისად, სააგენტომ მიიჩნია, რომ არ არსებობდა არაკეთილსინდისიერი კონკურენციის დასადგენად აუცილებელი კანონით დადგენილი საფუძვლები და სახეზე არ იყო კანონის მე-11[3] მუხლის მეორე ნაწილის „გ“ ქვეპუნქტის დარღვევა (მე-11[3] მუხლის მეორე ნაწილის „გ“ ქვეპუნქტი).[21]

„დიზაინ ჰაუსის“ საქმე

კიდევ ერთი მოკვლევა, რომელიც ციფრული სოციალური ქსელის მომსახურების სექტორს შეეხებოდა, 2018 წელს დასრულებული „დიზაინ ჰაუსის“ საქმეა,[22] სადაც შპს „დიზაინ ჰაუსი“ ასაჩივრებდა შპს „დნას“ და შპს „დიმპლექს ჯორჯიას“ ქმედებებს, როგორც არაკეთილსინდისიერი კონკურენციას.

საჩივარი შეეხებოდა მოპასუხე კომპანიების მიერ Facebook პოსტით ინფორმაციის გავრცელებას, რომელიც შპს „დიზაინ ჰაუსის“ უკანონო საქმიანობას, მისი საქმიანობის შეჩერებას და მის მიერ საგარანტიო მომსახურების გაწევის შეუძლებლობას შეეხებოდა.

სააგენტომ იმსჯელა, თუ რამდენად წარმოადგენდა Facebook გვერდზე განთავსებული პოსტის მეშვეობით გავრცელებული ინფორმაცია მომჩივანის რეპუტაციის შემლახავ მოცემულობას. სააგენტოს განმარტებით, კომპანიის ან მისი პროდუქტის დისკრედიტაცია და რეპუტაციის შელახვა შესაძლებელია განხორციელდეს რამდენიმე გზით, მათ შორის, კომპანიის პროდუქტის შესახებ არამართებული და ნეგატიური ცნობების გავრცელებით, ან კომპანიის იმიჯის დაზიანებით. Facebook პოსტში არსებული ინფორმაცია, რომელიც შეეხება კომპანიის მიერ საქმიანობის შეჩერების, მისი უკანონო საქმიანობის ან გარანტიის გაუცემლობის საკითხებს, არ არის დადასტურებული და წარმოადგენს კონკურენტის რეპუტაციის შემლახველ ნეგატიურ ქმედებას. ამასთან, პოსტის ზოგადი ხასიათის გათვალისწინებით, ინფორმაცია მიემართება არა მხოლოდ კონკრეტულ პროდუქციას, არამედ, ზოგადად, კომპანიის საქმიანობას. ამდენად, ის იწვევს შპს „დიზაინ ჰაუსის“ საქმიანობაზე არასწორი შეხედულების შექმნას და მის დისკრედიტაციას – რაც, თავის მხრივ, წარმოადგენდა კანონის მე-11[3] მუხლის მე-2 პუნქტის „გ“ ქვეპუნქტის დარღვევას.[23]

4.2. კონკურენციის შემზღუდველი შეთანხმებები ონლაინ ბაზრებზე

კონკურენციის შემზღუდველ შეთანხმებებთან მიმართებით კონკურენციის სააგენტოს პრაქტიკა სამ საქმეს მოიცავს, რომელთაგანაც ორი დასრულებულია – ე.წ. Booking.com-ის საქმე[24] და „კინოთეატრის ბილეთების ონლაინ რეალიზაციის საქმე“[25]. რაც შეეხება მესამეს, აღნიშნული შეეხება სააგენტოს მიერ 2024 წლის თებერვალში დაწყებულ საქმის მოკვლევას ელექტრონული კომერციის ბაზარზე. [26]

21 *იქვე*, გვ.62

22 საქართველოს კონკურენციის ეროვნული სააგენტოს თავმჯდომარის 2018 წლის 30 მაისის N 04/132 ბრძანებით დამტკიცებული გადაწყვეტილება, ხელმისაწვდომია: https://gcca.gov.ge/uploads_script/decisions/tmp/338c58ca9dca4499953a4175a8d97584.pdf

23 საქართველოს კონკურენციის სააგენტოს თავმჯდომარის 2018 წლის 30 მაისის N 04/132 ბრძანებით დამტკიცებული გადაწყვეტილება, გვ. 21.

24 კონკურენციის სააგენტოს თავმჯდომარის 2017 წლის 9 იანვრის N5 ბრძანებით დამტკიცებული გადაწყვეტილება, ხელმისაწვდომია: https://gcca.gov.ge/uploads_script/decisions/tmp/bab070eafe7a4cfb824dddeaaa0d1b81.pdf

25 საქართველოს კონკურენციის ეროვნული სააგენტოს თავმჯდომარის 2023 წლის 29 დეკემბრის N04/1031 ბრძანებით დამტკიცებული გადაწყვეტილება, ხელმისაწვდომია: https://gcca.gov.ge/uploads_script/decisions/tmp/phpdai1UR.pdf

26 გთხოვთ იხილოთ სააგენტოს ვებსაიტზე, 2024 წლის 20 თებერვალს გამოქვეყნებული ინფორმაცია, მოკვლევის დაწყების შესახებ.

Booking.com-ის საქმე

2017 წლის 9 იანვრის გადაწყვეტილებაში სააგენტომ იმსჯელა ა(ა)იპ „კონკურენციის სამართლისა და მომხმარებელთა დაცვის ცენტრი“-ს განცხადებაზე, რომელიც შეეხებოდა “Booking.com B.V.”-ის მიერ კანონის მე-7 მუხლის სავარაუდო დარღვევას, კერძოდ, ე.წ. პარიტეტული (MFN) სახელშეკრულებო პირობების[27] გამოყენებას.

მიუხედავად იმისა, რომ სააგენტომ განცხადება დაუშვებლად დატოვა, გადაწყვეტილება საინტერესოა რამდენიმე გარემოებით. სააგენტომ იმსჯელა შესაბამის ბაზართან დაკავშირებით და ასეთად მიიჩნია სასტუმროების დაჯავშნის ონლაინ პლატფორმების ბაზარი. შესაბამისი ბაზრის პროდუქციულ საზღვრებთან დაკავშირებით, სააგენტომ აღნიშნა, რომ იგი არ მოიცავს ჩვეულებრივ ტურისტულ სააგენტოებსა და ინტერნეტ სივრცის მიღმა არსებული („offline“) სასტუმროების დაჯავშნის სხვადასხვა საშუალებებს. გარდა ამისა, მეტასაძიებო სისტემები (Metasearch engine), რომლებიც გარკვეულ მსგავსებას ავლენენ ონლაინ დაჯავშნის პლატფორმებთან (Online travel agencies/OTA), წარმოადგენენ ისეთ საძიებო სისტემებს, რომელთა საშუალებითაც შესაძლებელია სხვა საძიებო სისტემების მოძიება და იდენტიფიცირება. ამასთან, სააგენტომ განმარტა, რომ დაჯავშნის ონლაინ პლატფორმები ქმნიან ე.წ. ორმხრივ ბაზარს (two sided market).[28]

რაც შეეხება სადავო სახელშეკრულებო პირობას, “Most Favoured Nation” (MFN) ანუ იგივე “პარიტეტის პირობები“ (Parity Clauses) სასტუმროს დაჯავშნის სექტორში წარმოადგენს სასტუმროებსა და დაჯავშნის ონლაინ პლატფორმებს (OTA) შორის არსებული ხელშეკრულების ერთ-ერთ მნიშვნელოვან შემადგენელ ნაწილს. განასხვავებენ MFN პირობების ორ – „ვიწრო“ და „ფართო“ კატეგორიას.[29]

ხელშეკრულების ფართო MFN პირობა სასტუმროს ავალდებულებს მის კონტრაჰენტ დაჯავშნის ონლაინ პლატფორმაზე უზრუნველყოს საუკეთესო ნომრის ხელმისაწვდომობა ყველაზე დაბალ ფასად. ეს კი გულისხმობს, რომ დაჯავშნის ამ ონლაინ პლატფორმაზე განთავსებული ფასი, საკუთარი მომსახურების გაყიდვის სხვა (როგორც online, ასევე offline) არხებთან შედარებით, უნდა იყოს დაბალი.

აღნიშნულისგან განსხვავებით, ხელშეკრულების ვიწრო MFN პირობის შემთხვევაში სასტუმროს განსაზღვრული აქვს ვალდებულება, რომ საკუთარ ვებგვერდზე არ შესთავაზოს მომხმარებელს შესაბამის პლატფორმაზე დაფიქსირებულ ფასთან შედარებით უფრო დაბალი ფასი. თუმცაღა, იგი არ ზღუდავს სასტუმროს მომხმარებელს – შესთავაზოს განსხავებული ფასი სხვა პლატფორმისა თუ online ან offline არხების მეშვეობით.[30]

განცხადების დასაშვებობის ეტაპზე კონკურენციის სააგენტომ შეისწავლა Booking.com B.V.”-ის მიერ საქართველოს ტერიტორიაზე განთავსებულ სასტუმროებთან დადებული ხელშეკრულებების საქართველოს კონკურენციის კანონმდებლობასთან თავსებადობის საკითხი. წარმოდგენილი განცხადების დასაშვებობის ეტაპზე Booking.com B.V.-მ გამოთქვა მზადყოფნა, ევროკავშირში დაწესებული სახელშეკრულებო პირობები გაევრცელებინა საქართველოს ტერიტორიაზეც, რაც გულისხმობს ვიწრო MFN პირობე-

ხელმისაწვდომია (შემოწმებულია: 12/03/24) შემდეგ მისამართზე: https://gcca.gov.ge/index.php?m=372&news_id=1455

27 MFN პირობის არსი დაწვრილებით განხილულია წინამდებარე დოკუმენტის მე-2 თავში.

28 იხ. საქართველოს კონკურენციის სააგენტოს სასტუმროების დაჯავშნის ონლაინ პლატფორმების ბაზრის მონიტორინგის ანგარიში, 2019, გვ.4-5 https://gcca.gov.ge/uploads_script/decisions/tmp/ba93e69448d1440f806dd21c5a19edd9.pdf

29 ამასთან დაკავშირებით, იხ: COMP/2020/OP/0002 – Market Study on the Distribution of Hotel Accommodation in the EU, ხელმისაწვდომია: https://competition-policy.ec.europa.eu/system/files/2023-01/kd0722783enn_hotel_accomodation_market_study.pdf

30 იხ. კონკურენციის სააგენტოს თავმჯდომარის 2017 წლის 9 იანვრის N5 ბრძანებით დამტკიცებული გადაწყვეტილება, გვ. 13.

ბის გამოყენებას.[31,32] საბოლოოდ, სააგენტომ განცხადება არ ცნო დასაშვებად, თუმცაღა 2017 წლიდან დაიწყო აღნიშნული ბაზრის მონიტორინგი და 2019 წელს დაასრულა.[33]

„კინოთეატრის ბილეთების ონლაინ რეალიზაციის საქმე“

კონკურენციისა და მომხმარებლის დაცვის სააგენტომ 2023 წლის მიწურულს გამოიტანა გადაწყვეტილება, რომელიც შეეხებოდა საქართველოს ტერიტორიაზე კინოთეატრების ბილეთების საცალო ელექტრონული/ონლაინ რეალიზაციის ბაზარს.

მიუხედავად იმისა, რომ მომჩივანი შპს „ელ.ბილეთების“ მიერ მითითებული სადავო ქმედება ჩადენილი იყო არა უშუალოდ ონლაინ ბაზარზე, უშუალო გავლენა სწორედ კინოთეატრის ბილეთების ონლაინ/ელექტრონულ რეალიზაციის ბაზარს შეეხებოდა.

უფრო კონკრეტულად, მომჩივანი შპს „ელ.ბილეთები“ (biletebi.ge) სხვა გარემოებებთან ერთად აპელირებდა „კონკურენციის შესახებ“ კანონის მე-6 მუხლისა (დომინანტური მდგომარეობის ბოროტად გამოყენება) და მე-7 მუხლის (კონკურენციის საწინააღმდეგო შეთანხმება) დარღვევაზე, ხოლო დავის საგნად მიუთითებდა შპს „სადისტრიბუციო კომპანიასა“ და შპს „თინეთს“ შორის 2022 წელს გაფორმებულ კინოთეატრის ბილეთების „ექსკლუზიური მიწოდების“ დებულების შემცველ ხელშეკრულებას, რის შედეგადაც კინოთეატრის ბილეთების ონლაინ რეალიზაციის ბაზარზე წვდომა შეიზღუდა.

მოკვლევის შედეგად დადასტურდა „სადისტრიბუციო კომპანიის“ განსაკუთრებული როლი ბაზრის სტრუქტურაში, რამეთუ იგი წარმოადგენს საქართველოს ტერიტორიაზე ფილმების ერთადერთ შემომტან კომპანიას, ხოლო ამასთან ერთად, იგი წარმოადგენდა საქართველოს ტერიტორიაზე მოქმედი ძირითადი კინოთეატრების („კავეა სითი მოლი საბუთალო“, „კავეა თბილისი მოლი“, „კავეა ისთ ფოინთი“, „კავეა გალერია“, „ამირანი“, „აპოლო“, ერთად „კავე ჯგუფი“) კინოსეანსებზე დასწრების ბილეთების რეალიზაციისა და დისტრიბუციის განმახორციელებელ ერთადერთ უფლებამოსილ სუბიექტს.[34]

მომჩივანი კომპანია შპს „ელ.ბილეთები“ და ერთ-ერთი მოპასუხე მხარე შპს „თინეთი“ ოპერირებენ ელექტრონული კომერციის სფეროში საკუთარი ონლაინ პლატფორმების მეშვეობით, ამ შემთხვევაში, შპს „ელ.ბილეთები“ – biletebi.ge-ს, ხოლო შპს „თინეთი“ – tkt.ge-ის მეშვეობით და წარმოადგენენ კონკურენტ ეკონომიკურ აგენტებს საქართვე-

31 აღსანიშნავია, რომ 2010 წლიდან, ევროკავშირის კონკურენციის რამდენიმე ეროვნულმა ორგანომ (NCA) გამოიკვლია პარიტეტული დებულებები OTA-ებს (კერძოდ Booking.com, Expedia და HRS) და სასტუმროებს შორის შეთანხმებებში. თუმცა, კონკურენციის ეროვნული ორგანოების, ეროვნული სასამართლოებისა და კანონმდებლების ჩარევის მანერა ამ პუნქტების წინააღმდეგ მნიშვნელოვნად განსხვავდებოდა და გამოიწვია გარკვეული იურიდიული ბუნდოვანება ბიზნეს სექტორისათვის ევროკავშირის მასშტაბით. 2015 წელს, საფრანგეთის, იტალიისა და შვედეთის კონკურენციის ორგანოებმა მიიღეს Booking.com-ის მიერ შეთავაზებული პირობითი ვალდებულებები (Commitments), შეეცვალათ ფართო პარიტეტული დებულებები ვიწრო პარიტეტული დებულებით ამ ქვეყნებში მოქმედი სასტუმროებთან დადებულ ხელშეკრულებებში. თუმცაღა, გერმანიის კონკურენციის უწყების მიერ 2013 წლის დეკემბრის გადაწყვეტილებით HRS-ის წინააღმდეგ და 2015 წლის დეკემბრის გადაწყვეტილებით Booking.com-ის წინააღმდეგ აიკრძალა ყველა პარიტეტული პუნქტის (ფართო და ვიწრო) გამოყენება ამ ორი პლატფორმის მიერ, რადგან მიიჩნია, რომ Booking.com-ის ვიწრო პარიტეტული პუნქტებიც შეზღუდავდა კონკურენციას. იხ: French Competition Authority, Decision 15-D-06 dated 21 April 2015; Italian Competition Authority, Decision dated 21 April 2015; and Swedish Competition Authority Decision 596/2013 dated 15 April 2015. 41 German Competition Authority, Decision B 9 – 66/10 dated 20 December 2013 and Decision B 9 – 121/13 dated 22 December 2015

32 სააგენტოს 2017 წლის 09 იანვრის გადაწყვეტილება ა(ა)იპ “კონკურენციის სამართლისა და მომხმარებელთა დაცვის ცენტრის“ 2016 წლის 15 ნოემბრის N01/1090 განცხადების საფუძველზე მოკვლევის დაწყებაზე უარის თქმის შესახებ, გვ.25

33 იხ საქართველოს კონკურენციის სააგენტოს სასტუმროების დაჯავშნის ონლაინ პლატფორმების ბაზრის მონიტორინგის ანგარიში, 2019,

34 საქართველოს კონკურენციის ეროვნული სააგენტოს თავმჯდომარის 2023 წლის 29 დეკემბრის N04/1031 ბრძანებით დამტკიცებული გადაწყვეტილება, გვ.55, ხელმისაწვდომია: https://gcca.gov.ge/uploads_script/decisions/tmp/phpdai1UR.pdf

ლოს ტერიტორიაზე ორგანიზებული სხვადასხვა ტიპის ღონისძიებებზე დასაწრების ბილეთების რეალიზაციის სფეროში.

აღნიშნული საქმე სააგენტოს პრაქტიკაში გამორჩეული იყო რამდენიმე ასპექტით. პირველ რიგში იმით, რომ მოკვლევის საწყის ეტაპზევე გამოვლენილი გარემოებებიდან გამომდინარე, 2017 წლის[35] შემდეგ პირველად, სააგენტომ მიმართა კანონის მე-18 მუხლის პირველი პუნქტის „ნ“ ქვეპუნქტით გათვალისწინებულ ე.წ. დროებითი ღონისძიებების მექანიზმს (interim measures),[36] ვინაიდან მიიჩნია, რომ სახეზე იყო კონკურენციის მნიშვნელოვანი შეზღუდვის აშკარა მტკიცებულებები.[37] კანონის მე-18 მუხლის პირველი პუნქტის „ნ“ ქვეპუნქტისა და ადმინისტრაციული საპროცესო კოდექსის VII[20] თავის შესაბამისად, მინიჭებული უფლებამოსილების ფარგლებში, სააგენტომ მიმართა სასამართლოს და მოითხოვა შპს „სადისტრიბუციო კომპანიასა“ და შპს „თინეთს“ შორის დადებული ხელშეკრულების „ექსკლუზივის პირობის“ შემცველი მუხლის და ამ ექსკლუზივთან დაკავშირებული უფლებებისა და ვალდებულებების მოქმედების შეჩერება სააგენტოს მიერ მოკვლევის დასრულებამდე, რაც სააპელაციო სასამართლოს ბრძანებით დაკმაყოფილებულ იქნა. აღსანიშნავია, რომ ე.წ. დროებითი ღონისძიების სუსპენზიურ ეფექტს თავისი შედეგი მოჰყვა აღნიშნულ საქმეში, როცა სადავო „ექსკლუზიური“ სახელშეკრულებო დებულების სასამართლო ბრძანებით შეჩერების შემდგომ შპს „სადისტრიბუციო კომპანიამ“ აღუდგინა ბილეთების მიწოდება შპს „ელ.ბილეთებს“, გააფორმა მასთან ხელშეკრულება, რის საფუძველზეც ამ უკანასკნელმა შეძლო დაბრუნებულიყო შესაბამის ბაზარზე.[38]

გარდა ამისა, მოკვლევის პროცესში სააგენტომ გამოავლინა, რომ შპს „სადისტრიბუციო კომპანიასა“ და საქართველოში მოქმედი ძირითადი კინოთეატრები (ე.წ. „კავეა ჯგუფის“ კინოთეატრები) წარმოადგენენ ერთიან არაფორმალურ ჰოლდინგს, შესაბამისად, შპს „სადისტრიბუციო კომპანია“ და „კავეა ჯგუფის“ კინოთეატრები მიჩნეულ იქნენ ერთიან ეკონომიკურ სუბიექტად.[39]

სააგენტოს მოკვლევის მიხედვით, 2016 წლიდან სადავო ექსკლუზიური ხელშეკრულების გაფორმებამდე კინოთეატრის ბილეთების ონლაინ რეალიზაციის ბაზარზე არაერთი ეკონომიკური აგენტი ოპერირებდა, მათ შორის, მომჩივანიც, ხოლო „ექსკლუზიური მიწოდების“ ხელშეკრულების შემდგომ კინოთეატრის ბილეთების რეალიზაციის ბაზარზე ოპერირებდა შპს „სადისტრიბუციო კომპანია“ საკუთარი არხების – kinoafisha.ge, cavea.ge, ონლაინ აპლიკაცია – Cavea cinemas და კინოთეატრის სალაროების მეშვეობით და მის მიერვე შერჩეული პლატფორმა – tkt.ge (შპს „თინეთი“) – ექსკლუზიურად.[40]

სააგენტომ მიიჩნია, რომ შპს „სადისტრიბუციო კომპანია“ წარმოადგენდა შპს „ელ.ბილეთების“ და სხვა, მსგავს სიტუაციაში მყოფი ეკონომიკური აგენტისათვის უალტერნატივო კონტრაჰენტს და შესაბამისად „აუცილებელ სავაჭრო პარტნიორს.“ შესაბამისად, მის

35 სააგენტომ „დროებითი ღონისძიების“ მექანიზმი პირველად გამოიყენა სააგენტოს თავმჯდომარის 2017 წლის 21 აპრილის N04/91 ბრძანებით დამტკიცებულ გადაწყვეტილებაში, ე.წ. „ფოთის პორტის საქმე“, იხ: https://gcca.gov.ge/uploads_script/decisions/tmp/def47d73b32b4cf0a9538ce94addd593.pdf

36 უმეტეს იურისდიქციაში, დროებითი ღონისძიების გამოყენების პირველი პირობა არის დარღვევის ალბათობის დადგენის აუცილებლობა (fumus boni iuris), იხ. OECD (2022), Interim Measures in Antitrust Investigations, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations2022.pdf

37 დროებითი ღონისძიების შეფარდების უფლებამოსილება ევროკომისიამ ჯერ სასამართლო გადაწყვეტილებით მიიღო, Case 792/79 R., Camera Care, პარ.14, ხოლო შემდგომ – 1/2003 რეგულაციით. აღნიშნული რეგულაციის 8 (1) მუხლის მიხედვით, „გადაუდებელ შემთხვევაში“, რომელიც განპირობებულია კონკურენციისთვის სერიოზული და გამოუსწორებელი ზიანის მიყენების საფრთხით, კომისიას შეუძლია საკუთარი ინიციატივით გამოსცეს გადაწყვეტილება შუალედური ზომების შესახებ, თუკი დარღვევა Prima facie სახეზე. იხ. საქართველოს კონკურენციის ეროვნული სააგენტოს თავმჯდომარის 2023 წლის 29 დეკემბრის N04/1031 ბრძანებით დამტკიცებული გადაწყვეტილება, გვ.17-19

38 *იქვე*

39 *იქვე*, გვ.16, 68-69

40 *იქვე*, გვ.150

მიერ მომსახურების გაწევა ანუ ბილეთების მიწოდება წარმოადგენდა ბაზარზე შესვლის აუცილებელ წინაპირობას, ხოლო აღნიშნული მომსახურების გაწევაზე უარი მომჩივანი ეკონომიკური აგენტისათვის ქმნიდა ბილეთების რეალიზაციის ბაზარზე შესვლის გადაულახავ ბარიერს.[41]

რაც შეეხება ქმედების კვალიფიკაციას, სააგენტომ განსაკუთრებული ყურადღება გაამახვილა სადავო ხელშეკრულების წინასახელშეკრულებო მოლაპარაკებების ეტაპზე, სადაც, როგორც გამოიკვეთა, შპს „სადისტრიბუციო კომპანია“ პარალელურად აწარმოებდა მოლაპარაკებებს, როგორც მომჩივან შპს „ელ.ბილეთებთან“, ასევე, მოპასუხე შპს „თინეთთან“. შესაბამისად, ეს უკანასკნელნი „ექსკლუზიური ხელშეკრულების“ მოპოვების მიზნით აქტიურად ახორციელებდნენ სხვადასხვა ქმედებებს. [42]

სააგენტოს პოზიციით, შპს „სადისტრიბუციო კომპანიასა“ და შპს „თინეთს“ შორის, ისევე როგორც შპს „სადისტრიბუციო კომპანიასა“ და შპს „ელ.ბილეთებს“ შორის გამოვლენილი შეთანხმება შეიცავდა მიზნით დეტერმინირებულ ქმედებას, რაც per se („თავისთავად”) წარმოადგენს კანონის საწინააღმდეგო ქმედებას და მისი სიმძიმის შეფასებისას არ არის საჭირო დამატებით შეთანხმებით გამოწვეული შედეგების გამოკვლევა.[43] სააგენტომ მიუთითა, რომ კინოთეატრის ბილეთების რეალიზაციის ბაზარზე მოქმედი კონკურენტი ან პოტენციური კონკურენტი ეკონომიკური აგენტების განდევნისა და არდაშვების, ბაზრის ჩაკეტვის თაობაზე ნებათა თანხვედრა წარმოადგენდა შეთანხმებას, რომელსაც, საბოლოო ჯამში, მიზნად ჰქონდა ბაზრის შეზღუდვა და რაც წარმოადგენს კონკურენციის საწინააღმდეგო შეთანხმებას.[44]

მიუხედავად იმისა, რომ ასეთ დროს აღარ არის საჭირო კონკურენციის შემზღუდველი შედეგის შეფასება და მტკიცება, ვინაიდან, საბოლოოდ, ექსკლუზიური ვერტიკალური კოორდინაცია შესაბამისი წერილობითი სახით შპს „სადისტრიბუციო კომპანიასა“ და შპს „თინეთს“ შორის გაფორმდა, სააგენტომ დამატებით იმსჯელა, ასევე, ექსკლუზიური ვერტიკალური დათქმის კონკურენციის შემზღუდველი ეფექტზე, რა დროსაც სააგენტომ გამოიყენა და იხელმძღვანელა შემდეგი კრიტერიუმებით: „ექსკლუზიური მიწოდების მასშტაბი და ხანგრძლივობა“, მიმწოდებლის დამაბალანსებელი საბაზრო ძალაუფლება, ვაჭრობის დონე და პროდუქტის/მომსახურების ბუნება, მიწოდების/მიმწოდებლის დონეზე შესვლის ბარიერების არსებობა. გარდა ამისა, სააგენტომ, რელევანტურად მიიჩნია და განიხილა სადავო ხელშეკრულების „ექსკლუზიური მიწოდების“ შინაარსი, საგანი და “ექსკლუზიური მიწოდების“ დათქმის მოქმედების ფაქტობრივი შედეგი.[45]

საბოლოო ჯამში, სააგენტომ დაადგინა კანონის მე-7 მუხლის დარღვევა და ერთიან ეკონომიკურ სუბიექტს შპს „სადისტრიბუციო კომპანიას“ და „კავეა ჯგუფის“ კინოთეატრებს დაეკისრათ ჯარიმა 1 120 562 ლარის ოდენობით, შპს „თინეთს“ – 544 328 ლარის ოდენობით, ხოლო შპს „ელ.ბილეთებს“ დაეკისრა ჯარიმა 5 368 ლარის ოდენობით.

ხაზგასასმელია გარემოება, რომ სააგენტოს პრაქტიკაში ეს პირველი პრეცედენტია, როდესაც კონკურენციის კანონმდებლობის დამრღვევ მხარედ ცნობილ იქნა მომჩივანიც, რომელსაც დაეკისრა შესაბამისი სანქცია.

გარდა ამისა, მოკვლევის შედეგების განზოგადებისა და ბილეთების ონლაინ რეალიზაციის ბაზრის გაჯანსაღების მიზნით, სააგენტომ გასცა განსახილველად სავალდებულო რეკომენდაციები კულტურული, გასართობი, შემოქმედებითი, სპორტული, დასვენებისა და ტურიზმის, საგანმანათლებლო, სატრანსპორტო თუ სხვა ტიპის ღონისძიებების/პროდუქციის/მომსახურების ბილეთების დისტრიბუტორების/ორგანიზატორების მიმართ, რათა ბილეთების რეალიზატორი ონლაინ პლატფორმის შერჩევის პროცესი და მასთან სახელშეკრულებო ურთიერთობის წარმართვა განხორციელდეს

41 *იქვე*, გვ. 57, 116
42 *იქვე*, გვ.114-118
43 *იქვე*. გვ.170.
44 *იქვე*, 115, 118.
45 *იქვე*, გვ.118-151.

იმგვარად, რომ არ გამოიწვიოს კონკურენციის დაუსაბუთებელი შეზღუდვა.

„მასტერქარდის“ საქმე

უახლესი მოკვლევა, რომელიც ელექტრონული კომერციის ბაზარს შეეხება, კონკურენციისა და მომხმარებლის დაცვის სააგენტოს მიერ საკუთარი ინიციატივით 2024 წლის თებერვალში დაიწყო „კონკურენციის შესახებ“ საქართველოს კანონის მე-7 მუხლის (კონკურენციის საწინააღმდეგო შეთანხმება) სავარაუდო დარღვევის ფაქტზე. საქმე შეეხება „მასტერქარდის" ბარათის მფლობელებისთვის მხოლოდ შპს „თინეთის“ კუთვნილ ვებპორტალზე – www.swoop.ge ექსკლუზიური ფასდაკლებების შეთავაზებას კონკრეტული პროდუქტების რეალიზაციისას.

უნდა აღინიშნოს, რომ სავარაუდო დარღვევის შესახებ ინფორმაცია სააგენტოში კომპანია „რეშენალ სოლუშენსის“ (www.hotsale.ge) მიერ იქნა მოწოდებული. მოგვიანებით, კომპანიამ მის მიერ წარმოდგენილი საჩივარი უკან გაიხმო, თუმცა მასში აღწერილი ფაქტობრივი გარემოებებისა და თანდართული მტკიცებულებების საფუძველზე სავარაუდო დარღვევის ფაქტთან დაკავშირებით გონივრული ეჭვი წარმოიშვა. შესაბამისად, სააგენტომ საკუთარი ინიციატივით დაიწყო საქმის მოკვლევა.[46]

დასკვნა

კონკურენციისა და მომხმარებლის დაცვის სააგენტოს გადაწყვეტილებების შესწავლამ აჩვენა, რომ ქართული კონცურენციის სამართლის შეფარდება და აღსრულება ციფრულ ეკონომიკასთან/ბაზრებთ მიმართებით ამ ეტაპამდე არც თუ ისე ხშირია და ძირითადი ნაწილი სოციალური პლატფორმების საშუალებით არაკეთილსინდისიერი კონკურენციის ფაქტებს შეეხება, თუმცაღა ციფრული ეკონომიკისათვის კონკურენციის სამართლის აღსრულების კუთხით პრობლემური არ არის, რადგანაც შესაბამისი აგენტების ქმედებები არ შეიცავდა რაიმე კომპლექსურ ან ტექნოლოგიურ სტრატეგიებს კონკურენტული უპირატესობის მოსაპოვებლად.

ასევე, ჩამოყალიბება დაიწყო პრაქტიკამ ელექტრონულ ბაზრებზე კონკურენციის შემზღუდველ შეთანხმებებთან მიმართებით. booking.com – ის საქმე მნიშვნელოვანია, რადგანაც მოხდა შესაბამისი ციფრული ბაზრის პროდუქციური საზღვრების დადგენა, მისი რეალური ბაზრისგან გამიჯვნა. რაც შეეხება ონლაინ ბილეთების გაყიდვის საქმეს, მნიშვნელოვანია, რომ სააგენტომ საბოლოო გადაწყვეტილებამდე გამოიყენა ე.წ. დროებითი მექანიზმი, რაც სააგენტოს მხრიდან საკმაოდ ეფექტური საშუალება გამოდგა ელექტრონულ ბაზარზე სწრაფი რეაგირებისა და წონასწორობის აღსადგენად, რამაც, საბოლოო ჯამში, პრაქტიკულად, ეკონომიკურ აგენტს ბილეთების რეალიზაციის ელექტრონულ ბაზარზე დაბრუნების საშუალება მისცა იქამდეც, სანამ სააგენტო მოკვლევის საფუძველზე შესაბამის გადაწყვეტილებას მიიღებდა.

საყურადღებოა ისიც, რომ სააგენტომ ცოტა ხნის წინ საკუთარი ინიციატივით დაიწყო მოკვლევა სწორედ ელექტრონული კომერციის სფეროში, რაც სააგენტოს პრაქტიკაში პირველი შემთხვევაა. შესაბამისად, აღნიშნულ საქმეზე მიღებული საბოლოო გადაწყვეტილებაც მნიშვნელოვანი იქნება ციფრულ ბაზარებზე საქართველოს კონკურენციის სამართლის აღსრულების შემდგომი შესწავლის მიზნით.

46 საქართველოს კონკურენციისა და მომხმარებლის დაცვის სააგენტო https://gcca.gov.ge/index.php?m=372&news_id=1455 (10.03.2024)

ბიბლიოგრაფია

საკანონმდებლო და კანონქვემდებარე აქტები:

1. ასოცირების შესახებ შეთანხმება ერთის მხრივ, საქართველოსა და მეორეს მხრივ, ევროკავშირს და ევროპის ატომური ენერგიის გაერთიანებას და მათ წევრ სახელმწიფოებს შორის, 2014.
2. „კონკურენციის შესახებ“ საქართველოს კანონი 6148-Iს, 08/05/2012.
3. საქართველოს კანონი „კონკურენციის შესახებ“ საქართველოს კანონში ცვლილების შეტანის თაობაზე, 7126-Iს, 16/09/2020
4. კონკურენციის სააგენტოს თავმჯდომარის 2020 წლის 23 ოქტომბერის №37 ბრძანებით დამტკიცებული „ბაზრის ანალიზის მეთოდური მითითებები“.
5. კონკურენციის სააგენტოს თავმჯდომარის 2020 წლის 28 ოქტომბრის №40 ბრძანებით დამტკიცებული „საქმის მოკვლევის წესი და პროცედურა“.
6. Treaty on the Functioning of the European Union, 2008.

სახელმძღვანელოები/სტატიები:

1. Bukht, Rumana, & Heeks, Richard. (2017, August 3). Defining, Conceptualising, and Measuring the Digital Economy. Development Informatics Working Paper.
2. Young, Ryan, and Wayne Crews. "The Case against Antitrust Law: Ten Areas Where Antitrust Policy Can Move on from the Smokestack Era" (April 17, 2019). Competitive Enterprise Institute, 2019.
3. Graef, Inge. "Market Definition and Market Power in Data: The Case of Online Platforms" (September 8, 2015). World Competition: Law and Economics Review, Vol. 38, No. 4 (2015).
4. Zelger, Bernadette. "Restrictions of EU Competition Law in the Digital Age: The Meaning of 'Effects' in a Digital Economy." In Studies in European Economic Law and Regulation, Volume 25. Springer, 2023.
5. danah m. boyd & Nicole B. Ellison, Social Network Sites: Definition, History, and Scholarship, 13 J. COMPUTER-MEDIATED COMM. 210,211 (2007).
6. Gebicka, Aleksandra; Heinemann, Andreas (2014). Social Media & Competition Law. World Competition, 37(2):155.

გადაწყვეტილებები:.

1. საქართველოს კონკურენციის სააგენტოს თავმჯდომარის 2016 წლის 14 სექტემბრის N152 ბრძანებით დამტკიცებული გადაწყვეტილება.
2. საქართველოს კონკურენციის სააგენტოს თავმჯდომარის 2017 წლის 19 ივლისის 04/186 ბრძანებით დამტკიცებული გადაწყვეტილება.
3. საქართელოს კონკურენციის სააგენტოს თავმჯდომარის 2018 წლის 30 მაისის N 04/132 ბრძანებით დამტკიცებული გადაწყვეტილება.
4. კონკურენციის სააგენტოს თავმჯდომარის 2017 წლის 9 იანვრის N5 ბრზანებით დამტკიცებული გადაწყვეტილება.
5. საქართველოს კონკურენციის ეროვნული სააგენტოს თავმჯ-

დომარის 2023 წლის 29 დეკემბრის N04/1031 ბრძანებით დამტკიცებული გადაწყვეტილება.
6. კონკურენციის სააგენტოს თავმჯდომარის 2017 წლის 9 იანვრის N5 ბრძანებით დამტკიცებული გადაწყვეტილება.
7. საქართველოს კონკურენციის ეროვნული სააგენტოს თავმჯდომარის 2023 წლის 29 დეკემბრის N04/1031 ბრძანებით დამტკიცებული გადაწყვეტილება.
8. სააგენტოს თავმჯდომარის 2017 წლის 21 აპრილის N04/91 ბრძანებით დამტკიცებულ გადაწყვეტილება.
9. სააგენტოს 2017 წლის 09 იანვრის გადაწყვეტილება ა(ა)იპ "კონკურენციის სამართლისა და მომხმარებელთა დაცვის ცენტრის" 2016 წლის 15 ნოემბრის N01/1090 განცხადების საფუძველზე მოკვლევის დაწყებაზე უარის თქმის შესახებ.
10. საქართველოს კონკურენციის სააგენტოს სასტუმროების დაჯავშნის ონლაინ პლატფორმების ბაზრის მონიტორინგის ანგარიში, 2019.

უცხოური უწყებების მიერ მიღებული გადაწყვეტილებები:.

1. Case no. COMP/M.7217, Facebook/WhatsApp.
2. French Competition Authority, Decision 15-D-06 dated 21 April 2015; Italian Competition Authority, Decision dated 21 April 2015;.
3. Swedish Competition Authority Decision 596/2013 dated 15 April 2015.
4. German Competition Authority, Decision B 9 – 66/10 dated 20 December 2013 and Decision B 9 – 121/13 dated 22 December 2015.

სხვა უცხოური წყაროები:.

1. Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645).
2. COMP/2020/OP/0002 – Market Study on the Distribution of Hotel Accommodation in the EU.
3. OECD (2022), Interim Measures in Antitrust Investigations, OECD Competition Policy Roundtable Background Note.

სხვა წყაროები:.

1. გზამკვლევი დოკუმენტი სააგენტოს მიერ მიღებული გადაწყვეტილებების კონკურენტულ გარემოზე ზეგავლენის შეფასებისა და განსახილველად სავალდებულო რეკომენდაციების შესრულების მონიტორინგის შესახებ, 2023.

ჟურნალის ელექტრონული ვერსია შეგიძლიათ
იხილოთ ჟურნალის ვებგვერდზე: www.lawandworld.ge
ელ. ფოსტა: info@lawandworld.ge
მისამართი: გურამიშვილის გამზირი 76. თბილისი. 0141
ტელეფონი: (+995 32) 2 000 171 (120); (+995 596) 171 171

The online version of the journal is available on the website:
www.lawandworld.ge
E-mail: info@lawandworld.ge
Address: 76 Guramishvili ave. Tbilisi. 0141
Phone: (+995 32) 2 000 171 (120); (+995 596) 171 171